

TOP 10 TIPS FOR EFFECTIVE VOIR DIRE

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Goals of Jury Selection

- Jurors make decisions based on their value systems
- Value Systems are inflexible
- You will not change someone's values during your trial
- You must craft questions to discover these value systems
- Decide prior to trial what values you need your jury to possess

Tip #1

Think About It Early and Often

- Start thinking about the issues as soon as you take the case
- Keep a notebook during trial preparation and discovery stages - list your weaknesses and the State's weaknesses
- Prepare a jury charge and work backwards to decide what issues need to be covered
- Decide whether your client will testify or not
- Decide whether the jury or judge will assess punishment (if D-40 case)

Tip #2 - Research the Court

- Know the size of the panel and how jurors are seated in the room
- Does the court staff provide a seating chart or do you need to make one?
- What issues will the judge cover?
 - Minimum qualifications
 - Disqualifications
 - Exemptions
 - Financial hardship
- Does the judge allow challenges for cause after voir dire or during?
- Are there time limitations?
- Try to sit through a voir dire in this courtroom prior to your trial

Tip #3 - Use Questionnaires

- Well crafted jury questionnaires are value time saving devices or at least an effective use of time
- The best questionnaire is one that elicits the most information in both quantity and quality
- It should be tailored to the case
 - Don't ask for a 10 page questionnaire if you will only have 30 minutes to review it
 - Tailor the questionnaire to be proportionate to the amount of time you have to read it

Questionnaires

- Start it with a confidentiality statement and ask jurors to write "private" next to any answer they don't want to discuss publicly
- If the case involves an allegation of violence, don't allow the defendant to sit and read the answers to the questionnaires during voir dire
- Number the questions, this will help make a record
- Have open-ended questions that allow jurors to express themselves in their own words and leave enough space for the jurors to answer

Tip #4
Avoid Commitment Questions

- A question is proper if it seeks to discover a juror's views on an issue applicable to the case. *Smith v. State*, 703 S.W.2d 641, 643 (Tex.Crim.App.1985).
- An otherwise proper question is impermissible, however, if it attempts to commit the juror to a particular verdict based on particular facts. *Standefor v. State*, 59 S.W.3d 177, 181 (Tex.Crim.App.2001).

Commitment Questions

- Relevant if seeks to uncover grounds for a challenge for cause. Potential juror can be challenged for cause if:
 - Possesses a bias or prejudice for or against Respondent
 - Possesses a bias or prejudice against a phase of the law upon which the State or Respondent is entitled to rely
 - Has already decided the Respondent's guilt or punishment.

Commitment Questions

- Careful phrasing is necessary to defeat objections to your voir dire. If you need to commit the panel on a certain topic, you must word your question so that it will lead to a challenge for cause.
- **Some examples:**
 - **Wrong:** "Would you automatically acquit if the complainant _____ [did not make immediate outcry, recanted, failed to testify]?"
 - **Right:** "Would you be unable to convict if the complainant _____ [did not make immediate outcry, recanted, failed to testify] even if the State proved the elements of the case beyond a reasonable doubt?"
 - **Wrong:** "Would you be impartial in an indecency case involving a victim who was eight to ten years old?"
 - **Right:** "Can you believe that a nine year old would lie?" or "Would you automatically believe a witness just because that witness is nine years old?"

Tip #5 - Communicate Effectively/ Listen Actively

- Your job is to get the jury to like you, trust you and believe you
- Be natural and be yourself
- Don't talk like a lawyer
- Concisely explain your theory of the case in the beginning of your voir dire
 - Tells the jury, in a nutshell, why you should win
 - Jurors remember the first and last things they hear and see
- Self-disclose
- Listen actively and focus on the juror's answers, not on your next question

Tip #6 - Get the Jurors to Do Most of the Talking

- Reinforce whatever response a panel member gives-good or bad. Remember you won't change deeply held beliefs or value systems. Thank jurors for their honesty. You want to hear the good but you really want to hear the bad.
- Create an environment of interactive participation letting panel members give the answers rather than supplying the answers for them.
- The best way to get the jurors to open up is to make statements you know jurors are already thinking - "When you walked in here, were you thinking what had my client done? When my client walked into my office, I was thinking what did you do. And I'm a lawyer. So this is just natural"
- Acknowledge the fear of public speaking
- Tell the jury what is going to happen such as the judge's daily schedule, when breaks occur, lunch, etc. It is hard to attend to something when you are worried about what will happen next.
- Ask open ended questions such as "what do you think or feel about ..."

Tip #7 - Questions You Should Never Use

- Do you understand that the law says ...?
- I take it from your silence that no one disagrees with the proposition that...
- Does anyone have a problem with ...?
- Will you keep an open mind and not decide this case until you have heard all the evidence?
- Can you set aside your bias and decide the case on the facts?
- Has anyone formed an opinion about ...?
- Can everyone of you be a fair and impartial juror in a case like this?
- Will you promise me that...?
- I trust you will agree...?
- Do any members of the panel have any feelings about...?

- All of these questions are dead ends. The question implies the correct answer. If you tell jurors you are looking for fair and impartial jurors, they will give you fair and impartial answers - not necessarily truthful ones.

Tip #8 - Get Jurors to Educate Each Other

- **Looping**
 - A technique whereby an attorney asks one potential juror a specific question, and then repeats the juror's exact response and asks a second juror for a reaction to the first juror's response. A third juror is then asked to respond to the answers given by the first two jurors, repeating their answers exactly and always using their names. This makes jurors more likely to share honest feelings and opinions.
- **Mirroring**
 - A technique of using one juror to find others. Once a juror has expressed an opinion, whether good or bad, ask the rest of the panel who has a similar opinion. This allows you to identify which jurors share biases and prejudices for or against your case. Jurors are more likely to open up and agree or disagree with a fellow juror.

Tip #9 - Explain Burdens of Proof in a Meaningful Way

- Make it real for the jurors, give them a reference point, don't just state the law.
- Identify jurors who have children. Talk about clear and convincing evidence is the standard for the State to take their children away forever.
- Explain "beyond a reasonable doubt" is even more than that.
- Reference this example in your closing argument

Tip #10 - Get Rid of the Bad Jurors

- Jurors don't enter the courthouse as blank slates.
- Strong opinions and long-held beliefs will not change.
- Get the potential juror to admit that this belief or opinion will not change. "You'd agree with me that you have had this opinion or feeling for quite some time."
- "By stating you have these feelings about this matter, this prejudgment, you are saying you would start out in this case having those feelings. If this were a race, we would not be starting off even with the other side, we would be starting a little behind. Given what you have just shared with us, do you mind if I ask the judge to excuse you from serving as a juror in this case."

Get Rid of Bad Jurors

- You need to tell jurors it is okay that this might not be the case for them.
- “If my house was broken into yesterday, I might not be a good juror for a burglary case.”
- You must eliminate in the minds of the jurors that it is embarrassing to admit prejudice.
- Use the language that your case might not be right for that particular panel member. This phrasing moves the negativity from the juror to the case.

How to Bust a Panel

- “No disposition may be made under this section unless the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made. If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition.” Section 54.04(c)
- Punishment range is from nothing to 40 years.
- Jurors must be able to consider the entire punishment range.

VOIR DIRE

One of the most difficult parts of a trial is jury selection. You are required to stand in front of a large group of strangers, who don't want to be there, elicit information from them and have them say things that you really don't want to hear. The entire time, you and your client are being judged. On top of that, how you handle this process will dictate the ultimate outcome in your case.

