

ETB
Sept 2018

Voir Dire

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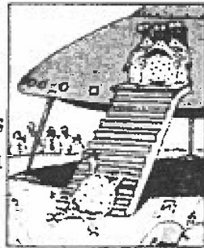
Misdemeanor Voir Dire 101

CDA New Prosecutor School Training
September 26, 2018
Deputy District Attorney Christopher Puck



Why It Matters

- Need 12 to win, Takes 1 juror to lose
 - Only chance to weed out the weirdos/poison pills
 - Evidence irrelevant if VD is poorly done
- Sets the tone for trial
 - First impressions critical
 - Expectations set at VD can lose your case
- First chance to educate jurors on key legal issues
- Only chance to gauge juror ability to follow principles



"Voor Dire" is a Dutch word. It means "to see" or "to look at". It is used in the legal system to refer to the process of selecting jurors.

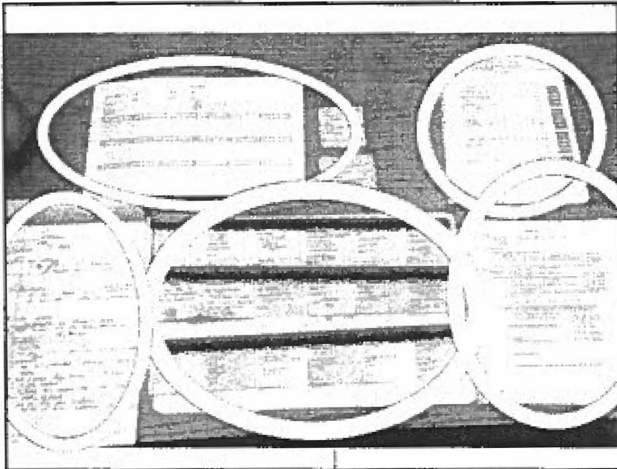
Goals of Voir Dire

- Officially:
 - Weed out Nutjobs/Poison Pills! (Aka For Cause Challenges)
- Unofficially:
 - Educate jurors on basic principles important to case
 - Desensitizing jurors to issues with your case
 - Connect with jurors to begin building your credibility
- Common Misconception: Obtain Information to aid Peremptory Challenges
 - *People v. Williams* (1981) 29 Cal.3d 392 allowed it
 - But was overturned by CCP § 223

only official purpose

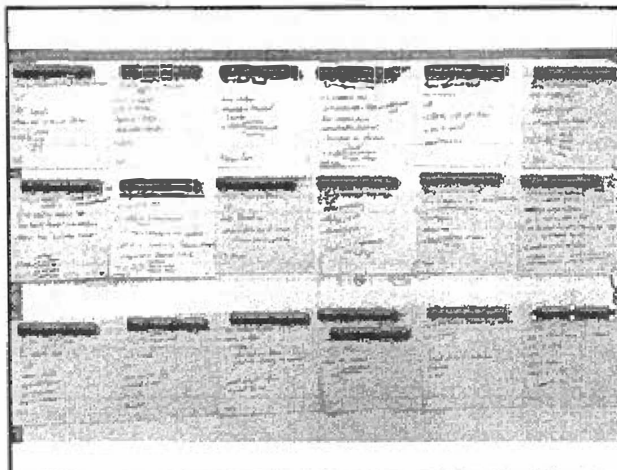
Voir Dire Basics

- **Structure**
 - Varies by Judge and Jurisdiction
 - Order of Questioning
 - Judge voir dire
 - Defense
 - Prosecution (because we have the burden → we get last word)
 - Court has discretion to put reasonable limits on time
 - C.C.P. § 223
- Number of Peremptory Challenges - C.C.P. § 231
 - Misdemeanors → 6
 - Felonies → 10
 - Life/Capital Cases → 20



