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HOW TO CONDUCT A MEANINGFUL & EFFECTIVE VOIR DIRE IN CRIMINAL CASES

*Cathy E. Bennett**
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I. INTRODUCTION

THE purpose of this article is not only to acquaint readers with the significant legal issues of jury selection, but also to provide a hands-on, "how to" primer for effective voir dire.

The federal, state and local governments have been conducting a constant "war on crime". Over the last three decades, the media's coverage of crime issues has often been from a law enforcement perspective. This media barrage and the government's strengthening arsenal of legal weapons has affected people's views and had an impact on the defense of persons accused of committing a crime. Trying a criminal case in this environment requires careful attention to jury selection.

Most attorneys put more energy into jury selection *after* the jury has been picked than they do during the actual selection of the jury that will hear and try to comprehend their case. Effective and skillfully conducted *voir dire* is the most important ingredient in winning a trial; yet, *voir dire* is perhaps the most neglected and overlooked part of the trial by attorneys.

A study by the Hearst Corporation entitled "The American Public, the Media and the Judicial System" showed that 45 percent of people with prior

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jury service wrongly believed that a person must prove his or her innocence. This statistic regarding jurors with prior jury service shows that instructions given at the end of a trial do not adequately help jurors deal with their misconceptions as they relate to the law.

Merely instructing someone not to have any feelings about a case, that publicity should not affect the jury, or that an accused citizen does not have to testify is to ignore how human beings operate. Jurors are products of their environments and thus mirror the people, experiences, and life-styles they have known.

II. PREPARING FOR *VOIR DIRE*

Jury selection has three main goals: (1) to elicit information from jurors; (2) to educate jurors on the defense case while defusing the prosecutor's case; and (3) to establish a relationship between the jurors, the defense attorney and his or her client. Before jury selection begins, however, the theory of the case must be thoroughly developed. If a case is not fully thought out, the attorney will not know the proper audience to choose for the play he or she puts on, nor will he or she know on what parts of the case to educate the jury. Thus, the first step in preparing *voir dire* is developing a theory of the case. There are a number of ways to accomplish this goal, including the pretrial survey, mock trial, preliminary review, and questionnaires.

A. PRETRIAL SURVEY

One tool is the pretrial survey. This is done by interviewing a cross-section of the community to see what they have heard or feel about the case. This information can provide a jury profile and/or assist with a motion for change of venue. However, defense counsel should only use this jury profile information as a guide. Counsel should not substitute survey results for in-court observations, information and intuition.

If the survey is conducted for change of venue purposes, bad results should not necessarily translate into a request to change the venue. For example, in the John DeLorean case,¹ the prejudgment of guilt was tremendous in each of the jurisdictions surveyed (73 percent of people interviewed felt DeLorean was guilty). Mr. DeLorean's attorneys decided to not seek a change of venue, and because they were able to address the perception of guilt, he was acquitted in both trials. These verdicts were the direct result of the herculean effort put forth on the part of Mr. DeLorean's lawyers, Juanita Brooks and Howard Weitzman.

B. MOCK TRIAL

Another potent tool is the mock trial, where the defense hires people from the community who have been randomly selected and who demographically match the typical jury pool in that jurisdiction. Defense counsel presents his

1. U.S. v. DeLorean, CR82-910-RMT.

or her case to them to find out whether the strategy is on the right track as to how best to present the facts, or whether he or she needs to emphasize some other theory that was not considered particularly relevant but the citizens in the community think is significant.

An effective mock trial requires the lawyer to streamline the prosecution and the defense so that the presentation takes no more than a day or two. Counsel must prepare and present every aspect of the case from opening statements to jury instructions. Lawyers have told the authors that mock trials have been the most effective tool to help them understand how to communicate better with the jury. An attorney might think that idea "A" is the theory of the defense. Then, he or she presents the case to the mock jurors (who are not friends or spouses of lawyers and do not work for lawyers), only to find out that they pick up on a different theory of the case which the lawyer thought irrelevant or unlikely to persuade a jury.

Mock trials should not be confused with shadow juries, in which we have little confidence. A shadow jury requires hiring people who match the demographics of the jurors in the box. The shadow jury sits in the courtroom to observe the testimony every day and then discusses the case with the consultant or attorney at night. That can be very dangerous. The lawyer has a tendency to gear the case presentation to the shadow jurors and totally forgets about the actual jury.

The mock trial must be conducted before jury selection. In addition to listening to what people have to say about the specific case, the mock trial helps in determining the necessary questions to ask of jurors during jury selection because it includes a *voir dire*. In short, the primary benefits of the mock trial are: (i) it forces the lawyer to prepare and simplify every aspect of the case prior to trial from both the defense and prosecution perspectives; (ii) the lawyer gets substantial feedback on the themes, evidence, and witnesses in the case; (iii) weaknesses and strengths of the case are uncovered; and (iv) the most important areas for *voir dire* are developed.

C. PRELIMINARY REVIEW

Another important tool in developing a case strategy is to review the preliminary hearing and information learned from it as well as from discovery. When looking at the evidence for purposes of *voir dire*, attorneys should explore the prosecutor's evidence, defense evidence, and characteristics of the witnesses, attorneys and defendants in the case.

D. QUESTIONNAIRES

There is a major movement in this country regarding jury questionnaires, which are currently used in the federal and state courts, in both felony and misdemeanor cases. Judges in rural areas and major cities have found the jury questionnaire informative, helpful, and a potential time-saver. Before you run out and drop a 15-page questionnaire on the judge, however, be aware of the following guidelines.

If you have never used a jury questionnaire before, you must lay the foun-

dation far in advance of trial. The questionnaire is designed to obtain information from the jurors on hardship and challenges for cause to assist in the intelligent exercise of peremptory strikes. If designed properly, the questionnaire should also benefit opposing counsel. If it is one-sided, there is no reason for the prosecutor to agree nor for the judge to allow its use.

In a typical criminal case, you will want to include questions on the juror's attitude regarding the crime problem in America, whether they consider the present punishment system too harsh or too lenient, whether the juror, a family member, or a friend has been a victim of crime, whether they have had good or bad experiences with law enforcement, and whether the juror has ever held a job or applied for a job with any law enforcement or government agencies. These questions are not exhaustive, but they provide examples of areas of inquiry which are helpful to the prosecution. Depending on the defense selected, counsel should consider including questions that reveal the juror's views on informants, plea bargaining, and electronic surveillance. Again, the answers to these questions can benefit the prosecution and an intelligent prosecutor would agree to such a questionnaire. Our experience has generally shown a greater likelihood of the court allowing a questionnaire if the prosecution joins in the request. Thus, attempt to reach an agreement with prosecution. This may require the addition, deletion, or changing of some questions, but this is a small price to pay for the information the questionnaire will yield. If the prosecutor will not agree, however, do not let that discourage you; many judges have allowed a questionnaire over the objection of the state attorney, district attorney, or U.S. attorney.

Defense lawyers frequently raise concerns about the questionnaire. First, defense counsels fear the questionnaire will flush out a "loose cannon" who could have made his or her way on to the jury to result in a hung jury. In our experience, most of these jurors are flushed out during *voir dire* with rare exception. We see the opposite benefit from the questionnaire. It will flush out the most ardent pro-law enforcement jurors whom defense counsel could challenge for cause instead of having to use the precious peremptory strikes. Secondly, attorneys worry the questionnaire will leave them little or nothing to talk about to the jurors. This criticism generally comes from inflexible, inexperienced, or ineffective lawyers. The questionnaire is a diving board and *voir dire* is the swimming pool of feelings, attitudes, and opinions. The final concern is that the questionnaire will disclose defense counsel's theory of the case to the prosecution. Of course, effective *voir dire* requires disclosure of the theory of the case to learn which jurors are most open to it. If this remains a major concern, however, an attorney can simply omit case theory questions from the questionnaire. Our experience has universally shown that the advantages of a questionnaire dramatically outweigh any and all disadvantages.

The final decision on the questionnaire is obviously left to the judge. Some judges favor long, comprehensive questionnaires, while others favor short questionnaires. Still others have never been asked about a questionnaire and some judges will never allow questionnaires. Although lawyers

believe that most judges fall into the last category, this perception is wrong. We all know judges who are too set in their ways or have had a bad experience with a questionnaire. If you find yourself in such a court, you must decide if you want to do battle over this issue. In most cases we recommend it is worth the fight. You will need to file the motion, attach the proposed questionnaire, examples of other questionnaires given by state or federal district judges in your area, attach affidavits from lawyers who have gotten questionnaires, affidavits from jury and trial consultants, psychology or sociology professors or affidavits from citizens who state they would feel less embarrassed and could be more honest if sensitive or private questions were asked in writing as opposed to orally in open court. Counsel should then request a hearing to present further evidence to the court. Again, when counsel has persevered, at least twenty per cent of the judges have reconsidered and agreed to the questionnaire or some abbreviated version. If lawyers make the effort now, questionnaires will be the norm in the next ten years.

To determine the likelihood of the court allowing your questionnaire, contact other lawyers who appear regularly before the judge, the court clerk, court coordinator, law clerk, court reporter, or even the bailiff. If the judge has used a questionnaire in another case, you should obtain a copy and try to find out if the judge felt it was helpful or disruptive. If the judge had a negative experience, find out all of the problems and devise a way to correct them. The primary criticism judges have is two-fold: 1) too burdensome on court staff; and 2) it did not save time. The attorney can easily remedy each of these. Supply a sufficient number of questionnaires and pens so the clerk merely has to distribute the instrument. Once the questionnaire is completed, volunteer to have a lawyer, associate, paralegal, or some other person assist with making copies. Always encourage the prosecution to participate in the logistical aspects of copying and disseminating the questionnaires. It is helpful if two copies are made for you (and two for the prosecution if they want two copies) so you and the person assisting you with jury selection can review the documents simultaneously. You should always agree to bear the cost (or split the cost) of reproducing the questionnaire, even if you have to pay for it out of your own pocket. Remember the cardinal rule in questionnaires — take the hassle out of it for the court staff; most of them are overworked and underpaid as it is.

The time consumption problem is handled rather easily. Virtually every criminal trial has some pre-trial matter (motion to suppress, motions in limine, etc.) that the judge address before jury selection begins. Suggest to the judge that while the court and parties are finishing the pre-trial motions, the potential jurors are drawn from the jury pool and they could then begin filling out the questionnaire, essentially killing two birds with one stone. The jury questionnaires are copied, the lawyers review the questionnaires over the lunch hour, and jury selection is ready to begin. Additionally, you must assure the judge that you will not ask any questions contained in the questionnaire, but rather only follow-up questions, case specific questions, and

questions that deal with possible challenges for cause. This procedure generally eliminates the judge's concern of wasted time.

Distribution of the questionnaires may take place in a variety of ways. Most questionnaires are handed out the day of jury selection. There are, however, other methods available that are far more time-efficient. The ideal way is to send out the questionnaire with the jury summons. Most jurors receive their summons two to six weeks in advance of their jury service. Included with the summons would be the questionnaire and a self-stamped, self-addressed envelope (to the clerk's office). The clerk sends a cover letter to the juror explaining the purpose of the questionnaire and that it must be returned to the clerk's office at least one week before their jury service. Our experience with this procedure has shown that well over ninety per cent of the jurors return their completed questionnaire in a timely fashion. Counsel should make arrangements with the clerk's office to pick up the questionnaires as they come in or the entire group on the return date. Obviously the former option is better for the lawyers since they can gradually absorb and digest the information rather than being overwhelmed by a large stack of completed questionnaires.

There is an aspect to this process that many lawyers, prosecutors, and judges have not considered. Mailing out the questionnaire sufficiently in advance of the trial to allow the lawyers to review the answers not only allows the parties time to identify cause and hardship challenges (thereby saving the court more time when the parties agree to excuse jurors) but more importantly it allows the parties to re-evaluate their respective cases. Some cases, including potentially lengthy trials, have been resolved or settled when counsel gets a glimpse of the prospective jurors. Courts have saved enormous expenditures of time and resources by mailing questionnaires out to the prospective jurors in advance of trial.

A third alternative is to bring in the jury panel the week before trial, have them fill out the questionnaire and instruct them to return the following Monday. While some judges resist having the panel come to court before the trial date, this can in fact expedite the jury selection process. The attorneys can agree upon cause challenges so that the clerk simply contacts those jurors by telephone and excuses them. The lawyers may even be able to resolve the case, but at a minimum, each side will have time to review the information, write specific follow-up questions for each juror, and carefully prepare a thorough and effective *voir dire*. Few judges like a "reverse and remand for new trial" order from an appellate court. Getting reversed on a jury selection issue is like a race car that stalls on the starting line — lots of time and resources wasted. Jury questionnaires coupled with sufficient time to review the information and to ask proper, meaningful, and relevant questions can eliminate most appellate reversals based on jury selection. The Appendix contains a sample questionnaire that was mailed out in advance in a federal drug case. Some questionnaires may be longer, although most questionnaires will probably be shorter. We have also attached a copy of a questionnaire we prepared in a recent criminal case in state court as well as a

copy of the standard jury questionnaire used in federal court for the Southern District of Texas, Houston Division.

III. CONDUCTING *VOIR DIRE*

The best place to conduct *voir dire* is in a jury room, where everybody can sit around a table and maintain equal footing. An alternative is the judge's chambers with the courtroom as a last resort. Logistically, in those cases done totally or in part in an individually sequestered manner, we have found the judge's chambers to be the best environment to question each juror. The courtroom can then be used to house jurors waiting to be questioned. Prospective jurors are usually more comfortable in a smaller room because they are less apt to feel intimidated by their surroundings.

It often seems while examining jurors that they are insurmountable stone mountains and that the defense counsel has only a plastic spoon with which to dig to their centers. Many attorneys have described how uncomfortable *voir dire* can be because of its intimacy with the jurors. It is indeed an intimate relationship and one that takes a different kind of lawyering skill. This lawyering skill is called the listening skill. In other words, during *voir dire* one is called upon to be a superb listener, a counselor of sorts. It requires that one be open, sincere, vulnerable, and receptive to the jurors. This is often difficult for an attorney to accomplish since his or hers is an adversarial role in other parts of the trial. This often can produce a conflict in roles for the attorney which largely grows out of the anxiety, frustration, and anger that surrounds a trial situation. People, and especially jurors, who feel threatened will not respond to a frustrated, angry, and dominating personality. They will respond to a gentle and sincere person whom they believe is interested in listening to them.

A. ELEMENTS NECESSARY TO CREATE AN OPEN ATMOSPHERE

Three core elements create the kind of atmosphere that lends itself to a person's disclosing honest and true perceptions, feelings, and behavior: empathy, respect (unconditional, positive regard) and congruence (genuineness). Social scientists who have been in the field of interviewing have researched these core elements for decades and have found that unless all three of these elements are present, people will mask their feelings, hide their thoughts, and fabricate their behavior. Thus, they will refuse to engage in a real and honest relationship or dialogue.

Empathy is that essence in a communication that says to the person being interviewed, "I hear your feelings, thoughts and behaviors," and "I hear your world." It is that experience of crawling into the other person's world and getting a feel for what it is like to live that person's feelings, thoughts and behavior. Respect, or non-possessive regard, expresses to the person that his or her world is respected and will not be judged by the listener. The third element, congruence, means the listener expresses on the outside what he or she is feeling on the inside. This means that the listener is a whole and

genuine person. This is particularly important because unless the listener is genuine, the respondent will not be.

During jury selection one has very little time to build a relationship with jurors and get them to express themselves for the purposes of selection, cause challenges, and peremptory strikes. Saying, "I don't have time to do all of that psychological stuff," can only prevent the attorney from employing skills that would tremendously increase the attorney's knowledge of each juror.

B. TYPES OF COMMUNICATION WITH JURORS

There are eight general categories in which every piece of communication can be placed. Four of these types of communication are called "open-ended" or "allowing responses." The other four types are called "close-ended" or "leading responses." What determines which category a listener's response falls into is the form and content of the statement or question, the intent of the response, and the non-verbal cues that accompany the response.

The four main "open-ended" responses that communicate empathy, respect and congruence are self-disclosure, open-ended questions, reflections, and clarification. These kinds of responses are relationship-building tools that leave the jurors more flexibility with which to answer expressed and unexpressed questions. These responses communicate to the jurors that the defense lawyer is attempting to get to know them, that he or she desires them to talk and will listen.

Self-disclosure on the part of the attorney is extremely valuable to the juror. It lets the juror know that the attorney has feelings and thoughts and is a human being as well as a lawyer. It also aids in equalizing the relationship between the attorney and juror and provides the groundwork for the relationship. Self-disclosure means the lawyer is telling the juror what he or she is perceiving, feeling or wanting to do at that moment. An example of self-disclosure is to have the attorney tell the juror that everyone, including the attorney, has some type of bias or prejudice. This will aid the juror in not feeling judged if he or she expresses any bias or prejudice he or she might have. Often lawyers ask jurors to talk about their biases or prejudices without admitting to the jurors that they have some themselves. This often makes the jurors feel inferior and thus, they more often hide their true feelings and prejudices. Another example of self-disclosure is for the attorney periodically to express to the jurors that he or she feels good about them for being candid and respects them for it. This acts as a reinforcement to the jurors, and many times will make them open up even more. Self-disclosure also is used when the examiner feels the juror is being untruthful with him or her. An illustration of this: "Ms. Jones, I feel there is something else you want to say about this issue. I've been in situations where I didn't think I could be totally honest. I have the sense you may be feeling that way right now. Please talk to me about this." This tells the juror the attorney is paying close attention to what she says and is affected by her answers.

The next allowing response type is the open-ended question. These ques-

tions give jurors the freedom to talk about what they want to express. They ask for more information from the juror. Many attorneys ask close-ended questions when they think they are asking open ones. There is a big difference between "Do you have any opinions about this case?" and "What opinions, feelings or impressions do you have about this case?" Open-ended questions, as with the other three open response types, can deal with all four parts of an experience. These four parts are: (1) An event or situation occurs (for example, a murder occurs, a suspect is arrested and the case receives publicity); (2) The person forms a perception about that event, such as, "That defendant looks guilty and I bet he did it"; (3) Out of this perception grows a feeling (emotion) such as fear or hate; and (4) Out of this feeling comes a behavior, such as trying to get on the jury in order to convict.

It is necessary to get information on all four parts of the experience in order to get as accurate a reading of the person as possible. Open-ended questions that would relate to the event described above would be: (1) "Mrs. Jones, what do you recall reading in the newspaper or hearing about the arrest of Mr. Green (the client) in connection with the Harris murder case?"; (2) "What was your first reaction to the story?"; (3) "How did you feel when you read about it?"; and (4) "What would you like to see done to people who are accused of murder?"

Another kind of open-ended question which exposes the feelings of a juror is for the defense counsel to stand behind the accused, place his or her hands on the client's shoulders and say, "Ms. Smith, what's the first thing that comes into your mind when you look at Bobby Green?" When asking such a question, gauge the juror's non-verbal cues closely. Does the juror seem to hold her breath? Does she seem more nervous than before? Does she have difficulty looking at your client? Does her breathing speed up? Does she drop or raise her tone of voice? Does she seem to find it easy to look at your client? Is there anger in her eyes? Does she bite her lip or move forward or back in her chair?

Once an open-ended question has been asked, the defense attorney can then use reflection responses to feed back to jurors what they have heard. A reflection response is a mirroring of the statement or non-verbal cues that a juror emits. It is a summary of the content and/or feeling of a person's messages. The advantages of using reflection statements are: (1) they let the jurors know that the lawyer has heard what they said, (2) they clarify for the jurors what messages they are sending the lawyer, (3) they encourage the jurors to keep talking, and (4) they assist attorneys in clarifying for themselves what the jurors have said. It is natural to desire to be listened to and to be heard. Everyone has had the experience of being in a conversation with someone and finding that the other person is too busy talking and is not listening to what one is saying. Another dynamic is where the other person keeps repeating the same point over and over again. What this signals is that the other person is unsure how to communicate this piece of information, or the person feels that no one has heard the message. One way of letting the person know that the message has been received is to feed it back to the

speaker. An example in the courtroom is when a juror keeps saying over and over again, "I can be fair, I really can be fair," while communicating frustration in the eyes or voice. The examining lawyer can reflect this back by saying, "Ms. Abbott, I have the sense that you feel frustrated and concerned that I may not believe you can be fair. Talk to me about this." This will have the effect of telling Ms. Abbott she has been heard and it will encourage her to say more about that frustration. Even if she says, "No, I am not frustrated, but I wonder why you keep asking me all of these questions," something is still learned. The lawyer has learned that the juror does not understand the need for *voir dire* questions, and thus it may be necessary to re-clarify the necessity for the personal nature of the questions. In either case, it provides valuable information to the lawyer about this juror.

Another response type is clarification. Clarification serves the same purposes as does reflection and is also a summarization response. The difference between a reflection and clarification is that clarification responses express an element of doubt in the listener. The listener conveys that she is unsure that she has heard the juror correctly. Some examples would be: (1) "You appear to be nervous," (2) "I wonder if you are feeling uncomfortable,"; or (3) "I sense that you may be angry with me for asking you all of these questions." Clarification serves an added role in pointing out conflicts to the juror in what was said. For example, "Ms. Little, earlier you said to the judge that you could fairly judge this alleged assault case and now you are saying that your daughter was physically assaulted by her ex-husband. How do those things fit together in your mind?" An open-ended question follows the clarification to urge the juror to keep talking. This is an example of how two open response types can be paired and is also an illustration of how to use listening skills in getting a juror challenged for cause.

