

CHAPTER 4

CONDUCTING THE TRIAL

Chapter 4 - Conducting the Trial

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CONDUCTING THE TRIAL

4.01 KEY POINTS

- Article I, Section 16 of the Florida Constitution, and the Sixth Amendment of the U.S. Constitution, both give each defendant the right to a jury trial in all criminal prosecutions.
- Rule 3.251 tracks the language of Article I, Section 16 and provides that “[I]n all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury...”
- However, a defendant’s right to a trial by jury has been judicially limited to only those crimes which are considered to be “serious” as opposed to crimes considered to be “petty.” The Supreme Court in *Whirley v. State*, 450 So. 2d 836 (Fla. 1984) has enumerated four classes of serious crimes as to which a defendant is entitled to a jury trial:
 - crimes that were indictable at common law
 - crimes that involve moral turpitude
 - crimes that are malum in se or inherently evil; and
 - crimes that carry a maximum penalty of more than six months in prison.
- Section 918.0157, Florida Statutes states that a defendant has the right to a trial by jury unless:
 - Court announce that in the event of a conviction of the crime or any lesser included offense a sentence of imprisonment will not be imposed and the Defendant will not be adjudicated guilty; and,
 - The right to a trial by jury is not guaranteed under the State or Federal Constitution.
- Waiver of Jury Trial
 - Make sure defendant understands his/her right to have a jury trial.
 - Determine that the defendant understands the difference between a jury and non-jury trial.
 - Determine that decision is freely and voluntarily being made.
 - Court makes findings of fact regarding the voluntariness of defendant’s decision.
 - Have defendant execute a waiver of jury trial affidavit and file in court file.

- State must join in waiver.
- Steps in Jury Trial
- Call Jury panel.
 - Explain importance of jury's role and function of all court personnel. Advise of court's schedule and when breaks will be given.
- Voir Dire
 - Question jurors -- Court may use standard questionnaire previously given to jurors.
 - State then ask questions
 - Defense then asks questions
- Jury selection.
 - Each side has unlimited challenges for cause and three peremptory challenges per defendant.
 - State challenges
 - Defense challenges
 - State tenders
 - Defense tenders
- Swear jury.
 - Swear alternate juror separately. Ask: any objection to jury panel? Has defendant attorney consulted with defendant re: jurors?
 - Have record reflect presence of defendant and his/her attorney
- Read preliminary instructions - 1.01
- Opening Statements
 - State opens to jury
 - Defense opens - defense may reserve opening until close of state's case
- Testimonial Phase
 - State calls witnesses - clerk swears in each witness
 - State rests
 - Defense motions (jury out)
 - Ensure that attorney does not argue the facts - only the law
 - Find out, outside jury's presence, if the defense will be putting on a case
Defense's case
 - Defense calls witnesses - clear swears each witness
 - Defense rests
 - State presents any rebuttal evidence

- Charge conference - outside of jury's presence
- Closing argument
 - Defendant goes first and last if defendant presents no evidence, whether or not defendant testifies
 - State goes first and last if defendant presents any evidence
- Jury charge
 - Read information or charges verbatim
 - Definitions
 - Standard instructions
 - Special instructions
 - Read form of verdicts to jury
 - Ask if any objections to any charges or form verdicts
- Jury deliberations
- Verdict
 - Ask jurors if an agreement has been reached
 - Ask foreperson to hand verdict form to clerk and have clerk read
 - Poll jury if requested - Is this your verdict?
- Discharge jury
 - Read discharge instructions and hand out certificates
 - If not guilty verdict, "Mr./Ms. defendant, the jury having found you not guilty, I hereby adjudicate you not guilty and forever discharge you from this case."
- Sentencing
 - If guilty verdict, ask: "Is there any legal reason why sentence should not be imposed?" (attorney and defendant speak)
 - "Mr. or Ms.(defendant), the jury having found you guilty of _____, I hereby adjudicate you guilty or withhold adjudication and impose the following sentence:"
- Right to appeal
 - "You are now advised that it is your right to appeal from the judgment and sentence within 30 days."
 - If there is a jail sentence, set a supersedeas bond. Supersedeas bond cannot be posted until a notice of appeal is filed

4.013 Peremptory Challenges

- Peremptory challenges may not be used to challenge potential jurors based on the juror's race, religion, ethnicity or sexual differences.
- At present the case law has established the following "cognizable groups":
 - African-American: (State v. Neil, 457 So.2d 481 (Fla. 1984).
 - Hispanics: State v. Alen, 616 So.2d 452 (Fla. 1993)
 - American Indians: Tennie v. State, 593 So.2d 1199 (Fla. 2d DCA 1992)
 - Jews: Joseph v. State, 636 So.2d 777 (Fla. 3d DCA 1994)
- White jurors: Rome v. State, 627 So.2d 45 (Fla. 1st DCA 1993);
 - McClain v. State, 596 So.2d 800 (Fla. 1st DCA 1992), requiring a heavier burden to establish invidious racial discrimination when dealing with the majority race
- Women: Abshire v. State, 642 So.2d 542 (Fla. 1994).
 - Men: Drawdy v. State, 644 So. 2d 593 (Fla. 2 DCA 1994).
- The party objecting to the use of a peremptory challenge on racial grounds must:
 - make a timely objection on that basis;
 - show the venire person is a member of a distinct racial group, and;
 - request that the court ask the striking party its reason for the strike. Melbourne v. State, 679 So.2d 759 (Fla. 1996).
- The Court's focus in determining whether a strike is facially race-neutral and not pretextual is not on the reasonableness of explanation but, rather, on its genuineness. Melbourne, supra.
- Procedure:
 - Party objects to the exercise of a peremptory challenge (applied to either party).
 - Party must specifically state each time:
 - I object to use of challenge against _____(juror 's name).
 - Juror is a (cognizable group).
 - Request court ask striking party its reason for strike.
 - Court must conduct a hearing.
 - Court asks party exercising challenge to give a race/ethnic/gender-neutral reason for striking juror (reason must be supported by the record).
 - Court determines if reason is valid in light of the case law and facts of the case. (Genuineness not reasonableness).
 - The court must determine if reason is genuine and not pretextual. If the Court concludes that the proffered reason is genuine, it should allow the peremptory challenge. If the Court finds that the proposed explanation is not genuine, it should disallow the peremptory challenge and require that the juror be seated.

