## Late testimony

Uploaded by: Alison Dodge

Position: FAV

**THE MARYLAND HISPANIC BAR ASSOCIATION**
www.marylandhispanicbar.com

February 18, 2024

Chairman William C. Smith, Jr.
Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East Wing
11 Bladen Street, Annapolis, MD 21401

Chairman Luke Clippinger
House Judiciary Committee
House Office Building, Room 101
6 Bladen Street, Annapolis, MD 21401

**Re: Support for SB 827/HB 1079**
**Courts and Judicial Proceedings – Jury Examination**

Dear Chairman Smith and Chairman Clippinger:

By way of this letter, the Maryland Hispanic Bar Association (MHBA) members[1] express their support for a favorable determination on SB 827/HB 1079, which addresses critical issues surrounding *voir dire* in Maryland. This legislation aligns Maryland with U.S. Supreme Court precedent and mitigates the risk of bias in jury selection. SB 827/HB 1079 is a crucial step towards combating bias and improving our legal system. The expansion of *voir dire* will ensure equal representation and foster diversity within our courtrooms by removing potential jurors who are unable to impartially exercise their duty. SB 827/HB 1079 offers a necessary clarification of the scope and purpose of *voir dire* and provides attorneys with essential information to exercise peremptory challenges judiciously without violating constitutional principles.

[1] Maryland Judiciary members who are MHBA Board members abstained from voting on the issue of this bill in accordance with Maryland Code of Judicial Conduct. The position of the MHBA members reflected on this letter is not the position of the judiciary members of the MHBA Board and members of the MHBA who are in the judiciary.

The MHBA urges you to support the passage of SB 827/HB 1079 to ensure equal access to a fair and impartial trial by jury. Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact the MHBA President, Rebeka Bautista at (301) 381-8286.

Sincerely,

Rebeka N. Bautista

Rebeka N. Bautista
President
Maryland Hispanic Bar Association

# 2024 POSITION PAPER

SB 0827 / HB1079

## COURTS - JURY SELECTION - EXPANDED *VOIR DIRE*

FAVORABLE

The requirement that jurors must be fair and impartial, free from conscious or implicit bias for or against any party, is essential to the right to jury trial. *Voir dire* is the process of questioning potential jurors to determine whether they hold any bias or prejudice that would inhibit their ability to render a fair and impartial verdict. Based on the answers to those questions, potentially biased jurors can be identified and excluded from jury service in that case.

Potentially biased jurors can be excluded in two ways. First, the juror can be stricken "for cause," if the Judge finds that their beliefs or experiences are likely to impair their ability to be fair and impartial. Second, the parties may exercise "peremptory challenges" to exclude jurors whose beliefs and experiences create a risk of implicit bias. The parties may not exclude a juror based solely on their race or gender.

### Maryland's Current Voir Dire System Does Not Account for Implicit Bias and Actually Promotes Explicit Bias in Jury Selection

Under current Maryland law, *voir dire*, "does not exist, even partially, for the purpose of supplying information to trial counsel that may guide them in the strategic use of their peremptory challenges." See, e.g., Collins v. State, 463 Md. 372, 404 (2019). Maryland's system of "limited *voir dire*" relies on jurors to self-assess and admit their own biases and does not account for implicit bias. For jurors who are incapable of accurate self-assessment, the only information available to an attorney is that which appears on the jury form – demographic information such as name, age, sex, marital status, employment, and zip code. This creates an environment where jurors may be stricken improperly based on race and gender.

This use of explicit bias in jury selection by Maryland attorneys was not only acknowledged but advocated for in a *Maryland Bar Journal* article titled, "The Art of Litigating: Deselecting Jurors Like the Pros." This article advised Maryland lawyers to "rate" potential jurors "demographically (age, gender, marital status, etc.) and mark who would be, under stereotypical circumstances, [their] natural enemies and allies." The U.S. Supreme Court has held that Constitutional right to jury trial does not permit striking prospective jurors solely on the basis of race or gender. See Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). Accordingly, Maryland's current system of "limited *voir dire*" incentivizes Maryland lawyers to exercise explicit bias in using their peremptory challenges in an Unconstitutional manner. SB 0827 / HB 1079 helps to prevent this by giving attorneys more information that will enable them to use peremptory challenges without violating the Constitution.

# 2024 POSITION PAPER

SB 0827 / HB1079

## Maryland's Current System is an Unconstitutional Outlier

The U.S. Supreme Court has explained that *voir dire* "serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Mu'Min v. Virginia, 500 U.S. 415, 432 (1991). Maryland is an outlier on this topic, directly conflicting with a vast majority of other states and the U.S. Supreme Court caselaw.

## This Bill Combats Unconstitutional Biases

The Maryland Supreme Court refuses to reconsider the limits on *voir dire*, leaving the responsibility to assess the scope and purpose of *voir dire* to the General Assembly. See Davis v. State, 333 Md. 27, 46 (1992). SB 0827 / HB 1079 clarifies the scope and purpose of *voir dire* in Maryland. SB 0827 / HB 1079 secures all Marylanders the right to a fair and impartial trial by a jury free of conscious or implicit bias.

**The Maryland Association for Justice urges a FAVORABLE Report on SB 0827 / HB 1079.**


## About Maryland Association for Justice

The Maryland Association for Justice (MAJ) represents over 1,250 trial attorneys throughout the state of Maryland. MAJ advocates for the preservation of the civil justice system, the protection of the rights of consumers and the education and professional development of its members.

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**Voir Dire MOPD Fav.docx (1).pdf**
Uploaded by: Elizabeth Hilliard
Position: FAV

MARYLAND OFFICE OF THE PUBLIC DEFENDER

**Natasha Dartigue**
Public Defender
**Keith Lotridge**
Deputy Public Defender
**Melissa Rothstein**
Chief of External Affairs
**Elizabeth Hilliard**
Acting Director of Government Relations

## POSITION ON PROPOSED LEGISLATION

**BILL: House Bill 1079 – Courts and Judicial Proceedings – Jury Examination**

**FROM: Maryland Office of the Public Defender**

**POSITION: Favorable**

**DATE: Mar 4, 2024**

**The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 1079.**

House Bill 1079 will improve the impartiality and fairness of our jury trial process in Maryland by expanding *voir dire.* Currently, in Maryland, we have "limited *voir dire."* Voir dire is the process of questioning potential jurors to determine whether they may have any bias or prejudice that would prevent them from rendering a fair and impartial verdict. Unlike other states, Maryland's limited voir dire means that questions that either the prosecution or defense counsel thinks are relevant to identifying juror bias may not be asked. House Bill 1079 will encourage inclusion of these questions so that the parties have the guidance they need to bring appropriate challenges.

The answers to voir dire questions help identify potentially biased jurors so they can be excluded from jury service. Potentially biased jurors can be excluded in two ways: First, the juror can be stricken "for cause," if the Judge finds that their beliefs or experiences are likely to impair their ability to be fair and impartial. Second, the parties may exercise "peremptory challenges" to exclude jurors whose beliefs and experiences create a risk of implicit bias. The parties may not exclude a juror based solely on their race or gender. Without the ability to have their questions answered, the attorneys for both sides are prone to blindly exercise peremptory challenges.

Maryland's "limited *voir dire*" relies on jurors to assess and admit their own biases, which makes it nearly impossible to identify implicit biases. For jurors who are not self-aware and self-critical, the only information available to an attorney is that which appears on the jury form: demographic information such as name, age, sex, marital status, employment, and zip code. This

creates an environment where jurors may be stricken improperly based on race and gender. Additional reforms – such as allowing attorneys to directly ask questions to prospective jurors; and limiting peremptory challenges — would further help ensure that voir dire is effective in identifying potential juror biases, but House Bill 1079 is an important first step to improving the jury selection process.

**For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report only after amending House Bill 1079.**

---

**Submitted by: Maryland Office of the Public Defender, Government Relations Division.**


Maryland Office of the Public Defender, Government Relations Division, 45 Calvert St, Suite 108, Annapolis MD 21401
*For further information please contact Elizabeth Hilliard, Elizabeth.hilliard@maryland.gov 443-507-8414.*

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Uploaded by: George Tolley
Position: FAV

DUGAN
BABIJ
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Finding Answers.
Demanding Justice.

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March 4, 2024

Chairman Luke Clippinger
House Judiciary Committee
House Office Building, Room 101
Annapolis, Maryland 21401

**HB 1079 Courts and Judicial Proceedings – Jury Examination**

Dear Chairman Clippinger:

I write to urge a FAVORABLE report on HB 1079, which would clarify that the purpose of pre-trial voir dire includes allowing the parties to obtain information that may guide them in the constitutional use of their peremptory challenges and challenges for cause.

As a trial lawyer admitted to practice in multiple jurisdictions, I have tried cases before juries in the courts of States where voir dire is not as limited as it is in Maryland. Judges in those courts exercise discretion over how much time is devoted to jury selection. In West Virginia, where attorneys may conduct voir dire with the trial judge's supervision, it is customary to finish jury selection (twelve jurors plus two alternates) before the lunch break.

The system of juror examination in Maryland is flawed and, despite many years of requests from the Bar and even the Standing Committee on Rules of Practice and Procedure, the Judiciary has not acted to fix it. It is time for the General Assembly to act.

Please return a FAVORABLE report on HB 1079.

Sincerely,

GEORGE S. TOLLEY, III

GST/jzie

**hand delivered testimony**
Uploaded by: Matt Paavola
Position: FAV

***MARYLAND CHRISTIAN LEGAL SOCIETY***
1808 Wilson Point Road
Baltimore, Maryland 21220

February 27,2024

Chairman William C. Smith, Jr.
Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East Wing
11 Bladen Street, Annapolis, MD 21401

Chairman Luke Clippinger
House Judiciary Committee
House Office Building, Room 101
6 Bladen Street, Annapolis, MD 21401

Re: Support for SB 827/HB 1079
Courts and Judicial Proceedings – Jury Examination

Dear Chairman Smith and Chairman Clippinger:

We write to urge a favorable report on SB 827/HB 1079 which addresses critical issues surrounding *voir dire* in Maryland. This legislation aligns Maryland with the rest of the country and mitigates the risk of explicit and implicit bias in jury selection. SB 827/HB 1079 is a crucial step towards improving our legal system, ensuring equal representation, and fostering diversity within our courtrooms. By widening the scope of voir dire, SB 827/HB 1079 is a step in the right direction to give all Marylanders a fairer jury and provides attorneys with essential information to exercise peremptory challenges judiciously without violating constitutional principles.

We urge you to support the passage of SB 827/HB 1079 to ensure equal access to a fair and impartial trial by jury. Thank you for your attention to this matter and your dedication to the principles of justice.

Sincerely

Matt M. Paavola, Esq
Vice President
attorney.matt.paavola@gmail.com

c.c. David Snyder, Treasurer
Lance Conklin, President

**Baltimore County Bar Association's Testimony befor**

Uploaded by: Matthew Moran

Position: FAV

# Baltimore County Bar Association, Inc.

100 County Courts Building • 401 Bosley Avenue • Towson, Maryland 21204-4491


March 4, 2024



Chairman Luke Clippinger
House Judiciary Committee
House Office Building, Room 101
6 Bladen Street, Annapolis, MD 21401

**Baltimore County Bar Association's Testimony in Favor of**
**HB 1079 Courts and Judicial Proceedings – Jury Examination**
**House Judiciary Committee**

The mission of the Baltimore County Bar Association (BCBA) is to serve as a leader in advancing excellence, ethical conduct, professionalism and public responsibility in the legal profession; to improve the efficiency, fairness and accessibility of our system of justice for all citizens; to increase the public's understanding and appreciation of our profession and our legal system; to use our collective resources to improve the well-being of our community and its citizens, especially our youth; and to identify and support the needs of a diverse membership and foster an environment in which members experience a sense of fulfillment and satisfaction in the practice of law.

The members of the BCBA[1] expressly support HB 1079, which addresses critical issues surrounding *voir dire* in Maryland, and urge a favorable report. The BCBA is of the opinion that this legislation aligns Maryland with U.S. Supreme Court precedent and mitigates the risk of bias in jury selection. HB 1079 provides a crucial step toward combating bias and improving our legal system. The expansion of *voir dire* will ensure equal representation and foster diversity within our courtrooms by removing potential jurors who are unable to demonstrate impartially. HB 1079 offers a necessary clarification of the scope and purpose of *voir dire* and provides attorneys with essential information to exercise peremptory challenges judiciously while maintaining constitutional principles.

For the foregoing reasons, the BCBA urges a favorable report on HB 1079. Should you have questions in this regard, please contact me at (443) 254-7620.

Respectfully,

*Lisa Y. Settles*

Lisa Y. Settles, President
Baltimore County Bar Association

[1]Maryland Judiciary members who serve on the BCBA Executive Council and/or the BCBA Diversity & Inclusion Committee abstained from voting on the issue of this bill in accordance with Maryland Code of Judicial Conduct. The position of the BCBA as reflected in this letter does not reflect the position of any member of the Maryland Judiciary.

## 2024.02.18 Voir Dire - Letter of Support.pdf

Uploaded by: Rebeka Bautista
Position: FAV

**THE MARYLAND HISPANIC BAR ASSOCIATION**
www.marylandhispanicbar.com

February 18, 2024

Chairman William C. Smith, Jr.
Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East Wing
11 Bladen Street, Annapolis, MD 21401

Chairman Luke Clippinger
House Judiciary Committee
House Office Building, Room 101
6 Bladen Street, Annapolis, MD 21401

**Re: Support for SB 827/HB 1079**
**Courts and Judicial Proceedings – Jury Examination**

Dear Chairman Smith and Chairman Clippinger:

By way of this letter, the Maryland Hispanic Bar Association (MHBA) members[1] express their support for a favorable determination on SB 827/HB 1079, which addresses critical issues surrounding *voir dire* in Maryland. This legislation aligns Maryland with U.S. Supreme Court precedent and mitigates the risk of bias in jury selection. SB 827/HB 1079 is a crucial step towards combating bias and improving our legal system. The expansion of *voir dire* will ensure equal representation and foster diversity within our courtrooms by removing potential jurors who are unable to impartially exercise their duty. SB 827/HB 1079 offers a necessary clarification of the scope and purpose of *voir dire* and provides attorneys with essential information to exercise peremptory challenges judiciously without violating constitutional principles.

[1] Maryland Judiciary members who are MHBA Board members abstained from voting on the issue of this bill in accordance with Maryland Code of Judicial Conduct. The position of the MHBA members reflected on this letter is not the position of the judiciary members of the MHBA Board and members of the MHBA who are in the judiciary.

The MHBA urges you to support the passage of SB 827/HB 1079 to ensure equal access to a fair and impartial trial by jury. Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact the MHBA President, Rebeka Bautista at (301) 381-8286.

Sincerely,

Rebeka N. Bautista

Rebeka N. Bautista
President
Maryland Hispanic Bar Association

**Letter of Favorable Support of HB 1079 Courts & Ju**
Uploaded by: Stephen Nolan
Position: FAV

SGS SMITH GILDEA & SCHMIDT LLC

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March 4, 2024

Chairman Luke Clippinger
House Judiciary Committee
House Office Building, Room 101
6 Bladen Street
Annapolis, Maryland 21401

Re: **Favorable Support of HB 1079**
Courts and Judicial Proceedings – Jury Examination
Committee Hearing: March 6, 2024

Dear Chairman Clippinger:

As a trial attorney of over 46 years, former President of the Baltimore County Bar Association, and former member of the Maryland State Bar Association's (MSBA) Special Committee on *Voir Dire*, I am writing in support of House Bill 1079 – legislation that will ensure an individual's right to a fair and impartial jury representative of the community. Unfortunately, existing law does not protect that constitutional right.

In October 2011, the MSBA convened a special committee of judges and lawyers "to develop, and recommend for acceptance, model *voir dire* questions to benefit the bench, bar and parties to court proceedings."[1] One of the other stated goals was "to review current *voir dire* practices throughout Maryland and present suggestions for improvement." Id.

I had the privilege of serving as the co-Chair of the Tort Law Subcommittee of the MSBA Special Committee. Fast forward to July 15, 2014, the Maryland Supreme Court's Standing Committee on Rules of Practice and Procedure issued a report that stated:

> This is a special report in response to the Court's request, in footnote 1 to its Opinion in *Pearson v. State*, 438 Md. 350, 357 (2014), that, after conducting a national study, the Committee consider and make a recommendation to the Court whether the scope of *voir dire* examination should be extended beyond its current limited function of determining a specific cause for disqualification of jurors, ***to***

[1] Minutes of Organizational Meeting of MSBA Special Committee on *Voir Dire* held on October 17, 2011.

> ***include facilitating what has been termed the "intelligent exercise of peremptory challenges."*** (emphasis added).

185th Report of Standing Committee on Rules of Practice and Procedure (July 15, 2014).

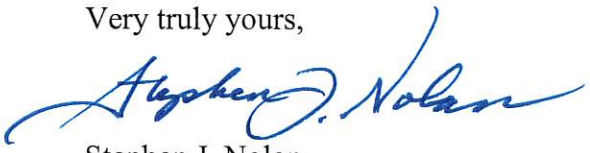
On April 18, 2016, the MSBA's Board of Governors adopted the report of the *Voir Dire Special* Committee. The primary substance of that report was a set of Proposed Model Jury Selection Questions for Civil and Criminal Trials (MJSQ). The report with those model questions was subsequently presented at the Joint Meeting of the Maryland Judiciary and MSBA in June, 2016 and to the Maryland Judicial College in October, 2016. The MSBA Special Committee continued to hone the MJSQ based on comments of lawyers and judges. I was a member of the panel that presented the final set of MJSQ at the MSBA's Annual Meeting on June 16, 2017.

It has been nearly 10 years since the court's request in *Pearson* and the Rules Committee's 185th special report. The time for "*facilitating what has been termed the 'intelligent exercise of peremptory challenges*'" is long overdue. Model Jury Selection Questions are beneficial but they are not enough. HB 1079 is designed to correct the constitutional defects in the current system by adding Section 8-423 to the Courts & Judicial Proceedings Article. Once enacted, that statute will make clear the fact that the purpose of jury examination is not only to "identify and remove prospective jurors who are unable to serve fairly and impartially;" it is also to "allow the parties to obtain information that may provide guidance for the use of peremptory challenges and challenges for cause."

Earlier today, the Baltimore County Bar Association joined the Charles County and Howard County bar associations and many other specialty bar groups in voicing support for this important legislation that aligns Maryland with U.S. Supreme Court precedent and at the same time preserves the trial court's control over the jury selection process.

Mr. Chair, I respectfully request that you and all members of your Committee vote in favor of HB 1079, the purpose of which is to protect our constitutional right to a fair and impartial jury.

Very truly yours,



Stephen J. Nolan
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Uploaded by: Vanessa Clark Brooks
Position: FAV

July 15, 2014

The Honorable Mary Ellen Barbera,
Chief Judge
The Honorable Glenn T. Harrell, Jr.
The Honorable Lynne A. Battaglia
The Honorable Clayton Greene, Jr.
The Honorable Sally D. Adkins
The Honorable Robert N. McDonald,
The Honorable Shirley M. Watts
Judges
The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

Your Honors:

The Rules Committee submits this, its One Hundred Eighty-Fifth Report. This is a special report in response to the Court's request, in footnote 1 to its Opinion in *Pearson v. State*, 437 Md. 350, 357 (2014), that, after conducting a national study, the Committee consider and make a recommendation to the Court whether the scope of *voir dire* examination should be extended beyond its current limited function of determining a specific cause for disqualification of jurors, to include facilitating what has been termed the "intelligent exercise of peremptory challenges."

That issue was raised in *Pearson*, but the Court determined that the appeal could be resolved on another ground, that "it would be imprudent for [the Court] to address this far-reaching issue without the benefit of study regarding the possible ramifications," and that it was unaware of any such study. The matter was referred to the Rules Committee to gather more information.

As a preface, a study conducted by the National Center for State Courts (NCSC), updated as of 2012, shows that, despite some calls for their elimination following the Supreme Court's decision

in *Batson v. Kentucky*, 476 U.S. 79 (1986)[1], the Federal Courts and all 50 States permit peremptory challenges in both criminal and civil cases, although the number of challenges allowed varies from State to State and, within the States, between criminal and civil cases and between felonies and misdemeanors. The data supplied by the NCSC is attached as Appendix A. NCSC and the State Justice Institute, in 2007, undertook a broader study of jury improvement efforts in the 50 States, part of which touched on *voir dire* generally. A copy of their Report is attached as Appendix B. The section on *voir dire* begins on page 27. Of some interest, in the context of our investigation, is their comment, on page 27:

> "[A]ll courts agree that the purpose of voir dire is to identify and remove prospective jurors who are unable to serve fairly and impartially. But not all states recognize the exercise of peremptory challenges as a legitimate purpose of voir dire. Although most judges frown on the practice, many lawyers also view voir dire as the beginning of trial advocacy – that is, their first opportunity to gain favor with trial jurors or even present evidence if they can."

NCSC was unaware of any official national study regarding the general scope of *voir dire* in the various States or, in particular, whether it extends to eliciting information to guide the exercise of peremptory challenges, and we have found none. The Committee had available an article written by Nancy S. Forster, Esq. in 40 U. Balt. L. Forum 229 (2010) in which cases from around the country are cited for the proposition that "most states permit both the prosecutor and the defense counsel to ask questions of the venire that will aid counsel in making peremptory challenges." *Id*. at 245. The Committee conducted its own investigation of the Rules, statutes, and case law governing *voir dire* practice in the Federal courts and in all 50 States and the District of Columbia. We also consulted the Criminal Justice Standards approved by the American Bar Association.

Because the Court indicated an interest not just in whether other jurisdictions permit *voir dire* to extend to information that would be helpful in guiding the exercise of peremptory challenges but as well in the *ramifications* of such expanded scope, we looked also at the Rules, statutes, and case law governing the *voir dire* process itself, especially in jurisdictions that permit that

[1] *See* discussion in *United States v. Annigoni*, 96 F.3d 1132 , 1140 (9th Cir. 1996).

extended scope. The 2007 NCSC study was helpful in that regard.

GENERAL CONCLUSIONS

Standard 15-2.4(c) of the American Bar Association Criminal Justice Standards states explicitly: "Voir dire examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges." Comparable language also appears in the statutes, Rules, or case law in many of the States and in opinions of some of the Federal appellate courts. In most instances, particularly in court opinions, it is immediately coupled with the caveat that the trial court has a large measure of control over the *voir dire* process, including the allowance of particular questions, and, at the appellate level, the issue ordinarily becomes whether the trial judge abused his or her discretion in refusing to allow specific questions or a particular line of inquiry.[2]

In a number of opinions, the issue of whether *voir dire* may be used to guide the exercise of peremptory challenges is not addressed quite so directly, or broadly, but rather is in the context of the specific line of inquiry that was sought – questions dealing with the effect of pre-trial publicity, possible racial or ethnic prejudice, direct or familial connection with a law enforcement agency, for example, the answers to which may not have sufficed to support a challenge for cause but might incline the party to exercise a peremptory challenge. Where possible racial bias is involved, the courts have held that the inquiry must be allowed; there has been somewhat less tolerance in allowing extensive questioning regarding pre-trial publicity, especially as to the content of the publicity. One needs to be careful in counting those courts as effectively adopting the broad ABA Standard.

The U.S. Supreme Court has addressed the issue on several occasions. In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Court observed that their cases involving the requirements of *voir dire*

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[2] This nearly universal subjection of *voir dire* examination to overall court control, particularly in the context of questioning beyond what is necessary to determine whether a juror may be challenged for cause, has a special significance in Maryland. As pointed out in *Curtin v. State*, 393 Md. 593, 602 (2006), in the case that initially led the Court to reject expanded *voir dire*, *Handy v. State*, 101 Md. 39 (1905), the arguments presented to and rejected by the Court were

> (1) "the absolute and unqualified right of the prisoner's counsel, after a juror upon his *voir dire* has been by the Court declared to be competent, to interrogate him at pleasure, and without the interference of the Court, for the purpose of determining whether the right of peremptory challenge shall be exercised" and
>
> (2) "the claim that the Court is bound to put to the jury any question which counsel may request the Court to put."

*Handy*, 101 Md. at 40. The *Handy* Court knew of no case recognizing such an unlimited right, and the Committee knows of none now.

fell into two categories – those that were tried in the Federal courts, which were subject to the Supreme Court's supervisory power, and those tried in the State courts, in which the question was whether what occurred was consistent with Federal Constitutional requirements. With respect to the former, the Court confirmed what it had said years earlier in *Connors v. United States*, 158 U.S. 408 (1895), that "a suitable inquiry is permissible in order to ascertain whether the juror has *any* bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. . . [but] that inquiry is conducted under the supervision of the court, and a great deal must, of necessity be left to its sound discretion" (Emphasis added).

With respect to cases emanating from State courts, the Court noted that it had singled out questions relating to racial prejudice as necessary, but, with respect to other issues – in *Mu'Min*, the issue of pre-trial publicity – there was greater flexibility. The Court stated:

> "Undoubtedly, if counsel were allowed to see individual jurors answer questions about exactly what they had read, a better sense of the juror's general outlook on life might be revealed, and such a revelation would be of some use in exercising peremptory challenges. But, since peremptory challenges are not required by the Constitution [citation omitted], this benefit cannot be a basis for making 'content' questions about pretrial publicity a constitutional requirement."

