CHAPTER 30

MARCH, 2012

Juror Examination and Selection

Written by Nancy Gertner (1st Edition)
and Arthur Leavens (this revision) [*]

Table of Contents:

§30.1 Voir Dire 2
A. The Statutory Framework 3
B. The Subject Matter of Voir Dire: Beyond the Statutory Questions 5
1. Constitutional Basis 5
2. Statutory Basis 6
C. Judicial Versus Attorney Voir Dire 10
D. Individual Versus Group Voir Dire 12
E. Form of the Question 13
§30.2 Cause Challenges 14
§30.3 Peremptory Challenges 15
A. Number of Peremptory Challenges 15
B. Procedure 16
C. Improper Exercise of Peremptory Challenges: *Commonwealth v. Soares*, *Batson v. Kentucky*, and their Progeny 18
§30.4 Compositional Challenges 24
§30.5 Miscellaneous Techniques for Gathering Information 28
§30.6 Anonymous Juries 29
§30.7 Right to Public Trial and Jury Selection 30

[*] Research assistance provided by Michelle Dame and Laura Miller

Cross References:
Challenges to the composition of the grand jury, ch. 5
Jury instructions, deliberation, and verdict, ch. 36
Motions related to prejudicial publicity, ch. 26
Waiver of jury trial, ch. 3 (district court), ch. 22.8 (codefendants), ch.34.1 (generally)

This chapter discusses issues in jury selection. For discussion of the right to jury trial, and jury waiver, *see supra* ch. 3 (right to jury trial in district court), § 22.8 (waiver by codefendants), and *infra* § 34.1 (waiver of right generally).

§ 30.1 VOIR DIRE

Under the Sixth and Fourteenth Amendments to the U.S. Constitution as well as article 12 of the Declaration of Rights, "part of the guaranty of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors."[1] The Supreme Court and the Supreme Judicial Court have mandated a two-step procedure for trial courts to follow in addressing a defendant's claim that he or she cannot receive a fair trial by an impartial jury. The trial court must first examine whether the defendant has identified a particular source of potential juror bias, e.g., extensive pretrial publicity or settled community opinion, that would make selection of an impartial jury as a practical matter impossible. If such presumptive prejudice exists, making voir dire a pointless exercise, a change of venue is constitutionally required.[2] However, as the S.J.C. has noted, "[such] presumptive prejudice exists only in truly extraordinary circumstances,"[3] and issues of potential juror bias are ordinarily addressed through the voir dire process. Thus, both the Supreme Court and the S.J.C. place great emphasis on the adequacy of the voir dire in the particular circumstances of each case as the means to ensure an impartial jury.[4]

The more effective the voir dire is, the more information defense counsel will glean from it, and the more informed will be counsel's arguments for cause challenges, or counsel's decision to exercise peremptory challenges. The anecdotal experience of counsel, as well as the experience of nonlawyers such as social psychologists, suggests that effective voir dire depends on such variables as the subject matter of the questions, the topics covered, the form, whether each juror is questioned individually or whether the venire is questioned as a whole, and who the questioner is.[5]

[1] Skilling v. United States, 561 U.S. 40, 130 S. Ct. 2896, 2950 (2010) (quoting Morgan v. Illinois, 504 U.S. 719, 729 (1992)); Commonwealth v. Toolan, 460 Mass. 452, 466-67 (2011) (reversing first-degree murder conviction under Sixth Amendment and article 12 due to inadequate voir dire where extensive pretrial publicity posed a substantial risk of unfair prejudice to defendant). *See also* Mass. Const. Declaration of Rights art. 29.

[2] Skilling, *supra*, 130 S. Ct. at 2914; Toolan, *supra*, 460 Mass. at 462-63. *See* ch. 26, *supra*.

[3] Toolan, *supra*, 460 Mass. at 463. The Court in *Toolan* observed that it was aware of no case in which it had overturned a conviction on the basis of such presumptive bias in the jury pool. *Id*. at 463 n. 17.

[4] Skilling, *supra*, 130 S.Ct. at 2917; Toolan, *supra*, 460 Mass. at 466-67.

[5] In JURYWORK: SYSTEMATIC TECHNIQUES (2004), the National Jury Project summarizes studies concerning the impact of various voir dire conditions on the outcome of

This section outlines for the practitioner how to use the existing statutory framework and case law to maximize and use effectively the information obtained about jurors.

§ 30.1A. THE STATUTORY FRAMEWORK

G.L. c. 234, § 28, mandates a limited number of areas for inquiry, leaving other issues (including the form of the question and who the questioner is) to the discretion of the court.[6] Traditionally, that discretion has been exercised to enforce a restricted voir dire. In 1982, an experimental procedure was implemented in certain counties, and later extended throughout the state.[7] Although the procedure did little to change the fundamentally limited nature of voir dire in this Commonwealth, it did increase the amount of information available to counsel. Potential jurors receive a questionnaire along with their jury summons, which requires that they provide the court and counsel with valuable demographic information.[8]

---

voir dire. Those studies could be used to buttress the motions outlined *infra* — e.g., for individual, attorney-conducted voir dire, open-ended questions, etc. *See* JURYWORK: SYSTEMATIC TECHNIQUES §2:10 (2010).

[6] Section 28 provides:

> Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead. In a criminal case such examination shall include questions designed to learn whether such juror understands that a defendant is presumed innocent until proven guilty, that the commonwealth has the burden of proving guilt beyond a reasonable doubt, and that the defendant need not present evidence in his behalf. If the court finds that such juror does not so understand, another shall be called in his stead.
>
> For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination, and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called. G.L. ch. 234, § 28 (West 2000 & Supp. 2011).

[7] G.L. c. 234A, §1. The statute mandated that the system be implemented in Middlesex County and in such other counties as the Supreme Judicial Court may designate. In October 1989 the system was in effect in all counties.

[8] Although G.L. c. 234A, § 22, provides that the questionnaire is to include information "as is ordinarily raised in voir dire examination of jurors," in fact the questionnaire frequently elicits more information than is usually brought out in the typically restricted voir dire. *See infra* § 30.1B.

G.L. c. 234 requires a very limited number of voir dire questions. These "statutory questions"[9] are simply "whether [the juror] is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein." In addition, the statute mandates examination to "learn whether such juror understands that defendant is presumed innocent until proven guilty, that the Commonwealth has the burden of proving guilt beyond a reasonable doubt, and that the defendant need not present evidence in his behalf."[10]

However, the statute requires a *second stage of questioning* if the court finds that the jury may not be indifferent as a result of matters extraneous to the case, "including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons." Such further examination shall include "such consideration, attitudes, exposure, opinions or any other matter which may . . . cause a decision . . . to be made . . . upon issues extraneous to the issues in the case."[11] While this language has typically been interpreted to mean questioning concerning exposure to pretrial publicity or questioning with respect to racial bias, the language of the statute is quite broad.[12]

Although individual voir dire is not generally prescribed, if further examination is required because of potential juror exposure to extraneous information, it must "be conducted individually and outside the presence of other persons about to be called as jurors or already called."[13]

The questioner at either stage of questioning may be either the court or counsel, under the direction of the court. The statute does not entitle the defendant to attorney

[9] *See* Commonwealth v. Tatro, 42 Mass. App. Ct. 918, 919-20 (1997) (absent showing of prejudice, conviction upheld where, instead of posing individual questions to prospective jurors followed by a show of hands, judge gave general instructions and invited those who doubted their impartiality to approach sidebar).

[10] The defendant is entitled to court inquiry on these areas under G.L. c. 234, § 28. Commonwealth v. Figueroa, 451 Mass. 566, 569 (2008). *See also* Mass. R. Crim. P. 20(b)(1). On the relation between the statute and the Rule, *see* Commonwealth v. Tatro, 42 Mass. App. Ct. 918, 919 n.3 (1997). Collective inquiry of the venire about matters beyond the "statutory questions" is in the judge's discretion. Commonwealth v. Stack, 49 Mass. App. Ct. 227, 240 (2000).

[11] G.L. ch. 234, §28, *supra* note 3. The statute further provides that this additional examination "may include a brief statement of the facts of the case to the extent the facts are appropriate and relevant to the issue of such examination…." *Id*.

[12] *See, e.g.*, Commonwealth v. Johnson, 426 Mass. 617, 627 (1998) (where defense counsel timely notified judge that potential juror's husband might have attended victim's wake, error for judge to decline to question juror, but no showing of prejudice); Commonwealth v. Hicks, 377 Mass. 1, 6 (1979) (exposure of venire to "scuttlebutt" in the jury room about the case, necessitating more extensive voir dire). *Cf.* Commonwealth v. Cassidy, 410 Mass. 174, 175-76 (1991) (mistrial necessitated by previously molested juror sitting on rape case). The court, of course, also has discretion to ask particular questions requested by the Commonwealth to identify potential jurors who might be biased against particular witnesses or kinds of evidence. *See, e.g.*, Commonwealth v. Perez, 460 Mass. 683, 691 (2011) (holding that asking if any potential jurors believed that the prosecution must present scientific evidence to prove its case – a question directed at the so-called "CSI effect" – was within trial court's discretion where the questions neither suggested that jurors could not consider lack of evidence nor identified jurors predisposed to convicting defendant based on the Commonwealth's evidence).

[13] Regarding the right of the defendant to be personally present to hear the examination of individual jurors, *see supra* § 28.1A.

voir dire; it is entirely in the discretion of the court.[14] Nor does the statute address the form of the questions. The court can ask closed-ended, conclusory, or even leading questions.[15]

§ 30.1B. THE SUBJECT MATTER OF VOIR DIRE: BEYOND THE STATUTORY QUESTIONS

The judge has broad discretion "whether to refine or improve on the subjects of . . . section 28" by going into more detail.[16] There is no requirement that any particular form or number of questions be asked[17] However, in some cases more detailed and expansive questioning may be constitutionally or statutorily required.

1. Constitutional Basis

In *Ham v. South Carolina,*[18] the Supreme Court recognized that due process as guaranteed by the Fifth and Fourteenth Amendments may be jeopardized when a judge refuses to question prospective jurors specifically as to racial prejudice.[19] But *Ham* announced no per se rules. It established a case-by-case analysis of whether questions concerning racial bias were required.

The post-*Ham* cases have established minimal requirements for questioning about race. Additional questioning about racial bias is required only when the defendant is a "special target" of racial prejudice because the "charges and defenses explicitly implicate racial issues," as opposed to cases raising racial issues "by inference, through the identities of the parties" *(e.g.,* the defendant is of one race, the victim is of another).[20] Nor has the Supreme Court required detailed voir dire on the subject of prejudicial publicity.[21]

---

[14] *See infra* § 30.1C.

[15] These procedures are codified in Mass. R. Crim. P. Rule 20. *First,* Rule 20(b)(1) provides for questioning in the statutory areas: "whether [the juror] is related to either party, has any interest in the case, has expressed or formed an opinion, or is sensible of any bias or prejudice." *Second,* Rule 20(b)(2) requires further examination "upon issues extraneous to the case if it appears that the juror's impartiality may have been affected by the extraneous issues." Such further examination "may" include a brief statement of the facts of the case, if the facts are relevant to the question of "extraneous influences" and "shall be conducted individually."

[16] *See* Commonwealth v. Yameen, 401 Mass. 331, 335 (1987); Commonwealth v. Lacy, 371 Mass. 363, 373 (1976); Commonwealth v. Bailey, 370 Mass. 388, 399–400 (1976) (partially abrogated on other grounds); Commonwealth v. Harrison, 368 Mass. 366, 371 (1975). *E.g.,* Commonwealth v. Kudish, 362 Mass. 627, 631–32 (1972).

[17] *See* Commonwealth v. Keohane, 444 Mass. 563, 572 (2005); Commonwealth v. Morales, 440 Mass. 536, 548 (2003); Commonwealth v. Bianco, 388 Mass. 358, 368 (1983) (abrogated as to another issue).

[18] 409 U.S. 524, 526-27 (1973).

[19] *See also* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (voir dire may play "critical" role in assuring Sixth Amendment right).

[20] Commonwealth v. Otsuki, 411 Mass. 218, 228 (1991); Commonwealth v. Grace, 370 Mass. 746, 755–57 (1976) (citing Dukes v. Waitkevitch, 536 F.2d 469, 470 (1st Cir. 1976), and Ristaino v. Ross, 424 U.S. 589 (1976)). *See also* Rosales-Lopez v. United States, 451 U.S. 182 (1981); Turner v. Murray, 476 U.S. 28 (1986); Commonwealth v. Core, 370 Mass. 369, 374–76 (1976). The distinction makes little sense. The only issue should be whether the prospective juror is in fact biased. Whether that bias is triggered by the presence of a defense specifically

2. Statutory Basis

In 1975, following *Ham,* G.L. c. 234,§ 28, was amended to permit questioning beyond the statutory questions whenever the court concluded that there was a risk that the decision would be skewed by issues extraneous to the case such as "community attitudes, . . . exposure to potentially prejudicial material or possible preconceived opinions about the credibility of certain classes of persons," and so forth.[22]

The threshold triggering the protections of the second paragraph of c. 234, § 28 (questions on "extraneous matters") is unquestionably lower than the threshold for constitutional protection.[23] As the Supreme Judicial Court held in *Commonwealth v. Sanders,*[24] "[a]lthough … interrogation of jurors as to racial prejudice is not constitutionally mandated in a case involving interracial rape . . . as a matter of law interracial rape cases present a substantial risk that extraneous issues will influence the jury and hence are within § 28, par. 2"[25] The questions must be specifically directed to racial prejudice, rather than part of a general question about impartiality.[26] This rule has been expressly extended to interracial murder.[27] In addition, several Appeals Court

raising racial issues (as in *Ham,* that the defendant was singled out for prosecution because he had been a civil rights activist) or only by the fact of an interracial crime is irrelevant.

