# INTERTWINING THE STRIKE FOR CAUSE METHOD AND THE COLORADO METHOD

## INTRODUCTION

Historically, lawyers used Voir Dire as an opportunity to try to sell their case. With the advent of jury consultants trained in psychology, methods arose which emphasized using Voir Dire as an opportunity to obtain information that would be useful in exercising preemptory strikes. One of the most effective systems for exercising peremptory strikes in capital cases is the Colorado Method of jury selection. This paper builds on the work of previous approaches, with an emphasis on obtaining strikes for cause.

The approach proposed in this paper places as its primary goal maximizing strikes for cause. By careful drafting and utilization of questions and appropriate follow-up, a lawyer can significantly and consistently increase the number of strikes for cause he can obtain. The steps required to achieve this result are the following: accurately analyzing the hot-button issues in a case; drafting appropriate questions; effectively asking the questions; and, finally, nailing down the strike for cause.

This method is effective in any type of case. However, it is especially important for a lawyer who is trying capital cases. There are few types of cases that arouse such strong emotional reactions as capital cases. Both because of intense media coverage and because of many individual’s intense personal experiences, the capital murder trial is one in which is it especially important to eliminate unfavorable jurors.

Before explaining the “Strike for Cause” method of jury selection, I will briefly discuss the goals of the Colorado Method of jury selection. This is not an exhaustive explanation of the Colorado Method, as that is available in other resources.

The Colorado Method has as its main goal to eliminate individuals who are more inclined to impose the death penalty. They have a scale that goes from 1 to 7, with 1 being someone who would never impose the death penalty and is vocal, adamant and articulate about it, and a 7 being someone who believes in “an eye for an eye” and that life imprisonment is not sufficient.

The premise behind this system is that individuals who are more inclined to impose the death penalty are also more likely to find a client guilty. This premise can be extended to other issues. If one is clear that the point of the exercise is to eliminate individuals who are both more likely to impose the death penalty and also more likely to find your client guilty, then a lawyer should use every tool at his disposal to get rid of those potential jurors.

The traditional approach to jury selection was primarily concerned with two things: first, getting a head start in placing a litigant’s theory of the case before the jury, and, second, not poisoning the jury pool with attitudes that are contrary to one’s position. This concern with persuading the jury pool during Voir Dire was fueled in part by a misreading of a study, which indicated that jurors had made up their minds as to who should win a trial by the end of Voir Dire.

Many people took this to mean that the lawyer must persuade the jury in Voir Dire, or they have lost the case. A more accurate reading of that study would indicate that the

venire persons had made up their mind about the issues of the case before they had walked into the courtroom. It is absurd to think that what a lawyer says in a brief address to a jury pool can come close to being as important as the life experiences and attitudes that the potential jurors brought with them to the courthouse. To give an example that would resonate with a trial lawyer, ask yourself if you would rather have a jury made up of members of the ACLU, or instead be given an opportunity to present a one and a half hour speech. Any criminal defense lawyer would choose to have a jury that is prejudiced in his favor than to have yet another speech. The same is true for prosecutors. There is an inherent conflict, however, between the desire to maximize strikes for cause and the desire to persuade a jury panel. It is essential in order to obtain strikes for cause to get jurors saying bad things about your side of the case. This is the only way to expose prejudice and, ultimately, to have them struck for cause. Individuals are much less likely to express their strongly held opinions if they believe they are going

to get into an argument with a lawyer in public. Through the process of elimination, you can guarantee the best jury possible out of a given panel.

## IDENTIFYING HOT-BUTTON ISSUES

The first step in any case is to identify the emotional issues on which jurors will be deciding your case. If one has tens of thousands of dollars to spend on a case, this information can be obtained through the use of focus groups, mock trials and polling. In most criminal cases, one does not have the resources to do a focus group or mock trial. One option is to develop a brief summary of the case, and then ask friends and family members what they think about the case without revealing your role in the case. Try to be as neutral as possible and include facts that you don’t think are relevant, but might be important to a non-lawyer. Have staff members do the same thing. If you are a criminal defense lawyer, call your one Republican friend, and ask his opinion. Be careful not to argue with the individual who is helping you. Encourage them to express

their opinions fully with follow-up questions. Listen more than you talk.

In making your notes, be sure to rely on what the non-lawyers say, rather than the lawyers, as to what issues are the most important. If non-lawyers seem to think that the fact that the Defendant liked to dance is important, then you need to focus on dancing, regardless of its relevance as to any issue in the case. Once you’ve identified the hot-button issues, you are ready to start drafting questions.

