▶ CRIMINAL LAW

Legal Prescriptions for Diagnosing Bias During Voir Dire in Kansas Criminal Cases

By Daniel E. Monnat and Paige A. Nichols

Daniel E. Monnat *of Monnat & Spurrier, Chtd., has been a practicing criminal defense lawyer for the past 30 years in his hometown of Wichita, Kan. A cum laude graduate of California State University, San Francisco, he received his J.D. from the Creighton University School of Law.*

Dan frequently lectures throughout the United States and has been listed in The Best Lawyers In America *for more than a decade. He was listed as one of the top* 100 Super Lawyers for Kansas and Missouri for 2006. *Monnat is a past two-term president of the Kansas Association of Criminal Defense Lawyers, a former member of the Board of Directors of the National Association of Criminal Defense Lawyers, a member of the KsAJ Board of Governors and Executive Committee, a graduate of the Gerry Spence Trial Lawyer's College, and a Fellow of the American College of Trial Lawyers.*

Paige A. Nichols *is a research and appellate attorney practicing in Lawrence, Kan. She received her J.D. in 1993 from Northeastern University in Boston and an LL.M. in criminal law in 2002 from the University of Missouri–Kansas City.*

Television medical dramas often lead up to the "aha!" moment when a doctor discovers some surprising aspect of a patient's history critical to a proper medical diagnosis. The brilliant curmudgeon Gregory House even goes so far as to recruit colleagues to break into patients' houses to search for clues about a patient's history. Jury selection is never quite so dramatic—and it is the litigants', not the jurors', future that hangs in the balance—but all trial lawyers know that extracting a complete juror profile is essential to diagnosing juror bias. This article offers authority for Kansas lawyers to ask the probing questions necessary to that diagnosis in criminal cases.

Jury selection is the mechanism by which courts ensure a criminal defendant's Sixth Amendment right to a trial "by an impartial jury."[1] In Kansas, attorneys conduct voir dire.[2] Allowing attorneys to question potential jurors promotes juror disclosure; both empirical research and anecdotal evidence suggests that "attorney-conducted voir dire, when conducted correctly, leads to an atmosphere where prospective jurors are more likely to provide meaningful self-disclosure and thus produce a more effective voir dire examination."[3]

The Kansas statute guiding voir dire in criminal cases authorizes the trial court to limit counsel's questioning only "if the court believes such examination to be harassment, is causing unnecessary delay or serves no useful purpose."[4] It would thus seem error for a court to limit any conceivably useful questioning that does not harass a juror or cause unnecessary delay. And yet, appellate complaints about voir dire limits have often been rejected on grounds that the trial court has discretion to limit the scope of voir dire.[5] Regrettably, it does not appear that the Kansas appellate courts have ever reversed a criminal conviction on grounds that the trial court unfairly limited voir dire.[6]

Despite the Kansas Supreme Court's unwillingness thus far to find reversible error in limits on useful questioning, the Court has nonetheless encouraged trial courts to give counsel "considerable latitude" in examining potential jurors:

> A trial court should not be satisfied in all cases with a one-size-fits-all approach to voir dire. Answers should not necessarily be limited to "stock questions" such as "Have you formed an opinion as to the accused's innocence or guilt?" or "Will you be able to determine guilt based only on the evidence presented?". . . Answers to such questions do, of course, go to the heart of the inquiry and are given under oath and therefore deserve a heavy presumption of correctness. Nevertheless, it is conceivable that prospective jurors with the purest of intentions may, in the heat of the moment in front of their peers, underestimate their own bias. Consequently, '[c]onsiderable latitude should be allowed counsel in the examination of jurors, so that all who have bias or prejudice, or are otherwise disqualified, may be eliminated.'[7]

This latitude is necessary not just so that counsel may develop challenges for cause, but also so that counsel may make informed peremptory challenges:

