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INTRODUCTION

Race has long had a pernicious role in how juries are assembled in the United States. Racism—intentional, implicit, and structural—has produced disparities in how jury venires are selected, whom the court excuses for cause, and how lawyers exercise their peremptory strikes.

We are, however, at a moment of reform in the United States. We see courts, legislatures, and citizens looking for opportunities to make our criminal legal system fairer.[1] One aspect of the system receiving attention is jury selection, specifically race discrimination in the selection process.[2] Efforts to counter discrimination range in scope from creating commissions to study the issue, to implementing rules to address *Batson's* shortcomings, to outright abolishing the use of peremptory strikes.[3]

Much of the research on racial discrimination in jury selection has focused on lawyers, particularly their use of peremptory strikes. But the process that produces racial disparities involves multiple steps and players. Judges, in particular, play a vital role in ensuring that voir dire is conducted in a way that produces a diverse and competent jury. Fortunately, significant research on best practices in jury selection provides practical guidance to judges overseeing the jury selection process.[4]

* Professors at Michigan State University College of Law. We wish to offer our sincere thanks to Annika Torng who provide provided excellent research assistance during the preparation of this article.

1. *See, e.g.*, Audra D.S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES, Oct. 5, 2021; CONFERENCE OF CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS, RESOLUTION 1 IN SUPPORT OF RACIAL EQUALITY AND JUSTICE FOR ALL (2020); Federal Death Penalty Abolition Act, H.R. 97, 117th Cong. (2021); RAISE Act, H.R. 128, 117th Cong. (2021); Federal Prison Bureau Nonviolent Offender Relief Act, H.R. 132, 117th Cong. (2021).

2. *See* UCLA Berkely L. Sch. Death Penalty Clinic, *Batson Reform: By State*, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ [https://perma.cc/3ANG-ZWQ9] (tracking the progress of jury selection reform proposals in the United States).

3. *See, e.g.*, N.Y. STATE JUST. TASK FORCE, RECOMMENDATIONS REGARDING REFORMS TO JURY SELECTION IN NEW YORK 10 (2022), http://www.nyjusticetaskforce.com/pdfs/Report-on-Recommendations-Regarding-Reforms-to-Jury-Selection-in-New-York.pdf.

4. *See infra* Part I.

To demonstrate how these best practices play out in the real world, this article examines two high-profile cases in light of what researchers have learned about maximizing the effectiveness of voir dire and, in particular, minimizing racial bias in jury selection. We take advantage of the live broadcasting of jury selection in two notorious cases during these times of crises and change to look closely at ways courts can mitigate racial bias in jury selection and, in the process, further the educational and information-gathering objectives of voir dire.[5]

In Part I, we review the research on practices that can enhance the effectiveness of voir dire and counter racial bias in jury selection, with a particular focus on the role of judges and on recent efforts to reform jury selection in several states. In doing so, we broaden the focus beyond how lawyers' behavior in exercising peremptory strikes contributes to racial discrimination to the role of judges. In Part II, we present a brief overview of the main actors, as well as the legal and social context for our two cases: the prosecution of Derek Chauvin in Minneapolis for killing George Floyd, and the prosecution of Travis McMichael, Greg McMichael, and William Bryan in Georgia for killing Ahmaud Arbery. In Part III, we draw on that research to examine the jury selection processes in the Chauvin and McMichael/Bryan cases. We compare the processes by which those juries were selected and the judges' approaches to voir dire by identifying attributes or initiatives that render voir dire more or less effective.

I. BEST PRACTICES FOR VOIR DIRE

Voir dire is supposed to help ensure the right to a fair and impartial jury.[6] Voir dire provides the opportunity for the court and lawyers to speak directly to jurors and gather information. The wisdom of a decision to excuse a juror for cause, peremptorily strike her, or seat her on the jury

5. By time of crisis, we mean the COVID pandemic, as well as the cases arising after the Summer of Racial Reckoning in 2020 and in the context of overt racial violence. By time of change, we mean that voir dire was live broadcast and courts shared related jury questionnaires with the public

6. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."); Tanner v. United States, 483 U.S. 107, 127 (1987) ("Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*."). Voir dire has often been seen as a central to the adversarial process and an opportunity for one side or the other to gain advantage. An Arizona work group on jury procedures unanimously urged Arizona courts and litigants to work toward a change in policy grounded in neutrality. SUP. CT. OF ARIZ., ARIZ. TASK FORCE ON JURY DATA COLLECTION, REPORT AND RECOMMENDATIONS OF STATEWIDE JURY SELECTION WORKGROUP 21–22 (2021), https://www.azcourts.gov/Portals/74/Jury%20TF/Resources/Final%20Report%20Posting%20JTF%20100421.pdf [https://perma.cc/XPN7-VZGE] [hereinafter AZ REPORT].

depends on the quality of the information the court and lawyers have about that juror.

Ample evidence suggests, however, that lawyers are not good at assessing jurors' competence or biases.[7] That may be due to shortcomings in the voir dire process (which often has a heavy reliance on closed questions or questioning jurors in groups rather than individually), as well as limits on people's general inability to assess others.[8] Without adequate information about the potential jurors' biases and relevant attitudes, lawyers habitually resort to relying on demographic characteristics, which ultimately involves resorting to stereotyping potential jurors based on age, gender, profession, and race.[9]

Ideally, voir dire should allow the parties to get the best, most diagnostic information possible and minimize reliance on harmful stereotypes.[10] The way a court conducts jury selection plays a part in achieving that ideal. Jury selection procedures vary across jurisdictions.[11] On one end of the spectrum is limited voir dire. Limited voir dire is characterized by judges rather than attorneys questioning potential jurors without the benefit of a pre-trial questionnaire and doing so in groups of jurors rather than individually.[12] The questions tend to be closed—calling for only yes or no responses—and the subject matter of the questions tend to be closely related to the trial.[13]

On the other end of the spectrum is expansive voir dire. Expansive voir dire involves both the judge and the attorneys asking questions. The

7. *See* Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI-KENT L. REV. 927, 935 (2015); Davis v. Fisk Electric Co., 268 S.W.3d 508, 531 n.35 (Tex. 2008) (Brister, J., concurring) (quoting Reid Hastie, *Is Attorney-Conducted Voir Dire An Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV., 703, 722 (1991) ("[A]ttorney-conducted voir dire is not an effective procedure for selection of impartial juries. Although none of the empirical studies is perfect, all evidence demonstrates a consistent lack of impressive attorney performance in this regard."); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 250 (1990).

8. *See generally* Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214 (2006) (analyzing results from 206 research documents on accuracy of deception judgments, which encompass 24,483 participants, and finding an average of 54% accuracy in lie-truth judgment); Konrad Bocian, et al., *Egocentrism Shapes Moral Judgment*, 14 SOC. PERS. PSYCH. COMPASS 1 (2020) (reviewing psychological literature on egocentric biases in evaluating others).

9. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1190–91 (2003) (discussing how stereotypes tend to fill in gaps in knowledge when lawyers have little information about individual potential jurors).

10. *See id.*

11. *Id.* at 1183.

