

ROAD MAP

- Law and procedure
- The best domestic violence jury
- Issues to address
- Intangibles

LAW AND PROCEDURE

Voir Dire In California is governed by:

1. California Rules of Court
2. California Code of Civil Procedure
3. Case law

CALIFORNIA RULE OF COURT 4.201

- Initial questioning by the court
- Supplemental questioning by counsel

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge shall conduct initial questioning
 - Attorneys may submit questions for consideration (CCP § 223(a))
- Attorneys shall have right to conduct oral questioning
 - Within reasonable limits
 - *"shall permit liberal and probing examination calculated to discover bias or prejudice"*

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Follow-up permitted to Judge's questions. (CCP § 223(a)(1))
- Not required to submit questions in advance. (CCP § 223(a)(1))
- No specific/unreasonable/arbitrary time limits or inflexible time policy.
- Judge shall permit supplemental time based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. (CCP § 223(a)(2))

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Questioning in presence of other jurors (practicable). (CCP § 223(a))
- Judge shall consider use of questionnaires. (CCP § 223(a))
- List of random order to attorneys. (CCP § 223(b))

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge's discretion viewed in light of:
 - Amount of time requested
 - Unique/complex law or facts
 - Length of trial
 - Number of parties
 - Number of witnesses (CCP § 223(a)(1-5))

PURPOSE OF VOIR DIRE

- Only in aid of the exercise of challenges for cause. (CCP § 223(c))
- Improper question:
 - A question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury. (CCP § 223(d))

GETTING STARTED

- Introduce yourself to court staff
- How does the judge select juries
- How much time you have
- Off-Limits
- Alternates
- Peremptories
- Challenges for Cause

FIRST IMPRESSIONS

- Counsel Table
- Confidence
- Listen to the defense
- Outline of Questions

TYPES OF QUESTIONS

- Road map
- Domestic violence questions
- General questions
- Issues in the case
- Pertinent to specific jurors
- Mix it up

GENERAL CHARACTERISTICS

- People that work in groups
- People with families
- People with stable jobs
- Leaders/Foreperson
- Followers

PEOPLE TO BE WARY OF

- Legal background
- Law enforcement
- Messy divorces / custody

PERSONAL QUESTIONS – LAY GROUNDWORK

- Acknowledge personal nature of questions
- Promise to be respectful
- Private if allowed

DOMESTIC VIOLENCE – STARTING THE DISCUSSION

- What do you think of when you hear the words "domestic violence?"
 - Gender(s)
 - Relationship
 - Type of abuse
 - Results

CONTINUING THE DISCUSSION

1. Repeat their exact words. *"There was violence in my house, it was horrible."*
2. Open-ended questions. *"What kind of violence occurred? What do you think it stemmed from? What would happen?"*
 - How recent
 - Relationship
 - Reported
 - How they reacted
 - Resumed Relationship
 - Impact / Effect on life
 - Law Enforcement Involvement
 - Judicial Involvement

CONTINUING THE DISCUSSION

3. Acknowledge validity and compare. *"Thank you for your honesty and sharing your personal experience. It is understandable that you feel the way you do. Has anyone else had violence in their home?"*
4. Compare and contrast: *"Mr. Smith, how was your experience similar or dissimilar to that of Mr. Jones?" / I know that*

SHIFTING GEARS – TOUGH(ER) SUBJECT

Has anyone here been accused of domestic violence or know someone else who has?

- "Mr. Smith, you said that your ex-wife accused you once."
 - What happened
 - How recent
 - Relationship
 - Reported
 - Resumed Relationship
 - Law Enforcement Involvement
 - Judicial Involvement
 - Were you treated fairly

CASES INVOLVING SEX CRIMES – TOUGH(EST)

- *Sometimes crimes of Domestic Violence may include a sexual component such as rape or sexual assault.*
- *Is there anyone here who as been the victim of, accused of, or know someone who has experienced or been accused of sexual assault?*
- *Same questions, maybe in private.*

DOMESTIC VIOLENCE – STARTING THE DISCUSSION

- Does anyone think that domestic violence is a personal family issue that the government should stay out of?
- Uncomfortable Nature of Topic – Getting Involved

USING THE INFORMATION

- Challenges for Cause
- Developing themes
- Similarities to your case
-
- MIXED BAG
- Keep with EXTREME CAUTION

INTANGIBLES

- Characteristics of Defendant
- Sympathetic defendant
- Uncooperative victim
- Unlikeable victim
- Cooperative / biased / motivated victim
- Different lifestyles
- Prior domestic violence

DEFENDANTS

- Expectations
 - *In this case the defendant is _____.*
- *Were you surprised when you heard the charges read?*
- *Why do you think that surprised you?*
- *What did you immediately think of?*

UNCOOPERATIVE VICTIM

- *Not all crime victims are happy about coming to court. In fact, some want nothing to do with it.*
- *Do you think domestic violence cases should be prosecuted even if the victim does not want it prosecuted?*
- *Can you think of reasons why a victim might not want the case prosecuted?*

UNCOOPERATIVE VICTIM

- *Do you think that a person could get on the stand and lie?*
- *How do you determine if someone is lying?*
- *The court will give you instructions as to how to evaluate testimony, will you use those as you reflect back on the testimony of witnesses?*
- *Listen to all of the evidence*

UNLIKEABLE VICTIM

- *Jury instruction*
- *Some witnesses in cases are not very likeable for a whole host of reasons.*
- *Can you set that aside as you look at the evidence in the case?*

Voir Dire

Voir Dire: Key Words

- Impairment
- Divided attention
- Totality of circumstances
- Objective signs
- Dangerous
- Collision

Voir Dire: Areas

- (1) Impairment
- (2) Dangerous
- (3) Experiences
- (4) Lying
- (5) Circumstantial Evidence
- (6) Burden of Proof

COOPERATIVE / BIASED / MOTIVATED VICTIM

- Preview the issue
- You may hear that there is an ongoing custody issue in this case.
- Would it influence you in a manner such that you would give less weight to the testimony based on that alone?

