# FINDING YOUR DREAM JURORS AND AVOIDING THOSE WHO GIVE YOU NIGHTMARES

## The 15 minute Voir Dire

**The Ten Scariest Criminal Issues in Voir Dire**

In the early days of my law practice, the general wisdom about jury selection was that you never asked the jury to express any bad opinions or attitudes that might be unfavorable to your case. The thinking in those days was that if one panel member expressed a bad opinion, it would somehow “taint” the rest of the panel. If a bad opinion was stated in open court, a young lawyer was advised to request a mistrial and start over, trying not to tread into that dangerous territory again. In 31 years of practice this was some of the worst advice I ever received about how to select a jury. This approach did not work then and does not work now.

Jury panels today are more educated than ever before about the judicial process, the rules of evidence, and the conduct of trials. Potential jurors come to the courtroom with strong attitudes and opinions about criminal trials, lawyers and the accused person sitting in the chair next to you. Some have the same kind of beliefs you may have expressed about problems with the legal system. Some of them come to the courtroom with an agenda, i.e., that they are not going to be like those other “crazy juries” that let someone off on a technicality. Ironically, as jurors have gotten more opinionated and biased, many judges have responded by limiting jury selection so these “attitudes” aren’t openly expressed, rather than recognizing that, the more biased the jury pool, the greater the need for an extensive voir dire.

Your job in jury selection, if the judge allows you to question the panel, is to identify and eliminate those “agenda” jurors who are there to wreak havoc in the jury room, who will disregard the presumption of innocence and, regardless of whether there

is proof beyond a reasonable doubt, will lead the charge to convict. The only way to do that is to ask them the things that scare you most.

If you do not bring the attitudes of those jurors out in voir dire, they will, without your knowledge take those attitudes back to the jury room and, behind closed doors, do everything they can to prevent an acquittal, even when your client is innocent.

This paper will discuss the basics of voir dire, the 15 minute voir dire and addressing the 10 scariest issues in a criminal defense case.

## BASIC VOIR DIRE - GETTING THE PANEL TO TALK

There you are standing in front of a group of 30-70 complete strangers and you want them to open up to you about their secret, innermost fears and feelings about crime, lawyers and the legal system. How do you get them talking? In this age of Oprah Winfrey-style talk shows and self-confessions, it is easier than you might think. The key is to focus on what should be the three goals of jury selection:

Gather Information

Remind the jury about the legal process Develop Rapport

## Gather Information

The more you know about a potential juror, the better off you are. If you are given enough time for a thorough voir dire, you must get sufficient information from a panel member to help you decide whether they are “one of yours,” “a disciple of the prosecution” or somewhere in the mushy middle. Without that information you will not be able to challenge for cause or intelligently exercise a peremptory challenge. Here is how you get them talking:

### Ask Open-Ended Questions

If you want jurors to talk to you, then you must ask them questions that cannot be answered merely with a yes or no. Start your questions with the journalist’s five W’s or an H – Who?, What?, When?, Where?, Why?, and How?. To that list, you can add open- ended questions that ask them to “describe” or that start with “**How many of you...**think feel or believe. . . .” This last question gives those answering some comfort that there may be other people who feel the way they do and makes them believe they won’t be the only one raising their hand in answer to your question.

### Let Them Talk More Than You

The voir dire process is a terrifying one for most lawyers, who are typically control freaks. It’s not like direct or cross-examination where you know what the witnesses will say and can thoroughly prepare to deal with those limited areas. In jury

selection, no matter how much you prepare, you have no idea what may come out of the mouths of some of these prospective jurors. Jury selection is like walking across a tightrope without a net.

Many lawyers cope with their fear of jury selection by doing all the talking. This keeps you from having to deal with any unexpected juror answers, but also prevents you from really gaining any information from the panel. Ask your question, then be quiet and listen to the answers. Do not explain things to them. Let them explain things to you.

That is the best way to gather the most information possible.

### No Lawyer Words

A former client once postulated (a lawyer word) that attorneys deliberately use Latin phrases and big words so they could justify their high fees. Although some people think big words work for fee setting, speaking in a foreign lawyer language does nothing to aid communications with your prospective jury panel.

If they don’t understand the words you are using, they will not let you know. It is embarrassing to admit in public that you have no idea what somebody is talking about.

Rather than question your phrasing, most jurors will just nod as if they know what you’re talking about and you will not get an accurate answer to the things you are concerned about.

