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# Use of Challenges for Exclusion of Venirmen Who Oppose Imposition of Capital Punishment

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# COMMENTS

## CRIMINAL PROCEDURE — EMPANELING JURORS — USE OF CHALLENGES FOR EXCLUSION OF VENIREMEN WHO OPPOSE IMPOSITION OF CAPITAL PUNISHMENT*

*A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its limits . . . . It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do.*[1]

### I. INTRODUCTION

The right of an accused in a criminal prosecution to trial "by an impartial jury of the State and district wherein the crime shall have been committed . . ."[2] is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[3] So hallowed has the right to trial by jury been in the United States that the original Bill of Rights included the specific guarantee of trial by jury,[4] that the constitution of every state has provided a corresponding right in serious criminal cases,[5] and that the fourteenth amendment to the United States Constitution has been held to guarantee to a defendant in a state court the same right to trial by jury

*People v. Sears, 74 Cal. Rptr. 872, 450 P.2d 248 (1969).

1. W. DOUGLAS, WE THE JUDGES 389 (1956).
2. U.S. CONST. amend. VI.
3. Duncan v. Louisiana, 391 U.S. 145, 158 (1968).
4. U.S. CONST. amend. VI provides, in part:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .
5. Duncan v. Louisiana, 391 U.S. 145, 154 (1968). S.C. CONST. art 1, § 18 provides:
   § 18. **Trial by jury; witnesses; defense.** In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

which article III and the sixth amendment guarantee to an accused in a federal court.[6]

The concept of trial by jury, theoretically sound, will justifiably remain an integral part of the American judicial scheme. The jury system itself, as a matter of day-to-day practice, is, however, necessarily involved in a continuing process of judicial and legislative redefinition and reinterpretation in an attempt to minimize the disruptive impact of the most significant variable in the system: man—man with all his strengths and weaknesses, opinions and prejudices, characteristics and peculiarities. *People v. Sears*[7] is dramatically illustrative of one important area in which this process of redefinition and reinterpretation is now occurring. Two legal tools — the challenge for cause and the peremptory challenge—have been improvised to lessen appreciably the possibility that the human variable will jeopardize the efficacious operation of the jury system in one of its most important functions: deciding whether a fellow man shall live or die.[8]

In *People v. Sears*[9] the defendant appealed from a judgment of the Superior Court of California wherein he had been found guilty of and had been sentenced to death for the first degree murder of his step-daughter, the attempted murder of his wife, and the attempted murder of his mother-in-law. The Supreme

6. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The Court, in making the sixth amendment guarantee of jury trial obligatory on the states through the due process clause of the fourteenth amendment, declared:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.

7. 74 Cal. Rptr. 872, 450 P.2d 248 (1969).

8. The two functions of the jury in capital cases are the determinations, first, of guilt or innocence and, second, of punishment. South Carolina, in accord with a majority of the states, employs a one-verdict procedure whereby the jury delivers one unanimous verdict as to guilt or innocence and punishment. The jury retains, however, discretion as to whether a defendant shall be sentenced to death or to life imprisonment. S.C. CODE ANN. § 16-52 (1962), which survived a recent court test in State v. Harper, 251 S.C. 379, 162 S.E.2d 712 (1968), provides:

> **§ 16-52. Punishment for murder.**—Whoever is guilty of murder shall suffer the punishment of death; *provided, however,* that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner.

*See* Comment, *Criminal Procedure—South Carolina Death Penalty Statutes—Guilty Pleas—Sentencing by the Jury,* 20 S.C.L. REV. 841 (1968).

9. 74 Cal. Rptr. 872, 450 P.2d 248 (1969).

