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GOING TO TRIAL (NOW WHAT DO I DO?): JURY SELECTION IN MISSISSIPPI TRIAL COURTS

John Helmert

I. INTRODUCTION

Approximately eight months out of law school, I faced my first trial. I had become a public defender out of a sense of public service, but it was not an extremely glamorous job. I was opposed by a seasoned prosecutor in a conservative jurisdiction, and my client was charged with driving under the influence of alcohol for the third time within five years. He was facing up to five years in the state penitentiary. Plea negotiations had failed, and the client insisted on a trial to vindicate his rights. I think I feared the outcome more than he did. Or, maybe, I just knew a little more than he did. As it turned out, maybe I didn't.

On the day of the trial, it seemed as if hundreds of people filled the lobby of the courthouse. They all looked like they had justice on their minds. The only thing that separated me from them was three years of law school and eight months of writing summary judgment motions. I stood before a jury panel with absolutely no idea what to do or say. My standard legal education and brief legal career had done nothing to prepare me for that moment. When it was my turn to speak, I took a deep breath and started talking. Afterwards, and still today, I have no memory of what I said.

Despite my first personal experience selecting a jury, jury selection in the trial courts of Mississippi does not have to be an experience that sears the soul. It is a process that is not taught much, if at all, in law school, and the only experience that prepares you for it is actually participating in the selection. My goal in writing this Article is to fill in that gap by sharing the practical knowledge that I gained in approximately twenty-four felony trials over a four-year period. My desire is that this Article will serve as a practical guide for lawyers facing the prospect of a jury trial who are confident in the strength of the facts and law in their cases, but unfamiliar with the process of jury selection in Mississippi. I will try to make this Article a written version of several conversations I have had in the past. If you are looking for a scholarly, research-laden tome on jury selection, put down this Article. However, if you are seeking a practical guide to jury selection from a practiced litigator, then readers of this Article will be able to focus their time on developing the facts of their case and fortifying their substantive legal research, and still manage to get a jury seated without looking like a fool or disadvantaging their clients.

Part II of this Article will discuss how the potential jurors are selected from the public to be considered for jury service. Part III will describe the process and standards for determining the qualifications of the potential

jurors who respond to the jury summons. I will explain how courts determine whether members of the jury panel are qualified to serve on a jury. This Article will briefly explore the voir dire process that follows qualification and reveal some very basic strategies to make it more effective for the novice or near-novice trial lawyer. Next, I will discuss challenges "for cause" and peremptory strikes, focusing on how they are conducted in Mississippi courts. I will also briefly review the one significant restraint on the use of peremptory strikes: race and gender-based strikes.

II. HUNDREDS OF PEOPLE IN THE LOBBY: WINNERS OF THE JURY SELECTION LOTTERY?

Juries do not appear out of thin air. A three-person jury commission exists in every county, whose members are chosen through individual appointments by the senior circuit judge, senior chancery judge and the board of supervisors.[1] The jury commission compiles a master list of all registered voters in the county.[2] One thousand names are chosen and placed into a "jury wheel."[3] An additional number of names are placed into the wheel, and this number must be at least one percent of the total number of voters on the original list.[4] A statutorily-imposed formula determines which of the names on the master list should be included in the jury wheel.[5] All of the names placed in the jury wheel are spread upon the minutes of the Circuit Court.[6]

An individual with no interest in any case pending before the courts will then select from the jury wheel at random the names of those who are *fortunate* enough to be summoned for jury duty.[7] In practice, a computer program usually conducts this function, and the list that results is *not* publicly available.[8] Whenever a trial is pending, the circuit clerk picks from this second list enough prospective jurors to constitute a sufficient jury panel.[9] These individuals are actually summoned to appear in court.[10] Unless the court determines otherwise, the names of these potential jurors *are* publicly available.[11]

Every lawyer scheduled to go to trial should obtain and review this public list prior to trial. If you are practicing in an unfamiliar jurisdiction, have a friend from law school in the area review the list and give you any available inside information. Of course, it should go without saying, none of these potential jurors should be contacted by anyone connected with

1. MISS. CODE ANN. § 13-5-6(1) (2008).
2. MISS. CODE ANN. § 13-5-8(1) (2008).
3. MISS. CODE ANN. § 13-5-10 (2008).
4. *Id.*
5. MISS. CODE ANN. § 13-5-12 (2008).
6. MISS. CODE ANN. § 13-5-14 (2008).
7. MISS. CODE ANN. § 13-5-16 (1) (2008).
8. MISS. CODE ANN. § 13-5-16 (2) (2008).
9. MISS. CODE ANN. § 13-5-26 (2) (2008).
10. MISS. CODE ANN. § 13-5-28 (2008).
11. MISS. CODE ANN. § 13-5-32 (2008).

your case. Specifically, your client should never see this list unless he or she can be trusted completely with that information. Although it felt like hundreds of people were staring at me and my first client, this process ensured that it was probably closer to eighty.

III. A JURY OF OUR PEERS (OR, THAT IS WHAT I AM AFRAID OF)

Most people can figure out how to get registered in order to vote. From those who register, the jury selection lottery randomly selects individuals to find a pool of prospective jurors. Yet, that does not necessarily mean that those selected are qualified to hear *that* case before *that* court.

