ISSUES RELATING TO THE SELECTION AND CONDUCT OF THE JURY

By: Anna L. Stuart

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Introduction

Juror misconduct can happen, but let's give the jury the benefit of the doubt for a moment. After all, the jury is presumed to have followed the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Rich* (1988) 45 Cal.3d 1036, 1090.) Assuming that those 12 people did their civic duty as best they could, it is possible that certain decisions and activities of the trial court and counsel made their task a little more challenging. Impermissibly so? That is what this article hopes to discover.

The focus of this article is limited to selected issues around voir dire, deliberations, and rendering the verdict. A couple of the myriad topics I chose to side-step include improperly excused jurors and jury instructions.[1]

I hope to pose more questions than I answer, but also hope to provide some guidance on what to watch for as we appellate practitioners read our future appellate records.[2]

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[1] For some existing SDAP materials, see Lori Quick's article, "Juror Misconduct: Recognizing It and Raising It on Appeal, <http://www.sdap.org/downloads/research/criminal/jmcdu.pdf>; and Jonathan Grossman's article "Defense Theories and Instructions, <http://www.sdap.org/downloads/research/criminal/defense08.pdf.>

[2] In preparing this article, I consulted prior SDAP Seminar articles drafted by my co-workers present and past, the California Appellate Defense Counsel's brief bank, and the Appellate Defenders Inc. Panel Manual (<http://www.adi-sandiego.com/panel/manual.asp>). To these aforementioned

I. SELECTED ISSUES DURING JURY SELECTION: When voir dire may go awry.

The right to a fair and impartial jury to determine guilt or innocence is "'one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]" (*People v. Wheeler* (1978) 22 Cal.3d 258, 283.)

Since the normal appellate record does not contain the voir dire transcript, the first question becomes: Should I augment the record? Although I do not touch on errors relating to the seminal cases of *Batson v. Kentucky* (1986) 476 U.S. 79, and *Wheeler*, *supra*, 22 Cal.3d 258, when such a *Batson-Wheeler* objection has been noted in the clerk's minutes, the entire record of jury selection should be sought. It is also worth obtaining voir dire where there are notes in the clerk's minutes that reference a denied request such as a refused "for cause" challenge, or a denied defense question. Other reasons to obtain the voir dire transcript include later references to voir dire. For example, if either the prosecutor or defense counsel mention voir dire to the jury in closing, it is worth obtaining the transcript to ensure that any comments on the evidence or law were within the proper parameters. Essentially, whenever you are reading a record and something strikes you as odd relating

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folks: Thank you for putting your work into the Google universe.

to voir dire, request the transcripts.

Once you have the transcripts in hand, consider the following.

A. Relevant Legal Principles: Constitutional Right to an Impartial Jury Under The State and Federal Constitutions.

Under both the state and federal Constitutions, a criminal defendant has the right to be tried by an impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722, superseded by statute on other grounds as stated in *Moffat v. Gilmore* (7th Cir. 1997) 113 F.3d 698; *People v. Clark* (2011) 52 Cal.4th 856, 895.) Back in 1895, the United States Supreme Court described an impartial jury as requiring "jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." (*Connors v. United States* (1895) 158 U.S. 408, 413.)

The right to an impartial jury arises from the Sixth Amendment as well as from principles of due process. The United States Supreme Court has recognized that "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 (plur. opn.).) Accordingly, the purpose of voir dire is to guarantee a jury is selected that satisfies this Sixth Amendment right as well as the Fourteenth Amendment right to due process. (*Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6; *People*

v. Nesler (1997) 16 Cal.4th 561, 578.) In *Nesler*, the California Supreme Court explained: "Due process means a jury capable and willing to decide the case solely on the evidence before it . . . ." (*Ibid.*, citing *Smith v. Phillips* (1982) 455 U.S. 209, 217.) Thus, while there is no constitutional right to voir dire per se, or to conduct voir dire in a particular manner, "the voir dire process serves as a means of implementing the defendant's Sixth Amendment right to an impartial jury." (*People v. Landry* (2016) 2 Cal.5th 52, 83, citing *People v. Contreras* (2013) 58 Cal.4th 123, 143.)

Indeed, "[o]ne way to ensure impartiality is through adequate voir dire to identify unqualified jurors." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729, citing *Dennis v. United States* (1950) 339 U.S. 162, 171-172.) Without adequate voir dire, the trial court cannot fulfill its responsibility to remove prospective jurors who will be unable to impartially follow the court's instructions and properly evaluate the evidence. (*Morgan*, *supra*, at p. 730, citing *Rosales-Lopez*, *supra*, 451 U.S. at p. 188; see also *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.)

B. How Can Analysis Of The Voir Dire Proceedings Lead To Arguable Appellate Issues?

Notwithstanding the reality that prospective jurors may sometimes withhold information, even if our prospective panelists do everything right, there are ways that voir dire may fail to uphold a defendant's constitutional rights. So how is voir dire in California supposed to function to uphold these vital interests? California provides for mandatory jury questioning by court rule and statute. California Rules of Court, rule 4.201, provides "[t]o select a fair and impartial jury, the judge must conduct an initial examination of the prospective jurors orally, or by written questionnaire, or by both methods. The Juror Questionnaire for Criminal Cases (form MC-002) may be used. After completion of the initial examination, the court must permit counsel to conduct supplemental questioning as provided in Code of Civil Procedure section 223."

Voir dire is designed to find those prospective jurors that are disqualified to serve. Code of Civil Procedure section 223, subdivision (d), expressly states this purpose: "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." (See *Rousseau v. West Coast Moves* (1967) 256 Cal.App.2d 878.) The *Rousseau* court aptly described voir dire's purpose:

> California has long permitted examination of prospective jurors in order to determine whether a basis for challenge for cause exists. Such examination is not for the purpose of determining the exercise of peremptory challenges . . . although occasional dictum has loosely

> supported such a purpose . . . Neither is it a function of the examination of prospective jurors to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. Such activities are taken care of by other phases of the trial, such as opening statements of counsel, presentation of proof, final arguments of counsel, and instruction in the law by the court."
> (*Id*. at pp. 882-883, internal citations omitted.)

Although a trial court's conduct during voir dire is reviewed for an abuse of discretion, courts have consistently narrowed the scope of such discretion. (*United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1297; *People v. Chaney* (1991) 234 Cal.App.3d 853, 861, citing *United States v. Jones* (9th Cir. 1983) 722 F.2d 528, 529.) "[W]ith the heightened authority of the trial court in the conduct of voir dire . . . goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.) Accordingly, a trial court abuses its discretion "if its failure to ask questions renders the defendant's trial 'fundamentally unfair' or 'if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Harris* (2013) 57 Cal.4th 804, 831; *United States v. Washington* (9th Cir. 1987) 819 F.2d 221, 224.)

With these principles in mind, let's turn to ways in which voir dire has been challenged on appeal both successfully and otherwise.

1. It would be an abuse of discretion if the questions posed during voir dire were not "reasonably sufficient to test the jury for bias or partiality."

While it is the trial court's responsibility to ensure adequate voir dire, the parties have an absolute right to examine prospective jurors. (*People v. Benavides* (2005) 35 Cal.4th 69, 87, citing Code Civ. Proc., § 223.)

"The exercise of discretion by trial judges under the new system of court-conducted voir dire is accorded considerable deference by appellate courts . . . [a] trial court has significant discretion with respect to the particular questions asked and areas covered in voir dire . . . [t]he failure to ask specific questions is reversed only for abuse of discretion [which] is found if the questioning is not reasonably sufficient to test the jury for bias or partiality." (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 247, citing *Chapman*, *supra*, 15 Cal.App.4th at p. 141.) "Where . . . the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error." (*Baldwin*, *supra*, 607 F.2d at p. 1298.)

In *Chapman*, *supra*, 15 Cal.App.4th 136, the court held it was trial court error to prohibit voir dire on the issue of whether the jury would be biased against the defendant because he had been previously convicted of a felony. (*Id*. at p. 141-142.) *Chapman* reasoned that because the defendant had

a prior felony conviction, precluding examination in that area prevented the court from fulfilling its obligation to remove any prospective jurors who may have been unable to follow the court's instruction and impartially view the evidence. (*Id*. at p. 141.)

Parties are entitled to ask prospective jurors questions to determine if those jurors harbor bias that would cause them not to follow an instruction on the issues presented in the case. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47.) The only limitation is that such questions must not be so specific that it would require prospective jurors to prejudge an issue based on a summary of the evidence likely to be presented. (*Ibid*.) California courts have repeatedly upheld the right to question prospective jurors about their ability to follow particular instructions. (*People v. Abilez* (2007) 41 Cal.4th 472, 497.)

Similarly, voir dire questioning should also be permitted with regard to particular facts expected to be shown by the evidence, and may not be precluded because the fact or circumstance was not expressly pled in the information. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721.) The *Cash* Court considered whether it was error for the trial court to preclude a specific defense voir dire question as to whether a juror would automatically vote for the death penalty if it was shown that the defendant had committed a prior murder. (*Id*. at pp. 719-721.) In concluding that such a limitation was error, the

court "affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." (*Id*. at pp. 720-721.) Thus, under *Cash*, where a particular fact or circumstance is likely to be of great significance to prospective jurors, the trial court should permit voir dire inquiry as to jurors' attitudes about that fact or circumstance.

