

# Prosecuting Cold Case Sexual Assault

## Jury Selection/*Voir Dire*

The jury selection or *voir dire* process is your first opportunity to communicate with jurors. Use deliberate and thoughtful language to explain the facts of the case, provide context for victim behavior, and inquire about jurors' life experiences to help you dispel prospective jurors' misperceptions and counter defense strategies that seek to exploit those misconceptions.<sup>1</sup>

Through *voir dire*, you can lay the foundation for presenting the victim's experience in the framework of the jurors' life experiences. This process allows you to identify and strike any prospective jurors whose deeply ingrained biases will interfere with their ability to follow the law and render a fair verdict. An effective, thoughtful *voir dire* can also help to blunt anticipated defense tactics and act as a vehicle to convey powerful themes in a closing argument.

### How Questions Affect Prospective Jurors

In sexual assault cases, some questions that arise during trial may be personally embarrassing for jurors. For instance, there may be people who have been accused of sexual assault or who know someone who has been accused. Other prospective jurors may be sexual assault survivors who have never fully disclosed their victimization or who may be traumatized by the jury selection process for various reasons (e.g., by questioning or by serving as a juror in this type of case). A preliminary questionnaire may help to identify sensitive areas that are best explored without other prospective jurors present. Persons required to disclose sensitive information should be questioned with the judge, stenographer, and other members of the court present; prospective jurors should not be present. In addition, offer available resources (e.g., a victim advocate) for any prospective jurors who wish to talk.<sup>2</sup>

The always-challenging dynamics of jury selection are only amplified in a cold case sexual assault trial. Issues of delay in bringing the case to trial, the quality of the investigation, and problems with chain of custody may impact jurors' ability to deliver the verdict objectively. Even more critical are jurors' perceptions of the law, law enforcement officials, and the impact of the passage of time on evidence.

### Questions for Jury Selection or *Voir Dire*

Use or adapt these questions as a starting point to develop your own questions for jury selection or *voir dire*.<sup>3</sup> Some questions address issues common to sexual assault cases; other questions focus on issues that arise during cold case prosecutions.

Generally speaking, questions should address issues pertaining to evidence for the specific case. The following questions will help you prepare for the jury selection or *voir dire* process. Use these questions or write your own based on the stated purpose for each category of questions.

As previously mentioned, *voir dire* should explore personal experiences (both of prospective jurors and people close to them) with incidents or allegations of sexual assault. Jury selection practices vary greatly among jurisdictions; therefore, you should familiarize yourself with the laws and customs in your community.

### Questions to Address the Time Delay

**Purpose:** *These questions focus on how prospective jurors perceive the time delay and how this perception may impact their ability to maintain an objective mindset when evaluating evidence and witness testimony.*

- ◆ The evidence will show that this crime occurred [timeframe (e.g., X months/years)] ago. Would knowing that cause you to return a verdict of "not guilty"?
- ◆ The law establishes the amount of time the prosecution has to pursue rape charges against a defendant. If you personally disagree with the amount of time permitted under the law, would you return a "not guilty" verdict, even if you find the evidence proves the defendant guilty of rape?
- ◆ The evidence will show that the victim reported the rape to authorities on [Month] [Date], [Year], but that charges were not filed until [Month] [Date], [Year]. Would the length of time authorities took to charge the defendant cause you to return a verdict of "not guilty," even if the evidence proves the defendant raped the victim?

## Questions About Evaluating Evidence and Witness Testimony

*Purpose: These questions seek to determine prospective jurors' views about the validity and reliability of evidence and witness testimony.*

