Ten Dictates of Death Penalty Voir Dire

1. The death penalty is a marathon, not a sprint. (Ie., there is no distinction between trial attorneys and appellate attorneys in capital litigation)

2. Mitigation must be completed before jury selection.

3. Know the standard for dismissal for cause. (Witherspoon v. Witt-Adams)

Ohio's legislature has set a strict standard for the dismissal of prospective jurors for the views on capital punishment. The standard is based upon the United States Supreme Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). This standard is codified in O.R.C. §2945.25(C). This section provides:

> A person called as a juror in a criminal case may be challenged for the following causes: (C) In the trial of a capital offense, that *he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case*. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard. (Emphasis added)

In State v. Treesh, 90 Ohio St.3d 460 (2001) the Court ruled:

> In his eighth proposition of law, Treesh contends that the inclusion of juror Lynn Volke denied him his constitutional right to a fair and impartial jury due to Volke's "unbending position" in support of the death penalty. For the following reasons, we disagree. **R.C. 2945.25(C) provides that a prospective juror in a capital punishment case may be challenged for cause where "he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case.** A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard."

4. Death penalty voir dire is a three-dimensional phenomenon for the interrogator.

A. First, jurors who are "substantially impaired" by virtue of anti-capital punishment views must be identified.

B. Second, jurors who are "substantially impaired" by virtue of *pro*-capital punishment views must be identified. See *Morgan v. Illinois,* 112 S.Ct. 2222 (1992) (venire must be questioned regarding pro-capital punishment, potentially disqualifying views).

B. Third, venire members must be identified who are substantially impaired *in considering lawful mitigating evidence*. See 6.

5. Identify case as culpability phase or penalty phase case.

6. Those most hesitant to sentence to death are usually the most hesitant to convict. The importance of life qualifying. "Still, the trial court came dangerously close, at the prosecutor's urging, to improperly restricting the voir dire. The trial court could have readily explained the concept of mitigation. *Jurors can be told, for example, that mitigating factors can relate to the nature and circumstances of the offense or the history, character, and background of the accused, his age, or other factors* ***known*** *to be relevant.* See, e.g., State v. Getsy (1998), 84 Ohio St.3d 180, 200, 702 N.E.2d 866, 886. **State v. Twyford**, **94 Ohio St.3d 340 (2002)**

This is why you have mitigation completed before voir dire. If you can show it is known to be relevant, you can ask under Twyford. The trial judge may not follow the United States Supreme Court, but he or she will the Ohio Supreme Court. Showing the judge the flow chart will not work, but Twyford will.

7. Batson, and remember, if state strikes all women, it is a suspect class and may be challenged under Batson. Batson is alive and well after Miller -El. It does not matter if there are blacks on the jury. If even one minority is dismissed for no good cause, it is a new trial even if all other jurors are the same suspect class. Do not forget race and religion as the basis for a Batson-type claim.

8. Use peremptories State v. Stallings, (2000) 89 Ohio St.3d 280
Error in the denial of a challenge for cause cannot be grounds for reversal when the defendant did not exhaust his peremptory challenges. (Note: this may not be constitutionally correct, grounds for cause should not require use of all peremptories, but if there is not a difference between whose on and the alternate coming up next, you may want to preserve the error)

9-10. Brooks, Brooks, Brooks and then Brooks again. Ohio v. Brooks and Mills v. Maryland. Single juror instruction. This is addressed below.

General Principles

Voir dire plays a critical role in protecting a criminal defendant's sixth amendment right to an impartial jury. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); see *Morford v. United States*, 339 U.S. 258 (1950); *United States v. Bear Runner*, 502 F.2d 908, 911 (8th Cir. 1974). "Without 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." *Rosales-Lopez*, 451 U.S. at 188. Thus *voir dire* must include "questions that permit the intelligent exercise of challenges by counsel." *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973). While trial courts exercise wide discretion over *voir dire*, this discretion is "subject to the essential demands of fairness," and "[a]t a minimum, when requested by counsel, inquiry must be made into matters where the likelihood of prejudice is so great that not to inquire would risk failure in assembling an impartial jury." *Aldridge v. United States*, 283 U.S. 308, 310 (1931). This is especially true in a capital case.

1. With many jurors, initial responses to death-qualifying questions cannot be taken at face value.

Gray v. Mississippi, 481 U.S. 648, 662-663 (1987) ("[D]espite their initial responses, the venire members might have clarified their positions upon further questioning and revealed that their concerns about the death penalty were weaker or stronger than they originally stated. It might have become clear that they could set aside their scruples and serve as jurors or that they could not." The Court in *Wainwright v. Witt*, 469 U.S. 423, 425 (1985), recognized that a searching inquiry is often necessary before jurors can be excluded on the basis of moral, philosophical or practical reservations regarding a particular punishment. "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings."