12. *Id.*

13. *Id.*; *see also* Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515, 523 (2019) (reviewing research on open and closed questions).

range of topics covered in expansive voir dire is broader and includes more open questions than does limited voir dire. The venire members will have completed a written juror questionnaire before the trial, allowing the judge and lawyers to focus their inquiries on particular responses of interest. Finally, prospective jurors are questioned individually—sequestered from the others—rather than in groups.[14]

Research on jury selection practices suggests that limited voir dire is not as conducive as expansive voir dire to identifying potential jurors' biases.[15] Asking closed questions to venire members in groups provides them with little opportunity to offer information about relevant attitudes and predispositions. Jurors are understandably more reluctant to disclose private matters that could bear on potential biases in front of all their fellow potential jurors than one-on-one in individualized voir dire.[16] Even when a juror is aware of his or her own biases, the use of leading questions in which the "correct" answer is implied—particularly when asked by a judge—exacerbates the tendency to downplay or obfuscate them.[17]

While no system will render lawyers and judges capable of identifying all hidden biases among jurors, efforts to improve the voir dire process by mitigating shortcomings remain worthwhile. A working group examining jury procedures in Arizona concluded that using case-specific juror questionnaires, permitting expanded oral voir dire, and allowing attorney questioning would cumulatively increase the amount of information provided during voir dire. Arizona recently abolished peremptory strikes, but the working group posited that more complete information would put courts and parties in a better position to identify improper bias to support a motion to excuse a potential juror for cause.[18]

Moreover, voir dire serves other important objectives besides gathering information from potential jurors. As Professor Marder argues, the process serves both to educate jurors and to establish a collaborative relationship between the judge and the jurors.[19] Educating jurors is not just

14. Hans & Jehle, *supra* note 9, at 1183–84.

15. *See id.* at 1186–90 (reviewing studies).

16. *Id.* at 1192–94 (discussing jurors' privacy concerns).

17. *Id.* at 1194–97 (discussing the "social desirability effect," in which people are inclined to present themselves favorably, particularly when interacting with a high-status person like a judge).

18. *See* AZ REPORT, *supra* note 6, at 7–8 (providing an overview of recommended amendments to the rules). According to the ABA Principles for Juries and Jury Trials, "a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially." A.B.B. Principles for Juries and Jury Trials (2016), Principle 11, C. 2. *See also* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 788 (2020).

19. Marder, *supra* note 7, at 929.

about the legal aspects of their role, and it should not be thought of as a one-way street in which the judge and lawyers are teachers and the jurors their passive pupils. Rather, the dialogue between the juror and the lawyer or judge serves both to inform the court and attorneys of the juror's suitability to serve and to prepare the juror for aspects of the case that may be particularly fraught.

The education process is not independent of the effort to detect bias—the conversation between the judge and juror is an opportunity both to learn about the jurors' beliefs and attitudes and to correct preconceived notions. Bias is not a fixed trait that the court and lawyers must unearth to determine whether a potential juror is suitable. A juror with unexamined preconceived notions about how the law operates, or how a generic criminal defendant looks or behaves might gladly let go of those preconceptions when told otherwise. This happens frequently in voir dire regarding certain topics. A juror who expresses their willingness to convict so long as guilt is proven beyond a "shadow of a doubt," for example, may readily adjust their stance once the judge explains the proper standard of proof.[20]

Discussions about legal rules may generate disagreement, but these topics clearly fall within the wheelhouse of both judges and lawyers. Judges and lawyers typically do not hesitate to correct misconceptions about the law or to explain specific legal principles that are relevant to the case (though some are easier to let go of than others). And sometimes the exchange between a juror and judge about a particularly thorny legal principle takes a fair amount of time to ensure that the potential juror not only grasps it but satisfies the parties that he or she is willing to abide by it.[21]

20. *See e.g.*, Transcript of Record at 111, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 9, 2021) [https://perma.cc/832K-JUW5] (judicial instructions to potential jurors at *voir dire*) ("Proof beyond a reasonable doubt is such proof as ordinarily prudent persons would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt."); *see also* Transcript of Record at 1098, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 12, 2021) [https://perma.cc/5UC8-5TT7] (question from prosecuting attorney and answer from potential juror)

> ("Q. . . . [I]f the State met its burden proving beyond a reasonable doubt all of the facts that would be required to render a guilty verdict for the charge of murder, would it still be difficult for you, difficult, to return that verdict, giving [sic] your views of law enforcement and the kind of discretion and deference they should be given for decisions they make in the line of duty?
>
> A. I don't think so, no. If we're proving something beyond a reasonable doubt, absolutely not.").

21. For a discussion of the challenges of educating jurors about complex issues of law, see John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1058–62 (2008).

Discussions about jurors' attitudes and prior experiences regarding discrimination and bias, on the other hand, can be fraught.[22] Accordingly, conversations about bias—particularly racial bias—are far less likely to occur, even in cases where race and racism are central to the events at issue. Judges are not required to permit lawyers to question potential jurors about racial bias even in serious cases involving interracial crimes.[23] When jurors say something to suggest a bias of any sort, judges often attempt to rehabilitate that juror. Rehabilitation is generally not effective at mitigating bias, however, and typically involves trying to get a juror to walk back earlier statements rather than probing them further.[24]

This reluctance to discuss race may be changing. General Rule 37 in Washington State seeks to turn this dynamic on its head. General Rule 37 has the stated purpose of "eliminat[ing] the unfair exclusion of potential jurors based on race or ethnicity."[25] The rule lowers the threshold at which the court can find that a peremptory strike is based improperly on race or gender. Rather than requiring evidence of purposeful discrimination, the rule instructs the court to disallow a strike if it determines that a reasonable observer could view race or ethnicity as a factor in the decision to strike.[26]

For the purposes of this paper, we are interested in ways that the reforms educate participants and introduce language that evaluates and discusses the influence of race. For example, General Rule 37 specifies a list of reasons an attorney might provide to exclude a potential juror that have historically "been associated with improper discrimination."[27] Those reasons include having bad experiences with the police or residing in a

22. *See, e.g.*, Transcript of Record at 862, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 11, 2021) [https://perma.cc/6YRP-6M4Y] (defense counsel *voir dire* asks potential juror about questionnaire responses where potential juror is unsure about responses)

> ("Q. The next question was 'police in this country treat whites and Blacks equally.' And you strongly disagreed with that.
>
> A. Uh, okay. I don't know if I'd say strongly today.
>
> Q. I mean, do you have personal firsthand knowledge of police treating minorities differently than white people?
>
> A. I'm a little surprised I said – I was that strong about it.").

23. Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 484 (1998) (citing Ristaino v. Ross, 424 U.S. 589 (1976); *see also* Turner v. Murray, 476 U.S. 28, 36–37 (1986) (finding that a constitutional right to *voir dire* concerning racial bias extends only to penalty phase of a capital trial involving interracial crime).

24. Jessica M. Salerno et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 LAW & HUM. BEHAV. 336, 338–39 (2021).

25. Wash. Ct. Gen. R. 37(a) (imposing limitations on the exercise of peremptory challenges with the intention of eliminating the unfair exclusion of potential jurors based on race or ethnicity); Cal. Civ. Proc. § 231.7 (West 2020) (adopting similar limitations on the exercise of peremptory challenges in California).

26. Wash. Ct. Gen. R. 37(d) (stating that "[t]he court need not find purposeful discrimination to deny the peremptory challenge).