All four types of responses can be used together to assist in obtaining information from jurors, encouraging them to speak, and cementing the attorney's relationship with them. People love to have their feelings responded to and will develop much more information about themselves if one pays close attention to them and lets them know that their feelings are important to defense counsel and the client. It is very important to use these skills in response to unspoken feelings by asking questions such as, "Mr. Harris, I heard you say you can be fair, but a moment ago when I asked you to look at Billy (the Defendant), you seemed afraid of him, you looked uncomfortable. Please tell me about that."

The four response types that are more commonly used in most relationships are advice, false reassurance, close-ended (leading) questions and interpretation (analysis). These response types have a purpose in *voir dire*, but must be appropriately timed and used. They tend to have a closing effect on people and tend to direct and lead people. They are often used in cross-examinations and are most often used by judges who conduct *voir dire*. Such questions should only be used after the foundation for a challenge for cause has been developed.

C. SAMPLE INTRODUCTORY *VOIR DIRE*

The attorney introduces himself or herself and everyone else at the defense table, making sure that the client stands up. The attorney touches the defendant during the introduction. Defense counsel then explains that the word "*voir dire*" comes from the French and means "to speak the truth." He or she then explains what it means to speak the truth in jury selection. She or he explains the procedure of a trial: the jury selection, opening statements, witnesses, closing arguments, the judge's instructions and finally jury deliberation.

The attorney says, "I don't know what you expected when you came here. Your expectations may be based upon L.A. Law, Matlock, or Perry Mason-type programs, your own court experiences or what you think of courts in general. Everyone has a desire and expectation to be seen as an impartial and fair person. Yet all of us have feelings and thoughts that make us prejudge a person. I am no different; I sometimes prejudge people because they bring back experiences that I have gone through and people that I have known. I want you to know that I cannot and will not lose respect for any of you for any such prejudgments as you might have. I have spoken of your expectations. It is my expectation, hope, and wish that each of you will be honest and will respond without embarrassment to questions about yourself. If there are any questions you don't feel right about answering in public, then tell me, and I am sure the judge will allow you to speak to her, the prosecutor and myself privately. This is the only time we can have this type of conversation. This part of the case is somewhat like a mutual job interview. At this point, I am not looking for the right answer or the correct response. Right now, I am looking for complete honesty and complete openness."

D. GENERAL QUESTIONS

"Just as we have an obligation to serve on juries, we also have an obligation not to serve on some juries. What is your feeling or reaction to that statement? Do you agree with it? Why?"

"My home was burglarized. I would not be a good juror in a burglary case. In what kind of case would you not be a good juror?"

"You seem nervous. Why are you feeling nervous?"

"I am nervous because I am the lawyer for this man and I have his life in my hands."

(The attorney touches his client.) "What's the first thing that comes into your mind when you look at John? What else do you see in him?"

"What kinds of adjectives or descriptive words would you use to describe John to a spouse or friend?"

"What are your gut feelings about his being on trial?"

"What are your assumptions, opinions, or feelings about him sitting here on trial?"

"What do you see when you look at me? I want you to be honest."

“What is the first thing that comes into your mind when you think of defense lawyers?”

“What is the difference between assault and self-defense in your mind?”

“What is the difference or similarity in your mind between John being tried for assault as opposed to theft?”

“Have you ever had a friend or relative who was hurt or assaulted by another? If so, how did that affect you? I asked that because, as humans, we often draw an assumption of guilt because of a specific incident.”

“Please share with me an example of when you were accused of doing something of which you were innocent?”

“How did you feel about being falsely accused? Do you think that John may feel the same way you did?”

“Have you ever been in a strange city and thought you saw someone you knew, then later found out that you actually didn’t know this person? Why do you think you thought you knew this person? Do you think it’s because we want to see that particular person? How do you think this applies to eyewitness identification?”

“In your opinion, why is crime on the increase today?”

E. SAMPLE QUESTIONS ABOUT POLICE OFFICERS

“All of the State’s witnesses are either police officers or employed by the police department or a police organization. What are your feelings about that?”

“When you think about the police department in your city, what’s the first thing that comes into your mind?”

“What have you heard about your local police department?”

“How reliable, do you feel, is a police officer’s testimony? Why?”

“How reliable, do you feel, is an accused’s or accused’s witness’s testimony? Why?”

“Compare and contrast the testimony of police officers with that of an accused or accused witness—what are the differences and similarities?”

“How often do you think police officers testify? Well, if I told you that not only do they testify constantly, but that they also take courses in testifying in court, what would you think? How do you think this will affect how a police officer appears in the court and while testifying?”

“How reliable do you think a police officer’s judgments and observations are compared to yours?”

“What would you think or feel if you saw a police officer avoid directly answering a question?”

“Have you or any of your relatives or friends applied for a job with or worked for any law enforcement agencies, such as the FBI, police force, sheriff’s department, etc.?”

“What is your relationship with that person? How often do you see him and do you ever discuss his job with him? What causes disagreements, if any, between the two of you when you discuss his job?”

“Police officers testify day in and day out and citizens accused aren’t professional witnesses, plus the citizen has the added tension of being on trial and therefore may appear tense at trial. What kind of impression will this give you?”

“A police officer is not particularly uncomfortable in court because he is here frequently. Does this fact make you more or less prone to value and believe a police officer’s testimony over that of the John (the Defendant)? Why?”

“What do you think of a police department that puts a lab technician with insufficient education and no updated know-how in charge of its crime lab?”

“What would be your reaction to a so-called ‘expert’ on D.N.A.?”

“What would you think of an official for a government agency, such as the Drug Enforcement Administration, who asks a defendant, after he has been charged with a crime, to be an informant for him?”

“What did you think of Watergate? What was it all about? What did the Watergate affair teach you about the credibility or fallibility of government officials? How did it make you feel when the country’s highest law enforcement officer, John Mitchell, was involved in Watergate?”

“What are some reasons why the police jump to conclusions and arrest an innocent person?”

“Do you believe a police officer might slant or shade the truth when writing a report or testifying? Why?”

F. SAMPLE QUESTIONS ABOUT ETHNIC GROUPS

“What’s the first thing that comes into your mind when you find out someone is Italian / Colombian / Black?”

“How many Italian / Colombian / Black people do you know that you would consider friends?”

“What, about your relationship with them, makes you consider them friends of yours?”

“What are some stereotypes you may have heard to describe Italian / Colombian / Black people? If you were aware of someone using these stereotypes, how would you respond to them?”

“How do you feel when people tell ethnic jokes? How would you feel if your son or daughter wanted to marry someone who was from a different ethnic group?”

“Have you ever been prejudged or labeled because of your particular ethnic culture, religion or color? How did that make you feel?”

“Have you ever felt prejudged or labeled? How did that make you feel?”

“If Luis testifies, you’ll notice he has a heavy accent. When you hear such an accent, what impressions come into your mind?”

“How will you compare this heavy accent to the smooth collected testimony of a police officer?”

G. BACKGROUND QUESTIONS OF THE JUROR

“What is your present employment?”

“What are your main job responsibilities? What do you like and dislike the most about your job?”

“What is your educational background?”

“Are you married?”

“What does your spouse do?”

“What are your spouse’s main job responsibilities?”

“What jobs have you and your spouse held in the past?”

“What hobbies do you have?”

“How do you spend your spare time?”

“To what organizations or clubs do you belong?”

“What religion are you? How often do you attend church?”

“What magazines do you read most often?”

“What is your favorite T.V. program?”

“Name two or three people you respect the most.”

“Name the one person who influenced your life the most and why?”

“What is the most important thing we can teach our children?”

IV. DEPLORABLE DEAD-END QUESTIONS

All of us who have picked juries have had an experience where we ask the panel a relevant and meaningful question and not a soul responds. We refer to these inquiries as the Deplorable Dead-End Questions. Examples would include the following:

- 1) “Do any of you have strong feelings against drugs or people who are accused of selling drugs?”
- 2) “I take it from your silence that none of you have strong feelings against drugs?”
- 3) “Can each and every one of you be fair and impartial jurors in a drug case?”

Given the media barrage surrounding the drug issue in America, one would naturally expect that most, if not all, jurors have very strong feelings about drugs. The issue is not whether the jurors have feelings, but what those feelings are. A secondary problem with these poorly worded questions is that the lack of response gives the judge or prosecutor ammunition to deny challenges for cause. A better way to approach these areas is to ask the following type of questions:

- 1) “Mr. Smith, would you please share with me your honest feelings about drugs, the war on drugs or people who are accused of selling drugs?”
- 2) “Some people have very strong feelings against drugs and other people feel certain drugs should be legalized. Ms. Jones, how do you feel about this issue?”

- 3) "Mrs. Hall, what qualities should a person have that would make them a fair and impartial juror in a drug case?"
- 4) "Mr. Knight, would you describe for me the kind of person who could not be a fair and impartial juror in a drug case?"
- 5) "Ms. Ellis, you have heard Mrs. Hall describe one kind of juror and Mr. Knight describe another kind of juror. Which of those two are you like and why?"

When the questions are phrased like this, it requires the juror to articulate how they think and feel. One has a foundation from which to explore the issues more thoroughly or to begin developing challenges for cause.

There is a second group of deplorable questions that many lawyers ask jurors which includes the following:

- 1) "Do any of you believe the Defendant is guilty just because he has been charged by the Government with a drug offense?"
- 2) "Would each of you find the Defendant not guilty if you voted right now?"
- 3) "Could each of you find the Defendant not guilty if the State failed to prove its case beyond a reasonable doubt?"
- 4) "Will any of you hold it against the Defendant if he does not testify?"
- 5) "Should the State fail to prove even one element of this offense, will each of you find the Defendant not guilty?"
- 6) "Can each of you promise to not make up your mind until you have heard all the evidence and arguments in this case?"

This list constitutes just the tip of the iceberg. Many more questions could be added to the list. There are a myriad of problems with these questions: (i) a sixth grader who has taken a civics class knows the right answers; (ii) the right answer is usually not a truthful answer; (iii) the questions are condescending; (iv) jurors think the lawyer is trying to trick them with loopholes and technicalities; (v) jurors often do not understand burden of proof and the presumption of innocence; (vi) the questions themselves yield little or no information; and (vii) jurors often make promises to the lawyer and then break them in the deliberation room, also known as the "guilty" room.

Our hope and expectation is that one day these type of questions will become extinct. Our research has unequivocally shown that jurors frequently misunderstand or disagree with legal issues, especially in criminal cases. Therefore, we recommend that one devote no more than twenty-five per cent of *voir dire* to legal concepts. The exception to this rule is when conducting a defense based on reasonable doubt. A larger percentage of time should be spent asking questions on burden of proof, reasonable doubt, and the constitutional right not to testify. On the other hand, when asserting and presenting a defense such as alibi, self-defense, necessity, misidentification, mere presence, entrapment, or insanity, one should spend the majority of the time going over case specific issues, getting the jurors talking, and beginning questions on the legal issues.

The six questions above should be asked in an open-ended, non-confrontational manner. Remember your objectives — establish rapport, elicit infor-

mation, and self educate. One way of asking these questions would be the following:

- 1) "What have you heard or read about people who were falsely accused of a crime?"
- 2) "How is it possible that an innocent person could be accused and brought to trial for a crime he or she did not commit?"
- 3) "What does the saying 'innocent unless or until proven guilty' mean to you?"
- 4) "Why are all people presumed innocent in our country?"
- 5) "If it were up to you, should the state be required to prove the person is guilty or should a person have to prove he or she is innocent? Why?"
- 6) "Why do you think our laws require the government to prove their case, if they can?"
- 7) "If the government brings charges against a person, should they be required to prove all, most, or some of the charges? Why?"
- 8) "Why do we all have a constitutional right not to testify?"
- 9) "Why did our forefathers fight for the right to not have to testify?"
- 10) "What are some reasons why a person on trial would not want to testify?"
- 11) "How would you feel if someone twisted your words and made it look like you were not telling the truth?"
- 12) "Some people think if my client testifies he will say anything to beat the case. Other people feel if he does not testify, he must be guilty of the crime. I am between a rock and a hard place. What do you think I should do?"
- 13) "Some people form impressions quickly and others do not. What do you do?"
- 14) "When candidates debate, I tend to make up my mind after the first person finishes speaking. What do you do?" and,
- 15) "Research on the jury system shows that as many as eighty per cent of the jurors make up their mind after opening statements. What is your reaction to that statistic? Why do so many people make up their mind before hearing the full case?"

Eliminate questions that begin with, "Do you," "Can you," "Would you," "Could you," etc., and replace those questions with those that require the jurors to speak. Do not ask, "Do you have any feelings or opinions on . . .". Instead ask, "What are your opinions or feelings on . . .". Your questions should begin with "Describe for me," "Tell me about," "Give me an example," "What are some reasons," or "Why". This will allow the jurors to disclose the information you seek.

V. HUMANIZING THE CLIENT TO THE JURY

While analyzing the biases of a juror, the defense attorney is simultaneously developing another important ingredient, namely, a relationship be-

tween the juror, the defense counsel, and the defendant. This can be achieved by realizing the pressures on the juror and responding to them. Establishing a relationship demands authenticity on the lawyer's part.

Throughout the questioning process, the attorney must pay close attention to the juror's feelings. Communicating this attention to the juror will reinforce the defense's sincerity. Remember this is the only chance to have a dialogue with the juror and to engage him or her in a conversation.

While establishing this relationship, the defense can also succeed in taking some of the power away from the judge and prosecution and giving it to the defense. A courtroom is a place that encourages jurors to look for someone who possesses strength, power, and leadership abilities. Because of jurors' predispositions toward the judge and prosecutor, the situation demands that the defense vehemently seek that guiding role in the eyes of the jurors or the prosecution and judge automatically inherit it. This means the defense can use *voir dire* to begin controlling the environment and to become the most important force in the courtroom.

As the attorney gains power and respect in the eyes of the jurors, he or she must assure the jurors that the only expectation of them is that they speak honestly in response to defense questions. Assure them again that you appreciate how uncomfortable it is to speak honestly about oneself in a public arena and that the defense understands how frightening it is to talk in front of people about attitudes, opinions, feelings, and behavior. In other words, create an environment in which they feel it is acceptable and even valued to admit biases. Most jurors do not realize that it is good to talk about what they have read, heard, or felt. They often believe that the only good juror is the one who has heard nothing, has no biases, and is totally unaffected by anything. It is the defense attorney's job to humanize the *voir dire* process, to self-disclose, and set the example so that jurors will begin loosening up and discussing frankly their true feelings.

The entire burden for this humanization process is on the defense counsel's shoulders because most judges and prosecutors will keep the process as dehumanized, structured, and rigid as possible. Defense lawyers must establish themselves as a different entity in the courtroom, one who is sincerely interested in getting to know the juror and one who respects the juror even if he or she says, "Yes, I am biased against your client." This can be difficult to do when the prosecutor is objecting to defense questions and the judge is demanding that the defense curtail in-depth questioning. If the judge is impatient during *voir dire* or belittles counsel before the jurors, it may be necessary to read into the record, at the bench, that the judge's loud and demeaning tone of voice is having a detrimental effect on the jurors' perceptions of defense counsel and that the defense will have to use some peremptory strikes on jurors simply because the judge has prejudiced them against the defendant.

After the defense strategy has been planned, the next step is to decide if the defendant should be appointed co-counsel. This is a very important decision to make and should be considered carefully. There are a few potential

times during a trial when the defendant could address the jury and one of the main places is during *voir dire*. This is especially true if the lawyer and defendant decide that he or she should not testify. Careful consideration should be given to how to humanize the defendant in the eyes of the jury. During *voir dire*, even if the defendant only asks a single question, it would give the jurors a chance to look into the defendant's eyes and talk directly to him or her. This contact is extremely important because it is easier for a jury to send someone to prison whom they have not personally encountered. Once the decision has been made whether to include the defendant in the presentation of the trial, the planning for selection can begin.

VI. SPECIAL NEED FOR INDIVIDUAL *VOIR DIRE* IN CERTAIN CASES

Certain cases or situations raise inflammatory issues necessitating an especially careful and sensitive attorney-conducted *voir dire*. People's honest attitudes toward drugs, violent crimes, including sexual crimes, or their knowledge about a high-profile case involve highly personal and private issues that will not generally come out without special handling. *Voir dire* is the only opportunity to talk with jurors about their feelings about these sensitive issues. It is better to know what someone thinks about the issues in the case prior to exercising your peremptory strikes than to let harmful opinions fester, grow, and run rampant in the jury deliberation room.

Some lawyers say that when they ask a question in a case about which there has been a lot of publicity, they feel the need to preface the remarks with an acknowledgement of the strong, negative opinions which are commonly held in the community about the client. The authors believe that it is important for the lawyer to say that he or she does not agree with this opinion, and to say to the jury, "What do you think and feel about that?" It is better to have the lawyer be honest with the juror and encourage the juror to talk honestly about his or her feelings than to not want to ask some question for fear it is going to pollute the panel. If the commonly-held beliefs are inside the juror's mind, it is best to hear them during *voir dire*, because they will certainly be voiced in the jury room. It also gives the accurate impression to the jurors that this defense lawyer is being honest with them. The more honest the attorney is with them, the more apt they are to listen to the attorney. The jurors see through attempts to hide, deceive, manipulate, or con.

The typical criminal case raises other problems for a jury. If police testimony is going to be heard, *voir dire* is an opportunity to sensitize jurors to the veracity of police. Similarly, when informants will be key witnesses, *voir dire* should raise questions about informant testimony. If entrapment is an issue, then jurors should be sensitized about the government's conduct in the case. Media attention is another reason why individualized *voir dire* is crucial in high profile cases.

VII. EXPANDING *VOIR DIRE* IN FEDERAL COURT

Many attorneys believe that the words, "federal district court" and "attorney participation in *voir dire*" do not belong in the same sentence. It is true that many federal district judges do not allow any attorney participation in *voir dire*. There is a trend, however, in federal district courts to grant juror questionnaires and at least limited attorney participation. More and more federal judges are willing to try questionnaires and attorney *voir dire* provided the lawyers do not abuse the opportunity. If a judge gives the lawyer thirty minutes or an hour of *voir dire* and the attorney proceeds to give a speech or an opening statement, it is no surprise that the judge will cut it off or simply not allow lawyers to do it again.

To encourage the judge to expand the *voir dire* conditions, you must file some or all of the following motions: 1) motion for jury questionnaire; 2) motion for attorney participation in *voir dire*; 3) motion for individual *voir dire* on limited issues; 4) motion to prohibit jury service in similar cases; 5) motions for disclosure of U.S. attorney jury selection data; 6) motion for additional and separate peremptory strikes; 7) motions for change of venue due to massive and prejudicial pre-trial publicity; 8) motion for small group *voir dire*; 9) motion for additional time to conduct *voir dire*; 10) motion to submit follow-up questions after each juror; 11) motion for fees to retain a jury and trial consultant; 12) requested *voir dire* questions to be submitted to the panel and individual jurors; 13) motion to allow the defendant to participate in *voir dire*; or 14) motion to allow the magistrate to oversee the attorney conducted *voir dire*. The motions you can file that relate to jury selection are only limited by your finances, time, and ingenuity.

The primary motions are those for a questionnaire and attorney participation. You should attach the proposed questionnaire and agree to accept a modified version if the court feels any of the questions are improper. With both motions you should request a hearing in advance of the jury selection. As discussed earlier in the section on questionnaires, you should secure the affidavits and testimony of lawyers, consultants, professors, former judges, and lay people. Judges can be persuaded to re-think this issue if they believe the bias or prejudice exists, that jurors will be more candid with the lawyer, and that the lawyer will ask probing and proper questions. Some judges have been known to allow an hour or two of attorney participation just to avoid the three or four hour hearing.

Be diligent, thorough, and persistent. Unless the lawyer conveys to the judge that he or she feels this is a major issue, there is no reason for the judge to break with tradition. Another technique that has been successful is to tell the court that in good faith you believe your defense will take a specific number of days, but if the court allows you two hours of *voir dire*, you will shorten your presentation of the case by four hours or one day. The argument is that a thorough *voir dire* by the attorney will give him or her a better reading on what issues are important to the jurors and the defense can be shortened accordingly. On the other hand, if the lawyers are not allowed to obtain information from the jurors, the lawyer will be required to guess

which issues are most important and therefore will have to present any and all evidence available.

Another approach is to say to the judge, "In a trial of this length, your Honor normally gives each side two hours for closing argument. If the court would give me one hour to *voir dire* the jury, my closing argument will last one hour or less." Most courts have huge dockets. If the attorney can save the court time or streamline the case, the court may expand the *voir dire* conditions.

Our experience in federal court and jurisdictions where the judge conducts *voir dire* has generally been that when the lawyers file the motions, request hearings, and fight as hard for expanded *voir dire* as they do at a motion to suppress evidence, the attorneys always get something, be it a questionnaire, some attorney participation, an additional peremptory strike or maybe just a couple of extra questions that the judge normally would not ask. This is a battle worth fighting. With your client's life or liberty at stake, you are obligated to seek every means available to secure the fairest jury possible in this "war on crime".

