

(1)

“Never forget, almost every case has been won or lost when the jury is sworn.” – Clarence Darrow (defense attorney), 1936

“You’re looking for people who need to be removed (from the jury pool) and your ¹questions should be designed to uncover those who should be removed,” Frederick says.

Frederick provided 11 tips on how to effectively conduct *voir dire*:

1. **Adopt the proper orientation.** Approach your *voir dire* questioning as a “conversation,” not a job interview. Be confident, reinforce juror participation and listen to jurors to yield the best results.
2. **Set the stage for jurors.** Explain the process, stressing honesty and candor and helping jurors acknowledge the filters and biases we all possess.
3. **Get them talking.** Successful *voir dire* requires that jurors talk (and not just listen to the attorneys talk at them). Using techniques such as the initial background summary (where all jurors answer three to five basic background questions) and having all jurors raise their hands will increase participation by jurors at the start of *voir dire*.
4. **Ask open-ended questions.** Open-ended questions (e.g., Why? and “What are your views on?”) provide more information than closed-ended questions (e.g., agree/disagree or yes/no questions).
5. **Avoid the Socially Desirable Response Bias.** Questions that include phrases that trigger the “looking good” response from jurors (e.g., “fair and impartial” or “bias or prejudice”) should be avoided where possible because these phrases inhibit honest and candid answers.
6. **Focus on difficulty vs. ability.** Jurors are more willing to acknowledge difficulties in doing something than in their ability to do it. Using questions that focus on difficulties and not abilities gives jurors an opportunity to admit where they would have problems.
7. **Use alternative route to uncover bias.** Jurors have difficulty recognizing and admitting their biases. Focusing on the behavioral manifestations of bias (e.g., give less weight or need more evidence) provides an alternate and more useful route for uncovering bias.
8. **Design questions using “bad” answers.** If there is reason to believe that some jurors hold certain negative opinions that have not been revealed, be sure to ask about them.
9. **Harness the power of “reflective” questions.** Using questions that ask jurors to reflect on how certain factors might affect their decisions (reflective questions) are more likely to uncover bias than questions that simply ask if certain factors would affect their decision (nonreflective questions).

¹ <https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/>

10. **Keep jurors participating.** Use techniques that encourage participation as the questioning process continues. Two useful approaches to revitalizing participation are: (a) interspersing majority response questions and (b) using the springboard method where you ask one juror a question and use the answer to talk with other jurors about the topic.
11. **Be persistent.** Don't let jurors hide. If some jurors are not participating in *voir dire*, ask them directly for their views so that you know what they think and all jurors know that they can't hide from the questioning.

Beyond the questions, Frederick says you have to pay attention to the juror's nonverbal communication. "Based on research on nonverbal cues to deception, pay attention to signs of anxiety and general positive or negative affect," he says. "Rule of thumb: look for deviations in the potential juror's behavior."

Look for such visual cues as body movement, body orientation, body posture, shrugs, eye contact and facial expressions. Also look for auditory cues, including voice pitch, tone, vocal hesitancy and word choice.

(2)

Looking Good Bias²

The “looking good” bias (i.e., the socially desirable response bias) is an impression management strategy designed to portray a positive image of oneself to others. This bias promotes responses that are not true reflections of the individual’s beliefs or experiences, but reflect a desire by the individual to have others think positively of him or her. In the case of jurors, this looking good bias fosters answers that reflect what jurors think the lawyer wants to hear or what they think are socially acceptable answers designed to create a positive impression of themselves. Obviously, this is exactly what we don’t want jurors to do. The looking good bias is fundamentally different from biases that can arise out of (a) exposure to case information whose influence is unrecognized by jurors or (b) implicit bias that reflects a general bias against a party.

Both of these biases reflect processes on a nonconscious or unconscious level. The looking good bias reflects a conscious decision on the part of jurors to suppress true and honest answers in hopes that the lawyers, the judge, and/or the public will think positively of them. Finally, while the answers fostered by the looking good bias and those provided by agenda-driven jurors are often the same (e.g., “I can be fair”), the looking good bias does not have at its core a desire to be seated on the jury but a desire to be perceived in a positive light.

Triggering the Looking Good Bias: “Hey, I’m Not Biased!”

