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Jury Selection in Capital Cases



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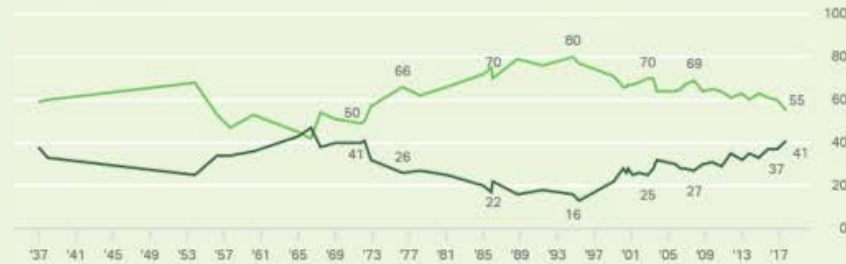
POLLS

1937-2017

Support for Death Penalty lowest since 1972

Are you in favor of the death penalty for a person convicted of murder?

■ % Favor ■ % Opposed



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Death Penalty Acceptance by Region

Moral Acceptability of the Death Penalty in U.S., by Region

% Morally acceptable

	2014	2015
East	54	53
Midwest	69	60
South	60	63
West	60	62

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Jurors views on penalty options

Death Penalty:

- Eye for an eye
- They deserve it
- Cost of prison/save tax dollars
- Deterrence

Death sentences now a rarity in Georgia

ATLANTA-NEWS



By Bill Rankin - The Atlanta Journal-Constitution



Death penalty opponents gathered in a circle outside the Georgia Diagnostic and Classification State Prison in Jackson on April 27, 2016, when Daniel Anthony Lucas was executed for the 1996 murders of a Jones County father and his two children. Ben Gray / bgray@ajc.com

**Life Without Parole (LWOP)
Killed the Death Penalty**

Reasons Jurors Favor LWOP

- Wrong to take a life
- Persons may be wrongly convicted
- Punishment should be left to God

Reasons for Deciding LWOP v. Death

- Lingering doubt of defendant's guilt
- Defendant has exhibited some positive behavior or exhibits remorse
- Defendant's mitigation evidence
- Reconsideration of death penalty when it is actually time to "pull the trigger"
- Compromise: not want to hang a jury

Reason for Deciding Death v. LWOP

- Heinousness of crime/characteristics of the crime
- Aggravation evidence especially evidence that D is a "bad inmate"
- Defendant shows no remorse

Death-qualified Jurors

Death-qualified Jurors

A basic legal framework:

- *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
- *Wainwright v. Witt*, 469 U.S. 412 (1985) (FL).
- *Lockhart v. McCree*, 476 U.S. 162 (1986) (AK).
- *Uttecht v. Brown*, 551 U.S. 1 (2007) (WA).
- Court rules and cases in your jurisdiction on this topic.

Death Qualification

Witherspoon v. Illinois, 391 U.S. 510 (1968)

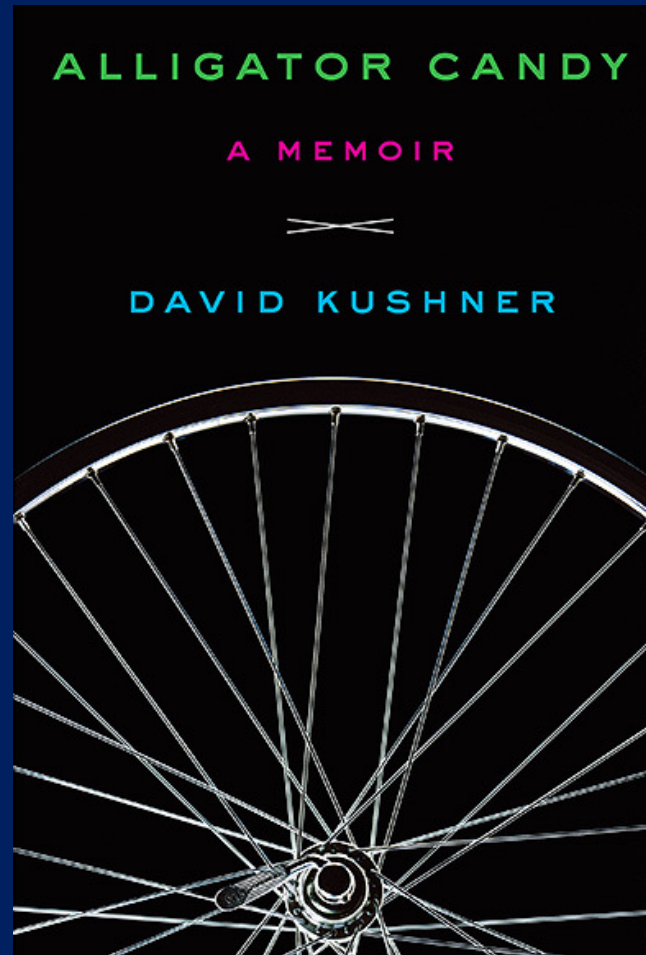
The Witherspoon test: Jurors who cannot under any circumstances consider the death penalty are excused from jury service.

