Appellate Advocacy College 2000

Lecture

Jury Selection and Jury Misconduct in Criminal Appeals

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LECTURE MATERIALS

JURY SELECTION
JURY MISCONDUCT

by

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INTRODUCTION

The following course materials are to be used in connection with the lectures on Evidence, Jury Selection and Jury Misconduct. For each topic, the materials consist of hypothetical questions designed to raise current and important issues.

Following each set of hypothetical questions appears a proposed approach to the issue, and some of the authority that is available. Keep in mind that since the selected issues are so current, that the law may be vulnerable to sudden change. Please check the finality and subsequent history of any cases cited in these materials.

Also included within in each topic are summaries by CCAP Staff Attorney Melissa Nappan of cases decided in the past two years. The CCAP summaries are updated for subsequent history, but a case will remain in the summaries even if rehearing or review is granted, or the case is ultimately not certified for publication. The index codes seen at the beginning of point of law are the index codes used within the CCAP brief bank. A partial index to the codes is included at the beginning of each section of cases. The CCAP summaries can be found on the internet by accessing the CCAP web page at www.capcentral.org.

Also, following the Evidence section, is a sample brief raising typical Evidence Code section 1109 issues, written by CCAP Staff Attorney Shama Mesiwala, incorporating other briefs written by John Doyle, Brendon Ishikawa, and William Arzbaecher.

JURY SELECTION ISSUES

A. *Wheeler* Motions

Hypothetical #7

A Spanish-speaking, Spanish-surnamed defendant was charged with the burglary of a home owned by a non-Spanish-surnamed family. In selection of the jury and alternates, an entire panel of 40 members was used by the time that hardship challenges, challenges for cause and peremptory challenges were completed. The remaining group included a large number of school teachers, but primarily consisted of people of a wide range of ages and experiences. Almost all of the jurors passed for cause said that they had been victims of a burglary at least once, and they all had relatives who had been arrested for crimes. These events were upsetting to them at the time, but they all said they could be fair and impartial. The prosecutor did not ask very many questions of any of the jurors, and several of the jurors, including five of the six jurors having Spanish surnames, were asked only the general question about being fair and impartial. Defense counsel used all of her peremptory challenges. The prosecutor used nine of her peremptory challenges, five of which were used to exclude the persons having Spanish surnames. Neither counsel passed a challenge until the prosecutor eschewed her tenth challenge, accepting the panel. The defense counsel approached the bench, and an unreported conference took place. The jury was sworn. Selection of alternates was uneventful, and the alternates were sworn. During further in limine motions, defense counsel stated, "When I approached the bench, I said I thought the prosecutor was discriminating in her exercise of peremptory

challenges, and you said to raise it at a break. I am now making a *Wheeler/Batson* motion because the prosecutor has excluded five Spanish-surnamed persons." The court denied the motion on two grounds: 1) it was untimely; and 2) a prima facie case of discriminatory use of challenges was not established because there was still a juror with a Spanish surname.

Was the motion untimely?

How would an appellate court proceed to resolve a claim of *Wheeler/Batson* error?

Did the attorney do enough to establish a prima facie claim?

Assuming that the trial attorney failed to vocalize a prima facie case, would the court analyze the elements on appeal to determine if there was a prima facie case?

What factors in the present case would the court consider in determining whether or not a prima facie case had been made?

Was the court right or wrong in its conclusion that a prima facie case had not been established because of the presence of the Spanish-surnamed juror on the panel at the time of the motion?

From these facts, does it appear that the trial court erred in not finding a prima facie case of discrimination?

Possible Approaches to Hypothetical #7

1) **Timeliness**. A *Wheeler/Batson* challenge should be made as soon as the discrimination becomes evident, and is untimely in a California court if made after the swearing of the jurors. Federal courts will not usually relieve this procedural default. However, here the fact that the court told counsel to wait until the next break, and counsel's having done so as soon as possible make this an exceptional situation in which an untimely motion might be heard.

2. ***Wheeler/Batson* analysis, generally**. The courts are generally in agreement as to the procedure for resolving a challenge to discrimination. According to both *Wheeler* and *Batson*, whenever a party believes the opponent is improperly using peremptory challenges for a discriminatory purpose, the party makes a prima facie showing of discrimination. Once that showing is made, the burden shifts to the other party to come forward and rebut the showing by showing a non-discriminatory basis or good faith in exercising challenges. (*Batson* v. *Kentucky*, *supra*, 476 U.S. 79, 96-98 [106 S.Ct. 1712, 90 L.Ed.2d 69].) The court then makes a "sincere and reasoned" evaluation of those reasons, in light of the circumstances of the case as then known, knowledge of trial techniques, and observations of the manner in which the prosecutor has examined members of the venire and exercised challenges. (*People* v. *Hall* (1983) 35 Cal.3d 161, 1670-168.)

However, as to the **prima facie** showing, a panel from the United States Court of Appeals, Ninth Circuit, has recently questioned whether the standard set forth in *Wheeler* is in fact consistent with *Batson*. In *Wade* v. *Terhune* (9th Cir. 2000) 202 Fed.3d 1190, the court reviewed a California conviction de novo for *Batson* error. Normally, deference would be given to the trial court's resolution of the issue, but the court noted that the California courts under *Wheeler* required a "strong likelihood" of discriminatory purpose, when in fact all that *Batson* requires is a reasonable inference that challenges of jurors were being made due to group association. The Ninth Circuit noted that the *Batson* standard is the law of the land, and California is not permitted to use a different standard.

3. **Trial Counsel's Prima Facie Showing.** Trial counsel, by merely alleging a "discriminatory purpose," has probably preserved the issue for state and federal review. However, a prima facie showing of discrimination requires much more than the identification of the group members challenged by the opponent.

4. **Appellate Court's Prima Facie Analysis.** Luckily, although the appellate court is required to give deference to the trial court's analysis of the prima facie case, the complete record is examined, regardless of the statements made below. (*People* v. *Howard* (1992) 1 Cal.4th 1132; *People* v. *Walker* (1998) 64 Cal.4th 1062.)

5. **Factors used in Determining the Existence of A Prima Facie Case.** The present case shows some of the factors. A partial list includes:

The jurors are members of a recognized group. (*People* v. *Trevino* (1985) 39 Cal.3d 667 [disapproved on other grounds in *People* v. *Johnson* (1989) 47 Cal.3d 1194].)

The defendant is a member of the group, but note that the party's membership in that group is not required. (*Powers* v. *Ohio* (1991) 490 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411].)

The challenged jurors had little in common other than their membership in the group.

The prosecutor had engaged only in desultory voir dire of the challenged jurors.

The prosecutor's use of challenges against the group members was a high percentage of her total use of challenges and was much higher than the percentage of the group to the total panel.

Except when the prosecutor finally passed the challenge, she had never passed a challenge with a group member on the panel.

6. The trial court was wrong in citing the presence of a Spanish-surnamed juror on the sworn panel as the sole basis for denying the motion. The factor is not enough by itself, although it may be considered with other factors.

7. A prima facie showing has probably been made, due to the large number of factors pointing toward discriminatory use of challenges. (See, e.g., *People* v. *Trevino*, *supra*. 39 Cal.3d 667.)

Hypothetical #8

Assume the same facts as in #7, except that the court found the motion timely and held that a prima facie case had been established. The prosecutor was asked to respond, and stated that as to the first juror challenged, she had excluded him not because he was Hispanic but because he was a school teacher. The prosecutor's experience was that school teachers tend to want to teach rather than learn. The second, third, and fourth jurors were excluded because the defense attorney was excluding persons who were not Spanish surnamed, and the prosecutor was trying only to obtain a "balanced" panel. As to the fifth juror, she said his body language was negative to the prosecutor, and she did not like the way he said he could be fair and impartial. "It did not seem like he really meant it." The defense pointed out that the prosecutor allowed several non-Spanish surnamed school teachers to stay on the panel, and passed the challenge leaving several teachers on the panel. The court sustained the prosecutor's reasons, finding that the reason given was true on each occasion.

Does the fact that the prosecutor was not consistent in her exclusion of school teachers play any part in the appellate court's resolution of the *Wheeler/Batson* motion?

Was it acceptable for the prosecutor to rely on the juror's body language as a reason to exclude, even though this is a subjective consideration?

Was the court correct in permitting use of peremptory challenges to "obtain balance"?

What if the appellate court finds the prosecutor's reasons justified on all but one of the occasions, and finds that one juror was excluded for discriminatory reasons?

Approaches to Hypothetical #8

1. **Prosecutor's Challenge of Schoolteachers.** The trial court believed the prosecutor's statement that she exercised her first challenge because the person was a schoolteacher. Because this reason was not used to excuse non-Spanish surnamed schoolteachers, a second distinction between state and federal approaches may emerge in the resolution of this case.

The California Supreme Court overruled its previous decision in *People* v. *Trevino*, *supra*, 35 Cal.3d 667, and held in *People* v. *Johnson* (1989) 47 Cal.3d 1194, that not only were subjective reasons, such as body language of the challenged jurors proper to consider, but a trial court's rejection of "comparative analysis" is totally acceptable. There might be other reasons that prosecutor may have for allowing some school teachers. For example, she may have been willing to accept "one or more passive jurors" to a point, but no further, etc.

A different approach is seen in *Turner* v. *Marshall* (9th Cir. 1997) 121 F.2d 1248, 1254, where the Ninth Circuit reversed a district court's denial of a petition for writ of habeas corpus brought on *Batson* grounds. Because it had been previously decided in *Turner* that the California trial court had erred in failing to find a prima facie case, a magistrate's hearing was conducted. The prosecutor was called as a witness and s/he gave reasons why the challenges exercised several years earlier were not racially motivated. It was noted by the defense counsel that the prosecutor's given reason was pretextual because this rationale was not followed in excusing a similarly situated white juror. A party may not insulate an explanation simply by couching it in "'vague and subjective terms.'" (*Ibid*, quoting from *Burks* v. *Borg* (9th Cir. 1994) 27 Fed.3d 1424.)

