

**BEHAVIORAL DESCRIPTION VOIR DIRE:
A JURY SELECTION METHODOLOGY
TO COMPLEMENT THE THEORY OF YOUR CASE**

Concept Created & Developed By:

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PREFATORY OBSERVATIONS

"We have a criminal jury system which is superior to any in the world, and its efficiency is marred only by the difficulty of finding twelve men every day who don't know anything and can't read."

Mark Twain
Roughing It (1913)

"Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done that is really serious, it collects twelve of the ordinary men standing about."

Gilbert K. Chesterton
Tremendous Trifles: The Twelve Men (1922)

"Lawyers have been known to wrest from reluctant juries triumphant verdicts of acquittal for their clients even when those clients, as often happens, were clearly and unmistakably innocent."

Oscar Wilde
Irish poet, dramatist, novelist,
essayist and critic
1854-1900

"A jury verdict is a quotient of the prejudices of twelve people."

Kenneth P. Grubb
"False Fears"
26 Insurance Counsel Journal 480 (1959).

STORYTELLING

Litigation is, of course, storytelling. In litigation there are at least two versions of the story to be told or there would be no reason to try the case. To persuade the fact-finder, the

defense must provide the better or best narrative of what actually occurred. The better or best narrative will be the most believable, the most persuasive, the most compelling, the most acceptable, even the most entertaining.

Storytelling is basic to human understanding of both simple and complex situations. "Most scientists do storytelling and model building." "Once Upon a Time There Was a Theory," Donald N. McCloskey, Scientific American, Vol. 272, No. 2, February 1995, p. 25. "Even when economists rely on models, decisions about what to include or what conclusions to draw turn on some principle of storytelling." Id. "The same issues of narrative aesthetics appear in paleontology. Classic Darwinian evolution proceeds like a film in dignified slow motion: punctuated equilibrium interleaves still photographs with bursts of silent movies." Id. "Nobel Prize-winning physicist Steven Weinberg wrote a paper in 1983 called 'Beautiful Theories' to make the point that aesthetic principles are at the heart of good physics." Id.

According to Harvard theologian Harvey Cox, "the next century will be shaped by the people who can tell the best stories." Law Practice Magazine, Vol. 23, No. 4 (May/June 1997), p. 20.

The reality is that human beings, whether resolving the mundane issues of everyday life or using science to alter radically the human situation, resort to storytelling as the method of understanding and solving problems. Storytelling is the universal means of communicating and persuading.

ADVOCACY & STORYTELLING

I have no scenery to help me and no words are written for me to speak. There is no curtain. But out of the vivid dream of somebody else's life I have to create an atmosphere for that is advocacy. @ Edward Marshall Hall, English advocate, died 1927

LITIGATION AS PERSUASIVE STORYTELLING

The necessary ingredients for persuasive storytelling are:

CAST OF CHARACTERS B Who are the characters in your story of innocence or reduced culpability?

PROPS B What are the physical objects, such as real and demonstrative evidence, you will need to tell this story?

CHARACTER DEVELOPMENT B Who are the people in your story? What are they like? How do they normally live their lives? What are their tragic flaws?

PLOT B What is your client's story of innocence or reduced culpability? Is it a classic story with which the jurors or fact-finder or appellate court can empathize?

CHRONOLOGY AND PERSPECTIVE B How does your story unfold? Is it told in chronological order or in flashbacks? Is it told from a single individual's perspective or from the viewpoints of many witnesses?

EMOTIONALLY RIVETING B What is the dominant emotion of your story? Is the emotional foundation of your story such that jurors and others can identify and appreciate how that emotion dominated and impacted your story?

THEORY AND THEMES: THE PROCESS OF PERSUASIVE LITIGATION

DUTY TO DEVELOP A THEORY OF THE CASE

"During investigation and trial preparation, counsel should develop and continually reassess a theory of the defense." NLADA, Performance Guidelines for Criminal Defense Representation (1995), Guideline 4.3, p. 61.

"Developing a theory of the case that encompasses the best interests of the client and the realities of the client's situation will help counsel evaluate various choices throughout representation, from pretrial release and exploration of pretrial diversion programs and plea negotiation, through taking of a guilty plea or trial, and sentencing." NLADA, Performance Guidelines, supra, Commentary, Guideline 4.3, p. 61.

