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This paper is intended to be a brief overview of issues related to jury trials in juvenile cases. It is not intended to be a comprehensive coverage of jury trials. Given the limitations of a 30 minutes presentation, we have set out to provide limited coverage of selected areas that either encompass matters so basic they must be mentioned, are of great importance to juvenile practitioners generally, or are areas of special interest (usually generated by the interplay of the civil vs. quasi-criminal nature of juvenile cases).

The Right to Jury Trial Generally

Juveniles do not have a United States Constitutional right to a jury trial as a general proposition. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). However, juveniles do have a statutory right to trial by jury in Texas. ' 54.03(c) states that ATrial shall be by jury unless jury is waived in accordance with ' 51.09 of [the Texas Family Code]@The right to jury belongs to the juvenile alone. Unlike a criminal case, the State does not have a right to seek a jury trial as to guilt or innocence. Rule 216, Tex.R.Civ.Proc. might be read to give the State a right to jury trial, but Attorney General Opinion No. JC-0242 concludes that Rule 216 does not confer such a right.

Number of Jurors

The number of jurors is determined by the type of juvenile court in which the trial is conducted. Trials in county courts and county courts at law have six members and in district courts have 12 members. In the Matter of A. N. M., 542 S.W.2d 916 (Tex.Civ.App B Dallas 1976); ' ' 25.0007, 62.201, and 62.301 Tex. Govt. C.

However, the provisions of ' ' 54.03(c) and 51.045, Tex. Fam. C., when read together, require a 12 person jury in all determinate sentence cases, regardless of the type of juvenile court in which the trial is conducted.

Peremptory Challenges

Rule 233, Tex. R. Civ. Proc. permits each side 6 peremptory challenges in district court and 3 peremptory challenges in county courts and county courts at law. Since ' 51.17 Tex. Fam. C. states that unless in conflict with the provisions of the Juvenile Justice Code, the Texas Rules of Civil Procedure govern procedure in juvenile cases. The Juvenile Justice Code is silent as to number of peremptory challenges permitted.

Determinate sentencing cases pose a problem, because a person who may eventually be incarcerated in a Texas prison might be afforded fewer peremptory challenges than a similarly situated adult. Art. 35.15 of the Tex. C. Crim. Proc. states that in non capital felony cases an adult defendant is permitted 10 peremptory challenges. ' 54.03(c) was amended in 2001 and now states that

AIf the hearing is on a petition that has been approved by the grand jury under Section 53.045, the jury must consist of 12 persons and be selected in accordance with the requirements in criminal cases.@

This provisions appears to require that 10 peremptory challenges be given to juveniles in determinate sentence cases, and it also appears to apply virtually all of Chapter 35 of the Tex. C. Crim. Proc.

Challenges for Cause

Because ' 54.03(c) now requires determinate sentence juries to be selected in accordance with the requirements in criminal cases, Art, 35.16 of the Tex. C. Crim. Proc. now governs what is a proper reason for a challenge for cause against a prospective juror. The full text of Art. 35.16 is set out below:

Art. 35.16. Reasons for challenge for cause

(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

1. That he is not a qualified voter in the state and county under the Constitution and laws of the state; provided, however, the failure to register to vote shall not be a disqualification;

2. That he has been convicted of theft or any felony;

3. That he is under indictment or other legal accusation for theft or any felony;

4. That he is insane;

5. That he has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind and the court in its discretion is not satisfied that he is fit for jury service in that particular case;

6. That he is a witness in the case;

7. That he served on the grand jury which found the indictment;

8. That he served on a petit jury in a former trial of the same case;

9. That he has a bias or prejudice in favor of or against the defendant;

10. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged;

11. That he cannot read or write.

No juror shall be impaneled when it appears that he is subject to the second, third or fourth grounds of challenge for cause set forth above, although both parties may consent. All other grounds for challenge may be waived by the party or parties in whose favor such grounds of challenge exist.