27. Gen. R. 37(h).

"high crime area."[28] This puts attorneys on notice about the extent to which prior contact with the police is correlated with race. Attorneys also are invited to think about what it means to spend time in a "high-crime neighborhood" with the correlated history of racism in U.S. housing policies.[29] Prohibiting reliance on these reasons as a matter of court rule educates everyone who participates in jury selection.[30]

II. TWO HIGH-PROFILE CASES

Two highly visible trials in 2021 provide a window into the ways that courts can make voir dire more or less effective—particularly in regard to procedures to mitigate racial bias—and in the process further the educational objectives of voir dire. The first case involved the prosecution in Minneapolis of a white former police officer, Derek Chauvin, for killing a Black man, George Floyd. The second case involved the prosecution of three white men—Travis McMichael, Greg McMichael, and William Bryan—in Georgia for killing a Black man, Ahmaud Arbery. The outcomes in these two cases were the same: Juries convicted all four defendants. But the processes by which those juries were selected varied starkly.

In the first case, a jury convicted Derek Chauvin of the murder of George Floyd in Minneapolis, Minnesota.[31] Judge Peter A. Cahill presided over the case. Cahill has always worked in Hennepin County. Before being appointed to the bench in 2007, he worked as a public defender, a private defense lawyer, and a prosecutor.[32] The voir dire videos present a person fully in his element—familiar with the attorneys and court staff, accustomed to the court building, and knowledgeable about the tools available to facilitate a smooth voir dire.

Videos of this jury selection reflect a highly organized, calm process of individual voir dire in which everyone in the courtroom—including the

28. Gen. R. 37(h)(iv).

29. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (discussing the collection of research and documentation of racist housing policies and programs throughout the United States).

30. National Center for State Courts, *Jury Selection Beyond Intentional Racial Bias*, VIMEO at 21:22 (July 12, 2022), https://vimeo.com/729213707 (reporting that attorneys all over the state are acknowledging that General Rule 37 changed the conversation and improved awareness of bias among the members of the bar in significant ways, and that the rule has led to more diverse juries).

31. Sentencing Order and Memorandum Opinion, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Apr. 21, 2021) (stating that jury found Chauvin guilty as to Count I: Unintentional second-degree murder; Count II: Third-degree murder; and Count III: Second-Degree manslaughter).

32. *Judge Peter A. Cahill*, In *Directory of Fourth Judicial District Judicial Officers*, MINN. JUD. BRANCH, https://www.mncourts.gov/About-The-Courts/Overview/JudicialDirectory/Bio.aspx?id=366 (last visited Sep. 5, 2022) [https://perma.cc/6A2J-HMM9].

potential jurors—maintained clear communication and had a solid understanding of each step and each decision. Voir dire unfolded in a measured and careful way. The resulting jury included an equal number of Black or multiracial, and white jurors. This jury was atypically diverse for the majority-white Hennepin County. Trial observers noted that counsel was "rigorous in . . . questioning the jurors."[33] One noted that seating a jury as diverse as this shows that "someone is putting in effort" and "that it is possible to be done."[34]

In the second case, a jury in Brunswick, Georgia, found Travis McMichael;[35] his father, Gregory McMichael;[36] and their neighbor, William Bryan,[37] guilty of murder in November 2021. Judge Timothy Walmsley presided over the McMichael/Bryan case. Judge Walmsley typically presides over cases in Chatham County Superior Court, about seventy-five miles north of Brunswick, near Savannah.[38] Governor Nathan Deal appointed Judge Walmsley to the Superior Court in Savannah after he worked as the Chatham County Magistrate and in a commercial and real estate litigation firm in Savannah.[39]

It is not clear if Judge Walmsley had previously tried a case in the Glynn County District Court. Gregory McMichael had once worked as an investigator with the Glynn County district attorney and as a police officer. Consequently, all five judges in the region recused themselves and Judge Walmsley was appointed to the case.

The Georgia Attorney General named the Cobb County District Attorney's Office, northwest of Atlanta and almost 300 miles from Brunswick, as special prosecutor in these cases after prosecutors in the

33. Univ. of Pa. Carey L. Sch., *Anatomy of a Trial – The Prosecution of Derek Chauvin*, YOUTUBE, at 00:35 (Sep. 2, 2021), https://youtube.com/watch?v=nyXQEITWcXU.

34. *Id.* at 00:37.

35. Jury Verdict Form, State v. Travis McMichael, No. CR 2000433 (Ga. Super. Ct. Nov. 24, 2021), https://www.glynncounty.org/DocumentCenter/View/73758/Verdict-Form—-Travis-McMichael (finding defendant guilty of one count of malice murder and four counts of felony murder).

36. Jury Verdict Form, State v. Greg McMichael, No. CR 2000433 (Ga. Super. Ct. Nov. 24, 2021), https://www.glynncounty.org/DocumentCenter/View/73757/Verdict-Form—-Greg-McMichael (finding defendant not guilty of one count of malice murder and guilty of four counts of felony murder).

37. Jury Verdict Form, State v. Bryan, No. CR 2000433 (Ga. Super. Ct. Nov. 24, 2021), https://www.glynncounty.org/DocumentCenter/View/73759/Verdict-Form—-William-Bryan (finding defendant not guilty of one count of malice murder, not guilty of one count of felony murder, and guilty of three counts of felony murder).

38. *Judge Timothy R. Walmsley Judicial Biography*, EASTERN JUD. CIR. GA., https://courts.chathamcountyga.gov/Superior/Walmsley (last visited Oct. 6, 2022) [https://perma.cc/T8XF-L43T].

39. Alexis Stevens, *Savannah Judge Appointed to Preside over Arbery Cases*, ATL. J.-CONST. (May 18, 2020), https://www.ajc.com/news/crime—law/savannah-judge-appointed-preside-over-arbery-cases/HeUxam4vDTNSnkNz25Lh5O/ [https://perma.cc/AVC9-SK8F].

Brunswick and Waycross judicial circuits recused themselves.[40] Only two of the six lawyers representing the three defendants were based in Glynn County, where the crime occurred.[41]

Neither the judge nor most of the lawyers were working in their home courtrooms. In addition, they were working out of a courtroom where their regular prosecutors and judges had recused themselves.[42] The judge and prosecutors were not accustomed to working together, nor were they familiar with the Glynn County court or court staff.[43]

The physical location of the trial presented another challenge. The courtroom had limited space to accommodate three defendants and their attorneys. The resultant scene was chaotic even before jury selection started. Images from the courtroom showed the three defendants and six defense lawyers crowded across the defense table and around the edge of the court on tables and large leather chairs added for their use. The physical crowding stood alongside the almost palpable sense that the process of selecting a jury would stretch the patience and capacity of everyone involved to their limits. The judge noted at the outset, "we are going to be pushing for time."[44]

Judge Walmsley conducted voir dire using a hybrid system: beginning with group questions and following with extensive individual questioning of potential jurors. The group voir dire addressed groups of twenty venire members. The judge, followed by the prosecutor, and then defense counsel, rapidly asked question after question, as the jurors raised their numbered placards to indicate an affirmative response to questions. Attorneys

40. Shaddi Abusaid & Bill Rankin, *Judge in Ahmaud Arbery Case: Speed Up Jury Selection*, ATL. J.-CONST. (Oct. 19, 2021), https://www.ajc.com/news/atlanta-news/judge-speed-up-jury-selection-in-trial-involving-arberys-killing/5CX53Z4Y2NFNBEVCDGYGYIL7NQ/ [https://perma.cc/CNR2-W63P] (reporting that the Brunswick district attorney was indicted for mishandling the case and interfering with the investigation). The Waycross district attorney stated he found a conflict of interest in the case in a letter to the Glynn County Police Captain in which the district attorney also shared his opinion that arrest warrants were not supported by probable cause. *See* Letter from George E. Barnhill, Dist. Att'y, Waycross Jud. Cir., to Tom Jump, Captain, Glynn Cnty. Police Dep't (Apr. 3, 2020), https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf. This was condemned by the National District Attorneys Association. *See* Bert Roughton, Jr., *US District Attorneys Condemn Recused Prosecutor in Ahmaud Arbery Case*, ATL. J.-CONST. (May 10, 2020), https://www.ajc.com/news/district-attorneys-condemn-recused-prosecutor-ahmaud-arbery-case/VWV86naEbd9eprgOCSWwRJ/ [https://perma.cc/6V64-M3AM].