Contrary to the belief of some attorneys, jurors are not impressed by ten-dollar words. They tend to gravitate toward the lawyer in the courtroom that speaks in their language. Some examples of words to use, rather than the words on the right:

|  |  |  |
| --- | --- | --- |
| - - The accused/name | **not** | the defendant |
| - - The prosecutor | **not** | the State, the People’s lawyer |
| - - Before/after | **not** | prior/subsequent |
| - - car/truck | **not** | vehicle |
| - - jury selection | **not** | voir dire |

### Don’t be Judgmental

Nothing will stop the flow of information like a well placed “tsk, tsk,” even if it is under your breath. Even worse is asking that the juror be excused for cause in front of the other panel members. No one else will talk to you about their true feelings and risk public humiliation.

No matter how abhorrent the opinion being given, thank the prospective juror for their honesty. You should mean it. If the candidate had not been honest with you, you would not know that you needed to strike him or her. If you have made a decision to try and strike the prospective juror for cause, keep gathering sufficient information for your challenge. Once you have enough information, move on or “bounce” (see below) off another juror.

### No Note Taking

How would you feel if someone you were having a conversation with began writing down everything that you said? Chances are you would stop talking to the person who was writing down your comments. The prospective jurors feel the same way.

No matter how small your office, you cannot afford to do voir dire alone and try to keep track of the information being provided by the jurors. If you do not have the resources to hire a jury consultant, then have a friend, a secretary, an associate or some intuitive person from off the street be responsible for writing down the information provided by the jurors. This will free you to maintain eye contact with each juror and to carry on a conversation that encourages them to provide more information.

## Remind the Jury About Truths They Already Know

Modern jurors now come to the courtroom with some information and a great deal of misinformation about how the court system works. Although they may have watched all of the latest “hot” criminal defense trial, they still may not understand some of the simpler concepts like the difference between a criminal and civil case and or the plaintiff and the defendant. They look for someone in the courtroom to help them understand all these things. Although voir dire is not the time to explain all of your case or all of the intricacies of the criminal justice system, you can remind them of some of the basic truths they know about how the system is supposed to work and their role in the system.

### No Lecturing. Make Them Think

How much information do you remember from all of those classroom lectures you heard in high school and college? Unless the speaker was unusually dynamic, you probably don’t remember much. Most learning comes not from someone telling you what to think, but from thinking things out yourself. The same is true for your prospective jurors.

You will get nowhere by telling them what to think. Avoid the standard lawyer questions you hear in voir dire that begin with the following:

-- I’m sure we can all agree that .

-- Do you all agree that everyone deserves a fair trial (before you send them off to prison)?

-- By your silence, I assume all of you can be fair and impartial to my client.

None of these lecturing-type statements get you anywhere with the jury. A juror is unlikely to challenge you on a statement of a legal principle, even if he or she disagrees. Some will nod their heads, most will do nothing, and you will have no idea about their true feelings.

Instead, educate them through questions about some of the unique challenges they may be facing as jurors in your case. Do you remember the Socratic method? That is how we learned to think like lawyers and how the jurors can learn to do their jobs in this case. Remember, many of the things they will be asked to do are new to them. They may never have thought about how they will accomplish these tasks. Asking them questions about how they will judge credibility will tell you much about their thinking process and will educate both you and them along the way. Consider the following:

Q. How many of you have ever had to decide between two people (your kids, your employees) who was telling the truth?

Q. How did you go about determining who was telling the truth between those two people?

Q. What factors were important to you in making that determination?

Q. Can you think of some reasons why a person (or your children) might lie? [You might go to several jurors for the answers to these questions. They will probably come up with the reasons pertinent to your case – for money, to get out of trouble, for revenge. If not, then ask whether they have ever seen people lie for those reasons]

Q. Can you think of some reasons why a person, even an “eyewitness,” might be mistaken? [Again, go to several jurors to elicit the factors that apply to your case – bad lighting, distance, fear, etc.]

1. Are there some things you shouldn’t use in deciding whether one person is telling the truth and another is not?
	* - How about the race of the person? Why shouldn’t that be used?
	* - How about a person’s occupation? Why shouldn’t that be used?
	* - How about the sex of the person? Why shouldn’t that be used?

### Intersperse Facts with Questions

In Texas you can give your opening statement in voir dire. In Arizona, you can give a brief opening before jury selection begins. For those of you who practice in those jurisdictions, have at it. Every where else, you have to intersperse your facts and questions.

Although most judges feel voir dire is not a time to give your complete opening statement, you have to give the jury some idea of what your case is about in order for them to intelligently evaluate their own biases and give you honest answers to your questions. Once prospective jurors have an understanding of the facts of the case, they are more easily able to identify and tell you about their own personal biases.

