**VOIR DIRE AND**

**PROPER AND IMPROPER VOIR DIRE QUESTIONS BY COUNSEL**

**Hello folks and welcome to another episode of the good judge-ment podcast. I’m Wade Padgett.**

*And I’m Tain Kell. Today we’re going to address a topic that is often overlooked in trials, but often becomes the worst part of the jury trial process.*

**That’s right. Of course we’re talking about VOIR DIRE!**

*Who among us hasn’t wanted to puncture their eardrums with a pencil during an especially long and draggy voir dire?*

**I know I sure have! But today we’re going to offer some tips on speeding the process and making it more efficient.**

*Yes, and more important, we’re going to offer you a host of case citations on this topic.*

**As always on the Good Judge-ment Podcast, you don’t have to try to write down the cases while you’re driving or running on the treadmill (or walking on the treadmill- yeah, we see you).**

*That’s right, you can go to the website at “goodjudgepod.com” for all the citations.*

**Let’s start off with some basics:**

Permissible for Court to require written voir dire questions in advance of trial.[[1]](#endnote-1)

“The right in criminal cases to examine each prospective juror in order to secure an impartial jury is set out in the Code at OCGA §15–12–133…which provides in part: “In the examination, the counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, any fact or circumstance indicating any inclination, leaning or bias which the juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the juror.”[[2]](#endnote-2)

However, questions which tend to test the prospective juror’s willingness to accept particular defenses are not allowed.[[3]](#endnote-3)

* 1. Where a potential juror makes a statement that may be prejudicial and could be seen to **have infected the entire jury panel**:[[4]](#endnote-4)

“In determining whether a trial court is required to excuse a jury panel for remarks made during voir dire, the inquiry is whether the remarks were inherently prejudicial and deprived [defendant] of his right to begin his trial with a jury free from even a suspicion of prejudgment or fixed opinion. If so, then the trial court's failure to excuse the panel constitutes an abuse of discretion.” *Johnson v. State*, 340 Ga. App. 429 (2017). Proper procedure for a “tainted panel” is a motion to disqualify panel and have the jury selected from a different panel. *Sharpe v. State*, 272 Ga. 684, 687-688 (2000). Any motion for mistrial made before the jury is impaneled and sworn is premature and Court should overrule it. *Smalls v. State*, 174 Ga. App. 698 (1985). However, it is permissible to ignore the “use of incorrect nomenclature” if the import of the motion is to make a “challenge to the poll.” *Herrington v. State*, 300 Ga. 149, 152 (2016). Where there is no timely objection (i.e. before the jury is impaneled or sworn), the objection may be waived. *Smith v. State*, 276 Ga. 97, 98 (2003). “Generally, dismissal of a jury panel is required when, during voir dire, a prospective juror relays information that is specific to the defendant and germane to the case for which the defendant is on trial. Dismissal is not required, however, when the statements establish only gossamer possibilities of prejudice.” *Johnson v. State*, 340 Ga. App. 429 (2017).

**On voir dire, counsel may ask jurors following questions:**

**Always permissible to ask:**[[5]](#endnote-5)

Any opinion as to which party should prevail;

The relationship or acquaintance with the defendant or counsel;

Any fact or circumstance indicating an inclination, leaning or bias respecting:

The subject-matter of the action;

Counsel (including elected DA)[[6]](#endnote-6) or

Defendant;

Any religious, social or fraternal connections.

Error not to allow in a drug case for Def. to ask if you or member of your family ever had any problems with drugs.[[7]](#endnote-7)

If a juror indicates that they have a relationship with anyone connected to the case, error to not allow counsel latitude to determine if the relationship will result in bias.[[8]](#endnote-8)

As to whether the juror has ever been represented by counsel in the case.[[9]](#endnote-9)

As to whether the juror knows or is related to a witness in the case.[[10]](#endnote-10)

Regarding any juror prejudice as to the subject matter of the suit.[[11]](#endnote-11)

Whether the juror or any close family members employed in law enforcement.[[12]](#endnote-12)

