

Presumed Fair? Voir Dire on the Fundamentals of our Criminal Justice System

Vida B. Johnson*

ABSTRACT

The American criminal justice system is built on three bedrock principles: the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt. These ideals, however, are frequently ignored by jurors. Social science research has shown that jurors routinely believe that a defendant must prove his innocence, and that the mere fact that the defendant is standing trial is proof of guilt. Jurors persist in these beliefs despite proper instructions on the law.

Despite the acknowledged centrality of these legal ideals, trial courts in many jurisdictions, routinely prevent defense attorneys from questioning prospective jurors on these fundamental legal issues based on a mistaken view that jurors will follow the given instructions. Unlike instructions, voir dire regarding prospective jurors' ability or willingness to apply the presumption of innocence and hold the government to its burden of proof beyond a reasonable doubt is not granted uniformly across jurisdictions. While the Supreme Court has sanctioned voir dire in capital cases on whether jurors can impose the death penalty, it has thus far remained silent on whether there is a right under the Due Process Clause to question prospective jurors on the presumption of innocence and the government's burden of proof of beyond a reasonable doubt. The states and federal circuits are split on the question.

This Article explores whether, in order to ensure fundamental principles of fairness, voir dire questions about the presumption of innocence and the burden of proof should be required in all criminal jury trials.

* Visiting Associate Professor of Law, Georgetown Law, Criminal Defense and Prisoner Advocacy Clinic and Criminal Justice Clinic. Prior to her position at Georgetown, Ms. Johnson was a supervisor at the Public Defender Service for the District of Columbia. Many thanks to Jonathan Anderson, Lara Bazelon, Violeta Chapin, Wally Mlyniec, Michael Pinard, Jenny Roberts, Abbe Smith, Kim Thomas, and Robin Walker-Sterling. Special thanks to Devin Prater and Carlton Powell for extraordinary research help.

INTRODUCTION: THE RIGHT TO VOIR DIRE REGARDING THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT	546
I. THE PRESUMPTION OF INNOCENCE, THE BURDEN OF PROOF, AND THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT: PRINCIPLES ESSENTIAL TO A FAIR TRIAL.....	549
II. JURY INSTRUCTIONS ON THE THREE PRINCIPLES AND THEIR INEFFICACY.....	551
A. Basics of Jury Instructions	551
B. Instructions on the Presumption of Innocence and the Standard of Proof Beyond a Reasonable Doubt	553
C. Inadequacy of Presumption of Innocence Jury Instructions & Instructions in General.....	555
III. VOIR DIRE REGARDING THE THREE PRINCIPLES IS A NECESSARY MECHANISM TO ENSURE A FAIR TRIAL	559
A. Basics of Voir Dire and Jury Selection.....	559
B. Limitations of the Voir Dire Process	562
C. Judge's Broad Discretion to Limit Voir Dire.....	563
D. Trial Court Incentives to Limit Voir Dire.....	564
IV. PRECEDENT RELATED TO VOIR DIRE ON THE PRESUMPTION OF INNOCENCE AND THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT	567
V. MOVING FORWARD TOWARDS SPECIFIC VOIR DIRE REGARDING THE PRESUMPTION OF INNOCENCE, THE BURDEN OF PROOF, AND THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT.....	577

INTRODUCTION: THE RIGHT TO VOIR DIRE REGARDING THE
PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF BEYOND A
REASONABLE DOUBT

Three related legal principles are indispensable to a fair criminal trial: the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt. Over a century ago the United States Supreme Court declared “the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”¹ The burden of the government to produce proof of guilt beyond a reasonable doubt

¹ Coffin v. United States, 156 U.S. 432, 453 (1895).

“dates at least from our early years as a Nation,” and the Supreme Court has concluded it is “basic in our law” and a constitutional requirement under the Due Process Clause.²

These core principles are, unfortunately, too frequently ignored by jurors. Legal instructions given by trial judges on the presumption of innocence and the burden of proof, while virtually universally given, are insufficient. A mounting body of social science has shown that jurors routinely believe that a defendant must prove his innocence, and that the mere fact that the defendant is standing trial—following arrest and indictment—is proof of guilt. Jurors persist in these beliefs despite proper instructions on these central legal principles.

Jurors who refuse to apply these vital principles in criminal cases erode the very foundation of a fair trial. Enforcement of these crucial doctrines in criminal jury trials requires a jury selection process that ferrets out the potential jurors who are unable to understand or unwilling to apply the presumption of innocence and the standard of proof beyond a reasonable doubt.

Despite the acknowledged centrality of these legal ideals, trial courts in many jurisdictions routinely prevent defense attorneys from questioning prospective jurors on these fundamental legal issues based on a mistaken view that jurors will follow the given instructions. So, while the parties usually know a prospective juror’s age, field of employment, and neighborhood, arguably the most important information one needs to know about a juror sitting on any criminal case is missing—can the juror be fair?

Unlike instructions, voir dire regarding prospective jurors’ ability or willingness to apply the presumption of innocence and hold the government to its burden of proof beyond a reasonable doubt is not granted uniformly across jurisdictions. Indeed, the Supreme Court has thus far remained silent on whether there is a right under the Due Process Clause to such an inquiry, and the states and federal circuits are split on the question.³

² *In re Winship*, 397 U.S. 358, 361–64 (1970) (quotations omitted).

³ *United States v. Beckman*, 222 F.3d 512, 519 (8th Cir. 2000) (finding that where there are sufficient instructions, voir dire on the presumption of innocence is not required); *United States v. Miller*, 758 F.2d 570, 572 (11th Cir. 1985) (finding no abuse of discretion for trial court not to question venire on presumption of innocence and reasonable doubt); *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973) (finding that failure to allow voir dire on presumption of innocence upon request is error); *State v. Dahlgreen*, 512 A.2d 906, 910 (Conn. 1986) (finding that the trial court properly precluded voir dire on presumption of innocence); *Baker v. State*, 853 A.2d 796, 805–06 (Md. 2002) (finding that voir dire on presumption of innocence not required); *People v. Zehr*, 469 N.E.2d 1062, 1064 (Ill. 1984) (holding that a trial court’s refusal to ask question about presumption of innocence warranted reversal of

There is, however, Supreme Court precedent regarding “death qualified” juries in capital cases that supports the argument for voir dire on the application of the presumption of innocence and the goal of “presumption of innocence qualified” juries. In capital cases more expansive voir dire of the venire is allowed than is typical in most criminal trials. Prosecutors routinely request that prospective jurors be “death qualified.”⁴ Specifically, prospective jurors are asked whether they would be able to return a death sentence in the event of a conviction. Jurors who answer that they would be unable to return a death sentence in the event of conviction are struck from the jury panel “for cause.” The resulting jury is referred to as “death-qualified.” After the Supreme Court held that the government was entitled to voir dire in order to ensure that jurors in capital cases would be willing to sentence a guilty defendant to death⁵, it ruled that capital defendants had a corollary right: the right to inquire if prospective jurors would automatically impose the death penalty upon a verdict of guilt and strike such jurors for cause.⁶ Thus, the Supreme Court has found both a government’s entitlement to voir dire concerning the prospective jurors’ willingness to apply the death penalty and a defendant’s right to voir dire regarding the prospective jurors’ willingness to not apply the death penalty where jury instructions that clearly require jurors to fairly consider both potential outcomes exists.

Just as defendants in capital cases are entitled to voir dire in order to exclude jurors who, despite instructions to the contrary, would impose the death penalty in all cases following a finding of guilt, defendants in all criminal jury trials should be entitled to voir dire to exclude jurors who would disregard the presumption of innocence, and the standard of proof beyond a reasonable doubt. Because the very purpose of voir dire and the jury selection process is to eliminate jurors who cannot be fair, and because the presumption of innocence,

conviction); *State v. Cere*, 125 N.H. 421, 424–25 (N.H. 1984) (finding that judges were required to ask whether juries believed that the defendant bears the burden of proving his innocence in a criminal case); *Jones v. United States*, 378 So.2d 797, 798 (Fla. Dist. Ct. App. 1980) (stating that defense attorney should be allowed to inquire of prospective jurors about the presumption of innocence and the burden of proof); *Harper v. State*, 474 S.E. 2d 288, 289 (Ga. Ct. App. 1996) (stating that questions of legal nature, like whether juror can follow instructions on the presumption of innocence, are “not within the purview of voir dire”); *New Jersey v. Lumumba*, 601 A.2d 1178, 1189 (N.J. Super. Ct. App. Div. 1992) (“[T]he jury must be asked whether they understand the basic principles of presumption of innocence . . .”).

⁴ *Lockhart v. McCree*, 476 U.S. 162, 165 (1986) (finding that “death-qualification” does not violate right to impartial jury).

⁵ *Whitherspoon v. State of Illinois*, 391 U.S. 510, 522 n.21 (1968).

⁶ See *Lockhart*, 476 U.S. at 170 n.7; *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

and the standard of proof beyond a reasonable doubt are foundational legal principles without which there cannot be a fair criminal trial, an opportunity to conduct voir dire regarding the potential jurors' willingness to apply these principles should be a requirement for every criminal jury trial.

This Article explores whether voir dire questions about the presumption of innocence and the burden of proof should be required in all criminal jury trials. To that end, the centrality of the presumption of innocence and standard of proof beyond a reasonable doubt to a fair trial is briefly reviewed, the basic procedure and jurisprudence of voir dire, jury selection, and jury instructions will be explained, precedent for instructions regarding the three core principles is considered, along with the social science demonstrating the inadequacy of such instructions, precedent for voir dire regarding the three principles is reviewed, the entitlement to death-qualification voir dire is examined, the relationship between death-qualification voir dire and presumption of innocence, burden of proof, and standard of proof voir dire is explored. Suggestions to defense attorneys concludes the Article.