2. Jurors Who Don't Believe in Mitigation Cannot Follow the Law

Adams v. Texas, 448 U.S. 38 (1980), as interpreted in *Wainwright v. Witt*, 469 U.S. 412 (1984), modified the "automatic" and "unmistakably clear" language of *Witherspoon*'s footnotes 9 and 21. Compare *Witherspoon v. Illinois*, 391 U.S. 510, 520 n. 9, 522 n. 21 (1968) with *Adams v. Texas*, 448 U.S. 38,l 45 (1980) ("*prevent or substantially impair* the performance of his duties as a juror . . . .") and *Wainwright v. Witt*, 469 U.S. at 424 ("standard is whether the jurors vies would '*prevent or substantially impair* the performance of his duties as a juror . . . .'"). While this relaxed somewhat the rigors of inquiry on one side of the question, in the long run it complicated matters. **This is because "death-qualification" now becomes a three-dimensional phenomenon for the interrogator.**

3. First, jurors who are "substantially impaired" by virtue of anti-capital punishment views must be identified.

4. Second, jurors who are "substantially impaired" by virtue of *pro*-capital punishment

views must be identified. See *Morgan v. Illinois*, 112 S.Ct. 2222 (1992) (venire must be questioned regarding pro-capital punishment, potentially disqualifying views).

5. Third, venire members must be identified who are substantially impaired *in considering lawful mitigating evidence*. "Presumably, under today's decision *a juror who thinks a 'bad childhood' is never mitigating must also be excluded*." *Morgan*, 112 S.Ct. at 2238 (Scalia, J., dissenting).

State v. Williams, 113 N.J. 393, 415, 550 A.2d 1172 (1988), the Court stated:

> . . . The issue is whether the juror's capacity to credit the evidence in mitigation would be 'substantially impaired' within the meanings of Adams and Witt. (citation omitted).

Jurors who are hostile to particular types of mitigating evidence, as well as those hostile to all mitigating evidence, can not follow the law and must be excused. Voir Dire must not be restricted to the point that counsel is unable to "discover [any] basis for intelligent exercise of cause and peremptory challenge . . . ," *State v. Jones*, 596 So.2d 1360, 1366 (La.App. 1992), on the relevant punishment issues.

3. Need for Information to Support Peremptory Challenges -

The defendant has a right to intelligently exercise his peremptory challenges based on the depth of each prospective juror's support for capital punishment. Voir dire must also provide the defendant with the information necessary to do so. *Rosales-Lopez*, 451 U.S. at 188. Peremptory challenges remain one of the most important rights of the accused. *Swain v. Alabama*, 380 U.S. 202 (1965). The Court's voir dire procedure and time and content restrictions on counsel reduced jury selection to crude guesses, thereby impairing the peremptory challenge right. See *United States v. Harris*, 542 F.2d 1283, 1294 (7th Cir.), *cert. denied*, 430 U.S. 934 (1976) ("the defendants must be permitted sufficient inquiry into the backgrounds and attitudes of prospective jurors to enable them to exercise intelligently their peremptory challenges"); *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977) ("peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."). See also *In Re Hitchings*, 6 Cal. 4th 97, 860 P.2d 466 (1993) ("The denial of the right to reasonably exercise a peremptory challenge is . . . the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction.").

4. Uneven punishment qualification

Jury selection is, in its essence, a "quest . . . for jurors who will conscientiously apply the law and find the facts . . . ." *Witt*, 469 U.S. 423, 105 S.Ct. at 852. Thus, "death-qualification" is "no different from excluding jurors for innumerable other reasons which result in bias . . . ." 469 U.S. at 429, 105

S.Ct. at 855. Viewed in light of *Adams* and *Witt*, "death-qualification" is a misnomer. If there is to be "punishment-qualification" it must be even-handed. The court may not employ an opening question which had the practical effect of eliciting responses only from potential jurors who expressed opposition to capital punishment. A similar technique is not ordinarily used with the panel to uncover those very strongly supporting the death penalty.

Even "those who firmly believe that death penalty is unjust may nevertheless serve as jurors in 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." *Lockhart v. McCree*, 476 U.S. 162, 176 (1986).

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court held that a trial court infringes a capital defendant's right under the sixth amendment when it excuses for cause members of the venire who express conscientious objections to capital punishment. A prospective juror may be excluded for cause from a capital jury only upon a showing that he or she is "irrevocably committed . . . to vote against the penalty of death *regardless of the facts and circumstances that might emerge* in the course of the proceedings," *Id.* at 522 n. 21, or that his or her 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, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Jurors may not be excluded simply because they express some disagreement with the death penalty in some cases or under some factual scenarios. Most citizens oppose the death penalty in one case or another. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (citing *Lockhart v. McCree*, 476 U.S. 162 (1986)).

A juror who disagrees with the death penalty under some factual scenarios may not excluded for cause merely because his personal opinion "might . . . affect how he might go." See *Adams v. Texas*, 448 U.S. at 49-50. Rather, such a juror may be excused only if her opposition to the death penalty would disable him from following his instructions and oath, or render him incapable of impartiality.

OHIO STANDARDS (Voir Dire Generally)

Attorney's Right to Question

Ohio Rule of Civil Procedure 47(A) and Criminal Rule 24(A) provide:

> Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry.
>
> Ohio Revised Code §2945.27 provides that:
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> The judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel.

Crim. R. 24(A) also discusses the court's duty to permit the parties to examine each venireperson. The rule states:

> Examination of jurors. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry.

The Revised Code and the Criminal Rules clearly establish that the parties must be afforded sufficient opportunity to question each member of the venire before excusal.