Because the defense raised the question of comparison analysis, it appears that *Turner* may afford relief, notwithstanding the *Johnson* decision. In the present fact situation, the *Wheeler/Batson* issue should be federalized by the court-appointed counsel for appellant. It should be stressed that it may be difficult to maintain this position in the California courts, as the *Johnson* approach was again used by the California Supreme Court in *People* v. *Jackson* (1996) 13 Cal.4th 1164, and by the Fifth District in *People* v. *Rodriguez* (1999) 76 Cal.App.4th 1093.

2. **Body Language.** Skipping ahead to the reasons given as to the fifth juror, the state and federal resolution would probably be the same. The party may legitimately rely on subjective reasons for exercising challenges, and as to the fifth challenge, the defense did not point out any disparity in treatment of the fifth juror from those jurors who did not have Spanish surnames.

3. **Use of Challenges to Obtain Balance.** The stated exercise of a challenge to exclude Hispanic jurors to account for discriminatory use of challenges by the other side is not permitted.

4. **Justification of Most But Not All of The Questioned Challenges.** The illegal exercise by a party of just **one** challenge against a member of recognized class will entitle the other party to a new jury panel, or in this case, a reversal of the conviction.

B. Systematic Exclusion of Jurors

A two-step showing is required. (*Duren* v. *Missouri* (1979) 439 U.S. 357, 364.) Often the first step, that the representation of a distinctive group is not reasonable in light of that group's representation in the community, is not established, as the party does not provide figures detailed enough to show a comparative disparity.

The second step, such as a showing that a policy of allowing hardship excuses for a certain group is not neutral, is even more rare. (See, e.g., *People* v. *Bell* (1989) 49 Cal. 502; *People* v. *Ramos* (1997) 15 Cal.4th 1133; *Thomas* v. *Borg* (9th Cir. 1998) 159 Fed.3d 1147.)

Typically, in order for there to be an arguable issue, there would have to be a lengthy hearing with testimony by a jury commissioner, and the use of significant statistics. In the alternative, parties will often ask the court to take judicial notice of a hearing from another trial in the same county. (*People* v. *Ramos*, *supra*.) Judicial notice of the records would be taken of the same records on appeal . Some attorneys have succeeded in making the transcript part of the record simply by augmenting the record to include the record from the other case.

C. Adequate Voir Dire; Effect of Proposition 115

Under Proposition 115, the court may conduct the voir dire in lieu of the attorney-conducted voir dire seen prior to 1991. However, the parties may still submit questions, and the court's error in refusing to ask those questions may constitute reversible error if it can be said that the record does not support a finding that the jury was fair and impartial.

Also, in a racially-charged case, there may be error in refusing to voir dire on this topic even if a party does not request it. (*Mum'in* v. *Virginia* (1991) 500 U.S. 415, 425.)

D. Voir Dire for Cause; Challenges for Cause; Renewed Venue Motions

The most common problem for the appellate attorney occurs when the defendant has not exhausted peremptory challenges. This is essentially a waiver of any error in denial of challenges for cause. (*People* v. *Bolin* (1998) 18 Cal.4th 297; *People* v. *Barnett* (1998) 17 Cal.4th 1044.) Also, it makes a showing of prejudice impossible. (*People* v. *Bittaker* (1988) 48 Cal.3d 1046.)

Sometimes voir dire for cause, which concentrates heavily on pre-trial publicity, will be followed by a renewed motion for change of venue. In such a case, it may become necessary to check the completeness of the record on the previous venue motions. The prior hearings may have very important information on the extent of the publicity, etc.

E. Augmentation Needs re Jury Selection

Some motions for augmentation of jury voir dire have been denied due to an insufficient showing of need. A case-specific showing of need should be established, if possible. When the augmentation is complete counsel should ensure that the transcripts comply with Code of Civil Procedure section 237 (juror confidentiality), and counsel should never mention a juror's name in a brief.

6. TRIAL PROCEEDINGS: JURY SELECTION [6.C. – 6.G.]

C. Challenges to panel
D. Use of interpreters
E. Voir dire
    1. Procedure
    2. Scope of voir dire
    3. Scope following Prop. 115
F. Challenges for cause
    1. Removal during trial or deliberations
G. Peremptory challenges

[6.C.] *United States* v. *Nelson* (2/26/98)
137 F.3d 1094 (9th Cir.)

An absolute disparity of 3.9% underrepresentation of Hispanics on the jury wheel does not statistically prove that the jury pool does not adequately represent the distinctive group in relation to the number of such persons in the community, particularly in light of the fact that a 4.9% and a 7.7% absolute disparity have been held in other cases to be insufficient to make out a prima facie case.

[6.C.] *People* v. *Kipp* (S004784, 6/22/98)
18 Cal.4th 349

Where the parties and trial court below relied on a motion to quash the jury panels filed in a pending case, as well as the trial court's denial of the motion in that pending case, the California Supreme Court's review of the ruling in the other case (*People* v. *Ramos* (1997) 15 Cal.4th 1133) was controlling. As a result, the trial court did not err in denying the motion.

[6.C.] *United States* v. *Mejia-Mesa* (8/6/98)
153 F.3d 925 (9th Cir.)

Because petitioner did not raise the issue of the systematic exclusion of Black and Hispanic persons from the jury pool at trial or on direct appeal, the claim is procedurally barred unless actual prejudice can be shown, and no such showing was made here.

[6.C.] *Thomas* v. *Borg* (9/16/98)
159 F.3d 1147 (9th Cir.)

A trial by an all-white jury was not a deprivation of a black defendant's Sixth and Fourteenth Amendment right to trial by a jury drawn from a representative cross-section of the community. At Thomas's trial, the panel of jurors from which the jury was chosen contained no blacks. Although appellant established the first prong of the *Duren* test, (*Duren* v. *Missouri* (1979) 439 U.S. 357, 364) by establishing that the representation of black persons on the jury panel was not fair and reasonable in relation to the number of the persons in the community, he failed to establish the second prong. *Duren* requires also that the misrepresentation be due to systematic exclusion of the group in the jury selection process. Thomas provided insufficient statistical evidence to determine whether blacks were substantially underrepresented on jury venires or panels in Kern County at the time of his trial. The fact that Kern County employed a financial hardship excuse policy, which excused low-skilled non-union employees who presumably were disproportionately black, did not result in systematic exclusion. As the California Supreme Court held in *People* v. *Bell* (1989) 49 Cal.3d 502, 530, such policies are neutral with respect to race.

[6.C.] *Rich* v. *Calderon* (3/25/99)
170 F.3d 1232 (9th Cir.)

Rich waived any claim that the indictment was tainted by pretrial publicity when he failed to challenge the impartiality of the jury venire following a change in venue.

[6.C.] *United States* v. *Footracer* (8/31/99)
189 F.3d 1058 (9th Cir.)

There was no violation of a Native American's Sixth Amendment right to a jury venire composed of a fair cross-section of the community where his criminal trial was transferred, sua sponte, to another district with a lower Native American population. In order to prove a Sixth Amendment violation, Footracer would have had to show that the

under representation of a distinctive group from the jury venire was due to a systematic exclusion of the group from the jury selection process. That claim in this case could not succeed because all criminal cases from Prescott were transferred to Phoenix. Therefore, all Prescott residents, Native American or otherwise, were excluded from the Phoenix jury venire. All Prescott residents were not a distinctive group with shared attitudes, ideas and experiences. Since all ethnic groups in Prescott were treated alike, there was no Sixth Amendment violation. Further, as a practical matter, requiring the same racial composition in the district in which a case is tried as the district in which the crime was committed would impose an onerous burden on district courts.

[6.C.] *People* v. *Carpenter* (S006547)
21 Cal.4th 1016 **Time for granting or denying rehearing extended to 2/25/00**
The granting of hardship excuses to 124 prospective jurors did not deprive appellant of his right to due process and a fair and impartial jury drawn from a representative cross-section of the community. The hardship here was the jurors' inability to survive on a five dollar a day stipend for the six month duration of this capital trial. Because appellant declined the opportunity for an evidentiary hearing, there was no proof of any correlation between the hardship excuses and cognizable classes such as race or sex. Further, any correlation between the excusals and cognizable classes would prove nothing legally significant. The relevant group here is the jury venire, not the group actually selected.

The penalty phase issues were not summarized.

[6.C.4.] *People* v. *Blount* (A082548, 9/1/98)
66 Cal.App.4th 561 (DCA 1, Div. 2) **Modification of opinion, 66 Cal.App.4th 1367b; Review granted 12/16/98; further action deferred pending *People* v. *Allen* (S054125)**
Petitioner's trial counsel was not ineffective for failing to challenge the prior conviction where he could have reasonably interpreted *Garcia* v. *Superior Court* (1997) 14 Cal.4th 953 as prohibiting using the motion to strike procedure to collaterally challenge the prior conviction. Moreover, misadvisement of the penal consequences of a plea is not constitutional error and therefore cannot be the basis of a motion to strike.

[6.E.] *Dyer* v. *Calderon* (8/6/98)
151 F.3d 970 (9th Cir.)
Petitioner was denied a fair trial where one of the jurors obtained her seat by lying during voir dire. Under these facts, the juror's bias could be inferred and her subjective state of mind did not have to be examined.

[6.E.] *United States* v. *Padilla-Mendoza* (10/6/98)
157 F.3d 730 (9th Cir.)
Automatic dismissal of jurors based on their views regarding drug policy is an abuse of discretion. Where the court, during voir dire, asked the jury panel whether anyone disagreed with current policy regarding marijuana, and then dismissed for cause two jurors who raised their hands without questioning them any further, the court abused its discretion. The court should have made an effort to determine whether the two jurors' beliefs regarding marijuana laws would impair their performance as jurors. To presume that their beliefs automatically rendered them unable to act as jurors was improper. However, the dismissal of the two jurors for cause did not presumptively result in a prejudiced jury panel, and there was no evidence that the exclusion of the two jurors resulted in a pro-government jury. Since appellant was required to show that the jurors as empaneled were not impartial, and failed to do so, the conviction was affirmed.

