

Example Jury Selection Outline for New Prosecutors | DUI charge

Good morning everybody

-once again my name is _____, I represent the state of FL, along with my co-counsel

-Like the judge said, right now we are here for what is called voir dire

-means "speak the truth", which is what I want all of you to do

-there is no wrong answer other than a lie

-is anybody going to lie to me today?

-Wow, that was a really horrible lackluster answer

-Let me explain how this works

-When I ask a group question, I need a good, loud, clear, group response

-Can everyone promise to give that to me?

-Good, that was better

-This will allow me to avoid asking each and every one of you, every last question, individually

-hopefully this will significantly speed up the process

-By the same token, if we get a big loud yes, and you give a little mousy no, but your voice isn't heard over the roar of the yes's, would you promise to raise your hand and let me know that your opinion differs from that other group?

The last real housekeeping matter:

-if I ever ask you a question that you don't feel comfortable discussing in front of this big group, please know my intent is not to embarrass you

-so if I do ask you one of those questions, please just let me know that you'd feel more comfortable answering it alone and we'll make arrangements so that you can do so later

-at the close of this process, we'll just call you back in so you can answer with only the attorneys and the judge present



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I'm pretty much going to cover only 4 areas today

- 1) the elements of an offense
 - 2) the standard of proof
 - 3) how I prove things up to that standard (I'm going to talk about evidence)
 - 4) some charge specific things (the judge read you everything about this case –ex: DUI – so I'm going to ask you some charge specific things about DUI)
-

Lets get started:

-One of this first few things you'll see in the jury instructions are the **elements** of the offense

-we're going to get into the elements of this specific offense later on

-It's only important for you to know now, that every crime, in every jurisdiction, is made up of certain elements (things that have to be proven)

-and it's important to know, that **these elements, are the only things the state has to prove**

-everyone understand? – that's it, that's all I've got to prove, are the elements
(might be 1, 2, or 4 – I have to prove them all, that's it, but nothing else)



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So, in order to help get some of these legal concepts, I'm going to start with some hypotheticals

-Raise your hand if you **think that recreational marijuana should be legal?**

(don't be shy, we're not going to prosecute you)

-You – you do know that it is currently not legal, right?

-hypothetically, say we were here for a possession of marijuana trial (which we are not)

-if I proved to you every element of the crime, beyond a reasonable doubt, could you still vote to convict the defendant even though you disagreed with the law?

-no? I appreciate your honesty, again, the only wrong answer is a dishonest answer

(anyone else feel the same way?)

-yes? So even though you believe recreational marijuana should be legal, but I proved to you that the defendant was guilty beyond a reasonable doubt, you should still vote to convict him, correct?

-and you would convict him, correct?

-now why is that?

-because the legislature is the place where we **make and change laws**, correct?

-and here, we **apply the law as it is**, even if we don't agree with it, correct?

-anybody here who disagrees with that? - Please raise your hand

[for the record I see no hands]

So, besides the people I've spoken to before

-can everyone else promise me, that you would convict a person for violating the law, if I have proven every element beyond a reasonable doubt, even if you don't think the law should exist?



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-So lets talk about elements

-Lets say in a possession of marijuana case, the only 2 elements are (1) the person possessed it, (2) the thing that they have possessed is marijuana

-There might be a whole lot of facts that come out in trial, or that don't come out in trial

-things that might be really interesting, and that you might want to know more about, but that really have nothing to do with proving or the elements of the offense

-for example, in the hypothetical, would it matter where they bought it from?

-would it matter how long they possessed it for?

-would it matter if the person who possessed it was an 85 year old sympathetic grandma, or a 20 year old college student?

-and why shouldn't it? – because its not an element, right?

-does everyone understand what I'm getting at?

-The only thing that matters are those 2 elements

-you might be asking yourself how much marijuana was it? Were they just holding it for a friend? Why did they have it? Do they have more marijuana somewhere else?

-you might wonder a lot of these things but they don't matter unless they go to the elements of the offense

-In a little while, we'll go through exactly what the elements are for the crime that the defendant has been charged with today

-So again, can everyone promise me, that they **will only require me to prove the elements of the offense**, in the jury instructions?

