

IMPANELING THE JURY

The jury venire should be brought in and seated in the spectators' section.

Court Officer: **Hear ye. Hear ye. Hear ye. All persons having business before the Honorable, the Justices of the _____ District Court, draw near, give your attendance and you shall be heard. God save the Commonwealth of Massachusetts. Please be seated.**

Clerk: **In the matter of the Commonwealth of Massachusetts versus _____: will the defendant(s) please stand. You are placed at the bar for trial and these good jurors whom I shall call are to pass between the Commonwealth and you upon your trial. If you should object to any of the jurors, you will do so after their numbers are called and before they are sworn. You have the right to challenge two of the jurors without giving any reason for doing so, and the Commonwealth has the right to challenge an equal number of jurors. You also have the right to challenge as many more as you have good cause to challenge. You may be seated.**

The judge should direct the clerk on how jurors are to be seated. They may be seated in the jury box in numeric order at this stage, or when the individual or panel voir dire process is begun.

In a case to be tried to a jury of six persons, seven jurors must be impaneled although a lesser number may be impaneled but only upon a finding of cause. G.L. c. 234A, § 68. A trial may proceed with five jurors only upon the defendant's express waiver of the right to be tried by a full

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jury and the agreement of all parties. See G.L. c. 234A, § 68; Mass. R. Crim. P. 19 (b). The trial judge must ensure, by way of a colloquy, that the defendant's decision to proceed with less than a full complement of jurors is knowing and voluntary. *Commonwealth v. Bennefield*, 482 Mass. 250, 255-256 (2019). Under Rule 19, the defendant must also file a written waiver with the court. Mass. R. Crim. P. 19 (b).

Alternate jurors should not be identified until immediately prior to jury deliberations. G.L. c. 234A, § 68.

In the case of a juvenile being tried as a youthful offender to a jury of twelve persons, fourteen jurors must be impaneled. G.L. c. 119, § 56 (e); G.L. c. 234A, § 68. Six jurors are required for a charge of delinquency. G.L. c. 119, § 56 (e). As in a District Court trial, at least seven jurors must be impaneled.

At a trial with multiple defendants, "the Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled." Mass. R. Crim. P. 20(c)(1).

Will all potential jurors please rise and raise your right hands.

Do each of you solemnly swear or affirm under the pains and penalties of perjury that you will make true answers to such questions as shall be put to you by the Court in the matter now pending, so help you God? Please be seated.

If a member of the venire prefers to omit reference to the Deity, they may be sworn by substituting the words "under the penalties of perjury" for the words "so help you God." See G.L. c. 233, § 19.

Judge: Ladies and gentlemen, we are about to choose a jury for the trial of the defendant(s) _____ who [has (have) pled] not guilty to the charge of _____. To assist you in planning, I will say that we expect to recess by 4:30 today. If the trial does not conclude today, anyone chosen to be a juror must return tomorrow. We usually take a lunch break between 1 and 2 o'clock and shorter breaks during the day as may be necessary or

convenient.

Would the prosecutor(s) please stand and introduce (yourself) (yourselves) to the jury panel? Thank you.

Would the defendant's attorney please stand with your client and introduce each of you to the jury panel? Thank you.

Will the potential witness(es) stand when I call your name(s): /Names

and home towns/ .

The jury should not be told for which party any prospective witness may appear. *Commonwealth v. Bolduc*, 383 Mass. 744, 747-748 (1981); See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.14.

Best Practice: A judge should swear in witnesses individually when they are called to the stand to testify. If witnesses are sworn as a group, jurors may speculate as to why one or more of them did not ultimately testify, and a witness who was not present may be mistakenly allowed to testify without being sworn.

[If witnesses are to be sworn at this time:]

Do you solemnly swear and/or affirm under the pains and penalties of perjury that the testimony you shall give in this matter now in hearing shall be the truth, the whole truth, and nothing but the truth, so help you God? Thank you. You may be seated.

Best Practice: The judge may provide a brief description of the nature of the case after conferring with counsel.

[OPTIONAL: If there is to be an attorney or party conducted voir dire, the judge may choose to instruct the jury on the elements of all, or of the most serious, offense(s) at this point.]

The defendant is charged with _____.

To prove the offense of _____, the Commonwealth must prove ____ things beyond a reasonable doubt:

[If there are offenses for which the judge does not list the elements, continue here.]

I will instruct you later as to what the Commonwealth must prove for the other offense(s).