In contrast, educating the jury on the defense theory of the case is proscribed. In *Landry*, *supra*, 2 Cal.5th 52, our High Court recently examined the scope of a trial court's discretion relating to voir dire. In *Landry*, the defendant was sentenced to death after his conviction for the murder of a fellow life prisoner. (*Id*. at p. 60.) On appeal, the defendant challenged the trial court's refusal to include questions in the jury questionnaire concerning their attitudes toward prison life. (*Id*. at p. 81.) These questions sought to elicit the prospective jurors' thoughts about inherent differences between prison life and life outside its walls, whether prison has inherent safety issues, and whether the jurors would consider evidence that a prisoner's "primary task on the inside is staying alive." (*Id*. at p. 82.)

The California Supreme Court found no trial court error in refusing the questions. (*Landry*, *supra*, 2 Cal.5th at p. 84.) In its discussion, the Court cited

to *Contreras*, *supra*, 58 Cal.4th 136, and explained, "[c]onsistent with applicable statutory law, the trial court has wide latitude to decide the questions to be asked on voir dire [citation], and to select the format in which such questioning occurs [citation]. The court likewise has broad discretion to contain voir dire within reasonable limits." (*Landry*, *supra*, 2 Cal.5th at p. 83.) The *Landry* Court also noted that under these principles, "content questions . . . even ones that might be helpful, are not constitutionally required." (*Ibid*.) "To be an abuse of discretion, the trial court's failure to ask questions 'must render the defendant's trial fundamentally unfair.' [Citation.] 'Such discretion is abused if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" [Citation.]" (*Ibid*.)

The *Landry* Court further underscored that voir dire is not for the purpose of educating "the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.'" (*Landry*, *supra*, 2 Cal.5th at p. 83, citing *People v. Crowe* (1973) 8 Cal.3d 815, 824.) Despite the fact that the defendant's questions went to the central defense to the capital/murder charges, the main purpose of the questions was to educate the jurors "about the defense," and so there was no error in omitting the questions. (*Id*. at p. 84.)

On the one hand, the import of *Landry* and the authority it references is to demonstrate the breadth of discretion afforded to a trial court in the conduct of voir dire. On the other hand, creative appellate use of *Landry* may help to expose a trial court's improper limitations imposed on voir dire questions requested by the defendant. *Landry* underscored that weighty constitutional principles are at stake – the right to an impartial jury and the right to a fair trial – accordingly, the case could be used to argue these principles were impermissibly contravened. For example, consider whether the trial court, prosecutor, or defense counsel posed an improper question under statutory law. Code of Civil Procedure section 223, subdivision (b)(3) provides, "[f]or purposes of this section, an "improper question" is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury."

2. An abuse of discretion may be evidenced by the trial court's imposition of improper limits on voir dire.

It is reversible error for a trial court to limit the scope of voir dire on an issue of law relevant at trial if the excluded question was substantially likely to expose a strong attitude antithetical to a defense. (*People v. Williams* (1981) 29 Cal.3d 392, 410, superseded by statute on other grounds as stated in *People v. Fuiava* (2012) 53 Cal.4th 622, 654.)

In *Williams*, the erroneous limitation of voir dire concerned the prospective jurors' thoughts regarding the legal concept that a person has no duty to retreat before he or she may use reasonable force to resist an attacker. (*Williams*, *supra*, 29 Cal.3d at p. 411.) In finding reversible error, the Court noted that the concept was controversial, and there was "a real possibility the average juror might disagree" with the rule. (*Ibid*.) Also, the *Williams* Court implicitly acknowledged that the retreat rule would likely be unknown to an average juror were it not addressed in voir dire. (See *Fuiava*, *supra*, 53 Cal.4th at p. 654 [distinguishing *Williams*].) In *Williams*, the prospective jurors' ability to follow the law as instructed may have been inhibited by failing to ask about the retreat rule, because it was not otherwise apparent that the rule would be at issue in the case. (*Williams*, *supra*, 29 Cal.3d at p. 411.) Additionally, two of the prospective jurors had expressed doubts concerning their ability to follow self-defense principles with which they might disagree, and thus the trial court's limitation had foreclosed any further exploration of those responses. (*Ibid*.) The *Williams* Court held that the error was prejudicial because the foreclosed inquiry "bore a substantial likelihood of uncovering jury bias." (*Id*. at p. 412.)

It was not error, however, for a trial court to preclude counsel's direct questioning of the prospective jurors where counsel would have been provided an opportunity to pose questions to the court, and the court would then pose

the questions to the jurors itself. (*People v. Robinson* (2005) 37 Cal.4th 592, 613-614.) It was also not found to be error when a prosecutor referred to evidence during voir dire that was never ultimately proven. (*People v. Alexander* (2010) 49 Cal.4th 846, 899-901.)

Unreasonable or arbitrary time limits are also proscribed by statute. Code of Civil Procedure section 223, subdivision (b)(2), provides: "The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire. As voir dire proceeds, the trial judge shall permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case." Accordingly, appellate counsel should carefully scrutinize any attempt by the trial court to limit questions about legal concepts or impose unreasonable time restraints.

3. Reference to punishment and sentencing is off limits.

The trial court, prosecution, and defense counsel are restricted from mentioning a defendant's potential sentence during voir dire (or, for that matter, at any stage during trial).

It is well settled that except in death penalty cases, the duties of the court and the jury are clearly defined: The jury finds the facts and, based on

those facts, renders a verdict. The judge imposes sentence on the defendant if a guilty verdict has been reached. (*Shannon v. United States* (1994) 512 U.S. 573, 579.) "Information regarding the consequences of a verdict is therefore irrelevant to the jury's task." (*Ibid*.) The *Shannon* Court warned, "providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion. [Citations.]" (*Ibid*.) The California courts are in accord. (See e.g., *People v. Honeycutt* (1977) 20 Cal.3d 150, 157, fn. 4; *People v. Nichols* (1997) 54 Cal.App.4th 21, 24.) So too is the Ninth Circuit. (See *United States v. Frank* (9th Cir. 1991) 956 F.2d 872, 879 [rejecting an argument that the jury should have been provided with an instruction on the consequences of finding the defendant not guilty by reason of insanity].)

In *Cardenas*, *supra*, 53 Cal.App.4th 240, the defendant wanted to question prospective jurors about the Three Strikes law. (*Id*. at pp. 246-249.) The Court of Appeal determined the trial court was correct not to allow this because it was an inquiry about punishment. (*Id*. at p. 248.) The court concluded the defendant "is no more entitled to question jurors about three strikes than he would be for any other sentencing scheme. Regardless of the sentence, the analysis remains the same: The jury's sole responsibility is the determination of guilt or innocence. As such, it is unnecessary, and unwise, to

concern them with the ramifications of their verdict." (*Id*. at p. 247.)

4. What is the proper role of counsel during voir dire?

In *Taylor*, *supra*, 5 Cal.App.4th 1299, the court noted trial counsel's pivotal role during voir dire. "In a system of court conducted voir dire, the role of the attorney remains significant, even vital. Counsels are present, and observe the text and manner of the prospective jurors' answers and reactions to questions, and to the responses of other prospective jurors. Based on these voluntary and involuntary responses, the facts and issues of the case, and their own skill and experience, counsel may formulate specific questions and areas of inquiry for further questioning by the court. An attorney is not relegated to reposing in the courtroom like the now proverbial potted plant." (*Id*. at p. 1314.) A claim of ineffective assistance of counsel may lie where defense counsel fails to actively engage with the voir dire process.

Indeed, it has been said that, "[s]electing the proper jury is perhaps the most important strategic decision that a lawyer will make in her entire case." (Goodwin, "Note: Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire" (1996) 38 Ariz.L.Rev.739.) Moreover, "experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings." (Covington, "Jury Selection: Innovative Approaches to Both Civil and

Criminal Litigation," (1985) 16 St. Mary's L.J. 575, 575-576.) The annual California Criminal Law and Practice guide, urges defense counsel to use "voir dire as an opportunity to explain the basics of the case and the defense in a neutral way," and as "an opportunity to desensitize jurors to prejudicial evidence that will be admitted at trial." (Cal. Criminal Law Procedure and Practice (2017 ed.) § 29.52, p. 841.)

