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Voir Dire

**Breaking the Magic Spell When
Judges Improperly Rehabilitate Jurors**



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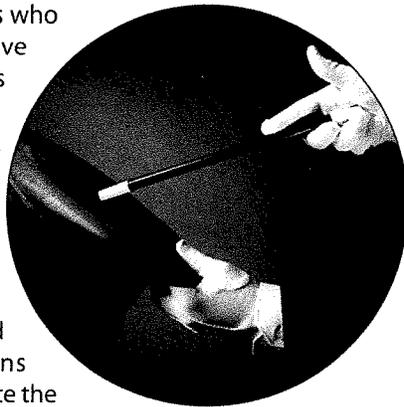
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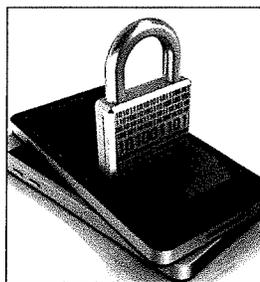


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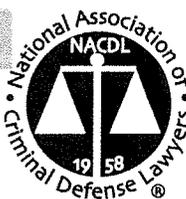
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Breaking the Spell Of the Magic Question During Voir Dire

Any defense attorney who has tried even a handful of jury cases has encountered a judge's improper rehabilitation of a biased juror during voir dire. And it is almost always the same routine. A juror's fairness or partiality becomes apparent during questioning by the attorneys or the judge. The judge tries to salvage the situation and protect the record by asking a short series of questions designed to demonstrate the juror's willingness to obey the law as given and reach a verdict based only on the application of that law to the specific facts of the case. The juror agrees to put aside previous experiences and decide the case only on the evidence and law, agrees to be fair, and is "rehabilitated." Improper rehabilitation looks something like this:

Defense Counsel (to juror in seat five)

Q: On the jury questionnaire you indicated that your daughter was killed by a drunk driver?

A: (Tears welling up in eyes, voice quivering) Yes.

Q: I'm very sorry to hear that. It must have been a very painful experience?

A: (Nods in agreement but does not verbally respond)

Q: I'm guessing you're here in part because of your respect for the law and your duty to be a juror?

A: Yes.

Q: I really can't imagine what it must have been like for you to lose your daughter in an accident like that. I'm wondering if this might have an impact on your ability to objectively view the facts in this case?

A: I don't know. It might.

Q: Can you tell me more about that?

A: (Eyes filling with tears again, upper lip trembling) Well, she was just 15 when it happened. And her 16th birthday would be next month. I can still vividly remember getting the call from the police. It was like my heart and all of time stood still at the same time. Our family was thrown into disarray and will never be the same. My house seems so empty now. I swore from that day forward to never have another drink, just to honor my daughter. I still think about her every day.

Q: (Handing the juror a tissue) I hardly know what to say. I have a daughter that same age, and to think about that happening, it's almost incom-

BY PATRICK T. BARONE AND MICHAEL B. SKINNER

prehensible. No parent should have to go through that.

A: (Juror clutching tissue in hands clenched together in lap) Thank you.

Q: You know, we all have a right to serve as jurors, but we also have a right not to serve if it's not the right case. I guess I'm wondering if maybe this is the right case for you?

A: Probably not.

Q: If you were Mr. Smith, would you want a juror like you to sit on your case?

A: No.

Q: Why not?

A: I just don't think I can be fair. I mean I'd want to be. Honestly, I think I'd feel like my daughter Amanda was sitting here next to me during the trial. I just don't think I could stop thinking about that.

(Defense Attorney) Judge, I challenge Juror Number Five for cause.

Judge Jones to Juror Number Five:

Q: (In a stern judicial voice of authority): We all have life experiences that we bring into the courtroom.

A: (Juror nodding)

Q: You understand that the defendant is not the person who killed your daughter?

A: Yes, I understand that.

Q: You also understand that in this case your job as a juror is to listen to the facts and to decide the case based only on the facts and evidence introduced, and the law as I give it to you?

A: Yes.

Q: And will you be able to set this experience aside and be fair and impartial in this case?

A: Yes.

Q: To ask you once more, after you hear the testimony and my instructions on the law, and considering the oath you take as a juror, can you set aside your experience and decide this case based solely on the evidence introduced and the law as I give it to you?

A: I'll do my best.

Judge Jones: Thank you. Challenge for cause denied.

It often seems that improper rehabilitation is more common in misdemeanor or minor felony cases because it is considered a reasonable shortcut in the often ponderous *voir dire* process, but improper rehabilitation can happen in any jury trial. It is not a procedure that exclusively benefits the prosecution; experienced trial attorneys have seen judges rehabilitate jurors that have expressed a prejudice in favor of defendants too.

Improper rehabilitation always corrupts the jury trial process, but it prejudices criminal defendants much more often than the prosecution because there is a stronger initial bias against them.¹ Either way, however, the result is the same — a corruption of the solemn right to a trial by an impartial jury.

This article briefly examines this solemn right to an impartial jury and then explains how both science and law intersect favorably in support of an argument to preclude the practice of rehabilitation. Finally, practical suggestions are given to the practitioner for combatting the practice of improper rehabilitation.

The jury right is the right to an impartial jury.

When the Founding Fathers of the United States convened at the Constitutional Convention of 1774, 12 of the states represented had already drafted state constitutions.² Of the various provisions included in these constitutions, the only one that had been included in all was the right of a criminal defendant to a trial by jury.³ This fact is less surprising when one learns that the right to a jury — at least in nascent form — had existed for about a thousand years, predating even the Magna Carta.⁴

This right to trial by jury was held so dear that of all the rights the Constitution guarantees to the people,

it is the only one that appears in both the original Constitution and the Bill of Rights.⁵ Additionally, three of the amendments in the Bill of Rights make mention of trial by jury.⁶ Yale constitutional law professor Akhil Reed Amar has accurately noted that “juries were at the heart of the Bill of Rights.”⁷ Included both explicitly and implicitly in this right to trial by jury is the right that such jury be fair and impartial. Otherwise, the right is meaningless.⁸

As late as 1965, even as the U.S. Supreme Court held that the states did not need to provide a jury trial in all criminal cases,⁹ the Court also held that if a state chose to provide a jury, that jury needed to be impartial.¹⁰ “[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.”¹¹

Voir dire is the mechanism designed to ensure impartiality.

Assuring the integrity of the right to impartiality is the purpose of *voir dire*.¹² *Voir dire* is, historically, the most reliable method for uncovering possible juror prejudice.¹³ “[T]he primary means through which most courts seek to determine the qualifications of citizens to sit on a jury is *voir dire*.”¹⁴ *Voir dire* protects an accused's right to a fair trial by helping a trial judge identify partial jurors, and it helps the defendant in making appropriate peremptory challenge decisions.¹⁵

The U.S. Supreme Court has recognized that “determining whether a juror is biased ... is difficult partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.”¹⁶ The Court has also concluded that while there is no set script for *voir dire*, “part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.”¹⁷

Because of the difficulty in identifying biased jurors, the jury selection process employs what appear to be “extensive procedures” ostensibly designed to ensure that only unbiased, fair individuals are seated as jurors.¹⁸ Furthermore, the jury selection process's attempt to reveal bias “is instrumental to justice and the appearance of justice in our trial system.”¹⁹

Trial courts' credibility determinations and rehabilitative procedures corrupt the voir dire process.