AUTHORITIES

Sixth Amendment, United States Constitution
Article 1, Section 16, Florida Constitution

Florida Rules of Criminal Procedure:

- 3.250 - Accused as Witness
- 3.251 - Right to Trial by Jury
- 3.260 - Waiver of Jury Trial
- 3.270 - Number of Jurors
- 3.280 - Alternate Jurors
- 3.281 - List of Prospective Jurors
- 3.290 - Challenge to Panel
- 3.300 - Voir Dire Examination, Oath, and Excusing of Member
- 3.310 - Time for Challenge
- 3.315 - Exercise of Challenges
- 3.330 - Determination of Challenge for Cause
- 3.340 - Effect of Sustaining Challenge
- 3.350 - Peremptory Challenges
- 3.361 - Attendance of Witnesses
- 3.440 - Rendition of Verdict; Reception and Recording
- 3.450 - Polling the Jury
- 3.451 - Judicial Comment on Verdict

Florida Statutes:

- Section 40.01 - Qualifications of Jurors
- Section 40.013 - Persons Disqualified or Excused from Jury Service
- Section 918.0157 - Right to Trial by Jury

Case Law:

- State v. Thorp, 659 So.2d 116 (Fla 2 DCA 1995)(State must consent to waiver of jury trial)
- Whirley v. State, 450 So. 2d 836 (Fla. 1984)

TIPS/NOTES

CHECKLISTS/FORMS

Faretta Inquiry - Trial Stage

- Right to Counsel Section

Do you understand that you have the right to a lawyer? If you can't afford to hire your own lawyer, and if you qualify for a court appointed lawyer, one can be appointed for you.

- That State of Florida will pay for a lawyer to advise you in these Court proceedings.
- Shall I appoint a lawyer to represent you in this case?

- Advantages Section

I would like to begin by explaining to you some of the ways that having a lawyer represent you can be to your advantage:

- A lawyer has the experience and knowledge of the entire trial process.
- The lawyer can call witnesses for you, question witnesses against you, and present evidence on your behalf.
- The lawyer will question potential jurors. The lawyer also has the experience to know which jurors will be in your best interest.
- A lawyer can advise of the harm and consequences of what you say in court and what you have a right not to say.
- Do you understand that a lawyer will object to those questions that are improper?
- Do you understand that a lawyer has studied the rules of evidence and knows what evidence can or can not come into your trial?
- And finally, do you understand that a lawyer will argue for your side during the whole trial and present the best legal argument for your defense?

- Disadvantage Section

As it is almost always unwise to represent yourself in court, let me tell you a few of the disadvantages of representing yourself in court:

- Do you understand that you will not get any special treatment from the Court because you are representing yourself?
- You also must follow all the procedural and substantive rules of criminal law. The same laws which took lawyers years to learn and abide by.
- (If defendant is in custody) You will be limited to the resources that are available to you while you are in custody. A lawyer has less restrictions in researching your defense.
- Do you understand that your access to the assistant state attorney will be severely reduced as compared to a lawyer who could easily contact the assistant state attorney.
- As well, the State will not go easier on you or give you any special treatment because you are representing yourself.
- The State will present its case against you using an experienced lawyer.
- Do you understand that if you are disruptive in the courtroom that the Court can terminate your self-representation and remove you from the courtroom? In that

situation the trial will continue without your presence.

- If a “stay away order” is in effect you will be prohibited from contacting the victim and any other witnesses who are part of the “stay away order”. On the other hand, a lawyer is allowed to speak to these people and question them regarding their testimony.
- Finally, if you do get convicted, you can not claim your own incompetence as a basis for appeal.

- Charge and Consequences Section

- Have you received and read a copy of the charges against you?
- Do you understand all the charges against you?
- Do you understand all the possible penalties if you are found guilty of all the charges?
- If you are found guilty by the jury the maximum jail sentence is _____ and the minimum sentence is _____.
- You may be forced to report to a probation officer for _____.
- You may have a permanent criminal record.
- Do you understand that if you are not a citizen of the United States, and if you are found guilty you could be deported from the country, excluded from entering this country, and denied the opportunity to become a naturalized citizen?

- Competency Section

I need to ask you a few questions about your background:

- Can you read? Can you write? Do you have difficulty understanding English?
- How many years of school have you completed?
- Are you under the influence of drugs or alcohol?
- Have you ever been diagnosed and treated for a mental illness?
- Has anyone told you not to use a lawyer?
- Has anyone threatened you if you use a lawyer?
- Do you understand that a lawyer will represent you for free?
- Have you ever represented yourself in a trial? What was the outcome of the case?
- Do you have any questions about having a lawyer appointed to defend you?
- Do you understand the dangers and disadvantages of representing yourself in court?
- **Are you certain that you do not want me to appoint a lawyer to defend you?**
- As an alternative to self-representation, if you would like, I could ask the public defender to act as standby counsel if you have any questions in the course of these proceedings. Would you like standby counsel?

