

Talking to Juries about Race

Building Theories & Themes Around Racial Issues at Trial

Which of these three statements do you most agree with?

- Racism still exists as a major problem in society.
- Racism still exists but has gotten better.
- Racism is no longer a problem in society.

- How many have ever had an honest discussion about race with a person of a different race?
- How many of you represent people of a different race regularly?
- Are you competent to represent someone of a different race if you've never broached the topic?

How to Start Talking to Juries About Racial Issues at Trial

- Identify what the jury pool in your jurisdiction thinks about racism and racial issues.
- Identify what the racial issues are in your case – both the obvious ones the subtle ones.
- Begin the first time you talk to a jury – at jury selection.

Which of these three statements would the jurors in your jurisdiction most agree with?

- Racism still exists as a major problem in society.
- Racism still exists but has gotten better.
- Racism is no longer a problem in society.

Fact Pattern

Black Man Accused of Shooting a White Man
Latino Man Accused of Raping a White Woman

Are there any racial undertones?

Fact Pattern

Black Man Accused of Selling Drugs by Police Officers
Latino Man Accused of Drunk Driving by Police Officers

Are there any racial undertones?

Jury Selection

Goals

1. Weed out anyone who can't judge your client fairly.
2. Plant the seed that in some cases, your client's race is part of the reason that they are accused.

How do you do that?

1. Ask for individual voir dire.
2. Ask for juror questionnaires.
3. During your voir dire.

Request For Individual Voir Dire

**Batson v. Kentucky is good for something:
maximizing the case for individual voir dire**

Request For Individual Voir Dire

MOTION OF xxxxx FOR INDIVIDUALIZED VOIR DIRE BY COUNSEL AND INCORPORATED MEMORANDUM

xxxx xxxxxx, by and through undersigned counsel, move the Court for an Order permitting defense and government counsel to voir dire the venire panel individually.

MEMORANDUM IN SUPPORT

Individualized voir dire by counsel is essential so that the defendants can effectively and adequately exercise his peremptory challenges in selecting jurors. In light of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, including *Georgia v. McCollum*, 112 S.Ct. 2348 (1992), and *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994), parties (including an accused) cannot exercise their peremptory challenges based on their personal race or gender biases or prejudices.

2. Case law now holds that where there is a prima facie case of racial discrimination in the exercise of a party's peremptory challenges, that party "must articulate a racially neutral explanation for the peremptory challenge." *McCollum*, 112 S.Ct. at 2359; see *Batson*, 476 U.S. at 98. Similarly, if there is a prima facie case of gender discrimination, counsel must offer a gender-neutral, non-pretextual explanation for the peremptory challenge. *J.E.B.*, 114 S.Ct. at 1430. **To enable the accused to exercise his peremptory challenges intelligently and adequately, and to ensure that they can be supported by a race and gender neutral explanation, individualized voir dire is essential.**

Request For Individual Voir Dire

3. The Supreme Court's decision in J.E.B. declared:

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently, See, e.g., *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602 . . . (1976) (Brennan, J., concurring in the judgement) (voir dire "facilitate[s] intelligent exercise or peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); *United States v. Witt*, 718 F.2d 1494, 1497 (CA10 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges"). 114 S. Ct. at 1429 (brackets in original). Because, as Justice O'Connor pointed out in her concurring opinion in J.E.B., litigants can no longer simply rely on their intuition in exercising peremptory challenges, 114 S.Ct. at 1432 (O'Connor, J., concurring), fairness dictates that defense counsel be given an opportunity to voir dire the venire panel individually to ensure that a fair and impartial jury is selected consistent with the dictates of *Batson* and its progeny.

CONCLUSION

For the foregoing reasons, the Court should enter an Order permitting defense and government counsel to voir dire the venire panel individually so that the accused can effectively and adequately exercise his peremptory challenges in selecting jurors.

Jury Questionnaires

Prospective jurors may be more likely to reflect honestly and independently when answers are given in writing and individually as versus in the public and intimidating environs of a criminal court. Some sample questions follow. Be sure to leave several lines after each question so as to encourage fuller responses:

RACIAL PREJUDICE: Personal Experience:

A. Free response questions:

Racial prejudice can take many forms. Tell us about your experiences with racial prejudice or where you have felt labeled.

