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LITIGATING JURY ISSUES IN CAPITAL TRIALS: CONSTITUTIONAL LAW AND VIRGINIA PROCEDURES

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LITIGATING JURY ISSUES IN CAPITAL TRIALS: CONSTITUTIONAL LAW AND VIRGINIA PROCEDURES

BY: PAULA DYAN EFFLE

I. Introduction

A capital defendant has a fundamental right to be tried by a jury drawn from a representative cross section of the community and which has been subjected to a thorough voir dire to remove those jurors with conscious and unconscious biases against the defendant, including jurors who cannot fairly consider a penalty less than death. Unfortunately, jury selection is perceived as an area requiring a great investment of time and money to be successful. As a result, challenges to the selection of jurors and jury venires are often ignored or handled perfunctorily before trial. Often the best a trial record offers on jury selection is a cursory *Batson* challenge that must be used in an attempt to circumvent procedural default when the other jury selection issues are finally raised on appeal and habeas corpus.

This article summarizes the constitutional rights of a capital defendant and discusses tactics available to defense counsel pre-trial to make effective jury claims. Jury selection issues are important for several reasons. Raising jury issues provides a pressure point in negotiating a noncapital plea with the Commonwealth. Additionally, recognizing and avoiding procedural default hurdles at trial provides appellate counsel with a solid record for getting the issues heard later. Finally, a well-planned attack on the jury venire and voir dire may help expose the fundamental flaws in Virginia's jury selection process and win the client a new trial in the process.

II. Challenges to the Venire

The Supreme Court of the United States has specifically held that the composition of a jury venire is subject to challenge based on both the Equal Protection Clause of the Fourteenth Amendment and the "fair cross-section" requirement implicit in the Sixth Amendment right to an impartial jury. Because each claim protects distinct rights, each requires a different showing to state a prima facie case. Strategically, defense counsel should make separate pre-trial motions for each claim and obtain separate rulings from the trial court judge on each issue.[1]

A. Sixth Amendment fair cross-section requirements

The Sixth Amendment guarantees a trial by an "impartial jury of the state and district wherein the crime shall have been committed."[2] The requirement is grounded fundamentally in a societal interest in the integrity of the criminal trial and public confidence in the criminal justice system. A Sixth Amendment challenge is an especially powerful tool for the capital defendant, as it requires no showing of prejudice in order for the defendant to be entitled to relief. The fair cross-section requirement is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[3]

The fair cross-section requirement is defined as an array from which no cognizable group has been systematically excluded.[4] Although the defendant is not entitled to proportional representation of the community in the jury array, he is entitled to a fair opportunity for such proportionality.[5] Moreover, a criminal defendant has standing to challenge exclusion resulting in a violation of the fair cross-section requirement, whether or not he is a member of the excluded class.[6]

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries is selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.[7]

Precisely what constitutes a "cognizable" group has not been articulated by the Supreme Court, but it is relatively settled that groups defined by race, ethnicity, and gender are cognizable.[8] Additionally, groups defined by economic, social, religious, political and geographical criteria may be "cognizable" for purposes of making a claim under the fair cross-section requirement.[9]

To make a showing of substantial underrepresentation, courts have used two statistical methods. "Absolute disparity" measures the difference between the percentage of the group in the jury pool and the percentage of the community that the group represents. An absolute disparity of over ten percent has been considered significant.[10] "Comparative disparity", more useful with small groups, denotes the percentage of the cognizable group represented in the array divided by the percentage of the community the group represents. The resulting figure indicates what percentage of the group has been summoned.

An example illustrates the two concepts. Suppose a pool in which thirty percent of those called for jury service or selected for a particular case were women, drawn from a community in which fifty percent of those lawfully and constitutionally eligible for service were women. The absolute disparity in this pool is twenty percent; the comparative disparity is sixty percent (only three-fifths of the women required to make the pool representative have been summoned). The Supreme Court has recognized a comparative disparity of thirty-eight percent as significant.[11]

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[1] This is particularly important because Virginia courts have a tendency to confuse the two claims, and have incorrectly denied a fair cross-section claim on the basis that no discriminatory intent has been shown. *See, e.g., Watkins v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989); *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987).

