JURY SELECTION IN IMPAIRED DRIVING CASES

A Guide for Prosecutors

RESPONSIBILITY.ORG

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

NTLC NATIONAL TRAFFIC LAW CENTER

Table of Contents

Disclaimer 3
About the National Traffic Law Center 4
About Responsibility.org 5
Acknowledgments 6
Preface 7
Introduction – Importance of Jury Selection 8
Preparing for Jury Selection 10
- Statutes and Court Rules Set the Scope of the Jury Selection Process 10
- Each Court is Different—Learn the Process for the Court Hosting the Trial 10
- Assessing Juror Attitudes and Beliefs 11
- Assessing Juror Criminal and Driving Records before Trial 12
- Professional Considerations for Conducting Juror Criminal Records Research 14
- Reviewing Sample *Voir Dire* Can Provide Additional Ideas for a Prosecutor to Consider 15

Considerations for Connecting with the Jury 16
- Dignity and Respect 16
- Asked Rather Than Told 17
- Told Why Being Asked to Do Something 17
- Options Rather Than Threats 18
- Second Chance 18
- Other Important and General Considerations 18

Considerations for an Effective Jury Selection 20
- Adult Learning Principles 20
- The Traditional Approach to Selecting a Jury 21
  - Preparation 21
  - The Conversation 22
- An Alternative Approach to Selecting a Jury 27
  - Preparation 27
  - The Conversation 31

Juror Challenges 38
- Challenges for Cause 38
  - Making a Challenge for Cause 38
  - Responding to Challenges for Cause 38
- Peremptory Challenges 39
  - Using Peremptory Challenges to the Case's Benefit 39
  - Improper Use of Peremptory Challenges 40
- Making a Record 41

Conclusion 42
Appendix A—Sample Attorney Conducted *Voir Dire* 43
Appendix B—Sample Court Conducted *Voir Dire* 51

Disclaimer

The National Traffic Law Center is a program of the National District Attorneys Association. This document was prepared with a grant from Responsibility.org. The points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the authors' employers, Responsibility.org, or the NDAA. This publication is intended to provide a general overview of jury selection in impaired driving cases. While some sections of this publication address issues that are inherently legal, this publication is not intended to provide legal advice. Therefore, it is important to seek legal advice from a licensed attorney on specific issues or questions the reader may have. Please ensure compliance with all local and state laws when considering information contained in this publication.

About the National District Attorneys Association's National Traffic Law Center

The National District Attorneys Association's National Traffic Law Center (NTLC) is a resource designed to benefit prosecutors, law enforcement, judges, and criminal justice professionals. The mission of NTLC is to improve the quality of justice in traffic safety adjudications by increasing the awareness of highway safety issues through the compilation, creation, and dissemination of legal and technical information and by providing training and reference services.

When prosecutors deal with challenges to the use of breath test instruments, blood tests, horizontal gaze nystagmus, crash reconstruction, and other evidence, the NTLC can assist with technical and case law research. Likewise, when faced with inquiries from traffic safety professionals about getting impaired drivers off the road, the NTLC can provide research concerning the effectiveness of administrative license revocation, ignition interlock systems, sobriety checkpoints, and much more.

The NTLC has a clearinghouse of resources including case law, research studies, training materials, trial documents, and information regarding crash reconstruction, toxicology, drug recognition, and many other topics. The information catalogued by the Center covers a wide range of topics with emphasis on impaired driving and vehicular homicide issues.

The professional staff at the NTLC includes experienced trial attorneys and research staff. Assistance is specifically provided in all areas of trial preparation, including methods to counter specific defenses. The NTLC facilitates the direct exchange of information among prosecutors, judges, and other criminal justice professionals in the field.

NTLC is a program of the National District Attorneys Association. NDAA's mission is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people.

For additional information, contact NDAA or NTLC, 1400 Crystal Drive, Suite 330, Arlington, Virginia 22202, (phone) 703-549-9222, (fax) 703-836-3195, www.ndaa.org.

RESPONSIBILITY.ORG

About the Foundation for Advancing Alcohol Responsibility

The Foundation for Advancing Alcohol Responsibility, also known as Responsibility.org, is a national not-for-profit that aims to eliminate drunk driving and work with others to end all impaired driving, eliminate underage drinking, and empower adults to make a lifetime of responsible alcohol choices. Responsibility.org is funded by the following distillers: Bacardi USA, Inc.; Brown-Forman; Campari Group; Constellation Brands; DIAGEO; Edrington; Hotaling & Co.; Mast-Jägermeister US, Inc.; Moët Hennessy USA; Ole Smoky, LLC; Pernod Ricard USA; Suntory Global Spirits; and William Grant & Sons. For more than 33 years, Responsibility.org has transformed countless lives through programs that bring individuals, families, and communities together to inspire a lifetime of responsible alcohol choices.

To learn more, please visit

www.Responsibility.org.

Acknowledgments

This *Jury Selection in Impaired Driving Cases —A Guide for Prosecutors* monograph would not have been possible without the support and funding of Responsibility.org, the hopeful recognition from Responsibility.org's **Darrin T. Grondel, Senior Vice President of Traffic Safety**, that this document will play a critical role in ending impaired driving and saving lives, and the dedicated efforts of the following professionals at the National Traffic Law Center:

Erin Inman, Director

Joanne Thomka, Former Director

M. Kimberly Brown, Senior Attorney

Stacy Graczyk, Staff Attorney

Additionally, this monograph relied heavily on the commitment to saving lives on America's roadways and the subject matter expertise of the following Traffic Safety Resource Prosecutors (TSRP):

Jackie McMahon, Connecticut[1]

Barzilai Axelrod, Delaware

Erica J. Dobbs, Indiana

Stephanie Watson, Missouri

Sarah Z. Garner, North Carolina

Ashley C. Schluck, Wyoming

1 Ms. McMahon served as the Connecticut Traffic Safety Resource Prosecutor during the drafting of this monograph. At the time of the monograph's publication, she is the former TSRP.

Preface

In a criminal case, selecting an impartial and knowledgeable jury is crucial for ensuring a fair trial. The prosecutor must carefully question potential jurors to uncover any biases, misconceptions, or gaps in their understanding of the case's complexities. This process can be especially challenging in an impaired driving case, where specific legal and technical issues may arise.

Since its inception, the impartial jury system has been a foundational cornerstone of the American criminal justice process. Numerous scholars, practitioners, courts, and others have extensively written on the concept. This monograph, while acknowledging the provenance of *voir dire* to define its scope, does not aim to re-examine the history, refinement, or other aspects of *voir dire*. Instead, it respects and builds upon the collective efforts made by others to educate and promote the pursuit of justice through an impartial jury selection system. *Jury Selection in Impaired Driving Cases, A Guide for Prosecutors* provides prosecutors with suggestions and strategies for effectively educating potential jurors on the salient facts, witnesses, and legal aspects of impaired driving cases. It serves as an additional resource, providing practical considerations for prosecutors who might not be familiar with the nuances of jury selection. By focusing on traffic safety cases, such as driving or operating under the influence of drugs or alcohol,[2] it provides a practical perspective on this dynamic process.

Additionally, this monograph serves as a resource for law enforcement, emphasizing the importance of accurately documenting the details of a traffic stop or crash and highlighting their role in helping the jury understand the facts. It equips prosecutors with invaluable insights into questioning potential jurors to assess their empathy for the defendant or biases towards law enforcement. Finally, it includes a collection of sample *voir dire* questions covering a variety of pertinent issues. This resource aims to enhance collaborative trial preparation and strengthen the effectiveness of the *voir dire* process in impaired driving cases. While each jurisdiction has its unique procedures, the broader concepts presented in this monograph can still offer insights for prosecutors' thoughtful consideration.

2 These cases often have different names across different jurisdictions. Driving Under the Influence (DUI), Operating Under the Influence (OUI), Driving While Impaired (DWI), all generally relate back to the same underlying concept of a person under the influence of alcohol, drugs, or a combination thereof either driving, operating, or being in actual physical control of a motor vehicle. For ease of reference, this monograph will refer to these cases as impaired driving cases or DUI/DWI cases.

Introduction – Importance of Jury Selection

The *voir dire*, or jury selection, process in a criminal jury trial is of constitutional importance, as it results in convening the fact-finding body responsible for rendering an impartial verdict based solely on the evidence presented at trial and in accordance with applicable laws. Prosecutors, other litigants, and judges should approach *voir dire* as a critical component, both ethically and practically, to achieving a fair and successful jury trial. When a criminal defendant is entitled to a jury trial, both the Sixth Amendment of the United States Constitution[3] and similar clauses within state constitutions guarantee the right to a fair trial by an impartial jury. In relevant part, the Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, ...[4]

"In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."[5] Maintaining juror impartiality is essential not only for ensuring fairness to the accused but also for upholding the overall integrity of the judicial process. *Voir dire*, which translates to "to speak the truth," is the historic method used to encourage jurors to speak candidly, thereby identifying any biases in prospective jurors. This process is critical to protecting a defendant's rights to a fair trial.[6]

A prosecutor must prepare thoroughly for the *voir dire* process and tailor their approach to accommodate the specific nuances of their jurisdiction and the issues existing in each case. The *voir dire* phase of the jury selection sets the tone for the entire trial, regardless of whether the questioning is directed by the court, the attorneys, or a combination of both. Colloquially, *voir dire* serves as the initial "meet and greet" between prospective jurors and the formal court system. Its purpose is to provide the court and the parties with sufficient information to decide whether a prospective juror can render an impartial verdict based on the evidence presented at trial and in accordance with the applicable law.

In any trial, jury selection is a critical phase that can shape the course of the proceedings and ultimately influence the outcome. *Jury Selection in Impaired Driving Cases* explores several key concepts necessary for a successful outcome. First, prosecutors must understand the structural parameters governing jury selection in their jurisdiction. They should know the state and local rules and the mechanics of the selection process particular to the judge in whose courtroom the case will be tried. This is an essential step in minimizing issues for appeal or post-conviction relief. Proper preparation includes information gathered by a prosecutor and using it to make effective decisions in court.

Second, a prosecutor must know how to develop a connection with jurors. This monograph also examines techniques to foster a rapport with jurors, establish trust, and other considerations for a prosecutor to connect with the jury in impaired driving cases. During the conversational nature

3 As applicable to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

4 U.S. Const. amend. VI, § 1.

5 Turner v. Louisiana, 379 U.S. 466, 471-72 (1965); see In re. Oliver, 333 U.S. 257 (1948).

6 See, e.g., Schwan v. State, 65 A.3d 582 (Del. May 2, 2013).

of *voir dire*, prosecutors must remain focused on its purpose, uphold ethical obligations, and avoid pre-trying the case. Presenting or directing *voir dire* is a complex process that requires practice to effectively balance multiple important concepts. Achieving this balance in a manner that appears seamless to prospective jurors is essential for a successful *voir dire*. During the *voir dire* process, prosecutors must be mindful that prospective jurors are forming impressions about the court, the attorneys, and the nature of the case. The way jurors are treated, the wording of the questions, the tone and demeanor of those asking the questions, and the reality of the process compared to their preconceived expectation all influence a juror's willingness to share their perspectives openly and to be forthcoming in a room full of strangers.

This monograph also delves into different strategies for identifying jurors who may align with the case's narrative, while also avoiding potential biases. Without a thorough understanding of the issues in their case, a prosecutor cannot effectively vet an impartial jury. Knowing the case inside and out allows the prosecutor to use the *voir dire* process to delve into jurors' backgrounds, experiences, opinions, beliefs, and values on the issues likely to arise during the trial.[7] For example, each jury must be tailored to the specific case. An impartial jury for a driving under the influence case without injury or death may not be suitable for a case with those that include injury or death. If the prosecutor does not explore these nuances with prospective jurors during *voir dire*, the presence of a physical victim could influence how some or all jurors view the case. Similarly, an impartial jury for a motor vehicle case might not be appropriate for a property crime, drug, firearm, domestic violence, or other types of cases.

To encourage juror forthcomingness, concepts such as adult learning principles, flexibility in questioning, rapport building, attentiveness to body language (both of the prospective juror being questioned and the other jurors listening), and active listening are crucial. Whether based on a specific reason or legal cause that indicates a juror's inability to be fair and impartial, or based on no stated reason at all, this monograph also explores the legal grounds and strategic decisions involved in dismissing jurors to secure a fair and impartial jury.

Jury selection is crucial in criminal trials, particularly those involving impaired driving offenses. The process of selecting a jury involves a systematic effort to assemble a jury that is fair, impartial, and capable of rendering a just verdict. The goal is to create a panel of individuals free from biases, capable of understanding complex legal concepts, and willing to carefully consider all the evidence presented. This monograph serves to equip prosecutors with the skills and insights necessary to choose a fair and impartial jury that will be able to hear the evidence and assess it based on the laws of the case, regardless of other factors, to follow the court's instructions, delivering a just verdict.

7 See generally Frederick, Jeffery T., 11 must-dos from a *voir dire* master, ABA YourABA March 2019, Around the Midyear Meeting (setting forth the main components of analyzing prospective jurors). Available at: https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/.

Preparing for Jury Selection

Statutes and Court Rules Set the Scope of the Jury Selection Process

A prosecutor must understand the parameters of jury selection in their jurisdiction, the specific court where they practice, and any limitations imposed by the level of the case[8] they are presenting. They should also familiarize themselves with any applicable statutes and court rules.

While most criminal cases default to requiring twelve jurors, statutes in some jurisdictions allow for fewer jurors in misdemeanor cases or, under certain conditions, permit a trial to proceed with fewer jurors if requested by written stipulation of the parties and approved by the court. Statutes also outline various disqualifications from jury service-based criteria such as citizenship, minimum age, jurisdictional residency, English language comprehension, and the status of convicted felons who have not restored their civil rights. Understanding these statutory disqualifications is crucial, as it ensures the jury venire comprises only eligible individuals, allowing jurors who do not meet these qualifications to be struck for cause rather than using a party's limited peremptory challenges.

Additionally, statutes establish protections to prevent discrimination against jurors based on protected class status or economic status.[9] Other concepts addressed in statutes or court rules may include whether jurors are placed under oath before *voir dire*, whether prospective jurors are examined individually or as a group, whether the court or attorneys conduct the examination, the number of alternate jurors to be selected, the number of peremptory challenges each party has both for the initial venire panel and the alternates, whether the number of peremptory challenges is expanded in co-defendant cases, and the order and sequence in which parties must exercise their peremptory challenges.

