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Regis University
School for Professional Studies Graduate Programs
Final Project/Thesis

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DECONSTRUCTING THE MOCK TRIAL

by

Harper Louden

A Creative Capstone Project Presented in Partial Fulfillment
of the Requirements for the Degree
Master of Arts
Specialization: Forensic Psychology

REGIS UNIVERSITY
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DECONSTRUCTING THE MOCK TRIAL

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Abstract

Can juror bias be predicted after a thorough voir dire is conducted by a trained forensic psychologist? Most cases involve complex laws that require jurors to be more critical and thoughtful about their decisions and ultimately their verdicts. It is not enough to observe a jury pool and assess non-verbal cues. A trained trial consultant must have the psychological background to completely predict behavior of jurors based not only on non-verbal behaviors but also on socioeconomic, racial and gender factors as well as experience. All jurors are biased, but it is the trial consultant's duty to filter through those biases and choose jurors that are most helpful to the side of the case they are representing. The bias and prejudice that exist within the minds of jurors are learned attitudes about others that affect thoughts and actions and ultimately judgments. The human condition is a vital part of understanding how jurors make decisions. Passion, intention, relationship, intellect and emotion all collide during the trial process and the juror cannot be expected to leave her own human take on the human condition at the courtroom door. The mock trial is used as a test run for trial consultants and defense attorneys to assess the how jurors will respond to the case, its themes, the defendant and even the prosecution's arguments. The mock trial allows a glimpse into the jury deliberation room and into the jurors' minds. A good forensic psychologist focused on choosing a jury will filter through the demographic data, non-verbal cues and other communications to select the most favorable jury for her client.

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Chapter One

INTRODUCTION

Deconstructing the Mock Trial

Choosing a jury that will be beneficial to the defendant requires a psychological understanding of potential juror types as well as an overall knowledge of how attitudes and beliefs guide decisions during the trial and deliberations. An overarching aspect of jury selection also includes a thorough understanding of the client's case, including witness testimony, evidence, themes and problems. When deconstructing the mock jury and pretrial process, one must look at what inspires jurors to make decisions and how their own stories overlay onto the presentation and affect the outcome (Waites, 2003). Most jurors have formed an opinion about the case before opening statements are completed (Waites, 2003). However, the work of jury consulting begins long before the first words are uttered in a courtroom.

The mock trial process begins with a conference with the client, followed by witness preparation sessions. Second, the case is examined by the consultant to gain a complete understanding of themes, problems and arguments. Next, the jurors are selected and called to a mock jury room to observe mock opening statements from both the prosecution and the defense and to listen to witness and defense testimony on direct and cross examination. The jurors then convene into deliberations and the consultant takes input and feedback, looking at issues of credibility of lawyers, witnesses and the defendant, as well as overall themes and potential problems. The data are then correlated with demographic information garnered from jurors and a report is generated for the

client. The final stages of the mock jury process involve “voir dire” or questioning of potential jurors in the courtroom setting for placement on the actual jury. Here the consultant uses information compiled from the mock session to pick jurors who should be favorable to their client. After the trial the jury consultant issues a report to the client counsel based on post-trial information gathered from jurors after deliberations and a verdict. Jurors have the power in the process and it is the job of the jury consultant to harness that power in a way that is beneficial to one side or the other (Waites, 2003).

The goal of jury selection is to choose a group that will be the most prone to be receptive to your argument and side of the story (Kassin & Wrightsman, 1988). The jury is asked to judge the themes, case story, attorney presentation style and witness effectiveness (Waites, 2003). But the jury consultant’s role during jury selection is to observe juror reactions to questions asked during voir dire and to interpret their answers. The jury consultant aims to understand the mental processes of the jurors and tries to deconstruct how they interpret information and make inferences that will affect deliberations and a final verdict (Waites, 2003). Jurors conjure their own story based on opening statements and evidence and testimony presented. They take that story and try to match it to verdict options given by the judge before deliberations. If the consultant has constructed a well-seated jury, that person will know going into deliberations how the knowledge, experiences, opinions and values will influence how the story is played out in the jury room (Frederick, 2005).

Chapter Two

REVIEW OF LITERATURE

Mock jurors help to predict important issues of the case and will help distill the meanings so they can be easily understood and communicated (Waites, 2003). The jurors give feedback on how the case could be more persuasive, what could be emphasized, what issues were the most compelling, what should be eliminated, how witnesses could be more effective and how exhibits could be more useful (Waites, 2003). It is the jury consultant's job to sift through the input and interpret the information to benefit the client. The jury consultant will ultimately decide who is an ideal juror for the side of the case they are hired to represent. After the mock deliberations, it is the jury consultant's job to distill the feedback from jurors into discernable data which clarifies problems as well as strengths and weaknesses of the case as it was presented.

Dynamics of the jury as a group are also important for the jury consultant to observe and it is critical to identify key decision-makers within the group (Waites, 2003). The decisions to be made by the jury consultant after the observed mock voir dire, trial and deliberations include who would be an ideal juror, who should not be seated and who would be acceptable but not preferable (Waites, 2003). Acquiring an in-depth knowledge of the case including evidence, witness and defendant testimony is a primary step in the jury selection process (Frederick, 2005). The jury consultant must first gather as much information as possible to determine what is needed from jurors and what they are being asked to decide (Frederick, 2005). This pre-trial information-gathering phase of jury selection involves question and strategy preparation and includes an overall case analysis identifying strengths and weaknesses, themes and potential juror characteristics

(Frederick, 2005). When identifying strengths and weaknesses of a case, the consultant must examine the law, the juror instructions before deliberations, evidence, arguments on both sides and witness and suspect testimony (Frederick, 2005). It is also important during this initial preparation phase to determine what effect any pre-trial publicity has had on the jury pool and how those effects could be mitigated (Frederick, 2005). While getting background on a case and establishing questions to be used during both mock and actual voir dire, the consultant must have an understanding of the juror's life experiences, reference points and education (Frederick, 2005). Jurors are constantly visualizing and imagining the circumstances of the case and interpreting them based on their own attitudes, beliefs and life experiences (Waites, 2003). The constant dissemination of information requires a detailed understanding of the case in its entirety to be able to persuade the juror to your side's way of thinking.