The question becomes, "if the judge gives me thirty minutes or an hour, what should I do?" There are essentially two choices — ask group questions on as many topics as possible or search out the two or three most important case specific issues and *voir dire* each juror on those questions. Attorneys who have worked with us know that we insist on the latter approach. In the typical drug case, the questions might be:

- 1) "Describe what good or bad experiences you have had with police officers."
- 2) "Tell me how you feel about informants, plea bargaining, and electronic surveillance in drug cases."
- 3) "Tell me your feelings about the war on drugs."
- 4) "At what point do the police cross the line on the war on drugs?"
- 5) "What does 'reasonable doubt' mean to you?"
- 6) "We have all read about the war on drugs. My client, Joe Brown, is charged with being involved in a conspiracy to distribute cocaine. How in the world can he get a fair trial?"
- 7) "What have you heard or read about a person being falsely accused or wrongly convicted of something?"
- 8) "What are some reasons why a person would be falsely accused of a rape charge?"
- 9) "The following question is very personal, and if you want to discuss your answer privately, I know the judge will allow us. My question is, have you, a family member or friend ever had any kind of negative experience with someone using or addicted to drugs?"

We would prefer to hear how the jurors answer these type of questions rather than having the lawyer ask a litany of "yes" or "no" questions. In the limited time setting, counsel should ask the important case specific questions during *voir dire*. Save the legal issues for opening statement. Given what we have said earlier about jurors not understanding or accepting certain legal

issues, it is virtually impossible to adequately develop these issues and thus challenges for cause in such a limited time. The lawyer, and ultimately the client, will be better off asking information-seeking questions. We have also found federal judges to be more lenient when it is the jurors who do most of the talking.

VIII. MAKEUP OF THE JURY

It is impossible to generalize about the type of people who you want in a typical criminal case. While there are no rules, we generally look for people who have traveled or have been exposed to the world and realize that no one is perfect. On the other hand, though, some of the best jurors we have had are people who have never been out of their home state yet view the world with an open-minded perspective because of something in their background. The only guidelines are to look for flexible, independent, sensitive, and open-minded people.

What we have found in all the research that has been done on juries is that demographics do indeed have something to do with how people communicate, and likewise, the type of publicity they have been exposed to has a lot to do with their perspective of the case. More importantly, however, is how a person's personal life experiences have affected his or her view of the important case issues. That is why the old stereotypes that many defense lawyers rely on are not reliable. As a result, lawyers often strike people who would have been good jurors in their case.

The old profile assumes that military officers, bankers, accountants, or conservatives are pro-prosecution as is everyone who has law enforcement background, or family members who are in law school. We have not found these to be necessarily true. Antiquated blind faith leads many lawyers to pigeonhole jurors, jumping to conclusions about them without enough information.

Similarly, if a person works in what appears to be a liberal profession, such as the arts or social sciences, one might assume that he or she is more apt to be open-minded. The stereotype does not hold anymore. Some of the most conservative, pro-prosecution jurors we have seen are in the "artsy" or liberal professions. Our society has become so mobile, we get information from a variety of sources and people are impacted in ways very different from the past.

In addition to individual jurors, the defense team must examine closely the group dynamics. This means that the defense team must decide who will be the most likely foreperson, who will follow this person, who will resist this person. They must also look closely at the sub-grouping which will emerge and how powerful these groups will be. Some questions to consider in the group dynamics are: (1) How many strong people do you want on your jury? (2) How many weak people do you desire? (3) What percentage are defense jurors? These are but a few questions that must be answered before exercising peremptory strikes. All of this, of course, will be figured in with whom the defense team thinks the prosecutor will strike.

In order for the defense counsel to have as many observations as possible, everyone at the defense table should take notes on each juror's verbal and non-verbal responses. It can also be helpful to set up rating scales for each juror. This would be a ten-point scale with the number one signifying prosecution, authoritarian and punitive, whereas number ten would illustrate pro-defense, strong, flexible, non-punitive, intelligent, and leader. The inherent problem with this system and most others is that the majority of jurors will get a rating of four for what we call the "grey" jurors. It is with this group that an experienced jury and trial consultant is worth his or her weight in gold. These scales when done on each juror will act as a point of comparison when making choices. This, combined with each person's notes on the juror and a verbatim account of what the juror said during *voir dire*, give additional data on which to base your strikes.

A very important dynamic when putting the group together is getting the defendant's perceptions of how each juror seemed to relate to him or her. This is extremely valuable input, because he or she often can perceive feelings and reactions from jurors that other people in the selection process miss. Another thing that is added into the use of peremptory challenges is how jurors related to one another during the selection process. If the selection was a panel *voir dire*, who nodded at someone else's answers or gave someone a scornful look when they were answering a question? Who copied someone else's answers and seemed to value what they said? When individual *voir dire* is being conducted, the defense team should have notes on who chooses to sit next to whom and who was talking to whom when the jury was in the hallway or in the bathrooms. Also note people's neighborhoods, jobs, socio-economic class, and hobbies to discover who will have common interests on the jury and who will identify with each other. This will also indicate which people will conflict with one another.

There is an infinite number of areas to look at while picking a jury that will feed into the decision-making process. The sign of a creative attorney during *voir dire* is the one who changes his *voir dire* process at the completion of each trial. This person finds new content areas in which to ask questions, deletes questions that are confusing or detrimental, and is always desiring to improve his or her verbal responses and non-verbal gestures. This person also interviews jurors after trials not only to gather information about how the jury saw the case, but also to find out the jurors' perceptions of him or her, the judge, and the prosecutor during *voir dire*. He or she asks questions of the jurors such as (1) What questions I asked made you want to talk to me? (2) What questions hindered our relationship? (3) What kinds of adjectives would you use to describe my behavior during jury selection? (4) How could I have explained jury selection more clearly that would have aided your answering my questions more completely? (5) What question or questions could I have asked that would have gotten to the core of who you are? and (6) What other questions should I have asked you? This attorney also puts as much energy into the selection of a jury as he or she does in the presentation of the case, because he or she realizes that he or she can put on

the best play in the world, but without an audience which is receptive to the play, it will be misunderstood and not comprehended.

IX. ROLE OF TRIAL CONSULTANT

A trial team in a criminal case generally consists of the trial lawyer, the investigator, the secretary and the paralegal/legal assistant. More and more lawyers are adding an extra, and necessary, member to the team: a jury and trial consultant. Many lawyers are now acknowledging the tremendous input and assistance provided by competent and experienced trial consultants. Their role is to augment, not replace, the trial lawyer. They should be the thirteenth juror, not the second chair lawyer.

A jury and trial consultant should be contacted and retained well in advance of the trial. Hiring a consultant on the eve of jury selection is the equivalent to hiring an investigator on the Friday before Monday's trial. Neither the consultant nor the investigator can do the job properly without sufficient time or information.

If the funds are available, the trial consultant should work with the attorney not only during jury selection and the trial, but also on developing a trial theme, assist with the trial preparation and run one or more mock trials. If time or funds are limited, the consultant should be retained to review case materials, prepare a jury questionnaire, write *voir dire* questions, and assist with jury selection.

Many lawyers call consultants and say, "I don't want all the bells and whistles, just give me a juror profile — do I want men or women, young or old, white collar or blue collar, high school educated or college educated?" The consultant can provide a generic profile but in the absence of empirical data (survey, mock trials, or focus groups) it is impossible for the consultant to accurately predict how certain demographic groups will react to a particular set of facts. The consultant that says he or she can give the lawyer a demographic-based profile without empirical input is either fooling the attorney or is remarkably lucky. Given the tools that are available, you should not leave jury selection to mere guesswork. Do not take a short cut. Jury selection is three-quarters art and one-quarter science. The courtroom is the canvas, the consultant has the colors but it is the trial lawyer who controls the paint brush.

X. CHALLENGE TO THE ARRAY

The Texas Code of Criminal Procedure unambiguously requires a challenge to the array of the jury to be made before the panel is qualified.² To successfully challenge the array, the defendant must demonstrate noncompliance with the mode and manner of summoning the venire, as set out in Texas Government Code Section 62.001, and that the noncompliance has

2. Callaway v. State, 818 S.W.2d 816, 837 (Tex. App.—Amarillo 1991, pet. ref'd); TEX. CODE CRIM. PROC. ANN. art. 35.06 (Vernon 1989).

harmed the accused.³ Harm occurs when the noncompliance compromises the fairness of the trial or the selection procedure forces the accused to accept an objectionable juror or denies him an impartial juror.⁴ Additionally, the grounds for challenging the array must be distinctly set forth in writing and supported by either a personal affidavit or an affidavit of a credible person.⁵

XI. JURY COMPOSITION CHALLENGE

The Sixth Amendment entitles every defendant to object to any jury panel that is not representative of a cross-section of the community.⁶ To demonstrate a prima facie violation of the Sixth Amendment's fair cross-section requirement, an accused must show: 1) the group alleged to be excluded is a "distinct" group in the community; 2) the representation of this group in venires assembled for jury selection is not fair and reasonable in relation to the number of such persons in the community;⁷ and 3) the under representation is due to systematic exclusion of the group of jurors summoned and drawn for this case.⁸

A "distinct group" has been defined as a group of people possessing a common thread of shared experiences or political, social, or religious viewpoints that distinguish it from other groups.⁹ It has also been described as an identifiable group, such as postmen, lawyers, or clergymen.¹⁰ In *Weaver v. State*,¹¹ the accused challenged the statutory exemption from jury service for persons over sixty-five years of age. Although the court acknowledged that the elderly have much to offer in terms of life experiences and exposure which make their contribution to all aspects of life invaluable, the defense failed to offer evidence demonstrating that the elderly constitute a distinct group.¹² Thus, to successfully challenge the composition of the venire, it is imperative to demonstrate that the excluded group shares a common thread or viewpoint that differentiate them from other groups. It is equally important to establish that the under representation occurred due to the systematic

3. *Callaway*, 818 S.W.2d at 837.

4. *Id.*

5. *Hart v. State*, 818 S.W.2d 430, 438 (Tex. App.—Corpus Christi 1991, no pet.). See TEX. CODE CRIM. PROC. ANN. art. 35.07 (Vernon 1989).

6. U.S. CONST. amend. VI; *Rodriguez v. State*, 832 S.W.2d 727, 728 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (citing *Holland v. Illinois*, 493 U.S. 474 (1990)). There are no significant textual differences between the pertinent parts of article 1, section 10 of the Texas Constitution and the Sixth Amendment of the United States Constitution. *Weaver v. State*, 823 S.W.2d 371, 373 (Tex. App.—Dallas 1992, pet. ref'd). An accused, however, does not have a Sixth Amendment right to a petit jury that represents a fair cross section of the community. *Seubert v. State*, 787 S.W.2d 68, 70 (Tex. Crim. App. 1990).

7. Counsel should obtain and put into the record the data compiled by the United States Census Report for the jurisdiction in question.

8. *Rodriguez*, 832 S.W.2d at 728 (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Weaver*, 823 S.W.2d at 373).

9. *Weaver*, 823 S.W.2d at 373 (citing U.S. *ex rel. Silagy v. Peters*, 713 F. Supp. 1246, 1251 (D. Ill. 1989)).

10. *Id.* (citing *Holland v. Illinois*, 110 S. Ct. 803, 810 (1990) (dictum)).

11. *Id.* at 372.

12. *Id.* at 373; see also *Silagy*, 713 F. Supp. at 1251.

exclusion of the group when they were summoned and drawn. In *Rodriguez v. State*,¹³ the defense counsel raised a jury composition challenge. He then clearly enumerated for the record the breakdown of the venire's racial composition and the racial composition of the county. The defense counsel, however, failed to satisfy the third prong of the test, namely, that the under representation was due to the systematic exclusion of the group when summoned and drawn.¹⁴

A challenge to the composition and an argument for an alternative method of jury selection must be made in conjunction with a particular constitutional or statutory protection in support of such argument.¹⁵

XII. JUROR DISQUALIFICATION

It is well-settled in Texas that a person under indictment or other legal accusation for theft or any felony is absolutely disqualified for jury service.¹⁶ A prospective juror may regain his qualification to serve on a jury if he completes a felony probation, has the conviction set aside, or has the case dismissed.¹⁷ Commutation of sentence, on the other hand, has no effect; the person still stands convicted, and therefore, is disqualified from jury service.¹⁸ If it is demonstrated upon motion for a new trial that one or more of the impaneled jurors was absolutely disqualified, a new trial shall be ordered without regard to showing injury, probable injury, consent, or waiver.¹⁹ If it is demonstrated that the juror was merely subject to challenge for cause, the accused must show harm to his case.²⁰

In *Thomas v. State*,²¹ the trial court erroneously denied the defendant's motion for new trial after it was discovered that one juror was on felony probation and charged with misdemeanor theft. The court rejected the State's argument that because the defense counsel never asked specific questions of the juror regarding the theft offenses, any error in the record had to be deemed waived.²²

13. 832 S.W.2d 727 (Tex. App.—Houston [1st Dist.] 1992, no pet. h.).

14. *Id.* at 728.

15. *Robinson v. State*, No. 69,568, 1991 WL 57765, at *5 (Tex. Crim. App. Apr. 17, 1991) (not yet released for publication).

16. *Thomas v. State*, 796 S.W.2d 196, 197 (Tex. Crim. App. 1990); see also TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(3), 35.19 (Vernon 1989).

17. *Day v. State*, 784 S.W.2d 955, 956 (Tex. App.—Fort Worth 1990, no pet.).

18. *DeBlanc v. State*, 799 S.W.2d 701, 708 (Tex. Crim. App. 1990), cert. denied, 111 S. Ct. 2912 (1991) (citing *Ex parte Freeman*, 486 S.W.2d 556, 587 (Tex. Crim. App. 1972)).

19. *Thomas*, 796 S.W.2d at 197 (quoting *Ex parte Freeman*, 254 S.W.2d at 121).

20. *Id.* at 199.

21. *Id.* at 197.

22. *Id.* at 198. It should be noted, however, that on the juror's questionnaire, the juror denied that she had been charged, arrested, indicted, or convicted of any criminal offense. Additionally, when the trial court conducted voir dire of the panel regarding felony convictions and charges or convictions of misdemeanor theft, the juror did not indicate that she was on felony probation or charged with misdemeanor theft. The court stated that the defense counsel was justified in relying upon the above questioning to conclude that the juror had not been charged with any offense. *Id.* (citing *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. 1978)).

In *Hammond v. State*,²³ the venire member was selected and preliminarily sworn in as the twelfth juror before the State discovered that she had been convicted of shoplifting in 1962. The juror testified that she had indeed been charged with shoplifting when she was eighteen but she never entered a plea. The trial court went to considerable lengths to determine whether she had been convicted of theft. The trial court made a finding of fact, inter alia, that because "there was never a judgment entered adjudging her guilty of theft," she was not disqualified.²⁴ The Court of Criminal Appeals, in affirming the decision, held that although there was evidence that someone pled guilty and paid a fine on behalf of the juror, she could not testify that she had been convicted of theft and there was no definitive proof a judgment was ever entered against her.²⁵

XIII. DISABILITY OF JUROR

Under the Texas Code of Criminal Procedure, a juror is subject to a challenge for cause for a defect in the organs, feeling, or hearing, a bodily or mental defect or disease which would render him unfit for jury service, or if he is legally blind.²⁶ Low intelligence is an improper ground upon which to challenge a juror under article 35.16(a)(5).²⁷ Inability to understand the law which the defendant is entitled to rely upon, however, is a proper ground for challenge under article 35.16(a).²⁸

XIV. SHUFFLE

The accused has an absolute right, pursuant to article 35.11 of the Texas Code of Criminal Procedure, to shuffle the names of the jury panel.²⁹ Refusal of the trial court to comply with the accused's timely request for a shuffle constitutes reversible error without any other evidence of demonstrated harm.³⁰ An accused has the right to see the jury panel seated in proper sequence before he decides whether he should exercise his right to a shuffle,³¹ because that right is virtually meaningless without seeing the panelists seated in the order in which they will be called.³² Article 35.11, however, does not allow a motion to shuffle which is based upon information gained during voir dire or gleaned from jury information cards or jury questionnaires.³³ Thus, the motion must be made before voir dire commences.³⁴

23. 799 S.W.2d 741, 743 (Tex. Crim. App. 1990).

24. *Id.*

25. *Id.* at 745.

26. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(5) (Vernon Supp. 1992).

27. *Burton v. State*, 805 S.W.2d 564, 568 (Tex. App.—Dallas 1991, pet. ref'd) (citing *Gardner v. State*, 730 S.W.2d 675, 695 (Tex. Crim. App. 1987)).

28. *Id.*

29. *Jones v. State*, 833 S.W.2d 146, 147 (Tex. Crim. App. 1992).

30. *Id.*

31. *Scott v. State*, 805 S.W.2d 612, 614 (Tex. App.—Austin 1991, no pet.).

32. *Id.*

33. *Turner v. State*, 828 S.W.2d 173, 176 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

34. *Id.* at 177.

Voir dire commences in a non-capital murder trial when the State begins its examination of prospective jurors rather than when the judge begins the initial instructions.³⁵ In a capital murder trial, voir dire commences when the trial judge begins his examination of the panel.³⁶ Although one court of appeals indicated it was a better practice to conduct the shuffle in the courtroom, shuffling the jury panel before it was seated in the courtroom was not reversible error.³⁷

While the right to a shuffle is absolute, it is a right which may be exercised only one time, at either the accused's request or the State's.³⁸ The Court of Criminal Appeals has held that an accused does not have a right to reshuffle the panel after the State has shuffled the panel.³⁹ The court has, however, held that an accused may acquire the right to have the panel reshuffled if there is evidence of misconduct in the State's shuffle.⁴⁰ The Court has stated in dicta that an accused has the absolute right to reshuffle if someone other than the State caused the original shuffle, such as the trial judge or other court personnel.⁴¹

In *Scott v. State*,⁴² the Austin Court of Appeals held that the trial judge committed reversible error by refusing to reshuffle the names after the trial judge sua sponte shuffled the names.⁴³ The trial judge directed the bailiff to shuffle the jury cards after screening the venire for disqualifications and exemptions. After the panelists were seated according to the results of the shuffle, the trial judge made introductory remarks. Before the prosecution began its voir dire, the accused made a motion to reshuffle the names. The trial court refused to reshuffle the jurors' names, saying: "They were shuffled, your motion is granted."⁴⁴ The appellate court held that the accused filed a timely motion to shuffle the jury and the trial court committed reversible error by denying the motion.⁴⁵ The court also held that a court's sua sponte shuffle does not foreclose a defendant's right to a shuffle.⁴⁶

XV. PRESERVING ERROR

If the trial judge denies the accused's timely motion for a jury shuffle, it is imperative that the accused pursue the objection until he receives an adverse ruling in order to preserve the issue for appeal.⁴⁷ In *Ramos v. State*,⁴⁸ the accused made a timely motion to shuffle the jury. The trial court responded

35. *Id.*

36. *Id.*

37. *Urbano v. State*, 808 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

38. *Jones*, 833 S.W.2d at 149.

39. *Id.*

40. *Id.* (citing *Stark v. State*, 657 S.W.2d 115 (Tex. Crim. App. 1983)).

41. *Id.* at 149 n.4.

42. 805 S.W.2d 612 (Tex. App.—Austin 1991, no pet.).

43. *Id.* at 614.

44. *Id.* at 613.

45. *Id.* at 614.

46. *Id.*

47. *Ramos v. State*, 819 S.W.2d 939, 943 (Tex. App.—Corpus Christi 1991, pet. ref'd).

48. *Id.*

that "because of the delays already, I'll shuffle at the end of the examination, it will be the same people, the same answers, I'll just shuffle at the end."⁴⁹ The accused's attorney acquiesced to the trial court's plan to reshuffle later, after which the State conducted its voir dire. Following the challenges for cause, the trial court offered to reshuffle, but the accused's attorney complained that he "would have preferred that it be done while we had the people there to look them in the eye."⁵⁰ The court of appeals held that by creating the impression that he was abandoning the objection, the accused did not perfect his objection for appellate review.⁵¹ When the trial court offered to reshuffle and the accused declined, he did not obtain an adverse ruling and therefore he did not preserve the error for review.⁵²

XVI. SUA SPONTE EXCUSAL

Pursuant to article 35.03 of the Texas Code of Criminal Procedure, a trial court has the authority to discharge a juror if it deems the juror's excuse sufficient to warrant discharge.⁵³ A trial judge also has authority to excuse jurors sua sponte who are absolutely disqualified within the meaning of Article 35.19 of the Texas Code of Criminal Procedure.⁵⁴ Although article 35.16 provides a complete list of challenges for cause⁵⁵ a trial court's excusal under article 35.19 may only be made in accordance with one of the three bases enumerated in its provisions.⁵⁶

Article 35.03, on the other hand, does not enumerate grounds for the trial court's dismissal of a venire person.⁵⁷ A trial court's power to excuse a juror is not limited to the period before questioning the venire takes place.⁵⁸ The trial court retains the power to grant an excusal article 35.03 from the first assemblage of the array until the juror is seated.⁵⁹ A trial court's dismissal pursuant to article 35.03 will be reversed upon a showing that it constitutes

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. TEX. CODE CRIM. PROC. ANN. art. 35.03 (Vernon 1989).

