

CONCURRING OPINION OF ACOBA, J.,  
WITH WHOM LEVINSON, J. JOINS

I believe that juror questions in criminal cases significantly alter the structure of trials and that, on remand, the impact of such questioning should be considered by the trial court. I write separately also to emphasize the widely held view that juror questions are inherently problematic.

In many instances, it is not the question posed or the answer given that is of most importance: it is the fact that the question is asked in the first place. As trial attorneys will grasp, the juror question is, in effect, a direct communication to counsel. Therefore, whether a juror question is posed to the witness or not, the question informs counsel of how particular jurors view the case--while evidence is being presented and before the controversy is submitted to the jury.

Inasmuch as the prosecution has both the burden of producing the evidence and the burden of proving a defendant guilty beyond a reasonable doubt, the questioning juror becomes, although unknowingly, an ally of the prosecution, suggesting by his or her questions how the prosecution's case must be shored up or fashioned to obtain a guilty verdict. The impact of such questioning is heightened by other juror "reforms." For example, because jurors are instructed on the elements of the crime at the beginning of the case, their attention is understandably focused on the presence or absence of facts germane to proof of the elements. Juror questions are asked after a witness has already

been examined and cross-examined by counsel. Hence, the opportunity to requestion a witness after counsel have conducted their own examination invites the jurors to clarify matters relating to the elements and enlists the jury in the prosecution's proof task. Moreover, allowing another round of examinations by counsel after the court has propounded the juror's questions gives the prosecution the proverbial "second bite" at the apple, to which it would not otherwise be entitled.

So called procedural safeguards in juror questioning do not address the fundamental problem posed by this practice. It is not what questions will be asked or how the questions are asked that is pivotal but, as stated previously, that the questions are asked in the first place, thus providing the prosecution with a preview of the jurors' pre-deliberation positions. The safeguards do not resolve this inherent problem.

As the judge of the facts, the jury must maintain its neutrality and the trial courts are duty-bound to see to that. Doubtless, jurors are not cognizant of the impact their questioning will have on the way attorneys will try the case or of the effect their inquiries can have in advancing the prosecution's case, because such questioning is sanctioned by the court. Nonetheless, under the procedure for juror questioning, their roles in the trial can change from that of neutral judges. See cases cited infra. Cf. State v. Silva, 78 Hawai'i 115, 118,

890 P.2d 702, 705 (1995) (holding that judge's questioning in bench trial was unduly extended and aimed at proving prosecution's case). Allowing jurors to ask questions can result in an abridgment of the principles of fair play and justice that must be preserved in criminal trials. As one court stated,

there is a risk [in allowing jurors to ask questions] of a subtle shift from the role of neutral fact-finder to that of advocate. See *United States v. Johnson*, 892 F.2d 707, 714 (8th Cir. 1989) (Lay, J., concurring) (to remain neutral the jury needs to listen to the case as it is developed by the advocates; "if the juror begins to match his [or her] interrogation skills with the lawyer, all of that impartiality is lost.").

State v. Monroe, 828 P.2d 24, 29 (Wash. Ct. App. 1992) (brackets omitted). Thus, while juror questioning is not widely prohibited, even those jurisdictions that do not prohibit the exercise largely advise against the practice because of the problems inherent in it.

## I.

Although the federal courts do not prohibit juror questioning, a majority of federal circuits strongly discourage the use of juror questions. The first circuit court of appeals has cautioned as follows:

We hasten to add that the practice, while not forbidden, should be employed sparingly and with great circumspection. The dynamics of a criminal trial are extremely sensitive. Innovations that carry the potential for disrupting those dynamics are risky. Juror participation in the examination of witnesses represents a significant innovation, transforming the jurors' role from a purely passive one to a partially interactive one. . . . We suspect that, in most situations, the risks inherent in the practice will outweigh its utility. Thus, juror participation in the examination

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of witnesses should be the long-odds exception, not the rule.

United States v. Sutton, 970 F.2d 1001, 1005 (1st Cir. 1992)

(footnotes and citations omitted) (emphasis added). The second circuit court of appeals has similarly explained that the practice of allowing jurors to ask questions of witnesses should be curbed:

Indeed, the courts of appeals have uniformly concluded that juror questioning is a permissible practice, the allowance of which is within the judge's discretion. Nonetheless, the courts of appeals are similarly unified in their disapproval of the general practice of juror questioning of witnesses. As we stated in [United States v.] Bush, [47 F.3d 511 (2d Cir. 1995),] "[a]lthough we reaffirm our earlier holding . . . that juror questioning of witnesses lies within the trial judge's discretion, we strongly discourage its use." [Id.] at 515. . . .