First and foremost, I instruct you that all parties stand as equals before the bar of justice. All parties are entitled to a fair and impartial jury, that is, jurors who will: (1) fairly evaluate the evidence; (2) follow the law as instructed; and (3) render a fair and just verdict based solely on the evidence presented at this trial.

Jurors, of course, are expected to bring their own life experiences, thoughts, opinions, beliefs, and common sense to this court and the deliberation room. Everyone, including me, makes assumptions and forms opinions arising from our own personal backgrounds and experiences. These biases or assumptions may have to do with any number of things, including an individual's race, color, nationality, ethnicity, age, disability, socio-economic status, religious beliefs, gender, or sexual orientation. I instruct you that a verdict must not be based on any such bias, including

conscious or subconscious bias.

Bias, whether it is conscious or subconscious, can affect how we evaluate information and make decisions. It can impact what we see and hear, how we remember what we see and hear, how we make important decisions, and may even cause us to make generalizations or to pre-judge.

While each of you brings your unique life experience with you to court today, as jurors, you must be alert to recognize whether any potential bias might impact your ability to fairly and impartially evaluate the evidence in this case, follow my instructions, and render a fair and just verdict that is based solely on the evidence presented in this case.

I am now going to ask you to respond to some questions that will assist us in obtaining a fair and impartial jury. If your answer to any of my questions is “yes,” please hold up your juror card and the court officer will read your juror number out loud. At the end of my questions, you may be called up to the judge’s bench one at a time so that I can talk to you.

[1.] There are four fundamental principles which you must follow in this case.

The first principle is that the defendant is presumed to be innocent.

The second principle is that the Commonwealth must prove the defendant’s guilt beyond a reasonable doubt; if it does not, the jury must find

the defendant not guilty.

The third principle is that a defendant has no burden to present any evidence and has an absolute right not to testify. If a defendant does not testify, you may not use it against them in deciding the case.

The fourth principle is that the jury must follow the law as the judge explains it.

Is there any potential juror who does not understand or agree to follow these four fundamental principles?

[2.] Do any of you know or are you related to the defendant?

[3.] Do you know or are you related to (either) (any) of the lawyers, or a witness in this case?

[4.] Have you read or heard anything about this case?

[5.] Do you have an interest that would be affected by the result of this case?

[6.] Have you expressed or formed any opinions about this case?

[7.] Are you aware of any bias or prejudice you have towards either the defendant or the prosecution?

[8.] Do you know of any reason why you would not be fair and impartial in this case, or be able to render a true and just verdict, based solely on the

evidence and the law?

[9.] Is there any reason [for example, personal concerns, difficulty with English, physical or medical concerns, or religious or ethical beliefs] which might make it difficult for you to be a juror?

If any jurors raise their hands in the affirmative to questions 5, 6 and 7, the trial judge should inquire further of individual jurors at sidebar after initial questioning of the venire. See Optional Follow Up Questions to Determine Juror Impartiality at page 10.

The judge must also follow-up on any affirmative responses from any of the jurors, and any other questions thought appropriate on voir dire (see e.g., optional inquiries 10-21 below). These may be asked either by the judge (see Section A below) or, if conducting attorney participated voir dire, the attorneys (see Sections B and C below).

General Laws c. 234A, § 67A, requires Questions 1-7 to be posed to the venire upon motion of either party. It also directs that inquiry be made as to any extraneous issues that might affect impartiality including community attitudes, prejudicial material, and preconceived opinions toward the credibility of certain classes of persons. In addition, Mass. R. Crim. P. 20(b)(1) appears to require the court to pose Questions 1-7 sua sponte, even without request by the parties. The final question is recommended as a final, summarizing question, but is not required.

As to when individual voir dire of prospective jurors, instead of collective inquiry of the entire venire, is required, see note 3, *infra*.

Regardless of the method used, it is strongly recommended that each potential juror be brought to the sidebar prior to being seated including jurors who did not affirmatively respond to a question and regardless of the voir dire procedure employed. A brief individual check-in often reveals significant issues not revealed by the statutory questions including, for example, hearing deficits or previously unidentified language issues.

The judge should make a record if a defendant waived his or her right to be present at the sidebar.

Continue with either Section A (Judge voir dire without attorney participation), Section B (Individual voir dire with attorney participation at page 12), or Section C (Panel voir dire at page 14).

[INQUIRIES 10-21 ARE OPTIONAL]

Given the potential for some of the following questions to cause jurors to feel discomfort or embarrassment if having to answer in front of others, consideration should be given to permitting potential jurors to disclose their answers at sidebar rather than having them raise their card to sensitive questions.

