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Footnotes:

¹See, Mello, "Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 American U. L. Rev. (1988).

²688 F. Supp. 511 (1986)

³*Bounds v. Smith*, 430 U.S. 817 (1977).

⁴847 F.2d 1118, *en banc* (1988).

⁵See, Rules 5:17 and 5:25 of the Virginia Rules of Court. These rules are absolute in capital cases. E.g. *Quintana v. Comm.*,

295 S.E.2d 643 (1982); *Coppola v. Warden*, 282 S.E.2d 10 (1981). To date I have not been able to locate a single capital case in which the Virginia Supreme Court forgave an appellate level procedural default.

⁶See, *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Smith v. Murray*, 106 S.Ct. 2661 (1986); *Whitley v. Muncy*, 843 F.2d 55 (4th Cir. 1987); and, generally: Batey, "Federal Habeas Corpus Relief and the Death Penalty: Finality with a Capital 'F'", 36 U. Fla. L. Rev. (1984).

⁷The Virginia Coalition on Jails & Prisons and, The Virginia Capital Case Clearinghouse, provide assistance programs.

CAPITAL JURY SELECTION IN VIRGINIA

William S. Geimer*

Selection of a jury in any criminal case is a difficult task for attorneys. First, though we talk a good game, it is a process we know a lot less about than we think we do. We have only an educated hunch, often based on folklore and our anecdotal experiences, of what kind of folks we want on our jury if we could get them. Second, identifying them through the *voir dire* process is a real problem. The atmosphere is artificial and stilted, and we are not really trained in conducting *conversations* with prospective jurors in every day language. The process is not helped by the fact that by the time we get to examine the prospective jurors, the trial judge has been required by law to ask them a series of stilted questions, hardly designed to elicit anything useful.¹ At the close of *voir dire*, we are often left with little more than we gleaned from examining the data contained in the jury list to inform our hunches.

All of these problems are present and magnified in a capital case, and there are more. In one process, we are to select a jury that will adhere to the presumption of innocence, give our client a fair trial on the merits, AND upon a finding of guilt of capital murder, not be predisposed to kill him. Moreover, the common defense counsel dilemma of trying to succeed at trial while making a proper record for appellate review is magnified in capital cases. In every phase of a capital case, including jury selection, it must be remembered that the Virginia Supreme Court will not have the only look or the last word on errors of law. But if errors are made by the court, they must be fully documented and objections made and preserved on all applicable grounds, INCLUDING FEDERAL GROUNDS. Otherwise, meritorious claims may be lost, and a person executed for whom the law says death is not the appropriate penalty. It has happened.² Capital jury selection is indeed a daunting task, but if we know what the law requires and what selection strategies have been successful, a fair jury can be found.

In capital cases, providing effective assistance of counsel requires that you investigate possible challenges to the array from which both the grand jury and petit jury are drawn, and that in some instances you even challenge the Commonwealth's use of peremptory challenges. All of these possible challenges are grounded in the right of an accused to be tried by a jury drawn

from a fair cross section of the community, that is from which no cognizable group has been systematically excluded.³ These issues will be discussed in the second half of this article.

Providing effective assistance of counsel in capital cases also requires that you do all in your power, whether the trial judge is impatient or not, to insure that no juror will automatically vote for death upon being satisfied that your client is guilty of capital murder, but rather that the juror will fairly consider all mitigating factors approved by the General Assembly as well as any other aspect of defendant's character, record or circumstances of the offense that he proffers as a basis for a sentence less than death.⁴ You are also required to insure that prospective jurors who have conscientiously held scruples against the imposition of the death penalty, but who could *consider* every penalty provided by law, including the death penalty are not successfully challenged for cause. It is to the law and techniques for fulfilling this duty that I turn first.