- Sample Colloquy - Waiver of Jury Trial

- Mr./Ms. (Defendant), you have indicated that you wish to waive your right to a jury trial.

- Do you understand that you are being charged with _____?
 - Mandatory minimum sentence is _____(if there is one) and the maximum sentence is_____.
 - Do you understand that you have a right to have the case heard by a jury of six (6) people?
 - Do you understand that you may give up that right, and instead, have the case heard by me without a jury, in which case only one person will decide the facts?
 - Do you understand that while your attorney may advise you on these matters, the decision as to whether the case should be tried by a jury of six (6) people, or by a judge, has to be your own decision?
 - Do you wish to give up the right to have the case heard by a jury, and instead, have the case heard by a judge? Has this been your decision?
 - Has anybody forced you or threatened you in any way to enter into this decision?
 - Are you making this decision freely and voluntarily and because you feel it is in your best interest?
 - Do you understand that, if I accept this waiver from you and later on you change your mind and decide you would rather have the case heard by a jury, you will not have the opportunity to have a jury trial?
 - Knowing all of this, do you still wish to go ahead and give up your right to a jury trial?
- Court's Findings
 - I am satisfied that the defendant is knowingly and intelligently and freely and voluntarily giving up his/her right to a jury. I will accept the waiver.
 - Mr./Ms. Defendant, please sign the written form to indicate that it is your wish to have the case heard by a judge without a jury.

ORDER WAIVING JURY TRIAL

IN THE COUNTY COURT, IN AND
FOR _____ COUNTY, FLORIDA
_____ JUDICIAL CIRCUIT

CASE NUMBER: _____

STATE OF FLORIDA

Plaintiff,

vs.

_____,
Defendant.

ORDER WAIVING JURY TRIAL

Upon stipulation of the Defendant and the State, the above-styled case will be tried by the Court.
The Defendant hereby waives his/her right to a trial by jury, and the State agrees to such waiver.

Defendant

State of Florida

Filed in Open Court

This ____ Day of _____, _____.

Deputy Clerk

DONE AND ORDERED this _____ day of _____, 20____,
at _____ County, Florida.

County Court Judge

- **Sample Colloquy for Prospective Jurors**

- o Good morning. Welcome to the _____ County Courthouse. I am Judge _____, County Judge of the _____ Judicial Circuit. The _____ Judicial Circuit includes _____ and _____ Counties. There are presently _____ county court judges and _____ circuit judges in the _____ Judicial Circuit.
- o Why are you here? I am sure that some of you asked yourself that very question when you received the jury summons in the mail. Why me?
- o I think it is important for the Court to answer that question for you. The entire concept of jury service should be put into proper perspective so that your efforts this week will be more meaningful to you. You are being asked to perform one of the highest duties that can be imposed on a citizen--that is to sit in judgment of civil disputes or determine the guilt or innocence of a person charged with a crime.
- o Our jury system is not perfect. It will never be perfect because it is run by humans and none of us are perfect, but it is the best system yet devised for the settlement of disputes between citizens or between a citizen and his/her government.
- o You as citizens of the United States enjoy the privileges of citizenship and the protection of your liberties and property by the government. Therefore, in return you have a duty as a citizen to participate in some very important aspects of your democracy.
- o Citizens serve their government in many ways such as serving in the armed forces, holding public office, voting and paying taxes. Of all of these, being a juror is the most direct participation in government. When a case is submitted to a jury and it retires to deliberate in order to render a verdict, that jury is the government. It happens in _____
- o Hundreds of cases in hundreds of courtrooms in every state in this country every day. It places an impartial group of citizens in charge of democracy and assures that the search for truth will not be tainted with governmental oppression. It is the most solemn duty and responsibility that a citizen has to his or her government.
- o While I realize that it is an inconvenience to almost all of you coming here, the system will not work without the participation of citizens from a cross section of the community with different experiences and different backgrounds. It means every person who comes into the courtroom has a right to be seated in this jury box; side by side with people who are formally educated and those educated by life and experiences, those of different religions, cultures, races, and gender.

- o WHY ARE YOU HERE? In sum, you are not only here today to perform your civic duty to serve on a jury, but you are also ensuring the survival of our democracy.
- o Now I am going to address some of the more common procedural questions about jury duty.
- LENGTH
 - o Usually your jury service is for one day or two at the most. We usually don't have cases that should last several days or weeks. If there is a trial that will be lengthy in duration, you will be notified of this so that if you have any problems with the length you can notify the court.
 - o Usually jurors work a normal business day--from 9 o'clock a.m. until 5 o'clock p.m. Occasionally cases require we go longer than that, and if that is the case we try to let you know in advance so that you can plan.
 - o You need to understand that trial by jury cannot proceed in a mechanical fashion. This is a human system. Matters continually come up that need to be taken up outside the presence of the jury. Some of these matters will be of short duration, and other matters will be of much longer duration. We will try our best to make sure that as little of your time is consumed in waiting as possible. But as a practical word of caution, there will be periods of waiting. So I encourage you to bring reading material or letter writing materials or other activities which can be done during these periods of waiting. And people will be communicating with you on an intermittent basis to let you know what's happening.
- THE QUESTIONING OF JURORS
 - o You will be required to take two oaths before you can serve as a juror. First, you will be sworn to answer truthfully all questions asked of you regarding your qualifications to serve. Then, when you are called to a panel for a particular case, the judge and the lawyers will ask additional questions of you regarding your background. The latter questioning is called "voir dire" examination.
 - o During voir dire some of the questions may seem personal, but the questions are not intended to embarrass or reflect upon a juror in any way. Lawyers have a duty to ask questions to assist them in deciding which jurors to select.
 - o A juror may be excused "for cause" when the judge is of the opinion that the juror cannot render a fair and impartial verdict. The attorneys can also exercise a limited number of "peremptory challenges," by which they may excuse a juror without stating any reason. If a juror is challenged or excused, it is not a reflection on the juror in any way. That a juror is excused means simply that in the particular case it is proper and lawful to excuse him or her. Those jurors who are

selected to try a particular case are then sworn.

