North Carolina Defender Trial School
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The University of North Carolina School of Government and
Office of Indigent Defense Services
Chapel Hill, North Carolina

VOIR DIRE AND JURY SELECTION

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Thanks to Ann Roan and many other fine defenders for their advice and input.

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LOOKING FOR A DIFFERENT, MORE EFFECTIVE WAY OF CHOOSING A JURY

For more than twenty years, I have been privileged to teach public defenders all over the country. And it pains me to conclude that when it comes to jury selection, almost all of us are doing a lousy job.

What passes for good voir dire is often glibness and a personal style that is comfortable with talking to strangers. The lawyer looks good and feels good but ends up knowing very little that is useful about the jurors.

More typically, voir dire is awkward, and consists of bland questions that tell us virtually nothing about how receptive a juror will be to our theory of defense, or whether the juror harbors some prejudice or belief that will make him deadly to our client.

We ask lots of leading questions about reasonable doubt, or presumption of innocence, or juror unanimity, or self defense, or witness truth-telling. Then when a juror responds positively to one of these questions, we convince ourselves that we have successfully "educated" the juror about our defense or about a principle of law. In reality, the juror is just giving us what she knows we want to hear, and we don't know anything about her.

Because the questions we are comfortable with asking elicit responses that don't help us evaluate the juror, we fall back on stereotypes (race, gender, age, ethnicity, class, employment, hobbies, reading material) to decide which jurors to keep and which to challenge. Or even worse, we go with our "gut feeling" about whether we like the juror or the juror likes us.

And then we are surprised when what seemed like a good jury convicts our client.

This short treatise, and the seminar it is meant to supplement, are a first effort at finding a more effective way of selecting jurors. It draws on:

- Scientific research done over the last decade or two about juror behavior and attitudes.
- Excellent work done by defenders in Colorado in devising a new and very effective method for voir dire in both capital and non-capital cases.
- Some very creative work done by defense lawyers all over the country.
- My own observations of too many trial transcripts from too many jurisdictions, in which good lawyers delude themselves into thinking that a comfortable voir dire has been an effective voir dire.

I. SOME BASIC THINGS ABOUT VOIR DIRE – WHY JURY SELECTION IS HARD. WHY WE FAIL.

A. It is suicidal to just "take the first twelve." It is arrogant and stupid to choose jurors based on stereotypes of race, gender, age, ethnicity, or class.

Every study ever done of jurors and their behavior tells us several things:

- People who come to jury duty bring with them many strong prejudices, biases, and preconceived notions about crime, trials, and criminal justice.
- Jurors are individuals. There is very little correlation between the stereotypical aspects of a juror's makeup (race, gender, age, ethnicity, education, class, hobbies, reading material) and whether a particular juror may have one of those strong biases or preconceived notions in any individual case.
- The prejudices and ideas jurors bring to court affect the way they decide cases – even if they honestly believe they will be fair and even if they honestly believe they can set their preconceived notions aside.
- Jurors will decide cases based on their prejudices and preconceived notions regardless of what the judge may instruct them. Rehabilitation and curative instructions are completely meaningless.
- Many jurors don't realize it, but they have made up their minds about the defendant's guilt before they hear any evidence. In other words . . .
- Many trials are over the minute the jury is seated.

For this reason it is absolutely essential that we do a thorough and meaningful voir dire – not to convince jurors to abandon their biases, but to find out what those biases are and get rid of the jurors who hold them.

The lawyer who waives voir dire, or just asks some perfunctory, meaningless questions, or relies on stereotypes or "gut feelings" to choose jurors is not doing his or her job.

B. Traditional voir dire is structured in a way that makes it very hard to disclose a juror's preconceived notions

The very nature of jury selection forces potential jurors into an artificial setting that is itself an impediment to obtaining honest and meaningful answers to typical voir dire questions. Here is how the voir dire process usually looks from the jurors' perspective:

1. When asked questions about the criminal justice system, prospective jurors know what

the "right," or expected answer is. Sometimes they know this from watching television. Sometimes the trial judge has given them preliminary instructions that contain the "right" answers to voir dire questions. Sometimes the questions are couched in terms of "can you follow the judge's instructions," which tells the jurors that answering "no" means that they are defying the judge. Jurors will almost always give the "right" answer to avoid getting in trouble with the court, to avoid seeming to be a troublemaker, and to avoid looking stupid in front of their peers.

EX: Q: The judge has told you that my client has a right to testify if he wishes and a right not to testify if he so wishes. Can you follow those instructions and not hold it against my client if he chooses not to testify?

A: Yes.

While it would be nice to believe that the juror's answer is true, there is just no way of knowing. The judge has already told the juror what the "correct" answer is, and the way we phrased our question has reinforced that knowledge. All the juror's answer tells us is that he or she knows what we want to hear.

2. Jurors view the judge as a very powerful authority figure. If the judge suggests the answer she would like to hear, most jurors will give that answer.

EX: Q: Despite your belief that anyone who doesn't testify must be hiding something, can you follow the judge's instructions and not take any negative inferences if the defendant does not take the stand?

A: Yes.

The juror may be trying his best to be honest, but does anyone really believe this answer?

3. When asked questions about opinions they might be embarrassed to reveal in public (such as questions about racial bias or sex), jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer – even if that answer is false.

4. When asked about how they would behave in future situations, jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers simply reflect what they hope (or want to believe or want others to believe) is the truth, even if they may be wrong.

EX: Q: If you are chosen for this jury, and after taking a first vote you find that the vote is 11-1 and you are the lone holdout, would you change your vote simply because the others all agree that you are wrong?

A: No.

We all know that this juror's response is not a lie – the juror may actually believe that he

or she would be able to hold out (or at least would like to believe it). On the other hand, we also know there is nothing in the juror's response that should make us believe he or she actually has the courage to hold out as a minority of one.

C. The judge usually doesn't make it any easier

1. Judges frequently restrict the time for voir dire. Often this is a result of cynicism – their experience tells them that most voir dire is meaningless, so why not cut it short and get on with the trial?

2. Judges almost always want to prevent defense counsel from using voir dire as a means of indoctrinating jurors about the facts of the case or about their theory of defense. And the law says they are allowed to limit us this way.

D. And we often engage in self-defeating behavior by choosing comfort and safety over effectiveness

1. Voir dire is the only place in the trial where we have virtually no control over what happens. Jurors can say anything in response to our questions. We are afraid of "bad" answers to voir dire questions that might taint the rest of the pool or expose weaknesses in our case. We are afraid of the judge cutting us off and making us look bad in front of the jury. We are afraid of saying something that might alienate a juror or even the entire pool of jurors.

2. If a juror gives a "bad" answer we rush to correct or rehabilitate him to make sure the rest of the panel is not infected by the bias.

3. As a result of these fears, we often ask bland meaningless questions that we know the judge will allow and that we know the jurors will give bland, non-threatening answers to.

4. We then fall back on stereotypes of race, age, gender, ethnicity, employment, education, and class to decide who to challenge. Or worse, we persuade ourselves that our "gut feelings" about whether we like a juror or whether the juror likes us are an intelligent basis for exercising our challenges.

Given all these obstacles to effective jury selection, how can we start figuring out how to do it better? My suggestion is to start with some of the things social scientists and students of human behavior have taught us about jurors.

II. THE PRIME DIRECTIVE: VOIR DIRE'S MOST IMPORTANT BEHAVIORAL PRINCIPLE

It is impossible to "educate" or talk a complete stranger out of a strongly held belief in the time available for voir dire.

Think about this for a moment. Everyone in the courtroom tells the juror what the "right" answers are to voir dire questions. Everyone tries hard to lead the juror into giving the "right" answer. And if the juror is honest enough to admit to a bias or preconceived notion about the case, everyone tries to rehabilitate him until he says he can follow the correct path (the judge's instructions, the Constitution, the law). And if we are honest with ourselves, everyone knows this is pure garbage.

Assume a juror says that she would give police testimony more weight than civilian testimony. The judge or a lawyer then "rehabilitates" her by getting her to say she can follow instructions and give testimony equal weight. When this happens, even an honest juror will deliberate, convince herself that she is truly weighing all testimony, and then reach the conclusion that the police were telling the truth. The initial bias, which the juror acknowledged and tried hard to tell us about, determines the outcome every time. It is part of the juror's personality, a product of her upbringing, education, and daily life. And no matter how good a lawyer you are, you can't talk her out of it.

Imagine, though, what would happen if we gave up on the idea of "educating" the juror, or "rehabilitating" her – If we admitted to ourselves that it is impossible to get that juror beyond her bias. We would then be able to completely refocus the goal of our voir dire:

III. THE ONLY PURPOSE OF VOIR DIRE

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

When a juror tells us something bad, there are only two things we should do:

- Believe them
- Get rid of them

This leads us to the most important revision we must make in our approach to voir dire:

We Are Not Selecting Jurors – We Are De-Selecting Jurors

The purpose of voir dire is not to "establish a rapport," or "educate them about our defense," or "enlighten them about the presumption of innocence or reasonable doubt." It is not to figure out whether we like them or they like us. To repeat:

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

Once we accept that the only purpose of voir dire is to get rid of impaired jurors, we have a clear path to figuring out what questions to ask and how to ask them. The only reason to ask a question on voir dire is to give the juror a chance to reveal a reason for us to challenge him. These reasons fall into two categories:

- The juror is unable or unwilling to accept our theory of defense in this case.
- The juror has some bias that impairs his or her ability to sit on any criminal case.

This leads us to two more principles of human behavior that will guide us in asking the right questions on voir dire:

The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.

The more removed a question is from a person's normal, everyday experience, the more likely the person will give an aspirational answer rather than an honest one. Factual questions about personal experiences get factual answers. Theoretical questions about how they will behave in hypothetical courtroom situations get aspirational answers.