I. THE PRESUMPTION OF INNOCENCE, THE BURDEN OF PROOF, AND
THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT: PRINCIPLES
ESSENTIAL TO A FAIR TRIAL

Our criminal justice system is premised on the lofty ideal of fairness⁷ and, according to the Supreme Court, “no right ranks higher than the right of the accused to a fair trial.”⁸ The presumption of innocence and the standard of proof beyond a reasonable doubt are the legal principles comprising the foundation of any just criminal trial in the United States.

The Supreme Court has observed that the presumption of innocence is “a basic component of a fair trial under our system of criminal justice,”⁹ and the history of the presumption of innocence has been “traced [. . .] from Deuteronomy through Roman law, English common law, and the common law of the United States.”¹⁰ The presumption of innocence is related to “the prosecution’s duty both to produce evidence of guilt and to convince the jury beyond a

⁷ *In re Murchison*, 349 U.S. 133, 136 (1955) (“[O]ur system of law has always endeavored to prevent even the probability of unfairness.”).

⁸ *Press-Enter. v. Super. Court of California*, 464 U.S. 501, 508 (1984).

⁹ *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *see also Taylor v. Kentucky*, 436 U.S. 478, 479 (1978).

¹⁰ *Taylor*, 436 U.S. at 483.

reasonable doubt” before a criminal conviction may be obtained.¹¹ The Court has also noted that the presumption of innocence “cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.”¹²

The presumption of innocence is first and foremost a trial right.¹³ Because of the importance of this right, a number of safeguards have already been put in place to enforce it. Jurors do not hear about an accused person’s prior conviction because of the presumption of innocence.¹⁴ The right of detained defendants not to be handcuffed or shackled before a jury¹⁵ or to wear civilian clothes in front of a jury¹⁶ are just some examples of additional efforts to safeguard the rights of the criminally accused. The Supreme Court has made it clear that trial courts have an obligation to take steps to ensure that criminal defendants receive the benefit of the presumption of innocence and that the government is held to its burden.¹⁷

The presumption of innocence and the burden of proof in a criminal trial are related. The standard of proof of beyond a reasonable doubt “provides concrete substance for the presumption of innocence” and has a “vital role in our criminal procedure,” which is “indispensable” and it is the “prime instrument for reducing the risk of convictions resting on factual error.”¹⁸ And “[t]he requirement of proof beyond a reasonable doubt in a criminal cases is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”¹⁹ The Supreme Court has “explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”²⁰

¹¹ *Id.* at n.14.

¹² Taylor, 436 U.S. at 485 (quoting 9J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)).

¹³ Bell v. Wolfish, 441 U.S. 520, 531–32 (1979).

¹⁴ Spencer v. Texas, 385 U.S. 554, 575 (1967) (Stuart, J., concurring) (“Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged.”).

¹⁵ Deck v. Missouri, 544 U.S. 622, 626–627 (2005) (reasoning that it was an error to shackle and handcuff defendant for the penalty phase of his capital trial).

¹⁶ Estelle v. Williams, 425 U.S. 501, 512 (1976).

¹⁷ Deck, 544 U.S. at 626–27; Estelle, 425 U.S. at 512.

¹⁸ *In re Winship*, 397 U.S. at 363.

¹⁹ Patterson v. New York, 432 U.S. 197, 208 (1977) (citations omitted) (internal quotation marks omitted).

²⁰ *In re Winship*, 397 U.S. at 364.

In addition to concluding that these principles are fundamental to a fair trial, the Supreme Court has also stated that “[i]t is self-evident . . . that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.”²¹ As this Article will discuss, however, the mechanisms required by the Supreme Court for ensuring verdicts based on these fundamental principles fall short, rendering these important principles and their underlying goal—a fair trial—in some instances an ideal rather than a reality.

II. JURY INSTRUCTIONS ON THE THREE PRINCIPLES AND THEIR INEFFICACY

Ensuring that verdicts in criminal cases are based on an application of the fundamental principles of the presumption of innocence and the standard of proof beyond a reasonable doubt requires at least two components: 1) legal instructions that accurately communicate the principles to the jury, and 2) jurors who are willing and able to follow those instructions. Unfortunately, significant problems exist with both components. The Supreme Court’s precedent thus far has focused on the first: jury instructions.

A. *Basics of Jury Instructions*

In every jury trial, the jury’s role is to consider the evidence and reach a verdict based on its view of the evidence within the legal framework provided by the judge. Jury instructions are the law distilled for the jury, with the goal of accurately stating the law in terms that jurors can understand and apply. Jury instructions in criminal cases generally include explanations of the presumption of innocence²² and the government’s burden to prove guilt beyond a reasonable doubt.²³

Jurors are also instructed on the elements of the charged crime, any affirmative defenses, and rules regarding the consideration of certain types of evidence, e.g., “other crimes” evidence, impeachment evidence, evaluation of certain types of witnesses, and other case-specific instructions. Each individual instruction may not be long—the model federal jury instruction about the presumption of innocence is just four sentences long—though when taken together the instructions can be very lengthy.²⁴

²¹ *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

²² 1-4 MODERN FED. JURY INSTRUCTIONS-CRIMINAL P 4.01, INSTRUCTION 4-1.

²³ 1-4 MODERN FED. JURY INSTRUCTIONS-CRIMINAL P 4.01, INSTRUCTION 4-2.

²⁴ 1-4 MODERN FED. JURY INSTRUCTIONS-CRIMINAL P 4.01, INSTRUCTION 4-1 reads: The defendant has pleaded not guilty to the charge in the indictment.

Jury instructions are stated orally by the judge, and in some courtrooms the judge will provide a written copy of the instructions either simultaneously with or subsequent to providing the instructions orally. Most instructions are provided after the close of evidence and are frequently provided even after the closing arguments of counsel.²⁵ Legal instructions are rarely provided prior to the evidentiary portion of trial.²⁶ And although pre-instruction has gained in popularity and proved effective, the practice continues to be relatively uncommon in trial courtrooms.²⁷

Jury instructions are often complicated and quite lengthy.²⁸ While written instructions have proved to be a helpful aide to jurors' comprehension of often complex and lengthy legal instructions, fewer than half of trial judges follow the practice of providing written instructions to jurors.²⁹ When written instructions are provided, they are usually provided after the close of all evidence and trial judges do not always provide sufficient copies of the instructions for each juror to have her own copy.³⁰ As will be discussed, legal instructions and the manner in which they are provided do not sufficiently educate jurors.

To convict the defendant, the burden is on the prosecution to prove the defendant's guilt of each element of the charge beyond a reasonable doubt. This burden never shifts to the defendant, for the simple reason that the law presumes a defendant to be innocent and never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. In other words, each defendant starts with a clean slate and is presumed innocent of each charge until such time, if ever, that you as a jury are satisfied that the Government has proved a given defendant is guilty of a given charge beyond a reasonable doubt.

²⁵ *How Courts Work*, AMERICAN BAR ASSOCIATION, DIVISION FOR PUBLIC EDUCATION, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct.html (last visited Feb. 15, 2015).

²⁶ See Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, *The States-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* 36 (2007), available at <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>.

²⁷ G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR & G. MARC WHITEHEAD, *JURY TRIAL INNOVATIONS* 132-2 (2006).

²⁸ Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451-52 (2006).

²⁹ Mize et al., *supra* note 26, at 37.

³⁰ *Id.* Of the judges that do provide written instructions to the jurors, only one-third provide them to all of the sitting jurors. *Id.*

B. Instructions on the Presumption of Innocence and the Standard of Proof Beyond a Reasonable Doubt

Because the legal principles concerning the presumption of innocence and the standard of proof beyond a reasonable doubt have been recognized as being fundamental to a fair criminal trial, jury instructions communicating those principles are required in jury trials. In *Sullivan v. Louisiana*, a capital murder case, the Supreme Court held that because the Due Process Clause requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury trial are interrelated, a guilty verdict in a criminal jury trial must be based on a jury finding of guilt beyond a reasonable doubt.³¹ In other words, the jury must be properly instructed on the government's burden to present evidence of guilt, and that the evidence of guilt must rise to the level of proof beyond a reasonable doubt before the jury may return a guilty verdict.³² The Supreme Court has further held that where the jury instructions fail to accurately communicate the burden of proof of beyond a reasonable doubt, structural error has occurred: harmless-error analysis does not apply and automatic reversal is required.³³

Where the jury has been properly instructed on the government's burden and the standard of proof beyond a reasonable doubt, separate instruction on the presumption of innocence is still a virtual requirement, although the Supreme Court has stopped short of holding it to be structural error or even necessarily constitutional error requiring reversal unless the error can be deemed harmless beyond a reasonable doubt. In *Taylor v. Kentucky*,³⁴ a robbery case, the jury was properly instructed with respect to the government's burden of proof of beyond a reasonable doubt, but the trial court denied the defense attorney's request for separate jury instructions explaining the presumption of innocence and the related legal principle that indictment has no evidentiary weight.³⁵ The Supreme Court reversed Taylor's conviction.³⁶ In reaching its conclusion, the Court observed that the presumption of innocence and the burden of proof of beyond a reasonable doubt are "equally fundamental" and logically related

³¹ *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

³² *Id.*

³³ *Id.* at 280–82.

³⁴ *Taylor v. Kentucky*, 436 U.S. 478 (1978).

³⁵ After the presentation of evidence, the attorney's second request for the instructions was again refused. *Id.* at 481.

