

Should Jurors Ask Questions in Criminal Cases? Minority Report

Submitted by
Carrie Lynn Thompson,
Member of the Standing Jury Committee

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Introduction

The practice of allowing jurors to ask questions in criminal cases has been quite controversial. The Colorado Jury Reform Committee recommended that a pilot project be designed to obtain empirical information on what impact juror questioning would have in criminal cases. The Colorado Jury Reform Committee gave birth to the Colorado Jury Reform Implementation Committee which has grappled with issues surrounding the pilot project for years. With the pilot project concluded, the Colorado Jury Reform Committee, now called the Colorado Standing Jury Committee stands ready to make recommendations to the Colorado Supreme Court.

On September 26, 2002, members of the Standing Jury Committee met at the Office of the State Court Administrator and addressed the report entitled, "*Should Jurors Ask Questions in Criminal Cases?*", prepared by Mary Dodge, Ph.D., Graduate School of Public Affairs, University of Colorado at Denver. That report concluded that, "[o]verall the results [of the pilot project] revealed that juror questioning has little negative impact on trial proceedings and may, in fact, improve courtroom dynamics." Dodge at ii. A majority of the members of the Standing Jury Committee felt that the report provided support for the committee's recommendation to the Colorado Supreme Court that there be an amendment to the Colorado Rules of Criminal Procedure, specifically Rule 24, which would allow jurors to ask questions during trial in criminal cases.

I respectfully disagree with the majority of the Standing Jury Committee on their recommendation and I maintain my previous concerns and objections to allowing jurors to ask questions in criminal trials. Those concerns and objections include:

- Juror questioning sanctions the shifting of the burden of proof from the prosecution.
- Juror questioning impacts a defendant's right to testify.
- Excessive delay impacts courts with heavy trial schedules, lawyers with heavy caseloads and jurors with busy schedules.
- The recommended procedures do not adequately screen out improper questions.
- Juror questioning will negatively impact trials.

In support of my position I submit this minority report outlining my objections and concerns.

The decision of whether to allow juror questioning should not be a balancing act or a weighing of the advantages of juror questioning compared with the disadvantages. Clearly there are advantages to allowing jurors to ask questions. However, courts across the country, both state and federal, have struggled to weigh the advantages of allowing jurors to ask questions in criminal trials against the impact on a defendant's constitutional rights to due process and a fair trial by an impartial jury. The advantages of juror questioning have been addressed in the Dodge report submitted to the Standing Jury Committee. This minority report will not address the advantages of allowing jurors to ask questions. Rather, the focus in this minority report will be on the disadvantages of allowing juror questioning. The disadvantages of jurors being allowed to ask questions were also discussed in the Dodge report. Dodge stated, "Numerous arguments against jurors asking questions also have emerged in the scholarly debates (e.g. Harms, 1977; McLaughlin, 1982; Roberts, 1993). One concern over jury questioning involves violations of a defendant's Constitutional right to a fair trial by an impartial jury." Dodge, p. 2. Dodge went on to list numerous disadvantages of jurors being allowed to ask questions in criminal trials.

The report submitted by Dodge simply weighs the advantages against the disadvantages of juror questioning when claiming that overall there was "very little negative impact on trial proceedings." The decision whether to allow juror questioning should not be a balancing act or a weighing of the advantages of juror questioning compared to the disadvantages. The pilot project provided evidence that there are indeed disadvantages of juror questioning. Of particular concern, is that there is evidence that juror questioning has a negative impact on a defendant's constitutional rights to due process and a fair trial by an impartial jury. It is my fear that defendants' constitutional rights are jeopardized if jurors are allowed to ask questions in criminal trials. And while that fear may not be realized in some cases, if that fear is realized in just one case then there is a problem of constitutional magnitude.

For ease of argument this report will follow the organization used in section III, Phase I: Findings of the Dodge report and will deal with the topics that are of concern, except that I will address the findings regarding impact first in that they are the most important points. Information from the findings from Phase II of the pilot project will be incorporated into the discussions related to Phase I. A word of caution was mentioned in the Phase II section of the Dodge report. It was noted that judges who allowed questions in the more serious felony cases were more likely to favor the procedure and that a smaller sample creates less reliable and valid results. Dodge at 54.

What Impact Did Questions Have on the Trial?

"Overall, there was less agreement by judges on the positive implications of juror questioning on the trials." Dodge at 33.

Do Juror Questions Have a Prejudicial Impact?

"Juror questions do not appear to create prejudice to either party." Dodge at ii.

The topics of what impact the questions had on trial and whether juror questions have a prejudicial impact have been collapsed because the issues are one and the same. There was evidence of prejudicial impact collected in the pilot project. The fact that there was **any** prejudicial impact at all is significant because the loss of liberty, and possibly life, is at stake.

