

# PROSECUTOR'S BRIEF

Vol. 40, Nos. 3 & 4 • Spring-Summer 2018

California Probation  
Conditions

New Tiered  
Sex Offender Registry

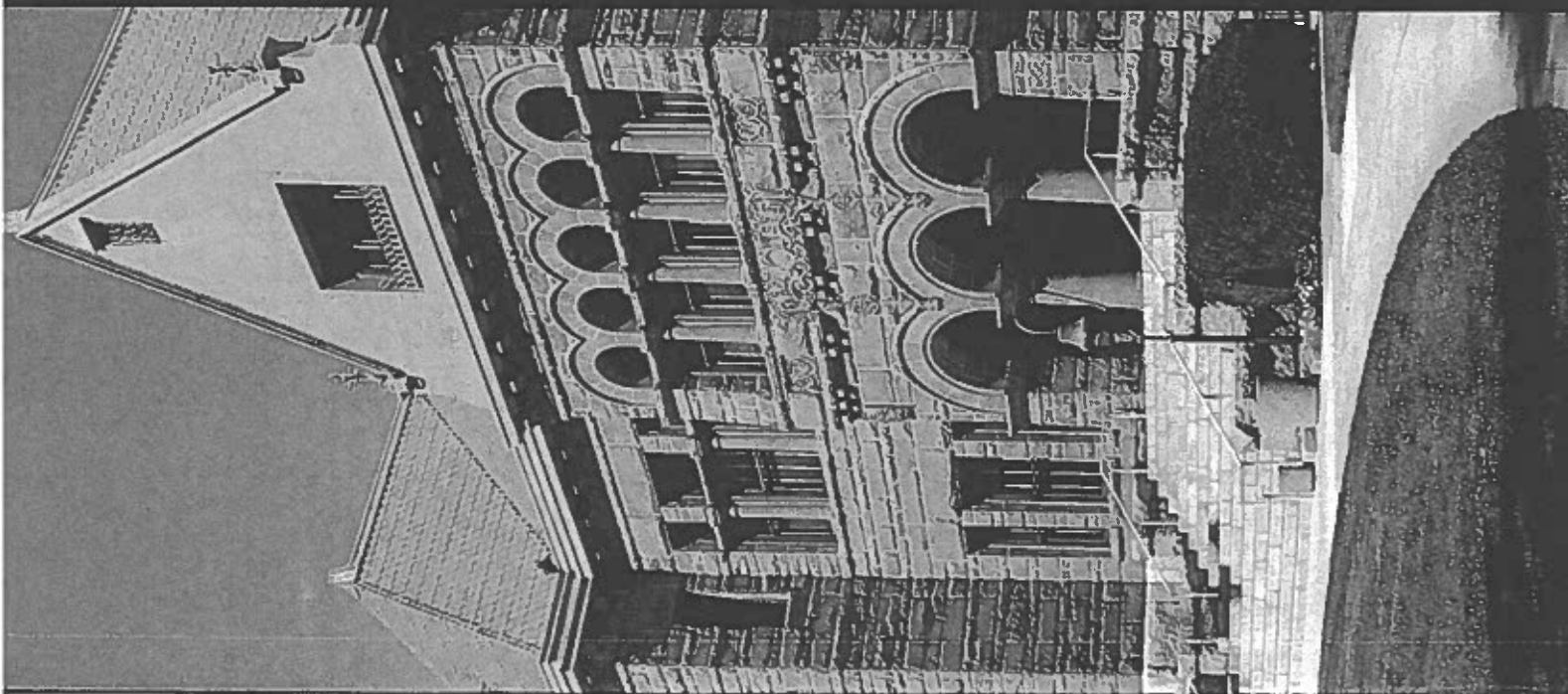
Statute of Limitations  
in Sexual Assault Cases

The Appellate Process  
for Prosecutors

Voir Dire in Domestic  
Violence Homicide  
Cases

Forensic Aspects of  
School Bullying and  
Cyberbullying

CALIFORNIA  
DISTRICT



## Voir Dire in Domestic Violence Homicide Cases

by Charles Cacciatore

When preparing for jury selection in domestic violence homicide cases, it is important to consider the differences between a domestic violence homicide and other types of homicide, e.g., during a robbery, a hold-up, or gang shooting. While some types of homicide are on the decline, domestic violence homicides appear to be increasing.