DEFINITION OF THEORY

Theory - "a judgment, conception, proposition, or formula formed by speculation or deduction or by abstraction and generalization from facts." Webster's Third New International Dictionary (Unabridged), (G. & C. Merriam Co. 1976), p. 2371.

Theory - "a more or less plausible or scientifically acceptable general principle offered to explain observed facts." The New Merriam-Webster Pocket Dictionary, (G. & C. Merriam Co. 1970), p. 508.

DEFINITIONS OF THEORY OF CASE

Theory of the Case [Defense]: A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocence or reduced culpability. -- Vince Aprile

Theory of the Case: "One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial." -- Mario Conte

Theory of the Case: "That combination of facts and law which in a common sense and emotional way leads the **jury to conclude** a fellow citizen is wrongfully accused." -- Tony Natale

COMPONENTS OF A THEORY OF THE CASE

(1) FACTUAL COMPONENT

(2) EMOTIONAL COMPONENT

(3) LEGAL COMPONENT

EXAMPLES OF A THEORY OF THE CASE

EXAMPLE:

THEORY OF THE CASE

Outraged and angered by the dramatic bruises that appeared on the face, head and body of two-year-old Mary Smith, shortly after she was picked up from the home of Joey and Karen Burden, her baby-sitters that day, Mary's parents, the police, and even the examining doctor all assumed an assault rather than an accident, a crime rather than a fall, and that Joey Burden had hit and hurt the child. With little or no investigation and evidence, the police ignored and discounted the obvious explanation for the spectacular bruises on the fair complexioned little girl - a face forward fall on the wooden front steps of the Burden's home which produced no wounds, no bumps and no bruising at the time Karen and Joey comforted and inspected Mary and assured themselves that she was okay. **EXAMPLE:**

THEORY OF THE CASE

Faced with having accidentally erased the convenience store videotape of the cashier's murder - the only evidence of the murderer's identity, Officer Jones, desperate to correct his mistake by solving the case, coerced (forced) a false confession from Bill Smith, who was only remotely associated with the incident, by lying to Bill Smith about the evidence against him and threatening to prosecute Smith's sister and to take her children from her. Even though the only witness to see the murderer fleeing from the scene has repeatedly stated that Bill Smith was not the fleeing murderer, the police and prosecutor, desperate for a conviction in this bungled murder case, continue to prosecute Bill Smith, an innocent man, solely on the basis of an unreliable confession obtained by lies, threats and tricks.

EXAMPLE:

THEORY OF THE CASE

When called into the gas station, Gary Conaster, was shocked to discover his friend, Adam Burnette, had stabbed the gas station attendant and was pointing a large knife at him. Terrified and confused, Gary, fearing for his life, obeyed Adam's commands to take the money and give it to Adam. Under these circumstances, Gary is NOT GUILTY of any crime because he was coerced, under threat of bodily harm, into participating in the robbery.

**A THEORY OF THE CASE IS NOT THE SAME AS THE
STORY OF INNOCENCE OR REDUCED CULPABILITY**

Story of innocence/reduced culpability is too large in scope and components to be manageable or useful to litigator.

Story of innocence/reduced culpability is to be unfolded and told to the fact-finder.

Theory of the case is the litigator's compass, lodestar or story synopsis.

THE NEED FOR A THEORY:

ALL OBSERVATION MUST BE FOR OR AGAINST SOME VIEW

"Darwin, who had such a keen understanding of fruitful procedure in science, knew in his guts that **theory and observation are Siamese twins, inextricably intertwined and continually interacting.**" Stephen Jay Gould, Dinosaur in a Haystack (1995), p. 148; (emphasis added).

Darwin "outlined his own conception of proper scientific procedure in the best one-liner ever penned": "**All observation must be for or against some view.**" Id. at 148-49; (emphasis added). "Objectivity is not an unobtainable emptying of mind, but a willingness to abandon a set of preferences - for or against some view, as Darwin said - when the world seeks to work in a contrary way." Id. at 149.

FUNCTIONS OF A THEORY OF THE CASE

Theory must be credible/believable

- Consistent with facts beyond change
- Explain facts beyond change

Theory must be interesting/entertaining

Theory must be consistent with common sense/human experience

Theory must showcase, channel and generate the emotions of the client's story

Theory must reveal the true nature/character of the major players

ELEMENTS OF A THEORY OF THE CASE

Persuasive facts

Strong emotion

Legal basis for jury to find for client

Vivid imagery

Concrete language

Vocabulary choices that reinforce the theory

Client-centered

Compelling and believable story

WHAT'S NOT A THEORY OF THE CASE

The defendant is not guilty [innocent] [not guilty by reason of insanity] [guilty of a lesser offense].

