International Municipal Lawyers Association

2017 Mid-Year Seminar

Washington D.C.

Saturday, April 22, 2017

Section 1983: Trials Part I: Voir Dire and Juror Bias

Presented by:

Brock J. Atkins

Divisional Deputy City Solicitor

Philadelphia Law Department

2017 IMLA Mid-Year Seminar

§1983 - Trials Part 1 – Voir Dire and Juror Bias

The discussion of this topic will cover what inquiries should be made of panel members in 1983 cases with a focus on the appropriate level of inquiry into deeply held beliefs regarding police officers in light of the prevalence of examinations of police conduct in traditional and new media.

I. Basics of Voir Dire

A. Federal Rules of Civil Procedure Rule 47

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(1) In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

B. Four Major Goals of Voir Dire

(1) Information gathering

(2) Build Rapport

(3) Educate Prospective Jurors

(4) Persuade Prospective Jurors

(5) Discover Latent Prejudices

II. Voir Dire in Police Misconduct Cases

A. Scope of Questioning

1. Should go beyond general questioning

(a) Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 2232–33, 119 L. Ed. 2d 492 (1992) (General questions inquiring whether jurors can "follow the law" and questions which simply ask prospective jurors to assess themselves whether they can be fair and impartial are not adequate to elicit bias.)

2. Individualized Questioning (Lawyer Conducted Voir Dire)

(a) "[T]here is no constitutional right for counsel to conduct voir dire." United States v. Torres, 191 F.3d 799 (7th Cir.1999), cert. denied, 528 U.S. 1180, 120 S.Ct. 1218, 145 L.Ed.2d 1118 (2000).

(b) U.S. v. Dansker, 537 F.2d 40, 56, 2 Fed. R. Evid. Serv. 577 (3d Cir. 1976) (Some courts have held that an individualized examination out of the presence of other jurors is the best approach to eliciting candid responses from jurors.)

See also Butler v. City of Camden, City Hall, 352 F.3d 811, 63 Fed. R. Evid. Serv. 232 (3d Cir. 2003) (stressing need for adequate voir dire to permit intelligent exercise or peremptory challenges).

3. Judge Conducted Voir Dire

(a) Advantages

(b) Disadvantages

(c) Appellate review of Judge Conducted Voir Dire

(1) Murray v. U.S., 532 A.2d 120 (D.C. 1987) "the trial court [has] broad discretion in conducting voir dire examination; absent an abuse of discretion and substantial prejudice to the accused, the trial court will be upheld."

4. Exposing Biases

(a) Scope of Questioning

(1) Trial court has discretion in formulating the manner of questioning. While the Supreme Court has specifically required federal trial courts to question a venire about racial biases in cases involving interracial crimes of violence, see Rosales–Lopez v. United States, 451 U.S. 182, 192, 101 S.Ct. 1629, 1636, 68

L.Ed.2d 22 (1981), it has never prescribed a precise formula as to how that inquiry or any other in which the court attempts to assess the prejudice of potential jurors is to occur.

(b) Strikes for Cause

(1) Dismissing a juror for cause is appropriate if the court is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. U.S. v. Snarr, 704 F.3d 368 (5th Cir. 2013).

(c) Rehabilitating a witness

(1) Techniques

(2) Demonstration

III. Litigating § 1983 Post-Batson v. Kentucky

A. Overcoming a Batson Challenge

(1) Once a party makes a prima facie showing of purposeful discrimination against a group in the use of peremptory challenges, the burden shifts to the challenger to come forward with a neutral explanation for challenging group members. The explanation must come from the challenger, and not from the judge.

(2) Explanation must be neutral, and clear and reasonably specific, and involve legitimate reasons, and be related to the particular case to be tried.

(3) The explanation need not be objectively supportable, and may be based on a trivial reason, if genuine and neutral, a mistake, or on a legitimate hunch or on past experience. Indeed, it has been held that intuition, standing alone, is a sufficient ground, although there is authority that a self-serving explanation based on intuition, or an unarticulated gut feeling is not a sufficient explanation.

(a) It's really up to the Judge!

B. Other Cases to Consider in Relation to Batson

Foster v. Chapman, 136 S. Ct. 1737 (2016):

Thirty years later SCOTUS reaffirms Batson in this death penalty case.

Edmonson v. Leesville, 111 S. Ct. 2007 (1991):

Batson applies to civil jury trials.

Georgia v. McCullum, 112 S. Ct. 2348 (1992):

Batson applies to defense attorneys in criminal trials.

J.E.B. v. Alabama, 114 S. Ct. 1419 (1994):

Can't strike based on gender of prospective juror.

Carino v. Muenzen, 2010 WL 3448071 (N.J. Super. A.D.) - Not Reported in A 2d

Computer used to access juror information during V. Dire

Oracle America v. Google, 172 F. Supp 3d (NDCA 3/25/16 - J. Alsup):

Provides an excellent overview on the issue of internet juror research

American Bar Association Formal Opinion 466 - Lawyer Reviewing Jurors' Internet Presence

Brock J. Atkins
Divisional Deputy City Solicitor
Philadelphia Law Department