Jury Trials in Juvenile Cases Generally¹

There is no United States Constitutional right to a jury trial in juvenile cases. In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), the United States Supreme Court held that the Sixth and Fourteenth Amendments of the United States Constitution require the states to make jury trials available in criminal prosecutions in which the potential punishment exceeds six months imprisonment. However, in *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976 (1971), the Supreme Court held that the United States Constitution does not require states to provide jury trials in any juvenile cases, but that they are free to do so under state law if they wish. Grounded in the Texas Constitution, § 54.03(c) of the Texas Family Code provides for jury trials in Texas juvenile cases.

There is only a right to a jury trial at the adjudication hearing unless the case is a determinate sentence case and then the juvenile has the right to have the jury hear the disposition if the juvenile so elects in **writing before commencement of the voir dire examination** of the jury panel. §54.04(a) T.F.C.²

The size of the jury, 12 or 6, depends upon which court has been designated the juvenile court under §51.04 T.F.C. If a district or criminal district court has been designated the juvenile court, then the jury will be comprised of 12 persons, as in other cases tried in district level courts. If the constitutional county court or statutory county court has been designated the juvenile court, then the jury will consist of six persons, as in other cases tried before the jury in those courts. *In the Matter of A.N.M.*, 542 S.W.2d 916 (Tex.Civ.App. –Dallas 1976, no writ)(upholding an adjudication by a six-person jury in a county level court for an offense that would have been a felony and would have required a 12-person jury in district court had it been committed by an

¹ For more information on jury trials generally see *Texas Juvenile Law 7Ed. (2008)* by Dr. Robert O. Dawson, updated by Christian A. Hubner, published by Texas Juvenile Probation Commission.

² It is beyond the scope of this paper to include any discussion of jury trials under Chapter 55 of the Texas Family Code. You should be aware that certain provisions of Chapter 55 provide for jury trials.

adult). Under the determinate sentencing procedure, the jury must consist of 12 persons, even if the case is being tried in a county level court. §54.03(c) T.F.C.

Unlike adult court, a juvenile and his attorney have the sole right to waive a jury trial. Section 54.03(c) provides for trial by jury unless waived under Section 51.09. That section permits a right to be waived by the child and his or her attorney if certain requirements of form are observed. There is no provision that the prosecutor agree or that the court approve of the waiver as there is in an adult criminal prosecution. Art. 1.13(a) C.C.P. In Attorney General Opinion No. JC-0242 (2000), the Attorney General concluded that the State does not have a right to a jury trial in juvenile proceedings.

Each side has six peremptory challenges in an ordinary delinquency case or CINS case if tried in a district level court, and three in a case tried in a county level court. Rule 233 Texas Rules of Civil Procedure. In 2001, §54.03(c) was amended to provide that in determinate sentence cases the jury should be selected in accordance with the requirements in criminal cases. Code of Criminal Procedure Article 35.15 allocates each side 10 strikes in a felony case in which the death penalty is not an issue. If there are multiple defendants, each defendant has six strikes and the State has six for each defendant.

Peremptory challenges are made without assigning any reason for the strikes. However, peremptory strikes may not be used to eliminate members of the defendant's race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In *C.E.J. v. State*, 788 S.W.2d 849 (Tex.App.—Dallas 1990, writ denied), the Court of Appeals held that *Batson* applies to a juvenile delinquency trial under the determinate sentence act. In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the United States Supreme Court held that *Batson* applies to the use of strikes for the purpose of eliminating panel members on account of their race, no matter what the race of the defendant. In *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the Supreme Court held that *Batson* applies to civil lawsuits, which would include juvenile cases. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419 (1994), the Supreme Court extended the prohibition against discrimination in jury selection to include gender, regardless of whether the challenge involves male or female.

Challenges for cause can be made to eliminate from a jury panel persons who cannot be impartial jurors in the case being tried.

TEN TIPS FOR JURY SELECTION³

TIP #1 THINK ABOUT VOIR DIRE EARLY AND OFTEN

Jury selection begins as soon as you take on a case. Think about it during your first meeting with your client. Jurors make decisions based on their value systems which are inflexible. You will not change someone's values during your trial. Therefore, you must craft a voir dire to discover these value systems and decide prior to trial what values you need your jury to possess. The entire time you are thinking about your theory and theme of the case, think about the type of person who would agree with your "story." Keep a voir dire notebook during the trial preparation and discovery stages. In this notebook, jot down issues that will need to be addressed with the jury. Prepare a jury charge and work backwards to decide what issues need to be covered. Decide prior to trial whether your client will or will not testify.

TIP #2 RESEARCH THE COURT PROCESS AND THE JUDGE

Know the size of the panel in advance of jury selection. Find out if the court staff has a seating chart or find out how the jurors will be seated in the courtroom and prepare one yourself. Find out what issues the judge will cover in his or her presentation to the jury, if any. If time is limited, ask the judge to inquire of the jury panel preliminary questions such as minimum qualifications, disqualifications, exemptions, and financial hardship.

Minimum Qualifications.

1. 18 years of age;
2. resident of the county and State of Texas;
3. qualified to vote;
4. sound mind and good moral character;
5. is able to read and write;
6. not convicted of a felony; and
7. not accused of misdemeanor theft or any felony.

Section 62.102 of the Texas Government Code.

Disqualifications.

³ For years, I have tried to read everything written by Robert B. Hirschhorn on jury selection. His articles and books are invaluable on this topic. I have had an opportunity to see him in action on several occasions and even to pick his brain on this topic. I would like to claim that most of the ideas in this paper are mine, but they are not. This paper is a compilation of a number of articles and a book published by Robert. I have used his techniques in every jury trial I have ever tried so I know they work.

1. legal blindness or deafness may disqualify the potential juror if the court determines the juror to be unfit;
2. is interested directly or indirectly in the subject matter of the case;
3. is related by consanguinity or affinity within the third degree to any party in the case;
4. has a bias or prejudice in favor of or against a party in the case; or
5. has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.

Section 62.104(b), 62.1041, 62.105 of the Texas Government Code.

Exemptions.

1. Over the age of 70;
2. has legal custody of a child under the age of 10 and jury service will leave the child without adequate supervision;
3. is a student in a public or private secondary school;
4. is enrolled and is attending an institution of higher learning;
5. is an officer or employee of the legislative branch of the state government;
6. has served as juror within the past twenty-four (24) months; or
7. is the primary care giver for a person who is an invalid unable to care for him/herself.

Section 62.106 of the Texas Government Code.

Find out if the judge does challenges for cause after voir dire or during. Try to persuade the judge to deal with challenges for cause at the end as it is more time efficient to do so. Find out if the judge imposes time limitations and how much time will be allotted to each side. Try to sit through a voir dire in this courtroom prior to your trial. File a motion to use a questionnaire. Convince the judge this is an efficient use of time. Inform the judge you will provide the questionnaires printed in triplicate, clip boards and pens for the jurors' use to remove any logistical objections by the judge. If the judge will not allow the use of a questionnaire, and is placing unreasonable time limits on voir dire, prepare a Motion for Additional Time to Conduct Voir Dire (sample attached).

To preserve error for unreasonable time limits, you must make a record. The three-part inquiry is whether

1. counsel did not prolong voir dire by asking irrelevant, immaterial or superfluous questions;
2. questions that counsel sought to ask were proper voir dire inquiries; and
3. the jury included venire members whom counsel was not allowed to examine.