Mistaken identification.

Self-defense.

Reasonable doubt.

Inadequate police investigation.

Coercion and duress.

ADVANTAGES OF A THEORY OF DEFENSE

Directs pre-trial motion practice.

Focuses and prioritizes voir dire questions.

Functions as a "mini" opening statement.

Measures the prejudice of prosecutorial actions.

Places all witnesses in a defense context.

Creates parameters for the scope of cross-examination.

Reveals the appropriate attitude for cross-examining each witness.

Organizes the presentation of the defense case.

Serves as a checklist for eliciting essential information from defense witnesses.

Dictates the essential defense instructions and reveals inappropriate instructions.

Identifies and prioritizes issues for closing argument.

DON'T LET THEORY OBSCURE FACTS

"[A]s Warner Oland, the Swedish pseudo-Oriental Charlie Chan, once said in one of his most delightfully anachronistic pseudo-Confucian sayings (Charlie Chan in Egypt, 1935): **'Theory like mist on eyeglasses. Obscure facts.'**" Stephen Jay Gould, Bully for Brontosaurus (1991), p. 293.

THEORY OF THE DEFENSE [CASE] INSTRUCTION

Theory of the Defense [Case] Instruction: The theory of the defense [case], when properly articulated, requires minimal adjustments to become a theory of defense [case] instruction.

EXAMPLE:

THEORY OF DEFENSE [CASE] INSTRUCTION

If you believe from the evidence that, when called into the gas station, Gary Conaster, was shocked to discover his friend, Adam Burnette, had stabbed the gas station attendant and was pointing a large knife at him, and terrified and confused, Gary, fearing for his life, obeyed Adam's commands to take the money and give it to Adam, you must find, under these circumstances, that Gary Conaster is NOT GUILTY of any crime because he was coerced, under threat of bodily harm, into participating in the robbery.

DEFINITION OF THEME

Theme - "an idea, ideal, or orienting principle that is dominant or persistent in a popular or tribal

culture and often effective in controlling and activating belief and conduct in a specific direction." Webster's Third New International Dictionary (Unabridged), (G. & C. Merriam Co. 1976), p. 2370.

THEMES IN GENERAL

Theme: A central idea in a literary work; usually suggested by the narrative action.

EXAMPLES: Virtue is its own reward.

Nice guys finish last.

Theme: An intellectual abstraction; the idea that unifies the structure and is represented by the actions of the characters as a whole dramatic piece.

DEFINITION OF THEME OF THE CASE [DEFENSE]

Theme of Case [Defense]: A word, phrase or simple sentence that captures the controlling or dominant emotion and/or reality of the theory of the defense. The defense theme must be brief and easily remembered by the jurors.

**ADVANCED VOIR DIRE:
SITTING ON THE ANALOGUE
BY THE STREAM OF CONSCIOUSNESS**

The art of voir dire, no matter who the practitioner, is incapable of transforming personal attitudes and biases developed over lifetimes. Voir dire, however, is capable of exposing those attitudes and biases so that the lawyers and the trial judge are able to evaluate those preconceptions against the issues and personalities involved in a particular case. As significant, voir dire can reveal those individuals who are open-minded enough on certain matters that they can give a case a fair hearing.

For voir dire to function effectively the questioner or interviewer must obtain honest and candid disclosures from the potential jurors. Voir dire inherently contains certain obstacles to candid and honest responses by the venirepersons.

One factor that impedes open and honest communication is the "spotlight" syndrome. Regardless of whether a potential juror must answer in the privacy of sequestered, individual voir dire or in the public forum of group voir dire, he or she is "in the spotlight" as judge, prosecutor, defense lawyer, defense lawyer, court reporter, court personnel, fellow jurors, spectators and media representatives listen and record the venireperson's answers, opinions and ideas.

Another impediment to frank and open juror responses is the artificiality of voir dire. As a result of the judicial orientation, potential jurors are aware to some degree of the facts and issues in the case as well as the roles played by the judge, prosecutor and defense counsel. In this context, venirepersons are likely to guess the "right" or "expected" answers. This is

particularly true where the individual juror either has no strong feelings about the matter or has a definite opinion but worries that the opinion is politically incorrect.