In this subsection "legally blind" shall mean having not more than 20/200 of visual acuity in the better eye with correcting lenses, or visual acuity greater than 20/200 but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

(b) A challenge for cause may be made by the State for any of the following reasons:

1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;

2. That he is related within the third degree of consanguinity or affinity, as determined under Chapter 573, Government Code, to the defendant; and

3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

(c) A challenge for cause may be made by the defense for any of the following reasons:

1. That he is related within the third degree of consanguinity or affinity, as determined under Chapter 573, Government Code, to the person injured by the commission of the offense, or to any prosecutor in the case; and

2. That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

The authors suggest that a copy of art. 35.16 printed out separately, or a list of challenges derived therefrom, always accompany any defense attorney into trial. It should be a basic part of every trial notebook.
Art. 35.16 is not, however, an exhaustive list of grounds for a challenge for cause. Any grounds that indicate a prospective juror=s inability to comport with his or her oath as a juror may be raised.

AA challenge for cause can be properly asserted on grounds which are not specifically enumerated in Article 35.16, V.A.C.C.P., where such a challenge is based on facts that show that the prospective juror would be >incapable or unfit to serve on the jury.=@

Mason v. State, 905 S.W.2d 570 (Tex. Crim. App. 1995); See also: Allridge v. State, 850 S.W.2d 471 (Tex.Cr.App.1991), cert. denied, 510 U.S. 831, 114 S.Ct. 101, 126 L.Ed.2d 68 (1993) ; Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App.1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989)

Batson Challenges

No discussion of voir dire would be complete without some discussion of A**Batson**@challenges. It is doubtful that any law student graduates from law school without having studied this type of challenge. Banning elimination of prospective jurors from a panel for racial discrimination, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), began a series of case in which a prospective juror=s right not to be unlawfully discriminated against is enforced by one of the litigants. The original case has been expanded from the criminal realm to civil and from the realm of racial discrimination to that of ethnic, racial and gender-based discrimination. See J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991) What follows is a summary of what makes a prima facie case and the court=s possible remedies. It is not intended as a comprehensive discussion, and is merely a refresher for experienced lawyers and is a brief summary to make new practitioners aware of potential issues.

There are three basic elements to establish a prima facie case of discriminatory exercise of peremptory challenges.

1. That there were prospective jurors who were members of a cognizable, protected group (race, ethnicity, gender);

2. That a party removed one or more of those prospective jurors by use of peremptory challenges; and

3. There is evidence (consisting of the fact of the removal of the prospective jurors and of other circumstances) that raises an inference that discrimination against members of the group was the motivation for their removal.

Upon such a showing, the burden shifts to the party who exercised the peremptory challenges to provide a neutral explanation for the exercise of those challenges.

If the explanation is neutral in the court=s judgment, then the objecting party must offer some other evidence to show the court by a preponderance of the evidence that the challenges were improperly exercised.

If the explanation is not neutral, or if the court is convinced by a preponderance of the evidence of the impropriety of the challenges, the court must consider how to remedy the violation.

If the excluded group was one identified by race, then Art. 35.261, Tex. C. Crim. Proc. indicates the remedy is to call an new array. There is no statutory provision to regulate improper challenges based on ethnicity or gender. Consequently cases state that the judge may in his discretion fashion a suitable remedy based on the circumstances. Hill v. State, 827 S.W.2d 860 (Tex.Crim.App. 1992), *cert. denied* 506 U.S. 905 (1992) Potential remedies include the the judge refusing to allow the peremptory challenge and seating the excluded person on the jury, or calling an entirely new array. Curry v. Bowman, 885 S.W.2d 421 (Tex.Crim.App. 1993); Johnson v. State, 879 S.W.2d 313 (Tex.App.-Amarillo 1994); Tims v. State, 779 S.W.2d 517 (Tex. App. - Beaumont 1989)
For a more complete discussion of these issues, these authors suggest reading Petit Jury Selection and Composition, Alan L. Levy. This is a comprehensive article regarding all aspects of jury selection. This paper is available on the TexasBarCLE website (www.texasbarcle.com). Be sure to obtain the most recent version, as this paper has been presented at numerous seminars under various topic names and has been updated regulary. The fee is $29.00 to download the individual article in PDF format.

