

## Modified Wymore for Non-Capital Cases

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This paper is derived from many CLEs, reading many studies, consulting with and observing great lawyers, and, most importantly, trial experience in approximately 100 jury trials ranging from capital murder, personal injury, torts, to an array of civil trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

A few preliminary comments. First, trial is a mosaic, a work of art. Each part of a trial is important; however, jury selection and closing argument – the beginning and end – are the lynchpins to success. Clarence Darrow once claimed, “Almost every case has been won or lost when the jury is sworn.” Public outrage decried the Rodney King, O.J. Simpson, McDonald's hot coffee spill, nanny Louise Woodward, and the 253 million dollar VIOXX verdicts, all of which had juries selected using trial consultants. After a quarter of a century, I now believe jury selection and closing argument decide most close case. Second, I am an eclectic, taking the best I have ever seen or heard from others. Virtually nothing herein is original, and I neither make any representations regarding accuracy nor claim any proprietary interest in the materials. Pronouns are in the masculine in accord with holdings of the cases referenced. Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pretrial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense. Be efficient on direct. Perfect the puzzle for the jury. Then close with punch, power, and emotion.

### I. *Voir Dire*: State of the Law

*Voir dire* means to speak the truth.<sup>1</sup> Our highest courts proclaim its purpose. *Voir dire* serves a dual objective of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu 'Min v. Virginia*, 500 U.S. 415, 431 (1991). The North Carolina Supreme Court held jury selection has a dual purpose, both to help counsel determine whether a

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<sup>1</sup> In Latin, *verum dicere*, meaning “to say what is true.”

basis for challenge for cause exists and assist counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

Case law amplifies the aim of jury selection. Each defendant is entitled to a full opportunity to face prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 105, 115 (1978). The purpose of *voir dire* and exercise of challenges “is to eliminate extremes of partiality and assure both...[parties]...that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial.” *State v. Conner*, 335 N.C. 618 (1994). We all have natural inclinations and favorites, and jurors sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. Jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror’s yesterday or today that would make it difficult for a juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. *State v. Hedgepath*, 66 N.C. App. 390 (1984).

Statutory authority empowers defense counsel to “personally question prospective jurors individually concerning their fitness and competency to serve” and determine whether there is a basis for a challenge for cause or to exercise a peremptory challenge. N.C. Gen. Stat. §15A-1214 (c); *See also* N.C. Gen. Stat. §9-15(a) (counsel shall be allowed to make direct oral inquiry of any juror as to fitness and competency to serve as a juror).

Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to *voir dire* jurors adequately. “Part of the Sixth Amendment’s guarantee of a defendant’s right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.... *Voir dire* plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored.” *Voir dire* must be available “to lay bare the foundation of a challenge for cause against a prospective juror.” *Morgan v. Illinois*, 504 U.S. 719, 729, 733 (1992).<sup>2</sup> *See also Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981) (plurality opinion) (“Without an adequate *voir dire*, the trial judge’s responsibility to remove prospective jurors who will not be able to impartially follow the court’s instructions and evaluate the evidence cannot be fulfilled.”).<sup>3</sup>

Now, the foundational principles of jury selection.

## II. Selection Procedure

Trial lawyers should review and be familiar with the following statutes. Two sets govern *voir dire*. N.C. Gen. Stat. §15A-1211 through 15A-1217; and N.C. Gen. Stat. §9-1 through 9-9, and 9-10 through 9-18.

- N.C. Gen. Stat. §15A-1211 through 1217: Selecting and Impaneling the Jury

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<sup>2</sup> This language was excised from *Morgan*, a capital murder case.

<sup>3</sup> *Rosales-Lopez* was a federal charge alleging defendant’s participation in a plan to smuggle Mexican aliens into the country, and defendant sought to question jurors about possible prejudice toward Mexicans.

- N.C. Gen. Stat. §9-1 through 9-9: Preparation of Jury List, Qualifications of Jurors, Request to be Excused, *et seq.*
- N.C. Gen. Stat. §9-10 through 9-18: Petit Jurors, Judge Decides Competency, Questioning Jurors without Challenge, Challenges for Cause, Alternate Jurors, *et seq.*

Read and recite to jurors the pattern jury instructions.

- Pattern Jury Instructions: Substantive Crime(s) and Trial Instructions<sup>4</sup>
- N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment and common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your will and desire to discharge your duties honorably).
- N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court’s instructions, becomes a final result; you become officers of the court, and your service will impose upon you important duties and grave responsibilities; you are to be considerate and tolerant of fellow jurors, sound and deliberate in your

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<sup>4</sup> The North Carolina pattern jury instructions are sample instructions for criminal, civil, and motor vehicle negligence cases used by judges as guidance for juries for reaching a verdict. Created by the Pattern Jury Instruction Committee, eleven trial judges, assisted by the School of Government and supported by the Administrative Office of the Courts, produces supplemental instructions yearly based on changes in statutory and case law. While not mandatory, the pattern jury instructions have been cited as the “preferred method of jury instruction” at trial. *State v. Sexton*, 153 N.C. App. 641 (2002).

- evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).
- N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the state proves the defendant’s guilt beyond a reasonable doubt; the only place this case may be discussed is in the jury room after you begin your deliberations; you are not to form an opinion about guilt or innocence or express an opinion about the case until you begin deliberations; news media coverage is not proper for your consideration; television shows may leave you with improper, preconceived ideas about the legal system as they are not subject to rules of evidence and legal safeguards, are works of fiction, and condense, distort, or even ignore procedures that take place in real cases and courtrooms; you must obey these rules to the letter, or there is no way parties can be assured of absolute fairness and impartiality).
  - N.C.P.I. – Crim. 100.31: Admonitions to Jurors at Recesses<sup>5</sup> (during trial jurors should not talk with each other about the case; have contact of any kind with parties, attorneys or witnesses; engage in any form of electronic communication about the trial; watch, read or listen to any accounts of the trial from any news media; or go to the place where the case arose or make any independent inquiry or investigation, including the internet or other research; if a verdict is based on anything other than what is learned in the courtroom, it could be grounds for a mistrial, meaning all the work put into trial will be wasted, and the lawyers, parties and a judge will have to retry the case).