DIFFERENT LIFESTYLES - IDENTIFY

- Socioeconomic
- Same sex relationship
- Drug use
- Bad choices

DIFFERENT LIFESTYLES – ADDRESS THE ISSUE

- Jury instruction
- Preview of what to expect
- What do you think?
- How would it affect you?
- Can you set aside?

PRIOR DV- EVIDENCE CODE 1109

- By Defendant (and/or Victim)
- Pre-trial ruling
- *You may receive evidence that you can consider in your deliberation, but only for specific or limited purposes. You will get instructions from the judge on how to do that.*
- *Will you agree to consider all of the evidence you are allowed to?*
- *Will you follow the judge's instructions?*

OTHER INTANGIBLES

- Presence / lack of injury
- Inconsistent statements
- Involvement of children
- CSI

CHILDREN AS WITNESSES / VICTIMS

- A child may be called as a witness in this case.
- Do you think it is fair to ask a child to testify?
- What if it is about something that involves their parents?
- Would you hold it against the party who called the child?

GENERAL QUESTIONS

- Reasonable doubt
- One witness rule
 - Domestic violence (witness)
 - Sexual assault

COMMITMENT - WAIT TO DECIDE

- Inconsistent statements
- Corroboration
- Whole picture

JUROR-SPECIFIC QUESTIONS

- Follow-up
 - Body language
- Prior questions by defense
- Any unanswered questions

SECOND WAVE OF JURORS

- Do not simply ask if anyone has different answers!
- Don't shortchange yourself on time!
- Still ask direct questions and general questions

THINGS TO AVOID

- Don't argue with a juror
- Be aware of discomfort- private topics
- Don't use legalese
- Ask open-ended questions
- Keep questions clear

HOW TO FINISH

- Anyone who has anything they want to add or discuss?
- Thank them

FINAL ADVICE

- The jury should talk most of the time
- Have an outline with your questions
- Listen to the defense
- Watch the jurors and their reactions
- Trust your instincts

KEEPING A RECORD

- Think of the AG come appeal time

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VOIR DIRE

- Critical...underrated & poorly done
- First impressions important – Trust me
- Opportunity to educate jury about theory of case & discount defense
- De-sensitize jury (unsympathetic/gang/RAP or conduct of witnesses or victims)
- Question on CSI factor
- Open-ended questions
- Avoid *Batson/Wheeler*
 - Keep good notes
- Trust your instincts

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IO in Jury Selection?



☞ IO: The officer/detective who can provide the most assistance during your case (or the only one!)

☞ To use in Jury Selection, or Not?

- First Trial for you in Jx? Then probably, yes.
- Officer on graveyard or days off?
- Some DA's use them for every case; some, never; some, case-by-case.
- Possible compromise: have them come in to see list of venire names only, then advise and leave

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Jury Selection: As the Jury Walks In



☞ Alphabetical List v. Randomized List

☞ Stand for the Jury (even when defense can't/won't)

☞ Check for familiar faces

☞ Take heed of attitude/treatment of others

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Jury Selection: What Happens Next



☞ Roll Call (done by clerk)

☞ Hardships (pay attention!)

☞ "Six-Pack" v. Traditional Jury Selection (and alternates)

☞ Order of Juror Questioning

1. Judge First (questions from pre-printed board)
2. Defense Second (usually at lectern or in well)
3. Prosecution Third (same)

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Challenges for Cause



⌘ CCP § 225(b)(1): Challenges for Cause Grounds

- Disqualification for Jury Service
- Implied Bias
- Actual Bias

⌘ CCP § 228: Grounds for Disqualification

- Ineligible for Jury Duty
- Or "any incapacity" preventing the person from fulfilling duties in a way that protects the challenging party's rights

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For Cause (cont'd)



⌘ CCP § 229: Implied Bias

- Related to a Party
- Other relationship: e.g., business partners
- An interest in the outcome
- Bias toward/against party
- Having "an unqualified opinion or belief as to the merits of the action founded upon a knowledge of its" facts

⌘ Defense Goes First

⌘ Unlimited Number

⌘ Usual Procedures:

1. Judge: "Defense, challenges for cause?" Then go from there.
2. Judge: "Counsel, approach." And discuss cause challenges at bench.

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Peremptory Challenges



⌘ CCP § 231 governs the number:

- 20 for Death or Life cases
- 6 for offenses w/MTC of 1 year or less (recently amended from 90 days or fewer)
- 10 for all the rest
- (some exceptions for multiple defendant cases)

⌘ The People go first

⌘ Keeping Track

- The Ladder
- Ok to ask clerk, too
- The Flag Rule: Who is Juror Number One?



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How to Voir Dire



- œ (This is covered more in Jury Selection segment)
- œ But to Make a Long Story Short:
- œ Have a canned opening/closing line (to calm yourself)
- œ Root out the Biased
- œ Get Them Talking!
- œ Make sure EACH ONE has spoken with you
- œ Take a final glance at the end to make sure

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VOIR DIRE

- French: To see, to speak
- CCP §§ 190 et seq
- Recent changes promising

CCP § 223

Voir Dire in Criminal Cases

- 2001 – 2017: Court shall conduct an initial examination of prospective jurors. The court may submit to prospective jurors additional questions requested by the parties as it deems proper. The court may limit the oral...questioning by counsel. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

CCP § 223

Voir Dire in Criminal Cases

- January 1, 2018: changes open up scope & time
- (b)(1): ...During any examination by counsel, the trial judge shall permit *liberal and probing examination* calculated to discover bias or prejudice with regard to the circumstances of the case or parties before the court. The fact that a topic has been included in the trial judge's examination shall not preclude appropriate followup questioning in the same area by counsel. [no prior written submissions required]
- (b)(2) The trial judge shall not impose specific *unreasonable or arbitrary time limits* or establish an inflexible time limit policy for voir dire. As VD proceeds, the TJ shall permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.

