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Jury Selection in Capital Cases

By Ernie Lewis

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Introduction. "In recent cases we have indicated that, when there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken. The trial court should err on the side of caution by striking the doubtful juror; that is, if a juror falls within a gray area, he should be stricken. We have attempted to make this fundamental rule clear in a series of cases since *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky.2007). Nevertheless, all too often trial courts, as here, inexplicably put at risk not only the resources of the Court of Justice, but the fundamentally fair trial they are honor-bound to provide, by seating jurors whose ability to try the case fairly and impartially is justifiably doubted. As former trial judges, every member of this Court knows that there is no shortage of citizens in the Commonwealth of Kentucky willing to serve capably and honorably in the most difficult and demanding of trials.

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This issue of *The Advocate* explores major problems in the administration of the death penalty in Kentucky that include jurors who do not understand their responsibilities and inadequate voir dire along with waste, error and abuse due to imprudent prosecution of marginal capital-eligible cases as death cases. Effective common sense reforms are needed to address the massive error in the system. Meanwhile, the many significant Recommendations of the comprehensive independent 2011 Kentucky Capital Audit have not been implemented. Kentuckians want a halt to executions until the problems are fixed. Also, loan forgiveness for defenders is very important. Read about new University of Louisville opportunities.

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University of Louisville Loan Forgiveness

By Interim Dean Susan Duncan and Professor Linda Ewald

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Louis Brandeis, was born in Louisville on November 13, 1856. His first memories were of his mother serving food and coffee to Union soldiers on his front yard. That first memory of service almost certainly played a role in his legacy of service. As the documentary, *Louis D. Brandeis, The People's Attorney* highlights, he gave his time, his talent, and his treasure to the service of others. The University of Louisville Brandeis School of Law officially embraced that legacy in 1990 when the faculty approved a mandatory public service program for all law students. We were one of the first to do so, and we are still one of the few law schools that require all law students to complete 30 hours of public service each year. Our students do substantially more than the minimum, with our graduating classes routinely performing over 7000 hours, and some graduates completing more than 400 hours.

This service mindset does not stop at graduation. Each year close to 25% of Brandeis graduates choose to work in the public interest field either as prosecutors, public defenders, legal aid attorneys, or with 501(c)(3) organizations. In fact, the Department of Public Advocacy reports that 56 University of Louisville Brandeis School of Law graduates currently practice as Kentucky public defenders. Deciding to practice in the public interest sector often is a great sacrifice for graduates, who have heavy debt from student loans.

The average salary for public interest jobs is $38,000. The average amount Brandeis students borrow for school is $90,195. In an effort to help Brandeis graduates repay this crushing debt load, the School of Law recently created two loan repayment assistance endowments. Dean Susan Duncan and Professor Linda Ewald generously started the two endowments to assist students who want to work in the public interest field.

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Basically, the money from these endowments will be used to pay the graduates' loan payments for a specified number of years and works in conjunction with the Federal government's public service loan forgiveness program. Under that federal program qualifying students can discharge their loans after ten years of public service. Assisting attorneys with the loan payments in early years may be the difference needed to ease the crushing debt load and allow talented legal minds to pursue a public interest career.

The loan assistance repayment endowments make sense for a number of reasons not the least of which is to support attorneys who commit themselves to advancing truth and justice in our communities. Contributing to these type funds makes sense financially. Tuition this academic year for in-state students is $19,702 and out-of-statue tuition is $36,538. To fund a full scholarship for in-state students would be over $60,000 with tuition increases and over $100,000 for out-of-state students. Compare this to $30,000 or less which would be the amount needed to repay a student's loans for ten years when the loan will be discharged.