Research suggests that jurors have a judgment about the case formed in their mind before opening statements are done (Waites, 2003). This underscores the importance of establishing a strong, persuasive message that speaks to the individual jurors and their own beliefs (Waites, 2003). The argument in the opening statement is a story, created by the lawyers, that asks for buy in from the juror. The lawyer is selling something and people will only buy it if it appeals to their interest and intellect (Waites, 2003). The role of the jury consultant is to observe the jurors during opening statements to better understand how the argument is being perceived and if the lawyer is communicating the message in the most effective way (Waites, 2003). The opening statements will be used by jurors to find central issues and will allow them to then systematically analyze the testimony and evidence in the case (Waites, 2003). The message must contain familiar

analogies so that the jury associates the concepts to things within their own personal realms of understanding (Waites, 2003). It is also central to have repetition of ideas and themes within the opening statements to place the message into jurors' both long-term and short-term memories for the most efficient retrieval (Waites, 2003).

The lawyers must also present as credible to the jurors if they are to be believed. Juror trust is a key factor in persuading the jury to one side's way of thinking. This persuasion is done through the use of a powerful message and the creation of mental pictures for the jury, but it is also accomplished through the lawyer's presentation of himself as trustworthy and one who is in line with the juror's moral standings (Waites, 2003). Lawyers must layout a statement of contention within their opening statement that offers a basic case summary along with assertions that will be made at trial. It is also important to respond to questions or issues that will be put forth by the opposition.

Lawyers and jury consultants need to overcome juror anxiety that is inherent in the jury process (Frederick, 2005). These obstacles include the formality of the courtroom or mock jury setting, the subordinate position felt by the jurors, the examination during voir dire, the juror's own apprehension of being judged by others and the failure of the juror to recognize her own bias or admit that bias exists (Frederick, 2005). To combat these obstacles, lawyers and jury consultants must create a message and environment during voir dire and opening statements that is conversational, sincere, warm, friendly, supportive and empathetic – an environment that capitalizes on the similarities between themselves and the jurors (Frederick, 2005). Jurors show a tendency to identify with someone who presents as genuine and who is willing to respect the juror as an individual and connect with the juror on a one-to-one basis (Frederick, 2005). The goals of voir dire

are to gather information, establish rapport, educate the jurors on the case and the specific laws as they apply and, finally, to persuade (Frederick, 2005).

Chapter Three

METHOD

The pre-trial information-gathering phase involves the consultant reading through the case file and contacting any witnesses for the defense that require additional interviewing. After the court file has been exhausted, the jury consultant meets with the client to discuss problems with credibility or presentation during testimony. Most jury consultants will have a psychology background, which is useful in helping with behavioral issues that come across on the stand as deceit.

During preparation of the mock trial of Aaron Hunt, a man charged with indecent exposure, I as the jury consultant was asked to help the defendant modify behaviors including strange head gestures, voice inflections and nervous eye movement (C. Feldmann, personal communication, October 2005). Lawyers for Hunt were concerned that their client's presentation would concern the jury and cause them to dismiss him as not credible (C.Feldmann, personal communication, October 2005). The defendant's mannerisms were observed and several gestures and verbal cues were flagged as being signs to a jury that the defendant might be fabricating his story. Hunt exhibited certain behaviors, both verbal and non-verbal, that could be interpreted by a jury as deceitful. These behaviors included facial expressions, head gestures, posture and hand placement. He also offered detailed answers to questions and fragmented information that could be read by a jury as fabrication. Hunt presented as fairly comfortable testifying but tended to fill the silences with fragmented details not directly related to the question posed.

Certain verbal and non verbal cues given off by the witness or defendant while testifying can be read by jurors as deceitful. A person who is fabricating details will often

take time in choosing their words so they do not slip up or give up more information than is necessary, but the more details they give, the more likely they are to be lying (Yeschke, 2002). According to Fleisher and Gordon (2001), suspects who lie will attempt to answer the question but will leave out relevant information and skirt around the issue, taking a path of least detection. Through an observed analysis of the unconscious non-verbal behaviors of the person on the witness stand, the juror may decide whether or not the person is being truthful. These non-verbal behaviors include general fidgeting; arms, hands, legs and feet moving, arms/legs crossing and uncrossing, constant eye blinks, touching face, sitting up/slouching (Yeschke, 2002). Hunt was open to modifying his behaviors that presented as deceitful and the mock jurors reported that they found him to be credible during the mock direct examination and cross-examination.

Figure 1. Hunt case timeline. The first step in the mock trial process is the discussion of trial preparation strategies with the lead defense attorney. The next step is to review the client file and meet with the client. During this meeting the consultant prepares the client for the mock trial, explaining how observation of a mock direct examination session offers the trial consultant a glimpse into possible issues of credibility and performance on the stand. The mock trial is then set up. To do this the consultant contacts potential jurors from a pool of volunteers that represents a cross-section of genders, ages and occupations. The jurors are chosen from the voter registration rolls which are obtained from the clerk and recorder's office. Jurors are chosen at random and are then contacted by phone. They are then instructed as to the date and time of the event and a description of their task. It often takes many more than phone calls to find jurors that agree to participate in the mock session.

The mock trial is best held in a neutral setting in a room that simulates a courtroom with a side for the prosecution and the defense with the defendant seated at the front of the room for testimony and the jurors seated to the side.

The attorney then conducts a direct examination of the witness in front of the jury. This questioning is done from the defense perspective. A second attorney then comes in to the session and conducts a mock cross-examination. This process offers the prosecution perspective to the case and allows for greater balance when considering the overall case. The mock trial is staged and recorded. The consultant then reviews the film/recording and makes note of any behaviors or verbal patterns that might negatively affect the jury. After this the consultant will counsel the client on how to improve his or

her presence on the stand, in the courtroom, and during testimony. This might include what to do or not to do with hands and feet, facial expressions as well as figures of speech to avoid.