*Id* at 424-25.

From that, the Court concluded that, "[t]o be constitutionally compelled, however, it is not enough that such questions might be helpful" but "[r]ather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id*. at425-26. Even with regard to an inquiry into racial bias, the Court observed that although "[*v* ]*oir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges," and possible racial bias must be covered by the questioning, the Court had not specified "the particulars by which this could be done." *Id*. at 431. *See* also *Skilling v. United States*, 561 U.S. 358, (2010) – a case arising in Federal court – where the Court confirmed that "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*."

Most of the U.S. Courts of Appeal have explicitly adopted and applied the view that *voir dire* should generally be allowed to assist counsel in exercising peremptory challenges, subject to the overall control of the court with respect to particular questions or specific lines of inquiry.[3] A Second Circuit case emphasizes the limitation:

> "In sum, the right of the peremptory challenge does not command a right to the peremptory question. Whatever the attorney's power to strike a number of venirepersons at will may be, to recognize a correlative right to question at will without in any way identifying the motivating concern would strip the judge of his control over the proceedings. Any question could be labelled necessary for some unspoken element in the decision to challenge peremptorily."

*United States v. Gibbons*, 602 F.2d 1044 (2nd Cir. 1979).

Among the States, it appears that, aside from Maryland, only Pennsylvania, California in criminal cases, and Virginia purport clearly to limit *voir dire* to eliciting grounds for a challenge for cause.

The clearest expression of the Pennsylvania view was in *Commonwealth v. England*, 375 A.2d 1292 (Pa. 1977), where the court noted that, although the goal of permitting the questioning of prospective jurors is to provide the accused a competent, fair, impartial, and unprejudiced jury, "[v]oir dire examination is not intended to provide a defendant with a better basis upon which to utilize his peremptory challenges." *Id.* at 1295. Thus, the court continued, "although latitude should be permitted on a voir dire, the inquiry should be strictly confined to disclosing qualifications or lack of qualifications and whether or not the juror had formed a fixed opinion in the case as to the accused's guilt or innocence." *Id.* That view, and much of that language, was confirmed in *Commonwealth v. Karenbauer*, 715 A.2d 1086 (1998).

California has different rules for civil and criminal cases. Section 222.5 of the California Code of Civil Procedure, applicable to civil cases, provides that, following an examination of

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[3] *See United States v. Noone*, 913 F.2d 20 (1st Cir. 1990); *United States v. Gibbons*, 602 F.2d 1044 (2nd Cir. 1979); *United States v. Segal*, 534 F.2d 578, 581 (3rd Cir. 1976); *United States v. Lancaster*, 96 F.3d 734, 738-39 (4th Cir. 1996); *Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991); *Miller v. Webb*, 385 F.3d 666 (6th Cir. 2004); *Alcala v. Emhart Industries, Inc.*, 495 F.3d 360 (7th Cir. 2007); *United States v. Underwood*, 122 F.3d 389 (7th Cir. 1997); *United States v. Love*, 219 F.3d 721 (8th Cir. 2000); *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996); *Photostat v. Ball*, 338 F.2d 783 (10th Cir. 1964).

prospective jurors by the judge, counsel for each party has the right to examine, by oral and direct questioning, any of the prospective jurors "in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause." The statute directs judges to permit "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case." Section 223, in contrast, provides that, in a criminal case, "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." In a 2007 study of *voir dire* in California, NCSC noted, with respect to criminal cases, "Maryland, for example, is similar to California in that the detection of juror bias or partiality is recognized as the only legitimate purpose of voir dire," citing *Dingle v. State*, 361 Md. 1 (2000) as authority.

Virginia has taken a view similar to Pennsylvania but appears to allow some discretion by the trial court to permit additional questioning. In *Green v. Commonwealth*, 580 S.E.2d 834, 843 (Va. 2003), the court confirmed that "a defendant does not have a right to propound any question he wishes" and that "voir dire questions must relate to the four statutory factors of relationship, interest, opinion, or prejudice." In the earlier case of *Davis v. Sykes*, 121 S.E.2d 513, 516 (Va. 1961), the court held that the purpose of *voir dire* is to ascertain whether any juror has an interest in the case or any bias or prejudice regarding it, that "[q]uestioning beyond this scope lies within the sound discretion of the trial court," and that "[s]uch discretion is not abused by refusing to ask whether jurors know persons expected to testify merely to aid litigants in making the peremptory challenges allowed by [the Virginia Code]."

Most of the other States, by statute, rule, or case law, clearly permit *voir dire* to be used to elicit information relevant to the exercise of peremptory challenges, at least in criminal cases.[4] There are others that have not articulated that principle

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[4] *See* Ala. R. Cr. Pr. 8.4(d); *Ex parte Dobyne*, 805 So.2d 763 (Ala. 2001); *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970); Ariz. R. Cr. Pr. 18.5; *State v. Melendez*, 588 P.2d 294 (Ariz. 1978); Ark. R. Crim. Pr. 32.2; *Percefull v. State*, 383 S.W.3d 905 (Ark. App. 2011); *Oglesby v. Conger*, 507 P.2d 883 (Colo. 1972); *State v. Ebron*, 975 A.2d 17 (Conn. 2009); *Ortiz v. State*, 869 A.2d 285 (Del. 2005); *Burgess v. United States*, 786 A.2d 561 (D.C. 2001); *Solorzano v. State*, 25 So.3d 19 (Fla. App. 2009); Ga. Code § 15-12-133; *Ellington v. State*, 735 S.E.2d 736 (Ga. 2012); *State v. Altergott*, 559 P.2d 728 (Haw. 1977); *People v. Rinehart*, 962 N.E.2d 444 (Ill. 2012); *Perryman v. State*, 830 N.E.2d 1005 (Ind. 2005); *State v. Tubbs*, 690 N.W.2d 911 (Iowa 2005); *Fields v. Commonwealth*, 274 S.W.3d 376 (Ky. 2009); *State v. Holmes*, 5 So.3d 42 (La. 2009); *Grover v. Boise Cascade Corp.*, 860 A.2d 851 (Me. 2004); *Commonwealth v. Fudge*, 481 N.E.2d 199 (Mass. App. 1985); Mich. R. Crim. Pr. 6.412; *People v. Harrell*, 247 N.W.2d 829 (Mich. 1976); *People v. Tyburski*, 494 N.W.2d 20 (Mich. App. 1993); Minn. R. Crim. Pr. 26.02; *State v. Greer*, 635 N.W.2d 82 (Minn. 2001); *In Matter of Care and Treatment of Wolfe*, 291 S.W.2d 829 (Mo. App. 2009); *Whitlow v. State*, 183 P.3d 861 (Mont. 2008); *State v. Iromuanya*, 806 N.W.2d 404 (Neb. 2011); Nev. Code §16.030(6); *Whitlock v. Salmon*, 752 P.2d 210 (Nev. 1988); N.H. Code § 500-A:12-a; *State v. Goding*, 474 A.2d 580 (N.H. 1984); *State v. Tinnes*, 877 A.2d 313

quite so clearly but have described the scope of *voir dire* in such a way as to indicate that it is not limited just to discovering a basis for a challenge for cause.[5] There seems to be some ambiguity regarding the applicable rule in Idaho.[6]

As noted, nearly every court, including those that have permitted *voir dire* examination to extend to eliciting information in aid of exercising peremptory challenges, has made clear that the process is subject to control by the court and that attorneys do not have free rein to ask any question they want. There are a number of control techniques that are used, often in combination. A significant one is the extent to which the court permits the attorneys to conduct the *voir dire* examination, which varies from State to State. The 2007 NCSC Study showed that, in 10 States, including Maryland, *voir dire* was conducted predominantly or exclusively by the judge,[7] in 18 States, the judge and the attorneys conducted the examination equally,[8] and in 23 States, the attorneys conducted the examination, predominantly or exclusively.[9]

Apparently on the basis of questionnaires returned by attorneys and judges, NCSC reported, on the one hand, that juror responses to attorney questions were generally more candid because (i) jurors were less intimidated than when questioned by the judge,

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(N.J. Super. 2005); *Pellicer v. St. Barnabas Hospital*, 974 A.2d 1070 (N.J. 2009); *Sutherlin v. Fenenga*, 810 P.2d 353 (N.M. App. 1991); *State v. Johnson*, 229 P.3d 523 (N.M. 2010); *People v. Robinson*, 973 N.Y.S.2d 570 (A.D. 2013); N.C. Code § 15A-1214; *State v. Maness*, 677 S.E.2d 796 (N.C. 2009); *State v. Anderson*, 282 N.E.2d 568 (Ohio 1972); *Sanchez v. State*, 223 P.3d 980 (Okla. App 2009); *State v. Nefstad*, 789 P.2d 1326 (Or. 1990); *State v. Wise*, 596 S.E.2d 475 (S.C. 2004); Tenn. R. Crim. Pr. 24; *Smith v. State*, 327 S.W.2d 308 (Tenn. 1959); *Wallace v. State*, 546 S.W.2d 244 (Tenn. App. 1976); *In re Commitment of Hill*, 334 S.W.3d 226 (Tex. 2011); *Fowlie v. McDonald*, 82 A. 677 (Vt. 1912); Wash. Super. Ct. Crim. R. 6.4(b); *State v. Davis*, 10 P.3d 977 (Wash. 2000); *State v. Karl*, 664 S.E.2d 667 (W.Va. 2008).

[5] *See State v. Reyna*, 234 P.3d 761 (Kan. 2010); *Jordan v. State*, 995 So.2d 94 (Miss. 2008); *State v. Gross*, 351 N.W.2d 428 (N.D. 1984); *State v. Purdy*, 491 N.W.2d 402 (N.D. 1992); *State v. Lopez*, 78 A.3d 773 (R.I. 2013); *State v. Foot Bull*, 766 N.W.2d 159 (S.D. 2009); *Hammil v. State,* 278 N.W.2d 821 (Wis. 1979); *State v. Van Straten*, 409 N.W.2d 448 (Wis. 1987); *Wardell v. McMillan*, 844 P.2d 1052 (Wyo. 1992).

[6] *See* Idaho R. Crim. Proc. 24; *compare State v. Larsen*, 923 P.2d 1001 (Ida. App. 1996) and *State v. Moses*, 2013 WL 1846550 (Ida. 2013).

[7] Arizona, District of Columbia, Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, South Carolina, and Utah.

[8] California, Colorado, Hawaii, Idaho, Illinois, Kentucky, Michigan, Minnesota, Mississippi, New Mexico, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Virginia, Wisconsin, and West Virginia.

[9] Alaska, Alabama, Arkansas, Connecticut, Florida, Georgia, Iowa, Indiana, Kansas, Louisiana, Missouri, Montana, North Carolina, Nebraska, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, and Wyoming.

and (ii) attorneys were more knowledgeable about the nuances of their cases and better suited to formulate questions on those issues. NCSC also reported, however, that many judges prefer to conduct the examination because they believe that the attorneys waste too much time and unduly invade jurors' privacy. *See* Appendix B at 28. Whether the questions are actually put by the judge or the attorney, the ultimate measure of control is whether the questions or line of inquiry must be approved in advance by the judge, a matter not specifically addressed in the NCSC Study.[10]

Another difference noted in the NCSC Study that can act as a control measure is how the examination is conducted – by use of a general questionnaire, case-specific questionnaires, questions addressed orally to the full panel, to individuals in the jury box, to individuals at the bench or in chambers. Many courts use a combination of those methods.[11] In its April 2000 Report, the Council on Jury Use and Management, a body created by the Maryland Conference of Circuit Judges, recommended that "[w]here feasible, and in appropriate cases, advance written questionnaires for jury panels should be utilized." The Council added:

> "Questionnaires can provide information in a more efficient form and with less invasion of juror privacy (e.g. whether a juror has been charged with a crime or has been the victim of a crime.) Advance written questionnaires can be especially useful in protracted or complex cases where jury selection will require prospective jurors to answer many questions. They may also be useful in more routine cases where jurors are asked certain standard questions."[12]

That effort has taken root in Maryland. Several years ago, the Criminal Pattern Jury Instruction Committee began to explore the idea of drafting pattern *voir dire* in criminal cases. That effort was suspended when, in 2011, the president of the Maryland

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[10] The *voir dire* process in Maryland is governed by Rules 2-512(d) (civil cases) and 4-312(e) (criminal cases). Under both Rules, the trial judge may permit the parties to conduct the examination of qualified jurors or may conduct the examination him/herself after considering questions proposed by the parties. In the latter event, the judge may permit the parties to supplement the examination by further inquiry or may submit additional questions proposed by the parties.

[11] A few courts, New Jersey being a prime example, have developed model *voir dire* questions, both general and case-specific. *See* Directive 4-07 of the New Jersey Administrative Office of the Courts (May 16, 2007), attached as Appendix C.

[12] *See* Report, attached as Appendix D at 6. The Council indicated that it had discussed, but made no recommendation regarding who should conduct the questioning of prospective jurors. *Id.* at 7.

State Bar Association (MSBA) appointed a special committee to develop form *voir dire* questions for both civil and criminal cases. In an Interim Report sent to the then-current president of MSBA on April 11, 2014, the special committee presented proposed model *voir dire* questions for civil tort cases and advised that, in the "not too distant future," the special committee would be presenting proposed model questions for criminal cases. The Interim Report noted that the focus of the special committee had been on lines of inquiry permissible under current Maryland law. A copy of the Interim Report is attached as Appendix E.

A control measure addressed in several of the cases and noted in the NCSC Study are time limits imposed by the court. As the NCSC points out, those limits necessarily vary depending on the nature and complexity of the case, the number of parties, the number of peremptory challenges allowed, the number of jurors to be selected, who conducts the examination, and how the examination is conducted. *See* Appendix B at 30.

We allude to these various control measures because, should the Court decide to alter the current rule and expand the scope of *voir dire* to include inquiries designed to guide the exercise of peremptory challenges, these measures may be considered adjunctively in ameliorating any perceived adverse ramifications from such an expansion. In 2005, as part of its American Jury Project, the American Bar Association proposed nineteen Principles for Juries and Jury Trials. Principle 11 – ensuring that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury – dealt with some of these control mechanisms. Section B.3. confirmed the ABA view that "[v]oir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."

Other sections of the Principle recommended:

(1) the use of general and issue-specific questionnaires, to be agreed upon by the parties if possible;

(2) that the questioning of jurors should be conducted initially by the court and should be sufficient, at a minimum, to determine the jurors' legal qualification to serve in the case;

(3) that following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel;

(4) that, where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the

parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions; and

(5) that it is the responsibility of the court to prevent abuse of the juror selection examination process.[13]

RECOMMENDATIONS

The Rules Committee considered the Court's request, in light of the information recounted above and presentations made by interested persons, at an open meeting on June 19, 2014. The Committee presents the following recommendations to the Court.

FIRST: The Court should join the Federal courts and the great majority of State courts and permit *voir dire* to include relevant inquiries designed to facilitate or guide the intelligent exercise of peremptory challenges, in both civil and criminal cases.

SECOND: The process should remain subject to the overall supervision and control by the trial court, exercised in a manner that will permit a fair inquiry but (1) avoid unduly prolonging the *voir dire* process and inappropriate intrusions on jurors' privacy or security, and (2) preclude attempts to use the process for inappropriate purposes or in inappropriate ways.

THIRD: The purpose and scope of *voir dire* should be defined by Rule, as it is in several of the States, so that it can be coupled with the Rules that govern the process (Rules 2-512 and 4-312).

FOURTH: The MSBA special committee should be encouraged to expand its work to develop form questions or lines of inquiry relevant to the intelligent exercise of peremptory challenges.[14] The special committee seems to have a fair balance of knowledgeable practitioners and judges and appears fully competent to undertake that task.

FIFTH: Full implementation of the extension should await the completion of such form questions or lines of inquiry and review of

[13] *See Principles for Juries and Jury Trials*, American Bar Association (2005), at 13, attached as Appendix F.

[14] In a letter to an Assistant Reporter to the Rules Committee, the Chair of the MSBA special committee advised that, if the Court were to expand the scope of *voir dire*, the special committee (or a successor to it) "will expand proposed *voir dire* questions.

those recommendations by the Rules Committee.[15] The Committee believes that form questions or lines of inquiry, developed by judges and practitioners and with the imprimatur of the MSBA and the Rules Committee, and possibly the Court, can go a long way in providing some uniformity in the process and, coupled with overall court supervision and control, avoiding undesirable ramifications from the extension.

There is precedent for this approach. *See* the Form Interrogatories, Guidelines Regarding Compensable and Non-Compensable Attorneys' Fees and Related Expenses, and Court Interpreter Inquiry Questions in the Appendix of Forms attached to the Maryland Rules.

In its consideration of these recommendations at its June 19, 2014 meeting, the Rules Committee was not fully aware of the progress that had been made by the MSBA special committee and anticipated that it might take as much as two years for the special committee to develop form questions relevant to the exercise of peremptory challenges. Whether it would, in fact, take that long, especially if the Court were to urge some greater expedition, is unclear.

Respectfully submitted,

Alan M. Wilner
Chair

[15] The Rules Committee does not envisage itself as having approval authority over the recommendations of the MSBA special committee but only the ability to review those recommendations in light of comments that may be received from other persons or groups so that it may make its own recommendation to the Court. That would be especially useful if the Court were to consider including the proposed questions or lines of inquiry in an Appendix to the Maryland Rules.

**Davis v State.pdf**
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Position: FAV

333 Md. 27
Court of Appeals of Maryland.

David DAVIS

v.

STATE of Maryland.

No. 114, Sept. Term, 1992
|
Dec. 9, 1993.

**Synopsis**

Defendant was convicted of possession of cocaine with intent to distribute and of possession of heroin with intent to distribute by the Circuit Court, Baltimore City, David Ross, J., and defendant appealed. The Court of Special Appeals, 93 Md.App. 89, 611 A.2d 1008, affirmed. On petition for writ of certiorari, the Court of Appeals, Chasanow, J., held that: (1) defendant was not entitled to have venire questioned as to whether any member of venire was employed as law enforcement officer or had friends or relatives in law enforcement field, and (2) missing witness argument was warranted based on defendant's failure to call, as witness who could allegedly have corroborated his claims of mistaken identity, the woman with whom he lived.

Affirmed.

McAuliffe, J., concurred in result and filed opinion.

Robert M. Bell, J., dissented and filed opinion, in which Eldridge, J., joined.

West Headnotes (18)

**[1]** **Jury** Examination of Juror
**Jury** Examination by court

It is typically the trial judge who questions prospective jurors, but judge has discretion to permit attorneys to conduct inquiry.

**[2]** **Jury** Extent of examination

Scope of voir dire and form of questions propounded is firmly within discretion of trial judge.

13 Cases that cite this headnote

**[3]** **Jury** Extent of examination

Trial judge's discretion regarding scope of proposed avenue of voir dire is governed by one primary principle, that purpose of voir dire is to ascertain existence of cause for disqualification and for no other purpose.

  

18 Cases that cite this headnote

**[4]** **Jury** Examination of Juror

When parties to litigation direct their proposed voir dire questions to specific cause for disqualification, they have right to have their questions propounded to prospective jurors during voir dire.

26 Cases that cite this headnote

**[5]** **Jury** Laying foundation for peremptory challenges

**Jury** Extent of examination

Proposed voir dire question that are not directed to specific ground that would permit juror's disqualification for cause, but which are asked in aid of party's peremptory challenges, may be refused in discretion of court, even though it would not have been error to have asked them.

18 Cases that cite this headnote

**[6]** **Jury** Competency for Trial of Issues in General

Fundamental tenet underlying practice of trial by jury is that each juror, as far as possible, be impartial and unbiased.

1 Case that cites this headnote

**[7]** **Jury** Official position

**Jury** Personal relations in general

Mere fact that prospective juror is or was member of law enforcement body, or is related to or associated with members of law enforcement community, does not constitute "cause" for juror's disqualification.

4 Cases that cite this headnote

**[8]** **Jury** Official position

**Jury** Personal relations in general

In general, professional, vocational, or social status of prospective juror is not dispositive factor establishing "cause" to disqualify; rather, proper focus is not on juror's status but on his state of mind, and on whether there is some bias, prejudice or misconception.

3 Cases that cite this headnote

**[9]** **Jury** Bias and prejudice

Defendant in narcotics case in which state's chief witness was police officer did not have right to have prospective jurors examined as to their possible membership in law enforcement body or association with members of law enforcement community; proposed questions did nor relate to any ground that would provide cause for juror's disqualification, notwithstanding that they may have assisted defendant in exercising his peremptory challenges.

3 Cases that cite this headnote

**[10]** **Jury** Criminal prosecutions

  

Defendant has no constitutionally protected right to exercise peremptory challenges.

**[11]** **Jury** Competence for Trial of Cause

Concept of fair trial entitles defendant only to jury composed of impartial and unbiased jurors, not to jury composed of what defendant views as ideal or model jurors predisposed to accept his or her theory of case.

**[12]** **Jury** Bias and prejudice

When parties identify area of potential bias and properly request voir dire questions designed to ascertain jurors whose bias could interfere with their ability to fairly and impartially decide issues, trial court has obligation to ask those questions of venire panel.

25 Cases that cite this headnote

**[13]** **Jury** Form and Sufficiency of Questions Propounded

General voir dire questions regarding jurors' ability to render a fair and impartial verdict are not adequate substitute for properly framed questions designed to highlight specific areas where jurors may have biases that could hinder their ability to fairly and impartially decide case.

12 Cases that cite this headnote

**[14]** **Jury** Form and Sufficiency of Questions Propounded

Voir dire questions should be framed so as to identify potential jurors with biases which are cause for disqualification, rather than merely identifying potential jurors with attitudes or associations which might facilitate exercise of peremptory challenges.

3 Cases that cite this headnote

**[15]** **Criminal Law** Comments by prosecution on failure of accused to present evidence

Missing witness argument was permissible during prosecutor's closing remarks based on defendant's failure to call, as witness who supposedly could have corroborated his claims of mistaken identity, the woman with whom he was living in functional equivalent of marriage; woman was not “equally available” as witness to both sides, notwithstanding that she sat in court room throughout trial and was subject to subpoena.

7 Cases that cite this headnote

**[16]** **Criminal Law** Comments on Failure to Present Evidence or Witnesses

Potential witnesses' “availability” must be judged, for purposes of deciding whether missing witness argument is permitted, in practical as well as physical terms, and may depend not only on physical availability but on witness' relationship to parties.

2 Cases that cite this headnote

**[17]** **Criminal Law** Failure to call witness or produce evidence

**Criminal Law** Comments on Failure to Present Evidence or Witnesses

  

Requirements of missing witness rule must be more rigidly applied when party requests missing witness instruction by court than when missing witness argument is made during party's closing argument.

11 Cases that cite this headnote

**[18]** **Criminal Law** Failure to call witness or produce evidence

Trial judge has discretion to deny missing witness instruction, leaving matter to closing arguments, even when facts would support missing witness inference.

15 Cases that cite this headnote

**Attorneys and Law Firms**

****869** ***31** Mark Colvin, Asst. Public Defender, argued and on brief (Stephen E. Harris, Public Defender, on brief), Baltimore, for petitioner.

Tarra DeShields–Minnis, Asst. Atty. Gen., argued and on brief (J. Joseph Curran, Jr., Atty. Gen. of Maryland, on brief), Baltimore, for respondent.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW, KARWACKI and ROBERT M. BELL, JJ.

**Opinion**

CHASANOW, Judge.

The Defendant, David Davis, was found guilty of distribution of cocaine and heroin by a jury in the Circuit Court for Baltimore City. Following his sentencing, Davis appealed his conviction, and the Court of Special Appeals affirmed the circuit court. This Court granted certiorari. Davis contends that the circuit court erred in improperly restricting the scope of *voir dire* during jury selection and in permitting the State to make a missing witness argument to the jury during closing arguments. We find that the circuit court did not err in either respect and affirm the decision of the Court of Special Appeals.

***32 I.**

On September 25, 1990, Officer Andrew Bratcher of the Baltimore City Police responded to a call regarding an individual selling narcotics in the 2100 block of Barclay Street. Shortly after his arrival, Officer Bratcher observed from his cruiser the Defendant, David Davis, carrying a small white bag in his hand. Davis placed the white bag beside a set of stairs and approached a car. Officer Bratcher then observed Davis hand the car's driver a small white object. Believing that he had just witnessed a drug transaction, Officer Bratcher exited his cruiser and instructed Davis to place his hands on the top of the purchaser's car. Davis fled, with Officer Bratcher giving pursuit. After apprehending Davis, Officer Bratcher returned to the location of the suspected sale and recovered the white bag that Davis had concealed along the side of the stairs. The white bag contained 48 capsules of cocaine and 18 wax-paper bags of heroin. Davis was subsequently charged with two counts of distribution of a controlled dangerous substance, ****870** two counts of possession of a controlled dangerous substance with the intent to distribute, and two counts of possession of a controlled dangerous substance.