[10.] [POLICE] Would you believe the testimony of a police (law enforcement) officer either *more or less* than the testimony of other witness, simply because the person is a police (law enforcement) officer?

[11.] [EMPLOYMENT] Are you, a close member of your family, or a close friend employed in an area related to law enforcement or criminal defense?

[12.] Do you believe that if a person is arrested or charged with a crime, they must be guilty?

[13.] [OUI] It is not a crime to consume alcohol and then drive, but it is a crime to drive if one is under the influence of alcohol. Would personal, religious or other beliefs about alcohol make it difficult for you to follow the law as I just explained it?

[14.] [OUI] Have you, a close family member or close friend been involved in self-help programs such as Alcoholics Anonymous, Al-Anon, or Narcotics Anonymous or with a group that is active on issues related to alcohol and driving such as Mothers Against Drunk Driving (known as MADD) and Students Against Destructive Decisions (known as SADD)?

[15.] [PERSONAL EXPERIENCES] Have you, a close family member, or a close friend been charged with [_____] [a crime involving a *motor vehicle accident*] [a crime of *violence*] [a crime involving *dishonesty*] [a crime involving *sexual misconduct*] [a crime *similar to* that (any of those) in this case], or been a witness in, or affected personally by a matter wherein an individual was so charged?

[16.] [DOMESTIC] Have you, a close family member, or close friend been involved in a situation with domestic abuse or violence, or with a related court matter such as a Chapter 209A abuse prevention order?

[17.] [VIOLENCE/SEX] Have you, a close family member, or close friend ever been employed by, or affiliated with, any organization that counsels or gives assistance to victims of: [violent crimes] [sexual assaults]?

[18.] [DRUGS] Have you, a close family member, or close friend had any contact with or concern about prescribed or illegal drugs which would affect your ability to be fair and impartial or to follow my instructions on the law?

[19.] [HIGH PROFILE] Have you ever read, seen, or heard anything about this case, the defendant, or the alleged victim(s) in the news media (that is, newspapers, radio or TV), or from any other source?

[20.] Would the use of a _____ interpreter either make it difficult for you to concentrate on the witnesses and the content of their testimony or give rise to any bias or prejudice on your part?

[21.] [TYPE OF CASE] Is there anything about the charge(s) in this case which would make it difficult for you to be fair and impartial?

[FINAL.] Do you know of any reason why you would not be fair and impartial in this case, or be able to render a true and just verdict, based solely on the evidence and the law?

Would counsel [and the defendant] please approach the sidebar?

SUPPLEMENTAL JUROR IMPARTIALITY FOLLOW-UP

1. Setting Aside Bias or Prejudice - If a prospective juror has indicated that they have expressed or formed an opinion regarding the case, or has an interest, bias, or prejudice related to the unique situation presented by the case:

You raised your hand in response to a question I asked about (opinions) (bias) (personal interest).

Can you set aside that (opinion) (bias) (interest) so as to be impartial in this case, to fairly evaluate the evidence, and follow the instructions on the law? Are you sure?

2. Given Opinion or Belief - If a prospective juror has expressed an opinion or world view based upon his or her life experience or belief system, the judge should not ask the juror to “set it aside”, but instead ask:

Given your (opinion) (beliefs) (world view), will you be able to be impartial in this case, to fairly evaluate the evidence, and follow the instructions on the law?

Commonwealth v. Williams, 481 Mass. 443, 448-449 (2019) (although it was error for judge to ask juror to “set aside” their belief system or world view, error was not sufficiently prejudicial to set aside the verdict; critical issue is whether, given their life experiences and beliefs, the juror can remain impartial.)

INDIVIDUAL VOIR DIRE IN INTERRACIAL OR INTER-ETHNIC CASES

The judge must not pose these questions to the jury unless requested or agreed to by the defendant. *Commonwealth v. Mason*, 485 Mass. 520, 524-525 (2020). Upon the defendant's request in interracial child sex offense cases, the court must ask these questions individually at sidebar. See also *Commonwealth v. DiRusso*, 60 Mass. App. Ct. 235, 238 (2003) ("the requirement for individual voir dire arises upon the defendant's request for such inquiry; it is not automatic"). Upon the defendant's request in any other case, it is within the court's discretion whether to allow the request. See *Commonwealth v. Colon*, 482 Mass. 162, 182 n. 17 (2019). The judge need not determine whether the parties are of different races or ethnicities. Rather, any distinction can be left to the representation of the parties and resolved by the defendant deciding whether or not to pursue inquiry into racial or ethnic prejudice. *Id.* at n.12.