[6.E.] *People* v. *Welch* (S011323, 6/1/99)
20 Cal.4th 701 **Rehearing denied 8/18/99**
There was no error under *People* v. *Wheeler* (1978) 22 Cal.3d 258 or *Batson* v. *Kentucky* (1986) 476 U.S. 79, where the prosecution exercised three of its eleven peremptory challenges to excuse black prospective jurors, and a fourth to exclude a black prospective alternate juror. The fact that there were three black jurors and two black alternates seated at the time the trial court ruled on the motion, while not conclusive, weighed in favor of finding no prima facie showing. Further, the race-neutral explanations proffered by the prosecutor appeared plausible and were supported by the record. Penalty phase issues not summarized.

[6.E.] *People* v. *Hart* (S005970, 6/1/99)
20 Cal.4th 546 **Rehearing denied 7/21/99**

Where appellant failed to challenge jurors at trial, he was not entitled to relief on appeal on grounds of alleged errors during jury selection. Hart was convicted of first degree murder and of committing several sexual offenses on both the murder victim and a second victim, Amy, who became the chief prosecution witness. The special circumstance charged based on the sex offenses was found true, and appellant was sentenced to death. On appeal, he argued that the trial court had made errors during the jury voir dire, including inadequately examining potential jurors for bias and prejudice, and failing to dismiss one juror for hardship. The Supreme Court rejected this argument, as during jury selection appellant had failed to challenge the jurors in question for cause or through the use of peremptory challenges available to him. A party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors, and any error was therefore waived. Penalty phase issues not summarized.

[6.E.1.] *Covarrubias* v. *Superior Court* (1/15/98)
60 Cal.App.4th 1168 (DCA 6) **Review denied 4/22/98**
California Code of Civil Procedure section 233 abrogates the holding in *Hovey* v. *Superior Court* (1980) 28 Cal.3d 1, which required individual sequestered voir dire during the death qualification portion of a capital case, by leaving the matter to the trial court's discretion. The court here issued a peremptory writ of mandate because the trial court did not exercise this discretion to determine the advisability or practicability of conducting voir dire in the presence of other jurors.

[6.E.1.] *People* v. *Murphy* (C0252452, 11/18/98)
67 Cal.App.4th 1205 (DCA 3) **Review granted 2/24/99 (S075263)**
Appellant was not deprived of his right to be present at a critical stage of the proceedings where an in-chambers examination of several potential jurors who had expressed reservations about serving was held without appellant being present. Those jurors were ultimately excused for cause, and appellant had already agreed to stipulate to his earlier convictions, so there is no conceivable way the in-chambers examination of the jurors could have affected appellant's decision to admit the priors.

[6.E.1.] *People* v. *Earp* (S025423, 6/24/99)
20 Cal.4th 826 **Rehearing denied 9/1/99**
When the trial court refused to utilize jury voir dire questions submitted by defense counsel which would have inquired into each prospective juror's background, relatives, friends, associates and feelings on the subject of child molestation, it did not violate the Sixth, Eighth or Fourteenth Amendments to the United States Constitution, nor did it violate article I, sections 15 and 16 of the California Constitution. Here, the trial court inquired of each prospective juror whether s/he, or a close friend or relative, had ever been involved in a criminal incident or case as a victim, suspect, defendant, witness or otherwise. The trial court also questioned prospective jurors, after explaining that appellant was charged with child molestation, as to whether they could be completely fair and impartial. Even though the responses to jury voir dire revealed personal experience with child molestation in substantially fewer persons than the scientific studies, the California Supreme Court held that the trial court fully satisfied the state and federal constitutions' requirement to empanel a fair and impartial jury. Penalty phase issues were not summarized.

[6.E.1.] *Stubbs* v. *Gomez* (9/1/99)
189 F.3d 1099 (9th Cir.)
A prosecutor's use of peremptory challenges to excuse three black jurors, after excusing for cause the other five who were present in the jury venire, was not discrimination in violation of the principles articulated in *Batson* v. *Kentucky* (1986) 476 U.S. 79. The prosecutor's reasons for excusing the jurors: that one intentionally withheld information regarding having witnessed an earlier robbery, that another would not miss her daughter's graduation, and that the third had no employment experience outside the home and seemed inattentive, were facially race-neutral and not tied to racial stereotypes.

[6.E.1.] *People* v. *Ervin* (S021331, 1/6/00)
22 Cal.4th 48 *Time for granting or denying rehearing extended to 4/5/00**
Counsel was not ineffective for failing to object to the prosecutor's voir dire questions about a codefendant, because he could have had a tactical reason for declining to object to questions aimed at a codefendant, but not appellant. Counsel was not ineffective for agreeing to the jury questionnaire procedure, as he may have had tactical reasons for agreeing to the procedure. Because there was no evidence that appellant was prejudiced by the denial of the motion to sever, counsel was not ineffective for failing to renew the motion after the "conflicts" became apparent.

[6.E.1.] *People* v. *Ervin* (S021331, 1/6/00)
22 Cal.4th 48 *Time for granting or denying rehearing extended to 4/5/00**
A preliminary jury screening procedure which, by stipulation of the parties, screened out "pro-death" as well as "pro-life" venirepersons based on jury questionnaires, was not improper. Appellant was also precluded from raising the issue because he acquiesced to the procedure. The fact that appellant was not personally present for the discussion of the questionnaires was not a violation of his right to due process and a fair trial.

[6.E.2.] *People* v. *Wilborn* (B115365, 2/25/99)
70 Cal.App.4th 339 (DCA 2, Div. 4) **Review denied 6/3/99**
The trial court's refusal to permit any voir dire questions concerning racial bias or prejudice was a reversible abuse of discretion and violated appellant's Sixth Amendment right to an impartial unbiased jury. Wilborn, a black defendant, was arrested by white officers and charged with possession of rock cocaine. The trial court conducted the voir dire, asking no questions about racial bias or prejudice. Wilborn's counsel requested that the court make such an inquiry to ensure that the jurors were "not going to hold (race) against him." The court replied that it did not want to "taint" anyone by talking about race. The purpose of voir dire is not to introduce prejudice and bias into the decision-making process, but to keep them out. Where the defense by an African American defendant rested entirely on a credibility challenge to the white police officers, the court had an obligation to make some inquiry as to racial bias of the prospective jurors. Because it made no inquiry whatsoever, it denied appellant the opportunity to determine whether the prospective jurors had a disqualifying state of mind. This was a violation of appellant's right to a fair jury, and required reversal.

[6.F.] *People* v. *Barnett* (S008113, 5/4/98)
17 Cal.4th 1044 **Rehearing denied 7/8/98**
The trial court's dismissal of jurors who furnished substantial evidence of their inability to conscientiously consider a death verdict was proper and does not constitute federal constitutional error.

[6.F.] *People* v. *Barnett* (S008113, 5/4/98)
17 Cal.4th 1044 **Rehearing denied 7/8/98**
The trial court's inquiry into a juror's marital relationship with a person who was incarcerated with a defense witness was adequate as were the juror's assurances that he had not discussed the case with her or anyone else, and would not do so.

[6.F.] *United States* v. *Salazar* (5/28/98)
--- F.3d --- (9th Cir.)
The district court's refusal to dismiss a juror on a proper challenge for cause where the juror admitted his bias in favor of the prosecution was error. Under *Siripongs* v. *Calderon* (9th cir. 1994) 35 F.3d 1308, 1322, this error did not violate the Sixth Amendment right to trial by an impartial jury because the juror was excluded with a peremptory challenge. However, this error did violate appellant's Fifth Amendment right to due process because it impaired his right to the full complement of peremptory challenges to which he was entitled under federal law, and reversal is required.

[6.F.] *People* v. *Bolin* (S019786, 6/18/98)
18 Cal.4th 297
Appellant cannot raise on appeal the trial court's failure to excuse five jurors who heard the case when appellant failed to exercise 16 peremptory challenges, and the trial court had no sua sponte duty to excuse biased jurors when counsel failed to do so.

[6.F.] *People* v. *Bolin* (S019786, 6/18/98)
18 Cal.4th 297
The trial court did not err in excluding jurors who expressed views against the death penalty, and counsel was not ineffective for failing to make an objection.

[6.F.] *People* v. *Kipp* (S004784, 6/22/98)
18 Cal.4th 349
The defense did not exhaust its peremptory challenges, so the issue of whether the trial court abused its discretion in failing to excuse a juror for cause, sua sponte, is waived for appeal, and in any event, lacked merit.

[6.F.] *People* v. *Rodriquez* (A077543, 7/30/98)
65 Cal.App.4th 1156 (DCA 1, Div. 4) **Review granted 11/18/98 (S073219), deferred pending disposition in *People* v. *Metters* (S069442) and *People* v. *Martinez* (S064345)**
Where the court's investigation into Juror No. 2's reasons to be discharged from the jury was unnecessarily intrusive, and where the court's inquiry of Juror No. 2 disclosed that the juror had doubts about the sufficiency of the evidence and had voted to acquit appellant, the court's discharge of Juror No. 2 violated appellant's right to a unanimous jury verdict under the Sixth Amendment to the United States Constitution.

[6.F.] *Poland* v. *Stewart* (8/24/98)
151 F.3d 1014 (9th Cir.) **Amending prior decision of 8/6/98**
Petitioner is not entitled to habeas relief for any trial court error in denying his juror challenges for cause as unconstitutionally impairing his right to exercise his peremptory challenges because he has failed to establish that "actual prejudice" resulted within the meaning of *Brecht* v. *Abrahamson* (1993) 507 U.S. 619.

Death penalty sentencing issues raised on habeas were not summarized.

[6.F.] *Furman* v. *Wood* (3/30/99)
169 F.3d 1230 (9th Cir.)
The trial of a non-capital defendant by death qualified jurors was not contrary to clearly established United States Supreme Court precedent, and therefore did not violate the Fourteenth Amendment's due process guarantee as alleged in this petition for writ of habeas corpus, filed under 28 U.S.C. section 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996.

[6.F.] *People* v. *Welch* (S011323, 6/1/99)
20 Cal.4th 701 **Rehearing denied 8/18/99**
There was no error under *People* v. *Wheeler* (1978) 22 Cal.3d 258 or *Batson* v. *Kentucky* (1986) 476 U.S. 79, where the prosecution exercised three of its eleven peremptory challenges to excuse black prospective jurors, and a fourth to exclude a black prospective alternate juror. The fact that there were three black jurors and two black alternates seated at the time the trial court ruled on the motion, while not conclusive, weighed in favor of finding no prima facie showing. Further, the race-neutral explanations proffered by the prosecutor appeared plausible and were supported by the record. Penalty phase issues not summarized.