> [T]he right to challenge a given

> number of jurors without showing cause is one of the most important rights to a litigant; any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise of the right of challenge must be condemned; a litigant cannot be compelled to make a peremptory challenge until he has been brought face to face in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice; the right to reject jurors by peremptory challenge is material in its tendency to give the parties assurance of the fairness of a trial in a valuable and effective way; the terms of the statutes with reference to peremptory challenges are substantial rather than technical; such rules, as aiding to secure an impartial, or avoid a partial, jury, are to be fully enforced; the voir dire is of service not only to enable the court to pass upon a juror's qualifications, but also in assisting counsel in their decision as to peremptory challenge.[8]

Consistent with the language of these cases, the ABA American Jury Project recommends that "[v]oir dire should be sufficient [1] to disclose grounds for challenges for cause and [2] to facilitate intelligent exercise of peremptory challenges."[9]

Incorporating case-specific facts into voir dire questions

For more than a century, the Kansas Supreme Court has recognized "how important it is that the panel should be duly sifted, and that all prejudiced and objectionable persons shall be excluded from it."[10] In most cases, it will be difficult if not impossible to "duly sift" the panel without touching on at least some case-specific facts. As one jurist has explained, "bias and prejudice cannot be probed in a vacuum, and therefore some discussion of the evidence is inevitable. And it may occasionally happen that a material piece of evidence which strongly favors one party coincides with a bias or prejudice of a particular prospective juror."[11] Even the United States Supreme Court has cautioned that "general fairness and 'follow the law' questions" are insufficient to detect challenge-worthy attitudes among potential jurors.[12]

Thus, the Kansas Supreme Court has urged that questions incorporating case-specific facts, if properly designed to ferret out juror bias, "should not be unduly restricted."[13]

At least one appellate court from another jurisdiction has reversed a civil verdict because of the trial court's refusal to allow counsel to ask questions that incorporated specific facts of the case. In *Grossman v. Gebarowski*,[14] an accident victim's estate brought a wrongful death action against the motorist who killed the victim. The trial court denied plaintiff's counsel's request to ask the potential jurors about specific facts of the case in order "to identify jurors entertaining a bias against a pedestrian who crosses a street at a place other than an intersection or marked crosswalk and to provide enough information to enable plaintiff to use her peremptory challenges."[15]

The Illinois Court of Appeals ordered a new trial, finding the court's "general question to the jurors regarding whether they or a family member or close friend had been involved in an accident" insufficient to ensure an impartial jury.[16] Recognizing the value of questions incorporating specific facts, the Court explained that "[a] question should not depend upon the prospective juror to volunteer information that does not fall within the question's scope."[17]

General case-specific questions versus "stakeout" or "commitment" questions

The propriety of case-specific questions has been litigated most frequently in the context of capital cases. While these cases are informed in part by Eighth Amendment concerns unique to capital cases, they are at heart about how best to ensure, through adequate voir dire, the Sixth Amendment's guarantee of "a fair trial by a panel of impartial, indifferent jurors."[18]

In *United States v. Johnson*, a federal district court examined at great length the question, "What degree of specificity about the facts of this particular case, if any, is it permissible to include in questions to prospective jurors?"[19] The court distinguished between case-specific questions that merely "attempt to discover a potential juror's bias based on facts that are or are likely to be at issue in this case,"[20] and those which "ask a juror to speculate or precommit to how that juror might vote based on any particular facts."[21]

Relying on its own experience to demonstrate "the insufficiency of purely 'abstract' questions to determine the ability of jurors to perform their duties," the court held that case-specific questions were "appropriate—indeed, necessary—to empanel a fair and impartial jury in this particular case."[22] The court announced "a sensible rule" under which case-specific questions would be evaluated not by their content, but by their form:

> Thus, any 'case-specific' question should be prefaced by 'if the evidence shows,' or some other reminder that an ultimate determination *must be based on the evidence at trial and the court's instructions.* Furthermore, to avoid 'stake-out' questions, which this court agrees are improper, questions must be in the form of whether or not the prospective juror 'could fairly consider' a life sentence, a death sentence, or both, not whether the prospective juror would vote for life or death in light of particular facts.[23]

Other courts have recently adopted similar approaches, approving of case-specific questions so long as they do not improperly ask jurors to commit to a particular verdict under particular facts.[24] One court offered the following useful distinction between an improper stakeout question and a proper fact-specific question:

