# Chapter 28

# Selecting the Jury at Trial: The *Voir Dire*

## § 28.01 INTRODUCTION

In a jury trial, the *voir dire* is the process by which the actual trial jurors (and alternates) are selected from the jury panel. Prior to the *voir dire,* counsel has had no real hand in the jury selection process, apart from the possibility of attacking it here or there for procedural defects. At the *voir dire,* counsel will have the opportunity to play a large part in determining what particular jurors are going to sit on the trial of the case. S/he will also have his or her first chance to talk to those jurors – directly or indirectly – and to say some things to them that will strongly affect their attitudes toward counsel, the respondent, and the case.

## § 28.02 DEFENSE OBJECTIONS TO THE PANEL PRIOR TO THE *VOIR DIRE*

Before or at the time the panel is brought into the courtroom, counsel is given a list of the individuals on it, ordinarily indicating names, addresses, and occupations. Counsel's previous investigation of the venirepersons, coupled with this list of those among them who have been selected for the panel, may suggest some ground of challenge to the panel collectively. See §§ 21.03-21.04 *supra.* If counsel decides to make such a challenge, s/he should do so before the panel is brought in to the courtroom. If that is not possible, s/he should ask leave to approach the bench and should make the challenge out of the hearing of the prospective jurors. Counsel is hardly going to be received favorably by the jurors if, on their first contact, s/he is cast in the role of an objector – and one who opposes their very presence in court.

## § 28.03 *VOIR DIRE* PROCEDURE GENERALLY

Practice on *voir dire* differs widely from jurisdiction to jurisdiction. Its common features are these: Prospective jurors are are sworn in (*see Barral v. State*, 131 Nev. Adv. Op. 52, 353 P.3d 1197 (2015)), and are told something about the case and the parties and participants in it. They are questioned, either individually or collectively or in both ways, to determine whether they (1) lack the statutory qualifications to be a juror, (2) are otherwise subject to challenge, or (3) should be relieved from jury duty at their request (a disposition sometimes described by saying that the juror is "excused" or "granted an excuse" or "granted an exemption") because of personal hardship, important conflicting obligations, or similar matters. *See*, *e.g.*, *United States v. Colon*, 64 F.4th 589 (4th Cir. 2023) (upholding a district court's *sua sponte* orders striking of all prospective jurors who were not vaccinated against COVID-19). The prosecution and defense are given the opportunity to object to any juror on grounds that are legally sufficient to preclude him or her from sitting (that is, in the jargon, "to challenge the juror for cause"); and the trial jurors (and alternates) are selected from the remaining panelists through the exercise of peremptory challenges or "strikes" by prosecution and defense.

Thus, there are two sorts of challenges to individual jurors: challenges for cause and peremptory challenges.

### § 28.03(a) Challenges for Cause

Challenges for cause assert that a prospective juror is not lawfully able to serve. They may be based on any of a number of grounds, the most important being:

(i) *Lack of statutory qualifications*.

(ii) *Implied bias*. The circumstances that support a challenge for implied bias are specified by statute in some jurisdictions; in others, they are left to common-law elucidation by the courts. They ordinarily include: (1) a financial interest or other direct personal stake in the outcome of the case, and (2) a familial relationship, business relationship, or other close connection to the respondent, the complainant or victim, a witness, or counsel for one of the parties. *See*, *e.g.*, *State v. Eddington*, 228 Ariz. 361, 266 P.3d 1057 (2011) (applying a statute which provides that any person "interested directly or indirectly in [a] matter" is disqualified from serving as a juror (*id*. at 362, 266 P.3d at 1058), the Arizona Supreme Court holds that "that a peace officer currently employed by the law enforcement agency that investigated the case is an 'interested person' . . . [challengeable for cause. Our conclusion does not depend on the particular officer's knowledge of witnesses or facts of the case or the officer's belief in his or her ability to be fair and impartial." *Id*. at 365, 266 P.3d at 1061.). Challenges for cause are often allowed by trial judges more liberally than the legal doctrines defining implied bias dictate, and their allowance may reflect stereotypical assumptions about the ability of classes of persons – such as individuals who have come into indirect contact with the criminal justice system – to be impartial. *See* Matthew Clair & Alix S. Winter, *The Collateral Consequences of Criminal Legal Association During Jury Selection* (forthcoming, LAW & SOCIETY REV.), *available at*: https://scholar.harvard.edu/matthewclair/publications/collateral-consequences-criminal-legal-association-during-jury-selection. This, together with the pervasive statutory disqualification of convicted felons and the commonplace practice of many judges to sustain prosecutorial challenges for cause to venirepersons with arrest records, results in disproportionate exclusion of African-Americans. *See* Lauren Kingsbeck, Note, *A History of Exclusion: "For Cause" Challenges and Black Jurors*, U. ST. THOMAS L.J. 654 (2023). At pages 665-66, this Note suggests steps that trial judges might be persuaded to take to reduce the disproportion.

(iii) *Express bias (also commonly called "actual bias")*. This traditionally meant an unyielding belief in the accused's guilt or innocence that the juror is unable to suspend. It also includes any state of mind that would render a juror unable to

fairly consider the defendant's guilt or innocence – or the question of the defendant's sentence in trials in which the jury does the sentencing – (*see, e.g.*, *Ex parte Killingsworth*, 82 So.3d 761 (Ala. 2010) (reversing a conviction on the ground that the defendant was denied his state and federal constitutional rights to trial by an impartial jury when the trial judge failed to excuse a juror who said on *voir dire* that she knew several members of a victim's family and, when asked whether she would be biased by that, nodded affirmatively)) or that would cause a juror to give unwarrantedly greater credence to prosecution evidence than to defense evidence (*see*, *e.g.*, *People v. Gulyas*, 2022 COA 34, 512 P.3d 1049, 1054 (Colo. App. 2022) (the trial court should have excuse for cause a juror who, because he had two young daughters, would tend to believe the testimony of the child complainant in a sexual abuse prosecution over the testimony of an adult defendant: "the court must excuse a prospective juror who favors one side over the other or who cannot impartially evaluate the credibility of the witnesses") or that prejudices a juror against the defendant because of the defendant's race, religion, ethnicity or other irrelevant personal characteristics (*see*, *e.g.*, *State v. Bates*, 2020-Ohio-634, 159 Ohio St. 3d 156, 161-62, 165, 149 N.E.3d 475, 482, 484-85 (2020) ("One of the questions on the written juror questionnaire asked, 'Is there any racial or ethnic group that you do not feel comfortable being around?' Juror No. 31, a Caucasian woman, answered 'yes' and in the space allotted for explanation wrote: 'Sometimes black people.' Another question started with the statement, 'Some races and/or ethnic groups tend to be more violent than others,' then asked jurors to choose among the options of 'strongly agree,' 'agree,' 'strongly disagree, 'disagree,' and 'no opinion.' Juror No. 31 indicated that she strongly agreed and then wrote 'Blacks' in the space allotted for explanation. ¶ . . . Under these facts, we hold that juror No. 31's statements demonstrate her actual bias against Bates. . . . ¶ . . . [A] defendant may demonstrate actual racial bias by showing that a juror has expressed a bias against a racial group to which the defendant belongs that indicates that the juror is unable to be impartial in the particular case before him or her . . . "); *cf. Peña-Rodriguez v. Colorado*, 580 U.S. 206, 223 (2017) ("[D]iscrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.' . . . The jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."' . . . Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"); *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018), or that disposes a juror to be particularly sympathetic to the complainant or victim on account of similar class or personal characteristics (*see*, *e.g.*, *United States v, Nelson*, 277 F.3d 164 (2d Cir. 2002)). In some jurisdictions a venireperson who asserts that s/he is able to put aside his or her opinion or prejudice and to consider the case fairly on the basis of the evidence presented at trial will escape a challenge for cause on the ground of express bias. There has, however, been a movement away from this position: Courts are increasingly coming to the view

that a venireperson's protestations of ability to disregard his or her preexisting biases and be guided solely by the evidence will not insulate him or her from a challenge for cause if those preexisting biases are strong. *See*, *e.g.*, *People v. Tyburski*, 445 Mich. 606, 628, 518 N.W.2d 441, 451 (1994) ("[c]ourts have long recognized that juror self-assessment of bias is inherently untrustworthy"); *Sampson v. United States*, 724 F.3d 150, 164 (1st Cir. 2013) (recognizing that "a person who harbors a bias may not appreciate it and, in any event, may be reluctant to admit her lack of objectivity"); *State v. Faucher*, 227 Wis. 2d 700, 731-32, 596 N.W.2d 770, 784-85 (Wis. 1999) ("The circuit court believed that Kaiser was honest when he testified that he could set aside his opinion. On our review of the record we conclude that the circuit court's finding that Kaiser was a reasonable person who was sincerely willing to put aside his opinion is not clearly erroneous. . . . The circuit court's determination that juror Kaiser was not subjectively biased is not clearly erroneous. . . . ¶ The circuit court did not consider whether juror Kaiser was objectively biased. Upon concluding that Kaiser was sincere in his willingness to set aside his opinion, the circuit court ended its inquiry. The circuit court's decision not to dismiss Kaiser was based solely on Kaiser's statement that he could set aside his opinion, and the court's erroneous belief that it had to 'believe his response.' On examination of the record, we conclude as a matter of law that a reasonable judge can reach only one conclusion; that is that the juror was objectively biased."); *Walker v. State*, 262 Ga. 694, 696, 424 S.E.2d 782, 784 (1993) ("[T]he court asked the juror if he could lay aside his 'feelings for the victim's family' and his 'acquaintances with the people in the District Attorney's office' and decide the case based on the evidence presented at trial. The juror at first answered, 'I think I could,' but when the trial court suggested, 'you've got to be more reassuring than that,' the juror stated: 'I could.' Based on that answer, the trial court denied appellant's challenge for cause. . . . ¶ Here, the juror himself was hesitant to say he could decide the case impartially, doing so only after the court told him he would have to be 'more reassuring.' We agree with the defendant that this admonition was more an 'instruct[ion] on the desired answer' than a neutral attempt to determine the juror's impartiality. ¶ Given the juror's close relationship to the trial judge, the district attorney, the latter's staff, law enforcement officers and the victim's family, his hauntingly similar experience with a member of his family being killed in a robbery of a grocery store, and his admitted bias in favor of the state, the defendant's challenge for cause should have been granted."); *Matarranz v. State*, 133 So.3d 473, 490 (Fla. 2013) ("Any lawyer who has spent time in our courtrooms, whether civil or criminal, has experienced the frustration of prospective jurors expressing extreme bias against his or her client and then recanting upon expert questioning by the opposition, which generates such embarrassment as to produce a socially and politically correct recantation. When a juror expresses his or her unease and reservations based upon actual life experiences, as opposed to stating such attitudes in response to vague or academic

questioning, it is not appropriate for the trial court to attempt to 'rehabilitate' a juror into rejection of those expressions . . . ."); *United States v. Kechedzian*, 902 F.3d 1023, 1029 (9th Cir. 2018) (in a prosecution for identity theft, a juror who expressed doubts about her ability to be impartial because she had had her social security number stolen five years earlier should have been excused for cause on grounds of actual bias, although further questioning by the trial judge elicited a statement that she would try to be fair: "Juror # 3 never affirmatively stated that she could be impartial. In fact, Juror # 3 was asked three times . . . if she could be impartial. And each time, she replied equivocally: (1) 'I might be able to put that aside'; (2) 'I would want to put my personal stuff aside, but I honestly don't know if I could'; and (3) 'I would try to be fair.' Likewise, we reject any argument that Juror # 3's final response – 'I would try to be fair" – is an unequivocal statement of impartiality."); *cf. United States v. Tsarnaev*, 142 S. Ct. 1024, 1034 (2022) (dictum) (the trial "court's duty is to conduct a thorough jury-selection process that allows the judge to evaluate whether each prospective juror is 'to be believed when he says he has not formed an opinion about the case.'"); Patrick T. Barone & Michael B. Skinner, *Breaking the Spell of the Magic Question During* Voir Dire, 39-MAR THE CHAMPION 22 (2015). See also the following paragraph.