In truth, lawyers don’t eliminate jurors as much as jurors eliminate themselves by an honest recitation of their potential prejudices. That works best when they know more facts about the case. Even the most restrictive judges should understand that the jury has to know something about the case to (a) respond to your questions and (b) not get angry that you are asking these personal questions for no reason. For example, it would be rude to ask for a show of hands of all those women who have been raped or had family members raped, without first explaining that your case involves a sexual assault.

The best and probably the most interesting way to let the jury know about the important facts of your case in voir dire is to intersperse the facts with your questions. For example, does your case involve self-defense? Tell the jury that before you ask them whether they have ever been in a situation where they were afraid they might be hurt or killed.

### Questions Should Be Related to Your Theme/Theories of the Case

Why wait until opening to try out the themes in your case? For example, if one of the theories of the case is police misconduct, you have to run that up the flagpole in jury selection and see how your jurors respond. Despite the Rodney King case, some of the panel will still never believe that law enforcement officers could ever act improperly or “testilie”. If they are unwilling to even consider what may be a central theory of your case, you want to find them and hopefully, exclude them.

### Use Current Events to Elicit True Feelings

Although many prospective jurors are reluctant to admit that they are biased or prejudiced in any way, their views of cases in the news may give you their true feelings about some of the issues in your case. For example, a panel member’s reaction to either the Kobe Bryant or Scott Peterson cases may reveal something about his/her true feelings about allegations of sexual assault or accusations of marital homicide. Find a case with controversial issues that have been already debated in the press and ask your jurors about it. The things they reveal in their discussions of the case may reveal prejudices they would be reluctant to admit head-on.

### Bounce Juror Opinions Off Each Other

My best jury selections occurred when one or two jurors took extreme positions on issues. Realizing that I would never talk them out of their positions, I asked the other jurors what they thought about these extreme positions. What ensued was a rousing debate over the issue in question, with the vast majority of jurors standing up against these extreme opinions and explaining why our criminal justice system, with all its flaws, was the best in the world because it erred on the side of letting a questionably guilty person free, to protect the innocent. Those ideas came from the jurors, not me.

When one juror espouses an extreme position, explore that briefly (unless you want to lay the foundation for a cause challenge through leading questions). You and

your assistants should watch for those who are nodding in agreement with the abhorrent opinion. Then ask whether any other jurors disagree with that position. Talk to those on the opposite side of the issue and see who nods in agreement with them.

### Put Them in the Shoes of Your Client

You understand a person’s position best by being asked to argue for it. If a juror states a negative opinion towards your client’s case, test the strength of their convictions by asking them how they would go about convincing someone else of the position they have just rejected. Those who are unable to do so may be so thoroughly entrenched that you wish to seek a cause challenge. Those who are able to see the other side, may make good jurors.

## C. Establishing Rapport

The best way to establish a rapport with a jury is to be honest with them. That means being honest about some of your concerns, your own fears about their views and your views about the judicial system.

Most importantly, you must **ask the things that scare you the most**. Some of the ten things that should scare you the most in a criminal case are listed in the next section.

# THE 15 MINUTE VOIR DIRE

As our jury pool becomes more opinionated and agenda-driven than ever, there is a need for **more** time to question jurors rather than less time. Unfortunately, the response of many judges to the advent of volatile opinions in the jury box is to limit, rather than increase the amount of time lawyers spend talking to the panel. Abandoning all pretext of trying to really find fair jurors, some judges are of the “don’t let them ask, don’t let them tell” school, where they believe that, if lawyers don’t have time to discover poisonous opinions in voir dire, they won’t be reversed. Just the opposite is true.

Allowing poisonous, agenda-driven jurors into the box increases the issues on appeal and the chances of reversal.

Some judges, often in federal court, limit voir dire to 15 minutes per side. Of course, there is no way you can thoroughly question a panel of 30 or more individuals and pick an impartial jury in 15 minutes. The first approach to dealing with 15 minutes of voir dire, is to fight like the devil to get a juror questionnaire and to get more time to examine the panel. If those approaches fail, remember that 15 minutes is better than nothing.

### The Jury Questionnaire

If your jurisdiction is like most states, the questionnaire filled out by prospective jurors gives very limited information about names, education, marital status and occupation. Lawyers in my home state of New Mexico, complained about this for years until one of them, Michael Stout joined with trial consultant Lin Lilley [phone # (512) 899-2858], to create a new, more useful questionnaire. After three years of lobbying the judges and re-drafting the questionnaire, it was approved by our district judges and is now in use around the state. You or someone you know can promote the use of a similar questionnaire in your state or federal court.