[6.F.] *People* v. *Hart* (S005970, 6/1/99)
20 Cal.4th 546 **Rehearing denied 7/21/99**
Where appellant failed to challenge jurors at trial, he was not entitled to relief on appeal on grounds of alleged errors during jury selection. Hart was convicted of first degree murder and of committing several sexual offenses on both the murder victim and a second victim, Amy, who became the chief prosecution witness. The special circumstance charged based on the sex offenses was found true, and appellant was sentenced to death. On appeal, he argued that the trial court had made errors during the jury voir dire, including inadequately examining potential jurors for bias and prejudice, and failing to dismiss one juror for hardship. The Supreme Court rejected this argument, as during jury selection appellant had failed to challenge the jurors in question for cause or through the use of peremptory challenges available to him. A party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors, and any error was therefore waived. Penalty phase issues not summarized.

[6.F.] *Stubbs* v. *Gomez* (9/1/99)
189 F.3d 1099 (9th Cir.)
A prosecutor's use of peremptory challenges to excuse three black jurors, after excusing for cause the other five who were present in the jury venire, was not discrimination in violation of the principles articulated in *Batson* v. *Kentucky* (1986) 476 U.S. 79. The prosecutor's reasons for excusing the jurors: that one intentionally withheld information regarding having witnessed an earlier robbery, that another would not miss her daughter's graduation, and that the third had no employment experience outside the home and seemed inattentive, were facially race-neutral and not tied to racial stereotypes.

[6.F.] *People* v. *Carpenter* (S006547)
21 Cal.4th 1016 **Time for granting or denying rehearing extended to 2/25/00**
The trial court did not err when it excused three jurors because of their views on the death penalty. The trial court's conclusion that the jurors' views would impair their ability to perform their duties was supported by the statements of the jurors during voir dire. It was not error to excuse two jurors for cause where both stated that they could not fairly judge a witness who used drugs, and one had also had bad experiences with police officers. It was not error when the court denied appellant's challenge for cause of one juror because appellant had not used all his peremptory challenges, and could have had the juror excluded by using his remaining peremptory challenge.

The penalty phase issues were not summarized.

[6.F.] *People* v. *Ervin* (S021331, 1/6/00)
22 Cal.4th 48 *Time for granting or denying rehearing extended to 4/5/00**
There was no error where the trial court dismissed several prospective jurors who expressed an inability to render a death verdict against one of the codefendants, who was the hirer, not the actual killer, in a murder-for-hire case. Moreover, it would be doubtful that Ervin could demonstrate prejudice because those same jurors did not express difficulty with imposing a death sentence against him.

[6.F.] *People* v. *Ervin* (S021331, 1/6/00)
22 Cal.4th 48 *Time for granting or denying rehearing extended to 4/5/00**
Appellant's failure to exhaust his peremptory challenges precluded him from raising the issue of the court's failure to dismiss certain jurors for cause. The fact that appellant claimed he reserved his peremptory challenges for tactical reasons did not excuse him from that general rule. Furthermore, the jurors in question affirmed their ability to follow the law and give appellant a fair trial.

[6.F.] *United States* v. *Martinez-Salazar* (1/19/00)
– U.S. –
Where a trial judge erroneously refused to dismiss a prospective juror for cause, reversal was not required because the defendant was caused to use one of his peremptory challenges to remove the juror. Martinez-Salazar moved to dismiss for cause a juror who said that he would favor the prosecution because people who are on trial are assumed to have done something wrong. The trial court denied the motion, and Martinez-Salazar used one of his peremptory challenges to remove him. Martinez-Salazar and his codefendant used all of their allotted peremptory challenges. At the close of jury selection, the court asked if there were any objections to the jurors, and Martinez-Salazar responded in the negative. Following his conviction, he argued on appeal that because he was forced to use a peremptory challenge curatively, his right to a full complement of peremptory challenges was impaired. The United States Supreme Court disagreed. Martinez-Salazar received and exercised 11 peremptory challenges, which was all he was entitled to under federal rules. After objecting to the denial of his for-cause challenge, he could have allowed the juror to sit on the jury and then pursued a Sixth Amendment challenge on appeal. Instead, he elected to use a peremptory challenge to remove the juror. Martinez-Salazar therefore did not lose a challenge, but used it in line with the principal reason for having them, i.e. to help secure a trial by an impartial jury. "A hard choice is not the same as no choice."

[6.F.] *People* v. *Phillips* (S025880, 1/24/00)
22 Cal.4th 226
Where a prospective juror's statements about whether he could impose a death sentence were equivocal and conflicting, the trial court did not err when it excused the juror for cause.

Penalty issues are not summarized here.

[6.F.1.] *People* v. *Bell* (D027299, 2/3/98)
61 Cal.App.4th 282 (DCA 4)
The trial court did not abuse its discretion in replacing the only African-American male juror when that juror was absent to take his son to the doctor, where the court made reasonable inquiry into good cause and it was uncertain when the juror would be able to return, even though there were reasonable alternatives to replacing the juror.

[6.F.1.] *People* v. *Ochoa* (S009522, 11/5/98)
19 Cal.4th 353 **Rehearing denied 1/27/99**

The trial court did not abuse its discretion by failing to dismiss, on its own motion or on the subsequent motion of defendant, a juror who briefly saw appellant in shackles, where the juror stated, upon inquiry, that seeing the shackled defendant did not influence her and where she gave assurances she would not mention it to the other jurors.

Penalty phase issues not summarized.

[6.F.1.] *People* v. *Ochoa* (S009522, 11/5/98)
19 Cal.4th 353 **Rehearing denied 1/27/99**
The trial court did not err in failing to excuse a juror who was sleeping on at least two occasions during the proceedings, where the court noticed the drowsiness and each time inquired of the juror whether he was paying attention.

Penalty phase issues not summarized.

[6.F.1.] *United States* v. *Beard* (11/23/98)
161 F.3d 1190 (9th Cir.)
While the district court did not abuse its discretion in excusing two jurors for just cause after deliberations had begun, it did err in substituting alternative jurors without appellant's consent. As the government bears the burden of showing lack of prejudice, and harmless error was not shown, reversal was required. The appellate court found reversal to be required regardless of whether the error was characterized as a trial error or structural error.

[6.F.1] *United States* v. *Symington* (6/22/99)
195 F.3d 1080 (9th Cir.)
The district court abused its discretion in removing one juror for cause on the eighth day of deliberations where there was a reasonable possibility that Juror Cotey's views on the merits of the case provided the impetus for her removal. Here, the other jurors described Juror Cotey as either unwilling or unable to deliberate. Symington claimed the complaints were, or at least very possibly may have been, rooted in substantive disagreements about the merits of the case. The Ninth Circuit found that to reach a conclusion, it had to address the issue of how likely it must be that a juror's views on the merits underlay the request for her removal before the district court would be precluded from removing the juror. The Ninth Circuit adopted the following standard of review: if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under these circumstances, a district court will then have two options: to send the jury back to continue deliberations or to declare a mistrial. Here, removing the juror was improper. The convictions were reversed and the sentences imposed were vacated.

[6.F.1.] *People* v. *Hightower* (A081424, 1/28/00)
77 Cal.App.4th 1123 (DCA 1, Div. 4)
The trial court did not err when during deliberations it discharged a juror who professed a categorical disbelief that a son could murder his mother under the circumstances shown by the evidence. The jury submitted a note to the court on the third day of deliberations asking how to proceed because the juror was not following instructions, expressed "unreasonable interpretations of the evidence," and did not believe that a son would be capable of killing his mother. The prosecutor requested a hearing regarding juror misconduct, and the court convened a hearing over defense objection. The juror expressed his disbelief that a son could kill his mother, and said that he shouldn't have been on the jury. The court also questioned the other jurors. The court dismissed the juror in question, finding he was biased in that he had deep feelings which prevented him from deliberating fairly, that he concealed that bias during voir dire, and that his conduct during deliberations amounted to a failure to deliberate. The appellate court held that the trial court had the power to dismiss the juror, and that the evidence supported a conclusion that good cause existed for the dismissal. The trial court did not exceed the scope of permissible inquiry or intrude on the deliberative process of the jury. The decision of the trial court must be presumed to be correct, and here the evidence amply supported the trial court's findings. Although the juror had doubts about the prosecution's case, the court found that the doubts were not actuated by an insufficiency of the evidence, but by an undisclosed preconception about the range of human behavior. There was therefore no error in the court's replacing the biased juror with an alternate juror.

[6.G.] *People* v. *Jones* (1/29/98)
17 Cal.4th 279 **Rehearing denied 3/18/98**

The mistrial motions, based on claims that 4 African-American prospective jurors had been peremptorily challenged in violation of *People* v. *Wheeler* (1978) 22 Cal.3d 258, were properly denied where the trial court found no impermissible bias in the prosecution's decision, and found no strong likelihood of such bias, and were the record contains evidence to support these rulings.

[6.G.] *People* v. *Taylor* (B097693, 4/14/98)
63 Cal.App.4th 29 (DCA 2) **Review denied and opinion DEPUBLISHED 7/15/98**
The trial court abused its discretion when it disallowed defense counsel's peremptory challenge against Juror SS because it found it was based on a whim. To justify exclusions under *People* v. *Wheeler* (1978) 22 Cal.3d 258, defense counsel must satisfy the court that s/he exercised peremptory challenges on grounds which were "reasonably relevant to the particular case on trial or its parties or witnesses." Defense counsel here gave reasonably relevant reasons: the similarity between the victim and the excluded juror. The trial court erred in applying a heightened standard not justified under *Wheeler*.

Justice Wood concurred and dissented, finding that the advisory opinion is both inappropriate and erroneous.