Jurors who would automatically vote for a death sentence without consideration of mitigating evidence are also ineligible for service. This is the *reverse-Witherspoon* objection.

The Standard

“... 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*, 469 U.S. 412 (1985).

The Compelling Human Story Behind the Case



Georgia's Statutory Question

“Are you conscientiously opposed to capital punishment?”

Really?

What We Should Ask

How do you feel about the death penalty?

Standard applies to all three penalty options

"A juror who favors the death penalty must be excused for cause if those views "would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions given the juror and the oath taken by the juror." *Lance v. State*, 275 Ga. 11, 15 (8) (2002). (citing *Greene v. State*, 268 Ga. 47, 48 (1997)). We also apply this same standard where a juror is challenged based on his or her willingness to consider life with the possibility of parole and life without the possibility of parole. In reviewing challenges to jurors based on their views on sentencing, we give deference to the trial court's findings."

Martin v. State, 298 Ga. 259, 357 (2015)

Prepare a System

- Jury selection can take weeks in a capital case.
- In pretrial, discuss how jury selection will be handled mechanically.
- In pretrial, discuss the format and parameters of the *Witherspoon* questions.
- Create a grid/cheat sheet on each potential juror.
- Use a notebook (electronic even) to organize the juror questionnaires, responses in voir dire, and your ratings on jurors.

Know the Law

Compile a Notebook of all the Death Penalty cases you can find that address Voir Dire issues and have them with you in Voir Dire because you will need them.

Really Get to Know Your Jurors

- Use a written questionnaire.
- Conduct social media searches.
- Does your court reporter produce daily transcripts? You may need to get one that does.
- Take great notes—this usually requires two attorneys or an assistant (observe demeanor and make a record of it if helpful).

Evaluate your juror's life experiences with the anticipated mitigation evidence

- Ask about personal experiences/interactions with individuals who suffer from mental illness, disorders, intellectual disabilities
- Get a clear picture of any current or past professional experience in caring for/treating/diagnosing any mental illness, disorders, or disabilities
- If substance abuse is going to be offered in mitigation make sure to ask about experiences/interactions with individuals who have substance abuse problems/disorders
- Look out for jurors who might identify with the Defendant's childhood history, broken home, alcoholic father, etc.

Religious/Spiritual Views

- The defense will usually spend time asking prospective jurors what their church/parish/synagogue/mosque/etc. teaches about the death penalty.



Be prepared for the jurors to shift positions, equivocate, completely contradict themselves at times, and to get emotional at times

Remember it is the record as a whole that the appellate court is reviewing so even a juror who initially seems disqualified can through a series of questions and answers be rehabilitated. Make a good record for this rehabilitation.

Waffleitis



Key to Waffleitis



Practice Tips

- Channel your inner Oprah or Dr. Phil.
- Ease into the questions.
- Make a good record.
- Urge your judge to make credibility and demeanor determinations on the record.



Practice Tips (cont.)

Key phrases:

- “Fixed opinion”
- How long have you felt this way?
- How strongly do you believe that?
- Is this a religious belief? Moral? Etc.
- Have you expressed this belief to others?



Frame Sentencing Option Questions

Nobody is asking you how you would vote today—you have not heard any evidence—that would be an **unfair** question. . . .

- What we need to know today, having heard no evidence, is there a sentencing option that you would not even consider?