A. DEATH AND LIFE QUALIFIED JURY

1. Law

The 6th Amendment to the United States Constitution guarantees criminal defendants the right to trial by an impartial jury. The Supreme Court of Virginia has recognized that this guarantee is also one of an impartial *sentencing* jury.⁵ As judges and Commonwealth Attorneys are aware, however, some opponents of the death penalty may be systematically excluded from serving on a capital jury. An unlimited number of challenges for cause may be used to exclude them. The most widely known test for excludability comes from the famous case of *Witherspoon v. Illinois*,⁶ providing for exclusion of jurors who make it unmistakably clear during *voir dire* that they would automatically vote against the imposition of the death penalty without regard to any evidence that might be developed at trial, or that their opposition to the death penalty would prevent them from making an impartial decision about guilt. You can expect that the prosecutor, and sometimes the judge, will ask a series of questions about this qualification and will follow

up on anyone who expresses *any* reservations with a series of conclusory leading questions designed to harden the juror's opposition sufficiently to warrant exclusion for cause. It is absolutely essential that defense counsel undertake to rehabilitate any juror with reservations about the death penalty. *Witherspoon* holds that persons with conscientiously held scruples against the imposition of the death penalty *are qualified* to sit on capital juries so long as they are able to *consider* any penalty provided by law. (Rehabilitation should be undertaken using the techniques described in the next subsection.)

Witherspoon has never been overruled. In *Wainwright v. Witt*,⁷ however, the U.S. Supreme Court relaxed the standard in the language it used to describe a properly excludable prospective juror. Instead of being excludable because of making it "unmistakably clear" that her life vote would be "automatic," jurors are now excludable for cause if their scruples would "prevent or substantially impair" their performance in accordance with their oaths. The prospective juror in *Witt* said she was "afraid" her personal feelings about the death penalty would interfere with her sitting as a juror. It should be noted well that defense counsel did not object to the disqualification of the juror and did not ask any questions in an effort to clarify her answers. Johnny Paul Witt was executed on March 6, 1985.

Witt can properly be viewed by defense counsel as adverse precedent. It can be useful, however, because the accused in a capital case is also entitled to a LIFE qualified jury. That is, he is entitled to exclude all prospective jurors whose views *in favor* of the death penalty would hinder or substantially impair their ability to serve. This class includes (I) all potential jurors who are satisfied that death is the appropriate penalty for all persons who commit an intentional, premeditated murder under the aggravating circumstances Virginia has designated in the *definition* of capital murder.⁸ (II) All who are satisfied that death is the only appropriate penalty for one who commits capital murder where there are also one or more aggravating *sentencing* factors designated by the legislature.⁹ (III) All who could not give serious consideration to the statutory mitigating factors designated by the legislature as a basis for not voting for death.¹⁰ (IV) All who could not give serious consideration to *any* aspect of the character, record, or circumstances of the offense proffered by the defense as a basis for a sentence less than death.¹¹ (Examination on these matters should also be undertaken using the techniques discussed in the following subsection.)

B. Selection Techniques

Without saying so directly, what you are attempting to do, in addition to death and life qualifying the jury is to determine not just what jurors think about the death penalty, but what they will think about the evidence you will put on at the penalty phase of the trial if it comes to that. It is virtually impossible for one person to keep all these balls in the air. You need at least one other person at the counsel table to evaluate the responses as you are asking the questions. We often get a warm feeling of security from having established rapport with a prospective juror and it takes a disengaged observer to let us know that leaving the juror on the panel would be a terrible mistake!

Try to conduct *voir dire* as you would a job interview for the position of juror. In that regard, it is usually best to talk about some other aspect of life before getting to questions about race, sex, and the death penalty. It is essential that this

conversation be conducted by the use of relevant, but OPEN questions. Some examples: "Mrs. Jones, how did you feel when you came to the courtroom and learned that you might sit on a case where the Commonwealth seeks the death penalty?" OR "How do you feel about life without parole compared to the death penalty? NOT "Mrs. Jones, would you allow your general support for the death penalty to interfere with your ability to sit as a fair and impartial juror in this case?" "Would you follow the law as the judge gave it to you?" Much more of what you need to know about challenges for cause and the intelligent exercise of peremptory challenges is yielded by open questions. There is a place for CLOSED questions. It is in the rehabilitation of jurors who have expressed reservations about the death penalty.¹²

Client involvement is another critical aspect of capital jury selection. The ultimate question for the jury after all may be whether to read your client out of the human race. That will be easier for them to do if you appear distant from him, only there because you were appointed to be. Clients should be involved in jury selection to the extent of their capabilities, which will vary. At a minimum, the client can be provided with a pad and paper and consulted in the presence of the panel before strikes are exercised. Some attorneys have secured permission for the client to ask some of the questions. Jury selection is the first opportunity to humanize the client before his jury.