54. *Id.* art. 35.19 (Vernon 1989). Article 35.19 of the Texas Code of Criminal Procedure reads: "No juror shall be impaneled when it appears that he is subject to the second, third, or fourth cause of challenge in Article 35.16, though both parties may consent." *Id.*

The relevant portions of article 35.16 are:

(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any of the following reasons:

2. That he has been convicted of theft or any felony;
3. That he is under indictment or other legal accusation for theft or any felony;
4. That he is insane.

TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 1989).

55. *Butler v. State*, 830 S.W.2d 125, 130 (Tex. Crim. App. 1992). The *Butler* court explicitly overruled the holdings of *Rougeau v. State*, 738 S.W.2d 651 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 1029 (1988), and *Nichols v. State*, 754 S.W.2d 185 (Tex. Crim. App. 1988), *cert. denied*, 488 U.S. 1019 (1989). *Id.* at 132.

56. *Butler*, 830 S.W.2d at 130.

57. *Id.*

58. *Id.*

59. *Id.* at 131.

an abuse of discretion.⁶⁰ The appellate court will consider whether the "record reasonably reflect[s] a tendency to support the trial court's holding."⁶¹ The Texas Court of Criminal Appeals has held that "the exercise of this authority by trial judges should be jealously guarded and relied upon, not by the parties but by the judges as a last resort for excusing what would otherwise be a proper juror."⁶²

In *Butler v. State*⁶³ the trial court sua sponte excused a potential juror without explicitly stating the statutory grounds for the basis of excusal. During the general voir dire of the panel, a venire person indicated that she was anxious about sitting on a jury for an extended period of time. The trial court questioned the venire person and then asked both parties if they wished to voir dire the juror. Both the defense and the prosecution declined the judge's invitation to voir dire the juror. The trial court excused the juror and the defense objected. The trial court responded to the defense's objection but did not directly address it, and then moved on to the next juror.⁶⁴ The Court of Criminal Appeals reviewed the trial court's pattern of excusal and held that the venire person was properly excused pursuant to Article 35.03 and not Article 35.16, albeit never articulated by the trial court.⁶⁵ Thus, if a trial court excuses a juror sua sponte without articulating the basis of the excusal, a request should be made to specify the basis of the excusal.

XVII. PRESERVING ERROR FOR SUA SPONTE EXCUSAL

To preserve error and establish the harm of an erroneous sua sponte excusal, an accused must: (1) object to the sua sponte excusal of the juror; (2) at the conclusion of the voir dire, assert a claim that he is to be tried by a jury to which he has a legitimate objection; (3) identify the specific juror or jurors of which he is complaining; (4) exhaust all peremptory challenges; and (5) request additional peremptory challenges.⁶⁶ A mere assertion that the accused was tried by a jury to which he had a legitimate objection is insufficient to establish harm.⁶⁷

If a judge sua sponte excuses a juror on two distinct grounds, an accused must state the basis of his objection in order to obtain appellate review.⁶⁸ In

60. *Id.*

61. *Id.* (quoting *Johnson v. State*, 773 S.W.2d 322, 330 (Tex. Crim. App. 1989)).

62. *Butler v. State*, 830 S.W.2d 125, 131 (Tex. Crim. App. 1992) (quoting Presiding Judge McCormick, *Johnson v. State*, 773 S.W.2d 322, 330 (Tex. Crim. App. 1989)).

63. 830 S.W.2d 125 (Tex. Crim. App. 1992).

64. The trial court responded by stating: "yesterday [sic] while we were here on voir dire and also this morning the Court personally observed this venire person [sic] . . . she was unusually and noticeably nervous and edgy about something and I assume from what she said it was about her economic situation in being here and not being covered by her employment in any way for it. And I just think it's fair to both sides not to have a juror that's in such a hurry to get out, they can't pay complete, full attention and concentrate on this case. It's not fair to the State or the defense . . ." *Id.* at 128.

65. *Id.* at 132.

66. *Alvarado v. State*, 822 S.W.2d 236, 239 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

67. *Id.*

68. *DeBlanc v. State*, 799 S.W.2d 701, 713-14 n.9 (Tex. Crim. App. 1990).

DeBlanc v. State,⁶⁹ the trial court excused a venire person for hardship reasons and because of her reservations concerning the death penalty. Defense counsel then stated, “[p]lease note our exception to the Court’s ruling.”⁷⁰ The Court of Criminal Appeals stated in dicta that it was unclear as to which ground the accused objected in the venire person’s excusal.⁷¹ On appeal, the accused asserted that the juror was improperly excused because she “never stated that her views on capital punishment would prevent or impair the performance of her duties as juror in accordance with her instructions and her oath.”⁷² The court refused to review on appeal the issue of whether the venire person’s excusal was erroneous since the accused never questioned the trial court’s hardship excusal.⁷³

XVIII. TIME LIMITATION

Control of the voir dire examination is within the sound discretion of the trial judge who may impose reasonable limits on counsel’s time for conducting voir dire.⁷⁴ The time allowed for voir dire examination depends upon several factors, such as composition of the jury panel, complexity of the case, the number of challenges for cause, and the amount of time spent in discussion at the bench.⁷⁵ It is the responsibility of each attorney to budget his or her time appropriately within the trial court’s restrictions.⁷⁶ When reviewing the reasonableness of the trial court’s limitations on the voir dire of an individual venire member, the appellate court will consider whether: (1) the accused attempted to prolong voir dire by asking irrelevant, immaterial, or unnecessarily superfluous questions; (2) the accused’s questions which were disallowed were proper voir dire questions; and (3) the record reveals that the jury included venire members whom the accused was not allowed to examine.⁷⁷ If, however, the trial court limits the collective voir dire of the venire, the appellate court will consider only the first two prongs of this test.⁷⁸ Thus, the appellate court’s analysis is contingent upon whether the trial court restricted the voir dire of the panel or individual venire members.⁷⁹ Because appellate courts are reluctant to establish a bright line rule as to how much time is unreasonable, they examine each case upon its own facts.⁸⁰ Furthermore, the appellate court will only reverse the decision if the trial court abused its discretion.⁸¹

69. *Id.*

70. *Id.* at 713 n.9.

71. *Id.*

72. *Id.*

73. *Id.* at 714 n.9.

74. *Tobar v. State*, 833 S.W.2d 296, 298 (Tex. App.—Corpus Christi 1992, pet. granted) (citing *Ratliff v. State*, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985)).

75. *Id.*

76. *Id.* (citing *Whitaker v. State*, 653 S.W.2d 781 (Tex. Crim. App. 1983)).

77. *Id.*

78. *McCarter v. State*, 837 S.W.2d 117, 120 (Tex. Crim. App. 1992) (en banc).

79. *Id.*

80. *Tobar*, 833 S.W.2d at 298.

81. *Id.* (citing *Ratliff*, 690 S.W.2d at 600).

For example, in one case involving delivery of a controlled substance,⁸² the trial court restricted the voir dire of the venire panel to thirty minutes. After the trial court informed the attorney that his time had expired, the defense attorney requested more time to question the panel and indicated the questions he desired to pose. The trial court denied his request for additional time. The Court of Criminal Appeals analyzed the case using the two-prong test and reversed the trial court's decision, holding it was an unreasonable limitation of voir dire which constituted an abuse of discretion.⁸³

In its analysis, the court first examined whether the defense counsel attempted to prolong the voir dire.⁸⁴ The State contended that the defense counsel attempted to prolong the voir dire of the panel by questioning a venire member even though the trial judge indicated that the venire member would be individually questioned to determine whether he was subject to a challenge for cause. The State argued that the juror was disqualified by the trial court, and the defense counsel prolonged the voir dire by questioning him. The Court of Criminal Appeals rejected this argument and held that the juror was not disqualified by the judge's statement that he might be questioned later.⁸⁵ Therefore, the minimal time the defense attorney spent questioning the venire person did not prolong the voir dire.⁸⁶ The court further noted that the defense counsel covered numerous topics and received responses from several other venire members during his allotted thirty minutes.⁸⁷

The State also contended that defense counsel prolonged voir dire by asking questions which had been posed earlier by the trial court and the State. The court held that this argument was also without merit, noting that a court cannot preclude defense counsel from the traditional voir dire examination simply because the questions are repetitive of those asked by the court and prosecutor.⁸⁸

The Court of Criminal Appeals then addressed the second prong of the test — whether the prohibited questions were proper voir dire questions.⁸⁹ The defense attorney properly preserved error by informing the judge of the topics he wanted to cover during his voir dire and the reviewing court held the topics were proper.⁹⁰ Having found that defense counsel met both prongs of the test, the appellate court held that the trial court's restriction of the voir dire was an abuse of discretion.⁹¹

In *Cartmell v. State*⁹² the trial court restricted the voir dire of the jury panel to twenty minutes. When the court terminated the defense attorney's

82. *McCarter*, 837 S.W.2d at 118.

83. *Id.* at 122.

84. *Id.* at 121.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 121 (citing *Mathis v. State*, 576 S.W.2d 835, 839 (Tex. Crim. App. 1979)).

89. *Id.* at 121-22.

90. *Id.* at 122.

91. *Id.*

92. 784 S.W.2d 138 (Tex. App.—Fort Worth 1990, no pet.).

voir dire, he objected to the time limitation placed upon his examination. After the trial court overruled his objection, the defense attorney renewed his objection when the jury was impaneled. Defense counsel then requested that the court allow him to make a bill of exceptions to put into the record the questions he was prohibited from asking the jury panel and to identify the jurors whom he was not able to individually examine. In a motion for new trial, the defense counsel renewed his objection, specified the questions he would have asked the panel and indicated which jurors he would have questioned had the trial court not restricted his examination. Although the trial court's restriction related to the collective voir dire of the panel, the Fort Worth Court of Appeals applied the three prong test.⁹³ The court held that the defense attorney met the test since he did not attempt to prolong the voir dire examination, the questions disallowed by the court were proper and relevant questions, and the defense counsel was unable to individually examine two venire members who served on the jury.⁹⁴

In the *Tobar* case⁹⁵ discussed earlier, the trial court restricted the voir dire of the panel to forty-five minutes. Defense counsel spent approximately half of his time lecturing the venire on general principles of the law, which both the State and the trial court had previously discussed at length. After approximately twenty minutes had elapsed, the defense began to question the venire on such issues as punishment and credibility of police officers' testimony. Additionally, the defense counsel posed lengthy and complicated hypothetical questions. After the defense attorney had almost exhausted his allotted time, the trial court informed the defense attorney that his time was about to expire. The defense attorney requested additional time to ask three more questions. The trial court denied the defense's request for additional time, and defense counsel's remaining questions were read into the record.⁹⁶ The court of appeals, in affirming the trial court's decision, reviewed the manner in which the defense counsel conducted his voir dire examination.⁹⁷ The court held that the defense counsel was not denied the opportunity to effectively examine the panel nor unfairly prohibited from conducting his inquiry.⁹⁸ The court further held that the defense counsel was fully aware of the time constraint, and the trial court did not abuse its discretion in limiting the length of the voir dire.⁹⁹ Although the defense counsel properly preserved error by making a bill of exceptions consisting of the three questions he was prohibited from asking, he failed to effectively use his time allotted to voir dire the panel.¹⁰⁰

93. *Id.* at 139.

94. *Id.*

95. *Tobar v. State*, 833 S.W.2d 296 (Tex. App.—Corpus Christi 1992, pet. granted).

96. *Id.* at 298.

97. *Id.* at 298-99.

98. *Id.* at 298.

99. *Id.* at 298-99.

100. *Id.* at 298 n.1, 299.

XIX. PRESERVING ERROR FOR TIME LIMIT RESTRICTIONS

In order to preserve error for a trial court's restriction of the voir dire examination, counsel must read into the record the questions disallowed by the court.¹⁰¹ Additionally, the restricted questions which are read into the record must be proper voir dire questions.¹⁰²

In one capital case, the court of appeals refused to consider the defendant's argument that the trial court erred in restricting voir dire.¹⁰³ After defense counsel's time expired, he requested additional time to continue voir dire. Upon the trial court's denial of the request, defense counsel informed the trial judge of the general subject about which he wanted to question the venire person. The Court of Criminal Appeals held that this was insufficient to preserve error for review, stating that the defendant had to present the trial court with a specific question and obtain an adverse ruling as to that question in order to preserve error.¹⁰⁴

XX. SCOPE OF VOIR DIRE

The accused has the right to question prospective jurors in order to exercise peremptory challenges and challenges for cause intelligently and effectively during the jury selection process.¹⁰⁵ This right stems from the right to counsel under article one, section ten of the Texas Constitution, as well as the U.S. Constitution.¹⁰⁶ While this right to pose questions cannot be unduly restricted or limited, the trial court has the sole discretion over conduct in the voir dire examination and may impose reasonable restrictions on it. The conduct of the voir dire examination rests in the sole discretion of the trial court.¹⁰⁷ This discretionary authority to impose reasonable limits directly competes with the constitutionally guaranteed right to counsel.¹⁰⁸ These two rights "co-exist and must be harmonized."¹⁰⁹ Although benefits accrue from a trial court dispatching business with promptness and expedition, these benefits "must never be attained at the risk of denying to a party on trial a substantial right."¹¹⁰

101. *Montez v. State*, 824 S.W.2d 308, 310 (Tex. App.—San Antonio 1992, no pet.).

102. *Id.*

103. *Caldwell v. State*, 818 S.W.2d 790, 794 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1684 (1992).

104. *Id.*

105. *McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992) (en banc).

106. *Maddux v. State*, 825 S.W.2d 511, 514 (Tex. App.—Houston [1st Dist.] 1992, pet. granted) (citing *Mathis v. State*, 576 S.W.2d 835, 836 (Tex. Crim. App. 1979)); *Florio v. State*, 568 S.W.2d 132, 133 (Tex. Crim. App. 1978)). The right to intelligently exercise peremptory challenges is implied in the right of representation under both the Texas Constitution and the United States Constitution. See *Shipley v. State*, 790 S.W.2d 604, 607-08 (Tex. Crim. App. 1990, pet. ref'd).

107. *Boyd v. State*, 811 S.W.2d 105, 115 (Tex. Crim. App. 1991) (citing *Faulder v. State*, 745 S.W.2d 327, 334 (Tex. Crim. App. 1987); *Strong v. State*, 805 S.W.2d 478, 483 (Tex. App.—Tyler 1990, pet. ref'd); *Bridge v. State*, 726 S.W.2d 558, 564 (Tex. Crim. App. 1986), *cert. denied*, 112 S. Ct. 448 (1991)).

108. *McCarter*, 837 S.W.2d at 119.

109. *Id.* at 120 (quoting *Ratliff v. State*, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985)).

110. *Id.* (quoting *Smith v. State*, 703 S.W.2d 641, 645 (Tex. Crim. App. 1985)).

A trial court may exercise its discretion to prevent an improperly phrased question from being asked when it duplicates earlier questions posed or presents broad questions that constitute a "global fishing expedition."¹¹¹ Questions posed to the venire, therefore, should be narrowly tailored and calculated to elicit testimony from potential jurors.¹¹² Thus, proper questions are those which ascertain a juror's views and sentiments on social and moral issues. Extremely broad questions should be avoided.

T.K.'s Video v. State,¹¹³ an obscenity case, presents an example of a global fishing expedition. The accused's counsel was precluded from inquiring as to the venire member's "feelings" about adult movies since it was overly broad and invited a general discussion of the topic.¹¹⁴ Counsel, however, was entitled to inquire into the venire member's attitudes toward adult movie stores, toward viewing sexually explicit movies, and toward others whom they know may have viewed one.¹¹⁵

A proper voir dire question should seek to discover a juror's views on an issue applicable to the case.¹¹⁶ If the restricted question was proper, harm is presumed because the defendant could not intelligently exercise his peremptory challenges without obtaining such information and an abuse of discretion will be found.¹¹⁷ It is proper to use hypothetical situations to explain the application of principles of the law in voir dire.¹¹⁸ It is improper, however, to ask hypothetical questions that are based upon the facts of the case.¹¹⁹ An improper question is one which seeks to commit a juror to the specific facts of the case before hearing all the evidence.¹²⁰ A Texas court of appeals has stated that "voir dire is designed to insure impartial jurors, but if jurors are forced to commit themselves prior to trial as to how they would consider certain facts or testimony, then the case is being tried on voir dire and the jurors are no longer impartial."¹²¹ This statement by the court should not be construed to imply that inquiry should be restricted when asking whether the jurors have a bias in favor of categories of potential witnesses.¹²² Jurors should be questioned about their views on the applicable issues and their sentiments on social and moral issues which are inextricably intertwined with the case.

The court in *Maddux v. State*¹²³ distinguished inquiries as to jurors' po-

111. *Strong v. State*, 805 S.W.2d 478, 483 (Tex. App.—Tyler 1990, pet. ref'd).

112. *Bethune v. State*, 803 S.W.2d 390, 392 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

113. 832 S.W.2d 174, 177 (Tex. App.—Fort Worth 1992, pet. ref'd).

114. *Id.* at 177.

115. *Id.*

116. *Id.* at 176.

117. *Maddux v. State*, 825 S.W.2d 511, 514 (Tex. App.—Houston [1st Dist.] 1992, pet. granted).

118. *Henry v. State*, 800 S.W.2d 612, 616 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

119. *Maddux*, 825 S.W.2d at 514.

120. *Id.* (citing *Hernandez v. State*, 508 S.W.2d 853, 854 (Tex. Crim. App. 1974)).

121. *Cadoree v. State*, 810 S.W.2d 786, 789 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd, untimely filed).

122. *Id.*

123. 825 S.W.2d 511 (Tex. App.—Houston [1st Dist.] 1992, pet. granted).

tential biases against categories of persons as witnesses, as opposed to potential biases against victims.¹²⁴ The defendant in *Maddux* was accused of murdering a two and a half year old girl. Defense counsel attempted to question the venire as to their views concerning the murder victim being a child. The trial court refused to permit the defense counsel to pose any such questions to the venire.¹²⁵ In affirming the trial court's restriction of the defendant's voir dire,¹²⁶ the court distinguished the case from *Nunfio*,¹²⁷ *Abron*,¹²⁸ and *Hernandez*.¹²⁹ The court held that although the inquiry into a bias in favor of categories of persons who would be witnesses is permissible, inquiry as to bias in favor of a child victim is "an improper question based on facts peculiar to the case on trial."¹³⁰ The court continued, saying that "[i]f the present case had involved an aggravated sexual assault on a child, or some other offense in which the child complainant was a prospective witness, then defense counsel would have been entitled to question the venire members concerning bias for or against the child witness."¹³¹ Thus, under the majority's analysis, the defense could question the venire as to bias against witnesses but not as to the venire's bias against the victim.¹³² Justice O'Conner, opining for the dissent, stated that he could not see the logic in the majority's opinion nor could he find any support for it in the case law cited by the majority.¹³³ A petition for discretionary review was granted on September 30, 1992, and this counterintuitive distinction is ripe for consideration by the Texas Court of Criminal Appeals.

It is also proper to question the venire on their application of principles of law, provided that the principle of law is first explained to the venire.¹³⁴ For example, in *Trevino v. State*,¹³⁵ the accused attempted to use open-ended questions to determine whether the prospective jurors would consider the defendant's youthfulness in the mitigation of punishment. The trial court refused to permit this line of questioning without informing the jurors that

124. *Id.* at 515.

125. *Id.*

126. *Id.*

127. *Nunfio v. State*, 808 S.W.2d 482, 484 (Tex. Crim. App. 1991) (reversing conviction because the trial court prohibited the defense from inquiring whether the victim of aggravated sexual assault being a nun would affect their ability to be fair and impartial).

128. *Abron v. State*, 523 S.W.2d 405 (Tex. Crim. App. 1975) (reversing rape conviction because trial court disallowed defense's questions as to whether a black defendant's rape of a white victim would prejudice the venire).

129. *Hernandez v. State*, 508 S.W.2d 853 (Tex. Crim. App. 1974) (reversing conviction because trial court refused to allow defense counsel to question the venire as to whether a police officer would lie under oath).

130. *Maddux v. State*, 825 S.W.2d 511, 515 (Tex. App.—Houston [1st Dist.] 1992, pet. granted).

131. *Id.* (emphasis in original).

132. *Id.*

133. *Id.* at 518 (O'Conner, J., dissenting).