Relevant case law follows:

- *State v. Harbison*, 315 N.C. 175 (1985) (defendant must knowingly and voluntarily consent to concessions of guilt made by trial counsel after a full appraisal of the consequences and before any admission);
- *State v. Call*, 353 N.C. 400, 409-410 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors “if they understand they have the right to stand by their beliefs in the case”); *See also State v. Elliott*, 344 N.C. 242, 263 (1996).
- *State v. Cunningham*, 333 N.C. 744 (1993) (defendant’s challenge for cause was proper when juror repeatedly said defendant’s failure to testify “would stick in the back of my mind”); *See also State v. Hightower*, 331 N.C. 636 (1992) (although juror stated he “could follow the law,” his comment that the defendant’s failure to testify “would stick in the back of [his] mind” while deliberating mandated approval of a challenge for cause).

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<sup>5</sup> N.C. Gen. Stat. §15A-1236 (addresses admonitions that must be given to the jury in a criminal case, typically at the first recess and at appropriate times thereafter).

- *Duncan v. Louisiana*, 391 U.S. 145 (1968); (held the Fourteenth Amendment guarantees a right of jury trial in all criminal cases and comes within the Sixth Amendment’s assurance of a trial by an impartial jury; that trial by jury in criminal cases is fundamental to the American system of justice; that fear of unchecked power by the government found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence; and a right to trial by jury is granted to criminal defendants in order to prevent oppression by the government; providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge).

It is axiomatic that counsel should not engage in efforts to indoctrinate jurors, argue the case, visit with, or establish rapport with jurors. *State v. Phillips*, 300 N.C. 678 (1980). You may not ask questions which are ambiguous, confusing, or contain inadmissible evidence or incorrect statements of law. *State v. Denny*, 294 N.C. 294 (1978) (holding ambiguous or confusing questions are improper); *State v. Washington*, 283 N.C. 175 (1973) (finding a questions containing potentially inadmissible evidence improper); *State v. Vinson*, 287 N.C. 326 (1975) (holding counsel’s statements contained inadequate or incorrect statements of the law and was thus improper). The court may also limit overbroad, general or repetitious questions. *Id.*; *But see* N.C. Gen. Stat. §15A-1214(c) (defendant not prohibited from asking the same or a similar question previously asked by the prosecution).

A primer on procedural rules:<sup>6</sup> The scope of permitted *voir dire* is largely a matter of the trial court’s discretion. *E.g.*, *State v. Knight*, 340 N.C. 531 (1995) (trial judge properly sustained State’s objection to questions asked about victim’s HIV status); *See generally State v. Phillips*, 300 N.C. 678 (1980) (opinion explains boundaries of *voir dire*; questions should not be overly repetitious or attempt to indoctrinate jurors or “stake them out”). The trial court has the duty to control and supervise the examination of jurors, and regulation of the extent and manner of questioning rests largely in the court’s discretion. *State v. Wiley*, 355 N.C. 592 (2002). The prosecutor and defendant may personally question jurors individually concerning their competency to serve. N.C. Gen. Stat. §15A-1214(c). The defendant is not prohibited from asking a question merely because the court or prosecutor has previously asked the same or a similar question. *Id.*; *Conner*, 335 N.C. at 628-29. Leading questions are permitted. *State v. Fletcher*, 354 N.C. 455, 468 (2001). Finally, the judge has discretion to re-open examination of a juror previously accepted if, at any time before the jury is impaneled, it is discovered the juror made an incorrect statement or other good reasons exists. Once the court re-opens examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse the juror. *State v. Womble*, 343 N.C. 667, 678 (1996).

A common issue is an improper stake-out question. *State v. Simpson*, 341 N.C. 316 (1995) (holding staking-out jurors is improper). Our highest court has defined staking-out as questions that tend to commit prospective jurors to a specific future course of action in the case. *State v. Chapman*, 359 N.C. 328, 345-346 (2005). Counsel may not pose hypothetical questions designed to elicit what a juror’s decision will be under a certain state of the evidence or a given state of facts. *State v.*

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<sup>6</sup> MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

*Vinson*, 287 N.C. 326, 336-337 (1975). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998). My synthesis of the cases suggests counsel is in danger of an objection on this ground when the question refers to a verdict or encroaches upon issues of law. A proposed *voir dire* question is legitimate if the question is necessary to determine whether a juror is excludable for cause or assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to the purposes of *voir dire*.<sup>7</sup>

Beware of reverse *Batson* challenges. Generally, race, gender and religious discrimination in the selection of trial jurors is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race discrimination); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (finding gender discrimination); U.S. CONST. amend. V & XIV (referencing due process); N.C. CONST. art. I, § 26 (no person may be excluded from jury service on account of sex, race, color, religion, or national origin). The U.S. Supreme Court established a three-step test for such challenges: 1) defendant must make a *prima facie* showing the prosecutor's strike was discriminatory; 2) the burden shifts to the State to offer a race-neutral explanation for the strike; and 3) the trial court decides whether the defendant has proven purposeful discrimination. Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious based peremptory challenges, known as a reverse *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42 (1992). It is noteworthy that our appellate courts have decided over 100 cases in which defendants have alleged purposeful discrimination by prosecutors against minorities, never finding a *Batson* violation. In contrast, North Carolina appellate courts have twice upheld prosecutors reverse *Batson* challenges on the ground the defendant engaged in purposeful discrimination against Caucasian jurors. *State v. Hurd*, \_\_\_ N.C. App. \_\_\_ (March 15, 2016) (trial court did not err in sustaining a reverse *Batson* challenge; defendant exercised eleven peremptory challenges, ten against white and Hispanic jurors; defendant's acceptance rate of black jurors was eighty-three percent in contrast to twenty-three percent for white and Hispanic jurors; the one black juror challenged was a probation officer; defendant accepted jurors who had strikingly similar views); *See also State v. Cofield*, 129 N.C. App. 268 (1998). Finally, should a judge find the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. *State V. McCollum*, 334 N.C. 208 (1993); *But cf. State v. Fletcher*, 348 N.C. 292 (1998) (following a judge's finding the prosecutor made a discriminatory strike, he withdrew the strike, passed on the juror, the trial court found no *Batson* violation, and the N.C. Supreme Court affirmed).