> For example, a juror may not be asked whether evidence of rape would lead him or her to vote for the death pen-

> alty. However, a juror may be asked if, in a murder case involving rape, he or she could fairly consider either a life or death sentence. The first question is an improper stake-out question. The second question is not a stake-out question because it only asks whether the juror is able to fairly consider the potential penalties."[25]

The distinction between proper fact-specific questions and improper stakeout questions appears as well, if only implicitly, in Kansas cases. As noted above, the Kansas Supreme Court has generally encouraged trial courts to grant counsel broad latitude to discuss relevant facts during jury selection; and the Court has only affirmatively disapproved of fact-specific questions that constitute stakeout questions.

For example, in *State v. King*,[26] the defendant argued on appeal from his murder conviction that his lawyer should not have been prevented from asking a potential juror whether evidence that the defendant had drunkenly said he was "going to get" the victim six months before the victim's death would be "evidence in your mind that [the defendant] was guilty of the crime charged against him?"[27] The Court held that this question—which asked the juror to precommit to a certain verdict upon certain evidence—was improper: "The juror could not give an intelligent answer to such a question, without knowing in advance what the court would instruct him in regard to his duties as a juror in considering and weighing the evidence."[28]

A proper non-stakeout question might have been as follows: "If the state presents evidence that six months before the victim died, my client drunkenly said that he was going "to get" the victim, how might that evidence affect your ability to fairly weigh the rest of the facts in this case?" This latter question asks not what effect the evidence might have on the juror's verdict, but rather what effect the evidence might have on the juror's *ability to perform his or her duty.*

A final note about stakeout questions. In *United States v. Fambro*,[29] the Fifth Circuit considered an appellant-defendant's claim that a prosecutor's stakeout questions violated the defendant's due-process rights. The prosecutor had described a "hypothetical" series of facts paralleling the government's evidence, and had then asked potential jurors to vote on whether they thought those facts established guilt.[30] The prosecutor then "referred back to these questions during closing statements."[31]

The Fifth Circuit rejected the defendant's claim only after noting that the defendant had not preserved the claim below, and that the evidence against the defendant was "considerable."[32] The Court nonetheless found the prosecutor's voir dire questions "highly suspect" and cautioned, "[w]e do not approve of 'commitment' questions of the variety at issue here."[33] The prosecutor's extraction of a promise by the jurors to convict based on evidence not yet presented was exacerbated by the prosecutor's explicit attempt to collect on that promise during closing argument. Kansas prosecutors should beware that a properly preserved objection to this use of commitment questions during voir dire may well lead to a reversal on appeal.

"Would you want you as a juror?"

While detailed discussions about a juror's ability to fairly consider certain types of evidence is necessary to the voir dire process, sometimes the most revealing answer a juror gives is in response to a more general question: "If you were accused of a crime, how would you feel if someone in your frame of mind were on your jury?"

This is a common voir dire question, the answers to which have been frequently cited by courts in reviewing cause challenges.[34] Indeed, courts themselves have asked the question and have approved of written questionnaires that included the question.[35]

"Would you want you as a juror" is an effective voir dire question that has long enjoyed wide use and apparent approval.

Rehabilitation

Rehabilitation refers to further questioning an apparently biased juror to determine whether the juror is actually disqualified. Rehabilitation can be a valuable method of discovering whether jurors who express doubt about their ability to serve should, in fact, be excused for cause.[36] At least one appellate court has found error in a district court's refusal to allow defense counsel to rehabilitate jurors challenged by the state.[37] Allowing counsel the opportunity to rehabilitate jurors challenged for cause by opposing counsel helps courts more fairly evaluate jurors.