To counter these attitudinal barriers to honest self-disclosure by potential jurors, some litigators advocate the use of the "everyday" analogue or the "life experience" example as an alternative to directly questioning venirepersons about the legal and factual issues in a case.

The more abstract and theoretical voir dire questions are to the life experiences of the potential jurors the least effective those questions are in eliciting reliable, reality-based attitudes and opinions of the venirepersons. "[O]ral test questions tell you whether the applicant knows how he or she should handle the situation, but not whether she or he is likely to handle it that way." Tom Janz, Behavior Description Interviewing (1986), p. 40; (emphasis in original). When the juror's mental and emotional context for an answer is a memory of how the juror had performed in a similar or comparable everyday experience, there is a much greater chance that the answer will accurately predict the individual's attitudes, opinions and actions. "It's better to look for similar behavior in past similar circumstances - how the person handled it the last time." Id.

Scientific validation of this technique is found in the principles of behavior description interviewing, which "improves on traditional approaches by systematically probing what applicants have done in the past in situations similar to those they will face on the job." Tom Janz, Behavior Description Interviewing (1986), p. ix. "The concept that the best predictor of behavior in the future is behavior in the past is what this" interviewing technique "is all about." Id. at pp. ix-x.

To apply the "everyday analogue" or "life experience" example, the questioner takes a

cue from the relevant life-history information about the venireperson, contained on the juror qualification form or revealed in earlier voir dire, and ties the legal or factual issue to a hypothetical question set in the context of the venireperson's life experiences.

The questions could develop this way:

You are the mother of two grown sons?

*I'm sure you have strong memories of raising your two
sons?*

*Think back to the time your younger son was nine
years old, what would you have done if you received a
call from a neighbor who said she had been told that
your son was seen throwing rocks and breaking windows
in the vacant house two streets away?*

*What action will you take when your younger son
comes home?*

*What if your neighbor says the person who saw the
rock-throwing incident does not want her name revealed?*

*What if your son, went told of this accusation, denies
doing it but refuses to talk with you about it?*

This is just one simple way to generate a reality-based, life experience discussion of the legal concepts of the presumption of innocence and the right to remain silent without ever mentioning those legal principles by name or legal label. When the potential juror responds,

the answers should be flowing from the memories of how the younger son was actually disciplined and treated, even where an incident comparable to the hypothetical one never actually occurred. Normally, behavior description information is elicited during an employment interview with questions such as the following:

Tell me about your best accomplishment in your last job?

Tell me about the last time you faced the situation of an employee who wasn't performing?

Tell me about the most emotional confrontation you had with your boss in that job?

Tell me about the hardest you worked in that job?

"Notice that superlative adjectives - those that indicate the greatest extent or degree of something (most, last, least, toughest, worst, etc.) - are the key to effective behavior description questions." Tom Janz, Behavior Description Interviewing (1986), p. 41.

"There are a number of compelling reasons why the superlative adjective is an important component of a high-quality behavior description question. First, the question tends to stimulate specific events in the minds of the interviewee, and it is then easier for the interviewee to respond. Second, the interviewer knows something about where the incident fits on the scale of all similar incidents. That is, if it is the 'most' of a particular quality, it is the most that can be expected if the interviewer believes in the principle that the best predictor of future behavior is past behavior in similar circumstances. The same is true if it is the 'least'

of a quality. This gives a more accurate reading of the event than simply asking: 'Give me an example.' Third, a superlative adjective is remarkably freeing on the respondent. It implies: 'Of course, you have had one of these. I (as the interviewer) expect you to have had an incident like this and, furthermore, do not think you are a jerk because you have had such an incident.'" Id.

"The responses to these kinds of questions, especially when followed up with further behavior description questions, will also yield close approximations to what the person did, indeed, does in the given situation." Tom Janz, Behavior Description Interviewing (1986), p. 41. "It is almost as though the interviewer is watching the person perform in the workplace." Id. "Consequently, asking behavior description questions is an excellent tool for cracking through the dynamics of situations in which the candidate is attempting to project an overly favorable impression." Id.

Applying this approach to voir dire, the questioner attempts to elicit actual incidents in the potential juror's background that are comparable to the legal or factual issue to be discussed. For example, the questioner might ask the venireperson the following:

*As an employer, have you ever had to settle a
dispute between two employees who have exactly
opposite versions of what happened?*

*How were you able to decide which employee
was telling the truth?*

Why did you trust the customer witness?