[2] U.S. Const. amend. VI.

[3] *Duncan v. Louisiana*, 391 U.S. 145 (1968).

[4] *Glasser v. United States*, 315 U.S. 60 (1942).

[5] *Duren v. Missouri*, 439 U.S. 357, 363 (1979).

[6] *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).

[7] *Duren*, 439 U.S. at 364.

[8] *See, e.g., J.E.B. v. Alabama ex rel T.B.*, 114 S.Ct. 1419 (1994)(women); *Duren v. Missouri*, 439 U.S. 357 (1968)(women); *Smith v. Texas*, 311 U.S. 128 (1940) (African-Americans) (pre-incorporation); *United States v. Test*, 550 F.2d 577, 586 (10th Cir. 1976)(Hispanics).

[9] *See Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). The case involved an action against a railroad company and defined the excluded group as wage earners. The Court stated that "[r]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Id.*

[10] *United States v. Tuttle*, 729 F.2d 1325, 1327 (11th Cir. 1984).

[11] *Turner v. Fouche*, 396 U.S. 346 (1970). The case was decided under equal protection analysis, but this statistical measurement of underrepresentation is a common feature of both types of claims.

Once the defense attorney makes these two showings, the court is required to infer that the underrepresentation results from the selection process. Again, unlike an equal protection claim, no showing of discriminatory intent is required, and the prima facie case cannot be rebutted simply by asserting a lack of intent. Only proof of a significant governmental interest which justifies the imbalance may defeat a Sixth Amendment claim to the jury array.[12]

B. Equal protection challenges to the venire

Five elements are required to make out a prima facie case in an equal protection challenge. First, the defendant must have standing. Even if the defendant is not a member of an excluded group, he or she has standing as a representative of the excluded juror.[13] Once standing has been established, the following must be established: 1) the group is a recognizably distinct class; 2) the group has been singled out for different treatment under the law, as written or applied; 3) substantial underrepresentation of the group has occurred over a significant period of time; and 4) the selection procedure itself is susceptible to abuse or is not neutral.[14]

Equal protection guarantees involve a juror's personal interest in not being subjected to irrational and discriminatory classifications, as well as a societal interest in the integrity of the system.[15] Two key aspects distinguish equal protection claims from fair cross-section claims. First, equal protection analysis traditionally applies only to race, ethnicity, and gender (so-called "suspect classifications") and it may be difficult to convince a court to be receptive to Equal Protection Clause claims based on categories other than these two narrow classes. Second, a prima facie equal protection challenge may be rebutted by a showing that discriminatory intent is absent.[16]

C. Virginia procedures

The creation of the venire from which grand and petit jurors are selected in Virginia is governed by Virginia Code section 8.01-345. Prior to October first of each year, Virginia circuit court judges appoint jury commissioners for the following year. Prior to December first, the jury commissioners submit to the clerks of Virginia courts a list of qualified inhabitants of their respective cities or counties. In generating this list, the Code states that:

> The jury commissioners *shall* utilize random selection techniques, either manual, mechanical, or electronic, using a current voter registration list and, *where feasible*, a list of persons issued a driver's license [] from the Department of Motor Vehicles, city or county directories, telephone books, personal property tax rolls, and other such lists as may be designated and approved by the chief judge of the circuit . . . .[17]

After the random selection, the commissioners apply statutory exceptions and exemptions. The Chief Judge is required to "ensure the integrity of the random selection process" and to ensure compliance with the provisions of the law governing jury selection.[18]

1. Virginia procedures violate fair cross-section requirements and are facially unconstitutional.

Many jurisdictions in the Commonwealth draw potential jurors from only voter registration lists, contrary to the clear mandate of the statute. In those jurisdictions, a facial claim of a fair cross-section violation is possible.[19] The 1990 National Census figures indicate that the number of voting age Virginia residents is approximately 4.7 million. Of that number, approximately 3.7 million (79%) are white, 823,000 (17.5%) are African-American and 166,000 (3.5%) are other non-white minorities.[20] By comparison, only about 3 million Virginia residents are currently registered to vote. Therefore, 1.7 million people who have the right to an opportunity to sit on a trial jury or a grand jury are excluded from consideration.