  

Davis pled not guilty to the charges and requested a trial by jury before the Circuit Court for Baltimore City. During *voir dire,* Judge David Ross asked the entire venire panel six questions and dismissed several prospective jurors on the basis of their replies. The six questions were as follows:

> "1) ... whether any of the prospective jurors had any knowledge or information about this particular case[;]
>
> 2) ... whether any of the jurors knew a) the [Defendant], b) defense counsel, c) the assistant state's attorney, d) Officer Andrew Bratcher, the chief police investigator and only State's witness; or e) Mary Easley, a witness for the defense[;]
>
> 3) ... whether any of the jurors 'has been or ... has a close relative who has either been the victim of or has been charged with or convicted of a drug related crime[;]'
>
> ***33** 4) ... whether any of the jurors is 'likely to give more or less weight to the testimony of a police officer merely because that person is a police officer[;]'
>
> 5) ... whether any of the jurors 'knows of anything that would keep him or her from giving a fair and impartial verdict in this case[;]'
>
> 6) ... whether any of the jurors 'knows of any reason why he or she should not sit on the jury in this case.' "

*Davis v. State,* 93 Md.App. 89, 92, 611 A.2d 1008, 1009 (1992) (quoting *State v. Davis,* No. 591032032, R. at 3–9 (May 29, 1991)).

Thereafter, Davis requested that the trial judge ask the jury panel "whether anyone on the jury has been a member or is a member of the law enforcement community or whether they have a close relative or friend who is such a member...." Davis argued that the judge's prior "omnibus" questions, pertaining only to whether any member of the panel knew of any reason why they should not sit on the jury, were insufficient. Davis contended that such questions were "unrealistic" and posited for "[w]hat other reason would I get ten peremptory challenges if I cannot make a halfway intelligent decision to strike or not to strike." The trial judge denied Davis's request.

At the conclusion of the trial, the jury found Davis guilty of the two counts of distribution of controlled dangerous substances. Davis appealed and the Court of Special Appeals affirmed his conviction. *Davis v. State,* 93 Md.App. 89, 611 A.2d 1008 (1992). Dissatisfied with the intermediate appellate court's holding, Davis filed a petition for certiorari, which we granted. *Davis v. State,* 329 Md. 22, 616 A.2d 1286 (1992).

**II.**

Davis's principal contention is that the trial court abused its discretion in refusing to ask whether any of the jurors were, or were associated with, law enforcement personnel. Davis argues that he was entitled to such a question since it may have led to the disqualification for cause of one or more of the ***34** prospective jurors or, at the very least, would have allowed him to intelligently exercise his peremptory challenges. For the reasons stated below, we disagree.

**[1] [2] [3] [4] [5]** The principles governing jury *voir dire* are well established in Maryland. As we have noted on several occasions, there is no statute in Maryland prescribing the manner in which *voir dire* is to be conducted or regulating the objects of inquiry during *voir dire. See Bedford v. State,* 317 Md. 659, 670, 566 A.2d 111, 116–17 (1989). Absent any statutory guidance from the General Assembly, this Court has consistently looked to Maryland's common law for guidance. The common law of this State vests trial judges with discretion to regulate *voir dire.* The trial judge typically questions the prospective jurors, although he or she has discretion to permit counsel to conduct the inquiry. *Moore v. State,* 7 Md.App. 495, 503, 256 A.2d 337, 341–42, *cert. denied,* 256 Md. 746, *cert. denied,* 398 U.S. 913, 90 S.Ct. 1714, 26 L.Ed.2d 76 (1970); Maryland Rule 4–312(d). Additionally, the scope of *voir dire* and the form of the questions propounded rests firmly within the discretion of the trial judge. ****871** *Casey v. Roman Catholic Archbishop,* 217 Md. 595, 605, 143 A.2d 627, 631 (1958). The trial judge's discretion

  

regarding the scope of a proposed avenue of *voir dire* is governed by one primary principle: the purpose of "the inquiry is to ascertain 'the existence of cause for disqualification and for no other purpose.' " *McGee v. State,* 219 Md. 53, 58, 146 A.2d 194, 196 (1959) (quoting *Adams v. State,* 200 Md. 133, 140, 88 A.2d 556, 559 (1952) (citations omitted)). Where parties to the litigation direct their inquiries concerning a specific cause for disqualification, they have "a *right* to have questions propounded to prospective jurors" during *voir dire. Casey,* 217 Md. at 605, 143 A.2d at 631 (emphasis in original); *see Bedford,* 317 Md. at 670, 566 A.2d at 116 ("Maryland Declaration of Rights Article XXI guarantees a defendant the right to examine prospective jurors to determine whether any cause exists for a juror's disqualification."). "Questions not directed to a specific ground for disqualification but which are speculative, inquisitorial, catechising or 'fishing', asked in the aid of deciding on peremptory challenges, may be refused in ***35** the discretion of the court, even though it would not have been error to have asked them." *McGee,* 219 Md. at 58–59, 146 A.2d at 196; *see also Kujawa v. Baltimore Trans. Co.,* 224 Md. 195, 201, 167 A.2d 96, 98 (1961) (stating that trial court's denial of *voir dire* question, in the nature of a "fishing" expedition, was clearly not an abuse of discretion). We must view Davis's challenge in the context of this framework.

**A.**

Davis first contends that the trial judge abused his discretion in refusing to ask his proposed question because, in a case where "the sole issue ... is the credibility of the police officer as [o]pposed to [the defendant], a *voir dire* question concerning law enforcement employment or association may well lead to the disqualification for cause of one or more of the prospective jurors." We must reject Davis's argument.

**[6]** As the Court noted in *Langley v. State,* a fundamental tenet underlying the practice of trial by jury is that each juror, as far as possible, be "impartial and unbiased." *Langley v. State,* 281 Md. 337, 340, 378 A.2d 1338, 1339 (1977) (citing *Waters v. State,* 51 Md. 430, 436 (1879)). The objective of this tenet is to assemble a group of jurors capable of deciding the matter before them based solely upon the facts presented, " 'uninfluenced by any extraneous considerations....' " *Id.* The function of *voir dire* is closely related to this fundamental tenet of trial by jury and, thus, the mandatory scope of *voir dire* in Maryland only extends to those areas of inquiry reasonably likely to reveal cause for disqualification. There are two areas of inquiry that may uncover cause for disqualification: (1) an examination to determine whether prospective jurors meet the minimum statutory qualifications for jury service, *see* Maryland Code (1974, 1989 Repl.Vol., 1992 Cum.Supp.), Courts & Judicial Proceedings Article, § 8–207; or (2) " 'an examination of a juror ... conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any ***36** collateral matter *reasonably liable* to unduly influence him.' " *Bedford,* 317 Md. at 671, 566 A.2d at 117 (quoting *Corens v. State,* 185 Md. 561, 564, 45 A.2d 340, 343 (1946) (emphasis added)).[1]

In addition, this Court has identified several areas of inquiry where, if reasonably related to the case at hand, a trial judge must question prospective jurors. *See Bowie v. State,* 324 Md. 1, 15, 595 A.2d 448, 455 (1991) (holding trial judge erred in failing during *voir dire* to inquire into prospective jurors' possible racial bias); *Casey,* 217 Md. at 606–07, 143 A.2d at 632 (trial judge erred in failing to inquire about religious bias); ****872** *Corens,* 185 Md. at 564, 45 A.2d at 343–44 (holding that State has a right to challenge prospective juror for cause based upon juror's unwillingness to convict founded upon circumstantial evidence in death penalty case); *Langley,* 281 Md. at 349, 378 A.2d at 1344 (holding that where a principal part of the State's case hinges upon the credibility of a police officer's testimony versus the credibility of the defendant, court must ask whether prospective juror would give more weight to police officer's testimony solely because of his or her official status). These areas entail potential biases or predispositions that prospective jurors may hold which, if present, would hinder their ability to objectively resolve the matter before them.

**[7]** **[8]** Davis's proposed *voir dire* inquiry does not relate to cause for disqualification. Davis merely sought to discover whether any prospective juror was either a law enforcement ***37** officer or was related to or associated with any law enforcement officers. Assuming that the court would have allowed such an inquiry, an affirmative answer would not have established cause for disqualification. First, the fact that a prospective juror is or was a member of a law enforcement body does not automatically disqualify that venire person. *See Harris v. State,* 82 Md.App. 450, 470, 572 A.2d 573, 583 (trial judge

  

did not err when he failed to strike former state trooper for cause where trooper indicated that he was able to render fair and impartial judgment despite earlier employment), *cert. denied,* 320 Md. 800, 580 A.2d 218 (1990). Likewise, the mere fact that a prospective juror is related to or associated with members of the law enforcement community does not constitute cause for disqualification. *Goldstein v. State,* 220 Md. 39, 45, 150 A.2d 900, 904 (1959); *Shifflett v. State,* 80 Md.App. 151, 156, 560 A.2d 587, 589 (1989), *aff'd on other grounds,* 319 Md. 275, 572 A.2d 167 (1990); *Baker v. State,* 3 Md.App. 251, 254, 238 A.2d 561, 564 (1968). In general, the professional, vocational, or social status of a prospective juror is not a dispositive factor establishing cause to disqualify. Rather, the proper focus is on the venire person's state of mind, and whether there is some bias, prejudice, or preconception. Short of those instances where there is a demonstrably strong correlation between the status in question and a mental state that gives rise to cause for disqualification, mere status or acquaintance is insufficient to establish cause for disqualification of a prospective juror. The fact that a prospective juror is employed as, related to, or associated with a law enforcement officer does not establish that the prospective juror has any undue bias or prejudice that will prevent that person from fairly and impartially determining the matter before them. *See Goldstein,* 220 Md. at 44–45, 150 A.2d at 904. The inquiry must instead focus on the venire person's ability to render an impartial verdict based solely on the evidence presented. We believe the Court of Special Appeals accurately stated this principle in *Borman v. State:*

> "The purpose of the voir dire examination is to ascertain the existence of cause for disqualification and for no other purpose. Neither mere acquaintance with an individual or ***38** group, nor mere relationship to witnesses, other than parties, is sufficient basis for challenging a prospective juror for cause. Bias on the part of prospective jurors will never be presumed, and the challenging party bears the burden of presenting facts, in addition to mere relationship or association, which would give rise to a showing of actual prejudice." (Citations omitted).

*Borman v. State,* 1 Md.App. 276, 279, 229 A.2d 440, 441–42 (1967).

**[9]** Davis next argues that, "[w]hile an affirmative answer to the proposed question may not, as a matter of law, result in disqualification of the prospective juror for cause, the answer, by itself or together with the juror's manner and demeanor, may persuade the trial court, in the exercise of its discretion, to excuse the juror for cause." He asserts that such "follow-up questioning may reveal facts, predilections, or unacknowledged prejudices...." Davis's suggested approach to *voir dire,* however, finds no support in the law of Maryland. Davis suggests that a party be allowed to incrementally question prospective jurors in a piecemeal fashion until the party can uncover grounds for a challenge for cause. We see no difference ****873** between this approach and the practice in some other states that permit parties to use *voir dire* as a means to more effectively exercise peremptory challenges—a practice that this Court has long since rejected. Where parties do not direct their questions to grounds for disqualification but such questions are "speculative, inquisitorial, catechising or 'fishing', asked in aid of deciding on peremptory challenges," a trial judge has the discretion to refuse to ask them. *McGee,* 219 Md. at 58–59, 146 A.2d at 196. We find that the trial judge did not abuse his discretion in refusing to ask a question not addressing a potential ground for disqualification. Although the trial judge possessed the discretion to allow Davis's proposed line of inquiry, he was not required to do so.

**B.**

Perhaps sensing the impending demise of his initial contention, Davis next requests that this Court reconsider the framework ***39** in which Maryland courts conduct *voir dire.* Davis recognizes that "[u]nder current Maryland law, *voir dire* examination ... not aimed at exposing the existence of cause for disqualification, but which may aid the parties in exercising their right of peremptory challenge ... may be refused in the discretion of the court even though it would not be error to ask them." Davis, however, points to what he considers an "overwhelming majority" of states that have adopted the position that a criminal defendant is "entitled to make reasonable inquiries of prospective jurors so that he may intelligently exercise his right of peremptory challenge." Not surprisingly, Davis urges us to reconsider the long settled law of this State and adopt this alternative system of *voir dire.*

  

Davis correctly recognizes that there exist two schools of thought among the various courts throughout the country with regard to the scope of *voir dire*. *See* J. Alexander Tanford, *An Introduction to Trial Law,* 51 Mo.L.Rev. 627, 638–40 (1986). These two camps differ largely in the mandatory scope of examination of prospective jurors. The Maryland system requires that the trial judge allow inquiries reasonably likely to disclose cause for disqualification with all other inquiries subject to the trial judge's discretion. In stark contrast is the system that Davis wishes us to adopt. This alternative system requires that a trial judge inquire about any topic or subject matter which may be reasonably related to the intelligent exercise of peremptory challenges.

**[10]** **[11]** While the extent of questioning under either system of *voir dire* may differ, the desire to obtain a fair and impartial jury is at the heart of both. Likewise, the constitutional imperative that the criminal defendant receive a fair trial remains constant. There is no constitutionally protected right to exercise peremptory challenges. *See Frazier v. United States,* 335 U.S. 497, 505 n. 11, 69 S.Ct. 201, 206 n. 11, 93 L.Ed. 187, 195 n. 11 (1948); *United States v. Wood,* 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78, 88 (1936); *Stilson v. United States,* 250 U.S. 583, 586, 40 S.Ct. 28, 30, 63 L.Ed. 1154, 1156 (1919); *see also* Raymond J. Broderick, ***40** *Why the Peremptory Challenge Should Be Abolished,* 65 Temple L.Rev. 369, 374–75 (1992) (examining evolution of Sixth Amendment and indicating that drafters of Bill of Rights considered an express guaranty of peremptory challenges in Sixth Amendment but abandoned the idea). The concept of a fair trial only entitles a defendant to a jury composed of impartial and unbiased jurors, not a jury composed of what a litigant views as ideal or model jurors predisposed to accept his or her theory of the case. *See Whittemore v. State,* 151 Md. 309, 315, 134 A. 322, 324 (1926) (stating that "the law does not aid a party in an effort to select jurymen in hope of favor from them, for that is contrary to the object sought by the law"). In the absence of a rigid constitutional requirement concerning the scope of *voir dire,* states have had to make a policy determination with respect to which method of *voir dire* best fits the needs of their justice system. In setting this policy, courts and legislatures have had to balance the parties' desires for extensive *voir dire* and the justice system's obligation to provide litigants with both an impartial as well as efficient method of administering justice.

Nearly ninety years ago this Court, in *Handy v. State,* 101 Md. 39, 60 A. 452 (1905), ****874** struck such a policy balance and established the general principles governing the scope of *voir dire* in Maryland. In *Handy,* this Court considered whether a trial judge was bound to ask a prospective juror a *voir dire* question submitted for the purpose of enlightening a party as to the propriety of exercising peremptory challenges. In the absence of any statute, the Court acknowledged that the common law provided a trial judge with the discretion to ask such questions but the Court rejected the defendant's contention that the trial judge was obligated to propound such questions to the jury. In reaching this conclusion, the Court stated "[w]e are aware that there are decisions to the contrary in other courts of equal authority and reputation, but such knowledge as we possess of the experience in practice under those decisions does not commend them to our adoption." 101 Md. at 43, 60 A. at 453.

***41** Twenty-one years later, in *Whittemore,* 151 Md. 309, 134 A. 322, this Court once again had an opportunity to reassess the policy choice made in *Handy* concerning the scope of *voir dire.* In *Whittemore,* the defendant sought to question a prospective juror concerning that juror's age and prior occupation without specifying any potential cause for disqualification. The trial judge, relying on *Handy,* refused to allow the inquiry, reasoning that "he would be glad to have them submit other questions that would affect the eligibility of the juror and not for the purpose of enlightening counsel as to whether there should be a peremptory challenge." 151 Md. at 312, 134 A. at 322. On appeal, the defendant challenged the trial judge's interpretation of *Handy.* This Court affirmed the trial judge and crystallized the principles that had been implicit in *Handy.* The Court held:

> "The rule is, then, that questions, not directed to a specific reason for disqualification and exclusion by the court, may be refused in the court's discretion....
>
> The questions excluded in this case were for no specified purpose, and apparently with no question of disqualification in mind, but were merely beginning a process of examining at large, in order to form impressions and preferences, which, while they might properly be made the ground for peremptory challenges, would not test the eligibility of the jurymen."

151 Md. at 315–16, 134 A. at 324.

In addition to clarifying the holding of *Handy,* the Court in *Whittemore* reexamined the policy underlying the adoption of a rule mandating *voir dire* in only those areas relating to a specific cause of disqualification. The Court noted the following:

  

> "Judge Pearce writing the [*Handy* ] opinion for the Court said, 'we are aware that there are decisions to the contrary in other courts of equal authority and reputation, but such knowledge as we possess of the experience in practice under those decisions does not commend them to our adoption'—in this referring, presumably, to reports from other jurisdictions ***42** of seemingly unreasonable encumbering and prolongation of the work of securing a jury to proceed with the trial."

151 Md. at 314, 134 A. at 323 (quoting *Handy,* 101 Md. at 43, 60 A. at 454).

This Court initially adopted the rules concerning the scope of *voir dire* because allowing more extensive inquiry would unduly tax the efficiency of Maryland's judicial system. Although some litigants might benefit from broader mandatory *voir dire,* a greater number of citizens would be hindered due to the accompanying decline in their ability to gain prompt resolution of their litigation. In *Handy* and *Whittemore,* this Court decided that any such detrimental effects outweighed the marginal gains springing from unlimited *voir dire.* Writing for the Court of Special Appeals in the instant case, Judge Moylan vividly captured the essence of this policy choice. In comparing Davis's proposed system of expanded *voir dire* with Maryland's current system, Judge Moylan wrote the following:

> "There is, however, an opposing school of thought that looks upon such indulgence as errant, if not grotesque, foolishness.... In terms of the profligate waste of precious courtroom and human resources, it looks upon any fractional gain from unlimited *voir dire* as a minimally incremental benefit that soon passes the point of diminishing returns. In a world of finite resources, ****875** if the fabled 'day in court' is permitted casually to multiply into twenty days in court, the inevitable consequence is that, by the inexorable law of mathematics, nineteen other litigants are denied any time in court at all...."

*Davis v. State,* 93 Md.App. 89, 94, 611 A.2d 1008, 1010 (1992).

Davis cites numerous other states that hold a contrary view to Maryland's and invites this Court to reverse the policy decision it made nearly a century ago. We must, however, decline any such invitation. Several considerations underpin our decision to remain faithful to the *Handy* rule and maintain this State's present course. First, the present-day need for judicial efficiency is even greater than it was at the turn of the ***43** century; crowded dockets abound with little chance of adequately expanding judicial resources in the near future.

Furthermore, the trend for expansive *voir dire* appears to be waning. For example, prior to 1981, California followed a rule which limited the scope of *voir dire* to questions reasonably likely to uncover cause for disqualification and excluded those asked to aid the use of peremptory challenges. *See People v. Edwards,* 163 Cal. 752, 127 P. 58, 58–60 (1912) and citations therein. In *People v. Edwards,* 163 Cal. at 753, 127 P. at 58, the California Supreme Court limited the scope of *voir dire* in criminal cases to avoid what it perceived of as a growing trend of unnecessarily prolonging court proceedings by unlimited and tedious examination of prospective jurors.

In 1981, however, the California Supreme Court reassessed its prior rule and abandoned the *Edwards* line of cases, thereby expanding the scope of permissible *voir dire* questioning. *People v. Williams,* 29 Cal.3d 392, 403–04, 174 Cal.Rptr. 317, 322, 628 P.2d 869, 871 (1981). In *People v. Williams,* the court found that the *Edwards* rule was too restrictive, and it did not effectively uncover juror partiality. 29 Cal.3d at 401, 174 Cal.Rptr. at 321, 628 P.2d at 873. The *Williams* court reasoned that people are governed by subconscious biases that are only discoverable upon more extensive *voir dire* questioning. 29 Cal.3d at 402–03, 174 Cal.Rptr. at 322–23, 628 P.2d at 873. Thus, the California Supreme Court adopted a new rule that *voir dire* should include reasonable inquiries made to assist counsel in the intelligent exercise of peremptory challenges. 29 Cal.3d at 398, 174 Cal.Rptr. at 319, 628 P.2d at 871.

When the California Supreme Court discarded the *Edwards* rule, which had limited *voir dire* to grounds for cause, the court failed to foresee the effects that broadened *voir dire* would cause. There was a great deal of dissatisfaction with the newly expanded right of *voir dire,* because of the additional burdens that the *Williams* rule placed upon California's criminal justice system. As one distraught trial judge wrote in the aftermath of the *Williams* decision:

  

> ***44** "Many trial judges have decided that if exclusion of such a question [to aid in the use of peremptory challenges, no matter how ridiculous] is grounds for reversal, it is too risky to rule out almost any line of inquiry.... In the large municipal court where I recently completed 11 years' service, voir dire in driving-under-the-influence cases now routinely consumes a minimum of two days, frequently three. Young lawyers recite their questions from dog-eared sets of Xeroxed inquiries, sometimes hardly glancing up to the faces of the prospective jurors. When voir dire is finally over, the evidence can normally be presented in a little over a day."

Roderic Duncan, *Putting a Cap on Voir Dire,* 7 Cal.Lawyer 14, 58 (March 1987).

In response to the apparent waste of judicial resources in the criminal arena, due to extensive *voir dire* required under *Williams,* the voters of California passed Proposition 115. *People v. Boulerice,* 5 Cal.App.4th 463, 474–76, 7 Cal.Rptr.2d 279, 285–86 (1992). The California voters decided that the *Williams* decision and the existing statutes had " 'unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.' " 5 Cal.App.4th at 474–75, 7 Cal.Rptr.2d at 286 (quoting Ballot Pamphlet, Proposed Amends. to Cal. Const., at 33 (June 5, 1990)). Proposition ****876** 115 was enacted " 'in order to restore balance and fairness to [the] criminal justice system.' " 5 Cal.App.4th at 474, 7 Cal.Rptr.2d at 285–86. As a result, Proposition 115 established two separate *voir dire* provisions for criminal and civil trials. *See* Cal.Civ.Proc.Code §§ 222.5, 223 (Supp.1993). While retaining the *Williams* rule for civil proceedings in § 222.5 of the California Code of Civil Procedure, Proposition 115 returned to the *Edwards* rule of limited *voir dire* for criminal trials. *Id.* § 223 (entitled "Criminal cases; voir dire examination by court and counsel"). Section 223 of the California Code provides the following:

> ***45** "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper....
>
> Examination of prospective jurors shall be conducted only in the aid of the exercise of challenges for cause."

Thus, California experimented with both forms of jury *voir dire* and ultimately returned to a more limited form of *voir dire* questioning in the criminal context. The populace clearly decided, as a matter of state law and policy, that any potential benefits to criminal defendants due to expansive questioning of prospective jurors was outweighed by the burdens imposed upon their State's system of justice. California's reaction to expanded *voir dire* reinforces our view that we should not change Maryland's current *voir dire* practices.

Finally, we note that a litigant's unbridled use of peremptory challenges has come under intense scrutiny and is the subject of some criticism. *See Batson v. Kentucky,* 476 U.S. 79, 107, 106 S.Ct. 1712, 1728, 90 L.Ed.2d 69, 94 (1986) (Marshall, J., concurring) ("The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."); *Gilchrist v. State,* 97 Md.App. 55, 78, 627 A.2d 44, 55 (1993) (Wilner, C.J., concurring) (stating that, in light of *Batson,* peremptory challenges should be eliminated as a matter of public policy due to the fact that "precious judicial time and resources are being sidetracked ..."); *People v. Bolling,* 79 N.Y.2d 317, 326, 582 N.Y.S.2d 950, 956, 591 N.E.2d 1136, 1142 (1992) (Bellacosa, Titone, JJ., & Wachter, C.J., concurring) (Where several judges invited the legislature to abolish peremptory challenges, stating "[p]eremptories have outlived their usefulness and, ironically, appear to be disguising discrimination—not minimizing it...."). Peremptory challenges have even been abolished in England, the birthplace of the ***46** peremptory challenge. *See generally* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished,* 65 Temple L.Rev. 369 (1992). Peremptory challenges have also been criticized for allowing jury selection based on stereotypes. An example of these stereotypes, which might be considered offensive today, can be found in Clarence Darrow's approach to jury selection:

  

> " 'Never take a German; they are bullheaded. Rarely take a Swede; they are stubborn. Always take an Irishman or a Jew; they are the easiest to move to emotional sympathy. Old men are generally more charitable and kindly disposed than young men; they have seen more of the world and understand it.' "

Robert F. Hanley, *Getting to Know You,* 40 Am.U.L.Rev. 865, 865–66 (1991) (quoting *The Oxford Book of Legal Anecdotes* 101 (M. Gilbert 1986)).