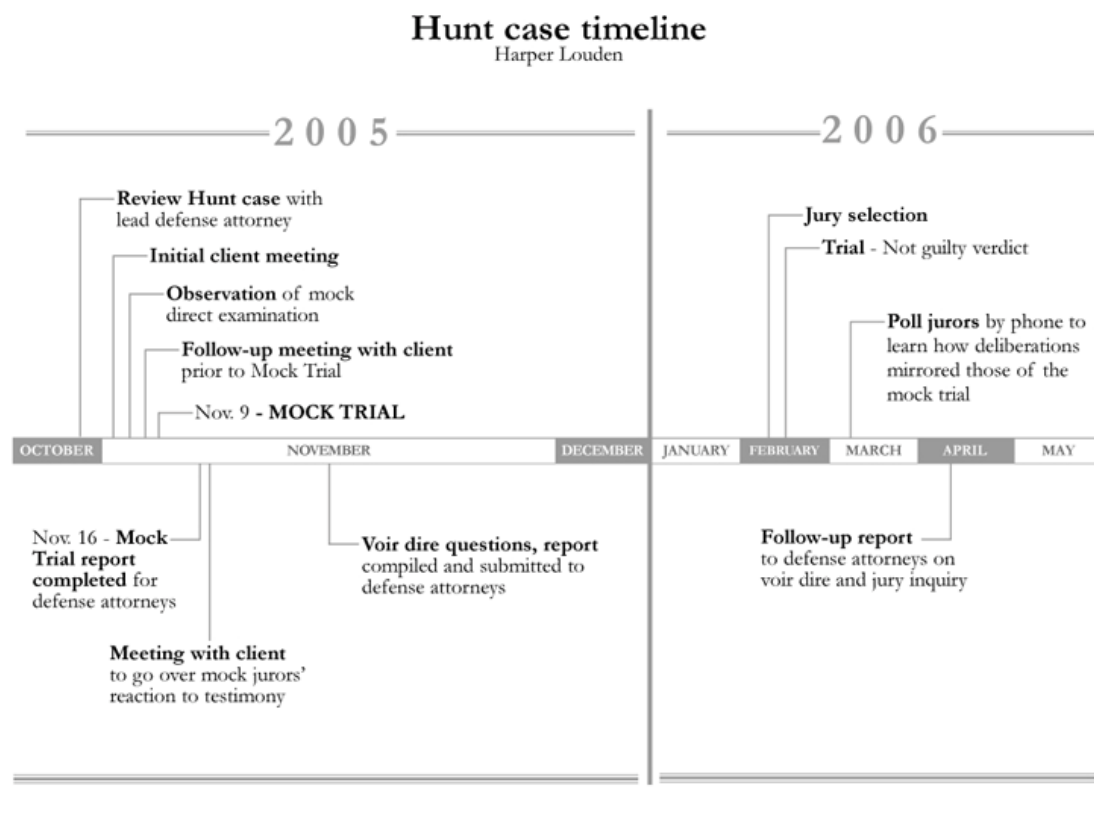
The mock trial/research group helps to determine who will be ideal jurors to seat during the actual trial and which jurors to avoid. It also helped us understand how to make the testimony and case more effective by understanding where strengths and weaknesses lie. After the session, the trial consultant can better understand what pieces of evidence will be most important to a jury and what aspects make the case most compelling and persuasive. A study of the decision-making processes observed during the mock trial allows the consultant to identify case themes and problems.

The next step is to outline questions for the attorney who will conduct voir dire. After voir dire is completed by both the defense and the prosecution, jury selection is conducted with each side taking turns dismissing jurors they feel are not favorable to their side. After the trial and verdict, the trial consultant can pool the jurors to gain feedback on decision making. This process helps the consultant evaluate effectiveness for future cases. At the end of the process a report is prepared for the law firm.

Thesis Project

For this thesis, On November 9, 2005, six jurors observed the 45-minute mock trial session for Aaron Hunt at the Feldmann, Nagel and Oliphant law offices. Opening statements were presented and the jurors then listened to mock direct and cross-examination of the defendant. The group then participated in a guided discussion to highlight weaknesses and strengths of the case and credibility issues with regard to defendant testimony.

I then counseled Aaron Hunt after the mock questioning as to how he could improve his presence and overall testimony through modified behaviors. I instructed him on how to alter both verbal and non-verbal cues so that jurors would not make judgments based on observations of those behaviors. I performed a follow-up with the defendant just prior to the mock trial and also prepared a subsequent report for the law firm.



On November 2, 2005, I met with Hunt to discuss trial preparation strategies. I also observed a mock direct examination session. During the session, Hunt exhibited certain behaviors, both verbal and non-verbal, that could be read by a jury as deceitful. These behaviors included facial expressions, head gestures, posture and hand placement.

He also offered detailed answers to questions and fragmented information that could be read by a jury as fabrication. We talked about how to change these behaviors and what specific exercises could be used to present in a more direct, honest manner to a jury. Hunt presented as fairly comfortable testifying but tended to fill the silences with fragmented details not directly related to the question posed.

I counseled Hunt after the mock questioning in terms of better use of non-verbal cues to illustrate to the jury honesty. I also instructed him on how to constrain both verbal and non-verbal cues that could be construed as deceit by a jury.

Hunt expressed a desire to work toward an improved presentation to jurors and accepted my critique of his performance on the stand. He committed to working on improved verbal and non-verbal communication by using the tools and exercises discussed during our session.

After meeting with the client and assessing and addressing behavioral issues that may impact how jurors view his testimony and overall credibility on the stand, the focus shifts to seating a jury for the mock session and focus group. The jurors in a mock trial are chosen at random, similar to how jurors are pooled for an actual trial. Some trial consultants purchase a voter registration list from the county clerk's office and choose jurors at random from that list. Other scenarios for soliciting jurors involve running an ad or posting flyers asking for participation. However, this may lead to bias toward one side of the case as the jurors may feel they have been hired by a specific side and may feel an alliance, however subconsciously to that side.

In the Hunt case, six jurors, four women and two men, were contacted and chosen to sit on the panel. The jurors were not paid for their time but the session did take

place at the defense law firm which could have affected their bias. During the mock trial, the focus is less on choosing jurors than it is on gaining insight into what particular jurors think of the case, specifically and in general. Jurors want to make decisions that feel good to them and the lawyers doing the persuading are required to understand what inspires them and their needs (Waites, 2003). Jurors, who agree with one side's moral interpretation of the case as presented by the lawyer, will be swayed toward that camp (Waites, 2003).

Before the mock trial begins with opening statements, the mock prosecutor conducts a short voir dire of the mock jurors in the Hunt case. Translated into English, Voir dire means "speak the truth," but for practical purposes it means a preliminary examination to determine the competency of a witness or juror. We distributed a 50-question jury panel feedback sheet which allowed us to collect demographic data (see Appendix A). But during voir dire the prosecutor asked direct questions to individual jurors that were to be answered in front of the remaining people on the panel. He asked each juror background questions about how they interpret different events and what certain issues meant specifically to them. This voir dire process helps lawyers and jury consultants to understand how themes will be perceived, how decisions will be made, what the attitudes and beliefs are of the jurors and how the case, evidence, testimony and lawyer styles will be interpreted (Waites, 2003). When a juror answered an open-ended question, more information about that juror was revealed and could be used in enhancing the jury consultant's ability to select a jury that will be beneficial to her side's case. Each time a juror reveals an issue of concern during voir dire that opens up a new avenue for

investigation and uncovers potentially helpful information with regard to jury selection (Frederick, 2005).

