Chapter 28

Selecting the Jury at Trial: The *Voir Dire*

§ 28.01 INTRODUCTION

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

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

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

§ 28.03 *VOIR DIRE* PROCEDURE GENERALLY

Practice on *voir dire* differs widely from jurisdiction to jurisdiction. Its common features are these: Prospective jurors are told something about the case and the parties and participants in it. They are questioned, either individually or collectively or in both ways, to determine whether they (1) lack the statutory qualifications to be a juror, (2) are otherwise subject to challenge, or (3) should be relieved from jury duty at their request (a disposition sometimes described by saying that the juror is "excused" or "granted an excuse" or "granted an exemption") because of personal hardship, important conflicting obligations, or similar matters. The prosecution and defense are given the opportunity to object to any juror on grounds that are legally sufficient to preclude him or her from sitting (that is, in the jargon, "to challenge the juror for cause"); and the trial jurors (and alternates) are selected from the remaining panelists through the exercise of peremptory challenges or "strikes" by prosecution and defense.

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

§ 28.03(a) Challenges for Cause

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

(i) *Lack of statutory qualifications*.

(ii) *Implied bias*. The circumstances that support a challenge for implied bias are specified by statute in some jurisdictions; in others, they are left to common-law elucidation by the courts. They ordinarily include: (1) a financial interest or other direct personal stake in the outcome of the case, and (2) a familial relationship, business relationship, or other close connection to the respondent, the complainant or victim, a witness, or counsel for one of the parties.

(iii) *Express bias*. This traditionally meant an unyielding belief in the accused's guilt or innocence that the juror is unable to suspend. In some jurisdictions a venireperson who asserts that s/he is able to put aside his or her opinion and to consider the case fairly on the basis of the evidence presented at trial will escape a challenge for cause on the ground of express bias. There has, however, been a movement away from this position: Courts are increasingly coming to the view that a venireperson's protestations of ability to disregard his or her preexisting biases and be guided solely by the evidence will not insulate him or her from a challenge for cause if those preexisting biases are strong. *See*, *e.g.*, *State v. Faucher*, 227 Wis. 2d 700, 731-32, 596 N.W.2d 770, 784-85 (1999) ("The circuit court believed that Kaiser was honest when he testified that he could set aside his opinion. On our review of the record we conclude that the circuit court's finding that Kaiser was a reasonable person who was sincerely willing to put aside his opinion is not clearly erroneous. . . . The circuit court's determination that juror Kaiser was not subjectively biased is not clearly erroneous. . . . ¶ The circuit court did not consider whether juror Kaiser was objectively biased. Upon concluding that Kaiser was sincere in his willingness to set aside his opinion, the circuit court ended its inquiry. The circuit court's decision not to dismiss Kaiser was based solely on Kaiser's statement that he could set aside his opinion, and the court's erroneous belief that it had to 'believe his response.' On examination of the record, we conclude as a matter of law that a reasonable judge can reach only one conclusion; that is that the juror was objectively biased."); *Walker v. State*, 262 Ga. 694, 696, 424 S.E.2d 782, 784 (1993) ("[T]he court asked the juror if he could lay aside his 'feelings for the victim's family' and his 'acquaintances with the people in the District Attorney's office' and decide the case based on the evidence presented at trial. The juror at first answered, 'I think I could,' but when the trial court suggested, 'you've got to be more reassuring than that,' the juror stated: 'I could.' Based on that answer, the trial court denied appellant's challenge for cause. . . . ¶ Here, the juror himself was hesitant to say he could decide the case

impartially, doing so only after the court told him he would have to be 'more reassuring.' We agree with the defendant that this admonition was more an 'instruct[ion] on the desired answer' than a neutral attempt to determine the juror's impartiality. ¶ Given the juror's close relationship to the trial judge, the district attorney, the latter's staff, law enforcement officers and the victim's family, his hauntingly similar experience with a member of his family being killed in a robbery of a grocery store, and his admitted bias in favor of the state, the defendant's challenge for cause should have been granted."); *Matarranz v. State*, 133 So. 3d 473, 490 (Fla. 2013) ("Any lawyer who has spent time in our courtrooms, whether civil or criminal, has experienced the frustration of prospective jurors expressing extreme bias against his or her client and then recanting upon expert questioning by the opposition, which generates such embarrassment as to produce a socially and politically correct recantation. When a juror expresses his or her unease and reservations based upon actual life experiences, as opposed to stating such attitudes in response to vague or academic questioning, it is not appropriate for the trial court to attempt to 'rehabilitate' a juror into rejection of those expressions . . . ."). See also the following paragraph.