Prior to the adoption of the Criminal Rules, Ohio Revised Code §2945.27 provided that, after the examination of prospective jurors by the court, "he shall permit reasonable examination of such jurors by the prosecuting attorney and by defendant or his counsel." In State v. Swanson (1984), 16 Ohio St. 3d 375, 376, the Ohio Supreme Court stated that the enactment of Crim. R. 24 did not abrogate the Ohio practice which permits counsel reasonable opportunity to personally examine

prospective jurors.

The Ohio Supreme Court in State v. Anderson (1972), 30 Ohio St. 2d 66 (decided prior to the enactment of Rule 24) found a basis in the Ohio Constitution for permitting voir dire examination of prospective jurors. In support of this finding, the court in Anderson first cited the Ohio Constitution Article I, Section 10, which provides in pertinent part:

> * * * In any trial, in any court, the party accused shall be allowed * * * a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. * * *

Citing Lingafelter v. Moore (1917), 95 Ohio St. 384, 387, the Ohio Supreme Court stated:

> It is beyond question that the right of trial by a jury guaranteed by the Constitution carries with it by implication the right to a trial of a jury composed of unbiased and unprejudiced jurors. This right being guaranteed, all courts are charged with the imperative duty of affording every litigant the opportunity of having his cause tried by an impartial jury.

The trial court retains discretion to reasonably limit counsel's voir dire. State v. Bridgeman (8th App. Dist. 1977), 51 Ohio App. 2d 105. However, unreasonable and excessive limitation may trench upon the litigants' ability to challenge prospective jurors intelligently because it may deprive counsel of the information necessary to an informed action. Swanson, at 376. In Anderson at page 73 the Ohio Supreme Court stated that, "The degree of examination that is 'reasonable' will vary from case to case depending upon many factors including whether the trial to be held is criminal or civil and, if criminal, for what crime."

Counsel is permitted to question the prospective jury panel on matters of applicable law. As long as counsel states the law fairly and accurately and couches his questions in language that makes it clear that the judge is the final legal arbiter, counsel should be permitted to address the jury about legal issues. Bridgeman, at 110. The Bridgeman Court ruled that the trial court had the duty to

determine the bias, prejudice or partiality of the panel on the law and the facts.

> Such inquiry of the panel should be sufficiently flexible to include matters of applicable law not reached by the court. Counsel should be permitted to probe into areas where the responses to the court's questions were incompletely or hesitantly given. The trial judge must allow for the selection of a jury that will evaluate the evidence presented by the parties and apply the law given by the court fairly and impartially.

Bridgeman, at 110.

Ohio Death Standard

Ohio codified the Witherspoon inquiry as it pertains to individuals who are opposed to the death penalty.

Ohio Rev. Code § 2945.25(C) (emphasis added) states:

> In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

Significantly, the Ohio Supreme Court recognized in State v. Jenkins, 15 Ohio St.3d 164, 180 (1984), that O.R.C. §2945.25(C) codified Witherspoon:

> In applying the principle set forth in Witherspoon, supra, and reflected in R.C. 2945.25(C), in order to uphold appellant's conviction and death sentence, we must be able to safely conclude from the record that the four jurors excluded under the authority of Witherspoon, supra, would have been "unwilling 'to consider all of the penalties provided by state law,' and that each was 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in **282 the course of the proceedings.' * * * " (Emphasis sic.)

State v. Bueke , 38 Ohio St.3d 29, 38 (1988)

Beuke argues that the proper application of the test of Witherspoon v. Illinois, supra, shows the exclusion of prospective jurors Ritz, Gilbert, and Patterson to be constitutionally infirm. Under R.C.

***2945.25*(*C*)**, which reflects, in principle, the Witherspoon standard, a prospective juror may be removed for cause where "* * * he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case." See State v. Jenkins, supra, at 180, 15 OBR at 325, 473 N.E. 2d at 281-282.

[41] Wainwright v. Witt, supra, at 424, **subsequently clarified the Witherspoon standard to be** "* * * whether the juror's views would `prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath' [Adams v. Texas (1980), 448 U.S. 38, 451." The Witt standard was thereafter adopted and applied by this court in State v. Rogers (1985), 17 Ohio St.3d 174, 178-179, 17 OBR 414, 417-4181 478 N.E. 2d 984, 989- 990, and at paragraph three of the syllabus, vacated on other grounds (1985), 474 U.S. 1002, and is a basis for challenging prospective jurors for cause under R.C. 2945.25(O). State v. Buell, supra, at 139, 22 OBR at 216, 489 N.E. 2d at 808.

(Emphasis added, SEE MATERIALS IN SEMINAR PACKET)

But see;

State v. Treesh, 90 Ohio St.3d 460 (2001);

In his eighth proposition of law, Treesh contends that the inclusion of juror Lynn Volke denied him his constitutional right to a fair and impartial jury due to Volke's "unbending position" in support of the death penalty. For the following reasons, we disagree. R.C. 2945.25(C) provides that a prospective juror in a capital punishment case may be challenged for cause where "he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard."

COMPARE TO:

State v. Twyford, 94 Ohio St.3d 340 (2002)

The standard for determining whether a prospective juror may be excluded for cause due to his or her views on capital punishment is "whether the juror's 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 [1985], 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, followed.)" State v. Rogers (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452. See, also, State v. Williams (1997), 79 Ohio St.3d 1, 5, 679 N.E.2d 646, 653.