CCP § 223

Voir Dire in Criminal Cases

- (c) In exercising the judge's sound discretion, the trial judge shall consider all of the following:
 - (1) The amount of time requested by trial counsel.
 - (2) Any unique or complex legal or factual elements in the case.
 - (3) The length of the trial.
 - (4) The number of parties.
 - (5) The number of witnesses

VOIR DIRE IS CRITICAL

- Defense wants at least 1 BAD juror, you need 12+ GOOD jurors (plus alternates)
 - Only chance to weed out jurors with issues
- First Impressions Important
- Only opportunity to educate jurors
- Voir dire poorly done
 - By judges
 - By defense attorneys
 - By many prosecutors

WHEN TO START THINKING ABOUT VOIR DIRE

- When you first get the case
 - What are the factual issues?
 - What are the legal issues?
 - What kind of person would be good/bad juror based on the issues?
- Keep list of potential questions & add/delete as trial approaches
 - In the file or trial notebook

BEFORE TRIAL - INFORM YOURSELF ABOUT JURORS

- How?
 - Jury list
- When?
- What to do with list?
 - Disseminate to fellow prosecutors
 - Disseminate to arresting agency
 - Run local criminal history (Support staff)



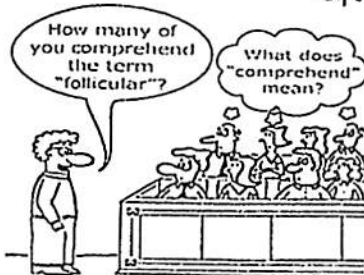
FIRST IMPRESSIONS

- Dress good, look good —
- Observe jury as they enter vs. sitting straight ahead
- Jurors are watching you too!
- Be relaxed (or fake it)
- Act professional with Δ attorney
- No legal speak...



Talk Normal!!

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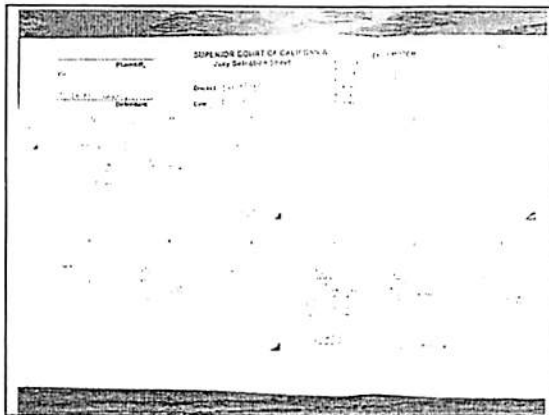


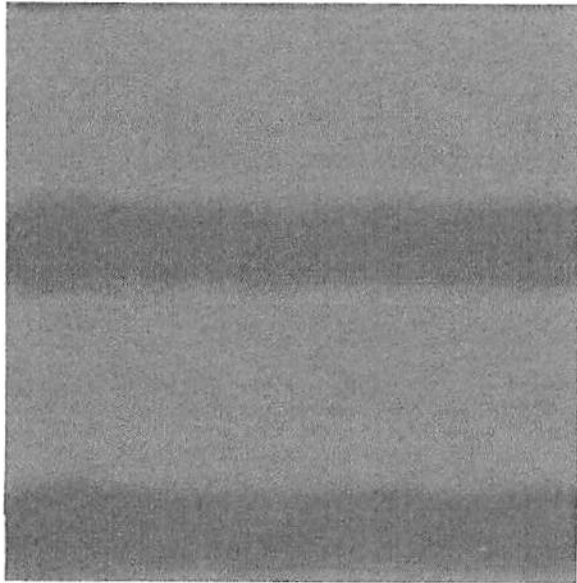
FIRST IMPRESSIONS

- No legal speak
- Stand when addressing court / jurors
- Be yourself
- Eye contact
- Don't argue with prospective jurors
 - If they're not saying what you want to hear don't spend a lot of time with them

JUROR INFORMATION

- What information to keep track of...
- Why keep track?
 - So you won't forget
 - To note answers that require additional questioning
 - Avoiding & winning Wheeler challenges
- How to keep track?
 - Post Its™
 - Easy to move around
 - Save all Post Its, even for excused jurors
 - Abbreviations





JUDICIAL VOIR DIRE

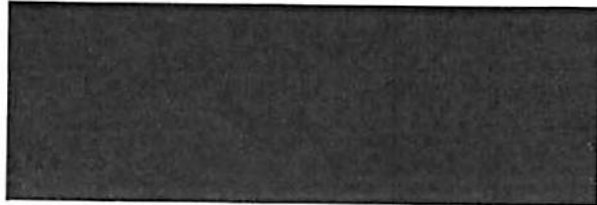
- Standards of Judicial Administration § 8.5
- Judges usually do minimum questioning
 - Charge related
 - "Can you be fair and impartial?"
 - General background
 - Note # of children, spouses, occupations, prior jury service
 - Law enforcement background
 - Victim of crime, accused of crime

ATTORNEY INQUIRY

- Time limits
 - Court can control time (CCP § 223)
 - Must be equal
 - Use "court's clock"
- Who goes first?
 - CCP: silent
 - Δ attorney should go first
 - Our burden
 - Allows prosecutor to react to defense questions