Some prospective jurors contact the judge or the clerk prior to their appearance for jury duty to seek dismissal from the list. Their success in avoiding jury duty varies. Inevitably, the participation rate among those summoned is always less than one hundred percent. Furthermore, courts do not know whether those summoned are qualified to serve as jurors or not. Therefore, courts engage in some type of oral examination of those who actually appear to determine their qualifications.

The examination of jurors sometimes occurs outside the presence of the parties and is frequently not recorded by a court reporter. Lawyers and parties may not even know when this examination is scheduled. Nonetheless, a back-door approach does exist to discover this information. Circuit clerks are responsible for installing and maintaining a telephone line where summoned jurors may hear a recorded message that tells them whether they are required to appear in court.[12] Lawyers with a case set for trial would do well to identify this telephone number and call it prior to trial to determine when jurors are scheduled to report. If you, as the attorney, are not available to be present, someone should be present in the courtroom throughout the time that prospective jurors are summoned to appear, even if it is a secretary or a paralegal who cannot sit behind the bar. Furthermore, if you anticipate that jury selection practices will be the subject of an appeal, the examination of the jury pool should be recorded by a court reporter. It may be necessary to file a motion and have a hearing prior to trial to ensure full recordation.

What does the examination entail? First, the Mississippi Legislature has decided that everyone should be eligible to serve as jurors.[13] To that general rule, there are a number of understandable, as well as some archaic and quaint, exceptions that may disqualify a person or allow the court to excuse a person from jury service.[14] In most jurisdictions, judges seat the prospective jurors in the courtroom and ask those jurors questions as a group to find out if all of the potential jurors are actually qualified to serve. Jurors are directed to respond orally and individually when any question

12. MISS. CODE ANN. § 13-5-18 (2008).

13. MISS. CODE ANN. § 13-5-23(1) (2008).

14. MISS. CODE ANN. § 13-5-23(1) (2008); MISS. CODE ANN. § 13-5-1 (2008).

relates to them personally. Then, the court can determine if any of the following exceptions apply.

A. Disqualified

A juror must be twenty-one years old and a registered voter or a landowner in the county for at least one year to be qualified to serve.[15] A person convicted of an "infamous crime" is not eligible, nor is anyone who has been convicted of bootlegging within five years.[16] No one who has a case pending before the same court may serve as a juror in that court,[17] nor may an illiterate person serve on a jury.[18] The Legislature has also decided that habitual drunkards and common gamblers are not allowed to serve on a jury, but that was prior to the arrival of the gaming industry in Mississippi.[19] All of these examples previously mentioned completely disqualify a person from serving on a jury, and a judge will almost certainly excuse anyone that falls into these categories. Although it is rare, I have witnessed a potential juror admit to being a habitual drunk. Despite his doubtful claim, he was excused from service because there were sufficient jurors present. I do not know if the stares from the remaining jurors were the result of derision or envy.

Each potential juror must complete a form prior to jury service.[20] This form requires a juror to identify his name, address, occupation, age, telephone number and distance he lives from the county seat.[21] The juror's signature is also required to complete the form.[22] When jurors report for the first day of jury service, they will be required by the clerk to complete the form if they have not already done so and mailed it prior to the court date. A judge is required personally to examine the form from each potential juror as an aid in determining whether the potential juror is literate.[23] Someone who cannot complete the form is not allowed to serve on the jury.[24]

As we know, judges are busy people, and the reading of the juror form probably slips by them when preparing to preside over a trial. However, a copy of this form is usually available to lawyers. If your trial date is not set on the same day that the jury first reports, this form can be reviewed extensively to identify potential jurors who might be sympathetic to your case. Even if you must go to trial on the same day that the jury first reports, these forms have utility in shaping your thoughts about which jurors are preferable to hear your case. Some jurisdictions even utilize a form that

15. MISS. CODE ANN. § 13-5-1 (2008).
16. ID.
17. *Id.*
18. *Id.*
19. MISS. CODE ANN. § 13-5-1 (2008).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

requests more than the statutorily-required information. Those forms are treasure troves of information that can be considered for voir dire purposes and to identify those who might be subject to strikes "for cause" and peremptory challenges. Whatever information is ultimately gleaned, remember that the forms are provided as an aid to determine whether a juror is disqualified for illiteracy.[25]

B. Excused

If a person is too ill to serve on a jury, he may be excused by the court.[26] If a person or his dependent would suffer undue or extreme physical or financial hardship, he may be excused by the court.[27] Further, a breast-feeding mother may be excused by the court.[28] These three categories require the judge to develop more facts about each juror's situation to determine if the juror should be excused.[29] A judge is even authorized to require a person to produce financial documents to support his claims.[30] Each and every excuse above must be made in open court in order for a judge to allow a potential juror to get out of jury duty.[31]

The Legislature has decided that some situations require potential jurors to be excused from service permanently.[32] When the trial judge makes a finding that an individual has an excuse that is of a permanent nature, that individual may be permanently excused from jury service.[33] Breast-feeding mothers will never qualify to be permanently excused. Those who suffer from a financial hardship will seldom qualify. Generally, it is those who suffer from a physical impairment who may utilize a permanent excuse.[34]

This examination and any subsequent decision to excuse necessarily requires the court to exercise discretion. As every practicing attorney knows, "abuse of discretion" is one of the standards of review that appellate courts consider. In order for decisions to be reviewable under that standard, a record of the decision has to be made. In those particularly tough cases where one cannot develop reviewable issues on the substance of a case, jury selection issues provide fodder for appellate review. That is why it is extremely important to try to get on the record every interaction between potential jurors, the court, and the lawyers involved in the case.