[21] *See* Mu'Min v. Virginia, 500 U.S. 415, 431-32 (1991), *reh'g denied,* 501 U.S. 1269 (1991) (no constitutional right to voir dire inquiry on the *content* of pretrial publicity to which prospective jurors have been exposed).

[22] *See* G.L. ch. 234, §28, *supra* note 3. *See generally* Commonwealth v. Duddie Ford, Inc., 409 Mass. 387, 388–93 (1991). If the evidence suggests that the prejudicial publicity has reached such a point as to endanger the fairness of the trial, and undermine the ability to choose any jury, the defendant can move for a change of venue, Mass. R. Crim. P. 37(b)(1), or even dismissal. The latter is rare. *Cf.* Commonwealth v. Toolan, 460 Mass. 452, 463 n. 17 (noting that the SJC has never overturned a conviction on the basis of presumptive jury-pool bias, i.e., so widespread that a change of venue was constitutionally required). Recently courts have been unwilling to change venue entirely, but have selected the jury in one venue and tried the case in another. *See* full discussion at section 26.3C and 26.3D.

[23] The S.J.C. cases requiring individual voir dire in certain classes of cases posing a special risk of extraneous influence rely on the Court's superintendency powers. A trial court's failure to comply with these requirements "is thus ordinarily not grounds for reversal unless the defendant can demonstrate resulting prejudice." Commonwealth v. Holloway, 44 Mass. App. Ct. 469, 473 (1998) (conviction of sexual assault on minor reversed for failure to conduct requested individual voir dire). However, the per se requirements established by *Commonwealth v. Sanders* and progeny, *infra,* were intended to establish "bright line" rules foreclosing the need for post hoc case-by-case analysis of whether, absent compliance with the rule, prejudice occurred. *Holloway, supra,* 44 Mass. App. Ct. at 474.

[24] 383 Mass. 637 (1981).

[25] Commonwealth v. Sanders, 383 Mass. 637, 641 (1981) (partially abrogated on other grounds). *See also* Commonwealth v. De La Cruz, 405 Mass. 269, 271-72 (1989) (quoting *Sanders* on this point).

[26] Commonwealth v. Hobbs, 385 Mass. 863, 873 (1982). However, the judge may refuse to put more specific questions seeking to probe for attitudes manifesting such prejudice. Commonwealth v. Johnson, 54 Mass. App. Ct. 224, 230-231 (2002).

[27] Commonwealth v. Young, 401 Mass. 390, 395–400 (1987) (partially abrogated on other grounds). This rule is prospective only. Commonwealth v. Lawrence, 404 Mass. 378, 388 (1989).

cases suggest that inquiry into racial bias may be mandatory in any particular case involving both sex and violence between different races.[28] However, the defendant must request such questioning.[29]

In non-interracial cases, where the *Sanders* rule does not apply, the trial judge must determine whether a "substantial risk" of extraneous influences exists in the circumstances of the case.[30] For example, the Supreme Judicial Court has upheld the

[28] Commonwealth v. Hooper, 42 Mass. App. Ct. 730, 731-32 (1997) (individual voir dire mandatory in cases involving interracial sexual violence, even at request of white defendant charged with crime against black victim); Commonwealth v. Stephens, 15 Mass. App. Ct. 461, 465 (1983). For example, Commonwealth v. Hobbs, 385 Mass. 863, 873 (1982) expanded the *Sanders* requirement to future trials involving interracial sexual offenses against children. Counsel should seek to have the *Hobbs-Sanders* rule, and the provisions of G.L. c. 234, § 28, ¶ 2, apply to other instances where race may be a factor — for example, where there is an interracial crime, whether it is rape, or murder, or any other; where there is an interracial identification; or where a critical witness is of one race and the defendant of another. It would be appropriate in such cases not only to draw analogies to *Hobbs* and *Sanders*, but also to develop the factual record described above. Indeed, because § 28, ¶ 2, is broadly worded, applying to "extraneous factors" in addition to racial prejudice, counsel should use the *Hobbs-Sanders* cases, by analogy, plus a factual record. *But see* Commonwealth v. Grice, 410 Mass. 586 (1991) (refusing to extend the *Sanders* rule to interracial armed robberies, which are less violent than murder or rape and less likely to inflame racial prejudices); Commonwealth v. Ramos, 31 Mass. App. Ct. 362 (1991) (not error but would have been wiser course to provide individual voir dire).

[29] The court in *Sanders* highlighted the need for a motion from the defendant himself because of the risk that specific questions "may activate latent racial bias in certain prospective jurors or may insult others." Commonwealth v. Sanders, 383 Mass. 637, 641 (1981). For a short period of time, the Court held that failure to question the defendant regarding his awareness of the dangers of questioning jurors concerning racial prejudice before such questioning is reversible error. Commonwealth v. Washington, 402 Mass. 769, 773 (1988). *See also* Commonwealth v. Rivera, 397 Mass. 244, 251 (1986); Commonwealth v. A Juvenile (No. 2), 396 Mass 215, 223 (1985) (before granting a motion for race-related questioning of prospective jurors, the trial judge "must determine sua sponte that the defendant has been informed of, and understands, the risks and potential dangers of this type of voir dire"). In Commonwealth v. Ramirez, 407 Mass. 553, 555 (1990) the Court reversed this line, holding that a judge is no longer required to hold a colloquy with the defendant.

If counsel does not request race-related questioning, then the court has no obligation to engage in such a colloquy. Commonwealth v. Guess, 23 Mass. App. Ct. 208 (1986). The request must be clearly based on the fact that defendant and alleged victim are of different races. Commonwealth v. Pina, 430 Mass. 66, 72–74 (1999) (defendant identifying himself as "Cape Verdean" did not establish racial difference between himself and white victim); Commonwealth v. Hunter, 427 Mass. 651, 654 & n.5 (1998) (white defendant did not advance racial difference from Asian victim as ground for mandated individual voir dire). In Commonwealth v. Connor, 392 Mass. 838, 847–849 (1984), the Court expressed concern over questions the trial court had asked that were *not* requested by counsel, questions suggesting that participation in the Witness Protection Program should not affect the juror's evaluation of a particular witness.

Counsel's decision to forego race-related questioning does not constitute "ineffective assistance" unless the defendant can show prejudice from it. Commonwealth v. Crowder, 49 Mass. App. Ct. 720, 722 (2000).

[30] The defendant has the burden in such cases of showing such a "substantial risk" but, once established, it requires the judge to conduct individual voir dire. Commonwealth v. Toolan, 460 Mass. 452, 469-470 (2011) (reversing first-degree murder conviction for failing to conduct individual voir dire of every potential juror – instead limiting individual voir dire to prospective jurors who responded to general questions – where combination of small

refusal to provide individual voir dire in a sexual assault by an Hispanic on a white person, finding they were not of different races.[31] Nevertheless, the Court has urged that discretion be exercised liberally, suggesting that "as a practical matter, when a motion is made to interrogate prospective jurors as to possible prejudice, the motion should be granted."[32] Moreover, while the amendments had their genesis in *Ham*, the statutory language goes beyond concern for racial bias alone. Thus, the Supreme Judicial Court has ruled that individual voir dire must be held, on request, in cases involving sexual offenses against minors[33] and in cases involving the insanity defense.[34] In other cases, if counsel demonstrates a substantial risk of extraneous influence, counsel may argue that the court is required to ask questions concerning pretrial publicity;[35] attitudes toward police officers or police testimony;[36] or bias

community and extensive pretrial publicity created a substantial risk of unfair prejudice); Commonwealth v. Ashman, 430 736, 739 (2000). *See* Commonwealth v. Pena, 455 Mass. 1, 11 (2009) (quoting *Ashman*); Commonwealth v. LaFaille, 430 Mass. 44, 50-52 (1999). The defendant may renew his request for individual voir dire if collective questioning of the venire persons produces responses indicating a need for reconsideration by the judge of the defendant's initial request. LaFaille, 430 Mass. at 51 n. 7.

[31] Commonwealth v. De La Cruz, 405 Mass. 269, 274 (1989). *See also* Commonwealth v. Pichardo, 45 Mass. App. Ct. 296, 303 (1998). *Compare* Hernandez v. New York, 500 U.S. 352 (1991) (avoiding issue whether Latinos are a distinct "racial" group for purposes of the Fourteenth Amendment equal protection clause); Commonwealth v. Colon-Cruz, 408 Mass. 533, 549–50 (1990) (implicitly accepting "Hispanics" as ethnic, not racial, group, whose members may not be systematically excluded from the jury).

[32] Commonwealth v. Lumley, 367 Mass. 213, 216 (1975). *Accord* Commonwealth v. Sanders, 383 Mass. 637, 639–640 (1981); Commonwealth v. Pelier, 14 Mass. App. Ct. 1000 (1982) (rescript). *See also* Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981) (*federal* supervisory power exercised to require racial bias inquiry when violent interracial crime, although not constitutionally required).

[33] Commonwealth v. Flebotte, 417 Mass. 348, 353–56 (1994) (judge must ask each juror individually whether the juror had been a victim of a childhood sexual offense).

[34] Commonwealth v. Seguin, 421 Mass. 243, 249 (1995), *cert. denied,* 116 S. Ct. 1280 (1996) (judge must ask whether the juror has any opinion that would prevent juror from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails to prove defendant criminally responsible). The Court also said that it might be desirable for the judge to give the entire venire a brief description of the charges and related facts, in a form agreed to by the parties. *Seguin, supra,* 421 Mass. at 249, n.6. The *Seguin* rule does not apply to non-insanity defense cases in which evidence of the defendant's mental impairment will be presented. Commonwealth v. Ashman, 430 Mass. 736, 739–740 (2000).

[35] Commonwealth v. Toolan, 460 Mass. 452, 468-69 (2011) (individual voir dire required due to small community and extensive pretrial publicity); Commonwealth v. Burden, 15 Mass. App. Ct. 666, 674 (1983). *See* full discussion *supra* at § 26.3G.

[36] The court should ordinarily ask whether jurors would believe police officers over other witnesses. Commonwealth v. Sheline, 391 Mass. 279, 291 (1984). *See also* Commonwealth v. Gittens, 55 Mass. App. Ct. 148, 151-52 (2002) (noting it would have been "prudent" in a case involving shots fired at a police witness for trial judge to conduct requested follow-up individual voir dire of potential jurors related to law-enforcement officials, but not an abuse of discretion to decline to do so); Commonwealth v. Jones, 9 Mass. App. Ct. 103 (1980) (questions re feelings about police officers that would prevent jurors from fairly hearing the case); Brown v. United States, 338 F.2d 543, 544-545 (D.C. Cir. 1964). *But see* Commonwealth v. Cameron, 385 Mass. 660, 667 (1982) (failure to ask questions about whether prospective jurors had affiliations with a police or fire department not error); Commonwealth v. Bailey, 370

against homosexuals[37] or prisoners.[38] To be sure, as the cases below indicate, counsel's burden of proof is relatively difficult to meet. Counsel must also be prepared to face the likely counterargument — that questioning may be improper if it would chill the jury's consideration of admissible and probative factors.[39]

Counsel seeking additional voir dire questions should submit a motion listing the particular questions requested. An example of questions appropriate in a high publicity case appears *supra* at § 26.3G. Additionally, in order to justify questioning beyond the statutory questions and trigger the procedures in the second paragraph of § 28 (like individual voir dire), defense counsel must supply the judge with an affidavit of "hard facts" to buttress his contention that the jurors might be predisposed or biased.[40] In a case in which there has been substantial pretrial publicity, for example, counsel should provide an affidavit attaching the articles in question, coupled with a content analysis.[41] In addition, attitudinal surveys of public opinion on particular issues (such as the insanity defense or battered women's syndrome) could be attached.[42] The defendant might offer expert testimony, such as from a social scientist familiar with the

Mass. 388, 399-400 (1976) (not abuse of discretion in that case to fail to ask about credence given to police testimony).

[37] *See* Commonwealth v. Plunkett, 422 Mass. 634, 641 (1996) (subject of juror attitudes toward homosexuality "requires careful attention"; judge may, but need not, address in individual voir dire); Commonwealth v. Proulx, 34 Mass. App. Ct. 494, 497 (1993) (although trial judge did not abuse his discretion in refusing to conduct individual voir dire, "there is obviously a potential for prejudice" in cases involving homosexual sexual acts"); Commonwealth v. Boyer, 400 Mass. 52, 54–56 (1987); Commonwealth v. Shelley, 381 Mass. 340, 353 & n.11 (1980).

[38] *See* Commonwealth v. Campbell, 378 Mass. 680, 696 (1979), *aff'd sub nom.* Campbell v. Fair, 838 F.2d 1 (1st Cir. 1988); Commonwealth v. Nelson, 2 Mass. App. Ct. 843 (1974) (rescript).

[39] *See, e.g.*, Commonwealth v. Connor, 392 Mass. 838, 847–50 (1984) (questioning on attitudes toward witness protection program chilled defense counsel's proper attack on witness's credibility); Commonwealth v. Nickerson, 388 Mass. 246, 248–49 (1983) (questioning on attitudes toward witness with prior criminal record was properly denied).

[40] Commonwealth v. Jones, 9 Mass. App. Ct. 103, 115 (1980). In Commonwealth v. Harrison, 2 Mass. App. Ct. 775 (1975), *aff'd*, 368 Mass. 366 (1975), the court found inadequate an affidavit which "amounted to no more than an argument of law intended to persuade the court to adopt the defendant's position on the utility of the requested questions and in no way informed the judge as to the possible injection into the case of prejudice stemming from possibly disparate political views or cultural values." *Harrison, supra*, 2 Mass. App. Ct. at 779. The court's decision that no second-stage questions are required will not be reversed unless there is demonstrated a substantial risk of extraneous issues affecting the decision. Commonwealth v. Sheline, 391 Mass. 279, 290–91 (1984).

The court need not address the issue sua sponte. Commonwealth v. Guess, 23 Mass. App. Ct. 208, 211 (1986).