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

"should the juror's protestation of impartiality [be] . . . believed" – must be resolved by a factual finding of the court. *Id*. at 1036.

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

(vi) *Any state of mind that makes it impossible for the juror to follow the court's instructions and to decide the case according to the law.* A prospective juror who is unable or unwilling to comply with the substantive legal rules bearing on the case or with the procedural rules governing its trial is challengeable for cause. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 595-97 (1978); *Morgan v. Illinois*, 504 U.S. at 729, 738-39. The latter rules include the presumption of innocence and the principle that the prosecution bears the burden of proving guilt beyond a reasonable doubt. See §§ 32.01, 36.06 *infra*. Some venirepersons who have formed opinions that the respondent is guilty but who escape a challenge for cause on grounds of express bias because they profess to be able to disregard those opinions can be gotten to admit on *voir dire* that they would require evidence to change their opinions; and this admission renders them vulnerable to a challenge for cause on the ground that they cannot abide by the presumption of innocence. *See*, *e.g.*, *Glover v. State*, 248 Ark. 1260, 1263-68, 455 S.W.2d 670, 672-75 (1970).

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

Ross v. Oklahoma, supra, holds that if the accused uses a peremptory challenge (see the following section) to remove a juror whom the trial judge erroneously declined to excuse for cause, that erroneous ruling is forfeited as a basis for appellate reversal. A number of state courts reject this result as a state-law matter. *E.g.*, *Matarranz v. State*, 133 So. 3d at 482-84; *State v.*

Wacaser, 794 S.W.2d 190 (Mo. 1990); *Johnson v. State*, 43 S.W.3d 1 (Tex. Crim App. 2001) (en banc); *cf*. *Boggs v. State*, 667 So.2d 765 (Fla. 1996). In these States, the error is preserved if the accused (a) objects to the denial of the challenge for cause, (b) exhausts all of his or her peremptory challenges, (c) requests additional peremptory challenges, and (d) objects to the denial of that request. (In some of these jurisdictions, it is also necessary to raise this claim of error – like all other claims of pretrial and trial error – in a motion for a new trial, in order to preserve it for appellate review.)

§ 28.03(b) Peremptory Challenges

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

Except when the peremptories appear to be employed in a discriminatory manner to exclude certain cognizable groups, a peremptory challenge can be made by the prosecutor or defense counsel for any reason whatsoever, and the attorney cannot be required to give a justification or explanation. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, defense counsel can object to a prosecutor's use of peremptories to exclude "racial minorities" (*Miller-El v. Dretke*, 545 U.S. 231, 235 (2005)) or women (*J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127 (1994)), and, at least arguably, can oppose the systematic exclusion of other cognizable groups as well (*see* NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES § 4:14 (2d ed. 2012-13)). The accused can invoke the *Batson* doctrine even if s/he is not a member of the excluded group. *Powers v. Ohio*, 499 U.S. 400 (1991). Defense counsel's peremptory challenges are also subject to *Batson* objection by the prosecutor, at least insofar as they appear to be aimed at excluding racial minorities. *See Georgia v. McCollum*, 505 U.S. 42 (1992). *But see Sells v. State*, 109 A.3d 568, 581-82 (Del. 2015) ("[B]ecause African Americans like Sells are members of a minority group in Kent County, the pattern of peremptory strikes against only Caucasian members of the venire may provide less of an inference of discrimination. If a super-majority of the venire is Caucasian, a pattern of striking white jurors is less telling evidence that race was a factor, because the mathematical odds would be that most potential jurors questioned for the parties to strike would be Caucasian. Thus, trial courts should be cautious about inhibiting the use of peremptory strikes by the accused except after careful application of *Batson*. Because here there was an insufficient basis for the trial court's conclusion that there was a 'pattern' of discrimination, prejudice must be presumed and a new trial is required.").