Do not spend voir dire lecturing the jury. Instead, ask the jurors meaningful and relevant questions. Prior to jury selection, make a list of 5-10 proper voir dire questions. When informed by the judge that time has expired, approach the bench and ask for additional time. If that request is denied, dictate into the record the 5-10 questions which were intended to be asked but were not due to time limitations. Be certain that the questions are proper and appropriate to the case, not covered in one's own voir dire, not thoroughly explored during opposing counsel's voir dire or the voir dire conducted by the court, and once the jury has been selected but before sworn, state for the record those jurors who are seated and were not asked any questions due to insufficient time. *Ratliff v. State*, 690 S.W.2d 597 (Tex. Crim. App. 1985).

TIP #3 USE QUESTIONNAIRES

Well crafted jury questionnaires are valuable as time saving devices as well as eliciting information about how jurors process information. This is important as a lawyer decides the most effective way to present evidence (visual aids, statistical data, etc.). Another use of questionnaires is identifying areas for bonding. An attorney may learn that a panel member has a hobby in common with the client or belongs to the same organization as one of the witnesses. Never overlook an opportunity to help jurors connect with the witnesses on your side of the case.

There is no ideal jury questionnaire. The best questionnaire is one that elicits the most information in both quantity and quality. A questionnaire should be tailored to the individual case. Don't ask for a 10 page questionnaire in a case when you will only have 30 minutes to review the answers. Tailor the length of the questionnaire to be proportionate to the amount of time you have to read them. If the case will be a short one, try to limit the questionnaire to one page.

Start the questionnaire with a confidentiality statement. Voir dire may be intimidating to prospective jurors, especially when they see topics on the questionnaire that they consider private. Attach a cover sheet explaining that the information the panel members provide will be kept confidential. Also ask them to write "private" next to any answer they are not comfortable discussing openly during voir dire. If the jurors trust that the lawyers will respect their privacy, they will be more forthcoming on the answers.

If the case involves an allegation of violence, do not allow the defendant to sit and read the answers to the questionnaires during voir dire. This is not likely to endear you to the jury.

Number the questions. This will allow you to make a clean record and to discuss the questionnaires intelligently with the judge and opposing counsel. If the questions are not numbered, the questionnaire will become more difficult to work with and will leave the judge with a negative impression. Lawyers want judges to see questionnaires as expediting the process rather than slowing it down.

Questionnaires should contain some open-ended questions. Open-ended questions allow panel members to express themselves in their own words. This may help the lawyer find out that some jurors have strong feelings about an issue (used all capital letters or exclamation points in answering the question). Closed questions are good for getting a lot of biographical information quickly. All “yes/no” questions should have a follow-up question like “why” or “please explain your answer.”

Leave enough space for the jurors to answer. People will typically fill in however much space they are given. So lawyers who provide one line for an answer to an open-ended question will receive much less information than those who provide four lines.

Logically organize your questionnaire. The first section should be biographical, the next section should be issue-specific, the third section should be psychological profile questions and the final section should contain questions to determine any connections jurors have to the parties, lawyers or witnesses and any hardship issues. Always put hardship questions last. If the jurors who think they will be let off answer the hardship questions first, they often don’t take the rest of the questionnaire seriously. End the questionnaire with a question that lets jurors say anything that’s on their minds such as “comments” with blank lines after it.

TIP #4 AVOID COMMITMENT QUESTIONS

In 2001, the Court of Criminal Appeals held that voir dire questions are improper if they commit prospective jurors to resolve or refrain from resolving an issue a certain way after learning a particular fact, and either: include more facts than necessary for a challenge for cause, or; would not lead to a valid challenge for cause. *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001). The Court of Criminal Appeals went on to explain its holding in *Standefer* in *Barajas v. State*, 93 S.W.3d 36 (Tex. Crim. App. 2002). In *Barajas*, the Court reasoned as follows:

During voir dire in the appellant's indecency with a child trial, his attorney tried to ask venire members if they could be fair and impartial in a case in which the victim was nine years old. The trial court did not permit the question. We granted review to determine whether the trial court abused its discretion. We conclude that it did not because the question was too vague to constitute a proper question.

The appellant was indicted for two counts of indecency with a child. Tex. Penal Code § 22.11(a). At the time of the offense, the victim was nine years old. During voir dire, the trial judge denied defense counsel's request to ask whether the venire members could be impartial in an indecency case involving a victim who was eight to ten years old or, in the alternative, a victim who was nine years old. Defense counsel also requested and was not permitted to ask whether the venire members could consider probation in a case involving a victim who was eight to ten years old.

The trial court has broad discretion over the process of selecting a jury. *Allridge v. State*, 762 S.W.2d 146, 167 (Tex.Crim.App.1988). The main reason for this is that voir dire could go on forever without reasonable limits. *Faulder v. State*, 745 S.W.2d 327, 334 (Tex.Crim.App.1987). We leave to the trial court's discretion the propriety of a particular question and the trial court's discretion will not be disturbed absent an abuse of discretion. *Allridge*, 762 S.W.2d at 163; *Faulder*, 745 S.W.2d at 334. A trial court's discretion is abused only when a proper question about a proper area of inquiry is prohibited. *Allridge*, 762 S.W.2d at 163.

A question is proper if it seeks to discover a juror's views on an issue applicable to the case. *Smith v. State*, 703 S.W.2d 641, 643 (Tex.Crim.App.1985). An otherwise proper question is impermissible, however, if it attempts to commit the juror to a particular verdict based on particular facts. *Standefer v. State*, 59 S.W.3d 177, 181 (Tex.Crim.App.2001). In addition, a voir dire question that is so vague or broad in nature as to constitute a global fishing expedition is not proper and may be prevented by the trial judge. *Smith*, 703 S.W.2d at 645.

One way a question can be relevant is if it seeks to uncover grounds for a challenge for cause. A venire member may be challenged for cause if: (1) he possesses a bias or

prejudice in favor of or against the defendant, Tex.Code Crim. Proc. art. 35.16(a)(9); (2) he possesses a bias against a phase of the law upon which the State or the defendant is entitled to rely, Tex.Code Crim. Proc. art. 35.16(b)(3) & (c)(2); or (3) he has already decided the defendant's guilt or punishment, Tex.Code Crim. Proc. art. 35.16(a)(10).

We have also held questions to be proper for the purpose of intelligently exercising peremptory challenges. *See, e.g., Hernandez v. State*, 508 S.W.2d 853, 854 (Tex.Crim.App.1974). Reliance on this basis provides no meaningful limit on questions to be asked for the intelligent use of peremptory challenges. The more intelligent or effective the question, the more likely it is that the question will commit the venire member to decide the case, or to refrain from deciding the case, on a basis not required by law.

For example, the most effective question would be "under the evidence that will be introduced in this case, would you convict the defendant?" Obviously, neither the State nor the defendant should be able to ask such a question. But the notion that *any* question is proper for the intelligent exercise of peremptory challenges means that the parties could ask such a question. Therefore, questions that are not clearly improper on some other basis may be asked for purposes of intelligently exercising peremptory challenges subject to reasonable time limits imposed by the trial court. *See Ratliff v. State*, 690 S.W.2d 597, 600 (Tex.Crim.App.1985).

II. Relevant Question

We cannot be certain to what issue in the case the appellant's question was relevant. We can conceive of at least three objects of the question counsel wanted to ask: (1) whether venire members use the victim's age for an improper purpose during the guilt phase, (2) whether venire members use the victim's age in determining credibility of the victim witness, and (3) whether venire members will use the victim's age in assessing punishment if the appellant is found guilty. We will address each of these potential objects.