A prosecutor must also be prepared to identify any legal deficiencies observed during the process and bring them to the court's attention. The sooner the court is made aware of an issue, the more likely it can be addressed and remedied before jeopardy attaches to the case.

Each Court is Different—Learn the Process for the Court Hosting the Trial

A prosecutor must also understand the court's standard practice for jury selection. This includes the background information of jurors that the court provides litigants, the steps and sequence of the jury selection process, any specific methods the judicial officer uses, and whether the court has its own set of standard *voir dire* questions.

The court's jury services office collects essential information from all prospective jurors through a questionnaire. It is common for jurisdictions to use the same questionnaire for both criminal and civil cases. Besides verifying statutory qualifications, the questionnaire may also request details such as the juror's education level, employment industry (for both the juror and their spouse), marital status, affiliations with law enforcement or insurance company, and any other information deemed relevant by the jurisdiction. This baseline information is typically made available to prosecutors.

8 For example, a prosecutor may have fewer peremptory challenges in a misdemeanor impaired driving case than they would have in a felony case.

9 See also Batson v. Kentucky, 476 U.S. 79, 93 (1986) (prohibitions on juror strikes based on race, gender, religion, and national origin). See also the section on Juror Challenges, below.

Just as each jury services office has its own process, each judicial officer has their own approach to jury selection. For example, judicial officers may impose time limits on each party, mandate the venire consists of all jurors summoned for a particular day or specify a certain number of jurors (common in larger jurisdictions with multiple trials on the same date), and determine whether the selection occurs on the same day as the start of the evidence or requires a longer vetting period.

Impaired driving cases, despite not usually being lengthy, often require a larger panel for *voir dire* than other cases. The high prevalence of DUI/DWI incidents means that many jurors, or their close acquaintances, have had experiences with DUI/DWI drivers, potentially affecting their impartiality. Additionally, every DUI/DWI case carries an underlying issue of substance use, abuse, or dependency, which may feel uncomfortably personal for some jurors or conflict with their personal or religious views on substance consumption.

If the court uses a standard preliminary set of questions to initiate *voir dire* in all criminal cases, the prosecutor should request a copy of the questions from the court clerk in advance. To avoid duplication, the prosecutor should use these default questions as a foundation for their own and be prepared to explain the nuances of how the submitted *voir dire* questions differ from the standard ones, even if they sound similar.

Assessing Juror Attitudes and Beliefs

DUI/DWI is a unique crime, because jurors often relate to it differently than to other crimes like child abuse or murder. Many jurors have been exposed to public awareness campaigns aimed at eliminating DUI/DWI offenses, which can make it challenging for them to set aside preconceived notions during a trial. Additionally, the type of drug involved in DUI/DWI case can influence a juror's perception of the evidence. While jurors might not initially recognize this bias, they could potentially overcome it once the concept is thoroughly examined.

For example, medically prescribed drugs like oxycodone, alprazolam, or amphetamine mixtures might not be considered by jurors to be drugs that impair driving behavior. The legalization or decriminalization of cannabis in many jurisdictions has also shifted public perception of the dangers posed by Delta-9-Tetrahydrocannibinol (THC) in the context of DUI/DWI. Even alcohol impairment, particularly when the evidence lacks a blood, breath, or urine result, or when the result is below a per se limit,[10] jurors may have preconceived notions of what constitutes a DUI/DWI offense.

Consider this scenario: The court's default question is, "Are you more likely to believe the testimony of a police officer merely because they are a police officer?" At first glance, this seems like a good question. However, does it go far enough to explore whether the juror is truly impartial? The question assumes that a juror might only view a police officer's testimony more favorably than that of a civilian. An impartial juror should not have any bias, prejudice, feeling, opinion, or belief that makes them view a police officer's testimony more or less favorably simply because of their occupation.

10 The limit proscribed in all states is 0.08 g of alcohol per 100 milliliters of blood, except in Utah and some other specified situations. Utah's legal limit of Blood Alcohol Concentration is 0.05 g of alcohol per 100 milliliters of blood (or 0.05 grams of alcohol per 210 liters of breath) (see Utah Code Ann. § 41-6a-502). Other per se limits also exist, such as the limits for a commercial driver or an underaged driver.

If a question does not address potential biases from all angles, a juror might answer accurately while leaving unexplored a position that could prejudice a party. In most impaired driving cases, the police officer's testimony is central to the evidence. If a juror is less likely to believe an officer's testimony simply because they are a police officer, the prosecutor has allowed the court to seat a juror who is already less likely to approach the evidence impartially. Thus, it is important for a prosecutor to ask questions designed to bring to light all biases potentially unaddressed by a court's form questions. (For more on juror bias, see the section on Juror Challenges, below.)

Assessing Juror Criminal and Driving Records before Trial

Most prosecutors enter jury selection with copies of jurors' in-state criminal records or have electronic access to these records in the courtroom. However, it is less common for prosecutors to review juror driving histories, even in motor vehicle cases like DUI/DWI trials. Given the nature of such cases, it is crucial for prosecutors to examine driving conduct, which may not appear on criminal records. Additionally, agreements like the Driver License Compact and Driver License Agreement often provide a more comprehensive history of both in-state and out-of-state motor vehicle violations, sometimes extending further back than criminal records.

When reviewing criminal and driving records, it is important to consider different factors for different cases. A prosecutor should pay particular attention to how closely a juror's record aligns with the charges being tried and how those prior convictions might affect the juror's ability to remain impartial. People are more than their criminal records, and the *voir dire* process should help the prosecutor determine whether their past experiences with the criminal justice system will influence their ability to be fair and impartial in this case.

The presence of a felony on a juror's record typically means they are ineligible to serve unless their civil rights have been restored. Jury services usually remove ineligible individuals from the venire before they reach the courtroom, but occasionally someone may be overlooked. If this happens, discreetly inform the court of the juror's ineligibility, preferably at a sidebar to avoid causing embarrassment, so the court can address the issue appropriately.

Most of the criminal histories provided to assess potential jurors offer comprehensive details, including the original charges, dropped charges, whether cases were resolved by plea or trial, failures to appear in court, prior probation violations, and more. While there is no one-size-fits-all approach to assessing a juror based on this information, there are key aspects a prosecutor can focus on to evaluate the juror's suitability to hear the case. As with all lines of questioning during *voir dire,* the goal is to understand whether a juror's past experiences created a bias which would result in an unfair trial. Therefore, when reviewing driving records and designing questions related to a juror's driving record, prosecutors should draft questions to understand how the juror's experience with the criminal justice system may impact the juror's perception of the case for which they will be seated.

Consider the following scenarios in a case where the defendant was stopped for speeding and, thereafter, was also charged with DUI/DWI.

- Jurors 1 and 2 both have identical speeding convictions, but their approaches to handling these cases differ significantly. Juror 1 has consistently resolved their speeding cases by either promptly paying the ticket or accepting responsibility through a plea. In contrast, Juror 2 has had several speeding cases dismissed due to the officer's absence and has only been convicted after a trial.

Should the prosecutor view these two jurors in the same light? Juror 1 seems to recognize the importance of accepting responsibility when they break the law. Despite having similar charges as the defendant, Juror 1's history suggests they can be impartial and adhere to the law. On the other hand, Juror 2 might not regard speeding offenses as serious. The fact that Juror 2 has had multiple dismissed cases implies they may have faced more speeding incidents than Juror 1 and has never accepted responsibility for their conduct, even in cases where a jury later found them guilty.

- Juror 3 and 4 both have a prior DUI/DWI conviction, but Juror 4 also has a history of minor traffic collisions, including incidents where they left the scene. Should the prosecutor view these two jurors similarly? Juror 4's driving history might suggest a pattern of uncharged DUI/DWI offenses, which they potentially evaded by leaving the scene.

  The prosecutor should consider exploring the following points during jury selection:

  Did Juror 4's DUI/DWI case resolve through a trial or plea?

  Did their experience with the DUI/DWI charge and court process affect their views on DUI/DWI cases, potentially impacting their ability to be impartial?

  Have they since turned their life around, or did they have a negative experience with law enforcement that they perceive as unjust?

  What substances were they under the influence of compared to what will be presented in this case?

  Did they submit to chemical testing or refuse it, and did they participate in standardized field sobriety tests?

  If tests were conducted and results are available in the case at bar, can they set aside their personal experiences and focus solely on the evidence presented?

  How long ago was their DUI/DWI conviction, and what does their driving record look like since then?

  These considerations may help in assessing whether Juror 4's past experiences and attitudes could affect their impartiality compared to Juror 3.

- Juror 5 has a clean record of traffic infractions but has faced a series of misdemeanors leading to probation violations and failures to appear in court. Given that jurors will be required to apply the law as instructed to the facts of the case, does Juror 5 appear to be someone who will follow instructions reliably? Their history of non-compliance with court orders raises concerns about their ability to adhere to the terms and conditions set by the court, even for seemingly straightforward requirements like attending scheduled hearings.

- Juror 6 has the same driving convictions as another juror but also had charges for driving without a license dropped as part of their case resolution. Does this history indicate that Juror 6 might be unwilling to follow rules, such as when they were instructed not to drive but did so anyway?

- Juror 7 holds a Commercial Driver's License (CDL) and has a clean driving record. As a professional driver with specialized training, a CDL holder understands the critical importance of adhering to road rules and does not take them lightly. With extensive experience driving thousands of miles, CDL drivers have encountered a wide range of situations, which can offer valuable impartiality when assessing driver conduct.

- Juror 8 has no driving record but does have a history of controlled substance use/possession and nuisance violations, with this pattern ceasing five years ago and no subsequent charges. While this juror may have had past issues with substance use, they have shown that they did not engage in driving under the influence. If the prosecutor does not specifically question them about this distinction during *voir dire*, the prosecutor risks dismissing a potentially suitable juror based solely on their past record.
- Juror 9 has charges for resisting arrest and disregarding police signals. Since the case the prosecutor is presenting is likely to be highly focused on law enforcement, it is crucial to pay close attention to Juror 9's responses during general questions about opinions on law enforcement. The prosecutor should be prepared to follow up with Juror 9 to ensure they can be impartial and not simply rely on their initial statement of neutrality.
- Juror 10 has multiple aliases, including names that are either entirely different from their legal name or include unconventional phrases like "Cool Cat Jack." These names do not seem consistent with typical name changes due to marriage, divorce, or adoption. It appears these aliases are linked to Juror 10's identity in a criminal records database.

The prosecutor should consider whether he might be missing a crucial part of this individual's overall record. There could be a chance that someone else used Juror 10's name, resulting in linked identities, or that Juror 10 used these aliases deceitfully, which was later uncovered. While the existence of aliases alone is not necessarily problematic, it may be worth noting and exploring further if appropriate.

As these examples illustrate, assessing a juror's impartiality involves more than considering their convictions. Any convictions should be viewed in the context of a juror's circumstances, background, and experiences. While criminal records can highlight areas for further exploration, they do not necessarily mean a juror is biased and should, therefore, be automatically dismissed from the jury.

Professional Considerations for Conducting Juror Criminal Records Research

In a jurisdiction permitting the research of jurors prior to trial, the prosecutor should be mindful that the discretion is not without limits. While *voir dire* is a tool litigants use to ensure trial by an impartial jury as mandated by the Sixth Amendment, the way litigants engage the court and the jury should also align with broader rules of professional conduct. For example, the American Bar Association (ABA), Criminal Justice Standards for the Prosecution Function, sets forth various advisory guidelines that a prosecutor can use to carry out their professional function. Each jurisdiction creates and adopts its own rules, but referencing the ABA's advisory rules in this monograph provides a common platform to address universal concepts as applicable to the jury selection process.

Some standards might apply more directly than others, but an important one to highlight is ABA Standard 3-1.2(b), which provides that the duty of the prosecutor is to seek justice, not merely to convict.[11] A prosecutor who seeks to have a jury that is not impartial is not seeking justice or abiding by the Constitution.

11 American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (Functions and Duties of Prosecutor). Available at: https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

Other standards, like Standard 3-1.6 (Improper Bias Prohibited),[12] Standard 3-1.10 (Relationship with the Media),[13] Standard 3-6.2 (Civility with Courts, Opposing Counsel, and Others),[14] Standard 3-6.3 (Selection of Jurors),[15] and Standard 3-6.4 (Relationship with Jurors)[16] are all important professional considerations of which a prosecutor should be mindful. Notably, Standard 3-6.3(c) reads, in part:

> (c) In cases in which the prosecutor conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, or unduly embarrass or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed.[17]

Being invited to serve on a jury does not forfeit a citizen's right to privacy beyond the courtroom proceedings. For instance, neither you nor your investigators should visit jurors at their workplaces or connect with them on social media. Jurors are fulfilling an important role in the judicial process and, if selected, serve as impartial factfinders deserving of the same respect as a judicial officer.

If a juror becomes aware that the prosecutor is investigating them simply because they are scheduled for jury duty, it might affect their impartiality. They could feel differently about their participation or the party the prosecutor represents. Furthermore, spending valuable time researching the entire jury panel before trial is often impractical. A thorough *voir dire* process should be sufficient to assess a juror's impartiality. Thus, a prosecutor should focus on conducting a detailed *voir dire* and, if necessary, perform a quick online search of jurors' names from the counsel's table to identify any glaring inconsistencies before finalizing peremptory challenges. A prosecutor should remember that if his computer lacks a privacy filter, the rest of the venire, seated behind him in the gallery, will see what he is doing and take note of it.

Reviewing Sample *Voir Dire* Can Provide Additional Ideas for a Prosecutor to Consider

Every case will be different, and every jurisdiction will have a different approach to the *voir dire* process. This monograph presents a sample of questions for both a court-read jurisdiction and from an attorney-led *voir dire* examination. The court-read sample was adapted from a case that also involved a motor vehicle collision and a fatality and is provided in Appendix B. A sample of an attorney questioning is also included in Appendix A. A prosecutor should remember these are provided to foster an understanding of concepts to address but are not designed to be templates nor do they represent an exhaustive list of DUI *voir dire* questions.

12 ABA Standard 3-1.6; see also American Bar Association, Criminal Justice Standards for the Defense Function Standard 4-1.6. Available at: https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

13 ABA Prosecution Function Standard 3-1.10; see ABA Defense Function Standard 4-1.10.

14 ABA Prosecution Function Standard 3-6.2; see ABA Defense Function Standard 4-7.2.

15 ABA Prosecution Function Standard 3-6.3. see ABA Defense Function Standard 4-7.3.

16 ABA Prosecution Function Standard 3-6.4; see ABA Defense Function Standard 4-7.4.

17 ABA Prosecution Function Standard 3-6.3. The Standard also discusses sharing the results of record searches that are unavailable to the defense, such as criminal record databases, with the defense. The dissemination of these records is often governed by statutes and is beyond the scope of this monograph.

