

Voir Dire of Prospective Jurors in Illinois

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I. Purpose of Voir Dire of Potential Jurors

“The purposes of voir dire are to (1) enable the trial court to select jurors who are free from bias or prejudice, and (2) ensure that attorneys have an informed and intelligent basis on which to exercise their peremptory challenges.”¹ The right to examine potential jurors before exercising challenges is based in part on the constitutional right to trial by an impartial jury.²

In order for voir dire to be effective, parties must be allowed to ask questions that are reasonably likely to uncover biases or reasonably calculated to expose prejudice. The Illinois Appellate Court has explained:

[L]imitation of voir dire questioning may constitute reversible error if it results in denying a party a fair opportunity to properly investigate an important area of potential bias and or prejudice among prospective jurors. And, trial courts “must exercise...[their] discretion so as not to block the reasonable exploration of germane factors that might expose a basis for challenge, whether for cause or peremptory.” Thus, the examination must adequately “call to the attention of the venire[persons] those important matters that might lead them to recognize or to display their disqualifying attributes.”³

Under this standard, the critical requirement is that the questions create a reasonable assurance that prejudice would be discovered if present.⁴ But a party need not demonstrate that venire members *actually* harbor prejudice against its position to justify a challenge.⁵

¹ Village of Plainfield v. Nowicki, 367 Ill. App. 3d 522, 524, 854 N.E.2d 791, 794 (3rd Dist. 2006). See also, People v. Mabry, 398 Ill.App.3d 745, 754, 926 N.E.2d 732, 740 (1st Dist. 2010) (“The trial court should always exercise its discretion in a manner that is consistent with the goals of *voir dire* – to assure the selection of an impartial jury, free from bias or prejudice, and grant counsel an intelligent basis on which to exercise peremptory challenges.”); People v. Gregg, 315 Ill.App.3d 59, 65, 732 N.E.2d 1152, 1157 (1st Dist. 2000) (“Voir dire serves the dual purpose of enabling the trial court to select jurors who are free from bias or prejudice and ensuring that attorneys have an informed and intelligent basis on which to exercise their peremptory challenges.”)

² See U.S. Const. amend VI; Ill. Const. Sec. 8, art. I; Morgan v. Illinois, 504 U.S. 719, 729 (1992) (“[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.”); Rosales-Lopez v. U.S., 451 U.S. 182, 188 (1981) (“Voir dire plays a critical function in assuring the criminal defendant that his right to an impartial jury will be honored.”); People v. Strain, 306 Ill.App.3d 328, 334, 714 N.E.2d 74, 79 (1st Dist. 1999) (“The sixth amendment right to an impartial jury guarantees ‘an adequate voir dire designed to identify unqualified jurors and ensure the selection of an impartial jury.’”), aff’d, 194 Ill.2d 467, 742 N.E.2d 315 (2000); People v. Oliver, 265 Ill.App.3d 543, 551, 637 N.E.2d 1173, 1179 (1st Dist. 1994); People v. Thomas, 89 Ill.App.3d 592, 599, 411 N.E.2d 1076, 1082 (1st Dist. 1980).

³ People v. Oliver, 265 Ill.App.3d 543, 548, 637 N.E.2d 1177 (1st Dist. 1994) (citations omitted) (ellipses in original) (second brackets in original) (quoting Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (1980) and U.S. v. Lewin, 467 F.2d 1132, 1138 (1972)). See also, People v. Taylor, 287 Ill.App.3d 254, 261, 678 N.E.2d 358, 363 (2nd Dist. 1997) (Voir dire must provide “sufficient information about prospective jurors’ beliefs and opinions to permit the removal of those members of the venire who are unable or unwilling to be impartial.”).

⁴ People v. Peeples, 155 Ill.2d 422, 459, 616 N.E.2d 294, 311 (1993) (“[T]he test for evaluating the court’s exercise of discretion is whether the means used to test impartiality have created a reasonable assurance that

General statements that a prospective juror could be impartial are not sufficient to assure that any latent bias has been discovered. The parties are entitled to explore whether any prejudices exist, regardless of a cursory statement that the venire member would be fair. The Illinois Appellate Court has explained:

While the statement of a juror as to his or her ability to be fair and impartial is proper for the court to consider as evidence of the juror's state of mind, it does not alone determine a juror's eligibility. In U.S. v. Lewin, Judge Pell warned of the dangers of conducting a cursory selection process based solely upon general questions similar to those used in the present case: "We do not consider the court's obligation to let counsel, on request, get at underlying bases reflecting on bias, prejudice or other suspect factors to be discharged by general questions such as, 'Is there any reason you cannot fairly and impartially try this case?' This obligation particularly would not seem to be discharged by general direct confrontation questions on human characteristics that most people are reluctant to admit they possess."⁶

The Illinois Appellate Court has applied this principle to specific cases. In Village of Plainfield v. Nowicki,⁷ for example, the Appellate Court overturned a conviction because defense counsel was not allowed to question prospective jurors about their feelings toward alcohol consumption. The Illinois Appellate Court noted, "Questioning prospective jurors generally about whether they have any biases or prejudices that could affect their ability to be impartial does not reasonably assure that prejudice toward alcohol consumption will be disclosed. 'It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands and declare themselves biased.'"⁸

Therefore, voir dire must consist of more than vague proclamations about being fair and must constitute an honest inquiry into potential biases or opinions that could influence the decisions of prospective jurors.

prejudice would be discovered if present."); People v. Pineda, 349 Ill.App.3d 815, 819, 812 N.E.2d 627, 632 (2nd Dist. 2004); People v. Jiminez, 284 Ill.App.3d 908, 911, 672 N.E.2d 914, 916 (1st Dist. 1996); People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996); People v. Lanter, 230 Ill.App.3d 72, 75, 595 N.E.2d 210, 213 (4th Dist. 1992).

⁵ People v. Strain, 306 Ill.App.3d 328, 335, 714 N.E.2d 74, 79 (1st Dist. 1999); People v. Jiminez, 284 Ill.App.3d 908, 913, 672 N.E.2d 914, 917 (1st Dist. 1996).

⁶ People v. Thomas, 89 Ill.App.3d 592, 600, 411 N.E.2d 1076, 1083 (1st Dist. 1980) (citations omitted) (quoting U.S. v. Lewin, 467 F.2d 1132, 1138 (7th Cir. 1972)).

⁷ 367 Ill.App.3d 522, 854 N.E.2d 791 (3rd Dist. 2006).

⁸ Village of Plainfield v. Nowicki, 367 Ill.App.3d 522, 524, 854 N.E.2d 791, 794 (3rd Dist. 2006) (quoting State v. Ball, 685 P.2d 1055, 1058 (Utah 1984)) (citations omitted). See also, People v. Strain, 306 Ill.App.3d 328, 336, 714 N.E.2d 74, 80 (1st Dist. 1999) ("Can you be fair to both sides here?" not sufficient to uncover specific biases.).

II. Objections to Voir Dire of Potential Jurors

A. Indoctrination or pre-educating. The Illinois Appellate Court has warned, “[V]oir dire should not be converted into a ‘vehicle for pre-educating and indoctrinating prospective jurors as to a particular theory or defense...’”⁹ The purpose of voir dire examination is not for the parties to argue their case. Therefore, questions that indoctrinate the jury as to specific positions of the parties are objectionable. “Broad questions are generally permissible.... Specific questions tailored to the facts of the case and intended to serve as ‘preliminary final argument’ are generally impermissible.”¹⁰

B. Pre-trying or hypotheticals. The purpose of voir dire examination is to impanel an impartial jury, not to ask the prospective jurors to pre-judge the case. Therefore, attorneys cannot present venire members with hypothetical fact patterns and ask them how they would vote.¹¹ For example, the Appellate Court found error where the prosecutor repeatedly informed jurors that they would hear two different versions of events and then asked whether this would automatically create reasonable doubt in their minds.¹² Hypotheticals that outline anticipated evidence and ask potential jurors for a decision are objectionable.

However, questions about specific pieces of evidence are not automatically prohibited.¹³ Parties are allowed to ask how potentially controversial facts may affect venire members as long as such questioning does not cross the line into pre-trying the case with hypotheticals. Furthermore, the Appellate Court has stated that the parties may use hypotheticals “‘to ascertain whether the jurors could intellectually comprehend’ the respective theories of the case. Such an inquiry is acceptable, as long as it does not rise to the level of indoctrination or preeducation.”¹⁴

C. Law and instructions. Illinois Supreme Court Rules 234 and 431 state that questions to prospective jurors “shall not directly or indirectly concern matters of law or instructions.” The rule contains no exceptions. However, higher courts in Illinois routinely allow questions about law and

⁹ People v. Mapp, 283 Ill.App.3d 979, 986, 670 N.E.2d 852, 857 (1st Dist. 1996) (quoting People v. Kendricks, 121 Ill.App.3d 442, 449, 459 N.E.2d 1137, 1142 (1st Dist. 1984)). See also, Rub v. Consolidated Rail Corporation, 331 Ill. App. 3d 692, 696, 771 N.E.2d 1015, 1019 (1st Dist. 2002) (voir dire should not be used “to indoctrinate or pre-educate jurors...”); People v. James, 304 Ill.App.3d 52, 57, 710 N.E.2d 484, 489 (2nd Dist. 1999); Limer v. Casassa, 273 Ill.App.3d 300, 302, 652 N.E.2d 854, 856 (4th Dist. 1995); People v. Lanter, 230 Ill.App.3d 72, 75, 595 N.E.2d 210, 213 (4th Dist. 1992).

¹⁰ People v. Rinehart, 2012 IL 111719, ¶ 17, 962 N.E.2d 444 (2012).

¹¹ Rub v. Consolidated Rail Corporation, 331 Ill. App. 3d 692, 696, 771 N.E.2d 1015, 1019 (1st Dist. 2002) (voir dire should not be used “to obtain a pledge as to how [prospective jurors] would decide under a given set of facts or determine which party they would favor in litigation.”); Gowler v. Ferrell-Ross Co., 206 Ill.App.3d 194, 207, 563 N.E.2d 773 781 (1st Dist. 1990) (improper “to obtain a pledge [from prospective jurors] as to how they would decide under a given state of facts...”); People v. Bell, 152 Ill.App.3d 1007, 1017, 505 N.E.2d 365, 372 (3rd Dist. 1987).

¹² People v. Mapp, 283 Ill.App.3d 979, 988, 670 N.E.2d 852, 858 (1st Dist. 1996); People v. M.D., 231 Ill.App.3d 176, 197, 595 N.E.2d 702, 715 (2nd Dist. 1992).

¹³ See *infra*, Section IV. Questions About Types of Evidence or Case-Specific Facts.

¹⁴ People v. Taylor, 287 Ill.App.3d 254, 261, 678 N.E.2d 358, 363 (2nd Dist. 1997). See also, Gowler v. Ferrell-Ross Co., 206 Ill.App.3d 194, 208, 563 N.E.2d 773, 781 (1st Dist. 1990).

instructions. The Illinois Appellate Court has stated, "[I]nquiry may be made as to whether a juror has a disagreement with a particular rule of law which will be applied in that case..."¹⁵

Two legal principles seem to govern the exceptions to the general rule prohibiting such inquiries. First, the parties cannot expect prospective jurors to understand the law before they receive instructions. Attorneys may not "test the jurors understanding of the law...before they were instructed..."¹⁶ Second, courts may allow questions about legal principles that might be controversial to some jurors. The Illinois Supreme Court has explained:

In People v. Wright, prospective jurors were asked whether they could impose the death penalty in an appropriate capital case. A majority of this court found such voir dire unexceptionable under Rule 234....Similarly, attorneys have been allowed in dramshop actions to ask prospective jurors whether they disagreed with the dramshop statute. The thread which runs through those cases is that the jury was going to be asked to apply an extraordinarily controversial legal requirement against which many members of the community may have been prejudiced. Inquiry into the feeling or viewpoint of the venire regarding such controversial legal positions is consistent with a bona fide examination conducted so that parties can intelligently exercise their prerogatives to challenge.¹⁷

Thus, questions about the law or instructions have been found acceptable when (1) a potentially controversial legal rule (2) is briefly and accurately stated and (3) prospective jurors then are asked their viewpoints about the rule.¹⁸

D. Privilege against self-incrimination. The fifth amendment's privilege against self-incrimination applies to prospective jurors. Therefore, venire members should not be asked whether they have committed crimes.¹⁹

E. Irrelevant and personal opinion. While counsel may briefly explain a point before asking a question, injecting irrelevant issues or personal opinion into a trial is not allowed.²⁰ However, the scope of "relevant" voir dire examination can be quite broad. Parties may ask about venire

¹⁵ Limer v. Casassa, 273 Ill.App.3d 300, 302, 652 N.E.2d 854, 857 (4th Dist. 1995).

¹⁶ People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996).

¹⁷ People v. Stack, 112 Ill.2d 301, 312, 493 N.E.2d 339, 344 (1986) (citations omitted). See also, People v. Mapp, 283 Ill.App.3d 979, 987, 670 N.E.2d 852, 858 (1st Dist. 1996); People v. Lanter, 230 Ill.App.3d 72, 76, 595 N.E.2d 210, 213 (4th Dist. 1992).

¹⁸ See, e.g., People v. Stack, 112 Ill.2d 301, 310, 493 N.E.2d 339, 343 (1986) (Approving the questions "Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case? If so, what?"); People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 860 (1st Dist. 1996) ("Given these decisions, we conclude, despite the proscription of Rule 234, that potential jurors may be given a brief and fair summary of accountability principles and then be asked if they could properly apply those principles to the evidence."); People v. Faulkner, 186 Ill.App.3d 1013, 1022, 542 N.E.2d 1190, 1195 (5th Dist. 1989) (Approving the question "Do you have any quarrel with the concept the State is not required to produce a body in this case?").

¹⁹ People v. James, 304 Ill.App.3d 52, 58-59, 710 N.E.2d 484, 489-90 (2nd Dist. 1999).

²⁰ See People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996).

members' personal life experiences including membership in organizations (civic, political, social, etc.), hobbies, reading interests, family, education, and professional experiences.²¹

F. No prohibition against non-leading or open-ended questions. The Illinois Supreme Court has expressly approved open-ended questions requiring a narrative answer on the part of prospective jurors.²² Attorneys may even ask open-ended questions requiring jurors to think of reasons why somebody might act a certain way under particular circumstances, as long as the attorneys do not supply the reasons and accept the answers without argument.²³ Several trial advocacy texts, including one cited by the Illinois Appellate Court, also recommend non-leading questions during *voir dire*.²⁴ Professor Mauet has noted, "Open-ended questions let jurors answer using their natural vocabulary and manner of expression. How a juror answers, rather than what he says, is often a more reliable indicator of that juror's attitudes on critical issues."²⁵

²¹ Lubet, Steven. Modern Trial Advocacy: Analysis & Practice (1993), pp. 446-47. The Illinois Supreme Court has allowed questions about childhood abuse in a case that had nothing to do with such conduct. In People v. Kurth, 34 Ill.2d 387, 390-91, 216 N.E.2d 154, 156 (1966), a juror informed the judge that she was nervous because of childhood abuse when she was locked in an attic. She stated she had a fear of confinement such that the jury room made her nervous. The Illinois Supreme Court noted, "To accept a juror who acknowledged a longstanding fear of closed places and to deny counsel the right to interrogate this juror, or even disclose her name, was under the circumstances prejudicial error." Id.

²² People v. Buss, 187 Ill.2d 144, 195-96, 718 N.E.2d 1, 30 (1999) ("[E]ach prospective juror not excused during preliminary questioning was required to provide a narrative answer to the court's question, 'Can you explain to us here in court what your feelings are about the imposition of the death penalty?' Their responses generally gave a clear picture of their attitudes toward this law.").

²³ People v. Rinehart, 2012 IL 111719, ¶ 5 ("Q. Can you think of a reason why a victim might delay in reporting being raped or being a victim of sexual assault: A. Shame, embarrassment, fear....Q. Can you think of some reasons why a sexual assault victim might not automatically come forward? A. Oh, I think may be fear, and think you would be a lesser person if something like that happened to you.").

²⁴ See, e.g., Bergman, Paul. Trial Advocacy in a Nutshell (2nd ed. 1989), pp. 319-20; Lubet, Steven. Modern Trial Advocacy: Analysis and Practice (1993), pp. 447-48; Mauet, Thomas A. Fundamentals of Trial Techniques (2nd ed. 1988), p. 38.

²⁵ Mauet, Thomas A. Fundamentals of Trial Techniques (2nd ed. 1988), p. 38. The Illinois Appellate Court relied upon Mauet in York v. El-Ganzouri, 353 Ill. App. 3d 1, 12-13 817 N.E.2d 1179, 1190 (1st Dist. 2004) (citing Mauet regarding *voir dire*) and People v. Lee, 342 Ill. App. 3d 37, 51, 795 N.E.2d 751, 762 (1st Dist. 2003).

III. Statutory Qualifications of Petit Jurors in Illinois

- A. Inhabitant of the county.²⁶
- B. Minimum age of 18 years.²⁷
- C. “Free from all legal exception, of fair character, of approved integrity, of sound judgment, well informed...”²⁸
- D. Able to understand the English language, whether in spoken or written form or interpreted into sign language.²⁹
- E. Citizen of the United States of America.³⁰
- F. No service as a juror on the trial of a cause in any court in the county within one year previous unless the prospective juror waives the exemption.³¹
- G. Not a party to a suit pending for trial in that court.³²

²⁶ 705 Ill.Comp.Stat. 305/2 (1) (2013).

²⁷ 705 Ill.Comp.Stat. 305/2 (2) (2013).

²⁸ 705 Ill.Comp.Stat. 305/2 (3) (2013).

²⁹ 705 Ill.Comp.Stat. 305/2 (3) (2013).

³⁰ 705 Ill.Comp.Stat. 305/2 (4) (2013).

³¹ 705 Ill.Comp.Stat. 305/14 (2013).

³² 705 Ill.Comp.Stat. 305/14 (2013).

IV. Questions About Types of Evidence or Case-Specific Facts.

A. Alcohol and drug use questions allowed. Many prospective jurors hold strong opinions about alcohol and drug use. For this reason, the Illinois Appellate Court has held that parties may ask venire members about their attitudes toward such substances.³³ However, jurors may not be questioned about whether they personally have ever used illegal drugs.³⁴

In People v. Lanter, the Illinois Appellate Court approved the following question:

Do any of you have any feelings concerning the use of alcohol or drugs which could affect your ability to be a juror in this case, if there were testimony about alcohol or drugs?³⁵

In Village of Plainfield v. Nowicki, the defendant was charged with driving under the influence of alcohol. The Appellate Court held that it was proper to question prospective jurors “whether they drink alcohol socially and, if not, whether they have any religious or moral opinions regarding drinking alcohol.”³⁶

In People v. Tenney, the Illinois Appellate Court ruled that the trial court had discretion to prohibit questions about whether prospective jurors had family members or friends with drug or alcohol problems and how they would “handle” a person with a drug dependency.³⁷ The rationale was that “The venire should not be questioned regarding how they would act given particular aggravating circumstances.”³⁸ To support this proposition, the Tenney court cited People v. Terrell.³⁹ Terrell was a death penalty case in which the defense proposed questions about how jurors would weigh the fact that the decedent was a child. The Terrell Court did *not* establish a general principle prohibiting questions about how jurors would act given particular aggravating circumstances, but instead analyzed the specialized area of voir dire of jurors for capital sentencing hearings.⁴⁰ Further, Terrell was decided before attorneys were allowed to ask questions during voir dire. The question about whether the juror has any family or friends with substance abuse problems does not require a juror to predict how he or she would act, even if the second question about how to “handle” such problems does call for such a prediction. Finally, this principle is inconsistent with most cases addressing the issue. Prospective jurors may be questioned about their experiences in life. An attorney must know if prospective jurors have had family and friends suffering from substance abuse problems in order to probe for bias and to exercise peremptory challenges intelligently in a case involving a party who is allegedly a substance abuser, using substances at the time of the incident, or accused of providing illegal drugs to other people.

³³ Village of Plainfield v. Nowicki, 367 Ill.App.3d 522, 854 N.E.2d 791 (3rd Dist. 2006); People v. Lanter, 230 Ill.App.3d 72, 76, 595 N.E.2d 210, 214 (4th Dist. 1992).

³⁴ People v. James, 304 Ill.App.3d 52, 58-60, 710 N.E.2d 484, 489-90 (2nd Dist. 1999).

³⁵ People v. Lanter, 230 Ill.App.3d 72, 73, 595 N.E.2d 210, 214 (4th Dist. 1992).

³⁶ Village of Plainfield v. Nowicki, 367 Ill.App.3d 522, 523, 854 N.E.2d 791, 793 (3rd Dist. 2006).

³⁷ People v. Tenney, 347 Ill. App. 3d 359, 361, 807 N.E.2d 705, 709 (2nd Dist. 2004).

³⁸ People v. Tenney, 347 Ill. App. 3d 359, 368, 807 N.E.2d 705, 714 (2nd Dist. 2004).

³⁹ 185 Ill.2d 467, 708 N.E.2d 309 (1998).

⁴⁰ Terrell is discussed in more detail in the section on capital voir dire.

B. Circumstantial evidence questions allowed. As long as the questions remain abstract and do not amount to hypotheticals regarding particular fact patterns in the case, a prosecutor may ask jurors whether they could consider circumstantial evidence as a basis to find a defendant guilty.⁴¹ Further, parties can ask questions about particular evidentiary issues that may call for the jurors to rely on circumstantial evidence. In one case, the State was allowed to ask venire members whether they would be prejudiced by the lack of a body in a murder case.⁴²

The Illinois Appellate Court has approved the following questions:

Would you find it difficult in your own mind to find a verdict of guilty if a good portion of the evidence which you heard is what is called circumstantial evidence?⁴³

Would either of you find it impossible in your own minds to find a verdict of guilty if there were no eyewitness testimony presented to you from the witness chair?⁴⁴

If the Court instructs you it is not necessary for the State to produce a body in this matter to sustain a conviction, will you follow that law or that instruction?⁴⁵

Do you have any quarrel with the concept the State is not required to produce a body in this case?⁴⁶

C. Confessions.

1. Reasons why somebody might confess are not proper in questions. Prosecutors may not ask prospective jurors whether they believe that people have a natural impulse to confess to their wrongdoings. Such questions constitute indoctrination of jurors as to the State's theory at trial.⁴⁷

2. Whether jurors can accept the possibility of a false confession. Questions advancing a particular theory of the case are not permissible. For this reason, questions about police coercion causing false confessions are not proper.⁴⁸ In one case, the Illinois Appellate Court ruled that the defense was able to uncover bias in the area of police coercion of confessions because defense counsel asked "whether the venire members gave more credence to police officers as a result of their position..."⁴⁹

⁴¹ People v. Freeman, 60 Ill.App.3d 794, 799-800, 377 N.E.2d 107, 111-12 (4th Dist. 1978).

⁴² People v. Faulkner, 186 Ill.App.3d 1013, 1024-25, 542 N.E.2d 1190, 1197-98 (5th Dist. 1989).

⁴³ People v. Freeman, 60 Ill.App.3d 794, 799-800, 377 N.E.2d 107, 111 (4th Dist. 1978).

⁴⁴ People v. Freeman, 60 Ill.App.3d 794, 799, 377 N.E.2d 107, 111 (4th Dist. 1978).

⁴⁵ People v. Faulkner, 186 Ill.App.3d 1013, 1021, 542 N.E.2d 1190, 1195 (5th Dist. 1989).

⁴⁶ Id., 186 Ill.App.3d at 1022, 542 N.E.2d at 1195.

⁴⁷ People v. Bell, 152 Ill.App.3d 1007, 1017-18, 505 N.E.2d 365, 372-73 (3rd Dist. 1987).

⁴⁸ People v. Dent, 2011 IL App (1st) 91384U, ¶¶ 61-66.

⁴⁹ People v. Dent, 2011 IL App (1st) 91384U, ¶¶ 66.

The Illinois Appellate Court has ruled that a trial court has the discretion to bar the following questions:

Has anybody read any articles in the newspaper, a series of articles recently about people that have been convicted of crimes and have given confessions and confessions were later found to be not true?⁵⁰

Do you believe it is possible that someone might confess to something he did not do?⁵¹

If you were to hear evidence that [defendant] made a confession or statement related to this case, would you be able to consider whether it is a true or false confession or statement based on all the circumstances?⁵²

Do you have any feeling or viewpoint concerning the defense of a false confession? If so, what?⁵³

The Appellate Court rejected the first of these questions because, “This question was directed at the venire’s knowledge of newspaper articles discussing false confessions rather than uncovering any bias toward police misconduct. The trial court did not abuse its discretion by disallowing it.”⁵⁴ The Appellate Court rejected the other proposed questions because they “would have improperly indoctrinated the potential jurors to defendant’s affirmative defense.”⁵⁵

D. Contradictory statements and witness credibility questions not allowed. In some cases, a witness makes a statement shortly after an incident and then gives contradictory testimony during the trial. The Illinois Appellate Court has ruled that an attorney should not be allowed to ask prospective jurors whether “a witness’s statement made immediately after an incident is generally more accurate than the witness’s testimony at trial several weeks or months later.”⁵⁶ The Appellate Court reasoned that such questions constitute pre-educating or indoctrinating the jury with the party’s theory of the case. The Illinois Appellate Court noted that “the purpose of voir dire is not to ascertain prospective jurors’ opinions with respect to evidence to be presented at trial.”⁵⁷ The Appellate Court analogized the questions about weighing contradictory witness statements to questions regarding self-defense or mis-identification, which also constitute improper indoctrination into the theory of the case.

E. Convictions and witness credibility questions. The Illinois Supreme Court has explained that trial courts should rule on motions regarding the admissibility of a defendant’s prior convictions

⁵⁰ People v. Klimawicze, 352 Ill. App. 3d 13, 26, 815 N.E.2d 760, 773 (1st Dist. 2004).

⁵¹ People v. Polk, 407 Ill.App.3d 80, 106, 942 N.E.2d 44, 66 (1st Dist. 2010).

⁵² People v. Polk, 407 Ill.App.3d 80, 106, 942 N.E.2d 44, 66 (1st Dist. 2010).

⁵³ People v. Polk, 407 Ill.App.3d 80, 106, 942 N.E.2d 44, 66 (1st Dist. 2010).

⁵⁴ People v. Klimawicze, 352 Ill. App. 3d 13, 26, 815 N.E.2d 760, 773 (1st Dist. 2004).

⁵⁵ People v. Polk, 407 Ill.App.3d 80, 107, 942 N.E.2d 44, 67 (1st Dist. 2010).

⁵⁶ People v. Pineda, 349 Ill.App.3d 815, 818, 812 N.E.2d 627, 631 (2nd Dist. 2004).