-Is there anyone here who is going to make up their own elements, that I might have to prove? – if so, please raise your hand [for the record I see no hands]

-Ok, so, we're done with part 1

-we know that the state only has to prove the elements in the jury instructions



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Now, 2nd part, what is the **standard** to which I must prove those elements?

-Beyond a reasonable doubt – (what does that mean?)

-You're going to get a copy of the jury instructions and you'll see that the definition is a paragraph long, and it starts in the negative

-So we know that anything with a definition like that is a really complicated concept

-Do you think there is a **difference between proving something beyond a reasonable doubt** on one hand, and **beyond all possible doubt** on the other hand?

-Which one do you think is a higher standard to prove? Why?

-If I prove something beyond all reasonable doubt, there are still some doubts left out there, correct? – (the unreasonable ones)

-But if I prove it beyond all possible doubt, I would have literally disproved every conceivable possibility – (that it wasn't aliens, that we aren't trapped in the matrix)

-that everything you can think of I have disproved, and that is absolutely not the standard

-So lets take a look at least at the first couple sentences of that definition again

-You'll get a copy of these instructions if you get chosen to sit on the jury so you don't have to worry about memorizing this

- "a reasonable doubt is not a mere possible doubt, a speculative, forced, or imaginary doubt"

- "such a doubt must not influence you to return a verdict of not guilty if you have an otherwise abiding conviction of guilt"

-That's a very clear start, it tells you exactly what it's not

-if you think oh something is possible, or if you're kind've speculating that maybe this could happen – that's not a reasonable doubt



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- So its about the time for another hypothetical to make sure that you understand this
 - Raise your hand **if you believe beyond a reasonable doubt that my co-counsel is a real lawyer?**
 - You – I’m going to cross examine you here, so please don’t wither, don’t hold this against me
 - you have never seen her before in your life, have you?
 - you’ve never seen her bar card?
 - you’ve never seen her wooden frame diplomas?
 - you’ve never been in her office with mahogany and leather bound books?
 - you’ve never seen her practice law?
 - you’ve never seen her graduate from law school?
 - but you still believe beyond a reasonable doubt, that she is a real lawyer? why?
 - So the **circumstantial evidence** that you’ve already taken in, in the 35-40 minutes that you’ve been sitting in this court room, **has convinced you beyond a reasonable doubt that she is a real lawyer?**
 - Without any of that direct proof? (excellent, good for you)
 - Now, is it possible, not reasonable, but possible that **she’s an imposter**, like that movie Catch Me if You Can with Leonardo Dicaprio
 - is it possible? is it reasonable? it is not reasonable – everyone agree with that?
 - Is it possible, that this is her **evil twin sister**, who has come from Russia with the sole intent of disrupting the American judicial system? - But I don’t know because they look and talk exactly the same?
 - is it possible? is it reasonable? no – everyone tend to agree with that?
 - Okay, now I’m going to stop picking on my co-counsel for the next one
 - Is it possible, that **I’m not actually a real lawyer, that I’m just a 3rd year law student** that has been certified by the Florida Supreme Court to only practice



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under the supervision of real lawyers, and under the supervision of certain judges?

-Is it more reasonable than my co-counsel being an imposter, or an evil twin?

-Now, those are sorta some funny examples everybody, **but does everyone understand kind've the analysis that you're going to go through** when deciding whether something is reasonable, or merely possible?

-Is there anyone here who feels uncomfortable doing that, who just doesn't feel like they can sort through testimony to determine whether something is reasonable or not?

-So, now we've talked about what I have to prove (the elements), and the standard I have to prove those elements (beyond a reasonable doubt, not beyond all possible doubt)

-Now, in this 3rd part we will talk about **how I go about proving the elements** to that standard

-What do I use, anyone want to take a guess? – Evidence

-I go about proving things with evidence

-Anybody here watch legal TV shows? – CSI, Law and Order?

-CSI is kind've about science right?

-Law and Order, more about testimony and what people say, but there's not a whole lot of forensic science, right?

-I choose those two TV shows because they sorta perfectly symbolize the 2 kinds of evidence that I could offer up at trial

-I could offer up **physical evidence** – it's the smoking gun, a bloody knife, a letter, a video recording, an audio recording (something that's tangible)

-Everyone gets that, right?