Group *voir dire* and, to a lesser degree, individual *voir dire* are situations that promote the looking good bias. Major contributors to this phenomenon are that (a) questioning is often conducted by relatively higher status individuals, e.g., the judge; (b) answers are given in a public setting, both in court (i.e., in front of their fellow jurors, attorneys, the judge, court personnel, and spectators) and in terms of potential media coverage; and (c) importantly, the focus of the *voir dire* is to evaluate potential jurors in terms of whether they are suitable for service in a particular case. The latter factor is key in that evaluation concerns (evaluation apprehension) are what drive the looking good bias. These factors prime the pump for the looking good bias.

While the previously mentioned factors prime the pump, the way many questions are phrased during *voir dire* subsequently triggers the looking good bias. Consider the following examples:

“Do you have any biases against big corporations?”

“Could you be fair and impartial?”

“You would follow the judge’s instructions, wouldn’t you?”

“Do you understand that the law says that defendant does not have to take the stand?”

² www.nlrg.com/blogs/jury-research/mastering-group-voir-dire-tip-5-avoid-the-looking-good-bias

Each of the questions above, in its own way, signals what the correct answer is. In looking at the above questions, it is pretty obvious what the “correct” answers are:

“No, I am not biased against big corporations.”

“I could be fair and impartial.”

“Sure, I can follow the judge’s instructions.”

“Yes” or shaking head yes. (While thinking, “Even if I didn’t understand, do you think I would let the other jurors know that I am not as smart as they are?”)

Avoiding the Looking Good Bias

While pressures to look good are great in the voir dire setting, particularly with group questioning, there are a number of tools we can use to minimize the looking good bias. Here are a few that can help:

Use juror questionnaires. Supplemental juror questionnaires are an excellent tool in securing relatively more candid answers from jurors. Because answers are given in a less public environment, i.e., completing a form/questionnaire versus making statements in open court, juror candor and honesty is maximized.

Reframe the inquiry. Jurors are told (often repeatedly) that the main qualification for jury service is their ability to be fair and impartial, e.g., “we are looking for fair and impartial jurors.” Jurors know that they are being evaluated (priming the looking good bias) in light of that standard or “frame” and that subsequent impressions of them are judged against it. What we need to do is to frame the inquiry in a slightly different manner. The first step is to explore bias in a less judgmental manner so as to minimize the stigma of “bias.” Discuss with jurors the concept of “lenses” (i.e., biases) and how they can influence our views of different situations. That these lenses arise from our different life experiences and beliefs and everyone has them. And that it is simply part of being human. The second step is to reframe the nature of the voir dire inquiry. Voir dire is the time when an open and candid discussion of these lenses is critical. In answering questions, the “correct” answers are those that reflect total honesty and candor. The result of this two-step process is the establishment of a “safe” and supportive environment where jurors can reveal their own personal “lenses.” In this manner, the context for voir dire is reframed in a manner that minimizes the looking good bias.

Ask open-ended questions. Since the looking good bias fosters a search for the “correct” or socially acceptable answer, questions should avoid clues or hints as to what the “correct” answers are. Open-ended questions (see Tip 4) are useful in exploring issues and beliefs without giving hints as to what the correct answer is. The following questions illustrate this approach:

“What are your views or opinions regarding big corporations today?”

“What would be your impressions of a defendant who does not take the stand?”

Neither of the above questions provides clues to the socially acceptable or correct answer.

Neither of the above questions provides clues to the socially acceptable or correct answer.

Focus on difficulty not ability. Research has shown that focusing on a juror's ability to do something decreases honesty and candor. Doing so increases pressures to look good by explicitly or implicitly challenge the juror's self-image. Examples of ability-type phrasing are:

“Would you be able to consider early childhood upbringing as mitigation evidence?”

“How many of you could award money damages for pain and suffering?”

Jurors are reluctant to admit shortcomings in their abilities, particularly in a public setting. However, the effects of the looking good bias can be reduced by focusing on difficulties or reservations instead of ability.

“Would you have any reservations in considering early childhood upbringing as mitigation evidence?”

“What difficulties would you have in awarding money damages for pain and suffering?”

It is easier for jurors to admit that they would have difficulties or reservations in doing something the law requires (e.g., considering mitigation evidence or awarding money damages for pain and suffering) than to admit they would be unable to do so.

Focus on undesirable behaviors not bias. Finally, while jurors are reluctant to admit bias, they are less reluctant to endorse positions that reflect such bias. Showing the judge that jurors will not discharge their responsibilities as jurors—thus revealing bias—is the key. Consider the following questions:

“How many of you feel that preponderance of the evidence is too low of a standard in cases involving damages in the millions of dollars?”

“How many of you feel that you would need to be 100% certain that the defendant committed the crime before you would convict him/her?”