In molestation case, whether the juror has such a strong feeling about child molestation that it would impair their judgment or make it difficult to judge the case.[[13]](#endnote-13) Same where the murder victim is a child—the jury can be asked whether that fact alone will make it impossible to be fair.[[14]](#endnote-14)

Whether the race of the parties would impact the jurors’ ability to be impartial.[[15]](#endnote-15) Same with national origin or immigration status.[[16]](#endnote-16)

State may ask whether anyone on panel believes that a person who assists another in the commission of a crime should not be prosecuted.[[17]](#endnote-17)

**On voir dire, counsel may not ask jurors questions:**

**Irrelevant questions (Generally)**:

Asking jurors about books, magazines, televisions programs, bumper stickers, views on abortion;[[18]](#endnote-18)

Prior **military** service.[[19]](#endnote-19)

Asking jurors about the **employment of their children** (EXCEPT LAW ENFORCEMENT-LAW ENFORCEMENT EMPLOYMENT IS A VALID QUESTION).[[20]](#endnote-20)

Asking jurors whether they **smoked cigarettes or drank alcohol**.[[21]](#endnote-21)

Whether the jurors have ever taken a **Spanish class**.[[22]](#endnote-22)

**Prior jury service (Irrelevant):**

Whether juror who had previously served on a grand jury, petit jury or had been the foreman of any type of jury;[[23]](#endnote-23)

**Hypothetical, argumentative or require prejudgment of case:**

Framed in language which is confusing or unduly argumentative or which is general and hypothetical or which is general or technically legal.[[24]](#endnote-24)

Of a hypothetical nature regarding the evidence in the case-Court has some discretion on hypothetical questions but not if the answer requires a prejudgment of the case.[[25]](#endnote-25)

**Possible defenses (Prejudgment of case):**

Asking whether juror could believe a defense of **insanity**.[[26]](#endnote-26)

Any question which tests willingness of juror to accept defense (i.e. using a gun in **self-defense**);[[27]](#endnote-27)

Cannot ask about their **feelings about cases where the allegations involve a man beating a woman**.[[28]](#endnote-28)

Asking if jurors think it is **possible for the gun to discharge** if two people are tussling over the weapon;[[29]](#endnote-29)

Asking if jurors had **ever heard of a death being accidental**;[[30]](#endnote-30)

Defense cannot ask whether the jurors have ever heard of the phrase of **“guilt by association”** and what that phrase may mean to jurors.[[31]](#endnote-31)

**Verdict without hearing evidence (Prejudgment):**

Asking jurors what their **verdict would be without hearing any evidence**.[[32]](#endnote-32) Or, if jurors believe the **defendant is probably guilty of something.**[[33]](#endnote-33)

Asking whether juror would convict if only evidence was only one witness’ **eyewitness identification**.[[34]](#endnote-34)

Asking if they believe that the defendant might be guilty but the state has not proved this beyond reasonable doubt **would the verdict be guilty or not guilty**? “Technical legal question”[[35]](#endnote-35)

Asking if jurors would be reluctant to return not guilty verdict if there was a **reasonable doubt** as to guilt.[[36]](#endnote-36)

Asking if jury understands that they would **also be enforcing the law by voting not guilty** if the case is not proven.[[37]](#endnote-37)

**Would believe certain witnesses over others/reliability of certain evidence (Prejudgment):**

Asking if jurors believe that **testimony of police officers due more weight** than other witnesses is improper.[[38]](#endnote-38)

Asking if they believed that **the accused’s testimony is less valuable than that of the person accusing him**.[[39]](#endnote-39)

Asking jurors about the **reliability of eye witness identification**.[[40]](#endnote-40)

**Aware of notorious cases (Irrelevant):**

Asking whether the jurors are familiar with the OJ Simpson case or any other **notorious cases** (even local case).[[41]](#endnote-41)

**Presumption of innocence (Technical, Legal Question):**

That defendant is **presumed innocent** unless evidence proves beyond reasonable doubt that he is guilty;[[42]](#endnote-42)

Asking jurors if they agree that **law presumes Def’s are innocent**–are the jurors “ok” with that principle.[[43]](#endnote-43)

That sometimes **innocent men are charged with crimes**.[[44]](#endnote-44)