Would it have made a difference if the customer witness

was a very close friend of one of the two employees?

Why?

Both of the techniques discussed above are premised on the venireperson's life experiences and historical conduct. Voir dire of this type relies upon the probe words, such as who, what, where, when, why and how? These techniques rely upon open-ended questions and careful listening. Often an imperative or command question is necessary to insure that the venireperson will answer the question in detail. Imperative questions direct the venireperson to provide the requested data. Examples of imperative questions include:

Tell me what you would do if your son

refused to talk to you about whether he

broke the windows in the vacant house?

Tell me the three major reasons you would believe

the police officer over your employee?

In the final analysis the "everyday" analogue or the "life experience" example as a mode of voir dire questioning is extremely valuable since it tends to disguise the legal and factual issues of the case and transform them into the issues of everyday life which the venirepersons have already lived and decided.

EVERYDAY ANALOGUE WORKSHEET

LEGAL DEFENSE

EVERYDAY ANALOGUE/LIFE EXPERIENCE EXAMPLE

Self-Defense

Protection of Others

Choice of Evils

Coercion & Duress

Insanity

Intoxication

LEGAL CONCEPTS EVERYDAY ANALOGUE/LIFE EXPERIENCE EXAMPLE

Presumption of Innocence

Reasonable Doubt

Right to Remain Silent

Burden of Proof

ISSUES

EVERYDAY ANALOGUE/LIFE EXPERIENCE EXAMPLE

Confession

Flight from Scene

Impeachment

Motive to Lie

Mental Illness

EMOTIONS

EVERYDAY ANALOGUE/LIFE EXPERIENCE EXAMPLE

Fear

Love

Hate

Anger

PREJUDICE/BIAS

EVERYDAY ANALOGUE/LIFE EXPERIENCE EXAMPLE

Victim of Crime

Police Contacts

Racial Prejudice

**1. ANALOGUE QUESTIONS DESIGNED TO ELICIT ACTUAL EXPERIENCES OF
VENIRE**

**A. FIND A LIFE EXPERIENCE OR EVERYDAY SITUATION COMPARABLE
OR ANALOGOUS TO THE ISSUE OR SUBJECT IN THE CASE**

**B. SELECT AN ANALOGY WHICH MIRRORS THE ISSUE IN QUESTION
BUT DOES NOT HAVE AN OBVIOUS CRIMINAL JUSTICE CONNECTION**

**C. THE ANALOGUE SHOULD DISGUISE THE ISSUE IN QUESTION TO
ENSURE AN EXPERIENTIAL ANSWER RATHER THAN AN
ASPIRATIONAL OR POLITICALLY CORRECT RESPONSE**

**D. DIRECT THE VENIREPERSON TO SHARE HIS/HER EXPERIENCE BY
USING AN IMPERATIVE SENTENCE, I.E., A COMMAND, SUCH AS:**

**1. TELL US THE MOST FRIGHTENING EXPERIENCE YOU HAVE
HAD.**

**2. DESCRIBE THE MOST SERIOUS INVOLVEMENT YOU HAVE HAD
WITH A BULLY.**

3. SHARE WITH US THE MOST SIGNIFICANT ENCOUNTER YOU

HAVE HAD WITH SOMEONE WHO HAD SEVERE MENTAL ILLNESS.

- E. ALWAYS USE A SUPERLATIVE ADJECTIVE (MOST SERIOUS, SEVEREST) TO ALLOW THE VENIREPERSON TO RANK THE EXPERIENCE FOR THE BENEFIT OF BOTH THE DEFENSE AND THE VENIREPERSON**
- F. THE USE OF A SUPERLATIVE ADJECTIVE, PARTICULARLY WHEN CONTAINED IN AN IMPERATIVE STATEMENT, WILL ALSO NORMALLY CAUSE THE VENIREPERSON TO VOLUNTEER A SITUATION RATHER THAN RETREAT INTO "I CAN'T THINK OF ANYTHING"**
- G. ONCE THE VENIREPERSON DESCRIBES HIS OR HER EXPERIENCE, COUNSEL SHOULD USE OPEN-ENDED QUESTIONS (WHO, WHAT, WHERE, WHEN, WHY AND HOW) TO DISSECT THE EXPERIENCE AND ITS IMPLICATION ON ISSUES IN THE CASE**
- H. IN GROUP VOIR DIRE, VENIREPERSON'S ANALOGOUS EXPERIENCE MAY VALIDATE THE COMMON SENSE OR UNIVERSAL APPEAL OF DEFENSE THEORY OF THE CASE**