In a domestic violence homicide case, jury selection is one of the most important parts of the case because you can personally interact with each of the individuals who will decide whether to acquit or convict the defendant. As a prosecutor, you are in control of who to select as jurors; therefore, you should approach how you interact with the jurors thoughtfully and carefully. Think of this process as a job interview where you are selecting individuals who can help your case and dismissing those who would not.

### Goals During Jury Selection

During jury selection, it is important to protect the record because numerous issues can arise and cause a hard-won conviction to be overturned on appeal.

It is crucial to impress prospective jurors with how you act as a prosecutor. And it is vital to be confident, listen, and pay attention to the smallest details—even

---

Charles Cacciatore served as a Marin County deputy district attorney until his retirement in 2015. This article was adapted from the 2014 CDAA webinar, "Voir Dire in Domestic Violence Homicide Cases."

down to shining your shoes. It may sound ridiculous, but jurors can get off on tangents, and it is your job to keep them on task and not provide any distractions from the case.

Some basic jury selection techniques include making eye contact, standing up, and being polite and firm, but take care not to be argumentative. Do not be shy about asking tough questions and being persistent about getting the answers you need. Of course, listen to each juror when he or she is answering your question. Some prosecutors may take notes or get distracted, so be sure to focus on the response that you are getting. One of the main goals of jury selection is to indoctrinate the jury by weaving the law and facts of the case together. In explaining the law to the jurors, you will be able to set forth your perspective of the case and address evidentiary issues for the jurors to follow.

There are multiple phases to jury selection and each requires preparation:

1. **Pre-trial conference.** The prosecutor meets with the court and defense counsel to determine what types of questions can be asked of the prospective jurors, especially in the areas relevant to a domestic violence homicide. The jurors are not involved in this phase
2. **Juror questioning.** The actual questioning of each potential juror in the courtroom.
3. **Post-trial.** This phase involves the prosecutor's contact and conduct with jurors after the verdict is rendered. (This phase will not be discussed in this article.)

### Statute Discussion

Pursuant to Penal Code section 1046: "trial juries for criminal actions are formed in the same manner as civil juries." Code of Civil Procedure sections 190–234 outline the rules for selecting a jury. Rules of Court, rules 4.200 and 4.201, and relevant case law including *Batson*<sup>1</sup> and *Wheeler*<sup>2</sup> are also notable, as are issues regarding gender being a protected class. Code of Civil Procedure section 231.5 states that you cannot exercise a peremptory challenge on "an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code or, similar grounds."<sup>3</sup>

Code of Civil Procedure section 223 sets forth the purpose of voir dire and references grounds for exercising cause challenges. In

domestic violence cases there should always be an advisement by the court that a juror can be questioned privately about sensitive issues that may be of concern to the jury. This is important because it gives the juror an opportunity to fully discuss important issues that may affect his or her ability to sit on that specific case.

There are two types of challenges a prosecutor can use to remove a juror: cause and peremptory. Section 225(b)(1) defines cause challenges as:

(A) General disqualification—that the juror is disqualified from serving in the action on trial.

(B) Implied bias—as, when the existence of the facts are ascertained, in judgment of law disqualifies the juror.

(C) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

General disqualification includes areas such as citizenship, residency, and language. Actual bias is for a juror who cannot be completely impartial, and says, for example, "I cannot be fair on this particular case for whatever reason." Implied bias is a little trickier. For example, I had a juror who said, "I'm on probation to this court, but I can be fair." In this case, there is really an implied bias and most judges would find a cause challenge for that particular juror, even if the juror says that he or she can be fair.

In addition to questioning jurors and using their answers as an aid to exercise cause challenges, you are also allowed to ask questions that assist in the exercise of peremptory challenges. A peremptory challenge allows you to challenge a juror without a reason. This is important because it enables you to indoctrinate the jury to the issues that you want them to focus on in your case and to make sure that you have a jury that is favorable to you.