³⁶ *Id.* at 490.

principles.³⁷ Although the principles are related, the Court noted that “scholars advise against abandoning the instruction on the presumption of innocence, even when a complete explanation of the burden of proof beyond a reasonable doubt is provided.”³⁸ The Court favorably quoted language from Wigmore that an instruction specifically on the presumption of innocence “cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.”³⁹ The Court concluded that an instruction on the presumption of innocence has a “purging effect” that is a “means of protecting the accused’s constitutional right to be judged solely on the basis of proof adduced at trial.”⁴⁰

The Court in *Taylor* held that an instruction on the presumption of innocence was required and reached this conclusion despite the fact that defense counsel had discussed the presumption of innocence in both his opening statement and closing argument because “arguments of counsel cannot substitute for instructions by the court.”⁴¹ The Court was also not swayed by the fact that defense counsel had, during an attorney-conducted voir dire, asked potential jurors about their understanding of the presumption of innocence.⁴² The Court, however, did not explicitly hold that a separate instruction on the presumption of innocence is required in every trial, instead holding that on the “facts of this case”—where the instructions on the government’s burden of proof beyond a reasonable doubt were “spartan” and the prosecutor made arguments about the standard in closing—an instruction on the presumption of innocence was required.⁴³

Justice Brennan joined the Court’s opinion in *Taylor*, but wrote a separate concurrence simply to note that “as is clear from the Court’s opinion . . . trial judges should instruct the jury on a criminal defendant’s entitlement to a presumption of innocence in all cases where such an instruction is requested.”⁴⁴ The following year, however, the Supreme Court granted certiorari in *Kentucky v. Whorton*, to

³⁷ *Id.* at 483 n.12.

³⁸ *Id.* at 484 (quoting J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 551–76 (1898); 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940); C. MCCORMICK, EVIDENCE 805–06 (2d ed. 1972)).

³⁹ *Id.* at 485 (quoting 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)).

⁴⁰ *Taylor*, 436 U.S. at 486 (citations omitted) (quotations omitted).

⁴¹ *Id.* at 488–89 (citations omitted).

⁴² *Id.* at 479–80.

⁴³ *Id.* at 486–87, 490.

⁴⁴ *Id.* at 490–91 (Brennan, J., concurring).

determine whether the Kentucky Supreme Court had correctly interpreted the Court's holding in *Taylor* as requiring a presumption of innocence instruction in all criminal trials.⁴⁵ The Court held that it had not created such a requirement, and that a failure to provide a requested instruction on the presumption of innocence may violate the Due Process Clause when considered "in light of the totality of the circumstances," including the other jury instructions.⁴⁶ Heeding Justice Brennan's concurrence in *Taylor*, and avoiding an unnecessary risk of constitutional error, most—if not all—jurisdictions have implemented standard jury instructions on the presumption of innocence.⁴⁷

C. *Inadequacy of Presumption of Innocence Jury Instructions & Instructions in General*

While the Court has recognized the importance of these legal principles, regrettably many jurors do not recognize their significance. The required instructions on the government's burden of proof beyond a reasonable doubt and the instructions on the presumption of innocence, which are now provided in virtually every criminal jury trial, do not ensure that the principles are enforced in every criminal jury trial.⁴⁸ Instructions vary from one jurisdiction to another. Many,

⁴⁵ Kentucky v. Whorton, 441 U.S. 786, 787 (1979).

⁴⁶ *Id.* at 790.

⁴⁷ Mize et al., *supra* note 26, at 36.

⁴⁸ While apparently every jurisdiction has standardized instructions on the principles of the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt, the language within the instructions varies between jurisdictions. Compare 1-1 MD CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 1.05, INSTRUCTION 1.04 (1998), stating:

[A] reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

with 1-II CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 2.108, stating:

[R]easonable doubt is the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more important matters in life. It is not an imaginary doubt, however, nor a doubt based on speculation or guesswork; it is a doubt based on reason. The government is not required to prove guilt beyond all doubt, or to a mathematical or scientific certainty. Its burden is to prove guilt beyond a reasonable doubt.

and MA SUP. CT. CRIMINAL PRACTICE JURY INSTRUCTIONS § 1.1.2, explaining:

[W]hat is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to

if not all, jurisdictions presume that jurors—who swear an oath to apply the law as it is stated to them—follow the jury instructions.⁴⁹

Not only are jurors presumed to understand the trial court's instruction, the Supreme Court has said that even jurors who have expressed confusion on a legal issue, and are then pointed back to the same instruction that was the source of the original confusion that jurors are nevertheless, "presumed to understand a judge's answer to its question."⁵⁰ So even in the face of evidence of juror confusion, courts insist that jurors understand and will follow instructions.

While the assumption that jurors can understand the instructions given to them is common, it is an inaccurate one. Jurors, of course, are lay people with varying levels of education and comprehension who tend not to have legal training. Studies show that even well-meaning jurors have a difficult time understanding the legal instructions given to them. Studies consistently show since 1970 that "jurors do not understand their instructions."⁵¹ Despite forty years of evidence, jury instructions and the manner in which they are delivered have changed little.⁵² One researcher has written that "comprehension by jurors of the instructions given them is dysfunctionally low."⁵³ Another has said that "lay persons are frequently bewildered by the wording of jury instructions."⁵⁴ The process of instructing the jury can take a significant amount of time especially in more complicated cases that involve various theories of liability or multiple charges. Little is done to ensure that jurors understand or even pay attention to the instructions given by the trial judge. One observer has forecasted that

some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.

⁴⁹ See, e.g., *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (finding that death sentence should be upheld despite questions by jury about legal instructions and where judge responded to the questions using the same instruction); *Harris v. United States*, 602 A.2d 154, 165 (D.C. 1992) (en banc) ("The jury is presumed to have followed these instructions . . . and this court will not upset a verdict by assuming the jury declined to do so." (citation omitted) (internal quotations marks omitted)); *Hall v. United States*, 171 F.2d 347, 349–50 (D.C. Cir. 1948) ("[J]urors should be presumed to have understood and followed the court's instructions."); *Landay v. United States*, 108 F.2d 698, 706 (6th Cir. 1939); *Parmagini v. United States*, 42 F.2d 721, 724 (9th Cir. 1930).

⁵⁰ *Weeks*, 528 U.S. at 234.

⁵¹ Walter W. Steele, Jr., *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77, 79 (1988).

⁵² Marder, *supra* note 28 at 452, 458–75.

⁵³ Steele, *supra* note 51, at 92.

⁵⁴ Bethany Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issue*, 67 TENN. L. REV. 701, 702 (2000).

“adequate juror comprehension is unattainable.”⁵⁵

The most likely reason for the juror comprehension problem is that legal instructions are written above the ability level of most jurors. The average legal instruction is written at or above a 12th grade level,⁵⁶ while the typical adult American has an 8th grade reading comprehension level.⁵⁷ Some even believe this figure to be declining.⁵⁸ And with most legal instructions delivered orally, the fact that listening comprehension may be even lower than reading comprehension⁵⁹ should be yet another cause for concern. One legal observer has said that the jurors are like students studying for an exam when they are given legal instructions because they are learning topics previously foreign to them.⁶⁰ However, unlike students, jurors are never tested on their knowledge of any topic, are limited in their ability to ask questions, and are asked to absorb a large amount of information in a relatively compact period of time.

Jurors' struggles with comprehending the law extend even to the core legal principles necessary to a fair criminal trial: the presumption of innocence and the standard of proof beyond a reasonable doubt. One study showed that 50 percent of prospective jurors believed that it was the defendant who had to prove his innocence.⁶¹ That same study showed that 49.9 percent of people *who had previous jury experience* agreed that defendants had to prove their innocence.⁶² A Washington Post poll showed that 31 percent of people believed that if a person had been charged with a crime, he was probably guilty of at least some crime.⁶³ In another poll, about 30 percent of people eligible for jury

⁵⁵ John P. Cronan, *Is Any of this Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV 1187, 1189 (2002).

⁵⁶ Rachel Small, Judith Platania and Brian Cutler, *Assessing the Readability of Capital Pattern Jury Instructions*, THEJURYEXPERT.COM (Jan. 31, 2013), available at <http://www.thejuryexpert.com/2013/01/assessing-the-readability-of-capital-pattern-jury-instructions/>.

⁵⁷ *Id.*

⁵⁸ Hector Tobar, *American Adults Have Low (and Declining) Reading Proficiency*, LA TIMES (Oct. 8, 2013), <http://www.latimes.com/books/jacketcopy/la-et-jc-american-adults-have-low-and-declining-reading-proficiency-20131008-story.html>.

⁵⁹ Small et al., *supra* note 56 (“[It is] likely that jurors would experience greater difficulty with listening comprehension compared to reading comprehension.”).

⁶⁰ Dumas, *supra* note 54, at 714.

⁶¹ HEARST CORPORATION, THE AMERICAN PUBLIC, THE MEDIA AND THE JUDICIAL SYSTEM: A NATIONAL SURVEY ON PUBLIC AWARENESS AND PERSONAL EXPERIENCE, tbl. 5D at 15 (1986).

⁶² *Id.*

⁶³ NATIONAL JURY PROJECT, 1 JURYWORK: SYSTEMATIC TECHNIQUES § 2:7 (Nov. 2014) (citing Turner, *Tabulation of Attitude Data on Criminal Justice Issues from A National Survey* (Washington, D.C.: National Research Council- National Academy of Sciences)

service in Miami and Atlanta thought that a person is probably guilty if the person is charged by the government and brought to trial. Even worse, more than 40 percent of people eligible for jury service in those two cities expected a defendant to prove his innocence *despite a judge's instructions on the matter*.⁶⁴

In addition to jurors who are unable to intellectually grasp the legal instructions given by the judge, there are some jurors who are simply unwilling to follow the law. These are jurors who have hostility toward criminal defendants generally. There are members of the public who for whatever reason—the media's sensationalist focus on crime,⁶⁵ racial animus toward the race of the accused,⁶⁶ or a simple belief that because the defendant was arrested, that is sufficient to show his guilt—do not believe in the presumption of innocence or believe that the burden should be on the government to prove guilt beyond a reasonable doubt. Jury instructions on the law will come too late for these people if they are unwilling to follow the law, even if they can understand it.

These people will not be identified if voir dire on the burden of proof and the presumption of innocence is not allowed. Without questioning during the voir dire practice, the possibility exists that some people with general opposition to those accused of crime will sit on juries either unfairly convicting defendants or causing a mistrial in a case that would otherwise result in an acquittal.