Morgan v. Illinois Issue

(Twyford)(2002) 94 Ohio St.3d 340

Still, the trial court came dangerously close, at the prosecutor's urging, to improperly restricting the voir dire. The trial court could have readily explained the concept of mitigation. Jurors can be told, for example, that mitigating factors can relate to the nature and circumstances of the offense or the history, character, and background of the accused, his age, or other factors known to be relevant. See, e.g., State v. Getsy (1998), 84 Ohio St.3d 180, 200, 702 N.E.2d 866, 886. The trial court can easily do this while avoiding inquiry about specific mitigating factors as proscribed in **State v. Jones, 91 Ohio St.3d at 338, 744 N.E.2d at 1171**. **91 Ohio St.3d 335, 744 N.E.2d 1163, 2001 Ohio 57**

State v. Murphy (2001) 91 Ohio St.3d 516

A juror whose views on capital punishment are such that they would prevent or substantially impair his ability to consider mitigating factors, as the law requires, is disqualified. See Morgan v. Illinois (1992), 504 U.S. 719, 729, 112 S.Ct. 2222, 2229-2230, 119 L.Ed.2d 492, 502-503; State v. Williams (1997), 79 Ohio St.3d 1, 5-6, 679 N.E.2d 646, 653; State v. Rogers (1985), 17 Ohio St.3d 174, 178-179, 17 OBR 414, 417-418, 478 N.E.2d 984, 989-990

SINGLE JUROR STANDARD

State v. Stallings, (2000) 89 Ohio St.3d 280

A single juror may prevent a death penalty recommendation by finding that the aggravating circumstances do not outweigh the mitigating factors.

Unlike State v. Brooks (1996), 75 Ohio St. 3d 148, 159-160, 661 N.E.2d 1030, 1040-1041, the trial court here never instructed [**175] the jury that it had to unanimously reject the death penalty before it could consider a life sentence. Instead, "the jury was free to consider [***36] a life sentence even if jurors had not unanimously rejected the death penalty." State v. Taylor (1997), 78 Ohio St. 3d 15, 29, 676 N.E.2d 82, 95. The instructions were consistent with R.C. 2929.03(D)(2), and no prejudicial error resulted from rejecting defense requests. See Madrigal, 87 Ohio St. 3d at 393-395, 721 N.E.2d at 67-69; *State v. Smith* (2000), 87 Ohio St. 3d 424, 437, 721 N.E.2d 93, 109; State v. Bey (1999), 85 Ohio St. 3d 487, 497, 709 N.E.2d 484, 496. Cf. *Jones v. United States* (1999), 527 U.S. 373, 119 S. Ct. 2090, [*295] 144 L. Ed. 2d 370 (Eighth Amendment does not require jury members to be instructed as to the consequences of their failure to agree.).

Nonetheless, we reiterate that trial courts should explicitly instruct, as we directed in Brooks, 75 Ohio St. 3d at 162, 661 N.E.2d at 1042, that a single juror "may prevent a death penalty

recommendation by finding that the aggravating circumstances * * * do not outweigh the mitigating factors." Madrigal, 87 Ohio St. 3d at 394, 721 N.E.2d at 68.

State v. Stallings, (2000) 89 Ohio St.3d 280
Error in the denial of a challenge for cause cannot be grounds for reversal when the defendant did not exhaust his peremptory challenges.

IAC

" 'The conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked.' " State v. Smith, 87 Ohio St.3d at 440, 721 N.E.2d at 110, quoting State v. Evans (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042, 1056. Moreover, this court "will not second-guess trial strategy decisions" such as those made in voir dire, and " 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " State v. Mason, 82 Ohio St.3d at 157-158, 694 N.E.2d at 949, quoting Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694; see, also, State v. Cornwell (1999), 86 Ohio St.3d 560, 569, 715 N.E.2d 1144, 1153.

As to defendant's claim of ineffective assistance in regard to voir dire, defendant fails to establish prejudice, namely, "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. Thus, we find that this claim has no merit. State v Hartman (2001) 93 Ohio St. 3d 274.

VOIR DIRE RATINGS GUIDE

Probably the most overlooked area of death penalty litigation is the voir dire. Lawyers are too often satisfied with a juror who indicates on initial questioning that he or she can consider both a death option and a life option. Because judges, prosecutors, and even defense attorneys, are often in a great hurry to complete the questioning and move on to the actual trial, further inquiry into such a juror is often avoided. This can be a fatal mistake to your client.

In Grigsby v. Mabry, 569 F.Supp. 629 (Ark.) (Case summary included in your materials), the federal district court in Arkansas held a hearing regarding conviction prone juries. For the purposes of this exercise, the most important conclusion drawn out of that hearing is that **the single best predictor of a juror's inclination on the guilt or innocence of a defendant is that juror's view on the death penalty.** A juror who is strongly against the death penalty will more likely find a defendant not guilty of the offense charged, where a juror strongly in favor of the death penalty would find that same defendant guilty of the offense charged.

Therefore, it is incumbent upon the defense counsel to evaluate each perspective juror as to their view on the death penalty. To that end, a "scoreboard" or "chart" which allows ratings to be made of each juror is absolutely essential for jury selection. Although counsel should devise a system which he or she is comfortable with, a ratings chart is attached here as a starting point which counsel may use or revise to their liking.