“At this time, how many of you are leaning toward (the opposing party)?”

“How many of you believe that it is just not right to award money for pain and suffering?”

(3)

PSYCHOLOGY of *VOIR DIRE*³

In the ABCs of emotion, **A stands for "activating event"**, or any event that might happen in the environment.

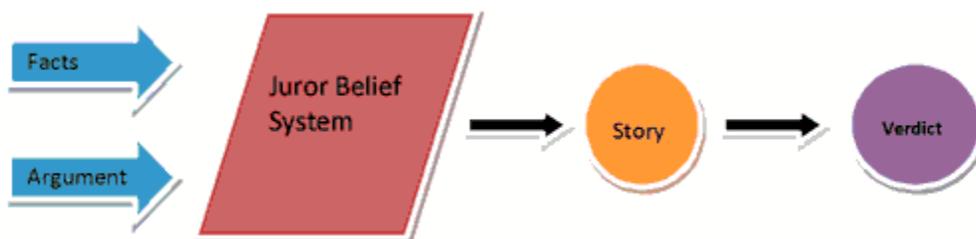
B refers to the individual's "belief system". All events are filtered through a set of beliefs and based upon those beliefs, the individual will have a resulting or "consequent emotion."

There is an important implication to the ABCs of emotion that might be readily obvious but it is fundamental to how a juror forms a verdict. The ABCs of emotion reveals that events don't cause emotions; instead, our beliefs regarding the event cause the emotion.

Let's take a look at one recent event and it will be easy to show the power of the belief system.

Consider for a moment a monumental presidential election, in which Barack Obama was the victor. If events determined how an individual felt, then the election of Barack Obama should have made everyone feel the same way but it did not. In general, Democrats were happy with Mr. Obama's election whereas Republicans were not. What caused the different reaction? Not the event, the event was the same for both Democrats and Republicans. **The difference was the belief systems that filtered the event- for any number of reasons.**

Let's take what you just learned about the ABCs of emotion and apply it to the behavior of jurors. In the graphic below, it is easy to see the critical role the belief system plays in verdict formation.



The graphic above is the ABCs of emotions translated into a court setting.

In this model, the activating events are the facts and arguments used when presenting the case.

³ <https://www.thejuryexpert.com/2010/11/the-psychology-of-voir-dire/>

The juror belief system is the filter through which the facts and arguments must pass.

The "Story" refers to the way that the juror uses her beliefs to organize the facts and evidence.

The story that the juror tells herself about the case is the basis on which the juror reaches a verdict.

Thus, the task of *voir dire* might be stated as, "Voir dire is the process of identifying jurors with beliefs that prevent them from a fair hearing of your case."

How to Conduct *Voir Dire*

In the psychological approach to conducting voir dire, voir dire is aimed at identifying jurors whose beliefs prevent them from an open and fair hearing of your case. *David Ball (2003)* has developed a method of conducting voir dire and with a little modification it can serve the purpose of identifying supportive and harmful beliefs held by jurors. The following is the recommended process for conducting voir dire, with goal of identifying juror belief systems.

1. Develop voir dire questions for key evidence and themes.
2. Develop voir dire questions to uncover juror beliefs.
3. Develop voir dire questions regarding juror life experiences.
4. Develop voir dire questions regarding juror demographics.

Step One: Develop Voir Dire Questions for Key Evidence and Themes

All attorneys and trial consultants have developed their own methods for organizing evidence. There is no right or wrong way to organize the evidence. If it works for you, it is the right way to do it.

Regardless of how the evidence is organized, if you are going to take the psychological approach to conducting voir dire, I would ask you to take one extra step after you have your evidence organized: group or categorize the evidence into themes.

It is recommended that you have one primary theme and no more than three subthemes.

I have been involved in cases where the attorney took the approach of "throw it all against the wall and see what sticks." On occasion, I have seen this work but I don't think this approach that should be routinely relied upon.

Research in the area of cognitive psychology has revealed that the average individual can keep three things in mind at one point in time. In other words, the average individual can keep three things in working memory.

If you want to use these scientific data to your advantage, you should organize your evidence so you have one primary theme for your case and no more than three subthemes. You might want to adopt the motto: If you present more than three themes, you have presented nothing at all. All that a juror can take into the deliberation room are three themes; a juror cannot take ten themes or arguments into the deliberation room.