Arguably, these 1.7 million people represent a "cognizable" group for purposes of making a fair cross-section claim under the Sixth Amendment.[21] In evaluating Virginia's jury selection procedures, the Fourth Circuit Court of Appeals has emphasized that,

> [t]here is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. . . . It is a democratic institution, representative of all qualified classes of people.[22]

Not only is the group cognizable — all nonregistered but eligible voters — but the statistical disparity, both absolute and comparative, is a highly significant one hundred percent. Another fair cross-section argument arises if the percentage of non-white minorities that are registered voters is not the same as the percentage of minorities that are of voting, and therefore jury-eligible, age. In that case, the master list will not represent a cross-section of the community with respect to racial composition.[23] Over time, Virginia's recent and reluctant enactment of the National Voter Registration Act of 1993 (the "motor voter bill")

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[12] *Duren*, 439 U.S. at 368. If the state suggests that permissible exemptions from jury service are responsible for the statistical disparity, evidence must be produced. "[M]ere suggestions or assertions to that effect are insufficient." *Id.* at 369. Reasonable exemptions, such as those based on special hardship, incapacity, or community needs, are permissible. However, if an exemption results in underrepresentation of a particular group, a serious question as to the "reasonableness" of the exemption arises. *Taylor v. Louisiana*, 419 U.S. at 534.

[13] *Holland v. Illinois*, 493 U.S. 474 (1990).

[14] *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

[15] *Rose v. Mitchell*, 443 U.S. 545 (1979).

[16] However, large disparities over a significant period of time have been held not rebutted by mere assertions of absence of intent. *See, e.g., Whitus v. Georgia*, 385 U.S. 545, 551 (1967); *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).

[17] Va. Code Ann. § 8.01-345 (Michie 1992) (emphasis added).

[18] *Id.* "[T]he statutory provisions with respect to empaneling juries are mandatory and not directory." *Harmon v. Commonwealth*, 212 Va. 442, 444, 185 S.E.2d 48, 50 (1971) (citing *Slater v. Commonwealth*, 182 Va. 579, 582, 29 S.E.2d 853, 854 (1944); *Jones v. Commonwealth*, 100 Va. 842, 846, 41 S.E. 951, 952 (1902); *Hall v. Commonwealth*, 80 Va. 555, 561 (1885)).

[19] These arguments were originally presented by Marvin D. Miller, Esq., from Alexandria, Virginia at the April 14, 1995 Continuing Legal Education Seminar hosted by Washington and Lee University School of Law and the Virginia Capital Case Clearinghouse.

[20] Additionally, the National Census provides population information regarding gender, household income, marital status and age.

[21] *See Foster v. Sparks*, 506 F.2d 805, 820 (5th Cir. 1975) (noting that "[c]ognizability derives meaning from the nature of the injury alleged, i.e., that because of discrimination in selection procedures, juries are not being drawn from a fair cross section of the community").

[22] *Witcher v. Peyton*, 405 F.2d 725, 727 (4th Cir. 1969) (quoting *Fay v. New York*, 332 U.S. 261, 299-300 (1947) (Murphy, J. dissenting)); *see* note 6, *supra*.

[23] Note that the same holds true of differences in percentages of women, men, ethnic minorities, religious minorities, etc.

might possibly bring the non-white numbers more in line with the census numbers. In the meantime, however, debate on the bill itself provides evidence that the voter registration system has historically suffered from racial bias.[24]

2. Application of Virginia jury selection statutes violates both fair cross-section and equal protection guarantees.

The Virginia State Board of Elections, which is responsible for all voting and voting registration regulation, does not keep records of statistical information similar to that available from the National Census. In those circuits that include driver's license lists, the Department of Motor Vehicles also does not keep statistical information on the race or gender composition of the lists. Therefore, in order to make a prima facie case of underrepresentation in violation of the Sixth Amendment or the Equal Protection Clause, defense counsel will need to obtain the statistical breakdown of the actual jury list in the particular jurisdiction.