The extent of the questioning is going to vary by court and should be fully discussed in your pre-trial conference with the court to determine what types of questions you can ask, as well as how much time you will have for questioning. The one witness rule, Evidence Code section 1109, reasonable doubt, and mental state issues that come up in the case are going to be important to discuss with jurors to help them understand various legal concepts from your perspective.

In a life case such as first-degree murder, each side may exercise 20 peremptory challenges.<sup>4</sup> Note that the jury panel must consist of 12 people before the court may allow an exercise of peremptory challenges.<sup>5</sup> In other words, if a juror is excused on a peremptory challenge, then that juror must be replaced, questioned, and passed for cause before the attorneys can continue peremptory challenges.

The People are the first side to exercise peremptory challenges, while the defense goes first with cause challenges. The 2011 edition of the *California Judges Benchbook: Domestic Violence Cases In Criminal Court* devotes exactly two pages to jury selection, so there is not much guidance for the court. However, section 5.26 discusses *Batson-Wheeler* challenges and issues of exercising peremptory challenges based on sex, which tend to occur in domestic violence cases because the defense may want to exclude one sex from the jury.

For example, in *People v. Macioce*—a case where a battered woman murdered her husband—the defense complained that the prosecutor was excusing battered women.<sup>6</sup> The court held that although women are a cognizable group, battered women are not. The court ultimately hung its hat on the fact that the jury panel included four women. Men are likewise a cognizable group, so if you see the defense trying to exclude one sex from the jury panel, there should be an objection and hearing.

The *Benchbook* offers one judicial tip: The court can consider bringing down larger panels for domestic violence cases because of the sheer number of people who have had domestic violence touch their lives in one way or another.

#### **The Pre-Voir Dire Conference and the Juror Questionnaire**

In most Marin County homicide cases, the court requires jurors to fill out a written questionnaire. Questionnaire issues are addressed in Code of Civil Procedure section 205 and Judicial Council Form MC-002.<sup>7</sup> Rules of Court, rule 4.200 requires that you meet and confer with counsel and the court in a pre-voir dire conference to discuss the guidelines for using the questionnaire. Form MC-002 is a good starting point, and both sides can submit additional case-specific questions. During this conference, the court should discuss the nature and extent of the questioning to be done by each side. For example, a court does have the discretion to limit the amount of time you may spend questioning each juror, or the amount of time that a party may spend on the entire panel.



Another area to address in the pre-voir dire conference is the number of alternate jurors that will be selected. From my perspective, having more alternates is better. I have gone through as many as four alternates in a lengthy trial. You certainly do not want to be in a position where you run out of jurors at the end of your case. You will also want to discuss the procedures and responsibilities for preparing the questionnaire with the court. For example, in Marin County, prosecutors are responsible for making copies of the jury questionnaires and distributing them to the parties both electronically and hard copy.

In a questionnaire, you can give a brief statement of your case. Additionally, Code of Civil Procedure section 222.5 provides that even if you are not using a questionnaire, counsel for each side can make a brief "opening statement" prior to jury selection. This is not a substitute for your actual opening statement, and it will be tailored by the court, but it does enable you to make some statement about the case if you are not using a questionnaire. This kind of statement may not be complete, but is still compelling because the jurors know at that point, after having read the complaint and hearing the statement, what the case will encompass.

Using juror questionnaires helps a prosecutor with organization, facilitates jury selection, and offers a bird's eye view of what you are dealing with as far as the entire panel is concerned. Questionnaires also save time for the court, which is one reason courts favor questionnaires. Based on my experience, the court will have panels of prospective jurors come in over successive days to address hardship challenges and fill out the questionnaires. Once the questionnaires are complete, the parties should meet and discuss issues relative to the questionnaires and determine if there are any stipulated challenges for cause based on some jurors' answers. Do not give up easily on defense challenges for cause based on a juror's written answer. Unless the challenge for cause is obvious, have the prospective jurors come to court so that you can evaluate their responses face-to-face.

Once the court feels there are an appropriate number of jurors, a date will be assigned for the entire prospective panel to return to court for oral questioning.