[41] Voluminous publicity alone will not establish the need for additional questions. Likewise, even a limited amount of publicity, if it is inflammatory, or if it appears shortly before trial or in the midst of jury selection, could be prejudicial. In a typical content analysis, the affiant analyzes the nature of the newspaper articles and radio and TV reports in a coherent fashion, highlighting, for example, the use of inflammatory language, references to suppressed or inadmissible evidence, the timing of the publicity, etc. *See* JURYWORK: SYSTEMATIC TECHNIQUES, §§8:2, 8:4 (2004); *supra* §§ 26.2, 26.3.A (motions related to prejudicial publicity).

[42] *See* Commonwealth v. Trainor, 374 Mass. 796, 801–04 (1978).

literature on public opinion in a given area.[43] Finally, if there are sufficient resources, the defendant could commission studies on his own — canvassing the public's attitudes on issues that are relevant in his case.[44]

Given the historic limitations on voir dire in this Commonwealth, factual presentations of this sort are critical to persuade the trial court that special procedures are required and/or provide a basis for appellate court review.

§ 30.1C. JUDICIAL VERSUS ATTORNEY VOIR DIRE

Under G.L. c. 234, § 28, attorney voir dire is entirely discretionary and, as a practical matter, rarely given.[45] Citing possible abuses of voir dire, the Reporter's Notes to Mass. R. Crim. P. 20 suggest that the better practice for initial voir dire under the first paragraph of § 28 is for the judge to conduct it. The inference is that a court might well be more amenable to attorney voir dire if the provisions of the second paragraph of § 28 are triggered, and the specter of improper extraneous influences is raised.[46]

A motion for attorney voir dire in such cases may significantly assist the defense. Studies have suggested that attorney voir dire is more effective than court voir dire in eliciting truthful responses.[47] An attorney dressed in ordinary clothes, without a

---

[43] For example, in a case in which the defendant intended to offer testimony concerning battered women's syndrome, counsel might offer studies concerning the typical and erroneous attitudes held by the public concerning battered women. Likewise, in cases offering an insanity defense, counsel could offer studies suggesting the public strong feeling that the insanity defense is an impermissible loophole for guilty defendants.

[44] *See* JURYWORK: SYSTEMATIC TECHNIQUES §10:1 (2004). In Commonwealth v. Sheline, 391 Mass. 279, 291 (1984), for instance, the Court found no error in the trial court's refusal to ask prospective jurors whether they would believe the testimony of a law enforcement officer more than that of any other witness where the defendant offered nothing more in support of his request than the "widespread belief " among the general public that a police officer is more credible than an ordinary citizen.

[45] Commonwealth v. King, 391 Mass. 691, 693 (1984); Commonwealth v. Pope, 392 Mass. 493, 504 (1984); Commonwealth v. Walker, 370 Mass. 548, 573 (1976).

[46] *See* Standard 15-2.4(d) of the ABA Standards for Criminal Justice: Trial by Jury (3d ed. 1993) and Principle 11(b) of the ABA Principles for Juries and Jury Trials (2005), each identically suggesting that while initial questioning should be conducted by the judge, the attorneys should have an opportunity for follow up questions, and, where extraneous information or prejudice may exist, "counsel [or "parties"] should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions."

[47] Note the difference between the outcome of the judge's closed-ended questioning and that of the defense attorney's open-ended questioning in the case of *Commonwealth v. Susan Saxe* (Nos. 51775-77, Superior Court Suffolk County):

Initial voir dire by the court:

Q. How recently have you read or heard or seen [publicity]?

A. Well, I read an article in the Sunday Globe. Of course, I didn't expect to be called for this case, but you keep up to date on things.

Q. Now, when, prior to that, have you read anything?

A. I knew all about this, naturally. It's been in the paper. So I had — I didn't form an opinion one way or another. I figure this is for the court.

Q. So let me ask you a formal question: Has whatever you read in the paper or seen on television or heard on the radio caused you to form any opinion or judgment as to the guilt or innocence of the defendant?

title, is less intimidating to a juror than the judge, at the podium in robes, addressed as "His Honor" or "Her Honor."[48] Moreover, the judge is less familiar with the case than counsel and thus less likely to probe the juror with any specificity.[49]

A. No, none whatsoever.

Q. Has it affected at all your ability to sit as an impartial juror?

A. No

Q. Have you heard from any source in connection with what you have heard or read on radio or TV or paper? Have you heard mention of these people [lists names of codefendants, victims, principle witnesses]?

A. Oh, yes, I read about them in the paper, but I don't know any of them. I just know the case.

Q. Does whatever information that you have about them from any source cause you to form any opinion as to the guilt or innocence?

A. No, sir.

Q. Or affected your impartiality as a juror at all?

A. No. . . .

Defense attorneys requested further questioning by the attorneys. The request was granted. Questioning by defense attorney:

Q. Miss, you said that you had read the Boston Sunday Globe article, is that right?

A. Yes.

Q. Is that the first article you have ever read about this case?

A. Oh, no, it goes back to 1970 or 1971, I believe when the State Street Bank was robbed. I'm not sure about that, and they shot the policeman and all.

Q. Have you been following this case?

A. No, when you read the paper, you read everything in the paper, so naturally about Walter — whatever his name — Stroger — was that his name?

Q. Yes.

A. You read everything — I do, anyway.

Q. And when you read the paper it is natural that you form some impression in your mind. When you read the paper on Sunday, did you get any impression about this defendant?

A. No, I figure that it's very hard to form an opinion when you read things in the paper. . . . You don't believe half the things. . . . I don't know Miss Saxe. I don't know her case history . . . I just know what she has done, you know, that she's on trial, that I was called to come here, right. . . . But I don't know anything about her case, just — from what I read in the papers, and I never formed an opinion one way or the other. I figured that's to the court whether she is guilty or innocent.

Q. Judge McLaughlin has instructed you it is up to the jury to determine whether she is guilty or innocent and that is why I ask your opinion.

A. Well, I would have to sit through and listen. . . . I have never been in court before. . . . I'm a little nervous.

Q. I don't blame you; I am too.

A. Right.

Q. What do you think Susan Saxe has done from your reading of the paper?

Prosecutor: I object to that.

The Court: I will exclude it in that form.

Q. When you said that you have only read about what she had done, what do you mean by that?

A. Well, we all know what she has done. You know, we all know what she has done. So it is now up to the court to see if she is guilty or innocent, but you have to go through the whole trial, you can't just read something in the paper and say the girl is guilty, you know. You understand?

Q. Well, I am not sure. I am not sure what you mean when you say we all know what she has done.

A. Well, we all know the girl went in and held up the bank and the policeman was shot there.

The juror was excused for cause.

[48] In JURYWORK: SYSTEMATIC TECHNIQUES, §2:2 (2004) the authors track social science research concerning the dynamics of human behavior in public situations. In interviews, for example, researchers found that "[w]hen the interviewer is of significantly higher social status, the respondent's evaluation apprehension is increased. The greater the

Once again, it is critical to base the request for attorney voir dire on a factual showing of the need for it. Affidavits may be prepared using the studies cited in the social science literature concerning the importance of the status of the interviewer in the candor of the subject; and the expert testimony of social psychologists may be offered.

§ 30.1D. INDIVIDUAL VERSUS GROUP VOIR DIRE

Questioning of jurors individually has been found to produce more truthful and elaborate responses than group questioning. A juror questioned in a group setting is less likely to reveal her potential bias or prejudice than one questioned individually.[50]

Although a capital defendant was afforded individual voir dire,[51] in noncapital cases the practice has been to pose the so-called statutory questions to the jurors as a group,[52] followed by questions to each juror individually at sidebar who responded affirmatively (i.e., in a fashion suggesting bias or prejudice) to the collective questions)[53]

---

status difference or social distance between interviewer and subject, the greater the tendency of the subject to give answers the subject believes the interviewer would like to hear." *Id.* at §2:3.. *See also* Jones, *Attorney-Conducted Voir Dire*, II LAW & HUMAN BEHAVIOR 131 (1987).

[49] As the court noted in United States v. Ible, 630 F.2d 389, 395 (5th Cir. 1980): "The 'federal' practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strengths and weaknesses of the case. . . . Experience indicates that in the majority of situations questioning by counsel would be more likely go [gain the necessary information upon which to base intelligent exercise of peremptory challenges] than an exclusive examination in general terms by the court."

[50] In Irvin v. Dowd, 366 U.S. 717, 728 (1961), the court said: "No doubt each juror was sincere when he said that he would he fair and impartial . . . but the psychological impact of requiring such a declaration before one's fellows is often its father." Likewise, as the court noted in Coppedge v. United States, 272 F.2d 504, 508 (D.C. Cir. 1959): "It is too much to expect of human nature that juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial." *See also* Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968), *cert. denied*, 393 U.S. 1022 (1969). The American Bar Association Project on Minimum Standards for Criminal Justice recommends questioning jurors individually, "outside of the presence of other chosen and prospective jurors" in criminal cases where "questions of possible prejudice are raised." ABA Standards for Criminal Justice 8-3.5 (3d ed. 1992). *See also* Standard 15-2.4(e) of the ABA Standards for Criminal Justice: Trial by Jury (3d ed. 1993) (same). *But see* Commonwealth v. Cokonougher, 35 Mass. App. Ct. 502, 503 (1993) (ordinarily, collective questioning does not inhibit truthful answers; questioning of jurors, other than as required by G.L. c. 234, § 28, is entirely in discretion of judge).

[51] Commonwealth v. Ventura, 294 Mass 113 (1936). The latter evolved because of the need to interrogate each juror about the death penalty. *See* Commonwealth v. Montecalvo, 367 Mass. 46, 48–49 (1975). In the absence of a death penalty, the Notes to Rule 20 indicate that "there is . . . no reason in the usual case why the statutory questions may not be asked of jurors as a group.

[52] *See* Commonwealth v. Montecalvo, 367 Mass. 46, 48–51 (1975).

[53] The Court held in Commonwealth v. Bodden, 24 Mass. App. Ct. 135, 140-41 (1987), that the failure to question jurors individually, at side bar, did not amount to reversible error where the defendant demonstrated no prejudice. The Court did effectively exhort the trial courts to follow the customary practice. If a court fails to do so, defense counsel should make a record about the importance of individual voir dire, citing to the studies cited above, and any other facts relevant to the particular case at hand.

Individual questioning is mandatory for "second-stage" questioning based on potentially extraneous influence, as in cases involving interracial violence, sexual offenses against minors, and the insanity defense.[54] Accordingly, the Reporter's Notes to Rule 20 suggest that individual questioning may be "commanded" depending on the facts and circumstances of the individual case.[55] Defense counsel should always move for individual voir dire and again, as above, offer a factual basis for it either in the general studies or in the facts of the case at bar.[56]

§ 30.1E. FORM OF THE QUESTION

Even where the provisions of the second paragraph of G.L.c. 234, § 28, are called into play because the trial court has found that the jury may be improperly influenced by "extraneous" factors, the form of the question is left largely to the discretion of the trial court.[57] But the form of the question is quite important: "Closed-ended" questions, those that call for a yes or no answer, give counsel and the court less information than "open-ended" questions, those that permit the juror to answer in her own words in any way she pleases.[58]

---

[54] *See supra* § 30.1B(2); G.L. c. 234, § 28; Commonwealth v. Auguste, 414 Mass. 51, 58 (1992) (reversible error; judge's determination of impartiality "should come from the juror's answer to the judge's questions, and not from answers suggested or . . . required by the questions"); Commonwealth v. Horton, 376 Mass. 380, 394–95 (1978), *cert. denied*, 440 U.S. 923 (1979). The better practice is to question the juror completely outside the presence of the other jurors, rather than at sidebar. Commonwealth v. Shelley, 381 Mass. 340, 353 n.12 (1980). However, the individual questioning should be conducted in the courtroom, as part of the defendant's right to a public trial. Commonwealth v. Cohen, 456 Mass. 94, 117-19 (2010) (holding that partial closure of the courtroom during empanelment was a structural error requiring reversal of conviction and a new trial).

[55] As noted in Commonwealth v. Shelley, 381 Mass. 340 at 353 n.12 (1980): "collective questioning on sensitive issues may not elicit a response from some jurors who would respond in private. That the collective questioning provokes 'no positive ripple among the venire' . . . does not conclude the issue whether individual voir dire is necessary. Nor is the issue settled when, as here, a few jurors come forward and are excused. Some more private form of questioning is necessary." Commonwealth v. Gittens, 55 Mass. App. Ct. 148, 153 n.5 (2002). *See also* Commonwealth v. Montecalvo, 367 Mass. 46 (1975). *Compare* Commonwealth v. Duddie Ford, Inc., 409 Mass. 387, 389–93 (1991) (no abuse of judge's broad discretion to forego individual questioning of jurors who indicated familiarity with defendant, but who did not respond affirmatively to collective questions regarding bias); Commonwealth v. Ashman, 430 Mass. 736, 739 (2000) (no abuse of discretion in initial collective questioning concerning bias against mental illness or impairment where first-degree-murder defense was lack of capacity, noting "a judge has considerable discretion as to whether the circumstances present a substantial risk that an extraneous influence might affect jurors").

[56] *See* Commonwealth v. Grice, 410 Mass. 586, 590 (1991); Commonwealth v. Jones, 9 Mass. App. Ct. 103 (1980). *See generally supra* § 26.3G (motions; prejudicial publicity).

[57] In Commonwealth v. Sowers, 388 Mass. 207, 211-14 & n.6 (1983), the court sustained the following question on racial bias: "Do you feel that you would have any tendency subconsciously to favor the testimony of white over black or black over white, or would be able to judge them in a way completely apart from the color of their skin." The question has foreordained the answer. It is apparent that the "correct answer" is contained in the ending phrase. *See also* Commonwealth v. Burden, 15 Mass. App. Ct. 666, 673 (1983).