Certain phrases are determinative in challenges for cause. For example, you may ask if a prospective juror would automatically vote for either side or a certain sentence or if a juror's views or experience would prevent or substantially impair his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask if, based on a response, if a juror would vote automatically for either side or a particular sentence); *See also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they "will automatically

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<sup>7</sup> John Rubin (editor), *Selection of Jury: Voir Dire*, N.C. DEFENDER MANUAL (2012).

turn off the rest of the case”); *See also Morgan*, 504 U.S. at 723 (court approved the question “would you automatically vote [for a particular sentence] no matter what the facts were?”); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror’s views would “prevent or substantially impair” the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*<sup>8</sup> which required an unmistakable commitment of a juror to automatically vote against the death penalty, regardless of the evidence); *State v. Cummings*, 326 N.C. 298 (1990) (State’s challenge for cause is proper against jurors whose views against the death penalty would “prevent or substantially impair” their performance of duties as jurors). Considerable confusion about the law could amount to “substantial impairment.” *Uttecht v. Brown*, 551 U.S. 1 (2007).

Other issues may include *voir dire* with co-defendants, order of questioning, challenging a juror, preserving denial of cause challenges and prosecutor objection to a line of questioning, right to individual *voir dire*, and right to rehabilitate jurors.<sup>9</sup> In cases involving co-defendants, the order of questioning begins with the State and, once it is satisfied, the panel should be passed to each co-defendant consecutively, continuing in this order until all vacancies are filled, including alternate juror(s). N.C. Gen. Stat. §15A-1214(e). For order of questioning, the prosecutor is required to question prospective jurors first and, when satisfied with a panel of twelve, he passes the panel to the defense. This process is repeated until the panel is complete. N.C. Gen. Stat. §15A-1214(d); *See also State v. Anderson*, 355 N.C. 136, 147 (2002) (finding the method by which jurors are selected, challenged, selected, impaneled, and seated is within the province of the legislature). Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge. Direct oral inquiry, or questioning a juror, does not constitute a challenge. N.C. Gen. Stat. §9-15(a). Preserving a denial of cause challenge or sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. *E.g.*, *State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995). The right to individual *voir dire* is found in the trial judge’s duty to oversee jury selection, implying that the judge has authority to order individual *voir dire* in a non-capital case if necessary to select an impartial jury. *See State v. Watson*, 310 N.C. 384, 395 (1984) (“The trial judge has broad discretion in the manner and method of jury *voir dire* in order to assure that a fair and impartial jury is impaneled...”). As to the right to rehabilitate jurors, the trial judge must exercise his discretion in determining whether to permit rehabilitation of particular jurors. Issues include whether a juror is equivocal in his response, clear and explicit in his answer, or if additional examination would be a “purposeless waste of valuable court time.” *State v. Johnson*, 317 N.C. 343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993).

### III. Theories of Jury Selection

There are countless articles on and ideas about jury selection. A sampling include:

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<sup>8</sup> *Witherspoon v. Illinois*, 39 U.S. 510 (1968).

<sup>9</sup> John Rubin (editor), *Selection of Jury: Voir Dire*, N.C. DEFENDER MANUAL (2012).

- Traditional approach: lecture with leading and closed questions to program the jury about law and facts and establish authority and credibility with the jury; a prosecutor favorite.
- Wymore (Colorado) method: *See infra* pp. 9-11.
- Scientific jury selection: employs demographics, statistics, and social psychology to examine juror background characteristics and attitudes to predict favorable results.
- Game theory: uses mathematical algorithms to decide the outcome of trial.
- Command Superlative Analogue (New Mexico public defenders’) method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors’ answers.
- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent’s failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory<sup>10</sup>: stereotype jurors based on race, gender, ethnicity, age, income, occupation, social status, socioeconomic status/affluence, religion, political affiliation, avocations, urbanization, experience with the legal system, and other factors.
- Listener method: learn about jurors’ experiences and beliefs to predict their views of the facts, law, and each other.

Strategies abound for jury selection methods. Jury consultants and trial lawyers use mock trials, focus groups, and telephone surveys to profile community characteristics and favorable jurors. Research scientists believe – and most litigators have been taught - demographic factors predict attitudes which predict verdicts, although empirical data and trial experience militate against this approach. Broda-Bahm, *supra* note 10. Many lawyers believe our experience hones our ability to sense and discern favorable jurors, although this belief has marginal support in practice and is speculative at best.

I use a blend of the above models. However, I focus upon one core belief illustrated in the ethical and moral dilemma of an overcrowded lifeboat lost at sea. As individuals weaken, starve, and become desperate, who is chosen to survive? Do we default to women, children, or the elderly? Who lives or dies? Using this hypothetical in the context of a courtroom, I believe the answer is **jurors save themselves**.<sup>11</sup> The basic premise is that jurors, primarily on a subconscious level, choose who they like the most and connect to parties, witnesses, and court personnel who are characteristically like them. Therefore, the party - or attorney - whom the jury likes the most, feels

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<sup>10</sup> Research on the correlation of demographic data with voting preferences is conflicted. *See* Professor Dru Stevenson’s article in the 2012 George Mason Law Review, asserting the “Modern Approach to Jury Selection” focuses on biases related to factors such as race and gender; *See also Glossy v. Gross*, 135 S. Ct. 2726 (June 29, 2015) (racial and gender biases may reflect deeply rooted community biases either consciously or unconsciously); *But see* Dr. Ken Broda-Bahm, *Don’t Select Your Jury Based on Demographics: A Skeptical Look at JuryQuest*, PERSUASIVE LITIGATOR, April 12, 2012 (for at least three decades, researchers have known that demographic factors are very weak predictors of verdicts).

<sup>11</sup> In panic, most people abandon rules in order to save themselves, although some may do precisely the opposite. DENNIS HOWITT, MICHAEL BILLIG, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER & ALAN RADLEY, SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES (1996).

the closest to, or has some conscious or subconscious relationship with typically wins the trial. This concept is the central tenet of our jury selection strategies.