*Note:* Some judges permit pre-randomizing of the jurors before the selection process begins. This allows the parties to know who the first 12 jurors seated in the jury box are, *and* the order of who

will be coming up to replace excused jurors. It is helpful for both sides to be able to see who is coming down the line. For example, in your preparation you can lay out the first 12 jurors and really have a good idea of where you want to go with jury selection. When this method is used, it goes very fast, and the judges expect you to keep it moving in that regard.

As a part of your general research on jurors, it is important to search the Internet (including social media) to learn whatever you can about prospective jurors. If you have time, an extra step would be to check their voter registration. Sometimes it may help for you to ask questions that they may relate to in a better or different way based on what you have learned about them.

#### **Preferred Characteristics of Jurors for Domestic Violence Cases**

It is important to look for stable members of the community, such as property owners who have jobs. You are looking for people with families. If there are people on the jury who have children, talk to them to see if they may relate to the defendant or the victim. Jurors form attachments to the defendant based on their personal experience, and I have had jurors tell me that because of the age or look of a defendant, they would have difficulty being fair because it reminded them of someone in their family.

You are going to want some jurors who are supervisors and/or decision makers in their jobs, but try to strike a balance, because too many decision makers may end up fighting with each other during deliberations, but you do want to look for someone who can take charge and will be favorable to your position.

Look for jurors who have a good life perspective as opposed to someone who is sheltered. Of course, what you will likely get is a different story. I generally find teachers, retirees, and government workers in our county. Homicide cases tend to be longer cases, and courts are more liberal in granting hardship challenges for these, especially for people not getting paid through jury services.

In addition, be aware of people who are trying too hard to be on the jury. Individuals who are trying to answer the questions just right so they will be picked as a juror are suspect regarding their motives. Pay careful attention to those individuals before allowing them to stay on the jury.

When you are talking with your prospective jurors, it does not hurt to remind them of their oath. The questionnaires have a

signature under penalty of perjury where they are swearing that all their answers are truthful. I usually pick a juror or two out when I am questioning them to remind them of that, and to drive the point home. Then, invite them to talk to you and really make the most of the interaction that you are having with them, trying to draw them out and be candid with you in their responses. One of my favorites is, "Thank you for your candor," because when you hear that from a defense attorney it is likely that a peremptory challenge will be exercised.

Regarding group questions or individual questions, I believe that jurors should be questioned individually. The questionnaire is going to take the place of a lot of group questions that you may have. However, if you are not using a questionnaire, and even in some instances when you are, group questions may be necessary for opening areas of discussion or narrowing issues.

To draw out more information, the preferred method for asking questions to the group is to ask: "How many of you," to invite them to volunteer information. Phrasing it this way, as opposed to saying, "Do any of you," lets the jurors talk. Remember you are there to listen to their answers. Do not cut off a prospective juror who is answering questions, and do not anticipate what an answer might be. In some instances, if there is an answer from a juror that is good for you, repeat it so that the other jurors can hear it.

### **Jurors' Perspectives**

We hear and read about domestic violence on a daily basis. It is the focus of movies (e.g., *The Burning Bed*, *Sleeping with the Enemy*) and music, and at times, is glamorized. Statistics indicate that three women are killed by their intimate partners every day in the U.S.<sup>8</sup> When selecting jurors for a domestic violence homicide, a prosecutor must be mindful of how each juror views domestic violence. For example, even though there has been a tremendous amount of education surrounding domestic violence issues, there are still some individuals who feel it is a private matter. Therefore, the age of the juror may be important in this context. I have found that older jurors tend to view domestic violence as private, whereas younger jurors understand domestic violence and its dynamic.

Prospective jurors may believe that domestic violence happens, but they would never be a domestic violence victim, or they may think that a victim of domestic violence would have or should have



left before the violence got worse. There is often something suspect in the jurors' minds with respect to domestic violence and why a woman stays in a domestic violence relationship. Jurors likely will have questions about the dynamics involved in a domestic violence homicide, so it may be helpful to keep this in mind as you are preparing your questions.