If you don't have a decent juror questionnaire, then you need to file a motion to submit a juror questionnaire. In arguing your motion for a juror questionnaire to the court, here are the top seven reasons the judge should grant your motion, in descending order of persuasiveness:

### Reason 7 - Less threatening way to question the jurors

**Reason 6 - Best way to deal with confidential or sensitive issues Reason 5 – Focuses upon areas of concern/helps challenges**

**Reason 4 – Can identify pre-trial publicity without tainting the panel Reason 3 - The defense will pay for and handle the distribution**

**Reason 2 - The defense will work and play well with the prosecution on formulating the questionnaire**

**Reason 1 - IT WILL SHORTEN THE VOIR DIRE PROCESS**

* 1. **Getting More Time for Voir Dire**

If you know the judge you are dealing with limits voir dire, then you need to file an early motion to extend the time for jury selection. Judges who have been conducting voir dire the same way for years, will not entertain such a motion the day before jury selection. You need to give them time to think about your proposals and consider a change. It may be helpful to include in your motion an affidavit from a jury consultant or citations from jury studies, showing that a shortened voir dire may violate due process or fail to reveal juror bias.

Again, here are the top 7 arguments for attorney-conducted voir dire and extended voir dire:

### Reason 7 - Federal Rule of Criminal Procedure 24 Allows Attorney Voir Dire -

Some federal judges have become so set in their limitation of attorney-conducted voir dire, that they forget what is provided by Rule 24:

**Examination.** The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court **shall** permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

### Reason 6 - Case Law Recommends Attorney Voir Dire

Here is a useful quote if you are arguing for attorney conducted voir dire in federal court:

[W]hile federal rules of criminal procedure 24(a) give wide discretion to the trial court, voir dire may have little meaning if it is not conducted at least in part by counsel. The "federal" practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strength and weakness of the case. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to case such strikes Experience

indicates that a majority of situations questioning by counsel to be more likely to fulfill the need than exclusive examination in general terms by the trial court. United States vs. Ible, 630 F.2d 389, 395 (5th Cir. 1980)

### Reason 5 - A Prospective Juror is more likely to respond accurately to an Attorney rather than a Judge -

The jury research indicates that jurors are more likely to respond accurately to the questions of an attorney rather than the judge, who they perceive as an authority figure. Jones, S. "Judge vs. Attorney-conducted voir dire: An empirical investigation of juror candor." Law and Human Behavior, 1987, p.11. Most jurors are highly sensitive to "social comparison information" and therefore are reluctant to deviate from the socially acceptable response. Arkin, J. "Social Anxiety, Self Presentation and Self-Serving Bias and Casual Attribution." Journal of Personality and Social Psychology, 1980, p.38. The higher the4 status of the questioner (i.e., judge vs. attorney), the more likely jurors are to give the answers they believe the judge wants to hear. See "judge vs. attorney-conducted voir dire...", supra, p.11.

### Reason 4 - Lawyers know issues/problems in the case better than the judge

**Reason 3 - Lawyers better able to deal with open-ended questions**

**Reason 2 - Need for follow-up questions. Jurors can't be instructed out of bias -**

Additional time for follow-up questions is particularly important when a juror admits a prejudice. Once a juror acknowledges a bias, he/she cannot merely be instructed out of that bias. Research shows that jurors place more emphasis on items which they are specifically instructed to ignore, than on the same item when not instructed. Sue, S.R.E. Smith and C. Caldwell. "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma." Journal of Applied Social Psychology, 1973, p.3. Time must be permitted to ascertain the nature and extent of the juror's bias through follow-up questions.

### Reason 1 - AVOID REVERSAL BECAUSE OF A CRAZED JUROR

* 1. **What to do if you're stuck with 15 minutes**

If you find yourself in a position where you do only get 15 minutes for voir dire, then all of the advice in this article and talk is heightened. You must selectively choose those questions about the topics that are most important to your case, including the things that scare you the very most (see section III below). Start with the most important items first and leave the more mundane topics for the judge to ask. The following approaches may help you get more information than one-on-one questioning.

### 1.) The Scaled Question

The scaled question gives you a snapshot read of jurors and those with extreme or extremely helpful opinions. Understand that this approach will reveal those who are favorable to you as well as those who may be troublesome. Without development beyond your 15 minutes, the other side will not be able to strike your favorable jurors for cause and may not have enough preemptory challenges to strike them all, but the prosecution will know who they are.