Asking jurors if they **believe that the defendant is innocent**.[[45]](#endnote-45)

**Defendant must have done something to be here (Technical, Legal Question/Prejudgment):**

Asking if the presence of a state prosecutor means that the **defendant must be guilty of something**;[[46]](#endnote-46)

Asking if the presence of a state prosecutor means that the **defendant must be guilty of something**;[[47]](#endnote-47)

Asking whether the **def. must have done something wrong** or he wouldn’t be here (Prejudgment of case);[[48]](#endnote-48)

Asking jurors **what weight should be given the fact that the defendant has been charged** or indicted.[[49]](#endnote-49)

**Grand Jury/Indictment (Technical, Legal Question):**

That proceedings before **grand jury are one sided**;[[50]](#endnote-50)

If juror understands that an **indictment is merely an accusation** and is no indication of guilt or innocence of accused;[[51]](#endnote-51)

**Burden of Proof (Technical, Legal Question):**

Cannot ask about their **feelings on the State’s burden of proof**;[[52]](#endnote-52)

Asking whether the jurors understand that the **State’s burden is beyond a reasonable doubt**.[[53]](#endnote-53)

**Right to remain silent (Technical, Legal Question):**

Asking if jurors would **expect someone who pleads not guilty to give some explanation**;[[54]](#endnote-54)

**Opinion of laws/justice system (Argumentative, Hypothetical, Prejudgment):**

Asking whether the criminal justice system works or if **criminals are treated too leniently**.[[55]](#endnote-55)

Asking if jurors believe that certain **drugs change people**.[[56]](#endnote-56)

As to whether, if not personally agreeing with certain laws, the **juror would attach less importance to those laws than to laws the juror agreed with**.[[57]](#endnote-57)

Questions calling for opinion **of juror on law are improper**.[[58]](#endnote-58)

**Put yourself in the position of defendant (Technical, legal question):**

Asking any question that begins by ‘**if you were ever so unfortunate as to find yourself sitting at this table...**’[[59]](#endnote-59)

Tips on how to handle jury selection:

* + - 1. Consider sending counsel a list of impermissible questions and case citations in advance of trial;
      2. Have counsel submit general questions well in advance of trial for vetting by the Court;
      3. Determine whether having the Court ask the general questions would expedite the process (it will);
      4. Consolidate repetitive or duplicate questions into one;
      5. Change counsel’s questions into acceptable and appropriate language.

*Well folks, we hope that this has been a helpful episode of The Good Judge-ment Podcast.*

**As always, please feel free to reach out to us at** [**goodjudgepod@gmail.com**](mailto:goodjudgepod@gmail.com) **with any comments, suggestions or questions.**