A. Determining Guilt

The appellant may have wanted to determine whether venire members would consider the victim's age during the guilt phase of the trial. The victim's age is not a fact of consequence that tends to prove or disprove the appellant's guilt, except that, in this case, the State had to prove that the victim was under the age of seventeen. Tex. Penal Code § 22.11(a). If a venire member stated that she would resolve the appellant's guilt on the basis of the victim's age, that venire member would be challengeable for cause. But that is not the question that the appellant asked. The trial court may, within its discretion, require that parties phrase questions in a way that is precise enough to glean relevant information from the venire member's answer.

B. Credibility

The appellant may have wanted to see whether venire members would decide the victim-witness's credibility on the basis of her age. In his brief, the appellant states that this is why he wanted to ask the question. Trial counsel in *Hernandez v. State*, 508 S.W.2d 853 (Tex.Crim.App.1974), had a similar purpose when he requested to ask whether any venire members could not believe that a police officer would lie. *Hernandez*, 508 S.W.2d at 854. We concluded that the question was a proper one and in a proper form because the defendant was not seeking to commit the venire to a conclusion based on a given set of facts. But in that case, the question was precise; the appellant asked a question that focused the venire members' attention on a relevant issue. Again, we think that the trial court does not abuse its discretion when it requires parties to phrase their questions to glean relevant information.

C. Assessing Punishment

The age of a victim is a permissible consideration during the punishment phase. The jury need not decide or refrain from assessing the appellant's punishment on the basis of the age of the victim. See Tex.Code Crim. Proc. art. 37.07 § 3(a)(1). If the appellant's aim was to determine whether venire members would consider the victim's age in assessing punishment, it was an improper pursuit. The appellant may not seek to commit venire members to assess or refrain from assessing punishment on this basis. *Standefer*, 59 S.W.3d at 181.

Some examples:

Wrong: “Would you automatically acquit if the complainant _____ [did not make immediate outcry, recanted, failed to testify]?”

Right: “Would you be unable to convict if the complainant _____ [did not make immediate outcry, recanted, failed to testify] even if the State proved the elements of the case beyond a reasonable doubt?”

Wrong: “Would you be impartial in an indecency case involving a victim who was eight to ten years old?”

Right: “Can you believe that a nine year old would lie?” or “Would you automatically believe a witness just because that witness is nine years old?”

Careful phrasing is necessary to defeat objections to your voir dire. If you need to commit the panel on a certain topic, you must word your question so that it will lead to a challenge for cause. Certain jurors find particular issues so distracting that, regardless of what proof is offered or not offered, they are never going to be able to see past them. If they hold the State to a lower burden of proof than beyond a reasonable doubt or refuse to convict despite proof beyond a reasonable doubt, then they can be challenged for cause. If they would automatically believe a child, based solely on age, regardless of what the child said, they are biased/prejudiced in favor of the child and the State’s case and may be challenged for cause.

TIP #5 COMMUNICATE EFFECTIVELY/LISTEN ACTIVELY

Effective communication will allow a lawyer to communicate the major points of a case and have them understood by the trier of fact. To be an effective communicator, one must be liked, respected and trusted. Being liked is inextricably linked to gaining the respect and the trust of others. Thus, becoming an effective communicator first involves being natural and being oneself. In other words, don’t talk like a lawyer, talk like a person. First impressions are formed in a matter of seconds and are powerful and difficult to reverse. Part of your job during voir dire is to get the jury to like you, trust you, and believe you.

There are many barriers to effective communication with potential jurors. In attempting to elicit information from prospective jurors, you must

make them feel comfortable. The more they identify with you, the better. The physical barriers in the courtroom hinder open communication. There is the railing, the sense that you are on one side and they are on the other. Don't create additional barriers by standing behind a podium or counsel table unless forced to by the judge. Second, you are already perceived as more powerful than the jurors; more educated, wealthier, etc. by virtue of being the attorney on the case. The easiest way to create a comfortable atmosphere is by wearing clothing that helps the jurors identify with you such as a sport coat for men or a dress for women. Power clothing should be worn when you want the jury to focus their attention on you. Thus on days when you give opening statements, conduct critical cross-examinations, conduct direct examination of expert witnesses, give closing arguments, wear the power suit. During jury selection, wear something more humble. In your hands have only the seating chart and your questions. Address the jurors by name, not number.

Concisely explain your theory of the case in the beginning of voir dire. The theory of the case tells a jury, in a nutshell, why you should win. Jurors remember the first and last things they hear and see. This is known as primacy and recency. Therefore, it is critically important that you start and end your voir dire on strong points.

Self-disclose during the voir dire. Tell the jury a bit about yourself as you go through. If a lawyer wants and expects to learn about the jurors, those jurors will feel more comfortable if the lawyer reveals something about herself/himself. Tell the panel members some of your biases so that it is easier for prospective jurors to share their biases with you. For example, you could say that when your client walked in the door, you wondered what he did. If you, the lawyer, thought that about your client, then you expect the jury was thinking the same thing.

Don't ask the same question in voir dire that you ask on the questionnaire. Do follow up in voir dire on the information you obtained from the questionnaire.

Listen actively. Focus on the juror's answers and not worry about your next question.

TIP #6 GET THE JURORS TO DO MOST OF THE TALKING

The only way to know if prospective jurors are good or bad for your case is to get them to talk about themselves, their ideas, and their feelings. To accomplish this goal, you need to convince prospective jurors to talk to you.

The best way to get prospective jurors to open up to you is make the statements you know jurors are already thinking. For example, acknowledge a prospective juror's fear of public speaking by saying, "I know people don't like to speak in groups. In fact, more people have a fear of public speaking than they do of dying. Let me tell you why it is important that you tell both sides how you feel about certain issues." Tell the jury how the process works and what they can expect daily in the trial if no one else has told them. For example, if the judge has a daily schedule with set breaks and time for lunch, tell the jury so they know. It is very hard to actively participate when you don't know what to expect. It also sends the message to the jury that you care about their time and other commitments and realize they have lives beyond the courtroom.

Tell the prospective jurors that the people who end up on the jury are the ones who do not talk during jury selection. This motivates people to speak up, especially those who do not want to serve. Jurors who do not want to serve probably will not be good jurors for either side.

Another technique you can use to make people feel comfortable in opening up is to reinforce whatever response a panel member gives – good or bad. Remember you are not going to change deeply held beliefs or value systems during jury selection. Do not argue with the statement the juror has made. Instead, tell the prospective juror that it is a good thing to voice his opinions, even if the comments are negative toward your side; doing so encourages other jurors to open up and say how they really feel about the issues. The idea is that even if a prospective juror attacks the lawyer personally or attacks the case, the lawyer answers back in a way that encourages honest statements and opinions. Say, "I want to thank you for your honesty. You are doing exactly what we lawyers and the judge have asked you to do. The beauty of our legal system is not only that each person is entitled to his beliefs, but that he is encouraged to express them. So thank you for doing just that. Now, who else on the jury panel agrees with what [Juror's name] expressed?"

Create an environment of interactive participation. Let the panel members give the answer rather than supply the answer for them. For example, to convey a point about bias and prejudice, do not just make the statement to the prospective jurors that former President Bush has a bias against broccoli. Make it more interactive by asking a question that requires their involvement: "Does anybody remember the vegetable that President Bush doesn't like?" This way, the jurors are interacting with you; you keep their attention and you keep them talking.