Under *Batson*, defense counsel can make out a *prima facie* case of discriminatory jury selection by showing that the prosecutor has exercised peremptories to exclude members of an

"arguably targeted class" (*Miller-El v. Dretke*, 545 U.S. at 239) and that the numbers of group members excluded or other circumstances raise an inference that the prosecutor is challenging these persons on account of their membership in that group. The burden on defense counsel at this first step in the process of applying *Batson* – commonly called *Batson*'s "three-step inquiry" (*Rice v. Collins*, 546 U.S. 333, 338 (2006); *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016)) or *Batson*'s "burden-shifting framework" (*Johnson v. California*, 545 U.S. 162, 170 (2005)) – is simply to present enough evidence of various sorts so that "the sum of the proffered facts gives 'rise to an inference of discriminatory purpose'" (*id.* at 169) – an inference "that discrimination may have occurred" (*id*. at 173). It is not necessary for the defense to show that "'it is more likely than not . . . [that the prosecutor's] peremptory challenges, if unexplained, were based on impermissible group bias.'" *Id*. at 168. *See also Madison v. Commissioner, Ala. Dept. of Corrections*, 677 F.3d 1333, 1338-39 (11th Cir. 2012) ("Madison argues that the Court of Criminal Appeals unreasonably applied clearly established federal law because the court used the wrong standard for establishing a prima facie case when it required Madison to establish 'purposeful racial discrimination' rather than to provide sufficient support for an inference of discrimination. We agree that requiring Madison to 'establish[ ] purposeful discrimination' is the wrong standard to apply for the first step of *Batson*, which only requires Madison to produce sufficient 'facts and any other relevant circumstances' that 'raise an inference . . . of purposeful discrimination.'" ¶ "Madison presented to the Alabama courts several relevant circumstances that in total were sufficient to support an inference of discrimination. . . . In addition to pointing out that the prosecutor used a number of his strikes against a variety of black jurors, Madison noted: (1) the failure of the prosecutor to ask questions to three of the challenged jurors, . . . (2) the case's racially sensitive subject matter, . . . and (3) the district attorney's office's prior discrimination in jury selection, occurring both in Madison's first trial and in other state cases."). "'Once the defendant makes [such] a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors' within [the] . . . arguably targeted class . . . [and to] 'give a clear and reasonably specific explanation of . . . [the prosecutor's] legitimate reasons for exercising the [peremptory] challeng[e].'" *Miller-El v. Dretke*, 545 U.S. at 239, quoting *Batson*, 476 U.S. at 97, 98 n.20. After the prosecutor has stated his or her reasons for challenging the jurors in the targeted class whom s/he has excused, "the court must . . . determine whether the defendant has carried his burden of proving purposeful discrimination. . . . This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice v. Collins*, 546 U.S. at 338, quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam); *Davis v. Ayala*, 135 S. Ct. 2187, 2199-2200 (2015). *See also, e.g.*, *Rice v. White*, 660 F.3d 242 (6th Cir. 2011); *Adkins v. Warden*, 710 F.3d 1241, 1255-58 (11th Cir. 2013); *Harris v. Hardy*, 680 F.3d 942, 952-66 (7th Cir. 2012); *Ali v. Hickman*, 584 F.3d 1174, 1192-96 (9th Cir. 2009).