Court of California affirmed the judgment of the superior court as to guilt but reversed as to penalty. In so reversing, the court said:

> In the instant case six prospective jurors were excused *for cause* solely on the basis of their own expressions of opinion that it would be either "difficult" or "unfair" for them to serve on the jury because they were "against" capital punishment, did not "believe" in it, or felt it was "not warranted."
>
> None of these jurors stated "unambiguously that he would automatically vote against the imposition of capital punishment . . . [regardless of] what the trial might reveal, . . . ." First, under *Witherspoon* it cannot be assumed that a person who merely states he is "against" capital punishment, does not "believe" in it, or feels it is "not warranted" would never, as a juror, vote to impose it or even consider doing so.
>
> Second, the questions asked of the six excluded jurors did not even deal with their willingness to consider the evidence before automatically committing themselves to vote against the death penalty.[10]

In rejecting the contention by the prosecution "that the exclusion of the jurors with reservations concerning capital punishment was, if erroneous, harmless since the prosecutor had unexercised *peremptory challenges* which he could have used to remove these jurors . . . ,"[11] the court stated further:

> We cannot assume that a prosecutor would abuse the high responsibilities of his office by employing *peremptory challenges* to accomplish an otherwise constitutionally impermissible result, the impaneling of a jury "uncommonly willing to condemn a man to die."[12]

The court noted moreover:

> [A] prosecutor who uses *peremptory challenges* for the

10. *Id.* at 880, 450 P.2d at 256 (emphasis added, footnotes omitted). *See* Comment, *Criminal Procedure—Empaneling Jurors—Death Sentence Invalidated When Veniremen Excluded for Voicing Scruples Against Imposition of Capital Punishment,* 20 S.C.L. REV. 833 (1968), which discusses *Witherspoon v. Illinois,* 391 U.S. 510 (1968) as it affects the viability of the death penalty as an alternative punishment and as its rationale might be extended to the guilt-determining process.

11. 74 Cal. Rptr. 872, 881, 450 P.2d 248, 257 (1969) (emphasis added).

12. *Id.* at 881, 450 P.2d at 257 (emphasis added).

purpose of producing such a jury is violating his obligation to assure the defendant a fair trial.[13]

In theory the challenge for cause and the peremptory challenge are tools whereby both the state and the accused can protect their interests in obtaining a "trial, by an *impartial* jury of the State and district wherein the crime shall have been committed . . . ."[14] In practice, however, the challenge for cause and the peremptory challenge are themselves subject to the disruptive influence of the human variable. *Sears* further redefines and reinterprets the challenge for cause and the peremptory challenge, theoretically workable and understandable, as necessarily circumscribed by the practical, day-to-day, human environment in which they must be applied. *Sears*, first, outlines more definitive guidelines for the conduct of *voir dire* examinations of veniremen consistent with the *Witherspoon* requirements for a challenge for cause,[15] and, second, requires a much closer scrutiny by the courts of a prosecutor's use of the peremptory challenge.

What is now of consequence for the practicing attorney is an understanding of the evolution of the two challenges as they relate to capital punishment. Through such an understanding the *Sears* case will produce a more intelligent exercise of the challenge for cause and the peremptory challenge by an attorney—prosecutor or defense counsel—who is cognizant of the role which he plays in the redefinition—reinterpretation process and who can therefore better acquire an impartial jury.

By way of historical analysis this comment will show (1) how the process of redefinition and reinterpretation of the jury system has produced the result found in the *Sears* case and (2) what the process purportedly suggests for the immediate future. Then it will attempt to formulate rules and standards, applicable in South Carolina, to govern the use of the two challenges to exclude veniremen who oppose capital punishment.

## II. CHALLENGE FOR CAUSE

The right to trial by an *impartial* jury is broadly defined by two principles. First, the process by which court officials designate prospective jurors shall be free of the systematic or intentional exclusion of any group or class of persons. This principle

13. *Id.* at 881 n.5, 450 P.2d at 257 n.5 (emphasis added).
14. U.S. CONST. amend. VI (emphasis added).
15. See text accompanying note 72 *infra*.

envisions "a body truly representative of the community,"[16] a jury which is drawn from a cross-section "of the State and district wherein the crime shall have been committed . . . ,"[17] but by no means warrants that every jury will contain representatives of all the particular social, economic, racial, religious, political, or geographical segments of a community.[18] Second, the jurors finally selected must be qualified, fair, unbiased, and impartial.[19] The trial court has a serious duty and a broad discretion to ascertain whether a juror is, in fact, qualified, fair, unbiased, and impartial.[20]