## DRAFTING QUESTIONS

Historically, lawyers would ask jurors “selling questions” such as, “Does everyone here agree that they will follow the law and make the prosecution prove their case by beyond a reasonable doubt? I take it by your silence that everyone agrees that they will require the prosecution to prove their case beyond a reasonable doubt.”

This approach was replaced by the open-ended questions such as, “How do you feel about the burden of proof being beyond a reasonable doubt?” Open-ended questions were introduced to try to find out jurors

attitudes so that the lawyers could intelligently exercise their preemptory strikes.

The approach advocated in this paper relies upon loaded questions. These are questions that make it easy for a juror to express opinions which result in them being struck for cause. For example, “People have strong feelings about the burden of proof in criminal cases. Some people, if they were on the jury, would require the state to prove their case beyond a reasonable doubt. There are other people, if they were on a jury, feel that, in cases like dealing with the death of a police officer, is too high a burden. They would only require the state to prove their case by clear and convincing evidence. Which of those best describe you?”

This question works on many levels. First, by suggesting that there is a group of people that has one set of opinions and another group of people who have a different set of opinions, a juror feels comfortable in expressing his opinion because it will be consistent with one group or the other. He is not out there alone in opposition to the law.

The second level on which the question works is that the language makes saying “yes” to the second half of the question seem more reasonable by using the words “clear” and “convincing.”

The question on its face looks neutral, but to someone with a strong law enforcement bias, the question is heavily loaded toward lowering the standard of proof in a criminal case. This is not to say that loaded questions are the only questions to be asked during Voir Dire.

The first step is to list all the hot- button issues you have distinguished from your formal or informal focus groups. You then begin to write out word-for-word the questions that reveal the attitudes of the venire persons with regard to each hot button issue. Some lawyers resist the idea of scripting out the language of the questions. This resistance is accompanied by the justification that scripting would somehow impede the natural delivery of the Voir Dire. A lawyer might say, for example, “I have to put it in my words; otherwise, it won’t work.” I would suggest that almost

everything a lawyer says in a Voir Dire is unconsciously scripted. Lawyers repeat what they have heard other lawyers say, or what they have said in the past. The only reason that it seems natural is because they’ve repeated it so many times. A new, carefully crafted question will feel natural if you say it enough. I therefore recommend that on key questions that you memorize them and practice saying them until they are as natural as anything else you say over and over again.

As I have pointed out before, there are several forms in which questions can be drafted. One is an either-or form. Ex: “Some people believe x, other people believe

y. Which best describes you?” Another form is the open-ended question. Ex: “How do you feel about y?” “What have you heard about x?” Once you have written questions covering all of the hot-button issues in your case, then examine the court’s charge and the applicable law in the case to see if there are opportunities for strikes for cause.

An example of a series of questions for a defense lawyer would be as follows:

*People have strong feelings about police officers. There are some people who so admire and respect police officers, they simply wouldn’t believe that a police officer would lie under oath. There are other people who believe that a police officer is just as likely as anyone else to lie under oath. Which of those best describe you? Mr. Smith, tell me more about that.*

*Now I want to be clear that I am not talking about believing a police officer because of his superior education, training or experience. I am simply asking: do you believe that police officer is more likely to tell the truth?*

*Is it fair to say that regardless of the law, the facts, or the judge’s instructions, you would give more credibility to the testimony of a police officer?*

This question will result in many state’s- oriented jurors being struck for cause. This example also demonstrates the next step in obtaining a strike for cause, which is drafting effective follow-up questions. By asking Ms. Smith to tell you more about that, she will provide personal experiences and statements that will be useful in seeking a strike for cause. The question that begins, “Is it fair to say . . .” makes it easy for Ms. Smith to agree that she cannot follow the law. Adding the phrase, “Is it fair to say . . .” softens the question and is less confrontational than if you had worded the question, “Isn’t it true that you can’t follow the judges

instructions?” By telling Ms. Smith that she could follow all the other judge’s instructions but simply couldn’t follow this one, it makes it appear as if she’s getting a B+ or an A- rather than failing as a juror because she could not follow one of the judge’s instructions.