41. Raisa Habersham, *Ahmaud Arbery Case: The People, Events and Aftermath*, FAYETTEVILLE OBSERVER (Nov. 24, 2021, 3:48 PM), https://www.fayobserver.com/story/news/2021/10/11/ahmaud-arbery-murder-trial-mcmichales-homicide-killing-crime-glynn-county/5888320001/ [https://perma.cc/75PL-NN8C].

42. *Id.*

43. 11Alive, *Death of Ahmaud Arbery Trial | Jury Selection Begins*, YOUTUBE at 01:01:00 (Oct. 18, 2021), https://www.youtube.com/watch?v=Khj-3htHL8g [hereinafter Selection Begins] ("One of the challenges being a Chatham judge coming down to Glynn County is that I'm not exactly sure exactly how they've got it set up.").

44. *Id.* at 1:21.

instructed jurors repeatedly to raise their placards if they possibly thought the question might apply, and that they would follow up initial responses with potential jurors individually. After completing individual voir dire for each group of twenty potential venire members, the judge reviewed motions to excuse jurors for cause.

No audio is available for any of the individual voir dire; the live video proceeds in silence without capturing the voir dire off camera. From those gaps in audio and the progression of the clock on the wall on which the video focused during individual voir dire, individual voir dire appears extensive. In a few instances, live video transmitted court proceedings after each group of twenty was questioned; at that point, attorneys initiated cause strikes. The discussion did not allow for rehabilitation or clarification. It is possible that some cause strikes took place during the section of individual voir dire that did not air. This phase of jury selection—group and individualized voir dire, and motions to excuse for cause—lasted two and one-half weeks during which participants frequently seemed confused about which juror was under discussion.[45]

On day twelve, Judge Walmsley initiated the process for the exercise of peremptory strikes.[46] This took place in the Jury Assembly Room, where group voir dire had taken place, rather than in the courtroom. The court staff still struggled to arrange the logistics. Once settled, they used a silent process, where the bailiff passed the juror names between the attorneys on paper. Again, the space barely accommodated the participants. When the nine lawyers crowded around the judge's make-shift bench for an early ruling, they were two and three lawyers deep as they appeared to strain to hear his voice. During three separate panels, potential jurors under review sat silently, out of sight, as the process proceeded. The silent process lasted three hours, after which the attorneys selected twelve jurors and four alternates.[47]

At the end of this process, the defense had peremptorily struck eleven of the twelve eligible Black jurors.[48] The prosecutors raised a *Batson* objection, arguing that the defense attorneys had disproportionately struck

45. 11Alive, *Death of Ahmaud Arbery Trial | Day 6 of Jury Selection*, YouTube, at 09:38:30 (Oct. 26, 2021), https://www.youtube.com/watch?v=zsazaWlS1_k (discussing Juror 469 and noting that the attorney had conflated two jurors who had previous been questioned in individual voir dire).

46. 11Alive, *Jury Expected to be Seated Wednesday for Trial of Ahmaud Arbery's Accused Killers*, YOUTUBE at 02:10 (Nov. 3, 2021), https://www.youtube.com/watch?v=xSOJvQrfUT0 [hereinafter Trial Day Twelve] (explaining the process and the difficulties setting up the room, providing video stream of the silent process).

47. *Id.* at 05:25 (noting the end of the silent phase of the jury selection process).

48. *Id.* at 05:38.

qualified Black jurors.[49] The judge found a prima facie case, noting that the first step of *Batson* was satisfied by the "numbers involved." The court noted that the defense used a disproportionate number of peremptories against Black venire members and subsequently noted that "there appears to be intentional discrimination" in this case.[50] The prosecution then clarified that it challenged the removal of eight of the eleven struck venire members. The court listened to the parties' arguments on each juror at some length.[51] After short recess, the court ruled that it "is not going to place a finding upon the defendants that they are being disingenuous to the court or otherwise are not being truthful with the court when it comes to the reasons for striking those jurors." The court denied the motions, based on that finding and "because of the limitations . . . *Batson* places on this court's analysis."[52]

At the end of the process, a total of 16 jurors were selected—including four alternates—five men and eleven women. Only one was Black. The remainder were white. The county where the trial took place is 26% Black[53] and the initial venire was 25% Black.[54] Looking back on the process several weeks later, CNN described the jury selection process as "long and contentious."[55]

Neither judge conducted jury selection in bad faith. Both worked to select a fair jury. Each benefited or suffered from situations that were to some degree beyond their control. Nonetheless, while it was clear that these efforts made a difference in Minnesota, something different happened in Georgia.

49. *Id.* at 05:37. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that a prosecutor may not peremptorily strike a juror based solely on race); Georgia v. McCollum, 505 U.S. 42 (extending Batson's prohibition of race-based strikes to criminal defendants).

50. Trial Day Twelve, *supra* note 46, at 08:05.

51. See *infra* Section III.D for a more complete discussion of these arguments.

52. Trial Day Twelve, *supra* note 46, at 08:11; *see also* Devon M. Sayers et al., *Judge Says 'There Appears to be Intentional Discrimination' in Arbery Jury Selection, but Allows Trial to Move Forward with 1 Black Juror*, CNN (Nov. 12, 2021, 9:52 PM), https://www.cnn.com/2021/11/03/us/ahmaud-arbery-jury-what-we-know/index.html [https://perma.cc/2Y6T-U7FQ].

53. U.S. Census Bureau, U.S. DEP'T OF COMMERCE, QUICK FACTS: GLYNN COUNTY, GEORGIA (2019), https://web.archive.org/web/20211104232048/https://www.census.gov/quickfacts/fact/table/glynncountygeorgia/PST045219 [https://perma.cc/8TWS-N9XV].

54. Trial Day Twelve, *supra* note 46, at 05:38 (comment in prosecuting attorney's *Batson* argument) ("African American jurors made up one quarter of the jury panel.").

55. Mike Hayes et al., *Here's a Timeline of Key Moments in the Ahmaud Arbery Murder Case*, CNN (Nov. 24, 2021, 9:47 AM), https://edition.cnn.com/us/live-news/ahmaud-arbery-killing-trial-verdict-watch-11-24-21/h_93d352f74702a7d17f58baf161149214 [https://perma.cc/L9FB-W78G].

III. TWO VERY DIFFERENT JURY SELECTIONS

Race was not merely a salient feature in the Chauvin and McMichael/Bryan trials, but instead persisted as a central factor. In other respects, while the jury selection did not proceed identically in these trials taking place in different jurisdictions, substantial overlap appeared in the content and manner of the voir dire. In both cases, media coverage presented a significant concern for jury selection. At the same time, the two jury selection processes differed in several important ways. Thus, they provide a compelling illustration of the differences that result from different styles of voir dire.[56] This section presents examples of these differences broken down into three general dimensions: rushed vs. deliberative questioning; cooperation vs. contentiousness among the judge and attorneys; and willingness to explore difficult topics (such as race) vs. attempts to constrain the conversation.