The results of these studies likely reflect a combination of jurors who are unable to understand the jury instructions, which can be complicated and lengthy, and jurors who understand the principles but are unwilling to apply them. Ultimately, the studies show that instructions *alone* do not serve to enforce the principles that are the

(unpublished manuscript) (June 1979)).

⁶⁴ NATIONAL JURY PROJECT, 1 JURYWORK SYSTEMATIC TECHNIQUES § 2:7 (Nov. 2014) (citing a National Jury Project poll from 2005).

⁶⁵ For a discussion on the news media, the internet, and crime dramas creating a "climate of fear" in the mainstream public, see Rachel Lyon, *Media, Race and the Death Penalty*, 58 DEPAUL L. REV. 741, 743–52 (2009). She finds that people who watch television news are the most likely to be fearful of crime. *Id.* at 746. The demographics of viewers of these programs are the ones "most likely to be jury members." *Id.* at 751. She also shows that defense attorneys are portrayed negatively on most crime dramas while police and prosecutors are portrayed generally as benevolent actors who rarely make mistakes. *Id.* at 752. See also Perry Moriearty, *Framing Justice: Media, Bias, and Legal Decision Making*, 69 MD. L. REV. 849, 856–61 (2010).

⁶⁶ Jonathan Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1015 (2013) ("[J]urors are more likely to associate black defendants with guilt . . ."). See also Justin Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Bias: the Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).

foundation of a fair trial.⁶⁷ Instead, the jury selection process, through voir dire, must produce juries composed of individuals who are willing and able to apply the presumption of innocence, the standard of proof, and the burden of proof. Voir dire on the issues of burden of proof and the presumption of innocence will allow trial courts to dismiss for cause jurors who refuse or are unable to hold the government to its burden, and allow defense attorneys to exercise peremptory challenges for those the attorney suspects is unable to follow the law. Voir dire also has the added benefit of exposing jurors early on to the legal principles prior to their synthesizing evidence or hearing arguments from either side.

III. VOIR DIRE REGARDING THE THREE PRINCIPLES IS A NECESSARY MECHANISM TO ENSURE A FAIR TRIAL

Questioning during voir dire that will identify jurors who are unable or unwilling to follow the law is a way to enforce the presumption of innocence and the standard of proof beyond a reasonable doubt in jury trials. If trial courts allow a broader voir dire and jury selection process, that may increase the likelihood that the selected jurors will in fact apply the legal principles as they are stated in the jury instructions. Ignoring the fact that a substantial number of jurors do not follow the law guarantees trials that are unfair to criminal defendants.

A. *Basics of Voir Dire and Jury Selection*

The purpose of voir dire is to identify members of the venire who are unfit to sit as jurors during the trial.⁶⁸ During the voir dire process the entire jury panel is placed under oath and asked a series of questions. The answers to these questions inform the parties' motions

⁶⁷ Some of the jurisdictions polled, e.g. Florida, allow voir dire on the presumption of innocence, the burden of proof, and the standard of proof. See FL STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.7. The study that polled Miami residents covered potential jurors, not individuals who had been subject to the voir dire process. NATIONAL JURY PROJECT, 1 JURYWORK SYSTEMATIC TECHNIQUES § 2:7 (Nov. 2014). The voir dire process in Florida should serve to filter out most of the problematic potential jurors. There is no reason to believe that Miami residents think differently than potential jurors in other jurisdictions; in fact, the polls from other jurisdictions show relative uniformity in that regard. Many other jurisdictions, however, do not have voir dire processes like Florida's to filter out the problematic potential jurors.

⁶⁸ Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 300 (2012). See also Ann Roan, *Reclaiming Voir Dire*, 37 THE CHAMPION 22 (2013).

and the trial court's decisions to strike individuals from the panel "for cause" if they are unable or appear to be unable to serve as competent, impartial jurors.⁶⁹ There is no limit to the number of potential jurors who may be excluded for cause, because even one juror who is biased or unable to follow the instructions impairs the defendant's right to a fair trial. Generally, however, there is a high bar and trial courts exercise strikes "for cause" sparingly.⁷⁰

Without voir dire, it is impossible to identify which jurors are unwilling or unable to follow the law and decide the case impartially. As early as 1895, the Supreme Court had observed that a "suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried."⁷¹ In 1981, the Supreme Court recognized that the voir dire process is an essential mechanism to obtaining a fair trial:

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire*[,] the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.⁷²

During jury instructions, jurors passively listen (if they do), during the course of voir dire interaction and participation is required. Jurors must actively think in order to respond to questions posed during voir dire instead of simply listening to the judge's lecture about the law. Thus, voir dire is necessary to identify members of the panel who should not sit as jurors in the trial. Without the direct questioning, they likely would not be identified.

The potential jurors' responses during voir dire also inform the parties' decisions to exclude certain individuals from the panel with peremptory strikes. Unlike strikes for cause, peremptory strikes are strictly limited in number. Each side gets an equal number of

⁶⁹ In *Hopt v. People*, 120 U.S. 430, 433 (1887), the court listed the bases for strikes for cause at the time in the state of Utah:

Consanguinity or affinity within the fourth degree . . . [b]eing the party adverse to the defendant in a civil action, or having complaint against or being accused by him in a criminal prosecution . . . [h]aving served on a trial jury which has tried another person for offense charged in the indictment . . . [h]aving formed or expressed an unqualified opinion that the prisoner is guilty or not guilty.

⁷⁰ Barbara Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 549-58 (1975).

⁷¹ *Connors v. United States*, 158 U.S. 408, 413 (1895).

⁷² *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

peremptory strikes,⁷³ although the number of peremptory strikes varies between jurisdictions and based on the type of charge.⁷⁴ Also unlike strikes for cause, the parties, rather than the trial judge, control the exercise of peremptory strikes. The parties may employ a peremptory strike to eliminate a prospective juror for any reason at all, except for the prospective juror's race or gender.⁷⁵ Because the peremptory challenges are limited in number, the parties would also prefer to have an undesirable juror struck for cause by the judge rather than employ a peremptory strike.⁷⁶

The Supreme Court has described peremptory strikes as “a means to achieve the end of an impartial jury,”⁷⁷ and stated that the right to exercise peremptory challenges is “one of the most important of rights secured to the accused.”⁷⁸ Peremptory challenges, however, are not required by the Constitution and “it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.”⁷⁹ Thus, the Supreme Court has held that where a defense attorney uses a peremptory strike to remove a prospective juror who the trial judge should have removed for cause, there is no constitutional error.⁸⁰ Voir dire, however, is necessary for the informed exercise of peremptory challenges, and “the informed exercise of jury challenges is an essential element in insuring jury impartiality.”⁸¹

⁷³ If there are co-defendants, the number of peremptory strikes is generally divided equally among them. *See, e.g.*, PA. R. CRIM. P. 634(B)(1) (“[I]n trials involving joint defendants, the defendants shall divide equally among them that number of peremptory challenges that the defendant charged with the highest grade of offense would have received if tried separately; provided, however, that each defendant shall be entitled to at least 2 peremptory challenges.”).

⁷⁴ FED. R. CRIM. P. 24(b) allows 20 strikes for each side in a capital case, 10 or 6 depending on the type of felony charge, and 3 for misdemeanor offenses.

⁷⁵ *Batson v. Kentucky*, 476 U.S. 79, 105–08 (1986) (holding that the government may not use peremptory challenges to exclude people on the basis of race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (extending *Batson* to gender).

⁷⁶ *Roan*, *supra* note 68.

⁷⁷ *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988).

⁷⁸ *Swain v. Alabama*, 380 U.S. 202, 218–19 (1965) (citing *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

⁷⁹ *Ross*, 487 U.S. at 89.

⁸⁰ *Id.*

⁸¹ *Davis v. Florida*, 473 U.S. 913, 914 (1985) (Marshall, J., dissenting).

B. *Limitations of the Voir Dire Process*

Despite the ambitious goals of voir dire, some scholars argue that voir dire is not particularly effective at identifying bias.⁸² In large part, the effectiveness of voir dire depends on the specific manner in which it is implemented. For example, in some courtrooms questions are asked of the panel as a whole, and prospective jurors are asked to provide their answers while the other prospective jurors listen. Other judges conduct voir dire with only a single prospective juror at a time up at the bench so that the jurors cannot hear one another's answers to questions. Some legal scholars and psychologists believe that voir dire of a prospective juror in front of the entire panel is less valuable at recognizing juror biases because jurors are less likely to acknowledge their biases in front of others, preferring to present themselves "in a socially desirable light" before a group.⁸³ Many people have anxiety over public speaking in general, and it is undoubtedly daunting to admit to bias or an unwillingness to follow the rule of law just announced to the group in front of a large group of people rather than a single judge and a few lawyers. Nonetheless, voir dire before the full panel is the more common practice⁸⁴ due to concerns about judicial economy.⁸⁵

Voir dire conducted primarily by attorneys rather than the judge is more effective. Studies show that responses by jurors to questions asked by attorneys are typically more candid than questions asked by judges.⁸⁶ Jurors are less intimidated by lawyers and therefore are less likely to give only "socially acceptable," but inaccurate, answers to an attorney as compared to a judge.⁸⁷ Attorneys are also more likely to know the details and "nuances" of their case, and in that way are more likely to get useful information from voir dire than in judge-conducted voir dire.⁸⁸ Despite these advantages, many jurisdictions either

⁸² See Jeffrey Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice*, 48 U. COLO. L. REV. 525, 533 (1977).

⁸³ Marie Comiskey, *Does Voir Dire Serve as a Powerful Disinfectant or Pollutant? A Look at the Disparate Approaches to Jury Selection in the United States and Canada*, 59 DRAKE L. REV. 733, 745 (2011).

