for cause; they did not preclude concern that the jurors were predisposed against the death penalty.[4] The dissent's argument in this regard suggests that it has essentially elevated peremptory challenges to challenges for cause. In so doing, the dissent appears to embrace Justice Marshall's concurring opinion in *Batson,* which advocates the elimination of peremptory challenges. Justice Marshall was alone in this view, and it has never found explicit acceptance in our opinions.

We cannot argue with the assertion by defendant and the dissent that the prosecutor's explanations would be inadequate under the approach taken by the majority in *People* v. *Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719]. We think, however, that *Trevino* extended *Wheeler* beyond its logical limits.[5] Despite its professed confidence in the ability of trial judges to distinguish a true case of group discrimination, the majority in *Trevino* specifically disallowed reliance on body language and the prospective juror's mode of answering questions in rebutting a prima facie case. *Wheeler* had given no indication that such subjective reasons were unacceptable, and the dissent does not really argue to the contrary. (See dis. opn., p. 1284.) In ruling out subjective reasons, the majority in *Trevino,* and the dissent in this case, seem unwilling to trust the trial courts to conscientiously rule on the adequacy of the proffered explanations. As Justice Kaus wrote in dissent: "I have my own hunch that what is really behind the majority's rejection of hunches, gut-feelings and body language is a fear that prosecutors will insincerely attempt to justify group bias with such reasons and that trial judges, some of whom are perceived as being unsympathetic toward the *Wheeler* rule, will rubber-stamp their explanations. I submit that if we cannot trust trial courts to do their job fairly, we might as well close up shop and that we, ourselves, were insincere when, in *Wheeler,* we professed our faith in the 'good judgment' of the trial bench."[6] (*People* v. *Trevino, supra,* 39 Cal.3d at p. 704, fn. 4.)

[4] Indeed, the defendants, as part of their *Wheeler* motion, argued that jurors who had a "general opposition to the death penalty, [although] obviously still death qualified under the *Hovey* and *Witherspoon* decision," constituted a cognizable class and they objected to the prosecutor's use of peremptory challenges to exclude these "death penalty skeptics." Included as members of this group, we note, defendants named one of the Black jurors (Mrs. T.), two of the Jewish jurors (Ms. S. and Mr. B.) and one of the Asian jurors (Ms. F.), thus indicating defendants' belief that these jurors were in fact "death penalty skeptics." As indicated hereafter, we have previously upheld the right to peremptorily challenge death penalty skeptics. (See *post,* at p. 1223.)

[5] Our discussion focuses on *Wheeler* since it has gone further than *Batson* in allowing defendant to challenge the exclusion of groups of which he is not a member.

[6] The trial judge in this case had almost 10 years of judicial experience in supervising jury trials when this case was tried. Moreover, trial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of reasons given for peremptory challenges.

The majority in *Trevino,* in our view, also placed undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor. First, we note, as did Justice Kaus in his *Trevino* dissent, that the comparison is one-sided since it ignores the characteristics of the other 26 jurors against whom the prosecutor also exercised peremptory challenges. (*Trevino* at p. 700.) Moreover, we fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial. Here, with a two-month voir dire it is unrealistic to expect the trial judge to make a detailed review of the reasons as the *Trevino* majority would require.

The dissent's use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors.

It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about "spending" his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of

challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel.

It should be apparent, therefore, that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. The dissent's attempt to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose. (7b) As stated in *Batson*: "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Batson* v. *Kentucky, supra,* 476 U.S. at p. 98, fn. 21 [90 L.Ed.2d at p. 89].) (5c) Here an experienced trial judge saw and heard the entire voir dire proceedings by which defendant's jury was selected. The record indicates he was aware of his duty under *Wheeler* to be sensitive to the manner in which peremptory challenges were used. He found no improper use of the peremptory challenges by the prosecutor. Under these circumstances we see no good reason to second-guess his factual determination.[7]

Accordingly, we disapprove *People* v. *Trevino, supra,* 39 Cal.3d 667, to the extent it is inconsistent with this opinion. We hereby return to a standard of truly giving great deference to the trial court in distinguishing bona fide reasons from sham excuses. The United States Supreme Court echoed our view in this regard when it stated in *Batson*: "While we respect the views expressed in Justice Marshall's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial prac-

[7] We note, moreover, that there was in fact some racial diversity in this jury. Three of the jurors had Hispanic surnames, and one of these persons, Luis Reguero, served as the foreperson.

tice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution." (*Batson* v. *Kentucky, supra,* 476 U.S. at p. 99, fn. 22 [90 L.Ed.2d at p. 89].)