Reporter=s Record

For error to be preserved in voir dire, it is essential that the reporter=s include the voir dire. It is also essential that the error be reflected in the reporter=s record. Villarreal v. State, 617 S.W.2d 703 (Tex.Crim.App. 1981) If you can=t prove the juror on the jury is the one about whom objection was made, harm cannot be shown. Counsel should go to great lengths to ensure that the record reflects not just what was said, but who said it. Individual jurors must be identified by name or by number, if the juror list with numbers will appear in the appellate record. The authors believe that it is best to identify jurors by name. Doing so is easy.

At the beginning of the questioning of an indiviudal panel member, counsel should simply ask the panel member=s name or use their full name in the statement of the question: ANow, Mr. Smith, you are J. T. Smith, right? Okay, Mr. Smith, ...@ Such a simple technique is easy to forget but using it habitually is an invaluable method to avoid an appellate court rejecting a point of error because is was not preserved, since it is not possible to determine if the panel member examined is the same panel member seated and objected to later.

Jury Trial Requests

Rule 216, Tex. R. Civ. Proc. require that a jury be requested for a jury trial in civil cases. This is not required in juvenile cases, as ' 54.03 requires a trial by jury unless the juvenile and his attorney waive that right.

Jury Trial in Disposition

In a normal juvenile case, there is no right to a trial by jury in disposition, however, a child subject to a determinate sentence does have the right to a jury in disposition to be made. This is specified in ' 54.04(a), Tex. Fam. C.:

(a) The disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing. There is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d)(3) or (m), in which case, the child is entitled to a jury of 12 persons to determine the sentence.

Jury Findings at Disposition

As a threshold issue, the jury in disposition would be required to find whether the child is in need of rehabilitation, whether the protection of the public requires a disposition or whether the protection of the juvenile requires a disposition. ' 54.04(c), Tex. Fam. C.

Additionally, if placement outside the home is sought, the jury must determine whether the child can or cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation. ' 54.04(c), Tex. Fam. C. These findings are required under ' 54.04(c) TYC (commitments and placements generally) and under ' 54.04(d) (placement outside the home on probation). ' 54.04(i) requires that the court place such findings in its order in all cases, regardless whether the judge or jury is the finder of fact.

Following this analysis, a jury has the right to special issues to support the findings that are required. If the jury is the finder of facts, then the jury, not merely the court, should be the one to make the factual determination.

Prof Robert O. Dawson, in his book, Texas Juvenile Law, 5th Edition, (Texas Juvenile Probation Commission, 2000) at 179 says:

Thus, in a determinate sentence case in which the juvenile has elected jury disposition, the jury must be given the special issue whether it finds that probation at home is not possible under the statutory standards. However, the jury is not permitted to make any of the related findings required by Section 54.04(i). Even in a determinate sentence case in which the respondent has elected jury disposition, the court must make the findings required by 54.04(i) to authorize placement outside the home or commitment to the TYC.

This is an area where a defense lawyer may be able to take advantage of a sloppy prosectuor if the jury returns a set of findings that are in conflict. If the findings are omitted regarding the propriety of leaving the child in the home, once the jury is released, it may be that a new trial is the only remedy. In the right case, an advantage may be gained in this manner. If the findings are in conflict (removing child from home but finding he could successfully complete the probation in his home) then even a determinate sentence to TYC could be overturned on appeal, at least temporarily.

Social Histories Before the Jury

One additional and very important reason for a jury disposition is to exclude the social history. In <u>In the Matter of A. F.</u> 895 S.W.2d 481, (Tex. App. B Austin, 1995), no writ, the Austin Court of Appeals determined that any amount of hearsay is permissible in a social history:

There appears to be no authority limiting the content of reports envisioned by section 54.04(b).

A. F., at 485. However, there is a stringent requirement that no jury may see a social history:

(d)...Except in a detention or discretionary transfer hearing, a social history report or social service file shall not be viewed by the court before the adjudication decision and shall not be viewed by the jury at any time.

' 54.03(d), Tex. Fam. C. See also, A. F. at 485, footnote 6.

Careful consideration should be given to balancing the interests of having a stricter application of the rules of evidence (which, though not as strict as at the adjudication hearing, arguably apply during a jury disposition) and whether the jury is likely to slam your client (they did find the alleged delinquent conduct true, after all). Some juries participate in an unspoken agreement to probate someone they have found guilty. Some juries aren=t going to probate anyone they have found guilty.