University of Louisville - Louis D. Brandeis School of Law

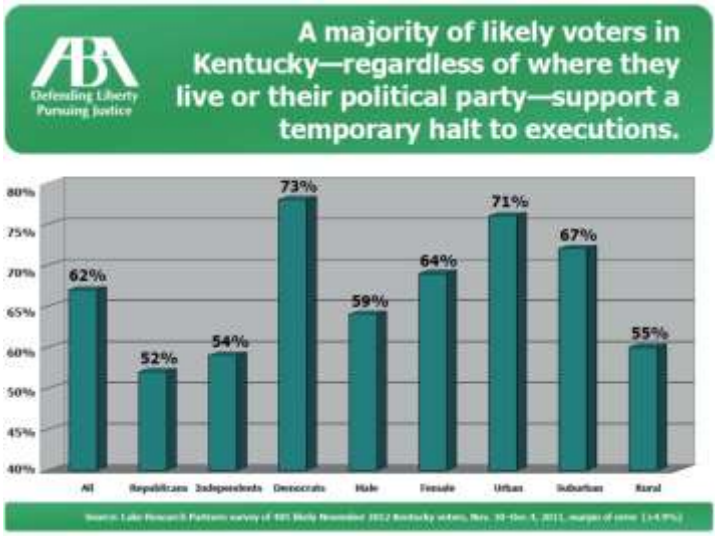
Other law schools have long traditions of loan repayment assistance programs. For example, Georgetown awards over two million dollars per year and guarantees that every graduate entering a public service career will receive the support for the full ten years. In addition, many states fund legal repayment assistance programs through IOLTA funds, state legislature funds and bar foundations. The Brandeis School of Law is confident that with the help of public-spirited lawyers across the state, it can build the endowments to benefit Kentucky attorneys and the public they serve for the future. The Brandeis School of Law hopes others will join in its efforts to ensure the best and the brightest can serve the public by donating to the endowments and encouraging the state to follow the lead of 24 other sister states and establish statewide loan repayment assistance programs. If you would like to learn more about these efforts please do not hesitate to contact Dean Susan Duncan at susan.duncan@louisville.edu or (502) 852-6373.

Kentucky Voters Support Temporary Halt in Executions

According to a 2011 survey of Kentuckians conducted on behalf of the American Bar Association Kentucky Assessment Team on the Death Penalty shows:

- A solid majority of Kentucky voters (62%) support a temporary halt to executions in Kentucky, including 44% who support it strongly.
- Majority support for a temporary halt of executions includes men (59%), women (64%), voters in urban areas (71%), suburban areas (67%), exurban areas (55%) and voters in rural areas (55%).

A temporary halt to executions in Kentucky also has support across partisan lines. Republican voters support the halt by a 10-point margin (52% support, 42% oppose), independents support it by a 16-point margin (54% to 38%), and Democrats support it by a 52-point margin (73% to 21%).



The survey questions and results are found at: http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments/kentucky.html

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What those citizens do not want is to have their time and money spent re-trying a difficult case because, in a prior proceeding, a trial judge was too diffident to excuse jurors who were credibly challenged.

We reiterate that trial courts should tend toward exclusion of a conflicted juror rather than inclusion, and where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused." *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013).

Jury selection is one of the most important parts of the capital trial. The jury in a capital case has become the most important body to persuade in the courtroom. *Ring v. Arizona*, 536 U.S. 584 (2002). There is no more crucial time in the trial of a capital case than jury selection.

It is during this prelude to the beginning of the capital trial that much of the outcome will be determined. For this reason, it is up to the trial judge to ensure fairness and thoroughness in the procedures he establishes for jury selection.

This was made clear in *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). There the Court stated that "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury… and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman v. California*, 386 U.S. 18, at 23. The right to an impartial adjudicator, be it judge or jury, is such a right. … As was stated in *Witherspoon,* a capital defendant's constitutional right not to be sentenced by a 'tribunal organized to return a verdict of death' surely equates with a criminal defendant's right not to have his culpability determined by a 'tribunal "organized to convict."'"

The ABA Assessment Team Report and the Capital Jury Project research both indicate that there are serious problems with the way voir dire is being conducted in Kentucky. In December 2011, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report* was issued. This was the product of a two-year comprehensive study by three law professors and two former Kentucky Supreme Court Justices, among others. It presented a disturbing portrayal of the manner in which the death penalty was being implemented in Kentucky. Among other issues discussed in the report, an entire chapter was devoted to "capital juror confusion." Kentucky jurors "failed to understand the guidelines for considering aggravating and mitigating evidence. For example, 45.9% (of those interviewed by the Capital Jury Project) failed to understand that they could consider mitigating evidence at sentencing, 61.8% failed to understand that they need not find mitigation 'beyond reasonable doubt,' and 83.5% of jurors did not understand that they need not have been unanimous on findings of mitigation. Furthermore, due to confusion on the meaning of available alternative sentences, Kentucky jurors may opt to recommend a sentence of death when they otherwise would not." (Executive Summary at vi). See also Chapter 10 of the report.