⁸⁴ Approximately one third of judges allow jurors to answer questions in privacy. Mize, *supra* note 26, at 28–29.

⁸⁵ Christopher Mallios & Toolsi Meisiner, *Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES NEWSLETTER 2, 2–3 (2010), available at http://www.courts.wa.gov/programs_orgs/gjc/documents/EducatingJuriesInSexualAssaultCasesPart1.pdf.

⁸⁶ Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95 ILL. B.J. 474 (2007). See also Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM BEHAV. 131–46 (1987).

⁸⁷ Mize, *supra* note 26, at 28.

⁸⁸ *Id.* at 28.

prohibit entirely or limit attorney-conducted voir dire.⁸⁹

Despite its flaws, voir dire remains the chief vehicle allowed by trial courts to ferret out bias or ignorance of the law amongst potential jurors.⁹⁰ There is no other standard mechanism within our justice system to ensure that juror bias is brought to the attention of the parties: regardless of its effectiveness, voir dire remains the only tool available to defendants and their lawyers to safeguard the right to a jury comprised of neutral, unbiased fact-finders who are willing and able to apply the law as it is stated to them. As such, sufficient voir dire is a necessity in achieving a fair trial.

C. Judge's Broad Discretion to Limit Voir Dire

The limitations on the effectiveness of voir dire have been encouraged by the deferential abuse of discretion standard of review for voir dire procedures that the Supreme Court and lower appellate courts adhere to. In one of its earliest opinions regarding voir dire, *Connors v. United States*, the Supreme Court affirmed a trial court's refusal to "permit certain questions to be propounded to [prospective] jurors" because the voir dire process "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion."⁹¹ In *Aldridge v. United States*, the Court recognized the trial court's "broad discretion as to the questions to be asked" during the voir dire process.⁹² In *Ham v. South Carolina*, the Court similarly acknowledged the "traditionally broad discretion accorded to the trial judge in conducting *voir dire* . . ." ⁹³ More recently, in *Skilling v. United States*, the Court stated that "[n]o hard-and-fast formula dictates the necessary depth or breadth of voir dire."⁹⁴

The Supreme Court has adhered to this deferential review despite its recognition of the importance of voir dire to fair trials. Justice White's plurality opinion in *Rosales-Lopez* stated that "the lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges" and leaves the trial judge unable to fulfill his duty "to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence."⁹⁵

⁸⁹ *Id.* at 27.

⁹⁰ *Id.* at 533–534.

⁹¹ *Connors v. United States*, 158 U.S. 408, 412–16 (1895). *Connors* was charged with election fraud and stealing ballot boxes, and sought to pose questions to prospective jurors regarding their political beliefs. *Id.*

⁹² *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

⁹³ *Ham v. South Carolina*, 409 U.S. 524, 528 (1973).

⁹⁴ *Skilling v. United States*, 561 U.S. 358, 386 (2010).

⁹⁵ *Rosales-Lopez v. United States*, 451 U.S. 184, 188 (1981).

Nonetheless, he maintained that “the adequacy of voir dire is not easily subject to appellate review.”⁹⁶ Justice White justified affording trial judges “ample discretion” because they “must rely on [their] immediate perceptions” of the potential jurors.⁹⁷ Appellate courts have also granted broad discretion to trial courts regarding voir dire.

As a result of the broad discretion granted to trial courts and the restrained review of the Supreme Court and other appellate courts, voir dire practices vary greatly from jurisdiction to jurisdiction and even among judges within the same jurisdiction.⁹⁸ As noted above, depending on the jurisdiction, voir dire may be conducted by lawyers, judges, or both.⁹⁹ Some trial courts use written questionnaires rather than oral questioning of the venire, while some trial judges may employ both modes of questioning in the same case. In federal courts and in the District of Columbia trial court, the trial judge conducts the voir dire with little attorney involvement.¹⁰⁰ When attorneys are allowed to engage in questioning of prospective jurors, judges can control that questioning by requiring the attorneys to submit their proposed questions in advance or foreclosing lines of questioning as they are posed. With few exceptions, discussed *infra*, the trial judge’s discretion controls what questions are asked during the voir dire process.

D. Trial Court Incentives to Limit Voir Dire

Trial judges often cite to a purported incentive to limit the voir dire process: efficiency. Jury trials can be a significant investment of judicial and government capital. Courts have always been concerned about the length of time necessary for voir dire.¹⁰¹ Particularly on crowded criminal dockets in cities and other large jurisdictions, trial judges feel pressure to limit voir dire in order to move trials along and clear their cases.

⁹⁶ *Id.*

⁹⁷ *Id.* at 189.

⁹⁸ Mize, *supra* note 26, at 27.

⁹⁹ Twenty-three states have predominantly or exclusively attorney-conducted voir dire, nine states and the District of Columbia have predominant or exclusive lawyer-conducted voir dire. Eighteen states have voir dire conducted by both attorneys and judges equally. *Id.* at 28, tbl. 21.

¹⁰⁰ See FED R. CRIM. P. 24(a) (“[T]he court may examine prospective jurors or may permit the attorneys for the parties to do so.”). See also D.C. SUPER. CT. R. CRIM. P. 24(a) (“The Court may permit the defendant or the defendant’s attorney and the prosecutor to conduct the examination of prospective jurors or may itself conduct the examination.”).

¹⁰¹ See James Gold, *Voir Dire: Questioning Prospective Jurors on their Willingness to Follow the Law*, 60 IND. L.J. 163, 180–81 (1985).

Voir dire, by its nature, does not lend itself well to efficiency. Typically, scores of citizens are called to comprise the panel of potential jurors in a criminal case. Because of the strikes for cause and peremptory strikes, far more people are needed than the twelve to fourteen jurors who ultimately serve on a criminal jury of typical size. Adequate questioning of this many individuals—often more than fifty—can take hours or even days. In high profile cases, when many prospective jurors are struck for cause due to exposure to media publicity, hundreds of prospective jurors may be called for a voir dire process that can take weeks.

There is no doubt that courts are extremely concerned with the length of voir dire and trials generally.¹⁰² In a footnote about a serious felony trial with substantial media attention, in which voir dire was more than six weeks long, the Supreme Court remarked, “a voir dire process of such length, in and of itself undermines the public confidence in the courts and the legal profession.”¹⁰³

The desire to increase the efficiency of the trial process leads judges to choose voir dire procedures that are less effective at exposing juror biases. For example, attorney-conducted voir dire is more likely to produce forthcoming answers from prospective jurors regarding bias, as discussed *supra*. In jurisdictions where voir dire is attorney-conducted, however, voir dire tends to be longer. In states with judge-dominated voir dire, the process takes far less time.¹⁰⁴ South Carolina’s criminal jury selection is judge-conducted and the median length of voir dire is just thirty minutes.¹⁰⁵ This is in contrast to Connecticut, which has attorney-conducted voir dire and the longest median length of voir dire—ten hours.¹⁰⁶ Most jurisdictions have opted for the more efficient, but less effective judge-conducted voir dire procedure. Similarly, questioning of prospective jurors individually is more effective, but less efficient—and less utilized—than requiring prospective jurors to answer before the entire panel.

For thirty years, legal observers have noted that, “judicial economy and a desire to assure speedy trials have placed the juror voir dire examination at the lowest level of priority in a trial.”¹⁰⁷ The time

¹⁰² *Id.*

¹⁰³ *Press-Enter. Co. v. Super. Court of California, Riverside Cnty.* 464 U.S. 501, 510 n.9 (1984).

¹⁰⁴ Mize, *supra* note 26, at 31.

¹⁰⁵ *Id.* at 29.

¹⁰⁶ *Id.*

¹⁰⁷ Beverly Jennison, *Trial Court Discretion in Conducting the Voir Dire Subjected to More Stringent Scrutiny: Cordero v. United States*, 33 CATH U.L. REV. 1121, 1121 (1984). See also Robert Hanley, *Getting to Know You*, 40 AM. U. L. REV. 865 (1991).

required for judges or attorneys to ask the additional voir dire questions and prospective jurors to answer them is not the only added inefficiency. When more questions and more probing questions are posed to the prospective jurors, more prospective jurors are identified as unfit and struck for cause, requiring even more prospective jurors to be summoned and questioned for each criminal case. This, of course, increases both the burden on the community for more prospective jurors and the length of the jury selection process even more. The cost to the courts and the community should be considered insignificant if it ensures a fair outcome.

Concerns about judicial resources continue even as more are resolved via guilty pleas rather than trials. Jury trials in many jurisdictions have plummeted.¹⁰⁸ The Supreme Court recently observed that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”¹⁰⁹ The increasing number of guilty pleas may make some judges even more impatient with the amount of time consumed by jury trials, including voir dire. A guilty plea is generally resolved in a matter of minutes, whereas jury trials can consume days or weeks. While a guilty plea is generally the result of both the prosecutor and the defendant reaching an agreement, a given judge may be more inclined to focus their frustration on the failure of the parties to reach an agreement on the defendant because the judge has likely seen the prosecutor reach agreements in many other cases, making it appear that the defendant is upsetting the apple cart by rejecting a plea offer. This frustration can lead to an unwillingness to allow a probing, effective voir dire process.

In addition to concerns about judicial economy, judges may worry that allowing voir dire on a particular legal topic will unfairly highlight an issue before any evidence has come into the case.¹¹⁰ In an assault case, for example, a trial judge might worry that allowing voir dire questions about self-defense before the defendant has presented evidence of self-defense (rather than present no defense case and simply rely on the presumption and the burden) might provide the defense with an unfair advantage.¹¹¹ Along those lines, there may be a

¹⁰⁸ John Simerman, *In New Orleans, Jury Trials Plummet While Conviction Rate Rises*, THE ADVOCATE (Jan. 8, 2014), <http://theadvocate.com/news/neworleans/8007281-148/in-new-orleans-jury-trials>.

¹⁰⁹ *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012).