[58] *See* Commonwealth v. Auguste, 414 Mass. 51, 52–59 (1992) (reversible error where trial judge failed to conduct meaningful inquiry of jurors who expressed concerns about their impartiality). Even a detail as minute as the questioner's "tone of voice" can affect the answers.

By moving for particular questions or attorney voir dire, counsel may be able to avoid a fruitless voir dire in which the court intones the statutory questions, even using the highly artificial language of the statute (i.e., "Are you sensible of any bias or prejudice?"). Quite apart from their closed nature, such conclusory and inflammatory language typically results in a denial. Defense counsel well know that it is bad cross-examination technique to ask the question in conclusory terms — "Are you prejudiced?" — rather than attempting to break down the concept of prejudice into questions that reveal it.

§ 30.2 CAUSE CHALLENGES

A cause challenge should be based on juror attitudes that take away from her ability to judge the case afresh and impartially. There are three general categories: (1) The juror has an interest in the particular case (based for example on a relationship to the parties or financial interest in the outcome); (2) the juror has prejudiced the outcome (a situation often sanitized through court questioning whether the juror can set that aside); or (3) the juror has been affected by some extraneous factor (bias or prejudice).[59] The impartiality of the juror must appear affirmatively, and if the juror cannot say he can judge the case on the merits, he must be dismissed.[60]

The rule provides that the basis for the challenge "may be made at the bench."[61] It is obviously critical that it be made outside the presence of the juror.[62] Rule 20(b)(1) also allows the objecting party with the approval of the court to "introduce other competent evidence in support of the objection." An offer of proof must be made to preserve appellate rights if the challenge is rejected.[63]

The juror should be challenged before the juror is sworn to try the case[64] but may be challenged after the jury is sworn but before evidence is presented if counsel can demonstrate a basis for that challenge.[65]

A judge that questions a juror in rapid-fire fashion, in a series of closed-ended, leading questions that readily suggest the answer he or she wishes to hear, will shape the responses.

[59] *See, e.g.*, Commonwealth v. Vann Long, 419 Mass. 798, 804 n.6 (1995) (juror admitting tendency to believe testimony of police officers over that of civilians must be dismissed unless further inquiry establishes indifference); Blank v. Hubbuch, 36 Mass. App. Ct. 955 (1994) (that juror in medical malpractice case is physician, and shares some professional affiliations with defendant, does not justify excuse for cause); A somewhat unusual case was presented in Commonwealth v. Susi, 394 Mass. 784, 788 (1985), where the court found error in the judge's refusal to excuse a blind juror where the predominant issue at the trial was identification.

[60] Commonwealth v. Vann Long, 419 Mass. 798, 804 n.6 (1995); Commonwealth v. Auguste, 414 Mass. 51, 52–59 (1992); Commonwealth v. Mangum, 357 Mass. 76, 79 (1970). *See also* Wainwright v. Witt, 469 U.S. 412, 424–26 (1985) (bias need not be proved with unmistakable clarity; judge's definite impression of juror partiality is enough).

[61] Mass. R. Crim. P. 20(b)(3).

[62] However, the fact that a prospective juror learns of a challenge poses no Sixth Amendment bar to that juror sitting on the jury. *See* Rivera v. Illinois, 556 U.S. 148, 159 (2009).

[63] Commonwealth v. Wygrzywalski, 362 Mass. 790 (1973). The trial court's decision will not be overturned unless there is a "substantial risk" the case was at least in part decided on extraneous issues. Commonwealth v. Lattimore, 396 Mass. 446, 449 (1985).

[64] Mass. R. Crim. P. 20(b)(3).

The trial judge is afforded great discretion in this area and will not be reversed absent clear abuse.[66]

§ 30.3 PEREMPTORY CHALLENGES

§ 30.3A. NUMBER OF PEREMPTORY CHALLENGES

Peremptory challenges are challenges by right, for which counsel need not provide a reason. Rule 20(c) specifies the number of peremptories afforded each defendant: two in a district court six-person jury trial; four in a jury of twelve; and twelve in a life imprisonment felony. However, in a life imprisonment felony trial where additional jurors are needed because the trial may be protracted, the court may impanel not more than sixteen jurors.[67] In that case, the defendant is entitled to one additional peremptory for each alternate juror. If cases are consolidated, each defendant is entitled to no more peremptory challenges "than the greatest number to which he would have been entitled upon trial of any one of the indictments or complaints alone."[68]

The Commonwealth is entitled to as many challenges "as equal the whole number to which the defendants in the case are entitled."[69]

Denying the defendant a peremptory challenge to which he is entitled is reversible error without a showing of prejudice.[70]

Seeking additional peremptory challenges: While Rule 20(c)(1) does not specifically authorize the judge to grant a request for additional peremptory challenges,[71] both the Supreme Judicial Court and the Appeals Court have assumed

[65] Mass. R. Crim. P. 20(b)(3); Commonwealth v. Monahan, 349 Mass. 139, 159 (1965). *Cf.* Commonwealth v. Zakas, 358 Mass. 265 (1970) (objection during prosecutor's opening statement too late where grounds discoverable earlier).

[66] Commonwealth v. Lattimore, 396 Mass. 446, 449–50 (1985). This case held that court need not allow challenge for cause of one juror, who saw her brother-in-law, a retired police officer, daily, or of another juror whose brother was a police officer. Even the fact that a juror himself is a police officer does not demonstrate partiality per se. Commonwealth v. Ascolillo, 405 Mass. 456, 458–61 (1989); Commonwealth v. Ortiz, 50 Mass. App. Ct. 304, 308 (2000). *See also* Commonwealth v. Duran, 435 Mass. 97, 107 (2001) (correctional officer); Commonwealth v. Sleeper, 435 Mass. 581, 588 (2002) (friend of Commonwealth witness). *Compare* Commonwealth v. Somers, 44 Mass. App. Ct. 920 (1998) (reversible error to deny cause challenge of juror who was engaged to a prosecutor, confessed to bias, and said he did not know if he could decide case on the evidence) (rescript).

[67] Mass. R. Crim. P. 20(d)(1).

[68] Mass. R. Crim. P. 20(c)(1).

[69] Mass. R. Crim. P. 20(c)(1). G.L. c. 218, § 27A(e) (jury of six).

[70] Commonwealth v. Green, 420 Mass. 771, 776-77 (1995); Commonwealth v. Hyatt, 409 Mass. 689, 692 (1991); Commonwealth v. Wood, 389 Mass. 552, 564 (1983). *See* Commonwealth v. Hampton, 457 Mass. 152, 164-65 (2010) (dictum).

[71] Counsel may request that the numbers of peremptory challenges be increased for all sides, as in Commonwealth v. Walker, 379 Mass. 297 (1979), or that only the challenges of the defense be increased, Commonwealth v. Burden, 15 Mass. App. Ct. 666, 674-75 (1983) ("assuming" court's discretion to grant additional peremptory challenges, but finding no basis to do so), but any such request must be shown to be necessary "to obtain an impartial jury." Commonwealth v. Leahy, 445 Mass. 481, 499 (2005). Indeed, at one point peremptory

without deciding that the court has the discretionary power to do so[72] and may in some instances be constitutionally required. Although there is no specific federal or state constitutional right to the exercise of peremptory challenges,[73] additional peremptory challenges may be necessary to secure the right to be tried by an impartial jury under the Sixth Amendment to the U.S. Constitution[74] and article 12 of the Massachusetts Constitution Declaration of Rights. As part of the defendant's right to a fair trial counsel may, for example, present affidavits presenting the results of surveys that establish that the venire is likely to be more prejudiced against the defendant than in the ordinary case.[75] Peremptory challenges are necessary in general because cause challenges and voir dire may not be adequate to ferret out prejudice. Where the defendant has been subject to particularly virulent pretrial publicity, it may be argued that the likelihood of lurking prejudices is even higher than in the ordinary case and therefore, it is especially important that the defendant be given additional peremptory challenges.

§ 30.3B. PROCEDURE

Counsel must exercise peremptory challenges after the potential jurors have been passed for hardship[76] and for cause and before the jurors are sworn.[77]

Super. Ct. R. 6 mandates the following procedure for the exercise of peremptory challenges, except when there is individual voir dire or other procedures

---

challenges were allowed to the defendant only, to be used for protection against jurors who appeared to be prejudiced against him. It was only later that the common law recognized that the government's interest in trial by an impartial juror also required that it be permitted to exercise peremptory challenges. Commonwealth v. Soares, 377 Mass. 461, 483 (1979).

[72] Commonwealth v. Lattimore, 396 Mass. 446, 450 (1985); Commonwealth v. Burden, 15 Mass. App. Ct. 666, 675 (1983).

[73] Commonwealth v. Wood, 389 Mass. 552, 559 (1983); Commonwealth v. Green, 420 Mass. 771, 776 (1995).

[74] Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

[75] The American Bar Association has suggested that "[w]henever there is a substantial likelihood that, due to pretrial publicity, the regularly allotted number of peremptory challenges is inadequate, the court shall permit additional challenges to the extent necessary for the impaneling of an impartial jury." ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 8-3.5(c) (3d ed. 1992). In Commonwealth v. Saxe, Nos. 51775-77 (Superior Court Suffolk County, April 14, 1976, Mem. McLaughlin) (Walter, C.J.), the court doubled the number of peremptory challenges for the defense as a means of countering extensive pretrial publicity. Expert affidavits were offered that presented the survey results and also proposed the number of challenges necessary to vitiate the prejudice. *See* Kadane & Kairys, *Fair Numbers of Peremptory Challenges in Jury Trials*, 73 J. AM. STATISTICAL ASS'N 747 (1979), which offers a model for determining the number of peremptory challenges necessary to deal with specific survey results. In cases of extensive pretrial publicity, it is particularly helpful for counsel to frame the requests for relief in the alternative, from dismissal at the most extreme end, to additional peremptory challenges and more extensive voir dire at the other. *See also supra* § 26.3H (extra peremptories in high-publicity case).

[76] *See* G.L. c. 234A, § 40. *Cf.* Commonwealth v. Barnoski, 418 Mass. 523, 531 (1994) (judge's "administrative determination" to excuse prospective jurors for hardship was not "critical stage" of proceedings at which defendant had right to be present).

[77] Mass. R. Crim. P. 20(c)(2); Commonwealth v. Johnson, 426 Mass. 617, 626–27 (1998); Commonwealth v. Hampton, 457 Mass. 152, 166 (2010).

are specially ordered.[78] A number of jurors are first called, which number "cannot be less than the number of jurors needed for the jury, plus the number of alternates."[79] Voir dire examination is then conducted, and after all of the jurors have been cleared for cause challenges, the Commonwealth exercises its right to peremptory challenge of each juror first seated, and each successive juror seated, until the Commonwealth has either exhausted its right to challenge or has chosen to stop challenging. The defendant then follows again until she has either exhausted her challenges or has chosen to stop. The Commonwealth, assuming it has challenges left, then stands to challenge, followed by the defendant "until the right of peremptory challenge shall be exhausted or the parties shall cease to challenge."[80] Throughout this process, additional venire persons will be summoned as needed from the jury pool. Those who are judged indifferent, after voir dire and challenges for cause, will be subject to remaining peremptory challenges. Under Super. Ct. R. 6, if a party has not exercised a peremptory challenge on a selected juror, that juror remains on the panel, and the party's right to exercise peremptory challenges pertains only to new venire persons called to replace those who have been challenged.[81] Unless the trial involves a "capital offense"[82] or the court "specially orders" another system, failure to conform to Rule 6 is reversible error.[83]

The decision to exercise a peremptory challenge is a relative one: Is this juror better than the one following or not as good as the one called a few moments before?

[78] Though the rule is expressed in civil terms, with the parties called "plaintiff" and "defendant," the parenthetical phrase under the heading is "(Applicable to all cases)." When the court conducts individual voir dire during empanelment, neither Rule 6 nor G.L. ch. 234, §28 provides for a process by which peremptory challenges are to be exercised, leaving the matter to the discretion of the judge so long as it results in an impartial jury. *See* Commonwealth v. Vuthy Seng, 456 Mass. 490, 494-95 & n. 6 (2010); Commonwealth v. Jean-Louis, 70 Mass. App. Ct. 740, 742 (2007). However, the S.J.C. has cautioned that "novel procedures, such as [requiring peremptory challenges following each individual voir dire, in alternating order, in the name of fairness and efficiency], raise the possibility of prejudicial error. Although not constitutionally mandated, peremptory challenges enjoy a 'venerable' status in our legal system. Deviations from tried and true voir dire procedures with respect to their exercise invite extra scrutiny because problems associated with peremptory challenges overlap with problems associated with the right to a fair trial. The two are not completely distinct." Vuthy Seng, 456 Mass. at 494 n. 6 (citation omitted).

[79] Commonwealth v. Johnson, 417 Mass. 498, 506 (1994). Rule 6 requires first calling jurors "until the full number is obtained." *Johnson* held that this language does not entitle defendant to use of the "Walker method," in which the parties do not begin to exercise their peremptory challenges until the number of venire persons found indifferent equals the number of needed jurors and alternates plus the total number of peremptory challenges for both sides. However, *Johnson* does not bar the trial court from using the Walker method, which has the advantage of enabling counsel to see as much of the entire venire as she can, before she is required to challenge. *Id*. at 506-508.

The S.J.C. in *Johnson* repudiated use of the term *struck method* to describe the Walker method. *Id*. at 505 n.7.

[80] Superior Court Rule 6 (1989).

[81] *Id*. *See* Commonwealth v. Ortiz, 50 Mass. App. Ct. 304, 309 (2000).

[82] In that case, the defendant may be required to exercise peremptories as each juror is seated. Commonwealth v. Freiberg, 405 Mass. 282, 293 (1989); Commonwealth v. Barry, 397 Mass. 718, 723–26 (1986).

[83] Commonwealth v. Daye, 435 Mass. 463, 471 (2001); Commonwealth v. Brown, 395 Mass. 604, 606-607 (1985). *Cf.* Commonwealth v. Barrows, 391 Mass. 781 (1984) (failure to object waived Rule 6 error).