In our recent discussion of juror questioning of witnesses, we made clear the danger inherent in such a practice. See [id.] at 525-26. When acting as inquisitors, jurors can find themselves removed from their appropriate role as neutral fact-finders. If allowed to formulate questions throughout the trial, jurors may prematurely evaluate the evidence and adopt a particular proposition as to the weight of that evidence before considering all the facts.

United States v. Ajmal, 67 F.3d 12, 14 (2d Cir. 1995) (some citations omitted) (some brackets and emphases in original and some added).

Of the nine federal circuits that have addressed the issue, six have advised against juror questioning.<sup>1</sup> See Sutton, 970 F.2d at 1005; Bush, 47 F.3d at 515-16 ("Balancing the risk

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<sup>1</sup> Some of the cases cited are outlined in a memorandum to the Hawai'i Committee on Jury Innovations for the 21st Century. The memorandum is contained in Appendix F of the Hawai'i Committee on Jury Innovations for the 21st Century, Final Report of the Hawai'i Committee on Jury Innovations for the 21st Century: A Report to the Chief Justice of the State of Hawai'i (1999). It should be noted that, according to this report, the committee approved of juror questions "by a narrow vote of 10 to 8." Id. at 7.

that a juror's question may be prejudicial against the benefit of issue-clarification will almost always lead trial courts to disallow juror questioning."); United States v. Powlichak, 783 F.2d 410, 413 (4th Cir. 1986) (holding that juror questions should be allowed only under compelling circumstances); United States v. Collins, 226 F.3d 457, 461 (6th Cir. 2000) ("There are a number of dangers inherent in allowing juror questions: jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts; the pace of trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions and there is a risk of undermining litigation strategies." (Citation omitted.)); United States v. Feinberg, 89 F.3d 333, 336 (7th Cir. 1996), cert. denied, 519 U.S. 1133 (1997) (stating that risks generally outweigh benefits of juror questions in most cases, because, among other things, jurors may engage in "premature deliberation" and become advocates); United States v. Welliver, 976 F.2d 1148, 1155 (8th Cir. 1992) ("[J]uror interrogation of witnesses presents substantial risk of reversal and retrial.").

Of the three federal courts that do not discourage the practice, two allow it with safeguards and the third has not conducted an in-depth analysis of the issue. See United States v. Hernandez, 176 F.3d 719, 723 (3d Cir. 1999) ("We take this

opportunity to approve of the practice [of jury questioning] so long as it is done in a manner that insures fairness of the proceedings, the primacy of the court's stewardship, and the rights of the accused."); United States v. Callahan, 588 F.2d 1078, 1086 n.2 (5th Cir. 1979) ("[C]ourts must . . . balance the positive value of allowing a troubled juror to ask a question against the possible abuses that might occur if juror questioning became extensive."); United States v. Huebner, 48 F.3d 376, 382 (9th Cir. 1994) (upholding juror questioning, but without any analysis of the issue). Therefore, despite permitting the practice of juror questioning, most federal circuits have urged the district courts to curtail its use.

## II.

Although finding juror questioning constitutional, a majority of State courts nevertheless advise against the practice. As pointed out by the Kansas Supreme Court:

In keeping with this court's view of trial as a quest for truth, we elect to follow those jurisdictions which permit the practice of juror questions. However, many risks are involved and a trial court should discourage the practice except when the benefits outweigh the risks. The litigants have generally employed counsel of their choice who have diligently prepared for trial. The trial judge and the jury are to be fair and impartial. The appearance of fairness and impartiality is frequently lost when the trial judge or juror becomes involved in questioning a witness. . . . We again suggest the practice be discouraged -- not encouraged.

State v. Hays, 883 P.2d 1093, 1102 (Kan. 1994) (emphasis added).

In a similar vein, the Texas Supreme Court, in affirming a

reversal of a defendant's conviction in a case involving juror questioning, explained that,

[g]iven the importance of maintaining juror impartiality as fundamental to adversarial integrity, any redefining of the juror's role in the process must be undertaken only when the benefits are exceedingly clear. The benefits of allowing jurors to participate in soliciting evidence are far from clear and fade into insignificance in light of the perils presented to adversarial principles.

Morrison v. State, 845 S.W.2d 882, 887 (Tex. Crim. App. 1992) (en banc) (footnotes omitted) (emphasis added).<sup>2</sup>

Of the thirty-three states that have considered the matter of juror questioning, three states prohibit the practice altogether. See Stinson v. State, 260 S.E.2d 407, 410 (Ga. Ct. App. 1979) ("[A] juror should not be permitted to examine a witness under any circumstances."); Wharton v. State, 734 So.2d 985, 990 (Miss. 1998) ("Today we hold that juror interrogation is no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this court."); State v. Zima, 468 N.W.2d 377, 380 (Neb. 1991) ("We therefore rule that in the trial courts of this state, juror questioning is prohibited.").