A. Rushed vs. Deliberative Pace

The McMichael/Bryan jury selection process was more complicated and chaotic than that of the Chauvin trial. Much of the chaos was attributable to matters outside of the judge's direct control. For instance, Chauvin was tried separately from his co-defendants, whereas all three defendants in the McMichael/Bryan trial were tried jointly.[57] Each McMichael/Bryan defendant had his own attorneys, which complicated the process. The defense attorneys often spoke with a unified voice; but that was not always the case. Kevin Gough, representing Bryan, frequently voiced different opinions than his defense colleagues. As noted above, images from the courtroom showed the three defendants and six defense lawyers crowded around defense tables.[58]

In addition, the jury selection process in Georgia involved multiple groupings of potential jurors. Discussions about each juror's qualifications typically took place long after the attorneys questioned the potential jurors in voir dire, and with no opportunity to ask additional questions. In

56. *See generally* Hans & Jehle, *supra* note 9, at 1183 (outlining the variation in voir dire procedures).

57. The court severed Chauvin's trial from his co-defendants several months before trial. Order Regarding Discovery, Expert Witness Deadlines, and Trial Continuance at 4, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Jan. 11, 2021). Though counsel for Bryan did mention the possibility of moving to sever his client's trial from the McMichaels, we found no evidence in the record that a motion to sever was filed.

58. Octavio Jones, Trial of Ahmaud Arbery Killers Continues in Brunswick, Georgia (photograph), *in* GETTY IMAGES (Nov. 23, 2021), https://www.gettyimages.com/detail/news-photo/general-view-shows-the-courtroom-of-*the*-trial-of-william-news-photo/1236749543 [https://perma.cc/N7WC-V9CP].

contrast, voir dire in Minnesota focused on one potential juror at a time. The tone and tenor were measured, predictable, and carefully connected to the attorneys, judges, and decisions to be made. Potential jurors did not leave the courtroom until the parties completed motions for cause removal or the exercise of peremptory strikes.

Finally, as noted above, the Chauvin trial took place on the judge's home turf. In contrast, the judge presiding over the McMichael/Bryan trial was brought in from a different county (Chatham County) after the judges in the county where the crime occurred (Glynn County) recused themselves.[59]

Perhaps in part due to these different circumstances, the tone of jury selection in these two trials differed substantially. The complicated Georgia jury selection felt rushed from start to finish. CNN reported initially that "less than half" of the summoned jurors arrived for jury duty as the process began.[60] Judge Walmsley subsequently noted that the court was taking additional measures to encourage jurors to report on time.[61]

Concern about how long voir dire was taking became a recurring theme in the McMichael/Bryan trial. On at least one occasion, defense counsel expressed worry that "we are going to have a revolt" in the jury pool due to the long wait times.[62] On a different occasion, the judge expressed concern:

> These individuals that came in for jury selection went through a long and arduous process . . . with state questions, defense questions. And I mentioned a couple of times . . . while we were doing this that I think parties need to be very careful . . . because some of it can start alienating people. Some of it can really start pushing people's buttons.[63]

The prosecutor suggested that defense counsel conducted protracted voir dire with Black venire members to provoke behavior or statements that would warrant cause for removal.[64] The court echoed this observation.[65]

59. Stevens, *supra* note 39.

60. Martin Savidge et al., *A Thousand People Were Summoned for Jury Duty, But Less than Half Showed Up*, CNN (Oct. 29, 2021, 1:47 AM) https://www.cnn.com/2021/10/29/us/ahmaud-arbery-jury-selection-low-turnout/index.html [https://perma.cc/ZE45-ZY8M].

61. 11Alive, *Death of Ahmaud Arbery Trial | Day 7*, YOUTUBE, at 02:16 (Oct. 27, 2021), https://www.youtube.com/watch?v=54MVfhtbV_g.

62. *Id.* at 02:14.

63. Trial Day Twelve, *supra* note 46, at 01:50 (raising this concern and then excusing a prospective juror for cause because she appeared to be upset from the extensive process).

64. *Id.* at 7:26 (asking the court to look at how much time defense counsel spent with each of the Black prospective jurors).

65. *Id.* at 7:30 (the judge noted that "I distinctly remember an African American . . . that was asked 'do you think race plays a part?' 'No.' 'Well, are you aware other people do?' 'Yes.' 'Then all we want to get into is, what do you think of their opinions?'").

In contrast, the simple individual voir dire in Minnesota moved at a steady pace, smoothly managing the jurors' need to be present in the courthouse, while providing ample time to speak carefully with each. Even though the Minnesota court and lawyers had substantive and thorough conversations with each prospective juror—often delving into nuances of their responses on the juror questionnaire—the process seemed to proceed more efficiently.[66] Questions of removal for cause or by peremptory strike happened before the judge released the juror from the courtroom (using a private electronic call line). The judge informed jurors selected to serve on the jury that they would most likely serve before releasing them to go home to await additional instructions.[67]

B. Very Different Jury Questionnaires

The different tone of questions may have arisen in part from the amount of information available to the court and the attorneys from the jury questionnaires. Six months before the Chauvin trial, Judge Cahill brought up the challenges of selecting a jury, considering both COVID restrictions and the high-profile nature of the case. He informed the parties at a pre-trial conference in September 2020 that he intended to have jury summons sent out well in advance of the trial, and that the summons would include a questionnaire tailored to the unique facts of the case. Judge Cahill stated that the court would "put together a questionnaire and it [would] address pretrial publicity . . . [and] bias, things like that."[68] The judge asked for input on the items in the questionnaire.[69]

Defense counsel objected, arguing that the responses to the questionnaire would be unsworn.[70] Moreover, the defense argued, it "essentially taints the jury before we even get the questionnaire back."[71] Notwithstanding these objections, the judge made clear his position that the questionnaire was essential to get as much information as possible,[72] and he

66. *See, e.g.*, Transcript of Record, *supra* note 20, at 222–51 (questioning by both defense counsel and the prosecutor about Juror 8's answers on the juror questionnaire) (referring to Mar. 9th transcript date).

67. *See, e.g.*, *id.* at 285 (judge informs seated juror when to report back to court and to expect further instructions).

68. Transcript of Record at 34; State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Sept. 11, 2020) [https://perma.cc/MKV3-NZ3S].

69. *Id.*

70. *Id.* at 37.

71. *Id.* at 38.

72. Judge Cahill explained, "I think those who've tried cases before me know that I'm fairly strict on not allowing indoctrination questions, and that is to get information, not to give information . . . . I will consider anything that's brought to me, but it has to go toward appropriate voir dire topics. Not indoctrination, not hypotheticals, not imparting facts about the case." *Id.* at 57.

asked for counsels' assistance in devising the best questions to uncover bias.[73] We do not know the extent to which the parties agreed upon or disputed its contents, because unfortunately the court held the discussion about the specifics of the questionnaire off the record.