While being a potted plant is discouraged, counsel should also not become overly zealous during voir dire. In *People v. Mitchell* (1964) 61 Cal.2d 353, the Court held that "manifestly" argument of counsel should "not be presented on voir dire examination." (*Id*. at p. 366.) *Mitchell* was a murder case where a disputed issue was the degree of the defendant's culpability. (*Ibid*.) During voir dire of an individual juror, defense counsel asked, "Now . . . it's possible that a variety of factual situations could result in the jury finding a man guilty of first degree murder. By that I mean you might have a situation where a man accepts a thousand dollars and for hire goes out and kills a man. On the other hand, you might find a situation where under the law of the State of California, if a killing occurred during the course of a robbery as here, that the killing perhaps was unintentional or accidental. So, on the one hand you have an accidental or unintentional killing. On the other hand you have a killing done for money, without [sic] absolute intent to kill the person. Do you agree that those are two varying -- that there are two varying degrees

of culpability in that situation?" (*Ibid*.) At which point the trial court cut defense counsel off for being argumentative. (*Ibid*.) Although *Mitchell* involved comments by defense counsel, improper prosecutorial argument could be challenged under this authority.

Whomever is asking the questions, it is clear that "the purpose of the voir dire is not to introduce prejudice and bias into the decision making process, but to keep them out." (*People v. Wilborn* (1999) 70 Cal.App.4th 339, 347.)

5. What errors may occur from the trial court's own examination of prospective jurors?

"[T]he exercise of discretion by trial judges with respect to the particular questions to ask and areas to cover in voir dire is entitled to considerable deference by appellate courts." (*Taylor*, *supra*, 5 Cal.App.4th at pp. 1313-1314.) "[T]he trial judge, aided by the advocacy of counsel, is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses." (*Id*. at p. 1314.) Quoting Justice Kennedy's dissenting opinion *Mu'Min v. Virginia* (1991) 500 U.S. 415, the *Taylor* court noted, "[t]here is no single way to voir dire a juror," "[s]ometimes a broad question or statement will elicit responses that call for follow-up questions which eventually disclose a bias. Or the prospective juror's response

may be innocuous in words, yet uttered with such hesitation or expression as to signal a basis for further questioning." (*Id*. at p. 1313.)

Where might there be room for argument? Justice Kennedy's dissent in *Mu'Min* alludes to one potential basis. (*Mu'Min*, *supra*, 500 U.S. at pp. 520-523.) *Mu'Min* involved the murder of a woman while the defendant was out of prison on work detail, which garnered substantial publicity causing 8 of the 12 venire-persons to acknowledge during voir dire that they had read or heard something about the case. (*Id*. at p. 417.) The issue was whether the trial court erred when it denied the defense request to voir dire the prospective jurors about the content of the news reports to which they had been exposed. (*Ibid*.) The Supreme Court held that while possible racial bias had to be a topic covered during voir dire, the trial was not rendered fundamentally unfair by the trial court's refusal to ask about the content of pretrial publicity to which the prospective jurors had availed themselves. (*Id*. at p. 432.)

In his dissent, Justice Kennedy noted a weakness in the majority's argument because the jurors had been "asked in groups, and individual jurors attested to their own impartiality by saying nothing." (*Id*. at p. 452.) According to Justice Kennedy, while "the trial judge should have substantial discretion in conducting the voir dire . . . in [his] judgment, findings of impartiality must be based on something more than the mere silence of the individual in response to questions asked en masse." (*Ibid*.) Although *Mu'Min* involved the

issue of pretrial publicity, perhaps an argument could be made in a circumstance where group questioning was preferred over an individual approach.

It is true that claims of error relating to the manner in which voir dire was conducted must meet a high standard. (*People v. Holt* (1997) 15 Cal.4th 619, 661 ["[u]nless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal"].) (*Id.* at p. 661.) Despite this, consider raising an argument that the manner in which voir dire was conducted demonstrated the trial court's failure to consider the array of interests and policy considerations involved. Albeit dicta, the opinion in *Rousseau*, *supra*, 256 Cal.App.2d 878, aptly articulates the competing considerations:

> [T]he responsibility for securing a fair and impartial jury has been placed on the trial judge, who is charged with the duty to examine prospective jurors. He must also permit reasonable examination of prospective jurors by counsel. The grand objective of the examination is to elicit information from prospective jurors which will permit the exercise of challenges for cause in order to arrive at a fair and impartial jury.
>
> In determining which method of jury examination is most appropriate for use in a particular cause the trial court must consider and balance a variety of interests. These include, the interest of the parties in trying their case before a fair and impartial jury, the interest of the parties in avoiding the unreasonable expense of a protracted jury examination conducted by their adversaries, the interest of jurors in conserving their time and energies, the interest of jurors in avoiding unwarranted

> intrusion into their personal affairs, the interest of the general public in encouraging its citizens to serve as jurors, the interest of the general public in avoiding the expense of wasted court time, the interest of other litigants in the availability of court facilities, the interest of counsel in conducting litigation and earning fees with a minimum of unproductive time, and the interest of the trial court in effective and productive dispatch of its business.
> (*Id*. at pp. 885-886, internal citations omitted.)

6. What if the trial court's instructions to the prospective jurors violate the defendant's constitutional rights?

In the recent case of *People v. Tatum* (2016) 4 Cal.App.5th 1125, the court reversed a murder conviction for judicial misconduct that occurred during voir dire. (*Id*. at pp. 1128-1132.) In front of the prospective jurors, the trial court tried to explain the applicable standard for judging the credibility of a witness. (*Id*. at p. 1128.) By way of example, the trial court said, "And I always use this example-and I'm sorry if somebody here is a plumber, but I've had horrible experiences with plumbers. I've just had horrible-during remodels or whatever, just horrible experiences. So if I hear somebody is coming in, and I hear he's a plumber, I'm thinking, 'God, he's not going to be telling the truth.' So obviously I have already prejudged that person, and I wouldn't be able to be fair." (*Ibid*.) It turned out the defendant's alibi witness was a plumber. (*Id*. at pp. 1128-1129.)

The defendant's counsel moved for a mistrial, which the trial court denied. (*Tatum*, *supra*, 4 Cal.App.5th at p. 1129.) The Court of Appeal

reversed finding the trial court's statements "validated the prosecutor's argument, irreparably damaging [the defendant's] chance of receiving a fair trial." (*Id*. at p. 1131.) Significantly, the court found that an admonition could not have cured the prejudice. (*Ibid*.) Reversal was therefore "mandatory." (*Ibid*.)

The misstatement of the beyond a reasonable doubt standard is definitely something worth watching out for both from the trial court as well as counsel. "The case law is replete with innovative but ill-fated attempts to explain the reasonable doubt standard. [Citations.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 667.) Indeed, our Supreme Court has been warning of the dangers of explaining the term "reasonable doubt" beyond the statutory definition for over 120 years. (See *People v. Paulsell* (1896) 115 Cal. 6, 12.) Attempting to define the term "reasonable doubt" beyond the statutory definition is dangerous, misleading, creates confusion and uncertainty in the minds of jurors (*People v. Garcia* (1975) 54 Cal.App.3d 61, 63-66), and often leads to reversals on appeal. (*People v. Johnson* (2004) 119 Cal.App.4th 976, 986.)[3]

[3] On request, SDAP can make available sample briefing on prosecutorial misconduct surrounding the misstatement of the beyond a reasonable doubt standard from panel member, Michael C. Sampson.

C. Reversibility: Frame as Structural Error.

An error is reversible per se in a limited class of cases where the error defies harmless-error review and contains a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Neder v. United States* (1999) 527 U.S. 1, 8-9.) Such errors infect the entire trial process and deprive defendants of "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." (*Id*. at p. 9, quoting *Rose v. Clark* (1996) 478 U.S. 570, 577-578.)

Neder listed several categories of errors that have traditionally been considered structural, which included errors resulting in the defendant not receiving a trial from an impartial adjudicator. (*Neder*, *supra*, 527 U.S. at pp. 8-9.) There is some useful precedent concerning errors during voir dire. In *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630, structural error was found where the jury were tainted by biased remarks delivered by a prospective juror during voir dire. (*Id*. at pp. 633-634.)

D. Appellate Advocate Take-Aways.

1. When to request a reporter's transcript of voir dire?

Carefully check the trial minutes for any unusual occurrences including, but not limited to, denied defense challenges for cause, extended discussions

regarding a particular juror or a particular subject, and (of course) any reference to the words "*Batson*" or "*Wheeler*." In some cases, it is worth communicating with trial counsel regarding his or her feelings and recollection about the voir dire process.

2. With the voir dire transcript in hand, then what?

Once you have the voir dire transcript, pay close attention to the types of questions posed, any limitations placed on the length or content of the questioning, and note instances where specific subjects were brought up. For example, prejudicial reference to a defendant's prior conviction, may be grounds for reversal. (*Chapman*, *supra*, 15 Cal.App.4th at p, 143.)