Scaled questions are usually done with a chart that you put up in front of the jury via a poster or screen. It looks like this:



After putting up the chart before the jury, you make a series of statements which are key to the issues in your case and get the jurors to rank their own opinions on the matter. For example:

Opinions for a drug case:

--Marijuana should be legalized

--Marijuana is a gateway drug that should never be legalized Opinions in a case where you are putting the police on trial:

--Police officers will sometimes bend the law to convict a person they decide is guilty

--Innocent people are sometimes wrongfully targeted by the police for crimes they did not commit

--An investigating police officer may be misled by witnesses who are willing to lie or make a deal

Opinions in a self-defense case:

--A person always has the right to stand their ground when attacked

--The government should not be allowed to pass any law which limits the right to bear arms in self-defense

--A person should always be able to avoid violence if they respond appropriately

### 2.) The “Which Way Do You Lean” Question

This type of question presents both sides of a question, **always** starting with the prosecution’s position first. The idea is to reveal both ends of the spectrum and, hopefully, spark a debate among the jurors which may interest the judge and extend your 15 minutes. Polarized positions in the jury box may also allow you to determine who is for and against you through body language, even for those who never speak a word.

When there is a vigorous debate, silent jurors begin to nod in support or shake their heads in disapproval of extreme positions.

The “Which Way Do You Lean” Questions go like this:

Some people say that marijuana is a gateway drug that should never be legalized, while other people say marijuana less harmful than alcohol and should be legalized.

Which way do you lean?

Some people say that police officers always look at the evidence impartially and let it lead them to the most likely suspect, while other people say that police officers decide who is most likely guilty and then tailor the evidence to fit the person. Which way do you lean?

Some people say that when faced with an imminent threat of harm, the best course is to retreat and call the police, while other people say that a person has a right to stand his/her ground, particularly on his/her own property and defend themselves.

Which way do you lean?

### 3.) When Your 15 Minutes Expires

When the judge cuts you off, approach the bench and make your record about all the areas of bias you intended to cover, but were not allowed the opportunity to finish.

Put on the record that you have not yet obtained enough information in order to intelligently exercise your peremptory and cause challenges and express your concern about the information you have not been allowed to discover. Someday, somewhere, this record may be enough to get a reversal of an unjust conviction.

1. **THE TEN SCARIEST JURY ISSUES IN A CRIMINAL CASE**

The advent of the 24/7 news cycle and televised trials have resulted in jurors who think they know the criminal justice system. As we know from the hazards of eyewitness testimony, a group of people can all witness the same thing and come away with very different views. So it is with the media-watching public. Most of the panel will have a great fear of crime (despite the fact that crime statistics are down, the latest brutal murder is beamed instantly into our living room). Some will mistrust the government and its ability to catch and prosecute the right person. Some will believe that juries can’t be trusted. All will believe that they, personally, can be trusted to do the right thing. The

good news is that the average American citizen still wants to do what is fair and right. Those citizens want the system to work correctly and believe their presence on the jury will make that happen. In talking with them about the things that concern them, you need to be looking for people who have no pre-set agenda but can be fair.

Although voir dire is unique for every case, here are the top ten areas you may need to talk to them about:

### Fear of Crime/Victim Rage

We are all afraid of crime. On every jury panel you will find that the majority of jurors or their family members have been victims of some kind of crime, whether burglary, sexual assault or even homicide. No one wants to be soft on crime or to be perceived by their neighbors as being soft on crime. How do you help people set that aside so they can fairly hear the case before them? You must match the fear of crime with something that should be a greater fear - - the fear of wrongfully convicting an innocent person.

If you have time, first find out what each juror’s experience is with being a crime victim. How did they feel after the crime? Did they catch the person who did it? What happened to that person? How did they feel about how the criminal justice system handled the case? Remember, the most important information is not what happened to them, but how it affected them. Then explore some of the things you are most concerned about.

Q. How many of you think that criminals have too many rights or that the courts have made it too difficult to prosecute and convict criminals?

Q. What kind of rights do you think we should give to criminals? Should we change the criminal justice system to make it easier to convict people? How should we change it?

Q. Now let me change the question a little bit. Rather than use the word “criminal,” let me ask how many of you think that American citizens, including those who might be accused of a crime, have too many rights?

Q. What rights would you want if you were falsely accused of a crime?

Q. How many of you at any time in your life, including your childhood, have ever been falsely accused of something you didn’t do?

Q. What happened when you were falsely accused?

Q. Did people believe you based on your word when you said you didn’t do it?

Q. Were you able to prove that you didn’t do it?

Q. How did you go about proving you were innocent?

Q. Were you able to prove your innocence? Are there still people who don’t believe you?

Q. You think there would have been a fairer result if your accusers had to prove you were guilty, rather than you proving you didn’t do it?

Q. When you hear that a guilty person went free or an innocent person was convicted, which seems worse to you? Why?

Q. Have you thought about what kind of proof you are going to require before you convict a person? What things will be important to you in making that decision?