I. ANALOGUE QUESTIONS ARE EFFECTIVE IN INDIVIDUAL SEQUESTERED VOIR DIRE AS THE BEST INDICATOR OF THE VENIREPERSON'S FUTURE ACTIONS

J. ANALOGUE QUESTIONS ARE NOT OBJECTIONABLE ON THE GROUNDS THAT THE QUESTION REQUIRES THE JUROR TO PREJUDGE THE ISSUE OR COMMIT ON AN ISSUE

2. FINDING THE MOST APPROPRIATE ANALOGUE TO THE ISSUE IN QUESTION

A. IDENTIFYING THE "IMPERFECT ANALOGUE"

1. THE "IMPERFECT ANALOGUE" BEARS SUPERFICIAL RESEMBLANCE TO THE ISSUE

2. THE "IMPERFECT ANALOGUE" CONTAINS ESSENTIAL ELEMENTS WHICH CONSTITUTE A FATAL FLAW IN ANALOGY TO YOUR ISSUE AND MAKE IT INHERENTLY INCAPABLE OF BEING AN ACCURATE MEASURE OF A

JUROR'S COMPARABLE EXPERIENCE

- 3. THE CLASSIC "HAVE YOU EVER WALKED UP TO A PERSON YOU WERE SURE YOU RECOGNIZED, ONLY TO REALIZE YOU HAD MISTAKEN THIS PERSON FOR SOMEONE YOU KNEW" IS AN "IMPERFECT ANALOGUE" FOR THE MISTAKEN EYEWITNESS CASE**
- 4. UNLIKE THE JUROR'S PRIOR EXPERIENCE WITH A MISTAKEN IDENTIFICATION, THE PROSECUTION EYEWITNESS HAS NEVER LOOKED YOUR CLIENT IN THE FACE AND SAID, "SORRY, I THOUGHT YOU WERE SOMEONE ELSE"**
- 5. THE JUROR'S PAST EXPERIENCE OF MISTAKING A STRANGER FOR SOMEONE THE JUROR KNOWS WELL IS QUITE DIFFERENT IN CIRCUMSTANCE FROM THE WITNESS WHO SEES A STRANGER BRIEFLY IN A TRAUMATIC OR STRESSFUL SITUATION AND THEN LATER IS REQUIRED TO SELECT THE STRANGER'S FACE FROM A**

PHOTO ARRAY OR A LINE-UP OR SHOW-UP

B. FINDING THE "MORE PERFECT" ANALOGUE

**1. THE "MORE PERFECT ANALOGUE" IS THE COMPARABLE
EVERYDAY LIFE EXPERIENCE YOU FIND WHICH BEST
MIRRORS THE COMMON ELEMENTS OF THE ISSUE IN
QUESTION**

**2. A "MORE PERFECT ANALOGUE" TO THE MISTAKEN
IDENTIFICATION ISSUE IS THE MISTAKEN BELIEF
OR OPINION ON A FACTUALLY VERIFIABLE MATTER
IN WHICH THE JUROR ADAMANTLY PERSISTED UNTIL
CONFRONTED WITH UNDENIABLE PROOF TO THE
CONTRARY**

**3. A MISIDENTIFICATION IS ACTUALLY NOTHING MORE THAN
AN INCORRECT OR ERRONEOUS OPINION OR BELIEF**

ABOUT

THE IDENTITY OF THE PERPETRATOR

- 4. A COMMON EXPERIENCE OF PERSISTING IN AN ERRONEOUS
OPINION IS: ERRONEOUSLY REMEMBERING A PARTICULAR
STORE OR RESTAURANT IS IN A PARTICULAR LOCATION;
ERRONEOUSLY REMEMBERING THAT A PARTICULAR
CELEBRITY PLAYED IN A TELEVISION SHOW OR A
MOVIE; ERRONEOUSLY REMEMBERING YOU WERE A
CERTAIN AGE WHEN A PARTICULAR HISTORICAL EVENT
OCCURRED**
- 5. THE PERSISTENT ERRONEOUS BELIEF ALLOWS THE JUROR
TO RECALL HOW ABSOLUTELY CONVINCED HE WAS THAT
HIS RECOLLECTION WAS ACCURATE, HOW NO ONE COULD
CHANGE HIS OPINION, HOW HE PERSISTED IN HIS
MISTAKE OVER A LONG PERIOD OF TIME, AND HOW HE
LATER LEARNED BEYOND A SHADOW OF A DOUBT THAT
HIS PERSISTENT BELIEF WAS ABSOLUTELY INCORRECT**
- 6. THE "MORE PERFECT ANALOGUE" VALIDATES THROUGH**