The number of peremptory challenges available to litigants is regulated by the legislature. *See* Md.Code (1974, 1989 Repl.Vol.), Courts and Judicial Proceedings Art., § 8–301. The future of peremptory challenges is a legislative question. If the General Assembly wishes to expand or contract those statutory rights or the manner in which they are exercised, it may do so. Until such time, we will continue to follow the principles adopted in *Handy* and *Whittemore* and applied consistently for the greater part of this century. *See Bowie v. State,* 324 Md. 1, 595 A.2d 448 (1991); *Bedford v. State,* 317 Md. 659, 566 A.2d 111 (1989); ****877** *Couser v. State,* 282 Md. 125, 383 A.2d 389, *cert. denied,* 439 U.S. 852, 99 S.Ct. 158, 58 L.Ed.2d 156 (1978); *Langley v. State,* 281 Md. 337, 378 A.2d 1338 (1977); *Kujawa v. Baltimore Trans. Co.,* 224 Md. 195, 167 A.2d 96 (1961); *McGee v. State,* 219 Md. 53, 146 A.2d 194 (1959); *Corens v. State,* 185 Md. 561, 45 A.2d 340 (1946). Accordingly, we must reject Davis's contention and affirm the circuit court. Although it was within the trial judge's discretion to allow the line of questioning, he was not required to do so. The trial judge did not abuse his discretion by refusing to propound Davis's question to the prospective jurors.

***47** **[12]** **[13]** **[14]** We hasten to add, however, that where the parties identify an area of potential bias and properly request *voir dire* questions designed to ascertain jurors whose bias could interfere with their ability to fairly and impartially decide the issues, then the trial judge has an obligation to ask those questions of the venire panel. Merely asking general questions, such as, "is there any reason why you could not render a fair and impartial verdict," is not an adequate substitute for properly framed questions designed to highlight specific areas where potential jurors may have biases that could hinder their ability to fairly and impartially decide the case. Those *voir dire* questions, however, should be framed so as to identify potential jurors with biases which are cause for disqualification, rather than merely identifying potential jurors with attitudes or associations which might facilitate the exercise of peremptory challenges.

**III.**

Davis's final contention focuses upon the propriety of a portion of the State's closing argument. At trial, Davis presented both his own testimony and the testimony of Mary Easley that he was only in the vicinity of the alleged drug sale because he was on his way to get food for his children. Easley testified that a woman identified only by her forename, Lakeesha, whom Easley stated was Davis's wife and mother of his children, gave Davis $10 in food stamps in order to buy food for their children. No food stamps were found on Davis's person at the time of his arrest. Although Davis did not call Lakeesha to testify in his defense, she sat in the courtroom throughout the entire trial.

In closing argument, the prosecuting attorney stated:

> "Now, I think you would find something interesting in this case.
>
> Defendant's wife, or girlfriend, came outside and saw him with the police. Allegedly the Defendant had been given food stamps by her via Ms. Easley. She was in the house when Deon allegedly came in and said that [the] Defendant ***48** had been arrested. Now this woman sat in the courtroom everyday the entire trial; she was clearly in a better position to know what happened other than Defendant. She was never called to testify.
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Overruled.

  

> [The Prosecutor continued:] She could have told you that she gave the food stamps to the Defendant. She could have told you where exactly he was when she went outside to see where he was....
>
> Why didn't she come in and tell you that that's where he was as opposed to Ms. Easley who didn't even see anything [and] stayed in the house? Doesn't make sense."

Davis argues that the State's reference to his failure to call Lakeesha was improper and the trial judge erred in overruling his objection to it.

In 1975, this Court approved the general statement of the missing witness rule in the context of criminal trials. *Christensen v. State,* 274 Md. 133, 134–35, 333 A.2d 45, 46 (1975). We stated the following:

> " 'The failure to call a material witness raises a presumption or inference that the testimony of such person would be unfavorable to the party failing to call him, but there is no such presumption or inference where the witness is not available, or where the testimony is unimportant or cumulative, or where he is equally available to both sides.' "

*Id.* (quoting 1 Underhill, *Criminal Evidence* § 45 (rev. 6th ed. P. Herrick, 1973)). This Court revisited the issue in ****878** *Robinson v. State,* 315 Md. 309, 554 A.2d 395 (1989). Writing for the *Robinson* Court, Judge McAuliffe explained the function and operation of the missing witness rule in the context of a jury instruction:

> "There is nothing mysterious about the use of inferences in the fact-finding process. Jurors routinely apply their common sense, powers of logic, and accumulated experiences in life to arrive at conclusions from demonstrated sets of facts. Even had there been no instruction concerning the ***49** availability of this inference, we think it likely that among the first questions posed in the deliberation of this case would have been, 'Why didn't the defendant produce [the missing witness]?' Only if, as a matter of law, the unfavorable inference could not have been drawn by the jurors would the trial judge have been authorized to prohibit the prosecutor from posing that same question in argument."

315 Md. at 318–19, 554 A.2d at 399.

In addressing this issue below, the Court of Special Appeals, relying upon *Bruce v. State,* 318 Md. 706, 729–31, 569 A.2d 1254, 1266–67 (1990), rejected Davis's contention and found that since Lakeesha was the "common-law" wife and mother of Davis's child she was peculiarly within his power to produce.[2] Davis contends that both the intermediate appellate court and the trial court erred. Davis reasons that, since Lakeesha sat in the courtroom throughout the trial and was subject to subpoena, she was equally available to both sides, and thus the use of the missing witness argument was improper. We disagree.

**[15]** **[16]** We find the trial judge did not err in permitting the State to make a missing witness argument in the instant case. Although the State could have called Lakeesha as a witness, this fact is not dispositive. As the District of Columbia Circuit Court of Appeals noted, the " 'availability' of a witness to the Government must be judged 'practically as well as physically.' ... And whether a person is to be regarded as equally available to both sides may depend not only on physical availability but on his 'relationship' to the parties." *U.S. v. Young,* 463 F.2d 934, 942 (D.C.Cir.1972) (footnotes omitted) (citing ***50** *Burgess v. United States,* 440 F.2d 226 (D.C.Cir.1970); *Stewart v. United States,* 418 F.2d 1110, 1115 (D.C.Cir.1969)).

The very close relationship that existed between the Defendant and the potential witness was significant in satisfying the requirement that the witness not be equally available to both sides. As this Court noted when setting out the missing witness rule in both *Christensen* and *Robinson:* " 'The presumption or inference that the testimony of a missing witness would be unfavorable is applied most frequently when there is a relationship between the party and the witness, such as a family relationship, an employer-employee relationship, and, sometimes, a professional relationship.' " *Robinson,* 315 Md. at 314–15, 554 A.2d at 397 (citing *Christensen,* 274 Md. at 134–35, 333 A.2d at 46, in turn quoting 1 Underhill, *Criminal Evidence* § 45 (rev. 6th ed. P. Herrick, 1973)). Underlying this principle is the realization that despite a party's theoretical ability to subpoena the witness's testimony, there is a practical concern that certain relationships may engender a very strong bias which would undermine the utility of that witness's testimony. *See State v. Michaels,* 454 So.2d 560, 562 (Fla.1984); *State v. Karnes,* 608 S.W.2d 455, 457 (Mo.App.1981).

  

Whether labeled as husband-wife or domestic partners, the existent relationship between Davis and Lakeesha was sufficiently close that as a practical matter Lakeesha was not equally available to the State. *See Hale v. United States,* 361 A.2d 212, 216 (D.C.1976). Lakeesha was the mother of Davis's children. Davis, Lakeesha, and the children lived together as a family, and Davis provided support for the children. Their relationship was at least the functional equivalent of marriage and family—relationships that ****879** would substantially hinder the State's access to accurate testimony from the witnesses. *Cf. Michaels,* 454 So.2d at 562; *State v. Reid,* 193 Conn. 646, 480 A.2d 463, 473 (1984).

Our holding here is in accord with our decision in *Bruce v. State,* 318 Md. 706, 729–31, 569 A.2d 1254, 1267 (1990). There we indicated that, at least in the context of the State's closing ***51** argument, the existence of a girlfriend-boyfriend relationship was sufficient to satisfy the missing witness rule. In *Bruce,* the defendant and several companions murdered a number of persons in a drug-related transaction. Bruce and his companions then fled the State. Among this group was Bruce's girlfriend. At trial, Bruce testified that he had not fled the jurisdiction but that he and his girlfriend simply traveled out of the State pursuant to their prior plans. Additionally, one of the issues during the trial was Bruce's incriminating actions in one of the out-of-state hotel rooms while his girlfriend was present. Bruce failed to call his girlfriend to testify and the State made a missing witness argument during its closing remarks.

On appeal, Bruce challenged the State's closing argument as improper. Bruce contended that the missing witness argument was inappropriate since the testimony of his girlfriend would have been cumulative. We affirmed the trial court, finding that the proposed subject matter of the girlfriend's testimony, "coupled with the testimony about her close relationship to [the defendant]," was sufficient to engender a missing witness argument. 318 Md. at 730–31, 569 A.2d at 1267.

In light of *Bruce, Christensen,* and *Robinson,* the judge did not err in permitting the State to make a missing witness argument to the jury in the instant case. There was a sufficient factual basis to support the inference that Davis failed to call Lakeesha because her testimony would have been harmful. Davis made her testimony material when he testified that he was only in the area because Lakeesha sent him to the store with food stamps to get food for their children. Lakeesha could have buttressed Davis's defense of mistaken identity. Additionally, the relationship between Davis and Lakeesha was sufficient to indicate that she was not equally available to the State. There was a sufficient factual predicate to permit the State to argue the missing witness inference to the jury. *Robinson,* 315 Md. at 318–19, 554 A.2d at 400.

***52** **[17]** We should also point out that the missing witness rule was raised by the State's closing argument rather than the judge's instruction to the jury which may have been a factor in the trial judge's decision. The missing witness inference may arise in one of two contexts. A party may request that a trial judge instruct the jury on the operation and availability of the inference where all the elements of the rule are present. *See Christensen v. State,* 274 Md. 133, 333 A.2d 45 (1975). Additionally, a party may wish to call the jury's attention to this inference directly during closing arguments. *See Bruce,* 318 Md. at 729–31, 569 A.2d at 1266–67. As a matter of necessity, the requirements of the missing witness rule must be more rigidly applied where the inference is used in the former context. Where a party raises the missing witness rule during closing argument, its use is just that—an argument. Trial judges typically instruct the jury, as in this case, that the parties' arguments do not constitute evidence. Furthermore, the opposing side also has an opportunity to refute the argument and counter with reasons why the inference is inappropriate.

**[18]** In contrast to the argument context is the trial judge's instruction to the jury. In the latter case, the inference is communicated to the jury as part of the judge's binding jury instructions, creating the danger that the jury may give the inference undue weight. At the very least, a trial judge's jury instruction on the missing witness inference may have the effect of overemphasizing just one of the many proper inferences that a jury may draw. As a result, where the jury instruction is the vehicle by which the missing witness inference is brought to the jury's attention, the trial court should be especially cautious and closely abide by the requirements set out in *Christensen.* A trial judge has discretion to deny a missing witness instruction, leaving the matter to closing arguments, even when the facts would support ****880** the inference. *Robinson,* 315 Md. at 319

  

n. 7, 554 A.2d at 399–400 n. 7. In the instant case, the trial judge properly permitted the State to argue the missing witness inference to the jury.

***53 JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY THE PETITIONER.***

McAULIFFE, Judge, concurring.

I concur in the result. The Court cannot mandate the asking of voir dire questions designed to aid in the exercise of peremptory challenges because it is impossible logically to frame a limitation on the questions that a judge would then be required to ask. A peremptory challenge may be used for any reason that does not involve impermissible discrimination; thus, the field of inquiry becomes virtually unlimited.

The real problem presented by this case is the method to be used in propounding voir dire questions designed to develop information that could lead to a challenge for cause. Experienced trial counsel and judges realize that a sequence of questions is sometimes the most effective method of focusing the prospective juror's attention on the legitimate subject matter at hand, and comfortably moving that juror toward a significant end question. More and more, our jurors serve for one trial or one day, and as a result the voir dire procedure is new to many of them. Answers to complicated and compound questions do not come easily, and a confused or nervous juror, in an environment that some may find threatening, may elect to say nothing if he or she is unsure of the meaning of the question or of the response that would be accurate. Simple, sequential questions, however, ease an otherwise difficult process, and are sometimes best calculated to produce truthful and useful information.

On the other hand, there are many questions that could qualify as potential predicate questions which, when coupled with others, could lead to the development of information relevant to a challenge for cause, and this Court cannot mandate the asking of all such questions. Again, there is no basis upon which to say that preliminary question "A" must be asked, but preliminary question "B" may be refused. The answer, then, lies in the ability of the trial judge to determine ***54** when there is a legitimate desire to explore the existence of cause for disqualification, and when sequential questioning will be beneficial in the pursuit of that inquiry.

It has been my experience that trial judges are quite capable of conducting effective voir dire within acceptable time limitations, and without hamstringing themselves and counsel by allowing only compound questions. Voir dire and jury selection should not be viewed as a nuisance by trial judges. It is an important part of any trial, and the trial judge should have no hesitancy in using the occasion to assist all parties in the search for relevant information.

Likewise, trial judges should not hesitate to restructure unartful questions propounded by counsel when it appears that the information sought would be relevant and the problem with the question is easily rectified. In the instant case, for example, the trial judge might well have asked the panel, in a single question, whether they or any members of their family had ever worked for a law enforcement agency, and as a result of that fact might find it difficult or impossible to render a fair and impartial verdict in the case about to be tried. The benefit of a compound question in that instance is to focus the prospective juror's attention on a specific circumstance that experience has shown is sometimes a disqualifying factor for a juror, without taking the time to hear from each juror about his or her uncle, aunt, or sister who was a police officer. Given the questions that were asked in this case, I agree that the failure to ask that question was not error. The point I make is that trial judges, with their superior experience in hearing responses of all kinds from prospective jurors, should not hesitate to propound reasonable questions, or even to assist with the framing of a proper question, even when it would not be error to refuse to do so.

Additionally, I do not join the Court's opinion because of the dictum which at least implicitly suggests that peremptory challenges are somehow less than desirable. I view peremptory challenges, properly used, ***881** as a valuable part of our jury system. Recent decisions designed to prevent impermissible ***55** discrimination in the exercise of peremptory challenges have certainly added a layer of complexity to the process, but that is hardly reason to jettison the entire procedure. I continue to have faith in the ability of attentive trial judges, sensitive to the possibility of unconstitutional misuse of challenges, to separate the wheat from the chaff.

  

ROBERT M. BELL, Judge, dissenting.
For the reasons set forth below, I respectfully dissent.

During the *voir dire* process, after the trial court had completed its questioning of the venire, the petitioner requested it further to inquire of the panel, whether any member or a close friend or relative, is or has been, a member of the law enforcement community. This question was necessary, he asserted, because, *inter alia*[1], the omnibus questions, which pertained only to the venirepersons' perception of their ability to serve as impartial jurors, and not to any specific area or issue potentially productive of bias, were wholly insufficient; they did not identify any area of potential bias, or any other potential cause for disqualification. The trial court declined the petitioner's invitation to further question the venire. The majority holds, citing judicial efficiency, and, in particular, ***56** raising the specter of greatly expanded and time consuming *voir dire* proceedings in criminal cases, *see* majority opinion at 878–879, that the trial court did not abuse its discretion. I do not agree.

I agree completely with the petitioner, "where 'the sole issue ... is the credibility of [one] police officer as [o]pposed to [the defendant] a *voir dire* question concerning law enforcement employment or association may well lead to the disqualification for cause of one or more of the prospective jurors.' "[2] Such an inquiry need not be extensive and, indeed, in this case, the inquiry sought to be made by the petitioner can not fairly be ****882** characterized as "extensive and unfocus[ed] questioning." I also agree that the trial court's refusal to make the requested inquiry denied the petitioner "the ability to challenge jurors for cause, [and left] the trial judge without ***57** meaningful information concerning juror bias [and prejudices] on which to act, and [shifted] to the prospective jurors themselves the responsibility for making the ultimate decision as to their ability to serve on the jury." The Petitioner's brief at 11, citing *Bowie v. State,* 324 Md. 1, 595 A.2d 448 (1991).

The majority correctly identifies the predominating purpose of the *voir dire* process: the discovery of whether cause for disqualification, which may involve uncovering bias and/or partiality, exists as to any venireperson. Majority opinion at 4–5. This purpose is, of course, served when "examination of a prospective juror ... is conducted strictly within the right to discover the state of mind of a juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him." *Bedford v. State,* 317 Md. 659, 671, 566 A.2d 111, 117 (1989), quoting *Corens v. State,* 185 Md. 561, 564, 45 A.2d 340, 343 (1946). The majority and I part company only on the question of whether the inquiry sought to be made in this case was for the purpose of ascertaining "the existence of cause for disqualification and for no other purpose." *McGee v. State,* 219 Md. 53, 58, 146 A.2d 194, 196 (1959), quoting *Adams v. State,* 200 Md. 133, 140, 88 A.2d 556, 559 (1952).

Unlike the majority, I do not construe Maryland law as requiring that the *voir dire* inquiry directly establish cause for disqualification. Stated differently, a question on the *voir dire* may be proper even though an affirmative answer is not automatically disqualifying. That is true whenever the question identifies an area of inquiry, exploration of which reasonably may result in ultimate disqualification. Nor do I read Maryland law to mean that the decision whether disqualifying cause exists is a matter to be determined by the venireperson him or herself, rather than the trial court.

In *Bedford,* we reviewed the nature of the *voir dire* examination. 317 Md. at 670, 566 A.2d at 116. We noted the source of the defendant's right in that regard: Art. 21 of the Maryland Declaration of Rights, which guarantees the defendant the right to examine prospective jurors to determine whether cause for disqualification exists. *See also* ***58** *Grogg v. State,* 231 Md. 530, 532, 191 A.2d 435, 436 (1962). We also pointed out that the mechanism by which that right is to be exercised is the *voir dire* process. *Id.,* quoting *Corens,* 185 Md. at 564, 45 A.2d at 343. We reiterated the broad rule underlying the *voir dire* process, that "any circumstances which may reasonably be regarded as rendering a person unfit for jury service may be made the subject of questions and a challenge for cause." *Bedford* 317 Md. at 671, 566 A.2d at 117, quoting *Corens,* 185 Md. at 564, 45 A.2d at 343. Just how broad and important we perceived the right of inquiry to be was made clear when we quoted from *Brown v. State,* 220 Md. 29, 35, 150 A.2d 895, 897–98 (1958 (quoting *State v. Higgs,* 143 Conn. 138, 120 A.2d 152 (1956)):

  

> If there is any likelihood that some prejudices in the jurors' mind which will even subconsciously affect his decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. Otherwise, the right of trial by an impartial jury guaranteed to him ... might well be impaired ...

Thus, it is clear that the defendant may benefit from the benevolent purpose of the *voir dire* only if the *voir dire* process permits the development of information relevant to cause for disqualification—only if the defendant is permitted to propound questions to the venire designed to unearth "any circumstances which may reasonably be regarded as rendering a person unfit for jury service." *Corens,* 185 Md. at 564, 45 A.2d at 343. A *voir dire* procedure which depends on the confession of the venirepersons as to their inability impartially to serve is an empty procedure which might well impair the defendant's right to a fair and impartial jury. Moreover, because the burden is placed on the defendant to demonstrate that a venireperson is biased or partial, the right guaranteed ****883** the defendant by Art. 21 of the Maryland Declaration of Rights to examine prospective jurors for cause for disqualification is rendered almost, if not entirely, meaningless by such a procedure.

***59** Under Maryland law it is clear that the focal point of *voir dire* is the trial judge. It is the trial judge that has responsibility for regulating and conducting *voir dire.* It is the trial judge that controls the process; he or she determines: what questions to ask on *voir dire;* whether, and when, to allow counsel to ask follow-up questions; and whether, and when, a prospective juror is dismissed for cause. It follows, therefore, that it is the trial judge that must decide whether, and when, cause for disqualification exists as to any particular venireperson. Neither the venire nor the individual venirepersons occupies such an important position. The position taken by the majority would imbue the venire with much greater power in the determination of the jury composition than the trial judge. Only if a venireperson were to respond in such a fashion as to make obvious that he or she could not serve impartially and fairly could the trial judge, under the majority's view, dismiss that juror for cause, and only under those circumstances could the defendant challenge that venireperson for cause. This renders the defendant's right to challenge for cause unworkable and essentially meaningless.

To be sure, the nature and extent of the *voir dire* process lies within the sound discretion of the trial judge. *Langley v. State,* 281 Md. 337, 341, 378 A.2d 1338, 1340 (1977), quoting *McGee v. State,* 219 Md. 53, 58–59, 146 A.2d 194, 196 (1959). That discretion is not, however, unlimited. *See Casey v. Roman Catholic Archbishop,* 217 Md. 595, 605, 143 A.2d 627, 631 (1958). Indeed, the majority recognizes that this is so. *See* majority opinion at 875. Thus, when it is, or potentially is, in the case, the venire must be questioned as to possible racial bias, *Bowie v. State,* 324 Md. 1, 15, 595 A.2d 448, 455 (1991), religious bias, *Casey,* 217 Md. at 606–07, 143 A.2d at 632, how the venire would weigh the credibility of a police officer's testimony versus that of the defendant or another witness, *Langley,* 281 Md. at 349, 378 A.2d at 1344, and juror attitudes concerning the death penalty, *Bowie,* 324 Md. at 5, 595 A.2d at 450. These are not the only circumstances, however, in which the failure of the trial court to further inquire may constitute an abuse of discretion. *See e.g.,* ***60** *Alexander v. R.D. Grier & Sons Co. Inc.,* 181 Md. 415, 419, 30 A.2d 757, 758 (1943). In that case, the trial court's refusal to ask "whether or not [jurors] or any of their immediate family [were assessables] in the Keystone Indemnity Exchange," where the issue was the enforcement of an assessment against a subscriber by Keystone, was held to be an abuse of discretion. This Court noted that the question was directed at determining whether any juror was biased or prejudiced: the juror's financial interest "would theoretically incline him in favor of recovery of a verdict for the liquidator." *Id.* at 419, 30 A.2d at 758. *See also Morford v. United States,* 339 U.S. 258, 70 S.Ct. 586, 94 L.Ed. 815 (1950) (where panel from which the jury was selected consisted of almost entirely government employees, refusal to allow questions pertaining to possible influence of the federal loyalty oath was error); *Dennis v. United States,* 339 U.S. 162, 170–172, 70 S.Ct. 519, 523, 94 L.Ed. 734 (1950). Similar reasoning unlay *Casey.* Explaining why the trial court's failure to inquire whether anyone in the venire had a religious bias, this Court said

> [I]f the religious affiliation of a juror might reasonably prevent him from arriving at a fair and impartial verdict in a particular case because of the nature of the case the parties are entitled to ferret it out, or preferably have the court discover for them, the existence of bias or prejudice resulting from such affiliation. In other words, a party is entitled to a jury free from all disqualifying bias or prejudice without exception, and not merely a jury free of bias or prejudice of a general or abstract nature."

  

217 Md. at 607, 143 A.2d at 632.

It is necessary that we focus more critically on the trial court's exercise of discretion. As we have seen, and the majority does not dispute, it is the trial court that is entrusted with making the decision whether cause for **884 disqualification exists. It is that decision to which the court's exercise of discretion is directed and which an appellate court must review. The majority recognizes that in attempting to empanel a fair and impartial jury, the critical inquiry is directed *61 toward determining the prospective jurors' state of mind, *i.e.,* whether they are biased or prejudiced. Whether a prospective juror has that mindset may be informed by the vocational or professional or social status of the prospective juror.

While professional, vocational, or social status is not dispositive of a venireperson's qualification to serve, it does tend to prove bias; that a venireperson has been, or is, a member of the group to which the principal witness for the State belongs is relevant to the determination of that person's partiality or bias. Thus, the prospective juror's mindset should not be inquired into in a vacuum; instead, because it is the correlation between the juror's status and his or her state of mind that is dispositive, as the majority also recognizes, *see* majority opinion at 876, when the venireperson's status is relevant to his or her bias, the question whether the venireperson can be fair and impartial should be linked with that venireperson's status. Therefore, while "[t]he fact that a prospective juror is employed as, related to, or associated with a law enforcement officer[, for example,] does not establish that the prospective juror has any undue bias or prejudice that will prevent that person from fairly and impartially determining the matter before them," majority opinion at 875, whether, in a particular case, that venireperson should be discharged as biased necessarily will depend upon the circumstances, including, in addition to the venireperson's bottom line conclusion in that regard, as reflected in the answers he or she gives, the character and duration of the position, the venireperson's demeanor, and any and all other relevant circumstances. In short, the trial court, being the proper authority for doing so, will determine from all of the circumstances whether "a demonstrably strong correlation [exists] between the status in question and a mental state that gives rise to cause for disqualification." Majority Opinion at 875.