A. ***Stop talking and listen*** – the goal of voir dire is to get the juror talking and to listen to his or her answers. You should not be doing most of the talking. You should start by asking open-ended, non-leading questions. Leading questions will get the juror to verbally agree with you but won't let you learn anything about the juror. Voir dire is not cross-examination.

B. Let the jurors do most of the talking. Your job is to listen to them.

C. ***You can't do the same voir dire in every case***

1. Your voir dire must be tailored to your factual theory of defense in each individual case.

2. You must devise questions that will help you understand how each juror will respond to your theory of defense. This means asking questions about how the juror has responded in the

past when faced with an analogous situation.

D. Our tactics should not be aimed at asking the jurors how they would behave if certain situations come up during the trial or during deliberations. That kind of question only gets aspirational answers (how the juror hopes he would behave) or false answers (how the juror would like us to think he would behave). They tell us nothing about how the juror will actually behave. They also invite the judge to shut us down.

E. Out tactics should be aimed at asking jurors about how they behaved in the past when faced with situations analogous to the situation we are dealing with at trial.

1. It is essential that our questions not be about the same situation the juror is going to be considering at trial or about a crime or criminal justice situation – such questions only get aspirational answers.

2. Instead the question should be about an analogous, non-law related situation the juror was actually in. And we must be careful to ask about events that are really analogous to the issues we are interested in learning about.

EX: Your theory of defense is that the police planted evidence to frame your client because the investigating officer is a racist and your client is black. (Remember OJ?)

a. Asking jurors, "are you a racist?" or "do you think it is possible that the police would frame someone because of his race?" will get you nowhere. Most jurors will say "I am not a racist," and "Of course it's possible the police are lying. Anything is possible. I will keep an open mind." And you will have no way of knowing what they are actually thinking.

b. You have a much better chance of learning something useful about the juror by asking an analogous question about the juror's experience with racial bias.

EX: Asking the juror to, "tell us about the most serious incident you ever saw where someone was treated badly because of their race" will help you learn a lot about whether that juror is willing to believe your theory of defense. If the juror tells you about an incident, you will be able to gauge her response and decide how a similar response would affect her view of your case. If the juror says she has never seen such an incident, you have also learned a lot about her view of race.

F. You must consider and treat every prospective juror as a unique individual. It is your job on voir dire to find out about that unique person.

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

1. What do you really need a juror to believe or understand in order to win the case?

2. What do you really need to know about the juror to decide whether he or she is a person you want on the jury for this particular case?

B. What kind of life experiences might a juror have that are analogous to the thing you need a juror to understand about your case or to the things you really need to know about the jurors?

EX: Assume that your client is accused of sexually molesting his 9 year old daughter. Your theory of defense is that your client and his wife were in an ugly divorce proceeding, and the wife got the kid to lie about being abused.

The things you really need to get jurors to believe are:

1. A kid can be manipulated into lying about something this serious.

2. The wife would do something this evil to get what she wanted in the divorce.

The kind of questions you might ask the jurors should focus on analogous situations they may have experienced or seen, such as:

1. Situations they know of where someone in a divorce did something unethical to get at their ex-spouse.

2. Situations they know of where someone got really carried away because they became obsessed with holding a grudge.

3. Situations they know of where an adult convinced a kid to do something she probably knew was wrong.

4. Situations they know of where an adult convinced a kid that something that is really wrong is right.

A fact you really need to know about the jurors is whether they have any experience with child sex abuse that might affect their ability to be fair. Therefore, you must ask them:

5. If they or someone close to them had any personal experience with sexual abuse.

C. When you are choosing which question to ask a particular juror, you should build on the answers the juror gave to the standard questions already asked by the judge and the prosecutor. Often the things you learn about the juror from these questions will give you the opening you need to decide how to ask for a life-experience analogy. Areas that are often fertile ground for

seeking analogies are:

1. Does the juror have kids?
2. Does the juror supervise others at work?
3. Is the juror interested in sports?
4. Who does the juror live with?
5. What are the juror's interests?

D. Another reason to pay attention to the court's and prosecutor's voir dire is that it will often lead you to general subjects that may cause the juror to be biased or impaired. Judges and prosecutors always spend a lot of time talking about reasonable doubt, presumption of innocence, elements of crimes, unanimity, etc. It can be very effective to refer back to the answers the juror gave to the court or prosecutor, and follow up with an open-ended question that allows the juror to elaborate on his answer or explain what those principles mean to him.

V. HOW TO ASK THE QUESTIONS

Although the substance of the questions must be individually tailored to your theory of defense and to the individual jurors, there is a pretty simple formula for effectively structuring the form of the questions:

A. Start with an IMPERATIVE COMMAND:

1. "Tell us about"
2. "Share with us"
3. "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a SUPERLATIVE to describe the experience you want them to talk about:

1. "The best"
2. "The worst"
3. "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. ASK FOR A PERSONAL EXPERIENCE

1. "That you saw"
2. "That happened to you"
3. "That you experienced"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. ALLOW THEM TO SAVE FACE

1. "That you or someone close to you saw"
2. "That happened to you or someone you know"
3. "That you or a friend or relative experienced"

The reason we ask for the personal experience in this way is:

a. Give the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them.

b. To give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.

VI. PUTTING THE QUESTION TOGETHER

EX: Assume we are dealing with the same hypothetical about the child sex case and the divorcing parents. Some of the questions might come out like this:

1. "Tell us about the worst situation you've ever seen where someone involved in a divorce went way over the line in trying to hurt their ex."

2. "Please describe for us the most serious situation when as a child, you or someone you know had an adult try to get you to do something you shouldn't have done."

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

If you are going to ask about sex, race, drugs, alcohol, or anything else that might be a sensitive topic there are several ways of making sure the jurors aren't offended.

A. Before you introduce the topic, tell the jurors that if any of them would prefer to answer in private or at the bench, they should say so.

B. Explain to them why you have to ask about the subject.

C. It often helps to share a personal experience or observation you have had with the subject you will be asking questions about. By doing so, you legitimize the juror's willingness to speak, and show that you are not asking them to do anything that you are not willing to do. If you decide to use this kind of self-revelation as a tool, be sure to follow these rules:

1. Keep your story short.

2. Make sure your story is exactly relevant to the point of the voir dire.
3. Keep your story short.

D. If you are going to voir dire on sensitive subjects, prepare those questions in advance, and try them out on others, to make sure you are asking them in a non-offensive way. Don't make this stuff up in the middle of voir dire.

E. If a juror reveals something that is very personal, painful, or embarrassing, it is essential that you immediately say something that acknowledges their pain and thanks them for speaking so honestly. You cannot just go on with the next question, or even worse, ask something meaningless like, "how did that make you feel."

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

A. Race

1. "Tell us about the most serious incident you ever saw where someone was treated badly because of their race."

2. "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

B. Alcohol/Alcoholism

1. "Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they're drunk."

2. "Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic."

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when they were threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because they thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by their reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

IX. HOW TO FOLLOW-UP WHEN A JUROR SHOWS BIAS

This is the crucial moment of voir dire. Having defined the purpose of voir dire as

identifying and challenging biased or impaired jurors, we now have to figure out what to do when our questions have revealed bias or impairment.

The key to success is counter-intuitive. When a juror gives an answer that suggests (or openly states) some prejudice or preconceived notion about the case, our first instinct is to run away from the answer. We don't want the rest of the panel to be tainted by it. We want to show the juror the error of his ways. We want to convince him to be fair. Actually we should do the exact opposite.

- There is no such thing as a bad answer. An answer either displays bias or it doesn't. If it does, we should welcome an opportunity to establish a challenge for cause.
- If an answer displays or hints at bias, we must immediately address and confront it. Colorado defenders have referred to this strategy as "Run to the Bummer."

<u>A. How To "Run to the Bummer"</u>

Steps to take when a juror suggests some bias or impairment:

1. Mirror the juror's answer: "So you believe that . . . ."

    a. Use the juror's exact language
    b. Don't paraphrase
    c. Don't argue

2. Then ask an open-ended question inviting the juror to explain:

    "Tell me more about that"
    "What experiences have you had that make you believe that?"
    "Can you explain that a little more?"

    No leading questions at this point.

3. Normalize the impairment

    a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
    b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

    a. Reaffirm where the juror is:

"So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: "So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense."

A: "Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn't need your client to testify."

Q: "How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?"

c. Reaffirm where the juror is not (i.e., what the law requires).

"And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense."

d. Get the juror to agree that there is a big difference between these two positions.

"And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn't testify at all."

e. Immunize the juror from rehabilitation

"It sounds to me like you are the kind of person who thinks before they form an opinion, and then won't change that opinion just because someone might want you to agree with them. Is that correct?"

"You wouldn't change your opinion just to save a little time and move this process along?"

"You wouldn't let anyone intimidate you into changing your opinion just to save a little time and move the process along?"

"Are you comfortable swearing an oath to follow a rule 100% even though it's the opposite of the way you see the world?"

"Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings."

Jury *Voir Dire* in Criminal Cases

By Phylis Skloot Bamberger

Voir dire questioning is a process for eliciting, within legally mandated boundaries, information relevant to prospective jurors' qualifications for service. New York law allows lawyers to question each prospective juror about his or her qualifications for service on a particular trial. It is, after all, the well-prepared lawyer who best knows the issues in a case and who is able to fashion an inquiry that is most likely to reveal a potential juror's bias or inability to meet the obligations of judging the evidence and applying the law.

The importance of the *voir dire* in criminal trials has turned it into a virtual battleground between judge and lawyer. If counsel asks questions that are repetitive, improper in form, or that encourage the prospective juror to form an opinion in the case, counsel will provoke adverse rulings from the judge. A tug of war develops, which breeds distrust, so that the judge may preclude even proper questions. The trial is likely, but unnecessarily, off on the wrong foot. This unfortunate state of affairs can be resolved, however, by re-examining the purpose of *voir dire*.