The jury was composed of five women and two men. The females reported ages of 43, 56, 25 and 28 and the men were 46 years old and 56 years old. Only the 28-year-old female was unmarried, the rest were married. Both males had children while, of the females, only the 56-year-old female has children. All jurors except the 25-year-old female graduated college; she had three and half years of college education. All of the jurors were born outside of the State of Colorado. Two had no religious preference. The following table, Table 1, outlines demographic and personal data collected for each juror in the Hunt mock trial.

Figure 2. Hunt mock trial jury demographics and relevant background information.

- **Juror #1 – 56-year-old Male:** Worked thirty years ago as a reporter covering crime and working/getting to know police; followed the O.J. Simpson trial; thinks youths are perceived to commit more crimes; thinks law enforcement would solve more crimes if they learned to “wait it out.”
- **Juror #2 – 25-year-old Female:** Spouse arrested for DUI and possession of marijuana; had positive experience with Texas police related to a “peeping Tom” who was apprehended by officers; she was cited for shoplifting 8 years ago; she was also a victim in a hit and run accident; she has taken firearms classes and owns her own gun.
- **Juror #3 – 28-year-old Female:** Has had positive experiences with law enforcement; believes law enforcement has a bad reputation and that punishments don’t fit the crimes (especially the three strikes law); also thinks that the criminal justice system has abandoned most rehabilitative solutions; believes that poverty, hopelessness and neglect by high risk populations are the underlying causes of crime today; says law enforcement should be more accountable, build a sense of community and that community policing should be more prominent.
- **Juror #4 – 49-year-old Male:** Says law enforcement has been helpful in handling employment issues, job site security, thefts and traffic accidents; has been the victim of theft by an employee but has since put into practice controls and pre-hiring checks; believes family structure and parental responsibility are problems with law and order today; says he has taken steps to protect himself and his family; this juror had a potential conflict citing prior contact with the defendant.

- **Juror #4 – 49-year-old Male:** Says law enforcement has been helpful in handling employment issues, job site security, thefts and traffic accidents; has been the victim of theft by an employee but has since put into practice controls and pre-hiring checks; believes family structure and parental responsibility are problems with law and order today; says he has taken steps to protect himself and his family; this juror had a potential conflict citing prior contact with the defendant.
 - **Juror #5 – 56-year-old Female:** Had parents home robbed 8 years ago; has never had a positive experience with law enforcement; son has been arrested for DUI; thinks law officers are overzealous and jump to conclusions; she thinks the focus should be on large issues and not the smaller cases.
 - **Juror #6 – 43-year-old Female:** Has been arrested for vehicular assault and served 54 days in Routt County jail; feels honesty, integrity and truth are problems with law enforcement today; feels understanding, love and commitment would help crime problem; thinks law enforcement both helps and hurts the public.
-

Jurors are to be observed at all times and the jury consultant's job is to watch carefully for consistency in behaviors to accurately evaluate patterns within individual jurors (Frederick, 2005). During voir dire jurors will be asked specific questions in attempts to uncover bias and slants based on general attitudes, beliefs and life experiences. But it is the non-verbal or unconscious verbal cues that are crucial to understanding the true nature of a juror and it is the job of the jury consultant to monitor the jury pool for these behaviors to aid in selection or dismissal from service. Kinesics, or body motions, is a straightforward way to establish comfort levels for jurors and the way the juror moves in the jury box also gives insight into whether they are answering a question honestly (Frederick, 2005). Paralinguistic, or non-content aspects of speech, are another way for jury consultants to evaluate if jurors are anxious, comfortable, telling the truth or lying (Frederick, 2005). Micro expressions are subconscious subtle movements that may go undetected unless they are being targeted by the observer (Frederick, 2005). These micro expressions can expose disbelief in what the lawyer is saying, boredom in

the overall process and even when the juror is not being truthful in an answer (Frederick, 2005). Psychological distance or closeness can be determined through observing the juror's body movements and facial expressions and by actively listening for sublevel aspects of speech which become apparent through word choices (Frederick, 2005). Word choices such as "I think" and "I believe" and "kind of" are powerless speech indicators that show the juror is hedging under the pressure of the voir dire questioning and may not be a strong decision-maker during deliberations (Frederick, 2005). The jury consultant's role is to consistently and properly evaluate each juror based on an observed pattern of behaviors (Frederick, 2005). This is accomplished through careful, constant observation and by understanding what behaviors to look for and what those behaviors mean. The first step is to establish a baseline for all the potential jurors that is measured during a non-stressful time. That baseline then can be used by the jury consultant throughout the mock voir dire and trial and into actual voir dire and trial to determine juror efficacy and how the individual will affect the outcome of the case (Frederick 2005).

Chapter Four

RESULTS

After opening statements in the Hunt case, the mock jurors agreed that the lawyers presented as credible and although they found the mock prosecutor to be a bit confusing at times, they decided that both sides were credible and both put forth reasonable and persuasive arguments. The jurors were impressed by the lawyers and their presentations and felt both sides were equally persuasive with their messages and case summaries. During opening statements, jurors 1, 2, 5 and 6 maintained eye contact with the lawyers and jurors 4, 3 and 5 took notes. Juror 5 showed uncomfortable body language and had her arms crossed during much of the trial. Juror 4 was tense and had his hands clasped for much of the session. Juror 2 shook her head when the themes of the case were revealed and reacted to eye gestures made by the mock prosecutor.

After opening statements concluded, the defendant took the stand for mock direct examination and cross-examination. Again during this phase of the session, all jurors were observed for subconscious and conscious expressions both verbal and non-verbal cues that would help understand their position with regard to the case and the defendant's testimony. The jury consultant utilizes the established baselines from non-threatening questioning during voir dire to determine the jurors' levels of apprehension and comfort during the remaining phases of the trial (Frederick, 2005).

When the direct and cross-examinations are done, the jury and jury consultant then convene into mock deliberations or a focus group setting. It is during this portion of the mock trial that the jury consultant begins to combine the observation with active listening and open-ended questioning (Waites, 2003). When analyzing the case through

the eyes of the mock jury, it is important to ask about strengths and weaknesses of the case themes, credibility issues, evidence presentation and overall persuasiveness and effectiveness (Waites, 2003). Research gained from the mock trial helps determine what pieces of evidence are most important and what testimony is most effective (Waites, 2003). The mock jury deliberation forum also allows consultants to ask quantitative questions such as: If a certain piece of evidence is not presented or testimony is not given that jurors would have liked to have seen or heard, which side does it hurt not to have that information? It is equally as important to identify when missing information will be helpful and when it will be hurtful and to determine who will benefit from the lack of available information.