(iv) *"[S]uch fixed opinions that [the juror can] . . . not judge impartially the guilt of the defendant." Patton v. Yount*, 467 U.S. 1025, 1035 (1984). "[D]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). See also §§ 21.01, 21.03(a) *supra*. This constitutional standard is somewhat more favorable to the accused than the concept of express bias as the latter concept is applied in a number of jurisdictions because a "juror's assurances that he [or she] is equal to [the] . . . task [of laying aside his or her previously-formed opinions and rendering a verdict based solely on the law and the evidence] cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" *Murphy v. Florida*, 421 U.S. 794, 800 (1975) (dictum); *see Irvin v. Dowd*, 366 U.S. 717, 724, 728 (1961); *Williams v. True*, 39 Fed. Appx. 830 (4th Cir. 2002); *compare Smith v. Phillips*, 455 U.S. 209 (1982). "[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton v. Yount*, 467 U.S. at 1031 (dictum); *cf. Holbrook v. Flynn*, 475 U.S. 560, 570-72 (1986) (dictum). Extrajudicial exposure of potential jurors to powerful evidence of the respondent's guilt can have a similar effect. *Rideau v. Louisiana*, 373 U.S. 723 (1963). "The constitutional standard [is] that a juror is impartial only if he [or she] can lay aside his [or her] opinion and render a verdict based on the evidence presented in court." *Patton v. Yount*, 467 U.S. at 1037 n.12. If the juror swears on

*voir dire* that s/he can, the issue of his or her credibility – that is, the question "should the juror's protestation of impartiality [be] . . . believed" – must be resolved by a factual finding of the court. *Id*. at 1036. *Cf*. *People v. Martinez*, 165 A.D.3d 1288, 1289-90, 86 N.Y.S.3d 143, 145 (N.Y. App. Div., 2d Dep't 2018) ("[t]he prospective juror's initial response" – "that, given his experience in an area prone to crime, it was a 'legitimate question' whether he could be fair to the defendant and [that] the prospective juror was not sure whether he could be fair" – "was not rehabilitated by his collective response with the rest of the prospective jurors that he could be open, fair, and impartial . . . . '[N]othing less than a personal, unequivocal assurance of impartiality can cure a juror's prior indication' of predisposition against a defendant").

(v) *Knowledge of the factual circumstances giving rise to the delinquency charge being tried. See*, *e.g.*, *Titus v. State*, 963 P.2d 258, 262-63 (Alaska 1998) ("We agree with the majority view that pre-existing knowledge about the case or the defendant can constitute extraneous prejudicial information . . . . ¶ . . . Because not all jurors will have access to specific facts about the crime and the defendant's connection thereto, those who purport to have such information may be believed without debate, even if their information is inaccurate. Permitting juries to convict defendants when they have considered such extra-record information would undermine interests in both fairness and accuracy by robbing the defendant of the chance to contest such evidence. We therefore conclude that a distinction must be made between a juror's general background knowledge about the defendant or the charge and a juror's knowledge about specific facts relating to the alleged crime and the defendant's involvement in it.").

(vi) *Any state of mind that makes it impossible for the juror to follow the court's instructions and to decide the case according to the law.* A prospective juror who is unable or unwilling to comply with the substantive legal rules bearing on the case or with the procedural rules governing its trial is challengeable for cause. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 595-97 (1978); *Morgan v. Illinois*, 504 U.S. at 729, 738-39; *compare United States v. Wilkerson*, 966 F.3d 828, 834 (D.C. Cir. 2020) (a juror who indicates during deliberations that s/he disagrees with the court's instructions and the applicable legal rules is subject to dismissal and replacement by an alternate: "the Sixth Amendment does not afford a defendant the right to a juror who is determined to disregard the law"), *and United States v. Martinez*, 2022 WL 3083358 (11th Cir. 2022) (approving a district judge's exercise of discretion to excuse a juror who, after about an hour of deliberations, displayed "paroxysm[s] of weeping": when questioned by the judge, the juror began by saying "I can't put someone else's life in my decision and I feel as though [Martinez] wasn't guilty and everybody is like . . ."; then, after being advised that the jury would not decide the issue of penalty and after further questioning, the juror answered "no" to the judge's question whether she could

continue to deliberate), *with United States v. Litwin*, 972 F.3d 1155 (9th Cir. 2020) (reversing a conviction where the trial judge's dismissal of a juror during deliberations was based in substantial part on the juror's views of the strength of the government's case), *and United States v. Brown*, 996 F.3d 1171, 1175 (11th Cir. 2021) (en banc) ("This appeal requires us to decide whether a district judge abused his discretion by removing a juror who expressed, after the start of deliberations, that the Holy Spirit told him that the defendant, Corrine Brown, was not guilty on all charges. The juror also repeatedly assured the district judge that he was following the jury instructions and basing his decision on the evidence admitted at trial, and the district judge found him to be sincere and credible. But the district judge concluded that the juror's statements about receiving divine guidance were categorically disqualifying. Because the record establishes a substantial possibility that the juror was rendering proper jury service, the district judge abused his discretion by dismissing the juror. The removal violated Brown's right under the Sixth Amendment to a unanimous jury verdict. We vacate Brown's convictions and sentence and remand for a new trial."), *and Moon v. State*, 312 Ga. 31, 860 S.E.2d 519 (2021) (reversing a conviction on the ground that the trial judge had dismissed a holdout juror without making an adequate inquiry into whether, as alleged by other jurors, she was refusing to deliberate and otherwise behaving in a manner justifying her disqualification). *And see People v. Hernandez*, 174 A.D.3d 1352, 1353, 105 N.Y.S.3d 763, 764-65 (N.Y. App. Div., 4th Dep't 2019) (the trial "court . . . erred in denying defendant's challenge for cause with respect to . . . [a] juror" who "repeatedly insist[ed] that police officers were unlikely to lie under oath because doing so would endanger their pensions," and who thereby "'cast serious doubt on [her] ability to render a fair verdict under the proper legal standards' and to follow the court's instructions concerning, at a minimum, issues of witness credibility"). The latter rules include the presumption of innocence and the principle that the prosecution bears the burden of proving guilt beyond a reasonable doubt. See §§ 32.01, 36.06 *infra*. Some venirepersons who have formed opinions that the respondent is guilty but who escape a challenge for cause on grounds of express bias because they profess to be able to disregard those opinions can be gotten to admit on *voir dire* that they would require evidence to change their opinions; and this admission renders them vulnerable to a challenge for cause on the ground that they cannot abide by the presumption of innocence. *See*, *e.g.*, *Glover v. State*, 248 Ark. 1260, 1263-68, 455 S.W.2d 670, 672-75 (1970).

When inquiry discloses grounds requiring that a prospective juror be discharged for cause, s/he may be excluded by the court *sua sponte*, or s/he may be challenged by the prosecutor or defense counsel. Technically, the number of challenges for cause that counsel may make is unlimited; each challenge must be tested by the court for its legal validity and sustained if valid, regardless of how many other challenges for cause counsel has made. *But see* § 28.03(d) *infra*.

*Ross v. Oklahoma, supra*, holds that if the accused uses a peremptory challenge (see the following section) to remove a juror whom the trial judge erroneously declined to excuse for cause, that erroneous ruling is forfeited as a basis for appellate reversal. A number of state courts reject this result as a state-law matter. *E.g.*, *Matarranz v. State*, 133 So.3d at 482-84; *State v. Wacaser*, 794 S.W.2d 190 (Mo. 1990); *Johnson v. State*, 43 S.W.3d 1 (Tex. Crim App. 2001) (en banc); *cf*. *Boggs v. State*, 667 So.2d 765 (Fla. 1996). In these States, the error is preserved if the accused (a) objects to the denial of the challenge for cause, (b) exhausts all of his or her peremptory challenges, (c) requests additional peremptory challenges, and (d) objects to the denial of that request. (In some of these jurisdictions, it is also necessary to raise this claim of error – like all other claims of pretrial and trial error – in a motion for a new trial, in order to preserve it for appellate review.)

For a thoughtful critique of the untested assumptions underlying current challenge-for-cause practices, *see* Anna Offit, *The Character of Jury Exclusion*, 106 MINN. L. REV. 2173 (2022).

**§ 28.03(b) Peremptory Challenges**

The prosecution and the defense each has a limited number of peremptory challenges specified by law (ordinarily more in felony than in misdemeanor cases). It is by the exercise of these peremptory challenges ("strikes") that counsel usually goes about trying to get the sort of jury s/he wants. S/he pursues the same ends, of course, by unearthing good legal grounds to challenge for cause a juror whom s/he does not like or by declining to challenge a juror, obviously challengeable for cause, whom s/he does like. But challenges for cause are of limited utility in this regard; peremptories are counsel's major tool for shaping the character of the jury.

Except when the peremptories appear to be employed in a discriminatory manner to exclude certain cognizable groups, a peremptory challenge can be made by the prosecutor or defense counsel for any reason whatsoever, and the attorney cannot be required to give a justification or explanation. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, defense counsel can object to a prosecutor's use of peremptories to exclude "racial minorities" (*Miller-El v. Dretke*, 545 U.S. 231, 235 (2005); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019)) or women (*J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127 (1994)), and, at least arguably, can oppose the systematic exclusion of other cognizable groups as well (*see* NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES § 4:14 (2d ed. 2021-22); *Commonwealth v. Carter*, 488 Mass. 191, 201, 172 N.E.3d 367, 379 (2021) (dictum) ("We now conclude that a peremptory challenge based on a prospective juror's sexual orientation is prohibited by arts. 1 and 12 [of the Massachusetts Constitution] and the equal protection clause of the Fourteenth Amendment."); *People v. Bridgeforth*, 28 N.Y.3d 567, 571-72, 69 N.E.3d 611, 613-14, 46 N.Y.S.3d 824, 826-27 (2016) (New York's high court holds that "under this State's Constitution and Civil Rights Law, [skin] color is a classification upon which a *Batson* challenge may be lodged," and the defendant made "a prima facie showing of discrimination when he challenged the prosecutor's use of peremptory strikes to exclude

dark-colored women"; "Discrimination on the basis of one's skin color – or colorism – has been well researched and analyzed, demonstrating that 'not all colors (or tones) are equal' . . . . Persons with similar skin tones are often perceived to be of a certain race and discriminated against as a result, even if they are of a different race or ethnicity. That is why color must be distinguished from race.")). A few courts have held that Caucasians are a cognizable group for *Batson* purposes. *Government of the Virgin Islands v. Forte*, 865 F.2d 59 (3d Cir.1989); *State v. Hurd*, 246 N.C. App. 281, 784 S.E.2d 528 (2016); *Williams v. State*, 634 So.2d 1034, 1037-38 (Ala. Crim. App. 1993) (considered dictum); *People v. Gomez*, 2020 WL 6482969 (Cal. App. 2020). The accused can invoke the *Batson* doctrine even if s/he is not a member of the excluded group. *Powers v. Ohio*, 499 U.S. 400 (1991). Defense counsel's peremptory challenges are also subject to *Batson* objection by the prosecutor, at least insofar as they appear to be aimed at excluding racial minorities. *See Georgia v. McCollum*, 505 U.S. 42 (1992); *and see*, *e.g.*, *United States v. Robertson*, 736 F.3d 1317 (11th Cir. 2013); *State v. Hurd*, 246 N.C. App. 281, 784 S.E.2d 528 (2016). *But see Sells v. State*, 109 A.3d 568, 581-82 (Del. 2015) ("[B]ecause African Americans like Sells are members of a minority group in Kent County, the pattern of peremptory strikes against only Caucasian members of the venire may provide less of an inference of discrimination. If a super-majority of the venire is Caucasian, a pattern of striking white jurors is less telling evidence that race was a factor, because the mathematical odds would be that most potential jurors questioned for the parties to strike would be Caucasian. Thus, trial courts should be cautious about inhibiting the use of peremptory strikes by the accused except after careful application of *Batson*. Because here there was an insufficient basis for the trial court's conclusion that there was a 'pattern' of discrimination, prejudice must be presumed and a new trial is required."); *accord, McCoy v. State*, 112 A.3d 239 (Del. 2015); *People v. Kabongo*, 507 Mich. 78, 112-13, 968 N.W.2d 264, 287 (2021) (opinion supporting a majority's position on this issue although the Michigan Supreme Court is equally divided on other issues in the case) ("The prosecution's reliance on the number of peremptory challenges to remove white jurors alone does not show any pattern of discrimination. Defendant's challenges were not against a minority ethnic group, so, presumably, there were plenty of white individuals left both on the prospective panel and in the venire. And the prosecution was not necessarily entitled to 'ask for' a reason for the peremptory challenge. Even though no party has raised the argument that the prosecution's prima facie case failed, we would conclude that it did."); *People v. Wilson*, 23 A.D.3d 682, 682, 806 N.Y.S.2d 671, 672 (N.Y. App. Div., 2d Dep't 2005) (rejecting the prosecution's *Batson* challenge to defense counsel's peremptory strikes of four prospective jurors, the court explains that defense counsel presented the "nonpretextual reason" that "the prospective jurors were victims of crimes," and there is "'a rational basis for the suspicion that a crime victim might be less sympathetic to an accused criminal than would a person who has never been victimized by crime'"); *State v. Nelson*, 2010-1724 (La. 3/13/12), 85 So.3d 21, 32-33 (La. 2012) ("[T]he trial court merged the steps of the *Batson* analysis which improperly shifted the burden of proof to defense counsel – the proponent of the strike. The . . . the trial court never made a finding that the race neutral reasons offered by defendants were pretextual. Although none of the proffered reasons appears to inherently violate equal protection, the court nonetheless rejected nine of them for no specific reason. In rejecting defendants' proffered race-neutral reasons, the trial court reasoned that defendants failed to rebut the State's prima facie case of discrimination, essentially

finding the defendants' reasons not persuasive enough. The court erred in putting the burden of persuasion on the defendants. . . . *Batson* makes clear that the burden is on the *opponent* of the strike to show purposeful discrimination."); *accord*, *Aki-Khuam v. Davis*, 339 F.3d 521 (7th Cir. 2003), *and State v. Mootz*, 808 N.W.2d 207 (Iowa 2012), *and State v. Reiners*, 644 N.W.2d 118 (Minn. App. 2002). A trial judge's erroneous allowance of a prosecutor's *McCollum* challenge does not, however, necessarily entail automatic reversal: "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws." *Rivera v. Illinois*, 556 U.S. 148, 157 (2009); *compare State v. Reiners*, *supra*, *and State v. Pierce*, 2012-0879 (La.App. 4 Cir. 12/10/13), 131 So.3d 136 (La. App. 2013) (holding as a matter of state law that an erroneous allowance of a *McCollum* challenge does require automatic reversal). "Following *Rivera*, the majority of states have continued to apply an automatic reversal rule on the basis of state law. . . . Delaware law is consistent with the holdings by the majority of the highest courts in other states." *McCoy v. State*, 112 A.3d at 255.