[6.G.] *People* v. *Taylor* (B097693, 4/14/98)
63 Cal.App.4th 29 (DCA 2) **Review denied and opinion DEPUBLISHED 7/15/98**
The trial court erred when it disallowed appellant's use of a peremptory challenge against Juror HT whose brother was a law enforcement officer. Here, the trial court stated that Juror HT was "about the fifth Oriental that's been excluded." The appellate court stated "[w]e doubt any defense counsel would accept a juror of any race who was the brother of a law enforcement officer."

Justice Wood concurred and dissented, finding that the advisory opinion is both inappropriate and erroneous.

[6.G.] *People* v. *Taylor* (B097693, 4/14/98)
63 Cal.App.4th 29 (DCA 2) **Review denied and opinion DEPUBLISHED 7/15/98**
The trial court erred in determining appellant had not provided a race neutral basis for challenging Juror JMI where he was a engineer who lived in a very conservative neighborhood and who had a son-in-law who was a police officer.

Justice Wood concurred and dissented, finding that the advisory opinion is both inappropriate and erroneous.

[6.G.] *People* v. *Taylor* (B097693, 4/14/98)
63 Cal.App.4th 29 (DCA 2) **Review denied and opinion DEPUBLISHED 7/15/98**
The trial court did not err in denying appellant's use of peremptory challenges where Juror JM2 was Latino male who worked for the post office and resided in a conservative area because employment background is not race neutral unless it relates to the facts of the case, which it did not here. Similarly Juror MR's status as a female Latina and single mother of five does not bear any relationship to the case and suggests racial discrimination.

Justice Wood concurred and dissented, finding that the advisory opinion is both inappropriate and erroneous.

[6.G.] *People* v. *Taylor* (B097693, 4/14/98)
63 Cal.App.4th 29 (DCA 2) **Review denied and opinion DEPUBLISHED 7/15/98**
The trial court's error here was not in creating a new cognizable group (non-blacks), but rather in not allowing the defense to exercise its peremptory challenges in those instances defense counsel articulated adequate grounds of dismissal not based on race.

Justice Wood concurred and dissented, finding that the advisory opinion is both inappropriate and erroneous.

[6.G.] *People* v. *Taylor* (B097693, 4/14/98)
63 Cal.App.4th 29 (DCA 2) **Review denied and opinion DEPUBLISHED 7/15/98**
When the court offered the defense five additional peremptories as an alternative remedy to dismissing the venire, appellant waived his right to strike the jury panel.

Justice Wood concurred and dissented, finding that the advisory opinion is both inappropriate and erroneous.

[6.G.] *People* v. *Barnett* (S008113, 5/4/98)
17 Cal.4th 1044 **Rehearing denied 7/8/98**
Appellant's failure to exhaust his peremptory challenges bars him from attacking on appeal the trial court's rulings on challenges for cause.

[6.G.] *People* v. *Walker* (E018940, 5/22/98)
64 Cal.App.4th 1062 (DCA 4, Div. 2) **Review denied 8/26/98**
Substantial evidence supported the trial court's finding that no prima facie case had been made because the defendant merely asserted that the excused potential juror was an African-American. Nonetheless, under *People* v. *Howard* (1992) 1 Cal.4th 1132, the transcript contains possible race-neutral reasons for excusing this juror. First, an African-American did serve on the jury. Second, the excluded juror exhibited a reluctance to serve. Third, the excluded juror's response to the question of whether she could keep an open mind until called upon to render a decision was "less than unequivocal."

[6.G.] *People* v. *Martin* (A077646, 5/29/98)
64 Cal.App.4th 378 (DCA 1) **Review denied 8/26/98**
Although an exclusion of a juror solely on the basis of religion would be unconstitutional under *People* v. *Wheeler* (1978) 22 Cal.3d 258, here the prosecutor's peremptory challenge of a juror on the basis of her relevant personal values was not improper even though those views may have been founded on her religious beliefs as a Jehovah's Witness.

[6.G.] *People* v. *Bolin* (S019786, 6/18/98)
18 Cal.4th 297
Where appellant failed to make a motion pursuant to *People* v. W*heeler* (1978) 22 Cal.3d 258, he cannot raise on appeal the improper use of peremptory challenges to exclude prospective jurors with Hispanic surnames, and the trial court had no sua sponte duty which enables appellant to dodge his obligation to raise the issue in the trial court, and whether counsel's failure constitutes ineffective assistance of counsel cannot be determined on the record on appeal.

[6.G.] *People* v. *Hart* (S005970, 6/1/99)
20 Cal.4th 546 **Rehearing denied 7/21/99**
Where appellant failed to challenge jurors at trial, he was not entitled to relief on appeal on grounds of alleged errors during jury selection. Hart was convicted of first degree murder and of committing several sexual offenses on both the murder victim and a second victim, Amy, who became the chief prosecution witness. The special circumstance charged based on the sex offenses was found true, and appellant was sentenced to death. On appeal, he argued that the trial court had made errors during the jury voir dire, including inadequately examining potential jurors for bias and prejudice, and failing to dismiss one juror for hardship. The Supreme Court rejected this argument, as during jury selection appellant had failed to challenge the jurors in question for cause or through the use of peremptory challenges available to him. A party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors, and any error was therefore waived. Penalty phase issues not summarized.

[6.G.] *People* v. *Welch* (S011323, 6/1/99)
20 Cal.4th 701 **Rehearing denied 8/18/99**
There was no error under *People* v. *Wheeler* (1978) 22 Cal.3d 258 or *Batson* v. *Kentucky* (1986) 476 U.S. 79, where the prosecution exercised three of its eleven peremptory challenges to excuse black prospective jurors, and a fourth to exclude a black prospective alternate juror. The fact that there were three black jurors and two black alternates seated at the time the trial court ruled on the motion, while not conclusive, weighed in favor of finding no prima facie showing. Further, the race-neutral explanations proffered by the prosecutor appeared plausible and were supported by the record. Penalty phase issues not summarized.

[6.G.] *Tolbert* v. *Page* (6/28/99)
182 F.3d 677 (9th Cir.)
[Editor's Note: This matter was undertaken en banc when the three-judge panel to which the appeal of this denial of a petition for writ of habeas corpus was assigned discovered an irreconcilable conflict in cases within the Ninth Circuit. The conflict was over what standard of review should be applied to the trial court's determination that a prima facie case of discrimination in jury voir dire, under *Batson* v. *Kentucky* (1986) 476 U.S. 79, was not shown.] The Ninth Circuit here overruled *Turner* v. *Marshall* (9th Cir. 1995) 63 F.3d 807, and joined the majority of federal

appellate courts in holding that a trial court's determination of whether a prima facie case of discrimination under *Batson* v. *Kentucky* (1986) 476 U.S. 79, had been established below is to be reviewed deferentially, on direct review for clear error, or in the habeas context, by application of the statutory presumption of correctness, rather than de novo. The court resolved the conflict between the Ninth Circuit cases by deciding that at the *Batson* prima facie showing step, the concerns of judicial administration tipped the scales in favor of deference to the trial court based on two factors. First, the trial court is better positioned to decide the *Batson* prima facie issue because it involves a "factual inquiry" that takes into account all possible explanatory factors including attitudes and behaviors. Second, because the *Batson* inquiry is fact-based, the law-clarifying value in appellate review is unlikely to add consistency, certainty and guidance to *Batson* prima facie case law. The case was returned to the three-judge panel for application of the presumption of correctness.

Justices McKeown, Pregerson and Hawkins dissented, noting that by transforming the threshold question of whether the defendant raised a sufficient inference of discrimination to shift the burden to the prosecutor to articulate a neutral explanation for the peremptory strike into a "factual inquiry," the majority had insulated from review a trial court's rejection of a *Batson* challenge.

[6.G.] *People* v. *Rodriguez* (F029039, 12/8/99)
76 Cal.App.4th 1093 (DCA 5)

It was not necessary for the original trial judge to conduct a limited remand hearing for the purposes of determining whether an attorney's reasons for exercising peremptory challenges were race-neutral, as long as the reasons were objectively verifiable. Here, the appellate court had previously remanded a case to determine whether the prosecution's dismissal of two Hispanic jurors was race-neutral. Prior to the remand, the original trial judge, Judge Kim, had retired, and Judge Kalashian conducted the limited remand hearing over defense objection. Judge Kalashian determined that the excusal of the two jurors had been race-neutral. The appellate court held that Judge Kim's presence was not a necessary element to provide the proper hearing. The prosecutor provided detailed and objectively verifiable reasons for the dismissal of the jurors, such as the fact that one juror had a niece murdered, and had sat on a previous jury during a rape trial, and the other juror had a brother who had been convicted of murder. The presence of the original trial judge was not required to evaluate the reasons given. Further, the race-neutral reasons given by the prosecutor for dismissal of the jurors were not a pretext for discrimination, and there was no reason to believe that the trial judge did not make a sincere and reasoned effort to evaluate the prosecutor's credibility. There was, therefore, substantial evidence to support the trial court's findings, and no reversal was required.

[6.G.] *People* v. *Ervin* (S021331, 1/6/00)
22 Cal.4th 48 *Time for granting or denying rehearing extended to 4/5/00**

Appellant's failure to exhaust his peremptory challenges precluded him from raising the issue of the court's failure to dismiss certain jurors for cause. The fact that appellant claimed he reserved his peremptory challenges for tactical reasons did not excuse him from that general rule. Furthermore, the jurors in question affirmed their ability to follow the law and give appellant a fair trial.

[6.G.] *People* v. *Ervin* (S021331, 1/6/00)
22 Cal.4th 48 *Time for granting or denying rehearing extended to 4/5/00**

There was no error under *Batson* v. *Kentucky* (1986) 476 U.S. 79 and *People* v. *Wheeler* (1978) 22 Cal.3d 258 where the prosecutor used nine of his fifteen peremptory challenges to excuse African-Americans from serving on this jury. The prosecutor explained the fact that one juror seemed nervous and was shaking, and that another had a belief in rehabilitation which might interfere with her ability to impose the death penalty. While these explanations were not necessarily logical or substantial, they were reasonably specific and race-neutral. The court also made an effort to determine whether the prosecutor's stated reasons were supported by the evidence. Even seemingly "highly speculative" or "trivial" grounds may support the exercise of a peremptory challenge.