There are several tools available to obtain this information. First, defense counsel should file a discovery motion specifically seeking a statistical breakdown of the master jury list, in terms of all cognizable groups, delineating that the breakdown is to include race, sex, age, economic factors and any other relevant classification. If this motion is denied on the basis that the required information does not exist, counsel may file a motion asking leave to perform such a survey as is necessary to determine whether a cognizable group has been systematically excluded from the master list.[25]

In order to reduce the burden on defense counsel, an *Ake*-type motion for appointment of an expert in the area or funds to hire such an expert, based on the Sixth, Eighth, and Fourteenth Amendments is also in order.[26] The Supreme Court, in recognizing the imbalance between the resources available to a State and an indigent defendant, found that the Constitution requires appointment and payment for the "basic tools of an adequate defense."[27] The rationale of the Court's decision in *Ake* applies to all experts reasonably necessary for an effective defense. Additionally, it can be argued that the Sixth Amendment's entitlement to the effective assistance of counsel includes "the allowance of investigative expenses or appointment of investigative assistance for indigent defendants in order to insure effective preparation of their defense by their attorneys."[28]

If the trial court denies these motions, they should be renewed when the panel for the individual case is called because the fair cross-section and equal protection guarantees apply to the panel as well as the array. Like all constitutional issues, to avoid procedural default the claims must be based on the federal constitution, and it is imperative that the motions state this expressly and firmly. Again to avoid default, defense counsel should renew their objection when the jury is empaneled and move for a new venire.

III. Voir Dire

As with challenges to the array, the Sixth and Fourteenth Amendments provide specific protections during voir dire.

A. Sixth Amendment impartiality requirement

In every capital case, defense counsel should seek to obtain individual and sequestered voir dire. The Virginia Capital Case Clearinghouse Trial Manual provides a sample motion and supporting memorandum to achieve this. The voir dire of capital jurors underscores the need for an effective co-counsel to ferret out biased jurors without jeopardizing credibility before the jury that is finally empaneled.[29]

Basic Sixth Amendment protection requires that "[e]very prospective juror must stand indifferent to the cause, 'and any reasonable doubt as to a juror's qualifications must be resolved in favor of the accused.'"[30] Appellate courts, especially the Virginia Supreme Court, are extremely deferential to the trial court judge when examining this issue.[31] Therefore, it is imperative that defense counsel impress upon the judge the importance that the juror can follow the reasonable doubt standard. For example, a juror who indicates a belief that the defendant is required to prove his innocence, or to testify, cannot be rehabilitated by giving "expected answers to leading questions"[32] by a trial court judge or opposing counsel. "Mere assent to a trial judge's questions or statements, or to counsel's leading inquiry, is not enough to rehabilitate a prospective juror who has initially demonstrated a prejudice or partial predisposition."[33]

Moreover, capital defendants have the right to an impartial sentencing jury.[34] Virginia Rule 3A:14 was amended to make it clear that counsel, as well as the judge, has the right to examine prospective jurors.[35] Because a juror is to be excluded if his or her attitude toward the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,"[36] it follows that counsel are entitled to examine prospective jurors about every matter that could prevent or substantially impair performance as required by law.[37] A section of the Clearinghouse's trial manual entitled "The Right to Meaningful Voir Dire" provides a thorough discussion of the areas defense counsel should explore, and suggests methods by which scrupled jurors can be rehabilitated.

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[24] *See* Jeff E. Shapiro, *Allen Gets Voting Measure*, Richmond Times Dispatch, Feb. 16, 1996 at A-10. Sen. Yvonne B. Miller is quoted as stating that defeated amendments to the bill were a "'smoke screen that's an attempt to repeat [Virginia's] inglorious history' of racially biased voting laws." *Id.*

[25] Although the Supreme Court of Virginia has held that the jury list is to be kept secret unless good cause is shown, *Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973), this case appears to have been overruled by statute. Va. Code Ann. § 8.01-351 (Michie 1992) provides that "[t]he list shall be available in the clerk's office for inspection by counsel in any case to be tried by a jury during the term."

[26] *See* Virginia Capital Case Clearinghouse Trial Manual for an article from *The Champion* regarding the preparation of a jury composition challenge.

[27] *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

[28] *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975).