Q. You have probably heard the phrase “proof beyond a reasonable doubt” in criminal cases. What do you think about the state having that burden?

Q. What would you do if you thought the accused person was probably guilty, but the state had not convinced you of his/her guilt beyond a reasonable doubt?

### The Accused’s Previous Record

Q. What do you think about someone who has admitted breaking the law in the past?

Q. Once a person has admitted breaking the law, can they ever be trusted again?

Q. How many of you have ever known someone that made a mistake in the past and then straightened out his/her life?

Q. Tell me about that person. How do you feel about him/her now? Would you trust him/her?

Q. If something turned up missing at your house and that person was there, would you suspect him/her? Why or why not?

Q. The reason I’m asking you about these things, is because (client’s name) is someone who made a mistake (or some mistakes) in the past. When he/she was younger, he/she stole some money, was caught, admitted his/her guilt and went to prison. Since then he/she has worked very hard to overcome that mistake. That past mistake is one of the reasons the

police suspected him/her in this case . . . but he/she did not commit this crime. I am concerned that because of that past mistake, you may not listen to what he/she has to say. How do you think this past mistake will affect you in listening to the evidence in this case?

Q. Have you ever heard of an innocent person being picked up and falsely accused by the police because of a past criminal record? Why do you think that happens?

Q. How are you going to keep the kind of biases the police have against ex- felons from affecting your decision in this case?

### Racial Issues

Q. How many of you have ever had family, friends or have yourself ever been discriminated against or witnessed discrimination against another person?

Q. Tell me about your experience. How did it make you feel when it happened? What did you do when it happened?

Q. What do you think about affirmative action programs in the workplace or for college admission? Have you ever felt discriminated against because of those programs? What did you do about it? Who do you blame for that discrimination?

Q. Have you ever felt that any minority groups have been getting ahead too quickly in the last ten years?

Q. How do you feel about inter-racial dating? How about in your own family?

Q. Would you say this is a good place or a bad place for a (Hispanic, African- American, Asian, etc.) to stand trial? (\*\*This question courtesy of Michael Stout, who always accuses me of stealing his best stuff without giving him credit). Why? (\*\*I’m sure Michael would come up with that “Why” question too).

Q. I’ve heard some stereotypes about (African-Americans, Hispanics, Asians, etc.). Give some examples. What kind of stereotypical comments have you heard? What do you think about those comments? How should you deal with those kinds of comments in the jury room?

Q. What effect should the race of Mr./Ms. have on your decision in this case?

Q. How would you feel if you were on trial in a foreign country and the judge, all the lawyers, the bailiff and all the jurors were (African- American, Hispanic, Asian, etc.)? What concerns would you have under those circumstances about getting a fair trial?

Q. Since Mr./Ms. is in that exact situation, how can he/she get a fair trial?

### Eyewitness Identification

Q. Have you ever thought you saw someone you knew and then realized you were mistaken? Tell me about that experience.

Q. Why do you think you were mistaken?

Q. What kinds of things can make a person believe they saw someone or something they didn’t really see? [Bounce off several panel members to elicit all of the elements that may be in your case]

-- Bad lighting

-- Distance

-- People look alike

-- Bad vision/no glasses

-- Expecting to see a particular person there

-- Similar clothing

-- Corner of your eye

-- Only a short time to see them

-- Stress of the moment

-- Someone suggests it is them

Q. Have you ever heard of people who are eyewitnesses to a crime being mistaken about the identity of the person there? Have you ever heard of an innocent person being convicted and sent to prison based on mistaken eyewitness testimony? What did you hear?

Q. How can that happen?

Q. What things will be important to you in deciding whether the eyewitnesses may be mistaken in this case?

### Accused May Not Testify

Q. How many of you are aware of the constitutional right that says an accused person can never be called as a witness against himself or herself at trial?

What do you think of that rule? Why do you think that rule exists?

Q. If someone were falsely accused of a crime, can you think of a situation where he/she might not want to testify at the trial? *[Again, bounce off as many jurors as possible to flesh out this answer].*

-- Not a very good witness

-- Not very smart or educated

-- Easily misled by the prosecutor

-- Fear

-- Too much pressure

-- Embarrassed about his/her past

-- The state hasn’t proven its case

### When you get the inevitable answer, “Because he/she is guilty,” try the following response:

Q. You know, that may be the reason in some cases and that is the very thing I’m concerned you may think in this case if I make the decision that Mr./Ms. should not testify. Unfortunately, if I decide he/she should not testify, the law does not allow us to tell you why that decision has been made. That means you won’t get to know if it was because he/she was afraid, or wouldn’t make a very good witness or any other reason. How will you feel if you can’t know the reason I’ve decided he/she shouldn’t testify?

