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VIRLYNN TINHELL
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA,

Plaintiff,

vs.

JUSTIN JAMES RECTOR

Defendant.

)
) NO: CR 2014-01193
)
)
) **DEFENSE MOTION FOR INDIVIDUALLY**
) **VOIR DIRE OF PROSPECTIVE JURY**
) **MEMBERS OUTSIDE THE PRESENCE**
) **OF OTHER POTENTIAL PROSPECTIVE**
) **JURY MEMBERS**

(Assigned to the Honorable Lee Janzten)

Defendant Justin James Rector, by and through undersigned counsel, moves this Court for an order permitting the defense and prosecution to undertake individual voir dire of prospective members of the jury outside the presence and hearing of other members of the venire panel. This motion is made to assist both parties facilitate the intelligent exercise of challenges while preventing prospective jurors from prejudicing or influencing others or tainting the entire pool. This motion is supported by the Memorandum of Points and Authority attached hereto and incorporated herein.



S8015CR201401193

1 By


Gerald T. Gavin
Co-Counsel for the Defendant

By:


Ron Gilleo
Co-Counsel for the Defendant

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6 MEMORANDUM OF POINTS AND AUTHORITY

7 The trial judge has the discretion to determine the proper scope of voir dire. State
8 v. Mapes, 19 Ohio St. 3d 108, 115, 484 N.E. 2d 140, 146 (1985). See Also Rosales-
9 Lopez v. United States, 451 U.S. 182, 189 (1981). However, the exercise of discretion
10 is limited by the constitutional dictates of due process and the right to be tried by an
11 unbiased jury. Morgan v. Illinois, 504 U.S. 719, 726-31 (1992).

12 "Voir dire plays a critical function in assuring the criminal defendant that his Sixth
13 Amendment right to an impartial jury will be honored." Rosales-Lopez, 451 U.S. at 188.
14 The ability to make informed challenges during jury selection ensures the right to an
15 impartial jury. The right to challenge a potential juror is "one of the most important of the
16 rights secured to the accused" and "[a]ny system for the empaneling of a jury that
17 prevents or embarrasses the full, unrestricted exercise by the accused of that right,
18 must be condemned." Pointer v. United States, 151 U.S. 396, 408 (1894). Individual,
19 sequestered voir dire facilitates the selection of an impartial jury because it furnishes the
20 court and the parties with the information necessary to make an intelligent exercise of
21 the right to challenge and excuse prospective jurors. State v. Jenkins, 15 Ohio St. 3d
22 164, 186, 473 N.E.2d 264, 286 (1984). As observed by the United States Supreme
23 Court, the exercise of the trial court's discretion, and the restriction upon inquiries at the
24 request of counsel, are "subject to essential demands of fairness." Aldridge v. United
25 States, 238 U.S. 308, 310 (1931). The Defendant bears the burden of establishing juror
26 partiality. See Wainwright v. Witt, 469 U.S. 412, 423 (1985). This fact makes it all the
27 more imperative that this Court permit meaningful examination at voir dire in order to
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1 elicit potential biases held by prospective jurors. Due process, reliability, and fairness
2 cannot be accomplished in this case by requiring the defendant to prove juror partiality
3 while at the same time restricting his ability to do so.

4 The United States Supreme Court recognized the sensitive and unique nature of
5 capital trials when it declared in Witherspoon that inquiry into the prospective juror's
6 views on the death penalty is mandated to prevent a biased jury or a "tribunal organized
7 to return a verdict of death". Witherspoon v. Illinois, 391 U.S. 510, 520 (1968). "If even
8 one such juror is empaneled and the death sentence is imposed, the State is disentitled
9 to execute the sentence." Morgan, 504 U.S. at 729. A thorough, searching inquiry is
10 necessary to detect a biased juror. Id. at 734-35. This can be best accomplished
11 through individual, sequestered voir dire.