It was to allow that correlation to be explored that the petitioner proposed further *voir dire.* It is because the trial *62 court chose not to do so that the trial court erred.[3]

Obviously prospective jurors may be struck for cause whenever they confess, for whatever reason, an inability to be fair and impartial. Indeed, disqualification ordinarily is automatic when that occurs. But surely that is not the only basis on which venirepersons could be stricken. In a proper case, where there is information from which the **885 contrary could be found, a trial court could, on motion, strike for cause a venireperson who professes to be able to decide the case fairly and impartially. Thus, whatever the prospective juror's response to the ultimate *voir dire* question, a prospective juror may, and should be, subject to challenge for cause. *See* *63 *Wainwright v. Witt,* 469 U.S. 412, 429, 105 S.Ct. 844, 855, 83 L.Ed.2d 841, 855 (1985), in which the Supreme Court discussed the nature of the trial court's decision-making when it determines whether to exclude a venireperson for cause. It stated, "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be discerned from an appellate record." Although *Witt* was a capital sentencing case, the Court noted explicitly that "excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias...." *Id.*

Thus, the strike for cause process encompasses the situation where the motion to strike is made on the basis of information developed during the *voir dire* process, not simply where the prospective juror admits an inability to be fair and impartial. In point of fact, I maintain that the *voir dire* process is meaningful only when it is expansive enough to allow a party—be it the State or the defense—to elicit factual information which could form the predicate for a challenge for cause. Unless the *voir dire* process is interpreted as requiring the trial judge to ask questions that will produce such factual information as may be relevant to the venireperson's bias, the *voir dire* process will be rendered all but entirely useless. When the inquiries that constitute proper *voir dire* are restrictively interpreted, so that the *voir dire* process does not produce any information other than that which is automatically disqualifying, the defendant may be deprived of the right to a fair and impartial jury; he or she is completely at

  

the mercy of the good faith, objectivity, and astuteness of the individual venirepersons. I believe that it is an abuse of discretion for the court to so restrict the *voir dire* process.

Under the rationale underlying the majority's view of *voir dire,* taken to its logical conclusion, all that would be necessary to empanel a legally sufficient jury is that the trial court ask the prospective jurors whether they could be fair and impartial. Only those jurors who confessed that they could not ***64** would, or could, be challenged for cause. Because the *voir dire* has not produced any other information, the others would be absolutely insulated from challenge. The majority's recognition that, by virtue of our prior holdings and the Supreme Court's insistence, more than one omnibus question must be asked is not particularly comforting. By requiring that the connection between the cause for disqualification and the answer to the *voir dire* inquiry be direct, the majority greatly reduces the value of even those required inquiries and, indeed, all but nullifies their value in obtaining information useful as a basis for challenging venirepersons for cause.

The jury selection process in capital cases is instructive. In *Bowie,* we considered the adequacy of a *voir dire* examination into juror attitudes concerning the death penalty. The entire *voir dire* examination on that issue consisted of the following:

> Ladies and gentlemen, the State of Maryland has filed a request before the court that if found guilty, Mr. Damon Bowie will be put to death. Is there any member of the prospective jury panel who has any feeling whatsoever about such a request, and I don't care which way you feel about it, that it would interfere with your ability to fairly and truly judge this matter based only on the evidence before the court?
>
> Said another way, is there anybody in this room who has such feelings about the death penalty one way or the other way that it would affect you emotionally or to the extent that it would override your ability to judge this matter based only on the evidence brought out in the courtroom and the instructions of the court to you and the application of that evidence to the law? If you have a positive response, please stand in place.

****886** 324 Md. at 16, 595 A.2d at 455. Jurors who responded affirmatively were excused for cause. *Id.* The court overruled defendant's objection to that procedure.

This Court reversed. After reviewing the decisions in *Witt, supra; Grandison v. State,* 305 Md. 685, 506 A.2d 580, *cert.* ***65** *denied,* 479 U.S. 873, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986); and *Hunt v. State,* 321 Md. 387, 583 A.2d 218 (1990), we explained:

> What occurred in the instant case is in no way similar to what occurred in *Witt* or in our cases applying *Witt.* In those cases, the basis for the juror's conclusion and, therefore, for the court's ruling was apparent in the record. All we have in this case is a trial judge's propounding of a question designed to elicit from prospective jurors *their* bottom line conclusion as to their ability to serve on a capital sentencing jury. Once the prospective juror answered that question, *i.e.,* indicated that, because of an inclination for or against the death penalty, they could not impartially apply the law in accordance with the court's instruction, they were excluded without further inquiry, not even that requested by appellant, because it would have allowed the parties to "argue them out of their responses that they cannot fairly and accurately try this case."
>
> It is significant that the question asked was extremely broad; not only did it address both sides of the death penalty issue, but the answer to it did not provide any clue as to what caused, or causes, the prospective juror's predisposition. Moreover, the answer to the question did not reveal whether the attitude thus expressed would, or should, result in automatic disqualification. In other words, the mere answer to the question does not provide the trial judge with any meaningful information concerning juror bias on which to act, nor does it conclusively establish juror disqualification; here, the question gives no clue and, hence, does not make apparent the nature of the juror's apprehension or bias or indicate that automatic disqualification would be appropriate. Were we to endorse the procedure followed in this case, we would be ratifying a trial court's shifting to the prospective jurors, themselves, the responsibility to make the ultimate decision as to their ability to serve on a capital sentencing jury, thus, allowing the court to avoid the exercise of discretion.

***66** *Bowie,* 324 Md. at 22–23, 595 A.2d at 459.[4]

  

In *Bowie,* the jurors' attitude for or against the death penalty was not automatically disqualifying, *See Witt,* 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851–52; *Hunt v. State,* 321 Md. at 415, 583 A.2d at 231, just as the questions as to the venire's status are not disqualifying. Disqualification could occur only after further inquiry into whether that juror's attitude, whether for or against the death penalty, impaired his or her ability impartially and fairly to decide the case. It is significant that we required a more specific inquiry than that made by the trial court. Implicit in the *Bowie* decision is that, whether for or against the death penalty, the juror's attitude in that regard is an important factor to be considered by the court when ruling on a motion to strike a death penalty juror for cause.

The *voir dire* actually conducted in this case is also informative. The trial court asked six questions on *voir dire.* Of the six, an affirmative answer to only one, namely,

> "4) ... whether any of the jurors is "likely to give more or less weight to the testimony of a police officer merely because that person is a police officer,"

*Davis v. State,* 93 Md.App. 89, 92, 611 A.2d 1008, 1009 (1992), which directed, and focused, ****887** the venire's attention to a specific, relevant issue in the case, was automatically disqualifying. As to the other five questions, *i.e.,*

> 1) ... whether any of the prospective jurors had any knowledge or information about this particular case[;]
>
> ***67** 2) ... whether any of the jurors knew a) the [defendant], b) defense counsel, c) the assistant state's attorney, d) Officer Andrew Bratcher, the chief police investigator and only State's witness; or e) Mary Easlay, a witness for the defense[;]
>
> 3) ... whether any of the jurors "has been or ... has a close relative who has either been the victim of or has been charged with or convicted of a drug related crime[;]"
>
> 5) ... whether any of the jurors "knows of anything that would keep him or her from giving a fair and impartial verdict in this case[;]"
>
> 6) ... whether any of the jurors "knows of any reason why he or she should not sit on a jury in this case[,]"

*Davis v. State,* 93 Md.App. at 92, 611 A.2d at 1009, an affirmative answer would not be automatically disqualifying. Each merely opened up an area of inquiry which *could, but did not have to, disclose* disqualifying bias. A prospective juror who has knowledge of the case on trial, knows either the counsel or the witnesses; is, has been, or is related to a person who has been, the victim of a crime, or knows of anything that would prevent him or her from rendering a fair and impartial verdict, or a reason why he or she should not sit in the case, is not automatically disqualified from serving on the jury. The venireperson's answer triggers, as occurred in connection with questions 2) and 3), a further inquiry into whether that knowledge would prejudice or bias him or her. To be meaningful the inquiry must, at the very least, identify, as to each prospective juror, the nature and source of the knowledge and its effect on his or her ability to be fair and impartial. The fact that, upon the completion of the inquiry, a prospective juror does not admit bias does not insulate him or her from being discharged for cause; a successful motion nevertheless could be made based on the prospective juror's responses and demeanor.

Questions 5) and 6) are somewhat different. Initially, it is to be hoped that a Court would not, without further inquiry, excuse a prospective juror who answers these questions in the ***68** affirmative; follow-up questioning is clearly necessary to establish the *bona fides* of the reasons the prospective jurors may proffer, a decision entrusted to the court. More to the point, however, those questions are quite general and uninformative insofar as what kinds of considerations could impact a response; they are no more than "broad questions calling for the jurors' bottom line conclusions, which do not in themselves reveal automatically disqualifying biases as to their ability fairly and accurately to decide the case, and, indeed, which do not elucidate the bases for those conclusions." *Bowie,* 324 Md. at 23–24, 595 A.2d at 459. It is improper to assume that the venirepersons could, and, therefore, simply to rely on them to, answer such questions objectively and accurately.

Although not identical, in the case *sub judice,* a prospective juror's belief as to whether, given his or her law enforcement background or connection, he or she cannot fairly and impartially decide the case is not conclusive as to that juror's qualification to serve. While it may be that the defendant will challenge, and the court will order, the discharge of all those prospective jurors

  

who say that they cannot be impartial, the defendant is also entitled to explore whether those with a law enforcement connection or background, who, by their silence, purport to be able to be fair and impartial, ought, nevertheless, be disqualified by reason of bias. So, it is to allow the defendant to challenge for cause prospective jurors who do not admit partiality or bias that prompts a defendant to request that questions pertaining to the jurors' status be asked.

I do not advocate unlimited *voir dire* of the kind against which the majority makes such a compelling case. My position simply is that a prospective juror's status or attitude must be the subject of the *voir dire* examination when a critical witness in the case occupies that status or has that attitude. In that ****888** event, the purpose of the *voir dire* examination is to identify the prospective jurors with that status or attitude. This may be accomplished by expanding the scope of the *voir dire* somewhat; rather than the six questions the trial judge asked in this case, it may be necessary to ask an additional ***69** two or three. Certainly, that is not too high a price to pay to give meaning to a right guaranteed by our Constitution.

I would reverse and remand for new trial.[5]

ELDRIDGE, J. joins in the views expressed herein.

**All Citations**

333 Md. 27, 633 A.2d 867, 62 USLW 2435

Footnotes

1 We must also note that these required areas of inquiry were qualified under the common law. Under common law rules of *voir dire,* jurors need not answer any questions likely to humiliate or embarrass them. The determination of which questions needed to be answered, however, rested within the trial judge's discretion. *See* J. Alexander Tanford, *An Introduction to Trial Law,* 51 Mo.L.Rev. 627, 638–39 (1986). Today, even where the scope of the proposed *voir dire* questioning is otherwise permissible but potentially embarrassing or humiliating, the trial judge should exercise discretion in structuring the questions in a manner which would avoid unnecessarily embarrassing the venire panel. Such questions should be worded in a way that potentially embarrassing responses should be given at the bench, rather than before open court.

2 We note that it is not clear from the record whether Lakeesha was Davis's wife or domestic partner. While Davis's witness, Mary Easley, and his attorney referred to Lakeesha as Davis's wife, Davis himself referred to Lakeesha only as his girlfriend. It is undisputed that Lakeesha was indeed the mother of the Defendant's children and that he provided support for those children.

1 The petitioner also argued that expanded *voir dire* would assist him in the exercise of his peremptories, a purpose he urges this Court now to recognize as legitimate. Maryland law, of course, as the majority points out, is to the contrary. *See Whittemore v. State,* 151 Md. 309, 134 A. 322 (1926); *Handy v. State,* 101 Md. 39, 60 A. 452 (1905). In both cases, the issue squarely presented was whether a defendant "may enlighten [himself] as to the propriety of exercising the right of peremptory challenge." *Handy,* 101 Md. at 40, 60 A. at 453. *See Whittemore,* 151 Md. at 313, 134 A. at 323. I do not propose that we revisit this well considered and legitimate policy decision. I note, however, that, to the extent that proper *voir dire* requires exploration of an area of potential bias, but does not conclusively establish its existence—the court denies the defendant's motion to strike—a fall-out effect of the expanded inquiry is to inform the use of peremptories, not only by a defendant, but by the State, as well. Moreover, that is not necessarily to be frowned upon. Given the disfavor into which the unbridled use of peremptory challenges has fallen, the incidental availability of information which could form the basis for the exercise of peremptory challenges would make more likely that jurors are not stricken for legally impermissible reasons.

2 The question at issue in this case is quite different from those sought to be asked in *Handy* and *Whittemore,* both of which I believe were correctly decided. In *Handy,* the defense wanted to know "whether a juror was married," *id.,* 101 Md. at 44, 60 A. at 454. Quite appropriately, the court held the question to be "clearly immaterial," given the issue to be decided—whether the victim's flirting with other men was sufficient to provoke her murder at the hands of her husband, the defendant. We explained:

  

> "[N]either in law nor in common sense can it be supposed that competency to judge of the effect of such provocation is found exclusively in married men, and if we indulge in speculation as to the reason behind this question, imagination can suggest none more substantial than we have hazarded."

*Id.*

In *Whittemore,* the question concerned the prospective juror's age and former business. In affirming the trial court's refusal to ask that question, the Court said:

> The appellant here suggests, by way of illustrating the need of freedom to ask questions as to a juryman's former occupation, that, in this instance, conceivably, he too may have been a former penitentiary guard, and because of that fact unfitted to render an impartial verdict on a charge of murder of a guard by a prisoner. But the answer to that suggestion is that if such ground for doubting a juryman's fitness should be known, *or feared,* a question directed to that ground specifically would *not only be proper,* but in this case would probably have been asked; and if facts showed reason to doubt the juror's fitness to sit in judgment, a challenge for cause might have been allowed.

151 Md. at 314–15, 134 A. at 323–324 (emphasis supplied).

3 It may be that a motion to strike for cause may be appropriate even when the only available information is that the venireperson is, or is related to, a police officer. *See Tate v. People,* 125 Colo. 527, 247 P.2d 665 (1952) (constitutional guarantee that law enforcement personnel are not qualified to sit as jurors precluded a special deputy sheriff from appearing as a witness at the defendant's trial for the murder of her former husband, it being presumed that deputy would clearly show allegiance to his superior who was the sheriff and the prosecutor); *Gaff v. State,* 155 Ind. 277, 58 N.E. 74 (1900) (deputy sheriff constitutionally cannot serve on a jury); *State v. Butts,* 349 Mo. 213, 159 S.W.2d 790 (1942) (it was error for the trial judge to overrule defendant's challenge for cause against a police officer who had investigated the crime and subsequently arrested the defendant. The court said "It seems incompatible with justice that a defendant who has been apprehended by the police, and against whom the police officers were going to testify should be tried by a jury made up of police officers.") *State v. Golubski,* 45 S.W.2d 873 (Mo.1932) (State statute exempting deputy sheriff's from jury service is legislative recognition of the impropriety of officers acting as jurors in cases wherein they might be called upon to perform other and inconsistent duties); *State v. Langley,* 342 Mo. 447, 116 S.W.2d 38 (Mo.1938) (defendant's statutory rape conviction was reversed where the State constitution guaranteed the defendant the right to an impartial jury thereby disqualifying a law enforcement officer from sitting on the jury panel); *Thompson v. State,* 541 P.2d 1328 (Okla.1975) (law enforcement personnel cannot sit as jurors where statutes specifically disqualify them from jury service); *State v. West,* 157 W.Va. 209, 200 S.E.2d 859 (1973) (a defendant's challenge for cause should be sustained when he can demonstrate even a tenuous relationship between the prospective juror and any law enforcement or prosecutorial arm of State government). In this case, because the court did not ask the proffered question, the petitioner was not afforded an opportunity to move to strike for cause any prospective juror with a connection to law enforcement.

4 We said in *Bowie v. State,* 324 Md. 1, 24, n. 10, 595 A.2d 448, 459 n. 10 (1991), that a different situation applies in non-capital cases. That may be true when the prospective juror's attention is focused by reference to a specific disqualifying cause, *i.e.,* as when the inquiry is whether a juror would give more or less weight to a police officer simply because of his or her status. On the other hand, the question whether the "juror" knows of any reason why he or she should not sit on the jury in this case and whether he or she "knows of anything that would keep him or her from giving a fair and impartial verdict in this case" are not proper bottom line conclusion questions inasmuch as they, like the question at issue in *Bowie,* leaves to the juror, and only the juror, the decision whether he or she is disqualified.

5 By stressing that it would not have been error had the court asked the subject question, like Judge McAuliffe, the majority seems to be sending a message to trial judges that they should not curtail *voir dire* too strictly, thus muting the impact of its ruling. Implicitly therefore, the majority recognizes that the inquiry is not totally irrelevant to the exercise of the right to challenge for cause. In any event, this same message has been delivered to trial judges in the past. In fact, in both *Handy* and *Whittemore,* the Court noted the trial court's discretion to have asked the excluded question. *See Handy,* 101 Md. at 42–43, 60 A. at 454; *Whittemore,* 151 Md. at 313, 134 A. at 323. Nevertheless, *voir dire* continuesto be limited more and more. There is no reason to suppose that "the message" will have any greater effect this time in causing trial judges to exercise their discretion more expansively than it has had in the past.

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**Draft Testimony HB 1079 Voir Dire.pdf**
Uploaded by: Vanessa Clark Brooks
Position: FAV

Chairman Clippinger, Vice Chair Bartlett and fellow members of Judiciary,

I am asking for a favorable vote on HB1079, a bill that would change the rules on jury examination, voir dire, in our State courts system. The single , primary, and overriding principle or purpose of voir dire is to ascertain the existence of cause for disqualification from the jury. Presently the procedure for jury selection provides such limited information to judges and counsel, i.e., demographic information on the prospective juror, that it would be impossible to determine whether a juror has an underlying bias that would impair their ability to be impartial in a particular case.

HB 1079 specifies that the purpose of jury examination, in all jury trials in any State court, must be to (1) identify and remove prospective jurors who are unable to serve fairly and impartially and (2) allow the parties to obtain information that may provide guidance for the use of peremptory challenges and challenges for cause.

The present law does not truly allow for "voir dire" in the State of Maryland. The information provided to the lawyers, judges alike is exclusively demographic in nature. After the jury examination, the parties in a civil or criminal proceeding may exercise a peremptory challenge excluding a prospective juror without stating a reason.

Case law in Maryland openly discusses this failure in our jury selection process and in several cases such as Collins v. State, 463 Md. 372, 404 (2019) the Court states that Maryland "does not allow "voir dire" in the manner and for the purpose it is designed; that is, for the purpose of supplying information to trial counsel that may guide them in the strategic use of their peremptory challenges." In essence Counsel operates with its hands tied. The only information available to an attorney or a judge in the jury selection process is that which appears on the jury form – demographic information such as name, age, sex, marital status, employment, and zip code. Under the present law judges and lawyers alike may not be able to assess whether a juror has implicit or in some cases explicit biases based on other background information. Where information base is strictly demographic information, we create an environment where judge or counsel may improperly strike a juror based because of race or gender. And we risk running afoul of the U.S. Constitution which protects the right to a fair trial by clearly stating that a juror cannot be disqualifies strictly on the grounds of race or gender. But how are we to know that was the underlying objective or rationale was in disqualifying the potential juror when counsel may exclude a juror without stating a reason? Additionally, with no right to interview a prospective juror with more probing questions, we are asking the potential juror to self-assess whether they are fit to serve on a particular jury even if their overall demographic profile would allow them to do so.

Passage of this bill would bring the State of Maryland in line with most States on how the Courts conduct jury selection and enable judges and lawyers to dig deeper than demographic information to ascertain whether a potential juror harbors biases that should exclude them from the pool of qualified jurors. Additionally, this change would protect the Constitutional right to a fair trial avoiding any violation of that Constitutional right where a juror is excluded exclusively because of race or gender.

For all the reasons above, I ask for a favorable vote and HB1079 which will remove this controversial and questionable jury selection practice from our Maryland Judicial System.

Respectfully Submitted,

Delegate N. Scott Phillips

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Uploaded by: Vanessa Clark Brooks
Position: FAV

# Fixing Maryland's Current System of Judicially Imposed *"limited voir dire"* is Necessary to Protect the Constitutional Right to a Fair Jury

By David A. Harak

## A Call to Action

Strap in! Disclaimer: the views in this article are mine alone and I will take and embrace any and all heat that may come from its content. Spoiler alert, when you finish reading this article, you will see why I feel the need to add this disclosure.

I realize the theme of this issue of Trial Reporter is "Medical Malpractice: More than Medicine." This article is about implementing a system that will effectively ferret out juror bias. In medical malpractice cases, that bias could be in favor of healthcare providers because a doctor once saved the juror's life. Alternatively, the bias could be against healthcare providers because a hospital bill sunk the juror's family into debt. Either way, the best way to uncover those biases is through attorney-led *voir dire*. In every case – not just medical malpractice cases – attorney-led *voir dire* is necessary to protect the constitutional right to a fair and impartial jury.

In the words of Dave Matthews: "So much to say, so much to say, so much to say…" In the summer issue of the 2019 Trial Reporter, I had the opportunity to lay the foundation for this article by reviewing the historical importance our country's founders placed on the right of parties to have their lawyers directly question jurors during *voir dire*. Patrick Henry, an oft-quoted founder of our nation, argued that he would prefer to be tried by a judge alone than by a jury selected without the right to question and challenge.[1] The right of parties to have a fair jury was so important to our founders that no one balked when, in *United States v. Burr*,[2] Chief Justice Marshall endorsed the concept that extensive attorney-conducted *voir dire* was necessary to empanel a fair jury. Chief Justice Marshall's reasoning was so compelling that virtually every state that existed at the time adopted the practice of allowing attorneys to question jurors during *voir dire*. This new tenet of what was needed to ensure the right to a fair trial became a vital part of early America's ethos of justice despite being a "sharp departure from the practice of empaneling juries in England and Canada."[3]

In the modern day case of *Gentile v. State Bar of Nevada*,[4] the United States Supreme Court stated: "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by '*impartial*' jurors . . . ." Given this backdrop, the question that begs to be asked is whether Maryland's current system of jury selection adequately guarantees this Constitutional right of all Maryland citizens.

## Maryland's System of *"Limited Voir Dire"*

Maryland's current approach relies upon what our appellate courts have termed "limited *voir dire*." Under this judicial doctrine, recently highlighted in the Maryland Supreme Court Case *Pearson v. State*,[5] "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification.'"[6] Holding that bias would qualify as a specific cause for disqualification in *Dingle v. State*, the Supreme Court of Maryland held that, "[b]ias is a question of fact."[7] The *Dingle* Court then cited *Davis v. State*, which was in turn quoting *Borman v. State*, to explain: "[B]ias on the part of prospective jurors will never be presumed, and the challenging party bears the burden of presenting facts . . . which would give rise to a showing of actual prejudice.'"[8]

How can an attorney possibly determine whether a juror who has not responded to any of the judge's questions to the entire panel possesses a disqualifying bias without the ability to directly question that juror? Unfortunately, bias and prejudice are innate characteristics often deeply ingrained and concealed from a person's own self-examination.

A system that relies upon juror self-assessment to determine whether bias may be present will inevitably allow some disqualifying biases to make their way into the jury room, tainting the ability of the system to yield fair and impartial verdicts. This concept was identified and recognized by the U.S. Supreme Court nearly one hundred and fifteen years ago, well before modern day social science research and evidence-based analysis definitively proved it to be true.[9]

In the 1909 case of *Crawford v. United States*, the U.S. Supreme Court stated "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence."[10] In Maryland's system that initially relies upon juror self-assessment, without the ability to address specific members of the entire panel through attorney led *voir dire*, how can any attorney possibly meet his or her burden of presenting facts which would give rise to a showing of actual prejudice?

In his dissent in Davis v. State, Chief Justice Robert Bell recognized that Maryland's "limited *voir dire*" method of empaneling juries contains a fatal flaw which places any attorney who is attempting to challenge a juror for cause in an untenable position:

> Under the rationale underlying the majority's view of voir dire, taken to its logical conclusion, all that would be necessary to empanel a legally sufficient jury is that the trial court ask the prospective jurors whether they could be fair and impartial. Only those jurors who confessed that they could not would, or could, be challenged for cause. Because the voir dire has not produced any other information, the others would be absolutely insulated from challenge.[11]

In *Mu'Min v. Virginia*, the U.S. Supreme Court held that "*[v]oir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."[12] Despite this U.S. Supreme Court holding, perhaps burdened by the tenets of stare decisis, Maryland Appellate Judges have continued to adhere to the system of "limited *voir dire*" created by their predecessors. In *Collins v. State*,[13] the Supreme Court of Maryland reaffirmed that in Maryland, voir dire "does not exist, even partially, for the purpose of supplying information to trial counsel that may guide them in the strategic use of their peremptory challenges."[14]

Maryland's doctrine of "limited *voir dire*" is at odds with Federal caselaw, including the U.S. Supreme Court Holding in *Swain v. Alabama*, wherein the Court recognized that peremptory challenges are one of the most important rights an accused has in securing a fair trial.[15] The *Swain* Court reaffirmed its prior holdings in *Lewis*[16] and *Pointer*[17] by ruling that the denial or impairment of the right to peremptory challenges is reversible error, even without a showing of prejudice.[18] Recognizing the importance of attorney-conducted *voir dire*, the Court stated that "the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause ."[19]

In *Swain*, Justice White stated, "[t]he function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.'"[20] As the 5th Circuit Court of Appeals recognized in *U.S. v. Ledee*, "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."[21]

Under Maryland's current system, the trial judge questions the entire venire. If, and only if, a juror is able to adequately self-assess whether he or she has a bias, and then also has the courage to admit this bias in open court by standing and responding to a question in the affirmative, will that juror be asked to come up to the bench for additional *voir dire*. There is a plethora of research concluding that a juror's ability to assess his or her own bias is limited. The existence of this research was actually acknowledged by the Maryland Supreme Court in *Collins v. State*, in "A Note on Best Practices" which states: "Research has produced concerning findings regarding the *voir dire* process. Those findings support the adoption of procedures that encourage disclosure to the greatest extent practicable."[22] Although *Collins* cites four studies, there are numerous other studies that reach equally troubling conclusions regarding judicially conducted *voir dire*'s inability to ferret out disqualifying bias. These studies conclusively establish that attorneys have a better record of ferreting out bias than judges when they have the right to question the entire panel of jurors and follow up with those that they suspect may be biased. The conclusions of those studies included, among other things, the following:

1. Despite trying their best jurors are not adept at self-assessing their implicit biases.[23]

2. Jurors are unlikely to admit to biases when they know (and are told) they should not be biased, and people want to believe they can be fair.