The Purpose of *Voir Dire*

The New York State Court of Appeals and the United States Supreme Court both have made clear that the *voir dire* is essential to the selection of a fair and impartial jury. The *voir dire* discloses prospective jurors who are unable to fulfill the obligations of a juror or who are not capable of undertaking an impartial evaluation of the evidence and application of the relevant legal rules. Such disclosure leads to excusal of jurors for cause. It also enables counsel to exercise peremptory challenges appropriately.

> *Voir dire* provides a means of discovering actual or implied bias and a firmer basis [than stereotyping] upon which the parties may exercise their peremptory challenges intelligently.[1]

Thus, the *voir dire* is the mechanism for carrying out the due process mandate that the fact-finder be fair.[2]

The Respective Roles of Judge and Lawyer

Criminal Procedure Law § 270.15(1)(c) (CPL) and the case law prescribe the roles of the lawyers and the judge in the conduct of the *voir dire*. The lawyers are given "a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications." The role of the court is to prevent "questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law," and "if necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter."

Thus, counsel's opportunity to examine a prospective juror extends to questions that are relevant to the case and not repetitious of inquiries already made.[3] The *voir dire* is to be used to learn about a prospective juror's qualifications; it is not to be used as a mini-trial, an opportunity to persuade jurors to a litigant's point of view, or as a dress rehearsal of the trial.[4]

The judge's traditional role in the *voir dire* is to set out the relevant legal principles. Further, to prevent irrelevant and repetitious questioning by attorneys, the judge has the discretion to preclude, or limit the scope of, counsel's questioning,[5] and the authority to conduct the

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questioning of the prospective jurors. Indeed, the court may ask each prospective juror to complete a questionnaire covering any "fact relevant to his or her service on the jury."

After identifying the attorneys and the parties, and outlining the nature of the case, the court is required to "put to the members of the panel . . . questions affecting their qualifications to serve as jurors in the action." These questions are asked of the prospective jurors as a group or individually. The court may have the jurors answer by raising their hands or speaking individually. The court may interrupt during attorneys' examination to prevent repetitious and irrelevant questions. When the lawyers have completed their questioning, the court may ask such further questions as it deems proper regarding prospective jurors' qualifications.

The trial judge sets the boundaries of the inquiry. Noting that this is "an area of the law which does not lend itself to the formulation of precise standards," the Court of Appeals has said that the trial judge "has broad discretion to control and restrict the scope of the *voir dire* examination."[6]

A juror who cannot provide unequivocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.

Areas for Examination

Both the nature of the case and the characteristics of the jurors determine what information is relevant to selection of a jury and therefore what questions are permissible. In all cases, each prospective juror must be qualified to serve and legally suitable for service. Each juror must be fair and unbiased, able to render an impartial verdict in accord with the evidence and applicable law, and capable of performing the functions required of a juror.[7] Here are some areas for inquiry aimed at establishing jurors' qualifications to serve in criminal trials.

1. ***Statutory requirements for jury service.*** Judiciary Law § 510 lists the qualifications for service. Jurors must be American citizens and residents of the county to which they have been summoned. They must not be convicted of a felony. They must be at least 18 years old and able to understand and communicate in English.[8]

2. ***Statutory requirements to sit on a particular case.*** CPL § 270.20(1)(c) lists the social or familial relationships between the prospective juror and trial participants which require that a prospective juror be excused.

3. ***Ability to fulfill the duties of a juror.*** The duties of a juror include: attending court at the prescribed hours, listening to the evidence, evaluating evidence fairly in accordance with the instructions, deliberating, and making efforts to arrive at a decision. Knowing whether these obligations can be fulfilled requires information about: a prospective juror's physical or mental circumstances and how those circumstances might be accommodated; family or employment obligations that cannot be avoided; economic hardship due to jury service; ability to deliberate with other jurors and to judge the credibility of witnesses;[9] and assurance that the juror's ability to make a decision is not prevented by religious belief or some other tenet.

4. ***Personal information about the juror.*** CPL § 270.20(1)(a) requires examination of the prospective juror's state of mind to determine if the juror can render an impartial verdict. Among the relevant subjects are marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests. Other areas might be relevant depending on the circumstances and issues in a particular case.

5. ***Views about issues related to the case and witnesses who may be called to testify.*** Here, too, state of mind is important. For example, views concerning police witnesses, child witnesses, witnesses with prior convictions, accomplice witnesses, child abuse issues, scientific evidence (or the absence thereof), eye-witness identification, or evidence of confessions may be relevant to a juror's qualifications. The circumstances of the case may determine other areas of questioning.

6. ***Professional expertise.*** If a prospective juror has professional expertise about a material issue in a case, the judge must ask if the prospective juror can deliberate without using personal professional knowledge to assess the evidence and without communicating his or her knowledge as if it were evidence to other members of the jury.

A prospective juror who cannot follow the rule not to disclose expert information to other jurors should be excused.[10] The judge must also question a prospective juror who has professional information about whether that juror can decide the case based on the evidence and disregard any opinion held as a result of personal professional information. A juror who cannot provide unequivocal assurance or whose credibility about the assurance is in doubt would properly be excused for cause.[11]

7. Race and ethnic issues. Questioning prospective jurors about racial or ethnic bias is constitutionally required if counsel so requests and "special circumstances" making the issue part of the case are present. For example, where the defendant was a civil rights worker, examination about racial bias was required.[12] In other cases, a sensitive probe of racial or ethnic issues should be granted if counsel requests it.[13]

8. Juror's ability to follow applicable legal principles. Lawyers cannot ask the prospective jurors about their knowledge of principles of law. This has been the rule in New York for over a century.[14] *People v. Boulware* included prospective jurors' attitudes toward the law among areas that could not be the subject of counsel's inquiries:

> Although counsel has a right to inquire as to the qualifications of the veniremen and their prejudices so as to provide a foundation for a challenge for cause or a peremptory challenge, it is well settled that it is simply not the province of counsel to question prospective jurors as to their attitudes or knowledge of matters of law. Asking whether prospective jurors have any personal feelings for or against a rule of law is like asking whether they think the law is good or bad.[15]

The Court added a wrinkle, however, when it said that it was permissible to ask if a prospective juror would have "any difficulty following the instructions of the court" and whether the juror would obey the court's instructions. Inevitably, questions exploring a juror's ability, or lack thereof, to follow instructions, explore the juror's attitude toward the law. Attitudes that may prevent the prospective juror from following the judge's instructions are relevant to the ability to be fair and unbiased. For example, some prospective jurors in narcotics cases have objected to classification of certain narcotics activities as crimes and the practice of using undercover officers or informers. Or, sometimes a prospective juror objects to the defendant's exercising his right not to testify, believing that an accused should offer an explanation.

Notwithstanding authority disallowing questions about attitude toward the law,[16] some questioning about legal principles is permitted. For example, the Fourth Department has held that it was error to deny the defense attorney the opportunity to question jurors on their ability to follow the *Molineaux* rule;[17] that it is permissible to ask jurors about the legal issue of eyewitness identification;[18] that questions about the burden of proof are proper (by implication);[19] and that it is proper to ask prospective jurors whether their associations with police officers would affect their ability to be fair.[20] The First Department has approved giving the defense the opportunity to ask if the jury could follow the instruction not to draw an adverse inference if the defendant did not testify[21] and has also allowed counsel to inquire about prospective jurors' views of the defendant's absence from the trial.[22] Both the First and Fourth Departments have allowed inquiries as to whether the juror could fairly evaluate the testimony of witnesses who have prior convictions.[23]

Even where questions about a prospective juror's attitude toward the law are not permitted, the trial judge, at the request of counsel, can give instructions on relevant legal principles before or during the *voir dire*.[24] The attorney can then properly ask if the panel members can follow the rule.[25] Such follow-up inquiries may disclose jurors' attitudes toward the law. Recent cases requiring unequivocal statements of impartiality, which include the ability to follow the law, make such a procedure not only proper but advisable.[26]

Questioning That Is Improper

Immaterial Questions

Whether a particular question in a specific case is material or immaterial is determined by the nature of the case and the prospective jurors. What is material in one case might not be so in another case. The First Department has held that open-ended questions about prospective jurors' familiarity with drug trafficking and law enforcement are not permitted, even in drug cases.[27] Nor are open-ended invitations to relate anecdotes and factual information permitted[28] or questions seeking commitments based on hypotheticals.[29] Where an issue was removed from a case or a legal ruling prevented the jury from learning certain information, so that the jurors were not aware of the issue or information, made *voir dire* on those points unnecessary.[30]

Repetitive Questions

The judge determines whether counsel's questions are repetitive based on the questions that have already been asked and the information already elicited.[31]

The judge may interview a prospective juror at any time during the *voir dire* and can use a written questionnaire to gather information. All information disclosed by the judge's questioning is available to counsel. Counsel must take that information into consideration to avoid repetitious questioning. The judge's questions or instructions may be sufficient to justify limiting or precluding questions by counsel.[32] Follow-up questions designed to explore a prospective juror's responses or views will be more successful – both in passing muster with the judge and in supplying information – than questions that elicit answers already given to earlier questions.

Judicial efforts to curb counsel's repetitious questioning have resulted in the imposition of time limits on counsel's *voir dire*. Fifteen minutes for each lawyer has been held appropriate, although the judge may extend the time.[33]

Conclusion

The judge and the lawyers have the same interests in the *voir dire* questioning: to disclose a prospective juror's

bias and partiality, his or her inability to serve because of reasons personal to the juror, or the presence of statutory exclusions. The Court of Appeals has made clear that a prospective juror who cannot unequivocally declare lack of bias must be excused. Trial judges do not want problems based on a juror's hidden bias or inability to fulfill the obligations of a juror, which might result in long interruptions in the trial, substitutions of jurors, and possibly a mistrial. They do not want post-conviction and post-judgment motions or reversals on appeal based on conduct of jurors who should have been excused.