134. *Henry v. State*, 800 S.W.2d 612, 616 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

135. 815 S.W.2d 592 (Tex. Crim. App. 1991), *rev'd and remanded for a Batson hearing*, 112 S. Ct. 1547 (1992). The accused asked such questions as "would you consider evidence of the youthful age of any criminal defendant," and "[i]n dealing with the death penalty . . . could you consider as mitigation or in lessening the punishment the youthful age of a person convicted of capital murder." *Id.* at 599.

the law requires that they consider the defendant's age in assessing punishment.¹³⁶ Holding that the trial court did not abuse its discretion in limiting the voir dire, the Court of Criminal Appeals stated that the jurors were entitled to be informed of the law of mitigating punishment before answering such questions.¹³⁷

In the same case, the defense attempted to question a prospective juror on whether he felt that the indictment was an indication of the defendant's guilt. The State objected on the grounds that the question was improperly phrased. After the trial court sustained the State's objection, the defense did not attempt to rephrase the question. The Court of Criminal Appeals agreed that the defense's question was improperly phrased and held that the trial court did not abuse its discretion.¹³⁸ Since the trial court only ruled that the question was improperly phrased, the defense should have rephrased the question to continue such inquiry.¹³⁹

XXI. PRESERVING ERROR FOR LIMITING SCOPE OF VOIR DIRE

It is well-settled in Texas that the record of the entire voir dire is necessary to preserve error for denials of questions sought to be posed to potential jurors.¹⁴⁰ This is necessary for the appellate court to review the scope and extent of the voir dire examination. A partial transcript consisting of only the questions posed to one venire person is insufficient.¹⁴¹ When the issue on appeal is the denial of a challenge for cause, however, the record need contain only the examination of the individual venire member.¹⁴²

XXII. BIAS OR PREJUDICE

A venire person who is biased as a matter of law must be excused when challenged, even if he states that he can set his bias aside and be an impartial juror.¹⁴³ As a matter of law, bias exists when a venire person admits bias for or against the accused or persons engaging in similar behavior, or admits or demonstrates prejudice toward a racial or ethnic class of which the defendant is a member.¹⁴⁴ Under article 35.16(a)(9) of the Texas Code of Criminal Procedure,¹⁴⁵ however, this does not require a showing of a particular bias or prejudice in favor of the defendant.¹⁴⁶ Rather, the juror statement that he

136. *Id.*

137. *Id.*

138. *Id.* at 601.

139. *Id.*

140. *Port v. State*, 798 S.W.2d 839, 844 (Tex. App.—Austin 1990, pet. ref'd) (citing *Payton v. State*, 572 S.W.2d 677, 689 (Tex. Crim. App. 1978)).

141. *Id.*

142. *Id.* (citing *Payton*, 572 S.W.2d at 680).

143. *Green v. State*, 840 S.W.2d 394, 405 (Tex. Crim. App. 1992).

144. *Id.* at 404-05.

145. TEX. CODE CRIM. PROC. ANN. art. 35.1b(a)(9) (Vernon 1989).

146. *Vaughn v. State*, 833 S.W.2d 180, 184 (Tex. App.—Dallas 1992, pet. ref'd) (citing *Sosa v. State*, 769 S.W.2d 909, 918 (Tex. Crim. App. 1989)).

cannot be a fair and impartial juror is sufficient.¹⁴⁷ The defendant's right to a fair jury trial untainted by bias or prejudice must be vigorously protected.¹⁴⁸ Grounds for a new trial exist when a partially biased or prejudiced juror who has unknowingly answered a voir dire question inaccurately is selected without fault or lack of diligence on behalf of defense counsel.¹⁴⁹ Defense counsel, however, must pose questions calculated to elicit responses that would reveal the juror's bias or prejudice.¹⁵⁰ For example, in *Spelling v. State*¹⁵¹ the court learned that a venire member's grandchildren were sexually abused as children even though the juror indicated on her juror information sheet that neither she nor any member of her family had ever been victims of crime.¹⁵² During voir dire, however, the juror was never asked whether she or any member of her family had been a victim of violence or abuse or whether it would affect her ability to be a fair and impartial juror. The Fort Worth Court of Appeals affirmed the trial court's decision that it was unreasonable for the defense to rely on broad, general questions contained in the juror information sheet due to the probability of inaccurate answers.¹⁵³ The court indicated that a more specific question posed to the venire person would have revealed the facts later discovered.¹⁵⁴ Another option would be a more detailed and thorough juror questionnaire.

The Dallas Court of Appeals reversed a conviction upon finding the trial court had abused its discretion in permitting an objectionable juror to remain on the jury.¹⁵⁵ After the trial court had sworn and impaneled the jury, a juror told the bailiff that "she thought she knew the defendant from high school," even though the defendant had questioned the entire venire earlier as to whether they knew "any of the participants in this trial, by name or reputation or any manner or means that could hamper your ability to serve as a fair and impartial juror."¹⁵⁶ The bailiff immediately informed the judge, who then questioned the juror. The juror stated that she knew the defendant from high school and could not be a fair and impartial juror in light of her knowledge of the defendant. Upon further questioning,¹⁵⁷ the trial judge refused to excuse the juror. The defendant then made a motion to quash the panel. The court of appeals noted that the proper motion was for a mistrial but because the trial court was aware of the relief requested by the defend-

147. *Id.*

148. *Delrio v. State*, 820 S.W.2d 29, 31 (Tex. App.—Houston [14th Dist.] 1991), *rev'd*, 820 S.W.2d 443 (Tex. Crim. App. 1992).

149. *Spelling v. State*, 825 S.W.2d 533, 536 (Tex. App.—Fort Worth 1992, no pet.) (citing *Brandon v. State*, 599 S.W.2d 567, 577 (Tex. Crim. App. 1979), *vacated on other grounds*, 453 U.S. 902 (1981)).

150. *Id.*

151. *Id.*

152. *Id.* at 537.

153. *Id.*

154. *Id.* at 536.

155. *Vaughn*, 833 S.W.2d at 182.

156. *Id.* at 185-86.

157. The trial judge asked the juror whether she knew the defendant personally, whether she knew of his reputation in the community and whether she socialized with him in high school. The juror answered "no" to all three questions. *Id.* at 185.

ant, the court of appeals treated his motion to quash as a motion for mistrial.¹⁵⁸ The court held that once the juror unequivocally stated that she could not be a fair and impartial juror, her bias was established as a matter of law.¹⁵⁹

In *Nunfio v. State*¹⁶⁰ prior to the voir dire, the State was granted a motion in limine which prohibited the defendant from discussing the occupation or vocation of the victim, who was a nun. The defense counsel requested clarification on whether he could pose hypothetical questions on the topic. The trial court refused to permit any such inquiry. The Court of Criminal Appeals first considered whether the issue was preserved for appeal.¹⁶¹ The court noted that the trial court was on notice that the defendant wished to pose such questions and that it specifically denied this request.¹⁶² The court further held that, under such circumstances, the defendant did not have to do more to preserve the issue for appeal.¹⁶³ The court then went on to hold that the defense's line of inquiry, to determine whether a potential bias or prejudice existed in favor of the victim by virtue of her vocation, was a proper line of inquiry.¹⁶⁴ The court further held that harm was presumed because the court's action denied the defendant an opportunity to exercise his peremptory challenges intelligently.¹⁶⁵ Accordingly, the court vacated the conviction and ordered a new trial.¹⁶⁶

In another Court of Criminal Appeals case,¹⁶⁷ the trial court barred the defendant from questioning the venire as to whether any prospective juror knew anyone harmed by an extramarital affair.¹⁶⁸ The defendant was on trial for the murder of his wife. The evidence proffered at trial revealed that the defendant was involved in two extramarital affairs, and was engaged to be married to one of his mistresses. The State objected to such questions on the grounds that they were irrelevant, or alternatively, that they went to facts specific to the case. The trial court sustained the State's objection. The Court of Criminal Appeals held that the defendant could have reasonably believed that the trial judge sustained the State's objection on one of these two grounds, and not on other grounds, such as an improperly phrased question.¹⁶⁹ The court noted that the defense counsel diligently attempted to

158. *Id.*

159. *Id.* at 184.

160. 808 S.W.2d 482 (Tex. Crim. App. 1991).

161. *Id.* at 484.

162. *Id.*

163. *Id.* The defendant obtained a specific ruling as to a specific question he wished to pose, thereby preserving the error for appeal. *Id.*

164. *Id.* at 484-85.

165. *Id.* at 485.

166. *Id.*

167. *Shiely v. State*, 790 S.W.2d 604 (Tex. Crim. App. 1990).

168. *Id.* at 606. More specifically, the defense attorney attempted to propound the following questions: "I need to talk with you about something that is very hard for me to talk with you about something . . . and that is the subject of an extramarital affair. [H]ow would you feel about it if it became apparent — " and "[h]ave you ever known somebody that was harmed by extramarital affairs." *Id.*

169. *Id.* at 606.

question the venire on this subject and was repeatedly prohibited.¹⁷⁰ The Court of Criminal Appeals further held that any juror bias or prejudice against a person who had engaged in an extramarital affair was relevant to the defendant's choice of whom he should exercise his peremptory challenges against.¹⁷¹ Since the question that the defendant wished to ask was proper and harm was presumed, the court reversed the conviction.¹⁷²

In a capital murder case,¹⁷³ the accused unsuccessfully challenged a biased venire person for cause on two separate instances. The potential juror was a previous robbery victim, the accused was on trial for robbery, and the defense argued that the venire person had a bias against the accused and in favor of the State. The Court of Criminal Appeals held that the trial court did not abuse its discretion in overruling the defendant's challenge for cause.¹⁷⁴ It appears, however, that the court's decision hinged on the fact that the venire person only stated that her prior experience as a robbery victim "could [make me biased], but it wouldn't."¹⁷⁵ Thus, it was never clearly established that the juror was biased as a matter of law, only that she exhibited the potential for bias.¹⁷⁶

In *Delrio v. State*,¹⁷⁷ a claim alleging ineffective assistance of counsel, the trial court allowed a former Houston narcotics officer to serve on a jury. The former officer not only stated that he knew the defendant but also that he could not be a fair and impartial juror. Although he was not challenged for cause, the court of appeals held that permitting a juror who openly admitted twice that he could not be impartial "undermines . . . the . . . essence of a jury's purpose to render a fair and impartial verdict."¹⁷⁸ The court reversed the conviction.¹⁷⁹

The defendant in *Nelson v. State*¹⁸⁰ also made an ineffective assistance of counsel argument when the defense counsel failed to challenge for cause or peremptorily strike three potential jurors who clearly enunciated their bias against the presumption of innocence.¹⁸¹ All three potential jurors sat on the defendant's jury. The Houston Court of Appeals held that all three jurors were not qualified as a matter of law.¹⁸² The court also wrote that if the defense attorney had challenged these jurors for cause, it would have been

170. *Id.* at 607.

171. *Id.* at 608.

172. *Id.* at 609.

173. *Green v. State*, 840 S.W.2d 394 (Tex. Crim. App. 1992).

174. *Id.* at 403.

175. *Id.* at 404.

176. *Id.* at 403.

177. 820 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1991), *rev'd*, 840 S.W.2d 443 (Tex. Crim. App. 1992).

178. *Id.* at 32.

179. *Id.* at 31.

180. 832 S.W.2d 762 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

181. Juror Howard repeatedly stated that she thought the defendant was guilty because he was charged with a crime. Juror Machala stated that she thought there was "a good chance the [defendant] is there for a reason." Juror Reit stated that she would automatically assume the accused was guilty. Reit also stated that she would hold it against the defendant if he asserted his Fifth Amendment right not to testify. *Id.* at 763-64.

182. *Id.* at 765.

error for the trial court to deny the challenges.¹⁸³ The court reversed the conviction and remanded for a new trial.¹⁸⁴

XXIII. RANGE OF PUNISHMENT

A potential juror who cannot consider a minimum range of punishment is subject to a challenge for cause, since the juror is biased or prejudiced against a law upon which the defendant is entitled to rely.¹⁸⁵ To successfully challenge a juror as biased against the law, the law first must be explained to the juror.¹⁸⁶ It is reversible error for the State to inform the jury, during voir dire, of any specific allegations contained in the enhancement paragraph of the defendant's indictment.¹⁸⁷ It does not constitute reversible error, however, for the State to inform the jury that an enhanced range of punishment is available if the State successfully establishes prior convictions.¹⁸⁸ A juror's views on probation, if probation is within the scope of punishment, also constitutes a proper area of inquiry.¹⁸⁹

In a capital case, a potential juror indicated that he considered the law too lenient if it allowed a minimum range of punishment for a defendant convicted of murder.¹⁹⁰ The State then successfully rehabilitated the juror and the trial court overruled the defendant's challenge for cause. The Court of Criminal Appeals affirmed the trial court's decision, holding that the juror's voir dire record supported the trial court's decision that the juror was not challengeable for cause for an inability to assess a minimum punishment.¹⁹¹

The Houston Court of Appeals upheld a trial court's decision that a potential juror could consider a minimum range of punishment.¹⁹² The defense attorney questioned the juror as to whether he could conceive a situation for which two years probation would be appropriate. The juror stated that he could not consider any situation. The defense attorney unsuccessfully challenged the potential juror for cause. In reviewing the record, the appellate court stated that the juror interpreted the attorney's question as asking whether he would consider a two-year probated sentence without hearing all the facts and evidence.¹⁹³ This demonstrates the importance of asking clear and concise questions to avoid confusing panelists.

183. *Id.* at 766.

184. *Id.* at 767.

185. Trevino v. State, 815 S.W.2d 592, 614 (Tex. Crim App. 1991), *reversed and remanded for a Batson hearing*, 112 S. Ct. 1547 (1992).

186. *Id.*

187. Rogers v. State, 792 S.W.2d 841, 842 (Tex. App.—Houston [1st Dist.] 1990, no pet.).

188. *Id.*

189. Maddux v. State, 825 S.W.2d 511, 514 (Tex. App.—Houston [1st Dist.] 1992, pet. granted).

190. Allridge v. State, No. 69,838, 1991 WL 235159, at *9 (Tex. Crim. App. Nov. 13, 1991).

191. *Id.* at *10.

192. Rische v. State, 834 S.W.2d 942, 945 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

193. *Id.*

XXIV. REASONABLE DOUBT CREDIBILITY OF LAW ENFORCEMENT

A venire person's unequivocal belief that a police officer would never lie while testifying constitutes bias under article 35.16(a)(9) of the Texas Code of Criminal Procedure.¹⁹⁴ Such a predisposition prevents impartial judging of witnesses' credibility.¹⁹⁵ The trial court, however, has the discretion to determine whether such prejudice for police officers exists.¹⁹⁶

In *Lane v. State*,¹⁹⁷ a capital case, the accused challenged a venire person for cause after she indicated that she believed that a police officer would tell the truth while testifying. The trial court denied the defendant's challenge for cause, a decision affirmed by the Court of Criminal Appeals.¹⁹⁸ The court held that the venire person's testimony was devoid of any bias or prejudice against the accused, and thus similarly devoid of any prejudice for police officers.¹⁹⁹ The court pointed out that although the venire person gave some responses indicating a predisposition to believe police officers, she also indicated that she would evaluate the officers' testimony on equal ground with other witnesses.²⁰⁰ This is yet another example of the State successfully rehabilitating a juror after she indicated prejudice against the accused.²⁰¹

XXV. TIES TO LAW ENFORCEMENT

One of the potential jurors in *Trevino v. State*²⁰² testified that he knew several of the police officers who were potential witnesses in the case. The defense then began voir dire of the prospective juror regarding his relationship with the police officers and whether it would influence his belief as to the officer's credibility. At one point in his voir dire, the potential juror stated that his friendship with the police officers would affect whether he would believe the police officers over other witnesses. After the State successfully rehabilitated the juror, the trial court overruled the defense's challenge for cause. The defense counsel should have anticipated the State's rehabilitation and placed the juror in the "cause coffin" by asking such questions as: "You would agree with me that you cannot be as fair of a juror as you would like to be?; You could be a fairer juror if both sides had police officers as witnesses?; and Would you like me to ask the judge to excuse you as a juror in this case?"

194. *Lane v. State*, 822 S.W.2d 35, 42 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1968 (1992). Article 35.16 (a)(9) states that a juror may be excused for cause if he has a bias or prejudice in favor for or against the defendant. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9) (Vernon 1989).

195. *Lane*, 822 S.W.2d at 35.

196. *Id.* at 42 (citing *Anderson v. State*, 633 S.W.2d 851, 854 (Tex. Crim. App. 1982)).

197. 822 S.W.2d 35 (Tex. Crim. App. 1991).

198. *Id.* at 42.

199. *Id.* at 45.

200. *Id.*

201. *See Port v. State*, 798 S.W.2d 839, 844 (Tex. App.—Austin 1990, *pet. ref'd*).

202. 815 S.W.2d 592 (Tex. Crim. App. 1991) (*en banc*), *reversed and remanded for a Batson hearing*, 112 S. Ct. 1547 (1992).

*Mayham v. State*²⁰³ is another example of the State successfully rehabilitating a potential juror. The venire person in *Mayham* was employed by the fire department and worked with police officers every day. The venire member testified at one point that he would tend to believe a police officer regardless of whether he believed other witnesses. The trial court denied the defense's challenge for cause.²⁰⁴ Although the error was not properly preserved for review, the court of appeals held that the venire person was not biased because of his working relationship with police officers.²⁰⁵

XXVI. POLLUTING THE PANEL

In *Nathan v. State*,²⁰⁶ in the presence of the jury panel, the prosecutor questioned a panelist concerning prior jury service, its influence on him, whether it might influence him subsequently, and whether he could set those experiences aside. The potential juror responded that in his prior jury service the issue of parole and the exact length of time the accused would serve concerned the venire. The trial court denied the defense attorney's ensuing motion to quash the jury panel on the grounds that there was no evidence that the comment prejudiced the other jurors' views. The court of appeals affirmed the trial court's decision, holding that the trial court cured any potential prejudice to other jurors.²⁰⁷ Thus, it is imperative to question other members of the panel to demonstrate that prejudice might have flowed from the venire person's comment.²⁰⁸ When the comment is spontaneous and not elicited by counsel, the defendant must establish that prejudice flowed from the venire person's statement by questioning other members of the panel.²⁰⁹

XXVII. JUROR WITHHOLDING INFORMATION

To successfully challenge a juror's failure to disclose pertinent information during voir dire, it is necessary to have questioned the panel on the topic.²¹⁰ Failure to question the panel regarding the non-disclosed information constitutes a waiver to a subsequent challenge.²¹¹

The Corpus Christi Court of Appeals, in *Martinez v. State*,²¹² remanded the case for a hearing on the defendant's motion for a new trial when it discovered that one of the juror's failed to disclose that he knew one of the

203. 795 S.W.2d 285 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

204. *Id.* at 288.

205. *Id.* The court of appeals stated that the defense erred in failing to state that he was forced to accept a juror whom he found objectionable, so no harm was presumed. To preserve error for the denial of a challenge for cause, all six steps must be demonstrated. *Id.* See *infra* text accompanying notes 234-36.

206. 788 S.W.2d 942 (Tex. App.—Fort Worth 1990, no pet.).

207. *Id.* at 944.

208. *Id.*

209. *Revia v. Marine Drilling Co.*, 800 S.W.2d 252, 256 (Tex App.—Corpus Christi 1990, writ denied).

210. *Martinez v. State*, No. 13-90-347-CR, 1992 WL 29909, at *2 (Tex. App.—Corpus Christi Feb. 20, 1992, no pet.).

211. *Id.*

212. *Id.*

alleged victims when questioned.²¹³ Another juror had also failed to disclose that he knew one of the defense witnesses. The court, however, refused to consider this issue on appeal since neither party questioned jurors on this subject.²¹⁴ Defense counsel's failure to question the juror's knowledge of a defense witness waived the complaint.²¹⁵

Another court of appeals did not find jury misconduct when a juror failed to disclose that he was related to a process server.²¹⁶ After the seating and swearing in of the jury, the trial court discovered that a juror was related to a process server. The entire venire had previously been asked whether they knew any support staff at the Harris County District Attorney's Office. The Harris County District Attorney did not employ the process server related to the juror, but the server was employed in the same district. The court noted that another process server chose the jury. The court held that it was not erroneous for the trial court to allow a juror who merely knows an employee of the trial court to sit on a case.²¹⁷

XXVIII. DEFENDANT'S CHALLENGE FOR CAUSE

Under article 35.16 of Texas Code of Criminal Procedure, the defense may challenge a venire person for cause upon showing of either bias against the defendant as a person or bias against any law applicable to the case upon which the defendant is entitled to rely.²¹⁸ Bias against the law may be a bias against a defense to some phase of the offense for which the defendant is being prosecuted, against a mitigation for the offense, or against the applicable punishment.²¹⁹ Initial disagreement by a panelist with any phase of the law relevant to a case does not, however, necessarily merit excusal for cause.²²⁰

Furthermore, an appellate court will examine the trial court's ruling on a challenge in light of all the answers given. In *Burnham v. State*,²²¹ the accused's attorney questioned the entire venire concerning the presumption of innocence. He then examined three potential jurors who exhibited bias and prejudice against the presumption of innocence. After further questioning by the State and defense counsel, the defense challenged the three venire members for cause, which the trial court overruled. The court of appeals, in reviewing the record as a whole, held that the record did not support the claim that the three venire members were biased and prejudiced against the accused.²²² The court noted that all three venire members repudiated their earlier answers concerning the presumption of innocence and indicated that

213. *Id.* at *3-4.

214. *Id.* at *4.

215. *Id.*

216. *Matthews v. State*, 803 S.W.2d 347 (Tex. App.—Houston [14th Dist] 1990, no pet.).

217. *Id.* at 350. (citing *De la Garza v. State*, 650 S.W.2d 870, 878 (Tex. App.—San Antonio 1983, pet. ref'd).)

218. TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (Vernon 1989).

219. *Id.*

220. *Harkey v. State*, 785 S.W.2d 876, 880 (Tex. App.—Austin 1990, no pet.).

221. 821 S.W.2d 1 (Tex. App.—Fort Worth 1991, no pet.).