Whatever the off-the-record process of creating the questionnaire, the resulting product was remarkable in its sophistication, breadth, and depth. We discuss the content and form of the questions below, but the thoroughness of the questionnaire affected the quality and tone of the voir dire. The judge and lawyers were able to identify specific topics for each individual juror that warranted further exploration. This led to in-depth conversations about the jurors' attitudes and experiences, and how those might translate into how they viewed the evidence in that case. The result facilitated dialogues in which jurors were invited—through open questions citing their questionnaire responses—to explain themselves thoroughly, rather than to provide oversimplified yes/no responses to questions in which the socially desirable answers were obvious.[74]

In contrast, the jury questionnaire in the McMichael/Bryan case filled only three pages.[75] The second question asked potential jurors what they believed the facts of the case to be. The remainder of the questionnaire items narrowly focused on jurors' sources of information about the case and their familiarity with the location of and parties involved in the crime. Nothing in the questionnaire touched on the racial aspects of a case some have described as a "modern-day lynching."[76] Rather, the importance of racism to the case and to jury selection emerged on the first day of jury selection as the court reviewed the defendants' proposed general questions

73. *Id.* at 35.

74. However, a potential hazard of detailed juror questionnaires is that judges or attorneys may approach inconsistencies between a potential juror's response on the questionnaire and their response to questioning like they would a witness under cross-examination. For example, the court used a similar questionnaire in the trial of Kim Potter, another Minneapolis case involving allegations of excessive use of police force. Juror Questionnaire, State v. Potter, No. 27-CR-21-7460 (Minn. Dist. Ct. Nov. 16, 2021), https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-21-7460/Juror-Supplemental-Questionnaires-Form-50.pdf. While the questionnaires facilitated voir dire in much the same way they did in Chauvin's trial, they were also weaponized by counsel at some points. For example, defense counsel aggressively questioned Potential Juror 4 about discrepancies between her questionnaire responses to challenge her earlier reassuring assertions to the judge. Fox 9 Minneapolis-St. Paul, *Kim Potter Trial Livestream - Jury Selection Day 1*, YOUTUBE, at 01:12, 01:21 (Nov. 30, 2021), https://www.youtube.com/watch?v=fOS1Ht8mrxc&t=562s.

75. Juror Questionnaire, Georgia v. McMichael, No. CR 2000433 (Ga. Super. Ct. 2021), https://www.glynncounty.org/DocumentCenter/View/73064/Brunswick—-Juror-Questionnaire.

76. The Editorial Board, *Ahmaud Arbery was Murdered or, More Accurately, Lynched*, USA TODAY (Dec. 8, 2021, 10:18 PM), https://www.usatoday.com/story/opinion/todaysdebate/2021/11/24/ahmaud-arbery-modern-day-lynching/8723517002/ [https://perma.cc/RA3S-9CGS].

for the round of questions in which the prospective jurors raised their placards to respond.[77]

By the end of the discussion, neither the jury questionnaire nor the general questions in Georgia provided the attorneys with the kind of subtle understanding of each juror's thoughts on race and racism that the Minnesota attorneys learned through the carefully drafted questionnaire.

C. A Related Difference – Talking About Race – an Open vs. Constrained Conversation

As noted above, in the Chauvin trial, the context and history of discrimination in jury selection was part of the conversation. This started months before jury selection with the fourteen-page jury questionnaire that included two extra blank pages in case the juror needed extra room for answers. The questionnaire not only armed the judge and lawyers with sufficient information to efficiently direct their questioning to points of particular interest; it also addressed sensitive issues—namely race and policing—directly. The questionnaire started with an open question about what the juror knew about the case from media reports. It then asks a series of closed questions, typically with check boxes for possible answers, followed with an open question, such as "Why do you feel that way?" or "Please explain." These questions sought information regarding the potential jurors' impressions of the defendants and George Floyd, their exposure to the video of George Floyd's death, and participation in "demonstrations or marches against police brutality that took place in Minneapolis after George Floyd's death."[78]

Later questions asked about contact with police, including arrest, use of force, or experiences of being restrained or placed in a chokehold.[79] Question nine of the "Police Contacts" section used a five-level scale to assess the potential jurors' "honest opinions" about twelve statements on discrimination, racism, policing, and the criminal justice system. Statements included the following:

- "Discrimination is not as bad as the media makes it out to be."
- "Blacks and other minorities do not receive equal treatment as whites in the criminal justice system."
- "Police in my community make me feel safe."

77. 11Alive, *Death of Ahmaud Arbery Trial | Day 1*, YOUTUBE, at 01:01-2:02 (Oct. 18, 2021), https://www.youtube.com/watch?v=Khj-3htHL8g

78. Special Juror Questionnaire at 4, Minnesota v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Dec. 22, 2020), https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/JurorQuestionnaire12222020.pdf.

79. *Id.* at 6–8.

- "I support defunding the Minneapolis Police Department."[80]

The questionnaire also asked about support for both Black Lives Matter and Blue Lives Matter.[81] Later questions sought the prospective jurors' opinions about whether the jury system is fair and whether the criminal justice system works.[82] These questions served as a jumping off point for one-on-one conversations with each prospective juror.

The Chauvin jury questionnaire's unflinching discussion of the influence and importance of race set a foundation for the discussion of race and racism throughout the voir dire process. For instance, the defense asked Prospective Juror 52 about his response on the questionnaire that he "strongly disagreed" with the statement, "Discrimination is not as bad as the media makes it out to be."[83] The prospective juror explained that discrimination is much more frequent than the media could possibly report, but also that whether something constitutes discrimination depends on someone's perception. When asked whether police made him feel safe in light of his reported experience witnessing police slamming someone to the ground when they did not respond quickly to police orders, he said that incidents like that did not make him feel safe. He then noted, however, that he knew many officers at his gym and considers them great people.

Potential Juror 52 was further asked to explain his questionnaire responses that indicated favorable view of Black Lives Matter and his neutral view of Blue Lives Matter.[84] He explained that he did not view Black Lives Matter as an organization but instead as an expression of the desire for Black lives to be valued the same as others. He further explained that his less enthusiastic support for Blue Lives Matter stemmed from his impression that it was merely a reaction to Black Lives Matter, and that the two should not be in competition.[85]

What stands out from this exchange (which was not unique in this proceeding) was the willingness of the parties to let the potential juror explain his views in an unhurried and respectful way.[86] The potential

80. *Id.* at 7.

81. *Id.* at 8.

82. *Id.* at 11–12.

83. Transcript of Record at 1202–04, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 15, 2021) [https://perma.cc/T2ME-WAXL].

84. *Id*. at 1205–07.

85. *Id.*; *see also* Anna Offit, *The Character of Jury Exclusion*, 106 MINN. L. REV. 2173, 2189–92 (2022) (reviewing questions asked during jury selection in the Chauvin trial regarding systemic racism).

86. A common thread throughout the process was Judge Cahill's emphasis on listening to the potential juror's thoughts without trying to persuade them to agree with assertions that would make them more suitable as jurors. As Judge Cahill explained to one potential juror, "Every juror tries to be fair and impartial. I've never met one in my 14 years on the bench who does not try to be fair and impartial. But we have to push you and say based on what you know about this case and that can you, yes or no, be fair and impartial. And it's not a failure if you say yes, it's not a failure if you say no, it's

juror's opinions were elicited with open questions following up on the shorter statements made in response to the questionnaire.[87] While this might not seem remarkable, attorneys and judges typically conduct voir dire using closed questions for which the socially desirable response is obvious.[88]

In contrast, while the McMichael/Bryan court did conduct individualized questioning eventually, many sensitive issues were broached by requesting a show of hands from groups of potential jurors.[89] As noted earlier, the attorneys litigated the content of the group questions on the first day of jury selection.[90] The discussion highlighted the different approaches surrounding the importance of race and racism to the crime and the trial. The defense proposed seven or eight questions addressing the jurors' perceptions of and responses to racism. Several asked about the jurors' participation in demonstrations or support for Black Lives Matter. Others asked whether jurors believed Black Lives Matter and related demonstrations had been positive to the community, and whether they believed the media covered the demonstrations fairly. Proposed questions also solicited potential jurors' reactions to the "N-word," the Confederate flag, and the old Georgia state flag.