Just as there is variety among jurors, defendants, and attorney, there certainly is among Circuit Court Judges. You will sometimes encounter one who is impatient with open questioning or who does not see the relevance of a question. Most of the time this is because the judge has not fully considered, and advocates have failed to urge, the wide range of matters that directly affect the jurors fitness to serve with respect to death and life qualification and ability to give serious consideration to a myriad of mitigating factors. You must respectfully, but firmly, insist on the right of the accused to explore the attitudes of jurors on these matters, not just ask brief leading questions. If you are not permitted to conduct such an examination, you must insure that the record reflects your objection and that the objection is based in part on the violation of rights guaranteed the accused by the 6th, 8th, and 14th Amendments to the Constitution of the United States.¹³

B. PRETRIAL ISSUES IN JURY SELECTION

1. *Challenges to the Array.* Your client has a right to a grand and petit jury drawn from a fair cross-section of the community.¹⁴ Deprivation of that right may in a given case implicate not only the Sixth Amendment, but also the Due Process and Equal Protection clauses of the 14th Amendment.¹⁵ Investigating the selection and composition of the venire before trial is essential for two reasons. First, if the issue is meritorious, it *will* result in relief. Booker T. Hillery, was indicated for murder in 1962 by a Grand Jury from which members of his race had been systematically excluded. In 1986, the United States Supreme Court reversed his conviction, though a representative pool would have yielded but one more black.¹⁶ Second, investigating this challenge is essential because if it is not made before the petit jury is empaneled, it is almost certainly lost.¹⁷ Hillery moved to quash the indictment before his trial and pursued the issue before state courts for 16 years.

Establishing a 6th amendment fair cross-section challenge re-

quires a showing that:

(1) the excluded group is a distinctive group in the community;

(2) the representation of this group in jury venires is not fair and reasonable in relation to the number of such persons in the community; and

(3) the under-representation is due to systematic exclusion of the group in the jury selection process.¹⁸

There has been a considerable volume of litigation about what constitutes a cognizable group in satisfaction of the first part of this test. It is clear that members of a particular racial group or gender qualify.¹⁹ There is no firm figure on the amount of disparity sufficient to meet the second part of the test. Any absolute disparity over ten per cent, however, may make out a prima facie case in satisfaction of the third test and shift the burden to the Commonwealth to explain the disparity.²⁰ This determination will be affected by a court's evaluation of the neutrality, in practice as well as on paper, of the procedure used to select the array.²²

2. *Batson Challenges*. A procedure similar to the one described above is available with respect to the selection of petit jurors who will sit on the case. It extends to the previously sacrosanct area of peremptory strikes. In *Batson v. Kentucky*,²¹ the United States Supreme Court held that a prima facie case of purposeful discrimination in violation of the Equal Protection clause may be made out solely on evidence of the prosecutor's use of peremptory strikes at defendant's trial. The requirements are that defendant must be a member of a cognizable racial group, and the prosecutor has exercised peremptory strikes to remove members of that group from the venire. It is not absolutely essential that *all* members of the group have been stricken but as a practical matter, especially given the limited number of peremptory strikes permitted in Virginia,²³ the challenge will be difficult to sustain unless this is the case.

This peremptory strike practice by the prosecutor, plus *any other relevant circumstances* (including, but not limited to disparities in the selection of the array discussed previously) establishes a prima facie case of purposeful discrimination and places the burden on the prosecutor to articulate a neutral explanation for striking the jurors. This explanation is evaluated by the court.

No specific remedy is prescribed for a meritorious *Batson* challenge. Possibilities include dismissal of the entire panel, or reinstating the improperly stricken jurors on the panel. You should decide on the remedy you think appropriate. You must, of course, make the *Batson* motion before the jury is empaneled.

C. CONCLUSION

The foregoing has been but an outline of the major issues in capital jury selection and the applicable Virginia and federal law. On these issues and others the Virginia Capital Case Clearinghouse can provide more detailed research and assistance, and in addition perform the true clearinghouse function of making sure what has been successful elsewhere is passed on to you. Given the complexity of death penalty law and the significant differences between a capital case and other criminal trials, there is little reason for appointed counsel to go it alone. Both the accused and the Commonwealth usually suffer when that course of action is chosen.