222. *Harkey*, 785 S.W.2d at 880.

they understood the presumption of innocence and were willing to apply it to the case.²²³

Defense counsel's main flaw in this case was the failure to place the juror in the "cause coffin." Under article 35.16(a)(10) of the Texas Code of Criminal Procedure, if a juror answers affirmatively to the following questions he will be excused without further inquiry: (1) from hearsay or otherwise, there is established in the juror's mind a conclusion as to the guilt or innocence of the defendant; and (2) such conclusion would influence the juror in reaching a verdict.²²⁴ Had defense counsel asked these two leading questions and had the potential jurors answered affirmatively, the trial court would have abused its discretion in overruling a challenge for cause.

In an aggravated robbery, aggravated kidnapping, and attempted capital murder case, a prospective juror expressed his belief that most defendants who go to trial will probably be found guilty, agreeing that "it would be a rare instance to find somebody not guilty."²²⁵ The accused challenged the juror on two separate bases. The trial court, however, was convinced by the potential juror's demeanor and directness that he could be fair, and overruled the challenge for cause. The court of appeals affirmed, stating the panelist expressed no prejudice toward the accused or the law involved, and therefore the trial court did not abuse its discretion in denying the challenge for cause.²²⁶ This provides another example where counsel's poorly phrased questions, coupled with the court and the prosecutor educating the juror through dialogue of appropriate answers, will result in a juror being struck by a peremptory challenge rather than excused for cause. This further illustrates the importance of employing open-ended questions to put the juror in the "cause coffin."

In a capital murder case, a potential juror stated that he might consider whether or not the defendant testified even if the court charged the jury on the defendant's Fifth Amendment right not to testify.²²⁷ The State then successfully rehabilitated the potential juror and the court denied the defense's challenge for cause. This is another illustration of the importance of anticipating juror rehabilitation. It is crucial to get the potential juror firmly committed, to state that he or she understands the concept at issue, and that he or she will not alter that position.

If a potential juror vacillates, elements such as demeanor, tone of voice, and body language are important factors in conveying the precise message intended.²²⁸ An appellate court reviewing a cold record will accord a trial court great deference in these matters because the trial court has the opportunity to consider factors such as these which are not apparent in the rec-

223. *Id.* at 879-80.

224. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(10) (Vernon 1989).

225. *Sanchez v. State*, 813 S.W.2d 610, 611 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd).

226. *Id.*

227. *Earhart v. State*, 823 S.W.2d 607, 626 (Tex. Crim. App. 1991).

228. *Mooney v. State*, 817 S.W.2d 693, 701 (Tex. Crim. App. 1991).

ord.²²⁹ To preserve the record on such factors, counsel should read the juror's response into the record including whether the potential juror, in answering during voir dire, broke into tears, was fairly calm and collected, or gave quick responses to the question posed.²³⁰

In *Mooney v. State*,²³¹ where a murder was committed in the course of a robbery, a potential juror indicated that recent murders in her family might interfere with her ability to weigh all evidence and abide by her oath. She later vacillated and stated that her personal tragedy would not affect her ability to weigh all evidence and abide by her oath, which caused the trial court to deny the accused's challenge for cause. The Court of Criminal Appeals, in affirming the trial court's decision, stated that when faced with a vacillating juror, the trial court is in a better position to assess the credibility of the venire member's response, and such a decision will only be reversed for an abuse of discretion.²³²

XXIX. NEED TO PRESERVE ERROR

To preserve denial of a challenge for cause for appellate review, the accused must: (1) ensure that the entire voir dire is recorded and transcribed, including bench conferences; (2) assert clear and specific challenge for cause on well-articulated grounds; (3) use a peremptory strike on the venire person who should have been excused for cause; (4) exhaust all peremptory strikes; (5) request additional peremptory strikes; and (6) be forced to take an identified objectionable juror whom he would not otherwise have accepted had the trial court granted his challenge for cause.²³³ To properly raise the erroneous denial on appeal, the objection lodged at trial and the issue raised on appeal must be identical.²³⁴ Thus, an issue raised on appeal that fails to comport with the objection lodged at trial will not be considered by an appellate court.²³⁵

The defendant in *Valanty v. State*²³⁶ failed to provide the Fort Worth Court of Appeals with a transcript of the voir dire examination, submitting only a partial transcript instead.²³⁷ The court refused to consider the trial court's denial of a challenge for cause without a complete transcript, holding that, in its absence, they could not ascertain whether the venire person had been rehabilitated or how the error appeared in light of the entire examina-

229. *Id.*

230. See *Farris v. State*, 819 S.W.2d 490, 500 (Tex. Crim. App. 1990), *cert. denied*, 112 S. Ct. 1278 (1992) (example of the defense attorney testifying for the record as to the demeanor of a potential juror).

231. 817 S.W.2d 693 (Tex. Crim. App. 1991).

232. *Id.* at 701.

233. See *Chatman v. State*, 830 S.W.2d 637, 639 (Tex. App.— Beaumont 1992, *ref'd*, 846 S.W.2d 329 (Tex. Crim. App. 1993)); see also *Green v. State*, No. 840 S.W.2d 394 (Tex. Crim. App. 1992); *Jacobs v. State*, 787 S.W.2d 397, 405 (Tex. Crim. App. 1990), *cert. denied*, 111 S. Ct. 231 (1990).

234. *Mooney*, 817 S.W.2d at 704.

235. *Id.*

236. *Valanty v. State*, 822 S.W.2d 805 (Tex. App.—Fort Worth 1992, no pet.).

237. *Id.* at 807.

tion.²³⁸ To ensure that a full record of the voir dire is transcribed, the attorney or any party to the case must request the court reporter to do so pursuant to 11(a)(2) of the Texas Rules of Appellate Procedure.²³⁹

In a case alleging indecency with a child,²⁴⁰ a potential juror indicated that her niece was sexually abused as a young child. The juror also stated that she would have a tendency to believe a child witness over other witnesses. The accused requested the court excuse the potential juror for cause, which the court denied. The accused then used one of his peremptory challenges to strike the venire member. The court of appeals held that the record as a whole did not reflect a need to disqualify the venire member from serving on the jury.²⁴¹ The court remarked that the record did not reflect a request by the accused for additional challenges after he exhausted all of his peremptory challenges nor that the trial court would have denied such a request.²⁴² The court noted the lack of evidence that the accused had unwillingly accepted an objectionable juror.²⁴³ Had the accused met the fifth and sixth elements of the test, the court might have held otherwise.

In a similar case, a venire member stated that he would automatically believe a child witness because he "did not think they would have a reason to lie."²⁴⁴ The trial court denied the accused's challenge for cause. The court of appeals held that the accused failed to show the fifth and sixth elements, namely, a request for additional peremptory challenges and demonstrating acceptance of an objectionable juror.²⁴⁵ As stated earlier, defense counsel must successfully bridge all six steps to contest erroneous denials of challenges for cause.

An El Paso Court of Appeals case also illustrates a defense attorney's failure to preserve error.²⁴⁶ The defendant challenged a juror for cause when she indicated that she would give more credibility to a police officer's testimony, and the trial court denied his challenge. The court of appeals held that the defendant had failed to preserve error for appellate review since he did not clearly and specifically articulate the grounds for the challenge.²⁴⁷ Any error was therefore waived by the defendant.²⁴⁸

XXX. STATE'S CHALLENGE FOR CAUSE

In an attempted murder case, the State challenged a prospective juror convicted of food stamp fraud for cause, even though she had satisfied her pro-

238. *Id.*

239. TEX. R. APP. P. 11(a)(2); *Villareal v. State*, 811 S.W.2d 212, 215 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

240. *Zuniga v. State*, 794 S.W.2d 799 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

241. *Id.* at 801.

242. *Id.*

243. *Id.*

244. *Randall v. State*, 803 S.W.2d 489 (Tex. App.—Fort Worth 1991, pet. ref'd).

245. *Id.* at 491.

246. *Burton v. State*, 830 S.W.2d 197 (Tex. App.—El Paso 1992, no pet.).

247. *Id.* at 200.

248. *Id.*

bation and had the charges dismissed.²⁴⁹ The Fort Worth Court of Appeals held that the trial court's decision was erroneous but that the defendant did not preserve the error because the objection at trial did not match the complaint on appeal.²⁵⁰ The court also considered whether the admission of an unadjudicated offense of theft as a plea should result in absolute disqualification of a potential juror.²⁵¹ The court stated that the state erased the theft charge from the panelist's record when he entered his plea in bar.²⁵² The court therefore held that entry of the plea removed any jury disqualification, and the trial court erred by granting the State's challenge for cause.²⁵³

XXXI. PRESERVING ERROR

If no objection is made when a court excuses a venire person for cause, the defendant may not challenge the ruling on appeal.²⁵⁴ The grounds of the objection must be articulated to the trial court so it is afforded the opportunity to rule on it.²⁵⁵ The court should also afford the State an opportunity to remove the objection or supply other testimony.²⁵⁶ To successfully challenge a trial court's denial of further questioning of a venireperson after the State's excusal for cause of said venireperson, defense counsel must make a timely and specific objection.²⁵⁷ Further, pursuant to the rules of appellate procedure, the issue on appeal must comport with the objection lodged at trial to obtain appellate review.²⁵⁸

XXXII. *BATSON* OBJECTIONS

A. *BATSON*

In *Batson v. Kentucky*,²⁵⁹ the defendant objected to the prosecutor's wholesale exclusion of all the African-Americans on the jury panel. The defendant argued that the prosecutor's actions violated his Sixth and Fourteenth Amendment rights to have a jury drawn from a cross-section of the community and to equal protection of the law. The Supreme Court held that to demonstrate a prima facie case of purposeful discrimination, the defendant: (1) must show membership in a recognized racial group, and the exercise of peremptory challenges by the prosecutor to remove members of that race from the venire; (2) may rely on the fact of permissible discrimination in the jury selection process in the form of peremptory challenges; and

249. *Day v. State*, 784 S.W.2d 955 (Tex. App.—Fort Worth 1990, no pet.).

250. *Id.* at 956.

251. *Id.*

252. *Id.* at 958.

253. *Id.*

254. *Crane v. State*, 786 S.W.2d 338, 344 (Tex. Crim. App. 1990).

255. *Id.*

256. *Id.*

257. *Robinson v. State*, No. 69,568, 1991 WL 57765, at *7 (Tex. Crim. App. Apr. 17, 1991).

258. *DeBlanc v. State*, 799 S.W.2d 701, 718 (Tex. Crim. App. 1990), *cert. denied*, 111 S. Ct. 2912 (1991).

259. 476 U.S. 79 (1986).

(3) must show these facts along with other relevant circumstances that raise an inference that the prosecutor peremptorily struck venire members because of their race.²⁶⁰ Improper exclusion of even one potential juror, who is a member of the defendant's race invalidates the entire jury selection process and requires a reversal.²⁶¹

B. POWERS

In 1991, the Supreme Court extended the holding of *Batson* to non-minority defendants in *Powers v. Ohio*²⁶² and to civil litigants in *Edmonson v. Leesville Concrete Co.*²⁶³ Thus, the Fourteenth Amendment protects every race against purely racially motivated exercises of peremptory challenges in either civil or criminal litigation.²⁶⁴ The Court found that the exercise of peremptory challenges in a racially discriminatory manner "would constitute an impermissible injury" to the excluded juror.²⁶⁵

C. MCCOLLUM

In 1992 the Supreme Court held in *Georgia v. McCollum* that the Constitution prohibits a defendant from exercising his peremptory challenges in a racially motivated manner.²⁶⁶

D. ARTICLE 35.261

After the Supreme Court decided *Batson*, the Texas State Legislature enacted article 35.261 of the Texas Code of Criminal Procedure to codify and implement *Batson* in the State of Texas.²⁶⁷ Article 35.261 was "intended to create uniform procedures and remedies to address claimed constitutional violations during jury selection."²⁶⁸ Under article 35.261, once the defendant has established a prima facie showing of the prosecutor's purposeful discrimination in the use of peremptory challenges, the burden shifts to the State to provide race-neutral explanations for exercising the strikes in ques-

260. *Id.* at 96.

261. *Woods v. State*, 801 S.W.2d 932, 940 (Tex. App.—Austin 1990, pet. ref'd) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

262. 111 S. Ct. 1364, 1373-74 (1991).

263. 111 S. Ct. 2077, 2088 (1991).

264. *Powers*, 111 S. Ct. at 1373 (1991).

265. *Georgia v. McCollum*, 112 S. Ct. 2348, 2352 (1992).

266. *Id.* at 2359. In considering whether the prohibition against the exercise of peremptory challenges in a racially discriminatory manner applied to criminal defendants, the Court conducted a four-factor analysis: "[f]irst, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case." *Id.* at 2353.

267. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).

268. *Hill v. State*, 827 S.W.2d 860, 863 (Tex. Crim. App. 1992) (citing *State v. Oliver*, 808 S.W.2d 492, 496 (Tex. Crim. App. 1991)).

tion.²⁶⁹ The trial court then must determine whether the State's explanations are truly race-neutral or merely a pretext.²⁷⁰ For a *Batson* objection to be timely, counsel must object after the parties have delivered their list of peremptory challenges to the clerk but before the court has sworn and impaneled the jury.²⁷¹ If the court finds that the State's explanations are race-specific, calling a new array is the sole remedy prescribed by article 35.261 for a violation.²⁷² The *Batson* decision, however, contemplates the additional remedy of disallowing the peremptory strike.²⁷³

The timing requirement of a *Batson* objection is easily calculated in non-capital cases.²⁷⁴ In a capital case, however, there is no specific time that jury lists are "delivered to the clerk" because of the unique jury selection structure wherein peremptory strikes generally must be exercised after the potential juror is passed for cause.²⁷⁵ In a capital case, therefore, counsel should make any *Batson* objection immediately after the state strikes the venire member.²⁷⁶ Counsel should consider renewing *Batson* objections before the jury is sworn, since error will be waived if the *Batson* objection is not made within this time period.²⁷⁷ The Court of Criminal Appeals in *Rousseau v. State*²⁷⁸ held that a *Batson* objection was timely when it was made immediately after the juror was struck even though counsel gave evidence supporting the objection shortly before the jury was sworn.²⁷⁹

269. *State v. Oliver*, 808 S.W.2d 492, 494 (Tex. Crim. App. 1991). Article 35.261 in part provides:

(a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised his peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

TEX. CODE CRIM. PROC. ANN. art. 35.261(a) (Vernon 1989).

270. *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986).

271. *Taylor v. State*, 825 S.W.2d 212, 214 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

272. *Id.* (citing *Hill*, 827 S.W.2d at 863 (Tex. Crim. App. 1992) See TEX. CODE CRIM. PROC. ANN. art. 35.261(b) (Vernon 1989) ("If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.").

273. *Batson*, 476 U.S. at 99 n.24. The Supreme Court specifically declined to instruct the state and federal courts on which remedy to implement because of the variety of jury selection practices throughout the country. *Id.*

274. *Rousseau v. State*, 824 S.W.2d 579, 581 (Tex. Crim. App. 1992).

275. *Id.*

276. *Id.* at 582.

277. *Id.*

278. 824 S.W.2d 579.

279. *Id.* at 581. The Court of Criminal Appeals held that the trial court erred by not requiring the State to provide its race-neutral reason for peremptorily striking a black juror. The Court further held that the trial court prematurely terminated the fact-finding process when it concluded that the *Batson* objection was not timely. *Id.* at 584.

E. STANDARD FOR REVIEW

An appellate court will review a trial court's *Batson* rulings to see if it was "clearly erroneous."²⁸⁰ The "clearly erroneous" standard has been defined as whether an appellate court is left with a "definite and firm conviction that a mistake has been committed."²⁸¹ The appellate court will examine the record to determine whether the State supplied adequate race-neutral reasons for the strike in question.²⁸² If the appellate court finds that the race-neutral explanation provided by the State is not supported by the record, the appellate court will conclude that a mistake has been committed and will reverse the defendant's conviction.²⁸³

The Court of Criminal Appeals has observed that "[a]ppellate review should not become bogged down on the question of whether the defendant has made out a prima facie case [unless the ruling on the prima facie case] stop[s] the fact finding process."²⁸⁴ If a prosecutor has articulated race-neutral reasons for the peremptory strikes and the court has ruled on the ultimate issue of intentional discrimination, the Court of Criminal Appeals will refuse to review the issue of whether the defendant has established a prima facie case of purposeful discrimination.²⁸⁵

The State's failure to object to an untimely *Batson* motion may result in proper preservation of the issue for appellate review.²⁸⁶ In *Cooper v. State*,²⁸⁷ the defendant made a *Batson* objection after the jury was sworn but before the venire was dismissed. Without objection from the State, the trial court held a brief *Batson* hearing where it noted that the defendant was an African-American and that the prosecutor peremptorily struck four out of five African-Americans on the venire. The prosecutor argued that she did not have to provide explanations for striking the venire members since she did not strike all the African-Americans from the venire. The trial court was persuaded by the argument and overruled the defendant's *Batson* motion.²⁸⁸ The Texas Court of Criminal Appeals held that the *Batson* issue was

280. *Wright v. State*, 832 S.W.2d 601, 604 (Tex. Crim. App. 1992) (citing *Williams v. State*, 804 S.W.2d 95, 101 (Tex. Crim. App. 1991) (opinion on remand), *cert. denied*, 111 S. Ct. 2875 (1991)); *Whitsey v. State*, 796 S.W.2d 707, 727 (Tex. Crim. App. 1989) (opinion on rehearing)). The "supported by the record" standard articulated in *Keeton II* is analytically and intellectually the same as the "clearly erroneous" standard. *Hill v. State*, 827 S.W.2d 860, 865 (Tex. Crim. App. 1992) (citing *Keeton v. State*, 749 S.W.2d 861, 870 (Tex. Crim. App. 1988)).

281. *Wright*, 832 S.W.2d at 604 (citing *Hill*, 827 S.W.2d 860, 865).

282. *Id.* at 604 (citing *Williams*, 804 S.W.2d at 101).

283. *Id.* at 605.

284. *Hill v. State*, 827 S.W.2d at 865 (citing *Dewberry v. State*, 776 S.W.2d 589, 591 (Tex. Crim. App. 1989)).

285. *Hill*, 827 S.W.2d at 865. Similarly, the United States Supreme Court recently held "that where a prosecutor has articulated the reasons for his allegedly racially discriminatory peremptory challenges 'without any prompting or inquiry from the trial court' and 'the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.'" *Hernandez v. New York*, 111 S. Ct. 1859, 1866 (1991).

286. *Cooper v. State*, 791 S.W.2d 80, 82 (Tex. Crim. App. 1990).

287. 791 S.W.2d 80 (Tex. Crim. App. 1990).

288. *Id.* at 81.

properly preserved for review since the motion was filed prior to the dismissal of the venire, the prosecutor failed to object to the untimeliness of the motion, and the trial court held a hearing on the motion.²⁸⁹ Fundamental to the court's affirmance of the appellate court were the defendant's establishment of a prima facie showing of discrimination and the State's failure to offer racially-neutral explanations for its peremptory strikes.²⁹⁰

1. *Sham Answers*

A prosecutor's sham or pretext for striking a venire member is apparent when the prosecutor attempts to justify the peremptory strike on the basis of the juror's group bias but fails to demonstrate that the juror possesses such bias.²⁹¹ An example of such is a prosecutor's peremptory strike of a potential juror who is a school teacher because all school teachers are assertive without demonstrating that the juror in question was assertive.²⁹² "A perfunctory voir dire examination or no examination of a venire member by the State weighs heavily against the legitimacy of a facially race-neutral explanation."²⁹³ If a prosecutor justifies a peremptory strike of an African-American juror because they were inattentive but asks few or no questions of the juror, such an examination would be insufficient to permit the State to fairly assess or judge the juror's alleged inattentiveness and therefore would be a pretext or a sham for the racially motivated strike.²⁹⁴ A prosecutor's race-neutral explanation is more likely a pretext for discrimination when the "peremptory policy" has not been applied evenly to minority and non-minority venire persons.²⁹⁵ This occurs, for example, when a prosecutor strikes a minority juror because of the juror's youth, yet accepts a non-minority juror of the same age.²⁹⁶ Appellate courts have also recognized that a pretext may exist if the reasons given for the peremptory strike are not related to the facts of the case.²⁹⁷ An example of such a pretext is when a prosecutor excuses the juror because she has young children at home but fails to articulate the relevance of such to the facts of the case.²⁹⁸ Nor does a prosecutor overcome the presumption of discrimination by merely "denying any discriminatory motive or by affirming his good faith in individual selections."²⁹⁹ In addition, if the prosecutor relies upon a juror's demeanor for the peremptory strike without pointing to specific intonations of the juror's voice, the juror's body language or other non-verbal clues to support the

289. *Id.* at 82.

290. *Id.* at 81.

291. *Woods v. State*, 801 S.W.2d 932, 936 (Tex. App.—Austin 1990, pet. ref'd) (citing *Keeton v. State*, 749 S.W.2d 861, 868 (Tex. Crim. App. 1988) (*Keeton II*)).

292. *Woods*, 801 S.W.2d at 938.

293. *Id.* at 936 (citing *Keeton II*, 749 S.W.2d at 869).

294. *C E J v. State*, 788 S.W.2d 849, 857 (Tex. App.—Dallas 1990, pet. denied).