Considerations for Connecting with the Jury

If a juror trusts the prosecutor and feels respected and safe, they are more likely to be open and honest in *voir dire*. During the trial, they will also be more attentive and receptive to what the prosecutor says, and this can translate into greater confidence in the prosecutor's presentation and interpretation of the facts during closing arguments.

To ensure jurors feel they are truly part of the process, the prosecutor must treat them with due regard. They are, after all, fellow citizens and community members, not just tools in the legal process. Accordingly, the prosecutor should understand they are building relationships with the jurors during jury selection and throughout the trial. This personal connection can make a significant difference in how the jurors perceive and respond to the prosecutor's presentation of the case.

Dr. George J. Thompson, author of Verbal Judo: The Gentle Art of Persuasion, worked in the field of verbal persuasion and de-escalation.[18] Different versions of these concepts are routinely taught in business, healthcare, law enforcement, and other fields. Dr. Thompson posited that there are five universal truths of human interaction:

- All people want to be treated with dignity and respect
- All people want to be asked rather than told
- All people want to be told why they are being asked to do something
- All people want to be given options rather than threats
- All people want a second chance.[19]

While these concepts may not be directly applicable to the *voir dire* process as they might be for dealing with a reluctant witness or a heated exchange with opposing counsel, keeping them in mind can still enhance the *voir dire* and trial experience for the jury. The prosecutor should not want to create any perceived barriers between themself and the jurors or the evidence presented. Think about how it feels when someone you dislike asks you to do something or tells you a story. Even if their request is reasonable and their story is interesting, your mental barrier might make you less receptive and attentive.

In a trial, building a connection with jurors starts during *voir dire*. Establishing this connection before opening statements increases the likelihood the jurors are more receptive to the prosecutor's arguments and evidence throughout the trial. Following Thompson's five universal truths of human interaction will further this goal.

Dignity and Respect

Jury selection is a conversation, not an interrogation. Jurors should not be treated like uncooperative witnesses. While a prosecutor is gathering facts from them, they are more importantly gathering opinions. Because opinions are often more personal than facts, prosecutors should be prudent in eliciting those opinions. When conversing with jurors, a prosecutor should not only pay attention to their words, but their reactions as well. If signs of discomfort are noted, the prosecutor should

18 Thompson, George J. Verbal Judo: The Gentle Art of Persuasion. United States: HarperCollins, 2010.
19 Id.

change or even abandon the line of questions. Treating jurors with dignity and respect means the prosecutor listens to jurors answers, acknowledges their feelings, and does not offend or embarrass them. Following these guidelines can be as simple, for example, as asking what the juror's "spouse" or partner does for a living, rather than what their husband or wife does; not all men have wives nor women have husbands.

Another consideration is the comfort of the jurors. It is important to determine if jurors have medical, mental, or physical issues that impact their service. Because these responses are sensitive and potentially embarrassing to jurors, it is advisable that the judge ask questions of this nature. Jurors are less likely to take offense when questioned by the court. Another option in accommodating sensitive issues may be to ask the jurors if anyone has an issue they would like to address outside the presence of the other jurors. Jurors should also be advised as to general schedules, such as the daily start and stop times, the time for lunch and intermittent breaks, and the estimated length of the trial.

Asked Rather Than Told

When conversing with jurors, a prosecutor should frame questions to solicit opinions rather than telling them what their views should be. A prosecutor should exercise caution to guide the conversation and minimize the expression of potentially damaging views.

An example:

Q: The law in this State is when a driver has an alcohol concentration of 0.08 or more, they are guilty of impaired driving. Do you understand you must follow the law?

Instead:

Q: The Judge will instruct you that the law in this State is when a driver has an alcohol concentration of 0.08 or more, they are guilty of impaired driving. Not everyone agrees with this law, and if you do not, we can discuss it. Do any of you have any strong feelings about this or disagree with the law?

Told Why Being Asked to Do Something

Jury service is a significant inconvenience for most people. It disrupts their daily lives, and they often need to make alternative arrangements to participate in the trial. To alleviate their frustration, jurors must understand the importance of their presence. While most jurors recognize that jury duty is a civic obligation, like paying taxes, it helps to explain why their roles are crucial.

Prosecutors should emphasize that jurors are representatives of a fair community and play a vital role in our system of government and in the courtroom. They should help them realize their value and assure them that their time is not being wasted. Jurors are often silently at the mercy of schedules set by judges and litigants, as well as the trial's flow with witnesses. Even those initially reluctant to serve may become invested and committed to the process once sworn in. It is appropriate and typically appreciated when litigants and the court show appreciation for the jurors' time given to ensure a fair process. A respectful court experience benefits every individual and society as a whole.

Options Rather Than Threats

Jurors who feel threatened by the prosecutor will not listen to them. A prosecutor should never threaten jurors with retaliation or imply that they could be in danger. Jurors should be questioned in a manner that encourages both honesty and openness. If jurors believe that an answer the prosecutor dislikes will be met with disdain or ridicule, they will feel threatened. In response, they may give answers they think will please the prosecutor or minimize their position to avoid conflict, leading to an ineffective jury.

A prosecutor should structure questions and strikes in such a way that allows for jurors to feel they can express their true opinions without fear of criticism. Treat jury selection as a conversation rather than an interrogation; this will minimize any sense of threat. For example, if a juror expresses a dislike for law enforcement officers and the prosecutor immediately removes them from the panel, other potential jurors may feel threatened by this action.

To provide jurors with options and soften any negative impact of removing them, below is an example of how a prosecutor can structure questions effectively:

> **Q:** I hear what you are saying. There are other types of cases that, unlike this, do not depend as heavily on the testimony of a law enforcement officer. For example, there are civil juries that need folks like you to decide matters such as land disputes or money issues. Do you think you would be more comfortable with a case such as that?

Second Chance

Sometimes jurors give the wrong answer, mishear something, or misunderstand the law. Engaging in conversation with jurors provides them a second chance to reassess their views or better understand unfamiliar concepts. A prime example of this is the burden of proof. Many jurors mistakenly believe that "proof beyond a reasonable doubt" means 100% certainty. While this assumption is not unreasonable, it is incorrect.

When such concepts are explained to jurors, most will adjust their preconceived notions and follow the law. Prosecutors should frame their questions to uncover opinions, clarify that factors like entertainment sources often cause confusion, explain what the law actually is, and ask if the jurors can accept the correct definition. This re-assessment, facilitated by education and exploring additional assumptions, gives jurors a second chance to align their understanding with the law.

Other Important and General Considerations

Regardless of the approach a prosecutor uses to connect with a jury, the following are a summary of final tips for a prosecutor to consider when conversing with potential jurors:

- Never use the word "allegedly." If the prosecutor thinks the crime is only an allegation, they should not be trying the case.
- Build rapport. Establish a connection with the jurors by being personable and approachable. This can help them feel more comfortable and open during questioning.
- Stay neutral. Avoid showing bias or leading the jurors towards a particular answer. The goal is to gather information, not to influence their opinions.

- **Maintain adaptability.** Be flexible when questioning jurors. If a juror seems uncomfortable or hesitant, adjust the approach to make them feel more at ease.
- **Encourage honesty.** Reassure jurors that there are no right or wrong answers and that their honesty is crucial for a fair trial. Acknowledge their responses and thank them for their honesty.
- **Be respectful.** If a juror says something negative about the prosecutor's office or law enforcement, it is best for the prosecutor to move on without arguing. A prosecutor should never be rude to a juror. Show respect for the jurors' time and opinions.
- **Address concerns.** If a juror expresses concerns about serving, address them directly and empathetically. This can help alleviate any anxiety they may have.
- **Maintain professionalism.** Many courthouses are small, and jurors often circulate in the same areas as prosecutors. Jurors should not see prosecutors joking around with defense attorneys, as they may perceive this camaraderie as corruption. Jurors often expect prosecutors and defense attorneys to be adversaries. Throughout the process, maintain a professional demeanor and uphold the integrity of the court.
- **Be clear and concise.** Officers are trained to choose their words carefully when they testify; prosecutors must do the same thing. It is important for the prosecutor to be professional, approachable, interested, and knowledgeable. The prosecutor should ensure the questions are straightforward and easy to understand while avoiding legal jargon that might confuse jurors.
- **Observe body language.** Pay attention to non-verbal cues, such as facial expressions and body language, which can provide insights into the jurors' true feelings and attitudes. Be cautious of jurors who are overly eager to serve. They may have hidden agendas, which can be dangerous.
- **Be patient and thorough.** There are no rewards for speed in jury selection. Unless the court limits the time allowed, the conversation should be thorough.
- **Listen carefully to the questions asked by the defense attorney when they speak to the jury.** Look at the jurors while they answer him. The defense attorney may uncover a challenge for cause that was missed and needs to be pursued. The jury must understand that they are important. Ignoring the defense *voir dire* does not convey that message.
- **Pay attention.** Jury selection is a two-way job interview. Maintain eye contact and listen carefully to their answers.
- **Summarize key points.** Periodically summarize the key points discussed to ensure clarity and understanding.

Considerations for an Effective Jury Selection

Jury selection is not only an opportunity for the prosecutor to converse with potential jurors but also a chance to educate them on several key concepts. These can include burdens of proof, elements of crimes, and technical evidence. To effectively teach these topics during jury selection, and throughout the trial, a prosecutor must understand how adults learn.[20]

Adult Learning Principles

Important principles of adult learning are primacy and recency, meaning people best retain what they hear first and last.[21] Prosecutors are fortunate to usually being the first to speak with the jury. Most jury selection begins with demographic questions, which, while not requiring retention by the jurors, provide the prosecutor an opportunity to reveal key qualities about themselves: attentiveness, concern for the jurors' comfort, approachability, confidence, and honesty. Recency pertains to the final questions asked during *voir dire*. This is the prosecutor's opportunity to emphasize the significance of the jurors' service and reassure them that it is acceptable to convict if the evidence supports it. While it is inappropriate to directly ask jurors if they can find the defendant guilty or if they can vote for guilt, it is entirely appropriate to remind them that their role is to decide based on the evidence and that they should not fear for their safety based on their verdict.

Another principle is to paint a vivid picture by teasing out the facts of the case; people tend to learn and remember best through pictures versus the written or spoken word.[22] For example, if a juror mentions they live in a particular town within the county, the prosecutor might say, "This crime occurred at the corner of Third Street and Elm Avenue. Since you live in the area, did you ever hear anything about this crime? Does the fact that it happened near where you live affect your ability to be fair to both sides?" In some cases, this principle can be applied literally with the use of photographs. Jurors should be informed that photographs will be part of the evidence, especially if they are graphic. Describe the pictures to the jurors to satisfy this principle and then ask if they will be able to view and consider them impartially.

People under stress do not retain information well,[23] and jury service can be extremely stressful for many. Most jurors have never been in a courthouse, let alone in a room with an accused person while being asked personal questions. Their greatest fear is the unknown. By explaining what the proceedings will entail, who the other people in the room are, what sort of evidence they will hear, and what the law and elements of the crime are, a prosecutor can reduce jurors' stress and increase their retention. Jurors will appreciate the prosecutor providing a roadmap, making them feel at ease, and helping them become part of the process.

20 This section borrows from the Prosecutor Train the Trainer curriculum materials in describing these adult learning principles. If interested in obtaining the training materials, please contact the National Traffic Law Center at https://ndaa.org/programs/ntlc/.

21 Hattie, John and Yates, Gregory C.R. (2013). How knowledge is acquired. Visible Learning and the Science of How We Learn (1st Ed.). (p. 116). London: Routledge.

22 Najjar, L.J. (1998). Principles of educational multimedia user interface design. Human Factors: The Journal of the Human Factors and Ergonomics Society, 40(2), 311-323.

23 Medina, J. (2008). Stress – Rule #8: Stressed brains don't learn the same way. Brain Rules: 12 Principles for Surviving and Thriving at Work, Home, and School (pp. 169-195). Seattle, WA: Pear Press.

Impact is another adult learning principle; every word spoken should be carefully considered. The concepts presented to jurors must be well-organized and clear. Sloppy vocabulary can lead to confusion, resentment, and offense, undermining a case. If a prosecutor alienates a juror with poorly chosen words, they risk losing the case. Conversely, a prosecutor who skillfully weaves their theme and theory into jury selection with strong word choices and effective use of tone and questioning will leave a lasting impression on the jurors throughout the trial.[24]

Jurors learn and retain information better through active participation. This is why jury selection should be a conversation, not an interrogation. If the only appropriate responses to questions are "yes" or "no," the jurors will retain only a fraction of what was said. When jurors are engaged and sharing their thoughts and beliefs, however, they retain much more information.[25] For concepts such as burden of proof, their retention of the proper standard is crucial.

Repetition is also an important adult learning principle. Consider how a listener gradually learns the lyrics of a song heard repeatedly on the radio. By the tenth time, they likely know the chorus. Optimal retention typically requires hearing something six times.[26] During jury selection, therefore, certain topics must be repeated. These include circumstantial evidence, the burden of proof, and the elements of the crime, details of which benefit from repetition to ensure jurors fully understand and retain the information.[27]

Lastly, jurors can become easily bored. If questions are scripted and always asked in the same order and manner, jurors may struggle to learn and retain information. This can be remedied by varying the speed, tone, and cadence of the prosecutor's voice. Reorder the questions and change the wording. For example, instead of repeatedly explaining what the burden of proof entails, try this approach: "Juror 3, did you hear the conversation I had with Juror 10? He understands that the State doesn't need to prove someone guilty beyond a shadow of a doubt, as that is not the standard. What are your thoughts on this?"

The Traditional Approach to Selecting a Jury

As described above, most states have established protocols that outline the procedures, conduct, and criteria for jury selection. The presiding judge typically has considerable discretion over the extent of a prosecutor's dialogue with jurors, including the content and duration of such interactions. In jurisdictions that afford prosecutors a degree of flexibility, the following provides strategic recommendations for the jury selection process.

Preparation

Prior to posing the first question, it is imperative for the prosecutor to have conducted a comprehensive review of the jury roster, investigated any criminal records or driving histories of the jurors (where possible), prepared printed copies of the jury instructions, and thoroughly reviewed the case file.

24 Medina, J. (2008). Attention – Rule #4: We don't pay attention to boring things. Brain Rules: 12 Principles for Surviving and Thriving at Work, Home, and School (pp. 79-82). Seattle, WA: Pear Press.