25. MISS. CODE ANN. § 13-5-1 (2008).
26. MISS. CODE ANN. § 13-5-23(1)(a) (2008).
27. MISS. CODE ANN. § 13-5-23(1)(b) (2008).
28. MISS. CODE ANN. § 13-5-23(3)(a)(i) (2008).
29. MISS. CODE ANN. § 13-5-23(2)-(3) (2008).
30. MISS. CODE ANN. § 13-5-23(3)(e) (2008).
31. MISS. CODE ANN. § 13-5-23(f) (2008).
32. MISS. CODE ANN. § 13-5-23(4) (2008).
33. *Id.*
34. *Id.*

C. *Privileged*

The law provides two personal privileges for potential jurors to exercise. First, an individual over the age of sixty-five may choose not to be on a jury.[35] Individuals over age sixty-five may file a notarized request with the clerk and will be permanently excused from service. When no such request is on file, the individual remains subject to being called for service. Any potential juror over age sixty-five may exercise the privilege on a case-by-case basis by appearing for service each time he is summoned. As someone who practices primarily criminal defense in a conservative jurisdiction, I worried about those who chose to serve. If they wanted to stay, I probably wanted them to go. Gauge your own circumstances accordingly.

Second, an individual who has actually served on a completed jury trial or as a grand juror within two years may choose not to serve.[36] Prior service exemptions are limited to the court where a potential juror actually served, so service in a federal court trial will not provide an exemption for jury duty in a state court.[37]

Courts usually examine potential jurors for these two privileges during the time of jury qualification. It is important to note, however, that a potential juror may invoke the age exemption prior to reporting for jury duty by providing documentation to the clerk of the court.[38] Although I have never seen this in practice, the wording of the statute appears to contemplate that a judge could never examine potential jurors to discover their eligibility for these exemptions.[39]

It is possible judges may "overlook" this part of the examination when few potential jurors appear for service, leaving a small panel. As a tactical matter, judges may choose not to provide jurors with a method to be excused from service when a sufficient jury pool is not present. Of course, if it is to the advantage of your client, you can voir dire about age and question each potential juror concerning his desire to remain for consideration. If he or she desires to leave, you should easily have him stricken "for cause," thereby saving your peremptory challenges for other jurors.

Another interesting item exists in the scheme enacted by the Legislature regarding jury selection.[40] Potential jurors who have actually served in a completed jury trial *are not qualified* to serve on a jury within two years.[41] In addition, they also have *an exemption* that they may claim when called to serve within two years of their last jury trial.[42] These two situations appear mutually incompatible. Trial judges surely approach this situation differently based on their local practices. Be aware of this legal incongruity

35. MISS. CODE ANN. § 13-5-25 (2008).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* (stating "[s]hall be exempt *if the juror claims the privilege* * * *") (emphasis added)).
40. JOHN G. CORLEW, THE MISSISSIPPI JURY: LAW AND PRACTICE §§ 37, 40 (MLi Press 1997).
41. MISS. CODE ANN. § 13-5-1 (2008) (emphasis added).
42. MISS. CODE ANN. § 13-5-25 (2008) (emphasis added).

when engaging in jury selection; you never know when you may be able to use it to make a situation work to your advantage.

The Legislature has decided every person is presumed to be eligible to serve on a jury. However, not every person is qualified. Some have excuses that are recognized legally, and others have been granted privileges that they invoke. Trial judges should limit their inquiry to these three areas of interest outside the presence of a court reporter and the parties in interest. Nonetheless, these are often not the only topics explored. For example, some potential jurors have ideological/religion-based issues concerning passing judgment on other people. Those who self-identify as having this problem may be subject to being excused prior to voir dire, depending on local practice.

I realized the importance of being present in the courtroom every minute that a potential juror is present when I discovered the use of these extra-legal excuses. In one instance the trial judge was asking the jury pool whether any of them had a difficult time coming to a decision. Those who self-identified as such were in the process of being excused. Realizing the significance of the situation for the first time, I objected and asked the judge to save those questions for voir dire so I could have the opportunity to rehabilitate those individuals who were being excused. This objection was only possible because I was present and observing the progress of jury qualification.

IV. "WHO'S NOT GOING TO BE FAIR HERE?": THE PROCESS OF VOIR DIRE

After qualification of the jurors, voir dire begins. Even if you are present for jury qualification, voir dire is the first time that the jury will get to see you as the possible cause for their necessary presence. It is important to remember that voir dire is the only time that you get to talk directly to a jury while they still have a favorable opinion of you. In fact, it is the only time they get to talk directly to you as well. An effective lawyer will use this time to foster goodwill and build a good relationship with the individuals who will ultimately decide the fate his or her client. As someone who began as an *ineffective* lawyer, I unfortunately ended my first voir dire and had a close friend, who was also a criminal defense attorney, congratulate me on the worst voir dire ever conducted. To say the least, that was an inauspicious beginning.

