

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: 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 names are called and before they are sworn. You have the right to challenge two of the jurors without giving any reason therefor, and as many more as you have good cause to challenge. You may be seated.

Members of the panel, please answer as your names and numbers are called and take your places in the jury box as indicated by the court officer.

The clerk should draw a panel of jurors' names from the jury panel sheets and have them take their seats in the jury box.

In a case to be tried to a jury of six persons, seven jurors must be impanelled, G.L. c. 234A, § 68, and the judge may direct that eight jurors be impanelled if the trial is likely to be protracted, G.L. c. 234, § 26B. In the case of a juvenile being tried to a jury of twelve persons, fourteen jurors must be impanelled, G.L. c. 234A, § 68, and the judge may direct that up to sixteen jurors be impanelled if the trial is likely to be protracted, G.L. c. 234, § 26B.

Will those jurors sitting in the jury box, please rise and the rest of the jurors in the courtroom, also rise, and raise your right hands.

Do each of you solemnly swear or affirm 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, he or she 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, this is the trial of Commonwealth versus _____. The defendant is accused of _____. The defendant has entered a plea of not guilty to that charge.

In this case, the Commonwealth is represented by Assistant District Attorney _____. The defendant is represented by Attorney _____. Will the defendant and both of the attorneys please stand? Thank you. You may be seated.

There may be several witnesses in this case. Will the potential witnesses stand as I name them: [Names and home towns] . Thank you. You may be seated.

The defense may not be compelled to disclose its witnesses in advance, and the jury should not be told for which party any prospective witness may appear. See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.14.

I am now going to pose some questions to all of the potential jurors in the room, whether you are sitting in the jury box or with the rest of the jurors. If your answer to any question is “yes,” please raise your hand.

[1.] Are any of you related to the defendant? Do any of you know the defendant, either of the lawyers, or any of the witnesses in this case?

[2.] Do any of you have an interest or stake of any kind in this case?

[3.] To the extent that you have heard anything about this case, have any of you expressed or formed any opinions about it?

[4.] Are any of you aware of any bias or prejudice that you have toward either the defendant or the prosecution?

[5.] Do any of you *not* understand that in a criminal case the defendant is presumed innocent until proven guilty?

[6.] Do any of you *not* understand that the prosecution has the burden of proving that the defendant is guilty beyond a reasonable doubt, and that the defendant does not have to present any evidence in (his) (her) behalf?

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

Here the judge should ask any other questions thought appropriate on voir dire.

If there is an affirmative response from any of the jurors, the judge should make a determination after any necessary further questioning whether the juror stands indifferent, and if not, the juror should be excused. If any juror seated in the jury box is excused, that juror should be replaced with an additional juror chosen at random by the clerk.

General Laws c. 234, § 28 requires the judge to pose Questions 1-6 to the venire upon motion of either party. In addition, Mass. R. Crim. P. 20(b)(1) apparently requires the court to pose Questions 1-4 sua sponte, even without request by the parties. Question 7 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 2, *infra*.

It appears that the panel stands indifferent.

Would counsel approach the side-bar.

At side-bar: **Please keep your voices down so that the jury does not overhear. Are there any challenges for cause?**

Here both sides should exercise any challenges for cause. If any seated juror is excused, that juror should be replaced with an additional juror chosen at random by the clerk. When all challenges for cause have been resolved, the parties may 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 empanelled). 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).

Superior Court Rule 6 generally requires the judge to fill the jury box with the requisite number of indifferent jurors and alternates before requiring the parties to exercise any peremptory challenges, and requires the Commonwealth to exercise its peremptory challenges before the defense does so. It appears that Superior Court Rule 6 governs District Court jury sessions. See G.L. c. 218, § 27A(e) (“Trials by juries of six persons shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court”); *Commonwealth v. Johnson*, 417 Mass. 498, 505 n.7, 631 N.E.2d 1002, 1007 n.7 (1994) (“Rule 6 . . . is the method of jury selection to be used by trial courts in the Commonwealth”). Individual judges are not free to disregard the requirements of Rule 6. *Commonwealth v. Brown*, 395 Mass. 604, 606, 481 N.E.2d 469, 471 (1985). Even the two exceptions found in Rule 6 itself (“except when an individual voir dire is conducted” and “unless specially ordered otherwise in a particular case”) do not allow a judge to order a different method at will, but only “if a judge wishes to expand the parties’ rights beyond those provided for by the rule or . . . when a judge is confronted with a special or exceptional situation . . . [and such an order] cannot be upheld in the absence of special or exceptional circumstances which are expressly noted by the judge or clearly apparent on the face of the record.” *Commonwealth v. Ptomey*, 26 Mass. App. Ct. 491, 494-495, 529 N.E.2d 400, 402-403 (1988). See *Johnson*, 417 Mass. at 507, 631 N.E.2d at 1008.