ATTORNEY INQUIRY - GOALS

- Determine bias or prejudice
- To follow up on judicial VD to uncover juror attitudes inconsistent with suitability to serve in your case
- Educate jurors as to case/legal issues
- Desensitize jurors
 - Gory photos
 - Offensive language
 - Sexual content
 - Unsympathetic victim/witnesses, sideways V in D.V.
- Weed out fruitcakes



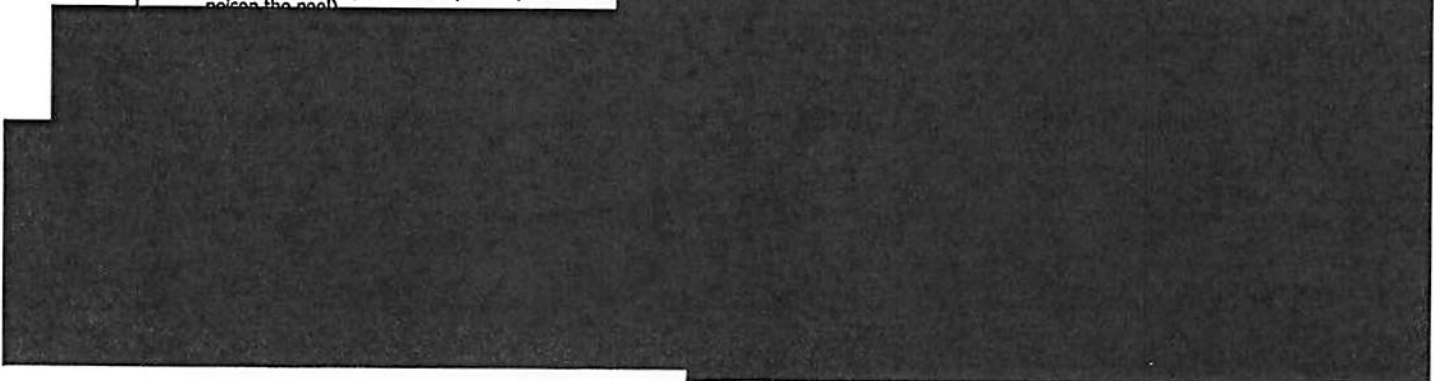
OPEN-ENDED QUESTIONS

- What is? Why better than yes/no?
- Good for opinions & attitudes
- Here's how:
 - Choose prospective juror
 - Ask open-ended question
 - Follow up until response clear
 - Choose another juror and compare/contrast
 - Get balance to agree
- Examples:



AREAS TO ADDRESS

- Case issues (examples)
 - Unsympathetic/recanting/hostile victims
 - Crimes with no human victims (commercial theft)
 - Defenses (e.g. vol tox., necessity)
 - 192 victim = friend
- Defendant-related issues
 - Young, female, elderly, veteran, sympathetic
- Juror-specific issues
 - Based on their previous answers
 - Feel free NOT to question bad jurors (don't let the police do the work)



FOLLOW UP QUESTIONS

- Don't be afraid to use prospective jurors to educate/influence other jurors
 - Even if you plan on excusing
- Examples:
 - Jurors familiar with the case
 - Jurors who have been in court before
 - Jurors who know the judge or late-reporting (e.g. tapes)
- Get them to share information

In-Camera inquiries

- Juror wants to address some issue outside presence of other jurors
- Some judges try to gloss over to avoid
 - E.g. "will the issue you are thinking of affect your ability to be fair & impartial"
 - Doesn't tell you what the issue is, your duty is to inquire (or excuse)
- Make sure judge doesn't forget to bring juror into chambers later

"NEWBIES"

- A prospective juror who wasn't on panel during initial questioning
- Judge will usually ask if any issues arose...very general questioning
- Tendency to spend less time with them
 - Not you! Question as thoroughly
- Big mistake to gloss over just because court did
 - Court may put pressure to speed up process

CHALLENGES

- Time to get rid of bad jurors!
- To the entire panel for cause (CCP § 225(a))
 - Rarely done
 - Done in writing, before jury sworn
- Individual juror challenge for cause (order = CCP § 227)
 - General disqualification (CCP § 228) or competency (CCP § 203)
 - Not a citizen, age, residency, hearing issues, felon, language issues
 - some other incapacity
 - Implied bias (CCP § 229)
 - Actual bias
- Peremptory challenges (CCP § 231)

CAUSE - IMPLIED BIAS

- Implied Bias CCP § 225(b)(1)(B)
 - When the existence of facts as ascertained, in judgment of law disqualifies the juror
 - Examples (CCP § 229):
 - Relationship/connection to case, parties
 - Having unqualified opinion of case merits
 - Having an interest in party or outcome
 - Having a pending action in same court which is set for trial
 - Prior juror (retrial, juror on first trial)
 - It happens

CAUSE - ACTUAL BIAS

- Actual Bias CCP § 225(b)(1)(C)
 - 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.
 - Examples:
 - Opinion as to A's guilt (Police only arrest guilty people)
 - Bias based on nature of the charge
 - Under no circumstances would believe a police officer

CHALLENGES FOR CAUSE

- Handled by the court at conclusion of questioning, at side bar
- Set up your argument for bias thru detailed questioning
- Don't just lay down on defense challenges for cause
 - Ask court to rehabilitate
 - Argue points showing lack of bias

PEREMPTORY CHALLENGES

- Each side gets 6 (misdemeanors)
 - Until January 2021, then back to 10
- General felonies: 10 + 5 per extra Δ
- Joint defendants: challenges + 2 addl (10 total for 2 Δs)
- People go first, Δ second, alternate (CCP § 231(d))
- **Cannot** use a peremptory challenge on juror presuming bias b/c of race, national origin, ethnic group, religion, age, sex, color or disability
 - Prohibited by CCP § 231.5
 - **It's totally wrong and against our principles!**
 - It will subject you to a Wheeler challenge

BYE BYE – WHAT TO SAY

- "The People would like to thank and excuse Juror #5, Mrs. Smith"
- Eye contact & smile
- Don't make replacements move in to the box for no reason!
 - I'd like to save Mr. Johnson the walk and thank and excuse him...
- The Good Guy vs. the good juror
 - You have a great juror, but has some commitment that jury service will wreck...excuse?