3. Consider the following questions:

a. Does the error rise to a constitutional violation of the defendant's Sixth Amendment right to an impartial jury or his or her Fourteenth Amendment due process rights? (*Rosales-Lopez*, *supra*, 451 U.S. at p. 182; *Nesler*, *supra* 16 Cal.4th at p. 578.)

b. Was voir dire adequate? (Code Civ. Proc. § 223; *Rousseau*, *supra*, 256 Cal.App.2d at pp. 882-883; *Taylor*, *supra*, 5 Cal.App.4th at p. 1314.)

c. Did the trial court abuse its discretion by rendering the defendant's trial "fundamentally unfair" or because the voir dire questioning was "not reasonably sufficient to test the jury for bias or partiality? (*Cardenas*, *supra*, 53 Cal.App.4th at p. 247; *Washington*, *supra*, 819 F.2d at p. 224.)

d. Did the trial court preclude defense questioning of the prospective jurors on a material subject? (*Chapman*, *supra*, 15 Cal.App.4th at p. 141 [error to deny opportunity to voir dire on jurors' feelings toward individuals, like the defendant, with prior felony convictions].)

e. Were the questions specific enough to determine if jurors harbored bias that would cause them to be unable to follow the court's legal instruction? (*Cash*, *supra*, 28 Cal.4th at pp. 720-721.)

f. Were any of the court's, prosecution's or defense counsel's questions for the purpose of educating the jury panel to the particular facts of the case, compelling the jurors to vote a certain way, introducing bias or prejudice into the jurors'

decision making process, or to instruct the jury on matters of law? (*Landry*, *supra*, 2 Cal.5th at p. 83; *Wilborn*, *supra*, 70 Cal.App.4th at p. 347; *Tatum*, *supra*, 4 Cal.App.5th at p. 1131.)

g. Did the trial court adhere to the proper procedure for conducting voir dire taking into account the competing interests? (Code Civ. Proc. section 223; *Rousseau*, *supra*, 256 Cal.App.2d at p. 885-886.)

h. Is there a way to frame the remedy as reversible per se (structural error)? (*Neder*, *supra*, 527 U.S. at pp. 8-9.)

II. SELECTED ISSUES AROUND JURY DELIBERATIONS

A. The Provision of Written Jury Instructions.

The jury's right to have a written copy of the jury instructions during deliberations is purely statutory; there is no constitutional right implicated by the omission. (*People v. Rubino* (2017) 18 Cal.App.5th 407, 414; *People v. Blakley* (1992) 6 Cal.App.4th 1019, 1023.) Under Penal Code section 1093, which governs the order of proceedings in a criminal trial, the trial court is required to either give the jury a copy of the written instructions or provide the jury with written instructions upon the jury's request. (Pen. Code, § 1093,

subd. (f).) What this implicitly means, alas, is that a request only by trial counsel can be properly denied. (*People v. Sheldon* (1989) 48 Cal.3d 935, 943; *Blakley*, *supra*, 6 Cal.App.4th at p. 1024.) If some instructions are provided, all must be provided to prevent undue emphasis being placed on the provided instructions. (*People v. Wingo* (1973) 34 Cal.App.3d 974, 984, disapproved on other grounds in *People v. Rist* (1976) 16 Cal.3d 211; Cal. Crim. Law Proc. & Practice, (2017 ed.), § 33.11, p. 960.) *Rubino* held that the failure to provide written instructions is subject to harmless error review under *People v. Watson* (1956) 46 Cal.2d 818. (*Rubino*, *supra*, 18 Cal.App.5th at p. 414.)

You may already undertake this practice, but it is worth analyzing the oral instructions in the reporter's transcript to make sure that they correspond with the printed ones provided to the jury. What the court actually said - not what it intended to say - is how the jury was "instructed" and reversible error may be found because a trial court could "misread an instruction, misspeak [him or herself] or extemporaneously elaborate upon the written instructions." (See *People v. Silva* (1978) 20 Cal.3d 489, 493, citing *People v. Gloria* (1975) 47 Cal.App.3d 1, 6.)

It is also worth reviewing any printed instructions sent into the jury room. (See Pen. Code, §§ 1093, subd. (f).) Sometimes the instructions contain improperly redacted information, or contain irrelevant, prejudicial, or legally incorrect information. In the event of a conflict between the written and oral

versions of jury instructions, the written instructions provided to the jury will control. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) Potential prejudicial error may thus loom in erroneously printed instructions.[4]

B. During Jury Deliberations.

1. What is the trial court's role in handling questions from the jury during deliberations? More than to just "figuratively throw up its hands and tell the jury it cannot help."

As an initial matter, the trial court must consult with counsel before responding to written juror questions. (*People v. Dagnino* (1978) 80 Cal.3d 981, 990.) An error in failing to consult with counsel violates the Sixth Amendment right to counsel. (*Id*. at pp. 989-993.) In *Dagnino*, without the consent of all counsel, the trial court responded to three juror notes during deliberations. (*Id*. at p. 985.) The first involved the trial court's repeating its instruction on the principle of reasonable doubt; second, the jury were given instructions on "the difference between first and second degree burglary, and then the definition of accessory," and finally, the court provided all of the

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[4] As noted above (see footnote 2), this article does not delve into instructional error. For some useful starting points, see Jonathan Grossman's article "Defense Theories and Instructions," <http://www.sdap.org/downloads/research/criminal/defense08.pdf>

instructions that had previously been given to the jury at the trial's beginning and end. (*Ibid*.)

On appeal, the Court concluded, "[f]rom the foregoing it becomes patent that a trial court's instructions to a jury in a criminal case are given at a "critical" stage of the proceedings and therefore, without the presence of counsel and absent a stipulation, comprise both constitutional and statutory error. (*Dagnino*, *supra*, 80 Cal.3d at pp. 986-988.) Due to the infringement on the defendant's constitutional rights and the requirement that a fair trial requires the ability to assess prejudice "on the record," the court found that the error was not harmless beyond a reasonable doubt. (*Id*. at p. 990.)

The procedure for handling juror questions during deliberations is governed by Penal Code section 1138, which provides, "[a]fter the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

Section 1138 imposes a "mandatory duty" on the trial court to "clear up any instructional confusion expressed by the jury, but does not necessarily require additional instructions." (*People v. Gonzalez* (1990) 51 Cal.3d 1179,

1212, superseded by statute on other grounds.) Where "the original instructions are full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. (*Id*. at p. 1213.) A violation of section 1138 "does not warrant reversal unless prejudice is shown." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

In *Beardslee*, after jury deliberations had begun, the jury submitted a note asking for an explanation of "whether first degree murder constitutes the act as a whole or the defendant's participation in said act." (*Beardslee*, *supra*, 53 Cal.3d at p. 96.) By way of explanation, the trial court told the jury, "Ladies and gentlemen, also in addition to your request concerning an instruction, there is and can be no explanation of the instructions. You have to just work with them as they are printed. [] This is one of the reasons we do not send, ordinarily, instructions into the jury room, because people start . . . picking them apart. [] You are going to have to consider the instructions as a whole as one of those instructions will . . . advise you, some of the instructions will apply, some of the instructions will not. [] All of those instructions have to be considered as a whole. Do the best you can with them." (*Ibid*.)

The trial court's stance was challenged on appeal. (*Beardslee*, *supra*, 53 Cal.3d at p. 96.) The Supreme Court first reiterated the trial courts' discretionary authority to decide whether to elaborate on full and complete

instructions. (*Id*. at p. 97.) The Court then made clear that, while a trial court may be reluctant to "strike out on its own . . . a court must do more than figuratively throw up its hands and tell the jury it cannot help." (*Ibid*.) Furthermore, the Court directed that trial courts "must at least consider how [they] can best aid the jury" and "should decide as to each jury question whether further explanation is desirable, or whether [they] should merely reiterate the instructions already given." (*Ibid*.) The *Beardslee* trial court had thus committed error, but no prejudice was ultimately found. (*Ibid*.)

In *People v. Thompkins* (1987) 195 Cal.App.3d 244, reversible error was found following the trial court's provision of instruction after a jury had announced it was deadlocked. (*Id*. at p. 247.) The issue in *Thompkins* concerned the trial court's handling of the information that the jury were deadlocked, but that they may be assisted by "a little clarification . . . about one aspect of the law . . . ." (*Id*. at pp. 249-250.) After the jury submitted several written questions, the trial judge provided his answers. (*Id*. at p. 250.) To the first question of "how does premeditation and sudden heat of passion interrelate in this law," the court answered, "It doesn't;" to the second question, "Can sudden heat of passion nullify premeditation, also in this law?, the court said simply, "No'" and then stated, "So with that added information, please continue your deliberations. . . ." (*Ibid*.) These statements constituted the judge's entire response to the jury's request for assistance. (*Ibid*.)

The *Thompkins* court noted the relevant legal principles:

> The trial judge's instructions to the jury have always been recognized to be a fundamentally important stage of the criminal proceeding. ([Citation.]) Indeed, one can legitimately argue that the primary function of the judge in a jury trial is to explain the applicable legal principles in such a way as to focus and define the factual issues which the jury must resolve. In this role, the trial judge acts much like a teacher or a guide; it is no accident that we refer to the trial court's obligation to "instruct" the jury on the applicable law. It is not sufficient that the trial judge be an adequate legal lecturer. Jurors are not first year law students with some independent motive for legal study. At best, they are well meaning but temporary visitors in a foreign country attempting to comprehend a foreign language.
>
> To perform their job properly and fairly, jurors must understand the legal principles they are charged with applying. It is the trial judge's function to facilitate such an understanding by any available means. The mere recitation of technically correct but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of facts. A jury's request for reinstruction or clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration. Why has the jury focused on this issue? Does it indicate the jurors by-and-large understand the applicable law or perhaps it suggests a source of confusion? If confusion is indicated, is it simply unfamiliarity with legal terms or is it more basically a misunderstanding of an important legal concept?
> (*Thompkins*, *supra*, 195 Cal.App.3d at p. 250.)