While the importance of voir dire is universally accepted as true, "people holding potentially prejudicial attitudes are regularly seated as jurors in civil and criminal trials."²⁰ Part of the problem is the wide discretion that trial courts have in directing the voir dire process and rehabilitating jurors. As discussed below, the flaw in the voir dire process that has no sufficient remedy occurs when the trial judge improperly rehabilitates a juror who admits to a bias by later getting that same juror to affirm his or her fairness in the most general terms.

A record laden with leading questions by the trial court can leave a reviewing court uncertain about the sincerity of the prospective juror's answers. The answers to such questions may suggest overt acquiescence in the trial court's effort to elicit a commitment to neutrality. Bias remains, however, if the prospective juror tells the court only what it wants to hear but covertly holds on to the previously articulated views that precipitated the challenge.²¹

The law insulates trial court decisions regarding juror challenges to such a degree that it is very difficult to successfully appeal an adverse decision.²² An attorney may or may not subscribe to the theory that trials are won or lost during voir dire, but it is clearly a critical stage of the trial that can nevertheless test everyone's patience. It is important for practitioners not to allow the process to get away from them (as much as possible) simply because the judge wants to "move things along." The judge's desire to speed up the process can easily be cloaked by "legitimate" rehabilitation of biased jurors that becomes unchallengeable at trial or on appeal.

Evidence shows that improperly rehabilitated jurors can corrupt the jury process.

Appellate practitioners are familiar with the wide berth that appellate courts give to trial court discretionary decisions, but the insulation that appellate courts give to trial court decisions on juror challenges is particularly alarming because a careful examination of the voir dire process "demonstrates that when groups,

such as juries, are used to make judgments, their level of performance typically does not rise to some higher level" simply because they are made as a group.²³ In other words, the sum is not greater than its parts, and if one of the parts is a biased juror, then the bias potentially becomes infectious. This is because "on difficult tasks where the solutions are not easily discernible, groups typically perform at the level of their average members. Thus, the seating of a potentially biased juror raises grave implications for the fairness of a jury trial."²⁴

In the jury trial context, it is most often the judge who does the rehabilitating. This is due to the "legal assumption that because of the formality of the voir dire setting, the high stakes of the situation, and the judge's high status, venirepersons will be candid with judges during voir dire questioning."²⁵ The trouble is that the assumption that potential jurors will be more candid with the judge is thoroughly wrong.

Courts and practitioners know that the assumption is wrong: "Not only do jurors provide less candid information to judges than to attorneys,"²⁶ judges also "elicit inaccurate information from jurors due to their choice of questions."²⁷ The U.S. Supreme Court has put it this way: "[I]t is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference, and may prove controlling."²⁸ Federal Judge Mark W. Bennett has criticized the overreliance on judges: "Judge-dominated voir dire allows jurors with undetected and undeterred implicit biases to decide cases by preventing attorneys from using preemptory or for cause strikes to eliminate such jurors."²⁹

Scientists understand the peril of unconsciously influencing the subjects of their experiments; "when experimenters have a prediction about the outcome of an experiment, this prediction can be unconsciously communicated to participants, resulting in hypothesis-confirming behavior, which fulfills the experimenters' expectations."³⁰ While trials do not take place in a traditionally scientific experimental setting, scientific principles are useful in the trial process. This might be particularly true as it relates to the science of psychology and practice of jury selection and deliberation. Thus, if judges hold an expectation of juror impartiality, this expectation may be communicated to venirepersons, making it less likely that judges will

uncover juror bias during questioning.³¹

Social scientists also know that the assumption that jurors will be more candid with the judge is wrong. Empirical research suggests that potential jurors respond more candidly and are less likely to give socially acceptable answers to questions from lawyers than from judges.³² This is why "care should be taken that the nuances imbedded in the judge's questions do not suggest that there is only one proper answer, and that questions are asked in a way that would not cause one, from fear or embarrassment, to give anything less than frank, honest answers."³³

For example, in one case, five of the 12 jurors who decided the case were asked, "Have you developed any opinions that would make you an unfair juror?" The question is vague and suggests the answer that the court considered appropriate. Those jurors who volunteered that they could not be fair because of opinions formed after exposure to negative publicity were lectured to by the court. These "lectures," heard by the entire venire, sent a strong message that the court did not approve of those who volunteered that they were biased. It is not surprising, then, that as the questioning went on, fewer and fewer jurors volunteered this information. Yet the court did not ask fact-specific questions, but merely asked the jurors themselves whether they could be fair.³⁴

Relying on juror self-assessment is not the only reason judicial rehabilitation is problematic. "[J]uror self-assessment that they can set bias aside or otherwise be fair and impartial is notoriously unreliable."³⁵ People want to believe that they can be fair and are unlikely to admit that they cannot set aside their biases.³⁶ This is the reason one court said that "the concept of 'rehabilitation' is a misnomer in the context of choosing qualified jurors." This court directed trial judges to remove the concept of rehabilitation from their thinking and to strike it from their lexicon.³⁷

Jurors' answers to rehabilitation questions are not reliable for at least seven additional reasons: "(1) lack of knowledge of own biases; (2) limitations of self-report of potentially biasing experiences and attitudes; (3) social desirability responses; (4) social pressure to conform; (5) lying; (6) perseverance of beliefs; (7) judicial instruction to set biases aside."³⁸

Separately and together these seven influences form powerful reasons for jurors to give answers that they believe

the judge will find pleasing and appropriate. "Interviews with former jurors suggest that they were torn between their reluctance to admit to a judge that they would be unwilling to follow the law and their desire to follow their values and conscience, leading jurors to give dishonest answers during voir dire."³⁹

Another item that might be added to this list is cognitive dissonance. "People experience psychological discomfort — known as cognitive dissonance — when their attitudes and behaviors are at odds."⁴⁰ "If judges appeal to venirepersons' sense of justice and remind them of the importance of their civic duty to serve as a juror, refusing to ignore their biases would be discrepant with these values and would likely produce cognitive dissonance. To reduce this uncomfortable psychological state, rehabilitative questioning by a judge might result in responses from venirepersons that reflect an adherence to these values: statements that the venirepersons will be able to put aside any bias and decide the case fairly."⁴¹

Voir dire is corrupted by the use of the magic question to improperly rehabilitate partial jurors.

The competing forces of the voir dire system for seeking out bias and the psychological and systemic forces that fight against the voir dire system intersect at what practitioners and commentators have dubbed the "magic question": the specific question used by trial courts across the country to improperly rehabilitate a juror who has expressed bias or partiality earlier in voir dire.