⁵⁷ People v. Pineda, 349 Ill.App.3d 815, 819, 812 N.E.2d 627, 632 (2nd Dist. 2004) (quoting People v. Buss, 187 Ill.2d 144, 179-80, 718 N.E.2d 1, 22 (1999)).

before the trial starts so that attorneys know whether to inquire about the issue during questioning of prospective jurors.⁵⁸ The Illinois Supreme Court noted that an attorney may want to “bring the prior conviction to the attention to the prospective jurors on voir dire.”⁵⁹ Thus, an attorney is allowed to “ask prospective jurors if knowledge of the defendant’s prior convictions would prejudice them.”⁶⁰

However, the Illinois Appellate Court has ruled that the following question is not proper:

If you learned that a witness or a defendant had a conviction in his background, would that impair your ability to be fair and impartial?⁶¹

The Illinois Appellate Court reasoned that questions about prior convictions are not proper because Supreme Court Rule 431(a) prohibits questions covered by the instructions and because a prospective juror could not know how to answer the question without first being instructed on the matter.⁶²

F. Delayed reporting of crime questions allowed. Prospective jurors may be questioned about why a victim might delay reporting of a crime, particularly in the case of a sexual assault. Such questions “focus...on potential jurors’ preconceptions about sexual assault cases, in an effort to uncover any bias regarding delayed reporting and the credibility of a victim who informed no one about the alleged attack when it happened. An answer which indicated a prospective juror was less likely to believe a victim who did not immediately report an incident would have given the State grounds to exercise intelligently its peremptory challenges.”⁶³ For this reason, the Illinois Supreme Court has approved the following questions:

Can you think of some reasons why a sexual assault victim might not immediately report an incident?⁶⁴

Can you think of a reason why a victim who had had some things happen to them might not immediately go to an adult or report it?⁶⁵

Can you think of some reasons why a victim of sexual assault might not immediately report it to someone?⁶⁶

Can you think of a reason why a victim might delay in reporting being raped or being a victim of sexual assault?⁶⁷

⁵⁸ People v. Patrick, 233 Ill.2d 62, 908 N.E.2d 1 (2009).

⁵⁹ People v. Patrick, 233 Ill.2d 62, 72, 908 N.E.2d 1, 7 (quoting Vermont v. Ritchie, 144 Vt. 121, 123, 473 A.2d 1164, 1165 (1984)).

⁶⁰ Vermont v. Ritchie, 144 Vt. 121, 123, 473 A.2d 1164, 1165 (1984) (cited by the Illinois Supreme Court in People v. Patrick, 233 Ill.2d 62, 72, 908 N.E.2d 1, 7 (2009)).

⁶¹ People v. Anderson, 407 Ill.App.3d 662, 679, 944 N.E.2d 359, 375 (1st Dist. 2011).

⁶² People v. Anderson, 407 Ill.App.3d 662, 680-81, 944 N.E.2d 359, 376 (1st Dist. 2011); People v. Brandon, 157 Ill.App.3d 835, 840-42, 510 N.E.2d 1005, 1008-10 (1st Dist. 1987).

⁶³ People v. Rinehart, 2012 IL 111719, ¶ 21.

⁶⁴ People v. Rinehart, 2012 IL 111719, ¶ 5.

⁶⁵ People v. Rinehart, 2012 IL 111719, ¶ 5.

⁶⁶ People v. Rinehart, 2012 IL 111719, ¶ 5.

⁶⁷ People v. Rinehart, 2012 IL 111719, ¶ 5.

In ruling that the questions were permissible, the Illinois Supreme Court observed that only five prospective jurors were asked the questions – “the State here did not ask every potential juror about this subject, and instead posed a question on it to only five potential jurors...”⁶⁸ The Supreme Court did not explain why a permissible question would become impermissible if more jurors were so questioned. The Illinois Supreme Court also cautioned that, “the subject could have been raised more artfully, and perhaps phrased in terms of a venire member’s bias and ability to put any bias aside in reaching a verdict...”⁶⁹ Nevertheless, the Illinois Supreme Court held that the trial court did not error in allowing these questions.

G. Eyewitness testimony and misidentification questions not allowed. The defense does not have a right to ask questions about prospective jurors’ beliefs regarding the accuracy of eyewitness identifications.⁷⁰

Illinois courts have upheld refusals to ask the following questions:

Have you ever greeted a stranger as an acquaintance because you mistook the stranger?⁷¹

Has a stranger ever greeted you because of a mistaken identity? Please explain.⁷²

Do you believe that a person can be mistaken about the identification of another?⁷³

Courts have reasoned that a refusal to tender such questions to the venire is not error because there is no basis to believe that people harbor bias or prejudice against the defense of mistaken identity.⁷⁴

⁶⁸ People v. Rinehart, 2012 IL 111719, ¶ 21.

⁶⁹ People v. Rinehart, 2012 IL 111719, ¶ 21 (citation omitted).

⁷⁰ People v. Boston, 383 Ill.App.3d 352, 354, 893 N.E.2d 677, 680 (4th Dist. 2008); People v. Pineda, 349 Ill.App.3d 815, 819, 812 N.E.2d 627, 632 (2nd Dist. 2004); People v. Bowel, 111 Ill.2d 58, 64, 488 N.E.2d 995, 998-99 (1986); People v. Washington, 104 Ill.App.3d 386, 391, 432 N.E.2d 1020, 1024 (1st Dist. 1982); People v. Witted, 79 Ill.App.3d 156, 164, 398 N.E.2d 68, 76 (1st Dist. 1979).

⁷¹ People v. Bowel, 111 Ill.2d 58, 64, 488 N.E.2d 995, 998 (1986).

⁷² People v. Bowel, 111 Ill.2d 58, 64, 488 N.E.2d 995, 998 (1986).

⁷³ People v. Witted, 79 Ill.App.3d 156, 164, 398 N.E.2d 68, 76 (1st Dist. 1979).

⁷⁴ See Bowel, 111 Ill.2d at 64, 488 N.E.2d at 998. Contrary to the Illinois Supreme Court’s intuition, a significant body of research indicates that many potential jurors harbor biases against the defense of mistaken identification. See Loftus, Elizabeth F. “The Risk of Ill-Informed Juries,” New York Times, August 31, 2011; Benton et. al. “Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts,” 20 Applied Cognitive Psychology 115, 126 (2006); Wells, Memon and Penrod. “Eyewitness Identification: Improving Its Probative Value,” Psychological Science in the Public Interest, vol. 7, no. 2, p. 47 (2006) (“[W]hile jurors might understand forgetting, they are not likely to understand that a witness can remember the wrong thing.”); Cutler, Penrod & Stuve, “Juror Decision-Making in Identification Cases,” 12 Law & Human Behavior 41 (1988).

In unusual cases, the Illinois Appellate Court has allowed questions related to eyewitness testimony. The Appellate Court approved the following question:

Would either of you find it impossible in your own minds to find a verdict of guilty if there were no eyewitness testimony presented to you from the witness chair?⁷⁵

H. Firearms questions allowed. The Appellate Court has upheld questions regarding jurors' views about the use of a gun in a crime. In People v. Sanders,⁷⁶ the trial court asked "if there is any one person who feels that the mere fact that a gun is involved would so prejudice them that they could not render a fair trial."⁷⁷ The Appellate Court upheld the decision, but also ruled that the trial court had discretion to refuse other questions related to guns.⁷⁸ The Illinois Appellate Court has affirmed a decision to strike a prospective juror based in part on responses to the following questions:

Do you own any firearms?⁷⁹

Do you have any strong feelings one way or the other about firearms?⁸⁰

Are you opposed to firearms, or in favor of firearms?⁸¹

If the evidence was to show that firearms were involved in this case, would that fact cause you to be biased against either side?⁸²

Do you think you would be able to put that out of your mind if I were to instruct you, and I do, that you should not let your personal feelings regarding firearms influence your decision in this case, can you do that?⁸³

In People v. Howard,⁸⁴ the Illinois Supreme Court upheld a conviction after the trial court refused to ask the following question:

The State will seek to introduce evidence that a handgun was used. Do you have any strong feelings about handguns which would affect you?⁸⁵

The Illinois Supreme Court did not rule that the question was improper. Rather, the Illinois Supreme Court relied on the trial court's discretion. Given changes in the rules regarding attorney-

⁷⁵ People v. Feeman, 60 Ill.App.3d 794, 799, 377 N.E.2d 107, 111 (4th Dist. 1978).

⁷⁶ 143 Ill.App.3d 402, 404, 493 N.E.2d 1, 2 (1st Dist. 1986).

⁷⁷ People v. Sanders, 143 Ill.App.3d 402, 404, 493 N.E.2d 1, 2 (1st Dist. 1986).

⁷⁸ People v. Sanders, 143 Ill.App.3d 402, 404, 493 N.E.2d 1, 2 (1st Dist. 1986).

⁷⁹ People v. Edwards, 167 Ill. App.3d 324, 330, 521 N.E.2d 185, 189 (2nd Dist. 1988).

⁸⁰ People v. Edwards, 167 Ill. App.3d 324, 330, 521 N.E.2d 185, 189 (2nd Dist. 1988).

⁸¹ People v. Edwards, 167 Ill. App.3d 324, 330, 521 N.E.2d 185, 189-90 (2nd Dist. 1988).

⁸² People v. Edwards, 167 Ill. App.3d 324, 330, 521 N.E.2d 185, 190 (2nd Dist. 1988).

⁸³ People v. Edwards, 167 Ill. App.3d 324, 330, 521 N.E.2d 185, 190 (2nd Dist. 1988).

⁸⁴ 147 Ill.2d 103, 588 N.E.2d 1044 (1991).

⁸⁵ People v. Howard, 147 Ill.2d 103, 135, 588 N.E.2d 1044, 1056-57 (1991).

conducted voir dire, this rationale arguably does not apply. Further, the Illinois Supreme Court also found it significant that under the facts of that case, “the offender’s use of a handgun as his weapon in committing the crimes charged was not a central issue at trial, much less pertinent to any of the forms of verdict.”⁸⁶ Questioning about gun violence arguably would be more important if the use of a gun is a central issue, if a firearms enhancement is being applied to a particular case, or if the charging instrument mentions the use of a gun. As a side note, the defendant in Howard was eventually pardoned due to significant questions about his guilt.⁸⁷

I. Gangs questions allowed. Due to the widespread prejudice against street gangs, venire members may be predisposed to find defendants guilty solely because of their gang affiliations. Therefore, defendants have a right to question prospective jurors about potential bias against street gang members. “[T]he questions must elicit ‘juror perception of and predisposition toward gangs.’”⁸⁸ The Illinois Appellate Court has explained:

We hold that even a gang member has a constitutional right to have his case determined on the basis of the evidence of his guilt or innocence, by a jury that is not predisposed to find him guilty solely because of his gang membership. Once the court decided to permit the prosecution to present evidence of defendant’s gang affiliation, by denying defendant’s motion in limine, “the trial judge was under a clear duty to insure during voir dire that the jury selected [was] free from prejudice against the group.”⁸⁹

Jurors may be asked general questions about their ability to give the defendant a fair trial in light of gangs-related evidence. The following questions have been approved or relied upon by higher courts:

Would the fact that [defendant], our client, was a member of a street gang prevent you from giving him a fair and impartial hearing? In what way?⁹⁰

It is possible that during the course of the trial, there will be evidence -- alleged evidence of gang membership. One thing I want to bring home to you right now is that that association, to the extent that it exists or doesn’t exist in, and of itself could not be considered by you as evidence of guilt in this charge. Do you understand that?⁹¹

⁸⁶ People v. Howard, 147 Ill.2d 103, 135, 588 N.E.2d 1044, 1057 (1991).

⁸⁷ “Pardons Spark Raw Emotion on Death Row,” Chicago Tribune, January 11, 2003.

⁸⁸ People v. Strain, 306 Ill.App.3d 328, 337, 714 N.E.2d 74, 81 (1st Dist. 1999), aff’d, 194 Ill.2d 467, 742 N.E.2d 315 (2000).

⁸⁹ People v. Jiminez, 284 Ill.App.3d 908, 912, 672 N.E.2d 914, 917 (1st Dist. 1996) (citations omitted) (quoting People v. Beya, 38 Cal.App.3d 176, 195, 113 Cal.Rptr. 254, 266 (1974)). See also, People v. Strain, 194 Ill.2d 467, 477, 742 N.E.2d 315, 321 (2000); People v. Pogue, 312 Ill.App.3d 719, 727, 724 N.E.2d 525, 531 (1st Dist. 1999).

⁹⁰ People v. Banks, 237 Ill.2d 154, 186, 934 N.E.2d 435, 452-53 (2010).

⁹¹ People v. Serrano, 1-09-1532, 2011 Ill. App. Unpub. LEXIS 1613 (1st Dist. June 30, 2011).

Is there anything about the association of people in groups that creates a negative connotation for you or that would influence you if you heard that in this case?⁹²

In addition, prospective jurors may be questioned about their experiences with street gangs. Jurors may be questioned about both direct and indirect experiences with gangs.⁹³ The following questions have been approved by higher courts:

Has any member of your immediate family or close friend ever been involved in a gang?⁹⁴

Have you or any member of your immediate family ever had direct involvement with a street gang?⁹⁵

Have any of you ever been involved in any groups, not necessarily now, but even when you were young? Did you run with a group, a clique, or something like that?⁹⁶

Do any of you have a memory or have any of your children had occasion as they were growing up to run around with a group of people or a clique?⁹⁷

As you were growing up or in your adult life or in the lives of your children, did you or they ever run with groups, associate with cliques, that kind of thing?⁹⁸

Failure to present voir dire questions regarding gang bias is not necessarily ineffective assistance of counsel. The Illinois Appellate Court has explained, “[D]efense counsel likely could have determined that the questioning of the prospective jurors by the trial court regarding whether they could be fair and impartial was sufficient to ensure that defendant would receive a fair trial and that he did not want to highlight the gang evidence further.”⁹⁹ Further, the trial court is not required to ask questions about gang prejudice without a request.¹⁰⁰

⁹² People v. Jones, 2011 Ill.App.Unpub. LEXIS 133 *5 (4th Dist. 2011).

⁹³ Gardner v. Barnett, 199 F.3d 915, 920 (7th Cir. 1999) (“The trial judge did ask the additional question of whether anyone had an *indirect* involvement with street gangs.”).

⁹⁴ People v. Strain, 306 Ill.App.3d 328, 333, 714 N.E.2d 74, 78 (1st Dist. 1999).

⁹⁵ Gardner v. Barnett, 199 F.3d 915, 920 (7th Cir. 1999).

⁹⁶ People v. Jones, 2011 Ill.App.Unpub. LEXIS 133 *4 (4th Dist. 2011).

⁹⁷ People v. Jones, 2011 Ill.App.Unpub. LEXIS 133 *5 (4th Dist. 2011).

⁹⁸ People v. Jones, 2011 Ill.App.Unpub. LEXIS 133 *5 (4th Dist. 2011).

⁹⁹ People v. Macias, 371 Ill.App.3d 632, 641, 863 N.E.2d 776, 783 (1st Dist. 2007). See also, People v. Powell, 355 Ill. App. 3d 124, 822 N.E.2d 131 (1st Dist. 2004) (counsel not ineffective for failing to ask questions regarding gang bias); People v. Furge, 332 Ill.App.3d 1019, 1026, 774 N.E.2d 415, 422 (2002) (“We note that in this case, both the victim...and the defendant were gang members. It is reasonable that defense counsel as a matter of trial strategy concluded that questioning the venire about bias against gangs would serve no purpose since both the victim and defendant were similarly situated.”).

¹⁰⁰ People v. Campell, 2012 IL App (1st) 101249, ¶ 29; People v. Macias, 371 Ill.App.3d 632, 640-41, 863 N.E.2d 776, 782-83 (1st Dist. 2007).

J. Gender or motherhood and sympathy toward a party questions allowed. The Illinois Appellate Court did not disapprove of the prosecution probing “the venire regarding any sympathies they might have towards defendant based on her gender or motherhood.”¹⁰¹ The defense waived the issue by failing to object, but the Appellate Court ruled that there was no danger of bias from the question even if the defense had objected.

K. Government’s role in dating or domestic relationships not proper in questions. In a sexual assault case, the Appellate Court has held that the State may not ask prospective jurors their feelings about government regulation of dating or domestic relationships. The following question was found improper:

Is there anyone in the group that believes incidents that arise between people who have a dating relationship, so therefore, a domestic type relationship, should not be handled by the State, that that is something personal and the State should not become involved in those types of incidents?¹⁰²

L. Gruesome photograph questions allowed. Parties may inquire about the effect of photographs on the prospective jurors. The Illinois Appellate Court has relied in part on a juror’s response to the following question when affirming a trial court’s finding that the juror was impartial:

The fact that the photographs are very gruesome, would that in any way prevent you from giving [the defendant] a fair and impartial trial?¹⁰³

M. Incarcerated witness credibility questions allowed. Questions about whether prospective jurors would automatically disbelieve a witness because he or she is incarcerated are permissible.¹⁰⁴

N. Military service and witness credibility questions allowed. In People v. Lane,¹⁰⁵ some witnesses were actively serving in the U.S. military and testified wearing uniforms. The trial court asked prospective jurors whether they had “any bias either in favor of people serving in the military or against them.”¹⁰⁶ Defense counsel also asked potential jurors about “the impact that seeing witnesses in military dress blues might have on them.”¹⁰⁷ The Appellate Court found that the defendant received a fair trial, explaining that “the defense not only could but did question potential jurors about any biases they might have in favor of people serving in the military.”¹⁰⁸

O. Motives for crime generally not proper in questions. Parties should not ask prospective jurors if they believe somebody could commit a crime for a specific reason because such questions pre-educate the jury regarding a theory of the case. For example, prosecutors may not ask

¹⁰¹ People v. Klimawicze, 352 Ill. App. 3d 13, 26, 815 N.E.2d 760, 773 (1st Dist. 2004).

¹⁰² People v. Boston, 383 Ill.App.3d 352, 355, 893 N.E.2d 677, 680-81 (4th Dist. 2008).

¹⁰³ People v. Reeves, 314 Ill. App. 3d 482, 490, 732 N.E.2d 21, 27 (1st Dist. 2000).

¹⁰⁴ People v. Smith, 241 Ill.App.3d 365, 383, 610 N.E.2d 91, 102 (5th Dist. 1992).

¹⁰⁵ 398 Ill.App.3d 287, 922 N.E.2d 575 (5th Dist. 2010).

¹⁰⁶ People v. Lane, 398 Ill.App.3d 287, 295, 922 N.E.2d 575, 582 (5th Dist. 2010).

¹⁰⁷ People v. Lane, 398 Ill.App.3d 287, 295, 922 N.E.2d 575, 582 (5th Dist. 2010).

¹⁰⁸ People v. Lane, 398 Ill.App.3d 287, 299, 922 N.E.2d 575, 585 (5th Dist. 2010).

prospective jurors whether they believe that a person could plan and carry out a murder of another family member as a solution to problems within the relationship.¹⁰⁹ The Appellate Court reasoned that the question “served primarily to indoctrinate the jurors as to the State’s theory at trial and asked them to prejudge the facts of the case.”¹¹⁰

P. Pedestrians and location of crossing the street questions allowed. The Illinois Appellate Court has found that trial courts must allow voir dire “sufficient enough to identify jurors entertaining a bias against a pedestrian who crosses a street at a place other than an intersection or marked crosswalk...”¹¹¹

Q. Penal institution as the location of events questions allowed. When an event happens inside a penal institution, prospective jurors may be questioned to ensure that they will apply the law the same way they would for incidents in public places. The Illinois Appellate Court has approved the following questions in a case involving the charge of aggravated battery to a correctional officer:

The allegation in this case is an aggravated battery that occurred out at the prison. Does everybody here agree that crime in the streets, excuse me, that a crime in the streets is the same as a crime in prison? In other words, a battery can happen in the street just like it can in a prison. If you don’t disagree with that, would you raise your hand?¹¹²

Does everybody agree that no matter what you do, whether you work at a prison or whether you work at a Dairy Queen, whether you work at wherever, or whether you work for a judge or anything like that, that you have a right to be safe at work. If you don’t agree with that proposition, can you raise your hands?¹¹³

R. Police officer/law enforcement officer credibility questions allowed. Prospective jurors may be questioned about whether they would give more or less weight to the testimony of a law enforcement officer compared to other witnesses.¹¹⁴ In People v. Taylor,¹¹⁵ the trial court refused to

¹⁰⁹ People v. Bell, 152 Ill.App.3d 1007, 1017-18, 505 N.E.2d 365, 372-73 (3rd Dist. 1987).

¹¹⁰ People v. Bell, 152 Ill.App.3d 1007, 1017-18, 505 N.E.2d 365, 372-73 (3rd Dist. 1987).

¹¹¹ Grossman v. Gebarowski, 315 Ill.App.3d 213, 222, 732 N.E.2d 1100, 1107 (1st Dist. 2000).

¹¹² People v. Pettigrew, 2012 IL App (4th) 110656U, ¶ 7.

¹¹³ People v. Pettigrew, 2012 IL App (4th) 110656U, ¶ 7 (the trial court ruled that this question was not proper, but the Appellate Court ruled that the question was permissible).

¹¹⁴ People v. Dent, 2011 IL App (1st) 91384U, ¶¶ 66; People v. Mabry, 398 Ill.App.3d 745, 750 and 755, 926 N.E.2d 732, 737 and 741 (1st Dist. 2010) (questioning approved when the trial court asked prospective jurors whether they would “give the testimony of a police officer greater credibility than that of any other witness simply because that person is a police officer,” whether they “would give the testimony of police officers less credibility than that of any other witness,” and whether they would “afford greater or less weight to police officer testimony.”); People v. Arce, 289 Ill.App.3d 521, 528, 683 N.E.2d 502, 507 (1st Dist. 1997); People v. Taylor, 235 Ill.App.3d 763, 764, 601 N.E.2d 1305, 1306 (3rd Dist. 1992); People v. Beil, 76 Ill. App.3d 924, 930, 395 N.E.2d 400, 404 (4th Dist. 1979) (“Prospective jurors may be questioned, however, regarding their ability to give the same consideration to the testimony of a police officer as that of a lay witness.”).

¹¹⁵ 235 Ill.App.3d 763, 764, 601 N.E.2d 1305, 1306 (3rd Dist. 1992).

ask whether prospective jurors “would be more likely to believe the testimony of a police officer simply because he was a police officer” unless a venire member had already acknowledged knowing a police officer. The Illinois Appellate Court ruled that the trial court erred by refusing to ask the question of all prospective jurors.¹¹⁶

The Illinois Appellate Court has cited the following questions:

Would you judge a police officer’s testimony “by the same standards of reasonableness and truthfulness as [you] would any other witness in the case”?¹¹⁷

I understand all of us are favor—or very favorable, may have very favorable experiences with police officers. I’m not saying anything bad about a police officer but would you give a police officer any more credibility, his testimony, right off Jump Street?¹¹⁸

Now anything an officer said, would you just assume that that is true?¹¹⁹

So you are more likely to give credibility after the fact, would you say that you would be more likely to give a police officer’s testimony than any other citizen?¹²⁰

Even a slight favoritism of police testimony would justify excluding a prospective juror for cause. The Illinois Supreme Court upheld a decision to exclude a juror for cause when he was asked whether he was predisposed toward believing a police officer’s testimony and answered, “Well, other than the fact that they’re professionals and do this job for a living, I think I’d have a little more belief because of that.”¹²¹

Follow-up questions are permitted for jurors with relationships with law enforcement officers (friends, relatives, neighbors, acquaintances). Some prospective jurors have relationships with law enforcement officers. These relationships do not automatically disqualify a juror even when law enforcement officers are expected to testify. However, further inquiry is permissible to ensure lack of prejudice.

Prospective jurors may be questioned about whether they would feel fear or embarrassment because of a specific verdict. In People v. Gay,¹²² the defendant was charged with aggravated battery for striking a correctional officer in the Illinois Department of Corrections. A couple of the jurors stated that they were friends with correctional officers at the penal institution where the alleged crime occurred. The prospective jurors were asked whether “their relationship with correctional officers would cause them to favor one side or the other.”¹²³ Further, the Appellate

¹¹⁶ Id.

¹¹⁷ People v. Rudeen, 2011 IL App (2d) 100613U, ¶ 5.

¹¹⁸ People v. Jones, 2012 IL App (2d) 110346, ¶ 72.

¹¹⁹ People v. Jones, 2012 IL App (2d) 110346, ¶ 72.

¹²⁰ People v. Jones, 2012 IL App (2d) 110346, ¶ 72.

¹²¹ People v. Terrell, 185 Ill.2d 467, 489, 708 N.E.2d 309, 320 (1998).

¹²² 377 Ill.App.3d 828, 882 N.E.2d 1033 (4th Dist. 2007).

¹²³ People v. Gay, 377 Ill.App.3d 882, 835, 882 N.E.2d 1033, 1038-39 (4th Dist. 2007).

Court found it significant that the trial court and defense counsel asked the prospective jurors whether they would fear retaliation or embarrassment if they found the defendant not guilty. “Both jurors indicated they neither feared retaliation against their friends nor worried about their friends taunting them if the jury found defendant not guilty.”¹²⁴

Prospective jurors also may be asked about the nature of law enforcement work by their relatives or friends. For example, prospective jurors may be asked whether the law enforcement officers they know are involved in the same type of work as the officers expected to testify in the pending case.¹²⁵ A prospective juror may be asked whether her relationship with a police officer (aunt/niece in the particular case) “would affect her previous response to the questions regarding police officer credibility.”¹²⁶ Prospective jurors may also be questioned about whether any police officers they know have been victimized while on duty.¹²⁷

S. Psychiatric or psychological evidence questions allowed. If psychological or psychiatric testimony is anticipated, prospective jurors may be questioned about whether they could consider such evidence. Many prospective jurors are skeptical of mental health evidence. Such jurors arguably would not fairly consider testimony from psychologists, psychiatrists, or other expert witnesses regarding mental health issues.

The Illinois Supreme Court has relied upon juror responses to the following questions in ruling that the trial court acted appropriately when asked to remove a juror:

Have you or anyone close to you had an experience with a psychiatrist or psychologist?¹²⁸

Tell me briefly and generally what happened and who was involved with that? [Question asked after prospective juror answered affirmatively to having had an experience with a psychiatrist or psychologist.]¹²⁹

Are you still seeing one [a psychiatrist]?¹³⁰

How long ago was it that you saw one [a psychiatrist]?¹³¹

Would those experiences [with psychiatrists] in any way affect your ability to consider such testimony of that type of a witness?¹³²

¹²⁴ People v. Gay, 377 Ill.App.3d at 835, 882 N.E.2d at 1038.

¹²⁵ People v. Gay, 377 Ill.App.3d at 835, 882 N.E.2d at 1038.

¹²⁶ People v. Mabry, 398 Ill.App.3d 745, 755, 926 N.E.2d 732, 741 (1st Dist. 2010).

¹²⁷ People v. Thomas, 89 Ill.App.3d 592, 600, 411 N.E.2d 1076, 1083 (1st Dist. 1980).

¹²⁸ People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 962 (2009). See also, People v. Stack, 112 Ill.2d 301, 310, 493 N.E.2d 339, 343 (1986) (same question presented to prospective jurors).

¹²⁹ People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 962 (2009).

¹³⁰ People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 962 (2009).

¹³¹ People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 962 (2009).

¹³² People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 962 (2009).

However, the Illinois Supreme Court has upheld a trial court's discretion to refuse questions about prospective jurors' willingness to accept psychological evidence as mitigation in death penalty cases.¹³³

T. Registered sex offender bias questions allowed. The Illinois Supreme Court has found defense counsel to be effective during voir dire in part because counsel asked prospective jurors how they feel about sex offenders and then asked follow-up questions to probe for bias.¹³⁴ The following question was presented to the jury:

If you are aware of somebody who is a registered sex offender, how do you feel about that?¹³⁵

After a prospective juror responded that sex offenders should be locked up for life, the following questions were presented:

What if the law permitted that he not be locked up for life or she not be locked up for life? Do you still think that should be the case? Do you think you would be able to listen to a case and render a judgment on a case that's separate and distinct from the sex offender case?¹³⁶

Even though that person may have that background?¹³⁷

Is that background going to influence you at all do you believe in your decision on the case?¹³⁸

¹³³ People v. Buss, 187 Ill.2d 144, 178, 718 N.E.2d 1, 21 (1999). See section on voir dire in capital cases.