¹¹⁰ Gold, *supra* note 101, at 174.

¹¹¹ *Press-Enter. Co. v. Super. Court of California, Riverside Cnty*, 464 U.S. 501, 510 n.9 (1984).

concern that certain questioning might “indoctrinate” prospective jurors.¹¹² Chief Justice Burger writing for the Court in *Press-Enterprises*, noted that, “[t]he process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused.” Questions that accurately reflect the law regarding the presumption of innocence, the burden of proof, or the reasonable doubt standard, principles that are integral to every single criminal trial, thus will not unfairly tip the scales or generate a jury “favorable” to the defense.

Apprehensions about efficiency that lead to a shorter voir dire are likely to hamper indigent defendants more than the relatively small number of criminal defendants with significant financial means. Defendants with resources (and prosecutors¹¹³ and police) can spend funds investigating prospective jurors, including hiring jury consultants or investigators with expertise in researching the backgrounds of prospective jurors.¹¹⁴ Public defenders and other court-appointed defense attorneys generally do not have the financial means for this type of investigation. Allowing insufficient voir dire also runs the risk of unfairly benefiting the government over the defense because prosecutors may not have to meet their burden of proof if jurors are unwilling to enforce it. This ultimately will result in prejudicial burden-shifting or burden-reducing. Efficiency concerns should not override a defendant’s right to a fair trial. In addition, these anxieties should be lessened as a result of the high number of cases settling via guilty plea.

IV. PRECEDENT RELATED TO VOIR DIRE ON THE PRESUMPTION OF INNOCENCE AND THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT

The fundamental nature of the presumption of innocence and the standard of proof beyond a reasonable doubt combined with the studies and polls, discussed *supra*, indicating that jurors do not always apply these principles even after instruction, dictate in favor of requiring voir dire, in every criminal case, to determine if prospective jurors are willing and able to apply these legal principles. Almost three

¹¹² Gold, *supra* note 101, at 170.

¹¹³ Keith Alexander, *Questions Arise Over Criminal Background Searches of Jurors in D.C. Superior Court*, WASH. POST (Dec. 8, 2013), http://www.washingtonpost.com/local/crime/questions-arise-over-criminal-background-searches-of-jurors-in-dc-superior-court/2013/12/08/fa612fec-4e13-11e3-be6b-d3d28122e6d4_story.html.

¹¹⁴ For a discussion on investigation of jurors, see generally Eric Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM J. TRIAL ADVOC. 597 (2013).

decades ago, the Supreme Court of New Hampshire in *State v. Cere*¹¹⁵ followed this line of reasoning and required that in every criminal jury trial in that state prospective jurors “shall be asked” about their willingness to apply the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt.¹¹⁶ In reaching its conclusion that a specific inquiry regarding these legal principles was necessary in every criminal case, the court specifically referenced “a 1983 national survey commissioned by the Hearst Corporation” that found that fifty percent of those surveyed believed that a defendant must prove his innocence at a criminal trial and “of those surveyed who had served as jurors, 49.9% “ held the same belief.”¹¹⁷ The court also relied on a recent New Hampshire trial where ten or eleven of twelve prospective jurors expressed a belief that the defendant must prove he is innocent.¹¹⁸ The court concluded that a specific inquiry into prospective jurors’ willingness and ability to apply the core principles of the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt would “aid in ensuring the integrity of jury verdicts.”¹¹⁹

The United States Supreme Court, however, has remained silent on the issue of whether or not a specific inquiry into prospective jurors’ willingness and ability to apply the presumption of innocence and the standard of proof is required in all criminal trials to ensure the integrity of jury verdicts. The Court has remained silent despite a split among the federal circuits; most circuits that have considered the issue have ruled that such an inquiry is not required.¹²⁰ State high courts

¹¹⁵ Other state high courts have reached similar conclusions. The Illinois Supreme court found in *People v. Zehr*, 469 N.E.2d 1062, 1064 (1984) that the refusal to ask questions about the presumption of innocence and the burden of proof required reversal of a conviction. The court specifically addressed the issue that the requested voir dire questions pertained to matters of law and instruction. The Court wrote:

We are of the opinion that essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf . . . [A]n instruction given at the end of trial will have little . . . effect [for jurors who are prejudiced against any of these “basic guarantees”].

See also *Jones v. State*, 378 So.2d 797, 798 (Fl. 1980) (holding that a defense attorney should be allowed to inquire of prospective jurors about the presumption of innocence and the burden of proof); *New Jersey v. Lumumba*, 601 A.2d 1178, 1189 (N.J. Super. Ct. 1992) (explaining that a jury must be asked whether they “understand the basic principles of presumption of innocence . . .”).

¹¹⁶ *State v. Cere*, 480 A.2d 195, 198 (N.H. 1984).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ But among the federal circuits, the Sixth stands alone on voir dire on the presumption of innocence.

have also split on the issue.¹²¹

The Sixth Circuit in *United States v. Blount*,¹²² found that failure to allow voir dire on presumption of innocence upon request is erroneous. It explained that, “[t]he primary purpose of voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel.”¹²³ It reasoned that, “a challenge for cause would be sustained if a juror expressed his incapacity to accept the proposition that a defendant is presumed to be innocent . . . “ that “since the failure may have resulted in the denial of an impartial jury, the error cannot be dismissed as harmless.”¹²⁴ The Sixth Circuit’s test makes sense; instead, if the answer is one that would identify a juror as someone who would have to be dismissed for cause, the question is one that is essential to a fair trial.

The argument for a specific inquiry into these related core legal principles is supported not only by the studies and polls indicating that jurors do not always apply them even when instructed, but also by Supreme Court precedent regarding other questions that must be asked during the voir dire process.

With respect to specific areas of inquiry during voir dire, the Court has generally concluded that a defendant is entitled to specific questions only where the failure to ask those questions will render the trial “fundamentally unfair.”¹²⁵ Unless there is some “special circumstance” present, a “generalized but thorough inquiry into the impartiality” of the prospective jurors is all that is constitutionally required.¹²⁶

The Supreme Court has found voir dire inquiry into a particular subject required where it involves bias specific to the defendant or to the case. In *Morford v. United States* the defendant was convicted of refusing to produce records and the names of individuals associated with the National Council for American-Soviet Friendship.¹²⁷ After the District of Columbia Circuit affirmed Morford’s conviction, the Supreme Court reversed because the trial court had denied specific questioning of prospective jurors who were federal government

¹²¹ See note 4.

¹²² *United States v. Blount*, 479 F.2d 650 (6th Cir. 1973).

¹²³ *Id.* at 651.

¹²⁴ *Id.*

¹²⁵ *Mu’Min v. Virginia*, 500 U.S. 415, 426 (1991); see also *Morgan*, 504 U.S. at 747 (Scalia, J., dissenting).

¹²⁶ *Turner v. Murray*, 476 U.S. 28, 37 (1986); see also *Morgan*, 504 U.S. at 747 (Scalia, J., dissenting).

¹²⁷ *Morford v. United States*, 176 F.2d 54 (D.C. Cir. 1949).

employees regarding “the possible influence of the ‘Loyalty Order,’”¹²⁸ which subjected all federal employees to “discharge upon reasonable grounds for belief that they are disloyal to the Government of the United States.”¹²⁹ The Court found reversible error because the refusal to inquire about this potential bias because “[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant’s right to an impartial jury.”¹³⁰ The Court in *Morford* did not articulate a standard, the satisfaction of which would trigger the constitutional entitlement to inquire into a potential area of bias. The Court referenced *Dennis v. United States*, where the inquiry had been allowed and all the prospective jurors who were government employees denied being biased by the order, the Court subsequently dismissed Dennis’s concerns about the order as “vague conjecture.”¹³¹ While *Morford* is distinguishable from the question of inquiring about fundamental legal principles, i.e. bias related to an issue that arises in every criminal case, the studies referenced *supra* are an even greater indication of the potential for bias than the Loyalty Order which triggered the need for inquiry in *Morford*’s case.

The Supreme Court later clarified, at least to some extent, the standard a defendant must satisfy in order to trigger constitutionally required inquiry into specific subject areas during voir dire in a number of cases involving the potential for racial bias. In *Aldridge v. United States*, the African American defendant accused of killing a white police officer requested that prospective jurors be asked about whether they were racially prejudiced against African Americans.¹³² The trial court refused. The Supreme Court reversed, concluding that the “essential demands of fairness” under the circumstances of that case required a specific inquiry regarding racial prejudice.¹³³ The Court also noted that “no harm would be done in permitting the question, but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit.”¹³⁴

¹²⁸ *Morford v. United States*, 339 U.S. 258, 259 (1950).

¹²⁹ *Dennis v. United States*, 339 U.S. 162, 165 (1950).

¹³⁰ *Morford*, 339 U.S. at 259 (quoting *Dennis*, 339 U.S. at 171–72).

¹³¹ *Id.*; *Dennis*, 339 U.S. at 172.

¹³² *Aldridge v. United States*, 283 U.S. 308, 309–10 (1931).

¹³³ *Id.* at 310.

¹³⁴ *Id.* at 314.