TIP #7 QUESTIONS ATTORNEYS SHOULD NEVER USE

1. Do you understand that the law says ...?
2. I take it from your silence that no one disagrees with the proposition that ...?
3. Does anyone have a problem with ...?
4. Will you keep an open mind and not decide this case until you have heard all the evidence?
5. Can you set aside your bias and decide the case on the facts?
6. Has anyone formed an opinion about ...?
7. Can every one of you be a fair and impartial juror in a case like this?
8. Will you promise me that ...?
9. I trust you will agree ...?
10. Do any members of the panel have any feelings about ...?

All of these questions are dead end roads. No prospective juror is going to answer any way other than the answer you want. Do not ever assume anything by the silence of the jury. All the silence tells you is that the jurors are not engaged in your voir dire. If you tell jurors you are looking for fair and impartial jurors, they will give you fair and impartial answers. In addition, you are not being honest with jurors when you say you want 12 fair and impartial people. You really want 12 people who will vote your way and they know it.

TIP #8 GET THE JURORS TO EDUCATE EACH OTHER

One of the most effective voir dire techniques is called looping. Looping is a technique whereby an attorney asks one potential juror a specific question and the juror responds. The lawyer then uses the juror's name, repeats the juror's exact words, and then asks another juror for a reaction to what the first juror said. A third juror is then asked to respond to the answers given by the first two jurors, repeating their answers exactly and always using their names.

The benefit of looping is that the jurors educate each other rather than the panel hearing lectures by the lawyers. By repeating the juror's exact words, any juror who disagrees is essentially disagreeing with another panel member and not the attorney. Using the jurors' names compliments the jurors who have spent all day being treated as nameless and faceless entities, and the attorney becomes the one person who has recognized the jurors as people. This technique makes the jurors more likely to share honest feelings and opinions and is the single greatest tool

in encouraging a roomful of strangers to talk about their honest opinions or feelings.

Use one juror to find others. Once a juror has expressed an opinion, whether good or bad, ask the rest of the panel members who has a similar opinion. This is called mirroring. This process allows you to identify which jurors share biases and prejudices for your case and against your case. Once a juror has publicly stated a bias, simply ask who else on the panel has similar feelings or agrees with the first juror. Panel members are much more inclined to open up and agree or disagree with a fellow potential juror.

TIP #9 BODY LANGUAGE

A very telling way to determine the good jurors from the bad jurors is to ask potential jurors to look your client in the eyes and say “Joe Blow, I can give you a fair trial.” You will be able to make a decision about many of the panel members based on that one question. Why? Because some panel members will turn to the judge and say, “Do I have to answer that?” Others will look to the prosecutors. Many panel members will say “sure.” And still others will look directly at your client and say “Joe, I can give you a fair trial.”

In situations such as this, body language of the potential juror is often just as important as the answer itself. Body language is another key ingredient to identifying potentially good or bad jurors.

Some panel members literally sit on the edge of their seats during voir dire. They are excited about being there and truly interested in the case. Some panel members sit back in their chairs, with their arms and legs crossed. They are indicating to the lawyers that they are shutting down.

TIP #10 GET RID OF THE BAD JURORS

Potential jurors need to know they do not enter the courthouse as blank slates. Strong opinions and long-held beliefs will not change. When a panel member expresses a strong negative opinion about your case, get the potential juror to admit that this belief or opinion will not change. “You’d agree with me that you have had this opinion or feeling for quite some time?” Use the magic words in getting rid of this juror by stating, “By stating you have these feelings about this matter, this prejudgment, this leaning that lawyers call a bias or prejudice, you are saying you would start out in this case having those feelings. If this were a race, we would not be starting off even with the other side, that we would be starting a little behind?” Once you incorporate the magic words into the

question, and once the prospective juror affirms it, you've gotten what you need to challenge the juror for cause. Conclude the challenge for cause questioning by asking the juror the following question, "Given what you have just shared with us, do you mind if I ask the judge to excuse you from serving as a juror in this case?"

An effective way of uncovering prejudice and bias is for you to admit to prospective jurors that you have biases of your own, which makes it okay for the potential jurors to admit they have biases and prejudices as well. An alternative technique is to use examples of family members or friends.

You need to convince jurors that it is okay to admit they might not be a good juror for this particular case. To accomplish this, you must eliminate the idea in the prospective juror's mind that it is embarrassing or belittling to admit to prejudice. Language is everything. It may be best not to say that a panel member would make a bad juror for your case, even if that person has admitted to a bias or prejudice. Instead you should say that your case is not right for that particular panel member. This phrasing moves the negativity from the potential juror to the case, thus removing the stigma of being a bad panel member.

ATTACHMENTS

Sample Questions

Sample Motion for Additional Time to Conduct Voir Dire

Sample Memorandum of Law in Support of Motion for Additional Time to Conduct Voir Dire

Sample Motion to Use Questionnaire

Sample Basic Questionnaire

SAMPLE VOIR DIRE QUESTIONS

VIOLENT CRIMES CASES

Have you ever been the victim of a violent act? Tell me about that.

Has anyone close to you died in the last few years? Describe that for me

What cases have you read or heard about involving violence towards other individuals?
How carefully did you follow those cases?

As a child, were you ever the victim of physical or emotional abuse?

Have any of your family members or close friends ever had any experiences involving physical abuse or emotional abuse?

There has been a lot of publicity lately regarding crimes of violence. Why do you think there is a lot of news coverage reporting violence?

What do you consider to be the number one cause of violence in the homes and streets of America today?

Can you give me some examples, if any, of valid reasons for violence towards another human being?

Have you ever been involved in a physical confrontation with another individual? Tell me about that experience.

Some people would agree with the following statement and some would not: "There are sometimes valid or excusable reasons for violence." What do you think? Have you ever heard a different opinion?

What are some of your thoughts and feelings about individuals accused of a violent crime?

Some people feel that persons from lower "socio-economic" cultures or groups are more prone to violence. Why? Why not?

Have you, a family member or friend ever worked for or applied to work for or volunteered time as a social worker, family services worker, at a rape counsel center, crisis center, battered women's shelter or at a similar crisis center?

Have you ever been in a position of being in fear for your life or Fear of being hurt because of the actions of another human being?
Tell me about that.

Have you or your family ever owned any types of firearms or other weapons? If yes, what types and what is the main reason for owning them?

There has been a lot of publicity about crime in America. Have you read or seen any of these stories?

Tell us what you think about the criminal justice system as it relates to individuals accused of violent crimes.

Some people would agree with the statement that regardless of the circumstances "An eye for an eye and a tooth for a tooth." What do you think? Have you ever held a different opinion?

How do you feel about neighborhood watch groups? Do you or your family belong to any? Why?

What experiences have you, your family and friends had in courses taken or training in psychology, psychiatry, sociology, social work or counseling?

Have you, any members of your family or friends ever worked for or applied for a position in law enforcement, District Attorney's Office, U.S. Attorney's Office, F.B.I., D.E.A., Bureau of Tobacco and Firearms, any law office, courthouse or any other law enforcement or legal related position? Tell me about that please.

There has been a lot of publicity about the death penalty and other forms of punishment for violent crimes. What are your feelings about the punishment given to individuals convicted of violent crimes?

There have been a number of publicized cases on 60 Minutes, and other news shows regarding individuals accused and convicted of violent crimes where it was later found out that they were wrongfully convicted. They were not guilty. What have you heard about any of these cases? How do you think that happens? Do you think it happens more than we realize? Why? Why not?