295. *Woods*, 801 S.W.2d at 936 (citing *Garrett v. Morris*, 815 F.2d 509, 514 (8th Cir. 1987), cert. denied, 484 U.S. 898 (1987)).

296. *Chivers v. State*, 796 S.W.2d 539, 543 (Tex. App.—Dallas 1990, pet. ref'd).

297. *Smith v. State*, 790 S.W.2d 794, 796 (Tex. App.—Beaumont 1990, no pet.) (citing *Keeton II*, 749 S.W.2d at 868).

298. *Miller-El v. State*, 790 S.W.2d 351, 357 (Tex. App.—Dallas 1990, pet. granted).

299. *Keeton II*, 749 S.W.2d at 868.

strike, the appellate courts are reluctant to find that such justifications are race-neutral.³⁰⁰

2. *Discrepancies Between Minorities and Non-Minorities*

Disparate treatment between African-Americans and white venire persons is a factor which the trial judge may consider when assessing the racial neutrality of the prosecutor's peremptory strikes.³⁰¹ In *Batson*, the Supreme Court noted that the trial judge's decision on whether the defendant has carried the burden on the *Batson* claim turns in part on the judge's observations during voir dire.³⁰² The trial judge can assess any discrepancies during the voir dire, such as the prosecutor declining to voir dire any minority venire members, yet striking them anyway; the prosecutor striking minority venire members who answered similar to non-minority venire members who were not struck; or the prosecutor striking minority venire members who possessed the same professional, social or religious characteristics as non-minority venire members who were not struck.³⁰³

Disparate treatment alone during the voir dire does not necessarily constitute a specific *Batson* violation.³⁰⁴ It is an important argument, however, to present to the trial judge during the voir dire and the *Batson* hearing.³⁰⁵ Although it is advisable to argue any perceived discrepancies in the voir dire to rebut the prosecutor's facially neutral explanations, discrepancies do not have to be brought to the trial judge's attention to preserve the issue for appeal.³⁰⁶ The basis of the comparison evidence, however, must be presented into evidence either at the conclusion of the voir dire or at a subsequent *Batson* hearing.³⁰⁷ Such evidence does, however, become very significant during the appellate court's review of the trial court's findings as to purposeful discrimination.³⁰⁸ Giving the appellate court a more accurate

300. *Woods*, 801 S.W.2d at 939.

301. *Young v. State*, 826 S.W.2d 141, 145 (Tex. Crim. App. 1991). The Court of Criminal Appeals focused on the language of footnote 6A in *Tompkins v. State*, 774 S.W.2d 195, 202 n.6A (Tex. Crim. App. 1987), *aff'd by equally divided court*, 490 U.S. 754 (1989) (O'Connor, J., not participating). The court in *Young* stated:

Judge Teague, the author of the *Tompkins* opinion, makes a valid point that urging the comparisons at the *Batson* hearing could materially affect the trial judge's findings of fact and conclusions of law on the *Batson* claim. Such comparisons draw into question the genuine neutrality of the prosecutor's explanations for his peremptory challenges and suggest that the race neutral explanations may be pretexts.

Young, 826 S.W.2d at 144.

302. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

303. *Young*, 826 S.W.2d at 145.

304. *Id.*

305. *Id.*

306. *Id.* at 145-46. More specifically, the Court of Criminal Appeals held that the defendant "was not required to request the trial judge to make his finding upon the *Batson* motion based upon a comparison analysis in order to have that very same evidence considered on direct appeal." *Id.* at 146. *See also Vargas v. State*, No. 1507-89, slip op. at 8 (Tex. Crim. App., Sept. 16, 1992) (reversing the court of appeal's refusal to consider rebuttal evidence of a comparison analysis for the first time on appeal).

307. *See also Vargas*, No. 1507-89, slip op. at 8.

308. *Young*, 826 S.W.2d at 146.

recount of the voir dire through a detailed comparison of the prosecutor's strikes, the explanations offered, and other relevant circumstances will shed more light upon the review of an otherwise cold record.³⁰⁹

F. COURT OF CRIMINAL APPEALS CASES

In a cocaine possession case, *Wright v. State*,³¹⁰ the State peremptorily struck four potential jurors. Upon the defendant's timely *Batson* objection, the State offered race-neutral explanations for striking three of the potential jurors. The State, however, neglected to offer an explanation for one of the potential jurors. The trial court found that the prosecutor's explanation for the strikes against the African-American jurors were race-neutral despite the prosecutor's failure to include a specific rationale for one of the potential jurors struck. The court of appeals, after noting the "oversight," scrutinized the record of the exchange between the State and the venireperson in question to determine whether the strike was racially motivated.³¹¹ The court found that the voir dire record revealed a legitimate racially neutral reason for striking the venire member in question.³¹² The court of appeals affirmed the trial court, holding that "the omission of a reason for striking [the venireperson in question] was an oversight on the part of all involved."³¹³ The defendant questioned the appellate court's propriety in "reward[ing] a prosecutor's silence" and "bestowing on [such silence] the same force and effect as an articulated neutral explanation related to the particular case to be tried."³¹⁴ The Court of Criminal Appeals agreed with the defendant and reversed the appellate court.³¹⁵ The Court of Criminal Appeals held that the dialogue which the court of appeals relied upon occurred during the voir dire examination, rather than during the *Batson* hearing as a race-neutral justification for the peremptory strike.³¹⁶ The court commented that the State's failure to refer to such dialogue during the *Batson* hearing was tantamount to the prosecutor's failure to offer a racially neutral explanation for striking the juror.³¹⁷ The court held that they were left with the definite and firm conviction that the defense had shown *Batson* error and that the trial court's finding that the prosecutor's peremptory challenge was not based on any racial consideration was clearly erroneous.³¹⁸

309. *Id.*

310. 832 S.W.2d 601 (Tex. Crim. App. 1992).

311. *Id.* at 603.

312. *Id.* at 604. The State argued that the portion of the record supporting such a finding was the exchange between the State and the juror in question concerning whether anyone in the panel ever knew someone or had a close friend or family member who had a drug problem which affected the family or friendship. The venire member responded to the question by stating "[t]he person that I know is a good friend of my son, which he worked under me and he confessed this to me, that he had this problem. We got him some help and I eventually had to fire him because he was upsetting, you know, the rest of the people." *Id.*

313. *Id.* at 603.

314. *Id.* at 604.

315. *Id.* at 605.

316. *Id.*

317. *Id.* at 604-05.

318. *Id.* at 605.

The Court of Criminal Appeals affirmed the appellate court's reversal of the defendant's conviction in *Hill v. State*.³¹⁹ When the defendant objected to the prosecutor's preemptory strike of an African-American venire member, the prosecutor responded that he excused the venireperson "because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions."³²⁰ The Court of Criminal Appeals, in reviewing the voir dire record, held that the examination was perfunctory and nothing in the record suggested that the venireperson was hostile to the State.³²¹

In *Emerson v. State*³²² the trial court refused to comply with the defendant's request to make findings of fact and conclusions of law, so the Court of Criminal Appeals reversed the defendant's conviction and remanded for a *Batson* hearing. At trial, the defendant attempted to make a prima facie case that the State had based its preemptory strikes on race. He argued that the State had either failed to examine or asked meaningless questions to the African-American jurors during the voir dire. The defendant also made a comparative analysis of the disparate treatment by the State between African-American venire members and white venire members. The State rebutted that the defendant had not made out a prima facie case since the State only struck four out of six African-American venire persons, accepted two on the jury and had one unused preemptory challenge at the end of the voir dire. The trial court accepted the State's argument.³²³ The Court of Criminal Appeals held that the trial court erred by accepting the State's arguments and failing to compel the State to give racially neutral explanations for its strikes after the defendant made a prima facie case of racially motivated strikes.³²⁴

In another Court of Criminal Appeals case, the court found that the trial court erred in concluding that the prosecutor sustained his burden of proof even though he could not articulate race-neutral reasons for striking two African-American jurors due to the passage of time.³²⁵ At the *Batson* hearing, the trial court found that the prosecutor did not purposefully discriminate in exercising his preemptory challenges despite his total failure to give any explanations for striking two of the five stricken African-American venire members. The Court of Criminal Appeals reversed, holding that the "State's default in articulating a neutral, clear and reasonably specific, legitimate and case related explanations for the two specified black venire persons [left the Court] no alternative but to conclude that the trial judge's determination in regards to [the two jurors in question] was 'clearly erroneous.'"³²⁶ The court held that the State did not meet its burden of proof within the

319. 827 S.W.2d 860, 861 (Tex. Crim. App. 1992).

320. *Id.* at 862, 869.

321. *Id.* at 869-70.

322. 820 S.W.2d 802, 804 (Tex. Crim. App. 1991).

323. *Id.*

324. *Id.*

325. *Brooks v. State*, 802 S.W.2d 692, 694 (Tex. Crim. App. 1990).

326. *Id.* at 695 (citing *Whitsey v. State*, 796 S.W.2d 707 (Tex. Crim. App. 1990)).

parameters established in *Batson* or its progeny.³²⁷

Several errors committed in the *Batson* hearing caused the Court of Criminal Appeals to reverse the defendant's conviction in *Salazar v. State*.³²⁸ First, the trial judge held the *Batson* hearing in his library over the defendant's objection. The reviewing court held this procedure contravened article 1.24 of the Criminal Procedure Code, which requires all court proceedings and trials to be public.³²⁹ Second, the trial court prohibited the defense attorney from cross-examining the prosecutor following his racially-neutral explanations. The reviewing court held that cross-examination is necessary because once the State puts forward its racially neutral explanations for striking the jurors, the burden to show purposeful discrimination shifts back to the defendant to show that the proffered explanation is merely a pretext or to impeach or refute the explanation.³³⁰ Third, after the trial court refused to allow the defendant to cross-examine the prosecutor, the judge barred the defendant from making a bill of exceptions through cross-examination of the prosecutor.³³¹ The court held that the right to make an offer of proof or perfect a bill of exceptions is absolute.³³² Finally, the defendant requested admission of the State's juror information cards into evidence. The trial court, however, sustained the State's objection that such forms were protected by the work product rule. The Court of Criminal Appeals held that admitting these forms was "proper" under Rule 611 of the Texas Rules of Criminal Evidence and "necessary," so a comparative analysis could be made of the prosecutor's peremptory strikes.³³³ The Court then remanded the case so that a proper *Batson* hearing could be held.³³⁴

G. COURTS OF APPEALS CASES

The Tyler Court of Appeals reversed and remanded the defendant's conviction for a *Batson* hearing after the defendant established a prima facie case of discrimination.³³⁵ The defense counsel made a timely *Batson* objection and pointed out to the trial court that the defendant was an African-American and the prosecutor had peremptorily struck the only two African-American venire members. The trial court immediately ruled that the defendant had not established a prima facie case of discrimination, and therefore the prosecutor did not have to offer race-neutral explanations for the strikes. The court of appeals reversed, holding that the burden of establish-

327. *Brooks*, 802 S.W.2d at 695.

328. 795 S.W.2d 187, 194 (Tex. Crim. App. 1990).

329. *Id.* at 192 (citing TEX. CODE CRIM. PROC. ANN. art. 1.24 (Vernon 1989)).

330. *Id.* The Dallas Court of Appeals held in *Williams v. State*, 767 S.W.2d 872, 874 (Tex. App.—Dallas 1989, pet. ref'd), that a defendant is entitled to cross-examine the prosecutor in a *Batson* hearing.

331. *Salazar*, 795 S.W.2d at 193; see *Newsome v. State*, 771 S.W.2d 620 (Tex. App.—Dallas 1989, pet. ref'd).

332. *Salazar*, 795 S.W.2d at 193 (citing *Spence v. State*, 758 S.W.2d 597 (Tex. Crim. App. 1988) and TEX. R. APP. PROC. 52(a)).

333. *Id.*; TEX. R. CRIM. EVID. 611.

334. *Salazar*, 795 S.W.2d at 193.

335. *Redman v. State*, No. 12-90-00134-CR, slip op. at 7 (Tex. App.—Tyler, May 12, 1992, no pet. h.).

ing a prima facie case is not onerous, and the defendant had met this burden.³³⁶

The Beaumont Court of Appeals reversed a conviction based upon the prosecutor's eight racially-motivated peremptory strikes.³³⁷ The prosecutor stated that he believed all eight African-American venire members that he struck were "inattentive" and "disinterested."³³⁸ No evidence in the voir dire record, however, suggested that the jurors were in fact inattentive or disinterested.³³⁹ The prosecutor also used his lack of personal acquaintance with the jurors as a blanket explanation for striking five jurors. The court held that the lack of personal acquaintance is not a racially neutral justification for a peremptory strike.³⁴⁰ The court further held that the prosecutor was not entitled to a jury of twelve persons who knew him.³⁴¹

In the same case the prosecutor explained that he struck three African-American venire members because they worked in hospitals, and he was involved in an unrelated suit with a doctor who worked at a hospital. The prosecutor feared that the other case might prejudice these venire members against him. The prosecutor explained that he struck another African-American venire member because the panelist worked for a company that was under a drug investigation and the prosecutor feared that an employee of such a company would become more tolerant of drugs. The prosecutor, however, never questioned these four jurors to confirm that these group characteristics applied to them personally. The court held that, in the absence of such questions confirming the prosecutor's beliefs, such justification was not racially neutral.³⁴²

Also in this case, the prosecutor stated he struck two African-American and one white venire members because he wanted to reach a particular juror who was the wife of a state trooper. The prosecutor believed she would be sympathetic to the State. The court held that this was not a racially neutral explanation because:

The racially neutral reason for the strike must apply to the venire member, not to some factor applicable to a third party, or to some random caprice unrelated to the potential juror's unbiased service, such as the phases of the moon, or a toss of the coin, or the fact that a juror's name reminds the prosecutor of a Chuck Berry song.³⁴³

336. *Id.*

337. *Oliver v. State*, 826 S.W.2d 787, 788 (Tex. App.—Beaumont 1992, pet. ref'd).

338. *Id.*

339. The court went on to state that:

Here the prosecutor makes a subjective claim, unsupported by any objective evidence in the record, that [the eight jurors] were so inattentive that he felt he needed to strike them, but none of the twenty-three white jurors on the venire were likewise inattentive. The explanation is either a bald pretext for discrimination or an expression of the prosecutor's unconscious attitudes towards people of color.

Id.

340. *Id.* at 789.

341. *Id.*

342. *Id.*

343. *Id.*

The prosecutor stated that he struck two other African-American jurors because he believed they might be related to a man whom he had prosecuted or who had been arrested. The prosecutor neglected to confirm these beliefs and the court held that such justifications were not race-neutral.³⁴⁴ Finally, the prosecution argued that the State historically struck African-American venire members because of the fear that they were more sympathetic to African-American defendants. The State went on to argue that since the defendant was Hispanic and not African-American, any motive to strike African-American jurors because of their bias in favor of an African-American defendant, was absent. The court refused to accept such an argument, and held if such rationale was valid, "it only makes the use of peremptory challenges foolish as well as discriminatory."³⁴⁵

The Fort Worth Court of Appeals reversed a conviction for driving while intoxicated because the prosecutor gave two non-racially neutral explanations for striking a Hispanic juror.³⁴⁶ The first explanation was based upon the juror's attitude toward intoxication and his views on the validity of an intoxilyzer test.³⁴⁷ The court held that the record did not reflect that the juror expressed any views on the validity of the intoxilyzer test.³⁴⁸ Furthermore, the only views the juror expressed on intoxication were that the DWI law made sense and he understood it. The prosecutor also attempted to explain the strike by the juror's demeanor and attitude while answering voir dire questions. The court held that the record was void of any reference to the juror's demeanor or hostility towards the State and the trial court's decision therefore, was clearly erroneous since the prosecutor's explanations were not racially neutral.³⁴⁹

After the Supreme Court handed down *Powers*,³⁵⁰ the Fort Worth Court of Appeals reversed a trial court's decision that white defendant did not have standing to raise a *Batson* objection.³⁵¹ The trial court did permit the prosecutor to offer racially neutral explanations for its strikes. The court of appeals held that the prosecution did not meet its burden for the five peremptory strikes of the African-American venire members for several reasons.³⁵² First, the appellate court held that the prosecutor did not ask meaningful questions to the five venire members.³⁵³ Second, the prosecutor disparately treated African-American venire members from white venire

344. *Id.* The court noted that the prosecutor did not have similar "misgivings" about white jurors whose relatives also had been prosecuted. *Id.*

345. *Id.* at 790.

346. *Martinez v. State*, 824 S.W.2d 724, 725 (Tex. App.—Fort Worth 1992, pet. ref'd), cert. denied, 113 S.Ct. 1414 (1993).

347. The juror was asked, "... [D]oes that make sense to you that you can have a drink or several drinks, get in a car and drive and not commit a crime." The juror responded, "[Y]es, I understand what you're saying." *Id.*

348. *Id.* at 726.

349. *Id.* at 727.

350. *Powers v. Ohio*, 111 S. Ct. 1364 (1991).

351. *Wiese v. State*, 811 S.W.2d 958, 959 (Tex. App.—Fort Worth 1991, pet. ref'd).

352. *Id.* at 960.

353. *Id.*

members who gave the same answers on voir dire.³⁵⁴ Finally, the prosecutor questioned one of the African-American venire members in a manner unlike the examination of white venire members, which the court held "appear[ed] to have been either calculated to evoke certain responses or indicative that the State had already decided to strike the individual involved."³⁵⁵

In *Moore v. State*,³⁵⁶ the Houston Court of Appeals reversed a defendant's drug related conviction when the prosecutor stated he struck one of the three African-American jurors because of her affiliation with a "minority club" and which might bias her in favor of the defendant.³⁵⁷ The prosecutor stated that the other reason he struck her was because the juror indicated that she might have a problem assessing punishment. On voir dire, however, the juror stated that she would not favor the defendant solely because he was a minority. The court held that even though the prosecutor gave a race-neutral explanation (inability to consider the full range of punishment), "the racially motivated explanation vitiated the legitimacy of the entire [jury selection] procedure."³⁵⁸

In another case out of the First District, the court sustained the defendant's point of error on the ground that the prosecutor failed to come forward with an explanation for striking the African-American venire members.³⁵⁹ The defendant, who was Hispanic, challenged the prosecutor's striking of all African-American venire members under article 35.261 of the Criminal Procedure Code.³⁶⁰ At the *Batson* hearing the prosecutor stated that he did not recall why he struck the African-American venire persons, but that he did not strike any venire persons solely because of their race. The court of appeals held that the prosecutor failed to offer any evidence to support his non-discriminatory reasons for challenging the venire members.³⁶¹

The Austin Court of Appeals found a *Batson* violation in *Woods v. State*³⁶² when the prosecutor admitted that he struck an African-American corrections officer because of his haircut. In justifying the strike, the prosecutor said he associated the officer's "punk rock haircut" with the drug culture, liberalism and radicalism, which was the sole reason for the strike.³⁶³ The prosecutor, however, never questioned the venire member to verify this assumption. The only question posed to the venire member, in light of his occupation as a correction officer, was whether he would give more credibility to a police officer's testimony. Furthermore, cross examination of the

354. *Id.*

355. *Id.*

356. 811 S.W.2d 197 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd).

357. *Id.* at 200. The name of the minority club was never identified in the opinion.

358. *Id.* (citing *Speaker v. State*, 740 S.W.2d 486, 489 (Tex. App.—Houston [1st Dist.] 1987, no pet.)).

359. *Garcia v. State*, 802 S.W.2d 817, 819 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) On the prosecutor's jury information sheet he placed "BF" next to each of the venireperson's names indicating that they were black females. No other notations indicating race appeared on the information sheet.

360. TEX. CRIM. PROC. CODE ANN. art 35.261 (Vernon 1989).

361. *Garcia*, 802 S.W.2d at 819.

362. 801 S.W.2d 932, 936-37 (Tex. App.—Austin 1990, pet. ref'd).

363. *Id.* at 936.

prosecutor established that he did not strike a "non-black" venire member who had "an unusual haircut, squared off" with a "2-inch spike down the back of the venireman's [] neck."³⁶⁴ The court held that the prosecutor did not provide a plausible race-neutral explanation.³⁶⁵

In the same case, the prosecutor also excused another African-American venire member, stating that he did not seem interested and he did not react like the other panelists to humorous remarks made in the during voir dire examination. The prosecutor also said that he made no eye contact with the panelist, and that he struck this panelist because of the failure to establish a rapport or line of communication with the panelist. The court held that the abbreviated voir dire examination supplied no factual predicate for the challenge and that the failure to "relate well" to the prosecutor, given the single question on voir dire examination, violated *Batson*.³⁶⁶ The prosecutor also tried to justify his excusal of another venire member on the same basis.³⁶⁷ Although Bullock's examination was slightly longer than Allen's (the prosecutor posed four questions to Bullock which established that he had previously served in a civil case and that he would have no problem serving in the instant case), the court also held the prosecutor's explanation was not race-neutral for the same reasons previously articulated.³⁶⁸

The prosecutor in *Woods* also struck an African-American speech teacher because the prosecutor felt teachers in general and the venire person in particular were "very assertive."³⁶⁹ The court, however, found no indication in the record of the venire person's assertiveness.³⁷⁰ The prosecutor also stated that he struck the venireperson because she was a speech teacher and he felt she would judge the case on the attorneys' speaking abilities rather than on the evidence. The court noted that the prosecutor's voir dire questions did not address this concern.³⁷¹ In addition, the prosecutor admitted that he had not struck six non-minority school teachers or administrators. The court concluded that the explanations were not race-neutral.³⁷² Furthermore, the prosecutor testified that he had tried approximately 200 criminal jury trials in which few African-Americans served. The court noted that "[w]ithout further clarification than was given, such evidence tended to

364. *Id.* at 937.