In *Ham v. South Carolina* the defendant was an African-American man who was involved in the civil rights movement and charged with possession of marijuana.¹³⁵ The defense at trial was that the police officers in the South Carolina town were framing the defendant because of his civil rights activities.¹³⁶ Ham requested questions to uncover bias against black people generally.¹³⁷ The Court held that the Fourteenth Amendment's Due Process clause "requires that under the facts shown by this record the petitioner be permitted to have the juror interrogated on the issue of racial bias."¹³⁸

In *Ristaino v. Ross*, however, the Supreme Court placed significant limitations on its holdings in *Aldridge* and *Ham*.¹³⁹ In that case, Ross, an African American, was convicted of an armed robbery and assault with intent to murder of a white Boston University security guard.¹⁴⁰ Ross argued that because he was African American and charged with committing violent crimes against a white person, he was constitutionally entitled to a specific inquiry of the prospective jurors regarding racial bias, an inquiry the trial court had denied.¹⁴¹ The Court held that *Ham* did not require such an inquiry in every criminal trial where there "may be a confrontation between persons of different races or different ethnic origins."¹⁴² The Court concluded that specific inquiries into a particular form of bias are only constitutionally required if, "under all of the circumstances presented there [is] a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as indifferent as (they stand) unsworn."¹⁴³ The *Ristaino* Court concluded that although the defendant and the victim were from different races or ethnic groups, because there were no other racial issues involved the circumstances of the case "did not suggest a significant likelihood that racial prejudice might infect Ross's trial."¹⁴⁴

In *Rosales-Lopez*, a man of Mexican descent was accused of illegally transporting undocumented Mexicans into the country. The evidence against him included the fact that he was engaged in a sexual relationship with a young white woman, the mother of the

¹³⁵ *Ham v. South Carolina*, 409 U.S. 524 (1973).

¹³⁶ *Id.* at 525.

¹³⁷ *Id.* at 525–26.

¹³⁸ *Id.* at 527.

¹³⁹ *Ristaino v. Ross*, 424 U.S. 589, 596 (1976).

¹⁴⁰ *Id.* at 590.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 596 (quotations omitted).

¹⁴⁴ *Ristaino*, 424 U.S. at 598.

prosecution's key witness.¹⁴⁵ The plurality opinion found no error, stating that a trial court's failure to honor a request for specific inquiry into the racial or ethnic prejudice of prospective jurors is only "reversible error where the circumstances of the case indicate that there is a *reasonable possibility* that racial or ethnic prejudice might have influenced the jury."¹⁴⁶ Justice White, writing the plurality opinion, concluded that there was no such possibility, in part because the trial court had asked questions during voir dire regarding the prospective jurors' feelings about illegal immigration.¹⁴⁷

Allowing a juror who refused to apply the presumption of innocence, or hold the government to its burden of proof beyond a reasonable doubt, to sit on a criminal jury would perpetrate as "gross [an] injustice" as seating a juror who is racially biased against the defendant. The studies discussed above indicating a high percentage of prospective jurors' unwillingness to apply these fundamental principles of law, certainly meet *Ristaino's* "significant likelihood" standard. The issue should qualify as a "special circumstance," although that term obviously does not properly describe a circumstance that presents a problem facing every criminal trial. Social science, however, should be considered just as powerful proof of a significant likelihood of bias as the common sense determinations made by the Court in *Ham* and *Aldridge*.

The Supreme Court's precedent has demonstrated a more expansive view of the requirements for voir dire in death penalty cases, particularly with respect to the sentencing phase in capital cases. In *Turner v. Murray*, for example, the Court held that *every* death penalty case involving an "interracial crime" requires informing the prospective jurors of the races of the defendant and the alleged victim and questioning "on the issue of racial bias."¹⁴⁸ The Court, however, was fractured with respect to the reasoning for this holding.¹⁴⁹ Justice White, who wrote the opinion, joined by Justices Blackmun, Stevens, and O'Connor, that the holding was limited to the sentencing phase of death penalty cases because jurors during the sentencing phase versus the guilt/innocence phase of a capital trial.¹⁵⁰ "[W]ith respect to the guilt phase," Justice White wrote, "we find this case to be

¹⁴⁵ *Rosales-Lopez v. United States*, 451 U.S. 182, at 184, 193 (1981).

¹⁴⁶ *Id.* at 191 (emphasis added).

¹⁴⁷ *Id.* at 193.

¹⁴⁸ *Turner v. Murray*, 476 U.S. 28, 36–37 (1986).

¹⁴⁹ *Id.* at 28–53.

¹⁵⁰ *Id.* at 28–29, 37–38, 38 n.12.

indistinguishable from *Ristaino*, to which we continue to adhere.”¹⁵¹ Oddly, because voir dire regarding racial prejudice necessarily must occur before the guilt/innocence phase, capital defendants in subsequent cases of interracial crime receive the salutary benefit of a voir dire regarding racial prejudice although they are technically not entitled to it. Turner’s case, however, was remanded only for a new sentencing phase, not a new trial.¹⁵² Both Justice Brennan and Justice Marshall wrote dissents criticizing the absurdity of voir dire regarding racial prejudice for the sentencing phase of a capital trial, while disavowing the need for such questions during the guilt/innocence phase of any criminal trial.¹⁵³

Despite the rigorous limits placed on defense voir dire, surprisingly, the Supreme Court does not require *any* “special circumstance” or “significant likelihood” to trigger the *prosecution’s* entitlement to voir dire regarding a juror’s willingness to apply the death penalty if a capital defendant is found guilty. In *Witherspoon v. Illinois*, the Court held that the defendant’s Sixth and Fourteenth Amendment rights to a trial by an impartial jury were violated because the trial court excluded for cause all prospective jurors who expressed objections to capital punishment.¹⁵⁴ In a footnote—one that gave rise to the so-called “death qualified” jury—the Court noted that prospective jurors may be excluded for cause from capital trials if they make it “unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence . . . or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s *guilt*.”¹⁵⁵ The Court explicitly stated that the voir dire process would be used to reveal the prospective jurors’ positions on these issues.¹⁵⁶

The Supreme Court subsequently broadened the category of prospective jurors who could be properly excluded for cause in *Adams v. Texas*.¹⁵⁷ There the Court concluded that jurors could not be struck for cause “unless [their] views [on capital punishment] would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”¹⁵⁸ It was decided that

¹⁵¹ *Id.* at 37–38.

¹⁵² *Id.* at 38.

¹⁵³ *Id.* at 39, 45.

¹⁵⁴ *Witherspoon v. State of Illinois*, 391 U.S. 510 (1968).

¹⁵⁵ *Id.* at 522 n.21 (emphasis added).

¹⁵⁶ *Id.*

¹⁵⁷ *Adams v. Texas*, 448 U.S. 38, 45 (1980).

¹⁵⁸ *Id.*

on the facts of the case, some prospective jurors had been improperly excluded.¹⁵⁹ Then, in *Wainwright v. Witt*, the Court clarified that the language in *Witherspoon's* footnote 21 was dicta and that the *Adams* standard controlled, emphasizing that the *Adams* standard “dispens[es] with *Witherspoon's* reference to ‘automatic’ decision making” and “does not require that a juror’s bias be proved with ‘unmistakable clarity.’”¹⁶⁰ The Court upheld the trial court’s exclusion of a juror who had indicated that she “thought” her views on the death penalty would interfere with her ability to judge the case, answers that were obtained through pointed questions about the juror’s beliefs about the death penalty.¹⁶¹

The Supreme Court clarified in *Lockhart v. McCree* that the prosecution’s entitlement to have prospective jurors whose views against the death penalty would substantially impair their judgment of the case excluded for cause *necessarily included* an entitlement to specific voir dire aimed at discovering those views:

The state may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant’s guilt or innocence. *Ipsa facto*, the state must be given the opportunity to identify such prospective jurors by questioning them at voir dire about their views on the death penalty.¹⁶²

There is no indication in *Lockhart* that the state’s opportunity to voir dire jurors about their views on the death penalty is limited in any way: it applies in every capital case. This entitlement is conferred to the prosecution *without any showing of special circumstances or a significant likelihood* that the prospective jurors will be biased against imposition of the death penalty.

In *Morgan v. Illinois*, the Court held that defendants in capital cases are entitled to the defense-corollary of death-qualification voir dire questions.¹⁶³ The Court held that under the Due Process Clause of the Fourteenth Amendment “a capital defendant may challenge for cause any prospective juror” who “will automatically vote for the death penalty in every case” and therefore would “fail in good faith to consider the evidence of aggravating and mitigating

¹⁵⁹ *Id.* at 49.

¹⁶⁰ *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

¹⁶¹ *Id.* at 415, 430.

¹⁶² *Lockhart v. McCree*, 476 U.S. 162, 170 n.7 (1986).

¹⁶³ *Morgan v. Illinois*, 504 U.S. 719, 735–36 (1992).

2015]

PRESUMED FAIR?

575

circumstances[.]”¹⁶⁴ Just as the Court in *Lockhart* determined that the prosecution was entitled to specific voir dire to discover disabling views against the death penalty, the Court in *Morgan* concluded that defendants are entitled to specific voir dire aimed at discovering a prospective juror’s disposition to vote for the death penalty regardless of the evidence and instructions.¹⁶⁵ The Court concluded that if voir dire were “not available to lay bare the foundation of petitioner’s challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State’s right, in the absence of questioning, to strike those who would *never* do so.”¹⁶⁶ In reaching this conclusion, the Court specifically rejected the argument that “direct inquiry into [the] matter” was not necessary “so long as . . . other questioning purports to assure the defendant a fair and impartial jury able to follow the law.”¹⁶⁷ The Court reasoned that “*Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath.”¹⁶⁸

The right of a criminal defendant to exclude prospective jurors who are unable or unwilling to apply the presumption of innocence and the standard of proof beyond a reasonable doubt is more fundamental than the right of a capital defendant to exclude prospective jurors who would automatically impose the death penalty upon a finding of guilt. Certainly, the right of the accused should trump any of the government’s entitlements to voir dire, as the defendant is the one on trial and whose constitutional rights the court is there to uphold. Nor is there any reason to believe that such views will be exposed by general inquiry rather than specific questioning any more so than the problematic views about the death penalty would be so exposed. Indeed, polls show that a large percentage of jurors believe a defendant is required to prove his innocence, which demonstrates that general inquires do not serve to lay bare such bias.

¹⁶⁴ *Id.* at 729. It is unclear why the Court used the “automatically” language explicitly eschewed by the Court in *Witt*. 469 U.S. at 424.

¹⁶⁵ *Morgan*, 504 U.S. at 733–34.