#### IV. The Wymore Method

David Wymore, former Chief Trial Deputy for the Colorado Public Defender system, revolutionized capital jury selection. The Wymore method, or Colorado method of capital *voir dire*, was created to combat “death qualified” juries<sup>12</sup> by utilizing a non-judgmental, candid, and respectful atmosphere during jury selection which allows defense counsel to learn jurors’ views about capital punishment and imposition of a death sentence, employ countermeasures by life qualifying the panel, and thereafter teach favorable jurors how to get out of the jury room.

In summary form, the Wymore method is as follows: Defense counsel focuses upon jurors’ death penalty views, learns as much as possible about their views, rates their views, eliminates the worst jurors, educates both life-givers and killers separately, and teaches respect for both groups - particularly the killers. In other words, commentators state Wymore places the moral weight for a death sentence onto individual jurors, making it a deeply personal choice.<sup>13</sup> Wymore himself has stated he tries to find people who will give life, personalize the kill question, and find other jurors who will respect that decision. Ingold, *supra* note 13.

In short, jurors are rated on a scale of one to seven using the following guidelines:

1. *Witt* excludable: The automatic life adherent. One who will never vote for the death penalty and is vocal, adamant, and articulate about it.
2. One who is hesitant to say he believes in the death penalty. This person values human life and recognizes the seriousness of sitting on a capital jury. However, this person says he can give meaningful consideration to the death penalty.
3. This person is quickly for the death penalty and has been for some time. However, he is unable to express why he favors the death penalty (e.g., economics, deterrence, etc.). He may wish to hear mitigation or be able to make an argument against the death penalty if asked, and is willing to respect views of those more hesitant about the death penalty.
4. This person is comfortable and secure in his death penalty view. He is able to express why he is for the death penalty and believes it serves a good purpose. His comfort level and ability to develop arguments in favor of the death penalty differentiates him from a number three. However, he wants to hear both sides and straddles the fence with

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<sup>12</sup> Jurors must express their willingness to kill the defendant to be eligible to serve in a capital murder trial. In one study, a summary of fourteen investigations indicates a favorable attitude toward the death penalty translates into a 44% increase in the probability of a juror favoring conviction. Mike Allen, Edward Mabry, & Drew-Marie McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, LAW AND HUMAN BEHAVIOR, Dec. 1998, at 715-731.

<sup>13</sup> John Ingold, *Defense Jury Strategy Could Decide Aurora Theater Shooting Trial*, THE DENVER POST, March 29, 2015, at 113.

- penalty phase evidence, believing some mitigation could result in a life sentence despite a conviction for a cold-blooded, deliberate murder.
5. A sure vote for death, he is vocal and articulate in his support for the death penalty. He is not a bully, however, and, because he is sensitive to the views of other jurors, can think of two or three significant mitigating factors which would allow him to follow a unanimous consensus for life in prison. This person is affected by residual doubt.
  6. A strong pro-death juror, he escapes an automatic death penalty challenge because he can perhaps consider mitigation. A concrete supporter of the death penalty who believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.
  7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

Wymore teaches the concepts of isolation and insulation. Isolation means that each juror makes an individual, personal judgment. Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and the court and parties will respect his decision. In essence, every juror serves as a jury, and his decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

Wymore also teaches stripping, a means of culling extraneous issues and circumstances from the jurors' minds. In essence, you strip the venire of misconceptions they may have about irrelevant facts, law, defenses, or punishments as they arise. You simply strip away topics broached by jurors which are inapplicable to the case and could change a juror's mind. In a capital murder, you use a hypothetical like the following: "Ladies and gentlemen, I want you to imagine a hypothetical case, not this case. After hearing the evidence, you were convinced the defendant was guilty of premeditated, deliberate, intentional murder. He meant to do it, and he did it. It was neither an accident nor self-defense, defense of another, heat of passion, or because he was insane. There was no legal justification or defense. He thought about it, planned it, and did it. Now, can you consider life in prison?" Note the previous question incorporates case specific facts disguised as elements which avoids pre-commitment or staking out objections.

When adverse jurors offer any extraneous reason to consider life in prison, Wymore teaches to continue the process of re-stripping jurors. For example, if a juror says he would give life if the killing was accidental, thank the juror for his honesty and tell him that an accidental killing would be a defense, thus eliminating a capital sentencing hearing. Recommit the juror to his position, keep stripping, and then challenge for cause. Frankly, this process is unending and critical to success.

Wymore emphasizes the importance of recording the exact language stated by jurors. Not only does this assist with the grading process, but it serves as an important tool when you dialogue with jurors, mirroring their language back to them, whether to educate or remove.

Finally, Wymore eventually transcends jury selection from information gathering to record building, or the phase when you are developing challenges for cause by reciting their words, recommitting them to their position, and moving for removal.

## V. Our Method: Modified Wymore

Our approach is a modified version of Wymore merging various strategies including the use of select statutory language<sup>14</sup> originating in part from the old *Allen* charge;<sup>15</sup> studies on the psychology of juries;<sup>16</sup> identifying individual and personal characteristics of the defendant, victim, and material witnesses; profiling our model jury; and a simple rating system for prospective jurors. One other fine trial lawyer has recently written, at least in part, on a non-capital, modified Wymore version of jury selection as well.<sup>17</sup>

Our case preparation process is as follows. First, we start by considering the nature of the charge(s), the material facts, whether we will need to adduce evidence, and assess candidly prosecution and defense witnesses. Second, we identify personal characteristics of the defendant, victim, family members, and other important witnesses, all in descending order of priority. We do the same for prosecution witnesses. Individual characteristics include age, education, occupation, marital status, children, means, residential area, socioeconomic status, lifestyle, criminal record, and any other unique, salient factor. Third, we bear in mind typical demographics like race, age, gender, ethnicity, and so forth. Fourth, we review the jury pool list, both for individuals we may know and for characteristic comparison. Finally, we prepare motions designed to address legal issues and limit evidence for hearing pretrial.<sup>18</sup>

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<sup>14</sup> N.C. Gen Stat. §15A-1235(b)(1),(b)(2), & (b)(4). These subsections have language which insulate and isolate jurors, including phrases addressing the duty to consult with one another with a view to reaching an agreement if it can be done without violence to individual judgment, each juror must decide the case for himself, and no juror should surrender his honest conviction for the mere purpose of returning a verdict.