- WHAT DOES A JURY DO?

- o It will be your duty to decide from the evidence what the facts are. You hear the evidence and then decide the facts. You and you alone are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law which the Court will give to you.
- o In a criminal case you will decide whether or not the State has proved its case beyond a reasonable doubt against an accused. In a civil case you will decide if the plaintiff has proved his/her case by a preponderance of the evidence against the defendant.

- ANSWERS TO QUESTIONS COMMONLY ASKED

- o What is the difference between a criminal and civil case?
 - Cases which come before a petit jury are divided into general classes: **Civil** and **Criminal**. If it's a case where there is a possibility of the loss of liberty, then it is a **Criminal** case. In a Criminal trial, the persons bringing the action are the people of the State of Florida, represented by the "prosecutor." The "defendant" is a person or corporation accused of a violation of law. If it's a case in which people are trying to seek monetary results, then it is a **Civil** case. In a Civil trial, parties in dispute come into court to determine and settle their respective rights. The person who brings an action against another is the "plaintiff." The person against whom the action is brought is the "defendant."
- o If it is a criminal case, what is the difference between a felony and a misdemeanor?
 - In a **felony case** a person can go to the state prison for more than a year and one day. In a **misdemeanor case** a person can go to the county jail for up to one year. A person can only be sentenced to a year or less.
- o What is the difference between the circuit court and the county court?
 - CIRCUIT: Criminal-over one year incarceration.Civil - over \$15,000
 - COUNTY: Criminal-one year or less incarceration.Civil - up to \$15,000
- o How many jurors serve on each case?
 - In all cases in Circuit and County court, in civil and criminal cases, there are 6 jurors that serve on the jury. There are two exceptions: 1) If the government is seeking the death penalty in a criminal; or 2) If the

government is seeking to take your land in a civil case(eminent domain), then there are 12 jurors.

- QUALIFICATIONS OF THE JURORS

- o Now I will qualify you as jurors. Please stand and raise your right hand.
- o Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors?
- o The questions I will now ask you are divided into those the usual answer to which is “Yes”, and those usually answered “No.” If your answer is different from the usual answer, please call yourself to my attention:

- QUALIFYING QUESTIONS FOR PROSPECTIVE JURORS

- o Are you at least 18 years of age? **Required, F.S. 40.01**
- o Are you a citizen of Florida? **Required, F.S. 40.01**
- o Are you a full time federal, state or local law enforcement officer? **Excuse if requested, F.S. 40.013(2)(b)**
- o Are any of you expectant mothers? **Excuse if requested, F.S. 40.013(4)**
- o Are any of you parents not employed full time who have custody of a child under the age of six? **Excuse if requested, F.S. 40.013(4)**
- o Are any of you practicing attorneys or physicians?

- **Judge’s discretion, F.S. 40.013(5)**

- o Do any of you have a physical infirmity that would render you incapable of being a fair and impartial juror attentive to all the evidence and law? **Judge’s discretion, F.S. 40.013(5)**
- o Are any of you over 70 years of age? **Excuse if requested, F.S. 40.013(8)**
- o Are any of you responsible for the care of a person who because of mental illness, retardation, senility or other incapacity is not able to take care of himself? **Excuse if requested, F. S. 40.013(9)**
- o (If any of you is required to give an affirmative answer to the next question, please come forward at the end of my questions to discuss this matter). Have any

of you been convicted of bribery, forgery, perjury, larceny or any other felony and your civil rights have not been restored? **Required, F.S. 40.013(1)**

- o Is anyone under prosecution at this time for any crime either in state or federal court? **Required, F.S. 40.013(1)**
 - o The court realizes that service on a jury panel is not always convenient. There may be instances where service would be much greater than a mere inconvenience and would constitute a great hardship to an individual or his/her family.
 - o Under these circumstances, the court may excuse a juror for good cause of postpone the time of service to a later date.
 - o If because of hardship, extreme inconvenience or public necessity you wish to be excused from jury service, please form a line in front of the bench and we'll address that. **F.S. 40.013(6)**. (learn nature of problem. After hearing the problem, make ruling).
- **FINAL REMARKS**
 - o Jury service never comes at a convenient time. And we who work daily in the court system realize that. It is our hope that this week we can take steps to minimize your inconvenience. The court personnel are here to assist you and make your week of service as pleasant as possible. It is our goal to allow you to go about your business unless you are actually needed. You should not read law books, visit the scene of any occurrence in a case, or perform any independent investigation. Everything that you will need to know about a case will be presented to you in the courtroom.
 - o Thank you for your patience. I hope that at the end of this week you will find that this was a rewarding and interesting experience; or at least that you will feel that you have done your part to insure that our democratic system of justice continues.

- **Sample Colloquy for Note Taking - Permitted**

- Notepads and pens have been provided to you so that you may take notes during the trial if you so desire.(or: There has been a request from one of the jurors to take notes.) The taking of notes by jurors is discretionary with the trial judge. I am going to exercise that discretion by allowing you to take notes during the trial and to carry those notes with you to the jury room during your deliberations.
- However, there are some dangers associated with note taking by jurors about which I will caution you.
- First, there is the possibility that a person may become so engrossed in taking notes that he or she may fail to see or hear other evidence, or he or she may fail to appreciate the demeanor of a witness.
- Also, when a juror uses his or her notes during the jury's deliberations, there may be a tendency for other jurors to rely on those notes and to abandon their own recollection of the evidence.
- If your recollection of the evidence differs from the notes taken, you should not abandon that recollection merely because of what is contained in the written notes. You should therefore not allow the opinion or position of a juror who is relying on written notes to be given greater weight solely because of his or her notes.
- After you have completed your deliberations, your notes will be placed into an envelope which will be provided to you when you retire to consider your verdict. The notes will be delivered to me at the end of the trial and I will personally destroy them--unread.
- You are instructed that although note pads have been furnished, you are not required to take notes.