In this case, the defendant and the alleged victim are of different races or ethnicities. [The defendant is _____ and the alleged victim is _____.]

Are you aware of any feelings based on race or ethnicity which might interfere with your ability to decide this case fairly and impartially?

Do you understand and accept that the presumption of innocence applies to all races and ethnicities equally?

This case may also involve the weighing of the credibility of a witness of one race or ethnicity against a witness of another race or ethnicity.

Might your view of the witness's credibility or truthfulness be affected by the witness's race or ethnicity?

Does the fact that the defendant is of a particular race or ethnicity make you feel that they are more or less likely to be guilty?

Can you fairly and impartially decide this case without regard to the race or ethnicity, or the difference in the race or ethnicity, of the defendant and the alleged victim?

INDIVIDUAL VOIR DIRE IN CHILD SEXUAL ASSAULT CASES

See *Commonwealth v. Flebotte*, 417 Mass. 348, 355-56 (1994).

Have you been the victim of a childhood sexual offense?

or

- 1. Have you or anyone close to you been a victim of sexual abuse?**
- 2. Have you or anyone close to you been accused of sexual abuse?**

INDIVIDUAL VOIR DIRE IN LACK OF CRIMINAL RESPONSIBILITY CASES

See *Commonwealth v. Seguin*, 431 Mass. 243, 249 (1995). In *Commonwealth v. Ashman*, 430 Mass. 736, 740 (2000), the Supreme Judicial Court declined to expand the *Seguin* rule to cases in which evidence of mental illness or mental impairment is presented, but left the determination of whether to engage in individual voir dire to the judge's discretion.

Do you have any opinion that would prevent you from returning a verdict of not guilty by reason of insanity if the Commonwealth fails in its burden to prove the defendant was criminally responsible at the time of the offense?

OPTION A. JUDGE VOIR DIRE WITHOUT ATTORNEY PARTICIPATION

[After inquiring as to the statutory questions and any others deemed appropriate, challenges for cause are to be made at this time.]

Best Practice: After conducting an individual voir dire, the judge should hear and act on challenges for cause, make a finding that the jurors are indifferent, and then proceed to peremptory challenges. Challenges for cause should be made out of earshot of the juror.

At sidebar: **Please keep your voices down so that the jury does not**

overhear. Are there any challenges for cause?

At this point the Commonwealth should exercise any challenges for cause. If any seated juror is excused, that juror should be replaced with the next numbered juror. When the Commonwealth is satisfied, the defendant should then exercise any challenges for cause. The judge should hear any additional challenges for cause as potential jurors are excused and replaced. Once all challenges for cause have been resolved, the judge should make a finding that the panel is indifferent. The parties may then exercise their peremptory challenges.

Massachusetts R. Crim. P. 20(c)(1) provides that in a case to be tried to a jury of six persons, each defendant is entitled to two peremptory challenges. In the case of a juvenile charged with delinquency in which the Commonwealth has proceeded by indictment, the juvenile is entitled to a jury of twelve persons, G.L. c. 119, § 56(e), and each accused juvenile is entitled to four peremptory challenges (or in the case of a life felony, twelve peremptory challenges plus one additional challenge for each alternate juror impanelled). It is undecided whether a judge may discretionarily allow additional peremptory challenges. See *Commonwealth v. Lattimore*, 396 Mass. 446, 450 (1985).

Best Practice: Do not require the parties to exercise peremptories until an indifferent panel has been seated. Although not required, the Court should direct the Commonwealth to use its peremptory challenges first and until it is content with the panel. The Court should then require the Defendant to exercise their peremptory challenges. When the defendant is content, return to the Commonwealth to exercise any remaining challenges, but only as to jurors who have been seated subsequent to the Commonwealth's last challenge. Continue until all parties are satisfied or all peremptories have been used. Once a party is satisfied, that party may not later challenge a juror with whom he (she) was previously satisfied.

I find the panel stands indifferent.

Does the Commonwealth have any peremptory challenges?

Here the Commonwealth should exercise its peremptory challenges, and any challenged jurors should be replaced. "The Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled." Mass. R. Crim. P. 20(c)(1). When the Commonwealth ceases to challenge:

Does the defendant have any peremptory challenges?

Here the defense should exercise its peremptory challenges, and any challenged jurors should be replaced.