At the close of the mock trial, a report is generated by the jury consultant that includes demographic data of the jurors and relevant background information to be used during voir dire at the actual trial (Appendix A). The report also includes areas to be worked on before trial that were revealed during the mock session. The report covers perceived themes, problems, weaknesses, strengths, credibility issues and persuasiveness of the arguments as perceived by the jurors. The information is then sifted through by the jury consultant to determine what should be changed in the case presentation and which types of jurors would be ideal for placement on the jury and who should be excused.

Trial in the Hunt case was scheduled for February 2006. Jury selection took two hours and was completed using a series of voir dire questions born out of the mock trial conducted in November. A three-day jury trial was conducted in Routt County Court and the jury returned a verdict of not guilty after a short one-hour deliberation. A poll of the jurors on the case was conducted and this exercise offered the trial consultant a glimpse

into the deliberation room. This glimpse was compared to the deliberations conducted during the mock trial in the Hunt case to determine similarities.

Chapter five

DISCUSSION

The mock trial/research group helped to determine who would be ideal jurors to seat during the actual trial and which jurors to avoid. It also helped us understand how to make the testimony and case more effective by understanding where strengths and weaknesses lay. The defense team came to a better understanding of what pieces of evidence would be most important to a jury and what made the case most compelling and persuasive. The credibility of witnesses was assessed, which allows for that to be addressed before trial. Key problems were also identified by decision-makers. Dynamics of the jurors both as a group and as individuals were observed and noted for future use when seating an actual jury and specific questions for use during voir dire were formalized. As a result of this process, the consultant came to better understand some of the questions actual jurors may have during deliberations of the case and how those questions could be better addressed during trial to increase the chance of a successful outcome. Through a study of the decision-making processes observed during this mock trial, themes and problems of the case were identified and the essence was distilled into manageable categories. With the information gathered through the mock trial/research group, the jury consultant and legal team could have effectively communicated the message and case story to a receptive and known jury.

During selection, jury consultants are looking for honest feedback from jurors and the ideal way to receive that is by establishing rapport (Frederick, 2005). Rapport is nurtured when respect, individuation and comfort are offered (Frederick, 2005). Once a rapport is established the jury consultant and lawyers have a better chance of collecting

genuine data to be used to select their ideal jury. After the communication channels are established and a respectful and honest rapport is created, questions pertaining to education levels, understanding of the law, basic attitudes, beliefs and biases can be explored. These explorations can lead to the revelation of existing bias which extends not only to the juror but also to those assessing the jury pool.

A trap that those choosing a juror must be wary of is that of stereotyping people based on first impressions (Frederick, 2005). It is important to know background information about potential jurors, including race, gender, occupation, education and organizational memberships, but those surveying the jurors based on this information do a disservice in going no further with voir dire before making dismissals (Frederick, 2005). Peremptory challenges are common in voir dire and each side is allowed to challenge for cause or not for cause and ask for individuals to be excused (Hastie, 1993).

It is important to assimilate what the juror is saying and if they are giving a truthful answer or if they are giving a socially correct answer. Some jurors will succumb to pressure under voir dire questioning and give socially desirable responses, or responses that are not true opinions but portray what the juror thinks the lawyer wants to hear (Frederick, 2005). The “similarity leads to selection” theory submitted by Wigley (1999) suggests that lawyers will choose jurors similar to themselves. There is also the theory that positive impressions lead to selection and negative impressions lead to rejection and that jurors with a positive self image will be seated and those with a negative self image will be excused (Wigley, 1999). Under this scenario, those jurors who do not expose themselves as positive may be viewed as either negative or unknowns

and will probably get excused from service. These theories tie into the stereotype category and could lead to a juror being excused based in misinformation and bias.

Most jurors have made a decision about their verdict before deliberation ever begins (Hastie, 1993). It is the job of the jury consultant to guide that decision through a thought-out psychological study of subconscious and conscious verbal and non-verbal behaviors of all potential jurors at all times. Jury consultants must understand what drives jurors and what psychological underpinnings will guide their decisions during deliberations. It is essential that during jury selection the consultant observe juror reactions to statements, questions and the formality of the setting and the idea that their freedom is being challenged (Frederick, 2005). Those jurors who feel they are being manipulated by lawyers during jury selection will retaliate and it is the jury consultant's role to foresee that behavior and remove it from hurting the case and the client (Frederick, 2005). Jurors will feel empathetic to lawyers who present as sincere and provide limited, non-controversial information about themselves as a way to reach out (Frederick, 2005). It is essential during jury selection to persuade the group before they know they are being persuaded and to listen and identify with the group and capitalize on perceived similarities (Frederick, 2005).

Jurors want to make decisions that feel good to them and they want to feel as if they have done the right thing (Waites, 2003). The role of the lawyer is to engage the jury with a persuasive case summary and argument and with meaningful testimony and evidence. The role of the jury consultant during jury selection is to mentally frame an ideal jury and, specifically, ideal jurors. The consultant does this during jury selection by gathering information, assimilating that data, identifying decision-makers and

understanding how attitudes, beliefs and life experiences affect how jurors will deliberate. The jury selection process is also fraught with deception, dishonesty and bias and it is the jury consultant's moral requirement to see through the stereotypes and choose a jury based on facts and empirical data. It is also the goal of the jury consultant to combine the statistical information gathered during jury selection with psychological schematic summaries of individuals and seat the ideal jury for the specific case.

Issues of credibility of the defendant exist with regard to testimony about the friend documented in the police report filed on the day of the incident. This issue needs to be clarified before a jury will accept the story. Other issues needing attention with regard to the defendant's testimony are repetitious or odd word choices, confusing statements with too much detail and the sense that he is not being real. Overall the defendant was deemed credible by the jurors citing good eye contact and a relaxed demeanor. They were not affected by mannerisms displayed by the defendant while on the stand.

The jurors were impressed by the lawyers and their presentations. They were receptive to the characterization of the victim as a "drama queen" and felt that impugning her would cast doubt on the entire incident.

The group thought that the prosecution case was weak and that this seemed like a situation where the defendant was simply peeking through the blinds because he heard a noise and that he didn't mean to be seen.

The mock trial/research group helped us determine who will be ideal jurors to seat during the actual trial and which jurors to avoid. It also helped us understand how to make the testimony and case more effective by understanding where strengths and weaknesses lie. We now understand what pieces of evidence will be most important to a

jury and what makes the case most compelling and persuasive. The credibility of witnesses was assessed and that issue can be tended to before trial now that key problems have been identified by decision makers. The defendant was determined to be effective in this case and important issues and questions were highlighted by the group. Dynamics of the jurors both as a group and as individuals were observed and noted for future use when seating an actual jury and specific questions for use during voir dire were formalized. As a result of this process we now understand some of the questions actual jurors may have during deliberations of this case and those questions can now be addressed during trial to increase the chance of a successful outcome. Through a study of the decision-making processes observed during this mock trial, we have identified themes and problems of the case and the essence has been distilled into manageable categories. This case can be effectively communicated to a receptive and known jury by utilizing data collected during the mock trial/research group.