To accomplish the goals of *voir dire* and to persuade the court that a longer than usual time should be allotted for attorney *voir dire*, lawyers can do two things. First, they must be fully prepared with thorough knowledge of the case before jury selection begins. Second, they must frame questions likely to obtain information relevant to the case and to the goals of *voir dire*. Questions designed to obtain new and relevant information are likely to be allowed by the judge. The procedure for eliciting information from prospective jurors can and should be a joint venture between counsel and the judge.

A prospective juror who cannot unequivocally declare lack of bias must be excused.

Judges are well-advised to hold a pre-*voir dire* conference, where well-prepared lawyers can suggest questions to include in the judge's oral or written questions and can argue why their requested questions should be included. At this point there is no limitation based on repetitious questioning or time constraints – relevance is the sole test.

An objection by an adversary to a question's inclusion can be countered with a request for additional discovery in order to strengthen the argument in favor of asking the question. Alternatively, the pre-*voir dire* conference can lead to an agreement between the parties that a particular subject will not be raised at trial. When the judge includes counsel's requested comments or questions in the charge or questions, some of counsel's allotted time can be saved for use in follow-up questioning.

Counsel can also seek the judge's aid in questioning about principles of law. Counsel is prohibited from stating the legal principles in questions or asking jurors about their knowledge of the law. It may not be permissible to ask if a juror agrees with a rule. Counsel can, however, ask the judge to state the relevant legal principle for the jury panel and can then inquire if panel members can follow the law. In response to such questions jurors frequently disclose that they cannot follow the law because they do not agree with the law or cannot understand it.

The importance of the *voir dire* necessarily brings about disputes about how it should be conducted. For example, the time allotted to counsel is often a subject of contention. The use of hypotheticals and references to specific anticipated evidence is subject to adverse judicial rulings. Examination about relevant legal principles is often foreclosed.

Revising the approach to the questioning will enable counsel to ask the questions relevant to uncovering bias or inability to fulfill the function of a juror. Careful preparation is of course the essence of representation, and it is crucial for asking the right questions about the prospective juror's personal lives and beliefs. With careful preparation and well-thought-out questions, the judge and the lawyer can cooperate in exploring bias and each prospective juror's ability to fulfill the role of a sworn juror. ■

1. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143–44 (1994).

2. *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986); *People v. Johnson*, 94 N.Y.2d 600, 610–11, 709 N.Y.S.2d 134 (2000); *People v. Blyden*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982); *People v. Branch*, 46 N.Y.2d 645, 652, 415 N.Y.S.2d 985 (1979); *People v. Boulware*, 29 N.Y.2d 135, 139–40, 324 N.Y.S.2d 30 (1971), *cert. denied*, 405 U.S. 995 (1972).

3. *Boulware*, 29 N.Y.2d at 139–40; *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001); *People v. Porter*, 226 A.D.2d 275, 641 N.Y.S.2d 283 (1st Dep't 1996); *People v. Rampersant*, 182 A.D.2d 373, 581 N.Y.S.2d 784 (1st Dep't 1992).

4. *People v. Corbett*, 68 A.D.2d 772, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980).

5. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118 (4th Dep't), *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 10 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003) (reasonable limits imposed on questions concerning eye-witness identification); *People v. Diaz*, 258 A.D.2d 356, 685 N.Y.S.2d 667 (1st Dep't), *leave denied*, 93 N.Y.2d 969, 695 N.Y.S.2d 55 (1999) (precluded questions about evidence that the prosecutor had not yet decided to use); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998) (curtailed questions about the defendant's right not to testify); *People v. Rodriguez*, 240 A.D.2d 683, 659 N.Y.S.2d 495 (2d Dep't), *leave denied*, 90 N.Y.2d 909, 663 N.Y.S.2d 521 (1997) (precluded questions about self defense).

6. *Boulware*, 29 N.Y.2d at 139–40; *see Carter*, 285 A.D.2d 384; *Byrd*, 284 A.D.2d 201.

7. CPL §§ 270.15(1), 270.20(1)(b).

8. Persons who have received a certificate of Good Conduct or a Certificate of Relief from Civil Disabilities that includes jury service are qualified to serve.

9. *People v. Mendoza*, 191 A.D.2d 648, 595 N.Y.S.2d 113 (2d Dep't), *leave denied*, 81 N.Y.2d 1017, 600 N.Y.S.2d 205 (1993).

10. *People v. Maragh*, 94 N.Y.2d 569, 708 N.Y.S.2d 44 (2000).

11. *People v. Arnold*, 96 N.Y.2d 358, 365–66, 729 N.Y.S.2d 51 (2001).

12. *Ham v. S.C.*, 409 U.S. 524 (1973).

13. *People v. Rubicco*, 34 N.Y.2d 841, 359 N.Y.S.2d 62 (1974) (denial of a request by an Italian defendant to question about ethnic prejudice was an error in the exercise of discretion); *People v. Blyden*, 79 A.D.2d 192, 436 N.Y.S.2d 492 (4th Dep't 1981), *rev'd*, 55 N.Y.2d 73, 76, 447 N.Y.S.2d 886 (1982) (where defendant, victim and witnesses were all African American, it was error not to excuse a prospective juror who did not state he would be fair despite his adverse view of minorities).

14. *People v. Conklin*, 175 N.Y. 333, 341, 67 N.E. 624 (1903).

15. *Boulware*, 29 N.Y.2d at 141 (internal marks and citations omitted).

16. *People v. Martinez*, 298 A.D.2d 897, 749 N.Y.S.2d 118, *leave denied*, 98 N.Y.2d 769, 752 N.Y.S.2d 9 (2002), *cert. denied sub nom. Martinez v. N.Y.*, 538 U.S. 963 (2003); *People v. Coleman*, 262 A.D.2d 219, 692 N.Y.S.2d 352 (1st Dep't), *leave denied*, 94 N.Y.2d 798, 700 N.Y.S.2d 431 (1999); *People v. Swift*, 260 A.D.2d 157, 687 N.Y.S.2d 363 (1st Dep't), *leave denied*, 93 N.Y.2d 930, 693 N.Y.S.2d 513 (1999). *See also People v. Glover*, 206 A.D.2d 826, 616 N.Y.S.2d 128 (4th Dep't), *leave denied*, 84 N.Y.2d 935, 621 N.Y.S.2d 532 (table), (1994) (counsel cannot ask about the juror's understanding of the presumption of innocence); *People v. Corbett*, 68 A.D.2d 772, 778–79, 779, 418 N.Y.S.2d 699 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 714, 436 N.Y.S.2d 273 (1980). In 1985, when the Legislature amended CPL § 270.15 to add subsection (1)(c), the Assembly memorandum stated that the amendment was intended to save time and authorized "the Court *not* [to] permit . . . questions relating to a juror's knowledge of or attitude regarding rules of law such as the presumption of innocence, burden of proof, reasonable doubt, etc" (emphasis added). The Practice Commentary to CPL § 270.15 states that the statute was intended to codify the case law. Preiser, Practice Commentary, McKinney's Cons. Laws of NY Book 11A, Criminal Procedure Law § 270.15 at 275–76 (2002).

17. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (4th Dep't 2005).

18. *Martinez*, 298 A.D.2d 897.

19. *People v. Horning*, 284 A.D.2d 916, 728 N.Y.S.2d 319 (4th Dep't 2001), *leave denied*, 97 N.Y.2d 705, 739 N.Y.S.2d 106 (2002).

20. *People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855, 661 N.Y.S.2d 181 (1997).

21. *People v. Maldonado*, 271 A.D.2d 328, 706 N.Y.S.2d 876 (1st Dep't), *leave denied*, 95 N.Y.2d 867, 715 N.Y.S.2d 222 (2000); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1996).

22. *People v. Castro*, 295 A.D.2d 219, 743 N.Y.S.2d 714 (1st Dep't), *leave denied*, 98 N.Y.2d 729, 749 N.Y.S.2d 479 (2002).

23. *People v. Evans*, 242 A.D.2d 948, 662 N.Y.S.2d 651 (4th Dep't), *leave denied*, 91 N.Y.2d 834, 667 N.Y.S.2d 687 (1997); *Porter*, 226 A.D.2d 276.

24. The idea of charging on the elements of the crime during the *voir dire* is coming into its own. *See People v. Andrews*, 2006 WL 1544053 (2d Dep't 2006) (pre-*voir dire* instruction on elements of the crime is not error); *People v. Miller*, 30 A.D.3d 444, 815 N.Y.S.2d 827 (2d Dep't 2006) (instruction during *voir dire* about acting in concert is proper. The defense, having consented to the giving of the charge, made no objection to its contents).

25. *People v. Harris*, 23 A.D.3d 1038, 803 N.Y.S.2d 854 (2005).

26. *See People v. Chambers*, 97 N.Y.2d 417, 740 N.Y.S.2d 291 (2002); *People v. Bludson*, 97 N.Y.2d 644, 736 N.Y.S.2d 289 (2001).

27. *People v. Green*, 3 A.D.3d 428, 770 N.Y.S.2d 621 (1st Dep't), *leave denied*, 2 N.Y.3d 800 781 N.Y.S.2d 299 (2004); *People v. Byrd*, 284 A.D.2d 201, 728 N.Y.S.2d 134 (1st Dep't), *leave denied*, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001).

28. *Byrd*, 284 A.D.2d 201; *see People v. Salley*, 25 A.D.3d 473, 808 N.Y.S.2d 664 (1st Dep't 2006).