12
13 In addition to these concerns, the sensitive and serious nature of this case
14 indicates that individual, sequestered voir dire would be the most effective and
15 economical way of obtaining an impartial jury:

- 16 1) Publicity: This case has already generated an enormous
17 Amount of publicity. Doubtless, more potentially prejudicial
18 publicity will be forthcoming as the proceedings continue.
19 The defendant has an absolute right to question prospective
20 jurors about their knowledge of this case. Questioning
21 case risks tainting the entire jury pool. Irwin v. Dowd,
22 366 U.S. 717 (1961).
- 23 2) Death Penalty: Because this is a capital case, this Court
24 must distinguish between prospective jurors who would
25 automatically vote in favor of or against the death penalty
26 regardless of the law. A probing and searching voir dire
27 on the issue of the death penalty is required to detect
28 partiality. General "follow-the-law" questions are
inadequate. "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
would prevent him or her from doing so." Morgan, 504 U.S.
at 735. The defendant has an absolute right to inquire into
each juror's attitudes about the death penalty and whether
he or she could consider mitigating circumstances as
mandated by Ohio law. Id.

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3) Life Sentence or Reversal on Appeal: The notion of early parole is so ingrained in the average citizen that it requires a true optimist to assume that a juror will merely ignore this possibility. A study documented in White v. State, 532 So.2d 1207 (Miss.1988), revealed that 65% of jurors polled believed that a life sentence for murder means a prisoner may be paroled in five to ten years. See also Anthony Paduano & Clive Stafford Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum.Hum.Rts.L.Rev. 211 (1987). Further, if one juror reveals his or her belief that the death penalty will not actually be carried out because of the "extensive" judicial review, the entire pool could be tainted. See Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) ("it is Constitutionally impermissible to rest a death sentence on a determination by the sentence that the responsibility for determining the appropriateness of the defendant's sentence rests elsewhere."). This inquiry can only be done individually.

4) Assertion of Constitutional Rights: Jurors often believe that the defendant should "tell his side of the story" or "prove his innocence." Nothing is more fundamental to a fair trial than the accused's Fifth Amendment right to remain silent. Griffin v. California, 380 U.S. 690 (1965). Only individual voir dire will ferret out these common prejudices without tainting the entire jury pool.

5) Mental Illness and Insanity: The United States Supreme Court has held that jurors "may not refuse to consider... any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987)(citations omitted). The defendant has a constitutional right to voir dire jurors on their attitudes regarding insanity or mental illness. It is possible that a juror might think that because the accused is mentally ill, he or she would be more dangerous in the future, and therefore, should be executed. It is also possible that a juror might think that a finding of insanity means that the defendant is "getting off" for the commission of the crime. However, the constitution and Ohio law forbids a juror from considering mental illness as anything but mitigating. Zant v. Stephens, 462 U.S. 862 (1983); State v. Wogenstahl, 75 Ohio St. 3d 344, 355, 662 N.E.2d 311, 321 (1996)(aggravating circumstances are confined to those found in O.R.C. §2929.04(A)). Further, a juror's experience with mental illness is a sensitive topic that typically a juror is reluctant To broadcast to the general public.

6) Other Sensitive Areas: Issues of child abuse, job loss, Substance abuse, and neglect are sensitive issues that

1 any juror would be loath to discuss his or her own personal
2 experiences in public. The defendant has a right to inquire
3 into these areas. Any childhood abuse must be considered a
4 mitigating factor. Eddings v. Oklahoma, 455 U.S. 104, 115
5 (1982). Indeed, any of the factors listed above may be
6 considered mitigating. O.R.C. §2929.04(B)(7). The
7 defendant has an absolute right to determine a juror's
8 ability to consider any of these mitigating factors. Morgan,
9 504 U.S. 719.

- 7) Other Prejudicial Matters: There may be other areas, as yet
Unforeseen, where highly prejudicial matters will come up that
that must be dealt with on an individual basis. "[I]t is clear
that [Supreme] Court presupposed the right to a searching and
extensive voir dire where the potential prejudice exists."
Jordan v. Lippman, 763 F.2d 1265, 1275-78 (11th Cir. 1985)
(citing Irwin v. Dowd, 366 U.S. 717).

11 This Court must take all caution in voir dire during a capital case because it
12 cannot simply rely upon a juror's assurances of impartiality. Irvin, 366 U.S. at 728.
13 (juror's statements of their own impartiality to be given "little weight" due to
14 "unconscious mental processes"). Individual questioning will prevent the "inhibiting
15 effect of a large audience" as well as the tendency for jurors to parrot the responses of
16 their peers or give what the jurors believe is the "correct" answer to a question. See
17 Berryhill v. Zant, 858 F.2d 633, 640-42 (11th cir. 1988)(Clark, J. concurring). In short, a
18 thorough, searching individualized voir dire will enable this Court to unearth information
19 that is critical to ensuring the defendant receives a fair trial.