25 For example, see Medina, J. (2008). Sensory Integration – Rule #9: Stimulate more of the senses. Brain Rules: 12 Principles for Surviving and Thriving at Work, Home, and School (pp. 197-219). Seattle, WA: Pear Press, and McKeachie, W.J. & Svinicki, Marilla D. (2014). Active learning: Group-based learning. McKeachie's Teaching Tips: Strategies, Research and Theory for College and University Teachers. (14th Ed.), (pp. 191-201). Belmont, CA: Wadsworth, Cengage Learning.

26 Medina, J. (2008). Vision – Rule #10: Vision trumps all other senses. Brain Rules: 12 Principles for Surviving and Thriving at Work, Home, and School (pp. 222-240). Seattle, WA: Pear Press.

27 See also the following resources: Brown, P.C., Roediger III, H.L., & McDaniel, M.A. (2014). To learn, retrieve. Make It Stick. The Science of Successful Learning (pp. 23-45). Cambridge, MA: The Belknap Press of Harvard University Press; and Medina, J. (2008). Long-term memory – Rule #6: Remember to repeat. Brain Rules: 12 Principles for Surviving and Thriving at Work, Home, and School (pp. 122-147). Seattle, WA: Pear Press.

It is useful to prepare a bullet list of questions to ensure all critical points are addressed. Additionally, having the charging officer or another prosecutor seated with the prosecutor may be beneficial; it is difficult to carry on a conversation with jurors, take notes, hear responses, and see reactions simultaneously. Thus, the presence of a colleague to observe juror reactions and document their responses can be invaluable. Moreover, a second individual offers an alternative viewpoint, which is advantageous when evaluating potential juror challenges

Finally, consider the specific attributes that would make an 'ideal' juror for the case, which are often dictated by its facts. For example, mothers with young children may offer valuable insights if the case involves children in the impaired driver's car or if there was a wreck and children were involved. Similarly, bicycle enthusiasts might bring relevant experiences to a case involving bicycle or pedestrian crash. Individuals holding commercial driver's licenses can contribute a depth of knowledge based on their observations of vehicular crashes and reckless driving. While the prospect of finding the perfect juror is uncommon, it is crucial to weigh the unique life experiences of potential jurors that could prove advantageous for better understanding the facts of the case.

The Conversation

The conversation, including the questions that should be asked, can be divided into several sections. Some questions should be directed to individuals, while others should be posed to the group. The key factor is the follow-up: whenever a response is elicited, the prosecutor should acknowledge it and engage in a discussion with the juror.

The general outline for conversation with, or the sections of questions for, the jury include the following:

- Asking introduction and demographic questions
- Establishing knowledge of the case and potential general biases
- Explaining the charges
- Defining burdens and evidentiary standards
- Determining familiarity and experience with impairing substances
- Inquiring about life experiences
- Reducing expectations
- Considering catchall questions

Introduction and Demographics

Jurors often feel nervous and intimidated by the unfamiliar surroundings of a courthouse, generally, or a courtroom or jury room, specifically. It is the prosecutor's first job to make them feel at ease, and this begins with an introduction: the prosecutor should share their name, their role, the geographic areas they cover (especially for multi-county districts), how long they have been on the job, and where they live. Introduce the officers involved, as well as the defendant and the defense attorney. If the defense attorney is part of a larger firm, mention the firm's name.

Next, read the witness list and ask the jurors if they have had any contact with these individuals. Pay close attention to their facial expressions for signs of uncertainty. If a juror appears to recognize a name, follow up immediately. Determine how they know or think they know the person and ask if this knowledge might affect their ability to remain impartial.

Demographic questions should be asked individually. A prosecutor should start by asking for the jurors' names, the town or area of the county where they reside, and inquire about how long they have lived there. A prosecutor should also find out if they work outside the home or, if retired, what their previous employment was. Additionally, a prosecutor should ask about the juror's immediate family, including their spouse's occupation and whether they have children, along with their ages.

These questions not only provide useful information but also serve another purpose. Jurors often worry about making mistakes or appearing unknowledgeable. These are straightforward questions they can easily answer, which helps alleviate concerns about giving wrong answers or being subjected to ridicule. As a result, the jurors' stress levels are reduced.

Knowledge of Case and Biases

At this point, the prosecutor can start to present the facts of the case in accordance with state and local laws and rules regarding discussing the facts of the case during *voir dire*. For example, the prosecutor can begin by telling the jurors where the stop or crash occurred followed by asking if they are familiar with the area and whether they have ever traveled near or through it or if it is close to their home. If they do know the area, ask if their knowledge of the crime scene might affect their ability to remain impartial. This serves two purposes. First, it helps ensure they do not have prior knowledge of the crime, which could lead to bias. Second, it makes them aware that impaired driving can occur in their community without their knowledge, heightening their awareness of the danger.

Because many impaired driving cases involve only one witness, a law enforcement officer, it is crucial to determine whether jurors have any biases against officers. A prosecutor should ask if the jurors have ever had contact with a law enforcement officer for any reason. This simple question covers a multitude of situations. For example, a juror may have received a speeding ticket, and their interaction with that officer could color their perspective of law enforcement. Their home may have been burglarized, and they were either pleased or displeased with the investigation. They may have been the victim of an assault and were grateful when the police arrived. They could have formed opinions about officers based on negative media coverage or have a relative who is a law enforcement officer. Following up on all responses, while controlling the conversation to minimize negative responses, is crucial. If there is a strong anti-officer response, the prosecutor should point out that the juror is not referring to the officer in the present case. A challenge for cause would be appropriate in such situations.

If there are other witnesses in the case, or if the officer has special skills, such as being a Drug Recognition Expert (DRE), this is also a good time for the prosecutor to forecast their testimony. For example, the prosecutor may ask jurors if they know what a toxicologist is and inform them that they will hear from a toxicologist about what was found in the defendant's blood or urine. The prosecutor could then follow up by asking if they will listen to this expert and consider their testimony in rendering a verdict. The same approach is useful for a DRE. Jurors tend to become more invested in the case if they think they will hear something new and interesting.

Charges

This is the point where the prosecutor defines the law and weaves in some of the facts of the case. The best practice is to use the same Pattern Jury Instruction the judge will use, as excessive paraphrasing can draw objections. A prosecutor should not assume that jurors understand commonly used terms as defined by courts and statutes. For example, a prosecutor should clearly define terms like "street," "highway," or any other elements required in the jurisdiction where the case is being tried. In some cases, it may be necessary to fully define "driving" or "operation." For instance, in a crash case, the driving may have ceased, and the vehicle might not be on a road. The prosecutor should prepare the jury for this and ensure they understand that it is not detrimental to the case. A prosecutor should never assume their knowledge of these terms is shared by the jurors and should explain that legal definitions can be hyper-technical to avoid making jurors feel that questions about their understanding of common words like "street," "vehicle," and "drive" are condescending.

Burdens and Standards

Two issues that must be covered in detail with a jury are proof beyond a reasonable doubt and circumstantial evidence. These two concepts can be intertwined during a prosecutor's conversation with the jury to make both more understandable. Consider the following examples:

> **Q:** Has everyone heard the term proof beyond a reasonable doubt? Do you understand this is the State's burden, but it does not mean proof beyond all doubt or proof beyond a shadow of a doubt? If it was, can we agree the only way you could be convinced the defendant committed this crime would be if you actually saw it take place? If you were a witness to the crime, it would not be fair for you to also serve as a juror, correct?
>
> **Q:** Has everyone heard the term circumstantial evidence? Direct evidence would be a witness testifying they saw the defendant driving, for example. Circumstantial proof of driving would be a series of facts that prove another, does everyone understand? Do you also understand that the judge will instruct you that neither type of evidence, direct or circumstantial, is considered to be of higher quality? For example, you go to bed at night and there is no snow on the ground. In the morning two inches of snow blankets your yard. You did not see it snow, but you can infer circumstantially that snow fell from the sky while you slept. Is it possible that your neighbor paid hundreds of dollars to have a snow machine cover your yard with snow? It is possible: but is it reasonable? In this example, can we agree that there is strong circumstantial proof it snowed overnight, and that you believe the snow fell from the sky beyond a reasonable doubt, even though there are alternate outlandish possibilities?

After reviewing the case, a prosecutor may identify other issues to address, such as intent or knowledge. A prosecutor should use the pattern instructions and statutes to correctly define and forecast these issues. Additionally, a prosecutor should address any defenses they know will be employed, such as duress, automatism, or alibi. By providing the jury with the proper definitions and engaging them in a conversation about their opinions helps them anticipate any proof that may be presented.

Familiarity with Impairing Substances

The substance consumed by the driver charged with impaired driving is a key factor in the case. It is important to determine the jurors' opinions about the impairing substance and, in some cases, their experience with it.

In alcohol-related cases, many jurors will have had some experience with the substance, either through personal use or by observing others under its influence. There are several ways to approach this topic. Jurors are often forthcoming in admitting they have consumed alcohol, although it is best to avoid asking if they have ever been drunk. Jurors who do consume alcohol are often better positioned to understand its effects compared to those who have never had a drink. A prosecutor should ask jurors if they have ever seen someone they believed to be impaired by alcohol and inquire about what they observed that led them to that conclusion. Jurors who describe signs and symptoms present in the case at trial can be very beneficial. Additionally, a prosecutor should ask jurors if they know anyone who has battled alcoholism and how alcohol affected that person's behavior.

In cases involving illegal drugs, the prosecutor should discuss illegal drugs with the jurors. A prosecutor should inform the jurors that the driver's toxicology report revealed the presence of substances such as cocaine or methamphetamine. A prosecutor should ask if they have heard of these drugs or have knowledge about how they affect users. This line of questioning may inform the prosecutor as to which jurors have had personal experience with someone who has used illegal drugs, and follow-up questions to reveal biases are appropriate.

In cases involving cannabis, the task of seating an impartial jury can be challenging due to the varied and strong public and personal opinions. Regardless of their opinions, jurors must impartially apply the law. Thus, a prosecutor should ensure jurors understand that cannabis impairs a person's ability to drive safely. Irrespective of the laws of any state regarding whether someone may possess and/or consume, inhale, or otherwise use cannabis, jurors must be willing and able to determine whether someone is guilty of driving while impaired. Just as it is illegal for someone to drive while impaired by alcohol, it is illegal to drive under the influence of cannabis. These cases are about whether the defendant drove impaired, and a juror's opinion about the issues surrounding "legalization of cannabis" cannot be allowed to unduly influence the case.

Finally, some cases involve prescription or over-the-counter drugs. Directly asking jurors if they take a specific drug, like Xanax, may not yield truthful responses. Instead, a prosecutor should ask if they are familiar with the drug, which will likely result in more honest answers. A prosecutor can also inquire if they have ever been prescribed a medication that made them feel sick or drowsy, and if so, whether they would have driven under those conditions. A prosecutor could also discuss the importance of warning labels on prescription medications and ensure they understand these warnings. In cases involving multiple drugs, a prosecutor should ask if they are aware that mixing prescriptions or consuming alcohol with prescription medications can heighten their effects or cause adverse reactions.

Life Experiences

If the case involves a crash, ask jurors if they or a family member or friend have ever been involved in a collision. Before proceeding with anyone who responds affirmatively, ask their permission to delve deeper. A prosecutor should assure them that they do not have to share details if they are

uncomfortable, but if they are willing, they have more questions. A prosecutor should inquire about their feelings during the incident, whether there were any injuries, and what the collision sounded like. Finally, a prosecutor should ask about the resolution of the incident.

An unfortunate reality is that within any panel of jurors, one or more may have had an experience with an impaired driver. This information is critical but can also be sensitive, so a prosecutor should exercise caution in how they ask about it. A suggested approach is to say, "Has anyone ever been impacted by an impaired driver, or had a family member or friend who was?" It is not unusual for a juror to have had a loved one who was seriously injured or killed in a crash. If there is an affirmative response, the prosecutor should ask for permission to continue. The juror's contribution to the case about the ramifications of being hit by an impaired driver can be extraordinary. Jurors tend to believe their peers—other jurors—more than anyone else in the courtroom. This personalizes the case for them.

A prosecutor should find out if any jurors know someone who was charged with impaired driving. The prosecutor should follow up by asking if they were involved in the progress of the case and inquire about their opinions regarding the treatment of the defendant by law enforcement and the courts. Sometimes, a juror may even reveal that they were arrested for impaired driving themselves.

Asking jurors if they have been convicted of a crime can be sensitive. Prosecutors who have accessed jurors' criminal histories already possess that information and may not need to inquire. It can still be useful to ask, however, if only to gauge their honesty about their past. The type of case for which they were convicted should also be noted. A conviction for larceny, for example, may have no impact on their ability to serve fairly in an impaired driving trial.

Jurors with prior convictions require additional scrutiny. If a juror has several impaired driving convictions, they would most likely be unsuitable for the case involving an impaired driving charge. Careful questioning about those convictions, including a suggestion that the juror might be more comfortable serving on a jury for a different type of case, can usually lead to a challenge for cause. In contrast, potential jurors with one conviction for impaired driving for which they pleaded guilty can be excellent jurors. These individuals recognized their conduct was dangerous and criminal and have taken accountability for their actions. A prosecutor should find out if they felt law enforcement and the criminal justice system treated them fairly. A prosecutor should also ensure they acknowledge that they understand the defendant has a right to a trial, even though the juror themselves accepted responsibility and pleaded guilty.

Reducing Expectations

Jurors often form their understanding of trials from television shows like *Law and Order*, *Forensic Files*, and reality shows like *Cops*, as well as from true crime podcasts. They may believe they know what a "drunk driver" looks like or how evidence is presented based on these sources. During jury selection, it is crucial for the prosecutor to dispel these entertainment-based beliefs and provide jurors with a clear, accurate understanding of the legal process.

This is another opportunity to weave the law and the facts of the case at hand into jury selection. If jurors enjoy watching *Cops*, for example, the prosecutor may want to ask if they have seen episodes featuring impaired individuals and explain that the "entertainment" level of impairment is not the legal standard. The prosecutor should describe what the proof will show in the trial and ask if the juror will hold them to the legal standard of the state, rather than the standards of television or videos.

For fans of *CSI* and *Forensic Files*, clarify that these cases rarely involve touch DNA or lifting fingerprints with superglue, powders, and brushes. The prosecutor should explain what the jurors can anticipate, such as HGN and DRE testimony, toxicology reports, or other relevant evidence. After informing them, the prosecutor should ask, "Does the fact that you will not hear about DNA and other interesting scientific evidence put you in a position where you can't be fair to both sides?" This question helps manage expectations and ensures fairness without making the conversation seem like an opening statement.