*Irvin v. Dowd*[21] illustrates the general standards for juror impartiality. Petitioner for habeas corpus had been convicted of murder and sentenced to death. The Supreme Court, reversing and remanding the case on the grounds that there was a denial of due process under the fourteenth amendment, because jurors with pre-conceived and unalterable opinions about the guilt of the defendant were allowed to sit, stated:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.[22]

The Court continued, however:

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.[23]

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16. Smith v. Texas, 311 U.S. 128, 130 (1940). In Glasser v. United States, 315 U.S. 60 (1942), the Court declared:

> [T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class.

*Id.* at 86. The notion, as popularly stated, that an accused has a right to be tried by one's peers is simply not true. Such a notion, inherited from the common law, has never found acceptance within the American concept, founded as it is upon a democratic society, of what constitutes a proper jury. *Id.* at 85.

17. U.S. CONST. amend. VI.
18. Thiel v. Southern P. Co., 328 U.S. 217, 220 (1946).
19. State v. Rasor, 168 S.C. 221, 235, 167 S.E. 396, 402 (1933).
20. Dennis v. United States, 339 U.S. 162, 168 (1950).
21. 366 U.S. 717 (1961).
22. *Id.* at 722.
23. *Id.* at 724-25, *quoting from* United States v. Wood, 299 U.S. 123, 145-46 (1936).

An "impartial" jury "is as human as the people who make it up."[24] Impartiality becomes, therefore, a relative term for the determination of the court at a particular point in time.

In South Carolina the question of the impartiality of a prospective juror is a matter for the court.[25] Section 38-202 of the Code of Laws of South Carolina of 1962 prescribes the manner in which the court will conduct the *voir dire* examination of veniremen and the reasons for which disqualification or exclusion for cause may occur:

> **§38-202. Jurors may be examined by court; if not indifferent, shall be set aside.** — The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause and another shall be called.[26]

Cognizant of the difficulty in delineating the bounds of impartiality, the court, in *State v. Gantt*,[27] noted: "The law does not require that a juror should be perfectly free from all impressions and opinions as to the issue."[28] In *State v. Fuller*[29] the court further explained that what the law requires is a juror who is impartial, whose opinion can be changed by the evidence, and who can stand indifferent between the state and the accused.[30]

In *Logan v. United States*,[31] decided in 1892, the first major case involving the particular problem of scruples against capital punishment, the Supreme Court stated that a juror who has conscientious scruples against capital punishment is not impartial and may be challenged for cause. The Court declared:

24. W. DOUGLAS, WE THE JUDGES 389 (1956).
25. State v. Dodson, 16 S.C. 453, 459 (1882).
26. S.C. CODE ANN. § 38-202 (1962).
27. 223 S.C. 431, 76 S.E.2d 674 (1953).
28. *Id.* at 437, 76 S.E.2d at 677, *quoting from* State v. Hayes, 69 S.C. 295, 48 S.E. 251 (1904).
29. 229 S.C. 439, 93 S.E.2d 463 (1956).
30. *Id.* at 447, 93 S.E.2d at 467-68. Thus, a juror who states that he has formed an opinion, but that the opinion will yield to the evidence presented at the trial and that he can render a fair and impartial verdict may be impaneled. *Id.* at 447, 93 S.E.2d at 467-68; citing precedent as old as Sims v. Jones, 43 S.C. 91, 94, 20 S.E. 905, 906 (1895).
31. 144 U.S. 263 (1892).