[29] *See* Townes, *Maximizing Your Potential: The Effective Use of Co-Counsel in a Capital Case*, Capital Defense Journal, this issue.

[30] *Clements v. Commonwealth*, 21 Va. App. 386, 392, 464 S.E.2d 534, 537 (1995) (quoting *Breeden v. Commonwealth*, 217 Va. 297, 298, 227 S.E.2d 734, 735 (1976)).

[31] *See Weeks v. Commonwealth*, 248 Va. 460, 475, 450 S.E.2d 379, 389 (1994), and case summary of *Weeks*, Capital Defense Digest, Vol.7, No.2, p.12 (1995).

[32] *McGill v. Commonwealth*, 10 Va. App. 237, 242, 391 S.E.2d 597, 600 (1990) (citing cases).

[33] *Griffin v. Commonwealth*, 19 Va. App. 619, 625, 454 S.E.2d 363, 366 (1995) (citing *Foley v. Commonwealth*, 8 Va. App. 149, 159-60, 379 S.E.2d 915, 921, *aff'd en banc*, 9 Va. App. 175, 384 S.E.2d 813 (1989)).

[34] *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).

[35] *See also* Va. Code Ann. § 8.01-358 (Michie 1992).

[36] *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

[37] *See Morgan v. Illinois*, 504 U.S. 719 (1992) (holding that voir dire on a juror's inability to consider a life sentence is constitutionally required).

B. *Batson* challenges

In *Batson v. Kentucky*[38], the Supreme Court held that a prosecutor may not utilize peremptory strikes to exclude African-Americans from the jury solely on account of their race or on the assumption that African-American jurors will be unable to consider impartially the state's case against an African-American defendant. The Court found that the use of peremptory challenges to discriminate against racial minorities violated the Equal Protection Clause of the Fourteenth Amendment. The same prohibition applies to the peremptory strikes of defense counsel.[39] As with the fair cross-section requirement, the individual making the *Batson* challenge need not be the same race as the struck juror.[40]

1. The prima facie case

Although *Batson* challenges were originally limited to cognizable racial groups, the Supreme Court has also held that women and ethnic groups are within *Batson*'s reach.[41] Lower courts have extended the protection to additional classifications, utilizing a rationale similar to that found in the fair cross-section cases, including the suggestion by some courts that the Equal Protection Clause prohibits the exercise of peremptory strikes to remove individuals of a particular socioeconomic class.[42]

To make out a prima facie *Batson* challenge, the defendant must show that the prosecutor has used peremptory strikes to remove individuals of a protected group. The defendant must also establish that the facts and circumstances raise an inference that the prosecutor used the peremptory strike process to remove venire members from the petit jury on account of their race.[43] Several kinds of evidence are useful in making the inference that jurors have been struck for discriminatory reasons. First, the defendant is entitled to "rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[44] Second, if the only common characteristic of all struck jurors is their race, or if the prosecutor uses a peremptory strike to remove the only member of a particular race from the venire, a discriminatory inference may arise.[45] Third, the nature of the struck juror's voir dire responses or the nature of the voir dire questioning by the prosecutor may also prove useful.[46] Finally, the Fourth Circuit Court of Appeals has held that the race of the victim, the defendant and witnesses is a consideration.[47]

2. Attacking the prosecutor's "race-neutral" explanation

Although a prosecutor's explanation "need not rise to the level of justifying a challenge for cause,"[48] the justification must identify "legitimate reasons" that are "related to the particular case to be tried"[49] and sufficiently persuasive to rebut the prima facie case. Unpersuasive or even implausible explanations may be legitimate; the threshold inquiry is whether the explanation was facially valid and not discriminatory.[50] However, the trial court's ultimate decision as to whether the strike was legitimate will hinge on how well the explanation is logically related to the particular case. Therefore, defense counsel should press the prosecutor and point out to the court that the explanation is not supported by the record.