Have you ever felt like you were the target of racial prejudice. Tell us about that situation or experience?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Please tell us about experiences you have had where other people expressed racially prejudice beliefs or opinions?

How do you feel when someone uses a racial slur or tells a racial joke?

What has been your most memorable experience with someone who is African American?

When you are sitting at a stoplight two young Black men approach the crosswalk, do you check to see if your doors are locked? Why do you check?

Jury Questionnaires

Would you do the same thing if two young white men approached the cross walk?

Do you have any friends who are African American? If yes, please tell us about them.

How would you feel if a member of your family wanted to marry someone who was African American?

Have you ever invited someone who is African American to your home?

If your child used a racial slur, what would you tell your child?

Would you be more inclined to believe that a black police officer would be more likely to commit a crime than a white police officer? Why?

Is there any other feeling or opinion you have regarding race that you feel you should share with us?

Jury Questionnaires

B. Multiple choice questions: Circle the answer that you feel is most true:

I would not want my child to marry a (*insert race/ethnicity of client*).

Strongly agree

Agree

Disagree

Strongly Disagree

I have become angry when I hear negative remarks about (*insert race/ethnicity of client*).

Strongly agree

Agree

Disagree

Strongly Disagree

Blacks (*insert race/ethnicity of client*) are less disciplined than whites.

Strongly agree

Agree

Disagree

Strongly Disagree

No respectable white woman would ever have consensual sex with a (*insert race/ethnicity of client*) man.

Strongly agree

Agree

Disagree

Strongly Disagree

Jury Questionnaires

RACIAL PREJUDICE: Beliefs about societal prejudice: Circle the answer that you feel is most true:

Racial prejudice still exists.

Strongly agree Agree Disagree Strongly Disagree

There is more racial prejudice today than there was 30 years ago.

Strongly agree Agree Disagree Strongly Disagree

(Insert race/ethnicity of client) commit more violent crimes per capita than whites.

Strongly agree Agree Disagree Strongly Disagree

Whites who encourage their children not to marry *(insert race/ethnicity of client) are making a wise choice.*

Strongly agree Agree Disagree Strongly Disagree

Whites are being discriminated against due to affirmative action programs.

Strongly agree Agree Disagree Strongly Disagree

(Insert race/ethnicity of client) use more illegal drugs than whites.

Strongly agree Agree Disagree Strongly Disagree

Talking to Jurors About Race

These questions are designed to get jurors to think about how a minority defendant might feel in the courtroom surrounded by people of a different race..

I. Assume that you are on trial – the alleged victim was Black. The judge and the lawyers are all Black. The police officers are all Black. All the jurors who make up your jury are Black and you are the lone white person in the courtroom:

- What are you feeling?**
- Right now as I describe this all Black courtroom in which you are the only white face, what is going through your mind? Tell me about that.**
- Why do you feel this way?**
- Why are you fearful of being the only one who is white in a sea of Black faces?**
- Have you ever been in a situation where you were in the minority racially?**
- Tell me about that. How did that situation make you feel?**

Talking to Jurors About Race

II. Mr./Ms. _____ may be tried by an all white jury (this question takes on additional power if the prosecutor decides to strike a juror of color.)

How do you think/feel that an all white jury may affect the verdict?

Why? (ask several people) – If the lawyer finds that this question is not generating responses from the jury:

A. Try the Pozner/Dodd technique of reversal and ask the following:

"How many people think that the fact that Mr./Ms. _____ may be tried by an all white jury will have no impact on the verdict?"

B. Why do you think this? Tell me more. Who feels otherwise?

C. Or, style the question so the prospective jurors have to choose:

"Some people think an all white jury will have no impact, while others feel it will make it more difficult for my Black client to get a fair trial. What do you think? Why? If the jury does end up being all white, how will you make sure the case is decided only on the evidence?"

Talking to Jurors About Race

These questions are designed to get jurors thinking about how stereotypes may be part of the reason your minority client stands accused.

- I. In the context of your work – who here in their job has never made a mistake of any kind?**

And you who here in the context of work again, has never made an assumption that wasn't true?

Why do you think that happens?

Do it on purpose?

Do you think it is different for police officers?

Do you think that sometimes those assumptions may be based on how someone dresses? How they look? Their race?