Rule 6 permits (but does not require) the so-called *Walker* method (sometimes mistakenly called the “struck” method), in which the judge first qualifies as indifferent a number of venire persons equal to the number of jurors and alternates needed plus the total number of peremptory challenges that may be exercised by both parties. *Johnson*, 417 Mass. at 505-508, 631 N.E.2d at 1007-1009. See *Commonwealth v. Walker*, 379 Mass. 297, 299 n.1, 397 N.E.2d 1105, 1106 n.1 (1979).

Is the Commonwealth content?

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:

Is the defendant content?

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

Here the Commonwealth may challenge only the newly-drawn jurors. If the Commonwealth does

so: **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.

We have a jury. The rest of the jurors may return to the jury pool, with the Court's thanks and those of the parties.

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

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, he or she 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 or Judge: Juror No. __ , in seat number __ , the Court appoints you Foreman (Forelady) of the jury and asks that you exchange seats with Juror No. __ , in seat one.

If the judge will precharge the jury, it should be done at this point. See Instructions 1.120 or 1.140.

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, 679 N.E.2d 531, 533-534 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-883, 401 N.E.2d 802, 805 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-377, 458 N.E.2d 781, 783-784 (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, 700 N.E.2d 270, 272 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, 782 N.E.2d 547, 550 (2003).

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

Here the prosecutor may present an opening statement, if there is to be one. Defense counsel has the option whether or not to offer an opening statement at this point. The prosecutor should then call the first witness.

Clerk:

Will all the witnesses who will testify in this case please stand and raise their right hands. Do each of you solemnly swear or affirm that the evidence you will give in the cause now in hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

If a witness prefers to omit reference to the Deity, the words “under the penalties of perjury” may be substituted for the words “so help you God.” See G.L. c. 233, § 19.

NOTES:

1. **Anonymous jury.** On the propriety of impaneling an anonymous jury, see *Commonwealth v. Angiulo*, 415 Mass. 502, 615 N.E.2d 155 (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, 706 N.E.2d 303, 305 n.2 (1999).

2. **Individual voir dire of prospective jurors.** General Laws c. 234, § 28 provides that 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, 723 N.E.2d 510, 513 (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, 555 N.E.2d 208, 211 (1990), overruling *Commonwealth v. A Juvenile (No. 2)*, 396 Mass. 215, 485 N.E.2d 170 (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, 500 N.E.2d 825, 827-828 (1986).

“Under G.L. c. 234, § 28, 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, 574 N.E.2d 367, 368

(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, 353-356, 630 N.E.2d 265, 268-270 (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, 434 N.E.2d 633, 641 (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, 640-641, 421 N.E.2d 436, 438 (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, 517 N.E.2d 130, 135 (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, 248-249 & n.6, 656 N.E.2d 1229, 1233 & 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, 723 N.E.2d 510, 513-514 (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, 296 N.E.2d 810 (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, as a practical matter, when a motion that prospective jurors be interrogated as to possible prejudice is presented, we believe the trial judge should grant that motion” in a trial that involves a crime of violence if the defendant and the victim are of different races. *Commonwealth v. Lumley*, 367 Mass. 213, 216, 327 N.E.2d 683, 686 (1975).
- **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, 640-641, 664 N.E.2d 833, 838(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. 234, § 28" *Toney v. Zarynoff's, Inc.*, 52 Mass. App. Ct. 554, 556-561, 755 N.E.2d 301, 306-309 (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, 735-738 & n.9, 802 N.E.2d 97, 101-104 & n.9 (2004).

When individual voir dire is required, G.L. c. 234, § 28 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, 409 N.E.2d 732, 740 n.12 (1980).

3. **Impanelment errors.** General Laws c. 234, § 32 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, 568-573, 887 N.E.2d 1040, 1043-1046 (2008) (unobjected-to failure to pose required questions to venire); *Commonwealth v. Fudge*, 20 Mass. App. Ct. 382, 387-389, 481 N.E.2d 199, 203-204 (1985) (same).

4. **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. The SJC has not yet set forth more detailed procedures and leaves them to the discretion of trial judges. *Commonwealth v. Cousin*, 449 Mass. 809, 815-819, 873 N.E.2d 742 (2007).

5. **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, 461 N.E.2d 1197, 1205-1206 (1983).

6. **Smoking in the jury room.** While G.L. c. 234, § 34C permits smoking in the jury room if a majority of the jurors consent, a subsequently-adopted statute provides that "[n]o person shall smoke in any courthouse . . . except in an area which has specifically been designated as a smoking area. An area shall be designated as a smoking area only if nonsmoking areas of sufficient size and capacity are available to accommodate nonsmokers." G.L. c. 270, § 22.