If any jurors have been excused upon the defendant's challenge and replacements seated:

Is the Commonwealth content with the new jurors who have been chosen?

It is common practice that the Commonwealth may challenge only the newly-drawn jurors. If the Commonwealth does so and is satisfied:

Is the defendant content with the new jurors who have been chosen?

It is common practice that the defendant may challenge only the newly-drawn jurors. If the defendant does so and is satisfied:

This alternating procedure should be continued until both parties are content or have exhausted their peremptory challenges.

[Continue on page 20.]

OPTION B. INDIVIDUAL VOIR DIRE WITH ATTORNEY PARTICIPATION

After inquiring as to any responses a juror had to the judge's questions of the entire venire, the judge should permit the attorneys to ask questions of each juror at the sidebar in accordance with District Court Standing Order 1-18: Voir Dire Protocol and Addendum A (Panel Voir Dire) regarding best practices. Each juror not excused for cause should be seated in the jury box.

Best Practice: After an individual voir dire of a juror or jurors, the judge should hear and act on challenges for cause, make a finding that the jurors are indifferent, and then proceed to peremptory challenges. Challenges for cause should be made out of earshot of the juror.

At sidebar: **Please keep your voices down so that the jury does not**

overhear. Are there any challenges for cause?

At this point the Commonwealth should exercise any challenges for cause. If any seated juror is excused, that juror should be replaced with the next numbered juror. When the Commonwealth is satisfied, the defendant should then exercise any challenges for cause. The judge should hear any additional challenges for cause as potential jurors are excused and replaced. Once all challenges for cause have been resolved, the judge should make a finding that the panel is indifferent. The parties may then exercise their peremptory challenges.

Massachusetts R. Crim. P. 20(c)(1) provides that in a case to be tried to a jury of six persons, each defendant is entitled to two peremptory challenges. In the case of a juvenile charged with delinquency in which the Commonwealth has proceeded by indictment, the juvenile is entitled to a jury of twelve persons, G.L. c. 119, § 56(e), and each accused juvenile is entitled to four peremptory challenges (or in the case of a life felony, twelve peremptory challenges plus one additional challenge for each alternate juror impanelled). It is undecided whether a judge may discretionarily allow additional peremptory challenges. See *Commonwealth v. Lattimore*, 396 Mass. 446, 450, 486 N.E.2d 723, 726 (1985).

Best Practice: Do not require the parties to exercise peremptories until an indifferent panel has been seated. Although not required, the Court should direct the Commonwealth to use its peremptory challenges first and until it is content with the panel. The Court should then require the Defendant to exercise their peremptory challenges. When the defendant is content, return to the Commonwealth to exercise any remaining challenges, but only as to jurors who have been seated subsequent to the Commonwealth's last challenge. Continue until all parties are satisfied or all peremptories have been used. Once a party is satisfied, that party may not later challenge a juror with whom they were previously satisfied.

If a seated juror is challenged, the judge and attorneys should engage in an individual voir dire of the juror with the next number in sequence and continue the process until all challenges for cause have been addressed. After completing the voir dire with individual jurors and filling the jury box, the judge should make a finding.

I find the panel stands indifferent.

Does the Commonwealth have any peremptory challenges?

Here the Commonwealth should exercise its peremptory challenges, and any challenged jurors should be replaced. "The Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled." Mass. R. Crim. P. 20(c)(1). When the Commonwealth ceases to challenge:

Does the defendant have any peremptory challenges?

Here the defense should exercise its peremptory challenges; challenged jurors should be replaced.

If any jurors have been excused upon the defendant's challenge:

**Is the Commonwealth content with the new jurors who have
been chosen?**

It is common practice that the Commonwealth may challenge only the newly-drawn jurors. If the Commonwealth does so and is satisfied:

**Is the defendant content with the new jurors who have been
chosen?**

Here the defendant may challenge only the newly-drawn jurors.

This alternating procedure should be continued until both parties are content or have exhausted their peremptory challenges.

[Continue on page 20.]

OPTION C. INDIVIDUAL VOIR DIRE FOLLOWED BY PANEL VOIR DIRE

[The judge should invite the attorneys to the sidebar for the judge's inquiry of jurors who responded affirmatively to the judge's questions to the entire venire. A juror not excused for cause should be seated in the jury box. The judge should then initiate the panel voir dire process. See District Court Standing Order 1-18: Voir Dire Protocol and Addendum A (Panel Voir Dire). This may include seating additional members of the venire near the jury box provided there is space and a microphone that will record their responses.]