3. Juror anxiety provides a disincentive to respond "yes" to a question which will require further individual questioning.

4. During judge conducted *voir dire* jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear.[24]

5. Since potential jurors look upon the judge as an important authority figure, many are reluctant to displease the judge and therefore tend to respond to the judge's questions with less candor than if the questions are posed by counsel.

6. Attorney participation in the questioning lessens the social distance between questioner and respondents, thus minimizing evaluation apprehension and minimizing the prospective jurors' tendency to try to please the interviewer.[25]

7. Attorneys are more effective than judges in eliciting candid answers from potential jurors and mock jurors change their minds more often when questioned by judges than attorneys.[26]

8. One reason why a short period of attorney conducted *voir dire* after the court's general *voir dire* will contribute to more complete information about the potential jurors is the attorneys' more in-depth knowledge of the case.[27]

9. Juror biases are not likely to be cured by judicial rehabilitation and might backfire by creating the illusion in jurors that they are unbiased.[28]

10. Asking jurors to express impartiality and awareness of their potential biases might have a "credentialing" effect, or a false sense of security that they have taken care of their biases.

11. Judges usually do not realize that they are seen by jurors as both powerful and fair, and that this attitude on the part of jurors creates an expectation in their minds that they should say they can be fair and impartial, whether or not this is true. Jurors desire to be accepted and approved of by the judge. They want to say the right things to the Judge.[29]

12. Judges do not attempt to warm up to jurors, nor should they, as it is not their role in the judicial process.[30] Lacking a black robe and the title your honor, attorneys are far closer to the social level of a juror. Consequently, not constrained by the formalities of their position, attorneys are able to speak to jurors on their level. Attorneys have the ability to positively reinforce juror self-disclosure during *voir dire* by a process of head nodding, mmhmming, eye contact, less physical distance, relaxed posture, and a direct orientation of the interviewers body toward the interviewer.[31] Each of these psychological techniques have been proven to help the comfort level of interviewees.[32] Comfort with their interviewer results in dramatic increases in the willingness of interviewees to accurately disclose their feelings.[33]

13. The non-verbal communication of a prospective juror (such as displays of tension, evasion or hostility) is much more revealing when questions are posed by advocates and not by the neutral judge.

14. Lawyers, as advocates who have acquired a thorough working knowledge of the details of the case, are in a better position to determine what questions should be posed to veniremen and are better equipped and more inclined to follow up the initial responses of a venireman with the type of probing, "individualized" questions needed to explore and expose prejudices.

15. Attorney conducted *voir dire* allows attorneys to share with jurors their own biases. By doing so they let jurors know that it's okay to have biases as they are a part of every human being's experience. They can then encourage the jurors to speak freely about their views without lecturing them for admitting their biases. This raises the level of juror comfort and thus juror candor and the prospect of revealing disqualifying biases that a Court can then evaluate.

I am unaware of a single study that has any data that would support the conclusion that judges are more capable of ferreting out bias than a process that includes attorney conducted *voir dire* of the entire juror panel.

Under Maryland's system, attorneys are forced to rely upon the limited information they can actually obtain from the jury in order to exercise their peremptory challenges. For jurors, who are incapable of accurate self-assessment and remain silent during the judge's group *voir dire*, the only information available to an attorney is that which appears on the jury form. For the minority of the jurors who actually come up to the bench for further examination, the judge does most of the questioning with some judges allowing attorneys some brief follow-up questions. An attorney's ability to obtain vital information that is specific to their client's case is usually limited to a few short questions that the attorney must come up with on the fly.

## Maryland's Current System Encourages Unconstitutional Racial and Gender Profiling and Discrimination

Let's all recognize the existence of a blue elephant that resides in every Maryland courtroom during jury selection. Given the dearth of information at their disposal, many attorneys rely upon stereotypes and blind guesses in exercising their peremptory challenges. As anyone that tries cases knows, though few would admit, many trial lawyers routinely walk on the razor's edge of violating *Batson v. Kentucky*,[34] which prohibits using peremptory strikes on racial grounds and *J.E.B. v. Alabama ex rel. T.B.*,[35] which does the same for gender-based strikes during every jury selection. The fact that this can and does occur is not a surprise. After all, what other information do attorneys have about jurors who have not approached the bench to answer a follow up question other than their address and their occupation?

Research on implicit racial bias has found demonstrable differences as to how members of racial groups view and prefer, or disprefer, members of other racial groups.[36] Other research has examined the role of implicit bias in tort cases in which the race of the plaintiff and the race of the defendant were varied to be either Black or White.[37] Along with many other conclusions, this research has demonstrated that Caucasian jurors had significantly lower implicit bias against Caucasian litigants than jurors who identified themselves as belonging to other racial groups. In the same way, Black jurors had significantly lower implicit bias against Black litigants than jurors who identified themselves as belonging to other racial groups. Without the right to elicit meaningful information about the entire jury panel from attorney conducted *voir dire*, the availability of this research will tempt attorneys to use race as a factor in exercising strikes in violation of *Batson*.[38]

Lest you scoff at this and conclude that I am overreaching, this is not theoretical, it is happening. The existence of this type of racially based research and its use in jury selection was recognized by Supreme Court Justice Breyer in his concurring opinion in the 2005 case of *Miller-El v. Dretke*[39] as follows:

> [T]he use of race – and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. See, *e. g.*, Post, A Loaded Box of Stereotypes: Despite `Batson,' Race, Gender Play Big Roles in Jury Selection., Nat. L. J., Apr. 25, 2005, pp. 1, 18 (discussing common reliance on race and gender in jury selection). For example, one jury-selection guide counsels attorneys to perform a "demographic analysis" that assigns numerical points to characteristics such as age, occupation, and marital status – in addition to race as well as gender. See V. Starr & M. McCormick, Jury Selection 193-200 (3d ed. 2001). Thus, in a hypothetical dispute between a white landlord and an African-American tenant, the authors suggest awarding two points to an African-American venire member while subtracting one point from her white counterpart. *Id.*, at 197-199.[40]

The next thing that Supreme Court Justice Breyer cites as an example of stereotype-usage in jury selection is not surprising given Maryland's system of "limited *voir dire*." It should, however, be deeply troubling to anyone who reads this because he cites to the Maryland Bar Journal:

> For example, a bar journal article counsels lawyers to "rate" potential jurors "demographically (age, gender, marital status, etc.) and mark who would be under stereotypical circumstances [their] natural *enemies and allies*." Drake, The Art of Litigating: Deselecting Jurors Like the Pros, 34 Md. Bar J. 18, 22 (Mar./Apr. 2001).[41]

**Wow! Let's all pause to consider the gravity of that quote.** A Supreme Court Justice noticed that our own bar association educates Maryland Lawyers to rate potential jurors on "demographic[s]" including age and gender, and found that fact striking enough to include in a written opinion.

In Maryland, all that a lawyer knows about jurors who choose to remain silent during judge-controlled group *voir dire* is their: race; gender; age; education; address; occupation; marital status; and if married the occupation of their spouse. Given the limited amount of information Maryland's system of "limited *voir dire*" provides them, it is not surprising that some lawyers have come to believe that it is "okay" to use race and gender considerations when exercising peremptory strikes. It should be further noted that even more research on utilizing "demographics" to exercise peremptory strikes has been developed in the eighteen years since Justice Breyer's opinion in *Miller-El v Dretke*. This type of research is clearly unconstitutional forbidden fruit under *Batson* and *J.E.B.* A system that is predicated on expecting lawyers to refrain from the temptation of using it is fraught with hazard.

## Maryland's System Restricts Litigants' Ability to Pursue *Batson* and *J.E.B.* Challenges

It is unconstitutional to strike jurors for race or gender. However, in order to make a challenge pursuant to *Batson*[42] or *J.E.B.*,[43] a litigant must:

1. Demonstrate that the opposing party has exercised peremptory challenges with intent to exclude members of a cognizable racial group or other protected class;[44] and
2. Provide the Court with facts and other relevant circumstances that raise an inference that opposing counsel used peremptory strikes to exclude members of the group in question.[45]

In deciding whether the litigant has made a *prima facie* showing to support a *Batson* or *J.E.B.* challenge, the trial court may consider all relevant circumstances, including the attorneys' questions and statements during the *voir dire* examination.[46]

How can an attorney evaluate the intention behind opposing counsel's strikes when opposing counsel does not even speak to or make statements to the entire juror panel? Compounding this problem is that in Maryland, parties are not provided with each other's peremptory strikes. Accordingly, it takes a second person at trial table just to keep track of who is on the ultimate jury and compare the list to the entire venire to even identify jurors stricken by opposing counsel in an effort to lodge a constitutional challenge grounded in *Batson* or *J.E.B.*

Seemingly prescient as to how a "limited *voir dire*" system may be problematic in the context of Batson or J.E.B., the U.S. Supreme Court recognized in J.E.B.:

> If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.[47]

One might argue that coupling the above analysis regarding *Batson* or *J.E.B.* with Supreme Court Justice Breyer's observations in *Miller-El v Dretke*, Maryland's current "limited *voir dire*" system is actually unconstitutional… *hint hint* to my brethren and sistren trial lawyers and appellate counsel.

Under Maryland's current system, attorneys may easily disguise the role that race or gender plays in their strikes by choosing to keep one racially diverse and/or one member of a particular sex on the jury. Not hearing opposing counsel make a statement to the jury or ask questions of the entire jury panel during attorney-led *voir dire* robs an attorney's client of the constitutional right to evaluate whether opposing counsel's use of strikes violates *Batson* or *J.E.B.* This is something I have experienced firsthand in more than one trial. Allowing attorney-

conducted *voir dire* will aid attorneys in in making sure that their client's jury is empaneled in accordance with the U.S. Constitution. If anyone really believes that unconstitutional peremptory strikes are not routinely made in Maryland Courts, they live in one of Stephen Hawkings' string theory alternate universes.

Conversely, when attorneys are accused of violating *Batson* or *J.E.B.* in the use of peremptory challenges, attorney led *voir dire* can also help rebut that accusation. The court in *Burks v. Borg*,[48] stated that "the stronger the objective evidence of discrimination, the more we will require by way of verifiable facts" to rebut a *Batson* or *J.E.B.* challenge.[49] An attorney who addresses questions to the entire jury panel during attorney-led *voir dire* is more likely to be able to point to the "verifiable facts" that caused him or her to strike a juror.

Allowing attorneys to directly address the entire juror panel through attorney-conducted *voir dire* will maximize the information they obtain, thereby enabling them to avoid the temptation of relying on generalizations and stereotypes which, if gender or race based, are clearly unconstitutional.

## Attorney-Led *Voir Dire* is Already Allowed in Maryland

To the surprise of some trial lawyers, Maryland Rule 2-512(d) actually enables a judge to permit the parties to conduct an examination of qualified jurors. Nevertheless, trial attorneys, who believe that they can convince a trial judge to afford them the opportunity to ask questions of the entire jury panel are living in another one of Stephen Hawkings' alternate universes. Despite an exhaustive search, I am aware of no Maryland case in which attorneys were given the opportunity to examine the entire jury panel. Suffice it to say, Maryland's trial judges and appellate courts have not exercised the discretion provided to them, but rather, have concluded that the way it is done in Maryland is adequate to assure parties that they are litigating their case in front of a fair jury.

## Attorney-Led *Voir Dire* in Other Jurisdictions

The conclusion of Maryland's judiciary is at odds with nearly every other state in the country. Currently, thirty-eight states guarantee attorneys the right to directly question jurors during the *voir dire* process in all civil cases.[50] The overwhelming majority of the eleven remaining states who do not explicitly give attorneys this right, still enable attorneys to directly pose questions to the entire jury panel. In Missouri, Arkansas, and Rhode Island, *voir dire* is conducted primarily by attorneys. In Michigan, Kentucky, and Nevada, judges and attorneys are equally involved in the questioning of jurors during *voir dire*.

In 1976 there were sixteen states that did not allow direct attorney participation in questioning every juror either collectively or individually.[51] Armed with the evidence gleaned from numerous studies on the subject concluding that less biased juries can be achieved by allowing attorneys to directly question every juror, states that did not previously give attorneys this right began to enact laws and rules that do. This trend has continued up to today. New Hampshire established the right of attorney-conducted *voir dire* in 2004, Massachusetts did so in 2015, California reinstituted this right in 2018, and New Jersey instituted a pilot program to allow attorney-conducted *voir dire* in criminal cases in 2022. At present, two thirds of the states that did not permit attorney-conducted *voir dire* in 1976 now afford attorneys with the right to participate in *voir dire*. Sadly, Maryland remains one of only five states,[52] which, despite judges having the discretion to do so, do not allow any meaningful direct attorney interaction with the entire jury panel. Over the past 50 years, surely there has been at least one case that would have benefited from the ability to ferret out juror bias by allowing attorney-conducted *voir dire*.

Some Maryland judges, who have denied motions for attorney-conducted *voir dire* have privately expressed concern that allowing Maryland lawyers to do something that they have not been trained to do could be fraught with problems. That is a fair point. Fortunately, with Maryland set to finally align itself with the other forty-six states that require attorneys to obtain continuing legal education, ample opportunities will exist for every trial attorney in Maryland to be educated and trained. Massachusetts' recent experience at implementing attorney conducted *voir dire* for the first time and New Jersey's current pilot program can act as models to learn from, thus avoiding or minimizing these legitimate concerns.

After the Revolutionary War, at the time of the founding of our country, attorney-conducted *voir dire* was considered to be a fundamental constitutional right.[53] That remained the case, even in most federal courts, until 1944 when Federal Rule of Criminal Procedure 24(a) was adopted: "The court may examine prospective jurors or may permit the attorneys for the parties to do so." This rule change began a trend of limiting attorney participation in *voir dire* process. Over the decades that have passed, however, citizens through the legislatures, attorneys serving on rules committees, and sitting judges in forty-five states have corrected the misguided trend started by the adoption of Federal Rule of Civil Procedure 24. These states have returned to the original vision of our country's founders of giving attorneys the ability to conduct *voir dire* that was endorsed and amplified by Chief Justice Marshall in the infancy of our country.

Lest any of my readers conclude that attorney-conducted *voir dire* is only being advocated by members of the trial bar, this cause has been embraced and adopted by numerous federal judges who have engaged in research and studied the issue at length. As a result, by 1994 attorney involvement in *voir dire* in federal court had doubled in the decades that preceded it.[54]

Not surprisingly, given the overwhelming research that supports it, the American Bar Association has also recognized the superiority of direct attorney involvement with the jury panel during *voir dire*. ***"[V]oir dire by the judge, augmented by attorney-conducted questioning, is significantly fairer to the parties and more likely to lead to the impaneling of an unbiased jury than is voir dire conducted by the judge alone."***[55] Principle 11 of the

American Bar Association's (ABA) Principles for Juries and Jury Trials allows attorney-conducted *voir dire* with "reasonable time limits and avoidance of repetition."[56]

I have been fortunate enough to try cases in states where attorneys are entrusted with conducting *voir dire*. In my experience, *voir dire* in these jurisdictions takes about the same amount of time as it takes in Maryland. In fact, on two such occasions it actually took less time to empanel the jury than it did in similar cases I tried in Maryland. Don't take my word for it. There has been a significant amount of research on this subject which supports my anecdotal experience. The time that is allegedly saved by judicially conducted *voir dire* without attorney participation was studied extensively in the late 1960s and early 1970s.[57] The data from the study included the time of jury selection in courts that used each of three methods: attorney conducted *voir dire*; judicially conducted *voir dire*; and a hybrid that contains both. The study concluded that time differences among the various methods are not dramatic.[58]

More recently, this was studied in 2007 comparing judicially conducted voir dire in federal courts with attorney conducted *voir dire*, and again, the research determined that attorney conducted voir dire takes no more time than judge conducted *voir dire*.[59] The National Center for State Courts and the State Justice Institute recently published a comprehensive survey of trial practices, including *voir dire*. This study concluded that *voir dire* conducted primarily by judges with some attorney involvement did not significantly increase the time of *voir dire* as compared to *voir dire* divided equally between judges and attorneys.[60]

Given the demonstrated gains in ferreting out disqualifying bias, even if a small amount of time can be saved by curtailing or eliminating participation by counsel are we willing to live with having a jury that is demonstrably more susceptible to bias? If time is a real concern, there are ways of dealing with it by rule or statute. In many jurisdictions where the right to attorney-conducted *voir dire* exists, the rule or statute that establishes it does not abrogate the trial judge's role of making sure the attorney's examinations are on point. Some of these jurisdictions enable the judge to place a time limit on attorney-conducted *voir dire*. This is especially true in jurisdictions that use a hybrid approach with the judge asking the entire panel questions before turning the panel over to counsel for the parties. This is the approach endorsed by the ABA.

## Subjecting Maryland's System to a "*Daubert*" Analysis

I have no doubt that the overwhelming majority of Maryland's Judges are doing their absolute best to act as honest brokers during the jury selection process. As set forth above, Maryland's long history of cases affirming "limited *voir dire*" has led to the mistaken belief that the way Maryland trial courts conduct *voir dire* is the best way to ferret out bias that would disqualify a juror from serving.

In *Rochkind v. Stevenson*,[61] the Supreme Court of Maryland replaced the Frye-Reed general acceptance test with the U.S. Supreme Court's *Daubert v. Merrell*[62] standard. As an interesting exercise, let's use the magic of surplus reality to apply the Daubert factors to Maryland's current system of "limited *voir dire*" to determine whether the system is reliable and acceptable:

(1) whether a theory or technique can be (and has been) tested;

**Yes, as noted above, it has been thoroughly tested by judges, lawyers, and social scientists.**

(2) whether a theory or technique has been subjected to peer review and publication;

**Yes, every peer review article I am aware of has concluded that of the three methods of *voir dire* used by courts in America, Maryland's system has been repeatedly found it to be the least effective way of ferreting out bias that would disqualify a juror.**

(3) whether a particular scientific technique has a known or potential rate of error;

**Yes and Maryland's system's error rate has been extensively reported in study after study.**

(4) the existence and maintenance of standards and controls;

**The discretion afforded Maryland judges under the current Maryland Rules provides for variability that may limit the ability of the system to maintain standards and controls.**

(5) whether a theory or technique is generally accepted;

**Maryland's system is not generally accepted by scientists, who have studied it. Furthermore, forty-five of the fifty states have rejected it and adopted systems that provide attorneys with the ability to conduct voir dire.**

(6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;

**Admittedly, this one may pass scrutiny as the testing of any of the three methods inextricably involves litigation.**

(7) whether the expert [or State employing limited voir dire] has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

**In light of the research cited to in this article along with the U.S. Supreme Court rulings in Batson[63] or J.E.B.[64] the answer is yes.**

(8) whether the expert [or State employing limited *voir dire*] has adequately accounted for obvious alternative explanations;

**Hard to say because of the inability to depose those who devised the current system.**

(9) whether the expert is being as careful as he or she would be in his or her regular professional work outside his or her paid litigation consulting; and

**This one is not really applicable.**

(10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

**Yes, credentialed scientists, as well as lawyers, and judges with practical experience have studied the issue and have concluded that not allowing attorney participation is far less reliable at ferreting out disqualifying bias than a system that relies upon attorney conducted *voir dire*.**

Would Maryland's current system survive a *Daubert*[65] challenge? Sadly, we will never have the opportunity to find out.

## How Do We Fix It?

In *Davis v. State*[66] the Court stated that it will continue to adhere to the principles its predecessors adopted over one hundred years ago in *Handy v. State*[67] and the progeny of cases that have followed it until "the General Assembly wishes to expand or contract those statutory rights or the manner in which they are exercised."[68] The view of the *Davis* Court has been repeatedly cited to and adhered to in every appellate court holding since. The practical effect of these holdings and their progeny is that it is likely that a statute will be required to untie what Judge Harrell referred to in his concurring opinion in *Collins v. State*,[69] as the "twisted pretzel" *stare decisis* has saddled upon Maryland Jurisprudence on the issue of "limited *voir dire*."

Once the legislature is educated about the disparate impact that Maryland's system of "limited *voir dire*" has upon citizens of color and women, perhaps a groundswell will be created like the groundswell in California in 2017. The California law that reestablished the right of attorney-conducted *voir dire* garnered bipartisan support initially passing in the California general assembly on a floor vote with 62 ayes and 12 nays. By the time it was voted on by the Senate it had unanimous support of both political parties and passed in a floor vote with 38 ayes and zero nays. It was signed into law by California's governor on September 26, 2017.

Hope for a legislative solution springs eternal. Of course, that does not mean that the trial bar should abandon the judiciary entirely and attempts to seek a Rules change that provides attorneys with a right to question the entire jury panel during *voir dire*. Even if a rule change is not made, I am hopeful that the contents of this article may cause some judges to reconsider the way that they conduct *voir dire* and perhaps be more open to adopting a method for jury selection in which attorneys play a greater role. The reality is that the current Rules give them the discretion to do this. Although appellate courts have weighed the decisions that trial judges have made under the judicial lens of limited *voir dire*, I am aware of no appellate case in which a trial judge has been admonished for allowing *voir dire* questions that are beyond the scope of "*limited voir dire*."

In the meantime, one other potential stop gap or supplemental solution may be the use of pre-trial questionnaires. I am aware that Baltimore Circuit Court Judge Fletcher-Hill has successfully used juror questionnaires to help him ferret out potential juror bias. I'm hopeful that I will be given the opportunity to address this possible supplement to our current system of selecting juries in a future article. Signing out David.

***Suggested reading***


1. Salerno, J. M., Campbell, J. C., Phalen, H. J., Bean, S. R., Hans, V., Spivack, D., & Ross, L. (in press). The impact of minimal versus extended *voir dire* and judicial rehabilitation on mock jurors' decisions in civil cases. *Law and Human Behavior*.
2. U.S. District Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated voir dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HAVARD LAW & POLICY REVIEW 149 (2010)
3. Valerie P. Hans & Alayna Jehle, Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, 78 Chi.-Kent L. Rev. 1179 (2003). (Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss3/11)
4. John Campbell, Jessica Salerno, et. al., An Empirical Examination of Civil *voir dire*: Implications for Meeting Constitutional Guarantees and Selected Best Practices
5. Gregory E. Mize, On Better Jury Selection: *Spotting UFO Jurors Before They Enter the Jury Room, CT*. REV., Spring 1999.
6. Judge Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated voir dire, The Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 160 (2010).
7. Anything written by Daniel Kahneman's and Amos Tversky's on biases in judgment and decision making (which was recognized with the 2002 Nobel Prize in Economics)


## Biography

**David A. Harak** earned his bachelor's degree from Randolph-Macon College in 1994. He received his law degree from the University of Maryland School of Law in 1997. After graduation from law school, Mr. Harak hung a shingle and practices in a firm known as The Harak Law Firm, LLC. He is also a graduate of Gerry Spence's Trial Lawyers College as well as fellow of the American Association for Justice's National College of Advocacy. He is one of Maryland's State Delegates to the American Association for Justice. He has been a member of the Board of Governors for the Maryland Association for Justice for over 20 years. He has been licensed to practice law in Maryland, in State and Federal Court since 1997 and has handled cases in Pennsylvania,

California, Oregon, Washington State, New York, West Virginia, Virginia, Florida and the District of Columbia. His practice areas include Motor Vehicle Accidents, Personal Injury, Product Liability, Medical Negligence, Maritime Negligence, and Sexual Abuse.