"[O]ne of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court's instructions. This has come to be referred to in the vernacular as the 'magic question.'"⁴²

While there is no single form of the "magic question," it generally features the judge asking the juror if she can (1) put aside previous experience, (2) be fair, and (3) render a verdict only on the facts and the law of the case.⁴³

The U.S. Supreme Court dealt with the magic question directly in *Morgan v.*

Illinois,⁴⁴ a capital case in which the trial court did not permit specific questioning of jurors on key issues related to imposition of the death penalty but did use variations of the magic question:

During *voir dire*, the trial court received from 9 of the 12 jurors empaneled an affirmative response to variations of this question: "Would you follow my instructions on the law even though you may not agree?" ... However, the trial court did not ask three of the jurors this question in any way. ... Every juror eventually empaneled was asked generally whether each could be fair and impartial.² Each juror responded appropriately to at least one of these questions, or a variation: (1) "Do you know of any reason why you cannot be fair and impartial?" ... (2) "Do you feel you can give both sides a fair trial?" ...

The *Morgan* court held that this generalized questioning was insufficient when an actually biased juror (a juror who would impose the death penalty no matter the facts of the case) was seated.

Unfortunately, use of the magic question effectively turns voir dire into nothing more than a "stark little exercise"⁴⁵ because the "determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism."⁴⁶

"It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a juror stands free of bias or prejudice who, having voluntarily and emphatically asserted its existence in his mind, in the next moment under successful questioning declares himself to be free from its influence."⁴⁷

What makes the magic question particularly troubling is that it assumes what is not otherwise humanly possible. Perception is shaped by past experiences, and these experiences have an impact on how people view present facts and circumstances. An "individual who is under the influence of personal prejudice 'is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony.'"⁴⁸ Thus, while a juror "may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it, the law ought not trust him, knowing that he will listen with more favor to

that testimony which confirms, than to that which would change his opinion."⁴⁹ This is why some courts agree that "accepting such jurors' statements, that they can set aside their personal prejudices and be fair, creates the risk of seating biased jurors, and a clear appearance of prejudice to a party."⁵⁰

Of course we know that "there is no 'magic' in the 'magic question.'"⁵¹ "It is just another question where the answer may have some bearing on deciding whether a particular juror is disqualified by bias or prejudice, from whatever source."⁵² The trouble is, many judges thoroughly believe in their ability to rehabilitate, and in the magic question's ability to act as the appropriate incantation.

And, the law gives such broad discretion to the trial court, if this practice of rehabilitation were "taken to its logical conclusion, all that would be necessary to empanel a legally sufficient jury is that the trial court ask the prospective jurors if they could be fair and impartial. Only those jurors who confessed that they would not could then be challenged for cause. Because the voir dire has not produced any other information, the others would be absolutely insulated from challenge."⁵³

Trial attorneys can take steps to try to prevent improper juror rehabilitation.

Criminal practitioners should start by familiarizing themselves with the process behind the "magic question" and begin to develop a strategy for either preventing the court from getting to the magic question or alleviating its negative effects. It may come as a surprise that in this particular regard, the law offers myriad tools and extensive support to the trial attorney prepared to challenge improper rehabilitation. Because "[t]he law ... is eminently practical,"⁵⁴ for the well-prepared lawyer, the law supports solid challenges to biased jurors against abstractions such as improper rehabilitation using the magic question.

Judges, of course, are also acutely aware of practicalities, which is one of the reasons that they resort to the magic question. Undoubtedly, judges seek to limit voir dire and then attempt to rehabilitate any challenged jurors for many reasons. First among these reasons is likely that judicial "concerns abound over the time spent on voir dire."⁵⁵ Thus, it may be true that "rather than risking

the possibility that challenges for cause may necessitate bringing in additional venirepersons to seat a complete jury, judges may rehabilitate venirepersons who hold biases that would otherwise render them ineligible for jury service.”⁵⁶

Determination of juror bias cannot be reduced to question-and-answer sessions that obtain results in the manner of a catechism.

While there is no absolute “solution” to the problem of opportunistic rehabilitation and the magic question, some steps exist that a well-prepared trial attorney can take to try to prevent a judge from using rehabilitation to seat a biased juror. The first step, as discussed below, is to make a very detailed and fact-specific record as to the biased juror. The second step is to file one or more pretrial motions and otherwise follow up with contemporaneous objections. Depending on the complexity of the case, the defense attorney might file a single form motion that he has prepared for every trial or he might have two or three specially tailored motions for specific fact-related issues that he expects to come up during jury selection.⁵⁷

Fact-Specific Questions, Follow-Up, and Contemporaneous Objection

The magic question, as discussed above, consists of some form of asking the potential juror whether he or she can (1) put aside previous experiences, (2) be fair, (3) and render a verdict only on the facts and the law of the case.⁵⁸

Criminal practitioners must be careful in voir dire not to simply ask the magic question *themselves*. Inexperienced lawyers or lawyers at the end of several hours of voir dire might be tempted to ask a prospective juror the following question: “Can you be fair?”

Such a lawyer risks receiving the same sort of affirmative answer that the magic question is designed to get. If the prospective juror actually does give a biased answer, the judge might then rehabilitate with the magic question. Either way, any potential bias is left hidden and undetected.

Instead, when presented with any facts that merit further questioning, defense lawyers must question *on those facts*. As discussed above, one of the primary deficiencies of the magic question

is its generality; it is a meaningless question because it tells the parties nothing specific about the juror in question.

Because of the discretion that the trial court has to direct voir dire, it is critical for the trial attorney to not let the

process spin out of control into the generalities of the magic question that will be fatal to any challenge at the trial or appellate level. For example, the Illinois Court of Appeals considered the case of a defendant who raised the issue of his trial attorney’s failure to ask specific questions about gang-related bias of potential jurors. Despite favorable Illinois Supreme Court law on the issue requiring reversal when such an issue is *preserved*, the court declined relief both on the substantive issue and on an ineffective assistance of counsel claim because the trial attorney made a decision not to make the sort of fact-specific inquiry that is necessary to overcome the improper rehabilitation of the magic question.⁵⁹

If the defense lawyer wants to challenge the juror, and if the lawyer wants to challenge the improper rehabilitation, the lawyer needs to have questioned the juror in a fact-specific manner about that juror’s experiences, thoughts, and feelings. Then the lawyer will be prepared to confront the judge with a fact-based argument explaining the reason the juror is biased despite the juror’s *generalized* assurance that he or she can be fair. This provides the lawyer an argument to present to the trial judge and preserves the record for appeal.⁶⁰

Motions

Many of the following motions can be filed pretrial, and should be, if possible. Some of them can be part of a set of form pretrial motions that are prepared in advance and ready to go whenever necessary. Also note that even a good pretrial motion can sometimes require a contemporaneous objection during trial.⁶¹

1. Educate the Judge Regarding Rehabilitation

Some states do not permit the use of the magic question to rehabilitate prospective jurors. For instance, Texas requires disqualification after a prospec-

tive juror expresses bias.⁶² New York follows a less black-and-white rule, but still significantly restricts the use of the magic question for rehabilitation.⁶³

If the attorney practices in a state that offers greater protection during voir dire, she should know her state’s law before trial begins and make sure the trial judge knows it too. If the state does not follow the more protective approach of Texas or New York, make the judge aware of the different ways that voir dire is conducted throughout the country.⁶⁴ It is easy to become myopic practicing in one court under the law of one state for years; even suggesting that some defendants in other states get greater protections during voir dire might make a trial judge think twice about how she conducts the voir dire in a case.