Likewise, counsel should consider how potential jurors are likely to interact with one another, who the leaders are likely to be, what kinds of alliances are likely to be drawn, and so on.

Except in extreme cases, it is unwise to use up all the peremptory challenges if the Commonwealth has not, because it leaves the defense helpless in the face of subsequent selections. One exception arises when the judge has erroneously denied a cause challenge, because only exhaustion of all peremptories will preserve the issue for appeal.[84]

§ 30.3C. IMPROPER EXERCISE OF PEREMPTORY CHALLENGES: *COMMONWEALTH V. SOARES, BATSON V. KENTUCKY,* AND THEIR PROGENY

In *Commonwealth v. Soares,*[85] the Supreme Judicial Court held that article 12 of the Massachusetts Constitution Declaration of Rights barred the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular groupings in the community.[86] In *Batson v. Kentucky,* the U.S. Supreme Court also barred discriminatory challenges, on federal constitutional grounds.[87] Defense counsel objecting to the discriminatory exercise of Commonwealth peremptories should cite both article 12 of the state constitution and the federal right to equal protection under the Fourteenth Amendment.[88] A *Soares* or *Batson* objection may be made by the Commonwealth,[89] the defendant, or by the court.[90] The defendant need not be a member of the same group as the struck jurors.[91]

---

[84] Commonwealth v. Auguste, 414 Mass. 51, 52–59 (1992) (reversible error, without showing of prejudice, where defendant was forced to exhaust peremptories excluding jurors who had expressed concerns about their impartiality, but who trial judge failed to examine meaningfully). *See* Commonwealth v. McCoy, 456, 838, 842 (2010) (prejudice from erroneous failure to remove a juror for cause "generally shown" by the use of a peremptory challenge to remove juror who should have been excused for cause coupled with evidence that defendant was forced to accept juror he would have challenged peremptorily but was unable to because peremptory challenges had been exhausted); Commonwealth v. Seabrooks, 433 Mass. 439, 445 (2001); Commonwealth v. Clark, 446 Mass. 620, 629 (2006).

[85] 377 Mass. 461 (1979).

[86] Commonwealth v. Soares, 377 Mass. 461, 485–86 (1979).

[87] Batson v. Kentucky, 476 U.S. 79 (1986) (equal protection clause bars racial exercise of peremptories). However, *Soares* rests on the right to a representative jury, rather than the right to equal protection. Commonwealth v. Soares, 377 Mass. 461, 477–88 (1979). In contrast, the Sixth Amendment "fair cross section" requirement, *see infra* § 30.4, applies only to selection of the array, not the petit jury. *See* Holland v. Illinois, 493 U.S. 474, 478-484 (1990); Commonwealth v. Arriaga, 438 Mass. 556, 562-63 (2003); Commonwealth v. Caldwell, 45 Mass. App. Ct. 42, 48 n.7 (1998).

[88] *See supra* note 87 citing *Batson v. Kentucky*. For relevant cases and discussion, *see also supra* § 5.8C(3)(b) (compositional challenges to grand jury).

[89] *Batson* applies to bar defense use of race-based peremptories. Georgia v. McCollum, 505 U.S. 42, 59 (1992); Commonwealth v. Fruchtman, 418 Mass. 8, 13–14 (1994), *cert. denied,* 115 S. Ct. 366 (1994) (Commonwealth's right to a representative jury).

[90] *See* Commonwealth v. Curtiss, 424 Mass. 78, 80 (1997); Commonwealth v. LeClair, 429 Mass. 313, 322-323 (1999).

[91] Commonwealth v. Vann Long, 419 Mass. 798, 806 (1995); Commonwealth v. Soares, 377 Mass. 461, *cert. denied,* 444 U.S. 881 (1979); Commonwealth v. Little, 384 Mass.

An important question is how to define those "discrete groups" protected from exclusion through the exercise of peremptory challenges. The Supreme Judicial Court noted in *Soares* that it viewed the equal rights amendment as dispositive on this issue; sex,[92] race, color, creed, or national origin may not permissibly form the basis for juror exclusion.[93] Challenges based on age, for example, are not protected by *Soares.*[94] A different definition of "cognizable groups" might apply under the equal protection theory of *Batson*.[95]

Peremptory challenges are presumptively proper.[96] In *Soares* the Supreme Judicial Court held that the presumption is rebuttable on a showing that "(1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group,[97] and (2) there is a likelihood

---

262 (1981); Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 637 n.1 (2000). *See also* Powers v. Ohio, 499 U.S. 400 (1991) (white defendant has standing to raise equal protection rights of blacks excluded from jury by prosecutor's race-based peremptories). However, this factor may be relevant in determining whether the presumption of propriety has been rebutted. Commonwealth v. Serrano, 48 Mass. App. Ct. 163, 166 (1999); Commonwealth v. Thomas, 19 Mass. App. Ct. 1, 4 & n.2 (1984); *Soares, supra*. CPCS Training Bulletin vol. 1, no. 2 (May 1991) advises that any third-party equal-protection claim on behalf of *juror's* rights should be made under both the federal constitution and art. 1 of the Mass. Const. Declaration of Rights, and that art. 12 should also be cited to preserve the personal, non-third-party jury trial right under the state constitution.

[92] *See* Commonwealth v. Fruchtman, 418 Mass. 8, 14 (1994) (improper to presume that females are more likely than men to be biased against defendant in child sexual abuse case; "[g]ender may not be treated as a surrogate for bias."). The Supreme Court has expanded *Batson* to bar the exercise of peremptory jury challenges on the basis of gender. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

[93] Commonwealth v. Soares, 377 Mass. 461, 488-489 (1979); Commonwealth v. Jordan, 439 Mass. 47, 62 (2003) (holding that *Soares* applies to a group delineated by race *and* gender).

See also Commonwealth v. Colon-Cruz, 408 Mass. 533, 549–50 & n.10 (1990) (implicitly applying *Soares* to "Hispanics" as ethnic, not racial, group); Commonwealth v. Rodriguez, 457 Mass. 461, 467 n. 15 (2010) (recognizing that *Soares* and *Batson* apply to Hispanics); Commonwealth v. Smith, 450 Mass. 395, 405-07 (2008) (declining to consider whether transgendered status or sexual orientation constituted a cognizable group under *Soares* or *Batson* due to inadequate record attributable to defense counsel's failure to object to peremptory strike). *But see* Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 193 (2011) (declining to extend *Soares-Batson* analysis to "persons of color," thus aggregating African-Americans and Hispanics into one "catch-all category")

[94] Commonwealth v. Wood, 389 Mass. 552, 564 (1983). *See also* Commonwealth v. Samuel, 398 Mass. 93, 95 (1986) (exclusion of "young women"); Commonwealth v. Hyatt, 409 Mass. 689, 692 (1991); Commonwealth v. Rivera, 50 Mass. App. Ct. 532, 536 n.8 (2000).

[95] *See* Murchu v. United States, 926 F.2d 50, 54–55 (1st Cir. 1991) (Americans of Irish ancestry not a cognizable group for *Batson* purposes; test explained). *But see* Commonwealth v. Rodriguez, 457 Mass. 461, 467-74 (2010) (recognizing the different conceptual bases for *Soares* and *Batson* claims but treating the issue as a "*Soares-Batson* objection" and employing the same procedural approach to its resolution).

[96] Commonwealth v. Sarourt Nom, 426 Mass. 152, 155 (1997) (citing Commonwealth v. Burnett, 418 Mass. 769, 770 (1994)); Commonwealth v. Serrano, 48 Mass. App. Ct. 163, 164-65 (1999).

[97] *See supra* text accompanying notes 92–94. Juror surnames, without more, may be relied on to establish ethnicity or national origin, but not religion; to establish religion, party

that they are being excluded from the jury solely by reason of their group membership."[98] The Supreme Judicial Court has since ruled that showing a "pattern" of challenges is not essential; a party may establish impropriety based on a *single* challenge to a prospective juror who is the sole member of a discrete group.[99] The party objecting must do so in a timely fashion, or risk forfeiture of the claim.[100]

---

could request inquiry of jurors by the judge. Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 144–45 & n.11 (1994), S.C., 418 Mass. 773 (1994) (affirming, without reaching religion issue).

[98]Commonwealth v. Soares, 377 Mass. 461, 489–90, *cert. denied*, 444 U.S. 881 (1979). There are no clearly defined rules with respect to the kind of case that must be made in the first instance in order to rebut the presumption of validity. In Commonwealth v. Gagnon, 16 Mass. App. Ct. 110, 118-121 (1983), *rev'd sub nom.* Commonwealth v. Bourgeois, 391 Mass. 869 (1984), the Appeals Court found a violation of *Soares*, where the prosecutor challenged 19 of the 23 members of the venire with arguably French-Canadian names, or a total of 83 percent. *See also* Commonwealth v. Mathews, 31 Mass. App. Ct. 564, 570 (1991) (in case with interracial sexual aspect, prosecution challenge of white juror who had black ex-boyfriend, and of one black, leaving only one black on the jury, established prima facie showing); Commonwealth v. Brown, 11 Mass. App. Ct. 288 (1981) (three blacks challenged); Commonwealth v. Reid, 384 Mass. 247, 251 (1981) (six challenged, consisting of all males on the panel); Commonwealth v. Robinson, 382 Mass. 189, 195 (1981) (three challenged, none seated); *Soares*, *supra* (12 blacks challenged, one seated). The First Circuit has avoided deciding whether statistical disparity alone can demonstrate a prima facie case, "a position adopted by many courts." Brewer v. Marshall, 119 F.3d 993, 998, 1005 (1997) (in absence of circumstances suggesting juror bias, judge insensitivity or improper motive, statistically disproportional (66 percent) strikes of black potential jurors did not compel finding of prima facie case).

[99] But this depends on all of the circumstances. *See* Commonwealth v. Calderon, 431 Mass. 21, 25 & n.2 (2000) (in case of Hispanic defendant charged with unlawful possession of firearm and ammunition, prosecutor's challenge of sole black prospective juror raised prima facie case of impropriety); Commonwealth v. Curtiss, 424 Mass. 78 (1997) (in case alleging rape by white defendant of black victim, defense challenge of sole black prospective juror raised prima facie case of impropriety); Commonwealth v. Vann Long, 419 Mass. 798, 805, 807 (1995) (prima facie showing of impropriety where prosecutor challenged two Hispanic members of venire, who were only minority members in the general panel); Commonwealth v. Fryar, 414 Mass. 732, 735–39 (1993), S.C., 425 Mass. 237 (1997) (prima facie showing based on prosecution challenge of only black person in venire); Commonwealth v. Harris, 409 Mass. 461, 466 (1991). *Compare* Commonwealth v. Vega, 54 Mass. App. Ct. 249, 251 (2002) (challenge of single minority juror did not constitute prima facie case of impropriety where other minority jurors remained in jury box); Commonwealth v. Serrano, 48 Mass. App. Ct. 163- 164-65 (1999) (where remaining venire included three Hispanics, challenge of sole African-American juror did not establish prima facie case of discrimination); Commonwealth v. Roche, 44 Mass. App. Ct. 372 (1998) (where both defendant and alleged victim were white, defense challenge of sole black juror on panel and venire does not necessarily establish prima facie case); United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994) *cert. denied*, 514 U.S. 1055 (1995) (prosecutor's challenge of only black juror does not automatically give rise to inescapable inference of discriminatory intent; opponent must produce additional direct or circumstantial proof).

[100] *Soares* challenges must be made at a time sufficient to "provide . . . the trial judge and opposing counsel with an opportunity to address the matter . . . [and create] a record which [is] adequate for appellate review." Commonwealth v. Bourgeois, 391 Mass. 869, 877 n.11 (1984), *discussed in* Brewer v. Marshall, 119 F.3d 993, 1000–03 (1997) (Massachusetts's contemporaneous objection rule allows trial judge to remedy *Batson* violation before challenged jurors leave court room).

Once a claim of improper peremptory challenges is made, the judge should "make a finding as to whether the requisite prima facie showing of impropriety has been made" before requiring the challenger to give reasons.[101] If the judge so finds, the burden shifts to the offending party to demonstrate that the group members disproportionately excluded were not struck on account of their group affiliation but rather for a bona fide reason.[102] How counsel satisfies that burden is not at all clear. In *Soares*, the Court suggested that counsel[103] might offer reasons tied to the individual qualities of the prospective juror and not to that juror's group associations.[104] Counsel might point to the fact that in the course of the jury selection, she also challenged similarly situated members of the majority group on comparable grounds,[105] or that she challenged similar

[101]Commonwealth v. Burnett, 418 Mass. 769, 771 (1994); Commonwealth v. Green, 420 Mass. 771, 776 (1995) (error for judge to require defense counsel to provide reasons for peremptory challenge before making a finding of impropriety); Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 638 (2000); Commonwealth v. Roche, 44 Mass. App. Ct. 372 (1998). *But see* Commonwealth v. Calderon, 431 Mass. 21, 25 (2000) (when judge requires prosecutor to explain reasons for peremptory challenge, judge has implicitly found that challenge might be improper); Commonwealth v. Benoit, 452 Mass. 212, 219-21 (2008) (same).

[102] No *Soares* violation can be found unless the offending party is afforded an opportunity to demonstrate permissible grounds for the challenge. Commonwealth v. Bourgeois, 391 Mass. 869, 877–78 (1984). *Batson* established a three-step procedure: (step 1) the opponent of a peremptory challenge must make out a prima facie case of racial discrimination; (step 2) the proponent of the strike must come forward with a race-neutral explanation; and (step 3) the trial court must decide whether the explanation is a pretext for purposeful discrimination. *See* Purkett v. Elem, 514 U.S. 765, 769 (1995)**,** *reh'g denied,* 115 S. Ct. 2635 (1995) (at step 2, even implausible race-neutral explanation — such as fact that stricken black jurors had facial hair — is sufficient).