21 Critical to a fair trial is the Defendant's right to effective assistance of counsel as
22 guaranteed by the Sixth and Fourteenth Amendments and Article I, §§ 10 and 24th of
23 the Arizona Constitution. Without individualized voir dire, defense counsel cannot fully
24 protect this right. The ABA Guidelines for the Appointment and Performance of Death
25 Penalty Cases (hereafter the ABA Guidelines) devote Guideline 10.10.2 instructs
26 defense counsel to "devote substantial time to determining the makeup of the venire,
27 preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and
28 choosing a jury most favorable to the theories of mitigation that will be presented."

1 Defense counsel are also instructed to "conduct a voir dire that is broad enough to
2 expose those prospective jurors who are unable or unwilling to follow the applicable
3 sentencing law...."

4 The United States Supreme Court has reiterated that the appropriate standards
5 to review capital defense counsel's performance are those enunciated in the ABA
6 Guidelines, and referred to them as "guidelines to determining what is reasonable."
7 Wiggins v. Smith, 539 U.S. 510, 525 (2003). Defense counsel in this matter cannot
8 effectively secure an impartial jury nor carry out the ABA Guidelines' objective of
9 ensuring "high quality legal representation" if the trial court forecloses individual
10 sequestered voir dire. See ABA Guideline 1.1

11 These measures are essential in order to vindicate the Defendant's State and
12 Federal Constitutional rights to effective assistance of counsel, due process of law,
13 equal protection of the law, confrontation of the State's evidence against him, and
14 freedom from cruel and unusual punishment. U.S. Const. Amend. V, VI, VIII, and XIV;
15 Arizona Constitution §§ 4, 10, 15, 24 . As the United States Supreme Court's
16 jurisprudence has made evident, death is different; for that reason more due process is
17 due, not less. See Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North
18 Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). It is well settled that "when a
19 State opts to act in a field where its action has significant discretionary elements, it must
20 nonetheless act in accord with the dictates of the Constitution- and, in particular, in
21 accord with the Due Process Clause." Evitts v. Lucey, 469 U.S. 387, 401 (1985). This
22 is all the more so when a petitioner's life interest, protected by the "life, liberty and
23 property" language in the Due Process Clause is at stake in the proceeding. Ohio Adult
24 Parole Authority v. Woodard, 523 U.S. 272, 288 (1998)(O'Connor, Souter, Ginsberg
25 and Breyer, J.J. concurring); Id. at 291. (Stevens, J. dissenting)(recognizing a distinct,
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1 continuing life interest protected by the Due Process Clause in capital cases). All
2 measures must be taken to prevent arbitrary, cruel and unusual results in a capital trial.
3 See Lockett, 438 U.S. at 604; Woodson, 428 U.S. at 304-305. "It is in just these
4 circumstances, when the crime itself is likely to inflame the passions of jurors, that
5 courts must be vigilant in ensuring that the demands of due process are met."
6 McKenzie v. Smith, 326 F.3d 721, 727-28 (6th Cir. 2003).

7 Therefore, Mr. Rector requests this court grant this motion for an individual,
8 sequestered voir dire.
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1 ORIGINAL of the foregoing filed
2 this 20th day of August, 2015 with:

3 Clerk of Court
4 401 E. Spring Street
5 Kingman Arizona 86401

6 COPY of the forgoing
7 Delivered this 20th day
8 Of August 2015, to:

9 Honorable Lee Jantzen
10 Judge of the Superior Court
11 Mohave County Courthouse
12 2nd floor
13 Kingman Arizona 86401

14 Greg McPhillips
15 Assigned Deputy County Attorney
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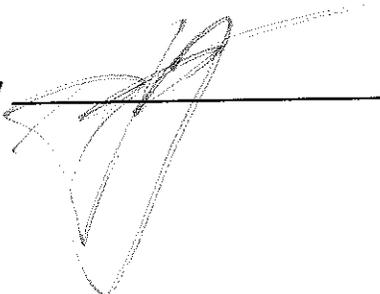
23 Client Justin James Rector
24 Mohave County Jail

25 File

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27 By: _____

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29 By _____
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