FINALTHOUGHTS

The mock trial process is an ideal tool for trial consultants and defense attorneys to use in a multitude of ways. The defense team is afforded the opportunity to see how their client will perform on the stand while testifying, in front of a group of people who will be judging him. The mock trial also allows the trial consultant to observe the jurors for reactions to the defendant, other witnesses, lawyers, evidence and overall case themes. The lawyers are also given a chance to try out lines of argument on mock jurors to determine if a line of questioning worked well or was offensive to jurors or even if the overall case themes worked in the setting of the courtroom.

Demographic data collected from jurors on a standard questionnaire are an important component of understanding the jury pool and are used to help make selections. However, the forensic psychologist focused on jury selection must also be able to read the jurors' minds by pinpointing specific beliefs, attitudes and biases. These can be weeded out by the experts through an extensive voir dire question-and-answer session. But also with the aid of a mock trial experience on each case, the trial consultant can overlay the information gathered during the mock session and apply to the actual jury pool during the trial process. Lessons learned from watching and questioning the mock jurors have a direct correlation to how the actual jury should be chosen and what choices individuals will make. Analyzing a mock trial, how it deconstructs the case, its themes, testimony and evidence is a vital tool that is used by trained forensic psychologists with an emphasis on trial consulting. The session allows the expert to focus on the psychological underpinnings of jury bias and prejudice and allows the consultant to choose the best possible jurors from the pool for any particular case.

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APPENDICES

Mock Trial Report

On November 9, 2005 six jurors observed a 45-minute mock trial session at the Feldmann, Nagel and Oliphant law offices. Opening statements were presented and the jurors then listened to mock direct and cross-examination of Aaron Hunt. The group then participated in a guided discussion to highlight weaknesses and strengths of the case and credibility issues with regard to defendant testimony. Had the juror responses been more disparate we would have created a break out box to graphically illustrate the differences in opinions person-by-person. A statistical analysis would have been warranted in that case to determine which particular juror responded to what evidence/testimony in what ways and why, based on demographic data, individualized attitudes and beliefs and distinct mental processes.

Demographics and Relevant Backgrounds of the Mock Jury

The jury was composed of five women and two men. The females reported ages of 43, 56, 25 and 28 and the men were 46 years old and 56 years old. Only the 28-year-old female was unmarried, the rest were married and both males have children while of the females only the 56-year-old female has children. All jurors except the 25-year-old female have graduated college, she has had three and half years of college education. All of the jurors were born outside of the state of Colorado. Two had no religious preference.

- **Juror #1 - 56-year-old Male:** worked thirty years ago as a reporter covering crime and working/getting to know police; followed the O.J.

Simpson trial; thinks youths are perceived to commit more crimes; thinks law enforcement would solve more crimes if they learned to “wait it out.”

- **Juror #2 - 25-year-old Female:** spouse arrested for DUI and possession of marijuana; had positive experience with Texas police related to a “peeping Tom” who was apprehended by officers; she was cited for shoplifting 8 years ago; she was also a victim in a hit and run accident; she has taken firearms classes and owns her own gun.
- **Juror #3 - 28-year-old Female:** has had positive experiences with law enforcement; believes law enforcement has a bad reputation and that punishments don’t fit the crimes (especially the three strikes law); also thinks that the criminal justice system has abandoned most rehabilitative solutions; believes that poverty, hopelessness and neglect by high risk populations are the underlying causes of crime today; says law enforcement should be more accountable, build a sense of community and that community policing should be more prominent.
- **Juror #4 - 49-year-old Male:** says law enforcement has been helpful in handling employment issues, job site security, thefts and traffic accidents; has been the victim of theft by an employee but has since put into practice controls and pre-hiring checks; believes family structure and parental responsibility are problems with law and order today; says he has taken steps to protect himself and his family; this juror had a potential conflict citing prior contact with the defendant.
- **Juror #4 - 49-year-old Male:** says law enforcement has been helpful in handling employment issues, job site security, thefts and traffic

accidents; has been the victim of theft by an employee but has since put into practice controls and pre-hiring checks; believes family structure and parental responsibility are problems with law and order today; says he has taken steps to protect himself and his family; this juror had a potential conflict citing prior contact with the defendant.

- **Juror #5 - 56-year-old Female:** parents' home robbed 8 years ago; has never had a positive experience with law enforcement; son has been arrested for DUI; thinks law officers are over zealous and jump to conclusions; she thinks the focus should be on larger issues and not the smaller cases.

- **Juror #6 - 43-year-old Female:** has been arrested for vehicular assault and served 54 days in Routt County jail; feels honesty, integrity and truth are problems with law enforcement today; feels understanding, love and commitment would help crime problem; thinks law enforcement both helps and hurts the public.

Themes

State of Arousal - Jurors decided that turning points in the case would be a determination of the state of arousal of the defendant at the time of the alleged incident indicating intent. They believe that if a person is committing a crime to derive sexual pleasure then in a man that would be apparent through his physical state of arousal. Male and female jurors agreed and were vociferous on this point. They questioned why would

he expose himself if not for sexual pleasure, and if that was the intent then surely arousal would be a factor in weighing guilt or innocence.

Victim's Character - The character of the victim was a central theme in deciding guilt or innocence in this case and the jury wanted more information about her. During discussion the group recommended more proof from the defense that Hillary is in fact a “drama queen” as was suggested during opening statements. The jury wanted evidence to back up that claim. They also want to know exactly what she says she saw in the window, did she see his face, was he in shadow or lit up, and how long was he exposed to her in her estimation?

Universal Behavior - An overall theme of the case was the universality of the act that is in this instance charged as a misdemeanor. All of the jurors admitted to getting ready for a shower and either forgetting something in another room or hearing a noise and walking through their house naked. Whether you are getting a towel or a bar of soap, whether blinds are open or not and even if you stop to look out the window, all of the jurors agreed they had participated in the same behavior that is now being charged as a crime in this case.

Only juror #4 (49-year-old Male) found the defendant to be not credible at all.

NOTE: It must be understood that the mock jurors in this simulation understood that they were being of service to the defense in this case. Because of that, it can be assumed that individually and collectively they felt some level of affinity for the defense position, and developed themes with this relationship as a background influence.