The *Thompkins* court concluded that the trial court provided inadequate and incorrect instruction. (*Thompkins*, *supra*, 195 Cal.App.3d at p. 252.) The defendant also suffered prejudice in part because the jury were deadlocked prior to the trial court's statements. (*Ibid*.)

Notably, in its closing remarks, the *Thompkins* court provided us with some useful language for arguing these issues and for finding prejudice:

> We pause at this juncture to express concern lest this opinion be interpreted as a bad case of appellate pontification induced by a virulent strain of ivory towerism. Each member of this panel has served as a superior court judge and we are sensitive to the significant burdens of that office. We are aware that while a jury is deliberating, a trial judge is occupied with numerous other important tasks. It is rarely convenient to "drop everything" to respond to juror questions, especially if the response requires supplemental research on a question of law.
>
> But from our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions. And if jury instructions are important in general, there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations. We recognize that formulating a response to such questions often requires consultation with counsel and significant independent legal research. In purely cost-benefit terms, however, a trial judge should view any such effort as time well spent.
> (*Thompkins*, *supra*, 195 Cal.App.3d at pp. 252-253.)

In sum, the trial court has a duty to respond to the jury's questions during deliberation. When reviewing the responses, the appellate practitioner should ensure that the trial court did more than "throw up its hands," and addressed the jury's concern and advised them on the applicable legal principles.

C. Our Functional Jury Is At A Deadlock: What Could Possibly Go Wrong?

1. Relevant principles.

California Rules of Court, rule 2.1036 [assisting the jury at an impasse] provides, "[a]fter a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict."

Although a trial court's conduct regarding an impasse is statutory (Pen. Code, § 1140), when faced with the trial court's handling of a deadlocked jury, constitutional principles are also at stake. Penal Code section 1140 provides, "[e]xcept as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

The Sixth Amendment to the United States Constitution requires in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right

to a speedy and public trial, by an impartial jury … .” One rationale for a jury trial is “to prevent oppression by the Government[,] … the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.” (*People v. Nelson* (2016) 1 Cal.5th 513, 568, citing *Williams v. Florida* (1970) 399 U.S. 78, 100.) Central to the achievement of that civic goal is the requirement that jury deliberations be conducted in secret. (*U. S. v. Thomas* (2d Cir. 1997) 116 F.3d 606, 618 [secrecy of deliberations is the cornerstone of the modern Anglo-American jury system].) Accordingly, the Supreme Court has emphasized that a jury’s deliberations must be “free from outside attempts at intimidation.” (*Williams v. Florida*, *supra*, 399 U.S. at p. 100.) This admonition applies to the trial court itself: “Courts must exercise care when intruding into the deliberative process to ensure that the secrecy, as well as the sanctity, of the deliberative process is maintained.” (*People v. Russell* (2010) 50 Cal.4th 1228, 1251.)

The California Constitution declares that “[t]rial by jury is an inviolate right and shall be secured to all … .” (Cal. Const., art. I, § 16.) The California Supreme Court has emphasized that the federal and state constitutional right to a trial by an impartial jury includes the right to a jury “in which no member has been improperly influenced” and that protecting a jury’s impartiality

"'assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.'" (*In re Hamilton* (1999) 20 Cal.4th 273, 294 & fn. 17.) These principles were all recently reaffirmed by our High Court in *Nelson*, *supra*, 1 Cal.5th at p. 568.

Protecting the sanctity of juror deliberations has long been recognized as a critical need. California courts have recognized the need to protect the sanctity of jury deliberations. Indeed, "The secrecy of jury deliberations should be closely guarded." (*People v. McIntyre* (1990) 222 Cal.App.3d 229, 232, fn. 1; see also *People v. Talkington* (1935) 8 Cal.App.2d 75, 85-86, disapproved on another ground in *People v. Friend* (1958) 50 Cal.2d 570, 578.)

Penal Code section 167 makes it a misdemeanor to eavesdrop upon or record jury deliberations without the jury's consent. Under Evidence Code section 1150, once a verdict has been rendered, it can be impeached with evidence of misconduct, but evidence of the jurors' mental processes is inadmissible. One reason for this rule is to "protect[] the stability of verdicts," (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350), but an additional reason is to " 'assure[] the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.' [Citation.]" (*Hamilton*, *supra*, 20 Cal.4th at p. 294, fn. 17.)

2. When the trial court's conduct crosses the line into impermissible coercion.

When confronted with a deadlocked jury, "[t]he trial court may ask jurors to continue deliberating when there is a "reasonable probability" of agreement; a determination that rests in the discretion of the court. (*People v. Lucas* (2014) 60 Cal.4th 153 CITE; § 1140; "The court must exercise its power, however, without coercion of the jury . . . ." (*People v. Breaux* (1991) 1 Cal.4th 281, 319.) Coercion exists where, given the totality of the circumstances, the court's instructions or remarks displace the independent judgment of the jury "in favor of considerations of compromise and expediency." (*Ibid*.) Such displacement may occur when the court exerts pressure to reach a verdict, rather than no verdict at all. (*Ibid*.) "Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case." (*People v. Pride* (1992) 3 Cal.4th 195, 265.) Coercion can also occur "absent any intimation, express or implied, that the court favors a particular verdict." (*People v. Carter* (1968) 68 Cal.2d 810, 817.)

"Whether statements of a trial judge amount to coercion of a verdict is peculiarly dependent upon the facts of each case." (*People v. Burton* (1961) 55 Cal.2d 328, 356.) The *Carter* Court explained that it "is not difficult to apprehend that the reason for this extreme sensitivity to particular factual

contexts lies in the fact that the law of California, like the law of other jurisdictions, intimately involves the court in the matter of obtaining a verdict upon the evidence." (*Carter*, *supra*, 68 Cal.2d at p. 815.) Moreover, "[o]nce a cause has been submitted to the jury, and absent a discharge by consent, the court bears the statutory responsibility of assuring that a verdict is rendered 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.'" (*Ibid*., citing Pen. Code, § 1140.)

In *Carter*, *supra*, 68 Cal.2d 810, the Court found that in encouraging a jury to reach an agreement on its verdict, the court may impress the jury with the importance of its task, may advise jurors to consider the case dispassionately and to lay aside views held through pride of opinion rather than through conscientious conviction, and may remind them of the cost in time and money of a retrial and that the retrial would be upon similar evidence and before a jury of similar qualifications. (*Id*. at pp. 815-816.) The Court cautioned, however, that any such advisements may not be made if they would operate to overbear the independence of the jury and produce a verdict tainted by compromise or concession to expediency. (*Id*. at p. 816.)

In *People v. Peoples* (2016) 62 Cal.4th 718, our High Court recently explained the meaning of jury "coercion" as it pertained to two settings. (*Id*. at p. 783.) First, jury coercion occurs where "the trial court, by insisting on

further deliberations, expresse[s] an opinion that a verdict should be reached." (*Ibid*, following *People v. Rodriguez* (1986) 42 Cal.3d 730, 775, .) Second, citing *People v. Debose* (2014) 59 Cal.4th 177, 209, the *Peoples* Court noted that, "Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency . . . the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived 'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.'" (*Peoples*, *supra*, 62 Cal.4th at p. 783.)

In *Peoples*, the defendant challenged three of the trial court's statements during deliberations, which he claimed coerced the jury into reaching its verdict. (*Peoples*, *supra*, 62 Cal.4th at p. 783.) The trial court had first stated the "21.5 hours of deliberation was a 'drop in the bucket'" and also made "the observation that deliberations could potentially continue until the end of the month of June . . . ." (*Ibid*.) These statements, the defendant argued, "led the jury to believe that they had to render a verdict." (*Ibid*.) The Court disagreed. (*Id*. at p. 783.) Applying a "totality of the circumstances" analysis to the trial court's conduct, the Court found the trial court's statements were not coercive. (*Ibid*.) Noting that the "drop in the bucket" remark when viewed in isolation "could be construed as coercive," the trial court's "complete remarks" did not

suggest that the "court crossed the line from encouragement to coercion." (*Ibid*.) Similarly, the *Peoples* Court found the trial court's "passing remark" concerning the length of potential deliberations "was not unreasonable" in light of its having previously informed the jury that jury service could last until the end of June. (*Ibid*.) The Court also noted the trial court's general flexibility to accommodate a "wide range of personal commitments on the part of the jury." (*Id*. at pp. 783-784.)

The trial court in *Peoples* had also suggested to the jurors that they advocate the opposite position in order to test their own. (*Peoples*, *supra*, 62 Cal.4th at p. 784.) With respect to this "reverse role-play" suggestion, the Court discussed its 1977 decision in *People v. Gainer* (1977) 19 Cal.3d 835, disapproved on another ground in *People v. Valdez* (2012) 55 Cal.4th 82, 163. (*Peoples*, *supra*, 62 Cal.4th at p. 784.) Ultimately, the Court found that the trial court's conduct was proper. (*Ibid*.)