[6.G.] *United States* v. *Martinez-Salazar* (1/19/00)
– U.S. –

Where a trial judge erroneously refused to dismiss a prospective juror for cause, reversal was not required because the defendant was caused to use one of his peremptory challenges to remove the juror. Martinez-Salazar moved to dismiss for cause a juror who said that he would favor the prosecution because people who are on trial are assumed to have

done something wrong. The trial court denied the motion, and Martinez-Salazar used one of his peremptory challenges to remove him. Martinez-Salazar and his codefendant used all of their allotted peremptory challenges. At the close of jury selection, the court asked if there were any objections to the jurors, and Martinez-Salazar responded in the negative. Following his conviction, he argued on appeal that because he was forced to use a peremptory challenge curatively, his right to a full complement of peremptory challenges was impaired. The United States Supreme Court disagreed. Martinez-Salazar received and exercised 11 peremptory challenges, which was all he was entitled to under federal rules. After objecting to the denial of his for-cause challenge, he could have allowed the juror to sit on the jury and then pursued a Sixth Amendment challenge on appeal. Instead, he elected to use a peremptory challenge to remove the juror. Martinez-Salazar therefore did not lose a challenge, but used it in line with the principal reason for having them, i.e. to help secure a trial by an impartial jury. "A hard choice is not the same as no choice."

[6.G.] *People* v. *Garcia* (G022376, 1/31/00)
Cal.App.4th (DCA 4, Div. 3)

Lesbians and gay males constitute a cognizable class. Here their exclusion resulted in a jury which failed to represent a cross-section of the community, and therefore violated Garcia's constitutional rights. Therefore, where the prosecutor excused two women who were lesbians from the jury, and the court denied appellant's motion pursuant to *People* v. *Wheeler* (1978) 22 Cal.3d 258 because it determined that sexual preference was not a cognizable group, the case had to be remanded for a hearing on whether the prosecutor's reasons for excusing the jurors were constitutionally valid. Although all homosexuals do not view the world alike, they share a common perspective on human events based upon their membership in that community. They share a history of persecution comparable to that which blacks and women share. The goal of a cross-section rule is to enhance the likelihood that the jury will be representative of significant community attitudes, not of groups per se. Although it is not always possible to discern a juror's sexual preference, and inquiry should not be permitted, the same is true for ethnicity. Sexual orientation as a criteria for cognizable groups will present no greater difficulty than race or ethnicity.

[6.G.] *Wade* v. *Terhune* (2/2/00)
F.3d (9th Cir.)

Where the prosecutor excused all the potential African-American jurors, and where the state trial court applied the wrong legal standard in determining whether appellants had established a prima facie case of discrimination, the question was reviewed de novo in federal court. The California Court of Appeal applied the standard enunciated in *People* v. *Wheeler* (1978) 22 Cal. 3d 258 as interpreted by the California Supreme Court. It affirmed petitioners' convictions because defense counsel failed to establish, from all the circumstances of the case, a *strong likelihood* that the jurors were being challenged because of their group association. Petitioners each sought writs of habeas corpus in federal court, contending that the California courts used the wrong standard by applying *Wheeler* rather than the standard established under *Batson* v. *Kentucky* (1986) 476 U.S. 79. *Batson* requires only that the defendant "raise an inference" of discrimination. The federal court here held that *Batson* is the "law of the land,"and California may not give lesser protection to criminal defendants. The *Wheeler* "strong likelihood" test for a successful prima facie showing of bias is impermissibly stringent in comparison to the more generous *Batson* "inference" test. However, following de novo review, the court also held that petitioner did not raise an inference that the prosecutor used a peremptory challenge to exclude a potential juror because of race, and the petitions were therefore denied.

[6.G.] *People* v. *Williams* (B130147, 3/6/00)
Cal.App.4th (DCA 2, Div. 4)

In a prosecution for corporal injury on a spouse, it was error under *People* v. *Wheeler* (1978) 22 Cal.3d 258 for the trial court to have rejected a defendant's challenge to the systematic exclusion of men from the jury. The trial court refused to consider the motion because it did not consider men to be a cognizable group. Because gender is not an appropriate basis for a peremptory challenge, the trial court failed to address whether a prima facie case had been established. This error is reversible per se, and remand is appropriate to allow the trial court to hold the appropriate hearing on the *Wheeler* issue.

JURY MISCONDUCT

A. Misconduct Defined

Penal Code section 1089 provides, in part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefore, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

Code of Civil Procedure section 233 (applicable in criminal trials) provides:

> If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors or there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged and a new jury then or afterwards impaneled, the cause may again be tried. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew.

With respect to motions for new trial, Penal Code section 1181, provides, in part:

> When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases, only:
> . . . .
> 2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property.
>
> 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.
>
> 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors. . . .

B. Jury Misconduct Reported During Course of Trial

Hypothetical #9

The defendant was charged with robbery and attempts to assert a duress defense based upon the fact that a local drug dealers had asked him to commit the robbery. He did it because local drug dealers had, on a recent occasion, threatened to kill him if he did not pay them money. His testimony at the in limine hearing was that he had used a simulated gun, and that he intended to return the money. The court denied instruction on this defense because the threats were not imminent enough, and the defendant had not exhausted non-criminal means to protect himself. However, the defendant was permitted to testify at trial as to all of the facts offered in the in limine hearing. After two full days of deliberation, the court received a note from the jury foreperson, stating the following:

> One of the jurors is not performing his duties properly. 1) He slept during some of the testimony. 2) He says the law is unfair and that a person should not be convicted when they were threatened.

3) He refuses to answer questions directed at him by other jurors; 4) He has stopped deliberating and just sits at the table reading a book.

The court questioned the jurors. Several agreed with the foreman as to what happened, but two did not see the juror's activities that way at all. There was just a difference in opinion. The juror in question basically said it was just a difference of opinion. The others were frustrated, as he was the sole holdout juror, and he would not relent to the majority position. The court agreed with the majority of the jurors on all of their grounds stated. The juror was removed and replaced with an alternate.

Was the court correct in questioning the jurors? Was the court obligated to do so? What are the limits on questioning jurors?

What, if any, of the four grounds stated are juror misconduct? Which of the grounds, if shown to be true, would justify the court in removing the juror, and ordering the panel to start deliberations afresh with the alternate? Does the fact that there were conflicting accounts affect the answer?

Assume the court erred in excusing the juror on the grounds that he did not like the law, would a conviction by a newly constituted jury constitute reversible error?

Is there a situation in which an error of this nature would bar retrial? Assuming that double jeopardy may attach in some occasions, does appellate counsel have any duty on appeal of a conviction after a retrial to learn the nature of the mistrial in the first trial? What might counsel's investigation of the first trial include?

Authorities on Hypothetical #9

1) **Duty of the Court to Investigate Reports of Possible Jury Misconduct.** Once a juror's inability to perform his or her duty is called into question, the court must investigate to determine if cause exists to replace the juror, and a hearing to determine the facts is "clearly contemplated." (*People* v. *Keenan* (1988) 46 Cal.3d 478, 538, quoting from *People* v. *Burgener* (1986) 41 Cal.3d 505, 519-520.) Note that in the present case no attempt was made by the court to ask questions about the direction of the juror vote split, or to instruct jurors as to the law applying to how they should vote, etc. The level of investigation would clearly be acceptable under the recent, non-final decision in *People* v. *Hightower* (2000) 77 Cal.App 4th 1123.

A level of investigation that probably would not be permitted would be an interrogation of a juror as to his or her beliefs, especially if the juror had been identified as a holdout juror. "The trial judge must establish whether a juror is biased or otherwise disqualified without delving into the reasons underlying the juror's views on the merits of the case." (*United States* v. *Thomas* (2d Cir. 1997) 116 F.3d 606, 621.)

2) All four allegations are potential misconduct under section 1089, and the jurors's refusal to deliberate, as shown by the juror's reading of a book during the deliberation, is clearly misconduct. In *People* v. *Metters* (1998) 61 Cal.App.4th 1489, 1518, (rev. granted June 10, 1998; S069442) the First District, Division Two, found that refusal of a juror to deliberate constituted not only misconduct, but also grounds, standing alone, to justify removing the juror. *Metters* relied significantly on the federal case, *Perez* v. *Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426.

However, it appears arguable that juror misconduct does not always justify exclusion of the juror. In the *Metters* dissent, Justice Kline stated that the majority approach deprived the defendant of a unanimous verdict guaranteed by the constitution. The mere possibility that a juror will be excluded because he or she has doubts about the guilt of the defendant requires rigorous judicial scrutiny. (*Apodaca* v. *Oregon* (1972) 406 U.S. 404.) It is therefore possible that the hypothetical situation could be governed by the results in *United States* v. *Brown* (D.C. Cir. 1987) 823 F.2d 591, 596 [juror thought RICO law wrong], *United States* v. *Hernandez* (2d Cir. 1988) 862 F.2d 17,22 [violent exchanges in jury room and holdout may have been removed to avoid a mistrial], and *United States* v. *Thomas*, *supra*, 116 F.3d 606, 622 [juror refused to deliberate but unclear whether that was because of belief in insufficiency of the evidence]). Also, in the present case, the juror did not make any statements to the court indicating a refusal to return to deliberations, the act found controlling by the *Metters* majority.

If *Metters* is decided contrary to the defense position and the trial court is given carte blanche to excuse jurors in the "sole holdout" situation, the appellate advocate will need to determine, in each particular case, whether the client's facts are distinguishable from those in *Metters*, and if not, whether the issue should be preserved for federal review to protect the defendant's Sixth Amendment right to a unanimous verdict.

3) **Appellate Court's Deference to Trial Court Resolution.** The decisions in *Metters* and *Hightower* place great weight on the trial court's determination of the facts, and take the traditional appellate level deferential approach to challenges to the trial court's exercise of its discretion and the sufficiency of the evidence. Keep in mind however, the language from the federal cases, *Apodaca*, *Hernandez*, *Brown*, and *Thomas*, that requests to remove a holdout juror must be denied when there is a possibility the juror's conduct "stems from the juror's view of the sufficiency of the evidence." (*United States* v. *Thomas*, *supra*, 116, F.2d at 622.)

