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CRIMINAL PROCEDURE—VOIR DIRE—PROSECUTORS MUST NOW SHOW THAT A JUROR IS IRREVOCABLY COMMITTED TO VOTING AGAINST THE MAXIMUM PENALTY BEFORE STRIKING FOR CAUSE. *Haynes v. State*, 270 Ark. 685, 606 S.W.2d 563 (1980).

William E. (Pete) Haynes was charged with battery in the first degree¹ and aggravated assault with a firearm² for an incident which allegedly occurred on the evening of January 1, 1979. At the beginning of voir dire, the St. Francis County prosecutor made it clear to the panel of prospective jurors that he intended to seek the maximum penalty of forty years.³ During voir dire the prosecutor struck for cause two veniremen who indicated that they would be unable to sentence a person convicted of assault and battery to forty years in prison regardless of the facts and circumstances incident to the commission of the crime.⁴

1. ARK. STAT. ANN. § 41-1601 (1977).

2. ARK. STAT. ANN. § 41-1604 (1977).

3. The prosecutor made the following statement to the prospective jurors:

Now what this all amounts to is that if the State proves the allegations of the information in its entirety, the maximum punishment that can be imposed will be another twenty years . . . for battery and fifteen plus five will be another twenty years . . . for aggravated assault, and ladies and gentlemen, that is serious and it is a very severe punishment, but I want to tell you right here and right now up front that that is what the State's going to be asking you to do, and that is put Pete Haynes in the Arkansas Department of Correction for forty years.

Haynes v. State, 270 Ark. 685, 688-89, 606 S.W.2d 563, 564 (1980).

4. The questioning of Ms. Collins, one of the excused veniremen, was as follows:

Prosecutor: As you sit there now, before you heard the facts, you feel regardless, that 40 years is just too much?

Ms. Collins: Well, yes, I do feel that way.

. . .

Prosecutor: . . . What I am asking and telling you is that I think the judge will instruct you that this man can receive up to forty years, and I understand that some of you—You may just feel like in any circumstances, regardless, that's too long. I am asking: As you sit there right now, are you thinking, regardless of what the State proves, that is just too long. I wouldn't impose that much. Maybe I could impose twenty but I just couldn't impose forty regardless of the facts. Is that the way you feel about it?

Ms. Collins: Well, I would have to hear the other side first.

Prosecutor: Well, that's not the way I'm asking. What I'm asking, Mrs. Collins—

Ms. Collins: I would try to be fair.

Prosecutor: . . . I know that, but here's the way I'm asking it to you. I'm asking: As you sit there right now, do you feel that for a battery and assault, that to put a man in the penitentiary for forty years is just too long regardless?

Ms. Collins: Well, yes, I do feel that way.

Haynes was convicted of the crimes as charged and the jury assessed his punishment at twenty years on the first degree battery charge and ten years on the aggravated assault with a firearm charge.⁵ On appeal to the Arkansas Supreme Court Haynes urged four grounds for reversal,⁶ one of which was that the court erred in excluding veniremen who expressed reservations about assessing the combined maximum sentence for the offenses charged.⁷

The Arkansas Supreme Court reversed and remanded the case⁸ holding that the most the state may require of a juror is that he be willing to consider all of the penalties provided by law and that he not be irrevocably committed to voting against the maximum penalty. *Haynes v. State*, 270 Ark. 685, 606 S.W.2d 563 (1980).

Historically, the English common law has never permitted the voir dire examination of jurors as it is practiced in the United States.⁹ In England the rule has always been that such examination may be conducted only after a challenge for cause has been interposed and then only in support of the challenge.¹⁰ It has been said

The questioning of Mr. Banks, the other excused venireman, was as follows:

Prosecutor: . . . [T]he question I want to pose to you is this: Assume that after the evidence is in that you believe the State had proved the man's guilt beyond a reasonable doubt as we are required to do on both offenses . . . and at that point, the maximum possible punishment would be forty years upon the Defendant in the Department of Corrections.

Mr. Banks: I could not.

Prosecutor: What I'm asking you is this: If you believe he's guilty of both offenses beyond a reasonable doubt, you are convinced that in your mind, he's guilty, would you automatically refuse to consider a punishment of up to forty years as possible punishment? Would you just refuse to consider it?

Mr. Banks: I couldn't give forty years.

Prosecutor: Regardless of the facts and circumstances, you could not consider—even consider that?

Mr. Banks: Not forty years.

Prosecutor: Regardless of what the facts were?

Mr. Banks: No.

Prosecutor: Is that your answer?

Mr. Banks: That's my answer.