**THE JUROR'S PERSONAL EXPERIENCE WHY YOUR
THEORY ON THIS ISSUE IS REASONABLE AND
COMPATIBLE WITH THE JUROR'S LIFE EXPERIENCE**

**3. CASTING THE NET TO CATCH THE JUROR'S COMPARABLE LIFE
EXPERIENCE**

**A. MAKE THE NET WIDE ENOUGH TO CAPTURE ANY PERMUTATION
OF THE LIFE EXPERIENCE YOU ARE SEEKING: [TELL US ABOUT
THE
MOST SIGNIFICANT SITUATION WHERE YOU OR SOMEONE YOU
KNOW WELL INSISTED HE OR SHE WAS RIGHT ABOUT A
PARTICULAR FACT OR EVENT ONLY TO LEARN LATER THAT HIS
OR HER RECOLLECTION WAS TOTALLY WRONG]**

**1. DON'T LIMIT THE JUROR'S ROLE TO BEING THE PERSON
WHO MADE THE MISTAKE**

**2. AS THE OBSERVER OF ANOTHER PERSON'S PERSISTENCE
IN A MISTAKEN BELIEF OR OPINION, THE JUROR'S
EXPERIENCE MAY BE JUST AS GRAPHIC AND THE
PERSPECTIVE MORE OBJECTIVE**

B. DON'T MAKE THE NET SO WIDE IT WILL CAPTURE INAPPLICABLE SITUATIONS: [DESCRIBE A MEMORABLE SITUATION WHERE YOU OR SOMEONE YOU KNOW WERE MISTAKEN ABOUT SOMETHING]

1. THE QUESTION MUST BE SPECIFIC ENOUGH TO ELICIT THE DESIRED ANALOGY OR A COMPARABLE ONE

2. IF THE INCOMPLETE QUESTION CAUSES THE JUROR TO DISCUSS AN "IMPERFECT ANALOGY," THE JUROR'S LIFE EXPERIENCE ELICITED MAY UNDERMINE RATHER THAN SUPPORT YOUR THEORY OF THE CASE

4. HYPOTHETICAL QUESTIONS DESIGNED TO ELICIT ANSWERS INFLUENCED BY THE CONTEXT OF VENIREPERSON'S ACTUAL EXPERIENCES

APPLICATION TO A SPECIFIC CASE

THEORY OF THE CASE

Outraged and angered by the dramatic bruises that appeared on the face, head and body of two-year-old Mary Smith, shortly after she was picked up from the home of Joey and Karen Burden, her baby-sitters that day, Mary's parents, the police, and even the examining doctor all assumed an assault rather than an accident, a crime rather than a fall, and that Joey Burden had hit and hurt the child. With little or no investigation and evidence, the police ignored and discounted the obvious explanation for the spectacular bruises on the fair complexioned little girl - a face forward fall on the wooden front steps of the Burden's home which produced no wounds, no bumps and no bruising at the time Karen and Joey comforted and inspected Mary and assured themselves that she was okay.

WORRY AND ANXIETY OVER YOUR CHILD

Tell us the most worried or frightened you have ever been for the safety or health of your child or a child you knew well.

THE WORST PUNISHMENT RECEIVED

Describe the worst spanking or hitting you or a family member or a close friend received as a child.

THE WORST PHYSICAL PUNISHMENT ADMINISTERED

Tell us the worst spanking or hitting you or someone you know well ever did to a child.

JUMPING TO CONCLUSIONS

Tell us the most serious mistaken conclusion you, a family member, or someone you knew well jumped to, only to learn it was wrong.

POLICE OFFICERS AND MISTAKES

Tell us the worst you have ever been treated by a police officer.