> A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror.[32]

One year earlier, in 1891, the Supreme Court of South Carolina, in *State v. James*,[33] had reached a similar result in holding that the entertaining of conscientious scruples against capital punishment is a ground for a challenge for cause and that it is, therefore, proper to interrogate a venireman on that subject.[34] In 1892, in *State v. McIntosh*,[35] the trial court asked a prospective juror during the *voir dire* examination whether he was opposed to capital punishment. The venireman replied, simply, "Well, I am inclined that way, sir."[36] The trial judge excluded the venireman from the jury for cause. In *State v. Hyde*,[37] decided in 1912, the court held that it was not an abuse of discretion to excuse for cause those jurors who were opposed to capital punishment.[38] In *State v. Bethune*[39] the court cautioned, however, that the court is only bound to ask those questions required by statute[40] and that any further examination of prospective jurors is entirely within the discretion of the trial judge, who is subject to review only for abuse of that discretion.[41]

In 1929, in *State v. Robinson*[42] the court, citing as precedent *State v. James*[43] and *State v. Hyde*,[44] held that it was proper to exclude from the jury in a murder trial those persons admitting a "disbelief" in capital punishment.[45] A similar result was reached in *State v. Griggs*,[46] decided in 1937, where those prospective jurors who answered the question—"Are you opposed to capital

32. *Id.* at 298.
33. 34 S.C. 49, 12 S.E. 657 (1891), *petition for rehearing denied,* 34 S.C. 579, 13 S.E. 325 (1891).
34. *Id.* at 52, 12 S.E. at 658.
35. 39 S.C. 97, 17 S.E. 446 (1892).
36. *Id.* at 107, 17 S.E. at 449.
37. 90 S.C. 296, 73 S.E. 180 (1912).
38. *Id.* at 298, 73 S.E. at 181.
39. 93 S.C. 195, 75 S.E. 281 (1912).
40. Questions relating to a venireman's views concerning capital punishment were not then, and are not now, specifically required to be asked by statute. See S.C. CODE ANN. § 38-202 (1962).
41. State v. Bethune, 93 S.C. 195, 199, 75 S.E. 281, 282 (1912).
42. 149 S.C. 439, 147 S.E. 441 (1929).
43. 34 S.C. 49, 12 S.E. 657 (1891), *petition for rehearing denied,* 34 S.C. 579, 13 S.E. 325 (1891).
44. 90 S.C. 296, 73 S.E. 180 (1912).
45. State v. Robinson, 149 S.C. 439, 442-43, 147 S.E. 441, 442-43 (1929).
46. 184 S.C. 304, 192 S.E. 360 (1937).

punishment—that is, electrocution?"[47]—in the affirmative were excused for cause.[48] In *State v. Lewis*,[49] the court in 1952, affirming both the conviction and the sentence, held that it was proper to seat a juror who on previous occasions had stated that he was opposed to capital punishment but who on the present occasion declared that he was not opposed to such a penalty. The court re-emphasized that the qualification of the juror was largely within the discretion of the trial judge absent a clear showing of abuse of that discretion.[50]

In *United States v. Puff*,[51] the appellant claimed error in that several jurors had been excused for cause after merely replying, "I do," when asked if they had scruples against capital punishment. The defendant objected because these jurors were "summarily excused by the Court *without the slightest probing into the character or strength of their convictions, doubts, or scruples.*"[52] The Second Circuit Court of Appeals, in affirming both the conviction and the sentence, found no error in the conduct of the *voir dire* examination on the grounds that, even if such failure to probe were error, it was harmless error, because the jurors in question were excused and the jury which sat was an impartial jury.[53] The continuing process of redefinition and reinterpretation of what constitutes adequate grounds for a challenge for cause as it relates to capital punishment was, however, highly evident. The language used by the defendant in stating his objection to the exclusion for cause of those prospective jurors with apparently superficial scruples against capital punishment was significantly suggestive of the phraseology later employed by the courts in the *Witherspoon*[54] and the *Sears*[55] decisions.