¹³⁴ People v. Manning, 241 Ill.2d 319, 322-23, 948 N.E.2d 542, 544-45 (2011).

¹³⁵ People v. Manning, 241 Ill.2d 319, 346, 948 N.E.2d 542, 557 (2011) (Freeman, J., dissenting).

¹³⁶ People v. Manning, 241 Ill.2d 319, 322, 948 N.E.2d 542, 544 (2011).

¹³⁷ People v. Manning, 241 Ill.2d 319, 323, 948 N.E.2d 542, 544 (2011).

¹³⁸ People v. Manning, 241 Ill.2d 319, 323, 948 N.E.2d 542, 544 (2011).

V. Questions Regarding Legal Principles

A. Agreement with legal principles and ability to follow the law questions allowed. Venire members who cannot follow the law, for whatever reason, are not qualified to sit as jurors. Thus, questions about whether prospective jurors disagree with a particular rule or would not apply that rule are permissible.¹³⁹

B. Proof beyond a reasonable doubt and privilege against self-incrimination questions in criminal cases.

1. Prospective jurors must be questioned on whether they understand and accept the presumption of innocence and the privilege against self-incrimination. Under Supreme Court Rule 431(b), jurors must be questioned about whether they understand *and* accept the “Zehr principles” – (1) the defendant is presumed innocent, (2) the State has the burden of proving the defendant guilty beyond a reasonable doubt, (3) the defendant need not offer any evidence, and (4) the defendant’s failure to testify cannot be held against her or him.¹⁴⁰ The Illinois Supreme Court has explained, “[e]ach of these questions goes to the heart of a particular bias or prejudice which would deprive defendant of his right to a fair and impartial jury.”¹⁴¹

Even if the defense does not request, the rule was amended in 2007 to require the trial court to question all jurors whether they understand and accept all four principles. The only exception is that “no inquiry of a prospective juror shall be made into the defendant’s failure to testify when the defendant objects.”¹⁴² Questions about the presumption of innocence and the State’s burden to prove the defendant guilty beyond a reasonable doubt do not eliminate the need for questions about the defendant’s right to remain silent.¹⁴³ The Illinois Supreme Court has explained:

[Rule 431(b)] mandates a specific question and response. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles.¹⁴⁴

¹³⁹ Limer v. Casassa, 273 Ill.App.3d 300, 302, 652 N.E.2d 854, 856 (4th Dist. 1995) (“[I]nquiry may be made as to whether a juror has a disagreement with a particular rule of law which will be applied in that case...”); People v. Thomas, 89 Ill.App.3d 592, 600, 411 N.E.2d 1076, 1083 (1st Dist. 1980).

¹⁴⁰ Ill.S.Ct.R. 431(b) (2012).

¹⁴¹ People v. Zehr, 103 Ill.2d 472, 447, 469 N.E.2d 1062, 1064 (1984) (citations omitted) (quoting People v. Zehr, 110 Ill.App.3d 458, 461, 442 N.E.2d 581, 584 (3rd Dist. 1982)).

¹⁴² Ill.S.Ct.R. 431(b) (2012).

¹⁴³ People v. Pogue, 312 Ill.App.3d 719, 726, 724 N.E.2d 525, 530-31 (1st Dist. 1999); People v. Wilson, 139 Ill.App.3d 726, 736-37, 487 N.E.2d 1015, 1023 (1st Dist. 1985).

¹⁴⁴ People v. Thompson, 238 Ill. 2d 598, 607, 939 N.E.2d 403, 409-10 (2010).

The Committee Comments to the rule state, “The new language is intended to ensure compliance with the requirements of People v. Zehr. It seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror’s willingness to follow the law.”¹⁴⁵

The rule does not require that the exact words be used.¹⁴⁶ However, the questions must ensure the venire members’ understanding of and ability to follow the four principles. Thus, questioning prospective jurors whether they have “any difficulty or quarrel with” the Zehr principles is sufficient,¹⁴⁷ but asking whether they have “any problems with those concepts”¹⁴⁸ or whether they “accept”¹⁴⁹ (without also asking whether they “understand”) the principles does not satisfy the rule.

Failure to comply with Rule 431(b) is not a structural error and does not always require reversal if the defendant waives the issue.¹⁵⁰ However, convictions have been reversed even when the defendant did not object to or propose questions during jury selection.¹⁵¹

Illinois courts have approved the following questions:

Do you have any bias against a person merely because he has been charged with a criminal offense?¹⁵²

¹⁴⁵ Committee Comment, May 1, 1997 (citations omitted). See also, People v. McCovins, 2011 IL App (1st) 81850B, ¶ 36.

¹⁴⁶ People v. Quinonez, 2011 IL App (1st) 92333 ¶ 49, 959 N.E.2d 713, 727 (1st Dist. 2011) (“This court has held that Rule 431(b) does not dictate a particular methodology for establishing the prospective jurors’ understanding or acceptance of those principles. In doing so, we have noted that there is no requirement that the specific language of the rule be used.”) (citations omitted); People v. Ingram, 409 Ill.App.3d 1, 10-12, 946 N.E.2d 1058, 1067-69 (1st Dist. 2011) (the rule does not “provide for any ‘magic words’ or ‘catechism’ ...”).

¹⁴⁷ People v. Ingram, 409 Ill.App.3d 1, 10-12, 946 N.E.2d 1058, 1067-69 (1st Dist. 2011).

¹⁴⁸ People v. Lampley, 2011 IL App (1st) 90661B, ¶ 35, 962 N.E.2d 1128, 1137 (1st Dist. 2011) (“The trial court in the instant case admonished the venire on each of the Zehr principles and asked if the prospective jurors had “any problems” with the principles. We agree that the trial court should have followed a straightforward questioning of the Zehr principles as outlined by Rule 431(b) and, as a result, committed error.”); People v. Schaefer, 398 Ill.App.3d 963, 967, 924 N.E.2d 1176, 1181 (2nd Dist. 2010) (asking prospective jurors whether they “had any problem” with Zehr principles not sufficient). But see, People v. Carmichle, 2012 IL App (1st) 101829U (Approving language “Does anyone have any problem with that concept?”).

¹⁴⁹ People v. Caliendo, 2011 IL App (2d) 91316U, ¶¶ 8-9, 2011 Ill.App.Unpub. LEXIS 2138 (2nd Dist. 2011).

¹⁵⁰ People v. Thompson, 238 Ill.2d 598, 611, 939 N.E.2d 403, 412 (2010); People v. Alexander, 408 Ill.App.3d 994, 1007-08, 946 N.E.2d 449, 461-62 (3rd Dist. 2011).

¹⁵¹ See, e.g., People v. Gonzalez, 2012 IL App (3d) 110031U; Village of Mundelein v. Sanchez-Robles, 2012 IL App (2d) 101324U; People v. Caliendo, 2011 IL App (2d) 91316U, ¶¶ 8-9 (2nd Dist. 2011); People v. Vesey, 2011 IL App (3d) 90570, 957 N.E.2d 1253 (3rd Dist. 2011); People v. Schaeffer, 398 Ill.App.3d 963, 924 N.E.2d 1176 (2nd Dist. 2010); People v. Owens, 394 Ill.App.3d 147, 153, 914 N.E.2d 1280, 1285 (4th Dist. 2009); People v. Pearson, 356 Ill. App. 3d 390; 826 N.E.2d 1099 (1st Dist. 2005).

¹⁵² People v. Alexander, 408 Ill.App.3d 994, 1007, 946 N.E.2d 449, 461 (3rd Dist. 2011).

If at the close of all the evidence and after you have heard arguments of counsel you believe that the State has failed to sustain the burden of proof and has failed to prove the defendant guilty beyond a reasonable doubt, would you have any hesitation whatsoever in returning a verdict of not guilty?¹⁵³

If the defendant decides not to testify in his own behalf, would you hold it against him?¹⁵⁴

Do you understand that the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proven guilty beyond a reasonable doubt by the State?¹⁵⁵

Now, would what you have read or heard require the defendant to prove himself innocent?¹⁵⁶

And so do you feel that a defendant then should be required to prove himself innocent of the charge against him?¹⁵⁷

Would you hold it against any defendant the fact that he didn't or she didn't testify in a trial when they were charged with a crime?¹⁵⁸

2. The State cannot ask questions that minimize the burden of proof and parties should not attempt to define reasonable doubt during voir dire. The State should not admonish prospective jurors that proof beyond a reasonable doubt does not mean proof beyond all doubt.¹⁵⁹ Similarly, the State should not ask questions that presume guilt. The Illinois Appellate Court has disapproved of the following question:

Do you know any attorneys that practice law as far as defense of criminals is concerned?¹⁶⁰

3. Prospective jurors may be questioned about different burdens of proof applied to affirmative defenses in some circumstances. Affirmative defenses sometimes involve a different burden of proof. In such cases, the defendant may request that prospective jurors be instructed on the different burden of proof as part of the voir dire process. The Illinois Appellate Court has ruled in the context of the insanity defense, "We conclude that defendant's right to an impartial jury is diminished when the possible prejudice of potential jurors against a

¹⁵³ People v. Zehr, 103 Ill.2d 472, 476, 469 N.E.2d 1062, 1063-64 (1984).

¹⁵⁴ People v. Zehr, 103 Ill.2d 472, 476, 469 N.E.2d 1062, 1063-64 (1984).

¹⁵⁵ People v. Zehr, 103 Ill.2d 472, 476, 469 N.E.2d 1062, 1063-64 (1984).

¹⁵⁶ People v. Buss, 187 Ill.2d 144, 195, 718 N.E.2d 1, 30 (1999).

¹⁵⁷ People v. Buss, 187 Ill.2d 144, 195, 718 N.E.2d 1, 30 (1999).

¹⁵⁸ People v. Buss, 187 Ill.2d 144, 195, 718 N.E.2d 1, 30 (1999).

¹⁵⁹ People v. Edwards, 55 Ill.2d 25, 35, 302 N.E.2d 306, 311 (1973) (harmless error).

¹⁶⁰ People v. York, 93 Ill.App.2d 180, 181, 235 N.E.2d 159, 160 (2nd Dist. 1968).

lesser burden of proof imposed by law on a defendant is not subject to meaningful inquiry on *voir dire*... We limit our decision to require that prospective jurors on *voir dire* be informed of the defendant's burden of proof and standard of proof imposed by law when the insanity defense is raised and we limit that requirement to insanity cases where defense counsel requests that prospective jurors be so informed."¹⁶¹

C. Accountability questions allowed. The State may ask a brief question about whether jurors could follow the law and could sign a guilty verdict form if the evidence revealed that the defendant was not the principal and was merely accountable.¹⁶² The following questions have been approved by higher courts in Illinois:

The law in certain instances would provide that a person would be held responsible for the acts of a co-defendant, a cohort in crime....Would it affect your ability in deciding this case on the issue or the charge of murder provided that the law states that the defendant could be held accountable under the facts that the defendant, this defendant before you, did not do the direct act, did not pull the trigger of the gun so to speak, that caused the death of the individual. Do you think that would affect your ability to decide or could you follow that law?¹⁶³

Do you understand under the law of accountability, that someone may be found accountable or responsible for the actions of another?¹⁶⁴

However, questions about accountability must be limited to a brief and accurate statement of the law followed by a question whether the prospective juror could follow the law. Long, repeated inquiries or previews of the evidence are objectionable because they constitute indoctrination and pre-trying the case.¹⁶⁵

The Appellate Court specifically found the following questions and statements to be objectionable:

Somebody, in this case we believe the defendant, and others got together to commit a crime.¹⁶⁶

Do you have any problem with the law of criminal responsibility and one for the actions of another when you're part of that agreement?¹⁶⁷

¹⁶¹ People v. Gregg, 315 Ill.App.3d 59, 73, 732 N.E.2d 1152, 1163 (1st Dist. 2000).

¹⁶² People v. Davis, 95 Ill.2d 1, 18, 447 N.E.2d 353, 361 (1983); People v. Klimawicze, 352 Ill. App. 3d 13, 26, 815 N.E.2d 760, 772 (1st Dist. 2004); People v. Johnson, 276 Ill.App.3d 656, 658-59, 659 N.E.2d 22, 24 (1st Dist. 1995) ("[I]t is not error to allow the prosecutor to briefly recite accountability principles and inquire as to whether potential jurors could follow the law as related to those principles."). *C.f.*, People v. Washington, 104 Ill.App.3d 386, 391, 432 N.E.2d 1020, 1024 (1st Dist. 1982) ("There is no reasonable likelihood that potential jurors will have fixed opinions or biases concerning...the law of accountability.").

¹⁶³ People v. Davis, 95 Ill.2d 1, 18, 447 N.E.2d 353, 361 (1983).

¹⁶⁴ People v. Klimawicze, 352 Ill. App. 3d 13, 26, 815 N.E.2d 760, 772 (1st Dist. 2004).

¹⁶⁵ People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859-60 (1st Dist. 1996).

¹⁶⁶ People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996).

Would you have any problems following the law that says it doesn't matter whether he intended the guy to die or not or whether he knew that the other guy was going to shoot him, that he would still be guilty of murder?¹⁶⁸

That when you're part of the plan when you set up an armed robbery with other people and you get guns and masks and things you can be found responsible for the crime even though somebody else is the one who actually did the shooting?¹⁶⁹

Similarly, trial courts may refuse questions on whether venire members would find a defendant guilty due to her or his mere presence at the scene of a crime.¹⁷⁰ The Illinois Appellate Court has found the following question objectionable:

If the evidence shows that a defendant was at the scene of the violence, would this create in your mind an assumption that because the defendant was there, he probably is guilty?¹⁷¹

The Appellate Court reasoned that the “mere presence” question tested jurors’ understanding of the law of accountability before being instructed.¹⁷² Based on this reasoning, a question that summarizes the “mere presence” rule and then asks prospective jurors if they could apply that principle may be acceptable.

D. Compulsion questions not allowed. Defendants in criminal cases do not have a right to ask questions about prospective jurors’ attitudes toward the compulsion defense.¹⁷³ The matter is left to

¹⁶⁷ People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996).

¹⁶⁸ People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996).

¹⁶⁹ People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859-60 (1st Dist. 1996).

¹⁷⁰ People v. Nunn, 184 Ill.App.3d 253, 272-73, 541 N.E.2d 182, 196 (1st Dist. 1989).

¹⁷¹ People v. Nunn, 184 Ill.App.3d 253, 272, 541 N.E.2d 182, 196 (1st Dist. 1989).

¹⁷² The Appellate Court explained:

In the case at bar, however, the proffered question did not summarize accountability principles and then ask the jurors if they could properly apply those principles to the evidence, in order to discern fundamental bias or misperception of the prospective jurors. Rather the suggested question in the instant case was intended to test the jurors’ understanding of the law of accountability before they had even been instructed with respect to accountability principles. Under these circumstances, we conclude that the trial court properly declined to submit the defense question to the prospective jurors during voir dire.

People v. Nunn, 184 Ill.App.3d 253, 273, 541 N.E.2d 182, 196 (1st Dist. 1989).

¹⁷³ People v. Boston, 383 Ill.App.3d 352, 354, 893 N.E.2d 677, 680 (4th Dist. 2008); People v. Phillips, 99 Ill.App.3d 362, 369, 425 N.E.2d 1040, 1046 (1st Dist. 1981); People v. Byer, 75 Ill.App.3d 658, 670-71, 394 N.E.2d 632, 641 (1st Dist. 1979).

the discretion of the trial court. For this reason, the Illinois Appellate Court has upheld the refusal to ask the following question:

Do you feel that a mother, to protect herself and her children from being hurt, might involve herself in a crime, and even be willing to go to jail to protect herself and her children?¹⁷⁴

E. Consent questions not allowed in sexual assault cases. In sexual assault cases, the concept of consent is a matter of law or instructions and is not controversial. Therefore, consent questions are generally not allowed.¹⁷⁵ Similarly, questions about the lack of physical resistance during a sexual attack or whether consent is granted through certain conduct are improper. The Illinois Appellate Court has ruled that the following questions are improper:

Now, can we all agree, and if you do not, just raise your hand, that regardless of the type or length of the relationship, that there must be consent before every sexual act between two people?¹⁷⁶

And is there anyone that believes if a person or a woman gets an order of protection against someone and then invites that person over that she has [the order of protection] against, does anyone believe that the invitation itself equals consent to a later sexual act?¹⁷⁷

And along these same lines, the woman with the order of protection, if she invites that person over, is there anyone that believes the woman is responsible for anything violent that may happen after the person comes over?¹⁷⁸

And is there anyone that believes a person consents to a sexual act if they do [no]t scream or fight or kick or yell or scratch or hit? Anyone require a victim to do any of those things while she [i]s being assaulted?¹⁷⁹

Each of these questions was deemed improper because they pre-educate the jury to the State's theory of the case and because they concern matters of law or instruction.

F. Death penalty questions.

1. Ability to impose the death penalty (Witherspoon questions). The State may question prospective jurors who will decide the penalty in a capital case whether they could impose the

¹⁷⁴ People v. Byer, 75 Ill.App.3d 658, 670, 394 N.E.2d 632, 641 (1st Dist. 1979).

¹⁷⁵ People v. Boston, 383 Ill.App.3d 352, 355, 893 N.E.2d 677, 681 (4th Dist. 2008).

¹⁷⁶ People v. Boston, 383 Ill.App.3d 352, 355, 893 N.E.2d 677, 681 (4th Dist. 2008).

¹⁷⁷ People v. Boston, 383 Ill.App.3d 352, 355, 893 N.E.2d 677, 681 (4th Dist. 2008) (brackets in original).

¹⁷⁸ People v. Boston, 383 Ill.App.3d 352, 355, 893 N.E.2d 677, 681 (4th Dist. 2008).

¹⁷⁹ People v. Boston, 383 Ill.App.3d 352, 355, 893 N.E.2d 677, 681 (4th Dist. 2008) (brackets in original).

death penalty. A prospective juror who would refuse to give the death penalty under any circumstances will be excused.¹⁸⁰

However, a “venire member who expresses only general objections to the death penalty may not be excused for cause.”¹⁸¹ To exclude a prospective juror for cause, the government must establish that the juror’s views on capital punishment will prevent or substantially impair the performance of the juror’s duties in accordance with the instructions and oath.¹⁸² Even religious convictions against the death penalty are not enough, by themselves, to sustain a challenge for cause. The Illinois Supreme Court has explained, “A prospective juror may not be removed for cause merely because he or she expresses general objections or conscientious or religious scruples against the imposition of the death penalty.”¹⁸³

The Illinois Supreme Court has relied upon juror responses to the following questions when determining impartiality in capital cases:

Are your beliefs about the death penalty such that regardless of the facts of the case and regardless of the background of the defendant that if the defendant were found guilty of first-degree murder, you would automatically vote against imposing the death penalty?¹⁸⁴

Well, can you give that some thought and be a little less equivocal. Would you be inclined to automatically vote against the death penalty regardless of the facts of the case and regardless of the background of the defendant?¹⁸⁵

If you believe that after hearing all of the facts, all of the aggravation, and all of the mitigation that the death penalty was the appropriate sentence, would you impose it?¹⁸⁶

¹⁸⁰ Wainwright v. Witt, 469 U.S. 412, 424 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968). Some observers have argued that “death qualified” juries violate the constitutional guarantees of (1) trial by impartial jury drawn from a fair cross section of the community and (2) due process because the procedure results in more punitive juries. Federal and Illinois courts have rejected these claims. See People v. Emerson, 189 Ill.2d 436, 468-70, 727 N.E.2d 302, 321-22 (2000).

¹⁸¹ People v. Brown, 172 Ill.2d 1, 32, 665 N.E.2d 1290, 1304 (1996). See also, People v. Banks, 237 Ill.2d 154, 189, 934 N.E.2d 435, 454 (2010) (“[T]he right to an impartial jury, guaranteed by the sixth and fourteenth amendments to the United States Constitution, prohibits removal of a prospective juror for cause where the prospective juror voices only general objections to the death penalty.”); People v. Mahaffey, 128 Ill.2d 388, 416, 539 N.E.2d 1172, 1185 (1989).

¹⁸² Wainwright, 469 U.S. at 424.

¹⁸³ People v. Emerson, 198 Ill.2d 436, 472, 727 N.E.2d 302, 322 (2000). See also, People v. Buss, 187 Ill.2d 144, 196, 718 N.E.2d 1, 30 (1999) (“[The prospective juror] stated, ‘I would say [my feelings against the death penalty are] probably ninety percent strong. I can [*sic*] say that I have a hundred percent understanding or consideration of the issue; but for strong religious moral reasons, I am quite assured that, that I would oppose.’ Based on the fact that [the prospective juror] indicated that he could follow the law despite these beliefs, the circuit court denied the State’s motion to excuse him for cause.”) (brackets within quoted material in original).

¹⁸⁴ People v. Harris, 225 Ill.2d 1, 35-36, 866 N.E.2d 162, 182 (2007).

¹⁸⁵ People v. Harris, 225 Ill.2d 1, 36, 866 N.E.2d 162, 182 (2007).

¹⁸⁶ People v. Harris, 225 Ill.2d 1, 36, 866 N.E.2d 162, 182 (2007).

All we want to do is make sure that you could be fair to both sides; keep an open mind in this case, set your personal beliefs about the death penalty aside, and just follow the law as I give it to you. That's all we want to do, and my question is very simple to you. Can you do that and in doing that, consider all of the sentencing options and if after hearing all of the facts, all of the aggravation, all of the mitigation, and keep an open mind in the process, you determine that the death penalty is the appropriate sentence, could you sign a verdict form to that effect?¹⁸⁷

If you convicted someone of murder, are there circumstances under which you could consider giving the death penalty?¹⁸⁸

[Are your feelings about the death penalty such that] no matter what the facts of the case may be and no matter what the background of the defendant may be, that under no circumstances would you ever give the death penalty in a murder case?¹⁸⁹

I mentioned in the courtroom, if the defendant is found guilty of the offenses charged in this case, the State will seek the death penalty in a separate sentencing proceeding. Do you have any scruples, by which I mean strong feelings by reason of religion, morals, or conscience, against the imposition of the death penalty?¹⁹⁰

Are your beliefs such that regardless of the facts of the case or the background of the defendant, that under no circumstances could you consider signing a verdict directing the Court to sentence the defendant to death?¹⁹¹

2. Ability not to impose the death penalty (Morgan questions). Venire members who believe that defendants convicted of murder should always receive the death penalty are subject to challenge for cause.¹⁹² The U.S. Supreme Court has explained, "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror."¹⁹³

The Illinois Supreme Court has approved the following questions:

¹⁸⁷ People v. Harris, 225 Ill.2d 1, 36, 866 N.E.2d 162, 182-83 (2007).

¹⁸⁸ People v. Cloutier, 156 Ill.2d 483, 495, 622 N.E.2d 774, 780-81 (1993).

¹⁸⁹ People v. Emerson, 189 Ill.2d 436, 467, 727 N.E.2d 302, 320 (2000).

¹⁹⁰ People v. Banks, 237 Ill.2d 154, 187, 934 N.E.2d 435, 453 (2010).

¹⁹¹ People v. Banks, 237 Ill.2d 154, 187, 934 N.E.2d 435, 453 (2010).

¹⁹² Morgan v. Illinois, 504 U.S. 719, 729 (1992); People v. Cloutier, 156 Ill.2d 483, 498, 622, N.E.2d 774, 782 (1993). However, defense counsel is not constitutionally required to ask such a question. The Illinois Supreme Court has ruled that failure to "reverse-Witherspoon" does not constitute ineffective assistance of counsel. People v. Childress, 191 Ill.2d 168, 175-76, 730 N.E.2d 32, 36 (2000).

¹⁹³ Morgan v. Illinois, 504 U.S. 719, 729 (1992).

Does anybody who is on the jury have any philosophical, religious, conscientious scruples or convictions that would require them automatically to impose the death penalty if there were a guilty verdict? Do you understand the question? I am just asking the reverse. Is there anybody who would find they would automatically impose the death penalty?¹⁹⁴

On the other hand, if you convicted someone of murder, would you be able to consider a sentence less than death for that person?¹⁹⁵

Are your beliefs about that such that regardless of the facts of the case or the background of the Defendant, but if the Defendant were found guilty as charged, you would automatically vote to impose the death penalty and not consider signing a verdict which would result in a sentence of imprisonment?¹⁹⁶

Other jurisdictions have allowed different versions of Morgan questions:

If you were to sit as a juror in this case and the jury were to convict the defendant of capital murder, would you also be able to consider voting for a sentence less than death?¹⁹⁷

Is there any one of you among the jurors who would return a verdict directing the court to impose the death penalty in every case where there is a finding of guilty of the offense of murder regardless of what the facts were that you heard?¹⁹⁸

If the jury should convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?¹⁹⁹

Is it your belief, sir, that the death penalty is the appropriate penalty for any murder?²⁰⁰

Do you have a personal belief that all first degree murder cases should suffer the death penalty as opposed to life imprisonment?²⁰¹

Does anyone here believe the death penalty ought to be imposed any time there's a murder?²⁰²

¹⁹⁴ People v. Brown, 172 Ill.2d 1, 30, 665 N.E.2d 1290, 1303 (1996).

¹⁹⁵ People v. Cloutier, 156 Ill.2d 483, 495, 622 N.E.2d 774, 780-81 (1993).

¹⁹⁶ People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 961-62 (2009). The Illinois Supreme Court commented, "What emerged from that questioning was Juror A's belief that he could be a fair and impartial juror...in that he did not have any strong beliefs for or against the death penalty, he would 'absolutely' consider evidence supporting an insanity defense, and he would further consider any mental illness defendant was suffering to be a mitigating factor in sentencing." Id., 234 Ill.2d at 120, 917 N.E.2d at 970.

¹⁹⁷ Mackall v. Angelone, 131 F.3d 442, 451 (4th Cir. 1997).

¹⁹⁸ People v. Jackson, 182 Ill.2d 30, 61, 695 N.E.2d 391, 407 (1998).

¹⁹⁹ Beavers v. Pruett, 125 F.3d 847, 1997 WL 585739, (4th Cir. 1997).

²⁰⁰ Com. v. Keaton, 556 Pa. 442, 467, 729 A.2d 529, 543 (1999).

²⁰¹ People v. Mitchell, 61 Cal.2d 353, 367, 392 P.2d 526, 535 (1964).

3. Morgan questions that “life-qualify” jurors by explaining the definitions of first degree murder and mitigation. The trial court has a constitutional obligation to ensure that capital jurors are life-qualified in the sense that they will consider mitigation.²⁰³ A process that includes jurors who would refuse to consider mitigating factors is unconstitutional. The only way to identify such jurors is to ask them questions using language that they comprehend. For this reason, Morgan questions must make clear that the prospective juror is considering the appropriate punishment for someone who is guilty of first degree murder without any legal excuse or justification.