In urging that a prosecutor's proffered race-neutral reasons for excusing jurors of the targeted class should not be credited, defense counsel would do well to note and argue that (1) the characteristics which the prosecutor claims explain his or her peremptory challenges of jurors belonging to the targeted class are shared by jurors who do not belong to the targeted class and

who have not been peremptorily challenged by the prosecutor (*see*, *e.g.*, *Foster v. Chatman*, 136 S. Ct. at 1750-51, 1752-53; *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008); *Adkins v. Warden*, 710 F.3d 1241 at 1255-58), and/or (2) the existence of those characteristics was elicited by prosecutorial *voir dire* examination of jurors who belong to the targeted class, and the prosecutor has not questioned jurors who do not belong to the targeted class in ways calculated to elicit the existence of the characteristics (*Miller-El v. Dretke*, 545 U.S. at 244-45), and/or (3) jurors in the targeted class were disproportionately often questioned in ways calculated to evoke responses that would make them challengeable (*see*, *e.g.*, *Miller-El v. Dretke*, 545 U.S. at 255-63), and/or (4) jurors who were struck possessed characteristics that would ordinarily have made them favorable to the prosecution, were it not for their race (*see*, *e.g.*, *Foster v. Chatman*, 136 S. Ct. at 1750-51; *Ali v. Hickman*, 584 F.3d at 1185-86, 1188-89) and/or (5) the prosecutor's stated justifications for striking jurors referred to concerns that could have been explored by "follow-up questions" but the prosecutor did not ask them (*Ali v. Hickman*, 584 F.3d at 1188; *see also Miller-El v. Dretke*, 545 U.S. at 244-46). *Compare Miller-El v. Cockrell*, 537 U.S. 322, 343 (2003), *with Davis v. Ayala*, 135 S. Ct. at 2200-01. *And* s*ee, e.g.*, *Castellanos v. Small*, 766 F.3d 1137, 1148-49 (9th Cir. 2014) (the prosecutor's claim that he peremptorily struck a Hispanic female venireperson because "'she didn't have any children . . . [and] [t]he victim here is going to be a child testifying'" was "'belied by the record,'" which showed that the venirewoman responded that "'she had two adult children'" and the prosecutor even "'asked about the occupations of her adult children, and she answered,'" and is further refuted by "[a] side-by-side comparison" of this venirewoman with three other venirepersons who had no children but "were ultimately permitted to serve on the jury," as was a venireperson who "didn't even answer the question about whether he had adult children."); *People v. Bell*, 126 A.D.3d 718, 719-20, 5 N.Y.S.3d 227, 229-30 (N.Y. App. Div., 2d Dep't 2015) (reversing a conviction on *Batson* grounds because "the facially race-neutral reasons proffered by the prosecutor for the use of peremptory challenges against . . . two prospective jurors were pretextual": the prosecutor asserted that she struck one prospective juror "because of a concern that his position as a church deacon would make it difficult for him to sit in judgment of another individual" but "[t]he prosecutor did not offer any explanation for how employment as a church deacon related to the factual circumstances of the case or qualifications to serve as a juror"; the prosecutor defended her other peremptory strike by saying that the African-American venireperson was "'shaking his head in agreement' with a white juror, who was explaining the trouble she would have in reaching a verdict and 'deciding the outcome of someone else's life,'" but the African-American venireperson "indicated that he could convict if the prosecution proved its case beyond a reasonable doubt" and was struck by the prosecutor anyway even though the prosecutor did not use a peremptory challenge to strike "the white juror who actually stated that she would have trouble 'deciding the outcome of someone else's life.'"). *See also Conner v. State*, 327 P.3d 503, 509-10 (Nev. 2014) (reversing a conviction on *Batson* grounds because the prosecutor's claimed reasons for striking the "prospective juror were belied by the record [of the witness's actual answers in *voir dire*]," and "[a] race-neutral explanation that is belied by the record is evidence of purposeful discrimination"; also, the trial court "failed to meet its step-three obligations" by denying defense counsel "an opportunity to respond to the[ ] [prosecutor's] new explanations" for striking the prospective jurors; a trial court cannot conduct "the sensitive inquiry into all the