While certainly jury instructions bear much of the responsibility for the education of jurors on what the law is, it is equally true that one of the primary times when jurors are educated on procedure and law is during voir dire. More importantly, confusion can be addressed during jury selection by questioning. The advantage of addressing juror confusion during voir dire is that jurors can say simply what it is they do not understand, and judges, prosecutors, and defense counsel can ensure through questioning that no juror sits who does not both understand the law and agree to follow the law.

Purpose of voir dire in a capital case. The primary goal of jury selection in a capital case is to seat a jury that will hear the case during both the merits phase and the sentencing phase with an open mind and without bias toward any of the significant issues in the case, including the various penalties.

ABA National Judicial and jury guidelines. Standard 6-1.1(a) of the *ABA Special Functions of the Trial Judge* (1999), states that the trial judge "…has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice." The ABA Criminal Justice Standards *Trial by Jury Standard 15-2.4 (c)* states that "Voir dire examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."

Individual voir dire is mandated by Kentucky Supreme Court rule. RCr 9.38 reads, in part, that "When the Commonwealth seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required if questions regarding capital punishment, race or pretrial publicity are propounded. Further, upon request, the Court shall permit the attorney for the defendant and the Commonwealth to conduct the examination on these issues."

This rule ensures in Kentucky the existence of the most important condition of an effective capital voir dire, that of being able to question each individual juror. The existence of the individual voir dire rule does not mean that voir dire is wide-open. Rather, the trial court may legitimately limit the questions to the topics of capital punishment, race, and

pretrial publicity. On the other hand, "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'" *Turner v. Murray*, 476 U.S. 28 (1986).

The rule also ensures that voir dire is conducted by the attorneys as well as the trial court. In many instances, initial questioning is done by the trial court, which then allows follow-up questions by the attorneys for the parties.

Publicity. One of the three issues requiring individual voir dire is on the issue of pretrial publicity. RCr 9.38. *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988) predated the promulgation of RCr 9.38. There the Court stated that "Inquiry in the presence of other jurors as to what a prospective juror has heard about the case poses the danger of bringing that information to the ears of the other prospective jurors. The better procedure is to question jurors separately and out of the presence of each other on such matters." *Id* at 134.

Race. Someone who harbors a prejudice based upon race has no place on a jury judging a fellow citizen. This is particularly so in a death penalty case, where racial prejudice has a troubling history. As a result, RCr 9.38 requires individual voir dire on the issue of race "if questions regarding …race…are propounded." In *Turner v. Murray*, 476 U.S. 28, 37 (1986), the Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Id. at 35. Individual voir dire on the existence of racial prejudice can, if done properly, uncover any underlying racial prejudice.

In *Winstead v. Commonwealth*, 283 S.W.3d 678, 684 (Ky. 2009), the Court said that "'t]his was a capital case in which the defendant was African-American and the victim Caucasian. Winstead had also been involved in romantic relationships with Caucasian women. Under these circumstances, as Winstead correctly notes, both the Fourteenth Amendment to the United States Constitution and RCr 9.38 gave him the right to question potential jurors regarding racial prejudice."

Implied bias. Implied bias comes from the status of the person as opposed to his or her answers. For example, if the potential juror is the secretary of the Commonwealth's Attorney, they have a bias that can be implied and that can require a cause challenge to be sustained. See *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985).

Group voir dire. Group voir dire is usually the time when all issues other than race, publicity, and the death penalty are discussed. Guilt phase defenses are dealt with during group voir dire, as are issues related to the presumption of innocence, the requirement of proof beyond a reasonable doubt, the right to remain silent, and other similar issues.

There is a temptation to give short shrift to group voir dire in a capital case, given the fact that individual voir dire is guaranteed. That is a mistake, and assumes that the only issue in the case has to do with sentencing. The reality is that cases where aggravated penalties are a possibility come in all sizes, with significant issues involving insanity, extreme emotional disturbance, eyewitness identification, and other merits phase issues. All of these require a probing group voir dire.