Id. at 689-90, 694-95, 606 S.W.2d at 564-65, 567.

5. *Id.* at 686, 606 S.W.2d 563.

6. *Id.*

7. The other grounds urged for reversal were: (a) the evidence was insufficient to support the verdict; (b) the court erred in failing to read ARKANSAS MODEL JURY INSTRUCTIONS CRIMINAL 203 [hereinafter AMI CRIMINAL] to the jury immediately following reference to a former felony conviction; and, (c) AMI CRIMINAL 301 as given was improper. *Id.*

8. 270 Ark. at 686, 693, 606 S.W.2d at 563, 566.

9. Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 GEO. L.J. 438, 445, 453 n.53 (1928).

10. *Id.*

that in selecting a jury in the English courts, the challenge of a juror is almost as rare as the challenge of a judge in the United States.¹¹ Although the English rule was followed in this country,¹² it became the prevailing view here, through legislative and judicial action, that a party could examine prospective jurors to decide whether to use peremptory or cause challenges.¹³

The purpose of voir dire has generally been twofold: to discover bases to challenge for cause and to gain information which would enable an intelligent exercise of peremptory challenges.¹⁴ Indeed, the rationale for jury challenges rests upon the assumption that certain types of individuals will be, consciously or unconsciously, more sympathetic to one side than the other.¹⁵ Additionally, it has always been assumed that the scope of the questioning was within the sound discretion of the trial court.¹⁶

Although much has been written concerning the history of jury selection in this country, there are few cases and little commentary regarding the permissible limits of voir dire inquiry into a prospective juror's willingness or unwillingness to assess a maximum penalty, particularly in noncapital cases. Before 1968, the law regarding capital cases was expressed in the rule of *Logan v. United States*:¹⁷

As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on voir dire that they had "conscientious scruples in regard to the infliction of the death penalty for crime" were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror.¹⁸

It was also settled that a state could not entrust the determination of whether a man was innocent or guilty to a tribunal "organized to convict."¹⁹

11. *Id.*

12. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 292 (1952).

13. *E.g.*, *State v. Manley*, 54 N.J. 258, 255 A.2d 193 (1969).

14. F. WOLESLAGEL, JURY 189 (1975).

15. J. BALDWIN & M. McCONVILLE, JURY TRIALS 15 (1979).

16. ARK. STAT. ANN. § 39-226 (1962). See *Finch v. State*, 262 Ark. 313, 316, 556 S.W.2d 434, 436 (1977) and cases cited therein.

17. 144 U.S. 263 (1892).

18. *Id.* at 298.

19. *Fay v. New York*, 332 U.S. 261, 294 (1947).

Initially Arkansas law was in line with the *Logan* rule in capital cases. *Bell v. State*²⁰ expressed the rule thus: “[T]he State, in the trial of cases where the death penalty may be imposed, is entitled to a jury that has no conscientious scruples as to such penalty.”²¹

In *Witherspoon v. Illinois*²² the United States Supreme Court modified the long-standing *Logan* rule by narrowing somewhat the state’s ability to exclude from the jury those veniremen who disliked the death penalty.²³ The Court held that the state could not exclude those who merely voiced conscientious scruples against the death penalty;²⁴ it could exclude only those who were irrevocably committed before the trial began to voting against it regardless of the facts and circumstances that might emerge in the course of the proceedings.²⁵ The Court reasoned that one who merely has general objections to, or conscientious scruples against, the death penalty could nonetheless “make the discretionary judgment entrusted to him by the State and thus obey the oath he takes as a juror.”²⁶ Since *Witherspoon* the Court has consistently reaffirmed its position and has on numerous occasions halted the execution of a death penalty given by a jury from which all who had “scruples” against the death penalty had been systematically excluded.²⁷

20. 120 Ark. 530, 180 S.W. 186 (1915).

21. *Id.* at 543, 180 S.W. at 192. See also *Needham v. State*, 215 Ark. 935, 224 S.W.2d 785 (1949); *Rogers v. State*, 136 Ark. 161, 206 S.W. 152 (1918); *Brewer v. State*, 72 Ark. 145, 78 S.W. 773 (1904); *Jones v. State*, 58 Ark. 390, 397, 24 S.W. 1073, 1075 (1894); *Atkins v. State*, 16 Ark. 568, 580 (1855).

22. 391 U.S. 510 (1968).