Under the standard of giving great deference to the trial court's determination, we affirm the ruling in this case. The dissent, in our view, unjustly faults the trial court for not making a sincere and reasoned determination regarding the genuineness of the prosecutor's reasons. There is no indication in the record that the court did not do so. The dissent seems to believe that inquiry by the court is required to demonstrate compliance with its obligation under *Wheeler.* We do not read *Wheeler* or *Hall* as establishing such a requirement. The dissent also misinterprets a remark by the trial court as indicating that the court had determined in advance that it would accept as true anything the prosecutor said. The court simply rejected the defense argument of the necessity for placing the prosecutor under oath before hearing his reasons. The court's remark cannot reasonably be interpreted as anything more than that. Although the court's explanation of its ruling was inartfully phrased, the record clearly reveals that the court understood the distinction between specific and group bias and had that distinction in mind when it made its ruling.

(8) Defendant finally contends that the prosecutor's use of peremptory challenges against death penalty skeptics violated *People* v. *Wheeler, supra,* 22 Cal.3d 258. We recently rejected that argument in *People* v. *Miranda, supra,* 44 Cal.3d at page 80. (See also *People* v. *Turner* (1984) 37 Cal.3d 302, 313-315 [208 Cal.Rptr. 196, 690 P.2d 669].)

B. *Peremptory Challenges.*

(9) Defendant contends that section 1070.5, which limits jointly tried capital codefendants to 5 individual and 26 joint peremptory challenges, but gives the prosecutor 36 unrestricted challenges, operated to deny him due process and equal protection of the law because his codefendant was not "realistically" exposed to the death penalty and thus had different interests. We have recently upheld the statute against virtually identical attacks based on denial of due process and equal protection. (*People* v. *Miranda, supra,* 44 Cal.3d at pp. 79-80; *People* v. *Ainsworth* (1988) 45 Cal.3d 984, 1004-1007 [248 Cal.Rptr. 568, 755 P.2d 1017].) Contrary to defendant's assertion, his situation is no different from that in *Ainsworth* where both defendants were charged with murder with special circumstances and there was no indication that the death penalty was not being sought as to the codefendant. Indeed, the *Ainsworth* situation was arguably more extreme in that each

JURY SELECTION

JENNIFER CROSSLAND, DEPUTY DISTRICT ATTORNEY

I. AFTER PROPOSITION 115 - DOES IT STILL EXIST?

A. CCP Section 223

B. Federal cases - "good cause"
   1. *U.S. v. Jones* (1983) 722 F.2d 528
   2. *U.S. v. Washington* (1987) 819 F.2d 221

C. In Limine Motions - see sample

II. WHAT KIND OF JUROR DO YOU WANT?

A. Stake in the community
   1. Homeowners
   2. Married
   3. Children
   4. Steady employment

B. Leaders and followers
   1. Can't have all leaders
   2. Experience working with others
   3. Committees/volunteer work

C. Life experience
   1. Mature enough to respect laws
   2. Have made significant life-changing decisions
   3. Someone who can recognize when they are being lied to

D. All/None of the above
   1. Look at each case on its own
   2. Sometimes need liberals on jury

III. HOW TO CONDUCT VOIR DIRE

A. Set stage
   1. Introduce self/job
   2. Establish rapport

B. Ask open-ended questions
   1. No one does this!
   2. Have you ever been lied to? Were you suspicious? Why? Do you feel comfortable making this type of decision?
   3. Follow-up questions

C. Take notes

D. Trust your instinct

IV. *WHEELER*: IT GOES BOTH WAYS

A. Prima Facie showing of discrimination
   1. Cognizable group
   2. Strong likelihood jurors challenged solely because they belong to the cognizable group
   3. *People v. Wright* (1990) 52 C3d 367, 398-400