If the *Puff* decision was indicative of the direction which the courts would take, the South Carolina case of *State v. Britt*[56] reaffirmed established law. In reasserting that it is the duty of

47. *Id.* at 311, 192 S.E. at 363.
48. *Id.*
49. 221 S.C. 491, 71 S.E.2d 308 (1952).
50. *Id.* at 495-96, 71 S.E.2d at 310.
51. 211 F.2d 171 (2d Cir. 1954).
52. *Id.* at 186 (emphasis added).
53. *Id.* at 186.
54. 391 U.S. 510 (1968). "Thirty-nine veniremen . . . were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment." *Id.* at 514-15.
55. 74 Cal. Rptr. 872, 450 P.2d 248 (1969). "We are left entirely to speculation in seeking to determine *why* each juror felt his opposition to the death penalty would make it unfair or difficult for him to serve as a juror." *Id.* at 880, 450 P.2d at 256.
56. 237 S.C. 293, 117 S.E.2d 379 (1960), *cert. denied*, 365 U.S. 886 (1961).

the trial judge to assure himself that every juror is unbiased, fair, impartial, and qualified,[57] the court held that the trial judge in the instant case had made an adequate examination of prospective jurors within the requirements of section 38-202 of the 1952 Code and that there was no abuse of discretion on the part of the court in asking prospective jurors the question—"Are you opposed to capital punishment?"[58] — rather than the question — "Are you conscious of any bias or prejudice either in favor of or against capital punishment?"[59] — as proposed by defense counsel.[60]

*State v. Young*,[61] decided in 1961, was representative of the final step, the culminating thrust, in the cycle of redefinition and reinterpretation prior to *Witherspoon* and *Sears*. In holding that the questions propounded by the trial judge to prospective jurors as to their understanding of the term, "capital punishment," were

57. *Id.* at 305, 117 S.E.2d at 385.
58. *Id.* at 304, 117 S.E.2d at 385.
59. *Id.*
60. *Id.* The court held, further, that the trial judge did not abuse the discretion vested in him when he denied defense counsel the right of cross-examination of prospective jurors on the *voir dire*. The court noted that, while defense counsel may be permitted under section 38-202 of the 1952 Code (unchanged in the Code of Laws of South Carolina of 1962) to examine veniremen, it is better practice for the judge to conduct such examinations. *Id.* at 311, 117 S.E.2d at 388. Rule 24(a) of the Federal Rules of Criminal Procedure provides:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

The American Bar Association takes this position on the conduct of the *voir dire* examination:

> A voir dire examination should be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge should initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge should then put to the prospective jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The judge should also permit such additional questions by the defendant or his attorney and the prosecuting attorney as he deems reasonable and proper.

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, APPROVED DRAFT, 1968, § 2.4 (1968).
61. 238 S.C. 115, 119 S.E.2d 504 (1961), *cert. denied*, 368 U.S. 868 (1961).

not an abuse of discretion,[62] the court recognized the necessity for "probing into the character or strength of . . . [the jurors'] convictions, doubts, or scruples."[63] The foundation for *Witherspoon* and *Sears* had been laid.

In *Witherspoon v. Illinois*[64] the Court held:

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[65]

"General objections," "conscientious or religious scruples"—what do these vague abstractions mean in daily practice? In dictum the Court proclaimed that those veniremen could still be excused for cause who "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . . ."[66] But where, as a matter of law, do "general objections" and "conscientious or religious scruples" become "unmistakably clear" expressions of a venire-

62. *Id.* at 121-22, 119 S.E.2d at 507-08. The court's *voir dire* examination of M. Goodwin, Jr., was, in part, as follows:

> Q. Do you know of anything which would embarrass you, if you are chosen to serve as a juror? A. No, sir.
> Q. Are you opposed to capital punishment? A. No, sir.
> Q. You know what capital punishment is? A. I do.
> Q. Well, are you opposed to capital punishment?
> A. Yes, sir.
> Q. Are you opposed to capital punishment? A. I'm not.
> Q. Now, you said yes and you said no. Now, do you understand what capital punishment is? A. I understand what it is.
> Q. What is it? A. Capital punishment is where a defendant is found guilty.
> Q. Capital punishment is provided, I'll explain it to you, in certain cases, for instance rape or murder, if a defendant is found guilty as charged and not recommended to the mercy of the Court, then the punishment provided for in such cases is death by electrocution. That's what is meant by capital punishment. Now, I ask you do you understand what's meant by capital punishment? A. Yes, sir.
> Q. Well, now are you opposed to capital punishment? You know what opposed means? Are you against it?
> A. I'm not against it.
> Q. Well, would you then if the evidence warranted it, would you under those conditions vote for a verdict of guilty if it meant electrocution? A. Yes, sir.
> Q. You would? A. Yes.
> Q. Unless there is some other question, the juror is qualified.