FOOTNOTES

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¹See, Va. Rules of Court 3A:14(a)

²In Virginia, Marshal Smith was executed despite introduction a trial of psychiatric testimony obtained in violation of the U.S. Constitution, after he failed to raise the issue before the Supreme Court of Virginia. *Smith v. Murray*, 477 U.S. 527 (1986). In Georgia, John Eldon Smith was executed after he did not preserve a valid constitutional objection to the jury array. (The issue is discussed, *infra*, at p.13.) His codefendant, also sentenced to death, did preserve the issue, was granted a new trial and sentenced to life imprisonment. *Smith v. Kemp*, 715 F2d 1459, 1476 (1983)

³*Glasser v. U.S.*, 350 U.S. 60 (1942); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁴Va. Code Ann. 19.2.264(B) sets out five factors recognized by the legislature as mitigating. The United States Supreme Court, however, has consistently emphasized that the jury may not be prohibited from considering and giving effect to *any* aspect of the character or record of the accused or any of the circumstances of the offense proffered as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 106 S.Ct. 1669 (1986); *Sumner v. Shuman*, 107 S.Ct. 2716 (1987).

⁵*Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981)

⁶391 U.S. 510 (1968)

⁷469 U.S. 810 (1985)

⁸Va. Code Ann. 18.2-31. In contrast, some states designate factors deemed to aggravate traditional first degree murder as matters to be considered by the sentencing jury after conviction of that offense. See, e.g., N.C. Gen. Stats. 14-17, 15A-2000.

⁹See, Va. Code Ann. 19.2-264.4(C)

¹⁰See, Va. Code Ann. 19.2-264.4(B)

¹¹See, *supra*, Note 4

¹²Rehabilitation questioning is legitimate, lawful, and practiced on both sides of lawsuits. Techniques are a tactical matter. Those interested in lines of inquiry that have been successful elsewhere are encouraged to contact the Virginia Capital Case Clearinghouse.

¹³Va. Rule of Court 3A:14 was amended to make it clear that counsel, as of right, may examine prospective jurors. It is important to understand, however, that issues which appear to be matters of state law implicate federal law in capital cases. Depriving the accused of adequate *capital* voir dire is an example. The United States Supreme Court has held that death is *qualitatively* different from any other penalty authorized by law

and that difference calls for a *corresponding difference* in the reliability of the determination that death is the appropriate punishment. *Woodson v. North Carolina*, 428 U.S. 280 (1976). This requirement has been termed “super due process.” It means that the 8th Amendment has its own due process component in addition to its impact on the 14th Amendment and is applicable to the states. Similarly, the totality and the components of the jury selection process, and the assistance of counsel are subject to the heightened standard. Because of this, every objection in a capital trial should be made stating the 6th, 8th, and 14th Amendments to the United States constitution as grounds, along with any applicable sections of the statutes or constitution of the Commonwealth of Virginia.

¹⁴*See, supra*, Note 3

¹⁵*See, U.S. v. Coletta*, 682 F.2d 820 (CA 9) (1982), cert. den. 459 U.S. 1202 (1983); *Castaneda v. Partida*, 430 U.S. 482 (1977)

¹⁶*Vasquez v. Hillery*, 106 S.Ct. 617 (1986)

¹⁷*See, Va. Rules of Court* 3A:9(b)(1)(2)

¹⁸*Duren v. Missouri*, 439 U.S. 357 (1979)

¹⁹*Whitus v. Georgia*, 385 U.S. 547 (1967); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

²⁰*See, e.g., Castaneda, supra*, Note 15; *Jones v. Georgia*, 389 U.S. 24 (1967). “Absolute disparity” refers to the difference between the cognizable group’s proportion of the population and its proportion of the jury list. Several Virginia cases have also dealt with the issue of the degree of disparity necessary to establish a prima facie case of discrimination. *See, Wansley v. Miller*, 353 F. Supp. 42 (E.D. Va.) (1973); *Witcher v. Peyton*, 405 F.2d 725 (CA 4) (1969); *Peyton v Peyton*, 303 F.Supp. 769 (W. D. Va.) (1969)

²¹Virginia procedure for qualification of jurors and selection of the array are set out in Va. Code Ann. 8.01-337 *et. seq.* For an example of manipulation of a facially neutral selection system, *see, Amadeo v. Zant*, 108 S.Ct. 1771 (1988)

²²106 S.Ct. 1712 (1986)

²³Virginia law provides four peremptory challenges to each side in felony cases, including capital cases. Va. Code Ann. 19.2-262. This is a very low number compared to other states. The super due process rationale, *supra*, Note 13, suggests that defense counsel should move before trial for additional peremptory challenges.