- **Sample Colloquy for Note Taking - Not Permitted**
 - There has been a request by one of the jurors for permission to take notes during the trial. The taking of notes by jurors is discretionary with the trial judge. I am going to exercise that discretion by not allowing you to take notes during the trial.
 - There are dangers associated with note taking by jurors during the trial.
 - First, there is the possibility that a person may become so engrossed in taking notes that he or she may fail to see or hear other evidence, or he or she may fail to appreciate the demeanor of a witness.
 - Also, when a juror uses his or her notes during the jury's deliberations, there may be a tendency for other jurors to rely on those notes and to abandon their own recollection of the evidence. Further, the opinion or position of a juror who is relying on written notes may be given greater weight by the other jurors solely because of his or her notes.
 - For these reasons, I am not going to permit you to take notes during the trial. I am going to ask that you pay careful attention to the evidence presented at trial, and that you rely on the collected memories of all the jurors during the jury's deliberations.

Sample Colloquy for Voir Dire

Good morning ladies and gentlemen. My name is Judge_____. I will be the judge presiding over the jury selection as well as the trials in this courtroom. I would like to welcome you to the criminal division of the county court of _____ County. The crimes that are heard in the county court are misdemeanors. Misdemeanors are crimes punishable in the county jail.

So that you will know the persons with whom you will be working and their duties, I will introduce you at this time.

- **BAILIFFS:** They enforce the court's orders and have charge of the jury and are in charge of security in the courthouse.
 - If you have any questions about your personal welfare, apart from questions about the case being tried, you should direct those questions to the bailiffs.
- **COURT CLERKS:** They perform several functions for the court:
 - Swear the jury in.
 - Have custody of any physical exhibits that are introduced into evidence.
 - Swear in the witnesses.
 - Make sure that everything that is being said in the courtroom is being picked up on the tape and is electronically recorded.
- **COURT REPORTER** She/he transcribes everything that is being said in the courtroom.
 - In a few minutes the selection process will begin. centuries and had been adopted by the colonies.
 - There are two matters which are so fundamentally important for you to understand from the outset that I am going to address them.
 - First, is the presumption of innocence. Our system of justice is accusatorial in nature. That means the state has the power to bring charges against a defendant for conduct that violates the criminal laws. However, the state also has the responsibility to prove that charge against a defendant beyond and to the exclusion of every reasonable doubt. A defendant is presumed innocent until proven guilty beyond a reasonable doubt.
 - Secondly, the Fifth Amendment provides that a person accused of a crime has the absolute right to remain silent and to require the state to prove its case without any assistance from the accused. When a defendant invokes this right, a jury is not permitted to be influenced in any way by that decision.

- The (first) case that is set for trial this morning is the case of **State of Florida vs. _____**.
- This first part of the trial is called *voir dire*. *Voir dire* is a French term and it means “to speak the truth.” It is a question and answer session touching on your qualifications to serve as jurors in this particular case. I will ask you some questions and after I have finished, the attorneys will ask questions. These questions are not designed to pry into your personal affairs. *Voir dire* is for the purpose of determining if your decision in this case would in any way be influenced by opinions which you now hold or by some personal experience or special knowledge which you may have concerning the subject matter to be tried. The object is to obtain six (6) persons who will impartially try the issues of the case based upon the evidence presented in this courtroom, and without being influenced by any other factors. These questions are to assure each party a fair and impartial jury.
- OPTIONAL: If you are uncomfortable answering any question in front of the entire venire, please raise your hand and ask to approach the bench. I will allow you to answer the question at the bench in the presence of the attorneys, the court reporter and myself.
- I want to point out that there is never going to be enough time to ask you every question that would bring out something in your background that would prevent you from being fair and impartial to the state, the defendant or both.
- So I am asking you to volunteer any information that you feel might make you biased for or against either the state, the defendant or both parties.
- Each side has a certain number of “peremptory challenges”, by which I mean each side can challenge you and ask that you be excused without giving a reason for the challenge. There are some legal limitations on “peremptory challenges.” For example, factors such as gender or race are not legally permissible grounds to excuse a juror.
- In addition, each side has challenges “for cause”, by which I mean that each side can ask that you be excused for a specific reason set out in the law or rules of court.
- If you are excused by either side, please do not feel offended or feel that your honesty or integrity is being questioned. It is not. If you are not selected on this jury, you may be selected for another one.
- As your name is called, please take a seat in the jury box as directed by the bailiff.

- QUESTIONS REGARDING THE INFORMATION
 - The defendant is charged with the offense of: _____.
 - I will now read you the pertinent portion of the information which sets forth the charges against the defendant. The information is not to be considered as evidence but is a mere formal charge against the defendant. You must not consider it as evidence of the defendant’s guilt and you must not be influenced by the fact that this information has been filed against the defendant. Under the Constitution of the United States and the Constitution of the State of Florida, every person accused of a crime is entitled to know the exact nature of the charge. The filing of this document fulfills that constitutional requirement.
 - The information charges that the defendant (read pertinent portion of charging document)
 - You have heard the charge made in the information against the defendant.
 - Do any of you know anything about this case, either through your own personal knowledge, rumor, or by discussion with anyone else? (Have any of you read or heard about it in any of the news media?)