Morgan questions are often unclear to prospective jurors because they do not understand (1) the definition of first degree murder or (2) the nature of mitigating factors as “compassionate” factors rather than “exonerating” factors. Some jurors feel that they would not impose the death penalty in all cases of murder because they would not vote for death in cases of self-defense or insanity. Of course, someone who has a legal excuse is not guilty of first degree murder and cannot receive the death penalty in the first place. For this reason, the Morgan questions should clearly explain that prospective jurors are considering whether to impose the death penalty on someone who is guilty of first degree murder without any legal justification.

For the same reason, questions must define “mitigation” at least to the extent that jurors do not confuse the terms “mitigating” with “exonerating” or “providing a legal justification.” Defining a mitigating factor merely as “a reason not to give the death penalty” is not sufficient because some jurors will consider only legal defenses to the charges (e.g., self-defense or insanity) as reasons not to give the death penalty. Such jurors are not eligible to serve under Morgan because they would always impose the death penalty if the defendant is guilty of first degree murder. However, these jurors will respond that they will consider mitigating factors when answering non-specific Morgan questions because they think the term “mitigating” encompasses legal defenses to the charges.

The Capital Jury Project, through interviews of hundreds of jurors who have served on capital juries, has demonstrated that significant numbers of jurors automatically impose the death penalty because the defendant is guilty of an intentional homicide without any legal justification.²⁰⁴ “These data make it clear that many persons chosen to serve as capital jurors

²⁰² State v. Biegenwald, 126 N.J. 1, 98, 594 A.2d 172, 226 (1991).

²⁰³ Morgan v. Illinois 504 U.S. 719, 735-36 (1992); Sumner v. Shuman 483 U.S. 66, 74 (1987); Eddings v. Oklahoma, 455 U.S. 104, 114 and 115 n.10 (1982) (“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence....[The Constitution] requires the sentencer to listen.”) (emphasis in original).

²⁰⁴ See Bowers, William J., Benjamin D. Fleury-Steiner, and Michael E. Antonio. "The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction" in James R. Acker, Robert M. Bohm, and Charles S. Lanier, America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction, 2nd ed., (2003) pp. 429-30 (hereinafter Bowers, Fleury-Steiner and Antonio); Capital Jury Project website, <http://www.albany.edu/scj/13194.php> (identifying additional publications and summarizing research). More than half (57.1%) of capital jurors responded that the death penalty is the “only acceptable” punishment for “a planned, premeditated murder.” Bowers, Fleury-Steiner and Antonio at 432.

fail to appreciate or to personally accept the principle, established in Woodson (1976), that the death penalty is never the ‘only acceptable’ punishment for a capital offense. More than half of the jurors believed that death was the only acceptable punishment for repeat murder, premeditated murder, and multiple murder....The obvious implication is that voir dire questioning has failed to detect many jurors who, because of their pro-death predispositions, should fail the ‘life qualification’ test for capital jury service.”²⁰⁵

Higher courts in Illinois have not expressly required or prohibited Morgan questions that define what it means to be guilty of first degree murder. Other jurisdictions permit such questions:

And would you choose the death penalty in every case of deliberate, premeditated, intentional murder for which there is no legal justification or excuse?²⁰⁶

So that, even though there may be evidence offered, or argued, as mitigation that you would still, bottom line, be considering a killing that was intentional, premeditated, and without any legal justification or excuse. With this little lead up, can you tell me how you would feel about the death penalty as a punishment for that kind of crime, taking those things into consideration?²⁰⁷

If the circumstances that were argued in mitigation were not circumstances that would legally justify the killing, would you be able to give consideration to those mitigating circumstances?²⁰⁸

“[T]hese questions are not the sort of ‘general fairness and ‘follow the law’ questions’ that the Supreme Court found to be constitutionally deficient in Morgan. Instead, they are the sort of questions that enable a capital defendant at *voir dire* to identify prospective jurors holding the misconception that ‘death should be imposed *ipso facto* upon conviction of a capital offense . . . regardless of the facts and circumstances of conviction.”²⁰⁹

4. General questions asking a prospective juror’s “feelings” about the death penalty are permissible. When questioning prospective jurors about their attitudes toward the death penalty, the Illinois Supreme Court has recognized the value of requiring jurors to provide a narrative answer. The Illinois Supreme Court noted:

[E]ach prospective juror not excused during preliminary questioning was required to provide a narrative answer to the court’s question, “Can you explain to us here in court what your feelings are about the imposition of the

²⁰⁵ Bowers, Fleury-Steiner and Antonio, pp. 432, 434.

²⁰⁶ Richmond v. Polk, 375 F.3d 309, 330-31 (4th Cir. 2004).

²⁰⁷ Richmond v. Polk, 375 F.3d 309, 330 (4th Cir. 2004).

²⁰⁸ Richmond v. Polk, 375 F.3d 309, 330 (4th Cir. 2004)

²⁰⁹ Richmond v. Polk, 375 F.3d 309, 330-31 (4th Cir. 2004) (citations omitted, brackets and italics in original).

death penalty?” Their responses generally gave a clear picture of their attitudes toward this law.²¹⁰

Additionally, the Illinois Supreme Court has approved asking prospective jurors about their level of support for the death penalty:

Do you have any strong feelings in favor of the death penalty?²¹¹

Other jurisdictions also allow questions designed to learn venire members’ general feelings about the death penalty:

If you were chosen as a juror, would you have a tendency to favor either the death penalty, the life imprisonment penalty, or neither?²¹²

Do you have strong feelings in favor of the death penalty?²¹³

5. No right to specific aggravation questions. Trial courts have the discretion to bar questions about whether prospective jurors would always vote for the death penalty if certain aggravating factors are present.²¹⁴ Some judges view these questions as a form of pre-trying the case with hypotheticals and therefore prohibit such inquiries. Thus, the trial court may restrict questions about the age of the victim²¹⁵ or the number of victims (multiple murder eligibility factor).²¹⁶

However, the Illinois Supreme Court has not prohibited these types of questions. The holding in these decisions is that questions about specific aggravating factors are not constitutionally required by Morgan v. Illinois,²¹⁷ not that such questions are barred. In People v. Hope,²¹⁸ for example, prospective jurors were asked whether they would automatically impose the death penalty if they learned that the defendant committed the murder in the course of an armed

²¹⁰ People v. Buss, 187 Ill.2d 144, 195, 718 N.E.2d 1, 30 (1999). The Illinois Supreme Court also approved this question: “[C]an you tell us what your feelings, what personal feelings you have, if any, regarding the imposition of the death penalty?” Id. at 196, 718 N.E.2d at 31.

²¹¹ People v. Banks, 237 Ill.2d 154, 187, 934 N.E.2d 435, 453 (2010).

²¹² Ramsey v. Bowersox, 149 F.3d 749, 757 (8th Cir. 1998).

²¹³ U.S. v. Tipton, 90 F.3d 861, 878 (4th Cir. 1996).

²¹⁴ People v. Terrell, 185 Ill.2d 467, 484, 708 N.E.2d 309, 318 (1998) (“[T]he mandates of Morgan do not require questioning potential jurors about how they would act given the particular aggravating circumstances of the victim’s murder.”); People v. Hope, 168 Ill.2d 1, 30, 658 N.E.2d 391, 404 (1995) (“Conducting inquiry into whether a potential juror would vote to impose the death penalty, given a particular set of circumstances, is thus not required by Morgan.”).

²¹⁵ People v. Terrell, 185 Ill.2d 467, 485, 708 N.E.2d 309, 318 (1998); People v. Brown, 172 Ill.2d 1, 30-31, 665 N.E.2d 1290, 1303 (1996).

²¹⁶ People v. Harris, 225 Ill.2d 1, 39, 866 N.E.2d 162, 184 (2007) (trial court prohibited defendant from asking prospective jurors whether they would automatically impose the death penalty if the “defendant were found guilty of two murders”); People v. Hope, 168 Ill.2d 1, 28, 658 N.E.2d 391, 403 (1995).

²¹⁷ 504 U.S. 719 (1992).

²¹⁸ 168 Ill.2d 1, 658 N.E.2d 391 (1995).

robbery.²¹⁹ In the same decision, the Illinois Supreme Court found no error in the trial court's refusal to ask whether the prospective jurors would automatically impose the death penalty if they learned that the defendant had previously committed another murder.²²⁰ Once the Morgan issue was resolved, the trial court had discretion.

Illinois courts have relied upon responses to the following questions:

Is there anything about the nature of the offense, armed robbery and murder, that sets you off one way or the other?²²¹

Would you automatically impose the death penalty if you found [the defendant] guilty of armed robbery and murder?²²²

The fact that there are five victims, three kids and two women, would that in any way prevent you from giving [the defendant] a fair and impartial trial?²²³

Additionally, the defense may request that the judge "notify" prospective jurors about aggravating factors before questioning whether they would automatically impose the death penalty. While the defense was prohibited from asking specific questions about the victim's age in People v. Terrell, the Illinois Supreme Court justified its decision by pointing out that the trial court had already "informed the venire that the victim involved was a child [and] educated the venire that the purpose of the voir dire examination was to select fair and impartial jurors who would decide the matter based solely on the evidence and the law. In addition, during the individual examination, the trial court asked each venireperson whether he or she would automatically vote to impose death without consideration of the mitigating evidence."²²⁴ Thus, there is dicta supporting the proposition that the trial court should notify the jurors about aggravating factors in its initial remarks even if specific questions are prohibited.

Many jurisdictions permit specific aggravation questions. The questions have been deemed proper because they do not ask jurors to pre-commit to a decision, but instead are designed to ascertain a prospective juror's ability to consider all possible punishments.²²⁵ According to

²¹⁹ People v. Hope, 168 Ill.2d 1, 31, 658 N.E.2d 391, 405 (1995).

²²⁰ People v. Hope, 168 Ill.2d 1, 31, 658 N.E.2d 391, 405 (1995).

²²¹ People v. Hope, 168 Ill.2d 1, 31, 658 N.E.2d 391, 405 (1995).

²²² People v. Hope, 168 Ill.2d 1, 31, 658 N.E.2d 391, 405 (1995).

²²³ People v. Reeves, 314 Ill. App. 3d 482, 490, 732 N.E.2d 21, 27 (1st Dist. 2000).

²²⁴ People v. Terrell, 185 Ill.2d 467, 485, 708 N.E.2d 309, 318 (1998).

²²⁵ See, e.g., People v. Cash, 28 Cal. 4th 703, 720-21, 50 P.3d 332, 341 (2002) ("A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, *whether or not the circumstance that would be determinative for that juror has been alleged in the charging document.*" (citations omitted, italics in original)); People v. Ervin, 22 Cal.4th 48, 70-71, 990 P.2d 506, 516 (2000) (proper to question and exclude prospective jurors who would never impose the death penalty on the hirer in a murder-for-hire case); People v. Pinholster, 1 Cal.4th 865, 916-17, 824 P.2d 571, 591 (1992) (proper to question and exclude prospective jurors who would never impose the death penalty in a felony-murder case); U.S. v. Flores, 63 F.3d 1342,

these cases, questions regarding one particular aggravating factor are the opposite of pre-trying the case with hypotheticals because they seek uncommitted jurors and allow for the excusal of jurors who would automatically vote for one side without considering all of the relevant evidence.

6. No right to specific mitigation questions. Trial courts have the authority to prohibit questions about mitigating factors if they believe such inquiries constitute indoctrination or pre-trying the case.²²⁶ For this reason, the Illinois Supreme Court has prohibited the following questions:

Do you understand that it is not a question of counting how many aggravating circumstances the State may try to present versus how many mitigating circumstances the defense may try to present?²²⁷

Do you understand that the existence of any one mitigating circumstance could outweigh all of the aggravating circumstances?²²⁸

Do you understand the term “mitigate” - it means to make less severe?²²⁹

Would you be able to consider any mitigating factors presented by the defense?
a. Would you be able to consider and give full weight to psychiatric/psychological testimony? b. Would you consider mercy as a possible mitigating factor, based on the evidence?²³⁰

However, the Illinois Supreme Court has been inconsistent in its treatment of such questions. Trial courts sometimes allow questions about whether jurors can consider specific mitigating factors and the Illinois Supreme Court has then used such questions to analyze whether jurors can fairly perform their role in capital sentencing hearings. The Illinois Supreme Court has relied upon juror responses to the following questions:

1354, 1356 (5th Cir. 1995) (“Both the government and [the defendant] asked the venire about their feelings toward specific aggravating and mitigating factors and about the penalty process.” Approved questions included whether prospective jurors could impose the death penalty in the case of a child victim or a victim who was involved in illegal drug-related activity with the defendant.); U.S. v. Johnson, 366 F.Supp.2d 822, 849 (N.D. Iowa 2005) (“[I]t would be permissible for defense counsel to frame a ‘case-specific’ question as a ‘life-qualifying’ question (for example, either, ‘Could you fairly consider a life sentence if the evidence showed *x*?’ or ‘Would you automatically reject a life sentence if the evidence showed *x*?’)...Either party may also ask ‘case-specific’ variants of the question approved in Morgan, such as the following: ‘If you found the defendant guilty of *murdering children*, would you automatically vote to impose the death penalty, no matter what the *other* facts are?’”) (italics in original).

²²⁶ People v. Buss, 187 Ill.2d 144, 178, 718 N.E.2d 1, 21 (1999).

²²⁷ People v. Buss, 187 Ill.2d 144, 178, 718 N.E.2d 1, 21 (1999).

²²⁸ People v. Buss, 187 Ill.2d 144, 178, 718 N.E.2d 1, 21 (1999).

²²⁹ People v. Buss, 187 Ill.2d 144, 178, 718 N.E.2d 1, 21 (1999).

²³⁰ People v. Buss, 187 Ill.2d 144, 178, 718 N.E.2d 1, 21 (1999).

Would you consider a person suffering--the fact that a person suffers from a mental illness a mitigating factor?²³¹

And would you be able to consider that mitigating factor [mental illness] along with any other aggravating or mitigating factors that may be presented to you at the trial?²³²

Do you think that a person could be guilty but still suffer from a mental illness?²³³

Would you consider a person suffering – the fact that a person suffers from a mental illness a mitigating factor?²³⁴

And would you be able to consider that mitigating factor [that a person suffers from a mental illness] along with any other aggravating or mitigating factors that may be presented to you at the trial?²³⁵

The Illinois Supreme Court cited the answers to these questions as important information establishing the qualifications of a juror and rejecting an argument for a challenge for cause.²³⁶

Other jurisdictions have also approved similar mitigation questions:

If the court instructs you that you should consider whether or not a person is suffering from a mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow that instruction?²³⁷

7. No right to “stand alone” questions. The Illinois Supreme Court has ruled that defendants do not have the right to ask prospective jurors whether they would be able to “stand alone” and vote against the death penalty even if the remaining jurors vote otherwise.²³⁸ Instead, the Illinois Supreme Court has reasoned that the issue is more properly handled by jury instructions.²³⁹

In particular, the Illinois Supreme Court has ruled that a trial court did not error when refusing to ask the following questions:

²³¹ People v. Runge, 234 Ill.2d 68, 108, 917 N.E.2d 940, 964 (2009).

²³² People v. Runge, 234 Ill.2d 68, 108, 917 N.E.2d 940, 964 (2009).

²³³ People v. Runge, 234 Ill.2d 68, 108, 917 N.E.2d 940, 964 (2009).

²³⁴ People v. Runge, 234 Ill.2d 68, 108, 917 N.E.2d 940, 962 (2009).

²³⁵ People v. Runge, 234 Ill.2d 68, 108, 917 N.E.2d 940, 962 (2009).

²³⁶ Runge, 234 Ill.2d at 120, 917 N.E.2d at 970.

²³⁷ State v. Skipper, 337 N.C. 1, 20, 446 S.E.2d 252, 261 (1994). See also, State v. Moeller, 616 N.W.2d 424, 442 (S.D. 2000) (“It was proper for State to use the hypothetical concept of a mental defect or a 15-year-old person to explain the concept of a mitigating factor. However, it would have been improper for it to then ask the potential juror whether he would impose a life sentence of a death sentence based upon that hypothetical, especially if those were truly the facts of the case.”).

²³⁸ People v. Buss, 187 Ill.2d 144, 183-85, 718 N.E.2d 1, 24 (1999); People v. Macri, 185 Ill.2d 1, 35, 705 N.E.2d 772, 787 (1998).

²³⁹ Macri, 185 Ill.2d at 35, 705 N.E.2d at 787-88.

In the event you are to consider [the death penalty] question, you would have to unanimously vote for death. But if any one of you were against death, you could so vote alone and stop the entire proceeding. Would you be able to stand alone in this way?²⁴⁰

In the event you are to consider this question, you would have to vote unanimously for death. But if any one of you were against death, you could so vote alone and stop the entire proceeding. Would you be able to stand alone this way?²⁴¹

If your fellow jurors did not agree with you that some act mitigate outweighs [*sic*] aggravation or that the sum of the mitigation outweighs aggravation, could you vote alone against death?²⁴²

If there were another juror who did not want to impose death, would you respect that other juror's opinion?²⁴³

After the decisions in Macri and Buss, the standard for imposing the death penalty within the Illinois Compiled Statutes was amended. Section 9-1(g) of the Illinois Criminal Code states, "If after weighing the factors in aggravation and mitigation, **one or more jurors** determines that death is not the appropriate sentence, the court shall sentence the defendant to a term of imprisonment..."²⁴⁴ Assuming jurors are going to be instructed with this language, a party arguably should be allowed to ask whether prospective jurors could accept such an instruction.

8. Exclusion of jurors aware of the potential of capital punishment when a judge will decide the penalty. Venire members aware that the defendant is eligible for the death penalty may be excluded where the judge will be deciding the sentence. Exclusion of such jurors prevents contamination of the venire pool and injection of the death penalty issue into jury deliberations.²⁴⁵

9. Ability to rehabilitate – must make clear objection to preserve issue. A trial court must give both parties the opportunity to rehabilitate prospective jurors who appear excusable for cause based on the trial court's preliminary questioning. In People v. Nieves,²⁴⁶ the State was allowed to ask further questions to advance its position on challenges for cause while the defense was not given this opportunity. Defense counsel waived any possible error by failing to request an opportunity for further questioning of the prospective jurors. A non-specific objection to the trial court's excusing a juror for cause was not sufficient to preserve the issue. Counsel

²⁴⁰ People v. Buss, 187 Ill.2d 144, 183, 718 N.E.2d 1, 24 (1999).

²⁴¹ People v. Macri, 185 Ill.2d 1, 32, 705 N.E.2d 772, 786 (1998).

²⁴² People v. Macri, 185 Ill.2d 1, 32, 705 N.E.2d 772, 786 (1998).

²⁴³ People v. Macri, 185 Ill.2d 1, 32, 705 N.E.2d 772, 786 (1998).

²⁴⁴ 720 Ill.Comp.Stat. 5/9-1(g) (2012).

²⁴⁵ People v. Peeples, 155 Ill.2d 422, 464, 616 N.E.2d 294, 313 (1993); People v. Lucas, 132 Ill.2d 399, 425-26, 548 N.E.2d 1003, 1913 (1989).

²⁴⁶ 193 Ill.2d 513, 523, 739 N.E.2d 1277, 1281 (2000).

must make a specific objection that the voir dire procedure is unfair if the trial court gives one party more opportunities to establish a basis to challenge than it gives the other side to rehabilitate prospective jurors.²⁴⁷

G. Entrapment questions allowed. The entrapment defense implicates an issue that might be contentious or difficult for many prospective jurors. For this reason, parties may question venire members about their ability to consider an entrapment defense.

In People v. Humphries,²⁴⁸ the Illinois Appellate Court pointed to a defense attorney’s voir dire of prospective jurors on the topic of entrapment as one of the factors mitigating against a finding of ineffectiveness. Asking prospective jurors questions regarding entrapment showed the attorney’s effectiveness in pursuing the entrapment defense.²⁴⁹

In People v. Dow,²⁵⁰ the Illinois Appellate Court affirmed a trial court’s rejection of the following question during voir dire of prospective jurors in a case involving the entrapment defense:

Will you accept and promise to follow the law that in some circumstances excuses otherwise criminal behavior by an individual?²⁵¹

The Illinois Appellate Court upheld the trial court’s rejection of the question, but was careful to state that it was not prohibiting all entrapment-related questions. The Appellate Court gave guidance for framing such questions in the future:

In this case, we do not address whether the defense of entrapment is so controversial and extraordinary that a new trial is warranted in situations where the trial court refuses to ask entrapment oriented *voir dire* questions. Rather, we elect to affirm the circuit court’s rejection of defendant’s question based on the question itself. First, the question seeks to indoctrinate the jury towards finding entrapment rather than probing for bias or prejudice regarding the defense. To the extent particularized defense questions have been allowed, their format has been very open ended. Both *Stack* and *Lanter* had this format in common...Second, the question is misleading in that it seeks to label defendant’s conduct as “otherwise criminal” if an entrapment is found to exist. A successful entrapment defense, however, makes the act in question non-criminal. Finally, the question makes no sense on its face. Words are apparently missing.²⁵²

Thus, questions regarding the entrapment defense should be open-ended, should be consistent with the law, and should be grammatically correct.

²⁴⁷ People v. Nieves, 193 Ill.2d 513, 523-24, 739 N.E.2d 1277, 1281-82 (2000).

²⁴⁸ 257 Ill. App.3d 1034, 630 N.E.2d 104 (2nd Dist. 1994).

²⁴⁹ People v. Humphries, 257 Ill.App.3d 1034, 1045, 112 (2nd Dist. 1994).

²⁵⁰ 240 Ill. App.3d 392, 608 N.E.2d 259 (1st Dist. 1992).

²⁵¹ People v. Dow, 240 Ill.App.3d 392, 393, 608 N.E.2d 259, 261 (1st Dist. 1992).

²⁵² People v. Dow, 240 Ill.App.3d 392, 398-99, 608 N.E.2d 259, 264 (1st Dist. 1992) (citations omitted).

H. Eyewitness testimony and misidentification questions not allowed. The defense does not have a right to ask questions about prospective jurors' beliefs regarding the accuracy of eyewitness identifications.²⁵³ Specific questions are discussed in section IV G.

I. Felony murder rule questions might be objectionable. Normally, parties are not allowed to pre-educate prospective jurors regarding their theory of the case. For this reason, felony murder questions are probably not acceptable during voir dire. The Illinois Appellate Court has ruled that the following questions were not proper:

According to the law it's called felony murder, that even if he didn't intend the person to be killed or shot, the mere fact that he participated and aided in the armed robbery makes him guilty of murder. Do you have any problems with that or anything?²⁵⁴

Do you have any problem following the law of felony murder, which means that even if he didn't intend for the guy to be murdered during the armed robbery but someone else murdered him but the fact that he helped in the commission of the armed robbery means that he's guilty of murder? Do you have a problem following that law?²⁵⁵

You probably heard me out there when I was asking everyone else. Would you have any problems with we're not going to say he's the shooter in this case but we are going to prove or show that he aided in the planning and in the commission of an armed robbery wherein someone died which makes him guilty of murder? Would you have any problems following that law?²⁵⁶

The Appellate Court ruled that the trial court abused its discretion by allowing the questioning. "This was indoctrination and conditioning, pure and simple."²⁵⁷ However, the decision concentrated on questioning about accountability and criticized the form of the questions.

J. Insanity defense questions allowed. Defense counsel may probe whether prospective jurors have any bias regarding the insanity defense.

The Illinois Supreme Court has approved the following questions:

Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case? If so, what?²⁵⁸

²⁵³ People v. Boston, 383 Ill.App.3d 352, 354, 893 N.E.2d 677, 680 (4th Dist. 2008); People v. Pineda, 349 Ill.App.3d 815, 819, 812 N.E.2d 627, 632 (2nd Dist. 2004); People v. Bowel, 111 Ill.2d 58, 64, 488 N.E.2d 995, 998-99 (1986); People v. Washington, 104 Ill.App.3d 386, 391, 432 N.E.2d 1020, 1024 (1st Dist. 1982); People v. Witted, 79 Ill.App.3d 156, 164, 398 N.E.2d 68, 76 (1st Dist. 1979).

²⁵⁴ People v. Mapp, 283 Ill.App.3d 979, 984, 670 N.E.2d 852, 856 (1st Dist. 1996).

²⁵⁵ People v. Mapp, 283 Ill.App.3d 979, 984, 670 N.E.2d 852, 856 (1st Dist. 1996).

²⁵⁶ People v. Mapp, 283 Ill.App.3d 979, 984-85, 670 N.E.2d 852, 856 (1st Dist. 1996).

²⁵⁷ People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 860 (1st Dist. 1996).

²⁵⁸ People v. Stack, 112 Ill.2d 301, 310, 493 N.E.2d 339, 343 (1986). See also, People v. Pitts, 104 Ill. App.3d 451, 456, 432 N.E.2d 1062, 1067 (1st Dist. 1982) ("Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case and if so what is it?") (question should have been asked, harmless error).

[T]he defense of insanity may be presented in this case. The law provides a Defendant is not criminally responsible for his conduct if as a result of a mental disease or defect he lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Do you have any feelings or view points concerning the defense of insanity in a criminal case?²⁵⁹

Have you or anyone close to you had any experience with a psychiatrist or psychologist?²⁶⁰

The Illinois Supreme Court has also approved the following set of questions with a prospective juror:

Q. Do you have any feelings or viewpoints concerning the defense of insanity?

A. Yeah, it's overused.

Q. You think it's overused. Well, the question is[,] a defense of insanity will be presented in this case and a psychiatrist or psychologist will testify, probably more than one. Will you be able to listen to that testimony and use it in assessing the defense of insanity?

A. Yes.

Q. It may be overused but that [in] itself isn't going to prevent you from listening to it, is it?

A. No.²⁶¹

The Illinois Appellate Court has approved the following questions:

Knowing the serious nature of the charges do you think the fact that you are going to hear such things and see some very unpleasant things, would you, nonetheless, be able to consider a defense of insanity in this case and nonetheless be able to vote for it if you were satisfied [the defendant] was insane at the time of this act?²⁶²

As a legal concept a person who is accused of a crime may not be responsible if, because of a mental illness or disease, he is unable to conform his conduct to the

²⁵⁹ People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 962 (2009). The Illinois Supreme Court commented, "What emerged from that questioning was Juror A's belief that he could be a fair and impartial juror...in that...he would 'absolutely' consider evidence supporting an insanity defense..." Id., 234 Ill.2d at 120, 917 N.E.2d at 970.

²⁶⁰ People v. Runge, 234 Ill.2d 68, 107, 917 N.E.2d 940, 962 (2009); People v. Stack, 112 Ill.2d 301, 310, 493 N.E.2d 339, 343 (1986).

²⁶¹ People v. Seuffer, 144 Ill.2d 482, 502-03, 582 N.E.2d 71, 79 (1991) (brackets in original).