### **Areas of Juror Questioning**

General areas of questioning in any domestic violence homicide typically encompass issues regarding violence and bias and include:

- Have you ever been a victim of violence?
- Have you ever witnessed violence?
- Have you ever called the police on neighbors who you thought were being violent?
- Did you call the police because you were afraid?
- Were you satisfied with the way the police handled the situation(s)?
- Are there any religious, philosophical, or moral reasons why you cannot convict?
- Do domestic violence victims deserve any less protection than other victims of a violent crime?
- Should domestic violence cases be handled within the family rather than within the criminal courts?

Additional questions may include issues of cultural consideration and whether those issues could excuse or justify a murder. Remember, your questions are gauged to help indoctrinate the jury on your points of view. Ask jurors how they are feeling, how they feel about different situations, how they feel about domestic violence, or how they felt when a family member told them about a domestic violence incident. Do not be concerned if you begin to sound a little bit like a therapist. It is good for them to get out their emotions because you are dealing with an emotional case.

Admittedly, it could be admissible to challenge a juror who was a victim of domestic violence in a domestic violence case. It would be an area that the prosecutor would need to explore with that prospective juror to see if he or she could be fair considering that personal experience. The defense will likely say there is an implied bias based on the experience, but as far as I know, there is not any supporting case law on this issue. So if the juror who was a past

domestic violence victim is answering questions appropriately, and says that he or she can be fair, it is likely that juror will stay, absent some peremptory challenge.

There are prospective jurors who may say they cannot look at autopsy photos due to the depiction of traumatic injuries. However, do not automatically excuse them for cause. Rather, they should be questioned about any photos and find out what the reason is; are they folks who do not watch the news, do not watch TV, do not want to have anything to do with any type of acts of violence, and would refuse to look at any photographs regarding violence? You are not going to want those people on your jury because they are not going to be able to assess the injuries related to the cause of death.

The media may also be an issue during a high-profile case. You are going to need to be able to discuss with the jurors the extent to which they know about the case before they have come into the courtroom. The judge will be admonishing them throughout the trial at every break and recess that they are not to look up anything about the case, study up on the case, or go to any locations mentioned in the case.

You want to find out exactly what the jurors' knowledge base is before you go forward. Be cautious of those who come in and tell you they have no knowledge about a high-profile case that has been in your local media. You need to talk to them and find out how it is that everybody else has heard about this case but they did not.

In addition, it is a good idea to have jurors who are in health care professions. I find that nurses and doctors are good jurors if they understand various issues regarding trauma. I have had emergency room nurses on juries who have been very good because they deal with domestic violence and traumatic injuries as a part of their jobs, and they can help explain to the other jurors the import of the evidence in that regard. When you are talking to them, ask them what type of patients they treat or if they have ever been called into court to testify in any cases. You will often find that emergency room personnel deal with domestic violence issues, and they can talk to you about that, their training, and their mandatory domestic violence reporting requirements. Of course, this type of questioning will help to educate the entire jury about domestic violence.

The areas of motive and intent to kill are also vital to address in voir dire. There is likely going to be psychological evidence introduced in these types of cases to excuse the behavior of the

defendant. There is going to be some scientific evidence, the "CSI effect," and the overall lifestyle of the victim. "Lifestyle" may include issues like the victim's low self-esteem, which is often seen in domestic violence cases.

One of the questions you should consider asking jurors in this situation is, "Would you vote not guilty just because the defendant had some psychological issues or disorders?" There was a case my office prosecuted, where a diagnosed paranoid schizophrenic man killed his father. It was a brutal murder with a knife. It took me a while to be able to deal with the fact that the defendant was severely mentally disabled, and then moving beyond that to show that the circumstances of the killing justified a second-degree murder conviction. As it turned out, the extent of his paranoid schizophrenia did not vitiate his ability to form the intent to kill.

Questions of motive are always relevant and come up all the time regarding whether the victim was responsible in any way, or if the victim somehow drove the defendant to the ultimate act of killing. There is a saying that the jury needs to acquit the victim before it can convict the defendant. The prosecutor will need to be able to describe the victim's lifestyle and what was going on in his or her life at that time to give the jurors an accurate perspective.

Furthermore, when you talk to jurors about motive, remember to ask open-ended questions. The following is a good example: "I noted on the questionnaire that you're divorced. I really don't mean to pry, but did you or your ex-husband or wife hire a lawyer? Did the case go to court? Were there child custody issues involved? How did you feel you were treated through the divorce process? Are there any residual feelings you have about that experience that would cause you not to be a fair and impersonal juror in this particular case?"