*And don’t forget that podcast notes at goodjudgepod.com.*

**Thanks for listening to The Good Judge-ment Podcast. I’m Wade Padgett.**

*And I’m Tain Kell. Remember: Always speak the truth…*

1. *Wilkins v. State*, 246 Ga. App. 667 (2000). [↑](#endnote-ref-1)
2. *Henderson v. State*, 251 Ga. 398, 399 (1983). [↑](#endnote-ref-2)
3. *Lester v. State,* 343 Ga. App. 618 (2017); *Stewart v. State*, 262 Ga. App. 426, 427 (2003); Meeks *v. State*, 216 Ga. App. 630, 632 (1995) citing *Henderson v. State*, 251 Ga. 398, 400 (1983). [↑](#endnote-ref-3)
4. “In determining whether a trial court is required to excuse a jury panel for remarks made during voir dire, the inquiry is whether the remarks were inherently prejudicial and deprived [defendant] of his right to begin his trial with a jury free from even a suspicion of prejudgment or fixed opinion. If so, then the trial court's failure to excuse the panel constitutes an abuse of discretion.” *Johnson v. State*, 340 Ga. App. 429 (2017). Proper procedure for a “tainted panel” is a motion to disqualify panel and have the jury selected from a different panel. *Sharpe v. State*, 272 Ga. 684, 687-688 (2000). Any motion for mistrial made before the jury is impaneled and sworn is premature and Court should overrule it. *Smalls v. State*, 174 Ga. App. 698 (1985). However, it is permissible to ignore the “use of incorrect nomenclature” if the import of the motion is to make a “challenge to the poll.” *Herrington v. State*, 300 Ga. 149, 152 (2016). Where there is no timely objection (i.e. before the jury is impaneled or sworn), the objection may be waived. *Smith v. State*, 276 Ga. 97, 98 (2003). “Generally, dismissal of a jury panel is required when, during voir dire, a prospective juror relays information that is specific to the defendant and germane to the case for which the defendant is on trial. Dismissal is not required, however, when the statements establish only gossamer possibilities of prejudice.” *Johnson v. State*, 340 Ga. App. 429 (2017). [↑](#endnote-ref-4)
5. OCGA §15-12-133. [↑](#endnote-ref-5)
6. *Cowan*, 156 Ga. App. 650 (1980) [↑](#endnote-ref-6)
7. *Henderson*, 251 Ga 398 (1983); *Craig*, 165 Ga. App. 156 (1983) [↑](#endnote-ref-7)
8. *Kim v. Walls*, 275 Ga. 177 (2002) [↑](#endnote-ref-8)
9. *Glover v. Maddox*, 100 Ga. App. 262 (1959) (civil case). *Payne v. State*, 195 Ga. App. 523 (1990); *Darden v. State*, 212 Ga. App. 345, 346 (1994). [↑](#endnote-ref-9)
10. *Hendricks*, 108 Ga. App. 259 (1963) (overruled on other grounds) [↑](#endnote-ref-10)
11. *Curtis*, 224 Ga. 870 (1968) [↑](#endnote-ref-11)
12. *Falsetta*, 158 Ga App 392 (1981); *Henderson*, 251 Ga 398 (1983) [↑](#endnote-ref-12)
13. *Meeks*, 269 Ga. App. 836 (2004) [↑](#endnote-ref-13)
14. *Ellington*, 292 Ga. 109 (2012) [↑](#endnote-ref-14)
15. *Keating*, 309 Ga. App. 804 (2011) [↑](#endnote-ref-15)
16. *Flores*, 277 Ga. App. 211 2006) [↑](#endnote-ref-16)
17. *Thomas*, 296 Ga. 485 (2015) [↑](#endnote-ref-17)
18. *Spivey*, 253 Ga. 187, 193 (1984); *Frazier*, 138 Ga. App. 640 (1976); *Alderman*, 254 Ga. 206 (1985); *Curtis* 224 Ga. 870, 871 (1968) [↑](#endnote-ref-18)
19. *Brown* 170 Ga. App. 398 (1984) [↑](#endnote-ref-19)
20. *White*, 230 Ga. 327 (1973); *Frazier*, 138 Ga. App. 640 (1976); *Falsetta*, 158 Ga. App. 392 (1981) [↑](#endnote-ref-20)
21. *Frazier*, 138 Ga. App. 640 (1976) [↑](#endnote-ref-21)
22. *Flores*, 277 Ga App. 211 (2006) [↑](#endnote-ref-22)
23. *Alderman*, 254 Ga. 206 (1985); *Frazier* 138 Ga. App. 640 (1976); *McGinnis* 135 Ga. App. 843 (1975); *Curtis* 224 Ga. 870, 871 (1968). [↑](#endnote-ref-23)
24. *Gatlin v. State*, 236 Ga. 707 (1976) [↑](#endnote-ref-24)
