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COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS

: CRIMINAL TRIAL DIVISION

v. :

: CP-51-CR-0000683-2008

MUSTAFA ALI : CHARGES: Murder, etc.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PERMIT THE USE OF THE VIDEOTAPE OF THE CRIME DURING VOIR DIRE EXAMINATION

OF PROSPECTIVE JURORS

Petitioner, Mustafa Ali, through his appointed counsel has filed a Motion to Permit The Use Of The Videotape Of The Crime During Voir Dire Examination Of Prospective Jurors. The actual shooting and killing of two victims in this case was captured on surveillance videotape and will be shown during the course of petitioner’s capital jury trial. The videotape is graphic and likely to cause strong emotions amongst those who watch it. Because of the potentially debilitating bias and prejudice that this videotape might engender, it is necessary that potential jurors be shown the videotape and be questioned about their reactions to it during the voir dire

examination.1 This is necessary to determine whether potential jurors, after viewing a videotape of the actual crime, would; 1) be able to remain fair and impartial with respect to guilt or innocence, and 2) be able to consider mitigating evidence and a sentence of life imprisonment without parole if petitioner is convicted of first degree murder.

Numerous scientific studies done on the jury - effect of graphic photos or videotapes confirms, as common sense would suggest, that these graphic images, standing alone, sway many jurors to find defendants guilty, and in capital cases, return sentences of death. Petitioner seeks to ameliorate that effect by identifying those jurors who yield to such biases or prejudices and dismiss them prior to their selection as jurors. In order to do that, petitioner must be allowed to show the videotape during voir dire examination and question the prospective jurors about their reactions to it. Petitioner’s Pennsylvania and Federal Constitutional rights to due process of law, equal protection, and a fair and impartial jury require this motion to be granted.

# Assessing potential jurors’ reactions to the videotape of the actual crime is a necessary component of meaningful voir dire in this case.

A criminal defendant has a constitutional right to a fair and impartial jury under Article 1, Section 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendment of the United States Constitution. The jury selection process is critical to the preservation of these constitutional rights. Commonwealth v. Ellison, 588 Pa. 1, 902 A.2d 419 (2006).

The purpose and primary goal of voir dire is to secure a competent, fair, impartial, and unprejudiced jury. Commonwealth v. Futch, 469 Pa. 422, 366 A.2d 246 (1976); Commonwealth

v. England, 474 Pa. 1, 375 A.2d 1292 (1977). In order to accomplish this goal, a criminal

1 The defendant seeks only to gauge emotional reaction to the videotape and not ask specific questions about its content. He seeks only to find out whether potential jurors would, after seeing the videotape, rationally consider it and other evidence for its relevant value, without specifying what that relevant value is.

defendant is afforded considerable latitude into inquiring into bias or any other prejudices or tendencies which might bear on a potential juror’s ability to be a fair and impartial juror.

Commonwealth v. Davis, 282 Pa. Super. 51, 422 A.2d 671 (1980); Commonwealth v. Lopinson,

427 Pa. 284, 234 A.2d 552 (1967). And although the scope of voir dire is generally in the discretion of the trial court, the latitude allowed in voir dire must be considered in light of the factual circumstances of the particular criminal case. Commonwealth v. Christian, 480 Pa. 131,

389 A.2d 545 (1978). Here, the unique factual circumstances, where the crime was captured on videotape, requires a voir dire process that adequately probes and surfaces any improper bias or prejudice as a result of that videotape.

Numerous scientific and sociological studies have quantified the powerful effect that graphic photographs or videotapes can have on particular jurors. For example, mock jurors who were shown autopsy photographs were twice as likely to convict as those mock jurors who were not shown the photographs. Kevin Douglas, et al., The Impact of Graphic Photographic

Evidence on Mock Juror’s Decisions in a Murder Trial: Probative or Prejudicial?, 21 Law and Human Behav. 485 (1997)2. Another study demonstrated that juries who were shown a videotape made of a homicide crime-scene actually required lower standards of proof to convict. Saul M. Kassin & David A. Garfield, Blood and Guts: General and Trial-Specific Effects of

Videotaped Crime Scenes on Mock Jurors, 21 J. Applied Social Psychology 1459 (1991).

A more recent study has confirmed these basic findings. In Gruesome Evidence and

Emotion: Anger, Blame, and Jury Decision Making, 30 Law and Human Behav. 183 (2006),

authors David Bright and Jane Goodman-Delahunty conducted a number of mock jury trials in

2 These same mock jurors, who were shown the photographs, reported emotional distress and physical reactions not reported by the jurors who did not see the photos. Furthermore, the group that was shown the photos did not feel like those photographs actually influenced their verdicts; all participants believed they acted fairly and impartially.

order to examine the effect of gruesome photographic evidence and gruesome verbal evidence on a jury’s decision-making process. Mock jurors who saw gruesome photographs reported experiencing significantly more intense emotional responses, including great anger at the defendant. These mock jurors convicted the defendants at a significantly higher rate than those who were not shown gruesome photographs. However, mock jurors who were presented with only gruesome verbal evidence did not have increased emotional responses and the gruesome verbal evidence had no impact on the conviction rate. Thus, this study confirmed the earlier findings that gruesome, visual evidence can have a great impact on jurors and can cause them to have significant emotional responses toward a defendant, resulting in convictions in far greater number than would occur in the absence of such gruesome visual evidence.