Use of a jury questionnaire can save time and increase understanding. Principle 11(a)(1) of the ABA's Principles of Juries and Jury Trials states that "In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party."

Juror questionnaires significantly improve the efficiency and reliability of the jury selection process during trial and have been recommended by the National Judicial College in its publication, *Presiding Over a Capital Case: A Benchbook for Judges* (2010). As both parties have advance notice of any issues relating to the impartiality of a juror, the trial process can be more focused and proceed with fewer general questions about a juror's background and fundamental beliefs. Questionnaires can also lead to revelations that might not come out during a public process, particularly from introverted or embarrassed jurors. This reduces the likelihood of mid-trial or post-conviction challenges to a juror's qualifications based on a factor unrevealed during voir dire.

The specialized questionnaire is a tool the trial court should consider for creating effective and fair jury selection. The reason for this is simple: some prospective jurors will say more on paper than they will in a group. Venire persons will often try to please everyone both during group and individual voir dire. When they fill out a questionnaire in their home, however, they will be more candid and forthcoming. Quiet jurors who may never volunteer during a group setting will express their opinions more readily on paper. The preparation of a questionnaire can make the voir dire

process go more smoothly and efficiently. This does not mean that the questions to be asked on voir dire are to be handed out prior to trial. The Court in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988) condemned the procedure used there of giving the prospective jurors ahead of time the questions to be asked so that they could contemplate their answers. It is noteworthy that the Court spoke favorably of the use of a jury questionnaire as well as extensive questioning of jurors in *Uttecht v. Brown*, 551 U.S. 1 (2007).

Information given to jurors prior to the beginning of voir dire. In order for the court and counsel to be able to conduct a thorough voir dire, information is given to jurors regarding the issues about which questions will be asked. The reading of the indictment is not sufficient to set into context the questions to be propounded during an adequate voir dire. Some courts allow the parties to give a brief "opening statement" during group voir dire to set the context for questioning. By allowing this, the trial court will ensure that jurors know more about the case when they are answering questions. "We are unable to perceive how a meaningful voir dire examination could be conducted without providing the prospective jurors with some information concerning the facts expected to be proven." *Tamme v. Commonwealth*, 973 S.W.2d 13, 25 (Ky. 1998).

The process effects of death qualification. There are several dynamics that are important to understand at the onset of jury selection. One must consider the effects of "death qualification" on a jury. It is well known that death-qualifying a jury has what social scientist Dr. Craig Haney calls "process effects." He points out that death-qualification results in implied labeling, that is that the law labels a case as one of the worst possible, as a case in which all of the authorities have decided that death is appropriate. It requires jurors to reflect on a possible penalty phase and to predict their behavior in that context. Further, the process of death qualification tells the jury that guilt is a given, and that a penalty phase will be reached. Professor John Blume summarizes numerous studies from the Capital Jury Project that demonstrate that many jurors sit on our capital cases who understand the voir dire process to imply that the law requires a death verdict. It is important for trial courts to avoid the "process effects" and ensure both parties a fair trial.

The trial judge has a great deal of discretion. The trial judge has a great deal of discretion during the process of jury selection. In *Uttecht v. Brown*, 551 U.S. 1 (2007), the Court affirmed that federal courts would be granting immense discretion to trial courts when reviewing their decisions made during voir dire. "'The need to defer to the trial court remains because so much may turn on a potential juror's demeanor.'" At the same time, *Uttecht* reviewed a case where voir dire lasted for several weeks, a juror questionnaire was used, and lawyers were allowed to question individually. This casts serious doubt on the single question voir dire in *Foley v. Commonwealth*, 953 S.W.2d 924 (Ky. 1997). See also *Fugett v. Commonwealth*, 250 S.W. 3d 604 (Ky.2008).

While many of the rules of voir dire are mandated, there is much that the trial judge can do to ensure a fair jury selection process. The judge determines where voir dire will take place. She decides how much time will be spent on each juror and the scope of the questions asked of each juror. She rules on objections to certain lines of questions. She interprets *Witherspoon* and *Witt* and *Morgan* by applying them in the context of ruling on motions on each juror. "The law recognizes that the trial court is vested with broad discretion to determine whether a prospective juror should be excused for cause…." *Mabe v. Commonwealth*, 884 S.W.2d 668, 670 (Ky. 1994).