It is reported that **only** 16% of the judges believed that the procedure had an unfavorable effect on the trial. I respectfully take exception with the term **only**. Sixteen percent is a significant number. In the comment section, one judge commented that the questions were disruptive and clearly benefited the prosecution. Dodge at 34. Opponents of juror questioning have feared the potential for burden shifting. This comment bears out those fears. If it happens one time then that is one time too many. Another judge commented that “the trial was a mess, with prosecution evidence poorly prepared, so we already had many delays, and this made it slower still. It took 3 days for a 3 witness trial (including deliberation).” Dodge at 34. In Phase II, 3 judges indicated that after the experience that they strongly oppose the procedure. Dodge at 57. It should be noted that in Phase I, 51% of the attorneys still oppose juror questioning. Dodge at 38.

It was reported that judges overwhelmingly agreed that the juror questioning procedure followed at trial did not result in actual prejudice to any of the parties involved (97%). Dodge at 30. That leaves 3%. In Phase II, where questions were asked in 23 trials, one judge stated that juror questioning resulted in prejudice and four attorneys agreed. Dodge at 57. It cannot be stressed enough that, if one defendant was prejudiced because of juror questioning then that is one time too many.

Furthermore one must consider the underlying concerns of whether allowing juror questions assisted in the prosecution meeting their burden of proof. In Phase II, 124 jurors stated that they submitted questions because they wanted information that had not yet been provided, 55 jurors wanted to know what the witness would say about a particular issue and 75 wanted information to help determine the truth about what happened. Dodge at 59. Clearly, the jurors were shifting the burden from the prosecution. In looking at Table 15 on page 31 of the report, it is reported by the judge responses that in 17.8% of the cases in Phase I, the prosecution was assisted in meeting their burden of proof. And in Figure 18 on page 32, the defense attorneys opined that it assisted the prosecution in meeting their burden of proof in over 25% of the cases, while prosecutors opined that it assisted them in meeting their burden of proof in over 20 % of the cases. It is notable that 20% of prosecutors actually admitted that juror questioning assisted them in meeting their burden. It would be interesting to know how many prosecutors failed to recognize that they had been assisted in meeting their burden. These results have frightening constitutional implications.

When asked why a question was submitted, one juror commented, “ I wanted the witness to clarify something that had been eluded (sic) to in the prosecutor’s opening statement.” This statement illustrates the concerns that have been previously voiced about allowing the shifting of the burden of proof away from the prosecution. Jurors are

instructed that opening statement is not evidence, yet when a prosecutor has failed to present evidence which was promised in the opening statement, the prosecutor is relieved of that burden of proof by virtue of the juror's questions.

Historically, jury trials have functioned as a check on governmental power. The institution of an impartial jury was never intended to serve as an adjunct of the state. *See Garcia v. People*, 997 P.2d 1, 8 (Colo. 2000) (describing "the institution of the jury as the barrier between the government and its citizens"). As stated before, there may be advantages to juror questioning including such things as helping jurors pay more attention, clarifying confusion and allowing jurors to be more involved in the trial process. Some courts and commentators have determined that these types of advantages are clearly overridden by the threat to the adversarial system of justice and the defendant's right to a fair trial by an impartial jury. *See generally*, Berkowitz, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?* 44 Vand.L.Rev. 117, 136-39 (1990); Sylvester, *Your Honor, May I Ask A Question? The Inherent Dangers of Allowing Jurors to Question Witnesses* (1990), 7 Cooley L. Rev. 213.

While the United States Supreme Court has not addressed juror questioning of witnesses, state and federal courts roundly discourage it. Mississippi, Georgia, Texas, and Nebraska have forbidden the practice in criminal trials. *See Wharton v. State*, 734 So.2d 985 (Miss.1998); *State v. Williamson*, 279 S.E.2d 203 (Ga. 1981); *Morrison v. State*, 845 S.W. 2d 882 (Tex. Crim. App. 1993); *State v. Zima*, 468 N.W. 2d 377 (Neb. 1991). The Eighth Circuit has found "[w]hen the jury becomes an advocate or inquisitor in the process, it forsakes its role of arbiter between the government and its citizens." *United States v. Johnson*, 892 F.2d 707, 713 (8th Cir. 1989). Recently in *State v. Costello*, 646 N.W.2d 204 (Minn. June 13, 2002), the Minnesota Supreme Court held that juror questioning in a criminal case is per se reversible error and further noted that "the truth-finding goal is balanced against the rights of the accused and concerns about individual freedom." 646 N.W.2d at 213. The Ohio Court of Appeals has recognized that the fundamental problem with juror questioning "is the 'gross distortion of the adversary system and the misconception of the role of the jury as a neutral factfinder in the adversary process.'" *State v. Gilden*, 759 N.E.2d 468, 471 (Ohio App. 2001) quoting *United States v. Johnson*, 892 F. 2d 707, 713 (8th Cir. 1989) (Lay, J., concurring). The *Gilden* court observed that when jurors are permitted to ask questions of witnesses, their neutrality as impartial factfinders is compromised because they take on the role of advocate, "actively seeking out facts instead of grappling with what the lawyers have provided." *id.* Consequently, a procedure permitting juror questioning is adverse not only to a defendant's right to a fair trial by an impartial jury, but also to his constitutional right to a presumption of innocence unless the state proves every element of the offense beyond a reasonable doubt. *Gilden*, 759 N.E. 2d at 472 ("Where the role of the jury as a neutral fact-finding body is significantly modified, the underpinnings of our system, designed to ensure trial by a fair and impartial jury, are compromised.")