<sup>15</sup> *Allen v. United States*, 164 U.S. 492 (1896) (approving a jury instruction to prevent a hung jury by encouraging jurors in the minority to reconsider their position; some of the language in the instruction included the verdict must be the verdict of each individual juror and not a mere acquiescence to the conclusion of others, examination should be with a proper regard and deference to the opinion of others, and it was their duty to decide the case if they could conscientiously do so).

<sup>16</sup> Part of my approach includes strategies learned from David Ball, one of the nation's leading trial consultants. Mr. Ball is the author of two best-selling trial strategy books, "David Ball on Damages" and "Reptile: The 2009 Manual of the Plaintiff's Revolution," and he lectures at CLE's, teaches trial advocacy, and has taught at six law schools.

<sup>17</sup> See Jay Ferguson's CLE paper on "Transforming a Mental Health Diagnosis into Mental Health Defense," presented at the 2016 Death Penalty seminar on April 22, 2016, wherein Mr. Ferguson, addressing Modified Ball/Wymore *Voir Dire* in non-capital cases, asserts, among other points, the only goal of jury selection is to get jurors who will say not guilty, listen with an open mind to mental health evidence, not shift the burden of proof, apply the fully satisfied/entirely convinced standard of reasonable doubt, and discuss openly their views of the nature of the charge(s) and applicable legal elements and principles.

<sup>18</sup> As a practice tip, ask to hear all motions pre-trial and before jury selection. Knowledge of the judge's rulings may be central to your jury selection strategy, often revealing damaging evidence which should be disclosed during the selection process. Motions must precisely address issues and relevant facts within a constitutional context. If a judge refuses to hear, rule upon, or defers a ruling on your motion(s), recite on the record the course of action is not a

We use several methods in jury selection. At the beginning, I spend a few minutes educating the jury about the criminal justice system and the jury's preeminent role, magnifying the moment and simplifying the process.<sup>19</sup> I often tell them I am afraid they will think my client did something wrong by his mere presence, thereafter underscoring they are at the pinnacle of public service, serve as the conscience of the community, and must protect and preserve the sanctity of trial.<sup>20</sup> In a sense I am using the **lecture method** to establish leadership and credibility. I then transition to the dominant method, the **listener method**, asking many open-ended group questions followed by precise individual questions. I speak to every juror, even if only to greet and acknowledge them, but more often to address specific comments, backgrounds, or engage them in areas of concern. We look closely at jurors, including their family and close friends, focusing on the characteristics we have identified, good or bad. I always address concerning issues, stripping and re-stripping per **Wymore**. We strip by using uncontroverted facts (e.g., "my client blew a .30") and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like "this is not an accident case") as they arise to find jurors who do not have the ability to be fair and impartial or hear the instant case. In a sense, stripping is accomplished via drawing the sting. We tell bad facts to strip bad jurors. During the entire process I am **profiling** jurors, searching for select characteristics previously deemed favorable or unfavorable. We also focus on **juror receptivity** to our presentation, looking at their individual responses, physical reactions, and exact comments. For jurors of which I am simply unsure, I fall back on **demographic** data, then using my **gut** as a final filter. Last, we isolate and insulate each juror per **Wymore**, attempting to create twelve individual juries who will respect each other in the process. My *voir dire* template is attached hereto as Exhibit A and illustrates both my chronological and theoretical approach.

I use a simple grading scale as time management is always paramount during jury selection. As a parallel, the automatic life juror (or Wymore numbers one through three) gets a plus symbol (+), the automatic death juror (or Wymore numbers four through seven) gets a negative symbol (x), and the undetermined juror get a question mark (?). While every jury is different, I try to deselect no more than three on the first round and strive to leave one peremptory challenge, if possible, never forgetting I am one killer away from losing the trial.

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. See *State v. Nobles*, 350 N.C. 483, 497-498 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he

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strategic decision by the defense, thereby alerting the court of and protecting the defendant's recourse for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>19</sup> Tools that can help jurors frame the trial, remain engaged, and retain information received include the use of a "mini-opening" at the beginning of *voir dire*, or delivering preliminary instructions of the process, law, and relevant legal concepts. Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL, Mar. 2008, at 33.

<sup>20</sup> Trial by a jury of one's peers is a cornerstone of the principle of democratic representation set out in the U.S. Constitution. U.S. CONST. amend. VI.

asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle “occupied by his wife and three small children”); *State v. Jones*, 347 N.C. 193, 201-202, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State’s witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287, *disc. rev. denied*, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury “if [they] can consider” all the admissible evidence, again linking the bad facts you have revealed to the juror’s ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *See also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842-844 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge’s instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror’s fitness to serve. *Thomas*, 294 N.C. at 115. When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome.

The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

## VI. The Fundamentals

*“While the lawyers are picking the jury, the jurors are picking the lawyer.”<sup>21</sup>*

*Voir dire* is distilled to three objectives: Deselect those who will hurt you or are leaning against you;<sup>22</sup> educate jurors about the trial process and your case; and be more likeable than your counterpart, concentrating on professionalism, honesty, and a smart approach.

I share a three tier approach to jury selection: Core concepts that are threshold principles, fine art methods, and my personal tips and techniques.

Now for foundational principles:

- Deselect those who will hurt your client. Move for cause, if possible. Identify the worst jurors and remove them.

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<sup>21</sup> RAY MOSES, *JURY SELECTION IN CRIMINAL CASES* (1998).

<sup>22</sup> I have heard skilled lawyers espouse a view in favor of accepting the first twelve jurors seated. It is difficult to comprehend a proper *voir dire* in which no challenges are made as chameleons are lurking within. As a rule of thumb, never pass on the original panel seated.

- Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.
- Jurors who honestly believe they will be fair decide cases based on personal bias and preconceived ideas. Bias or prejudice can take many forms: racial, religious, national origin, ageism, sexism, class (including professionals), previous courtroom experience, prior experience with a certain type of case, beliefs, predispositions, emotional response systems,<sup>23</sup> and more.
- Jurors decide cases based on bias and beliefs, regardless of the judge’s instructions.
- There is little correlation between the similarity of the demographic factors (e.g., race, gender, age, ethnicity, education, employment, class, hobbies, or the like) of a juror and defendant and how one will vote.
- Cases are often decided before jurors hear any evidence.
- Traditional *voir dire* is meaningless.<sup>24</sup> Social desirability and pressure to conform inhibits effective jury selection when using traditional or hypothetical questions.<sup>25</sup> Asking jurors if they can put aside bias, be fair and impartial, and follow the judge’s instructions are ineffective. Traditional questions grossly underestimate and fail to detect the degree of anti-defendant bias in the community. *See supra* note 25.
- Hypothetical questions about the justice system result in aspirational answers and have little meaning.
- You can neither change a strongly held belief nor impose your will upon a juror in the time you have in *voir dire*.<sup>26</sup>

## VII. Fine Art Techniques

*“The evidence won’t shape the jurors. The jurors will shape the evidence.”<sup>27</sup>*

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<sup>23</sup> Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. June P. Tangnet, Jeff Stuewig, and Debra J. Mashek, *Moral Emotions and Moral Behavior*, ANNUAL REVIEW OF PSYCHOLOGY, 2007, at 345-372.

<sup>24</sup> Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL, Mar. 2008, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms “fair” and “impartial”; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in *voir dire*. Cathy Johnson and Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, LAW AND HUMAN BEHAVIOR, 1991, at 487-506.

<sup>25</sup> James Lugembuhl, *Improving Voir Dire*, THE CHAMPION, Mar. 1986.

<sup>26</sup> Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one’s life experience – whether movies, television, friends or family – to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION, 2016.

<sup>27</sup> RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

The higher art form:<sup>28</sup>

- Make a good first impression. Remember primacy and recency<sup>29</sup> at all phases, even jury selection. There is only one first impression. Display warmth, empathy, and respect for others and the process. Show the jurors you are fair, trustworthy, and know the rules.
- Understand trial is an unknown world to lay persons or jurors. They feel ignored and are unaware of their special status, the rules of propriety, and that soon almost everyone will be forbidden to speak with them.
- Comfortable and safe *voir dire* will cause you to lose. Do not fear bad answers. Embrace them. They reveal the juror's heart which will decide your case.
- Tell jurors about incontrovertible facts or your affirmative defense(s).<sup>30</sup> Be prepared to address the law on staking-out the jury for a judge who restricts your approach to this area. Humbly make a record.
- Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience. When jurors share painful or emotional experiences, acknowledge their pain and express appreciation for their honesty.
- When a juror expresses bias, the best approach is counter-intuitive. Do not stop, redirect them, or segue. Immediately address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.
- Use fact questions to get fact answers. Ask jurors about analogous situations in their past. This will help profile the juror.
- Listen. Force yourself to listen more. Open-ended questions (e.g., "Tell us about...", "Share with us...", "Describe for us...", etc.) keep jurors talking, revealing life experiences, attitudes, opinions, and views. Have a conversation. Spend time discussing their personal background, relevant experiences, and potential bias. Make it

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<sup>28</sup> Ask about the trial judge and how he handles *voir dire*. Consider informing the trial judge in advance of jury selection about features of your *voir dire* which may be deemed unusual by the prosecutor or the court, thus allowing the judge time to consider the issue, preventing disruption of the selection process, and affording you an opportunity to make a record.

<sup>29</sup> The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, JOURNAL OF COMMUNICATION, 1969, at 239-247. The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, JOURNAL OF COMMUNICATION, 1994.

<sup>30</sup> Prior to the selection of jurors, the judge must inform prospective jurors of any affirmative defense(s) for which notice was given pretrial unless withdrawn by the defendant. N.C. Gen. Stat. §15A-1213; N.C. Gen. Stat. §15A-905(c)(1) (notice of affirmative defense is inadmissible against the defendant); N.C.P.I. – Crim. 100.20 (instructions to be given at jury selection).

interesting to them by making the conversation about them. Use the ninety/ten rule, jurors talking ninety percent of the time.

- Consider what the juror needs to know to understand the case and what you need to know about the juror.
- Seek first to understand, then to be understood.
- Personal experiences shape juror's views and beliefs and best predict how jurors view facts, law, and each other.
- Do not be boring, pretentious, or contentious.
- Look for non-verbal signals like nodding, gestures, or expressions.
- Spot angry jurors. "To the mean-spirited, all else becomes mean."<sup>31</sup>
- Refer back to specific answers. Let them know you were listening. Then build on the answers. Remember, a scorpion is a scorpion, regardless of one's trappings (i.e., presentation, words, or appearance).
- Deselect delicately. Tell them they sound like the kind of person who thinks before forming an opinion and the law is always satisfied when a juror gives an honest opinion, even if it is different from that of the lawyers or the judge. All the law asks is that jurors give their honest opinions and feelings. Stand and say, "We thank and respectfully excuse juror number...."
- Juror personalities and attitudes are far more predictive of juror choices.
- Jury selection is about jurors educating us about themselves.

## VIII. My Side Bar Tips

*"We don't see things as they are. We see them as we are."*<sup>32</sup>

My personal palette of jury selection techniques:

- At the very outset, tell the jury the defendant is innocent (or not guilty), be vulnerable, and tell the jury about yourself. Become one of them.
- You must earn credibility in jury selection.<sup>33</sup> Many jurors believe your client is guilty before the first word is spoken. Aligned with the accused, you are viewed with suspicion, serving as a mouthpiece. Start sensibly and strong. Be a lawyer, statesman, and one of them – a caring, community member. Earn respect and credibility when it counts – right at the start.

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<sup>31</sup> RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

<sup>32</sup> ANAIS NIN, SEDUCTION OF THE MINOTAUR (1961).

<sup>33</sup> According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant's responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.