- ◆ Under the law, a person who initially engaged in some degree of sexual activity, contact, and/or conduct can withdraw consent at any time, and the other party must immediately honor the person's expressed wishes. Would you be able to apply and follow this concept of the law when evaluating evidence and returning a verdict?
- ◆ The court has read to you a list of experts and witnesses whom we anticipate will testify, including law enforcement officials; medical professionals; forensic scientists; and other people, such as the victim. Are you able to listen carefully and assess the credibility of all witness testimony, regardless of an individual's background or life circumstances?
- ◆ The verdict must be based on what the evidence proves or fails to prove; a verdict cannot be based on sympathy or bias. Can you apply this concept to both the defendant and the victim?
- ◆ The victim's testimony alone can be legally sufficient to prove a charge of rape. The jury must decide whether that testimony proves the charge of rape. If the victim's testimony convinces you beyond a reasonable doubt that the defendant committed the crime, would you have difficulty returning a "guilty" verdict?<sup>4</sup>

## Questions to Address Misperceptions About Assault

*Purpose: These questions highlight prospective jurors' knowledge or potential biases related to sexual assault.*

- ◆ Do you believe that victims are raped only by people who are strangers to them? In other words, do you believe a rapist and the victim could never have a pre-existing relationship (plutonic or romantic)?
  - If no, there are no follow-up questions.
  - If yes, would you automatically return a "not guilty" verdict if the defendant had a pre-existing relationship with the victim?
- ◆ The court will inform you about the criminal charges the defendant is facing. A defendant can still be found guilty of rape, even if a weapon wasn't used during the assault and/or the victim wasn't physically injured. Would you

be able to accept and follow this law when evaluating evidence and returning a verdict?

- ◆ There is no legal requirement that a victim physically resist a sexual assault. Would you be able to accept the law and apply it to your analysis of the evidence that you will hear?

## Questions About Victim and/or Defendant Intoxication During the Assault

*Purpose: These questions seek to uncover information about whether prospective jurors believe alcohol consumption (by the defendant, victim, or both parties) played a role in the assault.*

- ◆ You may hear evidence that both the defendant and victim consumed alcohol before the assault occurred. Knowing that alcohol may have been consumed, is there anything that would affect your ability to fairly evaluate the evidence?
- ◆ The court will instruct you that the defendant's voluntary intoxication is not a legal defense to the charge of rape. If evidence or witness testimony proves that the defendant was intoxicated, would you be able to understand, apply, and follow the court's instructions?

## Questions About Prospective Jurors' Personal Perspectives and Experiences

*Purpose: These questions attempt to draw parallels and make connections between prospective jurors' experiences and the victim's experiences related to traumatic events, including sexual assault.*

- ◆ Witnesses will be testifying about events related to this crime. Are there any personal experiences that may prevent you from objectively evaluating and carefully listening to testimony about these events?
- ◆ Think of a time when a traumatic event occurred in your life. Were you able to talk about what happened right after the event occurred? Do you think the ability to discuss such an experience would vary by person and traumatic event? (You won't need to share details about the traumatic event as part of your answer.)
- ◆ Do you have any expectations about how a person would react after a traumatic event? Do you think that a person who has been sexually assaulted would react a certain way afterwards? Could you maintain a fair perspective by evaluating and listening to testimony about a traumatic event that an individual experienced?

- ◆ Experts and witnesses will share sexually graphic and/or violent details as part of their testimony; these details will include words that describe sexual acts and parts of the anatomy. Some people may find such discussion awkward or embarrassing. Based on your personal experiences, would you find it especially difficult to listen to the testimony and to discuss it with fellow jurors during your deliberations?

References:

1. Mallios, C., & Meisner, T. (2010, July). *Educating Juries in Sexual Assault Cases, Part I: Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES.
2. For example, see *Protecting the Rights of Survivors When They Are Called to Participate in Jury Service*, NATIONAL CRIME VICTIM LAW INSTITUTE (2014), <https://law.lclark.edu/live/files/18336-final-version-2victim-law-position-paperoregon>.
3. Please contact AEquitas for support in drafting or reviewing jury selection questions or preparing for *voir dire*. AEquitas Attorney Advisors are available 24/7 at [info@aequitasresource.org](mailto:info@aequitasresource.org) or 202.558.0040.
4. Check the law in your jurisdiction for relevant statutes and rules for the scope of *voir dire*.

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AEquitas, The Prosecutors' Resource on Violence against Women