Let's consider a child sexual abuse case in which Mrs. Green accuses her ex-husband of sexually abusing their three year old daughter and the allegations arose during their bitter divorce. In this case, defense counsel's primary theme will be: *The allegations were contrived by a vengeful ex-spouse*. The subthemes in the case could be as follows: (1) *Children in the three to five year age range are at risk for being induced to make a false outcry*; (2) *Mrs. Green has a history of using the children to hurt Mr. Green*; and (3) *In the past, Mrs. Green has made false statements to the police and child protective services*.

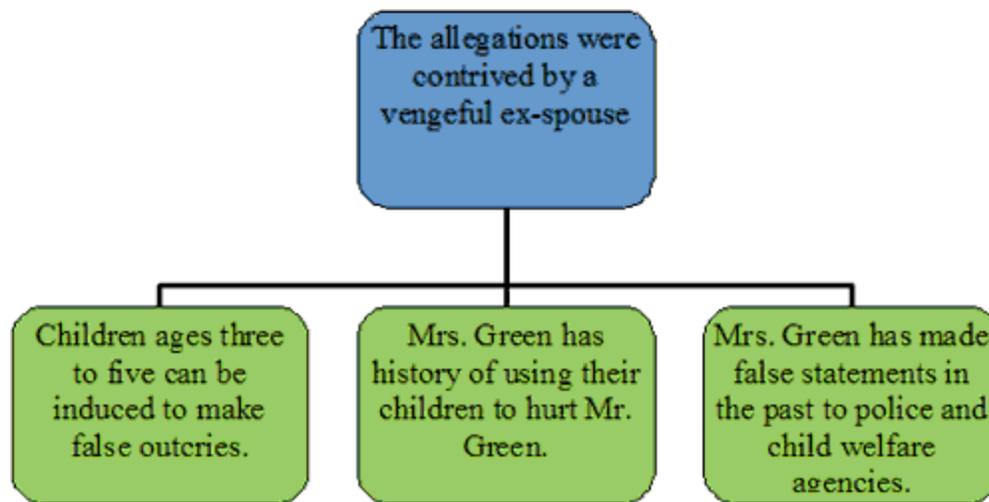
Once you have your primary theme and three subthemes, you are ready to formulate your first set of voir dire questions. The questions you create should be designed to reveal juror beliefs about your evidence and themes. For example, take the first subtheme, "*Children in the three to five year age range are at risk for being induced to make a false outcry*." Your voir dire questions might look something like this:

Q: What weight would you give to scientific research that says a child in the three to five year old age range can be induced to make a false outcry of sexual abuse about 45% of the time?

Q: What weight would you give to scientific research that says a child is equally likely to believe something happened when it actually happened or when she is told by a parent it happened?

Of course, there are many more questions that might be formulated than the two listed above. The questions listed above serve as examples of the type of questions you could ask regarding one of the subthemes in the hypothetical case about child sexual abuse.

For each theme and for each piece of key evidence, you want to develop voir dire questions that will reveal relevant juror beliefs. Your questions should be designed to get jurors talking. Once they are talking, you will begin to see the beliefs they hold regarding the evidence and your themes.



A word of caution is offered. You might instinctively want to avoid voir dire questions regarding evidence that is harmful to your case. Don't do this. Don't avoid asking questions about the potentially harmful topics you know are going to come up. The reason for this is simple, you need identify jurors whose beliefs will be supportive of the damning evidence. Once you have identified the juror whose beliefs support harmful evidence, you can deselect that juror.

You have now completed the first step of the voir dire process. You have written voir dire questions regarding key evidence, your case theme and subthemes, and harmful evidence. Now, you are ready to go to the next step in the process.

Step Two: Develop *Voir Dire* Questions that Reveal Juror' Belief Systems

Belief system is defined as the totality of an individual's values, attitudes, and opinions. When it comes to the matter of rendering a verdict, nothing is more critical than the juror's belief system. The juror's belief system is the filter through which all evidence and argument must pass. The juror will not deal directly with the evidence and argument when formulating a verdict. The juror will deal with the story he tells himself about the case information and the juror's story is based more on belief than fact.

Your job during the second step of voir dire is to uncover information about each juror's belief system. Once you uncover the juror's belief system, you should determine if your client can get a fair hearing with that belief system in the deliberation room.

There are two ways to identify relevant juror beliefs. First, you can take a rational approach. In the rational approach, you use reason and logic to deduce juror opinions that are relevant to the case. Second you can take an empirical approach. In the empirical approach, you identify

relevant juror beliefs by use of the existing scientific literature, or better still you use focus groups.