relevant circumstances required by *Batson* and its progeny" unless the judge affords defense counsel "the opportunity to meet his burden by responding to the individual race-neutral explanations proffered by the State."); *Foster v. Chatman*, 136 S. Ct. at 1752-53 ("'[c]redibility can be measured by, among other factors, . . . how reasonable, or how improbable, the [State's] explanations are'"). If the judge concludes that the prosecutor has acted with a purpose to prune the jury of members of the targeted class as such, the judge must either discharge the venire and begin anew with another panel or reinstate the challenged jurors. *See Batson*, 476 U.S. at 96-100 & n.24. *See, e.g.*, *Drain v. Woods*, 595 Fed. Appx. 558, 580-81 (6th Cir. 2014) (trial judge's response to the "acknowledged *Batson* violations" – "allow[ing] *voir dire* to proceed with the sole requirement that the prosecutor request permission from the court before using any more peremptory challenges against black jurors" – was "plainly inadequate to cure the *Batson* violation"; if "the improperly struck jurors" were not "available to be reinstated on the jury," "'the only remaining remedy for the *Batson* violation would be to discharge the entire venire and start the process anew.'"). *See generally* NJP LITIGATION CONSULTING, JURYWORK: SYSTEMATIC TECHNIQUES, *supra*, ch. 4 ("*Batson* and the Discriminatory Use of Peremptory Challenges in the 21st Century").

"'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Snyder v. Louisiana*, 552 U.S. at 478. *See id*. at 477-78 ("Petitioner centers his *Batson* claim on the prosecution's strikes of two black jurors, Jeffrey Brooks and Elaine Scott. Because we find that the trial court committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim regarding Ms. Scott."). *Accord, Foster v. Chatman*, 136 S. Ct. at 1747 (dictum); *Lark v. Secretary, Pennsylvania Department of Corrections*, 566 Fed. Appx. 161, 161 (3d Cir. 2014) ("'[R]elief must be granted under *Batson* when even one black person is excluded [from the jury] for racially motivated reasons'").

In some jurisdictions the trial court has discretion to grant one or both parties additional peremptory challenges, beyond the number ordinarily fixed by law or practice. The request for additional peremptories may be made before or during the *voir dire*. It may be made after counsel has exhausted all of his or her allotted peremptories; but the wiser course for counsel who wants to delay the request until late in the game is to make it when s/he has still has one peremptory remaining, so that s/he can decide advisedly whether to use that last peremptory. The most persuasive argument that counsel can make in support of a request for additional peremptories is that prejudicial pretrial publicity or community hostility to the respondent will make the empaneling of a fair and impartial jury difficult and that, although the most obviously and naively prejudiced venirepersons will be detectable and excludable through challenges for cause on grounds of bias, subtle biases will persist that the allowance of additional peremptories may help to eliminate. This is the theoretical justification for peremptory challenges (although, of course, it is not their principal strategic use), and it can be cited to the court when asking for more of them, along with passages such as those quoted in § 20.03(b), relating to the "affirmative constitutional duty [of a trial judge] to minimize the effects of prejudicial pretrial publicity" (*Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979)). See also § 21.03(a) *supra*.

"[P]eremptory challenges . . . are a means to achieve the end of an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("[d]emonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges"); *cf. Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 n.9 (1984) ("[t]he [*voir dire*] process is to ensure a fair impartial jury, not a favorable one"). When counsel has made a reasonably strong showing of prejudicial publicity or community hostility on a motion for a change of venue (see § 20.03(b) *supra*) or for a continuance (see § 15.02 concluding paragraph *supra*) but those motions have been denied, s/he is in an especially favorable position to request additional peremptory challenges; and some judges will be particularly disposed to allow them in this situation, if only as a consolation prize. But counsel should be clear, in making the request, that it is not a substitute for the earlier venue-change or continuance motion and that s/he reserves the client's rights to contend on a new-trial motion (§ 37.02(a) *infra*), on appeal, and in postconviction proceedings, that the denial of the motion was prejudicial error.