Rehabilitation

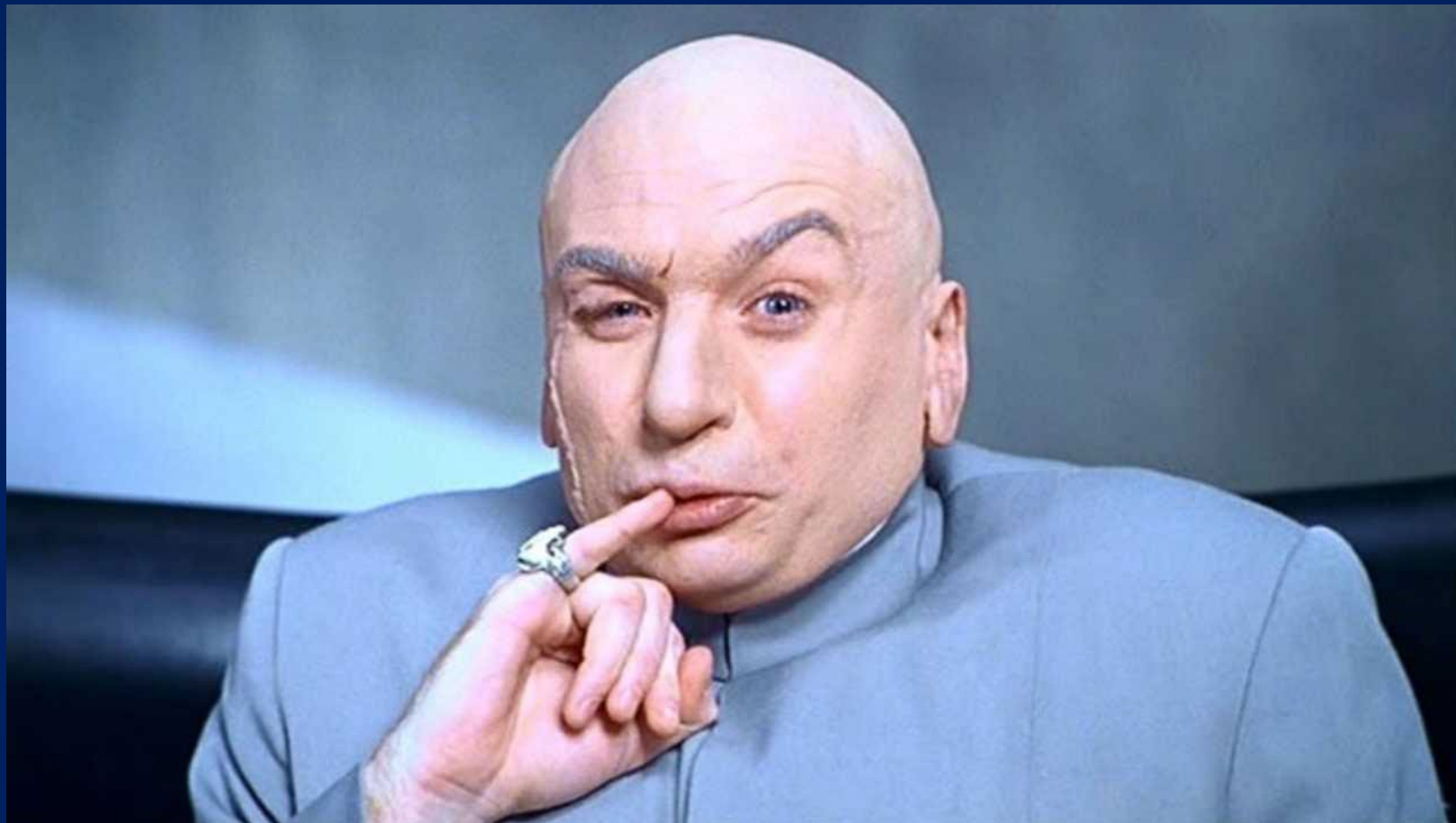
- Do you consider yourself a fair person?
- Are you open-minded?
- Have you already made up your mind without hearing the first piece of evidence?
- Are you open to considering the evidence of mitigation? Or have you already made up your mind to reject it?

What else do you want to know?

Critical Facts in a Death Penalty Case That May Influence Sentencing

- Multiple victims.
- Child victims.
- Heinous facts.
- Horrible defendants.
- Statutory aggravators (according to the defense).
- All mitigation (according to the defense).

What can you anticipate from the defense?



Colorado Method of Capital Voir Dire

- Jurors are selected based upon life/death views only.
- “Pro-death” jurors are removed utilizing cause challenges, and attempts are made to retain potential “life-giving” jurors.
- “Pro-death” jurors are questioned about their ability to respect the decisions of other jurors, and potential “life-giving” jurors are questioned about their ability to stand their ground.
- Peremptory challenges are prioritized based upon views on punishment.

Source: “Overview of the Colorado Method of Capital Voir Dire,” *The Champion*, by Matthew Rubenstein, November 2010.

Defense individual voir dire technique

They put the individual juror at sentencing decision after the guilt-innocence phase:

I want you to assume the defendant has been found guilty (They will insert case specific facts here sometimes).

Guilty of an intentional murder (pre-meditated, cold-blooded etc.)

NO self defense

NO justification

NO accident

NO mental health defense/substance abuse disorder

How do you feel about the DP at this time?

See what they have done here?

They have conveniently left out mitigation.

The relevant issue for Voir Dire is not "how they feel then about the death penalty," but whether going into the second phase of the trial the juror can give meaningful consideration to mitigating evidence in arriving at a sentencing verdict.