Potential Problems

Defendant Credibility

Which Blinds? - All of the jurors expressed concerns that the defendant seemed to change his testimony with regard to which blinds he looked out at the time of the alleged incident and decided a diagram of the layout of the windows and apartment would be helpful in determining truthful testimony.

Jurors were concerned when the defendant answered questions with “I was tired” or “It was a long time ago.” They also did not like the use of the term “I was contemplating a shower” and thought that word choice was contrived.

The primary concern for jurors and what contaminated his credibility was testimony about the friend that was alluded to in the police report. The testimony about “Lance Armstrong” or “John” was confusing and led jurors to believe the defendant was covering something up or lying. The defendant seemed flustered by this line of questioning and the jury did not believe the story at all. This affected his overall presentation and made the jury question his testimony and credibility in other areas as well. At the same time none of the jurors believed this was relevant to the story being told and that it “seemed strange” and “shady.”

At times the suspect seemed coached to the jurors and they wanted him to come off more “real and true.” They agreed that he repeated the same things over and over again.

They wanted more specific information about the noise he heard that led him to look outside. But they were concerned that he assumed the noise was Hillary's dog and questioned why he targeted her from the outset as being involved. They thought his testimony about Hillary's dog or about how she had dropped something was unnecessary and confusing, leading jurors to believe the defendant was fabricating a story.

The jurors also questioned why the defendant did not simply peak through two individual horizontal blinds rather than pulling back the entire shade. They agreed that it was possible that it occurred the way the defendant described but thought the alternative, easier scenario should be explored and answered and not covered over.

Miscellaneous Questions

The jurors wanted to know more about the past relationship between Hillary and the defendant and why she would be motivated to pursue this case. They wondered about a possible romantic relationship that had ended or an unrequited love scenario with one of the two winding up being vindictive toward the other. Or they questioned possible problems with the dog in the past that led to a strained relationship.

The jurors were troubled by the legal definitions offered by the "prosecution" and wanted more specific information on the intentionality of indecent exposure. They also wanted to know more about the potential penalties that would be imposed if the defendant was found guilty and if a sex offender registration was required.

The jurors also wanted to know why the defendant did not hear Hillary's knock at the door, was he in the shower and couldn't hear the door, was in the shower and chose

not to get out and answer the door? They thought these issues were relevant and deserved explanation.

The jury wanted to hear more testimony about the defendant's reaction to having the Steamboat Springs Police at his door and in his house. They wanted to know how he felt and if he was shocked or alarmed? They also wanted to know what the police did inside the residence and what kinds of things they looked for.

Discussion

All of the jurors found the defendant to be credible overall during testimony BUT you say #4 didn't find him credible at all. They were not bothered by any mannerisms displayed and the majority felt he displayed good eye contact with the lawyers and the jury during testimony. They all agreed that he was calm and did not get argumentative at any time even during combative questioning from the "prosecution."

Males and female jurors agreed that it is not uncommon to run out of a shower naked because you forget something in another room, or even to look outside if you hear noises. They stated that if you are in your own home it should be acceptable behavior. They all agreed that the act described seems innocent and that the "charges seem harsh."

The group *did* want further information on what time the incident happened and what the lighting was like in the corridor of the apartment complex. They wondered what could the defendant see and what could the victim see? They asked for diagrams and/or pictures of the location where the incident occurred to give perspective.

Observations of Overall Juror Reactions During Mock Trial

During opening statements jurors 1, 2, 5 and 6 maintained eye contact with the lawyers and jurors 4, 3 and 5 took notes. Juror #5 showed uncomfortable body language and had her arms crossed during much of the trial. Juror #4 was tense and had his hands clasped for much of the session. Juror #2 shook her head when the themes of the case were revealed and reacted to eye gestures made by the “prosecutor.”

Summary

Clearly issues of credibility of the defendant exist with regard to testimony about the friend documented in the police report filed on the day of the incident. This issue needs to be clarified before a jury will accept the story. Other issues needing attention with regard to the defendant’s testimony are repetitious or odd word choices, confusing statements with too much detail and the sense that he is not being real. Overall the defendant was deemed credible by the jurors citing good eye contact and a relaxed demeanor. They were not affected by mannerisms displayed by the defendant while on the stand.

The jurors were impressed by the lawyers and their presentations. They were receptive to the characterization of the victim as a “drama queen” and felt that impugning her would cast doubt on the entire incident.

The group thought that the prosecution case was weak and that this seemed like a situation where the defendant was simply peeking through the blinds because he heard a noise and that he didn’t mean to be seen.

The mock trial/research group helped us determine who will be ideal jurors to seat during the actual trial and which jurors to avoid. It also helped us understand how to make the testimony and case more effective by understanding where strengths and weaknesses lie. We now understand what pieces of evidence will be most important to a jury and what makes the case most compelling and persuasive. The credibility of witnesses was assessed and that issue can be tended to before trial now that key problems have been identified by decision makers. The defendant was determined to be effective in this case and important issues and questions were highlighted by the group. Dynamics of the jurors both as a group and as individuals were observed and noted for future use when seating an actual jury and specific questions for use during voir dire were formalized. As a result of this process we now understand some of the questions actual jurors may have during deliberations of this case and those questions can now be addressed during trial to increase the chance of a successful outcome. Through a study of the decision making processes observed during this mock trial, we have identified themes and problems of the case and the essence has been distilled into manageable categories. This case can be effectively communicated to a receptive and known jury by utilizing data collected during the mock trial/research group.

Voir dire questions

Introduction

In addition to identifying potential advocates, neutrals and opponents on a jury, voir dire questioning is an opportunity, as counsel knows, to emphasize case themes and introduce positive ideas and theories. With that in mind, what follows are recommended voir dire questions, overall case themes as well as additional issues relative to the case that counsel is advised to keep in mind.

Voir dire areas of emphasis and recommended questions:

1. Education/background

- a.* What is your educational background?
 - i.* Do you consider education important?
- b.* How long have you lived in Routt County?

2. Cultural issues

- a.* Have you ever traveled abroad and if so, how many times/how often?
- b.* When were you last out of the country?
 - i.* And for how long?
- c.* Have you ever seen cultural norms/traditions/customs that were perceived unusual or “out of place” in the United States?
- d.* Have you ever felt that your cultural norms/traditions/customs were unusual in the United States, even though they were perfectly normal to you?

- e.* How long would you expect a person to be in this country before he or she “knows better” when it comes to cultural differences?
 - i.* That is they conform to what is normally expected?
 - ii.* Is it possible that certain cultural differences take longer to change or overcome than others?