- We develop a relationship with jurors throughout the trial. Find common ground, mirroring back the intelligence and social level of the individual jurors. Be genuine. Become the one jurors' trust in the labyrinth called trial.
- Encourage candor. Tell the jury there are no right or wrong answers, and you are interested in them and their views. Tell them citizens have the right to hold different views on topics, and so do jurors. Tell them you will be honest with them, asking for honest and complete answers in return. Assure them honest responses are the only thing expected of them. Reward the honest reply, even if it hurts.
- Listen to and observe opposing counsel. Purposefully contrast with the prosecutor. If he is long-winded, be precise and efficient. If he misses key points, spend time educating the jury. Entice jurors who choose early to choose you.
- Humanize the client. Touch, talk with, and smile at him.
- Remind the client continually of appropriate eye contact, posture, and perceived interest in the case.
- Beware of a reverse *Batson* challenge when there is an obvious trend by the defense using peremptory challenges based on race, gender, or religion.
- Propensity is the worst evidence.
- If jurors fear or do not understand your client or his actions, whether due to violence, mental health, or the unexplained, they will convict your client - quickly.
- Pick as many leaders<sup>34</sup> as possible, creating as many juries as possible. Do not pick followers: you shrink the size of the jury. Avoid young, uneducated, and apparently weak, passive, or submissive jurors. Target and engage them to sharpen your view. Remember: you only need one juror to exonerate, hang, or persuade the jury to a lesser-included verdict.
- Look for jurors who are resistant to social pressure (e.g., piercings, tattoos, etc.).
- The best predictor of human behavior is past behavior.
- Let the client exhibit manners. My paralegal, Candace Brown, is present during much of the trial, most importantly in jury selection. When it is our turn to deselect or dismiss jurors, she approaches, the defendant stands and relinquishes his chair, and we discuss and decide who to deselect. Ms. Brown also interacts with the defendant regularly during trial, recesses, and other opportunities, communicating perceived respect and a genuine concern for the client.
- Use the term fair and impartial when engaging the jaundiced juror, skewed in beliefs or position. Talk about the highest aim of a jury.
- Older women will exonerate your client in a rape or sex offense case, particularly if a young female victim has credibility issues. Conversely, beware of the grandfatherly, white knight.<sup>35</sup>
- Fight the urge to use your last peremptory challenge. You may be left with the equivalent of an automatic death penalty juror.

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<sup>34</sup> Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. RAY MOSES, *JURY SELECTION IN CRIMINAL CASES* (1998).

<sup>35</sup> White knights are individuals who have a compulsive need to be a rescuer. MARY C. LAMIA & MARILYN KRIEGER, *THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS* (2009).

- Draw the sting (i.e., strip). Tell the jury incontrovertible bad facts and your affirmative defense(s). Some jurors will react verbally, some visibly. Let the bad facts sink in. Engage the juror who reacts badly.<sup>36</sup> Reaffirm his commitment to your client's presumed innocence. Then tell them there is more to the story. The sting fades and loses its impact during trial.
- Use the language of the former highest aim Pattern Jury Instruction, telling jurors they have no friend to reward, no enemy to punish, but a duty to let their verdict speak the everlasting truth.
- Mirror the judge's instructions to the jury, early and often, using phrases from the judges various instructions including fair and impartial, the same law applies to everyone, they are not to form an opinion about guilt or innocence until deliberations begin, and so forth.<sup>37</sup> Forecast the law for them. Clothe yourself with vested authority.
- Commit the jury, individually and as a whole to principles of isolation and insulation. Ask them if they understand and appreciate they are not to do violence to their individual judgment, they must decide the case for themselves, and they are not to surrender their honest convictions merely for the purpose of returning a verdict.<sup>38</sup> Extract a group commitment that they will respect the personal judgment of each and every juror. Target an oral commitment from unresponsive or questionable jurors. Seek twelve individual juries. If done well, you increase your chances of a not guilty verdict, lesser-included judgment, hung jury, or a successful motion to poll the jury post-trial.
- Tell the jury the law never requires a certain outcome. Inform them that the judge has no interest in a particular outcome and will be satisfied with whatever result they decide. Emphasize the law recognizes that each juror must make his own decision.

## **IX. Subject Matter of *Voir Dire***

Case law on proper subject matter for *voir dire*<sup>39</sup> follows.

Accomplice Culpability: *State v. Cheek*, 351 N.C. 48, 65-68 (1999) (prosecutor properly asked about jury's ability to follow the law regarding acting in concert, aiding and abetting, and felony murder rule).

Circumstantial Evidence: *State v. Teague*, 134 N.C. App. 702 (1999) (prosecutor allowed to ask if jurors would require more than circumstantial evidence, that is eyewitnesses, to return a verdict of first degree murder).

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<sup>36</sup> To deselect jurors, commit the juror to a position (e.g., "So you believe..."), normalize the impairment by acknowledging there are no right or wrong answers and citizens are free to have different opinions, and recommit the juror to his position (e.g., "So because of..., you would feel somewhat partial..."), thus immunizing him from rehabilitation.

<sup>37</sup> N.C. Gen. Stat. §15A-1236(a)(3), *et al*; *supra* pp. 3-4.

<sup>38</sup> N.C. Gen. Stat. §15A-1235(b)(1) & (4).

<sup>39</sup> See MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, *JURY SELECTION QUESTIONS* (2012).

Child Witnesses: *State v. Hatfield*, 128 N.C. App. 294 (1998) (trial judge erred by not allowing defendant to ask prospective jurors “if they thought children were more likely to tell the truth when they allege sexual abuse”).

Defendant’s Prior Record: *State v. Hedgepath*, 66 N.C. App. 390 (1984) (trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow the judge’s instructions they are to consider the defendant’s prior record only for the purpose of determining credibility).

Defendant Not Testifying: *State v. Blankenship*, 337 N.C. 543 (1994) (proper for defense counsel to ask questions concerning a defendant’s failure to testify in his own defense; however, the court has discretion to disallow the same).

Expert Witness: *State v. Smith*, 328 N.C. 99 (1991) (asking the jury if they could accept the testimony of someone offered in a particular field like psychiatry was not a stake-out question).

Eyewitness Identification: *State v. Roberts*, 135 N.C. App. 690, 697 (1999) (prosecutor properly asked if eyewitness identification in and of itself was insufficient to deem a conviction in the juror’s minds regardless of the judge’s instructions as to the law)

Identifying Family Members: *State v. Reaves*, 337 N.C. 700 (1994) (no error for prosecutor to identify members of murder victim’s family in the courtroom during jury selection).

Intoxication: *State v. McKoy*, 323 N.C. 1 (1988) (proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Legal Principles: *State v. Parks*, 324 N.C. 420 (1989) (defense counsel may question jurors to determine if they completely understood the principles of reasonable doubt and burden of proof; however, once fully explored, the judge may limit further inquiry).