In order to demonstrate the rational approach to uncovering juror beliefs, let's return to the child sexual abuse case which was introduced when we discussed the first step. Using logic and intuition, what beliefs do you believe would be helpful or harmful to the defense in such a case? Consider the following:

- Sexually Conservative – In our culture, sex is supposed to be a private thing, so everybody will be a little shy about sexual matters but the sexually conservative person is extraordinarily shy and might punish the defendant with a guilty verdict for bringing sex out of the bedroom and into the courtroom.
- Strong Parenting Instinct – Individuals with a strong parenting instinct might be overprotective towards children and thus inclined to begin hearing evidence in a child sexual abuse case with a guilty verdict already in mind.
- Law and Order – Individuals who identify with law enforcement and the courts would from the beginning of the trial be favorable to the prosecution.

The list above is not exhaustive of juror beliefs but it shows you the thought process you must go through to identify relevant juror beliefs. Notice that the beliefs you most want to identify are beliefs that favor your opponent. In the case of the defense attorney preparing to defend Mr. Green, the goal is to identify pro-prosecution beliefs. The reason for this is simple. The only tool you have available to you during voir dire is deselection, so you need to spend the precious little time that you do have determining who you need to deselect.

The second approach to developing voir dire questions designed to uncover juror beliefs is the empirical approach. There has been extensive psychological research regarding the relationship of beliefs and juror verdict. It is beyond the scope of this paper to review the entire body of research regarding juror beliefs. To give you a flavor of the research, consider the following summary of the research regarding three beliefs that have a tremendous impact on verdicts in civil and criminal trials.

•**Authoritarianism** – Authoritarianism is defined as a desire for order, well defined rules, and reliance upon authority when making decisions. Authoritarians have a strong belief in the legitimacy of conventional authority. The research shows that authoritarian individuals tend to convict and give harsher punishment than people who are low on authoritarianism (Narby, Cutler & Moran, 1993). To really appreciate the power of authoritarianism, consider the results of a thirty year old study that showed that authoritarian individuals recall prosecution evidence more than defense evidence (Garcia & Griffitt, 1978). The following are examples of beliefs held by authoritarian individuals:

Obedience and respect for authority are the most important virtues children should learn.

An insult to honor should always be punished.

There is nothing lower than a person who does not feel great love, gratitude and respect for his parents.

•**Locus of Control** – Locus of control means location of control. In the locus of control research, there are two locations for control: internal and external. Individuals with external locus of control believe that their actions matter little and what happens in their life is largely the result of external factors, like fate, luck, or serendipity. Individuals with internal locus of control believe that their personal qualities, such as intelligence, perseverance, and so on, determine what happens in their life.

You might think something as abstract as locus of control would have no bearing on a verdict but it does. The research shows that persons with a strong internal locus of control are more likely to convict because they view themselves as well as others as accountable for their own actions (Phares & Wilson, 1972). One research study having to do with a drunk driving showed that individuals with strong internal locus of control recommend more harsh punishment than individuals with external locus of control (Sosis, 1974). The following are some examples of beliefs held by internal locus of control:

People's misfortunes are the result of mistakes they make.

Capable people who fail to become leaders have not taken advantage of their opportunities.

When I make plans I am almost always certain I can make them work.

•**Belief in a Just World** – If you believe that people get what they deserve in life, you have a belief in a just world, i.e., good things happen to good people and bad things happen to bad people. The research regarding Belief in a Just World (BJW) is mixed. Some research has shown persons with a strong BJW are more likely to convict but these same individuals might be inclined to blame a rape victim or be less punitive towards a higher status defendant (Lieberman & Sales, 2007). The following are some beliefs held by individuals with strong just world beliefs:

I feel the world treats me fairly.

I believe that I get what I deserve.

I feel that I earn the rewards and punishments I get.

As you can see from the brief overview of the research, there is a wealth of scientific data to guide the formulation of questions designed to uncover a juror's belief system. If you would like to know more about this research, you can get started by Googling "jury selection". Another good option would be to go to Google Books and then Google "jury selection."

A word of caution is warranted regarding the research regarding juror beliefs. This research is general research and the extent to which it applies to your case is unknown.

Step Three: Develop *Voir Dire* Questions about Life Experiences

Juror decision-making is shaped by beliefs and beliefs are shaped by life experiences. So, life experience can be fruitful area of questioning during *voir dire*, if it is done correctly.