Have you, a family member or friend ever needed to use the services of the District Attorney's Office? Explain please.

Knowing that my client is charged with a violent crime, as you sit and look at him today, what feelings, opinions do you have about him?

Would you feel uncomfortable in any way serving on this jury involving an accusation of violence? Why? Why not?

Jury Service

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

If my home were burglarized, I would not be a good juror on a burglary case. In what kind of case would you not be a good juror?

Who here has previously served on a jury in a criminal case? Did the jury assess punishment?

Why do you think we have 12 jurors? How important is it that all 12 jurors speak their mind during deliberations? Do you think we ought to have unanimous verdicts, that all 12 jurors should agree on the decision or should we let the majority decide? Why?

The jury is the judge of the facts. Each juror decides if they believe a witness's testimony, you can believe all of it, some of it or none of it.

What are some reasons you would believe or not believe a witness?

- a. ability to observe
- b. conduct on the stand
- c. bias or prejudice
- d. probability or improbability of their story

Keeping an open mind sounds easy, but it's really not.

In fact, studies done of juries shows us that as many as 80% of jurors make up their minds after opening statements. What is your reaction to that statistic? Why do so many people make up their mind before hearing all of the evidence?

Some people form impressions quickly and others don't. What do you do?

Tell me about a time when you were called upon to resolve a dispute between family members or friends. Do you feel like the person who told you their side of the story first had the advantage? Why?

Why is it important to hear both sides before making up your mind?

Eyewitness I.D.

How many of you have ever thought you saw someone you knew only to discover it wasn't them or vice versa, had someone come up to you thinking you were someone else?

Tell me about that situation. Why do think that happens?

Have you ever been told you have one of those faces?

Has anyone ever approached you in a store thinking you worked there because of the clothes you were wearing? •

In your opinion, how likely is it that the police would plant an idea or identity in the mind of a witness?

Would you say that you had a good memory for details or do you forget details of an event after a while?

Some people think eyewitness identification testimony is very unreliable and other people feel it is very reliable. Which of the following categories would you put eyewitness identification testimony in: very unreliable, unreliable, very reliable or reliable?

Have you heard of any studies on eyewitness identification testimony?

Have you heard or read about any cases where it turned out that an innocent person was identified?

Have you ever had a situation where you identified one person was your waiter and it turned out that someone else was your waiter?

Alibi

When you're not working, who do spend your time with? Do you think most people spend time with their families and friends?

Who spent time with their family yesterday? If I accused you of burglarizing my home yesterday, who would you call as witnesses to prove you didn't do it? What kinds of concerns would that cause you? Would you worry that the jury wouldn't believe your family because they were your family? Would the fact that the jury is required to presume you are innocent until the State proves you guilty make you feel any better? Why or why not?

When you hear the word alibi, what comes to mind?

Some people feel alibi is a valid defense and other people feel it is a lawyer trick to try and get a guilty person off. Who on the first row feels alibi is legitimate? Who feels it is a lawyer trick?

Presumption of Innocence

What does that term innocent unless or until proven guilty mean to you? Didn't do it, can't treat him like he did,

What are your gut feelings about Respondent being on trial? What are your assumptions, opinions or feelings about him sitting here?

How is it possible that an innocent person could be accused and brought to trial for a crime he or she did not commit?

What have you heard or read about people who were falsely accused of a crime? Do you remember how that person felt or can you imagine how that person felt?

What does Respondent have to show you during this trial for you to find him not guilty?

Burden of Proof

How many people here have ever been on a civil jury?

Do you remember what the burden of proof was?

It was probably a preponderance of the evidence standard. What does that mean? That means more probably than not or 51% of the evidence. For example, it is more probable than not that Mr. Jones rear-ending Ms. Smith caused her back injury. It's a pretty easy standard to meet. Another standard that's higher is clear and convincing evidence. That's the kind of evidence the State would have to come up with to take away your children. If the State said you were an unfit parent and wanted to take away your children, they would have to prove that by clear and convincing evidence. Beyond a reasonable doubt is even higher. That's what we have in criminal cases.

What does beyond a reasonable doubt mean to you?

A doubt based on reason? Any reason? Proof must go beyond that so that you don't have any reasonable doubts.

Does it mean if there are questions a jury can't answer, they must find the person accused not guilty?

If it were up to you, should the state be required to prove the person is guilty, or should a person have to prove he or she is innocent? Why?

Give me an example of a time in which you would have liked someone to give you the benefit of reasonable doubt.

The law says a person can not be convicted of a crime unless each and every member of the jury is convinced the Respondent is guilty beyond a reasonable doubt. Do you agree or disagree with this law? Why?

The law says that if a juror thinks a person might be guilty or probably is guilty, that is not enough and the jury must find the person not guilty. What is your reaction to that law?

Verdict

Have you ever signed a petition, picketed, boycotted or otherwise expressed your opposition to any State law(s) or policy (ies)?

Some people, no matter what, could never speak out against or oppose the state or government. Do you feel that you have the courage to disagree with the Government?

In this case, the State wants and expects you to find Respondent guilty. How would you feel about saying “no” to the State if you felt you had a reasonable doubt at the end of this case?

Have you ever felt ready to stand up to the State? Please tell us about that.

Would you agree that you can still be patriotic and still disagree with the Government? Why?

Do you agree with the saying “what is popular isn’t always right and what’s right isn’t always popular”? Do you think that might apply in a high profile case such as this one?

Fifth Amendment

What are some reasons an innocent person would not testify?

I think it would be fair to say that all of us have had a situation where you said something to someone and that person turned what you said around so that it meant something completely different. When that happened to you, how did that make you feel?

Why do you think one of our constitutional rights that our founding fathers fought for was the right not to testify?

If your son or daughter [or loved one] was on trial and the choice was to testify and run the risk of having their words turned against them, or not testifying, what would be the best thing to do in your opinion? Why?

Why do we all have a constitutional right not to testify?

How would you feel if you had to testify? Would you be nervous? Do you think someone's nervousness could be construed as a sign of guilt?

If you watch talk-shows, you always see one of the guests on the show trying to go back and explain how something they said was taken out of context or misinterpreted. How would you feel if someone twisted your words and made it look like you were not telling the truth?

Some people think if Respondent testifies, he will say anything to beat the charges. Other people feel if he doesn't testify, he must be guilty of the crime. Since I'm his lawyer, I'm sure when the time comes; he will look to me for advice on what to do. I am between a rock and a hard place. What do you think I should do? Do you think people will hold it against Respondent if I advise him not to testify?

Gruesome Photographs

The State will want you to see gruesome and gory photographs. Why do you think the State wants you to see these horrible and disturbing photographs?

The issue in this case is who stabbed [victim's name]. The question you will decide is whether the State has proved to you beyond every possible reasonable doubt that Respondent stabbed him. Since that is the issue, can you think of any valid reason why the State wants you to see these disturbing photographs?

We will be the first to tell you that [victim's name] was stabbed to death but Respondent absolutely did not kill her. Since the photographs don't tell you anything about who stabbed [victim's name], why do you think the State wants you to see the photos?

Evidence

Many people feel that there must be some scientific or physical evidence (i.e. fingerprints, blood, hair, DNA, ballistics, etc.) to connect a person to a crime. Do you feel that in a case where several people are stabbed and there is a struggle with the assailant, there would be some physical or scientific evidence such as finger prints, footprints, hair or even blood? Why?

In deciding whether a person was not guilty or guilty of murder, would you expect there to be some physical evidence proving that the person on trial was at the scene? Why?