4) **Double Jeopardy Bar?** There is a possible bar to retrial. If the court failed to obtain alternates for the jury panel, or the alternates available had already been empaneled or excused, and the court then excused a juror without cause, there would be only 11 jurors left. If the parties could not agree to empanel an additional alternate or proceed with 11 jurors, this would mandate a mistrial. The removal of a juror without cause or without the aggrieved party's express acceptance is not only reversible error; in this situation, it is also a bar to further prosecution because the case was mistried without legal necessity. (*Curry* v. *Superior Court* (1970) 2 Cal.3d 707; *Larios* v. *Superior Court* (1979) 24 Cal.3d 707.)

5) **Appellate Counsel's Duty To Augment Record**. When there was a previous mistrial in the case, appellate counsel should augment the record for the important portions of the previous trial unless it is certain that appellant expressly requested or stipulated to the mistrial. If the trial attorney moved to enter a plea of double jeopardy, that issue is cognizable on appeal. If the attorney did not so move, the issue should then be cognizable as one of ineffective assistance of counsel.

C. Motions for New Trial and Requests for Juror Information.

Hypothetical #10

Assume the same facts as in #9. The jury convicted the defendant of robbery. The defense attorney talked to one juror after the verdict who provided his address and phone number. The other jurors "got away" while he was talking to the first juror. The defense investigator discussed the matter further with the juror, which resulted in the juror signing the following declaration: "Juror number eight was a social worker in the part of town where the events occurred. She said that those particular drug dealers do not threaten anyone in that community, and that if he knew them he was a drug user, too, and there was no chance that he ever intended to return the money. Based upon her statement to us after one day of deliberation, I changed my mind, and within one hour the composition of the vote changed from 9 to 3 to all 12 voting for conviction." The affidavit was offered in support of a motion for new trial. The defense also moved for juror-identifying information stating that the names and addresses of the other jurors could not be identified. The people filed opposition to the motion, including an affidavit from juror number eight stating she never made the statements recounted in the defense affidavit. The court denied the motion for juror identifying information because the showing was insufficient. As to the motion for new trial, the court found the declaration of juror eight "true and correct," and denied the motion.

1) Did the trial court err in denying the motion for juror-qualifying information? What criteria should the court use in ruling on the motion?

2) What type of objection is the prosecution likely to pose to the declaration offered by the defense in support of the motion for new trial? What would be the proper ruling as to the objection?

3) What legal standards should the court apply in resolving an allegation of juror misconduct?

4) Assuming that the court made the correct ruling on the use of the affidavit before ruling on the motion for new trial, was it correct to rule on the basis of the juror affidavits or should the court have conducted a further investigation of the allegations?

5) Does the present case involve federal constitutional rights that the defendant may pursue in federal court? Will the federal court be limited in its consideration of juror affidavits by the rule of *People* v. *Hutchinson*?

Possible Approaches to Hypothetical #10

1. **Obtaining Juror-Identifying Information.** Of course, this information may not be necessary if the court will need to make its own investigation. Although Code of Civil Procedure section 206, subdivision (f), would seem to seem to require the provision of juror-identifying information to the defense counsel, in fact the defense needs to establish good cause and timeliness of the request. There are several cases which affirm trial court decisions denying juror identifying information under policy reasons to prevent juror harassment. (See, e.g., *People* v. *Rhodes* (1989) 212 Cal.App.3d 541, 551-553.) It would also be helpful to place in the affidavit the reason why defense counsel was unable to talk to the other jurors. (*People* v. *Duran* (1996) 50 Cal.App.3d 103.) Here, since this is not a fishing expedition and there are no facts in the record indicating juror fear of harassment, a proper showing of need may have been established.

2. **Use of Juror Affidavits In Motion for New Trial.** The objection by the prosecutor would be that the juror declaration was incompetent to impeach the verdict. A correct ruling would probably find the juror competent to bring forth the nature of the violations by juror number eight and the time that they occurred, but not competent as to the statement that the misconduct caused the juror to change her mind. (*People* v. *Orchard* (1971) 17 Cal.App.3d 568.) Prior to the decision of the California Supreme Court in *People* v. *Hutchinson* (1969) 71 Cal.2d 342, juror affidavits were completely inadmissable except to impeach verdicts by chance. In *Hutchinson*, the standard was redefined to permit jurors to prove the objective facts of juror misconduct, but not the subjective thought processes of the jurors.

One should keep in mind that the dividing line is not "what was said vs. what was thought." For example, in *People* v. *Elkins* (1981) 123 Cal.App.3d 632, 637, a juror affidavit stating that another juror had misstated the law during deliberations was excluded because the appellate court concluded that the allegedly offending statements were merely an indication of that juror's thought process.

3. After determining whether the juror declarations contain admissible evidence, the court considers whether the facts show juror misconduct, and if so, whether the misconduct was prejudicial. (*People* v. *Perez* (1992) 4 Cal.App.4th 893, 906; *People* v. *Duran* (1996) 50 Cal.App.4th 103, 112.) Certain violations of the juror oath raise a presumption of prejudice. (*People* v. *Pierce* (1979) 24 Cal.3d 199, 207), especially receipt of extraneous information, such as the information received in the present case. (*People* v. *Nesler* (1997) 16 Cal.4th 561, 579.)

4. **Duty of Court to Set Motion for Contested Hearing.** In *People* v. *Hedgecock* (1990) 51 Cal.3d 395, the California Supreme Court held that the trial court has authority to conduct a hearing, in its discretion, but the defendant does not have a right to an evidentiary hearing. The court is not limited to ruling on the affidavits. The hearing is to be held when the evidence shows a strong possibility of juror misconduct, and there is a material conflict in the evidence. (*Id.*, at pp. 415-419.) In the present fact situation there is a strong showing that juror number eight violated her duty by not disclosing her personal knowledge of some of the persons named in the case, by interjecting that personal knowledge into the deliberations. As the facts of the defense declaration are fully contested, the court must conduct an evidentiary hearing. (*Ibid.*)

Had there been a less clear indication, such as if the juror who signed the declaration in support of the motion for new trial had refused to sign the declaration, the court would not be required to set an evidentiary hearing. (*People* v. *Cox* (1991) 53 Cal.3d 691, 698.)

5. **Federal Constitutional Remedies.** The federal courts have granted habeas corpus relief in state cases where there was jury misconduct. The difficult standard of review set forth in *Brecht* v. *Abramson* (1993) 507 U.S. 619 is satisfied when the jury has considered non-cumulative extraneous matter, as this is deemed structural error. (*Eslaminia* v. *White* (9th Cir. 1998) 136 F.2d 1234 [review of tape not admitted into evidence in the Billionaire Boys Club trial]; *Mach* v. *Stewart* (9th Cir. 1997) 137 F.2d 630 [prospective juror poisoned jury panel by his "expert" testimony re guilt of sex offenders during voir dire].)

In reviewing state and federal convictions, the federal courts will consider juror affidavits even as to the content of juror discussions, if those discussions were of extraneous matter. (*Gibson* v. *Clanon* (9th Cir. 1980) 633 F.2d 851), or to prove that a defendant was prejudiced by the influence of racial bias in the deliberations. (Smith v. *Brewer* (D.C. Iowa 1978) 444 F.Supp. 482.) In other words, the limitations set forth in *People* v. *Hutchinson* may be dispensed with on occasion where ignoring the evidence would deprive the defendant of due process.

7. JURY MISCONDUCT [7.C.]

C. Misconduct by Jurors
1. Jury nullification
2. Other

[7.C.] *People* v. *Jones* (1/29/98)
17 Cal.4th 279 ****Rehearing denied 3/18/98****
The trial court did not abuse its discretion in denying appellant's motion for a new trial based on juror misconduct where the statement did not suggest that any juror considered deterrence in deliberating.

[7.C.] *People* v. *Bento* (6/29/98)
65 Cal.App.4th 179 (DCA 2)
Where a juror expressed dissent after the verdicts were complete, the court did not err in refusing to reconvene the jury. Jurors are under official obligations prior to discharge, and they may be reconvened when a verdict is incomplete provided the trial court has not lost control over them. However, the discharge of a jury is simply a mechanical occurrence once the verdict is complete, and the trial court lacks the authority to impeach the verdict after it is complete.

[7.C.] *Dyer* v. *Calderon* (8/6/98)
151 F.3d 970 (9th Cir.)
Petitioner was denied a fair trial where one of the jurors obtained her seat by lying during voir dire. Under these facts, the juror's bias could be inferred and her subjective state of mind did not have to be examined.

[7.C.1.] *People* v. *Cline* (1/8/98)
60 Cal.App.4th 1327 (DCA 4) ****Review denied 4/15/98****
The defendant, while being tried for grand theft and commercial burglary, requested that the prosecution prove the twelve prior serious felony convictions (all burglaries from a single proceeding) in a unitary (non-bifurcated) trial. The prosecutor requested a bifurcated trial, claiming that to prove the priors along with the guilt phase on the present offenses could result in jury nullification. The court granted the prosecution motion for bifurcation. The Court of Appeal held that the trial court has discretion under Penal Code section 1044 to grant a motion for bifurcation regardless of whether the motion was brought by the defendant or by the People. Exercise of discretion under Penal Code section 1044 is reviewed for patent abuse of discretion. Here the trial court did not abuse its discretion, even where its decision to bifurcate was based upon the court's experience in other three strikes cases where the juries had practiced jury nullification. Even if the trial court did abuse its discretion in bifurcating the trial, defendant has shown no prejudice, as it is not reasonably probable that the jury would have engaged in nullification. A defendant has no constitutional right to a unitary rather than a bifurcated trial. A defendant has no constitutional right to have the jury, rather than the court, determine the truth of a prior conviction allegation. A defendant has no right to jury nullification.

[7.C.1.] *People* v. *Cline* (1/8/98)
60 Cal.App.4th 1327 (DCA 4) ****Review denied 4/15/98****
Even if it was an abuse of discretion under Penal Code section 1044 to grant the prosecution's motion to bifurcate the trial on the twelve prior serious felony convictions (which all resulted from one trial) from the trial on the charged offenses of grand theft and commercial burglary, based on the trial court's experience in other three strikes cases in which the juries had practiced jury nullification, it is not reasonably probable that the jury would have engaged in jury nullification. Moreover, a defendant has no constitutional right to a unitary trial, and no constitutional right to have the jury, rather than the court, determine the truth of a prior conviction allegation.