²⁶² People v. Scott, 148 Ill.2d 479, 514, 594 N.E.2d 217, 230 (1992).

requirements of the law, that is, he is unable, because of his disease, to do right instead of wrong. Do all four of you agree with that concept?²⁶³

Do you believe that a person who commits a crime can commit it while insane?²⁶⁴

[If] you find [the defendant] committed the crime while insane would you have any difficulty in returning a verdict of not guilty by reason of insanity?²⁶⁵

Do you agree with the concept that a person should not be held responsible for his acts if he is not capable to conform his conduct to the requirements of the law?²⁶⁶

The defendant may also request that the trial court inform prospective jurors of the burden of proof in an insanity case. The Illinois Appellate Court has required “that prospective jurors on *voir dire* be informed of the defendant’s burden of proof and standard of proof imposed by law when the insanity defense is raised...”²⁶⁷

K. Intoxication defense questions allowed. *Voir dire* must be sufficient to create a reasonable assurance of discovering “any prejudice toward intoxicated persons or the intoxication defense.”²⁶⁸ The Illinois Appellate Court has explained, “Generally, questions about specific defenses are excluded from *voir dire*...[A]n exception exists for matters of intense controversy when ‘simply asking jurors whether they could faithfully apply the law as instructed [is] not enough to reveal juror bias and prejudice toward that defense.’ Examples of matters found to be controversial include...the intoxication defense...”²⁶⁹ The Illinois Appellate Court has approved the following question:

Do any of you have any feelings concerning the use of alcohol or drugs which could affect your ability to be a juror in this case, if there were testimony about alcohol of drugs?²⁷⁰

L. Self-defense questions not allowed. “[Illinois] courts have consistently refused to allow *voir dire* questions concerning a defendant’s theory of self-defense. The rationale behind these cases is that ‘allowing [a] defendant to question the prospective jurors regarding any pre-disposition to a self-defense claim goes to an ultimate question of fact and would serve no purpose other than to improperly attempt to preeducate and indoctrinate the jurors as to defendant’s theory of the case.’”²⁷¹

²⁶³ People v. Scott, 148 Ill.2d 479, 514, 594 N.E.2d 217, 230 (1992).

²⁶⁴ People v. Scott, 148 Ill.2d 479, 514, 594 N.E.2d 217, 230 (1992).

²⁶⁵ People v. Scott, 148 Ill.2d 479, 514, 594 N.E.2d 217, 230 (1992) (first brackets in original).

²⁶⁶ People v. Pitts, 104 Ill. App.3d 451, 456, 432 N.E.2d 1062, 1067 (1st Dist. 1982) (question should have been asked, but harmless error).

²⁶⁷ People v. Gregg, 315 Ill.App.3d 59, 73, 732 N.E.2d 1152, 1163 (1st Dist. 2000).

²⁶⁸ People v. Lanter, 230 Ill.App.3d 72, 76, 595 N.E.2d 210, 214 (4th Dist. 1992).

²⁶⁹ People v. Boston, 383 Ill.App.3d 352, 354, 893 N.E.2d 677, 680 (4th Dist. 2008).

²⁷⁰ People v. Lanter, 230 Ill.App.3d 72, 73, 595 N.E.2d 210, 214 (4th Dist. 1992).

²⁷¹ People v. Karim, 367 Ill. App. 3d 67, 92-93, 853 N.E.2d 816, 837 (1st Dist. 2006). See also, People v. Boston, 383 Ill.App.3d 352, 354, 893 N.E.2d 677, 680 (4th Dist. 2008); People v. Pineda, 349 Ill.App.3d 815, 819, 812 N.E.2d 627, 632 (2nd Dist. 2004); People v. Dunum, 182 Ill.App.3d 92, 101, 537 N.E.2d 898,

The Illinois Appellate Court has upheld the refusal to ask the following questions:

Do you feel that a mother, to protect herself and her children from being hurt, might involve herself in a crime, and even be willing to go to jail to protect herself and her children?²⁷²

Will you be able to follow the law that a person may use deadly force if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself?²⁷³

Asking the questions in the context of whether the jurors could maintain the presumption of innocence, within the framework of a Zehr question, does not resolve the objection. In People v. Karim, the defendant “sought to question the jurors about whether they could maintain the presumption of innocence where a defendant admitted the murders but claimed he did so in self-defense.”²⁷⁴ The Illinois Supreme Court held that the question was improper.

However, attorneys may be able to ask prospective jurors about self-defense in unique circumstances when the defense could be deemed controversial. The Illinois Appellate Court did not criticize a decision to submit the following question:

Would the fact that the complainant...is paralyzed prevent you from requiring the State to prove beyond a reasonable doubt that [the defendant] was not acting in self-defense?²⁷⁵

904 (1st Dist. 1989); People v. Kindelan, 150 Ill. App. 3d 818, 822-23; 502 N.E.2d 422, 424-25 (1st Dist. 1986); People v. Kendricks, 121 Ill.App.3d 442, 449, 459 N.E.2d 1137, 1142 (1st Dist. 1984).

²⁷² People v. Byer, 75 Ill.App.3d 658, 670, 394 N.E.2d 632, 641 (1st Dist. 1979).

²⁷³ People v. Muhammad, 132 Ill. App. 3d 901, 904, 478 N.E.2d 457, 460 (1st Dist. 1985).

²⁷⁴ People v. Karim, 367 Ill. App. 3d 67, 91, 853 N.E.2d 816, 836 (1st Dist. 2006).

²⁷⁵ People v. Muhammad, 132 Ill. App. 3d 901, 904, 478 N.E.2d 457, 460 (1st Dist. 1985).

VI. Questions Regarding General Background Attitudes, Outside Influences, and Personal Experiences

A. General background questions. Parties may ask about venire members' personal life experiences including membership in organizations (civic, political, social, etc.), hobbies, reading interests, family, education, and professional experiences.²⁷⁶ In Village of Plainfield v. Nowicki, for example, prospective jurors were asked whether they had ever belonged or contributed money to organizations such as Mothers Against Drunk Driving.²⁷⁷

B. Attitudes toward or experiences with the legal system, civil claims, or crime.

1. General attitudes about litigation and the legal system. Questions about prospective jurors' attitudes toward the legal system are permissible.²⁷⁸ General questions about the jury system, for example, may expose biases. The Illinois Appellate Court has used juror responses indicating whether they have negative feelings about people who bring lawsuits or whether they believe that a lot of people bring unnecessary lawsuits when determining whether a juror is qualified.²⁷⁹ Responses to a general question about a prospective juror's "feelings regarding personal injury lawsuits"²⁸⁰ have also been used by the Illinois Appellate Court to determine whether a juror was impartial.

The Illinois Appellate Court has approved the following questions:

Do you have any quarrel with the jury system as a way of resolving disputes between parties?²⁸¹

Do you believe in the jury trial system as a legitimate method for our society, through the voice of twelve members of the community, to decide issues when parties are unable to agree?²⁸²

Would you agree, based on what you have heard and read, that there are some law suits filed which should not be filed because they lack merit?²⁸³

²⁷⁶ Lubet, Steven. Modern Trial Advocacy: Analysis & Practice (1993), pp. 446-47.

²⁷⁷ Village of Plainfield v. Nowicki, 367 Ill.App.3d 522, 523, 854 N.E.2d 791, 793 (3rd Dist. 2006).

²⁷⁸ Limer v. Casassa, 273 Ill.App.3d 300, 301, 652 N.E.2d 854, 856-57 (4th Dist. 1995).

²⁷⁹ Leischner v. Advance Store Company, 2011 Ill.App.Unpub. LEXIS 271 (4th Dist. 2011); Addis v. Excelon Generation Company, 378 Ill.App.3d 781, 792-93, 880 N.E.2d 685, 696 (1st Dist. 2007).

²⁸⁰ De Leon v. Allied Barton Security Services, 2011 IL App (1st) 103467U, ¶ 7 and 15. See also, Cummings v. Chicago Transit Authority, 86 Ill.App.3d 914, 918-19, 408 N.E.2d 737, 740 (1st Dist. 1980) ("Either party [is] entitled to expose any latent bias or prejudice of the prospective juror about personal injury litigation or settlement.").

²⁸¹ Limer v. Casassa, 273 Ill.App.3d 300, 301, 652 N.E.2d 854, 855 (4th Dist. 1995).

²⁸² Limer v. Casassa, 273 Ill.App.3d 300, 301, 652 N.E.2d 854, 856 (4th Dist. 1995).

²⁸³ Limer v. Casassa, 273 Ill.App.3d 300, 301, 652 N.E.2d 854, 856 (4th Dist. 1995).

Would you also agree that there are law suits which have been filed which are justified and the filing party is entitled to recover for injuries sustained?²⁸⁴

However, a juror should not be automatically excused merely for holding the opinion that our society is too litigious or that a lot of people bring frivolous lawsuits. The trial court must consider whether such attitudes about lawsuits will affect a prospective juror's ability to remain impartial in the pending case.²⁸⁵

2. Experiences with civil claims, including settlements. Counsel may ask about specific experiences with the legal system. Jurors are commonly asked whether they have ever served on a jury before, whether that jury was able to reach a verdict, and whether anything about their previous jury service would affect their ability to be fair in the pending case.²⁸⁶ Typically, prospective jurors are asked whether they have ever been a party to a lawsuit and, if so, what type of case and whether the experience would affect their ability to be impartial.²⁸⁷

Prospective jurors may be asked about experiences that would have placed them in a similar position to one of the parties, although they may not expressly ask jurors to put themselves in a party's place (e.g., how would you feel if this happened to you?).²⁸⁸ For example, a potential juror in a retaliatory discharge lawsuit may be questioned about whether he or she was the supervisor of a terminated employee.²⁸⁹ In a personal injury lawsuit arising from an accident, the venire members are often asked whether they have ever been involved in an accident in which somebody was injured.²⁹⁰

Parties may ask jurors whether they have been involved in cases that were settled without a trial, whether they were satisfied with their settlements, and whether they would hold it against one party or the other that the pending case had not been settled.²⁹¹ In Cummings v. Chicago Transit Authority,²⁹² three prospective jurors stated that they had prior personal injury claims that had been settled and that they had been satisfied with the settlements. "[T]he trial

²⁸⁴ Limer v. Casassa, 273 Ill.App.3d 300, 301, 652 N.E.2d 854, 856 (4th Dist. 1995).

²⁸⁵ See Addis v. Excelon Generation Company, 378 Ill.App.3d 781, 792-93, 880 N.E.2d 685, 696 (1st Dist. 2007) (juror allowed to hear case despite voicing negative feelings about people who bring lawsuits and opinion that many people bring unnecessary lawsuits).

²⁸⁶ See, e.g., Schaffner v. Chicago & North Western Transportation Company, 129 Ill.2d 1, 31-32, 541 N.E.2d 643, 656 (1989); People v. Bobo, 375 Ill.App.3d 966, 987, 874 N.E.2d 297, 317 (1st Dist. 2007); People v. Randall, 283 Ill.App.3d 1019, 1027, 671 N.E.2d 60, 66-67 (1st Dist. 1996).

²⁸⁷ See, e.g., Mack v. Anderson, 371 Ill.App.3d 36, 40, 861 N.E.2d 280, 287 (1st Dist. 2006); Barton v. Chicago & North Western Transportation Company, 325 Ill.App.3d 1005, 1024, 757 N.E.2d 533, 549 (1st Dist. 2001).

²⁸⁸ Cummings v. Chicago Transit Authority, 86 Ill.App.3d 914, 918-19, 408 N.E.2d 737, 740 (1st Dist. 1980).

²⁸⁹ See, e.g., Addis v. Excelon Generation Company, 378 Ill.App.3d 781, 793, 880 N.E.2d 685, 696 (1st Dist. 2007).

²⁹⁰ See, e.g., Barton v. Chicago & North Western Transportation Company, 325 Ill.App.3d 1005, 1024, 757 N.E.2d 533, 549 (1st Dist. 2001).

²⁹¹ Leischner v. Advance Store Company, 2011 Ill.App.Unpub. LEXIS 271 (4th Dist. 2011); Cummings v. Chicago Transit Authority, 86 Ill.App.3d 914, 918-19, 408 N.E.2d 737, 740 (1st Dist. 1980).

²⁹² 86 Ill.3d 914, 408 N.E.2d 737 (1st Dist. 1980).

court...permitted plaintiff's counsel to ask the last juror who had mentioned settlement whether she would be influenced by the fact that a case had not been settled. Prior to the question, plaintiff's counsel had remarked that plaintiff was unable to settle his case. In view of the circumstances, we find nothing improper about the question. Either party was entitled to expose any latent bias or prejudice of the prospective juror about personal injury litigation or settlement. The question did not connote or indoctrinate the panel to believe defendant was guilty of any wrongdoing, nor did the question attempt to place the prospective juror in plaintiff's place."²⁹³

3. Experiences with the criminal justice system or as a victim. Prospective jurors may be asked about their experiences with the criminal justice system, including whether they have ever been arrested, whether they have ever been a complainant or a witness, and whether they have ever served on a jury.²⁹⁴ But prospective jurors retain their privilege against self-incrimination and may not be asked whether they personally have committed crimes.²⁹⁵

Parties may ask questions about whether a potential juror or a close relationship has been a victim of crime, the nature of the crime, and whether the prior experience would affect the potential juror's judgment in the pending case.²⁹⁶ Merely asking jurors in a group whether they or any family members have been victims and then whether those experiences "would prevent you from being fair and impartial" is not sufficient.²⁹⁷

The Illinois Appellate Court relied upon the following questions when considering possible bias in jurors after they disclosed being victims or having relatives who were victims of crime:

If you were picked on this jury would you set that aside and decide this case on the facts and the law that apply to this case or you would still remember that?²⁹⁸

Can you be sure that you will set that aside or not?²⁹⁹

Now can I count on you to keep an open mind and listen to the witnesses and ferret out, discern, what you believe to be the truth?³⁰⁰

²⁹³ Cummings v. Chicago Transit Authority, 86 Ill.App.3d 914, 918-19, 408 N.E.2d 737, 740 (1st Dist. 1980). See also, Leischner v. Advance Store Company, 2011 Ill.App.Unpub. LEXIS 271 (4th Dist. 2011) (juror complaining about his insurance company settling a case).

²⁹⁴ See, e.g., People v. Kitchen, 159 Ill.2d 1, 22, 636 N.E.2d 433, 442 (1994) (arrest); People v. Bobo, 375 Ill.App.3d 966, 987, 874 N.E.2d 297, 317 (1st Dist. 2007) (previous jury duty); People v. Dixon, 409 Ill.App.3d 915, 917, 948 N.E.2d 786, 787-88 (1st Dist. 2011) (arrest); People v. Randall, 283 Ill.App.3d 1019, 1027, 671 N.E.2d 60, 66-67 (1st Dist. 1996) (previous jury duty).

²⁹⁵ People v. James, 304 Ill.App.3d 52, 58-59, 710 N.E.2d 484, 489-90 (2nd Dist. 1999).

²⁹⁶ People v. Snow, 2012 IL App (4th) 110415, ¶ 49, 964 N.E.2d 1139 (4th Dist. 2012); People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996).

²⁹⁷ People v. Oliver, 265 Ill.App.3d 543, 549-50, 637 N.E.2d 1173, 1178-79 (1st Dist. 1994).

²⁹⁸ People v. Wesley, 2011 Ill.App.Unpub. LEXIS 228 *17 (1st Dist. 2011) (asked after juror disclosed that one of her relatives had been murdered).

²⁹⁹ People v. Wesley, 2011 Ill.App.Unpub. LEXIS 228 *17 (1st Dist. 2011).

When a prospective juror or a close friend or relative has been a victim of crime, the juror must be unequivocal that the prior experience will not affect her or his ability to be fair and impartial. Prospective jurors should be removed for cause if they express doubts or give uncertain responses such as “I hope not,” “I don’t think so,” or “not really.”³⁰¹

In People v. Green,³⁰² three venire members indicated on their jury cards that they had been victims of crimes, but did not reply in open court when asked the question. The Appellate Court held that questioning should have been reopened for inquiry into whether the prospective jurors were in fact crime victims and whether those experiences would affect their ability to be impartial.³⁰³ The same rule has been applied when a party learned that a juror failed to reveal that he had been a victim of a crime after the jury had been sworn.³⁰⁴

If a prospective juror has been a victim of crime, attorneys may ask follow-up questions about whether the prospective juror contacted the police, whether anyone was arrested for the offense, and whether the prospective juror was satisfied or not satisfied with the police response.³⁰⁵ The Illinois Appellate Court has approved the following question:

Was there anything negative about the experience that you had with the law enforcement people in any way?³⁰⁶

If a potential juror has a relative who was a police officer and was a victim of a crime, the parties may inquire into whether the crime occurred while the officer was on duty.³⁰⁷

C. Insurance – prospective jurors insured by defendant’s insurance carrier. In a civil action, the trial court may dismiss prospective jurors for cause when those jurors are insured by the same insurance company that serves as the defendant’s insurance carrier.³⁰⁸ Normally, parties are not

³⁰⁰ People v. Rudeen, 2011 IL App (2d) 100613U, ¶ 6 (asked after a juror revealed having been the victim of two thefts within a year and that the police had handled things “[o]verall pretty decent.”) (brackets in original).

³⁰¹ People v. Johnson, 215 Ill.App.3d 713, 725, 575 N.E.2d 1247, 1254 (1st Dist. 1991) (“[The prospective jurors] were crime victims or they had close friends or relatives who were victims of violent crimes. In addition, they equivocated when first asked whether they could be fair and impartial. For these reasons, they should have been dismissed for cause. ‘[T]he purpose of *voir dire* examination is to filter out prospective jurors who are unable...to be impartial.’ Moreover, a venireman is *incompetent* to sit as a juror if he cannot be impartial. A reviewing court may reverse a conviction where a juror expressed ‘self-doubt concerning [his] ability to be impartial.’ The three aforementioned jurors expressed self-doubt with respect to their ability to be impartial. Therefore, we find that the trial judge’s determination with respect to [three jurors] was against the manifest weight of the evidence.”) (citations omitted, ellipses in original).

³⁰² 282 Ill.App.3d 510, 668 N.E.2d 158 (1st Dist. 1996).

³⁰³ People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 16-61 (1st Dist. 1996).

³⁰⁴ People v. Mitchell, 121 Ill. App. 3d 193, 196, 459 N.E.2d 351, 353 (2nd Dist. 1984).

³⁰⁵ People v. Rudeen, 2011 IL App (2d) 100613U, ¶¶ 5-7; People v. Thomas, 89 Ill.App.3d 592, 600, 411 N.E.2d 1076, 1083 (1st Dist. 1980).

³⁰⁶ People v. Rudeen, 2011 IL App (2d) 100613U, ¶ 7.

³⁰⁷ People v. Thomas, 89 Ill.App.3d 592, 600, 411 N.E.2d 1076, 1083 (1st Dist. 1980).

³⁰⁸ Casey v. Baseden, 131 Ill.App.3d 716, 722, 475 N.E.2d 1375, 1379 (5th Dist. 1985); Lynch v. Mid-America Fire and Marine Insurance Co., 94 Ill.App.3d 21, 30, 418 N.E.2d 421, 428-29 (4th Dist. 1981).

allowed to inform the jurors that an insurance company bears the ultimate responsibility to pay a judgment. In some cases, the parties may have acquired a list of policyholders so that the trial court may excuse such jurors without questioning.³⁰⁹ In cases in which jurors will learn about an insurance company being involved, the “preferable method of selection” is to allow questioning about prospective jurors’ relationships to the insurance company and whether that insurance company’s involvement would influence them.³¹⁰ If the veniremembers do not have any knowledge regarding the defendant’s insurance coverage and such evidence is not expected to be admitted during the trial, prospective jurors should not be questioned about their relationships with an insurance company.³¹¹ But they may be questioned about whether they have been contacted about such cases and further inquiry may be permitted out of the presence of other prospective jurors if there is some indication of possible bias or interest.³¹²

D. Media coverage. Parties have a right to ask potential jurors whether they have seen or heard pre-trial publicity about a case and whether they have formed an opinion about the case because of that publicity.³¹³ In cases with significant publicity, a trial court may excuse hundreds of jurors for cause.³¹⁴ However, a prospective juror is not automatically ineligible for service merely because he or she has read or heard reports about a case. The Illinois Appellate Court has explained:

In a typical instance of outside publicity, the examination of the jurors is probably the most valuable means of ascertaining the partiality or impartiality of the jurors. Although many of the jurors stated they had read the article or heard the commentaries or heard talk of them this alone is not decisive as it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.³¹⁵

³⁰⁹ See, e.g., Lynch v. Mid-America Fire and Marine Insurance Co., 94 Ill.App.3d 21, 30, 418 N.E.2d 421, 428-29 (4th Dist. 1981).

³¹⁰ Lynch v. Mid-America Fire and Marine Insurance Co., 94 Ill.App.3d 21, 30, 418 N.E.2d 421, 428-29 (4th Dist. 1981).

³¹¹ Parker v. Lawler-Shinn, 2012 IL App (5th) 90523U, ¶ 72.

³¹² Parker v. Lawler-Shinn, 2012 IL App (5th) 90523U, ¶ 72.

³¹³ People v. Santamaria, 165 Ill.App.3d 381, 387, 519 N.E.2d 1, 5 (3rd Dist. 1987) (“It is incumbent upon the trial judge to conduct a meaningful examination to determine whether newspaper articles or headlines or the electronic media have created a predisposition in the minds of the jurors.”); Parson v. Chicago, 117 Ill.App.3d 383, 389, 453 N.E.2d 770, 775 (1st Dist. 1983); People v. Cox, 74 Ill. App.2d 342, 344-46, 220 N.E.2d 7, 8-9 (4th Dist. 1966) (“While the trial was in progress, the only morning paper in Decatur published an article in which...stated that [a co-defendant] was convicted of the burglary...some three weeks before..and that [the defendant] was sentenced [to prison in previous cases].’...The difficulty here is that we do not know what effect the published material may have had on the verdict. No inquiry was made. No prejudice is affirmatively shown.... Where such a situation arises, it is clearly the duty of the trial court to determine, if alerted, so far as he can whether the article contains improper matter, whether it was read and whether its reading would or could affect the verdict. The failure to do this in the case at bar requires that this case be retried.”).

³¹⁴ See, e.g., Irvin v. Dowd, 366 U.S. 717, 727 (1961) (268 of 430 veniremembers excused for cause for having “fixed opinions as to the guilt of petitioner...”) People v. Pate, 2012 IL App (5th) 110130U, ¶ 15 (99 of 140 potential jurors excused for cause); People v. Fort, 248 Ill.App.3d 301, 309, 618 N.E.2d 445, 452 (1st Dist. 1993) (198 of 334 potential jurors excused for cause, 141 because of their fixed opinions regarding the defendant).

³¹⁵ Parson v. Chicago, 117 Ill.App.3d 383, 389, 453 N.E.2d 770, 775 (1st Dist. 1983).

Therefore, voir dire questions should be designed to evaluate not merely whether the venire members had contact with media reports, but also the impact of those reports on their ability to render an impartial verdict based on the evidence.

The following questions have been approved or relied upon by Illinois courts:

Did you -- did you actually read the article?³¹⁶

[W]ould this affect your ability to be fair and impartial having read this article in the paper?³¹⁷

[D]id you mention [reading the article] to anybody else in the jury room?³¹⁸

[Y]ou didn't discuss the article at all?³¹⁹

And you didn't talk about [the article] to any of the other jurors?³²⁰

When you mentioned that you read the article, did anybody say oh, yeah, I saw that article?³²¹

Did you hear any radio reports about it or T.V.? ³²²

Are you going to be able to put that [article] aside when you're sitting on judgment in this case?³²³

Based on what you had heard, have you formed an opinion as to the guilt or innocence of the defendant?³²⁴

Do you believe, even though you formed that opinion, that if you were asked to be seated as a juror in this case you could put aside that opinion and judge the guilt or innocence of the defendant based on the evidence that will be presented here at trial?³²⁵

Now, would what you have read or heard require the defendant to prove himself innocent?³²⁶

³¹⁶ People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³¹⁷ People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³¹⁸ People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³¹⁹ People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³²⁰ People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³²¹ People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³²² People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³²³ People v. Lopez, 371 Ill. App.3d 920, 932, 864 N.E.2d 726, 737 (1st 2007).

³²⁴ People v. Rolfe, 2012 IL App (5th) 100590U, ¶ 6.

³²⁵ People v. Rolfe, 2012 IL App (5th) 100590U, ¶ 6.

³²⁶ People v. Buss, 187 Ill.2d 144, 195, 718 N.E.2d 1, 30 (1999).

Let's say that it's a piece of evidence comes out and that's not the same as what you read in the newspaper. 'Are you going to struggle and say, well the newspaper said this, but the evidence on the witness stand was contrary, are you going to struggle there with that problem?'³²⁷

You said you kind of formed an opinion....Are you saying that you believe that you formed an opinion that the victims were hit in the head with a hammer by my client or have you formed an opinion that my client was trying to kill them?³²⁸

Would it be fair to say your mind is still open on the issue 'of what anyone's intent was?'³²⁹

A challenging situation arises when media coverage includes inadmissible evidence. Under such circumstances, jurors should be questioned about the contents of the media coverage and dismissed for cause if they learned of such evidence through news reports.

In a case receiving extensive media coverage, the prospective jurors were questioned about the contents of media coverage that they had heard or read. "Each prospective juror was asked a series of questions dealing with his knowledge of the case, including his exposure to and memory of written and broadcast reports. When a juror remembered certain key details, that juror was specifically asked if he had formed any opinions or drawn any inferences from those facts."³³⁰ Some of the prospective jurors recalled that another suspect had been released after passing a polygraph examination, but that the defendant was not released. The Illinois Supreme Court held that all jurors exposed to this information should have been dismissed for cause.³³¹ The Illinois Supreme Court explained:

If the biasing effect of the information is so powerful that it cannot be considered, even under the controlled conditions of the courtroom, then certainly access to the same biasing information, under the uncontrolled influence of the news media, cannot be allowed to affect the outcome of a trial. The nature of the information is such that the only way to be sure that a juror is not influenced by it is to insure that the juror is never exposed to the information in the first place. Once the juror believes that a law enforcement or prosecutorial decision has been based upon the results of a lie detector test, the damage has been done.³³²

Besides polygraph examinations, the Illinois Supreme Court discussed media coverage of an inadmissible confession as another situation in which disqualification might be automatically required.³³³ Similarly, the Illinois Appellate Court has approved of "extensive *voir dire* for the

³²⁷ People v. Rolfe, 2012 IL App (5th) 100590U, ¶ 5.

³²⁸ People v. Rolfe, 2012 IL App (5th) 100590U, ¶ 6 (ellipses in original).

³²⁹ People v. Rolfe, 2012 IL App (5th) 100590U, ¶ 6.

³³⁰ People v. Taylor, 101 Ill.2d 377, 387, 462 N.E.2d 478, 482-83 (1984).

³³¹ People v. Taylor, 101 Ill.2d 377, 399, 462 N.E.2d 478, 488 (1984).

³³² People v. Taylor, 101 Ill.2d 377, 392-93, 462 N.E.2d 478, 485 (1984).

³³³ People v. Taylor, 101 Ill.2d 377, 398, 462 N.E.2d 478, 488 (1984).

purpose of getting ‘out in the open’ exactly what each prospective juror knew”³³⁴ regarding a defendant’s prior convictions. The trial court should excuse jurors who know specific details of a defendant’s prior convictions, but may allow jurors to serve when they have a general knowledge that a defendant has been in jail or convicted if the jurors do not know what the previous charges were and state that their knowledge will not affect their ability to be impartial.³³⁵

E. Race, ethnicity, and sexual orientation questions allowed in some circumstances. Questions about racial and ethnic prejudice are constitutionally required if “special circumstances” exist to suggest a significant likelihood that such prejudice might infect a defendant’s trial. “Special circumstances” exist where racial issues are “inextricably bound up with the conduct of the trial.”³³⁶ However, there is no constitutional presumption of racial or ethnic prejudice. “The sole fact that the defendant is black and the victim is white ‘does not constitute a ‘special circumstance’ of constitutional proportions.’”³³⁷

Questions about racial prejudice must be allowed when the defendant is charged with a violent crime and the defendant and victim are members of different racial or ethnic groups.³³⁸ In these cases, the jurors must be informed of the race of the victim during the voir dire questioning. The Illinois Supreme Court has explained:

There is a difference between racial prejudice, which depends in no way on the race of the victim, and interracial crime bias. Therefore, where venirepersons are without knowledge that the offense was interracial, the general questions concerning the ability to be fair and impartial are ineffective in ferreting out any potential juror bias resulting from the victim being white and the accused being African-American.³³⁹

Questions about racial prejudice may be necessary in trials regarding some non-violent offenses. For example, the U.S. Supreme Court ruled that questions about racial prejudice must be allowed in a case where a defendant charged with possession of marijuana was a civil rights worker whose defense was that law enforcement officers framed him because of his civil rights activities.³⁴⁰

When “special circumstances” were present, the U.S. Supreme Court has approved the following questions:

³³⁴ People v. Fort, 248 Ill.App.3d 301, 311, 618 N.E.2d 445, 453 (1st Dist. 1993).