Objections

During this trial, there are rules which govern how the lawyers present their case and how a witness should answer a question. If I feel the Prosecutor or witness has broken a rule, I have a duty to object. I know that some jurors dislike it when a lawyer objects because they find it distracting. Will any of you feel it is distracting if I feel I need to object?

Some jurors think a lawyer who makes many objections is trying to hide something. Will any of you feel that way if I make many objections?

Some jurors are distracted or offended when a lawyer makes objections. Other jurors are not affected by objections. How might you react if during this trial I need to make a number of objections?

Police

Do you know a case in which you felt that the police took a shortcut or didn't do everything they should have done to determine who committed a crime? If yes, would you tell us about that?

What kinds of things would you expect the police to do when investigating a murder case?

How would you feel if the police did not do these things when investigating a case as serious as murder?

Why is it important for the police to preserve the scene of a crime and make sure it does not get contaminated?

Some people feel that the State has infinite resources available to investigate suspected criminal activity, and should never take shortcuts. What are your feelings about this?

If the police jumped to conclusion about a murder case and stopped their investigation, how would that make you feel?

Punishment

In a trial involving criminal charges there are two phases: one phase is for deciding guilty or not guilty; the other phase is known as the punishment phase. We do not expect to ever get to the second phase of this trial; however, it is necessary that we explore your feelings about the various punishment options. What are your feelings about discussing this issue even though we believe the jury will find Respondent not guilty?

If a person is found guilty of murder, what would you consider to be the appropriate punishment? Why?

What factors would be important to you in determining the appropriate punishment in a murder case?

People have many different reasons for wanting to impose a sentence on a person convicted of murder. Some reasons are for rehabilitation, punishment or retribution. Which would be your reason for imposing a sentence?

Miscellaneous

What was your first reaction when you saw Respondent and heard the charges against him?

When you look at Respondent what goes through your mind?

What qualities do you possess that would make you a good juror in this case?

If you were the Respondent in this case, would you want someone like you as a juror?
Why?

Would you like to be a juror in this case? Why?

Is there any question I should have asked but haven't?

Is there anything else I should know about you that would be important in deciding if you should be a juror in this case?

CAUSE NO. _____

IN THE MATTER OF

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IN THE

DISTRICT COURT OF

_____ **COUNTY, TEXAS**

MOTION FOR ADDITIONAL TIME TO CONDUCT VOIR DIRE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, the Respondent who by and through his undersigned counsel and pursuant to the 6th and 14th Amendments to the United States Constitution and Article I, Section 9 of the Texas Constitution and files this his Motion For Additional Time to Conduct Voir Dire and in support will show the following:

I.

That the Respondent is presently charged with the offense of sexual assault.

II.

That in order to render reasonably effective assistance of counsel and assure the Respondent that he receives a fair and impartial jury trial, it is necessary for undersigned counsel to extensively voir dire the jury panel on certain principles of law, burden of proof, defenses, and any bias or prejudice which a potential juror may harbor. Adequate time to *voir dire* the jury is essential to counsel's intelligent exercise of peremptory strikes.

III.

That undersigned counsel is prepared to proffer to the Court a list of questions it intends to present to the jurors, thereby demonstrating that said questions are not irrelevant, immaterial or repetitious.

IV.

That undersigned counsel specifically requests no more than two hours per side to *voir dire* the jury.

V.

That to unreasonably limit the time for *voir dire* will deny the Respondent a fair trial and effective assistance of counsel as guaranteed by the United States and Texas Constitutions.

VI.

That Respondent's request is reasonable in light of the Court of Criminal Appeals decisions in *De La Rosa v. State*, 414 S.W.2d 668 (Tex.Cr.App 1967) [20 minutes for *voir dire* was found to be unreasonable]; *Clark v. State*, 608 S.W.2d 667 (Tex.Cr.App 1980) [trial court reversibly erred in unduly restricting the extent of *voir dire* examinations in that Respondent could not intelligently exercise his right to make peremptory challenges].

WHEREFORE PREMISES CONSIDERED, the Respondent respectfully prays the Honorable Court grant this Motion For Additional Time To Conduct *Voir Dire* in order that the Respondent be entitled to *voir dire* for a period of up to two hours and for such other and further relief as this Honorable Court deems necessary and just.

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served by hand delivery upon the District Attorney of Dallas County, Texas, pursuant to the Texas Rules of Procedure on the same day of filing herewith.

CAUSE NO. _____

IN THE MATTER OF

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IN THE _____

DISTRICT COURT OF

_____ **COUNTY, TEXAS**

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION
FOR ADDITIONAL TIME TO CONDUCT VOIR DIRE**

TO THE HONORABLE JUDGE OF SAID COURT:

ARGUMENT AND AUTHORITIES

The right to be represented by counsel, guaranteed by Article I, Section 10 of the Texas Constitution, encompasses the right of counsel to effectively question members of the jury panel in order to intelligently exercise his peremptory challenges. *Mathis v. State*, 576 S.W.2d 835, 836 (Tex.Cr.App.1979). Often times there is a natural tendency on the part of the trial court to place an arbitrary time restriction on *voir dire*. *McManus v. State*, 591 S.W.2d 505 (Tex.Cr.App.1979). Cognizant of the propensity for these two principles to conflict, the Court of Criminal Appeals has set forth criteria to be followed.

In determining whether the trial court unreasonably restricted the time to conduct *voir dire*, the Court has adopted a two-pronged analysis: 1) were the questions proper; and, 2) did counsel seek to indefinitely prolong the *voir dire*. *Ratliff v. State*, 690 S.W.2d 597 (Tex.Cr.App.1985, en banc.).

The precise issue addressed by the Court in *Ratliff* was whether the trial court abused its discretion by limiting the Respondent's entire *voir dire* to one hour and thirty-five minutes. Speaking for the majority of the Court, Judge W.C.

Davis found that such a restriction was unreasonable. In so finding, the court stated, “Various and unpredictable considerations such as the complexity of the case or the make-up of the venire may prolong a *voir dire* examination. Challenges for cause and discussions at the bench can contribute to a lengthy *voir dire* examination. In the instant case appellant was . . . forced to expend additional time examining three or four jurors before the bench due to challenges for cause. He also had to question some jurors more than others because of their responses to his questions that were directed at the whole venire.” *Ratliff v. State*, at 600. The *Ratliff* opinion demonstrates the Court's acute awareness of the dilemma confronting counsel who seeks to conduct a thorough examination of the veniremen. To intelligently exercise peremptory challenges, counsel must elicit information from each individual juror and develop a rapport with that person. In even the simplest felony case, counsel's brief explanation of principles of law, followed by questions such as: 1) can you consider the full range of punishment; 2) have you ever been the victim of a crime; 3) whether any family member or close friend is in law enforcement; 4) whether they could render a verdict based solely upon the evidence; 5) whether they have a bias or prejudice against the Respondent; and, 6) general background information regarding education, prior employment, military service, membership in organizations, etc., could last well in excess of an hour or two. When counsel prepares a proper or thorough *voir dire*, controversial issues are raised which necessitate bench conferences, objections and challenges for cause, all of which attribute to necessarily prolonging the jury selection process. This is

a small price to pay to assure the accused receives a fair trial. The case law substantiates this proposition.

Ratliff is a reaffirmation of a string of cases which have reversed convictions due to unreasonable limitation of voir dire examination. In Thomas v. State, 658 S.W.2d 175 (Tex.Cr.App.1983), the Appellant's conviction was reversed because the time limitation placed upon the examination deprived counsel of the opportunity to ask relevant questions to individual jurors who were ultimately selected to be on the jury.