If you want to use questions about life experiences as a means to uncover juror beliefs, the first thing you must do is identify those life experiences that you think would create relevant juror beliefs. For example, in the sexual abuse case regarding Mr. Green, some relevant life experiences might include the following:

- **Sexual abuse history** – "Have you ever been sexually abused, sexually assaulted or raped?" "Has someone close to you ever been sexually abused, sexually assaulted or raped?"
- **Divorce** – "If you have gone through a divorce, was it a bitter divorce?" "Do you have family or friends who were harmed during a bitter divorce?"
- **Child rearing** – "If you have raised children, have you ever seen them get confused about facts or things that happened to them?" "If you have raised children, have you ever seen them make up things to please one or both of the parents?"

Taking a look at the first two life experiences (sexual abuse and divorce), you probably recognize how difficult it would be for prospective jurors to talk about those things in public. Yet, those life experiences are critically important in a sexual abuse case. If you know that you will be asking jurors about such sensitive matters as sexual abuse and divorce you might try to avoid a public discussion of these matters by use of supplemental jury questionnaire. If for some reason you cannot use supplemental questionnaires, then you should attempt to conduct individual *voir dire* on the sensitive topics.

Whether you are assessing life experiences by means of questionnaire, individual *voir dire*, or public *voir dire*, your goal is the same. You want to find out if a juror had the relevant life experience. However, it is not enough to know if the juror had that life experience. You must uncover the juror's beliefs about that life experience.

A life experience itself does not determine a verdict bias. Rather, the juror's beliefs about the life experience determine what if any bias will exist. You must first ask who has had the life experience and then you must follow-up with open-ended questions that reveal the juror's beliefs about the life experience.

Step Four: Develop *Voir Dire* Questions regarding Demographics

Let me apologize in advance to those traumatized by the LSAT similes but I must say: Demographics are to *voir dire* as the Sirens are to Odysseus. The Sirens I am referring to are the Sirens in the Greek myth, The Odyssey. These are the captivating Sirens who used their beautiful

voices to lure Odysseus' ship to the rocks. Odysseus did not wreck his ship upon the rocks and you don't have to wreck your *voir dire* by over-reliance on demographics.

If you want to use demographics effectively, use demographics to probe prospective jurors about beliefs. For example, in the alleged child sexual abuse case, as Mr. Green's defense attorney, you might be interested in knowing who among the prospective jurors has ever worked at a child welfare agency. But it is not enough to know that an individual worked at such an agency. Did that individual have experiences that would lead him or her to mistrust reports of child sexual abuse? Did that individual have experiences that might cause him or her to mistrust official reports of child sexual abuse?

With regard to Mr. Green's criminal case, juror occupation is just one of several demographics that might be relevant demographic areas worth investigation.

- **Occupation** – "Have you worked in a child welfare agency?" "Have you worked in a women's shelter or family shelter?" "Have you ever worked as an investigator for any governmental agency?"
- **Parent status** – "Do you have children?" "Do your children live with you?"
- **Social groups** – "Do you belong to a neighborhood watch group?" "Do you do volunteer work for any law enforcement agency or quasi-law enforcement agency?"
- **Bumper Stickers** – "Do you have or have you ever had bumper stickers on your vehicle? If so, what did the bumper sticker say?"

(4)

The Supreme Court's Jurisprudence on *Voir Dire* into Racial Bias

Brief History

SCOTUS has equivocated on the idea of whether a criminal defendant has a right to question prospective jurors on the issue of racial bias.

1931: *Aldridge v. United States*⁴

Holding: Court reversed Black Defendant's murder conviction

Facts: Judge refused a defense request to interrogate the venire on Racial Prejudice—when a black man was charged w/murder of white police officer

Rationale: Fairness demands that inquiries not racial justice be allowed (in response to lower court's ruling that such an inquiry was unnecessary since African Americans were afforded the same rights and privileges as whites.

“Despite the privileges accorded the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry.”

Government's argument is that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices.

SCOTUS “we think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred.”

1973: *Ham v. South Carolina*⁵

Holding: Court reverses judgement of Supreme Court of South Carolina

Facts: Defendant was convicted of possession of marijuana. Conviction upheld by South Carolina Supreme Court. Defendant was a well-known civil rights activist w/no criminal history. His defense was that law enforcement was out to get him because of his civil rights work and that he had been framed. Prior to *voir dire*, defense counsel submitted 2 of 4 questions which went to any possible racial prejudice. Judge asked general questions as to bias, prejudice or partiality but would not ask any of the requested questions.