Did the Questions Impact Defendants' Decision to Testify?

“Juror questions do not influence a defendant’s decision to testify” Dodge at ii.

In the Questions Permitted group of Phase I of the pilot project, it is reported that 87% of the attorneys responded “no” when asked if the questioning procedure had an impact on the defendant’s choice to testify and 81% indicated that the juror questions had no weight in the decision. Dodge at 23. In Phase II, only 77% of the attorneys responded that the procedure did not affect the defendant’s decision to testify. Therefore a significant number of attorneys felt that it did have an impact on the defendant’s decision. If allowing jurors to ask questions in criminal trials impacts a defendant’s decision to testify even one time than that is one time too many because of the constitutional implications. It should also be noted that 32.9% of the attorneys in phase II stated that the procedure affected their 5th Amendment advisement. Dodge at 53.

Furthermore, it is alarming to note that only 73% of the judges reported that they informed the defendant of the juror questioning procedure and judges in only 61% of the trials in phase I were told that the same rules applied to jurors questions as they applied to attorney questions.

It is critical to recognize that in deciding whether to exercise their constitutional right to testify, defendants will be forced to take into consideration not only that jurors will be allowed to ask questions, but that improper questions may be asked if not properly screened out. It was reported in the pilot project that some judges and attorneys had concerns about the actual success of the procedural safeguards in screening out improper questions. There is no doubt that juror questioning impacts a defendant’s constitutional right to testify.

Do Juror Questions Cause Excessive Delays to the Trial Process?

“Juror questions do not cause excessive or unreasonable time delays.” Dodge at ii.

Certainly, in those cases where there are few questions asked by jurors the delay will be minimal. However, common sense and experience tell us that the more complex the case, the more likely there will be questions asked by jurors. It was noted in the report, in Phase I, that the average number of questions submitted in district court cases was significantly higher than those submitted in county court cases. Dodge at 17. It is noted that 46 juror questions were asked in one case and 64 juror questions in another. In phase II, 83.3% of the judges responded that the procedure did not cause excessive delays. That leaves 16.7% that did not agree; while 40% of the attorneys appeared to feel that it caused excessive delays. Dodge at 55. The best example of the potential for excessive or unreasonable time delays is the attempted murder trial that was in Phase II of the pilot project where 103 questions were asked. The judge in that case made the following comment:

A lot of time was used. We were supposed to be done in a week.

The trial lasted 7 days. The questioning interrupts the flow of the examination by the attorneys. Most jurors did not ask questions--- only a few did. The bench conferences on a question were awkward and difficult....

Dodge at 60.

It is stated in the report that “[w]hile these cases are problematic for judges, they do not represent an average case.” It is important to note that there were far fewer complex and/or higher class felonies that were part of the pilot project than would actually exist should C.R.Crim.P 24 be amended to apply to all criminal cases. Serious felony cases are being tried in large numbers in Colorado Courts. Undeniably, we can therefore expect to see a larger “average” number of questions being asked in reality than was calculated in the Phase I of the pilot project, where the cases were less serious.

Furthermore, the comments of the participants in the pilot project should be given great weight to the determination for the potential that juror questions will cause excessive delays to the trial process. It is significant that 10.3 % of the judges responded that delays were excessive. Given the strained trial schedules in courts statewide, excessive delays take on an added dimension. One example cited in the study, demonstrates the potential problems with juror questioning:

We had a juror who decided he could do a better job than the DA if given the opportunity. He was sending questions one after another. The bailiff would bring me one and he would have another ready when she got back over to the jury box. It distracted the other jurors and the lawyers...

Dodge, at 22.

Having this happen one time is one time too many. This comment illustrates the potential for not only excessive delay, but the concern that the burden of proof will no longer be upon the prosecution.