B. Justification
   1. This is why you took notes
   2. ONLY if court makes finding there has been a prima facie case of discrimination established
   3. Have a juror profile of what type of juror you want on this case
   4. Don't be afraid of *Wheeler*
   5. Courts have upheld many reasons for challenge:
      a. Arrest record
      b. Hair/clothes suggest unconventional lifestyle
      c. Smiled at defendant/glared at D.A.
      d. Unsatisfactory jury service in prior criminal case
      e. D.A. wanted balance of men and women, young and old on jury
      f. Close relatives had been charged with crimes
      g. Familiar with crime scene
      h. Not mentally alert
      i. Loner
      j. Clothes, demeanor and reading of newspaper in jury box indicated disdain for proceedings

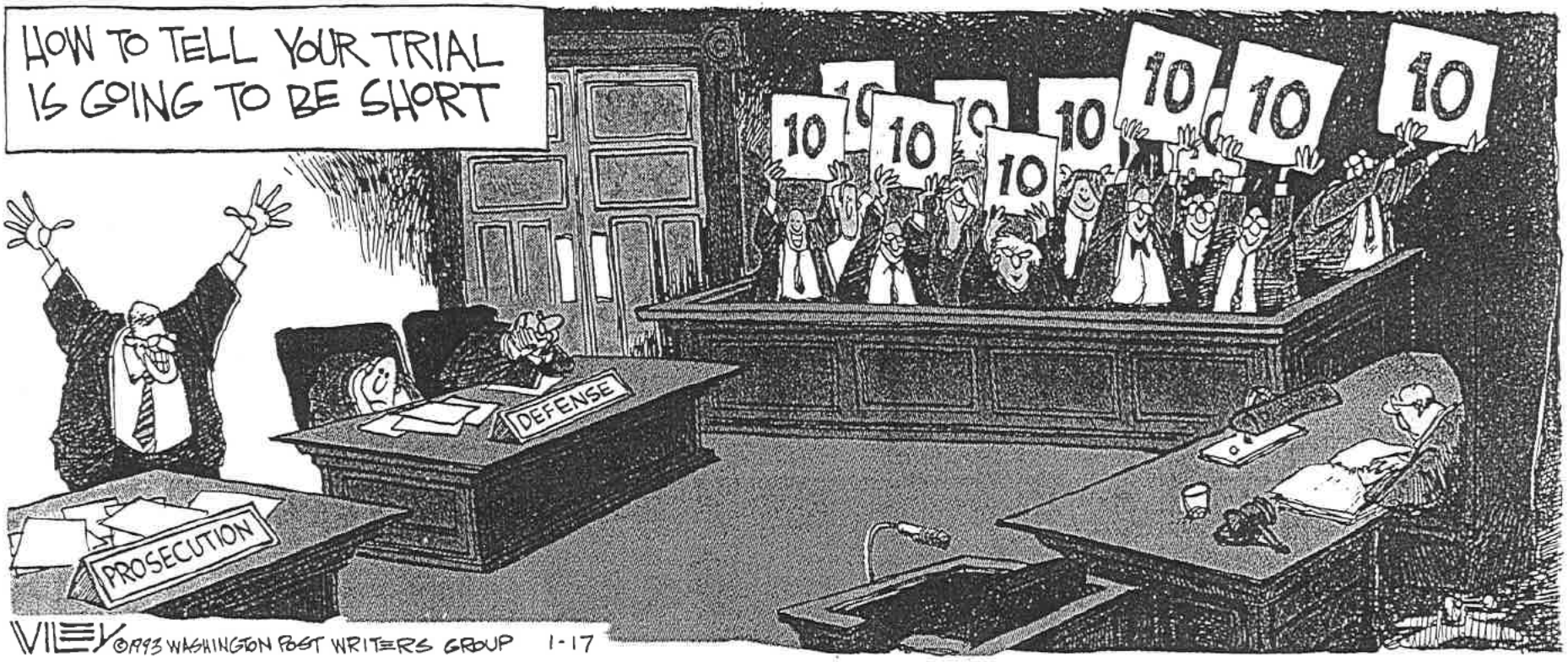
C. Remedy

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.


HOW TO TELL YOUR TRIAL IS GOING TO BE SHORT
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IRA REINER
District Attorney
By:
Deputy District Attorney
Criminal Courts Building
Room 18000
210 West Temple Street
Los Angeles, California 90012
(213) 974-

Attorney for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. Defendant.	BA MOTION TO SUPPLEMENT VOIR DIRE UNDER C.C.P. SECTION 223

TO: _____AND ATTORNEY OF RECORD.