“Because it is impossible to know beforehand how many prospective jurors may require significant examination for clarification of their points of view, no safe prediction of time required for voir dire can be made. Thus, although hindsight may reveal, as it did in Whitaker, that limitation of voir dire was not reasonable and was not an abuse of discretion in light of how voir dire actually proceeded, the very unpredictability of what voir dire will reveal makes it impossible to say beforehand that any particular time period will not reveal itself to be unreasonable as the events of voir dire unfold.” Thomas at 76.

In Thomas, the Court made reference to the Whitaker decision. There the Court held that the fifty (50) minute time limitation was not an abuse of discretion because the appellate record failed to reveal whether or not the jury was composed entirely from individuals that counsel had individually examined. Whitaker v. State, 658 S.W.2d 781 (Tex.Cr.App.1983).

Finally, in Clark v. State, 608 S.W.2d 667 (Tex.Cr.App.1980) and De La Rosa v. State, 414 S.W.2d 668 (Tex.Cr.App.1967) the Court of Criminal Appeals

held that the trial court abused its discretion by limiting *voir dire* to a mere thirty (30) minutes. In *Clark*, the court stated, “In view of the trial court's arbitrary time limitation on appellant's *voir dire* which consisted almost entirely of relevant, material and necessary questions, and in view of the trial court's refusal to allow appellant to ask a proper question about a proper area of inquiry, we concluded that the court erred in depriving appellant of a valuable right to intelligently exercise his peremptory challenges and thus abused its discretion.” *Clark*, supra, at 70.

In determining what constitutes a reasonable limitation on *voir dire*, it must be noted that the appellate court has never relied on the range of punishment as the determining factor. Instead, the Court has employed a more logical yardstick: did counsel use his or her time in an effective manner by asking proper and relevant questions?

Applied *sub judice*, counsel *does not* seek a limitless *voir dire* examination. Counsel has prepared proper and relevant questions which she desires to propound to the jury panel, some generally and some individually. The central issue in this case involves child sexual abuse. This area of inquiry will undoubtedly generate very strong opinions by members of the jury. To effectively represent the accused and intelligently exercise his peremptory challenges, counsel will be required to delve into dialogue with many of the jurors. This will necessitate extra time with those jurors who express an opinion on this hotly contested public issue.

WHEREFORE, PREMISES CONSIDERED, counsel respectfully prays that

this Honorable Court grant counsel's request that counsel be given sufficient time to ask relevant and proper questions to each juror individually and for such other further relief as this Honorable Court deems necessary and just.

Respectfully submitted,

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served by hand delivery upon the District Attorney of Dallas County, Texas, pursuant to the Texas Rules of Procedure on the same day of filing herewith.

CAUSE NO. JD-

IN THE MATTER OF

§ IN THE DISTRICT COURT

§

§ _____ JUDICIAL DISTRICT

§

§ _____ COUNTY, TEXAS

MOTION TO USE JUROR QUESTIONNAIRE

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Respondent in the above entitled and numbered cause and through his attorney respectfully requests the Court grant this Motion and for good cause would show as follows:

I.

There are three goals of voir dire: to receive information; to give information; and, to develop rapport. The most important of these goals is to receive information about the jurors. The attached questionnaire would be a useful tool in obtaining demographic and historical information about the jurors. This information would be useful to both the State and the Defense in making good use of challenges for cause as well as peremptory challenges.

II.

Due process requires the Respondent have at least the opportunity to exercise his peremptory challenges meaningfully. To be meaningful, the adequacy of voir dire examination must permit the Respondent an opportunity to make reasonably intelligent use of his peremptory challenges and challenges for cause. Knox v. Collins, 928 F.2d 657 (5th Cir. 1991). The Respondent must necessarily receive enough information through voir dire examination to intelligently exercise peremptory challenges, effectively challenge the prosecutor's use of peremptory challenges, and defend against accusations of Batson violations on the Respondent's part. A juror questionnaire would aid in providing the information needed. It would be a good use of the court's time to ask the jurors to complete the attached questionnaire.

WHEREFORE, premises considered, Respondent respectfully requests the Court grant this Motion.

Respectfully submitted,

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion was served on the District Attorney of Dallas County by personal delivery on the same date of filing herewith.

CONFIDENTIAL JUROR QUESTIONNAIRE

1. Name _____
2. Sex Male Female
3. Date of birth _____
4. Place of birth _____ (city and state)
5. How long have you lived in Dallas County? _____
6. What major intersection is near your home?

7. What other places (city, state or country) have you lived?

8. Marital status Married Never married Separated Divorced
 Widowed
9. With regard to your residence, indicate whether you Own Rent
10. Your occupation:

(If retired or unemployed, write retired or unemployed and give your previous occupation.)

11. If currently employed outside the home:
Give name of employer and place of work

Length of time worked there: _____
Your job title and
duties _____
About how many hours a week do you work?

What are your normal working hours?

12. Do you have a second job? Yes No
If yes, name of employer and place of work

Your job duties

12. What other types of jobs have you held as an adult?

13. How many years of schooling have you completed?

14. If you attended college or vocation school:

Major areas of study:

What degrees or certificates did you earn?

15. If you have had military experience, give highest rank and branch of service:

16. What religious, civic, social, union, professional, fraternal, political or recreational organizations do you belong to or participate in, and what offices, if any, do you hold in these organizations?

17. If you are married, spouse's full name

18. Spouse's occupation and employer

(If spouse is retired or unemployed write retired or unemployed and give previous occupation.)

19. Do you have any children or stepchildren? () Yes () No If yes:

Child #1: Sex _____ Age _____ Occupation

City lives in

Child #2: Sex _____ Age _____ Occupation

City lives in

Child #3: Sex _____ Age _____ Occupation

City lives in

Child #4: Sex _____ Age _____ Occupation

City lives in

20. Have you ever appeared as a witness in any court proceeding? () Yes
() No

If yes, was this a () Civil or () Criminal case?

What were the circumstances?

—

21. Have you ever served as a juror? () Yes () No If yes:

Year Court/Location Type of case Were you a Foreperson?

_____ () Yes () No

_____ () Yes () No

22. Have you or any members of your family ever been the victim of a crime?

() Yes () No

If yes, who was the victim?

What crime? _____

When? _____

Was an arrest made? () Yes () No

23. Have you or any members of your immediate family been a Respondent in a criminal case?

() Yes () No

If yes, who and relationship to you?

Type of crime accused of committing?

Was there a conviction? () Yes () No

24. Have you, any family member or any close friends ever worked for a district attorney or other prosecuting attorney's office? () Yes () No

If yes, who and relationship to you

Position
held _____

Name of attorney and office

Dates of employment

25. Have you or any family members ever worked for any other attorney or law office?

() Yes () No

If yes, who and relationship to you

Position
held _____

Name of attorney and office

Dates of employment

26. Have you or any family member ever been represented by an attorney?

Yes No

If yes, give name of attorney or law firm

27. Do you have a physical disability of which we need to be aware?

Yes No

If yes, is there any special equipment or services we can provide during your jury service?

Yes No

28. Are you presently taking medicine that may affect your ability to serve as a juror?

Yes No

If yes, please explain

29. Is there any reason you could not serve as a juror? Yes No

If yes, please explain

I SWEAR OR AFFIRM THAT THE ABOVE INFORMATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Signature

Date