- IF A JUROR HAS KNOWLEDGE ABOUT THE CASE: The question is whether the juror has formed an opinion or has developed any bias or prejudice. If so, the test is whether the juror “can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given to him [or her] by the court.”

- If there is a reasonable doubt, excuse the juror for cause. Turner v. State, 645 So.2d 444 (Fla. 1994).

- QUESTIONS ABOUT THE PARTICIPANTS IN THE TRIAL
 - The State is represented by Assistant State Attorney _____.
 - Would the Assistant State Attorney stand?
 - The defendant is _____
 - Would the defendant stand?
 - Representing the defendant is _____.
 - Would the attorney representing the defendant stand?

- Do any of you know the **defendant** or the **attorneys** in this matter?
- Do any of you know any of the **courtroom personnel including me (the judge)**?
If the answer is yes, please raise your hand.
- **THE COURT SHOULD READ THE NAMES OF THE POTENTIAL WITNESSES**
(THIS PREVENTS THE DEFENSE FROM HAVING TO COMMIT IN FRONT OF THE JUROR ITS INTENTION TO PRESENT WITNESSES OR NOT WHEN THE STATE RESTS).
 - Do you know any of the witnesses that have been disclosed? If yes, ask:
 - In what capacity have you known _____?
 - Do you feel you have a state of mind with reference to your knowledge of _____ in the event of his /her testifying in this case which would prevent you from acting with impartiality?
 - Would your relationship or knowledge of _____ cause you to give greater or lesser weight to his/her testimony?
- **COURT SCHEDULE FOR TRIAL**
 - The court recognizes that service on a jury panel is not always convenient. Every effort will be made to see that your time is not wasted. The estimated length of this trial is _____ days. The hours we generally work are from _____ a.m. to _____ p.m. with regular breaks and a break for lunch.
 - Does the schedule as I have explained it to you present a great hardship for any of you? If the answer is yes, please raise your hand.
- **DISABILITIES OF JURORS**
 - Do any of you have any medical or physical conditions such as hearing, sight, or otherwise which would require special accommodations or assistance or which would render you incapable of performing your duties as a juror in this case? If so, would you please raise your hand?
- **FAIR AND IMPARTIAL JURY**
 - Do you have any bias or prejudice either for or against the defendant or the state?
 - If you are selected as a juror in this case will you render a fair and impartial verdict based upon the evidence presented in this courtroom and the law as it pertains to this particular case as instructed by the court, even if you disagree with

the law and wish that it were different?

- Do you have any reason why you cannot give this case your undivided attention and render a fair and impartial verdict?
- Do each of you agree that trial by jury is the appropriate way to dispose of a criminal case?
- Do any of you have any conscientious beliefs that would preclude you from returning a guilty verdict in an appropriate case?
- On the other hand, do any of you have any conscientious beliefs that would preclude you from returning a not guilty verdict in an appropriate case?
- As jurors, you are the judges of the facts and the trial judge is the judge of the law. Do each of you agree and understand that proposition?
- Do you agree that if you are selected as a juror in this case you will put out of your mind any preconceived notion of what the law is or what you think the law ought to be and accept the law of this case as I instruct you?
- Do you agree that if you are selected as a juror in this case that the verdict you render will be based upon the testimony coming from the witness stand, exhibits introduced into evidence and the instructions on the law I give you---these things and these things only?
- In order to sustain a guilty verdict there must be proof presented by the state of the defendant's guilt beyond every reasonable doubt. I will explain to you later what the term **reasonable doubt** means. At this point then where there has been no proof presented, can the defendant be guilty of anything?
- Do you understand and agree with the principle of law that a person is presumed to be innocent until proven guilty beyond and to the exclusion of every reasonable doubt?
- Will you give the defendant in this case that presumption?
- Will you require the state to prove each and every element of the offense beyond a reasonable doubt?
- If the state proves the defendant's guilt beyond every reasonable doubt, will you render a verdict of guilty?
- If the state cannot prove the defendant's guilt beyond every reasonable doubt, will you render a verdict of not guilty?

- As a final question, if you were asked to go back into the jury room at this time and deliberate, what would be the only verdict that you could render?
- ALCOHOL
 - This case involves allegations of driving and the consumption of alcohol.
 - Does anyone on the juror panel not consume alcoholic beverages?
 - Why? Medical? Religious?
 - Have you or any of your friends or family members ever been involved in a traffic accident where it was alleged that someone had been drinking alcohol and driving?
 - If you do not drink alcoholic beverages, could you set aside your personal feelings about alcohol, and listen to the facts of this case impartially?
 - Are any of you members of Mothers Against Drunk Driving, Students Against Drunk Driving, or any other organization concerned with the formation or enforcement of laws related to drinking and driving?
- JUROR HISTORY RE: CONTACT WITH COURTS
 - Have you ever been a victim of a crime?
 - Have you ever been a plaintiff or defendant in any civil lawsuit?
 - Have you ever been a witness in a civil or criminal case?
 - Have you ever had any previous jury duty? If so: When? What kind of case was it (civil or criminal)? Did you reach a verdict? (Don't tell what your verdict was.)
 - Have you or members of your family ever been formally charged with committing a crime?
 - (Suggest to the jurors that if anyone wants to answer this at the judge's bench in the presence of only the judge, the attorneys, and the court reporter, this would be fine).
- Do you have any family or close friends who are in law enforcement such as:
 - police officers
 - highway patrol officers
 - probation officer
 - correctional officer
 - deputy sheriff?

