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.

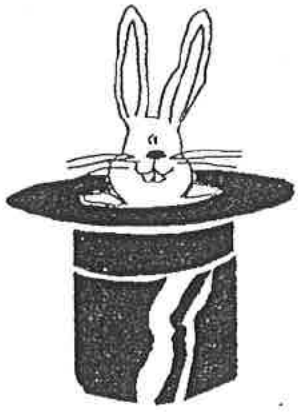
(8) Defendant finally contends that the prosecutor's use of peremptory challenges against death penalty skeptics violated *People* v. *Wheeler, supra,* 22 Cal.3d 258. We recently rejected that argument in *People* v. *Miranda, supra,* 44 Cal.3d at page 80. (See also *People* v. *Turner* (1984) 37 Cal.3d 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

Ned's

COMPLEAT® VOIR DIRE



New Prosecutor's College

1990

MAGIC (Maj'ik), n. The art of predicting or affecting events such as jury trials via supernatural powers. See also, Conjury, Bewitchment, Sorcery, Occultism, Witchcraft & VOIR DIRE.

The art of voir dire has as many experts and theories as exist trial attorneys. Clearly, however, the art of voir dire is a subset of the "art of trial advocacy." An effective vd is both consistent and integrated with the theme/theory of the case in order to present a coherent whole.

I hope that the following will serve as a guide to jury selection in misdemeanor cases.

Your buddy,

Ned

Ned Lee
Deputy District Attorney
County of Santa Clara

****

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.

****

PURPOSE OF VD.

The nominal purpose of vd is to "examine the prospective jurors and select a fair and impartial jury." (CCP 223) Right or wrong, in practice, it also fulfills two other functions -- that of establishing a relationship between the attorneys and the jurors, and educating the jurors concerning the important issues of the case.

GOALS OF VD

1) Elicit information from jurors to assist in selecting fair and impartial jury.

2) Establish rapport with jury.

3) Educate the Jury (if permitted).

THE PROSECUTION JURY.

Prosecutors at all levels should decide what sorts of jurors will best be able to decide the case fairly and impartially. In my humble view, the ideal prosecution jury consists of persons who represent the values of the community as a whole. In general, a prosecutor will want to select persons who:

1. Have a stake in the community . . . homeowners, stable renters (> 2-3 years in one place), have children in the home, long-standing job relationships

2. Can work together. . . persons who work with others in "committee-like" environments . . . church committees, PTAs, supervisors, etc

3. Are mature . . . have had significant life experiences . . .

have been lied to, are used to making significant decisions

4. Respect the communities institutions and procedures

CHALLENGES

Challenges come in two flavors -- for cause and peremptory.

Prosecutors should be familiar with statutory reasons for implied bias such as being a former juror in same action, related to parties, etc. Former PC section 1074, now CCP 190-276.

Either party may challenge potential jurors for actual bias.

In most misdemeanor cases without multiple defendants, each side receives 10 peremptory challenges. In misdemeanor cases where the maximum punishment is 90 days or less, each side is entitles to 6 preempts.

Remember that there is no limit to challenges for cause.

Exercise a challenge by saying "The People will thank and excuse Ms. Juror (Aside to juror) Thank you, Ma'am."

VD PROCEDURES

Normally, after in limine motions are completed, the trial judge will discuss vd with counsel. The judge's discretion in vd is broad indeed (see Trends, infra), however, usually the court will disclose what questions it intends to ask of the jurors, and in what areas it will permit (or forbid) the attorneys to enquire.

A sample list of forbidden areas is included as Annex A.

Absent a contrary agreement, a misdemeanor case shall have 12 jurors. The court clerk will draw 12 names and the persons called will be seated in the jury box. The trial judge will then examine the potential jurors. Typically, the judge will ask about:

- business/occupation of prospective jurors and spouses
- general area or residence
- prior jury service and if there was a verdict
- acquaintances with parties, witnesses, attorneys, etc
- physical or time problems which might prevent juror from sitting.
- if juror has been victim/witness/defendant in same/similar crime
- close friends/relatives in law enforcement

After the judge has questioned the potential jurors, the defense

may conduct vd. After the defense has concluded questioning, the People may vd. The first challenge for cause is made by the defense. After all the challenges for cause are heard, the People have the first peremptory challenge. Neither side losses 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 lease one, even on a two day trial. Each side gets one peremptory challenge for each alternate to be sworn.

GENERAL GUIDELINES

1. Tie your vd 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.)

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 vd 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 dame 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 vd is to limit it. CCP 223 was enacted specifically to limit the length and scope of vd 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 vd

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 court-room. 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 or your family ever had a bad experience with a law enforcement officer? (eg- impolite cop, undeserved ticket, unsolved crime, etc)
Q: Have you are 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 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 licence?

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 their 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 head-lights, 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: 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 dif-

ferently?

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?