Presumption

- Presumption: the People use peremptory challenges in constitutional manner (People v. Wheeler (1978) 22 Cal.3d 258; (People v. Watson & Fary (1965) 24 Cal.4th 243)

WHEELER CHALLENGES

- People v. Wheeler (1978) 22 Cal.3d 258
 - The use of peremptory challenges to remove prospective juror on sole basis of group bias violates CA Constitution Article I, § 16 (right to jury drawn from representative cross-section of the community)
- CCP § 231.5
- Batson: federal version of Wheeler
 - Violation of Equal Protection
- 3 prong test

WHEELER

- 1ST PRONG: Challenge & prima facie showing by proponent
- 2ND PRONG: Successful showing shifts burden, People must satisfy court that challenge(s) proper
- 3RD PRONG: Court decides if challenge(s) proper, denies or grants motion

WHEELER: PROCEDURE

First Prong

- Proponent makes challenge via appropriate objection
- Proponent makes prima facie case
 - producing evidence sufficient to permit a trial judge to draw an *inference of discrimination* on a member of a "cognizable group"

COGNIZABLE GROUPS

- Classifications of people that are constitutionally protected from challenge based solely on group membership
 - Must be "an identifiable group distinguished on racial, religious, ethnic or similar grounds" (Wheeler)
- Cognizable group must have 2 characteristics:
 - 1) members share a *common perspective* arising from life experience in the group, and
 - 2) *no other members of the community* are capable of adequately representing the group perspective

COGNIZABLE GROUPS

- Religious groups
- African-Americans (male & female)
- Hispanics
- Women
- Hispanic-surnamed women
- Men
- Gays & lesbians
- Spanish-speaking Hispanics (17 v. Gonzales (2008) 165 Cal.App.4th 620)
- Ever changing

NON-COGNIZABLE GROUPS

- Poor people
- People of color
- Less-educated people
- Blue-collar people
- Battered women
- Young adults
- People over 70
- Naturalized citizens
- Retired correctional officers

WHEELER: PROCEDURE First Prong

- Showing (outside presence of jury)
 - Juror is member of cognizable group
(defendant need not be member)
 - Majority/all jurors of a cognizable group removed via use of disproportionate # of peremptory challenges
 - Showing that the totality of facts give rise to an inference of discriminatory purpose

WHEELER: PROCEDURE Second Prong

- Successful showing shifts burden
 - Burden = to show that peremptory challenges were NOT on grounds of group bias but on grounds reasonably relevant to particular case or it's parties/witnesses

NOTE: that is why you keep good notes during voir dire so you can pull out facts or issues or observations re: excused jurors

WHEELER PROCEDURE

Third Prong

- If race neutral (non-discriminatory) explanation tendered, trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination (Johnson v. California (2005) 125 S.Ct. 2410)

WHEELER: PROCEDURE

- Make Δ attorney set forth facts
- Inquire of court if burden has been met (prima facie case)
- You want judge to state for record that prima facie case not met (no explanation from you needed)
 - Beware of remands
- Court should expressly rule on sufficiency of evidence
 - Failure invites error
 - Allowing challenged party to respond w/o ruling tantamount to shifting burden
- Error = prejudicial per se

THE WHEELER TRAP

- Scenario:
 - Wheeler challenge made by Δ
 - Court "telegraphs" denial = asks if People care to respond
 - You don't want to blow it, so you keep silent
- Court may be shifting the burden
 - People v. Johnson 47 Cal.3d 1194: such inquiry constitutes "at least an implied finding of a prima facie showing"

AVOIDING THE TRAP

-
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- See *People v. Turner* (1994) 8 Cal.4th 137, 167 for good example
- Your record should include "you do not feel that the defense has made a prima facie showing of bias"
- Not ex parte! (*P v. Ayala* (2000) 24 Cal.4th 243)

REASONS TO EXCUSE

- Must provide clear & reasonably specific explanation of legitimate reasons
- Even trivial reason, if genuine & neutral, will suffice (*Johnson case*):
 - Facial expressions
 - Gestures
 - Hunches
 - Arbitrary & idiosyncratic reasons
 - Demeanor
 - Attire, social awkwardness
- NOTE THESE ON YOUR POST ITS!!!

COURT LOOKS AT...

- Prosecutor's demeanor
- How reasonable/improbable are the explanations
- Lack of detail
- Prosecutor not questioning consistently

RESULT OF WHEELER CHALLENGE

- If challenged party fails to overcome burden, trial court must conclude jury as constituted fails to comply with fair representation requirement
- Jury is dismissed, jury selection begins again...or juror is re-seated (awkward)
- You're in big trouble (See State Bar reporting rules)

WHAT IF...

- ...trial court denies Wheeler challenge and appellate court finds decision to be erroneous?
- Appellate court could order a "remand"
 - Example: *P v. Kelly* (2008) 162 Cal.App.4th 797
 - A hearing in which you may be required to go back and explain your challenges
 - Could be years later! **KEEP YOUR NOTES**
- Remands
 - Not under oath
 - No cross examination by defense attorney

COMPARATIVE ANALYSIS

- *Miller-Ei v. Dretke* (2005) 125 S.Ct. 2317
- Court compares reasons for excusing a juror against another prospective juror of similar constitution
- Challenger Invokes by pointing out existence of other similar jurors not excluded
- Alive and well in California (even on appeal, remand).