Under *Batson*, defense counsel can make out a *prima facie* case of discriminatory jury selection by showing that the prosecutor has exercised peremptories to exclude members of an "arguably targeted class" (*Miller-El v. Dretke*, 545 U.S. at 239) and that the numbers of group members excluded or other circumstances raise an inference that the prosecutor is challenging these persons on account of their membership in that group. "The prosecutor's 'strike rate' when compared to the final composition of the jury is particularly relevant." *Coombs v. Diguglielmo*, 616 F.3d 255, 262 (3d Cir. 2010). *See Commonwealth v. Carter*, *supra* (finding a *prima facie* case even though, at the time of the strike at issue, six of the twelve already-seated jurors were African-American and less than 27% of the prosecution's peremptory challenges had been directed to African-Americans (488 Mass. at 195, 198, 172 N.E.3d at 374, 376); "We have cautioned judges not to rely heavily on composition [of the group of jurors previously seated], as '[t]he bare fact that some members of a protected group were seated on a jury does not immunize future peremptory challenges from constitutional scrutiny.'" *Id*. at 197, 172 N.E.3d at 376.); *accord*, *Saunders v. Tennis*, 483 Fed. Appx. 738, 743 (3d Cir. 2012) (dictum) ("Saunders argues – and both the Magistrate Judge and the District Court found – that the state court's step-one determination that Saunders failed to demonstrate a *prima facie* case was contrary to *Batson*. We agree. First, the state court unreasonably applied *Batson* when it rejected Saunder's objection on the basis that four African–American women had been selected for the jury, making African–American women the best-represented demographic on the panel. *Batson* makes clear that 'the State's privilege to strike *individual* jurors through peremptory challenges' is restricted by the Equal Protection Clause. . . . Accordingly, 'a prosecutor's purposeful discrimination in excluding even a single juror on account of race cannot be tolerated . . . [and] a prosecutor . . . can find no refuge in having accepted other [ ] venirepersons of that race for the jury."), and *Holloway v. Horn*, 355 F.3d 707, 720 (3d Cir. 2004). "Our precedents allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. For example, defendants may present:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination." (*Flowers v. Mississippi*, 139 S. Ct. at 2243.)

The burden on defense counsel at this first step in the process of applying *Batson* – commonly called *Batson*'s "three-step inquiry" (*Rice v. Collins*, 546 U.S. 333, 338 (2006); *Foster v. Chatman*, 578 U.S. 488, 499 (2016); *Williams v. Louisiana*, 579 U.S. 911, at 911 (2016) (concurring opinion of Justice Ginsburg)) or *Batson*'s "burden-shifting framework" (*Johnson v. California*, 545 U.S. 162, 170 (2005)) – is simply to present enough evidence of various sorts so that "the sum of the proffered facts gives 'rise to an inference of discriminatory purpose'" (*id.* at 169) – an inference "that discrimination may have occurred" (*id*. at 173). It is not necessary for the defense to show that "'it is more likely than not . . . [that the prosecutor's] peremptory challenges, if unexplained, were based on impermissible group bias.'" *Id*. at 168. *See also Commonwealth v. Sanchez*, 485 Mass. 491, 509-14, 151 N.E.3d 404, 422-26 (2020); *Madison v. Commissioner, Ala. Dept. of Corrections*, 677 F.3d 1333, 1338-39 (11th Cir. 2012) ("Madison argues that the Court of Criminal Appeals unreasonably applied clearly established federal law because the court used the wrong standard for establishing a prima facie case when it required Madison to establish 'purposeful racial discrimination' rather than to provide sufficient support for an inference of discrimination. We agree that requiring Madison to 'establish[ ] purposeful discrimination' is the wrong standard to apply for the first step of *Batson*, which only requires Madison to produce sufficient 'facts and any other relevant circumstances' that 'raise an inference . . . of purposeful discrimination.'" ¶ "Madison presented to the Alabama courts several relevant circumstances that in total were sufficient to support an inference of discrimination. . . . In addition to pointing out that the prosecutor used a number of his strikes against a variety of black jurors, Madison noted: (1) the failure of the prosecutor to ask questions to three of the challenged jurors, . . . (2) the case's racially sensitive subject matter, . . . and (3) the district attorney's office's prior discrimination in jury selection, occurring both in Madison's first trial and in other state cases."). *Compare City of Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (2017) (construing the state constitution's equal protection clause to "hold that the peremptory strike of a juror who is the only member of a cognizable racial group on a jury panel constitutes a prima facie showing of racial motivation. The trial court must ask for a race-neutral reason from the striking party and then determine, based on the facts and surrounding circumstances, whether the strike was driven by racial animus." (*id*. at 736, 398 P.3d at 1132); the court also follows "[s]everal state and federal jurisdictions" in "allow[ing] *Batson* challenges even after a jury has been selected and sworn in" (*id*. at 728, 398 P.3d at 1128).).

"'Once the defendant makes [such] a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors' within [the] . . . arguably targeted class . . . [and to] 'give a clear and reasonably specific explanation of . . . [the prosecutor's] legitimate reasons for exercising the [peremptory] challeng[e].'" *Miller-El v. Dretke*, 545 U.S. at 239, quoting *Batson*, 476 U.S. at 97, 98 n.20. Upon defense counsel's request, the trial judge must require the prosecutor to state for the record his or her reasons for peremptorily challenging each potential juror of the arguably targeted class. *Johnson v. Martin*, 3 F.4th 1210, 1224 (10th Cir. 2021) ("'[O]nce a prima facie case of racial discrimination has been established, the prosecutor must *provide* race-neutral reasons for the strikes.' . . . Thus, when a trial court offers its own speculation as to the prosecutor's reasons for striking minority jurors, it essentially disregards its own core function under *Batson* – to evaluate the reasons offered by the prosecutor, including the prosecutor's demeanor and other contextual information, in order to determine the prosecutor's true intent. . . . And in that regard, it matters not a whit that the trial court may have offered perfectly good reasons for striking the minority jurors."). *Cf. People v. Madrid*, 2023 CO 12, 526 P.3d 185, 189 (Colo. 2023) ("Following a second appeal in this case, we agreed to consider whether a party on remand may raise a new race-neutral reason to justify a peremptory strike made at trial. Our answer is no. We hold that when a party has been provided with an adequate opportunity to present its race-neutral justifications at trial, it is barred from introducing new race-neutral justifications on remand.")."An explanation for a strike that assumes a prospective juror's bias in favor of a defendant because both are members of the same race is not race-neutral under clearly established Supreme Court precedent. . . . Among *Batson*'s core teachings . . . is that '[r]ace cannot be a proxy for determining juror bias or competence.'" *Porter v. Coyne-Fague*, 35 F.4th 68, 78 (1st Cir. 2022). If the prosecutor professes to rely on documentary materials – for example, notes s/he made during jury selection, notations on venire lists, summaries of prospective jurors' pre-court questionnaire responses, a juror-rating system, or records of previous jury-selection proceedings and verdict outcomes – s/he waives any work-product privilege relating to those materials, and defense counsel should move for their disclosure. *People v. Superior Court of San Diego County,* 12 Cal. 5th 348, 499 P.3d 999, 287 Cal. Rptr. 3d 312 (2021); *Box v. Superior Court*, 87 Cal. App. 5th 60, 67, 303 Cal. Rptr. 3d 317, 322-23 (2022) ("Where a prima facie case of racial bias under Batson . . . has been made, a defendant is entitled to discover the prosecution's jury selection notes . . . . Those notes are not categorically shielded from discovery by the absolute work product privilege. . . . To the extent the People maintain that those notes reflect the prosecution's impressions, conclusions, opinions, or legal research and theories about case strategy independent of conclusions or impressions about prospective jurors, they bear the burden to make that foundational proffer and seek appropriate redactions from the trial court."). *See* Darryll K. Brown, Batson *v.* Armstrong*: Prosecution Bias and the Missing Evidence Problem*, 100 OR. L. REV. 101 (2022). After the prosecutor has stated his or her reasons for challenging the jurors in the targeted class whom s/he has excused, "the court must . . . determine whether the defendant has carried his burden of proving purposeful discrimination. . . . This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice v. Collins*, 546 U.S. at 338, quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam); *Davis v. Ayala*,

576 U.S. 257, 270-71 (2015). *See also, e.g.*, *Rice v. White*, 660 F.3d 242 (6th Cir. 2011); *Adkins v. Warden*, 710 F.3d 1241, 1255-58 (11th Cir. 2013); *Harris v. Hardy*, 680 F.3d 942, 952-66 (7th Cir. 2012); *Ali v. Hickman*, 584 F.3d 1174, 1192-96 (9th Cir. 2009). "To meet that burden, . . . [the defendant] 'need not prove that all of the prosecutor's race-neutral reasons were pretextual, or even that the racial motivation was "determinative."' . . . [S/he] must instead 'demonstrate that "race was a substantial motivating factor" in the prosecutor's use of the peremptory strike.'" *Walker v. Davis*, 822 Fed. Appx. 549, 552 (9th Cir. 2020). *See, e.g.*, *Shirley v. Yates*, 807 F.3d 1090, 1113 (9th Cir. 2015) ("Shirley's *prima facie* evidence of discrimination was met with only a lengthy statement that . . . [the prosecutor] 'liked to see jurors who have life experience.' His vague, general preference – as opposed to a regular practice of striking veniremembers for a specific reason – constituted at most an inclination towards jurors with highly indefinite attributes or qualities. A vague approach to jury selection may constitute sufficient circumstantial evidence for purposes of Step Two, but, in a case in which the prosecutor does not recall his actual reason for striking the juror in question, it provides little or no probative support for a conclusion at Step Three that he struck her for the reason he proffered. . . . Thus, Shirley's evidence was sufficient to carry his burden of showing that the strike of R.O. was motivated in substantial part by race."); *Mays v. State*, 356 So.3d 268, 275 (Fla. App. 2022) ("Based on the record pattern of exclusion of Black jurors, and the State's thin rationale for its peremptory strike, we find the trial court's grant of the State's peremptory strike of Juror Schuler was an abuse of discretion.").

