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-

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.' "[2] (*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].)

[2]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.[3] 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-

[3] 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

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

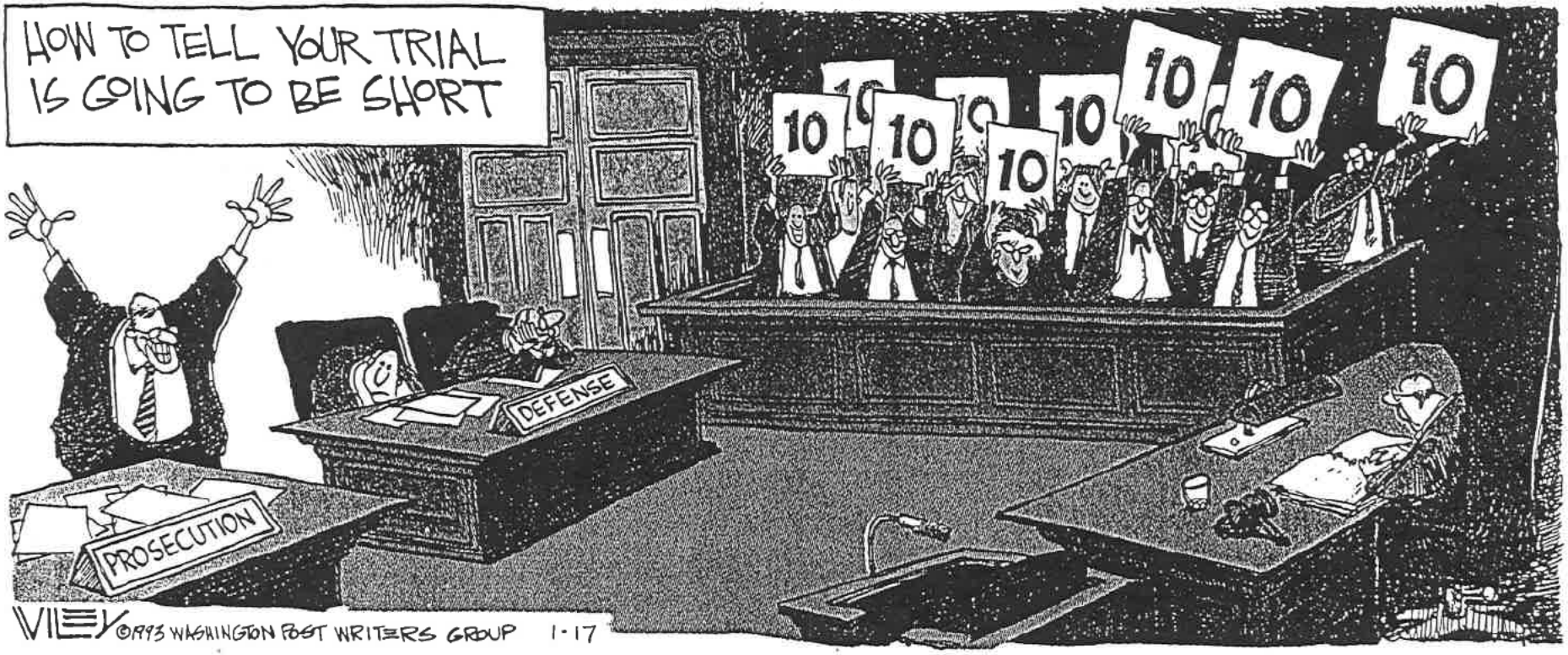
C. Remedy

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 ich 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