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<sup>2</sup> The proposition in Morrison is not distinguishable from our situation on the ground that questioning by trial judges is disapproved in Texas and permitted in our jurisdiction. Federal Rule of Evidence Rule 614 authorizes federal judges to question witnesses. Yet, most federal circuit courts of appeal discourage juror questioning. See cases cited supra. As in federal courts, in this jurisdiction, judges may ask questions of witnesses. See Hawai'i Rules of Evidence Rule 614(b) (1993). However, our appellate courts have recognized that such a procedure may result in judicial partiality. See State v. Silva, 78 Hawai'i 115, 118 890 P.2d 702, 705 (App. 1995).

Twelve states allow for juror questioning but discourage its use. See State v. LeMaster, 669 P.2d 592, 597-98 (Ariz. Ct. App. 1983) ("Because of the inherent risks in the practice of allowing jurors to pose questions to the witness, and the particular danger that a juror will not remain fair and impartial, we hesitate to condone the court's encouraging jurors to question witnesses to the extent presented in this appeal." (Emphasis added.)); People v. McAlister, 213 Cal. Rptr. 271, 277 (1985) ("[T]he practice [of juror questioning] is inherently dangerous and should be discouraged."); Pierre v. State, 601 So. 2d 1309 (Fla. Dist. Ct. App. 1992) ("While allowing jurors to ask questions of witnesses is permissible, it is hard to discern the benefit of such practice when weighed against the endless potential for error."); Hays, 883 P.2d at 1102; Commonwealth v. Urena, 632 N.E.2d 1200, 1205 n.7 (Mass. 1994) ("We note that the questioning of a defendant in a criminal case by jurors may be 'particularly troublesome.'" (Citation omitted.)); State v. Jumpp, 619 A.2d 602, 610 (N.J. Super. 1993) ("[W]e believe that the practice of juror questioning is fraught with dangers . . . ."); State v. Wayt, 615 N.E.2d 1107, 1112 (Ohio 1992) (stating that the practice of juror questioning "is generally not encouraged"; trial court abused discretion by denying defense counsel the opportunity to ask follow-up questions on issue raised by juror question); Day v. Kilgore, 444



S.E.2d 515, 517 (S.C. 1994) ("One of the most dangerous aspects of allowing juror questions is that a juror may lose his impartiality in the fact-finding process . . . . We agree with those jurisdictions that discourage juror questions."); State v. Jeffries, 644 S.W.2d 432, 434 (Tenn. Ct. App. 1982)

("[P]ermitting jurors to ask questions is a perilous practice and should be avoided." (Citation omitted.)); Morrison, 845 S.W.2d at 882 (reversing case where juror question was not asked, but question provoked the prosecution to recall a witness to address the juror's concern); State v. Johnson, 784 P.2d 1135, 1144-45 (Utah 1989) ("While not encouraged, it is within the trial court's discretion to allow jurors to ask questions in court." (Citations omitted.)); Monroe, 828 P.2d at 29 ("Other dangers [of juror questioning] include[:] . . . the deliberative process may begin prematurely with juror questions that necessarily reflect deliberative consideration of the evidence.").

Eleven states that neither encourage nor discourage juror questioning advise judges to exercise their discretion with great caution or provide for safeguards that limit the prejudice that results from questioning. See Ratton v. Busby, 326 S.W.2d 889, 898 (Ark. 1959) ("The fact that the trial judge gave the jury permission to interrogate a witness without any special request from them for the privilege has been held not to constitute error so long as the questions asked are germane to

the issue." (Emphasis added.) (Citations omitted.); Spitzer v. Haims and Co., 587 A.2d 105, 112 (Conn. 1991) (holding that the evil of permitting premature discussion by jurors is "not inherent in a properly safeguarded procedure of permitting jurors' questions"); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 556 (Iowa 1980) ("We approve the practice [of juror questions] in principle. . . . Of course the questions must call for admissible evidence, and trial court discretion must be exercised to prevent abuse of the practice."); State v. Daniels, 343 S.W.2d 661, 667 (Mo. Ct. App. 1961) ("Of course, a juror is not selected for the purpose of asking questions and can be permitted or denied the privilege by the trial court."); State v. Graves, 907 P.2d 963, 967 (Mont. 1995) ("While we neither encourage nor discourage the practice of allowing jurors to question witnesses, we, nevertheless, caution trial courts which allow this practice to be ever mindful that the jury's fact-finding role is to be accomplished in a spirit of neutrality, fairness, and open-mindedness."); Flores v. State, 965 P.2d 901, 902 (Nev. 1998) ("We hold that allowing juror-inspired questions in a criminal case is not prejudicial per se, but is a matter committed to the sound discretion of the trial court. To minimize the risk of prejudice . . . the practice must be carefully controlled by the court." (Citation omitted.)); State v. Rodriguez, 762 P.2d 898, 902 (N.M. Ct. App. 1988) ("[T]he