The prosecution objected to every single question in this group, arguing that the Black Lives Matter movement and the national anti-racism demonstrations had "absolutely nothing to do with this particular case."[91] Defense counsel addressed the issue more directly. One defendant's attorneys asserted, "that race is an issue in this case."[92] A second defendant's attorneys then contradicted the first, noting, "Your honor, for the record, we do not believe this is a case about race."[93] After a full hour of argument on these questions, the judge permitted several questions on race, including the question about the Confederate flag.[94] But he excluded

just what it is. Kind of given that, as opposed to can you try, ultimately knowing yourself, can you be?" Transcript of Record at 2592, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 23, 2021). To another, he noted, "I've said a few times during voir dire, just saying the magic words I can be fair and impartial does not end the Court's inquiry. The Court has to consider the totality of the circumstances and decide if it has been established, that they cannot be fair and impartial." Transcript of Record at 212–526, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 19, 2021) [https://perma.cc/5PLF-UC5R].

87. Transcript of Record, *supra* note 83, at 1205 ("And you wrote, 'Black lives just want to be treated as equals and not killed or treated in an aggressive manner simply because they are Black.' Can you explain that a little bit more?").

88. *See* Grosso & O'Brien, *supra* note 13, at 515, 530.

89. *See* Selection Begins, *supra* note 43, at 1:21 and following.

90. *See* Trial Day Twelve, *supra* note 46, at 02:10.

91. Selection Begins, *supra* note 43, at 01:24–01:26.

92. *Id.* at 01:35.

93. *Id.* at 01:50.

94. *Id.* at 01:54–02:02

most as duplicative, noting, for example, "I don't want to spend ten, twelve questions dealing [with] that issue," referring to racism.[95]

Following the process explained above, by the afternoon of day one and on almost every day for the next ten days, the attorneys asked these "general questions" to the jurors in rapid succession, furiously noting the numbers for the jurors who raised their placards. Again and again, jurors were asked to raise their hands if they thought that people of color are not treated fairly in this country, or whether the Confederate flag is a racist symbol. While their responses could eventually be addressed privately in individualized voir dire, it is not unreasonable to think that at least some of the potential jurors who would have answered affirmatively on a pre-trial questionnaire hesitated to raise their hands in such a public and high-profile setting.[96]

The conversations also differed in the subtlety with which jurors were invited to think and talk about race and racism. While we are not privy to the off-the-record conversation among the judge and attorneys in the Chauvin case, the resulting juror questionnaire includes nuanced questions about race—particularly regarding how police treat Black Americans.[97] It seems clear that long before trial, significant work went into crafting the questionnaire, and that disputes about the nature of the questions asked of prospective jurors were resolved long before voir dire began. This preparation allowed the court and attorneys to target questioning to the most salient issues for each prospective juror. In contrast, the McMichael/Bryan case started the process with less information about the potential jurors and with several issues about how the questioning would proceed unresolved. The parties argued about appropriate topics of questioning on the morning jury selection began and even then, at best, collected limited responses to tightly closed yes-and-no questions.[98] The quality of the argument over the prosecution's reverse-*Batson* motion discussed in the next section illustrates both the increased frustration and decreased quality of the voir dire that resulted.

D. Cooperation vs. Contentiousness

In our final observation, the voir dire in the Chauvin and McMichael/Bryan cases differed significantly in tone. In the McMichael/Bryan trial, media outlets reported conflict and tension in the

95. *Id.* at 01:55.

96. No audio is available for the individualized voir dire in the McMichael/Bryan case.

97. *See supra* text accompanying notes 78–82 (providing details on the Chauvin jury questionnaire).

98. *See* Selection Begins, *supra* note 43, at 01:07–01:50.

courtroom during voir dire on several occasions. News coverage reported that Judge Walmsley "appeared to grow frustrated at the slow pace" of jury selection.[99] Another article noted, "The judge overseeing the trial of the three men charged in Ahmaud Arbery's 2020 shooting death expressed frustration Tuesday at the pace of jury selection."[100] It further noted that Judge Walmsley said, "I do not have the ability to just store people or keep them longer than planned. . . . I am not comfortable with this. At the rate we're going, all these plans we have to move these panels through are not going to work."[101]

The argument around the prosecutor's reverse-*Batson* challenge at the very end of jury selection provided an even more striking glimpse into the tone and tenor of individual voir dire.[102] The rule in *Batson v. Kentucky*[103] prohibiting the exercise of peremptory challenges on the basis of race applies equally to defense counsel.[104] A party seeking to establish a *Batson* violation first must establish a prima facie case that the opposing party exercised a peremptory strike on the basis of race.[105] The judge must rule on whether the moving party meets this first burden.[106] As noted, the prosecutor asked the judge to find a violation of *Batson* and to reseat eight of the eleven Black potential jurors removed by defense peremptory strikes. The judge found a prima facie case under *Batson* "based on the numbers alone."[107]

The court then invited defense counsel to present the required race-neutral reasons for each of the eight Black jurors removed by a defense peremptory strike and challenged by the prosecution under *Batson*.[108] With respect to the first juror, defense counsel produced a list of facts suggesting that the juror would be biased again their clients, concluding "The decisions we had to make is [sic] the epitome of the lesser of two evils. . . the majority of the African Americans jurors that came in here were struck

99. Angela Barajas, Martin Savidge & Christina Maxouris, *It's Proving Difficult to Find a Jury in the Trial for Ahmaud Arbery's Killing*, CNN (Nov. 12, 2021, 10:19 PM), https://www.cnn.com/2021/10/23/us/ahmaud-arbery-jury-selection-process-difficult/index.html [https://perma.cc/9GM4-WYWT].

100. Abusaid & Rankin, *supra* note 40.

101. *Id.*

102. *See* 11Alive, *Death of Ahmaud Arbery Trial | Final Part of Jury Selection*, YouTube, at 05:37 (Nov. 3, 2021), https://www.youtube.com/watch?v=xSOJvQrfUT0.

103. 476 U.S. 79 (1986)

104. *See generally* Georgia v. McCollum, 505 U.S. 42 (1992) (extending the rule in *Batson* to the exercise of peremptory strikes by defense counsel).

105. *See Batson*, 476 U.S. at 96–98 (stating the process for establishing and evaluating a *Batson* challenge).

106. *Id*.

107. *See* 11Alive, *supra* note 102, at 05:44.