For the purposes of the system below, a ratings system of 1-10 is utilized. A rating of 1 would constitute a juror who favored the death penalty in every homicide. That person should be dismissed because that juror's ability to fairly judge the case is more than substantially impaired by their views on the death penalty. A juror with a rating of 10 would be a juror who could not

impose the death penalty in any homicide. That person, too, would be excluded for the same reason.

The goal is to get as many jurors with a rating of 6 or above on the jury as possible. Obviously, the more questions asked of the juror, the more accurate your ratings will be.

The chart below allows for two ratings. The general score includes a juror's attitude on the criminal justice system in general. It also includes the general questioning such as how distracted that juror might be while sitting because of being away from a job, children, etc. The death penalty rating is solely based upon that juror's views on capital punishment.

The reason that two evaluations are useful is that there are two kinds of capital cases. First, and less frequently, the defendant might have an actual guilt/innocence issue. The second is where the defendant's guilt is not an issue and the sole purpose of the trial is to avoid the death penalty.

An example of a juror who might be bad for the first example but good for the second is the juror who has a brother who is a police officer and believes that any charge the prosecutor brings is most likely accurate. On the same hand, that juror may have a real difficulty with the imposition of capital punishment due to religious or philosophical beliefs. If you were trying your case for a not guilty, you might not want that juror on the panel. However, if you were attempting to avoid a specification or simply avoid the penalty of death, that same juror might be very beneficial to your cause. This is especially true if your position was that the police did a proper investigation (it happens) but capital punishment is inappropriate. In that case, your strategy would not contradict that juror's belief in the credibility of law enforcement. In addition, your strategy would be consistent with that juror's religious or philosophical views.

This may be exactly the type of juror that you would want to sit in judgment of your client.

To that end, **insulation and isolation** are techniques that must be used in jury selection. This is especially true with jurors who are expressing reservations and hesitancy about imposing the death penalty. It is necessary to **fragmentize** the jury and empower the more compassionate jurors with the tools and confidence necessary to maintain their position that death may be inappropriate. Remember, Ohio is a **single juror** state. That juror may be in a position where he or she must reject the attempt of pro-death jurors to convince that juror to join in a unanimous death verdict.

Procedure

1. The first phase of the trial is to determine the factual background and how it fits the law. In this phase, a jury must unanimously agree on the proper verdict.

2. The penalty phase of trial is to determine the appropriate penalty. The penalty phase includes a completely different deliberation process. Although the jurors deliberate together and discuss and debate the various factors, the verdict is a compilation of **twelve individual verdicts**. If even one of these verdicts determines that death is inappropriate, a life option must be agreed upon.

Each juror must be so instructed.

Below are a set of principles that should be followed in the death qualification process. It is understood that most of these are self evident, however, they bear repeating here as they are often overlooked.

Principles

1. Respectability: Defense counsel must create an atmosphere of

respectability when questioning a perspective juror on their views regarding the death penalty if he or she expects the juror to reveal their true opinions.

2. Do Not Crusade: Arguing with a juror that their belief in the death penalty is wrong will get you nowhere fast. Remember, the majority of the population is for the death penalty.

3. Alternate: Forget lead and co-counsel designations. Questioning juror after juror will tire anyone out quickly. Your questioning and rehabilitation ability will diminish quickly after six hours of asking the same questions.

4. Support: Try to have someone other than the attorneys writing down their opinions. A lay person or a college student would be very helpful in providing the attorneys with an objective opinion not skewed by their proximity to the case.

5. Division: Each member of the team should evaluate and place their ratings separately. This will encourage greater discussion in the final evaluation process.

6. Be Ready: The trend in Ohio is for the judges to push death qualification to be completed as quickly as possible. Therefore, it is necessary to evaluate perspective jurors with your team at every break. You may find yourself in a position of having to use your peremptories without having thoroughly discussed the evaluations.

7. Forget Mother Theresa: Do not waste too much time trying to rehabilitate an extremely anti-death juror. On the other hand, if you see any chink in the armor, remember, statutorily, Ohio is still a Witherspoon state.

8. Beware of the Silent Vigilante: Although this could happen anywhere, it seems to be more prevalent in smaller communities. Jurors may want to be selected to ensure that the "proper punishment" is provided. In smaller communities, some jurors view themselves as minor celebrities. Thorough questioning must be utilized to unveil their true motives.

9. Use All Your Peremptories: The failure to use all peremptory challenges will result in the waiver of many important voir dire issues. Unless you have a jury of "10's" with a number of "2's" in waiting, you must use your peremptories. Jury selection is an inexact science. As painful as it may be to dismiss a "5" knowing that a "4" is in waiting, acknowledge that your evaluation may be inaccurate. It is not worth waiving your voir dire issues to keep a higher rated juror. Also, remember Ohio is a single juror state.

10. Insulate and Isolate: As noted above, you must empower the death hesitant jurors to remain strong in the face of badgering from the juror's desiring a unanimous death verdict. Proper instruction of the law and validation that there are no wrong views will aid the empowerment process.

Rating System

The following rating system was devised by David D. Wymore, Esq. Mr. Wymore is the chief deputy public defender in Denver, CO. These materials were supplied in a previous death penalty seminar and are invaluable. Mr. Wymore used a 1-7 grading system for the purposes of the death penalty only. The following provides definitions for the various stages of the grading system.