trial court must carefully consider the possible prejudice which may result from questions submitted by jurors to a criminal defendant . . . ."); People v. Bacic, 608 N.Y.S.2d 452, 452 (1994) ("It was within the trial court's discretion to permit jurors to submit written questions of a witness, striking those it deemed improper."); State v. Howard, 360 S.E.2d 790, 794 (N.C. 1987) ("Questions should ordinarily be for clarification and the trial judge should exercise due care to see that juror questions are so limited."); Williams v. Commonwealth, 484 S.E.2d 153, 156 (Va. Ct. App. 1997) ("We do not discourage trial judges from exercising their discretion to permit juror questioning, provided they adopt procedures that assure control over the process and avoid the pitfalls that have potential for prejudice."); State v. Darcy N. K., 581 N.W.2d 567, 580 (Wis. Ct. App.), rev. denied, 584 N.W.2d 123 (1998) ("If counsel objects [to juror questions], proceeding with juror questions should be supported by findings on the record.").

Four jurisdictions maintain a neutral stance toward juror questioning, commenting only that the matter lies within the discretion of the trial court. See Lawson v. State, 664 N.E.2d 773, 780 (Ind. Ct. App. 1996) ("While solicitation of jury questions was discouraged under prior case law, given the inclusion of the jury question provision in the Indiana Rules of Evidence, we are not persuaded that a trial court does not have

the discretion to incorporate a jury question procedure into a trial."); People v. Heard, 200 N.W.2d 73, 76 (Mich. 1972) ("The practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court."); State v. Costello, 620 N.W.2d 924, 928 (Minn. Ct. App. 2001) ("We agree with jurisdictions that find the process is within the discretion of the district court."); Boggs v. Jewell Tea Co., 109 A. 666, 668 (Pa. 1920) ("[E]ven jurors may ask questions [in a jury trial]"). One state has only addressed the issue in the context of whether a judge has the discretion not to allow for jury questions and has determined that the trial court indeed has such discretion. See Gonzales v. Prestress Eng'g Corp., 551 N.E.2d 793, 799 (Ill. App. Ct. 1990) (determining that it was not an abuse of discretion for trial court not to allow juror questions because "[n]either legislation nor Supreme Court Rules provide for [it]"). Only two states actually encourage juror questions. See Transit Auth. of River City v. Montgomery, 836 S.W.2d 413, 416 (Ky. 1992) ("The practice is encouraged with strict supervision by the trial judge, if it is likely to aid the jury in understanding a material issue involved." (Citations omitted.)); Krause v. State, 132 P.2d 179, 182 (Okla. Crim. App. 1942) ("We think it proper that a juror ask an occasional question where something has been said by a witness which is

confusing to the juror for the purpose of clarifying the matter.").

### III.

It is sometimes said that juror questioning assists in the search for truth. See Callahan, 588 F.2d at 1086; Yeager v. Greene, 502 A.2d 980, 985 (D.C. Cir. 1985) (denying writ of mandamus which challenged trial judge's practice of allowing jurors to ask questions because trial judge's related order, attached as an appendix to opinion, and which favored the practice as a truth-finding function, was not an egregious abuse of discretion). That search, however, must take place within the framework allocating the responsibility for the production of evidence and for sustaining the burden of proof established for criminal cases. As the Nebraska Supreme Court stated in Zima,

Since due process requires a fair trial before a fair and impartial jury, the judicial process is better served by the time-honored practice of counsel eliciting evidence which is heard, evaluated, and acted upon by jurors who have no investment in obtaining answers to questions they have posed.

. . . A change in the system whereby jurors become advocates and possible antagonists of the witness does not on its face suggest a more reliable truth-seeking procedure.

468 N.W.2d at 379-80 (internal citations omitted) (emphasis added). The Morrison court similarly explained that

[a] criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. Due process and those individual rights that are fundamental to our quality of life [such as the fifth amendment privilege against self-

incrimination] co-exist with, and at times override, the truth-finding function. . . . Evidentiary barriers to conviction exist, in part, to equalize the contest between the state and the defense by offsetting the abundant resources and the power of the state.

845 S.W.2d at 884-85 (citations and footnotes omitted) (emphasis added). The wisdom of the majority of jurisdictions, both federal and state, is consistent with this view and should be heeded by our trial courts.

Under Hawai'i Rules of Penal Procedure Rule 26(b), juror questioning is permitted in the discretion of the trial judge. Because juror questioning can have a profound impact on the structure of a criminal trial and the roles and functions assigned to the court, the jury, and the parties, refraining from its allowance would be, in my view, the better part of discretion.