23. *Witherspoon* was convicted and sentenced to death by a jury from which the prosecution had eliminated nearly half (47) of the venire by challenging, under the authority of a Illinois statute, any venireman who had conscientious scruples against capital punishment. Of the 47 excluded, only five explicitly stated that under no circumstances would they vote to impose capital punishment. Six said they did not “believe in the death penalty” and were excused without any attempt to determine whether they could nonetheless return a verdict of death. Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having “conscientious or religious scruples” against the infliction of the death penalty and were excluded without any effort to determine if their scruples would invariably compel them to vote against the death penalty. Only one was examined at any length. *Id.* at 514-15.

24. *Id.* at 522.

25. *Id.* at 522 n.21.

26. *Id.* at 519.

27. See *Adams v. Texas*, 448 U.S. 38 (1980) (reversing a conviction and death penalty imposed in a bifurcated trial from which a number of veniremen who stated that they were unable to take an oath that the mandatory penalty of death or life imprisonment would not “affect their deliberations on any issue of fact.”); *Davis v. Georgia*, 429 U.S. 122 (1976) (reversing a conviction and death penalty which had been affirmed by the Georgia Supreme Court even though it noted that one prospective juror had been excluded in violation of the *Witherspoon* standard); *Maxwell v. Bishop*, 398 U.S. 262 (1970) (remanded to consider in

Arkansas law follows the *Witherspoon* doctrine. Statutorily, voir dire is specifically allowed by section 39-226 of the Arkansas Statutes Annotated²⁸ and rule 32.2 of the Arkansas Rules of Criminal Procedure.²⁹ A challenge for implied bias may be made when the offense is punishable by death and the prospective juror entertains such conscientious opinions as would preclude his finding the defendant guilty.³⁰ The extent and scope of voir dire is largely a matter within the sound discretion of the trial judge, and the latitude of the discretion is rather wide.³¹ Since the *Witherspoon* decision, the Arkansas Supreme Court has held that it is not error in a capital case for the trial court to excuse those veniremen whose answers during voir dire indicate that they are unequivocally opposed to assessing the death penalty; that is, regardless of the facts they would not consider imposing it.³²

light of *Witherspoon*, a death sentence imposed by a jury from which one venireman was removed after stating that conscientious scruples *might* prevent his voting for a guilty verdict, one was removed after stating he had conscientious scruples against the death penalty and another was removed after stating he did not believe in capital punishment); *Boulden v. Holman*, 394 U.S. 478 (1969) (remanded to consider in light of *Witherspoon*, a death sentence imposed by a jury from which eleven veniremen were excused on the basis of asserting a "fixed opinion against" capital punishment and two were excluded because they did not "believe in" capital punishment); *accord*, *Lockett v. Ohio*, 438 U.S. 586 (1978) (affirming a conviction and death penalty imposed by a jury from which four veniremen were excluded after careful questioning by the trial judge during which each stated that his or her feelings against the death penalty would prevent him from taking an oath to "well and truly try the case and follow the law").

28. ARK. STAT. ANN. § 39-226 (1962) provides: "In all cases, both civil and criminal, the court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications. Further questions may be asked by the court, or by the attorneys in the case, in the discretion of the court."

29. ARK. R. CRIM. P. 32.2 provides in pertinent part:

(a) Voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable the parties to intelligently exercise peremptory challenges. The judge shall initiate the voir dire examination

(b) The judge shall then put to the prospective jurors any questions which he thinks necessary touching their qualifications to serve as jurors in the cause on trial. The judge shall also permit such additional questions by the defendant or his attorney and the prosecuting attorney as the judge deems reasonable and proper.

30. ARK. STAT. ANN. § 43-1920 (1977) provides in pertinent part: "A challenge for implied bias may be taken . . . When the offense is punishable with death, the entertaining of such conscientious opinions as would preclude him from finding the defendant guilty."

31. See note 16 *supra*.

32. See *Hulsey v. State*, 268 Ark. 312, 599 S.W.2d 729 (1980); *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979); *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979); *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979); *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978); *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, *cert. denied*, 434 U.S. 894 (1977); *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975), *vacated in part*, 429 U.S. 966 (1976), *on remand*,

While *Witherspoon* changed the permissible limits of voir dire in a capital case, the practice of excluding jurors who stated that they could not deliver the maximum penalty in noncapital cases remained. Prior to 1980 the Arkansas Supreme Court had not commented on the problem in a noncapital context. The United States Supreme Court, however, had considered the issue. In a footnote in *Witherspoon* the Court said: "Nor does the decision in this case affect the validity of any sentence *other* than one of death."³³ Additionally, the same day on which the Supreme Court handed down *Witherspoon*, it decided *Bumper v. North Carolina*³⁴ in which the constitutionality of a verdict returned by a jury selected in precisely the same manner as the *Witherspoon* jury³⁵ was upheld because the jury imposed a sentence of life imprisonment rather than death.