¹⁶⁶ *Id.* at 733–34 (emphasis in original).

¹⁶⁷ *Id.* at 729.

¹⁶⁸ *Id.* at 734–35.

The Third Circuit in *United States v. Wooton*, a case that pre-dates *Lockhart*, *Morgan*, and *Ristaino*, articulated a number of arguments against a requirement for specific voir dire regarding prospective jurors' willingness to apply the beyond a reasonable doubt standard.¹⁶⁹ The main argument is that a general inquiry about whether the prospective juror will uphold the law and only consider the evidence presented will reveal a prospective juror's inclination to disregard the presumption of innocence or the burden of proof beyond a reasonable doubt.¹⁷⁰ General questions like these are asked routinely, but the polls discussed above indicate that despite the broad use of these general questions, individuals who believe that a defendant must prove his innocence are nonetheless serving on juries for criminal cases. Furthermore, there is no reason to believe that problematic views regarding the presumption of innocence or the standard of proof will be revealed without specific inquiry any more than there is reason to believe that problematic views regarding the death penalty will be revealed by general questioning in capital cases, where prospective jurors are undoubtedly informed that the case involves the death penalty.

The court in *Wooton* also reasoned that because specific inquiries are only constitutionally required when they reveal bias, whereas inquiries regarding prospective jurors' willingness to apply the reasonable doubt standard "related to a rule of law and the juror's willingness to apply it," no such inquiry can be constitutionally required.¹⁷¹ The court in *Wooton* was ruling without the benefit of the Supreme Court's subsequent holdings in *Lockhart* and *Morgan*, which make clear that an inquiry into prospective jurors' willingness to apply a rule of law—in those cases the law regarding imposition of the death penalty—can be constitutionally required because it reveals potential partiality.

The *Wooton* court also expressed concerns about efficiency and the "slippery slope" of requiring specific inquiries regarding areas of the law: "If the principle is valid as to the reasonable doubt inquiry, it would also be valid for similar inquiries" regarding "constitutional, substantive and procedural law that must be contained in instructions to the jury," which would ultimately thwart the "public interest in reasonable expedition" of criminal trials.¹⁷² While the studies and polls discussed earlier certainly indicate a real need to inquire specifically

¹⁶⁹ *United States v. Wooton*, 518 F.2d 943, 946–47 (1975).

¹⁷⁰ *See id.* at 946.

¹⁷¹ *Id.*

¹⁷² *Id.* at 946–47 (internal quotations marks omitted).

about prospective jurors' willingness to adhere to the presumption of innocence and the government's burden of proof beyond a reasonable doubt, there is no basis to suggest that specific inquiries are necessary with respect to other legal issues in criminal trial, such as hearsay, impeachment, or unanimity. Furthermore, as discussed *supra*, the presumption of innocence and the standard of proof are fundamental principles without which there cannot be a fair criminal trial. The fundamental nature of these principles, unlike the rules of hearsay for example, merits specific inquiry. Finally, the Supreme Court has already started down the "slippery slope" of specific inquiry regarding legal principles in *Lockhart* and *Morgan*, and if there are going to be specific inquiries regarding legal principles they should include the most fundamental principles necessary for a fair criminal trial.

V. MOVING FORWARD TOWARDS SPECIFIC VOIR DIRE REGARDING THE PRESUMPTION OF INNOCENCE, THE BURDEN OF PROOF, AND THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT

The notion of a presumption-of-innocence-and-burden-of-proof qualified jury in a criminal trial should be entirely uncontroversial. Courts should be concerned with identifying jurors who will be unable or unwilling to follow the law. Those concerns should trump any efficiency concerns, especially because as we have seen the number of cases that make it to trial has dwindled to only five percent.¹⁷³ Nevertheless, many defense attorneys seeking a specific inquiry regarding prospective jurors' views of the presumption of innocence and the standard of proof beyond a reasonable doubt will still face an uphill battle: only one federal circuit and a handful of state high courts have found that specific voir dire regarding these fundamental principles is required, and reviewing courts continue to grant trial courts broad discretion with respect to the voir dire process.

Defense attorneys practicing in the jurisdictions where there are neither precedent nor custom that establishes specific voir dire regarding these principles¹⁷⁴ should request it and appeal denials of the request when it is not granted. This can be done in advance of trial and in writing via a motion *in limine*. In every trial case, defense attorneys should submit proposed voir dire that includes questions on this topic. Keeping the proposed questions as short as possible and litigating the issue on paper (as opposed to during valuable in-court

¹⁷³ See discussion *supra* notes 109–110.

¹⁷⁴ Virtually every jurisdiction outside of Florida, New Jersey, Illinois, and the Sixth Circuit.

time) will help avoid the courts' concerns about efficiency.¹⁷⁵ Requests for questionnaires (rather than live voir dire) on the issues completed by jurors outside the courtroom can also save the court time.

Arguments about the importance of voir dire on these bedrock principles of law compared to the government's need for a "death-qualified jury" should be advanced. Certainly no one can dispute that a defendant's right to have a jury comprised of people willing to presume him innocent and hold the government to its high burden would trump that of the government's entitlement to ask questions before trial about a juror's ability to impose the death penalty in the event of a conviction. Even as compared to the concerns posed in the racial bias cases addressed by the Supreme Court, the necessity of a jury that understands and is willing to follow the very fundamental doctrines of the presumption of innocence and the burden of proof beyond a reasonable doubt are at least as significant as those race-bias cases. So while there is not a Supreme Court case directly on point, the precedent supports the arguments for a voir dire on the presumption of innocence and proof beyond a reasonable doubt.

Defense attorneys in jurisdictions where voir dire on other legal issues is allowed may be in a position to achieve a presumption of innocence qualified jury sooner. In *United States v. Allsup*, the Ninth Circuit reversed a conviction where the trial judge refused to voir dire the jury panel on the insanity defense.¹⁷⁶ In that case, voir dire was judge-conducted.¹⁷⁷ The trial judge asked the defense attorney whether he would commit to an insanity defense. It was only when he refused that the judge refused to voir dire on the issue.¹⁷⁸ The Ninth Circuit found that the defense attorney should not have to predict with certainty his defense.¹⁷⁹ Similarly, the Ninth Circuit has repeatedly found reversible error where a trial judge failed to ask members of the jury pool, upon defense counsel's request, whether they would hold

¹⁷⁵ Almost thirty years ago, James Gold suggested voir dire on legal issues to be simple in his article cited *supra* note 101, at 188. He suggested that the question be posed, "If the judge instructed you that . . . is there any reason why you would be unwilling or unable to follow that instruction?" I would suggest a single question like, "The judge will instruct you that _____ is presumed innocent. The judge will also instruct you that the government has the burden of proof, not ____, and that burden is proof beyond a reasonable doubt. Do any of you believe that that you would be unwilling or unable to follow that instruction?" This sort of questioning might only elicit "yes" answers because it suggests what the correct answer should be. A more open-ended questioning might result in more candid responses.

¹⁷⁶ *United States v. Allsup*, 566 F.2d 68, 75-76 (9th Cir. 1977).

¹⁷⁷ *Id.* at 70.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 70.

the testimony of police officers in higher regard because of their profession.¹⁸⁰

Given that both police officer credibility and the insanity defense are issues about which the jury would receive instructions from the court, these cases are hard to square with the logic of *United States v. Price*,¹⁸¹ where the Ninth Circuit, *en banc*, found no abuse of discretion in failing to voir dire the jury on the presumption of innocence and the burden of proof. Illustrating how these cases are at odds with one another along with the use of social science that shows the difficulty jurors have with these legal issues, should allow the defense to prevail. *Price* and cases like it in other jurisdictions simply fail to address the social science illustrating how little prospective jurors understand these core legal values. Bringing the data to trial and appellate courts attention may increase the likelihood of voir dire on these essential legal issues.

Use of the social science is the defense attorney's key to getting the voir dire necessary for defendants.¹⁸² Both requests in the trial court and on appeal should consider explicit reliance on the social science that demonstrates the need for specific inquiry regarding these fundamental principles. Unfortunately, the polls are likely to be criticized because some are dated. There is, however, no reason to believe that Americans' views regarding the presumption of innocence or the standard of proof beyond a reasonable doubt have subsequently shifted. Public defender offices and defense firms should, however, consider pooling resources in order to fund a new round of polling on these issues.¹⁸³ If the courts are to be receptive to this issue at all, it will

¹⁸⁰ See *e.g.*, *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979); *United States v. Contreras-Castro*, 825 F.2d 185 (9th Cir. 1987); *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987).

¹⁸¹ *United States v. Price*, 577 F.2d 1356, 1366 (9th Cir. 1978).

¹⁸² Reliance on social science has swayed courts on the issue of eyewitness identification, juvenile culpability, adolescent brain development, and the death penalty for those with mental health issues. *Atkins v. Virginia*, 536 U.S. 304, 314–19 (2002) (utilizing scientific arguments of brain development to declare death penalty for mentally retarded persons unconstitutional); *Roper v. Simmons*, 543 U.S. 551, 565–72 (2005) (reasoning that the juvenile death penalty is unconstitutional and cites to developmental differences between juveniles under 18 and adults); *Graham v. Florida*, 560 U.S. 48, 67–69 (2010) (reasoning that the Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide); *Miller v. Alabama*, 132 S. Ct. 2455, 2462–66 (2012) (holding that the Eighth Amendment prohibits imposition of life without parole sentence on juvenile offenders).

¹⁸³ Given the crisis in indigent defense, funds for such a poll, which if professionally administered may run in the tens of thousands of dollars, may be scarce. Partnering with a psychology department at a nearby university or a law school may help with

likely depend on updated polling demonstrating that deeply problematic views regarding these principles continue to exist on a widespread basis.

Concerted efforts by defense attorneys to raise the issue and well-reasoned appellate briefs and arguments will someday hopefully bring about the presumption of innocence and burden of proof qualified jury.