At this time, the attorneys may ask questions of you individually or as a group. We will begin with the Assistant District Attorney followed by the defendant's (defendants') attorney(s). They will refer to you by your juror number, so please hold your juror number card in front of you so the attorneys can see it. If you want to answer a particular question confidentially, indicate that to the attorney or the Court and you will be asked to come to the judge's bench to provide your answer.

[If not using entire venire for first panel]

The potential jurors in the back of the room are instructed not to comment at all, even to one another, about anything that happens during this process. However, please listen carefully because you may be asked to answer the same questions later.

Counsel, you may proceed.

Best Practice: After panel voir dire of the jurors, the judge should hear and act on challenges for cause, make a finding that the jurors are indifferent, and then proceed to peremptory challenges. Challenges for cause should be made out of earshot of the juror.

As the party with the burden, the Commonwealth goes first. Jurors are to be referred to by their juror or seat

number. The judge should have already addressed any limits as to time, the number of questions, and/or subject matter. When questioning is complete, the attorneys should approach the sidebar to address any challenges for cause. At this point the Commonwealth should exercise any challenges for cause. When the Commonwealth is satisfied, the defendant should then exercise any challenges for cause. The judge should hear any additional challenges for cause as potential jurors are excused and replaced. Once all challenges for cause have been resolved, the judge should make a finding that the panel is indifferent. The parties may then exercise their peremptory challenges.

Are there any challenges for cause?

[If a seated juror is challenged and excused, the procedure should continue until there are no further challenges for cause.]

I find the panel stands indifferent.

Does the Commonwealth have any peremptory challenges?

Here the Commonwealth should exercise its peremptory challenges. "The Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled." Mass. R. Crim. P. 20(c)(1). When the Commonwealth ceases to challenge:

Does the defendant have any peremptory challenges?

Here the defense should exercise its peremptory challenges.

If too few jurors remain after jurors are excused for cause or by the use of peremptories, the judge may direct that additional jurors BE questioned individually at the sidebar or may add a new panel. See District Court Sanding Order 1-18: Voir Dire Protocol and Addendum A (Panel Voir Dire).

Are there any challenges for cause?

I find the [juror] [panel] indifferent.

Does the Commonwealth have any peremptory challenges?

When the Commonwealth ceased to challenge:

Does the defendant have any peremptory challenges?

This alternating procedure should be continued with the next numbered juror until both parties are content or have exhausted their peremptory challenges.

Optional Final Question to Seated Jurors

Of the jurors now seated in the jury box, I ask: is there anything that has come to mind since we began this discussion that you now realize might affect your ability to perform the duties of an impartial juror in this case?

[A juror responding affirmatively to this inquiry should be brought to the sidebar for further inquiry. If no hands are raised, the jurors should be sworn.]

We have a jury whose members stand indifferent. The rest of the jurors may return to the jury pool with the thanks of the Court and the parties.

Clerk: Members of the jury, please rise and raise your right hands.

Do you swear or affirm under the pains and penalties of perjury that you shall well and truly try the issue between the Commonwealth and the defendant, according to the evidence, so help you God? Please be seated.

If a juror prefers to omit reference to the Deity, they may be sworn by substituting the words: "under the penalties of perjury" for the words: "so help you God." See G.L. c. 233, § 19.

Clerk: Members of the jury, hearken to the complaint.

Here read the complaint.

In reading the complaint, the clerk must not disclose to the jury: (1) the potential penalties for any offense, see *Commonwealth v. Bart B.*, 424 Mass. 911, 913 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-83 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-77 (1984); (2) that the defendant is charged as a subsequent offender, G.L. c. 278, § 11A; (3) that there are alternate ways of committing the offense that are charged in the complaint but inapplicable to the case being tried, *Commonwealth v. Johnson*, 45 Mass. App. Ct. 473, 477 n.3 (1998); or (4) any alias that is unconnected to the offense and unnecessary to establish the defendant's identity as the perpetrator, *Commonwealth v. Martin*, 57 Mass. App. Ct. 272, 275 (2003).

To this complaint the defendant pleads not guilty, and for trial places themselves upon the country, which country you are. You are now sworn to try the issue. If the defendant is guilty, you will say so. If the defendant is not guilty, you will say so and no more. Members of the jury, hearken to the evidence.

Best Practice: The judge should precharge the jury at this point. See Instructions 1.120 or 1.140.

After the precharge, the prosecutor shall present an opening statement unless waived. Defense counsel has the option offer an opening statement after the prosecutor's, after the close of the Commonwealth's case, or not at all.