Voir dire may be conducted in-chambers. The trial court may conduct voir dire either in open court or in chambers. The atmosphere of voir dire changes dramatically depending upon the setting. In-court voir dire may be stiff, and the full expression of feelings is discouraged. In-chambers voir dire is preferable because it will allow jurors to open up more. It is more considerate of the potential juror.

The adequacy of voir dire is of constitutional dimensions. ABA Standards of the Criminal Justice Section Standard 15-2.4(c), Conduct of Voir Dire Examination, states that "Voir dire examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."

A thorough and comprehensive voir dire is essential in order to ensure a fair jury. The law places on counsel the burden of conducting a thorough voir dire. *Morgan v. Illinois*, 504 U.S. 719 (1992), states that "part of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Particularly in capital cases, certain inquiries must be made to effectuate constitutional protections…'[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled…[w]e have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections…It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on

trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception.'" *Uttecht v. Brown*, 551 U.S. 1 (2007) speaks favorably of the extensive voir dire conducted in that case while at the same time emphasizing deference to the trial court's findings. *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1992) states that "Appellant also has the burden of proving bias and preconceived ideas as to these challenged jurors."

One of the requirements of an adequate voir dire is that counsel be given an opportunity to develop challenges for cause. *Morgan* clearly puts the burden on the defense to "lay bare the foundation of [a] challenge for cause" based upon pro-death attitudes. Citing *Witt,* the Court states that "'[I]t is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality.'" Trial courts must allow a voir dire of considerable depth in order to allow counsel for the defendant the opportunity to develop the challenge for cause. See also *Gray v. Mississippi*, 481 U.S. 648 (1987); *Hannah v. Commonwealth*, 306 S.W.3d 509 (Ky. 2010) (reversed for failure to allow defense voir dire on the "duty to retreat").

There are several challenges for cause that cannot be developed without an adequate voir dire. Many jurors believe that the penalty decision is to be based entirely on the facts presented at the guilt phase. Many jurors either do not understand what mitigation is or believe that the penalty decision should not be based upon a fair consideration of evidence in mitigation. Many jurors fail to understand, consider, or give any effect to mitigation. "Evidence that might tend to mitigate the offense is often entirely absent from the description of the process leading to imposition of the death penalty…" Jurors may not sit in a capital case if they are automatically in favor of the death penalty upon conviction of a capital offense. Nor may they sit if they would shift the burden of proof on penalty to the defense. Finally, they may not sit if they cannot consider or give effect to evidence in mitigation when considering penalty. None of these cause challenges may be developed if the process utilized is inadequate.

Extra peremptories to the parties should be considered. Peremptory challenges are vital to a fair voir dire process. At present, the prosecution and the defense both receive only 8 peremptory challenges. RCr 9.40. If additional jurors are to serve as alternates, RCr 9.40(2) requires the number of peremptory challenges to be increased by one. An additional peremptory challenge is also added to the defense when more than one defendant is being tried. RCr 9.40(3).

In *Mabe v. Commonwealth*, 884 S.W.2d 668 (1994), the Court stated that the "law recognizes that the trial court is vested with broad discretion to determine whether a prospective juror should be excused for cause…but if it is later determined that a juror should have been excused but was not, such would be reversible error because the defendant had to use a peremptory challenge and was thereby deprived of its use otherwise." Id. at 670.

The trial court has the discretion to allow adding additional peremptory challenges. "Whether to grant additional peremptories is within the discretion of the trial judge." *Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky. 1998). In addition to multi-defendant cases, extra peremptory challenges should be considered when there is extensive publicity, or where the facts are egregious or unusually offensive.

The order of individual voir dire should alternate. The order of individual voir dire is important. While traditionally, the Commonwealth is allowed to go first with each juror, there is nothing in the rules that give the Commonwealth this prerogative. The first crack at a juror can give the questioning party an advantage. Initial feelings can be followed up. Rehabilitation may be attempted the first time. As a result, the trial court should consider alternating who engages the juror first in individual voir dire.