*Haynes v. State*³⁶ is a case of first impression in Arkansas and the Arkansas Supreme Court concluded that the questions asked by the prosecutor during the voir dire were designed to select a jury panel which would agree, before hearing the evidence, to assess the maximum penalty if the appellant were found guilty.³⁷ In arriving at its conclusion, the court emphasized the prosecutor's statement which informed the veniremen of the maximum penalties which could be imposed for the offenses charged³⁸ and the state's intention to seek that maximum.³⁹ The court also quoted parts of the interrogation of Mrs. Collins, a prospective juror who was challenged for cause by the state,⁴⁰ and concluded that the jury was composed of twelve people who may have felt obligated to impose the maximum forty year penalty.

The defendant contended that the *Witherspoon* doctrine was controlling.⁴¹ The majority disagreed stating that the *Witherspoon* doctrine did not apply because the question there related only to the

261 Ark. 336, 548 S.W.2d 135, *cert. denied*, 434 U.S. 878 (1977); *O'Neal v. State*, 253 Ark. 574, 487 S.W.2d 618 (1972); *Montgomery v. State*, 251 Ark. 645, 473 S.W.2d 885 (1971); *Davis v. State*, 246 Ark. 838, 440 S.W.2d 244, *cert. denied*, 403 U.S. 954 (1969).

33. 391 U.S. 510, 522-23 n.21 (1968) (Court's emphasis).

34. 391 U.S. 543 (1968).

35. *Id.* at 545. The prosecution was permitted to challenge for cause all prospective jurors who stated that they were opposed to capital punishment or had conscientious scruples against imposing the death penalty.

36. 270 Ark. 685, 606 S.W.2d 563 (1980).

37. *Id.* at 688, 606 S.W.2d at 564.

38. *Id.* at 688-89, 606 S.W.2d at 564. *See* note 3 *supra*.

39. *Id.*

40. *Id.* at 689-90, 606 S.W.2d at 564-65. *See* note 4 *supra*.

41. *Id.* at 691, 606 S.W.2d at 565.

penalty of death.⁴² The court distinguished *Haynes* from a death penalty case stating that one juror irrevocably opposed to the death sentence regardless of the facts could effectively prevent its implementation.⁴³ Because of this possibility, the court reasoned that it is proper in a death penalty case to determine if prospective jurors are irrevocably opposed to the maximum sentence. Additionally, capital punishment is a deeply emotional and, for some people, religious issue—a factor missing in noncapital cases.⁴⁴ The majority further reasoned that allowing the state to challenge for cause those veniremen who feel the maximum sentence is too long results in a jury which is not impartial and thus destroys the purpose of the jury.⁴⁵

Finally, the court noted the probable burden which would be placed upon the trial process in terms of the time and expense required by prosecutors who would feel duty bound to disqualify jurors who are reluctant to impose the maximum penalty.⁴⁶ The court predicted that the result would be endless bickering over unanswerable questions with hundreds of prospective veniremen needed to find twelve jurors who will be willing to promise in advance of trial to impose the maximum penalty.⁴⁷

The dissenters,⁴⁸ on the other hand, did not think that the state's interrogation of the veniremen was an attempt to empanel a jury precommitted to inflicting the maximum penalty upon a finding of guilt. Rather, the prosecutor was attempting to seat a jury which "could, if it so determined, award the maximum punishment."⁴⁹ Further, the dissenters found that the two excluded veniremen were in fact unequivocally opposed to the maximum punishment.⁵⁰

The dissent reasoned that it is the prosecutor's duty to present the state's case in the best possible light⁵¹ and that there are cases in which he would be derelict in his duty if he did not seek the maximum penalty. The dissent found no evidence to support the notion that a jury selected in this manner would be predisposed to auto-

42. The court also stated that it did adhere to the *Witherspoon* principle that both the state and the accused are entitled to an impartial and unbiased jury. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 690, 606 S.W.2d at 565.

46. *Id.* at 692, 606 S.W.2d at 566.

47. *Id.*

48. Chief Justice Fogleman and Justice Hickman.

49. *Haynes v. State*, 270 Ark. 685, 696, 606 S.W.2d 563, 568 (1980) (emphasis in the original).