NOTES:

1. **Repeal of G.L. c. 234.** In 2016, the Legislature repealed G.L. c. 234, entitled "Juries," and incorporated those provisions into G.L. c. 234A. Case law prior to the 2014 amendment will cite to G.L. c. 234. These notes have been updated to reflect where the new provisions can be found in G.L. c. 234A.
2. **Anonymous jury.** On the propriety of impaneling an anonymous jury, see *Commonwealth v. Angiulo*, 415 Mass. 502 (1993). On the propriety of limiting public reference to venire members to number rather than name, see *Commonwealth v. Howard*, 46 Mass. App. Ct. 366, 368 n.2 (1999).
3. **Individual voir dire of prospective jurors.** General Laws c. 234A, § 67 provides that, in the following circumstances, a collective examination of the venire is insufficient and that venire members must be examined individually and outside the presence of other jurors:

"if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror[s] may not stand indifferent."

To require the judge to conduct an individual voir dire of jurors, "[t]he defendant must show that there is some basis for finding that a substantial risk of extraneous influences on the jury exists, and that there is a substantial risk that jurors would be influenced by such considerations." *Commonwealth v. Ashman*, 430 Mass. 736, 739 (2000). Such a request may be communicated by counsel, and the judge need not conduct a colloquy with the defendant personally. *Commonwealth v. Ramirez*, 407 Mass. 553, 557 (1990), overruling *Commonwealth v. A Juvenile (No. 2)*, 396 Mass. 215 (1985). The judge is not required to raise the question of individual voir dire sua sponte. *Commonwealth v. Guess*, 23 Mass. App. Ct. 208, 211 (1986).

"Under [G.L. c. 234A, § 67A], the judge must examine the jurors individually when it appears that issues extraneous to the case might affect the jury's impartiality. Ordinarily, it is for the judge to determine whether the jury might be influenced by an extraneous issue." *Commonwealth v. Grice*, 410 Mass. 586, 588 (1991). There are four exceptions, where the Supreme Judicial Court has held that, as a matter of law, the judge must question potential jurors individually if the defense so requests:

- in cases involving **sexual offenses against minors**, on request the judge must question each potential juror individually as to whether that juror was the victim of a childhood sexual offense. *Commonwealth v. Flebotte*, 417 Mass. 348, 353-56 (1994).
- in cases involving **interracial sexual offenses against minors**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Hobbs*, 385 Mass. 863, 873 (1982).
- in cases involving **interracial rape**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Sanders*, 383 Mass. 637, 640-41 (1981).
- in cases involving **interracial murder**, on request the judge must examine potential jurors individually about possible racial or ethnic prejudice. *Commonwealth v. Young*, 401 Mass. 390, 398 (1987).

Some other common situations include:

- **Lack of criminal responsibility (insanity defense).** Where the defendant indicates that his or her lack of criminal responsibility may be placed in issue and so requests, the judge must inquire individually of each potential juror “whether the juror has any opinion that would prevent him or her from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible. It will be in the judge’s discretion whether to ask more detailed questions concerning a juror’s views of the defense of insanity.” *Commonwealth v. Seguin*, 421 Mass. 243, 248-49 & n.6 (1995), cert. denied, 516 U.S. 1180 (1996). For additional information, see the notes to Instruction 9.200 (Lack of Criminal Responsibility).
- **Mental impairment short of insanity.** Individual voir dire is in the judge’s discretion, and is *not* automatically required, when there will be evidence of mental illness or impairment but no claim of lack of criminal responsibility. *Commonwealth v. Ashman*, 430 Mass. 736, 738-740 (2000). For additional information, see the note to Instruction 9.220 (Mental Impairment Short of Insanity).
- **Racial bias.** Questions to prospective jurors designed to discover possible racial prejudice are not constitutionally required in every case where the defendant is of a minority race, but only where there are factors that make the defendant a “special target for racial prejudice.” *Commonwealth v. Ross*, 363 Mass. 665 (1973), cert. denied, 414 U.S. 1080 (1973). Determining this is usually in the judge’s discretion except in the three situations, *supra*, where the Supreme Judicial Court has held that individual voir dire is required on request as a matter of law (interracial sexual offenses against children, interracial rape and interracial murder). However, the Court has repeatedly stated that “a motion to have jurors asked about racial bias should usually be granted.” *Commonwealth v. Robertson*, 480 Mass. 383, 389 (2018) (quoting *Commonwealth v. Ramirez*, 407 Mass. 553, 555 (1990)).
- **Sexual orientation bias.** Where there is a possibility of bias against a defendant or a victim based on sexual orientation, the matter “requires careful attention” and the better practice is to conduct an individual voir dire of each potential juror. *Commonwealth v. Plunkett*, 422 Mass. 634, 640-41 (1996). “When faced with a question designed to detect such bias, a judge should make a brief examination of the facts of the case to determine if the question is relevant and important and whether sufficient prejudice is manifested to warrant such an inquiry. A judge may also assume that the party who desires the inquiry has evaluated the risk that the inquiry may activate latent bias in some jurors and insult others without uncovering bias in those jurors who refuse to acknowledge their bias. The ultimate decision as to whether the question should be asked lies within the judge’s sound discretion, but the judge must be assisted in this decision by the party seeking the inquiry. That party bears the burden of demonstrating the importance and relevance of the question and the risk of prejudice inuring from its omission by furnishing the judge with a brief summary of the evidence to be presented, and an affidavit or other means indicating the manner and means by which the subject will be introduced or play a role in the case. If the