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[1] Max Gutman, The Attorney-Conducted Voir Dire Of Jurors: A Constitutional Right, 39 BROOKLYN L. REV. 290, 296-297 (1973); see also https://www.ojp.gov/ncjrs/virtual-library/abstracts/attorney-conducted-voir-dire-jurors-constitutional-right; https://archive.csac.history.wisc.edu/Patrick_Henry_in_the_Virginia_Convention(2).pdf.
[2] 25 F. Cas. 2 (No. 14, 692a) (C.C.D. Va. 1807).
[3] Gutman, supra note 1 at 308.
[4] 501 U.S. 1030, 1075, 111 S.Ct. 2720 (1991) (emphasis added).
[5] 437 Md. 350, 356-57, 86 A.3d 1232 (2014).
[6] Id. at 356-357 (quoting Washington v. State, 425 Md. 306, 312, 40 A.3d 1017 (2012)). The conclusion of the Pearson Court is based on the following line of cases: Handy v. State, 101 Md. 39, 43, 60 A. 452 in 1905 which was expressly reaffirmed in Whittemore v. State, 151 Md. 309, 315-16, 134 A. 322 in 1926 which was, in turn, definitively affirmed in Davis v. State, 333 Md. 27, 39-43, 633 A.2d 867 in 1993.
[7] 361 Md. 1, 14, 759 A.2d 819 (2000).
[8] 361 Md. at 15 (quoting Davis v. State, 333 Md. 27, 38, 633 A.2d 867 (1993), in turn quoting Borman v. State, 1 Md. App. 276, 279, 229 A.2d 440 (1967).
[9] See Gordon J. Chelune, Self-disclosure: Origins, Patterns, and Implications of Openness in Interpersonal Relationships (1979); R.L. Archer, Role of Personality and the Social Situation (1979); H.J. Erhlich & D. B. Graeven, Reciprocal Self-Disclosure in a Dyad, J. EXP. SOC. PSYCH., Vol. 7, 389-400 (1971); S.M. Jourard, The Effects of Experimenters' Self-Disclosure on Subjects' Behavior (1969); C. Speilberger, Current Topics in Community and Clinical Psychology (1969); N.R. Simonson, The Impact of Therapist Disclosure on Patient Disclosure, J. COUNS. PSYCH., Vol. 23, 3-6 ( 1976); S.M. Jourard, Self-Disclosure and Other Cathexis, J. ABN. AND SOC. PSYCH, Vol. 59, 428-431 (1959); L. D. Goodstein & V. M. Reinecker, Factors Affecting Self-Disclosure: A Literature Review (1974): B. A. Maher, Progress in Experimental Personality Research, 49-77 (1974); Valerie P. Hans & Alayna Jehle, Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, 78 CHI. KENT L. REV. 1179, 1196 (2003).
[10] 212 U.S. 183, 196, 29 S. Ct. 260 (1909).
[11] Davis, 333 Md. at 64 (dissenting opinion of J. Bell).
[12] 500 U.S. 415, 432, 111 S. Ct. 1899 (1991).
[13] 463 Md. 372, 205 A.3d 1012 (2019).
[14] Id. at 404 (quoting Collins v. State 238 Md. App. 545, 559, 192 A.3d at 928 (2018)).
[15] 380 U.S. 202, 219, 85 S.Ct. 824 (1965), overturned on other grounds by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).
[16] Lewis v. U.S., 146 U.S. 370, 13 S. Ct. 136 (1892)
[17] Pointer v. U.S., 151 U.S. 396, 14 S. Ct. 410 (1894).
[18] Swain, 380 U.S. at 219.
[19] Id. at 219-220.
[20] Id. at 219.
[21] 549 F.2d 990, 993 cert. denied, 434 U.S. 902 (1977)
[22] 452 Md. 614, 629, 158 A.3d 553 (2017) (citing Richard Seltzer et al., Juror Honesty During the Voir Dire, 19 J. CRIM. JUST. 451 (1991)); see, e.g., Dale W. Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503 (1965); Neal Bush, The Case for Expansive Voir Dire, 2 L. & PSYCHOL. REV. 9, 13-14 (1976); Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL 5 (1989).
[23] The United States Supreme Court recognized this when it said that "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence." Crawford v. United States, 212 U.S. 183, 196, 29 S. Ct. 260 (1909).
[24] Frank P. Andreano, Voir Dire: New Research Challenges Old Assumptions, 95 ILL. B. J. 474, 476 (2007).
[25] Jurywork Systematic Techniques § 2:10 (2016).
[26] Jones, S. E., Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, L. & HUM. BEHAV., 11 (2), 131-146 (1987), available at https://doi.org/10.1007/BF01040446.
[27] United States v. Cleveland, Crim. A. No. 96-207, 1997 WL 2554 at *3 (E.D. La. Jan. 2, 1997).
[28] See, e.g., Macrae, C. N., et al., (1994), Out of Mind but Back in Sight: Stereotypes on the Rebound J. PERSONALITY & SOC. PSYCHOL., 67(5), 808; Payne, B. K., et al., (2002),Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons, J. EXPIRIMENTAL SOC. PSYCOL, 38(4), 384-96.
[29] Bennett, Psychological Methods of Jury Selection in the Typical Criminal Case, 4 CRIM. DEF. 11, 13 (No. 2, April 1977).
[30] See Suggs and Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 IND. L.J. 245, 255 (1981). at 255 (Citing Mehrabian, A Semantic Space for Nonverbal Behavior, 35 J. CONSULTING & CLINICAL PSYCH. (1970)).
[31] Id.
[32] Id.
[33] Id.
[34] 476 U.S. 79, 106 S. Ct. 1712 (1986).
[35] 511 U.S. 127, 114 S. Ct. 1419 (1994).
[36] Greenwald, A. & Krieger, L., Implicit Bias: Scientific Foundations, CAL. L. REV. 94(4), pp. 945-967 (2006).
[37] Cardi, J., Hans, V.P. & Parks, G., Do black injuries matter?: Implicit bias and jury decision making in tort cases, S. CAL. L. REV. 93(3), pp. 507-570 (2020).
[38] 476 U.S. 79, supra.
[39] 545 U.S. 231, 125 S. Ct. 2317 (2005).
[40] Id. at 270.
[41] Id. at 271 (emphasis in original).
[42] 476 U.S. 79, supra.
[43] 511 U.S. 127, supra.
[44] 476 U.S. 79 at 96.
[45] Id.
[46] Id. at 96-97
[47] 511 U.S. at 143; see, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539, 602, 96 S.Ct. 2791 (1976) (Brennan, J., concurring in the judgment) (voir dire "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); United States v. Whitt, 718 F.2d 1494, 1497 (10th. Cir.) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges.").
[48] 27 F.3d 1424 (9th Cir. 1994).
[49] Id. at 1429-30.
[50] Alabama, Alaska, California, Colorado, Connecticut, Flor Ida, Georgia, Hawaii, Illinois, Indiana, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming provide either a statutory or civil rule of procedure right to direct questioning of jurors by attorneys during the voir dire process. Nebraska recognizes this as a common law right.
[51] Jon Van Dyke, Voir Dire: How Should it Be Conducted to Ensure That Our Juries are Representative and Impartial, 3 HASTINGS CONST. at Table II pages 95-97 (1975).
[52] Arizona, Delaware, Maine, Maryland, and South Carolina. South Carolia guarantees the right of direct questioning of jurors during voir dire in capital cases.
[53] Gutman, supra note 1 at 90.
[54] John Shapard & Molly Johnson, Memorandum From the Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules (Oct. 4, 1994).
[55] Principles for Juries and Jury Trials, Am. Jury Project, at 72 (2005).
[56] American Bar Association, Principles for Juries and Jury Trials, Principle 11(B)(2) (2005).
[57] Van Dyke, supra note 73.
[58] Id. at 84-88.
[59] Vidmar & Hans, American Juries: The Verdict (New York: Prometheus Books, 2007), ch. 4 at p. 89; Mogill & Nixon, A Practical Primer on Jury Selection, 65 MICH. B. J. 52, 54 (1986).
[60] Mize, Hannaford-Agor & Waters, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report, p. 30, available at <http://www.ncsconline.org/ D_Research/cjs/pdf/SOSCompendiumFinal.pdf> (accessed October 21, 2011).
[61] 471 Md. 1, 33-34, 236 A.3d 630, 649 (2020).
[62] 509 U.S. 579, 113 S. Ct. 2786 (1993).
[63] 476 U.S. 79.
[64] 511 U.S. 127 (1994)
[65] 509 U.S. 579 (1993).
[66] Davis v. State, 333 Md. 27, 633 A.2d 867, (1992).
[67] 101 Md. 39, 60 A. 452 (1905)
[68] Id. at 46, 633 A.2d at 876.
[69] 452 Md. 614 (2017)

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369 Md. 202
Court of Appeals of Maryland.

STATE of Maryland

v.

Jerrod Leroy THOMAS.

No. 86 Sept. Term, 2001
|
May 10, 2002.

**Synopsis**

Defendant was convicted in the Circuit Court, Howard County, Dennis M. Sweeney, J., of distribution of cocaine and possession of cocaine. He appealed. The Court of Special Appeals, Sonner, J., 139 Md.App. 188, 775 A.2d 406, affirmed in part, reversed in part, and remanded for new trial. State filed petition for writ of certiorari, which was granted, 366 Md. 246, 783 A.2d 221. The Court of Appeals, Bell, C.J., held that trial court abused its discretion when it refused to give defendant's proposed voir dire question asking whether any member of the jury panel had such strong feelings regarding violations of the narcotics laws that it would be difficult for member to fairly and impartially weigh the facts at trial.

Affirmed.

Raker, J., concurred and filed opinion in which Harrell, J., joined.

Battaglia, J., filed dissenting opinion.

West Headnotes (3)

**[1]** **Jury** Examination of Juror

Single, primary, and overriding principle or purpose of voir dire is to ascertain the existence of cause for disqualification, and this is accomplished through the pursuit of one of the two mandatory areas of inquiry, i.e, an examination of a juror conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him.

27 Cases that cite this headnote

**[2]** **Jury** Personal opinions and conscientious scruples

A question aimed at uncovering a venire person's bias because of the nature of the crime with which the defendant is charged is directly relevant to, and focuses on, an issue particular to the defendant's case and, so, should be uncovered.

26 Cases that cite this headnote

**[3]** **Jury** Personal opinions and conscientious scruples

  

Trial court abused its discretion when, during voir dire on distribution and possession of cocaine charges, it refused to give defendant's proposed voir dire question asking whether any member of the jury panel had such strong feelings regarding violations of the narcotics laws that it would be difficult for member to fairly and impartially weigh the facts at trial.

46 Cases that cite this headnote

**Attorneys and Law Firms**

****567** ***204** Gary E. Bair, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General of Maryland, on brief), Baltimore, for petitioner.

Mark Colvin, Assistant Public Defender (Stephen E. Harris, Public Defender, on brief), Baltimore, for respondent.

Argued Before BELL, C.J., and ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL and BATTAGLIA, JJ.

**Opinion**

BELL, Chief Judge.

The issue in this case is whether, when the defendant is charged with distribution and possession of a controlled dangerous substance, it is an abuse of discretion for the trial court to refuse to ask the venire panel if any of them harbored "strong feelings regarding violations of the narcotics laws." The Court of Special Appeals held that it was, *Thomas v. State,* 139 Md.App. 188, 207–08, 775 A.2d 406, 408 (2001), and the State, the petitioner, by filing a Petition for Writ of Certiorari, requested our review of that judgment. We granted the petition, *State v. Thomas,* 366 Md. 246, 783 A.2d 221 (2001), and now affirm.

I.

On May 20, 1999, the respondent, Jerrod Leroy Thomas, was charged with possession and distribution of cocaine. The respondent was tried, and ultimately convicted, by a jury in the Circuit Court for Howard County. During voir dire, the respondent asked the trial court to propound to the panel, among others, the following voir dire question:

> "Does any member of the jury panel have such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged?"[1]

****568** ***205** The trial court refused to do so,[2] explaining that the question was "fairly covered by other questions, or the Court does not find it necessary to ask" it. *Thomas,* 139 Md.App. at 195, 775 A.2d at 410. The trial court previously had inquired, after apprising the venire of the allegations involved in the case, whether any member of the panel knew anything about the case, had formed an opinion regarding it or had other information about the case. It had also asked whether "there [was] any other reason why any member of this panel feels that if they are picked as a juror in this case they would not be [able] to be a fair and impartial juror and decide this case based solely on the evidence in this case and the law as I would instruct you in this case."[3]

***206** Following his sentencing, the respondent noted an appeal to the Court of Special Appeals. That court, as we have seen, agreeing with the respondent, held that the lower court abused its discretion by refusing to propound the voir dire question proposed by the respondent and, therefore, reversed the judgment of conviction. *Thomas,* 139 Md.App. at 193, 775 A.2d at 409. The intermediate appellate court concluded that the proposed voir dire question was "a valid question reasonably likely to uncover a bias that is directly related to the crime" on trial and that did "pose an obstacle to impaneling a fair and impartial

  

jury," *id.* at 206, 775 A.2d at 417, and, furthermore, that "[n]o other question asked of the venire adequately covered the area of undue influence [the respondent] sought to discover with [the question]." *Id.* at 207–08, 775 A.2d at 418.

II.

The principles pertinent to the conduct and scope of voir dire have been addressed by this Court and the Court of Special Appeals so often as to be well-known and well-settled. We most recently reviewed them in *Dingle v. State,* 361 Md. 1, 759 A.2d 819 (2000). We stated as follows:

> "Voir dire, the process by which prospective jurors are examined to determine whether cause for disqualification exists, *see Boyd v. State,* 341 Md. 431, 435, 671 A.2d 33, 35 (1996), is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights, ... *see Grogg v. State,* 231 Md. 530, 532, 191 A.2d 435, 436 (1963), is given substance. *See Hill v. State,* 339 Md. 275, 280, 661 A.2d 1164, 1166 (1995); ****569** *Bedford v. State,* 317 Md. 659, 670, 566 A.2d 111, 116 (1989). ***207** The overarching purpose of voir dire in a criminal case is to ensure a fair and impartial jury. *See Boyd,* 341 Md. 431, 435, 671 A.2d 33, 35 (1996); *Hill,* 339 Md. 275, 279, 661 A.2d 1164, 1166 (1995); *Davis v. State,* 333 Md. 27, 34, 633 A.2d 867, 871 (1993); *Bedford,* 317 Md. 659, 670, 566 A.2d 111, 117 (1989); *Casey v. Roman Catholic Archbishop,* 217 Md. 595, 605, 143 A.2d 627, 631 (1958); *Adams v. State,* 200 Md. 133, 140, 88 A.2d 556, 559 (1952). In *Davis [v. State],* 333 Md. [27,] 33, 633 A.2d [867,] 871, quoting *Langley v. State,* 281 Md. 337, 340, 378 A.2d 1338, 1339 (1977) (citing *Waters v. State,* 51 Md. 430, 436 (1879)), we said, 'a fundamental tenet underlying the practice of trial by jury is that each juror, as far as possible, be impartial and unbiased.'
>
> We recognized in *Davis* that:
>
> 'There are two areas of inquiry that may uncover cause for disqualification: (1) an examination to determine whether prospective jurors meet the minimum statutory qualifications for jury service, see Maryland Code (1974, 1989 Repl.Vol., 1992 Cum.Supp.), Courts & Judicial Proceedings Article, § 8–207; or (2) " 'an examination of a juror ... conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him.' "
>
> *Id.* at 35–36, 759 A.2d 819, 633 A.2d at 871–72, quoting *Bedford,* 317 Md. at 671, 566 A.2d at 117 (quoting *Corens v. State,* 185 Md. 561, 564, 45 A.2d 340, 343 (1946)). Thus, we said in *Hill,* 339 Md. at 279, 661 A.2d at 1166 (quoting *McGee v. State,* 219 Md. 53, 58, 146 A.2d 194, 196 (1959), in turn quoting *Adams v. State,* 200 Md. 133, 140, 88 A.2d 556, 559 (1952)):
>
> > 'Undergirding the voir dire procedure and, hence, informing the trial court's exercise of discretion regarding the conduct of the voir dire, is a single, primary, and overriding principle or purpose: "to ascertain 'the existence of cause for disqualification.' "
>
> In so doing, the questions should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered ***208** .... *See Alexander v. R.D. Grier & Sons Co. Inc.,* 181 Md. 415, 419, 30 A.2d 757, 758 (1943), in which the trial court's refusal to ask 'whether or not [jurors] or any of their immediate family [were assessables] in the Keystone Indemnity Exchange,' where the issue at trial was the enforcement of an assessment against a subscriber by Keystone and the juror's financial interest 'would theoretically incline him in favor of recovery of a verdict for the liquidator,' was held to be an abuse of discretion, the question being directed at determining whether any juror was biased or prejudiced. *See also Morford v. United States,* 339 U.S. 258, 70 S.Ct. 586, 94 L.Ed. 815 (1950) (finding that where panel from which the jury was selected consisted of almost entirely government employees, refusal to allow questions pertaining to possible influence of the federal loyalty oath was error). Indeed, as we held in *Bedford,* "any circumstances which may reasonably be regarded as rendering a person unfit for jury service may be made the subject of questions and a challenge for cause." 317 Md. at 671, 566 A.2d at 117, quoting *Corens v. State,* 185 Md. at 564, 45 A.2d at 343. In addition, we have also held that,

  

> 'If there is any likelihood that some prejudices in the jurors' mind which will even subconsciously affect his decision of the case, the party who may ****570** be adversely affected should be permitted questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. Otherwise, the right of trial by an impartial jury guaranteed to him ... might well be impaired....'

*Bedford,* 317 Md. at 671, 566 A.2d at 117; quoting *Brown v. State,* 220 Md. 29, 35, 150 A.2d 895, 897–98 (1959), quoting *State v. Higgs,* 143 Conn. 138, 142, 120 A.2d 152, 154 (1956)."
361 Md. at 9–11, 759 A.2d at 823–24 (footnotes omitted).

It is the application of those principles to particular fact patterns that presents the difficulty. This case is illustrative.

***209** The State does not disagree with these guiding principles; in fact, it cites virtually the same principles, but as penned by Judge Chasanow in *Davis v. State,* 333 Md. 27, 34–35, 633 A.2d 867, 871 (1993).[4] Relying on those principles as applied in that case, the State argues, diametrically opposite to the result reached by the Court of Special Appeals, that although it would not have committed error had it chosen to ask the voir dire question proposed by the respondent, the trial court did not abuse its discretion when it refused to ask the question.

At issue in *Davis* was the court's refusal, premised on its conclusion that the inquiry "[did] not relate to cause for disqualification," *id.* at 36, 633 A.2d at 872, to ask the venire the question, whether any member of the venire or a close friend or relative, was, or had been, a member of the law enforcement community. The Court reasoned that an affirmative answer to the question would not have established such cause, *id.* at 36–37, 633 A.2d at 872, and that

> "First, the fact that a prospective juror is or was a member of a law enforcement body does not automatically disqualify that venire person. *See Harris v. State,* 82 Md.App. 450, 470, 572 A.2d 573, 583 (trial judge did not err when he failed to strike former state trooper for cause where trooper indicated that he was able to render fair and impartial judgment despite earlier employment), *cert. denied,* 320 Md. 800, 580 A.2d 218 (1990). Likewise, the mere fact that a prospective juror is related to or associated with members of the law enforcement community does not constitute cause for disqualification. *Goldstein v. State,* 220 Md. 39, 45, 150 A.2d 900, 904 (1959); ***210** *Shifflett v. State,* 80 Md.App. 151, 156, 560 A.2d 587, 589 (1989),*aff'd on other grounds,* 319 Md. 275, 572 A.2d 167 (1990); *Baker v. State,* 3 Md.App. 251, 254, 238 A.2d 561, 564 (1968). In general, the professional, vocational, or social status of a prospective juror is not a dispositive factor establishing cause to disqualify. Rather, the proper focus is on the venire person's state of mind, and whether there is some bias, prejudice, or preconception. Short of those instances where there is a demonstrably strong correlation between the status in question and a mental state that gives rise to cause for disqualification, mere status or acquaintance is insufficient to establish cause for disqualification of a prospective juror. The fact that a prospective juror is employed as, related to, or associated ****571** with a law enforcement officer does not establish that the prospective juror has any undue bias or prejudice that will prevent that person from fairly and impartially determining the matter before them. *See Goldstein,* 220 Md. at 44–45, 150 A.2d at 904. The inquiry must instead focus on the venire person's ability to render an impartial verdict based solely on the evidence presented."
*Id.* at 37, 633 A.2d at 872.

The State also maintains that the trial court correctly ruled that the proposed inquiry was covered by other questions designed to elicit the same information. It points out that the venire was informed that the respondent was charged with selling narcotics to an undercover police officer and asked if anyone had information about the incident, and later the venire was given "an additional opportunity to express any feelings or concerns that might adversely impact on their ability to be fair and impartial and to render a verdict based exclusively on the evidence presented." The State concludes, "[t]he court's voir dire questions adequately ensured that potential jurors would reveal any biases they harbored about narcotics or the laws governing them."

*Davis* is inapposite to the resolution of the case *sub judice.* There, the inquiry the respondent sought to have made was into, and about, the prospective jurors' statuses, associations, or affiliations, not their attitudes. As the passage from the ***211** *Davis* opinion set out above demonstrates, the *Davis* Court well understood and recognized the distinction. Indeed, it emphasized that

  

it is the venire person's state of mind, in particular, whether there is some bias, prejudice, or preconception, that is the proper focus of voir dire, rather than the professional, vocational, or social status of a prospective juror, which is not a dispositive factor establishing cause to disqualify. *Davis,* 333 Md. at 37–38, 633 A.2d at 872–73. The *Davis* Court concluded that there must be a demonstrably strong correlation between the status, association, or affiliation and a mental state that gives rise to cause for disqualification. *Id.*

As indicated, the respondent's concern in this case was the venire persons' attitude concerning the crime with which the respondent was charged. The Court of Special Appeals concluded, we think correctly, that such an inquiry is directed at biases, specifically, those related to the respondent's alleged criminal act, which if uncovered are disqualifying when they impair the ability of the juror to be fair and impartial. *Thomas,* 139 Md.App. at 202, 775 A.2d at 415. The intermediate appellate court's analysis is instructive.

Relying on this Court's opinion in *King v. State,* 287 Md. 530, 536, 414 A.2d 909, 912 (1980),[5] in which we stated, "[i]t is common knowledge that a significant segment of our society believes, as a matter of public policy, that the criminal laws relating to marijuana should be modified in one way or another," and *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), explaining "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment," the Court of Special Appeals notes that it is not extraordinary for most citizens to have a bias against proscribed criminal acts and that "[p]rospective jurors with strong feelings about drugs are not uncommon." **572 *212 *Thomas,* 139 Md.App. at 203, 204, 775 A.2d at 415. After reviewing some of the literature addressing "controversial alternatives to the nation's current drug prohibition laws,"[6] *id.* at 204, 775 A.2d at 415, the intermediate appellate court observes that "the 'war on drugs' continues to be a household phrase," *id.,* reports that there is a view that the "war" can create biases that alter the impartial state of mind of a prospective juror,[7] *id.* at 204–205, 775 A.2d at 417, and offers, citing a pending case in the Court of Special Appeals and the *King* case, evidence that voir dire questions on drug attitudes "are effective in revealing strong feelings towards narcotics laws that may hinder a juror's ability to serve." *Id.* at 205, 775 A.2d at 416. Noting that the areas of inquiry that must be pursued, if reasonably related to the case at hand, "entail potential biases or predispositions that prospective jurors may hold which, if present, would hinder their ability to objectively resolve the matter before them, *id.* at 206, 775 A.2d at 417, citing and quoting *Davis,* 333 Md. at 36, 633 A.2d at 872, the Court of Special Appeals opines:

> *213 "Laws regulating and prohibiting the use of controlled dangerous substances harbor an unusual position within our criminal code, such that jurors may be biased because of strong emotions relating to the dangers of narcotics and their negative effects upon our cities and neighborhoods, or, on the contrary, biases may exist because of passionate positions that advocate the decriminalization of narcotics. Moreover, unlike the clear disparity in favor of the prosecution created by "death-qualified" juries, jurors with strong feelings about drug laws are as equally inclined to hold biases against the State as they are against the defendant."

*Id.* at 207, 775 A.2d at 418 (footnote omitted). The court held that "the potential biases sought to be revealed by [the respondent's proposed voir dire question] pose an obstacle to impaneling a fair and impartial jury." *Id.* at 206, 775 A.2d at 417.

[1] As we have seen, and so often reiterated, the single, primary, and overriding principle or purpose of voir dire is to ascertain " 'the existence of cause for disqualification.' " *Hill,* 339 Md. at 279, 661 A.2d at 1166 (quoting *McGee v. State,* 219 Md. 53, 58, 146 A.2d 194, 196 (1959), in turn, quoting *Adams v. State,* 200 Md. 133, 140, 88 A.2d 556, 559 (1952)), and this is accomplished through the pursuit of one of the two mandatory areas of inquiry, *i.e.,* **573 "an examination of a juror ... conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him.' " *Davis,* 333 Md. at 35–36, 633 A.2d at 871–72 (quoting *Bedford,* 317 Md. at 671, 566 A.2d at 117, in turn, quoting *Corens v. State,* 185 Md. 561, 564, 45 A.2d 340, 343 (1946)). We have been emphatic, even in civil cases, that "a party is entitled to a jury free of all disqualifying bias or prejudice without exception, and not merely a jury free of bias or prejudice of a general or abstract nature." *Casey v. Roman Catholic Archbishop of Baltimore,* 217 Md. 595, 606, 143 A.2d 627, 631 (1958). And, although we have entrusted the trial court with considerable discretion, we have admonished:

  

'' ***214** "In the exercise of that discretion, the trial judge should adapt the questions to the needs of each case in the effort to secure an impartial jury. Any circumstances that may reasonably be regarded as rendering a person unfitted for jury service may be made the subject of questions and a challenge for cause. Accordingly an examination of a juror on his voir dire is proper as long as it is conducted within the right to discover the juror's state of mind in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him. *Corens v. State,* 185 Md. 561, 564, 45 A.2d 340; *Grossfeld v. Braverman,* 203 Md. 498, 101 A.2d 824.' "

*Langley v. State,* 281 Md. 337, 342, 378 A.2d 1338, 1340 (1977) (quoting *Bryant v. State,* 207 Md. 565, 583, 115 A.2d 502, 510 (1955)).