§ 28.03(c) Variations in *Voir Dire* Procedure

Beyond the generalities noted thus far, it is difficult to describe *voir dire* procedure except as it is practiced in a particular court. Its variations are extreme. In some jurisdictions the judge conducts the *voir dire* questioning, while in others the attorneys do. In some jurisdictions the entire panel is questioned collectively, challenges for cause are made, and then 12 are placed in the box and peremptories are exercised; in other jurisdictions each individual juror is questioned, and then either challenged (for cause or peremptorily) or accepted; in still others, a group of 12 is questioned, challenges are made to these 12, and then new panelists are brought in – and questioned and challenged – as replacements for the original jurors who were struck for cause or peremptorily. Some jurisdictions take the view that *voir dire* questions must be limited to subjects that could give rise to challenges for cause; any enlightenment provided by the answers that enhances counsel's judgment on the intelligent exercise of peremptory challenges is supposed to be a mere by-product of inquiries directed to implied bias, to lack of statutory qualifications for jury service, or to similar grounds of challenge for cause. Other jurisdictions, however, recognize that a legitimate purpose of *voir dire* questioning is to enable counsel to find out the sort of person the prospective juror is, in order to determine whether or not to strike the juror peremptorily.

Local practice must be consulted in preparing for *voir dire,* and particularly in drafting *voir dire* questions. The following sections will address, in general terms, the defensive functions of *voir dire* and the types of questions that counsel can ask (or can request that the judge ask) at *voir dire.*

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

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

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

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

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

(1) Discovering factual grounds to challenge individual jurors for cause (see § 28.03(a) *supra*; § 28.05 *infra*).

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

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

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

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

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

Because of the extraordinary variety of local *voir dire* procedures, detailed discussion of the means for pursuing these objectives is not practical in this MANUAL. Counsel should consult NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES chs. 2-4, 17-18 (2d ed. 2012-13); ANN FAGAN GINGER, JURY SELECTION IN CRIMINAL TRIALS – NEW TECHNIQUES AND CONCEPTS (1975); 1 IRVING GOLDSTEIN & FRED LANE, GOLDSTEIN TRIAL TECHNIQUE §§ 9.21-9.86 (2d ed. 1969); CHARLES W. TESSMER, CRIMINAL TRIAL STRATEGY 51-68 (1968); WARD WAGNER, ART OF ADVOCACY – JURY SELECTION 1-6 to 1-53 (1983). The remaining sections of the present chapter are intended only to provide a few helpful hints.

At the outset it may be said that it is generally a good idea for defense counsel to prepare a list *of voir dire* questions in advance of trial. It is wise to write out each question on a separate file card and to make three identical sets of the cards. One set is for counsel's own use. The second is either for submission to the court in jurisdictions in which the judge conducts *voir dire* interrogation or for filing of the appropriate cards to protect the record if counsel is permitted to interrogate the jurors personally but certain inquiries are disallowed by the court. The third set enables counsel to hand selected cards to the prosecutor for examination in the event of legal argument or negotiation about particular questions. Counsel will find that the pretrial drafting of *voir dire* questions makes it easier at the *voir dire* itself to concentrate attention on the important business of observing the prospective jurors. If any of the draft questions embodies assertions of legal principles that are not obvious, counsel will also save fumbling and possible embarrassment by having notes of citations to support the principles.

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

These questions must be tailored in large part to the particular case and to local doctrinal restrictions on the scope of *voir dire* questioning. An important consideration in drafting questions is whether the law in counsel's jurisdiction requires that all questions asked on *voir dire* be justified by pertinency to a possible ground of challenge for cause or whether a broader range of inquiry is permitted. Even where questions are required "to go to cause," however, counsel can often defend a question as seeking information that would open up a line of circumstantial proof of the basis for a challenge for cause: "Relevant *voir dire* questions . . . need

not be framed exclusively in the language of the controlling appellate opinion" or statute defining the grounds for a challenge for cause. *Wainwright v. Witt*, 469 U.S. 412, 433-34 (1985).

The following are some standard questions:

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

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

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

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

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

(6) Have you or has any member of your family ever been the victim of a crime? [Follow-up questions should elicit the nature of the crime, the circumstances, and the juror's reactions to the experience.] (If counsel has reason to believe that questions such as this one and number (7) may be embarrassing to a juror or jurors, counsel should request that *voir dire* on these subjects be conducted individually through one of the procedures suggested in connection with question (13) *infra*.)