Pretrial Publicity: *Mu ’Min v. Virginia*, 500 U.S. 415, 419-421 (1991) (inquiries should be made regarding the effect of publicity upon a juror’s ability to be impartial or keep an open mind; questions about the content of the publicity may be helpful in assessing whether a juror is impartial; it is not required that jurors be totally ignorant of the facts and issues involved; the constitutional question is whether jurors had such fixed opinions they could not be impartial).

Racial/Ethnic Background:<sup>40</sup> *Ristaino v. Ross*, 424 U.S. 589 (1976) (although the due process clause creates no general right in non-capital cases to *voir dire* jurors about racial prejudice, such

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<sup>40</sup> Considerations of race can be critical in any case, and *voir dire* may be appropriate and permissible to determine bias under statutory considerations of one’s fitness to serve as a juror. *See generally* N.C. Gen. Stat. §15A-1212(9) (challenges for cause may be made ... on the ground a juror is unable to render a fair and impartial verdict). Strategically, try to show how questions on racial attitudes are relevant to the theory of defense. If the inquiry is particularly sensitive, request an individual *voir dire*. John Rubin (editor), *Selection of Jury: Voir Dire*, N.C. DEFENDER MANUAL (2012).

questions are constitutionally mandated under “special circumstances” like in *Ham*); *Ham v. South Carolina*, 409 U.S. 524 (1973) (“special circumstances” were present when the defendant, an African-American civil rights activist, maintained the defense of selective prosecution in a drug charge); *Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981) (trial courts must allow questions whether jurors might be prejudiced about the defendant because of race or ethnic group when the defendant is accused of a violent crime and the defendant and victim were members or difference races or ethnic groups); *See also Turner v. Murray*, 476 U.S. 28 (1986) (such questions must be asked in capital cases in charge of murder of a white victim by a black defendant).

Sexual Offense/Medical Evidence: *State v. Henderson*, 155 N.C. App. 719, 724-727 (2003) (prosecutor properly asked in sex offense case if jurors would require medical evidence “that affirmatively says an incident occurred” to convict as the question measured jurors’ ability to follow the law).

Sexual Orientation: *State v. Edwards*, 27 N.C. App. 369 (1975) (proper for prosecutor to question jurors regarding prejudice against homosexuality to determine if they could impartially consider the evidence knowing the State’s witnesses were homosexual).

Specific Defenses: *State v. Leonard*, 295 N.C. 58, 62-63 (1978) (a juror who is unable to accept a particular defense recognized by law is prejudiced to such an extent he can no longer be considered competent and should be removed when challenged for cause).

## **X. Other Important Considerations**

It is axiomatic you must know the case facts, theory of defense, theme(s) of the case, and applicable law to conduct an effective *voir dire*. Beyond these fundamentals, I offer a few practice tips. First, every jury selection is different, tailored to the unique facts, law, and individuals before you. Second, we meet with the defendant and witnesses on the eve of trial for a last review. Often, we learn new facts, good and bad, as witnesses are sometimes impressive but are more commonly afraid, experience memory loss, present poorly, or will not testify. We re-cover the material points of trial, often illuminating important facts that require disclosure in the selection process. Last, I like to use common sense analogies and life themes to which we can all relate in my conversation with jurors.

Look, act, and dress professionally. Make sure your client and witnesses dress neatly and act respectfully. Of all the things you wear, your expression is most important. A pleasant expression adds face value to your case.<sup>41</sup>

Use plain language. Distill legal concepts into simple terms and phrases.

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<sup>41</sup> RAY MOSES, *JURY SELECTION IN CRIMINAL CASES* (1998).

At the outset, tell the jury they have nothing to fear. Inform them the judge, the governor<sup>42</sup> of the trial, will tell them everything they need to know, and the bailiffs are there for their assistance, security, and comfort. Instruct the jury they need only tell the bailiffs or judge of any needs or concerns they may have.

Be respectful of opposing counsel, not obsequious. You reap what you sow. Promote respect for the process. Be mindful of how you address opposing counsel. He is the prosecutor, not the State of North Carolina (or the government). If the prosecution invokes such authority, tell the jury you represent the citizens of this state, protecting the rights of the innocent from the power of the government.

Sun Tzu, author of *The Art of War*, provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed, unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,<sup>43</sup> recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

We summarize life experiences and belief systems via themes. The best themes are succinct, memorable, and powerful emotionally. We motivate and lure jurors to virtuosity – or difficult verdicts – through life themes. Consider the following themes (combined with argument): The first casualty of war – or trial – is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever

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<sup>42</sup> Judges are sometimes referenced as the governor or gatekeeper of the trial, particularly when deciding admissibility of expert evidence. See *State v. McGrady*, 753 S.E.2d 361 (N.C. Ct. App. January 21, 2014) cert. granted, 2014 WL 2652419 (N.C. June 11, 2014) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under FED. R. EVID. 702).

<sup>43</sup> But see *State v. Ali*, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control).

think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice. Stop at nothing to find the truth. You have no friend to reward and no enemy to punish. Your duty is to let your verdict speak the everlasting truth. His triumph today will trigger change tomorrow. Investigations will improve, and justice will have meaning. Trials will no longer be a rush to judgment but instead a road to justice. A trial lawyer without a theme is a warrior without a weapon.<sup>44</sup>

## **XI. Integrating *Voir Dire* into Closing Argument**

At the end of closing argument, I return to central ideas covered in *voir dire*. I remind the jury the defendant is presumed innocent even now, walk over to my client and touch him – often telling the jury this is the most important day of my client’s life. I then remind them they are not to surrender their honest and conscientious convictions or do violence to their individual judgment merely to return a verdict, purposefully re-isolating and re-insulating the jury before stating my theme and asking for them to return a verdict of not guilty.

## **XII. Summary**

Prepare, research, consult, and try cases. Be objective about your case. Be courageous. Stand up to prosecutors, judges and court precedent, if you believe you are right. Make a complete record. I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to whom I esteem and aspire. Hear the message. Go make a difference.

“A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end.”

“The day may come when we are unable to muster the courage to keep fighting ... but it is not this day.”<sup>45</sup>

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<sup>44</sup> Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL, July 2001, at 63.

<sup>45</sup> THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).