PLEASE TAKE NOTICE that on _____or as soon thereafter as this matter can be heard in _____of the above-entitled court, the People will move this honorable court to supplement voir dire as provided by Section 223 of the Code of Civil Procedure.

This motion will be based upon the attached points and authorities, supporting declaration, the pleading, records, files,

documents, and evidence, whether oral or written, presented at the hearing on this motion.

DATED:

Respectfully submitted,

IRA REINER
District Attorney of
Los Angeles County

By:

_____

Deputy District Attorney

DECLARATION

I, _____, declare that:

I am an attorney licensed to practice law in the State of California;

I am a Deputy District Attorney employed by the County of Los Angeles;

I am assigned to assist in the prosecution of this case;

I am informed and believe that good cause exists to supplement voir dire in this case for the following reason(s):

_____ 1. The following areas of questioning requested in the pre-voir dire conference were not addressed by the court;

_____

_____

_____ 2. Follow-up questions from the court are needed to adequately address prospective jurors' responses which suggest actual and/or implied bias as follows:

_____

_____

_____ 3. The prosecution requests the opportunity to directly question the prospective jurors for the reason(s) below:

_____

_____

WHEREFORE, the plaintiff requests the court to supplement voir dire under Section 223 of the C.C.P.

I DECLARE UNDER PENALTY OF PERJURY that the above statement is true and correct.

DATED: _____ at _____, California.

_____

DECLARANT

POINTS AND AUTHORITIES

I

C.C.P. SECTION 223 PROVIDES THAT THE COURT MAY SUPPLEMENT THE VOIR DIRE EXAMINATION UPON A SHOWING OF GOOD CAUSE.

C.C.P. Section 223 provides that the court may permit the parties to supplement voir dire or shall itself further question the prospective jurors upon a showing of good cause. It is not clear what showing would satisfy the "good cause" standard. Neither the federal system nor other states surveyed utilize "good cause" as the standard for permitting additional voir dire.

"Good cause" has been used in another context as the standard which must be met to continue a case pursuant to Penal Code Section 1050. This showing of "good cause" is also undefined by both statute and case law. However, the trial court's determination of good cause will not be reversed absent a showing of abuse of discretion. See People v. Johnson (1980) 26 Cal.3d 557; Hollis v. Superior Court (1985) 165 Cal.App.3d 642.

C.C.P. Section 223 also provides that the purpose of voir dire is to aid in challenges for cause. C.C.P. Section 225(b)(1) permits a challenge of a prospective juror "for cause" in the following categories:

A) General disqualification

This rarely used challenge is made on the grounds that a juror is disqualified from serving as a juror in any case.

B) Implied bias

The eight statutory grounds for implied bias are set out in Section 229 of the C.C.P. No further proof of prejudice is

required; it is inferred as a matter of law. California Criminal Law: Procedure and Practice, Section 28.6, CEB, 1986.

C) Actual bias

Actual bias is defined as a state of mind which prevents the juror "from acting with entire impartially, and without prejudice to the substantial rights of any party."

Many, if not most, of the questions formerly asked during voir dire to determine whether there is a basis for a peremptory challenge are still relevant to determine whether implied or actual bias exists as a basis for a challenge for cause. There is no "bright line" distinguishing questions designed to uncover bias from those designed to assist with peremptory challenges.

The trial judge is given wide latitude to determine how best to conduct voir dire and his failure to ask specific questions will be reversed only for abuse of discretion; however, abuse will be found if the questioning is not reasonably sufficient to test the jury for bias or partiality. U.S. v. Jones (1983) 722 F.2d 528.

In U.S. v. Washington (1987) 819 F.2d 221, which reaffirms the standard in Jones, Id., the court held that the trial judge must exercise sound discretion in accepting or rejecting supplemental questions proposed by counsel. Discretion is not properly exercised when questions are not reasonably sufficient to test the jury for bias or partiality.

In the federal system, it has been held that detailed voir dire or attorney-conducted voir dire is appropriate where issues of special or unusual concern permeate the case, such as racial prejudice when race may

be an issue, or jury prejudice based on extensive pre-trial publicity. (See generally United States v. Giese, (9th Cir. 1979) 597 F.2d 1170 for extensive discussion of judicially conducted voir dire.)

II

THE COURT SHOULD EXERCISE ITS DISCRETION TO PERMIT APPROPRIATE SUPPLEMENTAL QUESTIONS.

