THE COLORADO METHOD OF JURY SELECTION COUPLED WITH CPR IS A MARRIAGE MADE IN HEAVEN

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Over 130 innocent people have been released from death row across our nation. DNA testing has revealed that many of these individuals could not have the committed the crimes for which they were prosecuted and ultimately convicted. Other evidence against these individuals have included eyewitnesses, fingerprints, forensic analysis, and even confessions. How can this be? Added to the mix is poor representation of the accused, police misconduct and prosecutorial misconduct. This volatile mixture is then fueled by the public belief that the police "do it right" and the prosecutors only charge crimes for which they have proof. While it is wonderful that these innocent people have at last been set free, it is incumbent upon us, the trial attorneys and their defense teams, to see that others are not wrongfully convicted. While better late than never is certainly true, having innocent people populating our prisons is unacceptable.

We have formed the Right to Justice Center in an effort to combat this unfortunate and seemingly pervasive lack of justice. Foremost among our concerns is the apprehension of defense attorneys to truly fight for their clients who are innocent, in whole or in part. It is far easier to simply plea clients out. It is far easier not to face the prospect of a jury trial with the knowledge that "you never know what a jury is going to do". While that is true, is it better to plea someone to something they didn't do because it is a known commodity? We think not. We think it is better to try to take the guess work out of the jury system and to utilize the system of justice we have for that end – justice.

We have all gone into trial wondering how the prosecution expected to get a guilty verdict. We saw no evidence, conflicting testimony, circumstances but not circumstantial evidence, and so on. We left wondering why the jury did not get it. They were not stupid, although we have all given that considerable thought at those times. Instead, what really happened was that their preconceived notions and "knowledge" of the legal system got in the way. From the viewpoint of the jury, the State would not have proceeded if all the "stuff" they put on did not mean something, and, if the judge thought there was something wrong with what was going on, he would have stopped it. And, of course, it is just the defense attorney's job to find loopholes. All those people testifying against the defendant, including the police, certainly would not be making things up. And, first and foremost, the Defendant is the defendant. He/she must have done something or he would not be there sitting next to you.

We have spent much time on trying to determine why juries do what they do. Given the fact that juries are made up of human beings, those questions will never be wholly answered. However, we can try to use the fact that they are human beings to our advantage and to work with that knowledge.

Jury selection, just like trial technique, is as unique as the individual doing it. There is no right and wrong way. At least there are no right ways. There are some things which will be raised here which we have found are definite negatives. There are certain things which may assist you in reaching the results you are seeking, though. You must shape them to your own personality.

The Colorado Method

We were expertly taught the Colorado method of voir dire at a seminar we attended. That method stresses the individuals comprising the jury as opposed to the jury being viewed as a unit. It impresses upon the individuals in the jury pool that they have a right to their opinion and should not be swayed by the views of others. If one of jurors tries to unduly pressure them to alter their views to reach a unanimous verdict, which the Court will instruct they must, they should contact the bailiff who will so inform the Court.

While the instruction we received on this was outstanding, I found myself less than brilliant in my execution. However, I continue to work on it. The pitfalls I have run into, which can hopefully save you from having the same problems, are several. First, I found it difficult to come up with questions which lead to desired result of empowering the individualism in each person. Lecturing seemed to come too easily. Try to come up with appropriate questions, such as equating it to individuals' jobs, meetings, school boards, or the like. The other problem that I faced, was that, when it became clear where I was going with the questioning, it caused the immediate reaction of the prosecutor leaping to his/her feet and heading for the bench. Because of these hurdles, we have adopted a slightly different approach by adding CPR – the Common People Rule. It has brought vitality back to the Colorado method for me and may be of some assistance to others.

CPR – The Common People Rule

The primary goal of the Colorado method is empowering the jurors. Try putting yourself in their shoes. They are being called to sit on a jury to do something they do not understand. They would, for the most part, rather be anywhere else. You may have some in the jury pool that have been on juries before, but most have not. They have no idea what is expected of them. And what is the most common perception of jury duty? It is something one endeavors to get out of – for almost anything. Just listen to jury qualification by the judge and you will hear some very creative reasons why those in the jury pool should not have to be there. Therefore, you have to get the potential jurors interested in being there before you can even begin to try to empower them.

