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Introduced by Lanny King

JOHN KENNETH ZWERLING practices law with Zwerling, Leibig & Moseley, P.C. in Alexandria Virginia.

For the past 36 years, Mr. Zwerling has been defending individuals and corporations who have run afoul of the law in the trial and appellate courts of state and federal judicial systems. His clients include the famous and the infamous. Rock stars, lawyers and doctors; politicians and protesters; the innocent and the not so innocent on charges ranging from murder to misdemeanors, including espionage, terrorism, mail fraud, bribery, cyber sex and unwanted sex.

He is a nationally recognized and respected criminal defense attorney. His ability to speak persuasively to prosecutors, judges and juries has yielded the type of success that resulted in his peers evaluating him as one of the Best Lawyers in America, a Pre-eminent Lawyer, and a Super Lawyer. He is sought out on the CLE lecture circuit and well as the national media including *The Today Show*, *Firing Line* and the NBC, ABC and CBS evening news.

Some of his and his firm's better known clients include the Red Hot Chili Peppers, Lorena Bobbitt, Daniel Elsberg, Peter Max and Dominick Dunne. He has represented defendants and subjects of the grand jury investigations of The Church of Scientology (United States v. Mary Sue Hubbard et al.); and government employees caught up in the special prosecutors' cases involving the White House e-mails; the mismanagement of the Indian trust funds by the Department of Interior (Cobel v. Norton) and Vernon Belicourt, Russell and Bill Means of the American Indian Movement.

Mr. Zwerling served in Vietnam prior to attending the American University's Law School. He is the past President of the Alexandria Bar Association, the founding President of the Virginia College of Criminal Defense Attorneys, and is currently a member of the Virginia State Bar Counsel.

The Right to a Fair and Impartial Jury of One's Peers

By John K. Zwerling

One of the most important safeguards to our liberty that the Founding Fathers incorporated into our Bill of Rights is the Sixth Amendment's guarantee to a fair and impartial jury of his peers. Before the sovereign may deprive a person of his life or liberty, the sovereign must prove the guilt of the accused beyond a reasonable doubt and must do so to an impartial jury, not just a judge.

VOIR DIRE

Clearly, the right to a fair and impartial jury will not be provided to the accused, if it is comprised of jurors who are not able to be fair and impartial or are unable to vote not guilty even if the government has not proved the accused's guilt beyond a reasonable doubt.

There is a procedure that takes place in every court room in the United States before the start of a jury trial. It is known as Voir Dire. It requires the jurors to answer questions placed to them. In some jurisdictions the judge and the attorneys for both the prosecution and the accused are allowed to ask questions, but in most jurisdictions only the judge asks the questions. The purpose of Voir Dire is to identify potential jurors who are not able to be fair and impartial, or are unable to provide the accused the constitutional protections of the presumption of innocence and government's burden of proof beyond a reasonable doubt.

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Voir Dire when conducted solely by the judge is simply ineffective in helping the prospective jurors recognize their unsuitability to serve on the particular case or to feel comfortable to state that they are unsuited to serve on that case.

There are many reasons that this is so. For example, as a general rule judges ask questions to the entire panel at one time and if no one responds, no one is disqualified. This is the "silence is golden school" of Voir Dire.

Judges ask generic questions such as can they give both the government and the defendant a fair trial. Since virtually no one views themselves as a biased person, the predictable result is that virtually no one admits that they are a defective human being. This is the "who among you are so stupid or prejudiced that you can't follow my instructions and fairly try this case" Voir Dire.

To bring this problem to life, I offer the following Court-conducted Voir Dire in a recent case that eliminated no potential jurors:

THE COURT: The Defendant is accused of using a computer to solicit a minor for sex acts that violate Virginia law. He will be pleading not guilty, and we will be having a trial by jury here today. Are any of you aware of any bias or prejudice that you might have against either the Commonwealth or the accused in this case?

JURY PANEL MEMBERS: No.

THE COURT: Do each of you understand that the Defendant is presumed to be innocent?

JURY PANEL MEMBERS: Yes.

THE COURT: Do you understand that the Commonwealth must prove the

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Defendant's guilt beyond a reasonable doubt?

JURY PANEL MEMBERS: Yes.

THE COURT: Do any of you know any reason whatsoever why you could not give a fair and impartial trial to both the Commonwealth and the Defendant based solely on the evidence that you will hear in this courtroom over the next two days and the law of Virginia as I will instruct you later on?

JURY PANEL MEMBERS: No.

THE COURT: Those are all the questions I have.