"The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers v. Mississippi*, 139 S. Ct. at 2244. *See*, *e.g.*, *United States v. Howard*, 67 F.4th 876, 880 (7th Cir. 2023) (acknowledging that "Howard is correct that it is indeed legal error 'for a judge to assume that a prosecutor of the same race as a juror would not engage in discrimination against that juror simply because of their shared race.' *United States v. Rutledge*, 648 F.3d 555, 562 (7th Cir. 2011)" but finding that, although the trial judge in *Howard* did refer to the prosecutor's race in "an aside", the judge's ultimate rejection of the defendant's *Batson* challenge was based solely on the credibility of the prosecutor's stated reason for a peremptory challenge – that the venireperson claimed not to use the internet and that the prosecutor believed that people who claim not to use the internet are liars). Defense counsel should respond to the prosecutor's proffered reasons with specific criticisms because a failure to do so will jeopardize any *Batson* claims on appeal. *See United States v. Hill*, 31 F.4th 1076 (8th Cir. 2022); *Clark v. State*, 343 So.3d 943, 961-62 (Miss. 2022); *Gordon v. State*, 350 So.3d 25, 34 (Fla. 2022) ("Gordon objected that the State's proffered reasons for its strike – first, James's "I'm not God" comment, and second, her statement during voir dire that her first cousin had been sentenced to 25 years in prison – were 'insufficiently race-neutral.' But the State's proffered reasons were facially race-neutral, and Gordon's objection did not put the trial court on notice of the argument he advances here – that the State's facially race-neutral reasons were pretextual, and why. '[P]roper preservation requires the following three steps from a party: (1) a timely, contemporaneous objection; (2) a legal ground for the objection; and (3) "[i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground

for the objection, exception, or motion below."' . . . Here, the second two requirements were lacking. The trial court must be presented with a reason to doubt the genuineness of the State's proffered race-neutral reason for a strike, for it is the genuineness of the reason upon which the trial court must rule. For this Court to meaningfully review a trial court's decision to allow a strike, the objecting party must specify its objection by giving some reasoning as to why the proffered reason for the strike is pretextual. Was it, for example, a consideration that would have applied to other members of the venire, some of whom were seated? Or was it a consideration that would not bear on the juror's ability to weigh the evidence as required? That cannot be said of Gordon's counsel's objection here, which did not put the trial court on notice as to the reason the challenged strike was allegedly a pretext for racial animus, and therefore did not contain a proper legal ground for the objection or a specific contention for us to review."). In arguing that a prosecutor's proffered race-neutral reasons for excusing jurors of the targeted class should not be credited, defense counsel would do well to note and argue that (1) the characteristics which the prosecutor claims explain his or her peremptory challenges of jurors belonging to the targeted class are shared by jurors who do not belong to the targeted class and who have not been peremptorily challenged by the prosecutor (*see*, *e.g.*, *Flowers v. Mississippi*, 139 S. Ct. at 2248; *Foster v. Chatman*, 578 U.S. at 504-07, 508-11; *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008); *Adkins v. Warden*, 710 F.3d 1241 at 1255-58; *Walker v. Davis*, 822 Fed. Appx. at 552-53), and/or (2) the existence of those characteristics was elicited by prosecutorial *voir dire* examination of jurors who belong to the targeted class, and the prosecutor has not questioned jurors who do not belong to the targeted class in ways calculated to elicit the existence of the characteristics (*Miller-El v. Dretke*, 545 U.S. at 244-45; *Walker v. Davis*, 822 Fed. Appx. at 553-55), and/or (3) jurors in the targeted class were disproportionately often questioned in ways calculated to evoke responses that would make them challengeable (*see*, *e.g.*, *Miller-El v. Dretke*, 545 U.S. at 255-63; *Flowers v. Mississippi*, 139 S. Ct. at 2247 ("disparate questioning can be probative of discriminatory intent")), and/or (4) jurors who were struck possessed characteristics that would ordinarily have made them favorable to the prosecution, were it not for their race (*see*, *e.g.*, *Foster v. Chatman*, 578 U.S. at 504-07; *Ali v. Hickman*, 584 F.3d at 1185-86, 1188-89) and/or (5) the prosecutor's stated justifications for striking jurors referred to concerns that could have been explored by "follow-up questions" but the prosecutor did not ask them (*Ali v. Hickman*, 584 F.3d at 1188; *see also Miller-El v. Dretke*, 545 U.S. at 244-46). *Compare Miller-El v. Cockrell*, 537 U.S. 322, 343 (2003), *with Davis v. Ayala*, 576 U.S. at 272-74. *And* s*ee, e.g.*, *United States v. Atkins,* 843 F.3d 625, 636, 637-38 (6th Cir. 2016) (the prosecutor's claimed justifications for striking an African American venirepeson – that "he had changed jobs four months prior and had eight children" – are found by the court to have been "pretexts for racial discrimination" because: "First, a comparative juror analysis shows that the government did not express concerns about the ability of similarly-situated white jurors to focus throughout the trial despite their large number of children and inconsistent work history. . . . Second, the government failed to ask any questions of Mr. Dandridge – or any other juror – about the impact his large family and recent career change would have on his ability to focus at trial. . . . Finally, read in context, the government's explanations 'reek[ ] of afterthought' and suggest a lack of reasoned consideration in striking [the venireperson]"); *Castellanos v. Small*, 766 F.3d 1137, 1148-49 (9th Cir. 2014) (the prosecutor's claim that he peremptorily struck a Hispanic female venireperson

because "'she didn't have any children . . . [and] [t]he victim here is going to be a child testifying'" was "'belied by the record,'" which showed that the venirewoman responded that "'she had two adult children'" and the prosecutor even "'asked about the occupations of her adult children, and she answered,'" and is further refuted by "[a] side-by-side comparison" of this venirewoman with three other venirepersons who had no children but "were ultimately permitted to serve on the jury," as was a venireperson who "didn't even answer the question about whether he had adult children."); *People v. Watson*, 169 A.D.3d 81, 84-85, 91 N.Y.S.3d 52, 55 (N.Y. App. Div., 1st Dep't 2019) (rejecting the prosecution's argument that its striking of African American male venirepersons was "race neutral" because they had "been the victims of police harassment": "We cannot agree with the People's logic. Indeed, refusing to seat any and all jurors who have been unfairly stopped and frisked or otherwise been the victim of police harassment is effectively a pretext for excluding a particular protected group as prospective jurors (*see City of Seattle v. Erickson*, 188 Wash.2d 721, 738, 398 P.3d 1124 [2017] [McCloud, J., concurring] [noting that frequently advanced race-neutral reasons for striking potential jurors, such as expressions of distrust of the police or belief that police engaged in racial profiling, served to exclude racial and ethnic minorities from juries]). It is a lamentable fact that a disproportionately high number of black males in this City have had occasion to be stopped and frisked by the police in a manner that does not comport with the Constitution . . . . To allow exclusion solely on this basis would bring us close to a reality where African American males are effectively barred from serving on juries in criminal trials, a proposition we cannot endorse."); *People v. Bell*, 126 A.D.3d 718, 719-20, 5 N.Y.S.3d 227, 229-30 (N.Y. App. Div., 2d Dep't 2015) (reversing a conviction on *Batson* grounds because "the facially race-neutral reasons proffered by the prosecutor for the use of peremptory challenges against . . . two prospective jurors were pretextual": the prosecutor asserted that she struck one prospective juror "because of a concern that his position as a church deacon would make it difficult for him to sit in judgment of another individual" but "[t]he prosecutor did not offer any explanation for how employment as a church deacon related to the factual circumstances of the case or qualifications to serve as a juror"; the prosecutor defended her other peremptory strike by saying that the African-American venireperson was "'shaking his head in agreement' with a white juror, who was explaining the trouble she would have in reaching a verdict and 'deciding the outcome of someone else's life,'" but the African-American venireperson "indicated that he could convict if the prosecution proved its case beyond a reasonable doubt" and was struck by the prosecutor anyway even though the prosecutor did not use a peremptory challenge to strike "the white juror who actually stated that she would have trouble 'deciding the outcome of someone else's life.'"). *See also Conner v. State*, 327 P.3d 503, 509-10 (Nev. 2014) (reversing a conviction on *Batson* grounds because the prosecutor's claimed reasons for striking the "prospective juror were belied by the record [of the witness's actual answers in *voir dire*]," and "[a] race-neutral explanation that is belied by the record is evidence of purposeful discrimination"; also, the trial court "failed to meet its step-three obligations" by denying defense counsel "an opportunity to respond to the[ ] [prosecutor's] new explanations" for striking the prospective jurors; a trial court cannot conduct "the sensitive inquiry into all the relevant circumstances required by *Batson* and its progeny" unless the judge affords defense counsel "the opportunity to meet his burden by responding to the individual race-neutral explanations proffered by the State."); *Foster v. Chatman*, 578 U.S. at 509 ("'[c]redibility

can be measured by, among other factors, . . . how reasonable, or how improbable, the [state's] explanations are'"); *State v. Clegg*, 2022-NCSC-11, 380 N.C. 127, 144, 867 S.E.2d 885, 899 (2022) ("shifting explanations [by the prosecutor] indicate pretext and should be viewed with suspicion"); *State v. Hobbs*, 374 N.C. 345, 357, 841 S.E.2d 492, 502 (2020) (holding a trial court's *Batson* analysis erroneous because "in evaluating a defendant's Batson challenge, the peremptory challenges exercised by the defendant are not relevant to the State's motivations"). If the judge concludes that the prosecutor has acted with a purpose to prune the jury of members of the targeted class as such, the judge must either discharge the venire and begin anew with another panel or reinstate the challenged jurors. *See Batson*, 476 U.S. at 96-100 & n.24. *See, e.g.*, *Drain v. Woods*, 595 Fed. Appx. 558, 580-81 (6th Cir. 2014) (trial judge's response to the "acknowledged *Batson* violations" – "allow[ing] *voir dire* to proceed with the sole requirement that the prosecutor request permission from the court before using any more peremptory challenges against black jurors" – was "plainly inadequate to cure the *Batson* violation"; if "the improperly struck jurors" were not "available to be reinstated on the jury," "'the only remaining remedy for the *Batson* violation would be to discharge the entire venire and start the process anew.'"). *See generally* NJP LITIGATION CONSULTING, JURYWORK: SYSTEMATIC TECHNIQUES, *supra*, ch. 4 ("*Batson* and the Discriminatory Use of Peremptory Challenges in the 21st Century"); *State v. Holmes*, 334 Conn. 202, 221 A.3d 407 (2019) (offering a comprehensive critique of the limited protection that federal constitutional *Batson* doctrine provides against racially skewed juries and announcing appointment of a Jury Selection Task Force charged with developing stricter state-law safeguards); *and see* Jack B. Harrison, *Is a Green Tie Enough? - Truth and Lies in the Courtroom*, *available at* https://ssrn.com/abstract=4301549.

"'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Snyder v. Louisiana*, 552 U.S. at 478. *See id*. at 477-78 ("Petitioner centers his *Batson* claim on the prosecution's strikes of two black jurors, Jeffrey Brooks and Elaine Scott. Because we find that the trial court committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim regarding Ms. Scott."). *Accord, Foster v. Chatman*, 578 U.S. at 499 (dictum); *Lark v. Secretary, Pennsylvania Department of Corrections*, 566 Fed. Appx. 161, 161 (3d Cir. 2014) ("'[R]elief must be granted under *Batson* when even one black person is excluded [from the jury] for racially motivated reasons'").

Local law in some States provides a more favorable set of rules than *Batson* for challenging prosecutorial peremptories on the ground that they are racially discriminatory. *See* Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform* (forthcoming, COLUMBIA L. REV.), *available at* : https://ssrn.com/abstract=4419333; Jeffrey Fagan, *Beyond Batson: Reducing Racial Bias in Capital Jury Selection*, 42 AMICUS JOURNAL 29 (2021); Berkeley Law Death Penalty Clinic website, https://www.law.berkeley.edu/ experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ (tracking *Batson* developments State by State). Illustrations are, *e.g.*, *State v. Hodge*, 248 Conn. 207, 219 n.18, 726 A.2d 531, 540 n.18

(1999) ("Under federal law, a three step procedure is followed when a *Batson* violation is claimed . . . . Pursuant to this court's supervisory authority over the administration of justice, we have eliminated the requirement, contained in the first step of this process, that the party objecting to the exercise of the peremptory challenge establish a prima facie case of discrimination. . . . Thus, in this state, after the party contesting the use of the peremptory challenge has raised a *Batson* claim, the party exercising the challenge must proffer a race neutral explanation for its decision to strike the venireperson from the jury array. . . . In Connecticut, therefore, the party objecting to the exercise of the peremptory challenge satisfies step one of the tripartite process simply by raising the objection."); *accord, State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992); *see also State v. Slappy*, 522 So.2d 18, 22 (Fla. 1988) ("Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts."); *and see* CAL. CODE CIVIL PRO. § 231.7 as added by Chapter 318, Statutes of 2020, applied in *People v. Jaime*, 91 Cal. App. 5th 941, 308 Cal. Rptr. 3d 742, 744 (2023) ("Under section 231.7, the party objecting to the peremptory challenge is no longer required to make a prima facie showing of racial discrimination. Instead, 'upon objection to the exercise of a peremptory challenge pursuant to [section 231.7]," the party exercising the peremptory challenge must state the reasons for exercising the challenge. (§ 231.7, subd. (c).) Also, certain reasons for a peremptory challenge are presumptively invalid under section 231.7 unless rebutted by clear and convincing evidence that they are unrelated to the prospective juror's perceived membership in a protected group and that the reasons bear on the juror's ability to be fair and impartial. (§ 231.7, subd. (e).) Those presumptively invalid reasons include the prospective juror having a negative experience with law enforcement or having a close relationship with someone who has been convicted of a crime. (§ 231.7, subd. (e)(1), (3).)"); WEST'S REV. CODE WASH. ANN. GEN. RULE 37, applied in *State v. Tesfasilasye*, 200 Wash. 2d 345, 518 P.3d 193 (2022). This Washington State Rule can serve as a model for counsel urging local courts to adopt the best contemporary practices for minimizing racial discrimination in jury selection. *See* Barbara O'Brien & Catherine M. Grosso, *Criminal Trials and Reforms Intended to Reduce the Impact of Race: A Review,* 16 ANNUAL REVIEW OF LAW & SOCIAL SCIENCE 117, 120-23 (2020); Timothy J. Conklin, *Note: The End of Purposeful Discrimination: The Shift to an Objective Batson Standard*, 63 BOSTON COLLEGE L. REV. 1037 (2022); Brooks Holland, *Confronting the Bias Dichotomy in Jury Selection*, 81 LA. L. REV. 165 (2020); *and see* Anna Offit, *Playing by the Rule: How ABA Model Rule 8.4(G) Can Regulate Jury Exclusion*, 89 FORDHAM L. REV. 1257 (2021). *And see State v. Andujar*, 247 N.J. 275, 284, 285, 254 A.3d 606, 611, 612 (2021) (holding that the New Jersey Constitution forbids jury-selection practices that cause jurors to be excluded through the operation of "implicit or unconscious bias on the part of the State, which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can . . .", and specifically prohibiting prosecutors from running a background criminal-records check on a prospective juror unless such a check is authorized by the trial judge upon a showing of a reasonable, individualized, good-faith basis to believe that it might reveal pertinent information unlikely to be uncovered through the ordinary *voir dire* process; the court also convenes a Judicial Conference on Jury Selection to "consider additional steps needed to prevent discrimination in the way we select juries."); ARIZ. RULE CRIM. PRO. 18.4 – 18.5, amended effective January 1, 2022, abolishing peremptory challenges altogether (a well-intentioned anti-

discrimination measure that many experienced criminal practitioners will regard as regrettably tossing the baby out with the bath; Michael A. Kilbourn, Note: *Abolishing Peremptory Challenges: A Fair Price to Pay for Just Jury Selection*, 100 DENVER L. REV. 495 (2023)).