When you arrive at the voir dire stage, the original pool of potential jurors has been winnowed down substantially. The jury selection lottery has chosen individuals at random, and they are served with summonses to appear in court. Some of those potential jurors are able to secure a release prior to the court date through unorthodox means. Some of them are over age sixty-five and secure a release from the clerk. Some are permanently excused and never have to appear in court. During qualification time, a judge will make a determination that some are not qualified to serve due to

prior service, illness, financial hardship, illiteracy, conviction of certain crimes, or having a case pending before that court.

The court makes a determination that these remaining potential jurors are qualified to sit as jurors; the next step is to find whether they are qualified to hear *your* case. The potential jurors are arranged in some manner so that they can be easily identified. This may involve a particular seating arrangement, numbering or both. Often the potential jurors will have numbered flags they they wave when they respond to a question. Many variations exists, therefore, it is important to find out what method the court will use when you select a jury.

The group will be seated again, with counsel and their clients present. The trial judge will begin by asking questions that are designed to reveal whether potential jurors have significant issues that make them inappropriate for hearing your case. For example, an individual who has been the victim of a property crime might not be the best juror for a burglary case; or, maybe the prosecutor and the potential juror attend the same Sunday school class. For these reasons, the judge will introduce the case in which you are participating. If the case is a criminal case, he might read the indictment. In a civil case, he may present a summary overview of the type of case involved. The judge will also introduce the parties and their lawyers. He will ask whether anyone knows the parties or the lawyers well enough that they ought to be excused. Most seasoned judges will also ask the questions you as an advocate would want to be asked, so pay attention to those questions. It is not a good idea to repeat that line of inquiry from a prepared script unless you can develop a new angle on the same subject.

Potential jurors with significant issues are not necessarily disqualified or excused immediately, although an issue may be severe enough for the trial judge to make that decision. This information is gleaned to allow lawyers to make challenges "for cause," or to demonstrate that the potential juror has a bias that makes him or her unsuitable for the present case.

After the judge has asked questions of the jury pool, each of the parties will have an opportunity to ask questions of the jury panel through their lawyers. The scope of the questions, depending on local practice, is generally limited to asking questions not presented by the court. It is generally permissible to ask a question that builds on a question previously asked by the court. For example, if a potential juror answers that he knows opposing counsel by attending Sunday school class with him, you could ask: 1) whether that close personal relationship would make it difficult for the juror to deliver a verdict inconsistent with the relationship; 2) would it put him in a difficult position to see opposing counsel in Sunday school every week knowing that he or she, the juror, had to vote against his or her Sunday school classmate; 3) would he or she feel that one or the other of them would have to move to another church? These are questions that build on the original question propounded by the court and will generally be allowed.

An ideal tactic to build an acceptable jury is individualized voir dire—the practice of asking specific questions to potential jurors individually. The rules actually forbid individual voir dire.[43] Nonetheless, individualized voir dire is a practice that can be utilized if approached in the correct manner. Because follow-up questions are allowed, simply ask the entire panel questions that you feel will elicit a strong response. For example, it is forbidden to ask prospective juror number four directly whether he or she believes reasonable doubt is an appropriate standard of proof for a criminal case. Yet, you may ask the entire jury panel whether anyone has ever served on a jury. For those that respond affirmatively, you may follow with questions about whether it was a civil or criminal case, how much time has elapsed since the service, and also the verdict of the case. If prospective juror number four sat on a jury in a criminal trial three years ago that resulted in an acquittal, you now have some idea about that juror's respect for the reasonable doubt standard of proof. Thus, the information sought might be gained indirectly without violating the rule prohibiting individualized voir dire, with the side benefit of educating the jury panel.

Another startling feature in voir dire is that you can draw an objection from opposing counsel. I trust this is not startling to lawyers with some degree of experience, but it was quite startling to me when I drew an objection during my first voir dire. And, then the second objection. And, then the third objection. I understand now why it was happening—precisely because it was so startling. I was already nervous and rattled, and the prosecutor knew it. He was making legitimate objections, but his purpose was to make me look inexperienced before the jury panel. In my mind at the time, it was working.

This situation brings about an interesting question: to object or not to object? Each case has its own unique ebb and flow, and as you prepare for trial, you will understand your case's weaknesses. You will know whether you have any possibility for a favorable outcome, and you will know what evidentiary arguments await. In short, if you prepare properly, you will already have a guideline for making the decision to object in voir dire or not, and, if so, when to object.

If the case is weak on substance and you will not have an appellate issue to build into the record, you might want to find objectionable questions propounded by opposing counsel during voir dire. If you think you could win a favorable verdict, you do not want to provide the jury with a reason to dislike you, and you could make the tactical decision to overlook marginally objectionable inquiries. The reverse holds true when considering asking questions that you think may draw an objection. If the facts are against you, ask a question that draws an objection, and you may be able to assume the role of the powerless victim compelled to court by the other party. These ploys do not often work well when planned in detail, so they are best used when the opportunities present themselves rather than in a

43. U.R.C.C.C. § 3.05 (2008).

rehearsed manner. Simply be aware that you can object during voir dire and counsel opposite can return the favor.

