Berkeley Law | Clinical Program

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To: CCDS
From: Professor Elisabeth Semel on behalf of the Berkeley Law Death Penalty Clinic
Re: In Limine Motion for Questionnaire on Juror Demographic Information
Date: January 30, 2025

A.B. 3070 replaced the *Batson-Wheeler* procedure and added section 231.7 to the Code of Civil Procedure. While the new statute reforms some of the most fundamental deficiencies in the *Batson-Wheeler* framework, we believe that the availability of self-identified juror demographic information is critical to ending prosecutors' use of discriminatory peremptory challenges.

In 2023, former DPC student (now Orange County Deputy Public Defender) Casey Jang and I drafted an in limine motion that requests the trial court to (1) collect the demographic information of the entire venire, court, counsel, alleged victim(s), and witnesses; (2) provide the information to counsel for use during voir dire; and (3) make the information part of the record. Our thanks to Alameda County Deputy Public Defenders Jennifer Brandt and Karin Drucker for sharing their motions with us and to Eli Batchelder, formerly of OSPD, for reviewing a draft.

In 2024 and 2025, I revised the in limine motion. The 2025 version is included in your materials for this session.

The pleading is in Word so that you can easily adapt it to address considerations specific to your case, the county in which you practice, and the trial judge.

You should ask for jurors' race and ethnicity in every motion. The motion identifies case-specific information and optional language with brackets and/or highlighting.

If it is useful to acknowledge the Berkeley Law Death Penalty Clinic's authorship or contribution, feel free to do so. However, this is a sample motion, and you certainly need not do so.

I note the following:

1. Code of Civil Procedure section 205, subd. (c), cited on page 13, states: "The court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary for assisting in the voir dire process or to ascertain whether a fair cross section of the population is represented as required by law, *if such procedures are established by local court rule.* (Italics added.) We did not use the full quotation. The California Supreme Court Jury Selection Work Group noted that "no local rules currently set forth procedures that specifically allow courts to ask demographic questions of prospective jurors." (Jury Selection Work Group: Final Report to the Supreme Court of California (2022) p. 7.) We advise that you check for a local rule in your jurisdiction in the event the Final Report is incorrect. You might also consider stating the obvious: for decades, judges in every judicial district have approved and used "additional questionnaires" on a case-by-case basis.

2. Two cases from other states that you might find worth reading:

    a. In *State v. Bennett* (2020) 374 N.C. 579, the North Carolina Supreme Court held that the record regarding two prospective jurors' races was sufficient for appellate review of the defendant's *Batson* claim because the racial identity of the struck jurors was undisputed; defense counsel, the prosecutor, and the trial

court agreed that the jurors were African American. (*Id.* at pp. 594-595.) The Court accepted the "perceived" race of the jurors because of the trial participants' agreement, likening the agreement to a stipulation as to the jurors' races. (*Id.* at p. 595.) In other words, reliance on "perceived membership" carries little risk for our clients when there is agreement. The court distinguished three other cases in which the defendant failed to establish the jurors' race based on the subjective impressions of the court reporter (*State v. Mitchell* (1988) 321 N.C. 650); defense counsel (*State v. Payne* (1990) 327 N.C. 194); and defense counsel and the court reporter (*State v. Brogden* (1991) 329 N.C. 534). (*Id.* at pp. 592-595.) Language from these three cases may be useful in arguing against reliance on "perceived" membership.

b. In *State v. Smalley* (2022) WL 17974659 (UNPUBLISHED), the Washington Court of Appeals held that the defendant failed to show that General Rule 37 (the Washington analog to section 231.7) applied to the prosecution's peremptory challenge of a juror because there was nothing in the record establishing that the juror was a member of a cognizable group. (*Id.* at p. 14.) The trial court did not perceive the juror to be a person of color, and the prosecutor argued that the juror appeared to be white. (*Id.* at pp. 1-2.) The defendant's trial counsel believed the juror to be multiracial. (*Id.* at p. 2.) An important take-away from *Smalley* is that, although GR 37 and section 231.7 eliminated *Batson*'s step one, the objecting party must still show that the juror

is a member of a protected group. The opinion also shows how reliance on "perceived" membership can preclude appellate relief.

You are not authorized to distribute this cover memo or the sample motion to anyone who is not a criminal defense lawyer. When you file the motion, it is, of course, a matter of public record.

I welcome suggestions for other pleadings that would be useful to the defense bar in litigating section 231.7 issues. If you file an in limine motion of any kind related to section 231.7, please send me copy. My email address is above.