50. See note 4 *supra*.

51. *Haynes v. State*, 270 Ark. 685, 696, 606 S.W.2d 563, 568 (1980).

matically assess the maximum penalty if it found the defendant guilty.⁵² Furthermore, the dissent viewed the majority decision as a denial of the state's right to an impartial and unbiased jury—one which had not already decided, before trial, that a lawful sentence would not be imposed regardless of the circumstances.⁵³

Although the *Haynes* court denied that *Witherspoon* was controlling, the essence of its holding is to extend the *Witherspoon* doctrine to noncapital cases. *Haynes* gives to noncapital defendants in Arkansas the same protection with regard to jury selection that *Witherspoon* gave to capital defendants; that is, the right not to have excluded from the jury those veniremen who have mere scruples against the maximum sentence. Compare the similarity of the language used by Justice Purtle in *Haynes*:

[T]he most that may be required of a juror, before the trial has begun, is that he be willing to consider all the penalties provided by law and that he not be irrevocably committed to vote against the possible penalties, regardless of the facts and circumstances that might ensue in the course of trial,⁵⁴

with the language used by Justice Stewart in *Witherspoon*:

[T]he most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.⁵⁵

A careful reading of the voir dire set out in both the majority and dissenting opinions of *Haynes* reveals that both jurors who were eventually excused for cause did indicate that they thought the maximum penalty of forty years was too much regardless of the circumstances.⁵⁶ The majority and the dissent seem to disagree only on what constituted being "irrevocably committed" to voting against the maximum penalty. The consequences for the state seem to be similar to those which resulted from the *Witherspoon* decision.⁵⁷ Prosecutors will have to question prospective jurors more extensively than in the past to determine the exact degree of opposition

52. *Id.*

53. *Id.* at 697, 606 S.W.2d at 568.

54. *Id.* at 693, 606 S.W.2d at 566.

55. *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

56. *Haynes v. State*, 270 Ark. 685, 689-90, 694-95, 606 S.W.2d 563, 564-65, 567 (1980).

57. See Note, 37 *FORDHAM L. REV.* 129 (1968), and Recent Decisions, 3 *GA. L. REV.* 234, 241 (1968).

which a prospective juror has toward the maximum punishment. Clearly, after *Haynes*, prosecutors may not ask prospective jurors if they would render the maximum penalty if the state proves the defendant's guilt.⁵⁸

Jurors who express hostile feelings to a given maximum penalty will no longer be summarily dismissed for cause. In their attempt to ensure that the state has a jury which could assess the maximum penalty, prosecutors will be forced to convince the trial judge that a given juror's voir dire answers indicate feelings strong enough to amount to an irrevocable commitment to vote against it. The questioning of veniremen could become more extensive as prosecutors try to establish the requisite irrevocable commitment in order to strike those jurors whom they feel could not assess the maximum penalty. The result of this extensive questioning may be a trial process greatly burdened and expanded with appeals becoming commonplace. Ironically, this is exactly what Justice Purtle feared would be the result if the state were allowed to strike for cause those veniremen who had mere reservations about imposing the maximum penalty.⁵⁹

Some alternatives are apparent. Prosecutors can use peremptory challenges to avoid the rule, but those challenges are limited in number.⁶⁰ One legislative solution to the problem is taking the job of sentencing from the jury and requiring the judge to set penalties. This, however, would not completely eliminate the questioning about sentencing during voir dire since it is conceivable that knowledge of the maximum penalty could influence a juror's willingness to find guilt. Another legislative solution is mandatory sentencing. This solution, however, also carries with it the possibility that a juror's knowledge of the required punishment could inhibit him from voting for a verdict of guilty. The state's voir dire questioning would thus still be aimed at determining which veniremen are irrevocably opposed to the maximum available penalty.

The likely result of *Haynes* is that trial judges will require a

58. *Haynes v. State*, 270 Ark. 685, 690, 606 S.W.2d 563, 565 (1980), wherein the prosecutor is quoted as asking, "[W]ould you be able to consider as the only possible punishment, would you be able to impose a sentence of up to forty years in the Department of Corrections if the facts warranted it?"

59. *Id.* at 692, 606 S.W.2d at 566.

60. ARK. STAT. ANN. § 43-1921 (1977) provides: "The State shall be entitled to ten [10] peremptory challenges in prosecutions for offenses punishable by death or life imprisonment, to six [6] peremptory challenges in all other prosecutions for felony and to three [3] peremptory challenges in (the) prosecutions for misdemeanor[s]."

more definite showing that a prospective juror is irrevocably committed to voting against the maximum penalty regardless of the facts of the case before allowing the state to excuse the juror for cause. This may result in more defense-oriented juries—at least until prosecutors learn how to characterize a juror's feelings against imposing the maximum penalty as an irrevocable commitment against imposing it.

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