365. *Id.*

366. *Id.* at 938. The court relied heavily upon the holding in *Daniels v. State*, 768 S.W.2d 314, 317 (Tex. App.—Tyler 1988, pet. ref'd), quoting

Although we are unwilling to say that a juror's demeanor cannot ever be a racially neutral motive for a prosecutor's peremptory challenge, the protection of the constitutional guarantees that *Batson* recognizes required the court to scrutinize such elusive, intangible, and easily contrived explanations with a healthy skepticism. Otherwise, 'inattentiveness' will inevitably serve as a convenient talisman transforming *Batson*'s protection against racial discrimination in jury selection into an illusion and the *Batson* hearing into an empty ceremony.

Woods, 801 S.W.2d at 937.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 938-39.

371. *Id.* at 939.

372. *Id.*

strengthen the inference of purposeful discrimination rather than rebut the prima facie case."³⁷³

The Dallas Court of Appeals reversed a conviction on the basis of the prosecutor's explanation that he struck two African-American jurors because of their appearance in *Davis v. State*.³⁷⁴ The State peremptorily struck four African-American venire members. The State justified one of the four strikes solely on the basis of the individual's appearance, stating "[h]is responses were not what disqualified him from my opinion [sic]."³⁷⁵ The prosecutor attempted to explain that he "sight strikes" individuals who do not fit within the group that the State wanted on the jury. The prosecutor, however, failed to specify the types of people for whom he was looking to serve as jurors. The State based another strike on the juror's appearance and reaction to the voir dire. The court noted that nothing in the record revealed that the juror appeared or reacted adversely to the prosecutor during the voir dire.³⁷⁶ The court, therefore, held that the State's explanations for peremptorily striking the jurors were not plausible, racially neutral reasons.³⁷⁷

In another case, the same court reversed a robbery conviction when the prosecutor explained that he struck the juror in question on a group bias without showing that the group trait applied to the juror.³⁷⁸ The prosecutor indicated that he struck the juror in question because he possessed a low level of intelligence and/or education by virtue of his career as an operator with DART (Dallas Area Rapid Transit) and because of his youth. Although low intelligence level constitutes a legitimate basis for exercising a peremptory challenge, the court held that the prosecutor had no basis for concluding the juror possessed a low intelligence level merely because he was employed by DART.³⁷⁹ The court also noted that fifty percent of the jurors who were selected were younger than the juror in question.³⁸⁰ The prosecutor never questioned the juror individually and only received one response from the juror when questioning the entire venire. The court held that by failing to explain why age thirty-five was too young, the prosecutor did not provide the requisite "clear and specific" explanations of legitimate reasons for the strike.³⁸¹

The Dallas Court of Appeals also reversed a robbery conviction on the basis of the prosecutor's race-specific explanation for striking a potential juror.³⁸² The prosecutor stated he struck the juror in question because he was concerned about the juror's membership with the NAACP (National Association for the Advancement of Colored People) because the organization

373. *Id.* at 940.

374. 796 S.W.2d 813, 818 (Tex. App.—Dallas 1990, pet. ref'd).

375. *Id.*

376. *Id.* at 819.

377. *Id.*

378. *Chivers*, 796 S.W.2d at 542.

379. *Id.*

380. *Id.* at 543.

381. *Id.*

382. *Somerville v. State*, 792 S.W.2d 265, 266, 269 (Tex. App.—Dallas 1990, pet. ref'd).

had been adverse to the District Attorney's Office in other cases.³⁸³ The prosecutor also stated that there was a "radical element" in the NAACP that he did not like. In addition, the prosecutor stated that the juror indicated that he read law books in his spare time, and the prosecutor was concerned that the juror would "play lawyer" while deliberating. The court noted that the prosecutor failed to question the juror concerning his involvement with the NAACP, his knowledge of the NAACP's involvement with the District Attorney's office or whether he could abide by the trial judge's instructions despite his knowledge of the law gained through his reading.³⁸⁴ The court stated that: "[t]his Court would appear to condone such discrimination if we were to accept as a racially neutral explanation for the prosecutor's strike that [the juror] was a member of the NAACP."³⁸⁵ The court, therefore, reversed the conviction since the record disclosed that the prosecutor's explanation for striking the juror was based upon his association with the NAACP which is race-specific.³⁸⁶

The Beaumont Court of Appeals reversed a defendant's robbery conviction in *Smith v. State*³⁸⁷ after holding that the prosecutor's explanation for peremptorily striking a juror was insufficient as a matter of law to rebut the defendant's prima facie showing of racial discrimination.³⁸⁸ The prosecutor peremptorily struck four of the five African-American venire members. The prosecutor explained that she struck one of the jurors because she claimed that the juror stared at her throughout the voir dire and it gave her a negative feeling." According to the prosecutor, she struck the juror purely because the negative reaction and non-verbal communication between the juror and prosecutor. The trial court ruled that this was a race-neutral explanation. The court of appeals disagreed, holding that there was no support in the record for the prosecutor's claim that the juror was staring at her.³⁸⁹ Furthermore, the State's attorney did not ask the juror any questions on voir dire, thus increasing the probability that the explanation was a sham or a pretext.³⁹⁰

The Dallas Court of Appeals found a *Batson* violation in *Miller-El v. State*³⁹¹ when the evidence at trial demonstrated a disparate treatment of jurors with the same or similar characteristics.³⁹² The defendant challenged two of the seven African-American venire members for cause, and the prosecution used five of his ten peremptory challenges on the remaining five African-American venire members. Although the prosecutor struck five

383. It should be noted that the juror also stated that his sister-in-law had been raped and the defendant was charged with rape. This fact would appear to make the juror in question more favorable towards the State's position. *Id.* at 268.

384. *Id.*

385. *Id.*

386. *Id.*

387. 790 S.W.2d 794 (Tex. App.—Beaumont 1990, no pet.).

388. *Id.* at 796.

389. *Id.*

390. *Id.*

391. 790 S.W.2d 351 (Tex. App.—Dallas 1990, pet. ref'd).

392. *Id.* at 357.

African-Americans, the court's analysis focused mainly upon one juror. When questioned about this strike the prosecutor responded that jury service would impose a hardship upon the juror, basing his conclusion upon the fact that she had held her job less than three months and had young children at home. The prosecutor, however, never asked the juror whether jury service would cause her hardship or whether she wanted to be excused. The court held that the prosecutor's stated reasons for striking the juror failed to correlate to the facts of the case.³⁹³ The court also found disparate treatment between similarly situated jurors whom the prosecutor did not strike.³⁹⁴ The court ruled the prosecutor struck the juror because of her race and the prosecutor's justification was a pretext or a sham.³⁹⁵

The Dallas Court of Appeals reversed another conviction on the basis of the prosecutor's unsupported racially neutral explanation.³⁹⁶ The prosecutor attempted to justify the peremptory strike of an African-American venire member on the ground that she previously worked at a Philadelphia halfway house for former criminals. A review of the record, however, revealed that the venire member in question was a resident advisor at a school for persons with disabilities of various kinds, including mentally retarded children, children with behavior problems, and adults with disabilities. She unequivocally denied ever having any wards with criminal history. The court summarily refused to accept the prosecutor's argument on appeal that he was entitled to a "strike for mistake" since there was nothing in the record to suggest that the strike was a mistake.³⁹⁷ The court found that the "venire member could not have stated more clearly that she did not work with criminals" and concluded that the strike was racially motivated.³⁹⁸

The Dallas Court of Appeals also reversed an aggravated robbery conviction based upon a prosecutor's contrived explanations that he struck four African-American jurors because they appeared to be conservative.³⁹⁹ Defense counsel responded that the prosecutor had not struck several conservatively dressed white venire members. After the defense rebutted the State's racially neutral explanations, the prosecutor failed to make a showing that he would have struck these venire members regardless of their race. The court stated that the prosecutor's statements implied that he believed conservative African-Americans could not impartially consider the State's case against the defendant.⁴⁰⁰ The court held that the State contrived facially neutral explanations for striking the jurors in questions and struck them at least partly because of race.⁴⁰¹

393. *Id.*

394. *Id.*

395. *Id.*

396. *Reich-Bacot v. State*, 789 S.W.2d 401, 404 (Tex. App.—Dallas 1990), *pet. dismiss'd, improvidently granted*, 815 S.W.2d 582 (Tex. Crim. App. 1991).

397. *Id.*

398. *Id.*

399. *Vann v. State*, 788 S.W.2d 899, 905 (Tex. App.—Dallas 1990, *pet. ref'd*).

400. *Id.* at 904.

401. *Id.* at 905.

In a juvenile capital murder case,⁴⁰² the Dallas Court of Appeals reversed the defendant's conviction when the State peremptorily struck two jurors because of their race.⁴⁰³ The State justified the two strikes on the grounds that both jurors were inattentive, did not make eye contact with the prosecutor and one juror did not have children. The court first noted the disparate treatment between African-Americans without children and white jurors without children.⁴⁰⁴ Five white jurors who were not struck and ultimately served on the jury did not have children. The court then examined the State's voir dire of the jurors and concluded that the cursory voir dire was insufficient to permit the State to fairly assess the jurors' attentiveness.⁴⁰⁵ Furthermore, the court found that the jurors' alleged inattentiveness was not supported by any objective evidence in the record.⁴⁰⁶ The State's explanations for their peremptory strikes, therefore, were not racially neutral and the court reversed the trial court's conviction.⁴⁰⁷

XXXIII. CONCLUSION

Jury selection is the point that sets the tone for the rest of the trial. It can be a jury's most valuable educational forum if used to its limit, and it requires sensitivity and awareness on the attorney's part. Openness, flexibility, and courage on the part of the attorneys are what make communication during *voir dire* accomplish its aims.

The art of human relationships is a very demanding one. It is filled with flaws and mistakes because understanding someone and how he or she will behave is one of the most difficult and unpredictable tasks in the world. Most people never really know even the people with whom they are closest, such as their spouse, their family, and their friends. During *voir dire*, the complications of human interactions become compounded and require highly developed skills in the art of listening, perceiving, and intuiting. Time, effort, and practice must go into using these skills. A sense of balance in *voir dire* emerges after many clumsy moments. The ultimate lesson is to analyze one's present *voir dire*, discover strengths and weaknesses in it, and encourage feedback from clients, other attorneys, social scientists, secretaries, friends, and spouses. Developing skills of communicating, educating, and persuading others in *voir dire* and elsewhere is the touchstone of strong defense advocacy.

402. *C E J v. State*, 788 S.W.2d 849 (Tex. App.—Dallas 1990, pet. denied). The court of appeals in *C E J* held that a juvenile defendant is also afforded protection under *Batson* since a juvenile proceeding is quasi-criminal. *Id.* at 852.

403. *Id.* at 856.

404. *Id.*

405. *Id.* at 857.

406. *Id.*

407. *Id.* at 858.

APPENDIX A

PERSONAL AND CONFIDENTIAL

RE: Federal Jury Service

Dear Juror:

You have been chosen for jury service in the United States District Court for the Northern District of Indiana. You should already have received a Summons from the Clerk directing you to appear at the United States Court-house in South Bend on March 23, 1987. Along with that Summons the Clerk enclosed a "Juror Information Card" (Form AO-229). You probably have filled it out and returned it to the Clerk by now.

Enclosed in the present mailing is a more detailed "Juror Questionnaire." You must fill it out and send it back in the envelope which has been provided for that purpose. This stamped, pre-addressed return envelope is also enclosed for your convenience.

Please take the time right away to complete the "Juror Questionnaire." The time and effort you invest now should save you (and many others) much time and effort in the future. Read the "Instructions for Juror" carefully and fill out the "Juror Questionnaire" completely. Then return it promptly.

The Court greatly appreciates your cooperation.

Very truly yours,

UNITED STATES DISTRICT JUDGE

CONFIDENTIAL JUROR QUESTIONNAIRE**INSTRUCTIONS FOR JUROR**

The attached questions must be answered by you. They will assist the Judge and lawyers in selecting a jury. Your complete written answers will save a great deal of time for the Judge, for the lawyers, and for you.

Take your time. Answer all the questions to the best of your ability. **DO NOT ASK FOR HELP.**

There are no right or wrong answers. The only requirement is that the answers be full and honest.

We need your candid answers so that we pick a fair and impartial jury for a trial involving criminal accusations. The Judge and the lawyers realize that every person has beliefs and prejudices concerning many things. You should answer with your true feelings, whatever they may be. Do not assume that any of your answers will qualify you or disqualify you from serving on this jury.

Do not assume anything from these questions. The fact that they are being asked does not necessarily have anything to do with the evidence that you will hear.

Please answer each question fully and to the best of your ability. Write or print clearly. You must not ask anyone for help. Do the best you can. That will be good enough.

If you cannot answer a question because you do not understand it, write "DO NOT UNDERSTAND," in the space after the question. If you cannot answer because you do not know, write "DO NOT KNOW," in the space after the question. If you want to discuss your answer to any question in private, please write "PRIVATE" in the space provided for your answer. If you need extra space to answer any question, please use the "Explanation Sheet" provided at the end of the questionnaire.

We are sure you understand the importance of juries to our American system of justice. We are confident that you also appreciate your duty as a citizen to serve as a juror if you are eligible. Your cooperation in completing and returning this "Juror Questionnaire" is a part of that duty. Without your help our courts cannot operate properly in accordance with the United States Constitution.

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN THAT YOUR ANSWERS ARE LEGIBLE, EITHER PRINT OR TYPE YOUR ANSWERS.

JUROR NUMBER: _____

- 1. Name: _____
- 2. Age: _____
- 3. Length of time at current address? _____ Years
 _____ Months
- 4. Where else have you lived? _____

- 5. Current occupation and employment: _____

- 6. How long? _____ Years _____ Months
 What are your main job responsibilities? _____

- 7. What jobs have you held in the past? _____

- 7a. What were your main job responsibilities? _____

- 8. Marital status: _____
- 9. If you have children, please tell us the sex, age and occupation of each of your children: _____

- 10. Spouse's (or former spouse's) occupation and employment? _____

- 11. How long? _____ Years _____ Months
- 12. What jobs has your spouse (or former spouse) held in the past?

- 13. Level of education? _____
 (a) If college, what was your major? _____
 (b) What college did you attend? _____
 (c) Have you ever taken any courses in law, law enforcement, criminology or criminal justice? _____ If your answer is "yes", what courses? _____

 (d) Were you ever a member of R.O.T.C.? _____

14. Do you have any legal training? _____ If your answer is "yes", in what areas? _____
15. Have you, any member of your family, or friends ever been employed by or made application for employment with any law enforcement agency such as: Police department, Sheriff's department, Constable's office, F.B.I., I.R.S., D.E.A., (Drug Enforcement Administration), Customs Bureau, Alcohol, Tobacco and Firearms, U.S. Marshall, District Attorney, U.S. Attorney, Department of Justice, Probation or Parole, Bureau of Prisons or any other agency? _____ If your answer is "yes", please list:

- 15a. Have you ever wanted to go into law enforcement? _____
If your answer is "yes", please explain: _____

16. Have you ever served in the armed forces? _____
(a) Branch and highest rank: _____
(b) Dates: _____
(c) Duties: _____
(d) Place of service: _____
(e) Type of discharge: _____
(f) Have you ever served on a court martial? _____
17. Have you or any close friend or relative made or had any claims against any federal, state or local government agency? _____
If your answer is "yes", please explain: _____

18. Have any claims been made by any federal, state or local government agency against you, any close friend or relative? _____
If your answer is "yes", please explain: _____

19. Have you or any close friend or relative ever been involved in a criminal case, either as a victim, defendant, witness, or attended court for any reason? _____ If your answer is "yes", please explain:

20. Have you or any close friend or relative ever been involved in a civil case, either as a plaintiff, defendant, witness or attended court for any reason? _____ If your answer is "yes", please explain:

21. Have you ever served on a federal, state or local grand jury?

40. Do you think there is a crime problem? _____ If your answer is "yes", please explain: _____

41. Do you believe the courts deal with criminals too severely or not severely enough? _____ Why? _____

42. Have you ever filed a complaint with the police against anyone? _____ If your answer is "yes", please describe the complaint: _____

43. Have you ever filed a complaint against a police officer or anyone in law enforcement? _____ If your answer is "yes", please describe the complaint: _____

44. Has a complaint ever been filed against you by anyone? _____ If your answer is "yes", please describe the complaint: _____

45. Have you, any member of your family or friends ever worked in any alcohol or drug abuse program or medical facility or at a volunteer agency that counsels or otherwise assists those addicted to alcohol or drugs? _____ If your answer is "yes", please describe: _____

46. Do you own or keep any weapons? _____ If your answer is "yes", what type of weapons do you keep or own? _____

47. Are you in favor of or do you oppose the use of undercover officers or informants in investigating criminal activity?
() Favor () Oppose
Please explain your answer: _____

48. Are you in favor of or do you oppose the use of electronic surveillance (tapping phones, bugging rooms or undercover videotaping) in investigating criminal cases:
() Favor () Oppose
Please explain your answer: _____

49. Please list the newspapers, magazines or periodicals you subscribe to or regularly read: _____

50. If you could subscribe to any three magazines, what would they be?

51. State whether or not you have ever been in a labor union, and if so, state that union: _____

52. In your opinion, is there presently a drug problem in the United States, and if so, what is the drug problem as you view it? _____

53. What are your three favorite television programs? _____

54. What type of relationship do you have with your children? _____

55. Have you known anyone who had a serious problem as a result of drug use? _____ Without mentioning any names, what was the problem? _____

56. Do you agree or disagree with the laws prohibiting the use of drugs, such as marijuana? _____ Why? _____

57. If you are in a group of people you don't know very well, would you be labeled a leader or follower? _____
58. In what kind of group do you find yourself to be more of a leader? . A follower? _____
59. Do you feel that a Drug Enforcement Agent's testimony should be given greater or lesser weight than anyone else's, all other factors being equal? _____ Why or why not? _____

60. What is the first thing that comes to your mind when you think of Defense Attorney? _____
Prosecutor? _____
61. Do you have any religious, moral, or ethical convictions that would prevent you from sitting in judgment of another person? _____

62. Are you taking any medication regularly? If so, state what kind? _____

63. Do you have any specific problems at home or on the job that might make it difficult for you to give your full attention to the trial? _____ If your answer is "yes", please explain: _____

64. What else should we know about you? _____

JUROR QUESTIONNAIRE Juror No. _____

Instructions: This questionnaire is intended to help the lawyers and the Court during jury selection. Please complete all applicable questions. **PRINT YOUR ANSWERS IN INK.** The questions are not intended to unreasonably invade your privacy. If, However, you prefer not to answer a question, please draw a line through the space provided for an answer. If the question is not applicable to you, please mark "N/A" in the space provided.

Name: _____ Age: _____

City of residence: _____

How long have you lived in the Houston area? _____

Place of birth: _____ Employer: _____

Type of work: _____

How long have you worked for your present employer? _____

Marital status: _____

If married, name of spouse: _____ Number of children: _____

State their ages and sex: _____

Spouse's employer: _____ Type of work: _____

How long has your spouse worked for current employer? _____

City of spouse's birth: _____

Years of formal education you completed: _____

If you completed college, please state: highest degree completed: _____

Undergraduate college attended: _____

Location: _____ Major: _____

Postgraduate college attended: _____

Location: _____ Major: _____

Have you served in the military service? _____ Yes _____ No;

If Yes: _____ Drafted or _____ Enlisted

If Yes, what branch? _____

Highest rank attained: _____

Have you or any member of your family been employed by a local, state, or the federal government, other than the military?

_____ Yes _____ No If Yes, what entity? _____

What position? _____

Have you previously served on a jury? _____ Yes _____ No

If Yes, _____ Civil or _____ Criminal?

If Yes, describe type of case: _____

If Yes, was it in: _____ Federal court _____ State court

Did you reach a verdict? _____ Yes _____ No

Have you ever been a party to a civil suit? _____ Yes _____ No

If Yes, describe the type of case: _____

Have you ever been a witness in a civil suit? _____ Yes _____ No

If Yes, describe the type of case: _____

Have you ever been the subject of a criminal investigation?

_____ Yes _____ No

Have you ever been formally accused of a crime (other than traffic ticket)?

_____ Yes _____ No

Have you ever been a witness or complainant in a criminal case?

_____ Yes _____ No If Yes, describe the type of case: _____

Have you ever been involved in a political campaign?

_____ Yes _____ No If Yes, which ones? _____

Do you know any other member of this panel? _____ Yes _____ No

What newspapers and/or magazines do you read? _____

To what civic clubs, societies, unions, professional associations or other organizations do you belong? _____

Your spouse? _____

Do you have any physical problem that could interfere with your jury service?

_____ Yes _____ No If Yes, explain: _____

Is there any reason you cannot serve as a juror? _____

Essays