³³⁵ People v. Fort, 248 Ill.App.3d 301, 311, 618 N.E.2d 445, 453 (1st Dist. 1993). See also, Marshall v. U.S., 360 U.S. 310, 312-13 (1959) (“We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution’s evidence.”).

³³⁶ People v. Peeples, 155 Ill.2d 422, 459-60, 616 N.E.2d 294, 311 (1993).

³³⁷ People v. Peeples, 155 Ill.2d 422, 460, 616 N.E.2d 294, 311 (1993).

³³⁸ Mu’Mim v. Virginia, 500 U.S. 415, 423 (1991); Turner v. Murray, 476 U.S. 28, 35-37 (1986); People v. Hope, 184 Ill.2d 39, 43, 702 N.E.2d 1282, 1284-85 (1998); People v. Diggs, 243 Ill.App.3d 93, 94-95, 612 N.E.2d 83, 84 (1st Dist. 1993).

³³⁹ People v. Hope, 184 Ill.2d 39, 46, 702 N.E.2d 1282, 1285-86 (1998).

³⁴⁰ Ham v. South Carolina, 409 U.S. 524, 528 (1973).

Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?³⁴¹

You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term "black?"³⁴²

The Illinois Appellate Court has approved or relied upon responses to the following questions:

[The defendant] is a black man, an African-American. Some of the witnesses in this case are white females. Would there be anybody here that merely because of that racial difference would not be able to be fair and impartial to [the defendant], fair to the People of the State of Illinois?³⁴³

Most of you in this room appear to be of a different race than the defendant, not all of you. Does anyone feel that the defendant's race may have or should have any place in your deliberations in this case?³⁴⁴

A party may also have a right to inquire about racial issues related to a witness rather than the defendant. For example, prospective jurors can be questioned about whether they could be fair and impartial if they learned that the defendant or a witness is involved in an interracial dating or domestic relationship.³⁴⁵

The Illinois Appellate Court has expressly approved the following question:

During this trial you will hear substantial evidence of several witnesses who are involved in interracial relationships or dating situations. Is there anyone here who would have such strong feelings about that or against that, that that fact alone would prevent them from giving either the State or Defense a fair trial?³⁴⁶

The fact that the defendant holds racist beliefs is not a proper subject for questioning if the defendant's beliefs are not relevant to the case. The Appellate Court has affirmed a decision not allowing the following question:

³⁴¹ Ham v. South Carolina, 409 U.S. 524, 525 n. 2 (1973).

³⁴² Ham v. South Carolina, 409 U.S. 524, 525 n. 2 (1973).

³⁴³ People v. Diggs, 243 Ill.App.3d 93, 95, 612 N.E.2d 83, 84 (1st Dist. 1993).

³⁴⁴ People v. Brooks, 2012 IL App (4th) 110516U, ¶ 8.

³⁴⁵ People v. Brooks, 2012 IL App (4th) 110516U, ¶ 8; People v. Boston, 383 Ill.App.3d 352, 354, 893 N.E.2d 677, 680 (4th Dist. 2008) ("Generally, questions about specific defenses are excluded from *voir dire*...An exception exists for matters of intense controversy...Examples of matters found to be controversial include...the subject of interracial relationships."); People v. Clark, 278 Ill.App.3d 996, 1004, 664 N.E.2d 146, 152 (1st Dist. 1996).

³⁴⁶ People v. Clark, 278 Ill.App.3d at 1002, 664 N.E.2d at 150-51.

You may hear evidence that the defendant professes to believe in the supremacy of the white race. Will that prevent you from being able to be fair and unbiased in your consideration of this case?³⁴⁷

The Appellate Court explained the restriction on voir dire: “In the instant case, there was no allegation that defendant’s white-supremacist views were in any way related to the crimes. This was a crime of passion in which defendant killed his estranged wife and her daughter...”³⁴⁸ Questions about white-supremacist beliefs are proper during voir dire only when those beliefs are relevant to the case.

While trial courts *must* allow questions about racial bias or prejudice when “special circumstances” exist, trial courts *may* allow questions about racial bias or prejudice whenever the defense requests. The U.S. Supreme Court has suggested such an approach (while carefully noting that it is not constitutionally required). The U.S. Supreme Court explained, “In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued.”³⁴⁹

Questions designed to reveal prejudices about sexual orientation are also permitted under appropriate circumstances. The Illinois Appellate Court addressed the issue in People v. Stanley Jones.³⁵⁰ The opinion was withdrawn when the defendant died during the 21-day period for rehearing. However, the matter was thoroughly discussed and the Appellate Court did not reissue a new opinion altering its decision. The Illinois Appellate Court explained:

The mere fact that a defendant or victim is homosexual may not be sufficient to require questioning of potential jurors as to possible bias. However, in cases where issues involving homosexuality are “inextricably bound up with the conduct of the trial,” the trial court should allow questions to potential jurors to discover any bias or prejudice in order to assure the defendant a fair and unbiased jury. Here, we disagree with the trial court’s dismissal of homosexuality as a “non-issue.” This case involved homosexual sexual assault, and under these facts where a defense of consent is presented, homosexual acts are inextricably tied up with the offense of sexual assault. Homosexuality invokes strong responses in many people, and a defendant is entitled to the opportunity to sufficiently develop any possible bias against him for that reason.³⁵¹

Courts in other jurisdictions have approved the following questions:

Now, does the fact that the defendant is charged with homosexual conduct prevent you from being fair to either side?³⁵²

³⁴⁷ People v. Pate, 2012 IL App (5th) 110130U, ¶ 88.

³⁴⁸ People v. Pate, 2012 IL App (5th) 110130U, ¶ 90.

³⁴⁹ Rosales-Lopez v. U.S., 451 U.S. 182, 191 (1981).

³⁵⁰ People v. Stanley Jones, 2004 Ill. App. LEXIS 1542 (1st Dist. 2004) (opinion withdrawn, the author has a complete copy of the opinion).

³⁵¹ People v. Stanley Jones, 2004 Ill. App. LEXIS 1542 (1st Dist. 2004).

³⁵² Gacy v. Welborn, 994 F.2d 305, 314 (7th Cir. 1993).

Could you put aside any feeling that you might have regarding homosexuality in rendering your verdict in this case?³⁵³

After telling the venire that the evidence might indicate that the victim was a homosexual or bisexual, the judge inquired: “Is there anything about that circumstance which would interfere with anyone’s ability to be fair and impartial?” and “Is there anything about that circumstance that would bias or prejudice anyone against either the prosecution or the defense?”³⁵⁴

Many people believe that homosexuality is against God’s law. I want to know how many people share that view?³⁵⁵

Of those of you who responded to [the] earlier question, are any of you not able to understand the distinction between God’s law and man’s law and are any of you not able to follow man’s law with respect to that particular issue in this case?³⁵⁶

F. Religious background questions allowed when relevant. “Generally, when religious affiliation is relevant to potential prejudice, subjects related to religious affiliation are proper subjects of inquiry on voir dire.”³⁵⁷ The Illinois Supreme Court has upheld “questions concerning membership in, or employment by, any religiously affiliated institution or organization”³⁵⁸ and “whether [prospective jurors] would give more weight to the testimony of persons who belonged to a religious order.”³⁵⁹

The Illinois Supreme Court has approved the following question:

³⁵³ Id., 994 F.2d at 315.

³⁵⁴ Commonwealth v. Plunkett, 422 Mass. 634, 641 n.3, 664 N.E.2d 833, 838 n.3 (1996) (cited by People v. Stanley Jones, 2004 Ill. App. LEXIS 1542 (1st Dist. 2004)).

³⁵⁵ State v. Rulon, 935 S.W.2d 723, 724 (Mo.App. 1996) (“The venire was also asked if any of them would be prejudiced against the defendant or the State because of evidence of a homosexual relationship between defendant and [the victim]. Several of the venire answered affirmatively and were subsequently stricken for cause. Defense counsel also asked the panel if any of them would give any different weight to defendant’s testimony because he is gay and whether any panel members felt homosexuality inclines a person more or less toward violence. Venire persons who answered affirmatively that homosexuality inclines a person more toward violence were subsequently stricken for cause.”).

³⁵⁶ State v. Rulon, 935 S.W.2d 723, 724 (Mo.App. 1996).

³⁵⁷ Congregation of the Passion v. Touch Ross, 159 Ill.2d 137, 166-67, 636 N.E.2d 503, 516 (1994). See also Village of Plainfield v. Nowicki, 367 Ill.App.3d 522, 525, 854 N.E.2d 791 794 (3rd Dist. 2006) (“Potential jurors can be asked about religious beliefs that may directly affect their ability to serve on a jury in a particular case. Questioning prospective jurors about their personal or religious views toward alcohol consumption is permissible because such questions are reasonably calculated to discover any latent bias that may exist among the venire.”) (citations omitted).

³⁵⁸ Congregation of the Passion v. Touch Ross, 159 Ill.2d at 166, 636 N.E.2d at 515.

³⁵⁹ Id.

Have you or any member of your family ever made a financial contribution to [a religious order that is a party in this case]?³⁶⁰

G. Relationships with the parties. When a potential juror has a close relationship with a party, the juror should be excluded. The relationship may be close because of family ties or for some other reason, such as a doctor-patient relationship.³⁶¹ However, jurors need not be excluded unless the relationship is one that would affect their impartiality. Illinois courts have allowed the father of an assistant state’s attorney,³⁶² a former classmate of an assistant state’s attorney,³⁶³ the spouse of a law enforcement officer,³⁶⁴ the spouse of a patient of a doctor who was a party in a lawsuit,³⁶⁵ and the niece and aunt of employees of a corporate defendant³⁶⁶ to sit as jurors.

H. Remedies – questions about specific remedies allowed. Prospective jurors may be questioned about their ability to award monetary damages, but the trial court may preclude questions involving specific figures. The Illinois Appellate Court has noted, “The trial judge has discretion in determining what questions to pose to the jury during *voir dire*, including whether potential jurors have fixed ideas about awards of specific sums of money. Here, the trial court asked potential jurors whether they could award ‘substantial damages.’ We do not find the failure of the court to allow inquiry into a specific amount was an abuse of its discretion.”³⁶⁷

In Gomez v. The Finishing Company,³⁶⁸ the trial court asked the venire, “Is there anyone here who has...an objection to rewarding money damages under any circumstances?” The judge also said, “[s]ometimes in the law there’s a concept called punitive damages.” He described such damages as “in the nature of punishment of a defendant.” He asked if any prospective jurors opposed punitive damages to the extent that they could not award them under any circumstances.³⁶⁹ The Appellate Court ruled that the defendant was not unfairly prejudiced by the questions about punitive damages.³⁷⁰

³⁶⁰ Id. (harmless error).

³⁶¹ Marcin v. Kipfer, 117 Ill.App.3d 1065, 1067-68, 454 N.E.2d 370, 372 (4th Dist. 1983).

³⁶² People v. Cobb, 189 Ill.App.3d 86, 89, 544 N.E.2d 1257, 1259 (4th Dist. 1989). The Appellate Court emphasized that the child was not a participant in the trial, merely a co-worker of the assistant state’s attorneys prosecuting the case.

³⁶³ People v. Carrillo, 2012 IL App (1st) 100786U, ¶ 19 (juror went to law school with the assistant state’s attorney prosecuting the case 13 years earlier, had no social contact with the assistant state’s attorney outside of school, and had not seen the assistant state’s attorney since law school).

³⁶⁴ People v. Buss, 187 Ill.2d 144, 192-94, 718 N.E.2d 1, 28-29 (1999).

³⁶⁵ Roach v. Springfield Clinic, 1992 Ill. LEXIS 204 *44-45 (1992).

³⁶⁶ Addis v. Exelon Generation Company, 378 Ill.App.3d 781, 792, 880 N.E.2d 685, 696 (1st Dist. 2007).

³⁶⁷ Juarez v. Commonwealth Medical Associates, 318 Ill.App.3d 380, 387-88, 742 N.E.2d 386, 392 (1st Dist. 2000).

³⁶⁸ 369 Ill. App. 3d 711, 861 N.E.2d 189 (1st Dist. 2006).

³⁶⁹ Gomez v. The Finishing Company, 369 Ill. App. 3d 711, 714, 861 N.E.2d 189, 193 (1st Dist. 2006).

³⁷⁰ Gomez v. The Finishing Company, 369 Ill. App. 3d 711, 721, 861 N.E.2d 189, 199 (1st Dist. 2006).

VII. Re-Opening Voir Dire After the Jury Has Been Selected.

A. Voir dire may be re-opened and jurors may be challenged for cause at any time. The trial court has discretion to re-open voir dire and question jurors after a jury has been selected.³⁷¹ Further, a party can challenge a juror for cause even after the panel has been sworn.³⁷² However, “once a juror has been accepted and sworn, neither party has the right to peremptorily challenge that juror. Although the circuit court retains the right to dismiss a selected and sworn juror for cause, the parties no longer possess the right to exercise a peremptory challenge.”³⁷³

B. Reasons why voir dire may be re-opened.

1. Clarifying or investigating responses from the original voir dire. “Where *voir dire*...has just been completed and it comes to the attention of the trial court that there are facts which contradict the answers given on *voir dire*, proper procedure calls for an inquiry.”³⁷⁴ In People v. Green,³⁷⁵ three venire members indicated on their jury cards that they had been victims of crimes, but did not reply in open court when asked the question. The Appellate Court held that questioning should have been reopened for inquiry into whether the prospective jurors were in fact crime victims and whether those experiences would affect their ability to be impartial.³⁷⁶

2. Potential exposure to media coverage. When the trial court has reason to believe that sitting jurors may have read or heard trial-related publicity after the trial has commenced, the trial court should question the jurors to determine whether they were actually exposed to the media coverage and whether it will affect their ability to judge the case fairly.³⁷⁷

3. Contact with witnesses, parties, or attorneys after beginning the trial. In some cases, a sitting juror has contact with a witness, party, or attorney outside of the courtroom. Illinois law does not categorically presume prejudice when there is outside contact with jurors, but the trial court should question such jurors about their ability to remain fair and impartial.

In People v. Roberts,³⁷⁸ a witness communicated with one of the jurors. The juror in question stated that she felt uncomfortable, told other jurors about what happened, and was later

³⁷¹ See, e.g., People v. Childress, 158 Ill.2d 275, 291-93, 633 N.E.2d 635, 642-43 (1994); People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996).

³⁷² Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998).

³⁷³ People v. Peeples, 205 Ill. 2d 480, 520-21, 793 N.E.2d 641, 666 (2002).

³⁷⁴ People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996). See also, Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998) (“When information is revealed during voir dire which tends to contradict a sworn juror’s answers, the trial court should allow further inquiry, and failure to do so can result in reversible error.”).

³⁷⁵ 282 Ill.App.3d 510, 668 N.E.2d 158 (1st Dist. 1996).

³⁷⁶ People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 16-61 (1st Dist. 1996); People v. Mitchell, 121 Ill. App. 3d 193, 196, 459 N.E.2d 351, 353 (2nd Dist. 1984) (“We conclude that the court abused its discretion in refusing to reopen *voir dire* of [the] juror...”). But see, People v. Adkins, 239 Ill.2d 1, 17-20, 940 N.E.2d 11, 21-23 (2010) (no error in removing juror for cause without follow-up questions).

³⁷⁷ See supra, Section VI E Media Coverage.

³⁷⁸ 214 Ill.2d 106, 824 N.E.2d 250 (2005).

excused. The remaining eleven sitting jurors were questioned about their ability to remain fair. However, the Illinois Supreme Court found that the trial court erred by failing to question the alternate who replaced the excused juror.³⁷⁹

In other cases, the outside contact has been deemed minimal and the trial court was not required to question the jurors. The U.S. Court of Appeals explained, “[T]he extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury. How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury’s deliberations.”³⁸⁰

The trial court is required to ensure a fair and impartial jury even if the defendant is the source of the potential extraneous bias. The Illinois Appellate Court has noted, “It makes no difference in this case that it was [the defendant] himself who initiated the contact that may have poisoned the jury. We reject the suggestion that [the defendant] may not be heard here to complain of the results of his own misconduct....At issue in his trial in this case was whether [the defendant committed the charged offense], not whether he had tried to corrupt the judicial system. A fair and impartial jury cannot be permitted to draw the conclusion that, because a defendant attempted to fix his trial, he is guilty of the offense for which he is being tried. It is conceivable that a defendant, innocent of the charge being tried, might attempt to tamper with a jury to assure a favorable verdict.”³⁸¹

If a party turns down the opportunity to question the juror about out-of-court communication with a witness, party, or attorney and presents no other evidence demonstrating that the incident caused prejudice, the party cannot later claim error.³⁸²

4. Jurors investigating the case, including internet searches. The trial court should question jurors if information arises that one of the jurors has used the internet or some other source to research an issue relevant to the case. In McGee v. Chicago,³⁸³ the plaintiff testified about memory lapses or blackouts. During the trial, a juror informed the courtroom deputy that another juror had performed her own research on the internet regarding memory lapses and had brought that information into the jury room. The trial court attempted to use the deputy to identify the juror in question. When the individual would not openly admit to the deputy that

³⁷⁹ People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260-61 (2005). See also, Horn v. Union Pacific, 2012 IL App (5th) 110558U, ¶¶ 16, 22 (failure to question juror about a conversation with the spouse of an attorney).

³⁸⁰ Wisehart v. Davis, 408 F.3d 321, 326 (7th Cir. 2005). The Wisehart decision required inquiry when one of the jurors received information that the defendant had taken a polygraph examination. See also, People v. Ward, 371 Ill. App. 3d 382, 862 N.E.2d 1102 (1st Dist. 2007) (After defendant allegedly communicated with one of the jurors, the trial court questioned that juror but did not question any of the other jurors. The defense did not request that the other jurors be questioned. No error in failing to question the rest of the jurors.)

³⁸¹ People v. Ward, 371 Ill.App. 3d 382, 406, 862 N.E.2d 1102, 1127 (1st Dist. 2007) (quoting U.S. v. Forrest, 620 F.2d 446, 458 (5th Cir. 1980)).

³⁸² Horn v. Union Pacific, 2012 IL App (5th) 110558U, ¶¶ 16, 22; People v. Turner, 143 Ill. App.3d 417, 426 493 N.E.2d 38, 43 (1st Dist. 1986).

³⁸³ 2012 IL App (1st) 111084.

she had done internet research, the trial court instructed the jurors not to consider outside sources of information and to base their decision on the evidence presented in the courtroom.³⁸⁴ The Illinois Appellate Court concluded that the trial court erred and that *voir dire* was required:

The circuit court abused its discretion in denying defendants' request to *voir dire* the jurors. Once it became apparent that extraneous information on memory lapse had reached the jury, the circuit court's well-intentioned concern not to embarrass any juror was misplaced. The circuit court should have sustained defendants' request to *voir dire* the juror in chambers. At a minimum, the circuit court should have determined what was brought into the jury room, what it contained, and who had read it. The court could then determine whether the extraneous information was prejudicial.³⁸⁵

Thus, the trial court should re-open voir dire examination when it receives credible information that extraneous or unauthorized information has reached the jury, whether by juror use of the internet or some other source.

5. Observing a defendant or co-defendant in custody in a criminal case (including defendants or co-defendants in jail jump suits or handcuffs). If jurors are accidentally exposed to a defendant or a co-defendant while he or she is shackled or in a jail jump suit, defense counsel should be given the opportunity to question "the juror who saw the defendant to determine what the juror saw, if any other jurors were informed, and if it would affect that juror's ability to be fair and impartial."³⁸⁶

6. Potential misuse of trial exhibits. When a party alleges that jurors have misused or mishandled an exhibit in a way that could cause prejudice, the trial court should consider questioning the jurors about the matter.³⁸⁷

7. Juror comments or behavior indicating an opinion before hearing all the evidence and argument. Jurors should be questioned if they appear to have formed an opinion before hearing all of the evidence and argument. In People v. Peterson, a juror "approached [defense counsel] in the hall and stated that she 'was praying that the defendants will plead guilty' so she could go home."³⁸⁸ The juror had stated during pre-trial voir dire examination that she could be fair. But the Appellate Court ruled that further questioning was necessary following the comment because it could have meant that the juror had already made up her mind. "[T]he remark itself vitiates any previous conclusion made as to impartiality on voir dire, and, without

³⁸⁴ McGee v. Chicago, 2012 IL App (1st) 111084, ¶ 29.

³⁸⁵ McGee v. Chicago, 2012 IL App (1st) 111084, ¶ 33.

³⁸⁶ People v. Romero, 384 Ill.App.3d 125, 135, 892 N.E.2d 1122, 1131 (1st Dist. 2008). See also, People v. Stevenson, 2012 IL App (1st) 111511U, ¶ 23.

³⁸⁷ See, e.g., People v. Williams, 384 Ill. App.3d 327, 336, 892 N.E.2d 620, 628 (4th Dist. 2008) ("[O]nce defense counsel raised the possibility that one of the jurors was copying the statement, the court should put on the record what transpired, review the jurors' notes, and possibly *voir dire* the jury on the issue.").

³⁸⁸ People v. Peterson, 15 Ill.App.3d 110, 303 N.E.2d 514-15 (5th Dist. 1973).

further inquiry, there was no way for the trial court to make a sound judgment on her present state of mind.”³⁸⁹

In People v. Nelson,³⁹⁰ the foreperson wrote a note during deliberations informing the judge that one of the jurors said in the middle of the proceedings (before evidence had been completed and before argument) that he had already made up his mind and then refused to deliberate at the conclusion of the trial. The trial court thoroughly questioned the juror about whether he or she had a “preconceived notion” how to resolve the case and whether the juror was able to “weigh the facts and circumstances and address the issue of the case from the evidence.”³⁹¹

In People v. Runge,³⁹² a juror complained of another juror saying “yes, yeah” when one party appeared to be doing well and threw his notes against the wall when the judge overruled an objection and allowed the other side to ask a question. The Illinois Supreme Court approved the trial court’s decision to allow the juror to remain after asking the following questions:

I observed you in the jury box. Are you having difficulty with the case of some kind? What’s happening?³⁹³

Did you formulate any opinions about this case at all?³⁹⁴

I told you earlier, at the beginning of the case, the defendant is presumed to be innocent of the charge against him?...You still understand that?...Do you have any problem being able to follow that rule of law basically?³⁹⁵

Do you have any opinions as to whether or not the defendant’s guilty or innocent of the charge against him at the present time?³⁹⁶

Is there anything about what’s happened with the trial so far that would in any way prevent you from giving either side in this case a fair trial?³⁹⁷

As the proceedings continued, a juror notified the trial court of potentially improper comments from the previously-questioned juror. The Illinois Supreme Court approved the trial court’s decision to replace the juror after asking the following questions:

I just wanted to ask you, are you having a rough time with this case at all?...What about, basically, if you can tell me?³⁹⁸

³⁸⁹ People v. Peterson, 15 Ill.App.3d 110, 111, 303 N.E.2d 514, 515 (5th Dist. 1973). See also, U.S. v. Resko, 3 F.3d 684, 690 (3rd Cir. 1993).

³⁹⁰ 235 Ill.2d 386, 922, N.E.2d 1056 (2009).

³⁹¹ People v. Nelson, 235 Ill.2d 386, 438-39, 922 N.E.2d 1056, 11085-86 (2009).

³⁹² People v. Runge, 234 Ill.2d 68, 917 N.E.2d 940 (2009).

³⁹³ People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).

³⁹⁴ People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).

³⁹⁵ People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).

³⁹⁶ People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).

³⁹⁷ People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).

Have you talked about anything, any of these issues,...with any of the other jurors or anything like that?³⁹⁹

In People v. Garza,⁴⁰⁰ the Illinois Appellate Court approved the trial court's decision to replace a juror after asking the following questions:

One of the important things about jurors is that they approach their duties with the mind-set of they don't know anything about the case. And they wait for the evidence, they follow the law, and in that way they decide the case. Do you understand what I'm saying so far?⁴⁰¹

The important part of a jury is that they don't walk into the trial thinking, before they hear anything, whether they want someone on one side or the other to win or lose. Do you understand that?⁴⁰²

Certainly jurors talk about jury service and why they're here. Every judge tells jurors not to talk about the case, but there's probably a few things about jury service that aren't about the case specifically, and my guess is jurors talk about those. Is it possible that the jury commission saw you talking with other jurors about jury service in some way?...What was the other thing you were talking about?⁴⁰³

8. Sleeping jurors. In People v. Jones,⁴⁰⁴ the trial court noted that a juror appeared to have been half asleep through most of the trial. Under those circumstances, the Illinois Appellate Court held that the trial court must, on its own motion, make further inquiry to ensure that the defendant receives a fair trial.⁴⁰⁵

The Illinois Appellate Court noted that "a juror who is inattentive for a substantial portion of a trial has been found to be unqualified to serve on the jury."⁴⁰⁶ However, a juror is not automatically disqualified and voir dire might not be required because of a momentary lapse in attention. In People v. Gonzalez,⁴⁰⁷ the trial court notified the parties that a juror "may have fallen asleep" early in the proceedings. Neither party asked to question the juror and neither party raised the issue again until the appeal. The Illinois Appellate Court held that the trial court was not obligated to voir dire the juror when neither party requested such relief and when the record contained no indication that the juror may have fallen asleep at any other time during the trial.⁴⁰⁸

³⁹⁸ People v. Runge, 234 Ill.2d 68, 117, 917 N.E.2d 940, 968 (2009).

³⁹⁹ People v. Runge, 234 Ill.2d 68, 117, 917 N.E.2d 940, 968 (2009).

⁴⁰⁰ 2012 IL App (2d) 110787U.

⁴⁰¹ People v. Garza, 2012 IL App (2d) 110787U, ¶ 4.

⁴⁰² People v. Garza, 2012 IL App (2d) 110787U, ¶ 4.

⁴⁰³ People v. Garza, 2012 IL App (2d) 110787U, ¶ 4.

⁴⁰⁴ 369 Ill.App.3d 452, 861 N.E.2d 276 (1st Dist. 2006).

⁴⁰⁵ People v. Jones, 369 Ill.App.3d 452, 456, 861 N.E.2d 276, 279-80 (1st Dist. 2006).

⁴⁰⁶ People v. Jones, 369 Ill.App.3d 452, 455, 861 N.E.2d 276, 279 (1st Dist. 2006).

⁴⁰⁷ 388 Ill.App.3d 566, 577, 900 N.E.2d 1165, 1174 (1st Dist. 2008).