Catchall Questions

There are a few important questions that do not fit neatly into a specific category. One such question relates to religious beliefs. Some jurors may perceive jury duty as passing judgment on another person and, for religious reasons, may be unwilling to perform this duty. The prosecutor should emphasize that jury duty does not require anyone to set aside their religious convictions. The prosecutor should also assure them that they are not sitting in judgment of a person but rather evaluating that person's conduct. Finally, the prosecutor should acknowledge that it is perfectly acceptable for them to hold fast to their beliefs and remove them for cause if necessary.

A prosecutor should also ask jurors about their prior jury service. If any have served before, find out if it was for a criminal or civil case. Some jurors may have served on a grand jury. A prosecutor should explain the distinctions between civil, criminal, and grand juries, as well as the differing burdens of proof. A prosecutor may use this opportunity to restate the State's burden of proof: what it is and what it is not. A prosecutor should also ask if the jury they served on was able to reach a unanimous verdict, while being mindful that many states have rules prohibiting prosecutors from asking what the verdict was.

A prosecutor should determine if any of the jurors know each other. Having two jurors who are sworn enemies serve on the same trial jury could be disastrous during deliberations.

Finally, the prosecutor should ask the jurors if there are any issues that were not covered in the questions that they believe could be important regarding their service. The prosecutor should also inquire if they have any concerns that might prevent them from giving their full attention to the case.

An Alternative Approach to Selecting a Jury

A very traditional approach to jury selection has been discussed above. Many prosecutors in recent years have found, however, that this method is no longer effective in their jurisdictions. Modern jurors are busier, more skeptical, and feel more informed than ever before. Rather than focusing jury selection primarily on education and indoctrination, this alternative approach emphasizes two key concepts: uncovering bias and building a team that can work together to understand the evidence the prosecutor will present to reach a unanimous verdict.

Preparation

The goal of this approach to jury selection is to identify and remove outliers from the jury pool, allowing the prosecutor to build a team of unbiased jurors capable of reaching a unanimous decision. While an acquittal can be disappointing, few things are more frustrating to a prosecutor than a hung jury. A hung jury means that not only has the prosecutor failed to secure a guilty verdict, but the case remains unresolved, often necessitating a retrial. This leads to delays in the docket, delays in justice, and additional resources being expended.

If the prosecutor has a factually strong case and has developed a competent team of jurors, the prosecutor is likely to achieve a favorable outcome. Even with strong facts, however, a dysfunctional team can lead to a hung jury or a runaway verdict, which is often a risk with the traditional prosecutor-focused approach. If the facts are weak, it begs the question: why is the prosecutor going to trial? Jury selection is just one part of the process; the trial itself requires the prosecutor to prove their case. Losing a weak case is simply the justice system at work. But if the prosecutor can prove the case beyond a reasonable doubt and present it to a solid team of jurors, research and statistics indicate that the prosecutor is likely to win.

Assembling a jury that functions as a team comes down to selecting jurors based on personality traits. "Personality traits are stable and enduring characteristics that influence how a person behaves in most situations. The unique constellation of personality traits that a person possesses affects what information they pay attention to, how thoroughly they consider an argument, and how they cooperate and deliberate in a group setting."[28]

This approach to jury selection requires prosecutors to quickly assess the personalities of potential jurors. Unfortunately, this often leads to reliance on demographics and stereotypes. For instance, a prosecutor might hear advice like, "Never put an engineer on your jury; you can't prove anything to them," or "Never pick a teacher; they have too much sympathy for defendants." While these stereotypes may hold some anecdotal truth, they only scratch the surface. The real question is: what are the core values, ways of thinking, and overall worldviews that lead someone to become an engineer or a teacher? More importantly, how can we identify these fundamental personality traits during jury selection?

One popular approach to deciphering personality is Color Theory. Rooted in the work of Swiss psychologist Max Lüsher and developed for use in jury selection by jury consultant Dr. James Rasicot, Color Theory provides an accessible shorthand for quickly assessing potential jurors.

Four Basic Personality Types, by Color

Color Theory in jury selection categorizes people into four basic groups: Blue, Green, Red, and Yellow. These colors represent general human archetypes, with everyone being a blend of each to varying degrees.

By classifying potential jurors into the color that best fits the information a prosecutor has about them, they can start to predict how they might perform on the jury and during deliberations. The chart on the following page provides a quick overview of key personal characteristics by color.[29]

28 "Understanding the Impact of Personality Traits on Jury Deliberation Using Jury Analysis to Leverage Psychographic Information," Jury Analyst, 5/9/23. Available at https://juryanalyst.com/blog/understanding-the-impact-of-personality-traits-on-jury-deliberation-using-jury-analysis-to-leverage-psychographic-information/ (accessed 3/28/24).

29 Adapted from New Techniques for Winning Jury Trials, Dr. James Rasicot, 1990. Pages 151-157.

Four Basic Personality Types, by Color

	Blue	Green	Red	Yellow
Dress	Casual; subdued	Formal; professional	Casual; athletic	Trendy; bold
Example Occupations	Administrative assistants; elementary teachers; stay-at-home parents; counselors	Lawyers; doctors; engineers; professors; computer programmers	Sales; entrepreneurs; athletes; bartenders; construction	Artists; travel agents; interior designers; fashion; advertising
Hobbies	Family trips; camping; reading for pleasure	Self-improvements; collecting; reading to learn	Sports; poker; competition; racing; hunting	Traveling; decorating; art; social sports; reading for pleasure
Trait	Introvert	Introvert	Extrovert	Extrovert
Speech	Soft; "I feel"	Precise; "I think"	Loud; "I believe"	Fast; "I imagine"
Civic Involvement	High (PTA; humane society; fund raisers; etc.)	Selective (school board; city council; etc.)	Minimal, if any	High (clubs; theater; music)
Body Language	Open; non-aggressive	Assertive	Aggressive	Expansive; friendly
Focus	Group	Self	Self	Group
Role	Followers	Leaders	Leaders	Followers
Orientation	People	Task	Task	People
Tendency	Supportive; compromising	Analytical; authoritarian	Dominant; competitive	Emotional; free-thinking
Likely outcome	**Verdict**	**Verdict**	**Impasse**	**Impasse**

For a jury to function effectively as a team, it should primarily consist of Blues with some Greens. On a twelve-person jury, this would ideally mean 9-10 Blues and 2-3 Greens, whereas for a six-person jury, the aim would be for 1-2 Greens with the rest being Blues. Reds and Yellows should be avoided if possible. Reds tend to dominate and act as one-person juries rather than collaborating with others to reach a verdict. Yellows, on the other hand, struggle with making and committing to decisions. In traditional jury selection, Reds might appear as strong jurors, often favored by prosecutors for their assertiveness. Reds can alienate and antagonize other jurors, however, leading to chaos and discord in the jury room—a recipe for a hung jury.

The best predictor of which juror will be selected as the foreman is their level of extroversion.[30] Research has shown that high levels of extroversion correlate with jurors rendering not-guilty verdicts in criminal cases, and that forepersons are "especially influential in criminal case juries that reach not-guilty verdicts."[31] Extroverts tend to be predominantly Red or Yellow. If the foreman is a Red or a Yellow, they may dominate or derail the process. By removing the Reds and Yellows from the jury, a prosecutor positions the Green(s) to be foreman. While introverted, Greens are logical thinkers who often hold jobs requiring leadership and public speaking. Unlike Reds, Greens do not feel they the need to be the leader and are capable of cooperating and compromising with others.

Pre-Trial Assessment

In jurisdictions using pre-trial juror questionnaires, valuable insights about the jury pool can be obtained by reviewing these questionnaires with a focus on color-typing clues. While basic demographics do not provide a complete picture of a person's personality, details such as occupation, education, familial relationships, and social group activities can help form an initial hypothesis about their "color." A prosecutor should look for warnings indicating potential Reds and Yellows, and positive indicators indicating potential Blues and Greens.

When pre-trial questionnaires include the prospective juror's name and identifiers, rather than just a juror number, reviewing social media profiles[32] can provide additional insights. A prosecutor should look for indicators such as numerous family photos to suggest a Blue, posts about politics and news (often with debates) to suggest a Red, and artistic projects or photos with friends to suggest a Yellow. Greens may be harder to find on social media or may have profiles with high privacy settings.

Before the trial, assign each juror a color based on preliminary assessments. A prosecutor should pay special attention to Blues who may have Green tendencies and Greens who may have Red tendencies. When meeting them, the prosecutor will need to determine where they fall on the continuum, confirming or adjusting any pre-trial assessments. This will be done through in-person observations and open-ended questions designed to reveal their relevant personality traits and attitudes toward the specific issues in the case.

30 John Clark, Marcus Boccaccini, Beth Caillouet, William Chaplin, "Five Factor Model Personality Traits Jury Selection And Case Outcomes In Criminal And Civil Cases," Criminal Justice and Behavior, Vol. 34, No. 5, May 2007, p. 644.

31 Id. at 655.

32 See, e.g., Professional Considerations for Conducting Jurors' Criminal Records Research, above, in the section on Preparing for Jury Selection; see also, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

First Impressions

As the jury pool enters the courtroom, the prosecutor can start making on-the-spot assessments to support or contradict their pre-trial color evaluations. The prosecutor should observe what the potential jurors are wearing, what they are carrying, their apparent demeanor, and who is socializing with others. Someone in a casual, brightly colored outfit who is talking animatedly with those around them, for example, is likely a Yellow. In contrast, someone in more subdued attire, carrying a notebook, and quietly observing their surroundings may be a Blue.

It is important to note that these preliminary, day-of assessments are available to the prosecutor regardless of whether pre-trial determinations were possible through questionnaires or other means.

The Conversation

A prosecutor's interaction with the jury pool during jury selection is essentially a conversation. While the topics may not be typical for everyday socializing, the prosecutor should remember they are still a person talking to other people, something done every day. Some specific approaches and phrasing for various topics are included below. However, the prosecutor should remember they already know how to communicate effectively; speaking with jurors is not uncharted territory.

Building Rapport

Respect the Jurors' Time

Chances are the people who have shown up for jury duty are not thrilled to be there. "Before your jurors are seated to hear your case, they will have been annoyed, intimidated, bored, insulted, and their privacy will be invaded."[33] Do not waste their time; they will appreciate a prosecutor being concise and to the point.

Prosecutors likely do not need to spend time introducing themselves or other courtroom participants, as the judge has probably already done so. If the judge has not, the prosecutor can quickly make introductions to open the conversation with the jurors.

Be as efficient as possible. If a complex analogy will not help jurors understand a concept, a prosecutor should discard it. If a question will not elicit crucial information, a prosecutor should not ask it. A prosecutor should plan questions ahead of time with the goal of identifying and removing individuals who will not benefit the team they are building. Every question should reveal the respondent's personality or, critically, any bias against an issue in the case.

Talk to Them Like People

"Two things jurors hate most of all are the perception that their time is being wasted and the belief that the attorneys are being manipulative, slick, or condescending."[34] Treat the potential jurors as equals. They are adults with jobs, families, and responsibilities, taking time away from their lives to serve on a jury. A prosecutor should avoid talking down to them or being condescending and be genuine–their authentic self. People are less likely to trust someone they perceive as hiding things or not being sincere.

33 Godfrey, Brett. Advanced *Voir Dire* and Jury Selection, Part II. Available at https://gojolaw.com/article-advanced-voir-dire-part-1/ (accessed 3/28/24).
34 Chopra, Sonia. "The Psychology of Jurors' Decision-Making." Plaintiff Magazine, Jan 2018. P. 4. available at https://plaintiffmagazine.com/images/issues/2018/01-january/reprints/Chopra_The-psychology-of-jurors-decision-making_Plaintiff-magazine.pdf (accessed 3/28/24)

"When it comes to communicating effectively…with others, you need to speak their language–to deliver your message in the way they want and will hear it."[35] Different personality types communicate—and prefer to be communicated with—in different ways. Entering conversations with potential jurors with an eye toward identifying their individual personalities will enable the prosecutor to converse with them more effectively. A prosecutor should approach them based on the pre-assessment of their personality and corresponding communication style. Listen not only to what they are saying but also to how they are saying it and subtly mirror their language and vocal style back to them.

Listen and Mirror

People want to feel heard and will engage more if they sense the prosecutor is genuinely paying attention and care about what they are saying. If a juror feels the prosecutor is not listening, it will shut down the conversation.

A prosecutor should make eye contact with the juror who is speaking, maintain an open posture, and remove physical barriers between themself and the jury if possible, such as podiums or lecterns. Then, the prosecutor should respond to what they said. With the adrenaline and nerves of trial, and feeling crunched for time, it can be tempting to think about the next question the prosecutor wants to ask and move immediately to it after the juror finishes their answer. The prosecutor should avoid this at all costs. Rather, a prosecutor should listen, respond, and follow up.

Actively listening serves a dual purpose in the screening process. As the person answers the question, a prosecutor should pay attention not only to the content of the given response but also to the words they use and the attitudes they convey. Are they using "we" language, referring to other jurors' answers in crafting their own, and exhibiting a strong sense of right and wrong? This is likely a Blue or Green who will be a valuable team player. Conversely, are they displaying distraction or inattentiveness, criticizing the rules or procedures, speaking in terms of "me" or "I," or qualifying their answers with "maybe" and "perhaps"? This person may well be a Red or Yellow, whom a prosecutor may want to consider striking.

Creating an Atmosphere of Disclosure

Equally important to what a prosecutor asks is the environment the prosecutor creates for asking it. This involves how prosecutors present themselves, how they ask their questions, and how they respond to the answers they receive. A prosecutor should establish themselves early as someone the jurors can trust to hear and respect them and their answers.

Get Comfortable with Being Uncomfortable

Many questions in jury selection involve sensitive, uncomfortable, or potentially embarrassing topics. For example, in impaired driving cases, much of the focus is on substance abuse. Substance use and abuse are extremely common throughout society. While the spotlight may be on the defendant's substance abuse, it is important to recognize that many potential jurors' lives may also be personally or tangentially affected by substance abuse issues.

35 The Art of Speedreading People: How to Size People Up and Speak Their Language, by Paul D. Tieger and Barbara Barron-Tieger, 1998, p. 139 (emphasis from original removed).