Much has been written about what questions are best put to potential jurors when attempting to reveal their biases for or against a particular party. I will examine aspects of that below, but the questions and the answers they draw are not the only important factor to evaluate. During the time the court and opposing counsel are propounding voir dire questions, you may choose to stare blankly into space, file your nails or catch a quick nap. You may also do as I did in my first trial and scrutinize the questionnaires completed by the potential jurors. More importantly, though, you should be watching the potential jurors, listening to their answers, and recording your observations. Each of these activities is incredibly important to your goal of seating a favorable jury.

Jurors reveal much about themselves before they even assemble as a jury panel and listen to the first question during jury qualification. A juror who brings a Bible to read may believe strongly in justice. A juror who appears for jury service in a work uniform may expect to escape service and resent you for keeping him or her there. Likewise, their body language and mannerisms reveal facts as well. A juror who chews gum and blows bubbles may not have much respect for the authority of the court. A juror who rolls his eyes when the indictment is read may be predisposed to convict. A juror who responds to questions forcefully and frequently is a potential foreman. I have a colleague who once noticed a potential juror cover her face when a sexual battery indictment was read. All of these actions and reactions reveal something about the predispositions of the potential juror. These illustrations demonstrate how important it is for you to be present every moment the potential jury is in the courtroom. Any and every observation you make about these individuals can shape your decision to keep them on the jury or, rather, make every effort to prevent them from sitting on the panel that will decide the fate of your client.

Listening to the answers of the potential jurors is also important. You must hear the responses in order to gauge the true meaning being imparted. Inflection may reveal a meaning different than what is destined to be imparted on the cold pages of the transcript. Listening closely allows accurate recording of the answers that are important to you.

Every time you step into a courtroom to engage in jury selection, you should be prepared to take notes about what you hear from potential jurors in response to voir dire questions. This may mean that you should prepare a form ahead of time. If you know how the prospective jurors will be seated or otherwise arranged, preparing a form in advance will be easy. If there is a seating chart, simply make blocks using cross-hatches and label each block accordingly. If they are organized according to a numbering system, use a gridded system with numbered lines. An important consideration is that the system should not require flipping paper around to find the proper place to make an entry. The system should operate smoothly in

front of an audience and allow for efficient examination of information that is recorded quickly.

It is also important to take good notes. If you hear an answer that is vague or subject to multiple interpretations, you should elicit more concrete answers if given the opportunity to rehabilitate. As indicated above, I once objected to questions during the qualification period about the potential jurors' inability to make decisions. The trial judge understood my objection and waited until we were on the record to inquire about that subject. In particular, one potential juror had indicated that she had great difficulty in reaching a decision. By listening to the tone of her response, I was able to detect that she really meant she was afraid of being wrong when making a decision. I was able to examine her and engage in a lively discussion about "reasonable doubt" and whether she just had a higher threshold for "reasonable doubt" than the law required. When faced with a decision between two favorite restaurants, she frequently could not decide between them. I helped her understand that because she had eaten at both, no matter which one she chose, it was "reasonable" for her to wonder whether a dinner at the other restaurant would have been more satisfying.

She was ultimately challenged peremptorily by the prosecution, but by paying attention and accurately recording the response allowed me to impart a great deal of information to those who served on the jury about the burden of proof required in a criminal trial. Therefore, accurate recording and active listening are not only helpful in your process of selecting the composition of the jury, they are also helpful in rehabilitating potential jurors.

As stated above, voir dire is the only time lawyers get to speak directly to a jury while the jury may harbor no dislike for the lawyers. The voir dire inquiry should be designed to reveal information about potential jurors that makes them inappropriate to serve on the particular jury or on any jury at all. There is far too much good literature about the best questions to ask for me to delve into that substantive subject, but a few pointers about style and structure are relevant.

An important thing to consider is that each question should be asked in a way that imparts some favorable impression of you or your client to the potential jurors. For example, when I represented criminal defendants, in mostly conservative jurisdictions, I realized that juries were disposed not to like me and, therefore, not to trust me. As a method of gaining their trust and approval, I would list some of my former corporate clients, larger retailers and local employers, and ask if anyone had ever sued one of them. I belabored the point to make them aware that I had represented the "good guys" at one point in my career and I was not completely reprehensible. The legal hook I used was that I was questioning the potential jurors to determine if they might have a hidden bias against me in the event I had ever been counsel opposing them in their claims.

Other considerations also exist when shaping your voir dire questions. You should explain as much as possible about the law to get them thinking

about your theory of the case. For example, in defending a slip-and-fall case, you could ask the jury whether any of them have ever seen a puddle in a public place so large that they instinctively knew to avoid it. You would be presenting the theory of "open and obvious" as a defense. In an aggravated assault case where self-defense is the theory, you can ask the jury whether anyone disagrees with the law that allows individuals to bear arms. If they identify as disagreeing, you have the perfect opportunity to ask whether they will apply the law as it exists or, rather, as they believe the law should read. In shaping your questions to the jury, you are limited by your imagination and the patience of the presiding judge. Attempt to use your imagination without trying the patience of the judge and you will be able to tease a great deal of information from many of the potential jurors that can be used when making your decisions to challenge for cause or to strike peremptorily.