Empirical data shows Kentucky capital jurors have poor understanding of the instructions, especially as they pertain to mitigating circumstances. Nearly half failed to understand that they could consider anything in mitigation

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- Over 60% failed to understand that they need not find mitigation beyond a reasonable doubt.
- Over 80% failed to understand that the jury did not need to be unanimous in its interpretation of mitigating evidence.
- 15% failed to understand that they must find aggravation beyond a reasonable doubt.

Grade Level Necessary to Fully Understand and Apply Kentucky Capital Jury Instructions 12.6 - 23.8 grade level

See: Marla Sandys, Misunderstanding of Capital Instructions: Clarification is Possible, The Advocate (August 2014) reprinted with permission of Professor Sandys and the American Bar Association Kentucky Assessment Team on the Death Penalty. It was originally released in July 2014 by the ABA Kentucky Assessment Team on its official page at: http://ambar.org/kentucky

Educating jurors is important during capital voir dire. Jurors do not understand many things as they sit prior to, during, and after a trial. They do not understand the evidence, the law, or procedure. While jury selection cannot give jurors law degrees, all of the parties should approach the jury selection from the vantage point of the juror, that is asking herself, what does the juror not know, and what does the juror need to know in order to decide the case fairly?

In a capital case, one of the primary matters about which jurors need education is the very complex procedure involved, and what needs to be decided at each phase. Jurors who have sat in a criminal case before will begin with the understanding of a typical criminal case, which will create confusion in a capital case. Jurors who have not been a juror before can expect to be even more confused. Judges can go a long way toward explaining the procedure, but should also allow the parties to do so as well.

What are the issues about which jurors need education? In addition to the routine matters, jurors should be educated at a minimum on the following issues:

- That they will be deciding on guilt and innocence unanimously.
- The meaning and purpose of aggravating circumstances.
- That they can only find the existence of an aggravating circumstance unanimously and beyond a reasonable doubt.
- The meaning of mitigation and how it is to be used by jurors in making decisions. Jurors must be educated on the meaning and role of mitigation. Most people have no idea what mitigation means or how it relates to the decision they are being called upon to make. The law does not allow mitigation to be minimized. Rather, jurors must base their sentencing decision solely on the presence of mitigation and the balancing of that mitigation with the facts of the case. That is not how jurors make decisions in real life. Consider a question after the educational process such as, "how do you understand that you are to use evidence in mitigation in making your decision?"
- That mitigation is to be decided as a personal matter by each juror rather than unanimously
- That mitigation is not limited to those listed in the statute.
- That mental illness may be applicable to both the guilt/innocence phase and the penalty phase, and that there are different definitions of mental illness in each phase.

The standard to be used for cause challenges. To understand and apply the standards for "death penalty" and "life penalty" qualification, it is vital to understand the development of those standards. It begins with *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Jurors under the *Witherspoon* standard are eligible to sit no matter what their views are in regards to capital punishment. The *Witherspoon* standard applies to the state's ability to exclude jurors due to their opposition to the death penalty. All jurors are presumed to be eligible to sit unless the state can prove that they should be excluded. To be excluded, the juror must make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

Witherspoon was followed by *Adams v. Texas*, 448 U.S. 38, 45 (1980). There the Court said that "[t]his line of cases [*Witherspoon* and *Lockett*] establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

Wainwright v. Witt, 469 U.S. 412 (1985,) modified *Witherspoon* and followed *Adams.* Under *Witt*, jurors may be excused if their views would "prevent or substantially impair the performance of their duties in accordance with their instructions and their oaths." What "impairment" means is within the discretion of the trial court. The burden is on the party seeking to exclude the particular juror to prove that they should not sit. *Witt* remains the standard most often affirmed today. *Greene v. Georgia*, 519 U.S. 145 (1996). *Witt* did not overrule *Witherspoon*. Rather, *Witt* should be viewed as a clarification of *Witherspoon*. See *Gray v. Mississippi,* 481 U.S. 648 (1987). *Gray* affirms the "Witherspoon/Witt" test as being "rooted in the constitutional right to an impartial jury." 95 L. Ed. 2d at 639. Under *Gray*, the erroneous exclusion of even one juror requires a reversal. *Lockhart v. McCree*, 476 U.S. 162 (1986) expresses the standard in a little different way. *Lockhart* states that jurors can only be excluded where they "cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, 'death qualification.'" *Lockhart* goes on to state that "not all who oppose the death penalty are subject to removal for cause in a capital case; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in a capital cases so long as they state clearly that they are willing to temporarily set aside