108. *See Batson*, 476 U.S. at 97–98 (explaining the requirement that the *Batson* respondent provide neutral explanations for each strike).

for cause immediately because of their firm opinions."[109] The prosecution responded by arguing that the defense's conclusions of bias in the case of one particular Black female juror were not supported by the content of the individual voir dire and that her attitude reflected the attitudes of most of the potential jurors.[110] Defense counsel objected that the prosecution's arguments were improper because they did not directly rebut the defense's purportedly race neutral reasons to strike the juror.[111]

The Court stepped in, noting that arguments about the genuineness as well as reasonableness were cognizable.[112] The court noted, "In this particular case where I have eight separate individuals we are going to be discussing and eleven individuals total of this particular class. I do think it is appropriate to hear from the State on what we have done with these individuals and how we have reached them, qualified them, and gotten them here, and compare that to other individuals that ended up on the panel that did not get struck."[113] Undeterred, defense counsel continued to argue until the court noted with some exasperation, "Why do I feel like we just said the same thing?"[114]

For almost two hours, the court listened to arguments about each juror. Each side regularly questioned the other side's notes, veering toward questioning the motives and ethics of opposing counsel. The judge repeatedly reminded the attorneys, "Let's try to keep it on a professional level, it's the nature of the motion itself."[115] On another occasion, he reminded them that "[y]ou all have heard from me before. This does not go back and forth between counsel."[116]

While individualized voir dire was not broadcasted, the arguments about the *Batson* claims suggest that the tone of the individual voir dire was also contentious. The prosecution recounted the defense cross-examination of a juror,[117] noting that defense counsel's "tone was to get this juror's back up and to imply to this juror that he was unbelievable" and that the juror got upset.[118] The prosecutor subsequently accused the defense of badgering Black potential jurors in an effort to create the basis for cause strikes.[119]

109. Trial Day Twelve, *supra* note 46, at 05:48–05:54.
110. *Id.* at 05:54–05:57.
111. *Id.* at 05:57–05:58.
112. *Id.* at 05:58–05:59.
113. *Id.* at 05:59.
114. *Id.* at 06:01.
115. *Id.* at 06:26.
116. *Id.* at 06:09.
117. *Id.* at 06:20.
118. *Id.* at 06:21.
119. *See id.* at 07:26–07:28.

Other parts of the argument suggest that attorneys—at least on a few occasions—objected to each other's questions during individual voir dire. The judge notes, for example, "You explained your two questions. I told you to go ahead with the first one, and not the second one. And then you chose to start discussing the court's ruling. The court's ruling is what it is. . . . Go ahead and ask the questions."[120] In the end, Judge Walmsley ruled that the strikes could stand, as the defense counsel provided racially neutral reasons as required by Georgia law.[121]

These tensions continued well past jury selection. At one point in the trial, defense counsel Kevin Gough, who represented William Bryan, objected to the presence of Reverends Al Sharpton and Jesse Jackson in the courtroom, stating that "[w]e don't want any more Black pastors coming in here."[122] Judge Walmsley rebuked Gough for this statement, noting that people were coming to watch the trial "directly in response . . . to statements *you* made, which I find reprehensible."[123] As the Washington Post reported:

> Walmsley suggested he was losing patience with Gough. "At this point I'm not exactly sure what you're doing," he said, noting that he already ruled on the matter of courtroom guests. "And with all candor, I was not even aware that Reverend Jackson was in the courtroom until you started your motion."[124]

We have not identified any evidence of similar tensions in the Chauvin pre-trial or trial transcripts. Nor did any news reports of which we are aware raise these concerns. Moreover, Judge Cahill consistently reassured potential jurors that they would not be judged or scolded for their responses and emphasized that they were seeking, above all, candor about their thoughts and opinions about the case. Prior research has shown that incorporating affective components in voir dire questions, such as expressions of reassurance or concern for the potential juror, improves the

120. *Id.* at 07:04.

121. *Id.* at 08:05–08:11 (issuing the ruling, citing *Batson v. Kentucky*, 476 U.S. 79 (1986), and noting that "at least in the state of Georgia, the court, if it hears a legitimate nondiscriminatory clear, reasonably specific, and related reason, and a reason related to the case, that is usually enough to get the court to a finding . . . where the panelist does not need to be reseated"). Judge Walmsley notes on the record that Washington State has a more specific and exacting standard. *Id.* See *supra* notes 25–28 and related text for information on the Washington State jury selection reforms.

122. Hannah Knowles, *Judge Rejects Mistrial Request in Arbery Case, Calls Defense Lawyer's Comments 'Reprehensible'*, WASH. POST. (Nov. 15, 2021, 5:48 PM), https://www.washingtonpost.com/nation/2021/11/15/arbery-mistrial-judge-gough/ [https://perma.cc/6XJ6-YQ3E].

123. *Id.*

124. *Id.*

quality of juror responses, particularly in conjunction with open ended questions.[125]

CONCLUSION

One must be cautious in drawing broadly applicable lessons from two trials, particularly when they are as high-profile and controversial as the Chauvin and McMichael/Bryan cases. But when viewed through the lens of what research has already shown us about best practices in jury selection, the ways in which these trials proceeded along different paths illustrate how adherence to best practices can enhance the information-gathering process. We can draw some lessons by comparing jury selection in these two trials.

First, jury selection takes time. Cutting corners by rushing can lead to inefficiencies that ultimately slow the process down anyway. Some matters can be handled more efficiently with a group of potential jurors rather than in individualized voir dire—such as general instruction about the law or inquiries about life circumstances that would render jury service an undue hardship for some potential jurors. However, questions related to the potential jurors' attitudes and beliefs that bear on their fitness to serve are best explored one-on-one to promote candor and minimize confusion about what questions each juror was asked and how they answered. Individual voir dire is particularly important when race is involved. Conversations about discrimination and racial justice are difficult enough for many people; the reluctance to voice an opinion contrary to what a potential juror believes the court wants to hear is hard to overcome. When the judge solicits it through a show of hands in a group, rather than through open-ended questions directed at a particular juror in a questionnaire or as part of a one-on-one conversation, the temptation to stay quiet must be overwhelming.

Second, it is well worth the effort for the parties to jointly craft a nuanced pre-trial juror questionnaire that probes potential jurors' relevant attitudes and pre-existing knowledge about the case. The process of drafting the questionnaire allows the court to resolve disputes about appropriate topics of inquiry and lays the ground rules for attorneys as to the proper scope and form of their questioning. It also makes the process of voir dire more efficient by allowing the court and attorneys to narrow their inquiries to the most relevant aspects of the potential juror's attitudes and prior experiences.

125. Grosso & O'Brien, *supra* note 13, at 537, 537 fig.1.

Third, contentiousness among the judge and attorneys undermines the jury selection process. We recognize that this is perhaps the most frustrating observation because there are no easy solutions. A judge can influence the tone, but he or she cannot unilaterally impose a spirit of cooperation. Trials are, after all, adversarial by design. Judges matter, but they face constraints and competing considerations in how they run their courtrooms.[126]

Finally, we note that the rare opportunity to watch live video recordings of voir dire in these two cases provided a unique window on the workings of our system. This opportunity expanded our collective understanding of some of the best practices for working with willing citizens in the criminal legal system.

126. Judge Walmsley reflected on these constraints in a talk he gave at Stetson Law in March 2022. While he did not directly address the verdict in the McMichael/Bryan trial, he noted some of the challenges he faced in overseeing such a high-profile, racially charged case during a pandemic and in a court outside of his home jurisdiction. *Judge Timothy Walmsley Gives Moving Talk on Diversity*, STETSON TODAY (Mar. 25, 2022), https://www2.stetson.edu/today/2022/03/judge-timothy-walmsley-gives-moving-talk-on-diversity/ [https://perma.cc/YA2J-C9X8].