To make CPR work, you have to keep in mind one very important fact. You are a person, too, just like those you are questioning. Forget that you are a lawyer, that you went to school for longer than half of the jury pool combined, and whatever else you may think sets you above or apart from the people you are addressing. If you are bound and determined to hold on to your view that you are any better than they are, for whatever reason, it will come across. The lawyer joke punch lines will be going through their minds. Keep in mind that your success or failure, and the very future of your client, is in their hands. Treat them with the respect they deserve.

Jurors have a very difficult job. They have to absorb in a matter of hours or days what you and your trial team have spent weeks or months immersed in. This is compounded if there are technical issues with expert testimony. Prosecutors have a tendency to minimize the complexity of the job, since it is in their

best interest to stick to the LETTER OF THE LAW argument. The prosecutor will outline to the jury during voir dire and in their opening arguments that the defendant did A, B and C. When the law which states 1, 2 and 3 is added to the mix, you have in instant guilty verdict. This instant breakfast approach is most appealing to people who are not sure what they are supposed to do, but do know that they are not lawyers. How are they supposed to understand the law and to make a decision on someone's future in a short period of time? Simplifying it to the letter of the law is easy. It also hangs many defendants.

It should be simple, though. It should make common sense. The law should make sense. If it doesn't, there is something wrong, either with the law itself or in its application. The jury has the power to make those decisions, and it is your job to get that across. That isn't hard either, if you stop being a lawyer and start being a person. Try to look at it from the jurors' perspective. A few suggestions may provide some assistance with this.

Circumventing Preconceived Notions

1. **The Defendant Must Have Done Something Wrong – After All He's the Defendant**

The prosecutor will go to some lengths to make sure they instruct the prospective jurors that the defendant is "innocent until proven guilty". I would venture to guess that no one has had a prospective juror say that they do not believe that. But ask them – If he didn't do something, why is he sitting over here at this table with me and you are out there? The heads of the prospective jurors will start to nod and there will be some giggling. It touches a nerve and makes them uncomfortable when you face them with what they are truly thinking. Laugh with them. It makes everybody human.

This is a great way to get into the discussion about reasonable doubt. You can get the explanation in as to the distinction between probable cause and reasonable doubt by asking what the police need to make an arrest. It then becomes easy for the jurors to see that the reason the defendant is sitting there is because the police only need probable cause to arrest. The State must prove its case beyond a reasonable doubt. The discussion which ensues between you and the jurors and among themselves on this is very enlightening and gets them thinking. It also, and most importantly, starts to level the playing field. If you do not confront head on what you know the jurors are thinking, you cannot diffuse the problem.

2. **The Case Must Have Merit or the State and the Judge Would Not Let It Go On**

This is a tough one to overcome, since you have to keep in mind that everyone, hopefully including yourselves, want to believe that the police, the State and the courts all have the same goal – justice. Unfortunately, that does not seem to be the case. The bigger the case, *i.e.*, the more grave the crime, the more difficult this is to overcome. This is an area you need to work on throughout the case, from *voir dire*, opening statement, through closing argument. You have to show the jury your case. Let them decide if the State has a case. In order to do that, you have to empower the jury to let them understand that they

not only have the right to make that decision, they have the obligation to do so, and they are fully capable of doing it. The last of those is probably the most important.

3. The Law Is Beyond Their Comprehension

The jury instructions are read at the end of the trial for a reason. The testimony heard and the review of the evidence should be looked at using common sense. The jurors are not supposed to be fitting what they hear into niches of legal terminology which they may or may not understand. They are a jury of the Defendant's peers, not lawyers. As such, they must view the evidence using the knowledge they have acquired as every day people.

As with everything else, you must use what is comfortable to you to get this point across. If you have someone in your life that you bounce ideas off about cases, tell them that. If you do not have a non-lawyer to use for this purpose, it would very helpful to find one. You need the perspective of non-legal people to develop a good approach to a trial. After all, it is those individuals who will be making the decision at trial.

By relating personal experience, you also let the prospective jurors know that they are fully capable of making the decisions you are asking of them. I have found that jurors look astonished when I ask how many of them think they could assist with cases. No one has yet to raise their hand. Let them know that they all could help.

Tailor CPR to the Particulars of Your Case

While all of the concepts of CPR are useful in all cases, it may be necessary to stress certain aspects of it as may be important to your case. For example, if the letter of the law goes against your client, it may be important to stress the spirit of the law. Each case presents its own particular problems. However, every case lends itself to the common sense approach. Keep in mind that if it does not make sense, it probably is not right. You have to make your case make sense to the jury. If you are successful in doing this, they are far more likely to see the flaws in the State's case.