Lastly, it is extremely important to remember the practical considerations. When a juror responds to your questions, require that juror to identify himself or herself for the record and make sure the court reporter can accurately record the responses. These practices will ensure that you have a record that can support your appellate arguments in the event that your closing argument does not win over the chosen jurors.

V. "YOUR HONOR, HE'S GOT TO GO": CHALLENGING A JUROR "FOR CAUSE"

Some people should not be allowed to serve on a jury. For unknown reasons, they may be predisposed to always think the plaintiff deserves money or maybe they go to church with the family of the criminal defendant, who "has always been such a nice young man." Hence, multiple reasons exists why jurors might not be fair to the process of hearing the evidence and applying the law given through jury instructions. Jurors who cannot be fair will violate federal and state constitutional provisions that guarantee a fair trial.[44] Therefore, prospective jurors who cannot be fair are subject to being challenged "for cause."

The first step in the process is to identify those potentially unfair jurors with thorough questions in voir dire. Then, the presiding judge will give each party the opportunity to request removal of prospective jurors. This is often done outside the presence of the jury panel. The party with the burden of going forward has the first opportunity to challenge prospective jurors. A motion should be made and supported with observations derived during voir dire. The motion should specifically identify an individual juror and the reason for the challenge. Your note-taking skills and organizational ability will aid you in making cogent motions to challenge. The judge will then allow each side to respond to the motions to strike a prospective juror. At this point, the information obtained by rehabilitation can become valuable in opposing counsel opposite's attempt to strike a

44. CORLEW, *supra* note 40 at § 76.

juror. Then, the process reverses and the other side has the opportunity to advance motions to challenge prospective jurors for cause. The presiding judge rules on the various requests to remove a potential juror for cause removing individuals from consideration as appropriate.

As a reminder, this part of the process is almost always conducted outside the presence of the jury, so you can be candid with the court about your reasons for requesting removal. By making these requests, you are signaling to counsel opposite that you do not want these individuals on the jury. This can be used to your benefit, if you think carefully about the potential jurors and the possible reasons for challenging each one. Sometimes you can convince counsel opposite by your actions that you want a potential juror removed when, in fact, that potential juror is exactly perfect for your case. Sometimes, the opposite side tries to go out of their way to fight for what you oppose, even if they can find no good reason to support their opposition. Prospective jurors you perceive as favorable can sometimes sneak onto a jury through this type of gamesmanship, but it is a process that should not be over-thought.

VI. PEREMPTORY STRIKES: GETTING YOUR OWN WAY (AND THERE'S NOTHING THEY CAN DO ABOUT IT!)

When you get beyond making challenges for cause, you have left the world of quasi-law and entered into the world of quasi-psychology and quasi-sociology. You have determined what arguments you will make in your case and hopefully what kind of juror will be best to hear those arguments. You have a list of potential jurors who are legally qualified to hear a trial and who have attested to their fairness and survived judicial scrutiny. Nonetheless, some remaining potential jurors have residual issues that concern you. The remainder of the jury selection process involves your right to remove those jurors peremptorily with almost no oversight over your decision-making. In fact, this process is sometimes conducted outside the presence of the trial judge, even though appellate courts have criticized this tactic.[45]

In county and justice courts, a six-person jury is used and each side may peremptorily strike two individuals.[46] Twelve people constitute a jury in circuit court. For non-capital criminal cases, each side can use six peremptory strikes. In capital cases, twelve peremptory strikes are available.[47] In civil cases, each side has four peremptory strikes.[48] For appellate purposes, it is important to know that all peremptory strikes assigned to a party must be used before most jury selection errors will be considered by an appellate court.[49]

45. Pruitt v. State, 807 So. 2d 1236, 1243 (Miss. 2002).
46. MISS. CODE ANN. § 11-9-143 (2008).
47. MISS. CODE ANN. § 99-17-3 (2008).
48. M.R.C.P. 47 (2008).
49. MISS. CODE ANN. § 99-17-3 (2008); Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

The plaintiff or the State begins the selection process by tendering a jury of a sufficient number to the defendant, utilizing the list narrowed by challenges "for cause." For instance, consider a hypothetical jury panel with thirty members. Prospective jurors five, eight, ten, twelve and twenty have been successfully challenged "for cause." The prosecutor for the state in a criminal case has decided that prospective jurors one, six, fifteen, and twenty-two are not appropriate for his case. Therefore, for a twelve-person jury, he would submit prospective jurors number two, three, four, seven, nine, eleven, thirteen, fourteen, sixteen, seventeen, eighteen, and nineteen to the defense side. He has implicitly used peremptory strikes on prospective jurors one, six, and fifteen without doing anything formal.

The defense gets the opportunity to respond, of course. For the defense, the unfavorable jurors are numbered one, seven, sixteen, and twenty-three. Therefore, they would accept the list tendered by the State, and strike seven and sixteen. In this example, the State has already stricken juror number one as unfavorable. The State has to fill the jury up once again, so it skips over juror twenty who was previously successfully challenged "for cause." So, the State offers twenty-one and twenty-three, skipping over twenty-two, whom it did not desire on the jury. The defense wants twenty-three off the jury, so it strikes that individual. The State offers twenty-four; the defense accepts. Neither side has used a full complement of peremptory strikes and six individuals are have not been considered. However, a full twelve-person jury is selected and ready to be seated in the jury box. Alternate jurors are selected in the same manner, beginning with the next available potential juror on the list.