The more openly and calmly a prosecutor can discuss difficult topics, the more openly and calmly the jurors will be able to respond. Additionally, responding to difficult answers with empathy and understanding encourages jurors to continue being open.

Grant Space for Honesty

A prosecutor should make it clear to the jurors that honesty is encouraged and that they can give their honest answers, regardless of whether they think it is what the prosecutor "wants" to hear. The prosecutor should set the expectation from the start that they are looking for brutal honesty from everyone and that, as long as they are truthful, there is no wrong answer to any question. Thank them for expressing their impressions, whether those impressions are "good" or "bad" for the prosecutor's approach to the case.

It is a common myth that it is better for a juror who will be unfavorable to a case to keep their opinions to themselves, rather than risk tainting the jury pool. There is nothing any potential juror can say, however, that is going to sink the case. The facts of the case are the facts, and if a prosecutor is bringing this case to trial, it is because they believe the facts support a finding that the defendant committed the crime. It is far worse to have a negative opinion or insurmountable bias hidden and sneaked into the jury room to derail deliberations than to have it exposed and dealt with in the jury selection phase. A prosecutor should "want the bad jurors talking. The first juror that says something horrible about your case or position, thank them…This helps get the other bad jurors comfortable to be 'brutally honest' and helps [you] to identify them."[36] The prosecutor should watch for nods and positive reactions to negative comments to identify other potential problem jurors. Also, a prosecutor should look for signs of disagreement to reveal jurors who are favorable to your case, then get them talking.

Follow-up and Appreciation

"All people have different biases and beliefs. Don't try to change them or criticize them for what they believe in. Accept it, thank them, and move on. If you are arguing with the people deciding your case – you are losing."[37] Thanking the person who has reacted negatively to an issue in the case helps make others who may feel similarly comfortable with speaking up, allowing the prosecutor to identify and remove them. Remember, the prosecutor is seeking brutal honesty. Shutting down or responding poorly to someone being brutally honest will thwart this goal.

As difficult as it may be, responding to a juror's negative statements is not the time to advocate. Instead, a prosecutor should follow up, seeking additional details and exploring the underlying reasons behind their feelings. Then, the prosecutor should kindly and genuinely respond with, "Thank you so much for sharing that with me. Who here feels differently, even a little bit?" This encourages other jurors, especially those who agree with the prosecutor, to speak up and provide a counterpoint to the negative statement.

There is no need for the prosecutor to argue with a juror who opposes them on an issue. The prosecutor is unlikely to change their mind, so the prosecutor should use their answer to their advantage by building the case to strike the biased juror for cause and furthering the conversation with the remaining pool. For a prosecutor, accepting that they cannot change jurors' views is the key difference between this approach to jury selection and the traditional one.

36 Robert Simon and Sevy Fisher. "Jury Selection: Strong Personalities - Identifying the 'poison' jurors and getting both the good and bad jurors talking." Plaintiff Magazine, Feb 2016. Available at: https://plaintiffmagazine.com/recent-issues/item/jury-selection-strong-personalities (accessed 3/28/24).

37 Id.

Creating The Questions

Get People Talking

When crafting questions, the words and phrasing a prosecutor uses are crucial. A prosecutor should ask open-ended questions that require more than a simple yes or no answer, allowing for follow-up to keep the conversation going. Additionally, a prosecutor should choose words that encourage further discussion and avoid those that shut it down. For example:

Ask: "Who here…?"
Not: "Does anyone…?"

Ask: "How many…?"
Not: "Any…?"

Ask: "How so?"
Not: "Why?"

Say: "Go along with"
Not: "Agree"

Say: "Strong feelings"
Not: "Bias"

Say: "Seating a jury"
Not: "Voir dire"

Say: "Tell me more about that"

The prosecutor should intersperse questions directed to the whole group with individual follow-up questions, focusing on both those who are engaging in conversation and those who are not. A good starting point for beginning the conversation is the "familiar face" introduction.

For example, the prosecutor can raise their hand to model what they are asking them to do, and ask the group, "Who here sees a familiar face?" Although the judge has likely already asked if the jurors know any of the courtroom participants, it is possible, especially in smaller, more rural jurisdictions, that some jurors may recognize each other. If so, the prosecutor should briefly question the individuals about how they know each other. Then ask, "What does the idea of 'brutal honesty' mean to you?" After they provide a definition, follow up with, "Is [other juror they know] someone you can be [use their definition of brutal honesty] in front of?"

If no one recognizes anyone else, a prosecutor can simply select a person and ask what the idea of brutal honesty means to them. The prosecutor then welcomes the jury pool and introduces them to the process:

"Welcome to jury selection, where we get a chance to talk to each other with brutal honesty [quote verbatim–do not rephrase or correct–the potential juror's definition] to determine whether this case is a good fit for you. There may be reasons this case is not a good fit for you—because you know some of the people involved, you know some of the facts, or you have feelings or life experiences that would make it tough for you to give both sides an equal shot, despite your best efforts."

The "familiar face" opening works well because it is safe—it offers only easy questions to answer, appeals to the Blues' and Greens' senses of justice, and establishes that the dignity of the potential jurors will be protected. It suggests that maybe this case is not a good fit for them, and perhaps a different case would be better. A prosecutor should avoid phrasing the problem in terms that suggest the juror is not good for this case; such an approach increases anxiety among all the jurors, telegraphs that there are correct answers to the questions, and decreases the likelihood of discovering latent views or opinions that could jeopardize a prosecutor's chances of winning the case.

Be Efficient

A prosecutor can respect the jurors' time by clearly explaining what the case is about and getting straight to the issues. For them, this is now a job, and wasting their time with irrelevant banter can be insulting.

A prosecutor should organize the questions by topic, following the same order they would use in their opening statement to introduce each subject.

When addressing a necessary topic that is not directly an issue in the case, such as the concept of "beyond a reasonable doubt," the prosecutor should avoid complex analogies and go straight to the heart of the matter. For example: "Some people say that 'beyond a reasonable doubt' means 'beyond all possible doubt,' or 'with 100% certainty.' The law in [this state] defines 'beyond a reasonable doubt' as [relevant definition]. Who here thinks that it makes it too easy to convict a defendant if you can still have some doubt?" A prosecutor should incorporate good answers into their follow-up questions and continue the discussion until it naturally transitions to the next topic.

Focus on the Negative

Prepping for jury selection requires a thorough case analysis, fully exploring the controversial aspects of the case to determine where biases may lie. A prosecutor should consider the weaknesses of the case, what they dislike, and what they fear jurors might think. What views might jurors hold that could make it difficult for them to consider the case with an open mind? These are the areas that need the most attention during jury selection, allowing the prosecutor to identify potential jurors with the most insurmountable biases against the case.

Consider the key issues in the case—specifically, why is this case going to trial? If there is no dispute that the defendant was driving, there is no need to waste time in jury selection exploring opinions on what it means to be driving. Focus on where the conflicts lie.

Here are a few sample questions to start the conversation about common points of contention in impaired driving cases:

- **Sympathy and Hate**

  Some people believe that if it's acceptable to drink and drive, then it's unfair to convict someone for that behavior. Who here goes along with that, even a little bit?

  Some people think that drinking and driving should never be allowed under any circumstances, or that driving after even one drink should be a crime. Who here feels that way, even a little bit?

Who here thinks that drunk driving is a rite of passage or something everyone does at some point in their lives?

Note the use of "some people think" as an opener when addressing a controversial aspect of the case. This phrasing invites those who harbor such thoughts but might not have the courage to express them to a group of strangers. The "some people think" lead-in reassures potential jurors that they can and should be honest about their views, regardless of how they might expect a prosecutor to react to them.

- **Per Se Crimes and Intoxication**

  The "legal limit" – Some people believe that if a person's BAC is under 0.08, they can't be intoxicated, no matter how impaired they seem. Who here agrees with that, even a little bit?

  Does it surprise anyone that our state's definition of "intoxication" is [quote from statute or caselaw]? [After providing definition of intoxication/impairment/etc.] Who here thinks that makes my job too easy?

- **Prescription Medication**

  The law in our state is that if you are intoxicated by a drug, it doesn't matter if you have a prescription for that drug. Who here thinks that's unfair?

  Some people think that if someone has a prescription for medication, they are not committing a crime by driving while on that medicine. Who here agrees with that, even a little bit? [Through conversation, explain how the therapeutic use of an over-the-counter medication may have intended effects or side effects that may negatively impact the ability to safely drive a vehicle, like the purpose of a sleep aid is to cause drowsiness which may significantly impact a driver's judgement, coordination, and ability to respond to road conditions or unexpected situations.]

- **Cannabis/THC**

  Since legalization, some people believe it's acceptable to drive with THC in your system. Who agrees with that?

  The prosecution does not need to show a specific number, level, concentration to prove that someone drove under the influence. Who here thinks that makes it too easy?

- **Drug Abuse/Alcoholism**

  Some people believe that an addict or an alcoholic is not responsible for their actions due to their substance use disorder. Who feels that way, even a little bit?

  Some people think that treating an addict as a criminal is wrong. Who feels that way, even a little bit?

  Some people have strong feelings or experiences about drug abuse or alcoholism for various reasons. Without sharing details, who here would say they have such strong feelings?

Accept That Jurors May Not Change Their Minds

As difficult as it may be, suppress the urge to advocate during jury selection. A prosecutor's goal is not to convince the jury pool that their position is correct. Instead, a prosecutor should focus on identifying and eliminating those potential jurors who are unlikely to be persuaded by their arguments during the trial.

Instead of arguing with someone who has a bias against or an issue in their case, a prosecutor should lean into it and work toward a strike for cause. By engaging with and delving deeper into the views of someone who holds such opinions–which are contrary to the law–a prosecutor can demonstrate to the remaining jurors their commitment to seeking a fair trial. This approach increases the prosecutor's credibility and rapport with the jurors, encouraging more open discussion on subsequent issues.

The prosecutor should identify the bias and explore the depth of the issue, paying close attention to the language the juror uses in their answers. They should next work toward locking the juror into that answer as an insurmountable bias, demonstrating that this is not the right case for them.[38]

38 See also the section on Juror Challenges, below.

Juror Challenges

Not every juror will be the right juror for a prosecutor's case. When seeking to excuse or dismiss a juror, a prosecutor must exercise a "challenge." There are two types of challenges: challenges for cause and peremptory challenges.

Challenges for Cause

A challenge for cause can be made when a prosecutor has a basis to believe that a potential juror is unable to render a fair and impartial verdict.[39] A juror's task is to set aside their impressions or opinions and render a verdict based on the evidence presented in the courtroom.[40] Challenges for cause may be made when a potential juror is acquainted with either party or a witness, or has personal knowledge about the facts of the particular case. A prospective juror who reveals a particular bias or interest in the case may also be able to be removed by the court "for cause." For example, during *voir dire* in an impaired driving trial, a prospective juror reveals that a family member has been arrested for the same offense and believes that the police and prosecutors treated the family member unfairly. The potential juror thinks that someone who has had just a little too much to drink should not have to go through the court process and feels that the police are overzealous in making such arrests. This potential juror has demonstrated a particular bias against the prosecution due to their family member's experience. This bias is likely to affect their ability to serve as a fair and impartial juror in this case, making a challenge for cause appropriate.

Making a Challenge for Cause

Any answer expressing a bias against the prosecutor's case or a key issue can be used to support a cause strike by establishing that the belief or opinion is deeply held and cannot be set aside in the courtroom. In this case, the prosecutor should always thank the juror for their answer, use their own language in follow-up questions, and make it clear that their opinion cannot be disregarded.

Responding to Challenges for Cause

During jury selection, both sides will make numerous challenges to potential jurors. When one side makes a challenge for cause, the other party has an opportunity to argue why the juror should not be excused for cause.

A prosecutor should try to anticipate potential challenges for cause before they are made and address them with the juror during their *voir dire* examination. Asking questions that explore any potential biases and the juror's ability to set aside those biases to ensure a fair trial will put the prosecutor in the best position to argue against a defense attorney's "for cause" challenge.

For example, during *voir dire*, a juror indicates that they believe impaired driving is very dangerous. They share that they have seen numerous public service campaigns addressing impaired driving and think that individuals who drive impaired are reckless. A defense attorney is likely to ask the court to dismiss this juror for cause, arguing that the juror has demonstrated a potential bias against individuals accused of driving impaired.

39 Often challenges for cause are codified in State statute or practice book rules. See, e.g., Conn. Gen. Stat. § 54-82f.
40 See, e.g., Irvin v. Dowd, 366 U.S. 717, 723 (1961).

It is important for the prosecutor to remember, however, that most individuals who appear for jury selection have had little or no prior involvement with the court process. Their responses to questions may initially seem to indicate a bias. In reality, the juror is simply in a new environment, answering questions they do not ordinarily encounter. It is important that the prosecutor spends time with the juror, exploring their answers thoroughly before making assumptions about potential biases.

Taking the example above, the prosecutor should ask questions that emphasize the juror's ability to follow the court's instructions. The court will instruct the jurors to set aside any personal biases or beliefs and follow the court's instructions regarding the law, applying them to the facts as the jury finds them. If the juror can agree to follow this rule, they can likely still be a fair juror in the case.

The prosecutor must remember that prospective jurors come into court with a wide range of life experiences. The fact that a potential juror has had personal experience with the charge in the trial or holds certain beliefs about the crime does not automatically mean the court will excuse them for cause.

To effectively support or defend against a challenge for cause, it is crucial for the prosecutor to reference the juror's testimony during the *voir dire* process. By addressing any responses that might indicate a potential "for cause" challenge with the juror, a prosecutor can help prevent the court from dismissing a potential juror who could be a valuable asset to the case.

In the example above, where a juror expressed concerns about the dangers of impaired driving, the prosecutor can counter the defense attorney's cause challenge by demonstrating to the court that the juror can set aside personal beliefs and adhere to the judge's instructions. This shows that the juror meets the criteria of being "fair and impartial," making it unlikely for the court to remove them for cause based solely on their expressed concerns. If a party still wants the juror removed, they would need to use a peremptory challenge.

Peremptory Challenges

A peremptory challenge in criminal practice allows the prosecution or the defense to object to a certain number of jurors, without assigning any cause.[41] Peremptory challenges allow the parties to excuse potential jurors without articulating a reason for the dismissal.

The number of peremptory challenges available in a case is often determined by state statutes, rules of criminal practice, the nature of the crime, and its classification.

Using Peremptory Challenges to the Case's Benefit

Prosecutors need to be strategic when exercising peremptory challenges. These challenges should be used to eliminate jurors who may have a high risk of bias, even if that bias does not warrant a for cause strike.