But courts should exercising caution in retaining jurors simply because they give lip service to magic words fed to them during the rehabilitation process. In *Thompson v. State*,[38] for instance, a prospective juror "stated that he had not formed an opinion as to Thompson's guilt or innocence only seconds after stating that Thompson was guilty."[39] Relying on the juror's final assertion, the district court denied the defendant's challenge for cause. The Nevada Supreme Court thereafter reversed, holding that "simply because the district court was able to point to detached language that prospective juror eighty-nine could be impartial does not eradicate the fact that he previously demonstrated partial beliefs, capped by an unequivocal statement that Thompson was guilty."[40]

Conclusion

Imagine if doctors were limited to asking patients general questions about how they feel and were prohibited from asking case-specific questions more likely to yield an accurate diagnosis. While counsel in criminal cases need not resort to burglarizing jurors' homes in search of bias, they should be allowed to ask appropriately specific and probing questions necessary to selecting a fair jury. ▲

Endnotes

1 U.S. Const. Amend. VI; *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992) ("Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility

to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.") (citation omitted); William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391, 1409 (2001) (noting implicit requirement of Sixth Amendment "that there be some recognized mechanism—challenges for cause—to effect the guaranty of impartiality").

2 K.S.A. 22-3408(3).

3 Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95 Ill. B.J. 474, 476 (2007) (citing studies).

4 K.S.A. 22-3408(3).

5 *See, e.g., State v. Neighbors*, 21 Kan. App. 2d 824, 829-30 (1995) (court did not abuse discretion in prohibiting open-ended questions about prospective jurors' attitudes towards interracial marriages), and cases cited therein.

6 The statutory limits on the trial court's control of questioning have only been recited in two cases, and have never been incorporated into the standard of review. *See State v. Pioletti*, 246 Kan. 49, 54 (1990); *State v. Case*, 228 Kan. 733, 737 (1980), disapproved of on other grounds by *State v. Kingsley*, 252 Kan. 761 (1993).

7 *State v. Hayes*, 258 Kan. 629, 631 (1995) (citations omitted).

8 *Kerby v. Hiesterman*, 162 Kan. 490, 497-98 (1947) (citation omitted); *see also Swift v. Platte*, 68 Kan. 1 (1903) ("[i]t is [counsel's] right to first learn the facts, and he must do so to intelligently exercise his right to challenge peremptorily"; "as parties and their counsel cannot be expected to know personally every juror who may be called into the box, an examination sufficiently broad should be permitted to enable a party to determine upon his peremptory challenges") (citations omitted).

9 ABA Principles for Juries & Jury Trials, Principle 11(B)(3).

10 *Swift v. Platte*, 68 Kan. 1 (1903) (approving voir dire inquiry in personal-injury case into jurors' "possible interest or connection" with insurance companies).

11 *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 765 (Tex. 2006) (Medina, J., dissenting).

12 *Morgan*, 504 U.S. at 734-35 ("As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views [indicating an inability to follow the law in considering a life or death sentence] are fair and impartial, while leaving the specific concern unprobed.").

13 *State v. Darling*, 208 Kan. 469, 476 (1972) (in case charging criminal abortion, "an attempt by counsel for the defendant . . . to discover if there is any bias or prejudice against one charged with abortion on the jury panel should not be unduly restricted"; nonetheless, "[w]hile the trial court perhaps should have granted the appellant more leniency in this respect, on the record presented we cannot say the court abused the exercise of its power of discretion in limiting the inquiry by the appellant"); *see also State v. Zamora*, 247 Kan. 684, 692-93 (1990) (in rape case involving bondage, trial court's refusal to let counsel "get into the evidence" during voir dire by asking potential jurors about their attitudes towards "unusual sexual practices" was "close question," but not abuse of discretion); *State v. Pioletti*, 246 Kan. 49, 54-55 (1990) (where trial court cut off discussion of insanity defense during voir dire, "the voir dire was not well handled by the trial court," but limits on questions were not abuse of discretion).

14 732 N.E.2d 1100 (Ill. App. 1 Dist. 2000).

15 *Id.* at 1107.

16 *Id.*

17 *Id.*

18 *United States v. Johnson*, 366 F.Supp. 2d 822, 825 (N.D. Iowa 2005), *quoting Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

19 366 F.Supp. 2d at 825.

20 *Id.* at 849.

21 *Id.* at 845.

22 *Id.* at 847-48.

23 *Id.* at 849 (emphasis in original).