63. United States v. Puff, 211 F.2d 171, 186 (2d Cir. 1954).
64. 391 U.S. 510 (1968).
65. *Id.* at 522.
66. *Id.* at 522 n.21.

man's unwillingness to consider the imposition of the death penalty? How far into the mind of a prospective juror must a court delve before it has satisfied the *Witherspoon* requirements?

It is to this precise question that the court in *People v. Sears* necessarily addresses itself. The trial judge addressed the entire jury panel at the beginning of the *voir dire* examination:

> I will ask now generally if there are any of you presently seated in the jury box that are opposed to the imposition of the death penalty, if under the evidence, it would appear in the exercise of your discretion that it would be a proper judgment.
>
> Any of you have any conscientious scruples or views which would preclude you in what would be termed to be a proper case . . . from voting for the death penalty?[67]

The interrogatory—"Is there anything about the nature of this case that would make it unfair [or "difficult"] for you to serve as a juror?"[68]—was then directed to prospective jurors. The court found reversible error in that, first, none of the excluded jurors stated "unambiguously that he would automatically vote against the imposition of capital punishment . . ."[69] and, second, the questions asked of the prospective jurors were neither probing nor definitive as to the veniremen's willingness to consider the evidence before automatically committing themselves to vote against the death penalty.[70]

The court articulated three standards which the trial court had failed to satisfy.

67. 74 Cal. Rptr. 872, 880 n.3, 450 P.2d 248, 256 n.3 (1969).

68. *Id.* at 880, 450 P.2d at 256. The opinion of the court cites this interrogatory as a "typical question." *Id.* at 880, 450 P.2d at 256. One concrete example cited by the court is as follows: "Is there anything about the nature of the case that would make it difficult *or impossible* for you to serve as an *impartial* juror?" The juror's reply was: "Yes, Your Honor, I think because of the nature of the case and my own personal feeling about capital punishment, I'd like to be excused." *Id.* at 880 n.2, 450 P.2d at 256 n.2.

69. *Id.* at 880, 450 P.2d at 256, *quoting from* Witherspoon v. Illinois, 391 U.S. 510, 515-16 n.9 (1968).

70. 74 Cal. Rptr. 872, 880, 450 P.2d 248, 256 (1969). See People v. Risenhoover, 73 Cal. Rptr. 533, 544, 447 P.2d 925, 936 (1968) where a juror who thought she "probably" had scruples against capital punishment was held to have been wrongly excluded; *In re* Anderson, 73 Cal. Rptr. 21, 24, 447 P.2d 117, 120 (1968) where, to the question—"Do you know of any reason you couldn't be a fair and impartial juror in this case?"—the answer, held unsatisfactory for exclusion under *Witherspoon,* was—"Yes, sir, I do. I don't believe in capital punishment"; and People v. Chacon, 73 Cal. Rptr. 10, 14-15, 447 P.2d 106, 110-11 (1968) where "I don't think so" was held to be an unsatisfactory answer to a capital punishment interrogatory.

> First, the trial judge must delineate the criterion for juror exclusion established in *Witherspoon* to prospective jurors.
>
> Second, the trial judge must specify what will happen to a venireman who meets the *Witherspoon* standards for exclusion.
>
> Third, if the trial judge elects to use the term, "proper case," he must instruct the prospective juror that, in such a jurisdiction, each individual juror has total discretion to determine what may be a "proper" case for imposing the death penalty without guidance from the court or the legislature.[71]

The court reversed the decision of the trial court as to penalty: "According to our understanding of *Witherspoon*, reversal is *automatically required* if a venireman was improperly excused for cause on the basis of his opposition to the death penalty."[72]

The right to trial by an impartial jury comprehends the rejection of those veniremen who are not "willing to *consider* all of the penalties provided by state law."[73] In order to ensure that an accused is not sentenced to death by "a jury uncommonly willing to condemn a man to die"[74]—that is, a jury "[c]ulled of all who harbor doubts about the wisdom of capital punishment"[75]—the Court in *Witherspoon* significantly narrowed the grounds for exclusion for cause of prospective jurors who are opposed in greater or lesser degrees to the infliction of the death penalty. The *Sears* court redefined and reinterpreted what was decided in *Witherspoon* within the context of existing state law and applicable rules of procedure.