Isolate the juror technique

Juror's Bill of Rights

Refusal to Deliberate

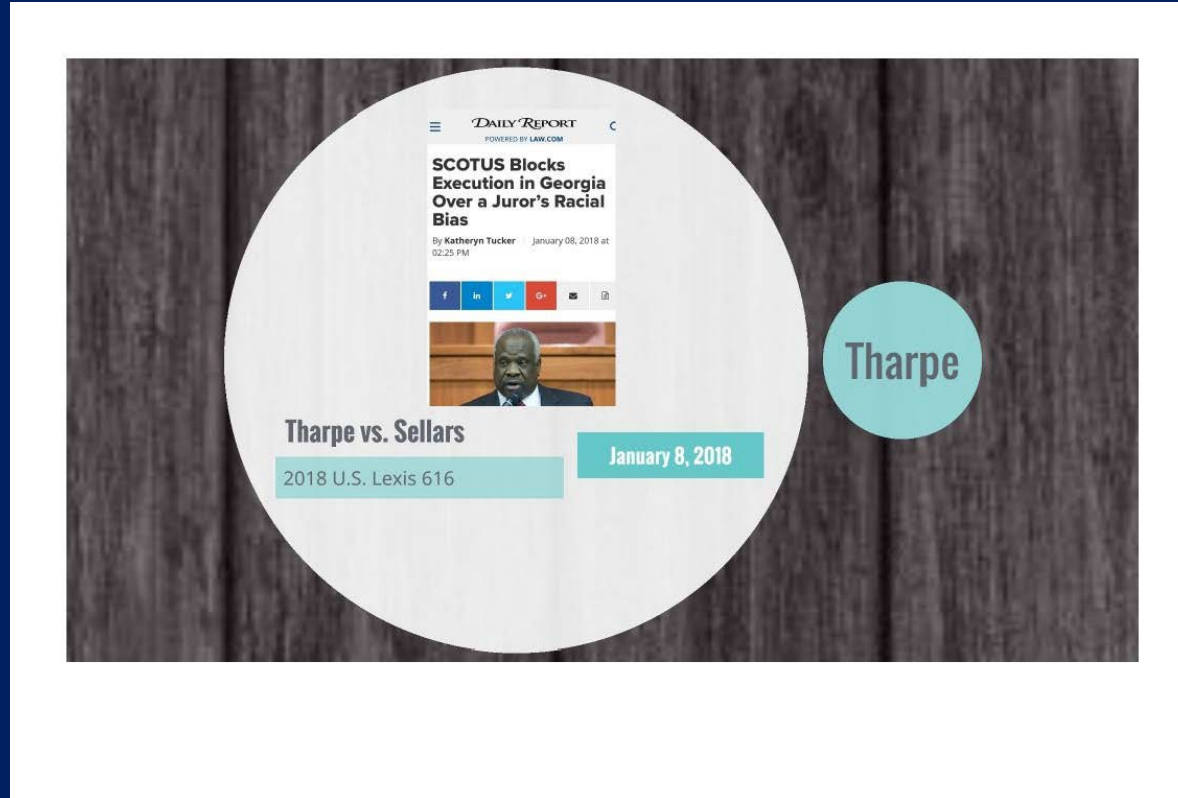
Question: "Do you think bullying is okay?" "If you were to see someone being bullied in the jury room during deliberations what would you do?"

Individual choice emphasis

Objectionable Questions

- How jurors would weigh certain mitigation (this is different than whether they can consider mitigation in general).
- Asking the jurors what type of mitigation they find compelling.
- The mechanics of execution.
- The mechanics of parole.

Choose wisely—this is a marathon.



Tharpe

Petitioner Keith Tharpe moved to reopen his federal habeas corpus proceedings regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black.

Gattie, who is now deceased, served as a juror in Tharpe's case and later an affidavit (that Gattie never retracted) was introduced that showed Tharpe using very racist rhetoric.

Tharpe

"Gattie's remarkable affidavit—which he never retracted— presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise."

"It may be that, at the end of the day, Tharpe should not [*4] receive a COA. And review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review. But on the unusual facts of this case, the Court of Appeals' review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe."

Dissent

Thomas, Alito, and Gorsuch dissented. Thomas wrote the dissent.

"Today's decision can be explained only by the "unusual fac[t]" of Gattie's first affidavit. The Court must be disturbed by the racist rhetoric in that affidavit, and must want to do something about it. But the Court's decision is no profile in moral courage. By remanding this case to the Court of Appeals for a useless do-over, the Court is not doing Tharpe any favors. And its unusual disposition of his case callously delays justice for Jaquelin Freeman, the black woman who was brutally murdered by Tharpe 27 years ago. Because this Court should not be in the business of ceremonial handwringing, I respectfully dissent."

The Takeaway

- **NEVER** block or impede the defendant's attempt to explore racial bias and/or racial attitudes in jury selection.
- **We all need to know how jurors feel up front!**