In *Gainer*, our Supreme Court addressed the validity of the infamous "*Allen* charge" or "dynamite charge."[5] (*Gainer*, *supra*, 19 Cal.3d at pp. 842-844.) In 1896, the United States Supreme Court decision in *Allen v. United States* (1896) 164 U.S. 492, discussed the trial court's conduct after the

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[5] The *Allen* charge has become known as the "hammer charge" or "dynamite charge" because it is said to "blast" a verdict out of the jury. (*Gainer*, *supra*, 19 Cal.3d at p. 844.)

jury had begun to deliberate, but had returned to the court for further instructions. (*Allen*, *supra*, 164 U.S. at p. 500.)

Although not a direct quote from the trial court, the *Allen* Court described the instruction given to the jury as follows:

> [I]n a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.
> (*Allen*, *supra*, 164 U.S. at p. 501.)

The *Allen* Court found no error in this instruction. (*Allen*, *supra*, 164 U.S. at p. 501.) Modernly, however, the "*Allen* charge" is no longer considered a legitimate instruction in California. (*Gainer*, *supra*, 19 Cal.3d at p. 844.)

The *Gainer* court surveyed *post-Allen* instructions and concluded that further use of the instruction should be prohibited "because it instructs the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice . . . ." (*Gainer*, *supra*, 19 Cal.3d at p. 852.) The

Gainer Court held, "it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Ibid*.)

In the aforementioned case of *Peoples*, *supra*, 62 Cal.4th, the Court distinguished *Gainer* on three grounds. (*Id*. at pp. 783-784.) First, the reverse role-play instruction "did not require the jurors to consider their minority status on the jury." (*Ibid*.) Second, the jury had been instructed, "that the jurors were to use their independent judgment and come to their own individualized determinations." (*Ibid*., citing CALJIC No. 17.40.) Finally, the trial court "suggested, but did not order, the jurors to engage in the reverse role-playing exercise. (*Ibid*.) In finding no coercion in the circumstances of the case, the reverse role play instruction did not "direct[] the jury that it was required to reach a verdict, place[] any constraints on an individual juror's responsibility to weigh and consider the evidence, or coerce[] the jurors into abdicating their independent judgment in favor of compromise and expediency." (*Id*. at p. 784.)

The take-away from the foregoing is simply that the *Gainer* principles are alive and well. It is still "error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or

preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Gainer*, *supra*, 19 Cal.3d at p. 852.)

4. Constitutional considerations: when jurors are coerced into a guilty verdict.

On this subject, *Nelson*, *supra*, 1 Cal.5th 513, is instructive. In *Nelson*, the defendant was convicted of first degree murder with special circumstances. (*Id*. at p. 521.) After the second of two penalty phase trials (the first resulted in a hung jury), the defendant was sentenced to death. (*Ibid*.) Our Supreme Court reversed the penalty phase judgment due to the "trial court's unwarranted intrusion into the jury's deliberative process." (*Id*. at pp. 521-522.)

After six days of jury deliberations during the second penalty trial, the jury sent word that it was deadlocked. (*Nelson*, *supra*, 1 Cal.5th at pp. 560-561.) Based on information about four votes they had taken, the court noted the jury appeared to be making progress, but wanted to know more about the timing of the ballots. (*Id*. at p. 561.) Defense counsel began what became a series of objections to the trial court's conduct. (*Ibid*.) First, the foreperson was summoned and questioned about the ballots. (*Ibid*.) The next morning, the trial court presented the jurors with its own questionnaire that listed a series of eight questions regarding the likelihood of reaching a verdict, whether any

assistance could be provided in that regard, and whether there had been any juror misconduct including the expression of opinions regarding the death penalty or life without parole. (*Id*. at pp. 561-562.)

After the questionnaires were completed, the court continued to question the jurors both individually and as a group on their answers, which included the substance of their discussions, and the focus of the hold-out jurors. (*Nelson*, *supra*, 1 Cal.5th at pp. 561-562.) One consequence of which was the discharge of a juror for allegedly withholding information during voir dire. (*Id*. at p. 562.) Ultimately, defense counsel moved for a mistrial, which the trial court denied. (*Id*. at p. 567.) An alternate juror was seated. (*Ibid*.) The trial court instructed the jury that deliberations should begin anew, but "perhaps, you collectively can bring [the alternate] up to speed and in the process cover what it is that you have covered previously." (*Ibid*.) The penalty of death was returned the next morning. (*Ibid*.)

In reversing the penalty phase verdict, the *Nelson* Court noted, "a trial court may intervene in jury deliberations where it receives reports of juror misconduct or in response to an impasse, but such interventions must be limited and undertaken with the utmost respect for the sanctity of the deliberative process. In this case, the trial court went considerably beyond any permissible intervention and took action that undermined the sanctity of jury deliberations and invaded the jurors' mental processes." (*Nelson*, *supra*, 1

Cal.5th at p. 569.) The trial court's conduct was improper in part because, "[a]s a general rule, no one-including the judge presiding at a trial-has a 'right to know' how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror." (*Ibid*., citing *People v. Engelman* (2002) 28 Cal.4th 436, 443.)

The *Nelson* court summarized that there was "a reasonable possibility that these intrusions into the jurors' deliberative process suggested to the jurors" that: "(1) the majority position was the reasonable one; (2) the dissenting jurors' position was unreasonable and would be subject to particular scrutiny-an inference that could only have been strengthened when the court, without explanation to the jury, excused one of the two holdout jurors; and (3) the "new" deliberations following the substitution of one holdout would simply be a matter of the majority convincing the last holdout and the new juror to come to its side." (*Nelson*, *supra*, 1 Cal.5th at p. 573.) As a consequence, the Court found there was "a considerable possibility that this message would have pressured the remaining holdout juror to reevaluate her position and would have discouraged the alternate juror, whose views until that point were unknown, from taking a minority position." (*Ibid*.)

Appellate advocate take-aways from *Nelson*: In a number of ways, the *Nelson* opinion may be useful for future appeals given its re-affirmance of the basic principles regarding juror coercion. More significantly, one import

from *Nelson* is that it aligned a finding of jury coercion with a violation of the Sixth Amendment and, accordingly, reversible error.

Regarding the standard for prejudice, the *Nelson* Court acknowledged, "not every unwarranted intrusion into a jury's deliberative process requires automatic reversal." (*Nelson*, *supra*, 1 Cal.5th at p. 570.) But, it found that even "assuming that the trial court's intrusions into the deliberative process do not constitute structural error and are instead subject to harmless error analysis, we conclude the intrusions were not harmless because they amounted to jury coercion." (*Id*. at p. 571.) This conclusion is significant. In practical effect, the Court is indicating that reversal is required if it can be shown the trial court's intervention into the jury's deliberations resulted in jury coercion.

Lastly, the *Nelson* trial court invaded the sanctity of the jurors' deliberative process in a number of ways that may well come up in the future. For example, the improper discharge of a juror based on information that comes out during deliberations, or subjecting individual jurors (especially hold-out jurors) to questioning in open court or in chambers during the deliberative process may amount to improper coercion and thus reversal.

5. Coercive or not, some examples.

Whether the standard of review is abuse of discretion (statutory error) or de novo (constitutional error), what follows are some examples where coercive conduct was either found, or not.

In *People v. Miles* (1904) 143 Cal. 636, after a jury announced its inability to agree upon a verdict, it was not error for the trial court to call their attention to great additional expense to the county of another trial and to urge that they, as taxpayers, should seek to avoid such expense and to agree upon a verdict if possible. (*Id*. at p. 640.) This holding, however, is contrary to the Supreme Court's later pronouncement that comment about the likelihood of a retrial is impermissible. (*Gainer*, *supra*, 19 Cal.3d at p. 952.)

No coercion was found in *People v. Johnson* (2015) 61 Cal.4th 734, because the trial court never indicated a preference for a particular verdict, nor did it exert pressure on any juror, or express any exasperation about the jury's deliberations. (*Id*. at p. 770.)

In a murder prosecution, the trial court did not err in instructing the jurors to the effect that in reaching a decision they should give consideration to the views of their fellow jurors, where such instruction was given without revelation as to how the jury stood on the question of guilt. (*People v. Gibson* (1972) 23 Cal.App.3d 917, 922.) Under such circumstances, it was merely an

adjuration to careful and dispassionate discussion and consideration of all issues, and there was no element of coercion. (*Ibid*.)

It is not coercion to refer to the "sacrifice" made by the parties to the action, but it may be coercion to ask the jury to consider the waste and hardship that would result from a mistrial. (*People v. Butler* (2009) 46 Cal.4th 847, 878, 884 [court's remarks to the deadlocked jury, which referred to two years of "'sacrifice'" by the attorneys, the parties, and the witnesses in the case, did not suggest to the jury that it should consider the waste and hardship that would result from a mistrial, given that the court made no comments regarding the costs or prospects of retrial, or the desirability of a verdict].)