COMPARATIVE ANALYSIS

- To protect against:
 - Keep notes on questions asked
 - Keep track of answers given
 - Need to ask questions the same way to each juror
 - When explaining reason for strike, give all applicable reasons, not just the one answer to the one question

LAST WORD ON WHEELER

- Don't go there, see it coming
- Keep good notes on your side, put in file post-trial
- Keep section in trial notebook on procedure and case law
- Wheeler applies both ways: "The People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community."
 - Keep good notes on the other side

ALTERNATE JURORS

- CCP § 234
- Insurance policy
- Often poorly examined by everybody
 - Subject to same examination & challenges
- Often substituted after trial commences
- Often crucial to successful verdict
- Always insist on at least one
- PAY ATTENTION TO THEIR SELECTION

WINNING & LOSING CASES IN VOIR DIRE

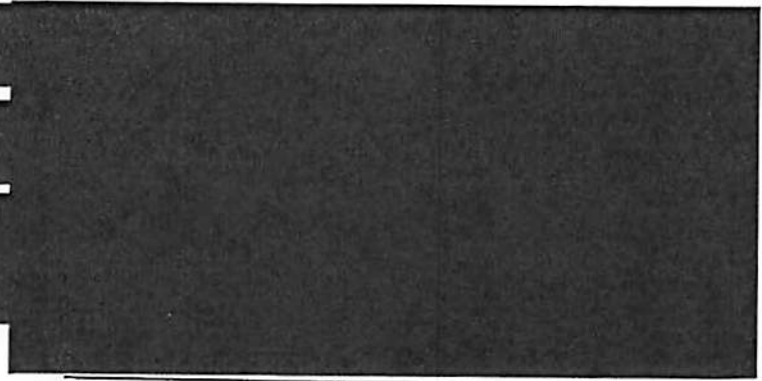
- Battery cases w/minor or no injury
- Low blow DUI
- Case with unsympathetic victim
- Case with recanting victim
- Case with sympathetic defendant
- NHI cases
- No-loss theft cases
- Miami CSI cases (forensic evidence issues)

LAST WORD

- Voir dire is chance to educate, impress, gain trust or credibility of jurors
- Voir dire is where & how you get rid of bad jurors and get good jurors
- Cases are won & lost in voir dire
- When in doubt...go with your gut
- Defense attorneys don't put as much into voir dire...they don't have to...PROSECUTORS NEED TO PUT ALL into Voir Dire

SPECIFIC QUESTIONS:

- Ev [REDACTED]
- Can you give me some examples of why a person would lie at trial after calling police about DV? Even from the witness stand?
- If a person calls police to report a crime and later becomes disinterested in the case, what role should that disinterest have?
- Experience with the Santa Ana Police Department?



A Few Key Differences

- (1) Jurors hate these cases
 - Political vs. legal
 - Defendant is the victim
 - No warm & fuzzy level
- (2) They take longer!
- (3) Defense will almost always put on a case
- (4) The defenses are different
- (5) Most police officers do not have the same understanding of the science
- (6) DOJ usually is not of much help

Trial Preparation: DUID

- (1) Blood sample will take much longer to obtain
- (2) Have THC content tested
- (3) Need to know studies backwards and forwards
- (4) Need to know opinion of expert well in advance
- (5) Consider retaining outside expert

Voir Dire on Drug DUIs


- If marijuana
 - Start with buzzed driving (beginning having people equate it to alcohol)
 - Ask who smoked weed if college
 - Choose older juror and ask how did it make them feel?
 - If they refuse to admit that they weren't even mentally impaired ask if they would drive their kids
 - Ask the entire box who has smoked in their life and work forward in time
 - Ask what people are hoping to get out of marijuana smoking
 - Ask why people drink alcohol
 - Point out that people are doing it for the mental effects. Ask if people are safe to drive after smoking?
 - If yes, then follow up with tolerance and potency then follow up with signs to look for (eggs tying it back with alcohol)
 - As person again who said it was ok if they would drive their kids immediately after smoking
 - What are signs you see right after smoking
 - Would you get on your plane if you saw those signs on your pilot?
 - Make sure to emphasize at some point this is not a political attack but a case about someone who shouldn't have been behind a wheel just like alcohol

■ If prescription pills:


- (1) Why are some prescription pills over the counters vs. prescribed?
- (2) If a person doesn't have a prescription what do you think their purpose is in taking the pills?
- (3) Does anybody here take any prescription medication like Soma, Ambien, Xanax?
- (4) Why do you take those, what are the effects?
- (5) Does the bottle warn you about driving?
- (6) Do you think about how you're feeling before you drive on those or plan out when you're going to take it if you know you're going somewhere that day?

■ If illicit drug focus on:

- (1) People's experiences with them (i.e. family, friends, the user in the park who yelled at them)
 - Always end this part with the bad experience
- (2) Why is the person taking those drug (meaning what effects are they after)?
- (3) What makes those people unsafe to drive a vehicle?



Trial Jury Selection in Domestic Violence Homicides



Your Goals

- Impress the prospective jurors with you as a prosecutor – Be confident and shine your shoes.
- Inform- address the issues in your case.
- Indoctrinate – Prospective jurors need to understand how the law works and applies to the facts of your case.

First and Foremost

Approach jury selection like you are conducting a job interview.

Unselecting the jury.

Protecting your record.

Two Parts to Jury Selection

- What the jury does not see – pre-trial conferences/questionnaire process.
- Actual questioning of prospective jurors.
- (contact/conduct with jurors after the verdict is rendered)

Relevant Statutes

- PC section 1046: Same as Civil Trial
- CCP sections 190 - 234
- Rules of Court, Rule 4.200 et. seq.
- Case Law (Batson (1986) 476 US 79/Wheeler (1978) 22 Cal.3d 258) issues. CCP 231.5
- Gender is a protected class. People v Jurado (2006) 38 Cal.4th 72, 104.