One author has articulated a number of examples indicating a discriminatory strike.[51] If the reasons are a "sham or thinly disguised pretext for purposeful racial discrimination", if the explanation was too vague, or if the "prosecutor engaged in no questions on voir dire that would indicate a good-faith interest in the jurors' attitudes that he now claims justified the peremptory challenge", the prosecutor has failed to rebut the prima facie *Batson* challenge.[52] Another category of illegitimate strikes involves the excluded juror as compared to those who were not struck. Defense counsel should always make sure the trial court is aware that other jurors with the same characteristics or voir dire responses as a stricken juror remain seated. For example, if a black juror is stricken because she is young and childless and other young childless jurors remain seated, the prosecutor's explanation is suspect.

A final type of unacceptable justification is one that indicates a secondary form of discrimination. In the previous example, the juror's youth may be an illegitimate reason on its face for the strike, unless the prosecutor can explain logically how the juror's age is relevant to the specific case. Similar arguments can be made when a strike is based on a juror's religion, gender, or socioeconomic status.[53]

IV. Defense Strategies — Avoiding Procedural Default

Before voir dire, defense counsel should decide what he or she hopes to accomplish by challenging the jury selection process. If the

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38 476 U.S. 79 (1986).

39 *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

40 *Powers v. Ohio*, 499 U.S. 400 (1991).

41 *See, e.g., J.E.B. v. Alabama ex rel T.B.*, 114 S. Ct. 1419 (1994) (male defendant can challenge peremptory strikes of male jurors); *Hernandez v. New York*, 500 U.S. 352 (1991) (Hispanics).

42 *See, e.g., United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992) (en banc) (women); *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992) (peremptory strike based on fact that juror lived in a poor, violent area was not race-neutral); *United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990) (Hispanics); *United States v. Gelb*, 881 F.2d 1155 (2d Cir. 1989), *cert. denied*, 493 U.S. 994 (1989) (Jews recognized as a cognizable group for purposes of civil rights statute); *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989) (Italians); *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989) (whites); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987) (Native Americans); *People v. Turner*, 42 Cal. 3d 711 (1986), *cert. denied*, 115 S.Ct. 1702 (1995) (in dictum, the court suggests that exclusion of "working class" people violated the Equal Protection Clause).

43 *Batson v. Kentucky*, 476 U.S. 79, 96 (1985).

44 *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

45 *See United States v. Clemons*, 843 F.2d 741, 747 (3d Cir. 1988), *cert. denied*, 488 U.S. 835 (1988); *United States v. Chalen*, 812 F.2d 1302 (10th Cir. 1987).

46 *Batson*, 476 U.S. at 97; *see, e.g., People v. Allen*, 23 Cal. 3d 286 (1979) (noting that black juror peremptorily struck by prosecutor had friends or relatives in law enforcement).

47 *United States v. Grandison*, 885 F.2d 143, 148 (4th Cir. 1989), *cert. denied*, 495 U.S. 934 (1990).

48 *Batson*, 476 U.S. at 97.

49 *Id.* at 98 n.20.

50 *Purkett v. Elem*, 115 S.Ct. 1769 (1995).

51 Peter Schoenburg, *A Lawyer's Perspective on Jury Selection After* Batson, Jury Selection, (2d ed. Supp. 1995) at 16-17.

52 *Id.*

53 *Id.*

atmosphere suggests that the goal of achieving a more representative jury at trial is realistic, defense counsel should consider bringing up jury issues early by filing motions to discover the racial composition of the jury array and to ensure that racial, ethnic and gender divisions are on the record. Counsel should also make sure that basic facts about the racial, ethnic, and gender identities of the defendant, victim, and witnesses are on the record. This puts the trial court and the prosecution on notice early that defense counsel intends to work zealously to achieve a representative petit jury.

In some situations, the best that defense counsel can hope to do with a jury challenge is to preserve a strong record to achieve reversal on appeal. In these cases, building a strong record is paramount. To do so, defense counsel must establish the group affiliation of each individual juror, the defendant, victim, and witnesses on the record. Additionally, a motion to have the prosecution's notes and materials used in the jury selection process sealed and preserved as a part of the appellate record is recommended.