**[2]** **[3]** A question aimed at uncovering a venire person's bias because of the nature of the crime with which the defendant is charged is directly relevant to, and focuses on, an issue particular to the defendant's case and, so, should be uncovered. *See Alexander v. R.D. Grier & Sons Co. Inc.,* 181 Md. 415, 419, 30 A.2d 757, 758 (1943). We agree with the intermediate appellate court: the proposed voir dire question should have been asked. The trial court abused its discretion when it refused to do so.

We also agree with the intermediate appellate court that the voir dire questions actually propounded to the venire, including those on which the State relies, were not reasonably calculated to ascertain the bias the respondent sought to uncover. The general voir dire question on which the trial court relied, and to which the State directs us now, falls squarely within the class of "general questions" rejected in *Davis v. State.* As the Court of Special Appeals rightly noted, in that case, we cautioned against the use of such questions to ascertain bias of a specific kind:

"[W]here the parties identify an area of potential bias and properly request voir dire questions designed to ascertain jurors whose bias could interfere with their ability to fairly ***215** and impartially decide the issues, then the trial judge has an obligation to ask those questions of the venire panel. *Merely asking general questions such as "is there any reason why you could not render a fair and impartial verdict," is not an adequate substitute for properly framed questions designed to highlight specific areas where potential jurors may have biases that could hinder their ability to fairly and impartially decide the case.*"

333 Md. at 47, 633 A.2d at 877 (emphasis supplied). *See also Casey v. Roman Catholic Archbishop of Baltimore,* 217 Md. at 606, 143 A.2d at 631.

In that case, an action for damages against the Roman Catholic Archbishop of Baltimore, a corporation sole of the State of Maryland, as the holder of the legal title ****574** to premises on which the plaintiff was injured when she slipped and fell, *id.* at 600–01, 143 A.2d at 628–29, the plaintiff asked the court to inform the venire that the defendant was a corporation sole and, as such, was the owner, with possession and control of the premises. She also requested that the court propound two voir dire questions on the subject:

"(1) Does any member of the jury panel have any preconceived objections to, or any preconceived opinions in favor of, or any bias or prejudice in favor of or against, a suit in which Roman Catholic Archbishop of Baltimore, a corporation sole of the State of Maryland, is sought to be held liable in damages for injuries claimed to have resulted to a person, a member of the Parish of the Roman Catholic Church in which such person claims to have been injured, that would prevent you from fairly and impartially deciding such a case?

"(2) If, in your opinion, the evidence in the case warrants a verdict for the plaintiff, Miss Casey, against Roman Catholic Archbishop of Baltimore, a corporation sole of the State of Maryland, the defendant, is there any member of the jury panel who could not fairly and impartially assess damages in the case in the same manner as if the defendant were a regular corporation or a natural person?"

***216** *Id.* at 604, 143 A.2d at 630. Refusing to inform the venire as requested, or to propound the questions submitted by the plaintiff, the trial court asked instead:

"Is there any reason, such as religious scruples or any other reason, which would prevent any one of you from giving the parties a fair and impartial trial, finding a verdict based only on the law and the evidence?"

*Id.* We reversed a jury verdict that the plaintiff appealed as inadequate, stating

  

> "[I]t is clear that the only question propounded by the court was not sufficient to determine possible cause for disqualification by reason of bias or prejudice or otherwise. The question asked was in a form so general that it is likely it did not sufficiently indicate to the panel of jurors what possible bias or prejudice was being probed."

*Id.* at 606, 143 A.2d at 631.

The State characterizes the Court of Special Appeals' opinion as an "unprecedented precedent," which is "as alarming as it is far reaching," forecasting that it places Maryland, with its history of limited voir dire, on a slippery slope, "with no stopping point to its rationale," that is bound to lead to the expansive, even unlimited, voir dire that this Court rejected in *Davis.* We do not share the State's concerns. To be sure, requiring a trial court to inquire, when requested, into the attitude or mental state of the prospective jurors, with respect to the crime on trial, may mean expanding the scope of the voir dire somewhat; in addition to those the trial court normally asks, it may be necessary to ask an additional two or three questions. But, we do not regard enforcing that which is already required during voir dire as an expansion of the voir dire process.[8]

Moreover, we continue to be of the view we expressed in *Dingle.* There, cognizant that "there may be, and often is, a ***217** conflict between keeping the voir dire process limited and the goal of ferreting out cause for disqualification," we opined:

> "The broad discretion of the trial court and the rigidity of the limited voir dire ****575** process are tempered by the importance and preeminence of the right to a fair and impartial jury and the need to ensure that one is impaneled. Thus, we have made clear that 'this Court will prescribe the juror voir dire process ... as is necessary ... to uncover disqualifying bias.' "

*Dingle,* 361 Md. at 14, 759 A.2d at 826 (quoting *Boyd,* 341 Md. at 433, 671 A.2d at 34).

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED, WITH COSTS.

RAKER and HARRELL, JJ., concur.

BATTAGLIA, J., dissents.

RAKER, J., concurring, joined by HARRELL, J.:
I join in the opinion of the Court and write separately to explain my reasons.

Maryland is one of the few states in the country that does not permit voir dire to inform the exercise of peremptory challenges. It has long been the rule in Maryland that voir dire is limited to the detection of bias sufficient to challenge a prospective juror for cause and not to assist in the exercise of peremptory challenges. *See* maj. op. at 11 (stating that "the single, primary, and overriding principle or purpose of voir dire is to ascertain 'the existence of cause for disqualification' ") (citations omitted); *Dingle v. State,* 361 Md. 1, 759 A.2d 819 (2000) (and cases cited therein); *Davis v. State,* 333 Md. 27, 633 A.2d 867 (1993).

I discern a trend in Maryland, on a case-by-case basis, to expand voir dire. The majority notes that "[i]f;.. requiring the proposed inquiry could be construed to be an expansion of the voir dire process, it certainly can not be construed to be an unreasonable one." Maj. op. at 14 n. 8. This expanded right is addressed in the context of the exercise of challenges for ***218** cause, but, in my view, the expansion is, in reality, in the area of peremptory challenges. The discretion of trial judges in controlling voir dire is, little by little and case by case, being diminished. For example, this Court has identified ever-increasing areas of mandatory inquiry. *See Dingle,* 361 Md. at 10 n. 8, 759 A.2d at 824 n. 8. We require inquiry, when requested, into racial, ethnic, and cultural bias, *see Hernandez v. State,* 357 Md. 204, 232, 742 A.2d 952, 967 (1999); *Hill v. State,* 339 Md. 275, 285, 661 A.2d 1164, 1169 (1995); *Bowie v. State,* 324 Md. 1, 15, 595 A.2d 448, 455 (1991); religious bias, *see Casey v. Roman Catholic Arch.,* 217 Md. 595, 606–07, 143 A.2d 627, 632 (1958); predisposition as to the use of circumstantial evidence in capital cases, *see Corens v. State,* 185 Md. 561, 564, 45 A.2d 340, 343–44 (1946); and placement of undue weight on police officer credibility, *see Langley v. State,* 281 Md. 337, 349, 378 A.2d 1338, 1344 (1977).

  

In my view, *Dingle* represented the highwater mark in the sea change. *See Dingle,* 361 Md. at 22, 759 A.2d at 831 (Raker, J., dissenting) (noting that "the true issue in this case is different in kind from the many this Court has been called upon to address"). Rather than continue this case-by-case expansion of the scope of voir dire examination for cause, and in its wake continue to reverse judgments based on voir dire error, let us, once and for all, join the rest of the country and expand the purpose of voir dire in Maryland to include the informed exercise of peremptory challenges. Since we have not moved to abolish peremptory challenges,[1] let us at least ****576** afford counsel the information necessary to exercise an informed challenge. To that end, I would endorse a voir dire process that would enable a lawyer to elicit sufficient information ***219** to develop a rational basis for excluding a potential juror, whether for cause or by peremptory challenges.

I point out that, in expanding the voir dire process, I in no way endorse unduly prolonging the jury selection process or permitting abuses known to the trial lawyer. Voir dire should not be used to make a point to the jury or to indoctrinate potential jurors, but rather to gain information to aid in the exercise of challenges. The regulation of voir dire is entrusted to the sound discretion of the trial judge, and the trial judge should reasonably supervise and control the voir dire process to ensure against abuses.

Judge HARRELL has authorized me to state that he joins in this concurring opinion.

BATTAGLIA, J., dissenting.

For the reasons set forth below, I must respectfully dissent from the majority decision in this case which reverses a conviction and remands the case for a new trial based upon the failure to ask a *voir dire* question which was not specifically related to the charge of possession and distribution of cocaine with which the defendant was indicted.

I find no abuse of discretion in this case where the trial court refused to ask the venire panel if anyone harbors "strong feelings regarding violations of the narcotics laws." Basically, any response would not have yielded specific information sufficient to form the basis of a disqualification for cause. *See Dingle v. State,* 361 Md. 1, 15, 759 A.2d 819, 826 (2000)(explaining that in order to be meaningful, *voir dire* "must uncover more than 'the jurors' bottom line conclusions [to broad questions], which do not in themselves reveal automatically disqualifying biases as to their ability fairly and accurately to decide the case, and, indeed, which do not elucidate the bases for those conclusions ...."")(quoting *Bowie v. State,* 324 Md. 1, 23, 595 A.2d 448, 459 (1991)). As a result, the majority is blurring the historical distinction between the use of *voir dire* as a basis for strikes for cause and its use as a basis for exercising peremptory challenges.

***220** In Maryland, the trial court conducts *voir dire* examination to determine whether possible cause exists to disqualify a juror on the basis of bias or prejudice. *See Chernock v. State,* 203 Md. 147, 150, 99 A.2d 748, 749 (1953). In *Davis v. State,* 333 Md. 27, 633 A.2d 867 (1993), we explained the limited nature of Maryland's *voir dire* process, that being to secure information to strike for cause:

> This Court initially adopted the rules concerning the scope of *voir dire* because allowing more extensive inquiry would unduly tax the efficiency of Maryland's judicial system. Although some litigants might benefit from broader mandatory *voir dire,* a greater number of citizens would be hindered due to the accompanying decline in their ability to gain prompt resolution of their litigation.

333 Md. at 42, 633 A.2d at 874. We reiterated the scope of Maryland's *voir dire* process in *Dingle:*

> ****577** To be sure, Maryland has adopted, and continues to adhere to, limited *voir dire.* It is also well settled that the trial court has broad discretion in the conduct of *voir dire,* most especially with regard to the scope and the form of the questions propounded, and that it need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification.

361 Md. at 13, 759 A.2d at 826 (internal citations omitted). Thus, "[q]uestions not directed to a specific ground for disqualification but which are speculative, inquisitorial, catechising or 'fishing', asked in aid of deciding on peremptory challenges, may be refused in the discretion of the court, even though it would not have been error to have asked them." *McGee*

*v. State,* 219 Md. 53, 58, 146 A.2d 194, 196 (1959); *see Whittemore v. State,* 151 Md. 309, 315–16, 134 A. 322, 324 (1926) (trial court properly exercised its discretion in excluding questioning concerning the juror's age because the questions were "for no specified purpose, and apparently with no question of disqualification in mind, but were merely beginning a process of examining at large, in order to form impressions and preferences, which, while they might properly be ***221** made the ground for peremptory challenges, would not test the eligibility of the jurymen").

Thomas's requested question would not have elicited specific bias relevant to the charge of possession and distribution of cocaine. To ask about "feelings" about "violations of narcotics laws" is so broad as to elicit responses about marijuana possession and misuse of prescription drugs, among many others. It would be similar to asking in a case involving driving while intoxicated whether the jury had any "feelings" about violations of the motor vehicle laws and expecting to elicit information sufficient to strike for cause.

In reaching its decision here today, the majority relies heavily on the Court's earlier decision in *Casey v. Roman Catholic Archbishop of Baltimore,* 217 Md. 595, 143 A.2d 627 (1958). *See* Maj. op. at 12–13. The *Casey* decision, however, is inapposite to the majority's position.

In *Casey,* the defendant, Roman Catholic Archbishop of Baltimore, requested that the trial court propound two specific questions directly related to the Roman Catholic Church and the particular parish where the plaintiff was injured, and asked if a verdict was rendered against the defendant, could the jurors "fairly and impartially assess damages in the case in the same manner as if the defendant were a regular corporation or a natural person?" *Casey,* 217 Md. at 604, 143 A.2d at 630. The trial court declined the defendant's request and decided to simply inform the panel that one of the parties was a "religious corporation,"—a term laden with ambiguities—and to ask whether due to "religious scruples or any other reason" the jurors would not be able to conduct a fair and impartial trial. *Id.*

The questions requested by the church were directed toward eliciting specific information about religious bias aimed at the Roman Catholic Church and bearing directly on the trial at issue. Conversely, the question actually propounded by the trial court in *Casey* neglected to frame the bias question with precision.

I believe that the question requested by Thomas in the case at bar is more akin to the nebulous question posed by the trial ***222** court in *Casey,* which we concluded "was not sufficient to determine possible cause for disqualification by reason of bias or prejudice or otherwise." *Id.* at 606, 143 A.2d at 631. As in *Casey,* the question requested by Thomas "was in a form so general that it is likely it [would] not sufficiently ****578** indicate to the panel of jurors what possible bias or prejudice was being probed." *Id.* Thomas's requested question lends itself to triggering a cerebral fishing expedition in an attempt for the venire panel to look within themselves to ascertain the possible meaning of what it means to be prejudiced by "strong feelings regarding violations of the narcotics laws."

I do not take exception to the notion that if requested and not otherwise adequately addressed in the questioning, the trial court should query the panel about their attitude or mental state with regard to the specific crime involved. *See Casey,* 217 Md. at 605, 143 A.2d at 631 (stating, "it is also well settled that parties to an action triable before a jury have a *right* to have questions propounded to prospective jurors on their *voir dire,* which are directed to a specific cause for disqualification, and failure to allow such questions is an abuse of discretion constituting reversible error")(emphasis in original). To be sure, the trial court must be free to exercise discretion in examining venire panels concerning fairness and impartiality. Any requirement that the trial court pose amorphous and ill-defined *voir dire* questions such as the question proposed by Thomas in the case at bar would undermine the long-held discretionary function of the trial judge in the *voir dire* process. As we explained in *Davis:*

> where the parties *identify* an area of potential bias and *properly request voir dire* questions designed to ascertain jurors whose bias could interfere with their ability to fairly and impartially decide the issues, then the trial judge has an obligation to ask those questions of the venire panel ... *Those voir dire questions, however, should be framed so as to identify potential jurors with biases which are cause for disqualification, rather than merely identifying potential jurors with attitudes or associations which might facilitate the exercise of peremptory challenges.*

  

***223** *Davis,* 333 Md. at 47, 633 A.2d at 877 (emphasis added); *Cf. Gilchrist v. State,* 97 Md.App. 55, 78, 627 A.2d 44, 55 (1993)(Wilner, C.J., concurring) (explaining his belief that peremptory challenges should be eliminated as a matter of public policy because "precious judicial time and resources are being sidetracked.")

Therefore, I conclude that in the case *sub judice* the trial judge properly exercised his discretion in disallowing Thomas's proposed inquiry into the panel members' "feelings" concerning "violations of the narcotics laws." Such an inquiry would have done nothing more than to facilitate Thomas's exercise of peremptory challenges. *See Davis,* 333 Md. at 47, 633 A.2d at 877. If the majority is desirous of expanding Maryland's traditionally conservative *voir dire* process to include eliciting information to aid the attorneys in exercising peremptory challenges, then it should do so explicitly and without reservation. Until such time as that happens, litigants will be charged with the difficult task of determining the limitations of the majority opinion in developing *voir dire* questions and trial courts will be left to speculate as to whether the *voir dire* really is designed to support strikes for cause or peremptory challenges.

**All Citations**

369 Md. 202, 798 A.2d 566

Footnotes

1 As to this question, with respect to its compliance with this Court's recent decision in *Dingle v. State,* 361 Md. 1, 759 A.2d 819 (2000), the Court of Special Appeals observed:

> "Preliminarily, we note that the current "two-part" form of Question No. 10 is unacceptable under the Dingle ruling. As the voir dire in the instant case took place before the Court of Appeals filed Dingle on September 15, 2000, we do not fault Thomas for proposing Question No. 10 as a two-part question. Further, we believe the issue of the trial judge's discretion is still properly before this Court. In accordance with Dingle, the circuit court must pose Question No. 10 to the venire through two questions. The first question should identify any jurors who harbor strong feelings about narcotics or the laws governing narcotics. Then, the trial court should individually ask those members of the venire who responded affirmatively follow-up questions regarding their ability to be fair and impartial despite their strong feelings."

*Thomas v. State,* 139 Md.App. at 202, 775 A.2d at 415. We do not share the intermediate appellate court's interpretation of *Dingle* as it relates to this case and, thus, we do not believe the guidance it offers is necessary. When the inquiry is into the state of mind or attitude of the venire with regard to a particular crime or category of crimes, it is appropriate to phrase the question as was done in this case.

2 Urging the trial court to ask the question, the respondent argued:

> "I think that [question] goes directly to challenge for cause. I think there are some folks who do have such strong feelings. The Court has only asked a general question about whether they haven't been asked about something that might effect them. I think the Defendant is entitled to a question that goes specifically to that ground for challenge for cause, so I take exception to the Court not asking that question."

3 In addition, the trial court asked whether any member of the panel knew or "had any prior relationships, dealings, involvements or contacts" with the respondent, his attorney, the assistant state's attorney, or the witnesses, whether any member of the venire "was inclined to give more or less weight to the testimony of a police officer or other law enforcement officer than to the testimony of another witness" simply because of the officer's status as a law enforcement officer, whether any member of the venire was unable to attend the two-day trial, whether any member of the venire had been charged with or convicted of a crime, and whether any member or a close family member of that member had been a victim of crime.

4 The dissent in *Davis v. State,* like the State in this case, took no issue with the controlling principles, as explicated by the majority in that case, "parting company only on the question of whether the inquiry sought to be made ... was for the purpose of ascertaining 'the existence of cause for disqualification and for no other purpose.' " 333 Md. at 57, 633 A.2d at 882 (Bell, J. dissenting) (quoting *McGee v. State,* 219 Md. 53, 58, 146 A.2d 194, 196 (1959) (quoting *Adams v. State,* 200 Md. 133, 140, 88 A.2d 556, 559 (1952))).

  

5 In *King v. State,* 287 Md. at 539, 414 A.2d at 913, characterizing them as a significant part of the community, we reversed a ruling excluding, for cause, without further inquiry as to their ability to be fair and impartial, jurors who expressed the belief that the marijuana laws should be changed.

6 Mathea Falco, *Toward a More Effective Drug Policy,* 1994 U. Chi. Legal F. 9, 9; Eric E. Sterling, *Symposium: The Sentencing Controversy: Punishment and Policy in the War Against Drugs: The Sentencing Boomerang: Drug Prohibition Politics and Reform,* 40 Vill.L.Rev. 383, 384 (1995); Melody M. Heaps and Dr. James A. Swartz, *Toward a Rational Drug Policy: Setting New Priorites,* 1994 U. Chi. Legal F. 175; Tracey L. Meares, *Symposium: Rethinking Federal Criminal Law: Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons For Federal Criminal Law,* 1 Buff.Crim. L.R. 137 (1997).

7 Eric E. Sterling, President of the Criminal Justice Policy Foundation, states:

> "At the same time, the 'drug war' label transformed those who used drugs—ostensibly those who were supposed to be helped by drug laws—into the enemy and then into a subhuman category of 'the druggies' or 'druggers.' They ceased to be people with drug problems, chemical disorders, or brain disease, and became the 'bad guys,' as the public's hatred of drugs grew into a hatred of druggies. For the Drug Enforcement Agency (DEA), and DEA personnel who train State and local police, this hatred translated into a variety of practices: druggies and their families could be rousted, humiliated, terrorized, jailed, hurt, threatened with being shot, or even, if necessary, shot."

Sterling, *supra,* at 398–99.

8 If, however, requiring the proposed inquiry could be construed to be an expansion of the voir dire process, it certainly can not be construed to be an unreasonable one.

1 Following *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), there has been, from time to time, a call to abolish peremptory challenges. *See, e.g., id.* at 102, 106 S.Ct. at 1726, 90 L.Ed.2d 69 (Marshall, J., concurring); *Gilchrist v. State,* 97 Md.App. 55, 78, 627 A.2d 44, 55 (1993) (Wilner, J., concurring); *People v. Bolling,* 79 N.Y.2d 317, 582 N.Y.S.2d 950, 591 N.E.2d 1136, 1145–46 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective,* 64 U. Chi. L.Rev. 809 (1997). I have been unable to find any state that has followed the call.

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**HB 1079 - MSAA Unfavorable.pdf**
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Rich Gibson
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Steven I. Kroll
Coordinator

**DATE:** **March 6, 2024**

**BILL NUMBER:** **HB 1079**

**POSITION:** **Opposed**

The Maryland State's Attorneys' Association (MSAA) opposes House Bill 1079, and urges this Committee to issue an unfavorable report.

While well-intentioned, the language of HB 1079 will have unclear effects on the method juries are selected in Maryland. Primarily, MSAA is concerned with how much the language of HB 1079 leaves open to interpretation the discretion trial judges enjoy – and have always enjoyed – to control the manner in which a jury is selected. The current goal of selecting a jury that can listen to the evidence and render an unbiased decision based exclusively on the facts and the law is well-served by the existing panoply of rules governing jury selection.

As the Supreme Court of Maryland has noted, the length of time it takes to select a jury is an important consideration – judicial economy and the efficient use of resources require judges, when deciding whether to ask a particular question voir dire question, to balance the associated expenditure of time with the likelihood that the question will reveal bias. The language of HB 1079 is open to an interpretation that would require judges to focus nearly exclusively on the latter interest, greatly increasing the time required to select a jury at the risk of appellate reversal.

Judges are not currently prohibited from asking questions that would assist parties in the exercise of peremptory challenges – they are simply not required to. HB 1079 would potentially change this (or, at least, could be interpreted by an appellate court to change this). MSAA supports methods by which parties can learn more about the potential jurors, but is concerned about the possibility that HB 1079 would require courts to engage in protracted inquiry into the private lives of potential jurors, burden an already overburdened system by extending the duration of the jury selection process, and cause unnecessary appellate reversal based solely on the trial court's exercise of discretion to control inquiry encouraged by the language on lines 18 to 20 (despite the accused being afforded a constitutionally-sound jury selection process), and urges this Committee to issue an unfavorable report.

**HB 1079 - MSAA Unfavorable.pdf**
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# MARYLAND JUDICIAL COUNCIL
# LEGISLATIVE COMMITTEE

## MEMORANDUM

**TO:** House Judiciary Committee
**FROM:** Legislative Committee
Suzanne D. Pelz, Esq., Staff
410-260-1523
**RE:** House Bill 1079
Courts and Judicial Proceedings – Jury Examination
**DATE:** February 27, 2024
(3/6)

## COMMENT PAPER

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The Judiciary respects the separation of powers doctrine and acknowledges that the legislature is the policy-making branch. However, the Judiciary writes to respectfully request that this bill,be amended to form a workgroup to study the important issue of voir dire. As currently drafted, this bill would be a drastic change to well- settled law in Maryland regarding the permitted purpose of voir dire. "This Court has frequently emphasized that, unlike courts in many other jurisdictions, Maryland courts allow only 'limited voir dire' – meaning that the sole purpose of voir dire questioning is to determine whether prospective jurors should be struck for cause, not to elicit information for the exercise of peremptory strikes in the second stage of jury selection." *Kidder v. State*, 475 Md. 113, 125, 256 A.3d 829, 835 (2021). In other words, Maryland courts are currently focused solely on removing potential jurors who are unable to be fair and impartial (and thus stricken for cause.) This bill would alter that focus to make equally important the litigants' ability to gather information on jurors to exercise discretionary strikes/removal. It is important to note that there have been recent questions raised as to whether those discretionary, or peremptory strikes, foster discriminatory practices. To that end, the Rules Review Subcommittee of the Equal Justice Committee of the Judicial Council recommended the altogether elimination of peremptory challenges. While this recommendation has not been fully considered, we thought it important to bring to your attention given the importance of the concerns raised. Additionally, expanded voir dire would have an operational impact on the Judiciary in the length of time allotted for jury

selection. Because this bill would be a dramatic departure from current law, and because of the varying and important views on the topic, the Judiciary believes that the topic warrants further study with input from a wide variety of stakeholders. We would welcome inclusion in a workgroup to determine how best to consider this important topic.

cc. Hon. N. Scott Phillips
Judicial Council
Legislative Committee
Kelley O'Connor