judge determines that the question should be asked, the judge may then inquire of the jury collectively, individually, or may simply cover the matter by incorporating the subject into his or her preliminary statement about the case before asking prospective jurors the mandated question about bias or prejudice under [G.L. c. 234A, § 67A]” *Toney v. Zarynoff’s, Inc.*, 52 Mass. App. Ct. 554, 556-61 (2001) (wrongful death action),

- **Victim of violent crime.** The Confidential Juror Questionnaire completed by prospective jurors asks them to “[d]escribe briefly any involvement (past or present) as a party or a victim in a civil or criminal case by you or any member of your immediate family.” In a case that involves a crime of violence, the Supreme Judicial Court “would expect” judges on request additionally to ask the venire collectively whether they or a member of their immediate family had ever been the victim of a violent crime. “[A]lthough not required, it has long been common practice to do so on request.” *Commonwealth v. Lopes*, 440 Mass. 731, 735-38 & n.9 (2004).

When individual voir dire is required, G.L. c. 234A, § 67A mandates that it be done individually and outside the presence of other impaneled or prospective jurors. Posing questions collectively to the venire and then individually interrogating jurors who come forward is insufficient. Individual voir dire may be done at the side bar if other jurors cannot overhear, but it is preferable to question jurors individually outside the presence of impaneled jurors and other venire members. *Commonwealth v. Shelley*, 381 Mass. 340, 353 n.12 (1980).

4. **Police witnesses.** “[O]rdinarily a trial judge should comply with a defendant’s request to ask prospective jurors whether they would give greater credence to police officers than to other witnesses, in a case involving police officer testimony,” but a judge is required to do so only there is a substantial risk that the case would be decided in whole or in part on the basis of extraneous issues, such as “preconceived opinions toward the credibility of certain classes of persons.” *Commonwealth v. Sheline*, 391 Mass. 279, 291 (1983).

5. **Impanelment errors.** General Laws c. 234A, § 74 provides that no irregularity in empanelment is reversible error unless objection is made before the verdict or the defendant “has been injured thereby.” See *Commonwealth v. Figueroa*, 451 Mass. 566, 568-73 (2008) (unobjected-to failure to pose required questions to venire); *Commonwealth v. Fudge*, 20 Mass. App. Ct. 382, 387-89 (1985) (same).

6. **Jurors’ criminal records.** The CORI law (G.L. c. 6, § 167) permits a prosecutor to check the criminal records of jurors or prospective jurors. If the prosecutor checks potential jurors’ criminal records prior to trial pursuant to G.L. c. 234A, § 67, the results must be disclosed to defense counsel at the start of impanelment. If the prosecutor does so at the start of trial, the results must be shared immediately. Defense counsel may use such information only in connection with the case and must return it to the court after impanelment. *Commonwealth v. Cousin*, 449 Mass. 809, 815-19 (2007). “After the jury are sworn, unless the prosecutor has reserved an entitlement to conduct such a check, any check of CORI records or other inquiry into juror misconduct, whether sought by the prosecution or the defendant, may be done only with the approval of the trial judge. We add that the same procedure applies to any investigation of jurors that may be conducted by the defense.” *Commonwealth v. Hampton*, 457 Mass. 152, 171 (2010).

7. **Verdict of fewer than six jurors.** The Court may take a verdict from fewer than six jurors if all parties agree by stipulation. G.L. c. 234A, § 68.