It is surprising how jurors will discuss these issues, and if you sense any reluctance on their part to talk with you, then you can ask to approach the bench so that they can talk to the judge, or be in a more comforting environment to fully discuss what it was about that experience that might have caused them some concern. This goes for a variety of questions including whether, if the victim had an affair, would that impact the juror's ability to be partial. A juror will often not write out long explanations on a questionnaire, so you will need to ask follow-up questions about how he or she feels about these types of domestic violence crimes in a way to properly vet each juror.

Mental health defenses and whether jurors have any experience in that area are also good questions to ask. You can ask, "Do you, a close friend, or a relative have any experience, training, or education in the mental health field?" See what type of response you get. Ask them directly, "Have you ever seen a mental health professional? A therapist? A psychologist? Or a psychiatrist? If so, was it related to any family issues?" Jurors will often talk to you about them. Then you can ask, "How did you feel about that experience?"

*Note:* Expect the number of mental health issues concerning post-traumatic stress (previously referred to as post-traumatic stress disorder)<sup>9</sup> to rise in coming years. It will be a topic you will likely need to speak with jurors about.

### **Expert Witnesses**

In addition, you are going to have to question jurors on expert witnesses that may be a part of the case, and whether the jurors have had any expertise or any education in the type of evidence that you are going to be presenting. You will ask the jurors if they have had any experience with DNA. People have generally heard about DNA, but DNA issues revolve more around the process than the actual results that you get from testing.

Crime scene investigations and scientific evidence will also need to be discussed with jurors. You need to know how much they understand about this topic and potential expert testimony on it. In this area, you are really going to be managing the jurors' expectations about scientific evidence. Most folks' experience with that is what they have seen on the detective and crime scene investigation shows on TV. One of my favorite questions to ask is whether they know if the CSI shows have won science fiction awards, as the programs are based on science fiction. I have had people tell me that they feel those shows are accurate reflections of what is real. You need to be wary of these potential jurors. Most people, however, recognize that it is just TV, and what goes on in the show courtroom is different from reality.

The autopsy and cause of death will most assuredly come up in the proceedings. Generally, a doctor will come in and testify about the autopsy that he or she has conducted. You want to alert and indoctrinate the potential jurors about those issues.

## Conclusion

Jury selection in a domestic violence homicide case is a complex, nuanced process that is different from other types of homicide cases because of the interpersonal relationship between the defendant and victim. A juror's understanding of the power and control dynamic is essential in getting the jury to understand what motivated the defendant. The statutory scheme for jury selection may be found in both the criminal statutes and the Code of Civil Procedure. The court has broad discretion to shape the nature and extent of the jury selection process, so it is essential that you prepare for this part of the case as diligently as you would any other phase of the case. The attitude of the jurors will determine their view of the evidence, so in that sense, this is the most important part of the trial because you will likely win or lose the case before the first witness testifies. ■

## ENDNOTES

1. *Batson v. Kentucky* (1986) 476 U.S. 79.
2. *People v. Wheeler* (1978) 22 Cal.3d 258.
3. Government Code section 11135(a) lists the following characteristics as areas of discrimination: "sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation."
4. Code Civ. Proc. § 231(a).
5. Code Civ. Proc. § 231(d).
6. *People v. Macioce* (1987) 197 Cal.App.3d 262.
7. <<http://www.courts.ca.gov/documents/mc002.pdf>> (accessed Jun. 1, 2018).
8. <<https://domesticviolencestatistics.org/domestic-violence-statistics/>> (accessed Jun. 1, 2018).
9. Greg Jaffe, "New name for PTSD could mean less stigma" (May 5, 2012), *Washington Post* <[https://www.washingtonpost.com/world/national-security/new-name-for-ptsd-could-mean-less-stigma/2012/05/05/gIQAIV8M4T\\_story.html](https://www.washingtonpost.com/world/national-security/new-name-for-ptsd-could-mean-less-stigma/2012/05/05/gIQAIV8M4T_story.html)> (accessed Jun. 1, 2018).