CCP section 223

- Voir Dire purpose is to "aid in the exercise of challenges for cause".
- Preference for non-sequestered voir dire (People v. Roldan (2005) 35 Cal.4th 646, 691) but private voir dire is permitted for sensitive areas where you may not get a complete answer.
- Questionnaire must advise of an ability to request a private hearing. Copley Press v. SC (1991) 228 Cal.App.3rd 77, 87.

Cause Challenges

- General disqualification (residency, citizenship, language competency) CCP 225(b)(1)(a).
- Actual bias (Juror cannot be fair) CCP 225(b)(1)(c).
- Implied Bias (Enmity against or bias towards either party).

Peremptory Challenges

- Life case you are allowed 20 peremptory challenges. CCP section 231(a).
- Panel must be full before exercising and People go first. CCP section 231(d)

DV From the Juror's Perspective

- In the news — virtually everyday there is a media report about a domestic violence or family violence murder.
- In entertainment and music.
- In their neighborhoods and amongst close friends and family.

What your Jury Thinks about Domestic Violence

- Movies
 - Burning Bed
 - Sleeping with the Enemy
 - Enough
- Music
 - Burn (Rihanna and Eminem)
 - Never Again (Nickelback)
 - Gunpowder and Lead (Miranda Lambert)
 - Goodbye Earl (Dixie Chicks)
 - Hey Joe (Jimi Hendrix)
 - He hit me...and it felt like a Kiss (The Crystals)

What your Jury Thinks about Domestic Violence

- Happens, but not to people like me.
- If it happens, the victim would leave before s/he is murdered.
- Long, well documented history of violence will exist if it really is a Domestic Violence Homicide.
- If you are battered and you kill your partner, then it is self-defense.

Jury Questionnaire

- CCP section 205 (c) and (d).
- Judicial Council Form MC-002 (includes death penalty supplement).
- CA Rules of Court, Rule 4.200 (a) and 4.201.
 - Requires court to meet and confer with counsel
 1. Guidelines for use
 2. Supplemental questions
 3. Extent of court's questioning
 4. Extent of counsel's questioning

Jury Questionnaire

<http://www.courts.ca.gov/documents/mc002.pdf>

Pros

- Organization
- Facilitates jury selection and saves court time
 - Stipulations re cause challenges
- See what you are dealing with ahead of time
 - Investigate your jurors – Google them, Check voter ID
- Focus voir dire on your issues
- Minimizes "group think"
- Rank your jurors, eg. 1-5

Cons

- Potential land mines in your record.
- More work for you – Potentially 100s of questionnaires.

Using the Questionnaire

- Use a simple questionnaire to help focus on relevant issues and as an aid to questioning.
- Alerts you on where to focus both for individual questioning and trends or themes from the entire group of prospective jurors.

Questionnaire Areas of Note

- 1.3 Physical difficulties of the juror.
- 1.4 Ethical, etc. that prevent jury service.
- 1.7 Training in the law and related subjects.
- 1.22 Background of people in the household.
- 1.29 Prior jury service.
- 1.31, 1.32 Crime victim or crime witness.
- 1.35 B.R.D. only jury instruction.
- 1.36, 1.37 Experiences with the police.

Questionnaire: Statement of Case

- On July 12, 2009, Danielle Rosa Keller was beaten to death with a baseball bat outside her home in Novato, California.

James Raphael Whitty Mitchell is accused of committing this crime and of abducting their one-year-old daughter, Samantha, from the scene. He is charged with the murder, stalking, inflicting corporal injury upon Ms. Keller, child endangerment, child abduction, and kidnapping of Samantha Mitchell.

Generalizations: Who You Want

- Stable members of the community-property owners with jobs.
- People with families.
Caveat: young defendant and folks with kids defendant's age.
- Supervisors, decision makers.
- Mix of leaders and followers.
- Prospective jurors with life experience that you relate to.

Who You Would Likely Get

- Teachers
- Retirees
- Government workers

You May Discuss Trial Issues

- Questions about applying relevant legal doctrines. People v. Williams (1981) 29 Cal. 3d 392.
- You are allowed to ask questions to assist in the exercise of peremptory challenges even if it indoctrinates. People v. Wells (1983) 149 Cal. App. 3d 721; People v. Williams (1981) 29 Cal. 3d 392.

Talking with Prospective Jurors

- Remind them that it is essential that they are truthful in their answers and that there are no right answers – remind them of the oath they took.
- Questions are prying, not intended to embarrass but to find out if they should sit as a juror on this type of case.
- OK to disagree with law or other jurors but need to let us know.

Let the Prospective Jurors Talk

- Open ended questions: "Would you automatically vote not guilty just because the victim did not leave the relationship."
- Based only on this fact would you vote not guilty.
- Listen to their answers.

Group Questions

- Necessary for opening areas of discussion.
- Each juror must be asked individual questions.
- Ask open ended: "How many of you..." suggesting there are some of them and not "Do any of you..."

General Areas of Questioning

- Violence in general - "Have you..."
- Bias and following the law – "Have you..." "How do you feel about..."
- Domestic Violence – "Do you feel..." "What do you think..."
- Prior unreported DV – "Have you..."
- Race and Culture – Talk to people you know "Do you believe..."

Gruesome photos

- The jury in this case may be required to hear and see graphic evidence caused by lethal force. This evidence may involve photographs of the crime scene, including photographs showing severe injuries to the body of the victim. Although we acknowledge that this will be/may be uncomfortable, do you think it would make it impossible for you to serve as a juror in this case? Yes _____ No _____
- If Yes, please explain:

Media Issues

- Other than the news media, have you read about, seen, or heard anything about this case? Yes _____ No _____
- If Yes, please give a detailed account of everything you recall hearing about the case: _____

- If you have heard about the case from any source, how would you rate your knowledge of it? (Please circle)
- Followed the case closely - very familiar with it.
- Followed the case a little bit - know something about it.
- Know just a little bit.
- Have no knowledge about it.