Juror coercion might be found where the court either expressly or impliedly tells the jurors that they must reach a unanimous verdict, or a particular outcome. (*Sheldon*, *supra*, 48 Cal.3d at pp. 959-960 [a judge's remarks regarding the necessity of reaching a unanimous verdict might produce a coerced verdict].)

In the recent case of *People v. Brooks* (2017) 3 Cal.5th 1, a trial court's directive to the jury to continue its penalty phase deliberations after the report of a deadlock neither violated Penal Code section 1140, nor coerced a penalty verdict. (*Id*. at p. 93.) There, after asking only the foreperson whether he believed there was anything the court could do to assist the jury in reaching a decision, the court reasonably conducted further inquiry into the deadlock by

asking the remaining 11 jurors the same question. (*Ibid*.) The Court found the trial court did not either express or imply to the jurors that they had to reach a unanimous verdict or a particular outcome, and at no time did the court suggest to the jurors they should reconsider their views in light of the numerical breakdown of the votes. (*Ibid*.)

In *People v. Kindleberger* (1893) 100 Cal. 367, upon learning that the jury had "no prospect of agreeing," the trial court said:

> [I]in view of the testimony in this case, the court is utterly at a loss to know why twelve honest men cannot agree in this case. Let me have that information, please. In that connection, further, I have this to say, that in my short experience upon the bench I have occasionally been associated with juries where some jurors having an idea that they are smart men, prominent men, with large heads and big capacity, on going to the jury-room, take occasion to express ill-digested and rapid opinions upon the case, and then stick to these opinions, right or wrong, unreasonably refusing to listen to the opinion and arguments of their fellow-jurors, and so hang a jury. I have on some occasions, having something of a personal knowledge of jurors on the jury, taken occasion to caution the jurors against that course, and to say that jurors ought to go into the jury-box without prejudice, without fear, without favor, with a desire to arrive at the truth, to sift and digest the testimony carefully and conscientiously, and not stubbornly to express an ill-digested opinion and stick to it. [] I repeat, gentlemen, that I see no reason on earth why a jury in this case, upon this testimony, cannot agree.
> (*Id*. at p. 368.)

Perhaps not surprisingly, the *Kindleberger* Court found this was prejudicial error concluding, "[t]he court has no right, except when advising an acquittal, to give any expression of its opinion as to the weight of evidence,

or to tell the jury that the evidence is so clear that they as honest men ought not to disagree, which is in effect the same as telling them that there is no conflict in the evidence, and that as honest men they can render but one verdict." (*Kindleberger*, *supra*, 100 Cal. at p. 370.)

The trial court in *People v. Carder* (1916) 31 Cal.App 355, responded to news of the jury's failure to agree by stating that questions of fact seemed "very plain" to him, expressing surprise at the idea that there were contrary facts, and concluding that "there oughtn't to be any trouble . . . [i]t's a case you ought to decide . . . ." (*Id*. at p. 357.) In reversing the conviction, the *Carder* court noted, "under our system, in the determination of the guilt or innocence of a defendant, the jury must be left free from coercion or influence of the trial judge, will not be gainsaid. This right and privilege accorded by the constitution to one charged with [a] crime is manifestly fundamental and vital. If serious infractions of it are to be tolerated, then trial by jury becomes a delusive formality." (*Id*. at pp. 357-358; see also *People v. Conboy* (1910) 15 Cal.App. 97, 102-103 [reversal where the trial court's admonishment to a deadlocked jury amounted to prejudicial error because it created the impression that the trial court was of the opinion that the defendant was guilty and that the jury ought to convict him upon the evidence before them].)

While it may be hard to imagine such overt impropriety in this century, *Kindleberger* and *Carder* remain relevant and could help show the existence

of jury coercion if a trial court's instruction is akin to a comment on the weight of the evidence or exposes a belief that a verdict is possible.

6. Handling the hold-out juror and the inquiry into the numerical split.

In *People v. Baumgartner* (1958) 166 Cal.App.2d 103, juror coercion was found because the trial court's statements could reasonably be read as singling out a hold-out juror. (*Id*. at p. 105.) In *Baumgartner*, after six hours of jury deliberations, the jury announced it was at an impasse. (*Ibid*.) The trial court asked how the jury stood "numerically," to which the foreperson replied it was 11 to one for conviction. (*Ibid*.) The trial court then requested further deliberation, which included instructions for the dissenting jury to consider the reasonableness of his or her opinion. (*Ibid*.) Forty minutes later the jury returned a guilty verdict. (*Id*. at p. 108.)

The Court of Appeal found the admonitory instruction was erroneous. (*Baumgartner*, *supra*, 166 Cal.App.2d at p. 108.) The court noted that, while the trial court has discretion to instruct a deadlocked jury, such instructions "must be carefully guarded lest the jury be persuaded the court desires a certain verdict to be brought in." (*Ibid*.) The court also found that improper "coercion is much more apt to exist where . . . the court, in the presence of the whole jury, is informed that the jury stand in a certain numerical status with

regard to conviction or acquittal. " (*Id*. at p. 107.) The court found the error mandated reversal because "under the provision of the Constitution an appellate court ought to direct reversal of a conviction when unable to say whether appellant would or would not have been convicted but for the trial court's errors." (*Id*. at pp. 108-109.)

In contrast, where there was no obvious hold-out juror, the court in *People v. Walker* (1952) 112 Cal.App.2d 462, found that the trial court's remarks "considered as a whole, constitute merely an explanation of the reasons for detaining a jury, the importance of the case, and the desirability for a careful and dispassionate discussion and consideration of all of the issues to the end that a verdict one way or the other should be reached, without in any way indicating that it should be a verdict of guilty . . . ." (*Id*. at p. 474.) Accordingly, there was no coercion or reversible error. (*Ibid*.; see also *People v. Lammers* (1951) 108 Cal.App.2d 279, 282-283.)

7. Inquiry into the numerical split under California and Federal law: can the trial court inquire regarding a purportedly deadlocked jury's numerical split?

Under California law, yes. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1254 [noting "our many decisions allowing inquiry into a jury's numerical split"].) But under Federal law, no. (*Brasfield v. United States* (1926) 272 U.S. 448, 450 [it was reversible error for a trial court, faced with a deadlocked jury,

to inquire into its numerical division because "in general [the] tendency [of such inquiry] is coercive."]

If the court did not specifically ask for or reference the numerical split, coercion may not be found. (*Pride*, *supra*, 3 Cal.4th at pp. 264-265 [court's admonition to the foreperson not to provide details of the jury's vote, and its lack of comment regarding the numerical breakdown, suggested to the jurors that the court found the direction of the vote irrelevant].)

Although our High Court has yet to be persuaded, there is some federal precedent to argue that an inquiry into a numerical split is inherently (and prejudicially) coercive. (*Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, distinguished by *Brooks*, *supra*, 3 Cal.5th at p. 93.)

In *Jiminez*, after the jury reported a deadlock, the superior court judge asked the foreperson for a numerical breakdown of the numerous votes, and elicited from the foreperson that there had been some "movement," to which the court remarked, "'[T]hat's what's important to me.'" (*Jiminez*, *supra*, 40 F.3d at pp. 978-979.) When the jury reported a deadlock after three more hours of deliberations, counsel for both sides indicated that a mistrial was appropriate at that point, but the court decided to bring the jury into the courtroom to determine if there had been "'any substantial movement.'" (*Id*. at p. 979.) The foreperson informed the court that only a single juror remained in the minority, and he confirmed there had been "'substantial movement since

the last time.'" (*Ibid*.) The court then remarked, "'Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time.'" (*Ibid*.) Defense counsel objected, asking the court to inquire whether further deliberations would be productive. (*Ibid*.) The court disagreed with counsel's concern that the hold-out juror would be subjected to undue pressure, noting that it had asked the jury to deliberate for the "rest of today," which was only a period of two hours. (*Ibid*.)

The Ninth Circuit reversed the defendant's conviction, concluding that the trial judge had "crossed the line" between permissible inquiry regarding the numerical division of a deadlock and coercive instruction. (*Jiminez*, *supra*, 40 F.3d at p. 981.) By expressing approval of the "movement" toward juror unanimity and directing the jury to continue deliberations, the court in essence instructed the jury to strive to reach a verdict. (*Id*. at pp. 980-981.) And when the court learned following the second report of deadlock that only a single juror remained in the minority, and again communicated its approval of the movement toward unanimity, its directive to the jury to deliberate "until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity." (*Id*. at p. 981.)

