

Standards for Trial by Jury, Commentary to Standard 15-2.7(a) (3d ed., 1996). Matters involving emotionally charged topics such as those relating to the death penalty (which often involve religiously-based opinions), potential racial bias, or prejudice from pretrial publicity, may cause strong reactions by jurors who may feel criticized or disparaged by remarks of counsel.

3. Even in cases involving penalties less than death, the American Bar Association recommends;

All challenges, whether for cause or peremptory, should be addressed to the court outside of the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge.

Standard 15-2.7(u), ABA Standards for Trial By Jury (3d ed., 1996). Standard 9, Standards Relating to Jury Use and Management, Rules of the Supreme Court of Kansas, which governs the procedure for making peremptory challenges, provides, "[c]ounsel should exercise their strikes ... out of the hearing of the panel." See Jones v. State, 343 Md. 584, 597, 683 A.2d 520 (1996) (citing ABA Standard with approval).

4. In the comments to the Standard, the ABA discusses the fact that a person who is reinstated to the panel after a successful Batson challenge would (perhaps rightfully so) resent the implications of such a proceeding. Under the ABA's recommended procedure, that juror "will not be aware that he or she was challenged, of the alleged basis for the challenge, or of the ruling that the challenge was racially motivated." ABA Standards for Criminal Justice, Standards for Trial by Jury, Commentary to Standard 15-2.7(a) (3d ed., 1996).

5. Requiring attorneys to make challenges in front of the jury panel in a death penalty case concerning jurors' religious or political views on the death penalty is likely to cause "heightened" reactions similar to those of jurors reinstated after a successful Batson challenge. In death penalty cases, the potential prejudice of such counsel-to-juror communications are of even greater concern than in non-capital prosecutions. See Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) ("[t]he decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is that appropriate penalty in a particular case").

6. In Gray v. Mississippi, 481 U.S. 648, 652-53, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), the Supreme Court recognized the problems which arise when venire persons who are being "death-qualified" are aware of the exercise of for-cause challenges:

The panel members were questioned individually for the most part, but this took place in the presence of the others in the box as well as in the presence of all prospective jurors in the courtroom waiting to be called. As a result, venire members were able to learn the consequences of different responses. In particular, they learned what response would likely result in their being excluded from the jury. This knowledge caused difficulty during the prosecutor's questioning. . . . After his denials of . . . for-cause motions, the judge observed that venire members perhaps were not being forthright in their responses to the prosecutor. He criticized them for expressing insincere hesitation about the death penalty in order to be excluded from the jury.

Such difficulties will be avoided if challenges are made and ruled upon outside the presence of the jury.

WHEREFORE the defendant prays that his Motion be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the foregoing motion to: the Clerk of the District Court; the Franklin County Attorney's Office, via FAX at (785) 229-8971; the Office of the Attorney General, via FAX at (785) 291-3875; and the Honorable Eric Godderz, Judge of the District Court, via FAX at (785) 448-3230 on this 14th day of December, 2015.

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