MAXIMIZING YOUR POTENTIAL: THE EFFECTIVE USE OF CO-COUNSEL IN A CAPITAL CASE

BY: COURTNEY S. TOWNES

As any attorney who has defended a capital case well knows, defending a capital case is different. The severe and irrevocable nature of the death penalty places a heavy responsibility upon defense counsel. Effective representation of a client facing the death penalty requires hundreds of hours of fact investigation and legal research as well as limitless energy and staying power. In recognition of the extraordinary demands inherent in capital cases, the American Bar Association recommends that state courts assign two attorneys who are qualified for capital litigation to each individual case.[1] On the federal level, statutory law entitles a capital defendant to dual representation upon the defendant's request.[2] Although Virginia does not by statute require more than one attorney in a capital case, courts have appointed two attorneys to capital defendants as a matter of course.[3]

I. Investigation and Division of Labor

A capital case contains two trials, one deciding guilt and one deciding punishment. It is extremely important that the defense devote commensurate time and energy to both the guilt-innocence phase and the penalty trial. Striking the balance, however, is not easy, because defense performance in the guilt phase revolves around theories of innocence, defense counsel is thus inevitably less inclined to prepare for the penalty phase which follows swiftly if there is a guilty verdict. A persistent danger exists, therefore, that, notwithstanding competent counsel, penalty phase preparation will be lost in the shadows while preparing for the guilt-innocence trial. If used properly, having two counsel can enable the defense team to ensure adequate attention is paid to both the guilt-innocence and penalty phases.

Many lawyers choose to divide preparation for the two phases of the trial: while one attorney handles the guilt side, the other is responsible for conducting voir dire and preparing for the possibility of a capital sentencing hearing. Allocating the burdens by splitting the trial into two equally important mini-trials often helps the defense team ensure that preparation is proceeding on both guilt-innocence and sentencing.

Once doubled in size, the defense, charged with two sets of particularized duties, is able to gather crucial information for both phases more effectively. Both attorneys must dive into the client's social and mental history and aggressively seek the assistance of others in order to tailor that information to the intricacies of their particular stages of the defense. Any overlap between the two phases operates as a safety net, keeping the two attorneys in close communication throughout the process.

Having two defense attorneys also increases opportunities for communication with the accused. Developing a rapport with the client is an essential tool in uncovering mitigation evidence but relationships are often difficult with the restraints of time and personal chemistry. With more time and an additional personality, a two-person defense team is more likely to get to know the client; increased rapport will also aid both attorneys in their investigation of the facts.

In addition to enabling counsel to cope systematically with an overwhelming amount of material, breaking up the mass of information into two logical parts serves two other vital functions: it allows counsel to proceed more aggressively and think thoroughly, and increases the credibility and effectiveness of the defense before the jury.

II. Strategy and Coordination of Skills

Perhaps the most overlooked assistance that co-counsel can provide is professional support and perspective. Although each attorney will be concentrating on different phases of the case, neither attorney should lose sight of the case as a whole. The two phases of trial are closely related and the guilt-innocence and penalty phases must be tightly integrated for a successful resolution of the case. Co-counsel should consult with each other on a regular basis to ensure that both lawyers are familiar enough that they could present the other side of the case if needed. Detailed communication is especially important when only one of the attorneys has significant experience in capital litigation. Moreover, while the experienced attorney can help guide the attorney unfamiliar with capital defense through the thicket of capital punishment law, the inexperienced attorney has the advantage of bringing novel perspectives to the case.

To present the most zealous defense for the client, primary counsel may want to request that the additional counsel come from another

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[1] Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 2.1 (1989).

[2] 18 U.S.C.A. § 3005 (Supp. 1996). The Fourth Circuit Court of Appeals has consistently held that the defendant must actively seek this right, however, or it will be presumed waived. Because the right is statutory rather than constitutional in nature, neither the court nor the Government need inform the defendant of this conditional entitlement. *United States v. Williams*, 544 F.2d 1215 (4th Cir. 1976); *United States v. Blankenship*, 548 F.2d 1118 (4th Cir. 1976); *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973).

[3] Failure to appoint two counsel in a capital case upon the defendant's request presents a strong claim for ineffective assistance of counsel. If a court refuses to comply with your request for the assignment of an additional attorney, the Virginia Capital Case Clearinghouse has access to motions and memoranda explaining why two defense counsel are constitutionally required in a capital case.