[103] The judge should wait for the prosecutor's reasons, rather than offer her own. *See* Commonwealth v. Fryar, 414 Mass. 732, 739–41 & n.6 (1993) (prosecutor merely subscribed to judge's proffered reason as "one" of his own; judge should have raised any reservations about juror's fitness to serve at earlier stage).

[104] "The proper inquiry is whether . . . counsel gave clear and reasonably specific reasons . . . which were personal to the juror and not based on the juror's group affiliation." Commonwealth v. Green, 420 Mass. 771, 778 (1995) (citing Commonwealth v. Burnett, 418 Mass. 769, 771 (1994)). *See* Commonwealth v. Calderon, 431 Mass. 21, 27 n.4 (2000) (prosecutor's challenge based on fact that juror "smiled" at defense counsel insufficient); Commonwealth v. Burnett, 36 Mass. App. Ct. 1, 5 (1994), S.C., 418 Mass. at 772 (characterization that youth workers might have certain feelings about crime held insufficient to challenge black juror); Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 142-44 (1994), *aff'd,* 418 Mass. 773 (1994) (challenges based on visual assessment of jurors, level of education, and widower status held insufficient because vague, general, and not specifically tied to issues in case); Caldwell v. Maloney, 159 F.3d 639, 652-55 (1st Cir. 1998), *cert. denied,* 119 S. Ct. 1152 (1999), *aff'g on habeas review*, Commonwealth v. Caldwell, 418 Mass. 777, 779-81 (1994) (holding sufficient prosecution challenges based on demeanor, residence in defendant's neighborhood, and fifth grade education level). *See also* Commonwealth v. Valentin, 420 Mass. 263, 267–69 (1995) (affirming trial court's allowance of challenge removing sole Hispanic person from jury, for reason that juror had difficulty understanding English).

[105] *See* Commonwealth v. Fryar, 414 Mass. 732, 737–38 & n.4 (1993) (challenge to white juror who showed difficulty understanding and answering questions posed on individual voir dire not "exactly the same" as later challenge to black juror who only misunderstood ambiguous instruction to group panel).

percentages of prospective jurors who did and who did not belong to the minority group.[106] After the proponent of the strike gives his reasons, the opponent must be given an opportunity to rebut the proffered explanation as a pretext.[107]

The judge must make a "meaningful evaluation of the reasons given"[108] and make explicit findings on the record whether the proponent's reasons for his challenges were bona fide or sham.[109] In so doing, the trial judge must "critical[ly] evaluat[e] both the soundness of the proffered explanation and whether the explanation (no matter how 'sound' it might appear) is the actual motivating force behind the challenging party's decision.... In other words, the judge must decide whether the explanation is both 'adequate' and 'genuine.'..."[110]

---

[106] *See, e.g.*, Commonwealth v. Green, 420 Mass. 771, 777 (1995) (no improper use of peremptories in challenging 50% of black venire persons where defendant had also challenged 42% of the nonblack; of the 10 venire members he challenged, 80% were nonblack and 20% were black). On the other hand, that the proponent did not challenge other members of the juror's group is not persuasive; "one need not eliminate one hundred percent of the discrete group to achieve an impermissible purpose." Commonwealth v. Carleton, 36 Mass. App. Ct. 137, 144 (1994) (alleged discrimination in striking jurors with Irish and Italian surnames, who were presumably Roman Catholic, not disproved by failure to challenge other jurors with similar names). In Commonwealth v. Hyatt, 409 Mass. 689, 691-92 (1991), the S.J.C. reversed a black defendant's convictions for rape and robbery of a young white woman. The trial judge had disallowed defendant's peremptory challenge of a young white woman because defendant had challenged each young white woman on the panel, while failing to challenge the sole black in the venire. The S.J.C. found no evidence that the whites were challenged *because* of their race; as for the black, it is no violation to "*refrain* from challenging a juror because of the juror's race" (*emphasis supplied*).

[107] Commonwealth v. Calderon, 431 Mass. 21, 26 & n.3 (2000); Commonwealth v. Futch, 38 Mass. App. Ct. 174, 178 (1995) (citing United States v. Wilson, 816 F.2d 421, 423 (8th Cir. 1987)). Counsel's failure to articulate specific reasons why the explanation should be ruled pretextual may be fatal, *see* United States v. Perez, 35 F.3d 632, 636-37 (1st Cir. 1994) (defense counsel's protest that prosecutor's explanation for challenging a Hispanic juror was "outrageous" and "made no sense," without elaborating why, excused failure of judge to make express findings on issue).

[108] Commonwealth v. Futch, 38 Mass. App. Ct. 174, 177 (1995).

[109] Commonwealth v. Benoit, 452 Mass. 212, 219 (2008) (citing Commonwealth v. Calderon, 431 Mass. 21, 26 (2000)); Commonwealth v. Rodriguez, 457 Mass. 461, 471 (2010); Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 638 (2000). *But see* Commonwealth v. Curtiss, 424 Mass. 78, 82 n.4 (1997) (although judge did not use preferred term *bona fide* or *sham*, statements that counsel's explanations were "inappropriate" meets standard of pretext or sham which is entitled to deference); Commonwealth v. Sarourt Nom, 426 Mass. 152, 155 (1997) (upholding action of trial judge in allowing Commonwealth's peremptory challenge where judge "tacitly" indicated that Commonwealth had met its burden). *Compare* Commonwealth v. Roche, 44 Mass. App. Ct. 372, 378–79 (1998) (where defense counsel explained that peremptory was meant to avoid seating juror with medical background, improper for judge to reject claim on ground that challenged juror was only black on the venire; judge may not bar peremptory in order to "construct a demographically representative jury"). *See also Curtiss, supra,* 424 Mass. at 83–86 (same) (dissenting opinion of Justice Fried).

[110] Commonwealth v. Benoit, 452 Mass. 212, 219 (2008) (quoting Commonwealth v. Maldonado, 434 Mass. 460, 464-66 (2003). The Court in *Benoit* elaborated, again quoting its earlier opinion in *Maldonado*:

Although the Court has thus tried to give clear guidance to the courts, the trial judge is given a great deal of discretion.[111] As a result, the application of *Soares* is subject to wide variation.[112]

If the court concludes that the "offending party" has not offered sufficient justification, the remedy may be drastic. *Soares* directs the court to "conclude that the jury as constituted fails to comply with the representative cross-section requirement,

> An explanation is *adequate* if it is 'clear and reasonably specific,' 'personal to the juror and not based on the juror's group affiliation' (in this case race) ... and related to the particular case being tried.... Challenges based on subjective data such as a juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination.... An explanation is *genuine* if it is in fact the reason for the exercise of the challenge. The mere denial of an improper motive is inadequate to establish the genuineness of the explanation....
>
> *Id*. at 219-20.

[111] Commonwealth v. LeClair, 429 Mass. 313, 321–323 (1999). Given the trial judge's superior ability to evaluate the demeanor of both the juror and counsel explaining his peremptory challenge – especially the "genuineness" of counsel's explanation for an apparently improper strike, *see* Commonwealth v. Benoit, 452 Mass. 212, 220 (2008) – if supported by the record, the trial court's ruling receives substantial deference on appeal. Brewer v. Marshall, 119 F.3d 993, 1004 (1st Cir. 1997). However, if the judge fails to make the explicit findings called for by the case law, her ruling is given no deference by the appellate court, and the appellate court will determine the question of proper or improper use of peremptory challenges based on its own independent review of the record. Commonwealth v. Calderon, 431 Mass. 21, 26–28 (2000); Commonwealth v. Dolliver, 52 Mass. App. Ct. 278, 281 (2001); Commonwealth v. Rivera, 50 Mass. App. Ct. 532, 536 (2000); Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 638 (2000).

[112] In reversing a black defendant's conviction of murdering a white man by an all-white jury, on the ground that the prosecutor had not met his burden of providing an adequate race-neutral reason for challenging the sole eligible black venireperson, the S.J.C. stressed the special value of a diverse jury in cases that pose a heightened risk of jury prejudice. *See* Commonwealth v. Fryar, 414 Mass. 732, 735–41 (1993) (circumstantial prosecution case dependent on disputed confession and testimony of victim's all-white friends as to killing in interracial street brawl). In Commonwealth v. Lattimore, 396 Mass. 446, 448 (1985), the prosecutor used six of his sixteen peremptory challenges to exclude three blacks and three whites. After the prosecutor had used his first three challenges to exclude two blacks and a white, the defendant objected. The following justifications offered by the prosecutor were then accepted by the Court: for the second peremptory challenge, that the juror was wearing a gold earring and the prosecutor did not "like his looks"; for the third challenge, that the juror lived with a nephew who had been convicted for carrying a gun. However, "as the number of members of a particular group who are challenged grows larger, the presumption of proper use of the peremptory challenge grows weaker." Commonwealth v. Gagnon, 16 Mass. App. Ct. 110, 120 (1983) (conviction reversed because of the prosecutor's use of peremptory challenges to exclude nineteen jurors with French surnames, constituting 83 percent of such prospective jurors), *rev'd sub nom.* Commonwealth v. Bourgeois, 391 Mass. 869, 876–78 (1984) (no error because the absence of an objection by the defense deprived the prosecution of an opportunity to explain its peremptories). *See also* Commonwealth v. Hutchinson, 395 Mass. 568, 572 (1985) (trial court found a violation of *Soares* where the defendant's counsel apparently excluded women from the jury and justified that exclusion on vague grounds — namely, their "responses on voir dire"; trial court's decision sustained).

and it must dismiss the jurors thus far selected."[113] Indeed, the Court is also required to quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire — not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges. Upon such dismissal a different venire shall be drawn and the jury process may begin anew.[114]

In fact, there is an alternative remedy. If the complaining party so desires, the jurors who have been shown to have been improperly challenged may simply be seated with the other jurors, without the dismissal of the entire venire.[115]

§ 30.4 COMPOSITIONAL CHALLENGES[116]

Under Mass. R. Crim. P. 20(a) and G.L. c. 234A, § 73, either party may challenge the jury array by "motion for appropriate relief pursuant to Rule 13(c)."[117] Under Rule 20, "[a] challenge to the array shall be made only on the ground that the prospective jurors were not selected or drawn according to law."[118] A challenge should be framed as a pretrial motion to dismiss the venire[119] and must be both made and decided before any individual juror is examined unless otherwise ordered by the court.[120] The motion must be supported by affidavit and specify the facts constituting

[113] Commonwealth v. Soares, 377 Mass. 461, 491 (1979).

[114] *Id*.

[115] *See* Commonwealth v. Hutchinson, 395 Mass. 568, 572–73 (1985); Commonwealth v. Reid, 384 Mass. 247, 255 (1981). Since *Soares* the S.J.C. has recognized that it could not put into the hands of the parties the ability to effect a mistrial simply by intentionally violating the dictates of *Soares. But see* Commonwealth v. Paniaqua, 413 Mass. 796, 799–800 (1992) (where trial court disallowed prosecutor's peremptory challenge of an Hispanic juror, and Commonwealth's appeal was reserved and reported to full bench of S.J.C., defense choice to go to trial without juror rather than accept continuance while defendant stayed in jail, effectively waived right to appeal exclusion of juror). *See also* Commonwealth v. Fruchtman, 418 Mass. 8, 16–17 (1994) (when defendant engaged in pattern of gender-based peremptory challenges to eliminate as many women as possible, judge had discretion to permit defendant to choose among suspect challenges instead of requiring him to justify every challenge of a woman, but judge was not required to adopt that remedy).

[116] Because the relevant state constitutional principles governing the composition of petty and grand juries are the same, *see also* the discussion *supra* § 5.8C(3)(b) (grand juries); extensive discussion of this issue in JURYWORK: SYSTEMATIC TECHNIQUES c. 5 (2010).

[117] *See also* G.L. c. 234A, § 74, and G.L. c. 234, § 32 (setting aside verdict for irregularity in venire).

[118] Mass. R. Crim. P. 20(a).

[119] Commonwealth v. Pope, 392 Mass. 493, 498 (1984). A challenge to the composition of the grand jury would be framed as a motion to dismiss the indictment.

[120] Mass. R. Crim. P. 20(a), 378 Mass. 889 (1979).

the ground of the challenge.[121] An evidentiary hearing on the motion is in the judge's discretion.[122]

Courts have recognized two separate grounds for a challenge based on exclusion or underrepresentation of a cognizable group from the jury: (1) the right of prospective jurors to equal treatment in the selection process, and (2) the right of a defendant to a jury drawn from a fair and representative cross section of the community.[123] Whatever the grounds, counsel should keep in mind the Supreme Judicial Court's assertion that article 12 of the state constitution "affords a defendant at least as much protection as the Sixth and the Fourteenth Amendment."[124]

1. *Violation of jurors' equal protection under the Fourteenth Amendment of the U.S. Constitution and article 12 of the Massachusetts Constitution:* Although this is the prospective jurors' right, the defendant has standing to assert the claim on their behalf.[125] If the selection process mandated by law is facially neutral, a defendant must demonstrate: (1) that the underrepresented group is a recognizable, distinct class singled out for different treatment under the law as applied; (2) that the group is statistically underrepresented[126] and (3) that selection procedures susceptible to abuse or not neutral were used.[127] The burden then shifts to the Commonwealth to rebut the case.[128] The defendant himself need not be a member of the underrepresented group.[129]

2. *Violation of the right to a jury drawn from a fair and representative cross-section of the community in violation of the federal[130] and state[131] constitutions.* Such a

---

[121] Mass. R. Crim. P. 20(a), *supra* note 120; Commonwealth v. Leitzsey, 421 Mass. 694 (1996). Regarding the sufficiency of an affidavit to establish a prima facie case, *see infra* note 129. *See also Equal Justice: Eliminating the Barriers* (1994), a report of the Commission to Study Racial and Ethnic Bias in the Courts. The report contains data on racial and ethnic composition of jury venires in Suffolk, Worcester, and Hampden counties.