The questions asked on voir dire are a matter of the trial court's discretion, but this discretion is "subject to the essential demands of fairness." Alridge v. United States, (1931) 283 U.S. 308, 310. Further, the judge must exercise sound judicial discretion in accepting or rejecting supplemental questions proposed by counsel. "When .e trial court undertakes the examination of potential jurors, it has a :ty to consider the perspective of informed counsel, as well as its own, in determining what questions will tend to reveal possible juror prejudice." United States v. Baker, (10th Cir. 1980) 638 F.2d 198, 201.

"[A] requested voir dire question should be asked if an anticipated response would afford the basis for a challenge for cause." United States v. Blount, (6th Cir. 1973) 479 F.2d 650, 651.

A thorough voir dire requires careful attention to jurors' responses so that appropriate follow-up inquiry can be pursued.

> By definition, presumed bias depends heavily on the surrounding circumstances. Therefore, when a defendant is trying to prove presumed bias, the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual bias'. This duty cannot be discharged solely by broad vague questions once some potential area of

actual prejudice has emerged. United States v. Nell, (5th Cir. 1976) 526 F.2d 1223, 1229-30.

DATED:

Respectfully submitted,

IRA REINER
District Attorney

By:

_____

Deputy District Attorney

JUDICIAL VOIR DIRE

Proposition 115 repealed the former Code of Civil Procedure (CCP) section 223 on voir dire and added the new CCP 223 as follows:

> "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.
>
> Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

Thus, the trial court, rather than the attorneys, now has the responsibility of conducting the voir dire examination. However, the attorneys for both sides can still have significant input in the voir dire process.

The revised California Rules of Court concerning voir dire provide as follows:

Rule 228.1 Pre-voir dire conference in criminal cases

(a) [The conference] Before jury selection begins in criminal cases, the court shall conduct a conference with counsel to determine:

> (1) a brief outline of the nature of the case, including a summary of the criminal charges:
>
> (2) the names of persons counsel intend to call as witnesses at trial;

(3) the People's theory of culpability and the defendant's theories;

(4) the procedures for deciding requests for excuse for hardship and challenges for cause; and

(5) the areas of inquiry and specific questions to be asked by the court and, as permitted by the court, by counsel and any time limits on counsel's examination.

The judge shall if requested, excuse the defendant from then disclosing any defense theory.

(b) [Written questions] The court may require that all questions to be asked of prospective jurors, either orally or by written questionnaire, shall be submitted to the court and opposing counsel in writing before the conference.

Rule 228.2 Supplemental examination in criminal cases

In criminal jury trials after completion of the initial examination, on request of counsel or on the court's own motion and on a showing of good cause, the court may conduct or permit counsel to conduct supplemental questioning as the court deems proper.

[See Rules 516.1 and 516.2 for the Municipal Court].

Both the statute and the rules contemplate the attorneys submitting voir dire questions for the court to use in examining prospective jurors. Resource materials on voir dire have been provided to each division. Also, Division Chiefs should accummulate voir dire questions on the specific types of cases handled by their division. It is the responsibility of each deputy to prepare appropriate questions tailored to apply to the case being tried.

In addition, the court may permit the attorneys, upon a showing of good cause, to personally question prospective jurors. Deputies should request that both sides be permitted at least limited access to the jurors to personally conduct part of the voir dire. Such personal questioning by the deputy should aid in the process of obtaining a fair and impartial jury and eliminating prospective jurors who may be biased against the prosecution.

Remember that we need all twelve jurors to obtain a guilty verdict; the defense only needs one juror to prevent a conviction. Also, the voir dire examination must be sufficiently detailed to enable deputies to properly comply with the requirements of People v. Wheeler (1978) 22 C.3d 258 and People v. Johnson (1989) 47 C.3d 1194. Deputies can never base a peremptory challenge on group bias.

The new CCP 223 has changed the law in two additional respects. First, the practice of sequestering jurors for individual voir dire has been largely eliminated, including in death penalty cases. This overrules Hovey v. Superior Court (1980) 28 C.3d 1, which required such a procedure. However, CCP 223 still allows some court discretion, and a deputy may request sequestered voir dire if it is appropriate in a particular case.

Second, the purpose of voir dire is to aid in the exercise of challenges for cause. This overrules People v. Williams (1981) 29 C.3d 392, which permitted voir dire to assist in the intelligent exercise of peremptory challenges. Of course, many questions which might assist with peremptory challenges are also relevant to a challenge for cause for implied or actual bias (See CCP 225-231).