(1) Witt Excludable (WE). The person who will never give a death penalty and is vocal, adamant, and articulate about it. This person we don't deal with that much in terms of voir dire.

(2) A person who is hesitant about saying they believe in the death penalty. They obviously realize the gravamen of being asked to set on the death jury and take seriously the life of a human being. However, they do say they are for the death penalty. These people need to be isolated and insulated and taught how to get out of the jury room. 2's can be intelligent abstract thinkers or less intelligent but compassionate people.

(3) Basically pro-death penalty. Able to quickly say, "I'm for the death penalty, and have been for quite a while." They are, however, lacking in ability to express a real understanding as to why, in fact, they are for the death penalty. The impression you receive from them is that they are pro-death as long as someone else has the responsibility for imposing the sentence. We call this a "kill problem." 3's don't necessarily propose the economic argument or the deterrence argument for death. They are more sensitive to mitigation and really wish to hear mitigation. Unlike 5's, 6's and 7's, they may be able to make an argument against the death penalty if asked and are also readily willing to respect the views and individual

assessments of those who are more hesitant about the death penalty.

(4) Pro-death. Comfortable and secure in the death penalty. 4's can tell you why they are for the death penalty and feel it is a "good thing." They, however, wish to hear "both sides". 4's are more fence-straddling in voir dire when it comes to the penalty phase evidence. They readily argue that there could be mitigation that calls for life even after conviction of first degree, cold blooded, after deliberation murder. They are different than 3's in their initial response of "comfort" level with death penalty and development of arguments in its behalf.

(5) Pro-death, vocal, articulate their support, less sensitive to mitigation than a 4, but more than a 6. A five is a sure vote for death. The difference is that the five can formulate perhaps 2 or 3 mitigators he/she might think are significant. A five would allow a unanimous vote for life, but would vote for death on first ballot and remain with majority. A 5 is more sensitive to the rights of other jurors in their assessments of mitigation and would be less prone to "bulldog" than a 6 or 7. A five is also more susceptible to "residual doubt" than a 6 or 7. Like the DA.

(6) A killer. Escapes ADP challenge because she/he can listen to a "perhaps' mitigation scenario and judge saves them. Concrete backer of death penalty. Only argument against death penalty (really) is it's not used enough. Believes in personal economic burden to them of life sentence for defendant and others and deterrence. Head nodder with DA.

(7) ADP. If your client is convicted of first degree murder, they will then impose the death penalty. Eye for an eye and everything else. Life without parole is not really an adequate sentence. Mitigation to them is manslaughter or self-defense. Hateful and proud of it. They must be removed, hopefully, on cause, but at least with peremptory.

PLAYING FOR THE FUMBLE

Prosecutor's use of peremptory challenges to excuse blacks or other members for reasons of race, religion and gender.

> Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. The diverse and representative character of the jury must be maintained partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.

State ex re. J.E.B v. Alabama, 511 U.S. 127 (1994)

1. *Batson v. Kentucky*, 476 U.S. 29 (1986)
2. *State v. Seiber*, 56 Ohio St. 3d 4 (1990)
3. *Powers v. Ohio*, 111 S.Ct. 1364 (1990)
    a. Defendant need not be a member of excluded race to challenge
4. *Georgia v. McCollum*, 505 U.S. 42 (1992)
    a. Defendant cannot excuse based on race

Do not forget *GENDER* challenge

State ex re. J.E.B v. Alabama, 511 U.S. 127 (1994);

Gender-based classifications are subjected to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.

Race

1. *Turner v. Murray*, 476 U.S. 28 (1986)

Questioning on race relations, white victim-ethnic defendant, etc

2. *State v. Conway*; 108 Ohio St.3d 214 (2006) **ASK AND OBJECT**

Conway relies primarily on *Turner v. Murray* (1986), 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27. In *Turner*, the Supreme 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." Id. at 36-37, 106 S.Ct. 1683, 90 L.Ed.2d 27. However, the court further held that "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." Id. at 37, 106 S.Ct. 1683, 90 L.Ed.2d 27. The *Turner* court noted that the actual decision to question on racial prejudice is a choice best left to a capital defendant's counsel. If defendant's counsel declines to request voir dire on the subject of racial prejudice, the trial court need not broach the topic sua sponte. Id. at 37, 106 S.Ct. 1683, 90 L.Ed.2d 27, fn. 10; *State v. Watson* (1991), 61 Ohio St.3d 1, 13, 572 N.E.2d 97.

Conway never sought to question prospective jurors about racial bias. Thus, the trial court did not commit error in failing to inquire on the subject. Therefore, we reject Conway's 14th proposition of law.