It is important to not stop at citing case law. This article has cited some of the psychological evidence that supports the conclusion that the magic question does nothing but provide a false veneer for a biased juror to be seated on a jury. Include this evidence in the motion to further educate the judge about the perils of biased jurors and the inadequacy of rehabilitation.

2. Attorney-Conducted Voir Dire

If the attorney has no opportunity to speak to the jurors, the trial judge may never delve deeply enough into jurors’ beliefs to trigger the magic question issue. It is critical to convince the judge that attorney participation in voir dire will make the process easier for the judge and better protect the parties’ rights.⁶⁵

The Fifth Circuit succinctly stated:

[W]e must acknowledge that voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties. A judge cannot have the same grasp of the facts, the complexities and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weaknesses of each litigant’s case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed. [66]

This point should be pressed with any judge who is reluctant to allow attorney participation in voir dire:

attorney participation does not hinder the process; rather, it enhances the process and makes it more efficient because of the attorneys' familiarity with the case. An experienced trial attorney will be able to get to the core issues with a venire better than a judge with a list of standard questions and the last-resort magic question. Even an inexperienced attorney could do a better job because of his familiarity with the facts of the case.

3. Sequestered Voir Dire

A request for sequestered voir dire can be made either for the entire panel or for those jurors that express some bias and require additional questioning individually during voir dire. In a run-of-the-mill criminal trial, felony or misdemeanor, few trial judges are going to take the time to individually sequester and question prospective jurors. And the law does not support such blanket requests. But if voir dire exposes a potential issue with an individual juror, then such sequestered questioning is appropriate.⁶⁷

Sequestered voir dire reduces *some* of the psychological pressures discussed above when the prospective juror feels peer pressure to answer the magic question in the socially acceptable way. It also allows the defense attorney the opportunity to push back against the judge's attempts to rehabilitate the prospective juror without fear of alienating the other venirepersons.

4. Additional Time to Conduct Voir Dire

Because trial judges are often very concerned with docket management, there is a noticeable trend in voir dire in which the original venirepersons are examined in detail and as the morning wears on, each new prospective juror receives less and less attention. There is more pressure to resort to the magic question if the court has an arbitrarily short time period in mind for jury selection. Given this problem, attorneys can preemptively ask for more time before the start of voir dire or during voir dire, anticipate the need for more time, and make the case to the judge for the need to expand the time and examine each prospective juror in full. Note, however, the ongoing theme of the need to make the request as fact-specific as possible; general requests that the attorney has not had enough time to do a complete examination may be insufficient to either obtain more time or preserve the issue for appeal.⁶⁸

5. Additional Peremptory Challenges

If the practitioner is faced with improper juror rehabilitation through the use of the magic question, she may be forced to use a peremptory challenge to remove the biased juror. In such a situation, the attorney should consider asking the court for an additional peremptory challenge. All of the remedies suggested here can be addressed pretrial or during the voir dire process. The pretrial motion has the benefit of alerting the trial court that the defense intends to vigorously press defendant's right to an impartial jury and to present case law supporting his claims. Of

course, the defense attorney will not have any specific facts yet to justify a claim for additional peremptory challenges based on improper rehabilitation.

Unfortunately, there is a large body of case law that provides only shaky constitutional underpinning for peremptory challenges. But when the issue does arise, the defense attorney should point out that the U.S. Supreme Court has given the states wide discretion to handle peremptories as justice demands.⁶⁹ "Harm may be shown in the wrongful denial of challenge for cause by showing exhaustion of appellant's peremptory challenges, denial of a request for additional peremptory challenges, and the seating of a juror

State of the Union in the Trial Court

State,
Plaintiff,
v.
Hon. James Jones,
Defendant.

Defendant's Motion to Require Constitutionally Adequate Questioning During Voir Dire

Defendant, James Jones, by his attorney, Sally Smith, moves this Court to require constitutionally adequate questioning during voir dire. This request is based on constitutional protections, as set forth in more detail in the accompanying brief.

1. Defendant is charged with felony x.
2. Jury trial is scheduled for January 1, 2020.
3. Undersigned counsel has tried x felony cases to a jury.
4. It has been counsel's experience that improper rehabilitation of biased jurors is a common occurrence in voir dire. It is also counsel's experience that biased jurors are often not questioned in sufficient detail concerning their biases.
5. Inadequate questioning regarding biases and improper rehabilitation have been condemned by the courts as inconsistent with due process and the Sixth Amendment trial right. *See generally Morgan v. Illinois*, 504 U.S. 719 (1992); *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998).

For these reasons and those explained in the accompanying brief, Mr. Jones requests that this Court require constitutionally adequate voir dire questioning regarding each potential juror's biases and potential biases.

Respectfully submitted

/s/ Sally Smith
Sally Smith
1 Main Street
Capital City, XX 00000

State of the Union in the Trial Court

State,
Plaintiff,
v.
Hon. James Jones,
Defendant.

Brief in Support of Defendant's Motion to Require Constitutionally Adequate Questioning During Voir Dire

1. The Right to an Impartial Jury

This right to trial by jury was held so dear that of all the rights the Constitution guarantees to the people, it is the only one that appears in both the original Constitution and the Bill of Rights.¹ Included both explicitly and implicitly in this right to trial by jury is the right that such jury be fair and impartial. Otherwise, the right is meaningless.²

Even before it incorporated the Sixth Amendment right to a jury through the Fourteenth Amendment, the U.S. Supreme Court held that if a state chose to provide a jury, that jury needed to be impartial.³ "[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."⁴

2. Voir Dire Is Necessary to Provide an Impartial Jury

The U.S. Supreme Court has recognized that "determining whether a juror is biased ... is difficult partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."⁵ Assuring the integrity of the right to impartiality is the purpose of voir dire.⁶ The Court has also concluded that, while there is no set script for voir dire, "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors."⁷

3. Social Science Evidence Proves That Rehabilitation by the Court During Voir Dire Does Not Remove Bias

"Not only do jurors provide less candid information to judges than to attorneys,⁸ judges also "elicit inaccurate information from jurors due to their choice of questions."⁹ The U.S. Supreme Court has put it this way: "[I]t is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference, and may prove controlling."¹⁰ Federal Judge Mark W. Bennett has criticized the overreliance on judges this way: "Judge-dominated voir dire allows jurors with undetected and undeterred implicit biases to decide cases by preventing attorneys from using preemptory or for cause strikes to eliminate such jurors."¹¹