Q. What will you think about Mr./Ms. if I make the decision he/she shouldn’t take the stand?

Q. Since the law doesn’t let me tell you the reason, how will you deal with your curiosity about that?

Q. Would it be fair to guess or speculate about the reason I’ve decided he/she shouldn’t testify, if you are not allowed to know?

### War on Drugs

Q. Have you had any personal experiences, either yourself or with your family members or friends, regarding the abuse of alcohol or drugs? Tell me about your experiences.

Q. How was the person’s drug or alcohol abuse problem handled?

Q. Was the person ever arrested or put in jail? How did that affect his/her problem?

Q. Did he/she ever receive any treatment or counseling? How did that work?

Q. How do you think we should deal with the drug problem? What is most effective?

Q. What do you think about the government’s War on Drugs? Are we winning or losing? Why?

Q. Have you ever heard of any government abuses that have occurred in the name of the War on Drugs? Please tell me about them.

### Police Misconduct

I usually discuss the police in the context of my previous credibility questions, i.e., should you believe or dis-believe a person just because of their occupation? Why or why not?

Probably the best discussions about police misconduct come from those who are on the police force or who know people on the police force. Identify those people and explore how well they know the police officer, whether they have ever discussed cases, crime and the criminal justice system, then ask them the following:

Q. From your own experience or your discussions with your friend/relative on the police force, have you ever heard about bad cops who are willing to lie or plant evidence? Tell me about that.

Q. Why would a police officer ever do such a thing? [*You may wish to explore this with several jurors*]

-- To make a case

-- To get a criminal they have not be able to catch

-- For a promotion

-- For revenge

-- To make a quota

Q. Have you ever heard of a police officer who did not deliberately lie, but who may have been mistaken – either about the evidence or about arresting the wrong person? Tell me about your experience. How can that happen?

-- In a hurry

-- Gets bad info from the witnesses

-- A snitch lies

-- Bad or incomplete investigation

Q. What things will be important to you in deciding whether the police officers who may testify in this case are lying or mistaken?

Q. Is there anyone who thinks there has been too much criticism of the police recently? Why? Are there ever any circumstances in which the police should be criticized? Tell me about those circumstances.

### Fragile Witness – Child/Crying

If you are going to have to cross-examine a fragile witness during the course of the case, don’t wait until they are on the stand to tell the jury about him/her. You must bring it up in jury selection. Again, the most effective way to do that is during your discussion of how the jury should determine credibility.

### The Child Witness

Q. In judging the credibility of a person, should you use a person’s age to determine whether or not they are telling the truth? Why or why not?

Q. Have you ever known children to tell lies? Perhaps I should ask the opposite question – have you ever known a child who has **never** told a lie?

Q. Why do children lie? [*Use several jurors for this answer*].

-- To keep from getting in trouble

-- To get someone else in trouble

-- For attention

-- For a reward

-- To get even

-- To keep from having to do something they don’t want to do

-- Because they are led to lie

-- Because the adults around them ask them to

-- To please a parent

-- To protect someone else

Q. What will be important to you in determining whether the child in this case is telling the truth, is lying or is mistaken?

### The Crying Witness

Q. In judging the credibility of a witness, should you consider whether or not the witness cries or shows emotion when he/she testifies? Why or why not.

Q. Are there other reasons a person might cry when they tell you a story, other than that they are telling you the truth? What reasons are those?

-- Acting

-- Upset about being in court

-- Covering up their own wrongdoing

-- Fear

Q. Have you ever been fooled by someone who cried when they told you a false story?

Q. How many of you saw Susan Smith crying on television before she was arrested for the drowning deaths of her two sons? How many of you believed that her sons had been kidnapped before the real story came out?

Q. I am asking you these questions because, even though this event occurred over one year ago, I expect one government witness will come in and cry for you as she testifies. We intend to show you that she is mistaken/lying, but I am concerned about how her crying may affect you. How many of you think you may be affected in your decision about credibility based on someone’s tears?

Q. How are you going to determine whether the witness is crying because of remorse, guilt or just acting? If you can’t make that determination, how many of you are willing to exclude the crying factor all together in trying to determine credibility?

### Psychological Testimony/Defenses

Q. Have you or anyone you’ve ever known suffered from a mental illness? Would you mind telling us about that?

Q. What kind of effects did the mental illness have on this person? Was it as debilitating for this person as a physical disability is for some people?

Q. Did this person have any control over their behavior when they were under the influence of this disease? Did they ever get in trouble because of this illness?