-the other kind of evidence, is testimonial

-you're going to have a number of witnesses, however many there are, come into court, sit down right here in that witness box, raise their right hand and swear to tell you the truth



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-and then tell you what they saw, what they felt, what they heard, what they did

-and that **testimony from those witnesses, can be given every bit as much weight** as any piece of physical evidence that you see

-you can accept that testimony as evidence, just as you could a videotape or a smoking gun - but you don't have to

-One of your main jobs as a juror, besides deciding what's reasonable and what's possible, is deciding what evidence to believe and what weight to give it – the judge doesn't do it, you do it as jurors

-you can do that with the testimonial evidence, and the physical evidence

-So, now I'm going to ask 3 of you to guess my **height, weight, and age**

-Now, I usually call on the people that look like they'd be the most uncomfortable doing it (I'm kidding)

-Height, weight, and age?

-Now, you – which one of those people is a dirty, filthy, rotten liar? (kidding, don't answer that) – none of them are, right?

-We have a range in height, weight, and age

-but that **doesn't necessarily mean any one of them is lying or not credible**, correct?

-and that **doesn't mean that you weren't sitting in the same room, at the same time, with the same prosecutor**, asking the same questions right?

-it just **means that you're perspectives were different**, right?

-Those are kind've opinion and estimation-based questions right?

-But **if I were to ask you what court room you were in at this time on this day**, that's a different kind of question than asking you to guess how tall I or old I am, isn't it?

-So just because you may be really crappy at estimating ages or heights, **doesn't mean I can't rely on you to answer a factual question** about something that happened that doesn't call for a guess, right?

-Does everyone get the difference between those kinds of questions?



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-Does everyone feel comfortable, assessing the type of question it is, and determining what weight to give it?

-Does anyone feel uncomfortable in trying to determine whether someone is telling the truth or not?

-Ok, just so you know the correct answers, I'm 5' 10", 180, and 26 years old

-but anyway, I'm sure I could still trust you to answer where you've been and what you saw correctly, even if I couldn't trust you to guess ages

So, I want to talk about something else found in the jury instructions

-basically that its really all about the **quality of the evidence, not the quantity of evidence**

-Let's say, that this is the trial of the century (which, I promise you it won't be)

- But, I brought in 50 boxes full of physical evidence witnesses (documents, photographs, video),
- and 100 witnesses, who all took the stand and testified

-and you all decided that all 50 of those witnesses were not credible, and you did not believe a word that they said

-and you didn't believe any of that physical evidence either

-what would the verdict have to be? (not guilty, correct?)

-Now let's say this is one of the shortest trials in recent memory (and I promise you it probably won't be that either, unfortunately)

-There is 1 witness who testifies, no physical evidence whatsoever



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-but that witness's testimony convinces you beyond a reasonable doubt, that the defendant committed each element of the offense and was guilty

-what does your verdict have to be then? (guilty, correct?)

-Does everyone understand that? – **it's about quality, not quantity**

-Now, what is implicit in that last hypothetical, was the fact that the conviction would have been based on testimony alone

-no physical evidence was to be had in that hypothetical - just the testimony of one witness

-but you believed that witness, and everything the witness said established each element

-So, **is there anyone out there who would refuse to convict the defendant no matter how much they believed the witnesses**, if there wasn't any physical evidence? [if so, raise your hand]

-so even though the law tells you that you can convict, and that you should, if you believe each element is met by testimony, you would still refuse to convict without any physical evidence?

-So now we've talked about elements, the standard I've gotta prove them to, and the fact that I have to prove them with evidence

-Now in this 4th part we're going to get into some **DUI specific issues** (issues specific to the crime to which we are here for today)

-You'll see in the jury instructions, that there are really only 2 elements of the DUI offense

-and that each of the elements can be met in 1 of 2 different ways

(1) the defendant was **driving** OR in **actual physical control** of the vehicle

-“actual physical control” is a little bit more complicated of a concept, but it used for situations in which we know that the defendant was driving at some point, just not driving at the time police stopped you



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(2) defendant's normal faculties were **impaired** by alcohol and/or controlled substance

-there are a couple of different parts there, couple of different way to prove things

-I can prove impairment by, for example, observations of people, OR state can prove it with breath alcohol test over .08

-its important to remember that its an OR

-I can either give you all testimony and no scientific evidence of impairment OR I can give you only scientific evidence (breath test), and no testimony whatsoever

So, now I want to ask you a question about this

-If I **gave you testimony from a police officer that convinced you beyond a reasonable doubt that the defendant was impaired**, but you didn't see a breath or blood alcohol test, **is there anyone out there who could never convict** the defendant in those circumstance? [please raise hand]

[if hand is raised]

-There are a number of reasons why the state may not present a breath/blood test

-not the least of which is that the defendant may have refused to give one, right that's possible?