To properly implement judicial voir dire, it is essential that deputies think about and prepare for the voir dire process before trial. Deputies must prepare written and oral questions based on the nature of the crime and the facts of the case, taking into account the practice of the court in which the case is being tried. Deputies must vigorously represent our interests during the entire jury selection process. Our goal is to identify and eliminate the unfair or biased person so that the case may be tried before a reasonable and impartial jury.

Voir Dire - Post Prop. 115

Prepared by

Los Angeles County

MEMORANDUM

TO: JEFF JONAS, Head Deputy CT-15

FROM: PAUL PFAU, Deputy District Attorney

SUBJECT: VOIR DIRE QUESTIONS IN THE FACE OF PROP. 115

DATE: OCTOBER 31, 1990

Given the inability of DDA's to personally voir dire in view of the prohibitive mandate caused by Proposition 115, I have compiled a list of voir dire questions that may be helpful for DDA's to use in making sure that (judges) properly canvass a jury during their voir dire.

It is currently the practice of most judges in the CCB to accept questions from (the) attorneys for his consideration and possible inclusion in the voir dire process.

The questions that are attached are not intended to exclusively define all of the areas that a particular DDA might want to suggest to the court. They are just some examples that broadly attempt to cover most of the typical areas included in voir dire and might, therefore, be useful as a general resource.

This effort was motivated by the concern due to Proposition 115's prohibitive effect in allowing prosecutors to directly address the jury at voir dire and the corollary problem caused when judges are not thorough in their questioning.

QUESTIONS FOR PROSPECTIVE JURORS

1. (Per the duties of juror's laid out in the "Juror's Handbook"): Do you understand that you have 2 basic duties as a juror?
   - To determine the facts from the evidence that is presented to you &
   - To apply the law that the (judge) will give to you to the facts in order to determine if the defendant is guilty beyond a reasonable doubt?

2. Do you understand that is not your duty to be an advocate for one side or the other, but to do your best to search for the truth given the facts of the case and your application of the law to them?

3. Do you understand thAt you should not consider the subject of penalty in determining whether or not the defendant is guilty?

4. Do you understsand that sympathy should not affect your judgment in determining whether the defendant committed the (charged) crimes? Similarly, do you understand that sympathy should not affect your judgment in assessing the credibility of any witness?

5. Will all of you apply the law as given to you by the (judge) even if you disagree with it?

6. Will any of you have any difficulty applying the same standards to judge all of the witnesses' testimony, regardless of whether they are called by the People or by the defense?

7. In judging the credibility of each witness, do each of you understand that you will be given instructions at the end of the case that will provide you with standards that you may use to help you measure the believability of (each) witness?

8. Do you understand that it is up to you to determine whether a discrepancy in a witness's testimony - or between witnesses - involves a material fact or is a trivial detail?

9. Do you understand that in weighing conflicting testimony that the final test is not in the (relative) number of witnesses, but in the convincing force of the evidence after a full and fair consideration of it?

10. Do you understand that in helping you to determine the believability of any witness that you may take into account - among others - such things as the demeanor of that witness while he is testifying as well as the character and quality of that testimony?

11. Do you understand that neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events?

12. Do you understand that a witness to any evidence used to prove a crime must be judged by the instructions that (I) will give involving credibility, and that any feelings that you may have toward that witness - such as whether that witness would be your friend, whether you like or dislike him, whether you respect or do not respect him - should not be considered in determing whether all or any of that witness's testimony is to be believed? (Suggest follow-up question citing an example)

13. Do you understand that the weight that you give to any so-called expert witness's testimony is up to you to determine given the extent of that witness's training and experience?

14. Do you understand that a police officer witness should be judged by the same standards as any other witness? If, on the other hand, that witness is proved to have some level of expertise, then it is up to you to determine the weight that you will give to such testimony?

15. Would you find the defendant not guilty merely because the witnesses that are used to prove the crimes against him are persons that you personally would not associate with?

16. Realizing that the case before you is not from some dramatic TV show or movie, will you work as hard as you can to determine the facts from the evidence and to apply the law in order to find the truth?

17. Do you understand that the People do not have to prove the case to you "beyond all doubt" or "beyond a shadow of a doubt"?