29. *Salley*, 25 A.D.3d 473; *People v. Jackson*, 306 A.D.2d 910, 762 N.Y.S.2d 462 (4th Dep't), *leave denied*, 100 N.Y.2d 595, 766 N.Y.S.2d 170 (2003); *People v. Woolridge*, 272 A.D.2d 242, 707 N.Y.S.2d 634 (1st Dep't 2000); *People v. Davis*, 248 A.D.2d 281, 670 N.Y.S.2d 76 (1st Dep't), *leave denied*, 91 N.Y.2d 1006, 676 N.Y.S.2d 134 (1998).

30. *People v. Stanard*, 42 N.Y.2d 74, 396 N.Y.S.2d 825, *cert. denied*, 434 U.S. 986 (1977).

31. *People v. Carter*, 285 A.D.2d 384, 728 N.Y.S.2d 449 (1st Dep't), *leave denied*, 97 N.Y.2d 680, 738 N.Y.S.2d 295 (2001).

32. *People v. Dinkins*, 278 A.D.2d 43, 717 N.Y.S.2d 167 (1st Dep't 2000), *leave denied*, 96 N.Y.2d 828, 729 N.Y.S.2d 448 (2001); *People v. Wongshing*, 245 A.D.2d 186, 666 N.Y.S.2d 166 (1st Dep't 1997), *leave denied*, 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998); *People v. Garrow*, 151 A.D.2d 877, 542 N.Y.S.2d 849 (3d Dep't), *leave denied*, 74 N.Y.2d 948, 550 N.Y.S.2d 282 (1989); *see People v. Bennett*, 238 A.D.2d 898, 660 N.Y.S.2d 772 (4th Dep't), *leave denied*, 90 N.Y.2d 855 (1997), *cert. denied sub nom. Bennett v. N.Y.*, 524 U.S. 918 (1998); *People v. Porter*, 226 A.D.2d 276, 641 N.Y.S.2d 283 (1st Dep't 1996).

33. *People v. Jean*, 75 N.Y.2d 744, 551 N.Y.S.2d 889 (1989).

CRIMINAL VOIR DIRE QUESTIONS

1. Read statement of the case.

    - Have any of you read or heard anything about this case from any source whatsoever?
    - Given this brief description of the facts, is there anything about this case that would cause you to believe that you could not consider the evidence fairly and impartially according to the law?

2. Introduce self and staff: ____________________. Do any of you know me or any member of my staff on any basis, social, professional or otherwise?

3. The United States is represented by _________________. Counsel please stand. He is an assistant United States attorney.

    - The United States attorney is Dennis Burke. Do any of you know counsel, or the United States attorney, or any of the employees in his office on any basis, social, professional or otherwise?
    - Counsel, please introduce your investigator. Do any of you know the investigator or any employees of his/her office on any basis, social, professional or otherwise?

4. The defendant(s) is/are represented by _______________. Counsel please stand.

    - Do any of you know the defendant's attorney or any employees of his/her office on any basis, social, professional or otherwise?

- Counsel, please introduce your client. Do any of you know the defendant on any basis, social, professional, or otherwise? (Ask in detail about lawyers from the same office, if appropriate.)

5. The witnesses who may be called during this trial are: (See Witness Tab):

   - Do any of you know or think you might know any of these witnesses?

6. Have you or any members of your family, including brothers, sisters, parents or children, or close friends, ever been the victims of criminal conduct? (give small example)

   - If yes, please explain including what the incident was, what police agency investigated, did you have to make a statement, and was the responsible party apprehended?
   - Do you think this experience would prevent you from being fair and impartial in this case?

7. Have you or any members of your family ever been convicted of a felony?

   - If so, which family member, what offense, and what was the disposition?
   - Do you think this experience would prevent you from being fair and impartial in this case?

8. Have you or any members of your family or close friends ever served in the capacity of law enforcement officer:

   - Please note that in the definition of law enforcement officer, I am including not only police officers, but also employees of law enforcement agencies,

military police, ICE, border patrol, DEA, ATF, etc.

- Do you think this relationship would prevent you from being fair and impartial in this case?

9. There will be witnesses called during this trial who are members of law enforcement and who may have been in that profession for a number of years.

- Would you give greater or lesser weight to their testimony solely because of their employment and experience in law enforcement?

10. Have any of you or members of your family been a party or witness in any litigation (excluding domestic relations, traffic, or probate)?

- Do you think this experience would prevent you from being fair and impartial in this case?

11. Do any of you or any of the members of your family have any legal training?

- Do you think this training would affect your ability to be fair and impartial in this case?

12. I will instruct you what the law is at the conclusion of the case. If selected as a juror, you will take an oath to follow the law. Does anyone think you would have trouble following the law even if you may disagree with it?

13. In a civil case the burden of proof is a preponderance of the evidence. This is a criminal case in which the government must prove guilt beyond a reasonable doubt. Does anyone have any difficulty in holding the government to its burden?

14. Here are some fundamental principles of law:

- The fact that an indictment has been filed raises no presumption whatsoever of the guilt of the defendant.
- The United States government must satisfy you beyond a reasonable doubt of the guilt of the defendant.
- The defendant does not have any obligation to testify or to produce any evidence and you may not draw an adverse inference if the defendant chooses not to testify.
- The defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt.
- You must wait until all of the evidence has been presented before making up your minds as to the innocence or guilt of the defendant.
- Does anyone believe that they would have any difficulty following these principles of law?

15. Ladies and gentlemen, we recognize that jury service is probably an inconvenience for you, taking you away from your jobs and families and disrupting your daily routine. Jury service is, however, one of the most important duties that citizens of this country can perform. For this reason, from time to time we ask citizens to make sacrifices and serve on juries, even when inconvenient. Prospective jurors can be excused from jury service if the length of the trial or the daily schedule would impose undue hardship. By undue

hardship I mean more than inconvenience – I mean genuine hardship that would be experienced by you or your family. This case is expected to last ___ days. Would the length of the trial create an undue hardship for any of you?

16. I expect to conduct trial on these dates and times:

____

____

____

____

____

____

- Would this schedule create an undue hardship for any of you?

17. Do any of you have any other reason whatsoever, such as a physical difficulty, a health problem or home problems that might interfere with your serving as a fair and impartial juror in this case?

18. Some of the participants in this trial are ethnic minorities. Has anyone had any contact or experience with ethnic minorities which would make it difficult to render a fair and impartial verdict in this matter?

19. Ladies and Gentlemen, we have handed you a sheet with 10 separate questions. Please stand and answer the questions. The last question asks about your prior jury service. With respect to civil cases, just tell us the number of civil juries on which you

have served. With respect to criminal cases, please indicate the nature of the crime involved and the result of the case, guilty, not guilty, or hung jury, for each of the criminal juries you have served on.

20. Did any of you know each other before this morning?

21. If there are any matters that you would rather discuss privately that may affect your ability to be a fair and impartial juror, please let the Court know.

1. Juror number

2. The general location of your residence

3. Length of time at current residence

4. Education after high school, if any. State your major

5. Marital status

6. Number of children. Ages of children if under 18

7. Employment

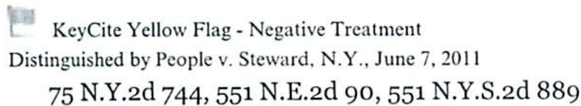
   A. Yourself – current job and types of jobs throughout lifetime

   B. Spouse – current job and types of jobs throughout lifetime

8. Civil, social, fraternal, union or professional organizations. Offices held in them

9. Hobbies or recreational activities

10. Prior jury service – civil or criminal



75 N.Y.2d 744, 551 N.E.2d 90, 551 N.Y.S.2d 889

The People of the State of New York, Respondent,

v.

Nyeirere Jean, Appellant.

Court of Appeals of New York
272
Argued November 17, 1989;
decided December 19, 1989

CITE TITLE AS: People v Jean

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 30, 1989, which affirmed a judgment of the Supreme Court (Lorraine S. Miller, J.), rendered in Kings County upon a verdict convicting defendant of assault in the first degree and assault in the second degree.

People v Jean, 146 AD2d 803, affirmed.

HEADNOTES

Crimes
Jurors
Selection of Jury--Time Limit on Each Attorney's Voir Dire

([1]) An order of the Appellate Division, which affirmed a judgment convicting defendant of assault in the first and second degrees, should be affirmed where the trial court initially questioned three panels of prospective jurors and then exercised its discretion by imposing a time limit of 15 minutes on each attorney's voir dire in the first two rounds and 10 minutes for the third round, resulting in a failure of defense counsel, who objected to the procedure, to individually question some of the prospective jurors, since a trial court has broad discretion to restrict the scope of voir dire (CPL 270.15 [1] [c]) and the record does not support the conclusion that the court abused its discretion or that defendant was prejudiced by the court's exercise of its discretion. Defendant's additional contention that the time limits imposed deprived him of his constitutional right to a fair and impartial jury is without merit.

APPEARANCES OF COUNSEL

Lawrence K. Marks and *Philip L. Weinstein* for appellant.
Elizabeth Holtzman, District Attorney (Richard T. Faughnan and *Barbara D. Underwood* of counsel), for respondent. ***745**

OPINION OF THE COURT

The order of the Appellate Division should be affirmed.

During the court's voir dire in this case, each member of three panels of prospective jurors orally answered a detailed biographical questionnaire, and when necessary and in response to questioning by the court, clarified those answers. The trial court, over defendant's objection, then exercised its discretion by imposing a time limit of 15 minutes on each attorney's voir dire in the first two rounds and 10 minutes for the third round. As a result of these time limits, defense counsel did not individually question some of the prospective jurors, although he was able to direct questions at each of the panels as a group. Although the court provided defense counsel with the opportunity, at a later time, to make a record of questions he claims he was unable to pose to the individual jurors, defense counsel never made such a record.