Grounds for Excusal

(Case law)

Personal Grounds

We further note that a juror's discharge "on grounds of personal excuse" is a matter "between the court and the jurors, and with which the parties can not, of right, interfere." Bond v. State (1872), 23 Ohio St. 349, 355, 1872 WL 78. A party has no right to have any particular juror on the panel. His right is to an impartial jury, and a juror's erroneous excusal does not compromise the jury's impartiality. See, e.g., United States v. Cornell (C.C.D.R.I.1820), 25 F.Cas. 650, 656; State v. Mendoza (1999), 227 Wis.2d 838, 863, 596 N.W.2d 736, 748 (citing cases); Jones v. State (Tex.Crim.App.1998), 982 S.W.2d 386, 392 (citing cases); People v. Lefebre (Colo.2000), 5 P.3d 295. **State v. Murphy** (2001) Ohio St.3d

Death of Relative

A prospective juror is not automatically disqualified by the fact that a close relative has been the victim of a crime similar to the crime on trial. See State v. Allen (1995), 73 Ohio St.3d 626, 628-629, 653 N.E.2d 675, 680-681; State v. Allard (1996), 75 Ohio St.3d 482, 493-494, 663 N.E.2d 1277, 1288; and see, generally, Crim.R. 24(B) (listing grounds for challenge for cause). Instead, the trial judge must determine, on a case-by-case basis, whether the juror "is possessed of a state of mind evincing enmity or bias." Crim.R. 24(B)(9). **State v. Murphy** 91 Ohio St.3d 516 (2001)

Standard -Jalowiec-Witt 91 Ohio St.3d 220 (2001)

The trial court did not abuse its discretion in excusing Porter, since her views on the death

penalty would have substantially impaired her performance as a juror. State v. Rogers (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus.

State v. Gross, 97 Ohio St.3d 121, 2002-Ohio-5524.] "[A]n erroneous excusal for cause, on grounds other than the venireman's views on capital punishment, is not cognizable error, since a party has no right to have any particular person sit on the jury. Unlike the erroneous denial of a challenge for cause, an erroneous excusal cannot cause the seating of a biased juror and therefore does not taint the jury's impartiality." State v. Sanders (2001), 92 Ohio St.3d 245, 249, 750 N.E.2d 90.

California v. Cash, 2002 Cal. LEXIS 4828 (CA 07/25/2002) Trial court's voir dire relating to limiting the defense's questioning concerning penalty phase issues requires appellant's sentence of death to be vacated.

> The trial court conducted death qualification voir dire of each prospective juror individually and out of the presence of other prospective jurors (see People v. Hovey (1980) 28 Cal.3d 1, 80), followed immediately by general voir dire of that juror. Voir dire of each prospective juror proceeded in three steps: The court asked death-qualifying questions, attorneys for each side posed death-qualifying questions, and finally each side posed questions on general voir dire. After each step, the court entertained challenges for cause. All prospective jurors not excused for cause during this process [*11] were directed to return at a later date. When the prospective jurors remaining after voir dire assembled on that date, they were called into the jury box according to randomly assigned numbers, the court entertained the parties' peremptory challenges, and in this manner the final selection of the jury and the alternates was concluded.
>
> On the second day of voir dire, when defense counsel attempted to ask a prospective juror whether there were "any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty," the trial court ruled the questions improper because "we're restricted to this case." Later, when no prospective juror was present, defense counsel asked the court to reconsider the restriction. Counsel explained that the defense wanted to determine whether prospective jurors could return a verdict of

> life without parole for a defendant who had killed more than one person, without revealing that defendant had killed his grandparents. The trial court replied that because the prior murders were not expressly alleged in the charging document, it would not permit any such questions: "You cannot ask anything about the facts that are not [*12] charged in the Information, period. You can't raise one mitigating factor, nor can [the prosecutor] raise one aggravating [factor] that is not charged in the Information. . . . You cannot go past the Information."

Miscellaneous Case Law

Knese v. Missouri, 2002 Mo. LEXIS 89 (Mo 8/27/2002) Knese's trial counsel was ineffective in failing to question, during voir dire, two of the eventual jurors about questionnaire responses suggesting they automatically would vote to impose death after a murder conviction. The attorney admitted he should have struck these jurors for cause, and his failure to do so was the most egregious mistake he ever has made in trying a case. This complete failure in jury selection affected the penalty phase only, as nothing in the questionnaires indicated either of these jurors was predisposed to vote for guilt or innocence automatically. The penalty phase of the trial is reversed accordingly, and the case is remanded.

Illinois v. Brown, 2002 Ill. LEXIS 945 (Ill 10/18/2002) "[T]he trial court's questioning was not sufficient to discover the beliefs and opinions of prospective jurors and did not allow for the removal of those prospective jurors who would automatically vote for the death penalty in every case. Consequently, the trial court's actions frustrated the purpose of voir dire and constituted an

abuse of discretion."

State v. Gross, 97 Ohio St.3d 121, 2002-Ohio-5524.]

Limited Voir Dire

{¶¶31} Gross argues that the trial court's restrictions on and repeated interruption of voir dire impaired his ability to use peremptory challenges effectively to remove prospective jurors. Gross also complains that the trial court summarily denied defense counsel challenges for cause without permitting counsel to ask appropriate followup questions. We find no merit to these arguments. "The scope of voir dire is within the trial court's discretion and varies depending on the circumstances of each case. Any limits placed thereon must be reasonable." (Citation omitted.) State v. Bedford (1988), 39 Ohio St.3d 122, 129, 529 N.E.2d 913. See, also, State v. Twyford (2002), 94 Ohio St.3d 340, 345, 763 N.E.2d 122. Accordingly, "[n]o prejudicial error can be assigned to the examination of veniremen in qualifying them as fair and impartial jurors unless a clear abuse of discretion is shown." State v. Cornwell (1999), 86 Ohio St.3d 560, 565, 715 N.E.2d 1144. The transcript shows that the trial court was not unduly restrictive; to the contrary, the trial court balanced its obligation to control the inquiry with according counsel latitude in questioning the prospective jurors. See State v. Lorraine (1993), 66 Ohio St.3d 414, 419, 613 N.E.2d 212, quoting State v. Durr (1991), 58 Ohio St.3d 86, 89, 568 N.E.2d 674 (" '[a]lthough R.C. 2945.27 affords the prosecution and defense the opportunity to conduct a reasonable examination of prospective jurors, * * * the trial court reserves the right and responsibility to control the proceedings of a criminal trial pursuant to R.C. 2945.03, and must