Empirical research suggests that potential jurors respond more candidly and are less likely to give socially acceptable answers to questions from lawyers than from judges.¹² This is the reason "care should be taken that the nuances imbedded in the judge's questions do not suggest that there is only one proper answer, and that questions are asked in a way that would not cause one, from fear or embarrassment, to give anything less than frank, honest answers."¹³

4. The Most Common Error: The Magic Question

"[O]ne of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court's instructions. This has come to be referred to in the vernacular as the 'magic question.'"¹⁴

The U.S. Supreme Court dealt with the magic question directly in *Morgan v. Illinois*,¹⁵ a capital case in which the trial court did not permit specific questioning of jurors on key issues related to imposition of the death penalty but did use variations of the magic question:

During voir dire, the trial court received from 9 of the 12 jurors empaneled an affirmative response to variations of this question: "Would you follow my instructions on the law even though you may not agree?" *Id.*, at 30; see *id.*, at 38, 43, 49, 56, 60, 64, 69, 107. However, the trial court did not ask three of the jurors this question in any way. See *id.*, at 73-77, 83-89, 94-100. Every juror eventually

upon whom appellant would have exercised a peremptory challenge."¹⁶

6. Juror Questionnaire

Extensive juror questionnaires are almost always helpful, but, of course are unlikely to be granted except in more complex cases. Nevertheless, they have become more common in recent years, and a well-crafted juror questionnaire can provide a powerful defense to the shallow magic question rehabilitation of a juror who has expressed biased opinions in writing.¹⁷

7. Jury Consultant

"Appointed counsel represent criminal defendants in the overwhelming majority of cases."¹⁸ Under these circumstances, the "overwhelming majority" of defendants will only have access to jury consultants with the approval of the trial court. And while jury consultants are exceptionally helpful to the trial attorney, courts simply do not consider them as essential as they do other types of experts.¹⁹

Therefore, if counsel decides on the need to request a jury consultant, it is not the sort of relief that should be expected in anything except the most serious and complex of felonies. But in those cases, counsel should make very specific factual arguments justifying the need for a jury consultant.²⁰ While the test for appointing a jury consultant falls into a gray area in the law, even the sympathetic courts demand specific reasons *this* defendant needs a consultant and *in what way* it will benefit him.

If the attorney is successful in getting a consultant, that success can have ripple effects throughout the jury selection process. The consultant can help draft a questionnaire and successfully sort the information. The consultant can help craft questions that will narrow voir dire, making it sufficiently fact-specific to protect the record from improper rehabilitation and expediting the process to assuage the judge that resorting to the magic question is unnecessary.

Appellate Relief: What If These Strategies Fail in the Trial Court?

What if the defense attorney has taken the precautions of making

fact-specific objections and has filed pretrial motions, but the court still seats a juror who is biased?

The attorney has now moved into the realm of protecting the record for appellate review and moving forward with the trial. How does the attorney protect the record for appellate review? The primary tool for record preservation rests in the steps that have already been taken. Record preservation is the filing of pretrial motions and contemporaneous objections.⁷⁵

But there is more that can be done to preserve the issue. If the defense attorney is on the losing end of a challenge for cause, and he believes that he has made a sufficient record by challenging in the first instance, there may be another step. Courts regularly require an exercise of a peremptory challenge on the juror in question.⁷⁶ Some appellate courts require that the trial attorney object again, *after* the challenge for cause and after the rehabilitation.⁷⁷

The defense attorney should know his state's law. For instance, Colorado currently provides *more* protection for civil litigants challenging jurors than criminal defendants.⁷⁸ If the attorney does not know his state's law but also does not have time to do research because of the pace of trial, the rule of thumb is to object by specifying the reason as best as possible (specifying both the facts and the law).⁷⁹ And object often. Object before (pretrial motions), object during (concurrent fact-specific objections), and object after.

Having now preserved the issue, having lost the trial (or else appellate issues would be moot), all the loose ends come together in the appellate practitioner's bane: harmless error. A great many juror issues are resolved by this question: Was defendant actually tried by a biased jury?

The U.S. Supreme Court has made it clear that it will not permit juror bias to be covered under the veil of trial court discretion to control voir dire.⁸⁰ Nevertheless, consider Jeffrey Skilling, of Enron infamy. One of his arguments that was considered and rejected by the U.S. Supreme Court was that the trial court engaged in an abbreviated voir dire and asked vague questions to rehabilitate biased jurors.⁸¹ The

empaneled was asked generally whether each could be fair and impartial.² Each juror responded appropriately to at least one of these questions, or a variation: (1) "Do you know of any reason why you cannot be fair and impartial?"; *id.*, at 33; see *id.*, at 41, 49, 64, 68, 75, 88, 99; (2) "Do you feel you can give both sides a fair trial?"; *id.*, at 70; see *id.*, at 35, 38, 43, 49, 56, 61, 65, 77, 100, 110.

The *Morgan* court held that this generalized questioning was insufficient where an actually biased juror (a juror who would impose the death penalty no matter the facts of the case) was seated.

5. The Constitution Requires Fact-Specific Inquiries into a Juror's Potential Biases

While trial courts are given discretion to conduct voir dire, there are constitutional safeguards. The U.S. Supreme Court has made it clear that it will not permit juror bias to be covered under the veil of trial court discretion to control voir dire.¹⁶ Use of the magic question, in particular, has drawn the attention of courts around the country. For instance, Texas requires disqualification after a prospective juror expresses bias.¹⁷ New York follows a less black-and-white rule, but still significantly restricts the use of the magic question for rehabilitation.¹⁸

The only constitutionally correct (and, therefore, appellate-proof) voir dire procedure is for the parties and the Court to inquire in a fact-specific way into each potential bias of each juror.¹⁹

Conclusion

Mr. Jones respectfully requests that this Court order that voir dire be conducted using only constitutionally adequate questioning, including:

1. Disallowing the use of improper rehabilitation of jurors (e.g., by way of the "magic question" or other similar means);
2. Requiring fact-specific questioning of all jurors with a potential bias, including in camera questioning of individual jurors as necessary.

Respectfully submitted

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Notes

1. See U.S. CONST. art. III, § 2, cl. 3 ("The trial of all Crimes ... shall be by jury"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]").

2. "It is, of course, settled that a state may not entrust the determination of whether a man is innocent or guilty to a tribunal organized to convict." *Fay v. People of State of New York*, 332 U.S. 261, 294, 67 S. Ct. 1613, 1630, 91 L. Ed. 2043. See *Turney v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749." *Witherspoon v. State of Ill.*, 391 U.S. 510, 521 (1968).

3. *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

4. *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S. Ct. 2222, 2229, 119 L. Ed. 2d 492 (1992).

5. *Smith v. Phillips*, 455 U.S. 209 (1982) (O'Connor, J., concurring).