A trial court has broad discretion to restrict the scope of voir dire by counsel *(People v Pepper,* 59 NY2d 353, 358; *People v Boulware,* 29 NY2d 135, 140) and indeed must preclude repetitive or irrelevant questioning (CPL 270.15 [1] [c]). Any restrictions imposed on voir dire, however, must nevertheless afford defense counsel a fair opportunity to question prospective jurors about relevant matters *(People v Boulware,* 29 NY2d, at 140). The record before us does not support the conclusion that the trial court abused its discretion in this case or that the defendant was prejudiced by the court's exercise of its discretion *(id.; People v Pepper,* 59 NY2d, at 358-359).

Under the circumstances of this case, defendant's additional contention that the time limits imposed deprived him of his constitutional right to a fair and impartial jury is without merit *(see, Rosales-Lopez v United States,* 451 US 182, 189-190).

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Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed in a memorandum.

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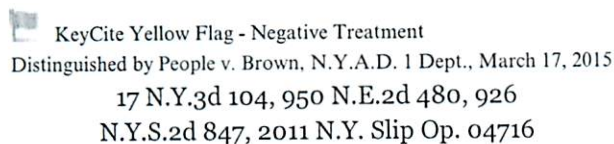

KeyCite Yellow Flag - Negative Treatment
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17 N.Y.3d 104, 950 N.E.2d 480, 926 N.Y.S.2d 847, 2011 N.Y. Slip Op. 04716

**1 The People of the State of New York, Respondent
v
Owen Steward, Appellant.

Court of Appeals of New York
Argued May 2, 2011
Decided June 7, 2011

CITE TITLE AS: People v Steward

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 20, 2010. The Appellate Division affirmed a judgment of the Supreme Court, New York County (Ruth Pickholz, J.), which had convicted defendant, upon a jury verdict, of robbery in the first degree (two counts) and robbery in the second degree.

People v Steward, 72 AD3d 524, reversed.

HEADNOTES

Crimes
Jurors
Selection of Jury—Time Limit on Attorney Questioning of Prospective Jurors

([1]) In the prosecution of defendant for multiple felonies, the trial court, in imposing a five-minute time limit on counsel for questioning of potential jurors during each round of voir dire, abused its discretion by adhering to that unusually short time restriction after defense counsel objected and explained that the time period was insufficient to conduct an adequate inquiry of venire persons in light of the complexity of the prosecution. CPL 270.15, which governs jury selection, does not contain guidelines relating to the duration of voir dire but states that the scope of counsel's examination of prospective jurors shall be within the discretion of the court. While the trial court's discretion is broad, restrictions imposed on voir dire must nevertheless afford counsel a fair opportunity to question prospective jurors about relevant matters. It is not possible to formulate rigid guidelines relating to the duration of voir dire that may be applied in all cases; if, however, a court chooses to allocate a fixed period of time for questioning, the allotment should be appropriate to the circumstances of the case. Here, the trial court erred in its five-minute allotment based on the seriousness and number of charges, the identity of the victim and certain characteristics of prospective jurors that were revealed during examination by the court. Further, the fact that the time limitation appeared to be substantially shorter than the norm in multiple felony cases was an important factor.

Crimes
Jurors
Selection of Jury—Factors to be Considered by Court in Establishing Time Limit on Attorney Questioning of Prospective Jurors

([2]) In exercising its broad discretion under CPL 270.15 to supervise the process of counsel questioning during jury selection, the trial court may choose at the outset to allocate a fixed period of time for such questioning appropriate to the circumstances of the case. It would be impossible to compile an exhaustive list of all the factors that might inform a trial court's determination of this issue, but, in most cases, relevant considerations would include: the ***105** number of jurors and alternate jurors to be selected and the number of peremptory challenges available to the parties; the number, nature and seriousness of the pending charges; any notoriety the case may have received in the media or local community; special considerations arising from the legal issues raised in the case, including anticipated defenses such as justification or a plea of not responsible by reason of mental disease or defect; any unique concerns emanating from the identity or characteristics of the defendant, the victim, the witnesses or counsel; and the extent to which the court will examine prospective jurors on relevant topics. Further, because the propriety of a limitation on counsel questioning must be assessed based on all the circumstances presented in a particular case, the fact that a time restriction appears to be substantially

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shorter than the norm for such restrictions in other cases, though not determinative of the issue, may be an important consideration. Moreover, it is incumbent on counsel to advise the court if any temporal limitation imposed relating to juror questioning is proving, in practice, to be unduly restrictive and prejudicial.

Crimes
Jurors
Selection of Jury—Showing of Prejudice

([3]) Defendant's conviction for robbery was reversed and the case remitted for a new trial where the trial judge improperly restricted attorneys' questioning of prospective jurors to five minutes during each round of voir dire. A trial court's abuse of discretion under CPL 270.15 in limiting the scope of counsel questioning of prospective jurors during jury selection will not warrant reversal unless defendant establishes that he or she suffered prejudice. Here, the prejudice inquiry was hampered by the manner in which the jury selection process was transcribed by the court stenographer, making it difficult to determine whether certain prospective jurors were discharged or retained. In addition, more than a dozen prospective jurors seem to have said something that invited additional inquiry in connection with their knowledge of the victim or status as a crime victim or witness. Given the lack of clarity in the record concerning whether certain prospective jurors were discharged or retained, it could not be said that defendant's claim of prejudice was refuted by the record. Since the record established that the unusually short time restriction imposed by the court prevented counsel from having a sufficient opportunity to examine the various prospective jurors whose statements could reasonably be expected to elicit further questioning, defendant's claim of prejudice could not be discounted.

RESEARCH REFERENCES

Am Jur 2d, Appellate Review § 459; Jury §§ 170, 178, 180.

Carmody-Wait 2d, Jury Selection and Supervision § 191:27; Carmody-Wait 2d, Appeals in Criminal Cases § 207:170.

LaFave, et al., Criminal Procedure (3d ed) §§ 22.3, 24.11.

NY Jur 2d, Criminal Law: Procedure §§ 2544, 3454, 3549, 3647.

ANNOTATION REFERENCE

See ALR Index under Appeal and Error; New Trial; Voir Dire.

*106 FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: voir /2 dire /p object! /6 time /3 limit!

POINTS OF COUNSEL

Office of the Appellate Defender, New York City (*Jalina J. Hudson*, *Richard M. Greenberg* and *Eunice C. Lee* of counsel), for appellant.

I. Owen Steward was denied his right to a fair and impartial jury and to meaningful participation in jury selection where the trial court arbitrarily and systematically imposed a five-minute limit on voir dire, thereby prohibiting defense counsel from conducting an adequate inquiry of prospective jurors. (*People v Branch*, 46 NY2d 645; *People v Rampersant*, 182 AD2d 373; *People v Hoffler*, 53 AD3d 116; *United States v Quinones*, 511 F3d 289; *People v Jean*, 75 NY2d 744; *People v Wright*, 13 AD3d 726; *People v Davis*, 166 AD2d 453; *People v Erickson*, 156 AD2d 760; *People v Habte*, 35 AD3d 1199.) II. The fact-finding province of the jury was usurped where the trial court permitted witnesses to identify Owen Steward on a videotape that had been admitted into evidence, thereby denying Mr. Steward his right to a fair trial. (*People v Narrod*, 23 AD3d 1061; *Corelli v City of New York*, 88 AD2d 810; *Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140; *People v Harte*, 29 AD3d 475.) III. The trial court abused its discretion and denied Owen Steward due process by ruling that, if Mr. Steward chose to testify at trial, he could be impeached by a 13-year-old conviction that was remote and lacked probative value. (*People v Sandoval*, 34 NY2d 371; *People v Ellis*, 94 AD2d 652; *People v Cooke*, 101 AD2d 983; *People v Pippin*, 67 AD2d 413; *People v Schwartzman*, 24 NY2d 241; *People v Williams*, 56 NY2d 236; *People v Dickman*, 42 NY2d 294; *People v Grant*, 7 NY3d 421.)

Cyrus R. Vance, Jr., District Attorney, New York City (*Timothy C. Stone* and *Dana Poole* of counsel), for respondent.

I. Contrary to defendant's largely unpreserved argument, the trial judge properly exercised her broad discretion by setting reasonable time limits on the parties' voir dire. (*People v Boulware*, 29 NY2d 135; *People v Rampersant*, 182 AD2d 373; *People v Jean*, 75 NY2d 744; *People v Nieves*, 2 NY3d 310; *People v Hines*, 97 NY2d 56; *People v Corbett*, 68 AD2d 772, 52 NY2d 714; *People v Jelke*, 284 App Div 211, 308 NY 56; *People v Smith*, 290 AD2d 367, 97 NY2d 762; *People v Rodriguez*, 184 AD2d 317, 80 NY2d 909; *People v Hecker*, 15 NY3d 625.) II. The trial judge appropriately exercised her discretion by allowing testimony about ***107** the nightclub surveillance video. (*People v Russell*, 79 NY2d 1024; *People v Grant*, 7 NY3d 421; *People v Romero*, 78 NY2d 355; *People v Medina*, 53 NY2d 951; *People v Rivera*, 259 AD2d 316; *United States v Robinson*, 804 F2d 280; *People v Harte*, 29 AD3d 475; *Corelli v City of New York*, 88 AD2d 810; *People v Sampson*, 289 AD2d 1022, 97 NY2d 733; *People v Morgan*, 214 AD2d 809, 86 NY2d 783.) III. The court's *Sandoval* ruling was a proper exercise of discretion. (*People v Sandoval*, 34 NY2d 371; *People v Hayes*, 97 NY2d 203; *People v Grant*, 7 NY3d 421; *People v Romero*, 78 NY2d 355; *People v Greer*, 42 NY2d 170; *People v Williams*, 56 NY2d 236; *People v Mayrant*, 43 NY2d 236; *People v Walker*, 83 NY2d 455; *People v Rivera*, 227 AD2d 205, 88 NY2d 993; *People v Rodriguez*, 284 AD2d 243, 97 NY2d 643.) IV. The lower court properly provided the deliberating jurors, at trial defense counsel's request, with written copies of its instructions on the elements of the charged crimes. (*People v Lewis*, 5 NY3d 546; *People v Aezah*, 191 AD2d 312, 81 NY2d 1010; *People v Owens*, 69 NY2d 585; *People v Douglas*, 156 AD2d 173.)