-in that case, the state won't have a test to give, right?

-We won't get into every possible reason for why the state does not have a BA test

-its important to know that we don't HAVE to give one, under the law

-Now that you kind've understand what the law is, and that one is not required, would you still refuse to convict if you were otherwise convinced beyond a reasonable doubt by the other evidence?

-Now, when you read that second element that "normal faculties were impaired"

-that has a couple of different parts to it

-luckily for you, you don't have to guess about what that means

-jury instructions defines "**normal faculties**"



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-“ability to see, hear, walk, talk, judge distances, drive a car, or conduct the normal activities of our daily lives”

-that’s not an exclusive list, because it would be impossible to list out everything you normally do in a day

-but these are the kinds of things the jury instructions contemplate are “normal faculties”

-Does everyone understand what a normal faculty is?

-Now, “**impaired**” is a little bit more complicated

-jury instructions define this as “diminished or lessened in a material respect”

-its kind’ve like beyond a reasonable doubt

-its going to be up to you to decide

-but I want to make one thing very clear...

[find someone with glasses]

-can you see me with your glasses? Vision 20/20?

-now, please take them off – is your vision now less than 20/20?

-can you still see me? So you’re not blind without them right? Go ahead and put them back on

-With the glasses her vision is normal – without the glasses her vision is impaired

-she’s not blind

-The defendant **doesn’t have to be falling down drunk in a pool of his own vomit** to be impaired either

-impairment can happen long before, being passed out or falling down

-being completely 100% drunk or passed out, that is not the standard

-normal faculties just have to be diminished, in a material respect

-Do we all understand and feel comfortable working with that definition?



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Is there anybody here **who has gotten a speeding ticket you feel you didn't deserve?** [please raise hand]

-Let's say we're here for a speeding trial

-and the defendant is charged with doing 85 in a 65, coming down 595

-and there was radar and video tape and testimony, and you were convinced beyond a reasonable doubt that he was speeding

-but you yourself in order to get to jury selection on time, had driven that exact same route, and went 86mph in a 65

-just this morning, to get to this jury selection, you committed that exact same crime and got away with it

-could you still convict the defendant, if I had proven it beyond a reasonable doubt, even though you had gotten away with the same crime?

-yes – **because its your duty** right?

-Could everyone here convict the defendant, if guilt was proven beyond a reasonable doubt, even if you or a loved one had gotten away with same crime?

-is there anyone here who would refuse to do that?

So now that you've had a chance to hear what the judge had to say and ask, and what I've had to say and ask, hopefully you have a little bit better understanding of what this process is about

-I kind've tried make some jokes and a little humorous to make this go by a little quicker

-but this is a serious matter and I want to give you one more opportunity to tell me anything that you think is important for us to know?

-so is there anything that we haven't touched on, that you feel is important for us to know, that you feel might have an affect on your ability to be a fair and impartial juror?



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Okay, I am done for now.

-Again, I just want to thank you all for performing your civic duty and for being here today

-each and every one of you plays an important role in this process, and we are grateful for your time and attention

[When someone gives a “maybe” or “I’m not sure” answer]

- sir/ma’m, 100% concrete answers aren’t always possible, but to the extent you can give one, we really need you to do so

-it’s kind’ve like when you’re getting on an airplane, and you’re going to fly out to California

-and the pilot walks in and is greeting everybody

-and you say “hey, we’re not going to crash or anything before we get to California, are we?”

-and the pilot is like “well ... I don’t think so ... I don’t want to, but we might... I’m not really sure..”

-How much confidence would you have in getting on that plane?

-not as much as if the pilot said “absolutely not, I’ve been on 750 flights and only crashed 2 of them”

-Now, to the extent that you can give a more definite answer . . . {ask question again}



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