outline of topics to cover

manila folder w/ sticky tabs

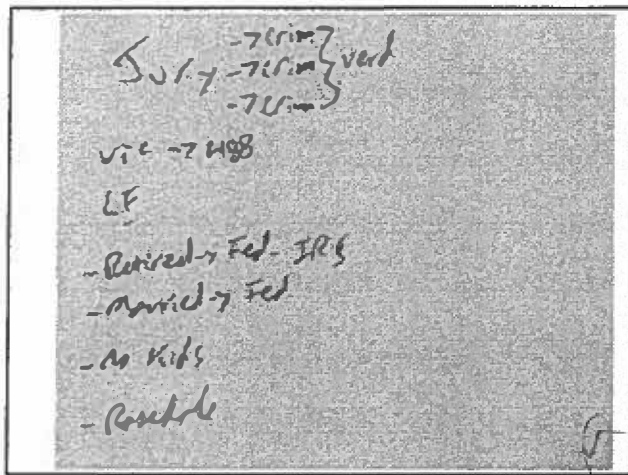


12 in the box

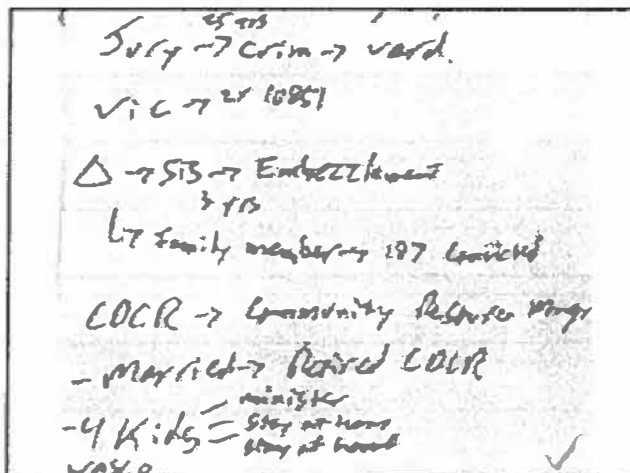
Voir Dire Basics

o Shorthand Suggestions

- o "Married → (job)"
 - Shows juror is married and the job is what their spouse does
- o "LE" for law enforcement connection
 - E.g. LE → brother → BPD = he has a brother in Bakersfield P.D.
- o "Vic" → them or someone close was a victim of a crime
 - Usually list relation and the crime
- o "A" → Them or someone close was a defendant/accused
- o "Jury → crim/civ → Verdict"
 - For prior jury experience, type of case, and where there was a verdict
 - If multiple prior juries, draw as many arrows as times they served



→ Keep



[illegible]

get the others to agree

Voir Dire Basics

• Proper Questioning Techniques

- Avoiding Objectionable Questions
 - Questions that ask jurors to prejudge evidence
 - Hypos can't use same general charges/fact patterns
 - Avoid discussing the definition of "Reasonable Doubt"
- Use open-ended questions
 - "What do you think about that?"
 - "Do you agree or disagree? Why?"
 - "How do you think your _____ might affect you as a juror?"
- Maintain Eye Contact!
- Use Names (if allowed by judge)

→ best way to get mistrial

can't give them evidence and ask if they'll vote guilty
- don't use charges from case

"There's a great definition the judge will give you."

Voir Dire Basics

• For-Cause Challenges

- Challenges can be based on Actual or Implied Bias
 - CCP 225(b)(1)(C)
 - Includes pre-conceived ideas about criminal law principles!
- Key Standard
 - Would a juror's views "prevent or substantially impair" the performance of the juror's duties in accordance with the court's instructions and the juror's oath?"
 - *People v. McDermott* (2002) 28 Cal.4th 946, 961
 - *People v. Eup* (1999) 20 Cal.4th 826, 853
 - *People v. Mayfield*, (1997) 14 Cal.4th 668, 727
- Large deference to court's factual findings
- Rulings based solely on written response → De Novo Review!

Voir Dire Basics

• Setting up For-Cause Challenges

- Phrasing Is Crucial to Avoid Objections
 - Key is to pit juror's desire to nullify verdict against their obligation to follow law
 - Certain biases may impair jurors' ability to follow law
 - "Assume I've proven the case B.R.D. ..."
 - "Assume you believe the witness B.R.D. ..."
 - "Do you think you are allowed to consider ...?"

• that he's 18
• punishment

expose potential to nullify
• bias against L.F.

requiring unreasonable corroborations
• predict to get sympathy for Δ
influence vote

• inability to judge on evidence
• inability to apply technical viol

questions must include key phrases that of law.
~~po & lines~~ show

per se

Voir Dire Basics

- **Setting up For-Cause Challenges**
 - **Use Hyperbolic Hypotheticals to Test Jurors' Resolve**
 - Makes it easier to expose possible impairment
 - E.g. What if the victim was a child molester?
 - E.g. What if the defendant had Stage 4 cancer?
 - E.g. What if he only stole a candy bar from Bill Gates?
 - E.g. what if his BAC was .07999999? NG, right? What about .08000000?

make them comfortable w/
stating opinions/inability to
follow law

Voir Dire Basics

- **Setting up For-Cause Challenges**
 - **Exploit Any Apparent Biases That May Hurt Your Case**
 - **Law enforcement Bias**
 - E.G. - "If officer said one thing, and a civilian said something else, would you automatically be inclined to believe civilian because your views/your prior experience?"
 - **Their Prior Criminal History**
 - E.G. - "Knowing what its like, and how it affected your life, do you think that may affect how you vote? How?"
 - **Family Members who had a negative experience**
 - E.G. - "As you hear evidence, do you think you'll be able to put aside what happened to your son?"