It is advisable to keep a vertical list of the numbers of all potential jurors. I cross out the numbers of those potential jurors excused by the court "for cause." I have always represented the defense, so I then listen to the State tender, and I draw a line under the twelfth juror tendered. I write S-one next to the first peremptory strike used by the State, and so on. I also circle the numbers of the tendered jurors who are acceptable to me, and then announce my peremptory strikes. Each round of tendering gets shorter until I have twelve circles which correspond to the potential jurors selected in the jury draft. Your system may be substantially different, but you must be able to account for jurors excused "for cause," those stricken peremptorily by you, those stricken peremptorily by your adversary, and those jurors who ultimately made the final panel.

Earlier I discussed how using peremptory strikes has almost no constraints. However, using peremptory strikes in a racial- or gender-based manner can result in an objection to your use of the strike.[50] Do not indulge in stereotypes and you will avoid the pitfalls that follow. Although it feels wrong, you should probably track the race and gender of the jury

50. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. v. Alabama, 511 U.S. 127 (1994).

panel so that you can identify whether counsel opposite is engaging in conduct that appears to be motivated by the race or gender of prospective jurors.

The case law on this subject is voluminous, and I will not attempt to give a complete guide to impermissible uses of peremptory strikes. However, I will provide a simple summary to guide your research and practice. You can make an objection to the use of peremptory strikes by any other attorney, without regard to the race or gender of your our own client.[51] If you detect a racial or gender-based usage of peremptory strikes, you must make out a *prima facie* case by identifying for the court the peremptory strikes made by opposing counsel and how those strikes demonstrate a pattern of exclusion.[52] If the court finds a pattern of exclusion, opposing counsel must give "race-neutral" or "gender-neutral" reasons for the use of the peremptory strikes. These "neutral" reasons are not required to be sufficient to justify a challenge "for cause."[53]

Case law acknowledges that the otherwise neutral reasons may be a pretext for racial or gender-based decisions to use peremptory strikes.[54] Therefore, you should have the opportunity to respond to the ostensibly neutral reasons to show two different things.[55] First, you can rebut the neutrality of the reason offered. Second, you can show how the use of that reason, although neutral on its face, is merely a pretext to disguise impermissible usage. The court is then required to make an on-the-record determination regarding the strength of the "neutral" reason for each strike.[56] If the judge determines that the strikes are not "neutral" or are merely pretextual, the stricken jurors are placed into consideration again and almost always make it onto the jury. Opposing counsel may lose those strikes as a penalty for improper usage. In the event the judge determines that the strikes are neutral and not pre-textual, the strikes remain, and those potential jurors are not considered.

The art to jury selection is in crafting the perfect jury for your client with peremptory strikes, knowing all the while that your adversary is attempting to do the exact same thing at the exact same time, with the exact same working materials. Thankfully, Mississippi law allows attorneys to examine potential jurors for removal both "for cause" and peremptorily.[57] Therefore, a lawyer has the opportunity to question potential jurors during voir dire for matters that are suitable in forming a peremptory strike.

With thorough and thought-provoking questions, you can get potential jurors to reveal more than they do to their therapists or best friends. Yet, you must record that information in a useable and easily accessible format

51. Henley v. State, 729 So. 2d 232, 239 (Miss. 1998).

52. *Id.*

53. Davis v. State, 660 So. 2d 1228, 1240–42 (Miss. 1995).

54. *See* Purkett v. Elem., 514 U.S. 765 (1995); Lynch v. State, 877 So. 2d 1254, 1271 (Miss. 2004); Mack v. State, 650 So. 2d 1289, 1298 (Miss. 1994).

55. Walker v. State, 815 So. 2d 1209, 1215 (Miss. 2002).

56. *Id.*

57. MISS. CODE ANN. § 13-5-69 (2008).

for your own reference. When actually selecting the jury and exercising peremptory strikes, you will find it necessary to have good recall of voir dire responses and an even better ability to skim your notes quickly. It can be fast-paced and eventful.

You must consider the entire jury panel, minus those challenged "for cause," as a whole. Remember, the jury will be making a decision together. It may be important to save a peremptory strike for the one potential juror with a strong and forceful personality who is sure to be selected as a foreman, even though you perceive that he or she leans only slightly against you. It may be more important to strike peremptorily four potential jurors higher on the list although they do not have foreman potential because they expressed such strong opinions against your client or case. The decisions are multi-faceted and demand considerations of your assessment of both the individuals and the potential group dynamic. When jurors have approached me after trials, I have been amazed to find out how far off the mark I have been about their ability to work together and make logical decisions. Until you can find a mind-reader to assist you, however, you are limited by your intuition and your best guesses about which individuals should be allowed to serve and the impact they will have on the group as a whole.

When you and counsel opposite have reached an agreement on the proper individuals to constitute your jury, the judge will call those individuals to take their places in the jury box. They should be given an oath, but if they are not, do not get overly concerned. If you notice and object, they will get sworn. This is one of the few things you should not worry about.