- Will you believe the testimony of a witness who is in law
 - enforcement simply because he/she is in law enforcement or will you
 - weigh the credibility of that person's testimony as you would all
 - witnesses who testify?

- Do you have any family or close friends who are involved in the court system such as
 - judges
 - lawyers
 - probation officers
 - clerk of the courts
 - prosecutor's office
 - public defender's office?

- PERSONAL HISTORY
 - Ask each juror to introduce himself/herself and to state:
 - What he/she does for a living (if he/she works outside the). Any other employment he/she has had during adult life. What his/her spouse does for a living (if the spouse works outside the home). If he/she has adult children, what they do if they work outside the home.
 - The attorneys will now ask you questions. What they say now, or at any time other time during the trial, is not to be accepted by you as evidence or law. In fact, they are not allowed to tell you what the law is.
 - That is the job of the court. They will simply be asking you questions looking for answers from you that will aid all of us in selecting a fair and impartial jury.

- AT CONCLUSION OF VOIR DIRE COURT SHOULD ASK
 - After listening to the voir dire, do any of you have any feelings toward the defendant or the attorneys which might affect your ability to serve as a fair and impartial juror?
 - From your answers, I understand that each of you, unless you have told me otherwise, can listen attentively to the evidence, apply the law to the facts which you find exist and fairly and impartially reach a verdict. Are there any of you who could not?
 - Can you think of any other matter which you should call to the court's attention which may have some bearing on your qualifications as a juror or which may prevent your rendering a fair and impartial verdict based solely upon the evidence and the law?

- SWEAR JURY

Sample Colloquy for Exclusion of Witnesses

- Have all the witnesses brought into the courtroom. Instruct the witnesses as follows, in front of the jury, so that the jury has the benefit of knowing that the rule has been invoked.
- Each of you has been summoned as a witness in this case. The court has invoked a rule of procedure which requires your exclusion from the courtroom at all times except during the time when you testify in this case. You are directed to remain out of the courtroom except when you are called to testify. While you are waiting to testify, and after you have done so, you are not to discuss this case or your testimony among yourselves or with anyone else.
- You may, however, one witness at a time, discuss your testimony with counsel for either party in this case. Any violation of this direction may not only subject you to contempt of court, but may also disqualify you as witnesses in this case.
- You will now retire from the courtroom until you are called. Counsel for each of the parties is instructed to advise each of its respective witnesses that are not present at this time of the direction I have just given, and each of them shall be governed thereby.

Sample Colloquy - Discharge of Jury

- Court asks foreperson if verdict reached
- Verdict delivered to judge: examines verdict form, and corrects form with consent of all jurors
- Clerk reads verdict
- Jury may be polled upon request of State, defendant or on court's own motion; if there is dissent, the court sends jury back for continued deliberation, there cannot be polling of jurors once the verdict is recorded or the jurors are discharged
- Verdict is entered into the record
- Jurors discharged
- Court can thank jurors, but cannot praise or criticize verdict

Sample Thank You Letter to Jurors

(Juror's name)

(Juror's address)

Dear (name):

The right to a jury trial is basic to our American criminal justice system. That right would be meaningless without citizens like you who have demonstrated your willingness to serve as a trial juror.

I appreciate your service as a juror in my courtroom on (dates). I know that service involved personal sacrifices by you. You played the very important role of judge of the facts. I hop that was a rewarding experience.

Some jurors feel their contributions to our justice system go unnoticed. Please be assured that this is not true in this case. I personally am very grateful that you helped to make our system work; and on behalf of all the people personally involved, as well as the entire community, I thank you.

Sincerely,
County Court Judge

Chapter 4 -- Conducting the Trial

Waiver of jury trial

Under the US and Florida constitutions, the defendant can waive his right to a six-person jury and go with five when a juror become unavailable. No violation of the right to jury trial occurs when a six-person jury is waived.

The court is not required to explain to defendant his right to six jurors when defense counsel represents that he explained the right. Where defendant personally indicates his desire to proceed, no error is shown in accepting the waiver. (See this case for extensive discussion of the right to jury trial and the potential problems of proceeding with five jurors.)

•Blair v. S., 698 So. 2d 1210 (Fla. 1997), 22 F.L.W. S517 (8/28/97)

Counsel cannot waive defendant's right to a jury trial by signing a written waiver. The waiver must be done orally by the defendant after the court explains to him the right he is waiving, or by defendant signing a written waiver.

S. v. Upton, 658 So. 2d 86 (Fla. 1995), 20 F.L.W. S387 (7/20/95)

Defense counsel's agreement to waive a jury is not sufficient where the defendant himself does not consent orally or in writing and the court does not inquire into the voluntariness of the waiver.

Sansom v. S., 642 So. 2d 631 (1st DCA 1994), 19 F.L.W. D1973 (9/14/94)

Court errs in refusing to allow defendant to waive a jury where, after jury selection, the defendant files a written waiver and the state consents. The court cannot refuse the request under rule 3.260.

Warren v. S., 632 So. 2d 204 (1st DCA 1994), 19 F.L.W. D370 (2/16/94)

Where defense counsel waives a jury and he court does not question the defendant to determine if he understood the waiver, conviction is reversed.

Montero v. S., 780 So. 2d 917 (2d DCA 2000), 25 F.L.W. D290 (1/26/2000)

A jury may not be waived without the consent of the state, and article I, section 16(a) of the Florida Constitution does not give defendant a right to waive a jury without the state's consent.

S. v. Thorup, 659 So. 2d 1116 (2d DCA 1995), 20 F.L.W. D1683 (7/19/95)

Where the record on appeal does not contain a written or oral waiver of a jury, the conviction will be reversed.