Voir Dire Basics

- **Setting up For-Cause Challenges**
 - **Exploit Any Apparent Biases That May Hurt Your Case**
 - **"I need more than one witness"**
 - Assume I only call one witness, and will you be able to vote Guilty if you believe that witness B.R.D.? Are you saying you could never vote guilty with just one witness?
 - **Race Issues**
 - Avoid if possible. Never bring it up unless the case absolutely requires it or juror first brings it up.
 - E.G. - Do you think the fact that he is _____ will affect how you view the evidence or how you vote?

"Are you at least open
to the possibility that
I could prove the case
BRD, even with only one
witness."

Voir Dire Basics

- **Setting up For-Cause Challenges**
- **Exploit Other Factors That May Hurt Your Case**
 - **Lack of Maturity/Confidence (College students)**
 - Many young jurors can't think concretely enough about your case/burden of proof
 - If you see one that is sheepish/nervous/can't talk coherently:
 - Ask if they feel comfortable deciding this "important" case?
 - Would he/she be able to focus on evidence and deliberate?
 - Are they able to understand everything that is being said?
 - Encourage him/her to express his/her lack of confidence/comfort with the juror role
 - Let them know it is common for people their age
 - And thank them for being honest

Voir Dire Basics

- **Setting up For-Cause Challenges**
- **Make Them Comfortable with Stating Opinions/Inability to Follow Law**
 - Use positive, encouraging tone
 - "There are no wrong answers if they tell the truth"
 - But always maintain your pokerface when they say something crazy/unexpected! Don't look like this:



Voir Dire Basics

- **Defending Against Challenges/Rehab'ing Good Jurors**
- **Remind jurors they don't decide punishment, just guilt**
 - Explain the difference between judge's role and juror's
 - "Do you understand, your job is just to decide if the evidence shows B.R.D. that he did it? You don't have to decide the punishment if he is in fact guilty."
 - Usually add the disclaimer that they can't consider punishment in any way, just to be safe
 - E.G. "No one likes drunk driving"
 - E.G. "No one likes theft"
 - E.G. "No one thinks violence is a good thing"

Voir Dire Basics

- Defending Against Challenges/Rehab'ing Good Jurors
 - Use concrete examples to test if they can be fair
 - Defense often use vague questions that don't really test anything
 - E.G. - "If you don't believe I've proven he's the driver, would you still find this man guilty just because...?"
- Distinguish this case from their past experience
 - This case is different from whatever happened in their past
 - Defendant had nothing to do with...

What happened to your family?

Making Them Care

- Most Always Voir Dire on for Misdemeanor Cases:
 - Ability to follow law on things that barely qualify as criminal
 - Or that jurors do themselves...
 - Discuss Importance of Enforcing law, regardless of how petty
 - Punishment/deterrence just as important as restitution
- Not All Evidence Required

→ exposes jurors who may speculate you're hiding evidence.
 - have 10 people on witness list, but only call 5.
 will that be a problem for you.

Making Them Care

- Frequent Issue to Voir Dire on:
 - Circumstantial Evidence
 - Need to make sure jurors are comfortable with it and how it works
 - Because most of your cases rely on it
 - First must ask if jurors have heard of it (50%-75% usually have)
 - Then ask what they think it is (to determine preconceived notions)
 - Ask if they hear it in the TV context where it is portrayed as weak:
 - "The People's case is purely circumstantial!!!"

Making Them Care

◦ Frequent Issue to Voir Dire on:

◦ Circumstantial Evidence

◦ Example - Pen Behind the Podium

- Direct evidence → "I see the pen. It's in the Court room"
- Drop the pen behind your podium, or the desk
 - Ask a juror if its in the courtroom
 - How do they know? They no longer have direct evidence
- Provide suggestions:
 - Did you hear a sound? Sound like the pen hit the ground?
 - Did you see a hole there? Is that even reasonable?
 - What if I testify the pen is not in the courtroom anymore? Does that change your mind? (if they waffle → KICK!)
- End with: Are you comfortable with doing that in this case? Using circumstantial evidence to decide whether ____?

→ what if I have three ppl testify?

• sometimes circumstantial evidence is better than direct evidence.