their own beliefs in deference to the rule of law." Id. 106 S. Ct. at 1766. *Buchanan v. Kentucky*, 483 U.S. 402, 408 (1987) articulates it this way: "Those who indicate that they can set aside temporarily their personal beliefs in deference to the rule of law may serve as jurors." 97 L. Ed. 2d at 351. *Morgan v. Illinois*, 504 U.S. 719 (1992) reiterates that "*Witherspoon* limited a State's power broadly to exclude jurors hesitant in their ability to sentence a defendant to death…a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."

Consideration of the full range of penalties. One means for qualifying a juror is to ask whether they can consider a particular option. This, of course, will apply to both prosecution and defense. "Both prosecution and defense are entitled to jurors who will fully consider the full range of penalties." *Epperson v. Commonwealth*, 809 S.W.2d 835 (Ky. 1991). See also *Morris v. Commonwealth*, 766 S.W.2d 58, 60 (Ky. 1989).

Beliefs and feelings about the death penalty. All participants in the process want to know how a prospective juror feels about capital punishment. A simple question such as "tell us how you feel about the death penalty?" should be asked of each juror. No one should get hung up on the use of the word "feel." Asking a juror about his or her thoughts or beliefs should get a similarly honest answer from the juror. The parties will want to listen to the answer to this question and ask follow-up questions. Without sufficient follow-up, the parties will not be able to develop either grounds for a challenge for cause or the ability to exercise an intelligent peremptory challenge. Follow-up questions can be similar to the following: "How long have you felt this way?" "Why do you feel this way?" "Tell us more about your feelings?" "For what crimes is the death penalty appropriate?" These are some of the many questions that can be utilized to follow up on the fundamental first question.

Jurors must understand that the death penalty is available only for homicides with an aggravating circumstance. Many jurors believe that the death penalty should be applied in all murder cases. Those same jurors will affirm to the judge that they can consider the full range of penalties. Without a thoughtful question, those jurors will be allowed to sit although they are unqualified. Questions should be posed to uncover this sort of bias, questions such as: "What is your understanding of an aggravating circumstance?" "How do you feel about the fact that a murder without an aggravating circumstance has a maximum penalty of a life sentence rather than the death penalty?" "What do you believe the proper penalty is for murder?"

Jurors must be excluded for cause if they would automatically impose death for all murders. Today, as many jurors are excludable due to their pro-death feelings as those with anti-death feelings. Both prosecution and defense must be given the latitude to develop challenges for cause in these areas. The standard which applies to exclusion of pro-life jurors must also apply to the pro-death juror. Equally as important will be the exclusion of jurors who are unable to consider mitigation.

An important way to uncover a challenge for cause is to ensure that the juror understands what kind of cases are appropriate for the death penalty. A question such as "when is the death penalty appropriate?" will reveal the answer to this question. For many jurors, death is appropriate for all murder cases, or for all "intentional" murder cases. A sentence of less than death for such jurors may be appropriate only for self-defense cases, or accidental killings. It is important to get those matters out of the way and not make an assumption that the juror knows what kinds of cases we are dealing with. The standard to use on this issue comes from *Morgan v. Illinois*, 504 U.S. 719 (1992) which states that a "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views." *Id*. at 502-503. A *Morgan* challenge is to be judged by the same standard as that used for the exclusion of pro-life jurors.

There is also Kentucky law which predated *Morgan* and should also be considered in determining the standard to be applied. In *Stanford v. Commonwealth*, 734 S.W.2d. 781 (Ky. 1987), aff'd 492 U.S. 361 (1989), the Court held that the defendant has a right to "life qualify" the jury. In *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988), the Court stated that "a juror should be excused for cause if he would be unable in any case, no matter how extenuating the circumstances may be, to consider the imposition of the minimum penalty prescribed by law." *Id*. at 137. See also *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989).