Now, the moment has arrived. Twenty-four eyes will be looking at you with varying expressions, depending on whether you rescued them from a hard day at the factory, required them to be make unusual arrangements for child care, or made them miss the important business meeting that took weeks to schedule. It is now your job to show those twenty-four eyes the evidence that favors your client, to explain away the evidence that does not, and to argue how that evidence tends to show that your client should prevail.

Every time I make it to this point, I remember the paraphrased sentiment of G.K. Chesterton about finding justice in our world. When a civil society needs to make the really important decisions, it does not employ its brain surgeons and the rocket scientists. Rather, it gathers up twelve ordinary folks with common sense. It is the same way Jesus chose to do things.

VII. THINGS TO DO BEFORE THE TRIAL (IN ADDITION TO READING THIS ARTICLE)

There are four important things to do in advance of your trial. First, find a copy of *The Mississippi Jury: Law and Practice* by John G. Corlew. This book is the best compilation of Mississippi law on juries and jury selection. If I had this book earlier, I might not have made so many mistakes in my legal career. This book is well-written and thoroughly researched. I

think of it as the advanced hornbook to the elementary school primer I have penned here. You will not use it in every trial, but when you need it, it will not let you down. I read it cover-to-cover before every trial.

Second, find someone you trust in the local jurisdiction who has been involved in a few trials in front of the judge who will preside at your trial. A local public defender has usually seen, or been involved with, multiple jury trials. There are always other lawyers who have a good record for trial participation. Consultation with these individuals will allow you the opportunity to learn the quirks and idiosyncrasies of the judge so that you will not be chastened in front of the prospective jurors. This will also allow you to discover if challenges "for cause" and peremptory strikes are conducted outside the presence of the jury or if any extra-legal processes are conducted. The variations on the process are endless, and it is necessary to know about them before you begin.

Third, try to observe jury selection at least once prior to engaging in it. Maybe that is just an impression that remains from my first experience with jury selection. However, it does not hurt to view the process at least once before being involved in it.

Fourth, determine whether jury selection will need to serve as an appellate issue. In the event that you have a completely worthless case to make before the jury, perhaps you can make jury selection itself the problem that you can take up on appeal. As long as the case lives, the possibility of a settlement lives as well. Even a losing case can result in an acceptable plea bargain or in a money settlement if jury selection errors prolong the case through reversals. If jury selection is going to be an appellate issue, you will need to pay attention more closely to the details of the selection process and prepare in advance with case law.

Of course, the overarching theme throughout the process is serving the interests of the client without violating any laws or rules of professional conduct. Thus, it is critical that you inform your client of the jury selection process and the chances for a favorable outcome. You should also discuss with your client the ideal characteristics that you desire in a juror. The client should have influence over your decisions in jury selection, but you are ultimately responsible for picking the individuals who will determine the fate of your client or his money.

Finally, do not fret over jury selection. Selecting a jury is crucial, but if you have to choose between knowing the substantive law and the jury selection process, you should choose to know the substantive law. If you are reading this article, you will have at least a minimal idea about how it works, enough to keep from getting embarrassed anyway.

VIII. CONCLUSION

A gaggle of citizens arrives at the courthouse on the date of trial. They are idealistic or anxious or trying to get out of jury duty. They are at the court house to hear your case—the one you have worked on for months—

filing pleadings, developing discovery, conducting depositions, developing a theory of the case, and preparing a trial notebook. All of that hard work can be thrown away if you do not understand the process of jury selection in order to avoid looking foolish in front of the potential jurors.

The jury selection lottery gives you a pool of prospective jurors to begin the process. The judge examines the pool to determine if they are qualified under Mississippi law to serve on a jury. Both parties will examine the pool through voir dire in an attempt to find latent reasons why each juror should not serve on this particular jury. Some prospective jurors might be subject to a challenge "for cause." Others will surely be stricken peremptorily. In the end, prospective jurors will graduate into full-fledged jurors. At this point, you finally get to present your case—what you have prepared for during those long months.

* * *

Enervated with adrenaline, I awaited the return of my first jury. I was emotionally and intellectually drained. I fully expected an unfavorable verdict. During the hour that we waited on the jury to make a decision, I reflected on the events of the day. The jury was laden with medical professionals. One witness for the prosecution, had been wearing a shiny badge and a new uniform. One witness for the defense, the defendant himself, had been wheezing throughout the trial with obvious breathing difficulty. I wondered if I committed malpractice by not calling a medical expert to put forward our defense concerning his medical condition. I worried about the inept closing argument I had presented. But, mostly, I worried over the elderly client, who I believed was headed to Parchman for an extended stay.

When the jury returned a verdict of acquittal, I was surprised and shocked. In retrospect though, I learned a valuable lesson. I realized that I had accidentally stumbled into picking jurors appropriate for my case. Even though I am still not completely confident in my skills now, I learned the critical lesson that selecting a jury is a critically important part of conducting a successful jury trial. I was lucky that time. Successful jury selection usually involves more preparation.

Learn from someone who has been there—do not stumble, but rather prepare ahead of time. If you do, your first few jury selections surely will not be as emotionally scarring as mine.