The following defense attorney Voir Dire just moments later resulted in one-third of the potential jurors telling the judge that they were not suited to serve on the jury. This case involved the defendant exchanging IM's, or Instant Messages, with a police officer who had assumed the personae of a thirteen-year-old girl on the Internet.

DEFENSE ATTORNEY: The question that you're going to be presented with is whether or not the defendant believed it was a thirteen-year-old child, a juvenile, or whether he believed he was dealing with an adult who was playing a role. Now, this type of a case, I'm sure, brings up strong feelings in many people, and the purpose of the question that we're going to ask you and that you've been asked already is really to

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help both sides decide whether or not we're comfortable having you sit on this jury and also to help you focus on whether you're going to be comfortable sitting on this jury, and therefore, be able to provide a fair and impartial jury. There is nothing wrong in a particular case with a person not being cut out for that case. We all have cases that we shouldn't sit on, and there's nothing shameful about that even though we all want to be impartial. So please, it's important. This will get me to a question I really need to put to all of you.

I appreciate your candor. That is this:

In a case such as this where the allegations are that the Defendant is a sexual predator seeking a child to have sex with, can you still acquit him if you believe he's probably guilty, but you aren't sure; the Commonwealth hasn't proven its case? In other words, having reasonable doubt about his guilt, but knowing that if you acquit him, and he did do it, he is a sexual predator, that you'd be letting him out on the street. Is that going to make it hard for you to find him not guilty?

MR E: Yes. I couldn't—if I didn't fully think he was guilty, but I partially thought he was guilty, then I'd vote that he was guilty.

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MR. T: I would too.

Mr. ZWERLING: Anybody else?

MR. B: (Indicating Yes)

MR. ZWERLING: Anybody else sitting in the jury box that feel that way?

Even when the prosecutor tried to "rehabilitate" the juror with the "Can't you keep an open mind and follow the judge's instruction" technique, she failed because the jurors were comfortable with their biases because they understood that it was acceptable and being truthful was preferable.

PROSECUTOR: And knowing now that it is the Commonwealth's burden to prove the case beyond a reasonable doubt, would you be able to keep an open mind during the case and look at the instructions of law and really judge the evidence and be able to find a person not guilty if the Commonwealth hasn't met its burden? Would you, knowing now that that's your responsibility today, think you'd be able to do that?

MR. E: I don't think I could objectively look at it. I think, in the back of mind, I would always be thinking about my daughter.

One third of the jury panel disqualified themselves after the defense attorney was allowed to question them. There is a movement

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to do a way with attorney Voir Dire. This will also do away with fair and impartial juries.

MR. T: If I were to err, I would err on the side of saying "he would be guilty."

PROSECUTOR: And Mr. B?

Mr B: I'd say the same way. I mean, I think I would see him as guilty.

PROSECUTOR: So you're basically all saying that your personally held views would make you unable to hear the case fairly for the Defendant, basically?

MR B: In my situation I think so.

The next group that was called to replace these jurors had witnessed these exchanges and was ready to admit their unsuitability to be jurors in this case.

THE COURT: Ms. L, would you have wanted to discuss any of the questions that have been asked?

MS. L: Yes. I have a fourteen-year-old son that lives at home with me, and I would find it very hard to find the Defendant not guilty.

MR. ZWERLING: Ms. V, Do you feel the same way, ma'am, or not?

MS. V: If they haven't proven it

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beyond a reasonable doubt, then I would hope that I could make an impartial—I would try to.

MR. ZWERLING: The question is, do you believe that you could if you had a reasonable doubt but you felt that the Commonwealth had established to your satisfaction that he probably did it—

MS. V: Guilty.

MR. ZWERLING: What?

MS. V: He'd be guilty. Yeah, he'd be guilty. If I could save another child.

Clearly these individuals were not suited to serve on this jury and the accused would not have been tried by a fair and impartial jury if only the judge had asked the questions.

Three weeks later we were in Federal Court about to start a similar case. The Federal Court in the Eastern District of Virginia, as in most federal courts, has a custom and practice that only the judge asks the jury questions during Voir Dire. Our Judge even refused our request for him to ask questions similar to the ones listed above. He refused, even after we shared with him our experience with the jury responses just weeks before. He simply stated that he will instruct them on the government's burden of proof and he is confident that they will follow his instructions. I am not—are you?

Lawyer conducted Voir Dire is a crucial tool for ensuring that the concept of proof beyond a reasonable doubt survives in the twenty-first century. There is a movement afoot to restrict the conducting of Voir Dire to judges, as well as to completely dispense with Voir Dire. Either of these changes would be severe blow to the Sixth Amendment's guarantee of a Fair and Impartial Jury.