Making Them Care

◦ Common Misdemeanor Issues

- Battery involving minimal/no injuries
 - Voir Dire on importance of following law and WHY
 - Have the jurors say why its important to enforce law, however slight the violation is
 - Compare to 08 DUI's or 1-step trespassing/Jaywalking
- Low-Blow DUI
 - Same voir dire tactic → focus on highly technical crimes
 - "If I prove B.R.D. he crossed that line, how will you vote?"

Making Them Care

◦ Common Misdemeanor Issues

- Refusals with no PAS or Forced Draws
 - Compare DRE/FST's to doctor visits that last 5 minutes
 - Trust opinion of medical professional or lawyer?
 - See if they are "open to the possibility" of deciding issue of intoxication based on circumstantial evidence / no breathalyzer
 - Suggest times they made opinions on other peoples' intoxication
 - Concerts
 - Bars / restaurants
 - Las Vegas
 - Obligatory family reunions (there's always one ☹️)
 - Places where they have seen individuals intoxicated, falling over themselves, holding beverage, etc.
 - Need a BAC # to know that person had too much to drink?

Making Them Care

Common Misdemeanor Issues

- **Unsympathetic Victim**
 - Desensitize jury using hyperbolic hypotheticals
 - What if you hate her? Should that matter as to whether ~~he~~ is guilty?
 - Victim unlikeability doesn't mean he gets a pass
- **Sympathetic/young defendant who just made a mistake**
 - Confront the fact head on
 - "Do you think you would consider the fact that he's only 18?"
 - "Do you understand you can't do that? Can you follow that law?"
 - "Judge decides punishment and will take it into account"
- **Misd. Vehicular Manslaughters**
 - Must voir dire on the fact that making a mistake or being careless can be a crime
 - Compare to cases where consequences of the crime decide if it's a felony or misd (e.g. DUI crash with injury vs without)

ex. 187.1

Making Them Care

Common Misdemeanor Issues

- **Victimless Crimes / No Loss Thefts**
 - Get jurors to discuss importance of following law
 - Punishment/Deterrence just as important as restitution
 - E.G. - Petty theft from Bill Gates
- **CSI Effect**
 - Ask them if they think these shows accurately portray court
 - Call on jurors with prior experience as jurors or in L.E. to bolster your points
- **The "Making a Murder Effect"**
 - Need to start addressing the "availability heuristic" of media coverage on the exoneration cases involving L.E. misconduct
 - DO THIS CAREFULLY

ask them if they watch these types of shows

*How does it impact these shows views? Will it influence
Do you understand these shows are for entertainment purposes?*

Making Them Care

Common Misdemeanor Issues

- **Bare Minimum Investigations**
 - Use the "Not All Evidence" instruction to set the right perspective
 - If you prove it B.R.D., doesn't matter what else is out there
 - E.G. - Battery with 60 witnesses, but we call 1 and they believe him
 - Get them to acknowledge why it might be reasonable to not invest same amount of resources into a 647(f) as we would a 187(a)...
- **Everyone Is Doing It**
 - The fact that other people do it, is that an excuse to vote N.G.?
 - See if they can vote guilty even though they do it
 - Have them reiterate why it's important to do so

Making Them Care

- Common Misdemeanor Issues
 - Domestic Violence – Uncooperative Victim
 - Test pre-conceived notions
 - Ask jurors what they expect with DV Victims
 - If they expect them to be cooperative
 - Do they understand why DV victim may not be cooperative?
 - Defendant is sole income earner...
 - Father of her children and still wants him in the kids' life
 - How is she supposed to testify? Expect her to cry? Why?
 - Does everyone handle trauma the same way? (Hint → no)
 - Make sure jurors don't use unique experiences to judge your victim
 - "Do you understand you can't judge the alleged victim's credibility based on how you / your friend handle your prior abusive situation?"
 - A juror's prior D.V. history isn't a common / lay experience

always say "alleged" victim

Making Them Care

- Common Misdemeanor Issues
 - Don't go overboard in trying to make them care
 - Never lose perspective because credibility is your #1 Asset
 - Misdemeanors aren't crimes of the century
 - Some of your jurors have misdemeanors on their record
 - Many defendants are normal people who made poor decisions
 - Acting like he's Charles Manson will alienate your jurors!
 - Do not overstate or overdramatize your case!

Final Words of "Wisdom"

- Practice new topics out loud
- Always prep your VD/identify issues in advance
- Be yourself and do what works for your personality
- Have fun with it
- Learn from your mistakes
 - Identify what types of jurors hung your case and why
- #1 Rule → When in doubt, go with your gut

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