In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court extended *Batson*'s prohibition of discrimination to peremptory strikes based on gender. In federal practice, 28 U.S.C. § 1862 has long provided that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status"; this statute was invoked to restrict federal prosecutors' exercises of peremptory challenges in a thoughtful opinion by then District Judge Jon Newman in *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976); and although Judge Newman's ruling was vacated by the Second Circuit in pre-*Batson mandamus* proceedings (*United States v. Newman*, 549 F.2d 240 (2d Cir. 1977)), his opinion was favorably cited in *Batson*, 476 U.S. 99 n.24; and the Supreme Court also referred to § 1862 – albeit glancingly – in holding in *Edmonson v. Leesville Concrete Co*., 500 U.S. 614 (1991), that *Batson* prohibited race-based peremptories in civil actions. Some state courts have held that *Batson* prohibits peremptories based on LGBT orientation (*Commonwealth v. Carter*, 488 Mass. 191, 201-04, 172 N.E.3d 367, 378-81 (2021) (considered dictum: the requisite showing of gender-identification discrimination was not satisfied by the record in the case at bar); *People v. Garcia*, 77 Cal. App. 4th 1269, 92 Cal. Rptr. 2d 339 (2000) – a state constitutional ruling subsequently adopted by statute (CAL. CODE CIV. PRO. § 231.5, referencing CAL. GOVT. CODE § 1113.5, which forbids discrimination "on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation")); *and see* Mark E. Wojcik, *Extending* Batson *to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1 (2019); Max Angel, Note, *Reassigning Batson: A Modern Approach*, 74 FLA. L. REV. 1003 (2022), arguing that the expansion of *Batson* to prohibit strikes based on sexual orientation or gender identity should be endorsed as a federal constitutional command.

In many jurisdictions the trial court has discretion to grant one or both parties additional peremptory challenges, beyond the number ordinarily fixed by law or practice. The request for additional peremptories may be made before or during the *voir dire*. It may be made after counsel has exhausted all of his or her allotted peremptories; but the wiser course for counsel who wants to delay the request until late in the game is to make it when s/he has still has one peremptory remaining, so that s/he can decide advisedly whether to use that last peremptory. The most persuasive argument that counsel can make in support of a request for additional peremptories is that prejudicial pretrial publicity or community hostility to the respondent will make the empaneling of a fair and impartial jury difficult and that, although the most obviously and naively prejudiced venirepersons will be detectable and excludable through challenges for cause on grounds of bias, subtle biases will persist that the allowance of additional peremptories may help to eliminate. This is the theoretical justification for peremptory challenges (although, of course, it is not their principal strategic use), and it can be cited to the court when asking for more of them, along with passages such as those quoted in § 20.03(b), relating to the "affirmative

constitutional duty [of a trial judge] to minimize the effects of prejudicial pretrial publicity" (*Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979)). See also § 21.03(a) *supra*. "[P]eremptory challenges . . . are a means to achieve the end of an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("[d]emonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges"); *Sampson v. United States*, 724 F.3d 150, 163-64 (1st Cir. 2013) ("Voir dire is a singularly important means of safeguarding the right to an impartial jury. A probing voir dire examination is '[t]he best way to ensure that jurors do not harbor biases for or against the parties.'"); *cf. Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 n.9 (1984) ("[t]he [*voir dire*] process is to ensure a fair impartial jury, not a favorable one"). When counsel has made a reasonably strong showing of prejudicial publicity or community hostility on a motion for a change of venue (see § 20.03(b) *supra*) or for a continuance (see § 15.02 concluding paragraph *supra*) but those motions have been denied, s/he is in an especially favorable position to request additional peremptory challenges; and some judges will be particularly disposed to allow them in this situation, if only as a consolation prize. But counsel should be clear, in making the request, that it is not a substitute for the earlier venue-change or continuance motion and that s/he reserves the client's rights to contend on a new-trial motion (§ 37.02(a) *infra*), on appeal, and in postconviction proceedings, that the denial of the motion was prejudicial error.

### § 28.03(c) Variations in *Voir Dire* Procedure; Sorts of *Voir Dire* Questions Allowed

Beyond the generalities noted thus far, it is difficult to describe *voir dire* procedure except as it is practiced in a particular court. Its variations are extreme. In some jurisdictions the judge conducts the *voir dire* questioning, while in others the attorneys do. In some jurisdictions the entire panel is questioned collectively, challenges for cause are made, and then 12 are placed in the box and peremptories are exercised; in other jurisdictions each individual juror is questioned, and then either challenged (for cause or peremptorily) or accepted; in still others, a group of 12 is questioned, challenges are made to these 12, and then new panelists are brought in – and questioned and challenged – as replacements for the original jurors who were struck for cause or peremptorily.

Whether the questioning is done by the court or by counsel, the jurisdictions vary widely regarding the kinds of questions that are permitted. Indeed, the very purpose of *voir dire* interrogation of prospective jurors is differently conceived in different jurisdictions. Some hold that its sole legitimate function is to discover grounds of challenge for cause; only questions going to matters that might provide these grounds may be asked; and any enlightenment given by the answers that enhances counsel's judgment on the intelligent exercise of peremptory challenges is at best a by-product and often one suspiciously regarded. Other jurisdictions unashamedly recognize that a legitimate purpose of the questioning is to enable counsel to find out the sort of person the prospective juror is in order to determine whether or not to strike the juror peremptorily. *United States v. Nieves*, quoted *infra*; *United States v. Lewin*, 467 F.2d

1132, 1138 (7th Cir. 1972); *Bailey v. United States*, 53 F.2d 982 (5th Cir. 1931); *Commonwealth v. Steeves*, 490 Mass. 270, 287, 189 N.E.3d 1235, 1252 (2022) ("We agree that the judge erred in instructing counsel that attorney-conducted voir dire is properly limited to questions solely relating to apparent bias, and does not include the opportunity to elicit information that may help counsel exercise a peremptory challenge. See American Bar Association, Principles for Juries and Jury Trials, Principle 11(B)(3) (rev. 2016) (voir dire should be 'sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges'). However, we conclude that the error was harmless and did not result in a substantial likelihood of a miscarriage of justice where the record demonstrates that the judge's misstatement did not produce actual restraint upon trial counsel's subsequent inquiry regarding background information, such as educational degrees, or the exercise of the defendant's peremptory challenges."); *Wappler v. State*, summarized *infra*; *Wasy v. State*, 234 Ind. 52, 123 N.E.2d 462 (1955); *State v. Miller*, 60 Idaho 79, 88 P.2d 526 (1939) (alternative ground); *cf. Bedford v. State*, 317 Md. 659, 668-75, 566 A.2d 111, 116-19 (1989). Local doctrines must be consulted in drafting *voir dire* questions,

since in jurisdictions that subscribe to the first of these two positions every inquiry must be framed in a fashion that relates, at least verbally, to some arguable ground of challenge for cause.

This is no longer as severe a restriction as it once was. One of the most salutary effects of the Supreme Court's decisions holding that the Due Process Clause of the Fourteenth Amendment requires trial by an "impartial jury" is the recognition that a challenge for cause can be supported by a showing of actual prejudice or bias of any sort – "actual predisposition against" the accused (*Murphy v. Florida*, 421 U.S. 794, 800 n.4 (1975) (dictum)) – whether or not it falls within the strict category of express bias traditionally recognized by state law (that is, a fixed opinion of guilt which the juror will not swear s/he can put out of account. And the constitutional right to exclude jurors who are not impartial implies an ancillary right to have an adequate inquiry conducted during *voir dire* examination for the purpose of discovering constitutionally disqualifying prejudice or bias. For example, *Ham v. South Carolina*, 409 U.S. 524 (1973), held that it was constitutional error to refuse to question prospective jurors concerning possible racial bias in a case in which "under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne"' (*Ristaino v. Ross*, 424 U.S. 589, 596 (1976) (dictum)). *Accord*, *Turner v. Murray*, 476 U.S. 28, 31-36 (1986) (an African-American defendant charged with the murder of a white victim is constitutionally entitled to have questions on the issue of racial bias put to jurors who will make a discretionary capital sentencing decision: "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*id*. at 35)). *See* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243 (2019), *and cf. Berthiaume v. Smith*, 875 F.3d 1354, 1359 (11th Cir. 2017) (in a civil rights action by an arrestee alleging excessive force, false arrest, and related claims, the plaintiff was entitled to have prospective jurors questioned on *voir dire* as to whether they harbored prejudice against gays: "the district

court here did not ask any questions to determine whether any of the jurors might harbor prejudices against Berthiaume based on his sexual orientation. Nor were the district court's general inquiries regarding the jurors' ability to be impartial and its instruction that jurors not be prejudiced against witnesses based on the witnesses' backgrounds sufficient to reach the important concerns highlighted by Berthiaume's proposed inquiry because the general inquiries were broadly framed and not calculated to reveal latent prejudice."). Both the *Ham* opinion (409 U.S. at 528) and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), imply that a respondent has a right to "searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence" (*id*. at 564) whenever substantial pretrial publicity may have caused such opinions to form. *See also Hughes v. State*, 490 A.2d 1034 (Del. 1985). However, *Ristaino v. Ross*, *supra*, makes it plain that the Constitution imposes only minimal restrictions upon the broad discretion of trial judges in conducting *voir dire* examination because "the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant" (424 U.S. at 595). *See also Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Skilling v. United States*, 561 U.S. 358, 385-99 (2010); *United States v. Tsarnaev*, 142 S. Ct. 1024, 1034 (2022) ("We have repeatedly said that jury selection falls '"particularly within the province of the trial judge."'").

Subconstitutional doctrines of abuse of discretion may give respondents a somewhat broader right to insist upon certain lines of *voir dire* examination. *See Rosales-Lopez v. United States*, 451 U.S. at 190 (plurality opinion); *United States v. Poole*, 450 F.2d 1082 (3d Cir. 1971); *United States v. Dellinger*, 472 F.2d 340, 366-70 (7th Cir. 1972) (alternative ground); *United States v. Martin*, 507 F.2d 428, 432-33 (7th Cir. 1974) (alternative ground); *Strachan v. State*, 279 So.3d 1231 (Fla. App. 2019) (alternative ground); *State v. Bell*, 287 N.C. 248, 214 S.E.2d 53 (1975). Nevertheless, the scope of *voir dire* examination and the sorts of questions that may be asked remain almost entirely within the control of the trial judge. *See Hamling v. United States*, 418 U.S. 87, 138-40 (1974); *Smith v. United States*, 431 U.S. 291, 308 (1977); *Rosales-Lopez v. United States*, 451 U.S. at 188-92. An instructive discussion of the standards and procedures that a trial judge should use in determining the propriety of a challenge for cause is set out in *Commonwealth v. Williams*, 481 Mass. 443, 116 N.E.3d 609 (2019), in the context of a prosecutor's challenge.