[122] Commonwealth v. Prater, 431 Mass. 86, 91 (2000).

[123] Although the scope of these two constitutional protections differ under Federal law, the S.J.C. long ago observed that under article 12, there is no distinction between the equal-protection analysis applicable to the venire from which grand juries and petit juries are drawn, and the fair-cross-section analysis applicable to petit juries. *See* Commonwealth v. Fryar, 425 Mass. 237, 240-41 & nn. 4-5 (1997) (citing *Soares*).

[124] Commonwealth v. Fryar, 425 Mass. 237, 244 (1997); Commonwealth v. Arriaga, 438 Mass. 556, 563 n. 3 (2003) (same). Although the Court in *Fryar* goes on to conclude that "therefore, there is no need to evaluate the defendant's claim under provisions in the United States Constitution," *Fryar*, 425 Mass. at 244, counsel should still assert the client's federal as well as state constitutional claims.

[125] *See* Powers v. Ohio, 499 U.S. 400, 409-16 (1991).

[126] *See* cases cited *supra* § 5.8C(3)(b)(1); Commonwealth v. Fryar, 425 Mass. 237, 242–43 (1997).

[127] *See* cases cited *supra* § 5.8C(3)(b)(1).

[128] Castaneda v. Partida, 430 U.S. 482, 494 (1977) (grand jury venire). *See also* Commonwealth v. Aponte, 391 Mass. 494, 496 (1984); Commonwealth v. Duteau, 384 Mass. 321, 328–29 (1981). *See* Commonwealth v. Fryar, 425 Mass. 237, 240 n.4 (1997).

[129] *See* Campbell v. Louisiana, 523 U.S. 392, 397-98 (1998) (white defendant has third-party standing to raise equal protection challenge to discriminatory exclusion of blacks from grand jury) (citing Powers v. Ohio, 499 U.S. 400, 409-16 (1991) (white defendant has standing to raise equal protection rights of blacks excluded from jury by prosecutor's race-based peremptories)).

[130] U.S. Const. amend. 6.

challenge could encompass a broader definition of cognizable groups than the equal protection ground.[132] A defendant must show[133] that "(1) the group allegedly discriminated against is a 'distinctive' group in the community,[134] (2) that the group is

[131] Mass. Const. Declaration of Rights art. 12. *See also* G.L. c. 234, § 1. Art. 12 "affords the defendant at least as much protection as the Sixth and the Fourteenth Amendment." Commonwealth v. Fryar, 425 Mass. 237, 244 (1997).

[132] The S.J.C. has recognized that a Sixth Amendment "fair cross-section" challenge focuses "not only on the exclusion of 'identifiable' equal protection classes but also on the exclusion of other significant groups in the community." *See* Commonwealth v. Duteau, 384 Mass. 321, 329 (1981) (citing Commonwealth v. Bastarache, 382 Mass. 86. 97 (1980) (observing "[i]t is conceivable … that a group might constitute a "distinctive" group in the community for Sixth Amendment purposes but not an "identifiable" group for equal protection purposes)). However, as noted, the S.J.C. has never so held. *See, e.g.*,Commonwealth v. Tolentino, 422 Mass. 515, 522 at n.8 (1996) (non-English speakers not protected from exclusion) (citing Commonwealth v. Acen, 396 Mass. 472, 478, 479, *appeal dismissed*, 476 U.S. 1155 (1986)); Commonwealth v. Siciliano, 420 Mass. 303 (1995) (doubtful that geographical grouping, such as residents of Chelsea or Revere, qualifies); Commonwealth v. Fryar, 425 Mass. 237, 2442 (1997) (neither visual observations nor surname analysis reliably indicates racial and ethnic composition of jury venire); Commonwealth v. Duteau, 384 Mass. 321, 329 (1981) (finding "residents of Athol" not protected from underrepresentation).

As noted (*see supra* notes 92-93 & text), under article 12, the S.J.C. defines "distinctive groups" for fair-cross-section purposes by explicit reference to the Commonwealth's Equal Rights Amendment, article 1of the Declaration of Rights, as amended by article 106, *See* Commonwealth v. Soares, 377 Mass. 461, 488-89 & n. 33 (1979) (recognizing article 12's fair-cross-section requirement in the context of peremptory challenges but confining its reach to groups enumerated in article 1, as amended by art. 106, *i.e.*, sex, race, color, creed or national origin). *See also* Commonwealth v. Smith, 450 Mass. 395, 405 (2008) (noting the *Soares* limitation to the groups identified in art. 1 amended by art. 106 in discussing and ultimately declining to decide if gay or transgendered persons were a distinctive group for fair-cross-section purposes); Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 193 (2011) (declining to recognize "young" persons or "persons of color" as distinctive groups because neither was within art. 1 as amended by art. 106).

While these cases are not grounded in the Sixth Amendment, article 12 is at least as protective in this regard as is the Sixth Amendment. *See Soares*, 377 Mass. at 479 n. 17. It thus would seem that in the eyes of the S.J.C., the Equal Rights Amendment sets the outer limits of "distinctive groups" recognized under the Sixth Amendment.

[133] The defendant must make out a prima facie case. *See* Commonwealth v. Fryar, 425 Mass. 237, 242 (1997) (neither visual observations nor surname analysis reliably indicates racial and ethnic composition of jury venire); Commonwealth v. Tolentino, 422 Mass. 515, 520ff. (1996) (affidavit that relied on counsel's visual assessment of a small subsection of the venire present on a particular day, a survey of experienced defense counsel, and statistics documenting total Hispanic population in county, rather than eligible adult population, failed to establish prima facie case; motion requires "careful and detailed documentation," not anecdotal evidence); Commonwealth v. Sena, 441 Mass. 822, 827 (2004) (mere visual assessment of the jurors is not sufficient basis to establish the racial and ethnic composition of the venire).

[134] *See* Commonwealth v. Arriaga, 438 Mass. 556, 563 (2003) (observing that it is undisputed that Hispanics are a distinctive group for fair-cross-section purposes); Commonwealth v. Tolentino, 422 Mass. 515 (1996) (Commonwealth did not dispute that Hispanics are "distinctive group"). "To qualify as 'distinctive' for Sixth Amendment purposes, a group must 1) be defined and limited by some clearly identifiable factor; 2) have a common thread or basic similarity in attitude, ideas or experience running through it; and 3) possess a community of interest among the members of the group, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process."

not fairly and reasonably represented in the venires in relation to its proportion of the community,[135] and (3) that underrepresentation is due to systematic exclusion[136] of the group in the jury selection process."[137] Unintentional discrimination is equally violative.[138] After such a prima facie case, the burden shifts to the state to demonstrate

Commonwealth v. Manning, 41 Mass. App. Ct. 696, 698 (1996) (persons over 70 not distinctive group for purposes of fair cross section analysis) (citing Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985)).

[135] The S.J.C. has adopted the "absolute disparity" test to determine whether underrepresentation is substantial. One calculates disparity under this test by subtracting the group's representation in the jury venire from its representation in the community. A less than 10 percentage point disparity can never be substantial. Commonwealth v. Prater, 431 Mass. 86, 92 & n.9 (2000); *see* Commonwealth v. Fryar, 425 Mass. 237, 242–43 & n.6 (1997) (if Blacks and Hispanics constituted 15.42 percent of population of eligible jurors in Hampden County, and 7.33 percent of venire, absolute disparity — 8.09 percentage points — would not be "substantial"); Commonwealth v. Arriaga, 438 Mass. 556, 565 (2003) (if eligible Hispanics comprised 5.5 percent of the community and 1.46 percent of the venire, the absolute disparity is 4.04 and not substantial).

The S.J.C. appears to treat "community" as synonymous with "county." *See* Smith v. Commonwealth, 420 Mass. 291, 295-98 & n. 7 (1995) (nonwhite defendant charged with crime allegedly committed in Suffolk County has right under art. 12 to trial by jury drawn from that county or from a county with racially similar demographics). This approach contrasts with the Court's broader construction of the "vicinage" requirement, *see Smith, supra,* 420 Mass. at 301–02 (Lynch, J., dissenting), and *supra* § 20.4E.

[136] "[I]f exclusion of a particular group arises as a result of the system by which potential jurors are chosen, that exclusion is 'systematic.' " Smith v. Commonwealth, 420 Mass. 291, 294 (1995) (underrepresentation of minorities because of administrative requirements moving trial from Suffolk County to Middlesex County was the result of "systematic exclusion"). *But see* Commonwealth v. Arriaga, 438 Mass. 556, 568 (2003) (evidence that census collection procedures in five cities where 89.3 percent of country's Hispanic population lived might not identify all potential available for jury duty did not show systematic exclusion); Commonwealth v. Prater, 431 Mass. 86, 92–93 (2000) (failure to show nonrandom selection procedure in Essex County fatal to claim of systematic exclusion); Commonwealth v. Fryar, 425 Mass. 237, 242–43 & n.6 (1997) (no systematic exclusion where jury lists drawn from random selection process, leaving authorities no discretion over whose names should appear); Commonwealth v. Colon, 408 Mass. 419, 438–39 (1990) (where random selection process and no evidence of the composition of any past venires, discrepancy between proportion of minorities in county population (3.8%) and in venires from which jury was selected (.7%) insufficient to show systematic exclusion ; Commonwealth v. Leitzsey, 421 Mass. 694, 700-701 (1996) (similar conclusion where 1.8% blacks in county and no blacks in two jury venires totaling 150 persons); United States v. Pion, 25 F.3d 18, 23 (1st Cir. 1994), *cert. denied,* 115 S. Ct. 326 (1994) (disparity between percentage of Hispanics in population (4.2%) and percentage of those appearing for juror orientation (.80%) does not make prima facie showing of systematic exclusion).

[137] Commonwealth v. Arriaga, 438 Mass. 556, 562-63 (2003); Commonwealth v. Bastarache, 382 Mass. 86, 96–97 (1980) (citing Duren v. Missouri, 439 U.S. 357 (1979)); Smith v. Commonwealth, 420 Mass. 291, 294 (1995) (nonwhite defendant charged with crime allegedly committed in Suffolk County, which has 34% nonwhite population, has right under art. 12 not to be tried by jury drawn from Middlesex County, with 8% nonwhite population; defendant's jury must be drawn from a representative fair cross section of Suffolk County, or of racially similar community).

[138] Commonwealth v. Tolentino, 422 Mass. 515, 524 (1996).

a significant state interest that is manifestly advanced by those aspects of the jury selection process that result in underrepresentation.[139]

§ 30.5 MISCELLANEOUS TECHNIQUES FOR GATHERING INFORMATION

Given the limited nature of voir dire in Massachusetts, it is not surprising that litigants have resorted to other techniques to gain information about potential jurors.[140]

In some instances, where there are sufficient resources, the defendant may choose to conduct an *investigation* of potential jurors. In *Commonwealth v. Allen*,[141] the Supreme Judicial Court outlined how such investigation is to proceed. *First*, counsel may acquire information about prospective jurors in advance of the trial and outside of voir dire in order to prepare for the exercise of challenges.[142] "Concomitant to the use of both peremptory challenges and challenges for cause must be the implied right to use reasonable means to gather information which will aid the parties in the intelligent exercise of challenges toward the constitutionally mandated goal of a fair and impartial jury."[143]

Second, the parties must not invade juror privacy[144] and avoid any direct contact with prospective jurors and members of their families, which has been expressly prohibited by statute and rule of court.[145]

These concerns would be met, according to the Court, if the litigants used a questionnaire, such as the questionnaire provided in G.L. c. 234, § 24A. Defense counsel should routinely move pretrial to supplement voir dire with a proposed questionnaire to be submitted to all of the potential jurors.

In addition, the Court in *Allen* held that the parties are "free to use investigators in a reasonable manner" as long as the following steps are taken to make certain that jurors are not intimidated: (1) The investigators should be persons who are not closely

[139] Commonwealth v. Bastarache, 382 Mass. 86, 96–97 (1980).

[140] *See* Commonwealth v. Cousin, 449 Mass. 809, 816-19 (2007), *cert. denied*, 553 U.S. 1007 (2008) (prosecutor's obtaining CORI records of jurors, and by extension of prospective jurors, not improper).

[141] 379 Mass. 564, 578-80 (1980).

[142] Commonwealth v. Allen, 379 Mass. 564, 575 (1980). The Court cited a number of bases, beginning with 4 BLACKSTONE, COMMENTARIES 351–52 (1778), and ending with G.L. c. 277, § 66. Furthermore, the statute governing challenges for cause, G.L. c. 234, § 28, expressly allows a party to introduce, in addition to information elicited on voir dire, "other competent evidence" in support of a challenge for cause. *See* Dolan v. Commonwealth, 304 Mass. 325 (1939); Commonwealth v. Wong Chung, 186 Mass. 231, 237 (1904). For further discussion of the defendant's statutory (G.L. c. 277, § 66) and constitutional rights to information about prospective jurors *see infra* § 30.6 (anonymous juries).

[143] Commonwealth v. Allen, 379 Mass. 564, 577 (1980); Commonwealth v. Angiulo, 415 Mass. 502, 525 (1993) (citing and quoting *Allen*).

[144] The Court did not define what the limits of a juror's right to privacy would consist of. Presumably, the investigators could find out the same categories of information that counsel could unearth in voir dire — demographic information, attitudinal information, and in the questionnaires provided by G.L. c. 234A, § 18. While many trial judges have cited to juror privacy to deny counsel certain questions, the concept is ill-defined and scarcely litigated.