It is also important to note as it relates to the resource of time in an already overstrained judicial system, juror questioning will generate more appellate issues. Issues of juror questioning allowed in the pilot project have been raised in appellate cases that are now pending.

Do Jurors Submit Improper Questions?

“Jurors will submit improper questions,...” Dodge at ii.

It is significant that in Phase I, 24% of the questions were declined. In Phase II, 50% of the judges reported that jurors did in fact submit improper questions. Dodge at 56.

Did the Procedures Successfully Screen Improper Questions?

“...the screening procedures employed by the judges generally are effective in eliminating troublesome inquiries.” Dodge at ii.

Unfortunately, the data collected in the pilot project did not note the number of questions that were submitted over counsel’s objection or the nature of those questions. It was noted in the report that “(a)ttorneys were less optimistic that improper questions were eliminated, with the majority indicating sometimes.” Dodge at 25. Some comments made by judges in Phase I of the study, were particularly troubling. One judge stated, “It was probably my fault that some of the improper questions were not screened out.” Dodge at 25. Another judge commented

I felt two questions asked were “harmless,” as the DA agreed, and asked those two questions to the defendant because they were “harmless.” However, on reflection, I’m not sure they were harmless. They were seemingly innocuous, but they made one witness---defendant---look evasive because of the answers.

Dodge at 25.

Yet another judge commented, “It can be difficult sometimes to determine if what looks like a proper question may be shifting the burden of proof.” Once again this comment has constitutional implications. Sixty percent of the attorneys in Phase II reported that jurors asked improper questions and 56% indicated that the procedure for screening was effective **sometimes**. (emphasis added).

In at least two pending appellate cases, the issue of juror questioning has been raised. *People v. Roman Huerta-Lozano*, Case NO. 02CA39 and *People v. David Milligan*, Case NO. 01CA435. Defense lawyers have argued that despite the prophylactic measures that were included in the pilot project, that juror questioning is fraught with dangers, which, in practice, simply cannot be eliminated through procedures and guidelines.

In Mr. Huerta-Lozano’s case, the court deviated from nearly all the guidelines set forth in the pilot project. The uncontrolled process allowed a juror to engage in a spontaneous colloquy with a witness who was no longer on the stand and after the prosecution had rested its case. Moreover, the court not only encouraged the witness to answer the juror’s questions, but then answered one of the juror’s questions itself. Furthermore, the questions asked by the juror and subsequently answered by the witness and the judge elicited prior bad act evidence that had been previously been excluded from the trial.

Furthermore, it seems unwise for the Court to consider as dramatic of change as contemplated here when appellate review is still pending.

What are the Dynamics of Declining Juror's Questions?

“Jurors do not react negatively when their questions are declined.” Dodge at ii.

It is interesting to note that the jurors in Phase I of the study indicated that “in over half of the circumstances when a judge declined to ask a question an explanation was offered that jurors viewed as satisfactory.” That would imply that in a little less than half of the circumstances when a judge declined to ask a question that the jurors received an explanation that was unsatisfactory. And note that in Table 11, it was reported that 4 jurors felt frustrated, two jurors felt embarrassed.

In Phase II, eight jurors self-reported that they were frustrated by the judge's decision not to ask the question. Dodge at 56.

Verdicts

“Juror questions do not overly influence verdicts.” Dodge at ii.

It is clear that information collected during the pilot project cannot accurately determine whether verdicts are affected by allowing jurors to ask questions. It is clear that factors other than juror questions influence juror verdicts making it difficult if not impossible to accurately assess the impact juror questions have on verdicts. Furthermore, a sample of 239 cases is just too small of a sample to make any reliable conclusions concerning the potential influence of jury questioning on jury verdicts. Referring to Table 6, and Figure 3, Dodge states that, “Based on the comparison, allowing jurors to ask questions did not appear to have any undue influence on verdicts. It is speculative and dangerous to use the words “overly influence” based on this small sample and the intervening factors that also influence juror verdicts.

Conclusion

The conclusions reached in the Dodge report, however well-intentioned, did not adequately address the concerns and objections that have been previously voiced by opponents of juror questioning. As stated earlier, the decision to allow jurors to ask questions of witnesses is controversial. It is controversial because of the inherent dangers to a defendant's constitutional right to a fair trial by an impartial jury, to a defendant's constitutional right to testify, to defendant's constitutional right to due process and a defendant's right to be presumed innocent. Before the Court endorses such a drastic departure from the time-honored tenets of an adversarial process, there should be a more representative sample utilized, with conclusive findings that there is no negative impact on the precious constitutional rights of defendants in criminal trials. Furthermore, before the Court endorses juror questioning, a full opportunity for appellate review should be completed.