In contrast, the California Supreme Court in *Brooks* found *Jiminez* to be distinguishable in a significant respect. (*Brooks*, *supra*, 3 Cal.5th at p. 93.) Unlike the *Jiminez* court, which conveyed to the jury its approval of the progression toward unanimity, there was no such approval communicated to the jury in *Brooks*. (*Ibid*.) There, the jury had reported a deadlock after only a brief period of deliberation. (*Id*. at p. 89.) The court elicited from the foreperson that each of the jury's first three ballots reflected a different numerical split and, after asking only the foreperson whether he believed there was anything the court could do to assist the jury in reaching a decision, the court reasonably conducted further inquiry into the deadlock by asking the remaining 11 jurors the same question. (*Ibid*.; see also Cal. Rules of Court, rule 2.1036(a) [when a deadlock is reported, the judge should ask jurors whether they have "specific concerns which, if resolved, might assist the jury in reaching a verdict"].) The *Brooks* Court found that section 1140 was not contravened because "seven jurors indicated that such assistance would, or might, be helpful," and "the court had an ample basis on which to conclude that there was a 'reasonable probability' a verdict could be reached," which was all that was required. (*Brooks*, *supra*, 3 Cal.5th at p. 93.)

On the other hand, the *Jiminez* court found that the trial judge coerced the jury into rendering a unanimous guilty verdict in violation of the defendant's Fourteenth Amendment right to due process. (*Jiminez*, *supra*, 40

F.3d at p. 978.) *Jiminez* is therefore helpful authority to federalize a claim of juror coercion.

C. Appellate Advocate Take-Aways.

So what can we learn from all of the above? Because juror coercion is analyzed in the "totality of the circumstances" (*Peoples*, *supra*, 62 Cal.4th at p. 783), it allows for a lot of appellate defense creativity when fashioning arguments that coercion occurred. Essentially, did the instruction expressly or impliedly cause the jurors to consider something other than "evidence and argument in open court." (*Gainer*, *supra*, 19 Cal.3d at p. 848.)

Consider the following questions:

1. Did the court depart from the written instructions when instructing the jury in open court? (*Silva*, *supra*, 20 Cal.3d at p. 493.)

2. What other jury instructions regarding juror conduct were given? (*Gainer*, *supra*, 19 Cal.3d at p. 852.)

3. If there was a known numerical division, did the court ask the foreperson to provide details of the jury's vote and/or comment regarding the numerical breakdown? (*Pride*, *supra*, 3 Cal.4th at p. 265.)

4. Did the court "express approval" of movement in deliberations? (*Landry*, *supra*, 2 Cal.5th at p. 83.)

5. Did the court set a timeline for jury deliberations? (*Jiminez*, *supra*, 40 F. 3d at p. 978.)

6. During deliberations, did the court invade the "sanctity" of jurors' thought processes by intrusive inquiry? (*Hamilton*, *supra*, 20 Cal.4th at p 294 & fn. 17; *Nelson*, *supra*, 1 Cal.5th at p. 568.)

7. Did the inquiry come before or after the verdict? (See *Hutchinson*, *supra*, 71 Cal.2d at p. 350.)

8. Did the trial court do more than inquire into a reasonable possibility of agreement that amounts to coercion of the jury by "displacing the jury's independent judgment 'in favor of considerations of compromise or

concession to expediency'"? (*Breaux*, *supra*, 1 Cal.4th at p. 319; *Carter*, *supra*, 68 Cal.2d at p. 817.)

9. How long was the trial and how voluminous the evidence, how complex were the issues? (*Rodriguez*, *supra*, 42 Cal.3d at p. 775.)

10. Was the trial court merely trying to "enhance [the jurors'] understanding of the case rather than pressuring them to reach a verdict "on the basis of matters already discussed and considered"? (*Rodriguez*, *supra*, 42 Cal.3d at p. 775.)

11. Did the court's instruction encourage the minority jurors to reexamine their views in light of the majority? (*Gainer*, *supra*, 19 Cal.3d at p. 852.)

12. Did the court say that the case must at some point be decided? (*Gainer*, *supra*, 19 Cal.3d at p. 852.)

13. Is there a way to argue any instruction to a deadlocked jury was a de facto *Allen* charge because the trial court directed the jurors to abandon a focus on the evidence as a basis for their verdict? (*Gainer*, *supra*, 19 Cal.3d at p. 852.)

14. Did the trial court make an untrue statement of law? (*Gainer's* second reason for disapproving *Allen*.)

15. Was the trial court's instruction a constitutional violation? (*Gainer*, *supra*, 19 Cal.3d 835, never reached the issue of whether there was a

due process violation, but see *Brooks*, *supra*, 3 Cal.5th 88 [rejecting on the record before it, but not precluding the argument that juror coercion can violate a defendant's statutory (Pen Code, § 1140) rights, as well as his or her federal and state constitutional rights to due process and a jury trial].)

III. SELECTED ISSUES AFTER THE VERDICT

A. If The Jury Forget To Sign The Forms, Can The Court Direct Them To Go Back And Deliberate?

Probably Not. (see *People v. Blair* (1987) 191 Cal.App.3d 832 [the court held that the jury's reconsideration constituted reversible error under Penal Code section 1162 because there was no jury mistake and any inconsistency could have been corrected by the trial court].)

B. Polling The Jury: Are There Appealable Issues Concerning Polling The Jury?

Polling the jury is governed by statute.

Penal Code section 1163, provides: "When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation."

Penal Code section 1164 provides:

> (a) When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall, subject to subdivision (b), be discharged from the case.

> (b) No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding.

The first note here is that a defense objection is required to raise issues arising from jury polling. (*People v. Anzalone* (2013) 56 Cal.4th 545, 550-551; see also *People v. Porter* (1955) 136 Cal.App.2d 461 [By not objecting at time jury was polled, defendant waives right to assert on appeal that not every juror gave affirmative answer to question whether verdict was his].)

There is a sufficient compliance with these statutes where the clerk reads the verdict and asks each member of the jury, "Is this your verdict?" and each replies in the affirmative. (*People v. Lopez* (1913) 21 Cal.App. 188, 190.)

If a juror dissents during the polling of a jury, the trial court may send the jury back for further deliberation, but if a juror who first answers evasively or in the negative, finally acquiesces in the verdict, it must be sustained. (People v. Burnett (1962) 204 Cal.App.2d 453, 458.)

A juror may dissent from a verdict at any time up to its final recordation, in which event the jury must be sent out for further deliberation. (*Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 266.) *Chipman* involved a prosecution for possession of stolen property in which one juror, when polled, dissented from the verdict of guilty, but the trial court accepted

the verdict as unanimous after eliciting from the dissenting juror that she had voted for a conviction in the jury room. (*Id*. at p. 267.) The court held that this conduct violated the defendant's constitutional right to a unanimous verdict (Cal. Const., art. I, §16). (*Id*. at pp. 266-267.)

In order to harmonize Penal Code section 1140 (trial court discretion when jurors at an impasse) with sections 1163 and 1164, it must be concluded that if at the time the jury is polled a negative or equivocal response is received to the poll, the trial judge has the discretion to interrogate the jurors further as to whether they are able to reach an agreement under Penal Code section 1140. (*In re Chapman* (1976) 64 Cal.App.3d 806, 814.)

Polling the jury is important because the verdict is not rendered in a criminal trial unless there is unanimity in the oral declaration. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1009-1010.) Neither the submission of the written verdict forms nor the clerk's reading of the forms constitutes the return of the verdict because the defendant has a constitutional right to a unanimous jury (Cal. Const., art I, § 16). (*Ibid*.) Under Penal Code section 1164, subdivision (a), the verdict is not "complete" if any juror dissents from the verdict as rendered, and the trial court must then reconvene the jury for further deliberation; in such circumstances, no verdict has been "returned." (*Id*. at p. 1010.)

Polling of jury is right available only on request of either party and failure to make proper request imposes no burden on court to poll jury; absent such request, failure to poll jury does not constitute denial of constitutional right. (*People v. Lessard* (1962) 58 Cal.2d 447, 452.)

If there are multiple counts, ensure that the jury was polled as to both counts. Absent an objection, however, may cause both forfeiture and a lack of prejudice. (See *People v. Wilkins* (1955) 135 Cal.App.2d 371.)

C. What If The Jurors Change Their Mind After The Verdict, But Before They Are Discharged?

When the verdicts have been collectively and individually confirmed in open court under Penal Code sections 1163 and 1164, and are complete in every detail, jurors are no longer empowered to dissent from the verdicts, and the trial court may not reconvene the jury for further deliberations on the basis of such dissent. (*People v. Bento* (1998) 65 Cal.App.4th 179, 191.) In the *Bento* court's view, "sections 1163 and 1164 describe a culminating formal procedure for verifying the unanimity of the jury in open court, and thus they define the moment of transition for when a juror may and may not withdraw his or her affirmation of the verdict. Before the verdict is complete within the meaning of these sections, a juror's expressions of doubt or confusion mandate further deliberations. After the passing of this moment, such expressions are

an impermissible attempt to impeach the verdict. In this respect, sections 1163 and 1164 define the final moment of the jury's deliberative process." (*Ibid*.)

CONCLUSION

When it comes to trial by jury, our judicial system relies on jurors who are fair and impartial and who are not improperly influenced by external factors. Even when the jurors fulfill their duty without misconduct, actions by the trial court and counsel may impermissibly affect the jurors' ability to reach a fair result. Accordingly, review of such actions on appeal is critical whether it is for purposes of an appealable issue or to strengthen an argument that our clients have suffered prejudice.