3. Affront and Alarm defined

- a.* If someone waves hello to you, would you consider that person to be alarmed?
 - i.* ALT - Would you consider someone waving hello to you to be feeling alarmed or affronted by your behavior?
 - ii.* ALT - If someone was offended by you or alarmed by your actions, would you expect them to wave at you?
- b.* When a neighbor waves at you, what is your interpretation of that?

4. Nudity

- a.* This case involves a person being naked on his own property, and not only naked on his own property, but INSIDE his own home. Is it automatically a crime, in your opinion, for a person to be naked on their own property or inside their own home?
- b.* If you were in your own home and needed to walk from one place to another to get a towel, for example, would you feel it necessary to pull down all the shades prior to getting the towel?
- c.* Do you believe that is nudity is illegal?

- i. If so, under what circumstances?
- d. Is nudity on your own property acceptable in your opinion?
- e. People on their own property in outdoor hot tubs are often naked – is this indecent exposure?

5. Neighborhood Issues

- a. Describe the neighborhood you live in.
 - i. Do you consider it a friendly neighborhood?
 - ii. Do you get along with your neighbors?
 - iii. Do you generally believe you know what's going on in the lives of your neighbors?
- b. Have you ever had a dispute with a neighbor or neighbors?
- c. Do you agree that often neighborhood disputes can arise simply out of a misunderstanding?
- d. If you had a problem with one of you neighbors, would you consider it appropriate to contact that neighbor directly as a first step to resolving the issue?

Case themes

- Act of being naked was on personal property and was not done with any intent to affront or alarm. Where did he cross the line from being naked on his own property to being arrested?

JUROR QUESTIONNAIRE

1. Juror number _____ 2. Gender _____ 3. Date of Birth _____ 4. Place of birth _____

5. Do you own or rent your home? _____

6. How long have you lived there? _____

7. In what other cities or areas have you lived?

8. What is your job or occupation? _____

9. Do you supervise others in your job? _____

10. What is your marital status? _____

11. Do you have children, if so please list their age and gender:

12. Religious preference: _____

13. Are you active _____, moderately active _____, or inactive _____, in church?

14. How many years of education have you completed? _____

Name of College or University: _____ Major: _____

15. Have you, your spouse, former spouse, or significant other, had any-legal training? If yes, please explain.

16. Would you describe yourself more as a follower or a leader? _____

17. What kind of vehicle do you drive? _____

18. What are your hobbies or interests outside of work?

19. How often do you watch television?

Every day _____ 3-4 times a week _____ Once a week _____ Less than once a week _____

Never _____ 20. List your three favorite television shows:

21. Do you enjoy reading? Yes _____ No _____

a. If yes, what authors and types of books do you tend to read?

22. What newspapers or magazines do you subscribe to?

23. Do you have a political preference? Yes _____ No _____

a. If your answer is yes, are you a Democrat _____ Republican _____ Independent _____

Other _____.

24. Have you ever held or sought political office? Yes _____ No _____

25. Have you served in the Armed Forces? Yes _____ No _____

a. If yes, please answer the following:

Which branch? _____ Did you enlist? _____ Re-enlist? _____

Did you serve in combat? Yes _____ No _____ If yes, when? _____ Ever serve in military police? _____ 26. What civic clubs, societies, professional associates, or other organizations are you a member?

27. Do you contribute services or financially to any charitable organization? Yes _____
No _____

a. If yes, please explain.

28. Are you or your spouse a member of (or have you ever been a member of) any neighborhood, local, state, or nationwide crime prevention watch organization?

29. Have you or your spouse ever worked on a political campaign either for the election of a candidate or for an interest group interested in matters affecting criminal justice? Yes _____ No _____

a. If yes, please explain.

30. Are you, or any close friend or relative, associated with, or employed now or in the past with any law enforcement agency, such as civilian or military police, sheriff, FBI? Yes _____ No _____

31. Have you, your spouse, a relative, or close friend applied for a job in law enforcement? Yes _____ No _____

a. If so, please describe

32. Have you, your spouse, a relative, or close friend ever had an unpleasant experience involving law enforcement?

Yes _____ No _____

a. If yes, please explain.

33. Have you ever had a positive experience with a law enforcement officer? Yes _____ No _____

a. If yes, please explain.

34. Do you have any opinions about law enforcement officers that might affect your ability to impartially evaluate the testimony of an officer during this trial? Yes _____ No _____

a. If yes, please explain.

35. Have you, or any close friend or relative ever been accused of a crime? Yes _____ No _____

a. If yes, please explain.

36. Have you, or any close friend ever been arrested? Yes _____ No _____

a. If yes, please explain.

37. Have you ever been convicted of a crime or received a probated or suspended sentence? Yes ____ No ____

a. If yes, please explain.

38. Are you presently under indictment or legal accusation for any misdemeanor or any felony? Yes ____ No ____

39. Have you, or any close friend or relative, ever been the victim of a crime? Yes ____ No ____

a. If yes, please explain the circumstances, including how long ago and what effect it has had on you? _____

40. Have you, or any close friend or relative, ever been involved in a criminal case defendant, witness, or otherwise

Yes ____ No ____

a. If yes, please explain.

41. Have you, your spouse, a relative, or close friend ever worked in, visited, or been incarcerated in a prison, jail, juvenile facility mental health facility or detention center of any sort? Yes ____ No ____

a. If yes, please explain.

42. Have you, your spouse, a relative, or close friend ever received treatment by a mental health expert or facility?

Yes ____ No ____

a. If yes, please explain.

43. Have you, your spouse, a relative, or close friend ever closely followed a criminal case? Yes ____ No ____

a. If yes, please explain.

44. Have you studied psychiatry or psychology, either formally or informally? Yes ____ No ____

45. In your opinion, what are the three (3) most important problems with law and order today?

a)

b)

c)

46. What is the underlying or principal cause of crime in America today?

47. What, in your opinion, should or could be done about the crime problem?

48. Have you taken steps to protect yourself? Yes ____ No ____

a. If yes, please explain.

49. In cases involving criminal accusations, the law states that a criminal defendant is presumed innocent unless the prosecutor proves beyond a reasonable doubt that the defendant is guilty of the charges. Do you agree? Yes ____ No ____

50. In criminal cases, the defendant and his lawyers do not have to prove anything. The defense does not have to present any witnesses and the defendant does not have to testify. Do you think the law concerning the burden of proof should be changed to require the defendant to prove his/her innocence? Yes ____ No ____ No opinion ____

51. If you have previously served on a jury, was there anything in your prior jury experience that either upset or agitated you to the extent that jury service was an unsatisfactory experience? Yes ____ No ____

a. If yes, please explain.