24 *See, e.g., United States v. Fell*, 372 F. Supp. 2d 766, 767, 771 (D. Vt. 2005) (permitting case-specific questions "provided the primary purpose of such questions is to ensure impartiality as opposed to committing jurors to particular findings"; emphasizing that "[t]here is a crucial difference between questions that seek to discover how a juror might vote and those that ask whether a juror will be able to fairly consider" particular evidence); *State v. Jackson*, 836 N.E.2d 1173, 1190-92 (Ohio 2005) (trial court abused discretion by prohibiting defense counsel from incorporating case-specific fact that one murder victim was three years old when questioning potential jurors for bias: "[w]hile it is improper for counsel to seek a commitment from prospective jurors on whether they would find specific evidence mitigating . . . counsel should be permitted to present uncontested facts to the venire directed at revealing prospective jurors' biases"). *But see United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (interpreting counsel's case-specific questions as improper stakeout questions, and holding that case-specific questions are not necessary), *disapproved of on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999).

25 Fell, 372 F.Supp. at 771.

26 101 Kan. 189 (1917).

27 *Id.* at 191.

28 *Id.*

29 ___ F.3d ___, 2008 WL 1914318 (5th Cir. May 2, 2008).

30 *Id.* at *8.

31 *Id.*

32 *Id.*

33 *Id.*

34 *See, e.g., State v. Isgitt*, 590 So.2d 763, 765 (La. App. 3 Cir. 1991) (relying in part on juror's answer to defense counsel's question "Would you want somebody that feels the way you do, as you've expressed it to me in the last few minutes, sitting on the jury?" to hold that juror should have been excused for cause); *State v. Hausauer*, 149 P.3d 895, 900 (Mont. 2006) (relying in part on juror's answer to defense counsel's question "If you were on trial, would you want to be judged by a juror who has your attitude and feeling about this?" to hold that juror should have been

excused for cause); *Thompson v. State*, 894 P.2d 375, 376 (Nev. 1995) (relying in part on juror's answer to defense counsel's question "If the shoe were on the other foot, if you were seated over here, would you want a person who has these kinds of preconceived notions—?" to hold that juror should have been excused for cause: "most disturbing, prospective juror number eighty-nine agreed that he would not want to be seated in the defendant's chair with a person like himself on the jury"); *Klahn v. State*, 96 P.3d 472, 477, 479 (Wyo. 2004) (relying in part on juror's answer to defense counsel's question "Would you want to have you on your own jury if you were charged with something like that?" to hold that juror should have been excused for cause); *see also State v. Zabrinas*, 271 Kan. 422, 434 (2001) (either defense counsel or prosecutor asked potential juror: "[W]ould you want yourself as a juror on a case like this?"); *Carrillo v. People*, 974 P.2d 478, 481 (Colo. 1999) (defense counsel asked potential juror: "So would you want you to be a juror in this case if you are [the defendant]?").

35 *See, e.g., Eizember v. State*, 164 P.3d 208, 220 (Okla. Crim. App. 2007) (noting that written questionnaire used in capital case "asked if the potential juror were the defendant or the State of Oklahoma, 'would you want yourself as a juror in this case?'"); *Garrido-Valdez v. Poole*, 384 F.Supp. 2d 591, 598 (W.D.N.Y. 2005) (noting court's question to potential juror: "[I]f you were the Defendant on trial having your state of mind would you want yourself to sit as a juror?"); *Lancaster v. Adams*, 324 F.3d 423, 430 (6th Cir. 2003) (noting court's question to potential juror: "Would you want you as a juror?").

36 *See Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92-93 (Tex. 2005) (discussing value of rehabilitation).

37 *Mitchell v. State*, 136 P.3d 671, 692-94 (Okla. Crim. App. 2006).

38 894 P.2d 375 (Nev. 1995).

39 *Id.* at 377.

40 *Id.*; *see also State v. Isgitt*, 590 So.2d 763, 767 (La. App. 3 Cir. 1991) ("A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied.").

Reprinted from the Journal of the Kansas Association for Justice, Vol. 30, No. 6, July 2008.