In a case such as this, where the evidence in question is more graphic than still photographs or a videotape of the crime scene after the crime has been committed, the resulting bias and prejudice is likely to be even more severe. Here, jurors will not see merely photographs of the crime scene and the deceased, but will see the actual crime take place. No piece of evidence could be more powerful or potentially more prejudicial, and its impact on the jury cannot be underestimated3.

Therefore, given the potential bias and prejudice inherent in the use of a videotape of the actual crime, it is crucial that the defendant be allowed to examine the prospective jurors about their reactions to the videotape. This is necessary in order to ascertain whether or not they can

3 Attached as exhibits A, B, C, D are articles gleaned from an internet search showing the devastating effect of graphic videotape on jurors. This list is far from inclusive. From Exhibit A, “(J)urors cringed, cried and some desperately looked away.” In Exhibit B, “(M)embers of the jury cried and hid their face while the disturbing video was played.” Exhibit C references jurors who “wept, sighed and put their hands together in prayer as they watched the chilling tape…” In Exhibit D, one juror bowed her head and put her hand to her forehead; another sat with his mouth agape.

put aside any emotions engendered by the videotape and thus sit as a fair and impartial juror, as required by law and under the state and federal constitutions.

# Use of the videotape during voir dire is also necessary to ensure that potential jurors are “life qualified” to serve as jurors for the penalty phase of the trial.

Because this is a capital case, the defendant has the right to “life qualify” potential jurors. before they are eligible to serve on a jury. In Morgan v. Illinois, 504 U.S. 719, 1125 S. Ct. 2222,

119 L. Ed. 2d. 492 (1992), the United States Supreme Court held that jurors must not make their minds up regarding sentence before mitigating evidence is presented. Jurors must be able to consider and give effect to any mitigating evidence presented at the sentencing phase of trial and if they are unable to do so they are unfit to sit as jurors. Thus, during the voir dire process, defense counsel has the right to question prospective jurors on whether or not they would properly consider and weigh any mitigating evidence presented at trial. See, e.g.,

Commonwealth v. Borley, 576 Pa. 611 (2003); Commonwealth v. Keaton, 556 Pa. 442, 729

A.2d 529 (1999). Prospective jurors who refuse to consider mitigating evidence are unable to follow the law. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 1 (1982).

Thus, in order to “life-qualify” prospective jurors, defendant is entitled to ask them, whether having seen the videotape at issue, they would still be able to consider a life sentence without parole and give effect to any mitigating evidence presented. If seeing the videotape would cause them to view death as the only appropriate punishment, these jurors are not qualified to sit as capital jurors.

Actual jurors have reported that viewing gruesome pictures of homicide victims or viewing videotape of the actual crime at the guilt-phase of a capital trial led them to make up their mind about punishment *simultaneously* with their decision to convict. See, Bowers, Sandys

& Steiner, Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Attitudes and Premature Decision-Making, 83 Cornell L. Rev. 1476, 1498 (1988).4 In other words,

photographs of the decedent offered as relevant to guilt convinced jurors that the defendant deserved death even before hearing or weighing any of the mitigating evidence presented at the penalty phase stage of the trial.

If jurors are unable to reserve judgment as to the proper penalty, due to the influence of gruesome visual evidence, they are also unable to sit as unbiased and fair jurors. Thus, defendant is entitled to ask whether having seen the videotape in question, they would be able to consider all mitigating evidence and consider a sentence of life in prison without the possibility of parole.

# Showing the videotape, as opposed to describing it, is essential to obtain a fair and impartial jury.

Since the videotape at issue contains visual evidence of the actual crime, it is insufficient to simply describe the videotape and ask voir dire questions about potential impact on the

4 One juror in this study, who admitted that he decided on the penalty of death during the guilt phase of trial, because he saw a videotape of the actual crime during trial, described his thinking as follows:

**Juror:** Just sitting there watching [a videotape of the killing from a store monitoring system]. I’ve seen a lot of stuff, but I never…Even Arnold Schwarzenegger movies didn’t affect me like that, you know? This wasn’t make believe, watching that videotape. The videotape was very powerful.

**Interviewer:** Okay, so once you saw the videotape that did it?

**Juror:** Yeah, that did it.

Id. 83 Cornell L. Rev. at 1499.

prospective jurors. The possible prejudice of the videotape is intrinsic to the videotape itself. Although a prospective juror could be asked whether or not the fact that a videotape of the crime exists and would be shown to the jury, would unduly prejudice or bias that juror, such question is of no value. On a theoretical level, the concept of viewing a videotape of the crime might not strike a potential juror as particularly difficult or emotional. But, as all the scientific studies cited above make clear, verbal descriptions, even detailed, gruesome ones, do not adequately convey the impact of the actual visual presentation. It is not enough, therefore, to simply ask jurors questions about the videotape, in the abstract. To accurately assess the emotional impact the videotape will have, the potential jurors must be shown the actual videotape.

Defendant needs to know, and has the right to know, if the emotional resonance of the videotape, distinct from its probative value regarding the circumstances of the crime, is going to thrust the jurors into an emotional state in which they cannot fulfill their duty to be fair and impartial jurors

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Respectfully Submitted,

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