Another area to consider in drafting strike for cause questions is basic constitutional rights, such as the Fifth Amendment or the presumption of innocence. For example, one could ask a question such as the following:

*People have strong feelings about the Fifth Amendment. There are some people who believe that if an individual doesn’t testify in a case, it doesn’t mean anything with regard to whether or not he is guilty. There are other people who believe that if someone were innocent, they would get on the stand and testify. What are your feelings on this issue?*

*Is it fair to say that even if a judge instructed you that you are not to hold it against my client if he decides not to testify that you would still have to consider a decision not to testify as evidence of guilt? Is that fair to say?*

One could deal with the issue of presumption of innocence as follows:

*There are some people who have no problem at all presuming that someone who is*

*accused of a crime is innocent. There are other people who, even though they know they should presume someone innocent, believe that they wouldn’t be sitting here facing charges if they hadn’t done something wrong. What do you think about that?*

*Is it fair to say that although you would do your best to presume my client is innocent, I am starting out behind with you from the start? That does not mean that you wouldn’t listen to the evidence. I am just saying that, as we sit here, I am starting out behind with you. Isn’t that fair to say?*

*Is there anyone that although they may be able to presume an individual innocent in any other kind of criminal case they simply could presume someone innocent in a case, which alleges the murder of a police officer?*

The important point is to draft follow-up questions, which give the potential juror permission to express prejudices. Another way to make it easy for a venire person to slide off of the panel is to say, “Is it fair to say I’m starting out behind with you with regard to x?”

## SELECTING THE JURY

Once you have drafted the questions and practiced saying them, you are ready for the day of trial. In most jurisdictions, you will have some period of time in which to review the juror cards before the beginning of trial. Quickly assign each juror a rating of “Leader” or “Follower,” and an additional

category of “For Me” or “Against Me.” Obviously, you will have to rely on stereotypes for this initial categorization. An obvious example would be the President of the local victim rights organization, who would be categorized as a “Leader” and “Against” the Defendant’s side. There may be a student or file clerk that turns out to be a leader on a jury, but for the purposes of your initial evaluation, use your stereotype, and place them in the “Follower” category. Do a quick count, and if there are more “Leaders” negative (L-) in the first half of the jury pool than there are “Leaders” positive (L+), and there are more “Leaders” positive than there are “Leaders” negative in the second half of the jury pool, request a shuffle.

Do your best to rank the jurors using the criterion of “Leaders” who are against you first, “Leaders” who are you don’t know whether they are for you or against you second, and then “Followers” who are against you third. Begin the questioning with the “Leaders” who are against you and work down the list. This is also the order in which to use your preemptory strikes. Even if

someone is against your case, if they were a follower, they’re not nearly as dangerous as someone who is a leader that turns out to be against you in a jury room. You also want to use the Colorado Method to assign the potential jurors a number from 1 to 7, so that you can focus on eliminating the people who are most inclined to impose the death penalty.

I like to begin Voir Dires by providing a context to the panel, which encourages full participation. The following is a good introduction:

*I am going to start out by asking if there is anyone here who’s ever watched one of those daytime talk programs, like Oprah Winfrey, Sally Jesse Rafael, Donahue, when he was on the air, Jerry Springer . . . go ahead and get your hands up. Do people in the audience on those shows have any difficulty expressing their opinions?*

***Juror:*** *No, people will speak right out.*

*Well that’s exactly how people should express themselves during voir dire. When either I, or the lawyer for the prosecution asks a question, everyone needs to feel free to tell us exactly what you think.*

Always have someone taking notes for you. It is difficult, if not impossible, to listen to jurors and take notes. Have the person who is taking notes put a big “C,” to remind

you who has made a statement that would support a strike for cause. Use a highlighter to make sure you don’t miss the C later on. Encourage the jurors to express their prejudices against your case. When a juror makes a statement that evidences bias or prejudice, ask the panel, “Who else agrees with this statement?”

After obtaining many strikes for cause, the choices you must make with your preemptory strikes should not be as difficult as in the past. As mentioned earlier, “Leaders” who are 6s and 7s are struck first, and “Followers” who are 6s and 7s are struck next. In order to efficiently use the time allotted for exercising your preemptory strikes, run the discussion like a meeting. Ask all of the decision makers to list which ten venire persons they would strike. Go around the table, one by one, and write down the ten juror numbers for each decision maker. Do not allow discussion at this point. You only want each person to give the numbers of the six people they would strike if jury selection were entirely up to them. If some venire person’s number shows up on

everyone’s list, use a preemptory strike for that person without discussion. You then will have plenty of time to discuss the remaining venire persons upon whom there was not initial agreement. This system saves time and provides more clarity.

Hopefully, at the end of the process, you will look and see twelve people in a jury box with whom, if you do not have a head start, you at least are not behind the eight ball.