In appropriate situations, counsel can and should push back against judicial limitations upon *voir dire* and assert a right to conduct a *voir dire* that is as thorough as is needed to identify challenges for cause (*Kazadi v. State*, 467 Md. 1, 223 A.3d 554 (2020) (holding that "on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify (*id*. at 9, 223 A.3d at 559) and canvassing decisions on the issue in other jurisdictions: "*Voir dire* questions concerning these fundamental rights are warranted because responses indicating an inability or unwillingness to follow jury instructions give rise to grounds for disqualification – *i.e.*, a basis for meritorious motions to strike for cause the responding prospective jurors, that may not be discovered until it is too late, or may not be discovered at all. *Id*. at 41-42, 223 A.3d at 578.) – and also to inform

defense counsel's exercise of peremptory challenges in jurisdictions that allow questioning for that purpose (*United States v. Nieves*, 58 F.4th 623 (2d Cir. 2023) ("The Supreme Court has recognized that the *voir dire* process 'plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.' . . . That is because an inadequate *voir dire* compromises the trial court's 'responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence.'" *Id*. at 631. A district court has broad discretion in conducting *voir dire* "[b]ut that discretion is not boundless. 'The standard set by the [Supreme] Court . . . is that the trial court's discretion must be exercised consistent with "the essential demands of fairness."'" *Id*. at 632. "[W]e have often reiterated the basic principle that '[t]here must be sufficient information elicited on *voir dire* to permit a defendant to intelligently exercise' both for-cause and peremptory challenges." *Id*. at 633. "We hold that (1) prejudice against people associated with gangs represented a pervasive bias relevant to a key dynamic likely to arise at trial, and (2) the district court neglected to 'inquire about, or warn against,' that bias." *Id*. The Second Circuit reverses the defendants' convictions because "the district court must provide *some* opportunity for prospective jurors to be meaningfully screened for biases relevant to a particular defendant or the charges against that defendant" (*id*. at 638) and did not do so.). *See State v. Crump*, 376 N.C. 375, 383-84, 851 S.E.2d 904, 912 (2020) (reversing a conviction because the trial judge refused to allow defense counsel on *voir dire* to "inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years"; the North Carolina Supreme Court, "[r]eading the transcript holistically, . . . agree[s] with the Court of Appeals that the trial court prevented defendant from pursuing any line of inquiry regarding racial bias, implicit or otherwise. Defendant was unable to ask prospective jurors about racial bias at any point during voir dire."); *United States v. Pérez-Rodríguez*, 13 F.4th 1, 31-32 (1st Cir. 2021) ("Given that we are remanding for a new trial, we choose to comment on one aspect of any new trial: the voir dire process. . . .¶ The court devoted only one question to the topic of anti-gay bias, asking the panel: 'Do you feel that you would not be able to render a fair and impartial verdict based on the evidence and my instructions if the defendant were homosexual or gay?' On remand, the court should carefully consider Pérez's argument that this single self-assessment question 'was inadequate to permit discovery of stereotypical and pejorative notions rooted in an extremely relevant bias.' As Pérez notes, this case raises particular concerns about anti-gay bias not only because the defendant is gay, but because of the graphic sexual nature of the evidence and the repugnant but unfortunately widespread prejudicial belief that gay men are likely to sexually abuse children. Questions probing prospective jurors' actual bias against gay men – rather than their self-assessment of their ability to be impartial at a criminal trial where the defendant is gay – would be more useful in identifying jurors who could not be fair and impartial in dealing with the difficult facts of this case."); *State v. Fleming*, 2020 ME 120, 239 A.3d 648, 655-56 (Me. 2020) ("Questioning potential jurors about their *explicit* views, opinions, or beliefs about people of a different race is a critical step in achieving the ultimate goal of the voir dire process: detecting bias and prejudice in prospective jurors. . . . ¶ Over the past decade, legal scholarship has recognized the role that implicit or unconscious racial biases and in-group favoritism play in the administration of justice. . . . ¶ It may be difficult to uncover and address implicit racial biases among potential jurors, but that does not lessen the importance of developing methods to

confront these biases in our justice system. We echo the other courts that have noted the importance of doing so and instruct our trial courts to be proactive about addressing implicit bias. . . . ¶ Given the lack of any questions that directly addressed Fleming's concerns about the jurors' contact with or opinions about people who are African American or Black, the voir dire process was not 'sufficient to disclose facts that would reveal juror bias.'"); *McCarter v. State*, 837 S.W.2d 117 (Tex. Crim. App. 1992), essentially overruled on another issue by *Gonzales v. State*, 994 S.W.2d 170 (Tex. Crim. App. 1999) ("[T]he constitutionally guaranteed right to counsel . . . encompasses the right to question prospective jurors in order to intelligently and effectively exercise peremptory challenges and challenges for cause during the jury selection process." *McCarter*, 837 S.W.2d at 119. Here the trial judge refused to allow defense counsel to ask additional questions after the expiration of the 30 minutes that the judge had allocated to group *voir dire* by each party. Counsel's questioning that had consumed the 30 minutes was on proper subjects ("[defendant's] attorney asked the venire general questions concerning . . . [defendant's] expected testimony, law enforcement officers, anti-drug organizations, experiences with African-Americans, the presumption of innocence, the 'concept of mere presence,' criminal records, victims of crime, and drug addiction" (*id*. at 121)) and was not unduly prolonged. "At the conclusion of the thirty minute limit, . . . [defendant's] attorney requested additional time to explore the following issues with the venire: problems with drugs in the veniremembers' immediate family, prior criminal jury experience, association/relationship with police officers, and people accused of a crime by a police officer." *Id*. These also were proper questions. "Having found that . . . [defendant's] attorney did not attempt to prolong the voir dire and that the questions . . . [defendant's] attorney sought to ask were proper, we conclude the Court of Appeals erred by holding the trial judge did not abuse his discretion in limiting . . . [defendant's] voir dire. Should a trial judge determine that either party is prolonging the voir dire, the simple and effective remedy is to call the attorneys to the bench and instruct them to expedite the process." *Id*. at 122.); *Wappler v. State*, 183 S.W.3d 765 (Tex. App. 2005) ("The Sixth Amendment guarantees the right to a trial before an impartial jury. . . . The right to question venire members to exercise peremptory challenges intelligently is an essential part of that Sixth Amendment guarantee." *Id*. at 776. The trial court's refusal to extend defense counsel's time for questioning prospective jurors beyond the 15-minute limit it had ordered in a DWI prosecution constituted reversible error when assessed against the prejudice standard applicable to constitutional violations. *Id*. at 776-78. Enforcement of the 15-minute limit prevented defense counsel from asking the following "proper" *voir dire* questions (*id*. at 774): "(1) . . . 'whether the jury could consider the full range of punishment in this case including the minimum punishment range.' . . . ¶ (2) . . . 'whether anyone on the panel was a member of Mothers Against Drunk Drivers (MADD) or how members of the panel's lives had been affected by alcohol, either positively or negatively and whether such experiences might cause panel members to hold a particular bias in favor of the State.' . . . ¶ (3) [questions] 'to more adequately discuss feelings about police officers with the jury . . .' [including] 'ask[ing] all of venire members whether they knew police officers, or whether they could be more likely to believe the testimony of police officers simply because of what those individuals did for a living . . . [and] whether they had a bias in favor of police officers and in favor of the State in this case because of the same.'. . . ¶ (4) . . . 'question[s] . . . on the issue of illegally obtained statements, specifically because it is an

issue in this case . . . [and] the defense plans on requesting a jury instruction regarding the same.'; ¶ (5) . . . 'whether . . .[the venirepersons] could disregard all statements which were taken in violation of defendant's Sixth Amendment rights, his right under Article I, Section 10 of the Texas Constitution as well as Article 38.22 of the Code of Criminal Procedure . . . [,] specifically[,] the issue in this case was whether . . . [the defendant] had made incriminating statements to the police officer while . . . [the defendant] was under arrest and without the benefit of Miranda warnings'." *Id*. at 773-74.); *Ellington v. State*, 292 Ga. 109, 735 S.E.2d 736 (2012), *disapproved in regard to an unrelated matter in Willis v. State*, 304 Ga. 686, 706 n.3, 820 S.E.2d 640, 658 n.3 (2018) ("Much like cross-examination is the engine of truth in our justice system, voir dire is the engine of selecting a jury that will be fair and impartial. Thus, while recognizing that trial judges must have substantial discretion to oversee jury selection and that this subject is largely governed by state laws and practices, the Supreme Court of the United States has held that due process requires that voir dire be sufficient to allow the parties and the trial court to elicit juror bias. . . . Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule. . . .¶ Georgia has a broadly worded statute describing the scope of voir dire . . . . This Court has held that . . . [the statute] allows voir dire questions beyond those that the Constitution would require allowing. . . . Moreover, the language of the statute is broad enough that we would interpret it to avoid significant constitutional concerns. . . . Accordingly, we address the question presented [in this case] under . . . [the statute], recognizing that constitutional considerations inform our view of what the statute requires." *Id*. at 124-25, 735 S.E.2d at 752-53. "Ellington argues that the trial court erred in precluding voir dire questioning of prospective jurors as to whether they would automatically impose the death penalty, as opposed to fairly considering all three sentencing options, in a case involving the murder of young children. Under all the circumstances, and cautioning that our holding is limited in scope, we agree, and we therefore conclude that Ellington's death sentences must be reversed . . . ." *Id*. at 121, 735 S.E.2d at 750.); *State v. Dyer*, 682 So.2d 278 (La. App. 1996) (After the trial judge ruled that defense counsel's question "Do you think that police officers usually arrest the right person?" was impermissible and should be whittled down to "how much weight would they give to a police officer's testimony, and would they a [sic] police officer's testimony any greater weight than any other witness's testimony" (*id*. at 279-80), defense counsel proffered the following questions, which the judge disallowed: "1. Suppose you did hear the defendant's side of the story, would you assume he's lying to save his skin? 2. Would you think he's lying because he's the accused person? 3. Do you think eyewitnesses are always right? 4. Do you think eyewitnesses are usually right? 5. Suppose the witnesses believes he or she is right, does that mean they are right? 6. Do you think the police usually arrest the right person? 7. Do you think the police sometimes make mistakes? 8. Do you think the police are likely to admit to making mistakes? 9. Do you think the police always tell the truth? 10. Do you think the state always prosecutes the right person? 11. Suppose it's getting late and you are getting hungry, and you are not sure how to vote, would you go ahead and vote with the majority just to move things along? 12. What if you weren't sure about how you wanted to vote as to the defendant's guilt or innocence, but the majority was pressuring you about your vote, would you stick to your position?" *Id*. at 280. "After considering the exchange between counsel and the court, and reviewing the entire voir dire examination," the Court of appeals finds that "the

limitation of voir dire by the trial court constitutes error. In the instant matter . . . a substantial portion of the state's case relies on eyewitness police officer testimony. The trial court unduly restricted inquiry into jurors' attitudes concerning police officers or eyewitnesses. The proffered questions would have elicited responses regarding a potential juror's weighing of testimony by the eyewitness police officers and would have allowed defendant to explore any prejudices, predispositions, or misunderstandings relevant to central issues in this matter." (*id*. at 281.)); *and see generally* Ann M. Roan, *Reclaiming* Voir Dire, 37-JUL THE CHAMPION 22 (2013); Sophie E. Honeyman, *Escaping Death: The Colorado Method of Capital Jury Selection*, 54 UIC JOHN MARSHALL L. REV. 247 (2021); Matthew Rubenstein, *Overview of the Colorado Method of Capital* Voir Dire, 34-NOV THE CHAMPION 18 (2010). But counsel will often find that s/he is more likely to obtain some latitude on *voir dire* by beseeching the favorable exercise of the trial judge's discretion than by irritating the judge with a demand that particular lines of inquiry be allowed as a matter of right. Reasons that a trial judge might find persuasive as the basis for permitting wide-ranging *voir dire* examination are set forth in Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,*" 27 STAN. L. REV. 545 (1975); but these are probably best advanced in terms of appeals to the judge's sense of fairness, with only sufficient mention of Professor Babcock's constitutional contentions to preserve a footing in the record for a possible claim of error on appeal. Because the recommendations in the ABA AIJ Toolbox for *voir dire* practice aimed at minimizing racial bias in juries bear the imprimatur of the American Bar Association, some trial judges may be more readily persuaded to adopt them than other practices proposed by counsel with the same aim. *See* ACHIEVING AN IMPARTIAL JURY [AIJ] TOOLBOX, *available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf, at 22-26. But note that these recommendations are regarded by some experienced trial lawyers as useless or even harmful; in considering whether and to what extent to draw on them, counsel should take stock of the composition of the jury panel, the local ambience, and the cast and circumstances of the specific case at hand.

There is some nice rhetoric in Supreme Court decisions that can be quoted in urging a trial judge to allow extensive and probing *voir dire* questioning by the defense. "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. at 188 (plurality opinion). *See also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *but see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 n.9 (1984). And "our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial" (*Gannett Co. v. DePasquale*, 443 U.S. 368, 379 n.6 (1979)).

### § 28.03(d) Strategic Considerations in Exercising Challenges for Cause and Peremptories

The clear technical distinction between challenges for cause and peremptory challenges

sometimes blurs a bit in practice. Most grounds of challenges for cause involve subtle assessments of the challenged venireperson's verbal responses and demeanor by the trial judge, and virtually all of them are subject to "'a broad discretion"' on the part of the trial judge. *Wainwright v. Witt*, 469 U.S. at 429, quoting *Dennis v. United States*, 339 U.S. 162, 168 (1950). Early in the *voir dire* many trial judges are prone to exercise their discretion and to resolve close questions of fact and law in favor of allowing a challenge for cause to any venireperson whose suitability is marginal, but they become increasingly loth to sustain challenges for cause as the panel is progressively depleted, because they are losing patience or are anxious to fill the jury without the bother of calling in another whole panel.