For instance, if a juror has had a negative experience with law enforcement and cannot clearly state whether they can set those feelings aside, a judge might deny a strike for cause. In cases where the prosecution relies heavily on the testimony of an officer, it becomes crucial to remove any jurors who might harbor biases against law enforcement.

Instead of arguing with a juror who has a bias against the case or an issue, the prosecutor should lean into it and work toward a strike for cause. By engaging with the juror, delving deeper into their views,

41 See Black's Law Dictionary, 4th Ed. (Rev); see also Lewis v. U.S., 146 U.S. 370 (1892).

and seeking to strike them for cause, the prosecutor demonstrates to the remaining jurors their commitment to a fair trial. This approach can enhance the prosecutor's credibility and rapport with the jury, encouraging more open discussions on subsequent issues.

A prosecutor needs to identify bias and explore its depth, paying close attention to the juror's language in their responses. Then, they should work to lock the juror into their answer as an insurmountable bias, demonstrating that this case is not suitable for them.

For example, if the bias is a fixed opinion against something essential to your case, you can work toward a cause strike with a conversation such as: "Thank you for that answer. Is it safe to say that is an opinion you have?" When they answer in the affirmative, then, "Might it be safe to say that is a fixed opinion, and one that you should not be asked to change?" And finally, "So would it be unfair for me to ask you to set aside such a fixed opinion when considering this case?" Or, "You seem very confident in that response. Would it be fair to say that this is your 'final answer' on this topic? Would you have difficulty following the law considering this, even a little bit?"

Any answer expressing a bias against the case or a key issue in the case can be worked into a prosecutor's cause strike, by establishing that the belief or opinion is deeply held and could not be left outside the courtroom for the juror to hear the case unaffected. The prosecutor should always thank them for the answer, use their own language in follow-up questioning, and make clear that the opinion they hold cannot be set aside.

Improper Use of Peremptory Challenges

Typically, a party's use of a peremptory challenge goes unquestioned. There are instances, however, when the opposing party may object to the use of such a challenge. When this happens, the party attempting to exercise the challenge must provide a reasonable, non-discriminatory basis for excusing the juror. This practice ensures that potential jurors are not excluded for discriminatory reasons.

In *Batson v. Kentucky,* the U.S. Supreme Court ruled that the equal protection clause prohibits the removal of a potential juror based on race.[42] Over time, the *Batson* rule has been expanded to forbid the exclusion of jurors based on their membership of a "cognizable" group, including ethnicity, gender, religious affiliation, or national origin.

When a party raises a *Batson* challenge, the court follows a three step process to analyze the claim: (1) the objecting party must establish a prima facie case that the circumstances of the strike suggest a discriminatory purpose; (2) the burden then shifts to the other party to provide a non-discriminatory reason for the juror's exclusion; and (3) the court must determine whether the party was intentionally discriminating in making the challenge.[43]

In the second step, the party defending their use of a peremptory challenge only needs to provide a race-neutral reason for the excusal; they do not need to present an argument that would support a cause challenge at this stage. It is the burden of the objecting party to persuade the court, by a preponderance of the evidence, that the jury selection process was tainted by purposeful discrimination.

In the third step, the court must determine whether the party making the challenge did so for a discriminatory purpose, considering the totality of the facts and circumstances surrounding the case.

42 Batson v. Kentucky, 476 U.S. 79 (1986).
43 Id. at 98.

Making a Record

It is just as important for the prosecutor to make a clear record during jury selection as it is throughout the trial. In a *Batson* hearing, prosecutors should request that the judge make a ruling on the record, detailing the decision made and the reasons for it. This is especially important if the trial court is relying on observations made of the juror during *voir dire*. For example, if a potential juror was falling asleep during *voir dire*, the prosecutor should ask the court to document that fact. Similarly, if a juror's body language indicated their opinions without them expressly stating them, the prosecutor should also ensure that is recorded.

Prosecutors should make a record of the composition of the jury panel, particularly noting the cognizable group involved in the *Batson* challenge. Additionally, jury questionnaires should be entered into evidence when necessary to help create a comprehensive record for appellate review.

Conclusion

This monograph illustrates the importance of selecting an impartial and knowledgeable jury to ensure a fair trial, particularly in impaired driving cases with specific legal and technical issues. By providing practical strategies and sample voir dire questions, it helps prosecutors to effectively educate potential jurors and assess their biases or empathy. Additionally, it highlights the critical role of law enforcement in documenting traffic stops or crashes to help the jury understand the facts. While acknowledging the foundational role of the impartial jury system in the American criminal justice process, this guide builds upon existing efforts to promote justice through thoughtful and effective jury selection and serves as a valuable resource for both prosecutors and law enforcement involved in impaired driving cases.

Appendix A

Sample Attorney Conducted *Voir Dire*

Preface

These questions are not meant to be exclusive or used as a script. They do not need to be asked in the order listed and the concepts presented need to be tailored to the facts and issues in a specific case. A prosecutor must be flexible in their approach and follow up when receiving responses that allow for more questions. The prosecutor is building rapport and a relationship with the jury so that they will be forthcoming in their answers and each party can thereafter better assess if the juror can serve on this jury. The *voir dire* process is the prosecutor's best opportunity to get jurors who have strong opinions, one way or another, on DUI/DWIs or other issues in the case to voice them. If a juror has strong negative feelings towards impaired drivers, let them voice their concerns. Always remember: the other 11 in the box and the venire in the courtroom are listening and a prosecutor can see how those other jurors are approaching that juror's position. A prosecutor cannot announce how dangerous impaired drivers are because the danger those drivers pose to society is not likely to be an element of the case and, therefore, is not relevant to the function and role of a jury. It can be viewed as an attempt to garner sympathy or an emotional reaction that should not form the basis of a verdict. However, a juror might express that opinion on their own and a prosecutor can take note of how the rest of the jury reacts. The prosecutor's goal is a fair and impartial jury that can set aside their understanding of the problem of sharing the road with impaired drivers and apply the laws to the evidence in the case. DUI/DWI is a unique crime in that many jurors may relate to the offense in a way that they do not with other crimes, such as child abuse and murder. They need education to remove notions that proof of guilt requires drunkenness, that using medications prescribed by a doctor means it is okay to drive, and that using marijuana makes a person a safer driver. Many cases are won or lost in jury selection: do not treat these charges as "just a misdemeanor" when selecting a jury.

To the Group

1. (Reintroduce yourself: name and how many years working with the office) Do any of you know me or had contact with me for any reason?
2. (List counties your elected covers if in multi-county district) Have any of you had contact with the DAs Office in these counties for any reason, such as to ask a question about a case or traffic violation?
3. Do you know the defendant?
4. (If the attorney is in practice with other lawyers list them for the jury) Do you know his/her lawyer or had contact with him for any reason? Do you know his partners or had contact with them for any reason? [do not mention that someone is represented by a public defender's office]
5. Do you know any of the following people who might be called to testify as witnesses or may be mentioned by witnesses during this trial?

They are (list witnesses).

Look at the jury when you ask these questions. Follow up with everyone who looks puzzled. If you get a positive response, dig a little deeper. You have a limit on peremptory challenges, and no limit on challenges for cause. If a juror has a preconceived notion of the offense or the parties that they

cannot put aside, you need to establish that fact and challenge them for cause. Always ask: does the fact that you know them put you in a position where you feel you can't be fair to both the defendant and the State? Do you think your knowledge/relationship to them would make you better suited to sit as a juror in another case? However, bear in mind that the defense attorney or his partner could have been on the other side of the juror's divorce, leaving that juror with strong feelings against the defense lawyer. If you can establish this fact quickly it will save you and the court time.

To the Individual

6. Beginning with Juror #1, will you tell us in what part of the county do you live?
7. Have you ever served on a jury before? When? Was it civil or criminal? Did the jury actually deliberate? Without telling me the verdict, were you able to reach a verdict?
8. Are you employed outside the home? What do you do? How long have you worked at that job?
9. Are you married? Does your spouse work outside the home? What do they do?
10. Do you have children? What are their ages? Where do they go to school/work?
11. Are you or do you have any relatives or friends that are employed in law enforcement or in the criminal justice field? Is there anything about your employment or that relationship that puts you in a position where you can't be fair to both sides?

People with steady jobs, that are working towards a career path goal, have stable living environments or are otherwise have grounded and productive day-to-day lives might be less distracted and can give your case the full time and attention it deserves. Words are important, and the way you couch your question may keep you from offending the juror. Don't ask if they have a job: there are many jurors who would love to be employed but are unable to find work. There are also housewives/husbands, who are working hard but not for a paycheck. You don't want to start off by making them feel less important because they do not have a 9 to 5 occupation. You may also get information about volunteer work if you ask the question properly.

If you get a response that indicates they or a family member work in law enforcement, a legal office, or courthouse related job, stop and get details. You want to word your questions in a positive way to prevent later challenges by the defendant for cause. Therefore, your follow up question could be: the fact that you have knowledge of the legal system won't affect your ability to be fair, will it? By the same token, if they have a connection to a defense firm, you could say: don't you feel it would put you in an awkward position to have to decide the guilt of this attorney's client?

Individual Juror

12. This arrest/crash occurred (name location). Are any of you familiar with that location or this case?

- How are you familiar with this location?
- (if yes) [Defendant] was charged with driving while impaired/ having a crash while impaired very close to your home/ where you routinely travel. Do you know anything about the event? Since you aren't a witness, you can still be fair to the defendant and State, can't you?

13. Have you ever had contact with a law enforcement officer for any reason? Have you, a close friend, or relative ever been arrested for a criminal offense other than a traffic violation?

This has a two-fold reason. Since you already know their records, you can determine who gives honest answers. In addition, you need to ferret out any predispositions against law enforcement. Watch reactions carefully when you ask the question. You may want to address some jurors individually.

14. Do you have any strong feelings, negative or positive, towards law enforcement?

15. (Individual, if positive) Tell us what your experience was.

16. (Individual, if negative: do not ask for specifics) The State will be calling law enforcement officers to prove that the defendant was driving impaired. Part of your job as a juror is to the judge the credibility of witnesses. Since you have concerns about law enforcement in general, do you think you would be better suited to serve as a juror on a case that does not involve law enforcement officers?

This specific question focused on law enforcement, but you should consider taking a broader approach. Do you have any opinions about the police, the State, prosecutors, defense lawyers, or the criminal justice system itself, whether positive or negative, that might make it difficult for you to be fair and impartial in this matter? Again, these questions are an opportunity to not only hear a specific juror's response, but also to see how the rest of the venire reacts to that response. A pro law enforcement response might get head nods from other jurors but might also get looks of disagreement from jurors that had not spoken up yet. For anti-law enforcement jurors, you do not want the entire venire hearing a horror story about an officer in a way that might impute that experience onto the officer in your case, but you need to elicit a sufficient basis to seek a cause strike rather than a peremptory challenge. We are not here to change people's opinions and if it seems like that juror cannot set aside that experience and be impartial, then make them feel like they can keep their opinion so the judge will remove them. However, if in developing that record that juror is saying things that are negatively impacting the venire as a whole, you should make a strategic decision as to whether you might want to cut that narrative short and just use a peremptory challenge for the sake of not continuing to shift the room.

17. The defendant is charged with Driving While Impaired. You have probably heard the term before, either in news reports about the number of people charged or through familiarity with groups such as MADD, Responsibility.org, or other groups that have, as their purpose, elimination of drinking and driving. If you have already formed a notion about what is required to be guilty of driving while impaired, will you put those notions aside and follow the law as the judge explains it to you?

18. Do you understand that the elements of driving while impaired are that the defendant isoperating a vehicle on a street, highway, or public vehicular area while under the influence of an impairing substance? Will you accept that and follow the law?

19. (For alcohol cases with a per se BAC) Do you understand to prove impairment the State must only prove that defendant's blood alcohol concentration was 0.08 or more? Will you accept that and follow the law?

20. (For alcohol case with or without BAC) Do you understand that the State has no burden to prove the defendant was drunk? That "drunk" and "impaired" are two entirely different standards? Do

you understand that when a person such as the defendant is impaired it does not necessarily mean he was drunk? Will you hold the State to the standard of impairment rather than the higher standard of drunkenness?

21. (For drug cases) In this case the defendant is charged with being under the influence of drugs rather than alcohol and that it is drugs that caused his/her impairment. If you have always considered this type of crime to be "drunk driving" instead of "impaired driving" can you put those feelings aside and only hold the State to the standard of impairment? Will you listen to the proof regarding how the defendant's mental and physical faculties were impaired by the drugs he/she took and base your decision on that?

Watch the jurors' faces when you go over these questions. If you are getting funny looks from any of them, you need to stop and ask if they have any concerns based on the question. These questions educate your jurors as to the elements and standard of proof to help assess whether the jurors could be able to understand and apply them appropriately.

22. Have you personally experienced or have you been in contact with a person, whether a relative, friend, or neighbor, who had a drug or alcohol problem?

23. (If yes) I am not trying to pry, but was it someone close to you? Did this person ever get in trouble with the law because of their use or addiction? Did they ever try to get treatment for their addiction? Is there anything about that situation that puts you in a position where you could not be fair to both the defendant and the State?

24. Have you or someone you know ever been in a collision with an impaired driver?

(If yes, elicit enough detail to be able to assess whether there is anything about that experience that would mean that they would not be able to be impartial here. Merely experiencing an event does not necessarily mean a juror would be unable to fairly assess the evidence in this case. As they are discussing their experience, continue to also assess the rest of the venire. You and the defendant might view the juror's experience and closeness to the case differently and the defendant might still seek to have the juror excused for cause, but you gain insight into the rest of the room in the process).

25. Do you know anyone who has been charged with impaired driving?

(If yes, very gently try to determine their attitude towards the charge and whether it might make it difficult for them to be fair and impartial in this case. If they felt it was justified, ask whether the person had a drug or alcohol problem / did they think the justice system treated the person with fairness / did they recognize that it was the combination of the decision to drive a motor vehicle and the underlying substance issue that was the cause of the criminal justice system getting involved and not just the substance issue on its own.)

26. Do any of you have such strong feelings about the use of alcohol or drugs that you cannot be fair to the defendant and the State?