A MISTAKEN BELIEF THAT PERSISTED

Tell us the most significant mistaken belief you or someone in your family or one of your friends held for a long time only to learn eventually it was false.

MISTAKEN BELIEF

Tell us about the most significant situation where you or someone you knew well insisted he or she was right about a particular fact or event only to learn later that his or her recollection was totally wrong.

MISTAKENLY SUSPECTED

Describe the most serious time when you or someone you know well was mistakenly suspected of doing something that was considered wrong or unacceptable conduct.

WHEN YOU MISTAKENLY SUSPECTED SOMEONE

Tell us the most significant time when you or someone you know well mistakenly believed that another person had done something that was considered wrong or unacceptable conduct.

INJURY TO A CHILD

Tell us the most serious injury that ever happened to one of your children.

MISTAKES OF A DOCTOR

Tell us the most significant disagreement you ever had with a medical doctor.

HAVE YOU EVER CHANGED DOCTORS?

Tell us the most significant time when you or someone you know well changed doctors because of the doctor's opinion or advice.

YOUNG CHILDREN AND "THE TRUTH"

Tell us the most unbelievable story your child or a child you knew well told as true that you knew could not be true?

THE UNSUSPECTED INJURY

Tell us the most serious injury you or someone close to you received but did not realize was an injury until hours or days later?

DISAGREEMENT WITH A BABY-SITTER

Tell us the most serious disagreement you or a family member or a close friend had with a baby-sitter or someone who had charge of the person's child?

DISAGREEMENT WITH A PARENT

Tell us the most serious disagreement you, a family member or a close friend had with a parent concerning the supervision or watching of that parent's child?

FEAR OF SPEAKING IN PUBLIC

Tell us the most frightening or most difficult time you have ever had speaking in front of a group of people?

FEAR

Tell us the most frightening experience you have ever had.

Tell us the weirdest thing you or someone you know well did out of fear.

HOPELESSNESS

Tell us the most hopeless you or someone close to you has ever felt.

Tell us the most desperate thing you or someone you know well did out of hopelessness.

LYING

Tell us the worst experience that you or someone you know well, such as family or friend, had with a liar.

Tell us the most significant situation where you or someone you know well, a family member or friend admitted to doing something wrong when that was not true.

Tell us the most serious lie you or someone you know well told because of fear.

Tell us the most serious lie you or someone you know well told because of hopelessness.

DETERMINING THE TRUTH

Tell us the most serious situation where you had to decide whether a person you knew was lying or telling the truth.

Tell us the most serious situation where you or someone you know well thought another person was lying only to learn that person was telling the truth.

Tell us the most serious situation where you or someone you know well thought another person was telling the truth only to learn person was lying.

LYING TO HELP YOURSELF

Tell us the most serious situation where you or someone close to you lied to get out of trouble.

LYING FOR GAIN

Tell us the worst lie you or someone you know well, such as a family member, friend or co-worker, told to get something that person wanted.

**BAD TREATMENT
BY A POLICE OFFICER**

Tell us the worst you or someone you know well was treated by a police officer.

JUDGING BY PAST ACTIONS

Tell us the most serious mistake you or someone you know well made by judging a person by his or her past actions.

MISTAKENLY SUSPECTED

Describe the most serious time when you or someone you know well was mistakenly suspected of doing something that was considered wrong or unacceptable.

**MISTAKE DUE TO RELIANCE
ON GOSSIP/RUMOR**

Tell us the most serious mistake you or someone close to you made by relying on gossip or rumor only to learn the gossip or rumor was untrue.

PERSUASION

Tell us the most significant situation where you were persuaded to believe that you had done something you really did not do.

Tell us the most significant situation where someone you know well was persuaded to believe something about themselves which was not true.

RACE RELATIONS

Tell us the most significant relationship you have ever had with a person of a different race.

Tell us the most significant relationship you have ever had with an African-American.

Tell us the most significant relationship someone you know well, close friend or family member, had with an African-American.

VICTIMIZATION

Tell us the most serious crime that was ever done to you or to someone you know well.

HEROIC CONDUCT

Describe for us the most heroic or bravest action you or someone you know well took to help another person who was in danger.

Tell us the most significant time when you punished your child for lying about not doing something, rather than for having done the act.

Tell us the worst decision you made out of hopelessness.

ALCOHOLISM

Tell us the most significant involvement you or someone close to you, such as a family member or friend, has had with severe alcoholism.