Health Profession

- Have you or have any members of your family or close friends ever worked in the health professions as doctors or nurses, or otherwise been involved in health care? Yes _____ No _____
- If Yes, please explain:

Examples of DV Murder

- Victim divorces defendant and has an affair- murder/suicide.
- Severally mentally ill son murders father.
- Loss of custody/visitation and control of victim- sense of entitlement leads to murder of victim.

Essential Areas of Questioning

- Motive and intent to kill.
- Psychological Evidence – Intent to kill.
- Scientific Evidence and the CSI effect.
- Lifestyle of the victim.

Motive

- Why is the victim dead?
- Love and/or a sense of entitlement
 - Cheating / jealous.
 - Breaking up/leaving the relationship.
 - Divorce issues.
 - Child custody and visitation issues.
 - Not obeying the rules established within the relationship - Loss of control of the relationship.
 - Self Defense or Defense of Others.

Question Jury about Motive

- Direct Questioning
- Ask open ended questions and do not be afraid of the answers

Do you believe that someone would kill the person they love, the parent of their child?

Would you vote not guilty just because the defendant tried to kill himself?

How do you feel about a mother who seeks to deny custody/visitation?

Motive

- Are you familiar with the concept of power and control as it is applied to domestic violence?
- Do you believe there are circumstance where a person should not be allowed to leave a relationship. OK with divorce.

Several Questions on DV

- Do you feel violence that occurs between people who know each other should be looked at differently than violence that occurs between strangers? Yes _____ No _____
- If Yes, please explain: _____

Mental Health Profession

- Have you or have any members of your family or other persons close to you ever worked in the mental health professions as psychologists, therapists, counselors, marriage counselors, psychiatric technicians, or nurses, or in any other related occupation? Yes _____ No _____
- If Yes, please explain: _____

Intent to Kill

- Murder/ Suicide Pact
- Mental health defenses – Axis 1 v. personality disorder. Paranoid/Schizophrenia / poly substance abuse
- Narcissistic behavior by a defendant
- Voluntary Manslaughter/ Heat of Passion. (Cal Crim 570)
- Imperfect Self Defense – good faith reasonable belief.
- Post traumatic stress
- Weapons used.

Mental Health Related

- Do you, a close friend or relative have any experience, training or education in the mental health field?
 - Should be in the questionnaire but a must ask.
- Follow up for the individual – tough question so it is better in the questionnaire but if you have to ask you have, ask – likely follow-up.
 - Get up and talk to the juror directly, active listening, repeat the last response if it supports your point.
- Other questions.

Expert Witnesses

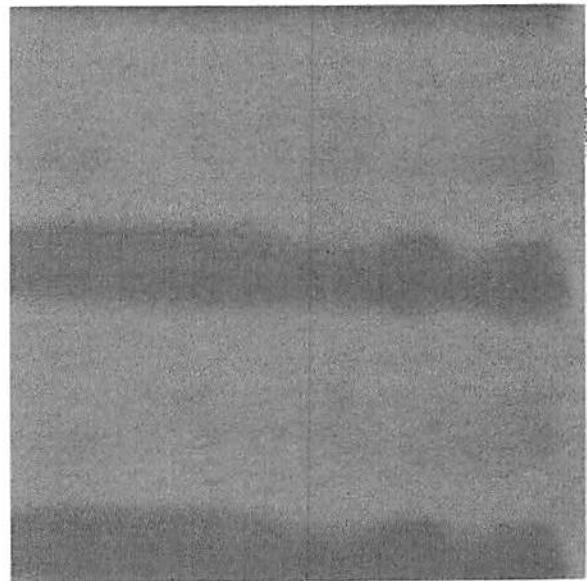
- Do you or any members of your family or any other persons close to you have any education, knowledge, training, or experience in or with any of the following?
- ☐ Administration of Justice ☐ Toxicologist
- ☐ Criminalistics/Criminology ☐ Law Enforcement
- ☐ Forensics ☐ DNA
- ☐ Laboratory Techniques ☐ Substance Abuse/
- ☐ Law/Legal ☐ Rehabilitation
- ☐ Sociology
- ☐ Investigative Techniques

CSI and Scientific Evidence

- Find out jurors' understanding of expert testimony:
 - DNA
 - Fingerprints
 - Fibers/Environmental findings
 - Firearms
 - Other deadly weapons – knife, bat
 - Blood spatter evidence
 - Autopsy and cause of death
 - Crime scene reconstruction

Expert Witnesses

- Psychiatrist/psychologist on intent issues including the effects of substance abuse on intent. PTS (not PTSD)
- DNA experts.
- Scene reconstruction experts
- Firearms/weapons experts
- Forensic pathologist / autopsy
- Intimate Partner Violence Expert



Voir Dire: Impairment

- Driving when below 0.08
 - Grandma Example
- Prescription Drugs
 - Bottle
 - Follow the law
- OSIs

Voir Dire: Dangerous

- Operating vehicle/divided attention
- The next day
- No bad driving

Experiences

- Drink
- Family History
- DUI
 - Arrested/Prosecuted
 - You, family, or friend
 - FSTs
 - Ever performed
 - Trup
 - Breath Test
 - Reliable
 - Call one in or suspect

Voir Dire: Lying

- Motives
- Refusals

Voir Dire: Circumstantial Evidence

- Grocery store or red light example

Voir Dire: BRD

- Impairment
- Not 100%