6. "The trial court has the duty in a criminal case to properly voir dire prospective jurors to ensure the Sixth Amendment guarantee of an impartial jury is met." *United States v. Frank*, 901 F.2d 846, 849 (10th Cir. 1990) (citation omitted).

7. *Morgan*, 504 U.S. at 729 (1992).

8. *Id.*

9. L.L. Marshall & A. Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 205-217 (1987).

10. *Starr v. United States*, 153 U.S. 614, 626 (1894).

11. Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

12. *Id.*

13. *Bell v. State*, 725 So. 2d 836 (Miss. 1998).

14. *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717-718.

15. 504 U.S. 719, 723-24, 112 S. Ct. 2222, 2226-27, 119 L. Ed. 2d 492 (1992).

16. *Morgan*, 504 U.S. at 730 (1992).

17. See, e.g., *State v. Dick*, 69 S.W.3d 612, 620 (Tex. App. 2001) (stating that "[e]ven where such a juror is 'rehabilitated' through efforts of counsel or the court by stating that he could be fair to both sides, the trial court must excuse the juror"); *Texas Elec. Serv. Co. v. Boyce*, 486 S.W.2d 111, 113 (Tex. Civ. App. 1972) (holding that juror could not be rehabilitated after he had expressed opinion sufficient for disqualification); *Lumbermen's Ins. Co. v. Goodman*, 304 S.W.2d 139, 145 (Tex. Civ. App. 1957) (emphasizing that "[i]f it develops that a juror has bias or prejudice, his affirmation that he can set this aside and try the case fairly upon the law and the evidence should be disregarded, and he should be excused upon challenge").

18. *People v. Torpey*, 472 N.E.2d 298, 303 (N.Y. 1984).

19. See generally *People v. Macias*, 371 Ill. App.3d 632, 640-41 (2007).

decision by the U.S. Supreme Court is, in short, a hurdle for criminal defense practitioners on the voir dire issue. But it and other Supreme Court precedent (such as *Morgan*) points the way toward understanding the narrow route for success on appeal.

And that route requires a demonstration that a biased juror was actually seated in the trial.⁸² Returning to the beginning of this article, the core right, a right that has roots dating back nearly a thousand years, is to an impartial jury. In the norm, demonstrating to the court that there has been a procedural error and an improper rehabilitation of a juror will only get an appellant as far as harmless error and an affirmed conviction. Thus, on appeal counsel should make certain that the focus is not on the procedural error of the improper rehabilitation, but on the bias of the seated jury.

And the bias of the seated jury can only be an issue in most jurisdictions if the defense attorney has exhausted all peremptory challenges and is then forced to accept a biased juror who should never have been on the jury in the first place.⁸³

Finally, it is important again to note that each jurisdiction's law is different. While most appeals should focus on the bias of the juror and the denial of the right to an impartial juror, some jurisdictions will reverse if the court erroneously denies a challenge for cause, forces a defendant to use a peremptory challenge, and the defendant nevertheless ends up with an unbiased jury.⁸⁴

The appellate issue, as with most appellate issues, begins at the trial level and should focus not on the abstraction of the appellant's rights, but on how the appellant was harmed in the most down-to-earth explanation possible.

Conclusion

Hearing the trial judge invoke the incantation of the magic question, and then watching all of the carefully prepared voir dire dismantled, an attorney will feel deflated. Counsel may even think there is little that he can do to change this perception or to combat this magical thinking. As a result, he uses a precious preemptory challenge (if he has any left) or sits quietly through what he assumes to be the now ill-fated trial. But to persist, he convinces himself that one bad apple really will not spoil the bunch. Or he may place his faith instead with the appellate court.

A review of the psychological litera-

ture and the supportive case law lays bare what defense lawyers might otherwise intuit — the fateful significance of latent bias is too great to succumb to judicial rehabilitation. Accordingly, the best way to combat judicial rehabilitation is to attack the issue through pretrial motions, vigorous contemporaneous objections, and fact-specific arguments. Defense attorneys are not powerless in the face of improper rehabilitation and the magic question.

Notes

1. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (explaining why elected state judiciaries lead to institutional bias against criminal defendants).

2. Leonard W. Levy, *Essays on the Making of the Constitution* 258, 269 (2d ed. 1987).

3. *Id.*

4. James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892).

5. See U.S. CONST. art. III, § 2, cl. 3 ("The trial of all Crimes ... shall be by jury"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]").

6. U.S. CONST. amend. V, VI, VII.

7. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991).

8. "It is, of course, settled that a state may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' *Fay v. People of State of New York*, 332 U.S. 261, 294, 67 S. Ct. 1613, 1630, 91 L. Ed. 2043. See *Turney v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749." *Witherspoon v. State of Ill.*, 391 U.S. 510, 521 (1968).

9. This holding lasted only three years, when *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) held the Sixth Amendment protection to a jury trial applicable to the states through the Fourteenth Amendment.

10. *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965)

11. *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S. Ct. 2222, 2229, 119 L. Ed. 2d 492 (1992).

12. "The trial court has the duty in a criminal case to properly voir dire prospective jurors to ensure the Sixth Amendment guarantee of an impartial jury is met." *United States v. Frank*, 901 F.2d 846, 849 (10th Cir. 1990) (citation omitted).

13. Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 649-50 nn. 118-19 (1991).

14. *Id.* at 649-50.

15. While this article is aimed at criminal defense practitioners, it is important to note that an impartial jury is the goal of the justice system *as a whole* and benefits all parties and the entire community alike. Therefore, while the Constitution guarantees certain rights to criminal defendants, the courts have extended the protection of an impartial jury to the prosecution as well.

"Although the Sixth Amendment provides protection only for the defendant, if we believe that the American system of justice is based on the premise that a jury trial is a search for the truth, we must acknowledge that both the prosecution and defendant are entitled to an impartial jury." *Teague v. Lane*, 820 F.2d 832, 842 (7th Cir. 1987) *aff'd*, 489 U.S. 288 (1989).

16. *Smith v. Phillips*, 455 U.S. 209 (1982) (O'Connor, J., concurring).

17. *Morgan*, 504 U.S. at 729 (1992).

18. Arthur H. Patterson & Nancy L. Neuffer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 CORNELL J.L. & PUB. POL'Y 97 (1997).

19. *Id.*

20. *Id.*

21. *People v. Merrow*, 181 P.3d 319 (Colo. App. 2007) (Webb, J., specially concurring).

22. "[A] trial judge's decision with respect to a challenge for cause is entitled to substantial deference and may be overturned only for manifest error. *Irvin v. Dowd*, 366 U.S. 717, 723-24, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *accord Patton v. Yount*, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)." *Cato v. Superintendent of Groveland Corr. Facility*, 463 F. Supp. 2d 367, 372 (W.D.N.Y. 2006).

23. Patterson & Neuffer, *supra* note 18.

24. *Id.*

25. S.E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, LAW & HUM. BEHAV., 11, 131-146 (1987), and D. Suggs & B.D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 INDIANA L.J. 245-271 (1981).