(If you get a yes, the person may be so rigid in their beliefs that you don't want them either. Remember: if the juror state's their position but through subsequent questioning avers that they can be impartial (akin to the concept of rehabilitating a witness after a cross-examination, except your goal in voir dire is not necessarily to keep or not keep a juror, but to determine if they can be fair and impartial), the defendant must use a peremptory challenge rather than one for cause. Explain to the juror that everyone comes to jury service

with their own thoughts and feelings. Explain that the crime with which the defendant is charged is not drinking but drinking in conjunction with driving a two-thousand-pound car [or words to that effect]. There are different approaches to having this conversation. For example: you try to be a fair person, don't you Mr. Jones? So, would you be able to set aside your personal beliefs and follow the law as the judge gives it to you in the interest of a fair and impartial trial?)

Again, the previous questions have multiple purposes. While voir dire is not designed to pre-try your case to the jury, inherent to exploring a juror's impartiality is to educate them on what they are actually being called upon to judge (i.e. a DUI/DWI case). For example, the words "addict" and "addiction" may not be sympathetic words in the eyes of most jurors. Defendants charged with DUI/DWI charges have committed a prohibited act when they merged their impairment as individuals with the use or operation of a motor vehicle. Keep in mind that the attitudes and experiences of jurors who have dealt with alcoholism or addiction in their personal lives can educate or influence others with no experience in this realm on a personal level in a way that that you cannot do. After a juror shares information with the venire, you should inquire if that additional perspective has changed anyone's ability to be fair and impartial.

27. Does anyone watch the TV shows Law and Order, CSI, or Cops?
28. Do you understand that Law and Order and CSI are for entertainment purposes and not realistic?
29. Do you understand that even though Cops is a reality show, they edit it so what gets televised are the most outrageous and therefore entertaining arrests?
30. Do you promise to hold the State to a standard to the law's true and correct standard and not to any pre-thought notion that the criminal justice system should be "wildly entertaining"?
31. Do you also understand that the State has the burden of proof in all criminal trials?
32. Do you understand that "beyond a reasonable doubt" is not the same as "beyond all doubt"? Do you understand it is not the same as "beyond a shadow of a doubt"?
33. Do you understand that holding the State to the standard of "beyond any doubt," "beyond all doubt," or "beyond a shadow of a doubt" would not be reasonable?
34. Do you each promise to hold the State to the standard of proof beyond a reasonable doubt, and nothing higher?
35. Some of the State's proof will be direct evidence. Eyewitness observations are direct evidence, because that person saw, heard, felt, or otherwise experienced an event. On the other hand, some of the State's proof is circumstantial. An example would be proving it snowed last night because there was no snow on the ground when you went to bed, and six inches on the ground when you woke up. Does everyone understand the difference? Can you also accept that in the eyes of the law, you should not put greater confidence in either kind of evidence? That is, circumstantial evidence is just as good as direct evidence? Will you view both direct and circumstantial evidence by the same standard, even if you were unaware that that is the law [of this State]?

We all use our life experiences, background, and common sense every day to assess facts, circumstances, people, and events as we live them. A juror probably does not need much guidance if you asked them to make a credibility assessment of a witness. But, having to take that assessment and

place it in the context of elements of a crime, a burden of proof, presumptions of innocence, and other laws as provided to them by the court is something that is not as intuitive. Because this aspect of the process is likely the most foreign to them, this is your opportunity to educate them on those concepts while exploring whether they can properly follow them at trial. If you do not pre-tell them what they are being called upon to apply, they don't know what they don't know, and you will have missed an opportunity to explore through voir dire one of the most important aspects of their jury deliberation. The more you explore this the better you will be.

36. Do any of you have a strong religious or moral belief that puts you in a position where you cannot sit in judgment of another person's conduct?

A defendant is presumed innocent under the law. A jury needs to be unanimous in their verdict. If for personal reasons a juror, regardless of what the evidence is that is presented to them, might decline to engage in the deliberative process itself, then you will never achieve a unanimous guilty verdict. This juror should be struck for cause, but it is also important to make sure that juror understands it is OK for them to feel that way. Other jurors are watching how you are addressing individuals that provide an opinion that might run contrary to theirs. If you are trying to promote forthcomingness, you need to be prepared to accept what you have elicited. That juror should not be made to feel uncomfortable simply because they are standing firm. If the court does not excuse this juror for cause, you MUST remove them peremptorily because there is no point in trying this case with that person on the jury. That juror in essence has declared that they cannot exercise the job for which they are being interviewed for and therefore they cannot be impartial.

37. Do any of you know any of the other 11 people in the jury box with you? If so, will you have any problem if you both end up on the jury? Will you both listen to each other's opinions during deliberations and work with the group to reach a unanimous decision?

38. Do you have any health problem that would make it difficult for you to sit in a jury box, see exhibits, hear testimony, and concentrate on the proceedings for an extended period of time?

39. Do you have any physical or mental disability, or any other personal circumstances, that would affect your ability to render satisfactory jury service?

40. Do you have any difficulty speaking, reading, or understanding the English language that would affect your ability to render satisfactory jury service?

41. At the end of the case and after all the evidence has been presented, (I) (the judge) will instruct you on the law that must be applied to facts of this case. Will you have any problem applying the law as instructed even if you personally disagree with it?

42. Is there any reason, other than what has already been brought to your attention, why you cannot give this case your undivided attention and render a fair and impartial verdict?

Additional Considerations

- Never use the word "allegedly". If you think the crime is only an allegation you should not be trying this DUI/DWI case.
- Never be rude to a juror. If they say something negative about your office or law enforcement move on and don't argue with them.
- Don't lose track of your manners. Whether it is a nod or a thank you, even the juror you just struck took time to show up to the jury selection process. Perception is reality and letting them down easily and acknowledging them is not only the right thing to do but the rest of the jury is taking note of how you are treating them.
- Many courthouses are small, and the jurors are on top of you. Do not let the jurors see you joking around with opposing counsel. The public has a pre-conceived perception that opposing counsel should be enemies and that somehow collegiality and comradery is viewed as corruption. While we know this is not the case, professionalism is the best policy.
- Witnesses and officers choose their words carefully when they testify. You must do the same thing when speaking in a courtroom. The jury judges you too: you must be professional, approachable, interested, fair, and knowledgeable. Jury selection is a two-way job interview. Maintain eye contact and listen carefully to their answers.
- But also listen carefully to the questions asked by the defense attorney when they speak to the jury. Look at the jurors while they answer him. The defense attorney may uncover a challenge for cause that you missed and need to pursue. You want the jury to understand that they are important. Ignoring the defense *voir dire* does not convey that message!
- People also tell you a lot about themselves in non-verbal ways like how they dress, what books they bring, and their demeanor. Make sure to pay attention.
- Be wary of jurors too anxious to serve. Hidden agendas are dangerous.
- Be over inclusive in the subjects you explore. If there is a possibility that something might become an issue in the trial, then pre-vet it with the jurors to ensure they will maintain impartiality in the event the issue was to come up.
- Be over inclusive in the names that are read to the jury for conflict purposes.

  Do not just list the witnesses you intend to call. Instead list any name of anyone that might be called as a witness and any other name that might be referenced by a witness at a trial. If the defendant's mother is the registered owner of the vehicle and vehicle registration might come up, list her.

  If the name is somewhat common, provide some means of narrowing down the person you are mentioning with a title or other guidance to further identify the witness (e.g. John Smith (ACME Hardware)).

  There is no penalty for being over inclusive and it avoids a midtrial issue when a juror hears a name for the first time and knows them. When being over inclusive, let the court know that many of the names are for name conflict check purposes and not necessarily because they are being called as witnesses so that the court does not think their two-day trial is about to balloon into a week-long trial.

- Remember there is a physical and mental aspect to being a juror, needing to hear and see things clearly, sitting for long periods of time, being away from bathrooms for long periods of time, the ability to focus for long periods of time, medical and personal needs that otherwise might be an issue for a juror. You need to explore that jurors are up to the task.
- Keep your counsel desk straightened up, evidence in the case tucked away before the trial, your statute or code book accessible and visible, speak with confidence, and make good eye contact.
- If you are trying a case with co-counsel, be mindful of how close you are to the jury, where microphones are located, and how you communicate with each other to avoid inadvertently having the juror pool hear something you did not mean to be heard.
- Really think about your last peremptory strike because their replacement is going to come from whomever is left of the juror pool and whomever gets seated is going to be on your jury since you have no more strikes. A quick peak backwards to see who is left might be worth doing before you employ your final challenge.
- Do not be afraid to be content without using all your strikes. If the very first 12 in the box appear to meet the mark and are up for the task after you have conducted your *voir dire*, keep them! Or if there are only 1 or 2 that you believe need to be excused then work through those and keep the rest. Let the other side be the side that is constantly moving people in an out of the box. Just remember that once you have said that you are content with the jurors that are seated, the only jurors you can strike thereafter are jurors that have been replaced by the defense. Once you say you are content with a specific juror, absent rare exceptional circumstances (that your court rules might otherwise instruct), there is no going back.
- There are no rewards for speed in jury selection. Take your time. This is important.

Appendix B

Sample Court Conducted *Voir Dire*

In the **[Name of Court]** Court of the State of **[State]**

STATE OF **[State]**, v. **[Defendant Name]**, Defendant.

ID No. **[Case Number]**

VOIR DIRE

Introduction

We are about to select a jury in the case of the State of [State] against [Defendant]. This is a criminal case and the charges against the defendant are: [Charges]

[*FYI. These questions were adapted for a case involving the following charges: Vehicular Homicide, Driving a Vehicle Under the Influence or with a Prohibited Alcohol/Drug Content, Speeding, and other motor vehicle moving violations*]

The allegations in this case are centered around a fatal motor vehicle collision that occurred on [Date of Offense] on [Roadway Name] at the intersection of [Roadway Name] at [Roadway Name], [City], [County], [anecdotal geographical reference if helpful -- *near the XYZ*]. [Brief overview of event, if agreed to by the parties and otherwise helpful to inform the jury in assessing *voir dire* questions -- *As a result of the collision, it is alleged that the sole occupant driver of the vehicle that was struck died and that his vehicle was engulfed by flames within a matter of seconds*].

This trial will begin [Day], [Date], and we estimate it will take

[No.] days, ending [Day], [Date].

Each of you is a prospective juror in this case. During the jury selection process, except in response to my questions, you are not to discuss this case with anyone, including the other possible jurors. Nor are you to read about or listen to any accounts or discussions of this case that may be reported in the news media, social media, on the internet, in the newspaper, or on radio or television.

The State is represented by [DA or DAG name], Esquire. Defendant [Defendant] is represented by [Attorney], Esquire.

***Voir Dire* Questions**

1. Do you know the defendant or his friends or relatives?
2. Do you have any relationship with any attorney in this case or with or any other attorney or employee in the offices of the Attorney General or defense counsel that might affect your ability to render a fair and impartial verdict?
3. Have you, any member of your immediate family, a close friend, or a close neighbor, ever been employed or otherwise associated with a law enforcement agency either on a State or Federal level?

4. It is expected that police officers will be called to testify in this case. Would any of you give greater or lesser weight to the testimony of a police officer merely because he or she is a police officer?
5. Do you know any of the following people who might be called to testify as witnesses or may be mentioned by witnesses during this trial?
   (Read List)
6. Have you, any member of your immediate family, or a close friend, ever been seriously injured because of injuries received from a motor vehicle collision?
7. Have you, any member of your immediate family, or a close friend, ever been involved in a car crash in which a driver was suspected to be under the influence of drugs or alcohol?
8. Have you, a close friend, or relative ever been arrested for Driving Under the Influence of either drugs or alcohol?
9. Have you, a close friend, or relative ever been arrested for a criminal offense other than a traffic violation?
10. Are you, any member of your immediate family, or a close friend, under investigation for or being prosecuted for any criminal offense anywhere?
11. Have you or a member of your immediate family ever been a victim of a crime or a witness in a criminal proceeding?
12. Do you have any opinions about the police, the State, prosecutors, defense lawyers, or the criminal justice system itself, whether positive or negative, that might make it difficult for you to be fair and impartial in this matter?
13. Do you have any strong feelings, opinions or beliefs about drinking or using drugs and driving that would affect your ability to render a fair and impartial verdict?
14. Are you a member of, or have you ever contributed to any entity or group that has, as its purpose, elimination of drinking or alcohol and driving?
15. Have you had any personal experiences with persons thought to be under the influence of alcohol or drugs which have been negative and may cause you to have a bias in a case where evidence may be forthcoming that a witness had ingested marijuana or prescription medication?
16. Do you have any bias or prejudice, feelings, opinions, or beliefs either for or against the use of controlled substances, including Marijuana, or alcohol that might in any way affect your ability to render a fair and impartial verdict?
17. This case involves a motor vehicle crash which resulted in the death of an individual. Might the nature of this case prevent you from rendering a fair and impartial verdict?
18. During the presentation of evidence in this trial, it may be necessary for you to view photographs of the deceased victim at the scene of the collision. Would the nature of this evidence or the fact that you must view such photographs hinder you from rendering a fair and impartial verdict?

19. Have you had any training or specialized instruction in matters that occur in scientific laboratories where testing has been performed to determine blood alcohol or drug content?
20. Have you had any training regarding the collection of blood samples taken from the human body?
21. Do you have a familiarity with the area of [Roadway Name]?
22. Do you possess any special knowledge regarding the functioning of automobile braking systems based upon experience, employment, or study?
23. Have you ever held a position where your duties or requirements were to determine the cause of motor vehicle collisions or the field of collision reconstruction?
24. Have you seen, read, or heard anything in the media, through television, documentaries, movies, social media, the Internet or any other source, including personal knowledge or discussion with anyone about this case, that might affect your ability to render a fair and impartial verdict in a criminal case?
25. Do you know any other potential juror who is here for service in this case other than because of reporting here today?
26. Do you have any bias or prejudice either for or against the State or for or again the Defendant?
27. Do you have any health problem that would make it difficult for you to sit in a jury box, see exhibits, hear testimony, and concentrate on the proceedings for an extended period of time?
28. Do you have any physical or mental disability, or any other personal circumstances, that would affect your ability to render satisfactory jury service?
29. Do you have any difficulty speaking, reading, or understanding the English language that would affect your ability to render satisfactory jury service?
30. At the end of the case and after all the evidence has been presented, (I) (the judge) will instruct you on the law that must be applied to facts of this case. Will you have any problem applying the law as instructed even if you personally disagree with it?
31. Is there any reason, other than what has already been brought to your attention, why you cannot give this case your undivided attention and render a fair and impartial verdict?

Conclusion

Once again—this trial will begin today [Date] and we estimate it could take [No.] days; so, it may last through [Date]. If your answer to any of the above questions is yes, or you cannot serve through the end of the day on [Date], please stand in place at your seat.