Scruggs v. S., 785 So. 2d 605 (4th DCA 2001), 26 F.L.W. D1112 (4/25/2001)

Right to a Jury Trial

Where defendant waives a jury trial on some charges, and the state adds charges, the court errs in proceeding without a jury on those counts in the absence of a properly-executed waiver.

Elmore v. S., 782 So. 2d 1016 (4th DCA 2001), 26 F.L.W. D1106 (4/25/2001)

The fact that the court certifies under §918.0157 that defendant will not be imprisoned or adjudicated guilty upon conviction does not serve to eliminate defendant's right to a jury trial for offenses that have a constitutionally-guaranteed right to jury trial.

Defendant has a constitutionally protected right to jury trial for offenses that were indictable at common law, crimes that involve moral turpitude, crimes that are malum in se, or crimes that carry punishment over 6 months.

Criminal mischief is indictable at common law and is malum in se, so defendant is entitled to a jury even where the court indicates defendant will not be adjudicated or imprisoned.

•Weber v. Ft. Lauderdale, 675 So. 2d 696 (4th DCA 1996), 21 F.L.W. D1486 (6/26/96)

Rule 3.251 stating that in all criminal prosecutions defendant shall have right to jury trial merely tracks the language of art. I §16 Fla. Const., and does not change or expand a defendant's right to jury trial.

Because criminal mischief is a codification of common law malicious mischief and is a malum in se offense indictable at common law, defendant has a right to jury trial.

Reed v. S., 470 So. 2d 1382 (Fla. 1985)

When the court certifies that defendant will not be incarcerated if convicted, and thereby tries the case non-jury, upon VOP defendant cannot be sentenced to jail.

Harris v. S., 773 So. 2d 627 (4th DCA 2000), 25 F.L.W. D2843 (12/13/2000)

Jury selection

A party objecting to the other side's use of a peremptory challenge on racial grounds must (a) make a timely objection on that basis, (b) show that the venireperson is a member of a distinct racial group, and (c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.

The burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.
Failure to request that the prosecutor state the reasons for the strike will result in a ruling that the claimed error is not preserved.
Slappy is overruled to the extent that it requires a “reasonable” explanation rather than a “genuine” nonracial basis for the strike.

•Melbourne v. S., 679 So. 2d 759 (Fla. 1996), 21 F.L.W. S358 (9/5/96)

Court does not abuse its discretion in refusing to permit the defense to exercise a strike against a white juror because the defendant did not feel that the juror “would adequately represent a fair cross-section of the community.” While the “fair cross-section” claim can encompass permissible bases, it also can be used for race-based claims.

Curtis v. S., 685 So. 2d 1234 (Fla. 1996), 21 F.L.W. S442 (10/10/96)

To get a Neil inquiry, the objecting party must (1) make a timely objection on that basis; (2) show that the venireperson is a member of a distinct class, and (3) request that the court ask the striking party for a reason. The party objecting to the strike need not place on the record facts that reasonably indicate that the challenge is being used impermissibly.

S. v. Holiday, 682 So. 2d 1092 (Fla. 1996), 21 F.L.W. S493 (11/14/96)

When reviewing the lawfulness of peremptories, the court should be mindful of two principles: (1) strikes are presumed to be exercised in a nondiscriminatory manner, and (2) the trial court’s decision, which turns on an assessment of credibility, will be affirmed on appeal unless clearly erroneous.

Farina v. S., 801 So. 2d 44 (Fla. 2001), 26 F.L.W. S793 (11/29/2001)

When the defense does not challenge the reason given by the state for a strike and does not object to the jury panel as seated, any error in allowing a strike is not preserved.

Rimmer v. S., 825 So. 2d 304 (Fla. 2002), 27 F.L.W. S633 (7/3/2002)

Rule of Sequestration

The purpose of the rule of sequestration is to avoid a witness coloring his or her testimony by hearing the testimony of others, thereby discouraging fabrication, inaccuracy and collusion.

Section 90.616(2)(c) allows an exception to the rule for a person who is shown by the party’s attorney to be essential to the presentation of the party’s case. The court has wide discretion in determining which witnesses are essential.

(See this case for discussion of circumstances where a fact witness, not an expert, can be allowed to remain in the courtroom.)

Knight v. S., 721 So. 2d 287 (Fla. 1998), 23 F.L.W. S587 (11/12/98)

The rule of sequestration is intended to prevent a witness' testimony from being influenced by the testimony of other witnesses in the case. Where evidence technicians were not told the rule had been invoked, and there was no danger that their conversation could have influenced them to change their testimony in any meaningful way, the court properly refuses to impose any sanction for violation of the rule.

Lott v. S., 695 So. 2d 1239 (Fla. 1997), 22 F.L.W. S289 (5/22/97)

The rule of sequestration of witnesses is not a strict rule of law. Before excluding a witness, the court must first determine whether the testimony of the witness would be substantially different after having heard the testimony of other witnesses in violation of the rule. The court must also determine whether the violation was intentional, and whether the witness or a party had acted in bad faith. Once the court has determined the circumstances, it can exercise its discretion in determining whether to exclude the witness.

Hines v. S., 719 So. 2d 358 (1st DCA 1998), 23 F.L.W. D2398 (10/21/98)

The purpose of the rule of sequestration is to avoid a witness coloring his testimony by hearing the testimony of another. Enforcement of the rule is within the court's discretion. Before a witness' testimony should be excluded on that ground, the court must determine whether the witness' testimony was affected by the other witness' testimony to the extent that it substantially differs from what it would have been had the witness not heard the testimony. (Concurring opinion.)

Duncan v. S., 727 So. 2d 413 (5th DCA 1999), 24 F.L.W. D743 (3/19/99)