[145] *See* G.L. c. 234, §§ 24, 24A; Mass. R. Prof. C. 3.5(d).

related or associated with a litigant or his family; (2) the investigators should avail themselves of sources of information other than third-party interviews;[146] and (3) ideally investigators would be employed on a mutual basis with the resulting information available to both sides.[147] The Court further indicated that investigations may well be subject to reasonable rules of the trial court such as requiring the parties to submit the names of the investigators, the type of information to be sought, the procedures to be followed and questions to be asked. Moreover, the Court made it clear that the investigation of prospective jurors is "subject to the limitations of the judicial process."[148] Trials ought not be delayed in order to seek time to investigate.[149]

There are numerous other sources of information to supplement voir dire. If there are resources, one can hire an *expert* to do an attitude survey of the particular county in question, attempting to determine the relationship between certain relevant attitudes and demographic information that is likely to be obtained even in the limited Massachusetts voir dire. A number of sociologists offer assistance in applying existing attitudinal studies and profiles to any particular case. Some social psychologists seek to assist defense counsel by offering to read "body language" of potential jurors.

Finally, a number of services use *focus groups.* A focus group enables an attorney to specifically test particular legal theories and defenses, just as market research allows a businessperson to test public reaction. The expert selects a focus group that reflects the same demographics as the likely jury and presents the group with a synopsis of the trial under circumstances that attempt to replicate a real trial.[150]

§ 30.6 ANONYMOUS JURIES

In recent years some courts have allowed the identities of jurors to be kept secret in trials of organized crime and other high profile defendants.[151] In

[146] Commonwealth v. Allen, 379 Mass. 564,578-79 (1980). There are substantial sources of information about the potential venire as a group through published documents — information about the standard of living of particular regions, census data, political party registration, and possibly existing attitudinal studies.

[147] The court made this statement in dicta, in effect to exhort the parties to collaborate. Nothing in the rules or case law suggests that information generated by a private investigator investigating the venire consistent with these guidelines would be discoverable. *See* Commonwealth v. Allen, 379 Mass. 564, 579 n.12 (1980).

[148] Commonwealth v. Allen, 379 Mass. 564, 580 (1980).

[149] In fact, with the exception of those counties under the experimental system, it is often difficult to obtain a list of the potential venire sufficiently in advance of trial to make investigation a reasonable alternative. Counsel should always request the jury list in advance, whether or not he can make use of these kinds of techniques. Thinking out jury choices before the trial begins is particularly helpful.

[150] For an account of one focus group, *see* Devine, *Deliberations of a Mock Jury*, 24 TRIAL 75 (Sept. 88).

[151] *See, e.g.*, Saker, Massachusetts' Revision of DR 7-108(D): Attorney Postverdict Communication with Jurors, 5 GEO. J. LEG. ETHICS 719, 730ff. (1992); Litt, "Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors, 25 COLUM. J.L. & SOC. PROB. 371 (1992). The reason for anonymity is to protect the jury from bribery and intimidation by agents of the defendant, as well as to prevent unjustified acquittal by jurors frightened of retaliation. The safety of jurors is also important especially where there is a

Commonwealth v. Angiulo[152] the Supreme Judicial Court reversed a state murder conviction on the ground that withholding the jurors' identities violated the statutory right of capital defendants to obtain a list of prospective jurors. The Court also established guidelines to govern future use of anonymous juries in the Commonwealth. To safeguard defendants' rights to the presumption of innocence under the federal constitutional right to due process, anonymous juries may not be empanelled unless the trial judge: (1) first determines on adequate evidence that anonymity is "truly necessary to protect the jurors from harm or improper influence," and has made written findings on the question, and (2) has taken "reasonable precautions . . . to minimize the effect of . . . anonymity on [juror] perception of the defendant."[153] In arguing on the first issue, counsel can request sequestration of the jury as an alternative to anonymity. If the court approves anonymity, it might take such precautions as concealing the security reasons for anonymity from the jury or, if jurors are aware that their names have been withheld, give curative instructions to discourage them from drawing negative inferences as to the defendant's guilt.[154]

§ 30.7 RIGHT TO PUBLIC TRIAL AND JURY SELECTION

In *Presley v. Georgia*,[155] the Supreme Court held that the Sixth Amendment right to a public trial applies to jury selection.[156] This right is not absolute, giving way in limited circumstances to a case-specific determination by the judge that partial, or even full, closure of the courtroom is necessary.[157] In finding such necessity, the judge must satisfy the four factors announced by the Supreme Court in *Waller v. Georgia*.[158] *Waller* requires (1) that a court room not be closed unless "an overriding interest is likely to be prejudiced," (2) that the closure be "no broader than is necessary to protect that interest," (3) that the court consider alternatives to closure that would protect that interest, and (4) that the judge make specific findings adequately supporting the closure.[159] Defendant can of course waive this public-trial right, but in the absence of

concern that jurors may refrain from speaking freely during deliberations because they fear for their safety if their names and comments become public knowledge. *See* Commonwealth v. Silva, 448 Mass. 701, 708 (2007).

[152] 415 Mass. 502, 520–26 (1993) (construing G.L. c. 277, § 66). The statute, meant to allow fully informed use of defense challenges, would be satisfied by disclosing the jurors' names and addresses only to the parties' attorneys. *Angiulo, supra*, 415 Mass. at 526, n.19.

[153] Commonwealth v. Angiulo, 415 Mass. 502, 527 (1993). The S.J.C. cited federal cases in support, but its requirement of written findings allegedly goes beyond the requirements of those cases (Nolan, J., dissenting). *See Angiulo, supra*, 415 Mass. at 536–37.

[154] Commonwealth v. Angiulo, 415 Mass. 502, 528-29 (1993). If jurors become aware of their anonymity in the midst of proceedings, the judge must take "affirmative measures" to protect the defendant's due process rights. *Angiulo, supra.* As a general rule, jurors should not be given the impression that anything has been done to avoid their identification by the defendant. *See* Commonwealth v. Howard, 46 Mass. App. Ct. 366, 368 & n.2 (1999).

[155] 130 S.Ct. 721 (2010).

[156] *Id*. at 723-24.

[157] *See* Commonwealth v. Cohen (No. 1), 456 Mass. 94, 107 (2010).

[158] 467 U.S. 39, 48 (1984).

[159] *See* Cohen. 456 Mass. at 107.

waiver, unjustified closure is a structural error which entitles defendant to a new trial without any showing of prejudice.[160]

To exercise and preserve this public-trial right, the defendant must object to the courtroom's closure, whether the closure is full or partial.[161] The right applies "full force" during empanelment,[162] even though during much of jury selection the spectators may see little more than the judge, lawyers and individual potential jurors conferring out of hearing at sidebar.[163] The right does not depend on the judge being aware of the closure, much less the court ordering it. Actions by court officers (whether acting pursuant to some policy or on their own), such as posting do-not-enter signs or instructing potential spectators that they may not enter the courtroom during jury selection, constitute Sixth Amendment closure.[164] However, at some point a closure

[160] *Id*. at 118.

[161] Beyond calling the court's attention to the courtroom's closure and seeking its re-opening, the defendant's objection is important to avoid waiving this structural right. If the trial court impermissibly closes the courtroom during jury selection, on appeal the Commonwealth must demonstrate a valid waiver by defendant to avoid reversal. *See* Commonwealth v. Lavoie, 80 Mass. App. Ct. 546. 553, *rev. granted*, 461 Mass. 1101 (2011). What constitutes a valid waiver is less clear. The Appeals Court requires defendant's knowing assent to the closure, which is not satisfied simply by counsel's failure to object. The court's decisions require a finding that defendant knew of the right and chose to forego it. *See* Lavoie, 80 Mass. App. Ct. at 553 (holding defendant's purported waiver of his public-trial right during jury selection was not a knowing waiver and thus not valid where defense counsel chose not to object to the closure for tactical reasons but did not discuss this decision or the underlying public-trial right with defendant); Commonwealth v. Alebord, 80 Mass. App. Ct. 432, 439. *rev. denied*, 461 Mass. 1103 (2011) (holding counsel's failure to object insufficient to constitute defendant's waiver of his public-trial right during jury selection and remanding to determine if defendant knowingly assented to the closure personally or through counsel); Commonwealth v. Downey, 78 Mass. App. Ct. 224, 230, *rev. denied*, 458 Mass. 1110 (2010) (defense counsel's responses of "yeah" and "fine" to court's explanation for closure did not constitute waiver of defendant's public-trial right during jury selection, these responses being equally consistent with counsel's indicating an understanding of the announced procedures).

The S.J.C. has been less clear. In *Cohen*, the Court required more than defendant's waiver of his right to be at sidebar for individual voir dire as a basis to find that he thereby waived his right to a public jury selection. *See* Cohen, 456 Mass. at 118. The Court further declined to find waiver based on Cohen's knowledge that the courtroom might not hold all potential spectators and his inaction in the face of that knowledge. *Id*. at 119. But, in Commonwealth v. Dyer, 460 Mass. 728, 736-37 (2011), the Court held that by expressing his discomfort at being shackled in the courtroom on a hot summer day, which discomfort was to some degree relieved by conducting individual voir dire in the judge's air-conditioned lobby, the defendant waived his public-trial right. The Court may shed further light on this issue, having – as noted – granted review in *Lavoie*, *supra*, in which the Appeals Court declined to find waiver based on defense counsel's tactical decision not to object to closure. Further, although it denied review in *Alebord*, *supra* (in which the Appeals Court also declined to find waiver based on defense counsel's failure to object), in doing so, the Court observed that, in *Lavoie*, it would be reviewing "similar issues" and thus the better course in *Alebord* was go forward with the waiver-issue remand there ordered by the Appeals Court. *See* Alebord, 461 Mass. at 1103.

[162] *Id*. at 114.

[163] *Id*. at 117.

[164] *Id*. at 108.

may be so limited as to amount to a de minimus or trivial closure that does not implicate the right.[165] Of course, adjourning the selection process to a nonpublic setting, such as the judge's lobby, constitutes closure, but if the defendant assents to that procedure, he will waive his right to public jury selection.[166] Whatever the nature of the closure, counsel should pay attention to public access during empanelment and object to any such closure, be it full or partial.

A common reason for closure of the courtroom during jury selection is space. Often the venire is large but the courtroom is relatively small, with the potential jurors filling most if not all of the available seats.[167] Coupled with this lack of space is the concern that intermingling potential jurors with the public, including friends or family of the defendant, could taint the venire or even raise safety concerns. These are interests that in a particular case could justify closure, but if the defendant objects the court must ensure that the particular measures taken to accommodate such concerns are justified under the four *Waller* factors.[168]

The S.J.C. joins other courts in distinguishing between full closure and partial closure, for example, where a limited number of spectators such as defendant's family and friends are permitted entry during jury selection but the general public is excluded. If the closure is partial, the first *Waller* factor is modified, requiring only "a substantial reason" to justify closure rather than an "overriding interest."[169] Moreover, specific findings by the trial judge are not required; a reviewing court may look to the record to determine whether *Waller*'s requirements of a substantial reason, closure no broader than is necessary to meet that substantial reason, and consideration of alternatives were satisfied.[170]

---

[165] *Id*. at 108-09 & n. 20. In *Cohen*, unbeknownst to the judge, court officers posted a do-not-enter sign on the courtroom door and told would-be spectators that they were not permitted in the courtroom during jury selection, both actions pursuant to a courthouse policy. The SJC noted that such closure was actionable under the Sixth Amendment, distinguishing it from de minimus closure that other courts have found did not implicate the defendant's public-trial right. *See, e.g.*, Peterson v. Williams, 85 F.3d 39, 44 (2d Cir.), *cert. denied*, 519 U.S. 878 (1996) (public exclusion for 20 minutes, unknown to the judge, held de minimus and thus not violative of right to public trial) (cited by the SJC with express agreement, Cohen, 456 Mass. at 108 & n. 20)). *See also* Commonwealth v. Alebord, 80 Mass. App. Ct. 432, 439, *rev. denied*, 461 Mass. 1103 (2011) (remanding to consider scope of the de minimus exception to public-trial right and to determine whether barring defendant's friend, brother and sister-in-law from jury selection for some period of time fell within that exception).

[166] *See* Commonwealth v. Dyer, 460 Mass. 728. 736-37 (2011) (individual voir dire conducted in judge's lobby because it was air-conditioned constituted impermissible closure, but because defendant did not object – instead complaining of discomfort in the courtroom, which the air-conditioning alleviated – defendant held to have waived his right to public jury selection).

[167] Other cited reasons include a safety policy not to admit spectators when standing room only, *see* Commonwealth v. Alebord, 80 Mass. App. Ct. 432, 433, *rev. denied*, 461 Mass. 1103 (2011) (remanded to determine extent of closure and whether knowingly waived by defendant), and the convenience of conducting individual voir dire concerning potential jurors' CORI information from witness stand as opposed to at sidebar. *See* Commonwealth v. Downey, 78 Mass. App. Ct. 224, 230, 232, *rev. denied*, 458 Mass. 1110 (2010) (reversing murder conviction, holding courtroom closure during jury selection not justified by an overriding interest and not knowingly waived by defendant).

[168] *See* Cohen, 456 Mass. at 112-14.

[169] *Id*. at 111.

[170] *Id*. at 115-16.

But even if a small courtroom and a large venire might constitute a substantial reason to partially close the courtroom, the courts carefully attend to *Waller*'s requirements that the closure be no broader than is necessary to accommodate the particular concern(s) ostensibly justifying the closure and that alternatives be considered.[171] If the prospective jurors fill all, or almost all, of the seats in the largest available courtroom, the S.J.C. has suggested that the judge announce at the outset that as space becomes available, members of the public will be admitted.[172] And, while the Court neither requires that every seat be filled as soon as it becomes available nor insists that court officers track down interested spectators once space is available, as empanelment proceeds and seats are freed up permitting the public to be seated a suitable distance from prospective jurors, the judge must ensure that spectators are admitted.[173]

[171] *See* Commonwealth v. Wolcott, 77 Mass. App. Ct. 457, 462, *rev. denied*, 458 Mass. 1109 (2010) (holding defendant's public-trial right denied where judge did not announce at the outset of jury selection that public would be admitted when space became available and where there was no evidence that when space was available spectators were admitted).

[172] *Id*. at 114 n. 30.

[173] *Id*. at 114.