⁴ *Aldridge v. United States*, 283 U.S. 308 (1931)

⁵ 409 U.S. 524, 529 (1973)

Rationale: The Due Process clause of the 14th Amendment requires that the defendant be permitted to have the jurors interrogated on the issue of racial bias. While the Trial Court has discretion to conduct *voir dire* in the manner it thinks best (because a trial court is not required to put the question in any particular form or to ask any particular number of questions simply because it is requested to do so), its refusal in this particular case violated the defendant's constitutional rights.

*Court also limited one's right in controversy to an interrogation into racial bias, an not simply any bias

1976: Ristaino v. Ross⁶

Holding: Court Sustains conviction of Ristaino

Facts: Three Black men were on trial for assault and battery by means of dangerous weapon, and assault with intent to murder to white security guards. Defense requests that trial judge asks venire "are there any of you who believe that a white person is more likely to be telling the truth than a black person." Trial court refused to ask this question and failed to ask any question regarding possible racial bias. Defendants were convicted on all counts

Rationale: The Court distinguished this case from Ham, stating that in Ham the racial issues "were inextricably bound up with the conduct of the trial." "the mere fact that the victim of the crimes alleged was a white man and the defendants were negroes was less likely to distort the trial than were the special factors involved in Ham.". The court issues a caveat or limitation (some refer to as a special rule), a defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a significant likelihood of prejudice by the jurors.

While it is troubling and unsettling that the Court seemed to start retreating from its un-equivocating progeny; where the court falls silent in its clear opinion, it attempts to re-establish in its dicta/suggestions, by stating "Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defense." The Court even goes as far to state that had this been in Federal court, it would have used its supervisory power to require the trial court to ask such questions of the venire.

1981: Rosales-Lopez v. United States⁷

Holding: Supreme Court upholds Rosales-Lopez's conviction

⁶ Ristaino v. Ross, 424 U.S. 589,597 (1976).

⁷ Rosales-Lopez v. United States, 451 U.S. 182 (1981)

Facts: Rosales-Lopez was charged with smuggling undocumented Mexican immigrants into the United States. The Defense requested the court ask 2 questions:

1. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case?
2. How would it affect you?

The trial judge did not pose these questions rather asked the venire:

1. Do any of you have any feelings about the alien problem at all?
2. Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?

He was convicted.

Rationale: The Court notes that *voir dire* plays a critical role in assuring that the defendant's Sixth Amendment right to an impartial jury is honored. The Court states that a lack of adequate *voir dire* impairs the trial court's ability to remove jurors who cannot act impartially. The Court goes on to distinguish between (a) inquiries directed at the discovery of racial prejudice that are constitutionally mandated and (b) inquiries directed at the discovery of racial prejudice that are required of federal courts as a matter of the Court's supervisory authority over the federal courts.

The Court then created a new rule for federal courts holding that they must inquire into racial prejudice "when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial groups. IN the balance of the cases reversible error will only be found when the circumstances "indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." (The Court did not believe that these circumstances existed in this case).

1986: Turner v. Murray⁸

Holding: The Court reverses the death sentence but affirms the conviction

Facts: A black man was charged with capital murder along with other counts, when alleged to have fatally shot a white jewelry store owner in front of a police offices and other witnesses. Prior to jury selection the defense requested certain questions be asked of the venire. Namely,

"The defendant Willie L. Lloyd Turner, is a member of the Negro Race. The victim, W. Jack Smith Jr. was a White Caucasian. Will these facts prejudice you against Willi Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"

⁸ Turner v. Murray, 476 U.S. 28, 29-30 (1986)

The Trial court refused to ask this question and in the alternative asked:

“whether any person was aware of any reason why he could not render a fair and impartial verdict.” Surprisingly, everyone in the venire answered in the negative. 8 whites and four blacks were selected. Turner was found guilty on all counts and the jury recommended that he be sentenced to death.

Rationale: Court reverberates the sentiment that the “mere” fact that the defendant is black and the victim is white is not a “special circumstance” which rises to constitutional significance. However, the Court finds that because this was a Capital Offense case, the protections and scrutiny were heightened.

With such prudence and high clairvoyance, the court notes “the unique opportunity for racial prejudice to operate but remain undetected.”

The court reasons:

“A juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved the aggravating factors specified under Virginia Law. Such a juror might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case. Fear of Blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.”

The Court goes on to reestablish that in cases where the defendant is charged with a crime of violence and the defendant and the victim are of different races—there remains a real risk that racial prejudice might infect the proceeding.

Race Salience

It is not a matter of endeavoring to compel people to come out from beneath their implicit biases, and *voir dire* is not the most conducive atmosphere to attempt such—even if heartily armed with naivete and righteous indignation.