limit the trial to relevant and material matters with a view toward the expeditious and effective ascertainment of truth' "). Voir dire lasted eleven days, encompassed over 2,500 pages of transcript, and, as we noted in our discussion on venue, featured extensive examination of the prospective jurors by the court, the state, and defense counsel. Although the trial court limited certain areas of inquiry, these limitations were within the discretion of the court. Nor do we find the trial court's interaction with counsel unduly intrusive.

* * *

"While fairness requires that jurors be impartial, jurors need not be totally ignorant of the facts and issues involved. State v. Sheppard (1998), 84 Ohio St.3d 230, 235, 703 N.E.2d 286, 292. The trial court [is] entitled to accept [a juror's] assurances that he would be fair and impartial and would decide the case on the basis of the evidence. '[D]eference must be paid to the trial judge who sees and hears the juror.' Wainwright, 469 U.S. at 426, 105 S.Ct. at 853, 83 L.Ed.2d at 853." State v. Jones (2001), 91 Ohio St.3d 335, 338, 744 N.E.2d 1163.

"[A]n erroneous excusal for cause, on grounds other than the venireman's views on capital punishment, is not cognizable error, since a party has no right to have any particular person sit on the jury. Unlike the erroneous denial of a challenge for cause, an erroneous excusal cannot cause the seating of a biased juror and therefore does not taint the jury's impartiality." State v. Sanders (2001), 92 Ohio St.3d 245, 249, 750 N.E.2d 90.

97 Ohio St.3d 1 (2002); State v. Franklin, p.9 The relevant inquiry during voir dire is whether the juror's beliefs would prevent or substantially impair his or her performance of the duty in accordance with the instructions and oath. Wainwright v. Witt (1985), 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841. In the present case, the trial judge asked jurors whether they were capable of signing a death verdict. Clearly, a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties. Although the judge's inquiry differed in form from that endorsed by the Witt court, the substance of his interrogation was the same. Thus, the failure to object to the judge's line of questioning in voir dire did not constitute deficient performance by appellant's counsel.

State v. Smith 97 Ohio St.3d 367 (2002) The standard for determining whether a prospective juror may be excluded for cause based upon his or her views on the death penalty is whether those views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (Emphasis is omitted.) Wainwright v. Witt (1985), 469 U.S. 412, 420, 105 S.Ct. 844, 83 L.Ed.2d 841, quoting Adams v. Texas (1980), 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d581. In this case, juror Bryant indicated that she favored the death penalty. However, she later stated that she would listen to all of the evidence and that she would not be predisposed to recommending the death penalty. Instead, she would make the

state prove that the aggravating circumstances outweighed the mitigating factors. Since the juror agreed to follow the law, we find that the trial court did not abuse its discretion in denying Smith's challenge for cause.

State v. Myers 97 Ohio St.3d 335 (2002)

Last, Myers's complaint that the court erred in not allowing the defense to qualify jurors on their ability to consider specific mitigating factors isnot well taken. "Morgan does not require judges to allow individual voir dire onseparate mitigating factors." State v. Wilson, 74 Ohio St.3d at 386, 659 N.E.2d292.

State v. Braden 98 Ohio St.3d 354(2003) This court has recognized that " '[t]he conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked.' " State v. Cornwell (1999), 86 Ohio St.3d 560, 568, 715 N.E.2d 1144, quoting State v. Evans (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042. Moreover, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." Murphy, 91 Ohio St.3d at 539, 747 N.E.2d 765.

State v. Group, 98 Ohio St.3d 248, 2003 It is true that prospective juror No. 383 equivocated. However, where a prospective juror gives contradictory answers on voir dire, the trial judge need

not accept the last answer elicited by counsel as the prospective juror's definitive word. See State v. White (1999), 85 Ohio St.3d 433, 439, 709 N.E.2d 140, citing State v. Scott (1986), 26 Ohio St.3d 92, 97-98, 26 OBR 79, 497 N.E.2d 55. Rather, "it is for the trial court to determine which answer reflects the juror's true state of mind." State v. Jones (2001), 91 Ohio St.3d 335, 339, 744 N.E.2d 1163.

But see **White v. Mitchell**, 431 F.3d 517 (6th Cir. 2005)

> . . . the appropriate question on review of a juror bias issue is "did a juror swear that [s]he could set aside any opinion [s]he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Id.* The second portion of that inquiry-whether the statements of the impartiality *should have been believed*--highlights the grave problem with Sheppard's voir dire testimony in this case. With a transcript reflecting statements as internally inconsistent and vacillating as these, including numerous statements of strong doubt regarding impartiality and merely a few tentative