This tendency has tactical implications for defense counsel. First, particularly early in the *voir dire*, s/he should not hesitate to make challenges for cause in close cases. S/he should try to exclude as many undesired jurors as possible through challenges for cause, so as to husband the respondent's allotment of peremptories. Second, under *voir dire* procedures that permit the questioning of an entire panel or box of venirepersons before challenges to any of them, counsel should ordinarily make his or her weakest challenges for cause early and save the strongest ones for the end. This will maximize the likelihood of prevailing on both and will also increase the likelihood that if the judge denies any of counsel's challenges for cause, s/he will err reversibly. (The judge cannot justify the improper denial of a challenge for cause on the ground that s/he was unduly charitable in his or her rulings on earlier challenges. *See Gray v. Mississippi*, 481 U.S. 648, 658 (1987).) Of course, counsel cannot afford the luxury of this tactic if the venirepersons most clearly subject to challenge for cause are true horrors whom s/he wants to be sure to eliminate and if they exceed the number of peremptory challenges s/he has.

## § 28.04 DEFENSIVE FUNCTIONS OF THE *VOIR DIRE;* PREPARED QUESTIONS; AUTHORITIES

The principal uses to which counsel can effectively put the *voir dire* are these:

(1) Discovering factual grounds to challenge individual jurors for cause (*see*, *e.g.*, *Tijerina v. State*, 202 S.W.3d 299 (Tex. App. 2006) (reversing a conviction because the trial court did not allow defense counsel to ask prospective jurors whether they would automatically disbelieve somebody who was a convicted felon; the defendant had prior felony convictions, and the disallowance of the question prevented the defense from making an advised decision whether she should testify); *State v. Gonzales*, 111 Wash. App. 276, 45 P.3d 205 (2002) (reversing a conviction because the trial court denied a challenge for cause to a venireperson who stated on *voir dire* that she would presume that a police officer was telling the truth and that, if the case came down to believing the defendant's testimony or that of a police officer, she would believe the officer), *overruled on another issue in State v. Talbott*, 200 Wash. 2d 731, 521 P.3d 948 (2022); and see § 28.03(a) *supra*; § 28.05 *infra*).

(2) Making a record to support appellate and postconviction claims of error in the denial of earlier challenges to the venire (see §§ 20.03(b), 21.03, 28.03(b) concluding paragraph *supra*), motions for a change of venue on grounds of prejudicial publicity, community hostility, and similar biasing circumstances (see § 20.03(b) *supra*), or motions for a continuance on the latter grounds (see § 15.02 concluding paragraph *supra*).

(3) Sounding out the temper and attitudes of individual jurors to determine whether they should be struck peremptorily (see § 28.05 *infra*).

(4) Driving home to the jury certain principles that are vital to the defensive case (see § 28.06 *infra*).

(5) Disarming "surprise" prosecution evidence and taking the sting out of prejudicial disclosures that will be made at the trial (see § 28.07 *infra*).

(6) Establishing a good relationship with the jurors and explaining to them things counsel is going to do that they may misunderstand and dislike (see § 28.08 *infra*).

Because of the extraordinary variety of local *voir dire* procedures, detailed discussion of the means for pursuing these objectives is not practical in this MANUAL. Counsel should consult JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY (4th ed. 2018); and JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: SUPPLEMENTAL JUROR QUESTIONNAIRES (2018); NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES chs. 2-4, 17-18 (2d ed. 2021-22); ANN FAGAN GINGER, JURY SELECTION IN CRIMINAL TRIALS – NEW TECHNIQUES AND CONCEPTS (1975); 1 IRVING GOLDSTEIN & FRED LANE, GOLDSTEIN TRIAL TECHNIQUE §§ 9.21-9.86 (2d ed. 1969); CHARLES W. TESSMER, CRIMINAL TRIAL STRATEGY 51-68 (1968); WARD WAGNER, ART OF ADVOCACY – JURY SELECTION 1-6 to 1-53 (1983); Harry Mitchell Caldwell, *The Art and Science of Voir Dire: Empirical Research, Anecdotal Lessons from the Masters, and Illustrations Supporting the Ten Commandments of Voir Dire*, 98 OREGON L. REV. 577 (2020). *See also* Sophie E. Honeyman, *Escaping Death: The Colorado Method of Capital Jury Selection*, 54 UIC JOHN MARSHALL L. REV. 247 (2021). The remaining sections of the present chapter are intended only to provide a few helpful hints. Chapter 17 of NJP Litigation Consulting's JURYWORK: SYSTEMATIC TECHNIQUES contains a particularly useful array of illustrations of specific lines of *voir dire* questions that defense counsel can use for the several purposes itemized in §§ 28.05-28.08 *infra*.

At the outset it may be said that it is generally a good idea for defense counsel to prepare a list *of voir dire* questions in advance of trial. It is wise to write out each question on a separate file card and to make three identical sets of the cards. One set is for counsel's own use. The second is either for submission to the court in jurisdictions in which the judge conducts *voir dire* interrogation or for filing of the appropriate cards to protect the record if counsel is permitted to interrogate the jurors personally but certain inquiries are disallowed by the court. The third set enables counsel to hand selected cards to the prosecutor

for examination in the event of legal argument or negotiation about particular questions. Counsel will find that the pretrial drafting of *voir dire* questions makes it easier at the *voir dire* itself to concentrate attention on the important business of observing the prospective jurors. If any of the draft questions embodies assertions of legal principles that are not obvious, counsel will also save fumbling and possible embarrassment by having notes of citations to support the principles.

## § 28.05 QUESTIONS TESTING THE ATTITUDES OF JURORS TO LAY A BASIS OF CHALLENGE FOR CAUSE OR TO INFORM THE EXERCISE OF PEREMPTORY CHALLENGES

These questions must be tailored in large part to the particular case and to local doctrinal restrictions on the scope of *voir dire* questioning. An important consideration in drafting questions is whether the law in counsel's jurisdiction requires that all questions asked on *voir dire* be justified by pertinency to a possible ground of challenge for cause or whether a broader range of inquiry is permitted. Even where questions are required "to go to cause," however, counsel can often defend a question as seeking information that would open up a line of circumstantial proof of the basis for a challenge for cause: "Relevant *voir dire* questions . . . need not be framed exclusively in the language of the controlling appellate opinion" or statute defining the grounds for a challenge for cause. *Wainwright v. Witt*, 469 U.S. 412, 433-34 (1985).

The following are some standard questions:

(1) Are you related to, or are you friendly with, or do you have any close acquaintanceship with, anyone in the District Attorney's [Corporation Counsel's] Office?

(2) How about police officers – anyone in the Police Department here in the city? Other police officers anywhere? Law enforcement officers of any sort, such as federal revenue agents or military police or security guards?

(3) Have you ever had close relations with anyone in any of those categories?

(4) Have you yourself ever been a police officer or a military police officer or an employee of any law enforcement agency? Ever had any responsibilities for industrial or physical plant security or for investigating possibly criminal acts?

(5) Would you tend to believe the testimony of a police officer, just because s/he is a police officer, more than that of another witness?

(6) Have you or has any member of your family ever been the victim of a crime? [Follow-up questions should elicit the nature of the crime, the circumstances, and the juror's reactions to the experience.] (If counsel has reason to believe that questions such as this one and number (7) may be embarrassing to a juror or jurors, counsel should request that *voir dire* on these subjects be conducted individually through one of the procedures suggested in

connection with question (13) *infra*.)

(7) Have you or has any member of your family ever been a complainant or a witness in a criminal case? [Similar follow-up questions should be asked.]

(8) Have you ever served on a jury in a delinquency case? In an adult criminal case? In a civil case? [Similar follow-up questions should be asked.]

(9) Do you think that anything in your earlier experiences as a juror might affect your ability to serve as a juror in the present case with complete impartiality and with no predispositions for or against my client?

(10) Had you ever read or heard anything about this case before you came into the courtroom today?

(11) Had you read anything about it in the newspapers or on the internet? [To be asked only if counsel knows that there was significantly prejudicial publicity.] Or heard about it on the radio or TV? [Same.] Or heard about it through the social media or a website or a blog? [Same.]

(12) [If yes:] What [newspaper/radio program/TV program/website/blog/form of social media], do you remember? [Same.]

(13) What did you [read] [hear] about the case? [To be asked only if the previously accepted jurors and the remaining unquestioned panelists are sequestered.] (Even though sequestration is not generally in effect throughout the *voir dire*, counsel may ask that particular, potentially prejudicial questions such as this one be asked of the venireperson in the judge's chambers or that the other prospective jurors be excluded – or even that the courtroom be cleared – while this specific line of questioning is pursued. *Cf. Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511-12 (1984); and see the admonition to defense counsel in *Murphy v. Florida*, 421 U.S. 794, 800 n.3 (1975), mentioned in the concluding paragraph of § 33.4.2.1 *supra*.)

(14) Did that mention my client's name or anything about him or her? [Same.]

(15) Would what you read [heard] make it any the more likely, in your mind, that my client has committed [is guilty of] the crime with which s/he is charged here?

(16) If you were to sit as a juror in this case, do you think that what you read [heard] would have any effect upon your attitude with regard to whether my client was guilty or innocent of the crime with which s/he is charged here?

(17) When you read [heard] that, did it cause you to form in your own mind any opinions

concerning whether s/he was probably guilty or innocent?

(18) What was that opinion?

(19) Of course, there's been no evidence presented here in court yet, but [in light of what you've read or heard about this case so far] [in light of that newspaper/radio program/TV program/website/blog/social media story], would it take some evidence to change the opinion? (Arguably, a prospective juror's answer that it would require some evidence to change his or her opinion that the respondent is guilty supports a challenge for cause. See § 28.03(a) subdivision (vi) *supra*.)

(20) [If the juror indicates that s/he has read or heard any newspaper/radio program/TV program/website/blog/social media story relating to the case:] Have you discussed that story with anyone?

(21) Have you discussed this case with anyone?

(22) Do you remember what you said? [To be asked only if the previously accepted jurors and the remaining unquestioned panelists are sequestered.]

(23) Did you say that my client was innocent or that s/he was guilty, something about whether s/he did it or not? (A previously *expressed* opinion of guilt is sufficient in some jurisdictions to disqualify a panelist for cause. *See*, *e.g.*, *Stevens v. State*, 94 Okla. Crim. 216, 232 P.2d 949 (1951); *cf. State v. Nett*, 207 W.Va. 410, 414, 533 S.E.2d 43, 47 (2000) ("At the turn of the last century this Court held that ¶ '[w]hen a juror on his voir dire admits that he has formed and expressed an opinion of the guilt or innocence of the accused, and expresses any degree of doubt as to whether such previously formed opinion would affect his judgment in arriving at a just and proper verdict in the case, it is error to admit him on the panel.'").)

(24) Did the person you were talking with say anything you recall about [the story] [the case]?

(25) Do you remember what they said? [To be asked only if the previously accepted jurors and the remaining unquestioned panelists are sequestered.]

(26) My client is charged with the crime of [murder]. Would the fact that s/he is charged with [murder], rather than with some other crime, make it seem more likely to you that s/he is guilty?

(27) Now, you know, of course, that you will be asked to return a verdict of guilty or not guilty in this case. If the court instructs you that you cannot return a guilty verdict unless you find that the respondent's guilt is proved beyond a reasonable doubt, would you be able to follow that instruction?

(28) So if you heard all the evidence and you thought that the respondent was probably guilty – you weren't convinced beyond a reasonable doubt that s/he was guilty but you thought the evidence showed that s/he *probably* was guilty – would you be able to return a verdict of *not guilty* in this case?

(29) Would it bother you or weigh on your conscience to return a verdict of *not guilty* when you thought probably s/he was guilty?