⁴⁰⁸ People v. Gonzalez, 388 Ill.App.3d 566, 578, 900 N.E.2d 1165, 1175 (1st Dist. 2008).

VIII. Racial and Gender Composition of the Jury and Batson Issues

A. Panels must be selected in a race-neutral fashion. The Equal Protection Clause of the U.S. and Illinois Constitutions requires that the panel of jurors presented for voir dire questioning must be selected in a race-neutral fashion. In People v. Hollins,⁴⁰⁹ the court’s personnel deliberately removed or redirected members of one race from the jury pool. The Illinois Appellate Court found that a 20% disparity between the general population in the county and the jurors in the panel established a *prima facie* case of discrimination.

B. Three-step process of Batson challenges. Batson v. v. Kentucky⁴¹⁰ establishes a three-step process to determine whether a party used its peremptory challenges to remove prospective jurors on the basis of race. A Batson challenge must be made before the jury is sworn.⁴¹¹ Trial courts must be careful to address each step in the correct order rather than collapsing the inquiry into one step.⁴¹²

1. *Prima facie* case of purposeful discrimination. The party objecting to the use of peremptory challenges must first establish a *prima facie* case of purposeful discrimination during jury selection by demonstrating that relevant circumstances raise an inference that the opposing party exercised a peremptory challenge based upon a prospective juror’s race.⁴¹³

The mere number of people in a protected class who are peremptorily challenged will not by itself establish a *prima facie* case of discrimination.⁴¹⁴ However, that number is relevant because Illinois courts look to the percentages of a protected class within the venire compared to the composition of the jury selected to hear the case.⁴¹⁵ When a Batson objection is made

⁴⁰⁹ 366 Ill. App. 3d 533 852 N.E.2d 414 (3rd Dist. 2006).

⁴¹⁰ 476 U.S. 79 (1986).

⁴¹¹ People v. Richardson, 189 Ill.2d 401, 409, 727 N.E.2d 362, 368 (2000); People v. Fair, 159 Ill.2d 51, 71, 636 N.E.2d 455, 467 (1994).

⁴¹² People v. Davis, 233 Ill.2d 244, 248 909 N.E.2d 766, 768 (2009) (“[T]he trial court impermissibly collapsed the three-step *Batson* process. Accordingly, we remanded the cause for a full *Batson* hearing, beginning with the *prima facie* stage...”); People v. Allen, 401 Ill.App.3d 840, 850, 929 N.E.2d 583, 593 (1st Dist. 2010).

⁴¹³ Batson v. Kentucky, 476 U.S. 79, 96; People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 876, 883 (2007); Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 48 (“[T]he party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record...” (quoting People v. Davis, 233 Ill.2d 244, 262, 909 N.E.2d 766, 775 (2009))); People v. Allen, 401 Ill.App.3d 840, 849, 929 N.E.2d 583, 592 (1st Dist. 2010) (“To make it beyond stage one, defendant must produce evidence sufficient to permit the trial court to draw an inference that discrimination has occurred.”); People v. Jackson, 357 Ill. App. 3d 313, 325, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419, 745 N.E.2d 13, 22 (1st Dist. 2001).

⁴¹⁴ People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 876, 883 (2007); People v. Gutierrez, 402 Ill.App.3d 866, 891, 932 N.E.2d 139, 164 (1st Dist. 2010) (“It is settled that a *Batson prima facie* case cannot be established merely by the numbers of black venirepersons stricken by the State.”) (quoting People v. Peeples, 155 Ill.2d 422, 469, 616 N.E.2d 294, 316 (1993)). But see, Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 61 (“This is not to suggest *in any way* that such a small number [two peremptory challenges against a racial minority] can never support a *prima facie* case of discrimination.”).

⁴¹⁵ See, e.g., People v. Green, 2012 IL App (3d) 110050U, ¶ 16 (“Here, defendant made a *prima facie* showing of gender discrimination. The State used its peremptory challenges to exclude predominantly

regarding discrimination against a particular race, the unchallenged presence of jurors of that race on the seated jury tends to weaken the basis for a *prima facie* case of discrimination. But a small number of challenges may constitute a *prima facie* case even when several members of the protected class are selected to serve on the jury.⁴¹⁶

In considering whether a party has established a *prima facie* case, courts consider: (1) the racial identity between the defendant and the excluded prospective jurors; (2) a systematic pattern of strikes against prospective jurors of a particular racial group; (3) a disproportionate use of peremptory challenges against prospective jurors of a particular racial group; (4) the level of a racial group's representation in the venire as compared to the jury; (5) the opposing counsel's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded prospective jurors from the racial group in question were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witnesses.⁴¹⁷ In addition, "an important tool in assessing the existence of a *prima facie* case is 'comparative juror analysis,' which examines 'a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group.'"⁴¹⁸

In weighing these factors, the trial court should keep in mind the purpose of the first prong. The *Batson* framework is meant to address suspicions that discrimination may have infected the jury selection process and the first prong identifies which cases require further investigation because of such suspicions.⁴¹⁹ The U.S. Supreme Court has explained, "We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."⁴²⁰ Quoting this language, the Illinois Supreme Court has noted, "the threshold for making out a *prima facie* claim under *Batson* is not high."⁴²¹

2. Race-Neutral Explanation. If the objecting party establishes a *prima facie* case, the burden shifts to the other party to articulate a race-neutral explanation for challenging the

female jurors; only four of the impaneled jurors were female, while the venire was evenly balanced between the genders..."); People v. Gutierrez, 402 Ill.App.3d 866, 893, 932 N.E.2d 139, 165 (1st Dist. 2010).

⁴¹⁶ See, e.g., People v. Taylor, 409 Ill. App.3d 881, 902, 949 N.E.2d 124, 145 (1st Dist. 2011) (*prima facie* case established when three African-American jurors were peremptorily challenged and three of four selected on the first panel were African-American).

⁴¹⁷ See People v. Jackson, 357 Ill. App. 3d 313, 325-26, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419-20, 745 N.E.2d 13, 22-23 (1st Dist. 2001). A detailed analysis of each of these factors is contained in Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶¶ 47-78.

⁴¹⁸ People v. Davis, 231 Ill.2d 349, 361, 899 N.E.2d 238, 246 (2008) (quoting Boyd v. Newland, 467 F.3d 1139, 1145 (9th Cir. 2006)). See also, Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 47.

⁴¹⁹ Johnson v. California, 545 U.S. 162, 172 (2005).

⁴²⁰ Johnson v. California, 545 U.S. 162, 170 (2005).

⁴²¹ People v. Davis, 231 Ill.2d 349, 360 899 N.E.2d 238, 245 (2008).

venirepersons in question.⁴²² Numerous factors have been held to be race-neutral reasons for a challenge, including a prospective juror’s employment,⁴²³ youth,⁴²⁴ or failure to complete a written questionnaire.⁴²⁵ Even a juror’s demeanor or body language may constitute a race-neutral reason for a challenge.⁴²⁶ At the second stage, the race-neutral explanation need not be “persuasive, or even plausible.”⁴²⁷ The only issue is whether the explanation is non-discriminatory.

3. Evaluating whether the race-neutral explanation is credible or pretextual. If the opposing party provides a race-neutral explanation, the trial judge must consider this explanation and determine whether the complaining party has established purposeful racial discrimination, including whether any purported neutral explanation is pretextual.⁴²⁸

The trial court must thoroughly examine the articulated reasons for the peremptory challenge and should not suggest race-neutral explanations. In one case, the Illinois Appellate Court observed:

[T]he record clearly shows that the trial judge did not “closely scrutinize” the prosecutor’s explanations. In fact, several times he coached the prosecutor by explaining or developing the reasons given by the prosecutor or simply articulating a “race-neutral” reason for the prosecutor, who merely agreed... The trial judge did not undertake a “sincere and reasoned attempt to evaluate the prosecutor’s explanation in light of the circumstances of the case.”⁴²⁹

The credibility of a race-neutral explanation can be evaluated based on many factors, including “the [proponent’s] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.”⁴³⁰ The trial court should consider “the offering party’s consistency in applying its non-discriminatory

⁴²² Harris v. Hardy, 2012 U.S.App.LEXIS 10336 (May 23, 2012); People v. Jackson, 357 Ill. App. 3d 313, 325-26, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419-20, 745 N.E.2d 13, 22-23 (1st Dist. 2001).

⁴²³ People v. Taylor, 409 Ill. App.3d 881, 902, 949 N.E.2d 124, 145 (1st Dist. 2011).

⁴²⁴ People v. Taylor, 409 Ill. App.3d 881, 902, 949 N.E.2d 124, 145 (1st Dist. 2011).

⁴²⁵ People v. Brooks, 2012 IL App (4th) 110516U, ¶ 41.

⁴²⁶ People v. Brooks, 2012 IL App (4th) 110516U, ¶ 35; People v. Sipp, 378 Ill.App.3d 157, 169, 883 N.E.2d 1133, 1143 (1st Dist. 2008) (“Historically, demeanor, body language, and manner have been important factors in jury selection and constitute legitimate, racially neutral reasons for exercising peremptory challenges. However, such demeanor-based explanations ‘must be closely scrutinized because they are subjective and can be easily used by a prosecutor as a pretext for excluding persons on the basis of race.’”) (quoting People v. Banks, 241 Ill.App.3d 966, 976, 609 N.E.2d 864, 871 (1st Dist. 1993)).

⁴²⁷ Purkett v. Elem, 514 U.S. 765, 767-68 (1995). See also, Harris v. Hardy, 680 F.3d 942, 949 (7th Cir. 2012).

⁴²⁸ Harris v. Hardy, 680 F.3d 942, 949 (7th Cir. 2012); People v. Jackson, 357 Ill. App. 3d 313, 325-26, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419-20, 745 N.E.2d 13, 22-23 (1st Dist. 2001).

⁴²⁹ People v. Banks, 241 Ill.App.3d 966, 976, 609 N.E.2d 864, 871 (1st Dist. 1993) (quoting People v. Harris, 129 Ill.2d 123, 174, 544 N.E.2d 357, 380 (1989)).

⁴³⁰ Miller-El v. Cockrell, 537 U.S. 322, 339 (2003).

justification.”⁴³¹ “[I]f a [party’s] proffered reason for striking [a prospective juror of one race] applies just as well to an otherwise-similar [juror of a different race] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.”⁴³² “A further factor that may be considered in determining the credibility of the explanation is whether the non-discriminatory justification offered in step two results in disparate impact on prospective jurors of one race or gender.”⁴³³ “An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another.”⁴³⁴

C. Batson has been extended to claims of gender discrimination during jury selection. The Fourteenth Amendment to the U.S. Constitution prohibits discrimination in jury selection on the basis of gender regardless of whether the challenge involves a male or female.⁴³⁵ The same three-step Batson process applies in cases of alleged gender discrimination in the exercise of peremptory challenges.⁴³⁶

D. Batson has been extended to civil cases. A private party’s exercise of peremptory challenges occurs pursuant to state action administered by government officials. For this reason, “[t]he rule announced in *Batson*, that the State may not use peremptory challenges to purposefully exclude members of the venire based on their race, applies with equal force to private litigants in civil cases.”⁴³⁷ Thus, the same three-step Batson process applies to civil as well as criminal cases.⁴³⁸

E. Batson applies to defendants as well as the prosecution in criminal cases. The Fourteenth Amendment to the U.S. Constitution prohibits discrimination in jury selection by defendants in criminal cases. The discriminatory use of challenges by either party in a criminal case inflicts harms on the dignity of prospective jurors and the integrity of the courts. Therefore, a prosecutor has standing to raise a Batson objection on behalf of excluded jurors.⁴³⁹

F. The trial court may make a Batson objection on its own motion when a prima facie case of discrimination is “abundantly clear.” A trial court may raise a Batson issue *sua sponte*.⁴⁴⁰ The Illinois Supreme Court has observed that a trial court “suffers an injury as significant as either of the parties when discrimination takes place in jury selection...[P]erceived discrimination in jury selection reflects negatively on the integrity of the judge who presides over the proceedings.”⁴⁴¹

⁴³¹ United States v. Stephens, 514 F.3d 703, 711 (7th Cir. 2008).

⁴³² Miller-El v. Dretke, 545 U.S. 231, 241 (2005).

⁴³³ United States v. Stephens, 514 F.3d 703, 712 (7th Cir. 2008).

⁴³⁴ Herndandez v. New York, 500 U.S. 352, 363 (1991) (brackets in original, quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

⁴³⁵ J.E.B. v. Alabama, 511 U.S. 127 (1994).

⁴³⁶ People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 786, 883 (2007); People v. Green, 2012 IL App (3d) 110050U.

⁴³⁷ McDonnell v. McPartlin, 192 Ill.2d 505, 526 736 N.E.2d 1074, 1087 (2000).

⁴³⁸ Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 35.

⁴³⁹ Georgia v. McCollum, 505 U.S. 42, 59 (1992).

⁴⁴⁰ People v. Rivera, 221 Ill. 2d 481, 852 N.E.2d 771 (2006).

⁴⁴¹ People v. Rivera, 221 Ill. 2d 481, 503, 852 N.E.2d 771, 784 (2006).

However, a trial court may make a Batson claim on its own motion only when a *prima facie* case of discrimination is “abundantly clear.”⁴⁴² Moreover, the trial court must make an adequate record consisting of all relevant facts, findings, and articulated bases for all three stages of the Batson process.⁴⁴³

G. Preserving the record when making a Batson objection. The party making the Batson challenge must preserve the record by establishing the race or gender of all of the venire members and also establishing which prospective jurors possess which traits.⁴⁴⁴ If a party relies upon the demeanor of a prospective juror as a race-neutral basis for a peremptory challenge, the party raising the Batson claim must put into the record any disagreement as to the description of the challenged juror’s demeanor or must put into the record whether any other prospective jurors displayed the same demeanor.⁴⁴⁵

⁴⁴² People v. Rivera, 221 Ill. 2d 481, 515, 852 N.E.2d 771, 791 (2006).

⁴⁴³ People v. Davis, 231 Ill.2d 349, 367, 899 N.E.2d 238, 249 (2008); People v. Rivera, 221 Ill. 2d 481, 515, 852 N.E.2d 771, 791 (2006).

⁴⁴⁴ People v. Davis, 231 Ill.2d 349, 365, 899 N.E.2d 238, 247 (2008) (“[W]e are not comfortable with presuming facts not contained in the record, and defendant has made no representation before this court that the jurors [accepted by the State] are in fact nonblack.”); People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 876, 883 (2007); People v. Abdulla, 2012 IL App (1st) 110313U, ¶¶ 52-53 (“There is nothing in the record regarding the racial identity or national origin of any of the other [unchallenged] venirepersons or jurors. As a result, we cannot assess whether there is a pattern of strikes or a disproportionate use of peremptory challenges against Arabic venirepersons.”); Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 48 (“[T]he party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against that party.”) (quoting People v. Davis, 233 Ill.2d 244, 262, 909 N.E.2d 766, 775 (2009)).

⁴⁴⁵ People v. Brooks, 2012 IL App (4th) 110516U, ¶ 35 (“[I]t was incumbent upon defendant to make a record that appropriately supports his contentions of discrimination, and defendant does not point to any statement in the record describing the outward appearance or body language of other venirepersons.”).

IX. Procedures for Voir Dire of Potential Jurors

A. Attorneys directly questioning prospective jurors. Prior to May 1, 1997, voir dire examination in civil and criminal cases was governed by Illinois Supreme Court Rule 234. After that date, rule 234 was amended for civil cases and rule 431 was adopted for criminal cases. Rule 431 modified rule 234 in the following ways (additions are underlined, deletions have a line through them):

(a) The court shall conduct *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate touching their qualification to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate ~~or~~ and may shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges. Questions shall not directly or indirectly concern matters of law or instructions. The court ~~may~~ shall acquaint prospective jurors with the general duties and responsibilities of jurors.⁴⁴⁶

Rule 234 was amended with virtually identical language, except for substituting “the nature and extent of the damages” for “the nature of the charges.”⁴⁴⁷

Among the changes, the new rule replaced “*may* permit...direct inquiry” with “*shall* permit...direct inquiry.” A conflict has developed over whether this language is mandatory or whether a trial court could deny a request for attorney-conducted voir dire.⁴⁴⁸ The rule contains the language “as the court deems proper,” which undoubtedly gives the trial court the right to sustain objections and limit improper voir dire questioning. But the “as the court deems proper” language is immediately followed by the phrase “for a reasonable period of time.” This would seem to indicate that some period for direct inquiry is mandated. Further, interpreting the new rule as maintaining the old discretionary standard would make the change from “may” to “shall” completely meaningless.⁴⁴⁹

In People v. Garstecki,⁴⁵⁰ the Illinois Supreme Court discussed Rule 431. Although the trial court first questioned the prospective jurors, the attorneys were then allowed to ask questions of every prospective juror requested. For this reason, the Illinois Supreme Court stated that it was not ruling

⁴⁴⁶ Ill.S.Ct.R. 431(a).

⁴⁴⁷ Ill.S.Ct.R. 234.

⁴⁴⁸ Compare People v. Allen, 313 Ill.App.3d 842, 847, 730 N.E.2d 1216, 1221 (2nd Dist. 2000) (presumption in favor of attorney-conducted voir dire) and Grossman v. Gebaroski, 315 Ill.App.3d 213, 221, 732 N.E.2d 1100, 1106 (1st Dist. 2000) (attorney-conducted voir dire mandatory).

⁴⁴⁹ Since the adoption of the rule, Appellate Court decisions have referred to attorney-conducted voir dire as an accepted procedure. See, e.g., People v. Brooks, 2012 IL App (4th) 110516U, ¶ 7 (“The State and defense counsel were then permitted to follow up with individual questions as necessary.”); Thornhill v. Midwest Physician Center, 337 Ill. App. 3d 1034, 1045, 787 N.E.2d 247, 257 (1st Dist. 2003) (“When questioning of prospective jurors is turned over to counsel, it has been held that it is properly within the scope of questioning to expose any hidden bias or prejudice of a prospective juror.”); Rub v. Consolidated Rail Corporation, 331 Ill. App. 3d 692, 696, 705, 771 N.E.2d 1015, 1019, 1026 (1st Dist. 2002).

⁴⁵⁰ 234 Ill.2d 430, 917 N.E.2d 465 (2009).

on the issue of whether Rule 431 is mandatory: “Following its own *voir dire*, the court then allowed defendant’s attorney to pick out any prospective jurors that he wished to question further.... Because the trial court complied with the rule’s mandatory obligation, we are not presented with the question of whether the rule is mandatory or directory.”⁴⁵¹

While not expressly ruling on the issue, the Illinois Supreme Court discussed the rule:

[T]he change from “may” to “shall” must have had some significance. That significance was to change the rule from a permissive one to a mandatory one. Under the previous version of the rule, which stated that the court “may” allow attorney participation as the court deems proper, the trial court had complete discretion whether to allow attorneys to participate in *voir dire*...[W]hat the rule clearly mandates is that the trial court consider: (1) the length of examination by the court; (2) the complexity of the case; and (3) the nature of the charges; and then determine, based on those factors, whatever direct questioning by the attorneys could be appropriate. Trial courts may no longer simply dispense with attorney questioning whenever they want. We agree...that the “the trial court is to exercise its discretion in favor of permitting direct inquiry of jurors by attorneys.” We are not prepared to say, however, that it is impossible to conceive of a case in which the court could determine, based on the nature of the charge, the complexity of the case, and the length of the court’s examination, that no attorney questioning would be necessary.⁴⁵²

Thus, there might be some circumstances in which direct inquiry would not be required.

In People v. Gonzalez,⁴⁵³ the trial court prohibited direct questioning of prospective jurors. The defendant complained that the trial court used leading questions that influenced a juror’s responses and then prohibited direct inquiry by the attorney to follow up on the matter. The Illinois Appellate Court reversed the conviction: “[D]efense counsel voiced concern that leading questions from the court affected the juror’s answers to questions on that issue. In a close case, the prospect of a biased jury could easily affect the outcome. Accordingly, the error threatened to tip the scales of justice against the defendant...”⁴⁵⁴

B. Back-striking. “Back-striking is the process wherein a party may strike a venireperson from an already accepted panel, where that panel has been broken by opposing counsel and re-tendered.”⁴⁵⁵ When one party tenders a panel to the other party, the other party accepts the panel without change, and then the first party exercises a peremptory challenge to excuse one of the panel members, no back-striking has occurred.⁴⁵⁶ The trial court has discretion to prohibit “back-

⁴⁵¹ People v. Garstecki, 234 Ill.2d 430, 444-45, 917 N.E.2d 465, 474 (2009).

⁴⁵² People v. Garstecki, 234 Ill.2d 430, 443-44, 917 N.E.2d 465, 473-74 (2009) (citations omitted).

⁴⁵³ 2011 IL App. (2d) 100380.

⁴⁵⁴ People v. Gonzalez, 2011 IL App (2d) 100380, ¶ 27, 962 N.E.2d 23 (2nd Dist. 2011).

⁴⁵⁵ Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998).

⁴⁵⁶ Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998).

striking” of venire members during the jury selection process if the policy is announced before jury selection begins.⁴⁵⁷

In some cases, additional information is learned after one party has exercised its peremptory challenges and before the entire panel has been selected. Even if the trial court has prohibited back-striking, a party must object to the back-striking prohibition and must attempt to exercise a peremptory challenge as a back-strike in order to preserve an objection for appellate review. In People v. Dixon,⁴⁵⁸ the defendant accepted a panel of prospective jurors. After accepting the panel, the State informed the defendant that a juror had been dishonest in denying prior arrests. The trial court rejected the defendant’s motion to strike the juror for cause. The defense did not attempt to exercise a peremptory challenge based on the trial court’s prohibition against back-striking. The Appellate Court ruled that the error was not preserved because the defense failed to object to the back-striking prohibition and failed to request a peremptory challenge after learning the new information.⁴⁵⁹

C. Burden of proof when challenging jurors. The burden of showing that a prospective juror possesses a disqualifying characteristic or state of mind is on the party making the challenge.⁴⁶⁰

D. Court reporter required during voir dire examination of prospective jurors in criminal cases. Illinois Supreme Court Rule 608(a)(9) states that in non-death penalty criminal cases, “court reporting personnel...shall take the record of the proceedings regarding the selection of the jury...”⁴⁶¹ The language is mandatory.⁴⁶²

Higher courts in Illinois have given different answers to the question of whether an attorney may waive a court reporter during jury selection in a criminal case. Waiving a court reporter during voir dire is not *per se* ineffective assistance of counsel,⁴⁶³ but such a waiver can constitute ineffectiveness under the facts of the case. In People v. Houston,⁴⁶⁴ defense counsel waived the court reporter during jury selection in an armed robbery case. After the trial, the defendant wrote to the judge to complain about the racial composition of the jury. The lack of a record precluded analysis under Batson. The Illinois Supreme Court found defense counsel’s performance to be deficient: “[C]ounsel’s waiver of the court reporter in the case at bar falls below an objective standard of reasonableness. We can conceive of no possible strategic advantage that might have been gained by waiving the court reporter for *voir dire*.”⁴⁶⁵

⁴⁵⁷ People v. Moss, 108 Ill. 2d 270, 275-76, 483 N.E.2d 1252, 1255-56 (1985).

⁴⁵⁸ 382 Ill.App.3d 233, 887 N.E.2d 577 (1st Dist. 2008).

⁴⁵⁹ People v. Dixon, 382 Ill.App.3d 233, 241-42, 887 N.E.2d 577, 585 (1st Dist. 2008).

⁴⁶⁰ People v. Peoples, 155 Ill.2d 422, 463, 616 N.E.2d 294, 313 (1993); Roach v. Springfield Clinic, 1992 Ill.LEXIS 204 *45 (1992).

⁴⁶¹ Ill.S.Ct.R. 608(a)(9) (2012).

⁴⁶² People v. Houston, 226 Ill.2d 135, 152-53, 874 N.E.2d 23, 34 (2007).

⁴⁶³ People v. Houston, 226 Ill.2d 135, 144, 874 N.E.2d 23, 29 (2007) (“[A] waiver of the court reporter for *voir dire* is not *per se* ineffective assistance of counsel...”); People v. Ash, 346 Ill. App. 3d 809, 813, 805 N.E.2d 649, 652 (4th Dist. 2004).

⁴⁶⁴ 226 Ill.2d 135, 874 N.E.2d 23 (2007).

⁴⁶⁵ People v. Houston, 226 Ill.2d 135, 148, 874 N.E.2d 23, 32 (2007).

The Houston Court did not grant a new trial, but instead fashioned a different remedy. If the jury selection is not recorded and if a *Batson* claim is raised, the trial court must attempt to reconstruct the record of the jury selection. The Illinois Supreme Court explained:

We hold that where, as in the unusual case before us, a defendant attempts to raise in the trial court a *Batson* claim of discrimination in jury selection, and claim may not be pursued because trial counsel waived the presence of the court reporter for *voir dire*, in violation of our *Rule 608(a)(9)*, resulting in the absence of a *voir dire* record, the appropriate course, in the first instance, is to remand to the circuit court for an attempt to reconstruct the record of the proceedings regarding the selection of the jury.⁴⁶⁶

On remand, the trial court created a bystander's report with several exhibits, including the written jury questionnaires, driver's license photographs of the prospective jurors, and notes identifying which jurors were excused by the trial court, the State, and the defense.⁴⁶⁷

Before Houston, Illinois courts had ruled that appellate review is not possible without a transcript or a bystander's report, but would not necessarily remand the case for a bystanders report.⁴⁶⁸ In civil cases, higher courts have continued the practice of refusing to review claims of error during *voir dire* if a transcript or a bystanders report is not included in the record.⁴⁶⁹

Houston found counsel's performance deficient for waiving the court reporter. But after Houston, at least one Appellate Court panel has stated that counsel still may waive a court reporter during jury selection. The Illinois Appellate Court has stated, "There is nothing in rule 608(a)(9), however, that prohibits the parties from waiving the presence of the court reporter during *voir dire*. Allowing the parties to do so does not deprive a defendant of due process. Any claim of error in *voir dire* may be established through the use of a bystander's report or an agreed statement of facts."⁴⁷⁰

Whatever the cause (including a court reporter losing notes or counsel waiving a reporter), the lack of a transcript of *voir dire* is not plain error and a conviction will not be overturned without an allegation of some irregularity in jury selection.⁴⁷¹

E. Defendant's presence during *voir dire*. A defendant in a criminal case has a right to be present during jury selection, but a defendant can waive that right.⁴⁷² The defendant need not

⁴⁶⁶ People v. Houston, 226 Ill.2d 135, 152-53, 874 N.E.2d 23, 34 (2007).

⁴⁶⁷ People v. Houston, 229 Ill.2d 1, 6, 890 N.E.2d 424, 427-28 (2008).

⁴⁶⁸ See, e.g., People v. Toft, 355 Ill. App. 3d 1102; 824 N.E.2d 309 (3rd Dist. 2005) (no review possible and conviction affirmed when defendant failed to provide a transcript or a by-stander's report regarding *voir dire* of prospective jurors).

⁴⁶⁹ See, e.g., White v. Northeast Illinois Regional Commuter Railroad Corp., 1-09-1867, 2011 Ill. App. Unpub. LEXIS 636 (1st Dist. April 15, 2011).

⁴⁷⁰ People v. Reed, 376 Ill.App.3d 121, 125, 875 N.E.2d 167, 171 (1st Dist. 2007).