18. Do you understand that the burden of proof that the People need to prove the case to you is "beyond a reasonable doubt"? And that (like #17) this does not mean that the People need to prove the case to you beyond all possible doubt "because everything in human affairs is subject to some possible or imaginary doubt". (Suggest an example or at least to differentiate that popularized TV standards of the burden of proof are not applicable in the real-life context of a criminal case)

19. Do you understand that if the attorneys "stipulate" to a fact that you must consider that fact proved (and just as though evidence were produced during the case to prove such fact to you)?

20. A party, attorney or witness may come from a particular national, racial, or religious group or have a lifestyle different from your own. Would that fact affect your judgment or the weight and credibility you would give to his or her testimony?

21. Will you have any difficulty keeping an open mond until you have heard all the evidence as well as hearing all the arguments of both counsel and the instructions that (I) will give you regarding the law that you are to apply to the case?

22. If any of you have any preconceived ideas about what the law is that you should apply to the case (e.g., what murder means, etc.) will you put that idea aside and wait for (me) to give you the law at the end of the case (or when I do)?

23. Each attorney has the right to excuse prospective jurors without showing cause. Would you disfavor the attorney or that side of the case if he excused the prospective juror - even though you may have developed a friendship with that (excused) juror?

24. Each attorney has the right to object to evidence and testimony that is offered during the case. Would you disfavor the attorney or that side of the case if he objected to (such) evidence? What if he continued to object to evidence being offered many times?

25. Have you or any of your relatives or friends ever been involved in any criminal charge or any charge similar to that alleged here?

26. Do you have any feelings about this particular offense that would make it difficult for you to be a fair and impartial juror?

27. Are you a lawyer or have you received any training as a lawyer?

28. If you observe an attorney - out in the hallway/somewhere else - appear to be discussing something with an individual who later appears as a witness in the case before you, would you hold it against that side (because of such fact)?

29. Would the mere fact that the case takes a shorter time than you feel (this) type of case should take affect your judgment in determining whether the case has been proved to you?

30. Do you understand what "direct" evidence is? What about "circumstantial" evidence? (Suggest you differentiate the two forms of evidence by citing examples of each)

31. Do you understand that BOTH direct and circumstantial evidence are entitled to the same weight and that neither form of evidence - by themselves - is entitled to any greater weight than the other?

32. Do you understand that you must decide all questions of fact in this case from the evidence received in this trial and not from any other source? Do you understand that you must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence?

33. Do you understand that you must not speculate about evidence (that you may wish had been presented to you) but which was not actually presented to you during the presentation of the case in this court?

34. Do you understand that statements made by the attorneys during the trial are not evidence?

35. Do you understand that the only evidence that you may consider is that which is produced during the case and that it may consist of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact?

36. Do you understand that it is perfectly reasonable for you to use your common sense in helping you to find the truth in this case?

37. In this case of murder-with-special-circumstances do you understand that the defendant does not face the death penalty?

38. In being impartial, will you avoid bending over backwards - over-compensating - should you recognize in yourself that you identify with one class of witness as opposed to another? (E.g., relative of police officer, etc.)

39. If, after a full and fair comparison of all of the evidence in the case - and after considering its relative convincing force - you determine that the People have proved the case beyond a reasonable doubt, will you be able to vote guilty? Again, will you avoid letting feeling of sympathy or pity for the defendant or for any witness affect your decision? And will you avoid letting any consideration of penalty affect your decision? Will you do your best to avoid being an advocate for one side or the other but rather to be an impartial judge of the facts?

40. When all is said and done, will you do your best to search for the truth?

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41. As an alternate juror will you give this case the same attention as though you were one of the twelve chosen to hear it?

42. Please ask questions, above. Please note "priority" questions, below.

PRIORITY QUESTIONS: #'s 2, 3, 4, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 20, 22, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40.

COUNTY OF SAN DIEGO

INTER-DEPARTMENTAL CORRESPONDENCE

August 30, 1990

TO: Don MacNeil
Bob Sullivan

FROM: Richard McCue

RE: Voir Dire
Sec. 8.5 of Standards of Judicial Administration

I have discovered that the California Rules of Court have a preferred judicial voir dire script. It is sec. 8.5 of the Appendix to Calif. Rules of Court, Division I, Standards of Judicial Administration. It follows in full.

RM/jc