(30) Would the fact that my client is [a member of a certain racial or ethnic group] and the complainant in this case is [a member of a different racial or ethnic group] affect your judgment or your ability to decide this case in any way? *See*, *e.g.*, *Filmore v. State*, 813 A.2d 1112 (Del. 2003); *Hernandez v. State*, 357 Md. 204, 742 A.2d 952 (1999); *Jones v. State*, 216 So.3d 742 (Fla. App. 2017); *Commonwealth v. Holland*, 298 Pa. Super. 289, 444 A.2d 1179 (1982); *cf. Legare v. State*, 256 Ga. 302, 348 S.E.2d 881 (1986). *Compare Ham v. South Carolina*, 409 U.S. 524 (1973), *and Turner v. Murray*, 476 U.S. 28, 31-36 (1986), *with Ristaino v. Ross*, 424 U.S. 589 (1976), *and United States v. Murry*, 31 F.4th 1274, 1281 (10th Cir. 2022) ("[W]ithout any substantial indication that racial or ethnic prejudice likely affected the jurors, we hold that the district court did not abuse its discretion in denying Defendants' requests to directly examine the jurors about the subject."). It is ordinarily preferable to ask more detailed questions probing possible racial prejudice if local practice allows them. *See Walker v. State*, 214 Ga. App. 777, 779, 449 S.E.2d 322, 324 (1994) ("On voir dire, defendant asked if the venire socialized with blacks, if they employed blacks in their home, if they worked with blacks, if they supervised blacks or worked as peers, if they or their spouses belonged to any discriminatory fraternal, religious or social organizations and what type of bumper stickers or flags they displayed on their cars."); *State v. Bates*, 2020-Ohio-634, 159 Ohio St. 3d 156, 161-62, 149 N.E.3d 475, 482 (2020) ("One of the questions on the written juror questionnaire asked, 'Is there any racial or ethnic group that you do not feel comfortable being around?' . . . Another question started with the statement, 'Some races and/or ethnic groups tend to be more violent than others,' then asked jurors to choose among the options of 'strongly agree,' 'agree,' 'strongly disagree, 'disagree,' and 'no opinion.'"); *and see* NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES (2d ed. 2021-22), and NATIONAL JURY PROJECT & NATIONAL LAWYERS GUILD, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (David Kairys, ed. 1975); Ariana R. Levinson, Sonya Faber, Dana Strauss, Sophia Gran-Ruaz, Amy Bartlett, Maria Macaluso & Monnica T. Williams, *Challenging Jurors' Racism*, 57 GONZAGA L. REV. 365 (2021-2022). But often it does not, and a general inquiry is all that is permitted. One approach to the subject, which defense counsel can usually get away with, even in the most illiberal jurisdictions, is to ask at the beginning of the examination, following question (1) *supra:* "Now, this [murder] is supposed to have taken place near _____ [naming a recognizable intersection or landmark in the neighborhood]." *Or*: "[Mr.] [Ms.]_____, the person who was killed, lived [*or, alternatively,* "The respondent lives"] near _____." "Do you know where that is?" "Have you had

any occasion to be in that area?" Biased jurors will frequently give a telltale response in describing or responding to the mention of a ghetto or low-income neighborhood, although these questions themselves can be justified by counsel as the lead-in to a line of questioning aimed at determining whether the juror is disqualified by reason of personal knowledge of the offense or of the parties. Also, because there is empirical evidence of a correlation between racial bias and retributive attitudes (*see* Justin D. Levinson, Robert J. Smith, Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019)), questions on the one subject can serve to some extent as proxies for questions on the other.

(31) Would there be any inconvenience to you if this case ran late and we had to stay over late here some day?

More open-ended questions touching on the prospective jurors' experiences, attitudes, and beliefs are ordinarily desirable (see § 28.08 *infra*) if the court can be convinced to allow them (see § 28.03(c) *supra*).

## § 28.06 DRIVING HOME PRINCIPLES VITAL TO THE DEFENSE CASE

*Voir dire* presents an excellent chance to describe to the jurors the few most basic and important principles on which the defensive theory of the case rests, to explore the meaning of those principles, and to obtain the assent of the jurors to them. The principles should be stated both in the orthodox terms that the court will use in its charge and in more immediate, striking formulations that communicate the orthodox terms forcefully and make the prospective juror think about them. In this way the judge's charge will echo what counsel has told the jury at the beginning of the case and vindicate and reinforce it.

Thus, for example, counsel might begin by asking a juror whether the juror could follow an instruction by the court to find the respondent not guilty of assault with intent to kill if the prosecution failed to prove that the respondent actually intended to kill. Then counsel might ask:

(1) "So, if the court were to charge you that in order to convict my client, you would have to be convinced that s/he actually intended to kill [Mr.] [Ms.] *X* – that she wanted [Mr.] [Ms.] *X* to die and intended when s/he shot to take [Mr.] [Ms.] *X*'s life away – you would follow that instruction?"

(2) "Now, if my client were to testify that s/he did not know the gun was loaded and you believed that – you believed s/he did not know it was loaded – although you thought it was terribly careless not to know that and it was reckless of my client to wave that gun around, s/he shouldn't have done something dangerous like that, but you believed she did not know it was loaded, you would acquit my client of assault with intent to kill, even though s/he did wave the gun around carelessly and shot somebody with it?"

(3) "So you could follow [His] [Her] Honor's charge that you have to find an actual intent to

kill before you can convict, and you would say 'not guilty' of assault with intent to kill even if you found that my client was careless and reckless and recklessly shot someone, not knowing that the gun was loaded?"

Questions (28) and (29) in § 28.05 *supra* are a similar reformulation of the concept that the prosecution has the burden of proof beyond a reasonable doubt. By securing the jurors' commitment to these propositions, counsel lays the foundation for a closing argument which reminds the jurors that they have all sworn they could do the difficult job demanded of them in this case, namely, to hold the prosecution to its burden of proof beyond a reasonable doubt, and to return a verdict of acquittal even though they believe that the client probably is guilty if they cannot say that his or her guilt is established beyond a reasonable doubt.

The circumstances of particular cases and counsel's theory of the defense will identify the basic principles that counsel wants to underscore to the jury in this fashion. How much jury-educating counsel will be permitted to undertake will vary from judge to judge. A helpful quotation when the prosecutor objects that counsel's questioning amounts to argumentation rather than bias-testing is this passage in *State v. Moore*, 122 N.J. 420, 446, 585 A.2d 864, 877 (1991): "In a sense, *voir dire* acts as a discovery tool. It is like a conversation in which the parties are trying to reveal the source of any such attitudes without manipulation or delay of the trial. However, in order for that discovery procedure to be effective, potential jurors need to have some basic comprehension about what their legal duties as jurors will be. In that sense, *voir dire* can act as a teaching tool. When necessary, courts can use *voir dire* as a way of educating potential jurors to the 'legal requirements' of their responsibilities as jurors."

## § 28.07 DISARMING SURPRISE PROSECUTION EVIDENCE AND PREJUDICIAL DISCLOSURES

When the prosecution is going to get a certain shock value out of particular aspects of its proof or when highly prejudicial specific facts are inevitably going to be brought out at trial, counsel should disclose them to the prospective jurors on *voir dire.* This serves the double function of lessening their impact when the evidence is received and of allowing counsel to observe each juror's reaction to the damning item. "Now, if my client's own brother were to testify against [him] [her] at this trial, if [his] [her] own brother were to give evidence against [him] [her], would that affect your ability to give my client a fair trial?"

## § 28.08 ESTABLISHING A GOOD RELATIONSHIP WITH THE JURORS, EXPLORING THEIR BACKGROUNDS AND THINKING PATTERNS, AND FOREWARNING THEM OF CONDUCT BY COUNSEL THAT THEY MAY NOT LIKE

The *voir dire* is counsel's first contact with the jurors, and counsel must use it to make friends. If possible, s/he should call each prospective juror by name. It is usually good practice to begin the examination of each juror with a number of questions about the juror's general background, such as:

(1) Where do you live, [Mr.] [Ms.] Jones?

(2) Have you lived here in [city] all your life?

(3) Do you have family here?

(4) [And are your children still in school?]

(5) Could you tell us, please, where you were born and raised?

(6) And where did you go to school?

(7) Are you presently employed, [Mr.] [Ms.] Jones?

(8) Where do you work?

(9) What sort of work is it that you do there?

(10) Could you describe the nature of that job – what it is you do as ["an assistant to the director"; "an employment counselor"; or whatever job title the juror has given, if his or her answer to question (9) is nothing more than an unilluminating title].

Questions of this type manifest an interest in the juror as a person and can be asked in a manner that makes counsel likeable as a person – as someone who is fond of kids, for example. Many of the questions are open-ended in the sense that they cannot be answered simply "yes" or "no" but require the juror to frame answers in the juror's own words; others of the questions leave the juror the option of a yes-or-no answer or a more elaborate response. The way in which the juror responds to these questions can tell counsel a good deal about the juror's intelligence, quickness of understanding, patterns of language and thought, cultural background, self-confidence or nervousness, decisiveness or indecisiveness, eagerness to please or recalcitrance. For that reason, open-ended questions should be used as much as possible throughout the *voir dire* (*see* Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 (No. 3) JOURNAL OF EMPIRICAL LEGAL STUDIES 515 (September 2019)), but they are particularly easy to fashion and likely to be effective in the area of the juror's background. Counsel cannot, for example, ask a juror open-ended questions about the beyond-a-reasonable-doubt standard. These questions would be both objectionable (because the juror is not required or supposed to know the legal rules governing burden of proof; the juror is merely required to be willing to follow the court's instructions on the subject) and potentially embarrassing (because a juror who is asked a legal question to which s/he does not know the answer will feel put down). Questions like those numbered (27) – (29) in § 28.05 *supra* and (1) – (3) in § 28.06 are about as far as counsel can go in dealing with burden-of-proof issues or with the elements of the offense charged. In contrast, jurors are most knowledgeable and therefore most at ease on the topic of their own lives.

A few jurors may be inclined to resent background questions as prying, but counsel can ordinarily avert any negative reaction of this nature by opening a *voir dire* examination with the following preliminary inquiries:

(1) Good morning, [Mr.] [Ms.] Jones. At this point in the proceedings it is the responsibility of the prosecuting attorney and me to ask certain questions of each individual person on the jury panel for the purpose of selecting an appropriate jury to sit in this case. We are not singling you out for questioning but will be asking questions of each person who is called as a possible juror. Is that all right?

(2) We have to ask each person some questions about his or her attitudes and background. We are not doing this to pry into your personal life or to snoop around in your privacy but only for the purpose of selecting an appropriate jury for this case. Would it be okay if I asked you some questions?

(3) Would you be willing to listen to these questions and to answer fully and freely any question that I ask you that does not seem to you to be too personal?

(4) And if I should ask you a question that seems to you too personal, would you be willing to tell me so, and maybe I can find some way to skip over the answer to that particular question?

(5) And if, not knowing you at all, I should happen to ask a question that comes across as too personal, you wouldn't hold that against my client, would you?

This line of questions exemplifies a kind of questioning that counsel will also want to use in other areas of *voir dire* examination, in order to inform the jurors of things that counsel is going to do at trial that they may not like and to explain those things in a manner that makes them least objectionable. For example, "Do you think that you could be fair and impartial in considering the possibility that a child witness, like any other witness, might be mistaken in some part of his or her testimony?" "Certainly, no one likes to see a lawyer cross-examining a very young child or asking questions that may embarrass the child if the child is wrong. But you will understand, won't you, that I am obliged to cross-examine witnesses, even if they are very young children, to see if they may be mistaken?" "And if I do cross-examine a child witness, would you hold that against my client?"

Among the things counsel will do in almost every trial that need to be explained to the jury are:

(1) peremptorily challenging prospective jurors on the *voir dire* (in most jurisdictions, jurors congregate for periods of weeks and make friends with fellow jurors; as a result they may be offended when counsel strikes another panelist);

(2) objecting to evidence at trial;

(3) cross-examining the complaining witness (or any sympathetic witness); and

(4) failing to extract a dramatic courtroom confession from the prosecution's star witness that s/he is really guilty of the crime with which the respondent is charged, as defense lawyers

sometimes do on T.V.

If a juror emits negative vibrations when forewarned of anything that counsel is going to do or of any damaging aspects of the prosecution's case (see § 28.07 *supra*) or if a juror is captious or hostile on the *voir dire,* counsel should not argue with the juror. Counsel should be nice to the juror (for the sake of the other jurors) and strike him or her quickly. Or in cases in which the jurors are not sequestered, counsel may want to use a juror of this sort, after deciding to strike him or her, as an opportunity to pursue the essentially pedagogic questioning described in § 28.06 *supra.*

## § 28.09 SELECTING JURORS

This is so largely an intuitive art that there is little safe to say about it. Apart from displays of hostility by a juror or specific factors in a juror's background that might predispose the juror against the respondent, counsel should be guided by the nature of his or her defense. If the defense, for example, requires conceptual thinking, counsel will want to be alert to strike unintelligent jurors. Ordinarily heterogeneity on the jury is desirable. Counsel should also give some credence to his or her instincts. All other things being equivocal, s/he may properly be governed by whether s/he *likes* a prospective juror. At this point, counsel is emotionally attuned to his or her own defense, and counsel will have subtle reactions of dislike to jurors on the basis of half-perceived, but often relatively reliable, signs that the juror is dangerous. In any event, the more counsel likes a jury, the better counsel will project to it.

Counsel should usually give the client the opportunity to advise counsel of any prospective jurors that she does not like and should strike those jurors unless there is a strong reason not to. Considering how unscientific *voir dire* is and considering that the respondent has experience in knowing who will dislike or fear him or her, the client is as likely to be right about whom to select or reject as is counsel. And because it is the respondent's liberty that is at stake, counsel ordinarily should give the respondent a veto over the persons who will sit in judgment on him or her.