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

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

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

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

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

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

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

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

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

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

(17) When you read [heard] that, did it cause you to form in your own mind any opinions concerning whether s/he was probably guilty or innocent?

(18) What was that opinion?

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

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

(21) Have you discussed this case with anyone?

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

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

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

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

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

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

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

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

(30) Would the fact that my client is [a member of a certain racial or ethnic group] and the complainant in this case is [a member of a different racial or ethnic group] affect your judgment or your ability to decide this case in any way? (It is obviously preferable to ask more subtle questions probing possible racial

prejudice if local practice allows them. But often it does not, and this form of inquiry is all that is permitted. One approach to the subject, which defense counsel can usually get away with, even in the most illiberal jurisdictions, is to ask at the beginning of the examination, following question (1) *supra:* "Now, this [murder] is supposed to have taken place near _____ [naming a recognizable intersection or landmark in the neighborhood]." *Or*: "[Mr.] [Ms.] _____, the person who was killed, lived [*or, alternatively,* "The respondent lives"] near _____." "Do you know where that is?" "Have you had any occasion to be in that area?" Biased jurors will frequently give a telltale response in describing or responding to the mention of a ghetto or low-income neighborhood, although these questions themselves can be justified by counsel as the lead-in to a line of questioning aimed at determining whether the juror is disqualified by reason of personal knowledge of the offense or of the parties.)

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

§ 28.06 DRIVING HOME PRINCIPLES VITAL TO THE DEFENSE CASE

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

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

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

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

and shot somebody with it?"

(3) "So you could follow [His] [Her] Honor's charge that you have to find an actual intent to kill before you can convict, and you would say 'not guilty' of assault with intent to kill even if you found that my client was careless and reckless and recklessly shot someone, not knowing that the gun was loaded?"

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

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

§ 28.07 DISARMING SURPRISE PROSECUTION EVIDENCE AND PREJUDICIAL DISCLOSURES

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

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

The *voir dire* is counsel's first contact with the jurors, and counsel must use it to make

friends. If possible, s/he should call each prospective juror by name. It is usually good practice to begin the examination of each juror with a number of questions about the juror's general background, such as:

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

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

(3) Do you have family here?

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

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

(6) And where did you go to school?

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

(8) Where do you work?

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

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

Questions of this type manifest an interest in the juror as a person and can be asked in a manner that makes counsel likeable as a person – as someone who is fond of kids, for example. Many of the questions are open-ended in the sense that they cannot be answered simply "yes" or "no" but require the juror to frame answers in the juror's own words; others of the questions leave the juror the option of a yes-or-no answer or a more elaborate response. The way in which the juror responds to these questions can tell counsel a good deal about the juror's intelligence, quickness of understanding, patterns of language and thought, cultural background, self-confidence or nervousness, decisiveness or indecisiveness, eagerness to please or recalcitrance. For that reason, open-ended questions should be used as much as possible throughout the *voir dire,* but they are particularly easy to fashion and likely to be effective in the area of the juror's own background. Counsel cannot, for example, ask a juror open-ended questions about the beyond-a-reasonable-doubt standard or about the juror's attitude toward the credibility of police officers (see § 28.05 *supra*). These questions would be both objectionable (since the juror is not required or supposed to know the legal rules governing burden of proof or the evaluation of testimony; the juror is merely required to be willing to follow the court's instructions on those subjects) and potentially embarrassing (since a juror who is asked a legal question to which s/he

does not know the answer will feel put down). On the other hand, jurors are obviously most knowledgeable and therefore most at ease on the topic of their own backgrounds.

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

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

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

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

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

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

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

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

(1) peremptorily challenging prospective jurors on the *voir dire* (in most jurisdictions,

jurors congregate for periods of weeks and make friends with fellow jurors; as a result they may be offended when counsel strikes another panelist);

(2) objecting to evidence at trial;

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

(4) failing to extract a dramatic courtroom confession from the prosecution's star witness that s/he is really guilty of the crime with which the respondent is charged, as defense lawyers sometimes do on T.V.

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

§ 28.09 SELECTING JURORS

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

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