25. “Hypothetical voir dire questions are not *per se* improper [cits omitted] but a trial judge should be cautious in allowing counsel to propound question which ask the juror to assume that certain facts will be proven. Such questions tend to improperly influence jurors.” *Waters v. State*, 248 Ga. 355 (1981); *Walker v.* State, 294 Ga. 752, 755 (2014). USCR §10.1 provides “hypothetical questions are discouraged, but may be allowed in the discretion of the court. It is improper to ask hoe a juror would act in certain contingencies or on a certain hypothetical state of facts. No question shall be framed so as to require a response from a juror which might amount to a prejudgment of the action.” [↑](#endnote-ref-25)
26. *Waters*, 248 Ga. 355 (1981) [↑](#endnote-ref-26)
27. *Holloway*, 137 Ga. App. 124 (1975); *Stewart*, 262 Ga. App. 426 (2003); *Johnson,* 244 Ga. 295 (1979) [↑](#endnote-ref-27)
28. *Ganas*, 245 Ga. App. 645 (2000) [↑](#endnote-ref-28)
29. *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-29)
30. *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-30)
31. *Hubbard*, 274 Ga. App. 184 (2005) [↑](#endnote-ref-31)
32. *McNeal,* 228 Ga. 633, 635 (1972); *Mills*, 137 Ga. App. 305 (1976); *Montgomery*, 128 Ga. App. 116 (1973) [↑](#endnote-ref-32)
33. *Gonzales v. State*, 345 Ga. App. 334, 340-341 (2018). [↑](#endnote-ref-33)
34. *Jenkins*, 157 Ga. App. 310 (1981) [↑](#endnote-ref-34)
35. *Stack*, 234 Ga. 19 (1975) [↑](#endnote-ref-35)
36. *Chastain*, 255 Ga. 723 (1986); *Ross*, 194 Ga. App. 285 (1990) [↑](#endnote-ref-36)
37. *Hill*, 221 Ga. 65, 68 (1965); *Curtis*, 224 Ga. 870, 871; *McNeal*, 228 Ga. 633, 635-636; *Bethay*, 235 Ga 371 (1975); *Stack*, 234 Ga. 19 (1975) [↑](#endnote-ref-37)
38. *Foster*, 288 Ga. 98 (2010); *Simmons*, 282 Ga. 183 (2007); *Bennett*, 153 Ga. App. 21 (1980); *Smith*, 148 Ga App 1 (1978); *Cox*, 248 Ga 713 (1982); *Ganas*, 245 Ga. App. 645 (2000) [↑](#endnote-ref-38)
39. *Bramble*, 263 Ga. 745 (1994); *Baxter*, 254 Ga. 538 (1985) [↑](#endnote-ref-39)
40. *Jenkins*, 157 Ga App 310 (1981) [↑](#endnote-ref-40)
41. *Williams*, 259 Ga. App. 742 (2003); *Alderman*, 254 Ga. 206 (1985); *Meeks,* 216 Ga. App. 630 (1995) [↑](#endnote-ref-41)
42. *Westbrook v. State*, 242 Ga. 151 (1978) [↑](#endnote-ref-42)
43. *McCoy*, 231 Ga. App. 703 (1998); *Goughf*, 232 Ga. 178 (1974) [↑](#endnote-ref-43)
44. *Westbrook v. State*, 242 Ga. 151 (1978) [↑](#endnote-ref-44)
45. *Evans*, 222 Ga. 392; *Pinion*, 225 Ga. 36 (1969) [↑](#endnote-ref-45)
46. *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-46)
47. *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-47)
48. *Baxter*, 254 Ga. 538, 543 (1985); *Conley*, 157 Ga. App. 166 (1981); *McCoy*, 231 Ga. App.703 (1998) [↑](#endnote-ref-48)
49. *Todd*, 243 Ga. 539 (1979); *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-49)
50. *Westbrook v. State*, 242 Ga. 151 (1978) [↑](#endnote-ref-50)
51. *McNeal*, 228 Ga. 633, 636; *Lundy*, 130 Ga. App. 171 (1973) [↑](#endnote-ref-51)
52. *Ganas*, 245 Ga. App. 645 (2000) [↑](#endnote-ref-52)
53. *Stack*, 234 Ga. 19 (1975); *Mills*, 137 Ga. App. 305 (1976) [↑](#endnote-ref-53)
54. *Conley*, 157 Ga. App. 166 (1981); *Anderson*, 161 Ga. App. 816 (1982); *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-54)
55. *Reynolds*, 231 Ga. 582; *Williams*, 165 Ga. App. 69 (1983) [↑](#endnote-ref-55)
56. *Smalls*, 174 Ga. App. (1985) [↑](#endnote-ref-56)
57. *Williams*, 249 Ga. 6, 7 (1982) [↑](#endnote-ref-57)
58. *McCoy*, 231 Ga. App. 703 (1998) [↑](#endnote-ref-58)
59. *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-59)