OPINION OF THE COURT

Graffeo, J.

The issue before us in this appeal is whether the trial court abused its discretion in imposing a five-minute limitation on counsel for the questioning of jurors during each round of voir dire in this multiple felony case. Based on the seriousness and number of charges, the ****2** identity of the victim and certain characteristics of prospective jurors that were revealed during examination by the court, we conclude that the trial court erred in adhering to the unusually short time restriction after defense counsel objected. Defendant is therefore entitled to a new trial.

This prosecution arose from a robbery that allegedly occurred outside a Manhattan nightclub in the early morning hours of July 23, 2006. The alleged victim of the crime was Raashaun Casey, a prominent radio personality in New York City known as "DJ Envy" who hosted a show on "HOT 97," a popular radio station. According to the witnesses presented by the People at trial, defendant and an unidentified accomplice accosted Casey and his friend Derrick Parris at gunpoint as the two men were leaving the nightclub, demanding that Casey hand over his $25,000 gold and diamond necklace.

After obtaining the necklace, defendant and the accomplice fled the scene in a vehicle driven by defendant. Casey and Parisfollowed ***108** them in Casey's car, resulting in a high speed car chase through lower Manhattan. The defendant's vehicle crashed and the pursuit continued on foot, with the victim and Parris ultimately apprehending and detaining defendant but not the accomplice (whose identity remains unknown). Defendant offered proof suggesting that he had been beaten by Casey and Parris before the police arrived, which resulted in his hospitalization for several days after his arrest. Defendant was subsequently charged with multiple counts of first- and second-degree robbery as well as various weapon possession offenses.

Prior to the commencement of jury selection, the trial judge informed the parties that the attorneys would be given only five minutes to question each panel of prospective jurors. The judge began voir dire by instructing and examining the venire members on a variety of topics and then permitted counsel to question the panel. At the conclusion of the first round of voir dire, defense counsel objected to the time limit, contending that five minutes was an insufficient period of time for counsel to conduct an adequate inquiry of venire persons in light of the complexity of the prosecution, which involved multiple class B felony charges. Defense counsel suggested that the trial judge's usual five minute "rule" that she had employed in misdemeanor cases—where only six jurors were being selected and the parties had only three peremptory challenges—should not apply in this instance where the charges against defendant were serious, 12 jurors were being selected and the parties would be exercising 15 peremptory challenges. He also cited examples of several topics that he hoped to discuss with the prospective jurors but had not had time to address as he was able to speak to only two of the 16 prospective jurors during the allotted time. Without addressing defendant's objection, the court continued to

enforce the time limit in the two subsequent rounds of voir dire.

The impact of this decision was evident throughout the remainder of voir dire, particularly in the third round. In response to questioning by the court, 12 prospective jurors indicated that they, or people close to them, had **3 been victims of robbery or theft. Several others stated that they had either witnessed or been the victims of violent crimes. Some of these individuals told the judge that they did not "think" their past experiences would affect their ability to deliberate in this case while at least one indicated it might (the court did not follow-up with this juror). After this series of questions, the court sua sponte excused a number of jurors but the record does not *109 indicate whether the individuals that had been crime victims were discharged (defendant suggests that none were). Given the unusual role the victim allegedly played in facilitating defendant's capture and arrest and the considerable number of venire members that had been victims of crime, there were undoubtedly topics that would have been appropriate for follow-up questioning by counsel.

During this same round, two prospective jurors indicated that they had ties to law enforcement and several others identified themselves as lawyers or law students. Two members of the panel stated they had previously served on a jury; one had deliberated to verdict and the other case ended in a hung jury. In addition, three jurors responded that they were familiar with "DJ Envy," with one acknowledging that he listened to the victim's radio show. [1]

Yet, as a result of the time restriction on questioning by counsel, defense counsel had only five minutes to explore the issues that had arisen during questioning by the court. Defense counsel used his time segment to ask follow-up questions of the prospective juror that had previously sat on a deadlocked jury. He also inquired of the panel whether jurors would hold it against his client if he did not give an opening statement and whether they would draw a negative inference from his client's decision not to testify on his own behalf. At this point, the court interrupted counsel to warn him that only one minute remained for questioning. Time expired before defense counsel had an opportunity to examine any of the prospective jurors who stated that they had heard of the victim or indicated that they had been witnesses or victims of crime.

After the jury was selected and sworn, the trial proceeded and defendant was convicted of two counts of robbery in the first degree and one count of robbery in the second degree. On appeal, defendant contended that he should be granted a new trial because counsel **4 was not provided with an adequate opportunity to examine prospective jurors during voir dire and the defense *110 was prejudiced as a result. The Appellate Division rejected this argument and affirmed the conviction (72 AD3d 524 [2010]). A Judge of this Court granted defendant leave to appeal (15 NY3d 810 [2010]) and we now reverse.

([1])In criminal cases, jury selection is governed by CPL 270.15, which directs that prospective jurors will initially be questioned by the trial court (CPL 270.15 [1] [b]). The statute also provides:

> "The court shall permit both parties . . . to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors. Each party shall be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law" (CPL 270.15 [1] [c]).

CPL 270.15 does not contain guidelines relating to the duration of voir dire but states that the scope of counsel's examination of prospective jurors ""shall be within the discretion of the court" (*id.*). This Court has emphasized the broad discretion afforded trial courts in this arena (*see People v Jean*, 75 NY2d 744 [1989]; *People v Pepper*, 59 NY2d 353 [1983]; *People v Boulware*, 29 NY2d 135 [1971], *cert denied* 405 US 995 [1972]), while cautioning that any restrictions imposed on voir dire "must nevertheless afford . . . counsel a fair opportunity to question prospective jurors about relevant matters" (*Jean*, 75 NY2d at 745).

As we have previously recognized, this area of law is not amenable to "the formulation of precise standards or to the fashioning of rigid guidelines" that can be applied across-the-board in all cases (*Boulware*, 29 NY2d at 139). Thus, the Legislature has left to the trial court the supervision of the process of counsel questioning during jury selection. Should a court choose at the outset to allocate a fixed period of time for such questioning, the

allotment should be appropriate to the circumstances of the case.

([2]) It would be impossible to compile an exhaustive list of all the factors that might inform a trial court's determination of this issue. But, in most cases, relevant considerations would include: the number of jurors and alternate jurors to be selected and the number of peremptory challenges available to the parties; the number, nature and seriousness of the pending charges; any notoriety the case may have received in the media or local ***111** community; special considerations arising from the legal issues raised in the case, including anticipated defenses such as justification or a plea of not responsible by reason of mental disease or defect; any unique concerns emanating from the identity or characteristics of the defendant, the victim, the witnesses ****5** or counsel; and the extent to which the court will examine prospective jurors on relevant topics. Because voir dire is a fluid process and it is not always possible to anticipate the issues that may arise during examination of the venire, it is also incumbent on counsel to advise the court if any temporal limitation imposed relating to juror questioning is proving, in practice, to be unduly restrictive and prejudicial.

In this case, the trial judge was particularly conscientious in her extensive examination of the venire and her sua sponte discharge of prospective jurors who offered troubling responses—a commendable approach that is certainly to be encouraged. But the controversy centers around the court's imposition of a five minute restriction on counsel questioning for each round of voir dire. As defendant points out, five minutes per round is significantly shorter than the time restrictions that have previously been upheld in this Court and the Appellate Divisions (*see Jean*, 75 NY2d 744 [trial court did not abuse its discretion in limiting counsel questioning to 15 minutes in first two rounds and 10 minutes in third round of voir dire]; *see e.g. People v Davis*, 166 AD2d 453 [2d Dept 1990], *lv denied* 76 NY2d 985 [1990] [15 minute restriction in first round followed by 10 minutes in second and third rounds not an abuse of discretion]; *People v Erickson*, 156 AD2d 760 [3d Dept 1989], *lv denied* 75 NY2d 966 [1990] [10 minute restriction in each round was not an abuse of discretion]). While we agree with the People that this fact is not determinative because the propriety of a limitation on counsel questioning must be assessed based on all the circumstances presented in a particular case, the fact that the time restriction appears to be substantially shorter than the norm in this multiple felony prosecution is an important consideration in our review of defendant's claim.

It is also significant that defendant was facing four serious class B violent felony charges—offenses punishable by up to 25 years in prison—as well as five other felony offenses. And jury selection was complicated by the fact that the victim was a local radio celebrity. During questioning of the venire, it became apparent that the victim was known to many prospective jurors, with one panel member cryptically indicating that the radio ***112** station that carried his program had a "reputation" in the community. In addition, the facts were somewhat unusual as the case involved allegations that the victims of the crime had turned the tables on the assailants after the robbery, pursuing them in a car chase and eventually capturing defendant (allegedly through the application of significant force). The case therefore raised potentially sensitive issues concerning the use of self-help by crime victims—a consideration that increased in significance once it became apparent that many of the prospective jurors had themselves been victims of crime.