[7.C.2.] *People* v. *Sanchez* (B108473, 3/23/98)
62 Cal.App.4th 460 (DCA 2) ****Review denied 6/17/98****
The trial court did not abuse its discretion in denying appellants' motion for a new trial on grounds of juror misconduct where the juror affidavits suggested deliberative error in the collective mental process in the form of confusion and a misunderstanding and misinterpretation of the law which are inadmissible under Evidence Code section 1150.

[7.C.2.] *People* v. *Milwee* (S014755, 5/18/98)

18 Cal.4th 96 ****Rehearing denied 6/26/98****
The motion for new trial was properly denied where the court concluded that the juror's excusal did not become problematic until the penalty phase, and that she was mentally competent at the guilt phase.

[7.C.2.] *People* v. *Metters* (A074986, 3/10/98)
61 Cal.App.4th 1489 (DCA 1) ****Review granted 6/10/98****
The trial court did not abuse its discretion in dismissing a juror who was the sole hold-out where the aggregate of the juror's conduct during deliberations, and her unwillingness to continue deliberating, constituted good cause to justify her removal.

Justice Kline dissented, finding that the juror's dismissal was not an abuse of discretion, but did violate appellant's Sixth Amendment right and required rigorous judicial scrutiny.

[7.C.2.] *People* v. *Cochran* (E019590, 3/27/98)
62 Cal.App.4th 826 (DCA 4) ****Review denied 6/10/98****
The disclosure, after the trial began, of two jurors, one of whom knew a family member of the victim, and one of whom recognized the grandmother or great-grandmother of the victim but did not know her, should be reviewed as jury misconduct to which a rebuttable presumption of prejudice applies. Here, there was no actual probability of harm where the relationship between the jurors and victim's family was extremely distant, and the jurors said they could set aside this knowledge to judge the case fairly and impartially. Moreover, the evidence of guilt was extremely strong and the suspicion of prejudice was overcome by the circumstances and content of the nondisclosure as well as the strength of the case.

[7.C.2.] *United States* v. *Noushfar* (4/1/98)
140 F.3d 1244 (9th Cir.)
Where the jury was allowed to listen to audio tapes that were never played in open court, the error was structural and reversible per se. The convictions were reversed and the cause remanded for a new trial.

[7.C.2.] *People* v. *Loot* (B110474, 4/29/98)
63 Cal.App.4th 694 (DCA 2) ****Review denied 7/29/98****
A juror committed misconduct when she first made inquiries of a deputy public defender regarding the marital status and availability of the prosecutor in the case the juror was hearing, and again when she slipped the prosecutor a note apologizing for embarrassing him, which included her name and telephone number. However it was not prejudicial because the juror denied this had any influence on her deliberations, and she did not relate any of this to the other jurors. Her conduct did not establish as a "demonstrable reality" her inability to perform the functions of a juror. "To hold otherwise would be tantamount to accepting a sexual stereotype that women cannot distinguish truth from a handsome face." The trial court did not err in denying appellant's motion for a new trial based on this juror's misconduct.

[7.C.2.] *United States* v. *Keating* (6/9/98)
147 F.3d 895 (9th Cir.)
Defendant did not waive any claim that the jury was poisoned by knowledge of Keating's state court conviction where the jurors learned of the state court conviction during the trial.

[7.C.2.] *United States* v. *Keating* (6/9/98)
147 F.3d 895 (9th Cir.)
While pretrial juror exposure to Keating's previous conviction does not create an irrebuttable presumption of prejudice, the midtrial juror exposure to extrinsic evidence entitled Keating to a new trial if there is a reasonable possibility that the extrinsic material could have affected the verdict. Here, at least one juror learned of, and several jurors discussed, the state conviction during the federal trial. In effect those jurors were testifying against Keating in violation of his Sixth Amendment rights. The government failed to show beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. This unambiguous evidence was highly prejudicial and the probability that one or more jurors based their verdict, at least in part, on it is unacceptably high. The prejudice to Keating suffered when the jurors learned of and discussed his state court conviction spilled over to his co-defendant, Keating III, so both are entitled to a new trial.

[7.C.2.] *People* v. *Majors* (S019708, 6/22/98)
18 Cal.4th 385
As a factual matter, the juror here did not conceal information, and trial counsel was not ineffective in failing to draft the juror questionnaire in a manner that would have elicited the information appellant claimed the juror concealed here because appellant failed to show trial counsel was responsible for drafting the questionnaire.

Justice Mosk concurred separately, and dissented in part.

[7.C.2.] *People* v. *Majors* (S019708, 6/22/98)
18 Cal.4th 385
The record here failed to establish juror misconduct consisting of some of the jurors discussing the case before it was submitted to them.

Justice Mosk concurred separately, and dissented in part.

[7.C.2.] *People* v. *Majors* (S019708, 6/22/98)
18 Cal.4th 385
Trial counsel was not ineffective for failing to challenge, as an unauthorized receipt of evidence, jurors who reported that they heard references to "Reese," "Arizona" and/or "killings."

Justice Mosk concurred separately, and dissented in part.

[7.C.2.] *United States* v. *Plunk* (8/28/98)
153 F.3d 1011 (9th Cir.)
Neither an officer's comment to the jury that the evidence was secure, nor the provision of a dictionary to the members of the jury during deliberations, which was not read, were shown to be prejudicial, so there was no reasonable possibility that the verdict was affected.

Issues related to administrative subpoenas under federal law and federal sentencing issues were not summarized.

[7.C.2.] *In re Hamilton* (S040799, 5/6/99)
20 Cal.4th 273 ****Rehearing denied 6/30/99****
The issuance of a show cause order based on juror misconduct was vacated where the evidentiary hearing disclosed that the juror in question neither harbored nor concealed bias. Hamilton was convicted in 1983 of special circumstance murder for the killing of his wife, who was pregnant at the time. In July 1994, he filed a second petition for habeas corpus, alleging juror bias and misconduct supported by declarations. One of the declarations was from a juror Geneva Gholston, then 76 years old, which stated, among other things, that she had prayed to sit on the jury after the spirit of her dead uncle told her to atone for his wrongs by avenging Hamilton's crimes. She also claimed she had seen one of Hamilton's sisters sitting in a car in the alley near her home, and had asked for extra police protection. The 1994 declaration was handwritten, and contained the initials "G.G." on each page. In 1996, a new declaration was filed, in which Gholston stated that the investigators from CAP had not made clear that they were part of the defense team, that they had not recorded the conversation, and that she had neither read the declaration before signing it, nor had she received a copy. Material portions of the declaration, including the part about Uncle Frank, were wrong. Gholston said that she had put all pretrial impressions aside and judged the case on the evidence alone, and had answered all voir dire questions honestly. An evidentiary hearing was held in November 1997. The referee found no substance in the allegations that Gholston had been biased. Because there was no substantial likelihood of juror bias, no grounds for habeas relief were established.

In a concurring opinion, Justice Chin referred to the case as an "extreme example of what is almost a routine practice of trying to create misconduct claims." He suggested that the Legislature needs to protect jurors from "fishing expeditions by litigants who lost at trial."

[7.C.2.] *United States* v. *Symington* (6/22/99)
195 F.3d 1080 (9th Cir.)
The district court abused its discretion in removing one juror for cause on the eighth day of deliberations where there was a reasonable possibility that Juror Cotey's views on the merits of the case provided the impetus for her removal. Here, the other jurors described Juror Cotey as either unwilling or unable to deliberate. Symington claimed the complaints were, or at least very possibly may have been, rooted in substantive disagreements about the merits of the case. The Ninth Circuit found that to reach a conclusion, it had to address the issue of how likely it must be that

a juror's views on the merits underlay the request for her removal before the district court would be precluded from removing the juror. The Ninth Circuit adopted the following standard of review: if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under these circumstances, a district court will then have two options: to send the jury back to continue deliberations or to declare a mistrial. Here, removing the juror was improper. The convictions were reversed and the sentences imposed were vacated.

[7.C.2.] *People* v. *Hayes* (S004725, 12/23/99)
21 Cal.4th 1211
Because the evidence of juror misconduct offered here was inadmissible hearsay, the trial court did not abuse its discretion in denying the new trial motion.

Justices Mosk, Kennard and Werdegar dissented on the jury misconduct issue.

[7.C.2.] *People* v. *Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****
Where the court had admonished jurors to refrain from reading news accounts of the trial, it was not error to have failed to voir dire jurors about an Oakland Tribune news article discussing the case. Absent evidence of juror misconduct, it was proper for the court to assume that the jury heeded the court's initial admonition.

[7.C.2.] *People* v. *Hightower* (A081424, 1/28/00)
77 Cal.App.4th 1123 (DCA 1, Div. 4)

The trial court did not err when during deliberations it discharged a juror who professed a categorical disbelief that a son could murder his mother under the circumstances shown by the evidence. The jury submitted a note to the court on the third day of deliberations asking how to proceed because the juror was not following instructions, expressed "unreasonable interpretations of the evidence," and did not believe that a son would be capable of killing his mother. The prosecutor requested a hearing regarding juror misconduct, and the court convened a hearing over defense objection. The juror expressed his disbelief that a son could kill his mother, and said that he shouldn't have been on the jury. The court also questioned the other jurors. The court dismissed the juror in question, finding he was biased in that he had deep feelings which prevented him from deliberating fairly, that he concealed that bias during voir dire, and that his conduct during deliberations amounted to a failure to deliberate. The appellate court held that the trial court had the power to dismiss the juror, and that the evidence supported a conclusion that good cause existed for the dismissal. The trial court did not exceed the scope of permissible inquiry or intrude on the deliberative process of the jury. The decision of the trial court must be presumed to be correct, and here the evidence amply supported the trial court's findings. Although the juror had doubts about the prosecution's case, the court found that the doubts were not actuated by an insufficiency of the evidence, but by an undisclosed preconception about the range of human behavior. There was therefore no error in the court's replacing the biased juror with an alternate juror.