Q. Who was to blame for the trouble they go into?

Q. What happened to the person? Ever go to jail? Receive treatment? Medication? Did anything help?

Q. How do you think we should deal with the mentally ill?

Q. Some people don’t believe mental illness exists. How do you feel about that?

Q. Have you ever known anyone who consulted with a psychologist or psychiatrist?

Q. What do you think about psychologists or psychiatrists?

Q. What concerns will you have if you are asked to find the accused not guilty by reason of insanity?

### Homicide/Self-Defense

Q. Mr./Ms. is charged by the state with killing Joe Randall. In fact, he/she did kill Joe Randall. [*Pick someone who looks shocked or distressed by this revelation*]. Juror X, you looked surprised when I just told you that. What do you feel about someone who took the life of another human being?

Q. Is there ever any time when you believe one human being is justified in killing another human being? What are those circumstances?

Q. Under what circumstances is a person justified in acting in self-defense?

Q. You talked about acting in self-defense when a person is afraid. How many of you have ever been in a situation where you were afraid and thought you might have to act in self-defense? Please tell me about those situations.

Q. Why were you afraid? What did you do? Did you have a weapon? If you had one in your possession, what did you do or what would you have done? What were you thinking about at the time you were attacked or threatened?

Q. Should you have been punished if you had been pushed to use deadly force to protect yourself? Why not?

Q. How many of you think a person should be punished by a conviction or jail time if they kill someone else, even if they were acting in self-defense? What should happen to someone in that situation?

Q. How do you think a person feels after killing someone in self-defense?

Q. If that person isn’t convicted or doesn’t go to jail after that kind of killing, do you think most people still suffer for what they did . . . even if it was justified at the time?

## DEVELOPING A CHALLENGE FOR CAUSE

Although our prospective jury panels have become more and more biased over the years, the response of many judges has been to reduce, rather than extend the time allowed to question the panel. Worse, the attitude of some judges is to try and select the jury as quickly as possible. These judges are reluctant to strike any juror for cause and will go out of their way to rehabilitate bad jurors. We’ve all been there. It goes something like this:

**Juror to lawyer:** I think if the state files criminal charges against someone, they must have done something wrong.

**Judge** (sensing a cause Excuse me, Mr. Juror. You really don’t challenges, jumps in) mean that, do you?

**Juror:** I think so, your Honor.

**Judge:** Well, if I instruct you that you have to set aside that belief and follow the law in the instructions, you can do that can’t you?

**Juror:** Of course, your Honor.

Knowing that the judge may try to rehabilitate a juror, how can you develop a cause challenge that cannot be overcome without the court risking reversal on appeal?

### Switch to Leading Questions

Just like the rehabilitating judge did in the example above, once you decide you want to strike a juror, you should switch from non-leading questions to leading questions.

### Cement the Juror’s Commitment to His/Her Opinion

Some jurors simply repeat what they have heard about cases and judicial system in the media. Before deciding to reject the juror, explore the depth of their commitment to the opinion they have expressed. You may want to test the opinion by asking them to argue the other side or point of view from their own (see above). If they are unable to do so, be afraid, be very afraid. In order to build your record for a cause challenge, have cement and commit them to their position.

### Complement Their Honesty and Deep Thought on the Issue

As discussed above, always thank the jurors who are honest enough to reveal their biases against your case. This might go something like this:

**Juror:** I think any unrelated adult who would sleep in the same bed with a child, must be a child molester.

**Lawyer:** Thank you for sharing your personal view on this matter. It appears that you have given a great deal of thought to this issue, is that correct?

**Juror:** Yes, I have.

**Lawyer:** And it’s based on your own life experiences?

**Juror:** Yes, it is.

**Lawyer:** And your own personal and deeply held views on the value of life?

**Juror:** That’s right.

**Lawyer:** Having come to this conclusion after a great deal of thought, I don’t expect there is anything someone like me could do to talk you out of that view?

**Juror:** No.

**Lawyer:** Because this is based on your own life experiences, there’s nothing anyone could do at this point to change your mind?

**Juror:** Nope.

**Lawyer:** Not even if it was someone in a position of authority, like the judge?

**Juror:** No.

### Find all the Jurors Who Agree with the Extreme Position

Now that you have established the basis for your cause challenge, find all the other panel members who agree with the extreme position the juror has taken. Because you have been so nice and complimentary, they may be encouraged to tell you the truth. Go through similar questioning with each one to pin down the cause challenge.

### Find all the Jurors Who Disagree with the Extreme Position

After you’ve uncovered all of your case-killing panel members, ask if there is anyone who disagrees with the extreme position? Switch back to open-ended questions to discover why they oppose the views expressed by those who have closed minds on this

issue. Remember, you have to find your friends as well as your enemies to intelligently exercise your preemptory challenges.