26. *Id.*

27. L.L. Marshall & A. Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 205-217 (1987).

28. *Starr v. United States*, 153 U.S. 614, 626 (1894).

29. Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

30. R. Rosenthal, *Covert Communication in Classrooms, Clinics, Courtrooms, and Cubicles*, 57 AM. PSYCHOLOGIST 839-849 (2002).

31. L.L. Marshall & A. Smith, *supra* note 27; D. Suggs & B.D. Sales, *supra* note 25.

32. Bennett, *supra* note 29.
33. *Bell v. State*, 725 So. 2d 836 (Miss. 1998).
34. *People v. Tyburski*, 518 N.W.2d 441 (Mich. 1984).
35. Patterson & Neuffer, *supra* note 18.
36. Suggs & Sales, *supra* note 25.
37. *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717-718 (Ky. 1991).
38. Patterson & Neuffer, *supra* note 18.
39. Marshall & Smith, *supra* note 27.
40. J. Cooper & R.H. Fazio, *A New Look at Dissonance Theory*, in 17 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 229-266 (L. Berkowitz ed. 1984).
41. Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 *LAW & HUM. BEHAV.* 212 (2010).
42. *Montgomery*, 819 S.W.2d at 717-718.
43. *Id.* at 717.
44. 504 U.S. 719, 723-24, 112 S.Ct. 2222, 2226-27, 119 L.Ed. 2d 492 (1992).
45. *State v. Saunders*, 992 P.2d 951 (Utah 1999).
46. *Wainwright v. Witt*, 469 U.S. 412 (1985).
47. *Johnson v. Reynolds*, 121 So. 793, 796 (Fla. 1929).
48. *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) (citing *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va. 1807)).
49. *Id.*
50. *O'Dell v. Miller*, 565 S.E.2d 407 (W.Va. 2002).
51. *Montgomery*, 819 S.W.2d at 718.
52. *Id.* at 717-718.
53. *Dingle v. State*, 759 A.2d 819 (Md. 2000).
54. *Unatin 7-Up Co. v. Solomon*, 350 Pa. 632 (1944).
55. Caroline B. Crocker & Margaret Bull Kovera, *supra* note 41.
56. *Id.*
57. Because of the variety of approaches to jury selection among the 50 states and the federal courts, it is important to research the law of the applicable jurisdiction before preparing a motion.
58. *Montgomery*, 819 S.W.2d at 717.
59. "On appeal, defendant contends that he is entitled to a new trial because the trial court failed to *sua sponte* question the venire regarding their attitudes toward gangs. Defendant cites no cases supporting his argument and, as noted by the state, case law contradicts his position. See *Gardner*, 348 Ill. App. 3d at 487, 284 Ill. Dec. 527, 810 N.E.2d 180 (noting that no Illinois court has ever held that a trial court has a *sua sponte* duty to ask a gang bias question); *People v. Pogue*, 312 Ill.App.3d 719, 243 Ill. Dec. 926, 724 N.E.2d 525 (1999); *People v. Williams*, 295 Ill. App.3d 456, 229 Ill.

Dec. 734, 692 N.E.2d 723 (1998) (holding that the trial court has no duty to make *sua sponte* inquiries regarding gang bias.).

"Defendant contends that *People v. Strain*, 194 Ill. 2d 467, 252 Ill. Dec. 65, 742 N.E.2d 315 (2000), compels a different result. In *Strain*, the trial court said, before conducting voir dire, it would ask potential jurors questions relating to '[t]he allegation they or any close member of their family or close friend had any involvement with a gang, could be membership, affiliation, could be a victimization and so the parties then would be fully aware of anything like that.' *Strain*, 194 Ill. 2d at 470, 252 Ill. Dec. 65, 742 N.E.2d 315. After the first panel of the venire was questioned, defense counsel asked the court to inquire of every potential juror whether 'the juror would find defendant less believable if the juror learned that defendant belonged to a gang.' *Strain*, 194 Ill. 2d at 471, 252 Ill. Dec. 65, 742 N.E.2d 315. The trial court denied the request and did not pose the question.

"Our supreme court held that 'when testimony regarding gang membership and gang-related activity is to be an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias.' *Strain*, 194 Ill. 2d at 477, 252 Ill. Dec. 65, 742 N.E.2d 315. The supreme court held that the trial court's question regarding gang involvement did not sufficiently explore the area of potential gang bias. The supreme court further held that the trial court had abused its discretion when it refused defense counsel's request to 'probe for gang bias' during voir dire. *Strain*, 194 Ill. 2d at 481, 252 Ill. Dec. 65, 742 N.E.2d 315.

"Unlike in *Strain*, defense counsel in the present case did not request or pose gang bias questions. Accordingly, *Strain* is inapposite and does not compel reversal."

People v. Macias, 371 Ill. App. 3d 632, 640-41 (2007).

60. "In a challenge for cause, the cause of the challenge should be stated." *Davis v. Anchor Mut. Fire Ins. Co.*, 96 Iowa 70 (1895) (holding that it was insufficient to object even where the juror admitted to having "some opinion" about the case and "some bias").

61. "Some circuits require that '[o]bjection must be made in the trial court unless a good reason exists not to do so,' notwithstanding an unsuccessful pretrial motion *in limine*. *Rojas v. Richardson*, 703 F.2d 186, 189 — 90 & n.3, *opinion set aside for other reasons on rehearing*, 713 F.2d 116 (5th Cir. 1983); see also *Northwestern Flyers, Inc. v. Olson Bros. Manufacturing Co.*, 679 F.2d 1264, 1275 n.27 (8th Cir. 1982)." *Palmerin v.*

City of Riverside, 794 F.2d 1409, 1412 (9th Cir. 1986).

62. See, e.g., *State v. Dick*, 69 S.W.3d 612, 620 (Tex. App. 2001) (stating that "[e]ven where such a juror is 'rehabilitated' through efforts of counsel or the court by stating that he could be fair to both sides, the trial court must excuse the juror"); *Texas Elec. Serv. Co. v. Boyce*, 486 S.W.2d 111, 113 (Tex. Civ. App. 1972) (holding that juror could not be rehabilitated once he had expressed opinion sufficient for disqualification); *Lumbermen's Ins. Co. v. Goodman*, 304 S.W.2d 139, 145 (Tex. Civ. App. 1957) (emphasizing that "[i]f it develops that a juror has bias or prejudice, his affirmation that he can set this aside and try the case fairly upon the law and the evidence should be disregarded, and he should be excused upon challenge").

63. *People v. Torpey*, 472 N.E.2d 298, 303 (N.Y. 1984).

64. Christopher A. Cospser, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 *GA. L. REV.* 1471, 1489-97 (2003).

65. *People v. Tyburski*, 445 Mich. 606 (1994) (stating that courts should generally permit counsel's participation in voir dire to allow meaningful decisions to be made regarding juror challenges).

66. *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977).