⁴⁷¹ People v. Sims, 403 Ill.App.3d 9, 16-17, 931 N.E.2d 1220, 1228 (1st Dist. 2010) (Transcript of jury selection missing "through no fault of defendant due to the court reporter's lost notes...It is not enough to say that as a result of the missing records we do not know whether any error occurred..."); People v. Russell, 385 Ill.App.3d 468, 473, 895 N.E.2d 1131, 1137 (3rd Dist. 2008).

personally declare the he or she waives the right to be present. If defense counsel waives the defendant's presence for voir dire while the defendant is in court, the waiver will be deemed valid.⁴⁷³ However, a waiver may not be valid if it occurs outside of the defendant's presence.⁴⁷⁴

Additionally, "a defendant's right to be present is not absolute; therefore, the fact that a defendant was absent during a portion of his trial does not automatically mean that the defendant has suffered a violation of his constitutional right to due process. Rather, a defendant's due process right of presence under the fourteenth amendment is violated only in the limited circumstance when his absence results in the denial of a fair and just trial. Where, as here, a defendant alleges that his absence from a portion of jury selection violates his fourteenth amendment right to due process, the 'fairness' issue concerns 'the impartiality of defendant's jury.' Therefore, a defendant must show that his absence from the *in camera voir dire* 'caused him to be tried, convicted, and sentenced by a jury prejudiced against him.'"⁴⁷⁵ However, some caselaw holds that the State must prove the violation harmless beyond a reasonable doubt if the defense objects. According to this line of precedent, the defendant is required to show prejudice only when the defendant fails to object and then raises the issue for the first time on appeal.⁴⁷⁶

When a defendant is not present during voir dire examination of prospective jurors, the defendant must be represented by counsel. If the defendant proceeds *pro se*, the defendant should be present during voir dire or the trial court must appoint counsel before conducting voir dire.⁴⁷⁷ However, if an in-custody defendant refuses to come into the courtroom during jury selection, the trial court may proceed with *voir dire* in the defendant's absence. Under such circumstances, the defendant's absence functions as a waiver of the right to be present during jury selection.⁴⁷⁸

In People v. Eppinger,⁴⁷⁹ the defendant refused to come into the courtroom for *voir dire*. "The court then proceeded with jury selection, advising the venire that defendant made a choice to represent himself, and made a choice that day not to participate in the proceedings."⁴⁸⁰ After jury selection, the defendant participated in the remainder of the trial. He made an opening statement,

⁴⁷² People v. Stokes, 293 Ill. App. 3d 643, 649, 689 N.E.2d 625, 629 (1st Dist. 1997).

⁴⁷³ People v. Bassett, 2011 IL App (3d) 91035U; People v. Wilson, 257 Ill.App.3d 670, 679, 628 N.E.2d 472, 481 (1st Dist. 1993).

⁴⁷⁴ People v. Oliver, 2012 IL App (1st) 102531, ¶ 5 and 16, 972 N.E.2d 199, 200-01 and 202 (1st Dist. 2012).

⁴⁷⁵ People v. Peeples, 205 Ill. 2d 480, 524-25, 793 N.E.2d 641, 668 (2002) (citations omitted, quoting People v. Bean, 137 Ill.2d 65, 85, 560 N.E.2d 258, 267 (1990)).

⁴⁷⁶ People v. Oliver, 2012 IL App (1st) 102531, ¶ 21, 972 N.E.2d 199, 204 (1st Dist. 2012). In People v. Stokes, 293 Ill. App. 3d 643, 689 N.E.2d 625 (1st Dist. 1997), the defense objected when voir dire proceeded without the defendant and the conviction was reversed. In Peeples and Bean, the defense failed to object and the convictions were affirmed. Further, the Bean decision involved the defendant's absence during the *in camera* examination of just one juror who defense counsel peremptorily challenged. The other jurors were challenged for cause by the judge or were among the alternates who did not serve.

⁴⁷⁷ 725 ILCS 5/115-4.1(a) (2012) ("The absent defendant must be represented by retained or appointed counsel.").

⁴⁷⁸ See People v. Eppinger, 2013 IL 114121, ¶¶ 40-41; People v. Reisinger, 106 Ill.App.3d 148, 153-54, 435 N.E.2d 860, 864 (5th Dist. 1982) ("no error in..fail[ing] to strictly comply with" Rule 115-4.1(a) because the defendant knowingly and intelligently waived counsel and voluntarily absented himself from the trial).

⁴⁷⁹ 2013 IL 114121.

⁴⁸⁰ People v. Eppinger, 2013 IL 114121, ¶ 11.

cross-examined the State's witnesses, and made a closing argument. The defendant did not raise any constitutional issues, so the Court did not consider whether jury selection without the defendant and without an attorney violates the Right to Counsel Clause or whether the Due Process Clause requires an attorney or the defendant's presence in order to subject the State's case to a meaningful adversarial test.⁴⁸¹ The Illinois Supreme Court held that section 115-4.1(a) of the Illinois Code of Criminal Procedure does not apply to in-custody defendants and that jury selection could proceed without an attorney when the defendant refused to enter the courtroom (when the defendant "essentially boycotts his or her own trial."⁴⁸²

F. Duty to tell the truth. Voir dire literally means "To speak the truth."⁴⁸³ Jurors are sworn to tell the truth before voir dire examination. In order to evaluate jurors, attorneys must receive truthful information. Therefore, jurors should be excused for cause if they give incorrect information during pre-examination surveys or oral examination.⁴⁸⁴

"When information is revealed during voir dire which tends to contradict a sworn juror's answers, the trial court should allow further inquiry, and failure to do so can result in reversible error."⁴⁸⁵ If a party does not learn of a juror's false statement until after the trial is complete, the party must establish that the juror answered falsely during voir dire examination and that prejudice resulted in order to receive a new trial.⁴⁸⁶ However, this two-part test cannot be applied using inadmissible evidence. Generally, post-trial statements by jurors about the mental process involved in reaching a verdict are not admissible.⁴⁸⁷

The juror need not admit to prejudice. When significant information is omitted or misstated during voir dire, Illinois courts have found prejudice based on the circumstances despite juror claims of

⁴⁸¹ People v. Eppinger, 2013 IL 114121, ¶ 20.

⁴⁸² People v. Eppinger, 2013 IL 114121, ¶¶ 38-41.

⁴⁸³ Black's Law Dictionary 1575 (6th ed. 1990).

⁴⁸⁴ People v. Szudy, 262 Ill.App.3d 695, 709, 635 N.E.2d 801, 810 (1st Dist. 1994).

⁴⁸⁵ Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998). See also, People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 16-61 (1st Dist. 1996) (when three venire members had indicated on their jury cards that they had been victims of crimes but did not reply in open court when asked orally, questioning should have been reopened). But see, People v. Adkins, 239 Ill.2d 1, 17-20, 940 N.E.2d 11, 21-23 (2010) (no error in removing juror for cause without follow-up questions).

⁴⁸⁶ People v. Nitz, 219 Ill. 2d 400, 422-223, 848 N.E.2d 982, 996 (2006); People v. Kantu, 196 Ill. 2d 105, 124-27, 752 N.E.2d 380, 391-93 (2001) (jury foreperson in a capital case did not reveal that he had gone to law school with the Cook County State's Attorney, juror wrote a congratulatory note to the Cook County State's Attorney after the trial which contained language indicating a personal relationship, case remanded for a post-trial hearing during which the trial court found that the juror and the Cook County State's Attorney had seen each other only twice since graduating from law school, the trial court found that the juror's state of mind allowed him to give to the defendant a fair and impartial trial); People v. Monroe, 2011 IL App (5th) 90616U (defendant entitled to evidentiary hearing when postconviction petition alleged that one of the jurors lied during voir dire when he denied knowing the defendant because the prospective juror was carrying on a sexual relationship with the defendant's girlfriend and "voted to convict the defendant with the hope that [the girlfriend] would want him [the juror] more if the defendant was sent to prison."); People v. Ollinger, 176 Ill.2d 326, 353, 680 N.E.2d 321, 335 (1997); People v. Dixon, 409 Ill.App.3d 915, 917, 948 N.E.2d 786, 787-88 (1st Dist. 2011) (no prejudice from failure to disclose 20-year-old arrests).

⁴⁸⁷ People v. Nitz, 219 Ill. 2d 400, 848 N.E.2d 982 (2006).

fairness. In People v. Potts,⁴⁸⁸ a juror failed to disclose that her daughter had been murdered and that she was acquainted with witnesses that were named on the witness list. At a post-trial motion, the juror testified that she did not know the witnesses' names and did not realize she knew the witnesses until the trial was underway. Further, the case did not involve a charge of murder and the witness testified that she was not prejudiced or influenced by her knowledge of any witness or her experience with her daughter's murder. Still, the Illinois Appellate Court reversed the conviction based on the juror's omissions during voir dire questioning.

G. Exhibits allowed during voir dire examination, trial court discretion. The Illinois Appellate Court has upheld a trial court's decision to allow prospective jurors to see a disabled plaintiff during voir dire because it allowed the parties to test for prejudice.⁴⁸⁹ The Illinois Appellate Court has also ruled that trial courts have discretion to allow or refuse the showing of "day-in-the-life" videos during voir dire examination of prospective jurors.⁴⁹⁰

H. Individual or in camera voir dire. The trial court has discretion to conduct individual voir dire out of the presence of the other venire members, but is not required to do so.⁴⁹¹ However, individual voir dire might be required when jurors express fears about their personal safety such that the defendant might not receive a trial by an impartial jury.⁴⁹²

I. Number of peremptory challenges, discretion to grant additional peremptory challenges, and peremptory challenges when selecting alternate jurors. In criminal cases involving one defendant, Illinois Supreme Court Rule 434(d) grants parties fourteen peremptory challenges in capital cases, seven peremptory challenges in non-capital felony cases, and five peremptory challenges in all other cases. When multiple defendants are being tried before the same jury, each defendant is allowed eight peremptory challenges in capital cases, five in non-capital felony cases, and three in all other cases. The State is allowed the same number of peremptory challenges as all of the defendants.⁴⁹³ In addition, trial courts have the discretion to grant additional peremptory

⁴⁸⁸ 224 Ill.App.3d 938, 947, 586 N.E.2d 1376, 1382-83 (2nd Dist. 1992).

⁴⁸⁹ Roberts v. Sisters of Saint Francis Health Services, Inc., 198 Ill.App.3d 891, 900-01, 556 N.E.2d 662, 668-69 (1990).

⁴⁹⁰ Foley v. Fletcher, 361 Ill. App. 3d 39, 50-51, 836 N.E.2d 667, 677 (1st Dist. 2005) (trial court refused the video).

⁴⁹¹ People v. Neal, 111 Ill.2d 180, 197-98, 489 N.E.2d 845, 852 (1985).

⁴⁹² U.S. v. Blich, 622 F.3d 658, 665 (7th Cir. 2010) ("In light of the revelation that the whole venire had been exposed to the discussions of fear for personal safety, the defendants were concerned that they would not receive a fair trial from persons who might have prejudged the case or were motivated by fear or preconception. They immediately requested a new pool or, at the least, individual questioning of the prospective jurors. They received neither. It is certainly true that not all allegations of juror bias or misconduct require individualized voir dire. We also recognize that 'courts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct or bias during the course of a trial [A]ny such investigation is intrusive and may create prejudice by exaggerating the importance and impact of what may have been an insignificant incident.' Nonetheless, we find the procedure in this case insufficient under the circumstances. The first important circumstance is, as we have already emphasized, the widespread nature of the discussions among the jurors. Unlike cases where a judge decides against individual voir dire of the entire panel at the risk of conjuring up new fears among previously unexposed jurors, individual questioning here did not run the same risk of planting a new concern in anyone's mind since all the venire members were part of the discussion.") (citations omitted).

⁴⁹³ Ill.S.Ct.R. 434(d) (2012).

challenges.⁴⁹⁴ Such a request might occur if the trial court rejects a party's request for a challenge for cause and the party must exercise a peremptory challenge to remove the prospective juror.

Supreme Court Rule 434(e) states that, "Each party shall have one additional peremptory challenge for each alternate juror."⁴⁹⁵ On its face, the rule gives an *additional* challenge for use when alternate jurors are being selected and does not prevent carrying over peremptory challenges that were not used when selecting the first twelve jurors. Some courts interpret the rule in this manner.⁴⁹⁶ In practice, many Illinois trial courts prohibit the parties from carrying over any peremptory challenges for selection of alternate jurors. Under this interpretation of the rule, parties are allowed only one peremptory challenge per alternate juror.

J. Public trial – voir dire may be closed to the public in limited circumstances. "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial."⁴⁹⁷ But a trial court must consider whether alternatives are available to protect the interests of the litigants and the prospective jurors without closing the courtroom.

In Press-Enterprise Co. v. Superior Court,⁴⁹⁸ three days of voir dire were open to the public, but six weeks of the jury selection process were closed and media requests for the transcripts were denied. The U.S. Supreme Court ruled that the procedure was illegal. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire."⁴⁹⁹

The U.S. Supreme Court suggested a procedure to balance the interests of a public trial and juror privacy:

The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public

⁴⁹⁴ People v. Eldefonso, 2011 IL App (1st) 101121U ¶ 42 ("[H]ad defense counsel used a peremptory challenge against [the prospective juror] and later exhausted all of the defendant's peremptory challenges, she could have requested, if necessary, additional peremptory challenges – a request that the trial court could have granted at its discretion."); People v. Bowens, 407 Ill.App.3d 1094, 1100, 943 N.E.2d 1249, 1257 (4th Dist. 2011) ("Had defendant used a peremptory challenge [after unsuccessfully challenging a prospective juror for cause] and later exhausted all of his peremptory challenges, he could have requested – if necessary – additional peremptory challenges, a request the trial court could have granted at its discretion."); People v. Fort, 248 Ill.App.3d 301, 311, 618 N.E.2d 445, 453 (1st Dist. 1993) ("A decision to grant... a request for additional peremptory challenges rests within the sound discretion of the trial court.")

⁴⁹⁵ Ill.S.Ct.R. 434(e) (2012).

⁴⁹⁶ See, e.g., People v. Pate, 2012 IL App (5th) 110130U, ¶ 82 ("When the panel of 12 was complete, the defendant had one peremptory challenge remaining, which carried over for the selection of alternates.").

⁴⁹⁷ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 551, 581 n.18 (1980). While this case did not directly concern jury selection, the U.S. Supreme Court cited Richmond Newspapers in a later case dealing with the issue of closed voir dire. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 n.10 (1984).

⁴⁹⁸ 464 U.S. 501 (1984).

⁴⁹⁹ Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 (1984). See also, People v. Kelly, 397 Ill.App.3d 232, 259, 921 N.E.2d 333, 358 (1st Dist. 2009) ("The questioning and selection of jurors has historically been open to the public.").

domain...[A trial judge] should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record. By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.⁵⁰⁰

The trial court may close the courtroom during pre-trial hearings on questions to be presented to prospective jurors. In People v. Kelly,⁵⁰¹ the trial court conducted closed hearings regarding questionnaires for potential jurors and sealed the transcripts until after the trial. The trial court considered alternatives including (1) redacting transcripts, (2) using pseudonyms for the jurors' names, (3) questioning potential jurors during *voir dire* concerning pretrial publicity, or (4) changing the venue of the trial. But the trial court rejected each of these alternatives as ineffective or unworkable in the particular case.⁵⁰² The Illinois Appellate Court affirmed the decision to close the hearings and seal the transcripts. "Making the questions public to the very pool from which the jurors are about to [be] drawn would completely undermine their function, of eliciting honest and unrehearsed responses from potential jurors."⁵⁰³

K. Replacing sitting jurors with alternates. Section 115-4(g) of the Illinois Code of Criminal Procedure and Supreme Court Rule 434(e) provide for mandatory replacement of a juror who dies or is discharged before submission of a case to the jury.⁵⁰⁴ The replacement of a discharged juror after deliberations begin is not directly addressed by these provisions.

In People v. Roberts,⁵⁰⁵ the Illinois Supreme Court ruled that a trial court may replace a juror with an alternate after deliberations have begun, but the trial court must "review carefully the matter and take significant precautions to avoid prejudice before allowing substitution."⁵⁰⁶ In determining whether a defendant was prejudiced by substituting a juror after deliberations have begun, reviewing courts consider the totality of the circumstances including: (1) whether the alternate juror and the remaining original jurors were exposed to outside prejudicial influences about the

⁵⁰⁰ Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511-12 (1984).

⁵⁰¹ 397 Ill.App.3d 232, 921 N.E.2d 333 (1st Dist. 2009).

⁵⁰² People v. Kelly, 397 Ill.App.3d 232, 241, 921 N.E.2d 333, 343 (1st Dist. 2009).

⁵⁰³ People v. Kelly, 397 Ill.App.3d 232, 260, 921 N.E.2d 333, 358 (1st Dist. 2009).

⁵⁰⁴ Ill.S.Ct.Rule 434(e) (2012); 725 Ill.Comp.Stat. 5/115-4(g) (2012).

⁵⁰⁵ 214 Ill. 2d 106, 824 N.E.2d 250 (2005).

⁵⁰⁶ People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260 (2005).

case; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution.⁵⁰⁷ The Illinois Supreme Court also expressed concern about guarding the privacy and secrecy of a jury's deliberations. Thus, trial courts must be careful to avoid inquiring as to jurors' specific views on the case.⁵⁰⁸

Illinois courts have applied a stringent test to ensure that a juror's position during deliberations does not influence the trial court's decision whether to remove the juror: "[I]f the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror."⁵⁰⁹ In People v. Gallano,⁵¹⁰ juror notes revealed the identity of a lone holdout juror who would not sign a guilty verdict. The State performed a background check on the holdout juror and discovered that he had not honestly disclosed his criminal background. The trial court dismissed the dishonest juror and the defendant was convicted. The Illinois Appellate Court reversed the conviction because the impetus for the State's background check was the juror's status as the lone holdout.⁵¹¹

L. Trial courts must not discourage candid and open responses by prospective jurors. When a prospective juror states that he or she cannot be fair, a trial court may ask follow-up questions to be sure that the prospective juror understands the issue and is genuinely unable to be impartial. But the trial court must be careful not to discourage or intimidate the prospective juror or other venire members from giving candid responses when questioned about potential bias.

In People v. Brown,⁵¹² a prospective juror stated that he or she could not be fair in a drug case due to personal experiences with family members addicted to drugs and "drug problems" on the west side of Chicago. The trial court asked several pointed questions, but the prospective juror consistently denied the ability to be fair because of the nature of the charges. The judge then ordered the prospective juror to return to court the next day to observe the trial.⁵¹³

The defendant waived the issue before the trial court. The Illinois Appellate Court found that the trial court's conduct did not constitute plain error and would not reverse the conviction without some showing that the selected jury was biased.⁵¹⁴ However, the Appellate Court cautioned, "It is

⁵⁰⁷ People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260 (2005).

⁵⁰⁸ People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260 (2005).

⁵⁰⁹ People v. Nelson, 235 Ill.2d 386, 445, 922 N.E.2d 1056, 1088 (2009).

⁵¹⁰ 354 Ill.App.3d 941, 821 N.E.12 1214 (1st Dist. 2004).

⁵¹¹ People v. Gallano, 354 Ill.App.3d 941, 953, 821 N.E.2d 1214, 1224-25 (1st Dist. 2004).

⁵¹² 388 Ill.App.3d 1, 903 N.E.2d 863 (1st Dist. 2009).

⁵¹³ People v. Brown, 388 Ill.App.3d 1, 2-3, 903 N.E.2d 863, 864 (1st Dist. 2009).

⁵¹⁴ People v. Brown, 388 Ill.App.3d 1, 8, 903 N.E.2d 863, 869 (1st Dist. 2009). The Illinois Appellate Court compared the situation to U.S. v. Rowe, 106 F.3d 1226 (5th Cir. 1997), in which the conviction was reversed because the trial court ordered a venire member to return for jury service in each of the next three months. The Illinois Appellate Court stated, "[W]e have no disagreement with the Rowe decision... First and foremost, the error in Rowe was preserved. The trial judge was given the opportunity by a defense objection to strike the venire panel and continue with the jury selection with an untainted group of prospective jurors." Id. See also, People v. Morales, 2012 IL App (1st) 101911, ¶ 58-59, 966 N.E.2d 481,

precisely that ‘frank’ exchange between the prospective juror and the questioner that is the primary objective of voir dire. Anything that might reduce that frank exchange should be avoided.”⁵¹⁵ The Appellate Court also questioned the trial court’s authority to order an excused venire member to return to court the next day.⁵¹⁶

As an alternative, a trial court might consider asking a potentially dishonest prospective juror attempting to avoid jury service to remain for an appropriate sanction after the remainder of the prospective jurors are no longer present.

M. Preserving issues for appeal and failure to challenge. When objecting to a voir dire limitation, the party must preserve the error by informing the trial court of the proposed questions at the time when the error can be addressed.⁵¹⁷

The failure to challenge a juror for cause or by peremptory challenge waives any objection to that juror.⁵¹⁸ Further, a court’s failure to remove a prospective juror for cause is grounds for reversal only if the party exercised all of its peremptory challenges and an objectionable juror was allowed to sit on the jury.⁵¹⁹ Even if a party eventually exhausts all peremptory challenges, the issue is waived if the party had any remaining peremptory challenges at the time the challenged juror was accepted.⁵²⁰

Despite the rule that a party must exhaust all peremptory challenges to preserve error, higher courts sometimes consider a trial court’s denial of a challenge for cause when the party still had remaining peremptory challenges.⁵²¹ In particular, a defendant does not waive a challenge for cause by holding back peremptory challenges in a high publicity case. The Illinois Appellate Court has explained:

The State initially argues defendant has waived any objections he might have regarding jury impanelment, as he failed to exhaust all of his peremptory challenges. Case law certainly suggests that failure to use all allotted peremptory challenges precludes any complaint on appeal. Also, such failure by defense counsel to exercise those challenges “tends to belie a claim of unfair prejudice.” However, because of the amount of publicity in this case and the number of venire[members] apparently influenced by it, defendant had special need to

495 (1st Dist. 2012) (threat to send prospective juror to a different court building to spend a month on a medical malpractice case not plain error and issue waived by failure to object).

⁵¹⁵ People v. Brown, 388 Ill.App.3d 1, 5, 903 N.E.2d 863, 867 (1st Dist. 2009). See also, People v. Morales, 2012 IL App (1st) 101911, ¶¶ 11, 58-59.

⁵¹⁶ People v. Brown, 388 Ill.App.3d 1, 5, 903 N.E.2d 863, 866 (1st Dist. 2009).

⁵¹⁷ York v. El-Ganzouri, 353 Ill. App. 3d 1, 12, 817 N.E.2d 1179, 1189 (1st Dist. 2004).

⁵¹⁸ People v. Metcalfe, 202 Ill. 2d 544, 551-52, 782 N.E.2d 263, 269 (2002); People v. Collins, 106 Ill.2d 237, 271, 478 N.E.2d 267, 282 (1985); People v. Rudeen, 2011 IL App (2d) 100613U ¶ 26 (“[D]efendant accepted [the prospective] juror, even though she could have excluded her via peremptory challenge. Defendant thus forfeited any objection...”); People v. Redmond, 357 Ill. App. 3d 256, 258, 828 N.E.2d 1206, 1209 (1st Dist. 2005).

⁵¹⁹ People v. Redmond, 357 Ill. App. 3d 256, 258, 828 N.E.2d 1206, 1209 (1st Dist. 2005).

⁵²⁰ People v. Bowens, 407 Ill.App.3d 1094, 1099-1100, 943 N.E.2d 1249, 1257-58 (4th Dist. 2011).

⁵²¹ See, e.g., Leischner v. Advance Stores Company, 2011 Ill.App.Unpub. LEXIS 271 (4th Dist. 2011); People v. Hines, 165 Ill.App. 3d 289, 297, 518 N.E.2d 1362, 1367 (4th Dist. 1988).

preserve his peremptory challenges. We conclude we should not hold defendant to have waived error in the denial of his challenges for cause for failing to exercise all of his peremptory challenges.⁵²²

N. Effective assistance of counsel and failure to challenge. Illinois courts have ruled that “defense counsel’s conduct during *voir dire*, including the decision whether to exercise a peremptory challenge, involves matters of trial strategy that generally are immune from claims of ineffective assistance of counsel.”⁵²³ Even if a prospective juror states that he or she cannot be fair, counsel may choose to keep that individual to serve on the jury.⁵²⁴ Illinois courts also “decline to impose a duty upon a trial court to *sua sponte* excuse a juror for cause in the absence of a defendant’s challenge for cause or exercise of a peremptory challenge.”⁵²⁵ However, “a trial court certainly has the discretion to remove a juror *sua sponte* for cause...”⁵²⁶

O. Harmless error. Typically, *voir dire* restrictions make difficult issues on appeal because the trial court is granted wide discretion in this area.⁵²⁷ However, some decisions have refused to apply the harmless error rule. The Illinois Appellate Court has explained, “Even if evidence of defendant’s guilt was sufficient, issues involving the right to a fair trial by a panel of impartial jurors cannot be disposed of by the harmless error rule.”⁵²⁸

⁵²² People v. Hines, 165 Ill.App. 3d 289, 297, 518 N.E.2d 1362, 1367 (4th Dist. 1988) (citations omitted, quoting People v. Sanchez, 115 Ill. 2d 238, 265, 503 N.E.2d 277, 286 (1986).

⁵²³ People v. Lopez, 371 Ill. App.3d 920, 933, 864 N.E.2d 726, 736 (1st Dist. 2007). See also, People v. Manning, 241 Ill.2d 319, 333, 948 N.E.2d 542, 550 (2011) (“[C]ounsel’s actions during jury selection are generally considered a matter of trial strategy. Accordingly, counsel’s strategic choices are virtually unchallengeable.”); People v. Banks, 237 Ill.2d 154, 215-16 934 N.E.2d 435, 469 (2010) (“The law is equally clear that defense counsel’s conduct during *voir dire* involves matters of trial strategy that generally are not subject to scrutiny under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).”); People v. Jones, 2012 IL App. (2nd) 110346, ¶ 71 (“In general, counsel’s actions during jury selection are considered a matter of trial strategy, and counsel’s strategic choices are virtually unchallengeable. Attorneys consider many factors in making their decisions about which jurors to challenge and which jurors to accept, and reviewing courts should hesitate to second-guess counsel’s strategic decisions, even where those decisions seem questionable.”) (citations omitted).

⁵²⁴ See, e.g., People v. Manning, 241 Ill.2d 319, 323, 948 N.E.2d 542, 545 (2011) (defense counsel not ineffective despite responses: “Q You cannot? A. No. I said it’s not going to change. I cannot be fair with the case. Q. You can be fair, or you cannot? A. No, I cannot be fair.”); People v. Metcalfe, 202 Ill. 2d 544, 782 N.E.2d 263 (2002).

⁵²⁵ People v. Metcalfe, 202 Ill. 2d 544, 555, 782 N.E.2d 263, 271 (2002).

⁵²⁶ People v. Metcalfe, 202 Ill. 2d 544, 556, 782 N.E.2d 263, 272 (2002).

⁵²⁷ People v. Peeples, 155 Ill.2d 422, 458-59, 616 N.E.2d 294, 313 (1993).

⁵²⁸ People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996) (quoting People v. Mithcell, 121 Ill. App. 3d 193, 196, 459 N.E.2d 351, 353-54 (2nd Dist. 1984)).