In light of these circumstances, it would not have been surprising if the trial court had allotted a longer-than-average period of time for the attorneys to conduct their questioning. ****6** Instead, the attorneys were significantly limited in their efforts to follow-up on provocative answers given by prospective jurors in response to the court's inquiries. Although defense counsel specifically alerted the court during the first round of voir dire that the time limit was unduly restrictive and that he had been able to examine only two jurors during the allotted five minutes, the judge neither revisited the issue nor explained why she had concluded that five minutes was sufficient. [2]

Defendant argues that the trial judge did not offer an explanation because she applied a similar rule for jury selection in all cases, regardless of the number of jurors being selected, the number or seriousness of the charges or the complexity of the issues. Although such a "one size fits all" approach does not seem to have been what the Legislature had in mind when it granted trial courts broad discretion in CPL 270.15 (1) (c), the fact that the trial court may or may not have imposed the same limitation in other cases is not relevant to the resolution of this appeal. And, from a practical standpoint, some uniformity in jury

selection procedures involving comparable prosecutions is to be expected. Judges may well begin voir dire with the assumption that a time limitation that has proven appropriate in other similar trials will be adequate again (although the court should be willing to reconsider the propriety of that restriction if a party raises a legitimate concern once jury selection is underway).

***113** But, as noted above, this was hardly a typical case. And, after counsel brought the issue to the court's attention, the difficulties posed by the time restriction became more apparent when a significant number of venire members revealed that they, or someone close to them, had been a crime victim and several others indicated their familiarity with the victim. Considering the factors that we have discussed, we conclude that the trial court abused its discretion in continuing to enforce the five-minute limitation on counsel questioning after counsel's timely objection explaining why the time period was insufficient.

([3])This error, standing alone, does not warrant reversal. A trial court's abuse of discretion in limiting the scope of counsel questioning will not warrant reversal unless defendant establishes that he suffered prejudice (*see Jean*, 75 NY2d at 745). In this case, however, the prejudice inquiry is hampered by the manner in which the jury selection process was transcribed by the court stenographer. The prospective jurors that answered questions are not identified in ****7** the record by name, initials or panel number. Rather, all members of the venire are referred to as "prospective juror" in the transcript making it difficult to differentiate between them. And there were occasions when groups of prospective jurors were excused sua sponte by the court but the record fails to identify which individuals were retained and which were dismissed. Through no fault of the court or defense counsel, it is therefore difficult to definitively resolve certain issues relevant to the prejudice inquiry.

Defendant contends that he suffered prejudice because critical issues were revealed during jury selection involving a large number of prospective jurors and, as a result of the five-minute time restriction, his attorney was unable to query the various venire members that had responded to the court's inquiries in a problematic or provocative manner. And he suggests that some of these individuals did, in fact, serve on the jury that convicted him.

Given the lack of clarity in the record concerning whether certain prospective jurors were discharged or retained, we cannot say that defendant's claim of prejudice is refuted by the record. This is not a case where defendant has done nothing other than identify one or two venire persons who made questionable remarks but were not examined by counsel due to a time constraint. In the third round of voir dire alone, more than a dozen prospective jurors seem to have said something that invited additional inquiry in connection with their knowledge of the victim ***114** or status as a crime victim or witness—topics especially pertinent to this case. While none of these jurors made statements that, without further elaboration, would have justified their dismissal for cause, the purpose of follow-up questioning by the court or counsel is to explore hidden biases. During jury selection, attorneys pay close attention to juror responses in order to identify who should be challenged "for cause" and decide whether to exercise peremptory challenges. This process may be thwarted if an insufficient amount of time is permitted for questioning. And, here, due to peculiarities in the record, it is impossible to contradict the contention that the problematic prospective jurors that counsel was unable to examine ultimately sat on the jury that convicted him of multiple class B violent felonies.

Although we conclude that reversal is warranted in this case, we agree with the People that it is certainly possible that the statements made by these venire members were not indicative of any inappropriate bias (this, too, might have been established had counsel been provided a greater opportunity to pursue follow-up questioning). And we also recognize that efficiency is an important consideration and that judges are in the difficult position of having to properly marshal limited court resources while at the same time respecting the rights of jurors and ensuring that the parties receive a fair trial. Sometimes this can be a difficult balance to strike. But the fact remains that trial judges are not always able to cover all avenues of questioning that interest the parties during voir dire—that is why the Legislature has directed that counsel must be provided a "fair opportunity" to examine prospective jurors after the court has ****8** concluded its questioning (*see* CPL 270.15 [1] [c]). Since the record here establishes that the unusually short time restriction imposed by the court prevented counsel from having a sufficient opportunity to examine the various prospective jurors whose statements could reasonably be expected to elicit further questioning, and defendant's claim of

prejudice cannot be discounted, we conclude that the conviction must be reversed and the case remitted for a new trial.

In light of our resolution of the voir dire issue, it is unnecessary for us to consider defendant's other claims of error.

Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

Smith, J. (dissenting). This case seems to me to raise a single issue: Is five minutes of lawyer-conducted voir dire per side too ***115** little time, as a matter of law, for the first round of jury selection in a felony case? I would answer that question no. The majority does not address it, but answers another question, one I do not think is preserved in this record.

After conducting her own voir dire of the first-round panelists, the trial judge gave each counsel five minutes to question them. After they had done so, defense counsel asked "to put on the record my objection to the time limit." He made clear that the objection was one he had made to the same judge before, in other cases: "I tried cases before you in supreme court and criminal court. My objection isn't something new to you, but I need to make it nevertheless." Counsel then spoke about the importance of peremptory challenges and the need for a "fair opportunity to question jurors." He said that he had found "no case where only five minutes was allowed in the first round of voir dire, particularly a Class B violent felony or any other felony." He relied on a mathematical calculation: "Sixteen jurors in the box and five minutes to speak with them averages to less than 20 seconds per [prospective] juror."

Counsel made no criticism of the judge's voir dire, and acknowledged it was ""thorough," but stressed that his job as an advocate was different from the judge's. He summarized by saying: "[M]y objection is that your time limit here in this case violates the defendant's statutory right to exercise preliminary challenges and violates his rights under the state and federal constitution." At the end of his argument, counsel briefly mentioned the circumstances of the present case, saying that he "used up four out of my five minutes" in questions of individual jurors and was forced to omit some subjects he would have covered with the group.

It is clear to me that counsel was making a generic objection to the five minute time limit, though he illustrated his argument by referring to the case at hand. He was saying that, at least in the first round of a felony case, where 12 jurors may be selected and that number of panelists or more—16 in this case—are being interviewed, five minutes is just not enough ****9** time for a lawyer to talk to them. The argument is not an unreasonable one, but I would reject the per se rule that defendant asked for.

CPL 270.15 (1) (c) says, in relevant part:

> "The court shall permit both parties . . . to examine the prospective jurors, individually or collectively,regarding ***116** their qualifications to serve as jurors. Each party shall be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law."

The question here is whether, by limiting defendant to five minutes in the first round, the trial court denied him "a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications." What amounts to "a fair opportunity" is to be decided by the trial court in its discretion (*People v Jean*, 75 NY2d 744 [1989]). In *Jean*, we held that a trial court did not abuse its discretion by limiting counsel to 15 minutes in each of the first two rounds, and 10 minutes in the third.

So long as the trial court allows some appreciable time for lawyer questioning—and five minutes is appreciably more than zero—I would not hold as a matter of law that any minimum number of minutes is necessary. A lawyer who thinks more time is needed to "question the prospective jurors as to any unexplored matter" should tell the court what the "unexplored matter" is; in this case, defense counsel identified no subject not covered in the trial court's own "thorough" questioning. If he had done so, the judge might well have given him more than five minutes.

In exercising its discretion to keep lawyers on a very short leash during voir dire, the trial court implicitly recognized two important facts of courtroom life: Time is precious, and lawyers questioning prospective jurors waste a lot of it. Lawyer-conducted voir dire no doubt has its value, but it is a very inefficient process, as lawyers

understandably try to get to know as well as they possibly can each human being who might serve on the jury. The Legislature's purpose in enacting CPL 270.15 (1) (c) was to avoid such waste of time by "instructing the court to maintain tight control over voir dire questioning" (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.15, at 276 [2002 ed])—a practice we had previously encouraged (*People v Boulware*, 29 NY2d 135, 140 [1971]). I believe we would best serve the legislative goal by not requiring any arbitrary minimum for lawyer-conducted voir dire.

Today's majority does not suggest that it disagrees. Indeed, it disapproves of rules "that can be applied across-the-board in all ***117** cases" in this area (majority op at 110). Yet it reverses ****10** defendant's conviction on a ground that defendant never presented to the trial court: that the special circumstances of this case rendered the five minute limit too strict—especially in the third round of jury selection, where an unusual number of people who had been, or whose relatives had been, crime victims appeared as prospective jurors.

The majority may be right about this, but I do not see why defendant should be excused from preserving the argument. He could have said to the trial judge, essentially, everything the majority now says, but he said none of it. He never suggested that he needed more time in the third round to ask about the crimes of which panelists or their family members had been victims; indeed, he made no objection to the time limit during the third round of jury selection. He did not say, at any stage of the voir dire, that the victim's modest fame, or any other fact unique to this case, made lengthier questioning appropriate. If he had said that, perhaps the trial judge would have agreed with him. But he preserved only a generic objection to the time limit. Since I think that objection should fail, I would affirm.

Chief Judge Lippman and Judges Ciparick, Pigott and Jones concur with Judge Graffeo; Judge Smith dissents and votes to affirm in a separate opinion in which Judge Read concurs.

Order reversed, etc.

FOOTNOTES

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Footnotes

1 This was a recurring theme during jury selection. Before prospective jurors were placed in panels, the trial court generally asked the entire venire whether they had heard of or knew the victim either by the name Raashaun Casey or "DJ Envy." Many individuals raised their hands. The court then instructed that anyone who thought his or her knowledge of the victim would impede fair consideration of the evidence was free to leave. An unidentified number of individuals left—but it appears that many prospective jurors that were familiar with the victim remained, including the three venire members questioned during the third round.

2 While the trial court certainly had no obligation to articulate the basis for her decision on the record, such an explanation would have facilitated appellate review. Without it, we must search the record ourselves to discern whether there was a sufficient basis for the court's conclusion that the time restriction provided counsel the requisite "fair opportunity" to examine prospective jurors.

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