There are several iterations of the juror who is an "automatic death penalty" juror and thus excludable for cause. In addition to actually supporting only the death penalty for an intentional murder, the juror may also be excludable because they support the death penalty for all murders of a particular

nature (double homicides, or the killing of a child), or they may start with death and require the defense to prove that a sentence other than death is appropriate (the burden shifter). A juror may not be an automatic death penalty juror but may be excludable under *Witt* because they are impaired on a constellation of death penalty and criminal justice views.

A challenge under *Morgan* should be available whenever the juror supports the death penalty in every murder case, the juror supports the death penalty in this particular case, the juror is unable to consider the minimum penalty of 20 years, the juror is unable to consider the statutory and non-statutory mitigating circumstances and give those circumstances mitigating effect in rendering a sentencing decision, the juror would impose death in all cases with certain facts (they have a particular personal crime threshold), the juror would place the burden of proof on the defendant regarding the sentence, or the juror would begin with death or life without parole and work downward as the evidence of mitigation is considered.

Jurors must understand and give full effect to mitigation. Mitigation is the most misunderstood aspect of a capital case. Questioning jurors about the mitigation in the case is an important element of jury selection. It is as important as questioning a juror about mental illness in an insanity case. There are two purposes to mitigation questioning. The most important is to determine the juror's feelings about mitigation to allow the parties to exercise the peremptory challenges intelligently. The second purpose is to determine whether the juror is "mitigation qualified."

Morgan gives wide latitude in questioning regarding mitigation. The parties must have a thorough knowledge of what mitigation is and be able to explain it to the jurors. It is vital to explain to jurors what role mitigation plays in this process.

Jurors will often tell the trial judge that they can consider mitigation without really understanding what mitigation is. It is vital that a more probing and thorough voir dire be allowed in order to uncover this level of confusion.

Questions that are appropriate to both discover whether a juror understands mitigation and will consider and give effect to mitigation are as follows: "How do you feel about the use of alcohol?" "How have you seen alcohol effect people over time?" "Some people believe that if someone is drunk when they do something, they are more responsible than if they are sober. Others believe that if someone is drunk when they do something, they are less responsible for what happened. How do you feel?" "How do you feel that mental illness affects someone in making decisions?" "What experiences have you had with persons with mental illness?" "Some people feel that a person with a mental illness is even more dangerous than someone without a mental illness and thus should be sentenced more harshly. Others feel that if a person is mentally ill, she should be treated for that mental illness and her sentence should not be as harsh. How do you feel?" "How would you use evidence of mental illness in making your penalty decision?" "How important would it be in making your penalty decision that my client came from difficult family circumstances?" "How important would it be in making your penalty decision that the defendant was placed in numerous foster homes as a child?"

A juror is not qualified to sit if he or she believes that mitigation is something that is unimportant to the penalty decision. Many jurors believe that the penalty decision should be based only upon the facts of the crime and the defendant's criminal record. If that is the case, the juror is not qualified to sit. Voir dire must be broad enough to allow for the discovery of this bias against mitigation.

Jurors are confused about mitigation. "Substantially higher percentages of Kentucky capital jurors than jurors from all states of the Capital Jury Project fail to understand that they need not be unanimous on mitigating circumstances, and that they need not find mitigation beyond a reasonable doubt. Kentucky capital jurors are, however, less likely than the Capital Jury Project jurors as a whole to be mistaken about the burden of proof required for aggravating circumstances. All told, the most likely situation is that a juror serving on a capital case in Kentucky does not understand how to consider and possibly give effect to mitigating evidence, and to a lesser extent, may not require the state to prove aggravating circumstances beyond a reasonable doubt. The obvious follow-up question is why is understanding so poor?" Sandys, *The Advocate,* August 2014, p. 3.

Jurors who are unable to consider and give effect to mitigation are excludable. Jurors may be excluded not only because of their pro-death views, but also because of their inability or unwillingness to consider mitigation and give it effect in their sentencing decision. "[S]uch jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: They not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." *Morgan v. Illinois*, 119 L. Ed. 2d,at 507. "Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death penalty." *Id*. at 508. "Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for