However, the endeavor is to encourage people to be aware of their biases and to make them, if only for deliberations, accountable and critical of their thinking as well as their fellow jurors.

Race Salience is a term employed by some social scientists which refers to the process of making salient, apparent and important the potential for racial bias. It is not simply an illumination of the race of the defendant and the victim (He is black and she is white) . It is specifically the highlighting the potential racism of juror’s attitudes.

It has been empirically proven that when race is made salient through pretrial publicity, *voir dire*, witness testimony and opening and closing statements, white jurors are more likely to treat similarly situated black and white defendants the same way.⁹

In an experiment, jury-eligible citizens and actual jury pool members from a county in Michigan were shown a videotaped summary of a rape trial involving a Black defendant. The Participants completed a *voir dire* questionnaire, watched a trial video, received actual Pattern jury instructions from Michigan and deliberated on the case as six-person juries. All mock jurors viewed the same materials, though some received questions about their racial attitudes and general perceptions of racial bias in the legal system on their *voir dire* questionnaire while others did not. Among those questions were:

1. The defendant in this case is African American and the victims are white. How might this affect your perceptions of the trial?
2. In your opinion, how does the race of a defendant influence the treatment she receives in the legal system as a whole?

It was discovered that, regardless of race, mock jurors who received the race-relevant questions were less likely to vote to convict the black defendant than the mock jurors who did not receive race-relevant *voir dire* questions. These questions were not even intended to identify jurors likely to exhibit racial bias in their judgments. They were actually designed to compel mock jurors to think about racial attitudes, social norms in light of racial prejudice and institutional bias in the legal system.¹⁰

⁹ Samuel R. Sommers & Phoebe C. Ellsworth, "Race Salience" in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI & L. 599,61 (2009).

¹⁰ Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries?: A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026 (2003).

(5)¹¹

Tips and Real Life Example(s)

Ask For Help:

Do not be afraid to appear in need or require the participation of jurors in understanding them or understanding a concept. This creates an aura of humility and empowers them to assist (as they will be asked to do during the trial)

Line 15, p74 – Line 19, p75

Judge’s Rebuke:

The judge is not your friend—and doesn’t need to be. Learn how to not only expect a judge to interrupt or attempt to detour but minimize his impact to the jurors—keep going.

Line 5, p77 – Line 14, p78

Bringing Up Race (*it doesn’t have to be jarring*):

Introduce race in a neutral way if you are trying to warm the jury up, meaning if you use the term “black” also use the term “white” (sometimes using “white” first will disarm) and create a situation that they have to figure out for themselves.

Line 14, p 82

Do not be afraid to give examples where this critical awareness was necessary

Line 5-10, p84

Critically and Actively Listen:

Jurors will attempt to evade the question or refuse to go somewhere mildly uncomfortable. Do not be afraid to inquire and challenge—especially if their answer is nonresponsive

¹¹ State of Wisconsin v. Quintez R. Cephus, 18CF 1694 (*Excerpts :Defense Voir Dire*)

Line(s) 1-6, p83

WHY? – give them the ask:

Once you have delved into the subject, ask them what they would o about it. Do not leave t to chance or expect that the answer is understood. Having them say something, holds them accountable to you, your client, themselves and one another

Line(s) 12-21, p83

Line(s) 7-10, p85

Speak Plainly:

Know when to be direct. Usually with topics that make s uncomfortable, we like to leave things unspoken. Race cannot be unspoken. What you want done cannot be unspoken. If you are direct, the potential of eliciting the jurors with beliefs inapposite to yours is far more likely.

Line(s) 21-25, p87

Discomfort Yourself:

This is not an easy topic to discuss. You will have to push jurors. They may not go willingly, therefore you have to take them there. A lot f folks are not simply unwilling, they are unaware and unfamiliar with this territory. Build the trust early so they can trust where you are taking them. (See empower the jury and show humility)

Line(s) 6-25, p89

Welcome the Confrontation:

Everyone will have different reactions to this topic. Among those reactions will be defensiveness and even anger. Expect that. Welcome it. Do not fight it or try to avoid it. You'd rather it be in the open.

Line(s) 6-22, p91-92 (both pages)

Pivot to Judge When Appropriate:

Always punctuate with what ‘innocence’ means and why it is so important in this context. This time you can defer to the judge as the one who mandates the presumption. Sometimes saying “the law” or “the constitution” is too elusive and unrecognized.

Line(s) 15, p93 – Line 7, p94.