67. "Individual voir dire is mandated only when there is a 'significant possibility' that a juror has been exposed to potentially prejudicial material. *State v. Porterfield*, 746 S.W.2d 441, 447 (Tenn. 1988). Voir dire on the prospective jurors' exposure to publicity was conducted individually just as the defendant had requested." *State v. Harris*, 839 S.W.2d 54, 65 (Tenn. 1992).

68. "Following his questioning of the panel, appellant's counsel failed to request additional time to conduct voir dire and failed to make a record of any questions which he was prohibited from asking. Instead, counsel made only a generalized objection stating: 'We still have many issues that we didn't get the chance to address and that's why we needed a longer period of time. My client's constitutional rights are implicated here.' This broad statement fails to properly inform the court of the questions appellant was not allowed to ask. See, e.g., *Caldwell*, 818 S.W.2d at 794 ('[T]here must be a question before there can be a proper question.'). *S.D.G.*, 936 S.W.2d at 380 (finding that recitation of general topics failed to preserve error); *Godine*, 874 S.W.2d at 201 (noting that to preserve error regarding voir dire, specific questions must be presented to the trial court)." *Dhillon v. State*, 138 S.W.3d 583, 590-91 (Tex. App. 2004).

69. "Because peremptory challenges are a creature of statute and are not

required by the Constitution, *Gray, supra*, 481 U.S., at 663, 107 S. Ct., at 2054; *Swain, supra*, 380 U.S., at 219, 85 S. Ct., at 835, it is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. Cf. *Stilson, supra*, 250 U.S., at 587, 40 S. Ct., at 30; *Frazier v. United States*, 335 U.S. 497, 505, n. 11, 69 S. Ct. 201, 206, n. 11, 93 L. Ed. 187 (1948); *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988).

70. *Drummond v. State*, 624 S.W.2d 690, 693 (Tex. App. 1981).

71. To lay the groundwork for effective jury selection, counsel should ask the trial judge to send the potential jurors a questionnaire before voir dire takes place, in order to reduce the time required for jury selection and make the selection process more effective. Juror questionnaires in several complex trials over the years have met with great success. With the judge's approval, the parties prepare an agreed-upon questionnaire and, under the best of arrangements, the judge has a magistrate judge summon the jury pool to court a week before trial to fill out the questionnaire under the supervision of the magistrate judge. The questions can range far and wide, relating to diverse subjects from personal and family data to opinions on various subjects, from familiarity with the involved technology to levels of education. Counsel should have well-considered positions on the reasons for the questions proposed for the questionnaire, as the judge will need to be convinced that a questionnaire in general and the questions on *this* questionnaire in particular are a sound idea. A strongly persuasive reason to have a questionnaire is that it *saves time* while still facilitating the seating of a fair jury.

The parties should receive copies of the responses to the questionnaire under a protective order to ensure the confidentiality of the jurors' responses. The questionnaire enables counsel to undertake a very effective jury selection process and to identify and eliminate unsuitable potential jurors.

John C. Lowe, *Reinventing an Outdated Wheel: Innovations in Complex Litigation*, 2 VA. J.L. & TECH. 6 (1997).

72. *Sutton v. Carpenter*, 745 F.3d 787, 793 (6th Cir. 2014) (citing Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 31 (1995) ("It is not uncommon for indigent defense programs to represent up to 90 percent of all criminal defendants in a given felony jurisdiction.")).

73. See generally Steven C. Serio, *A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143,

1186 (2004).

74. See *State v. Dellinger*, 79 S.W.3d 458, 469 (Tenn. 2002) (reasoning that the appointment of a jury consultant is not justified unless the defendant can show a "particularized need," which is defined as a showing that the defendant cannot receive a fair trial without a consultant's assistance); *State v. Odom*, No. W2000-02301-CCA-R3-DD, 2002 WL 31322532, (Tenn. Crim. App. Oct. 15, 2002) (dismissing a request for a jury consultant in one sentence because the defendant did not show a particularized need); *Grayson v. State*, 806 So. 2d 241, 255 (Miss. 2001) (requiring a showing of "substantial need" for nonlegal assistance); *State v. Smith*, 993 S.W.2d 6, 28 (Tenn. 1999) (refusing to appoint a jury consultant absent a showing of "substantial need" to justify expending state funds); *State v. Ashley*, No. 9605003410, 1998 WL 109903, 1 (Del. Super. Ct. Feb. 12, 1990) (denying the defendant's request for a jury selection expert because the defendant failed to show specific need).

Steven C. Serio, *A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1186 (2004).

75. See, e.g., *Hale v. State*, 343 Ark. 62, 80 (2000).

76. In order to preserve error on a challenge for cause, appellant must (1) exhaust his peremptory challenges, (2) request additional peremptory challenges, (3) identify a member of the jury as objectionable, and (4) claim that he would have struck the juror with a peremptory challenge. *Broussard v. State*, 910 S.W.2d 952, 956-57 (Tex. Crim. App. 1995). *Irvine v. State*, 857 S.W.2d 920, 925-26 (Tex. App.-Houston [1st Dist.] 1993, pet. ref'd).

Berry v. State, 01-01-00387-CR, 2002 WL 188564 (Tex. App. Feb. 7, 2002).

77. See, e.g., *Lovell v. Com.*, 2402-04-3, 2005 WL 3464672 (Va. Ct. App. Dec. 20, 2005); *Bell v. Commonwealth*, 264 Va. 172, 196 (2002) (finding issue forfeited because defendant did not object to the judge's rehabilitation of potential jurors); see also *Ireland v. State*, B14-89-00098-CR, 1990 WL 8478 (Tex. App. Feb. 1, 1990); *State v. Chapman*, 410 So. 2d 689, 696 (La. 1981).

78. *People v. Novotny*, 320 P.3d 1194, 2014 CO 18 (Colo. 2014); *Morales-Guevara v. Koren*, 2014 COA 89 (2014) ("We are certainly aware that continuing to follow *Denver City Tramway* and *Blades* in the civil context creates an incongruity in the law and that incongruities are disfavored. That is, the peremptory challenge is better protected in the civil context than it is in the criminal context.").

79. "Rather, this Court will consider an argument only if the party asserting it

made a proper, timely and specific objection on the same ground at trial, that is, unless 'plain error' is manifest." *United States v. Linwood*, 142 F.3d 418, 422 (7th Cir. 1998).

80. *Morgan*, 504 U.S. at 730 (1992).

81. *Skilling v. United States*, 561 U.S. 358, 386-99 (2010).

82. See, e.g., *State v. Sellhausen*, 2012 WI 5, 338 Wis. 2d 286, 303; *Gaither v. Com.*, 2004-SC-0474-MR, 2006 WL 436071 (Ky. Feb. 23, 2006).

83. "Error, if any, in overruling a challenge is not available to an appellant (i.e., is harmless error) unless it be shown that he had exhausted his peremptory challenges." *Chatman v. State*, 164 Ind. App. 97, 100 (1975).

84. "Putting the defense in a position where it is forced to exercise its peremptory challenges to exclude a biased juror is not harmless error." *Gosling v. Com.*, 7 Va. App. 642, 647 (1989).

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