As a matter of practice in South Carolina, what would appear to be required, what would at least be sound policy in order to minimize the risk of reversal as to penalty, is the *voir dire* examination of prospective jurors in capital cases to include the following elements:

> First, the term, "capital punishment," should be clearly and intelligibly defined. (The necessity for such defini-

71. 74 Cal. Rptr. 872, 880 n.3, 450 P.2d 248, 256 n.3 (1969).
72. *Id.* at 881, 450 P.2d at 257, *quoting from In re* Anderson 73 Cal. Rptr. 21, 26, 447 P.2d 117, 122 (1968) (emphasis added).
73. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).
74. *Id.* at 521 (footnote omitted).
75. *Id.* at 520.

tion has been adequately demonstrated in cases such as the *Young* case. See note 62 *infra.*)

Second, the code section which prescribes the alternative punishments for the offense charged should be explained to include, where applicable, an instruction emphasizing that the choice between imposition of the death penalty and a recommendation to the mercy of the court is solely within the discretion of the jury without guidance from the court or the legislature.[76] (See text accompanying note 71 *infra*).

Third, the *Witherspoon* requirements for juror exclusion should be articulated.

Fourth, the procedural result of the exclusion for cause of a venireman should be specified.

Fifth, the first four elements should be restated if veniremen are at any time introduced who were not present during the making of the initial remarks to the prospective jurors.[77]

How much time will be required to complete such an extensive *voir dire* examination is certainly a matter for consideration when court dockets are already crowded. Weighed against the possibility of reversal, retrial, and the imposition of the death penalty by a "hanging jury," the time necessary for a more probing examination will, however, be of small consequence.

76. *See generally* State v. Hamilton, 251 S.C. 1, 159 S.E.2d 607 (1968) where the court, by way of dictum, suggested the possibility of *voir dire* inquiry into a venireman's views as to a recommendation that the death sentence not be imposed:

> While we see no abuse of discretion or denial of a constitutional right, we cannot but observe that, in view of the jury's power... to recommend that the death sentence be not imposed, it would (be) a wise exercise of discretion for the judge to inquire of veniremen on the *voir dire* whether they had any opinion which would prevent their making such a recommendation.

*Id.* at 7, 159 S.E.2d at 610, *quoting from* Commonwealth v. Ladetto, 349 Mass. 237, 245, 207 N.E.2d 536, 541-42 (1965).

77. In *People v. Teale,* 75 Cal. Rptr. 172, 450 P.2d 564 (1969), the court said:

> [W]e cannot realistically consider a venireman's response to a question on *voir dire* examination as an hermetically sealed unit wholly unrelated to its context.

*Id.* at 184, 450 P.2d at 576. The court found that its duty was to "evaluate the examination of the challenged venireman 'in the full context and setting of the *voir dire* examination conducted up until the time [the venireman] was excused.'" *Id.* at 185, 450 P.2d at 577. While the general rule here stated applies, the necessity for repeating those remarks which were made prior to a venireman's being called is obvious.

## III. PEREMPTORY CHALLENGE

Although there is nothing in the Constitution which requires that the right of peremptory challenge be extended to the parties in a criminal prosecution, both the federal system and the parallel state systems include statutory provisions for the exercise of such a challenge.[78] The essential nature of the peremptory challenge, inherited from the common law, has been that of one exercised without the necessity of giving a legally cognizable reason for its employment, without judicial inquiry as to why it has been presented, and without being subject to the control of the court.[79]

In *Swain v. Alabama*,[80] in affirming both the conviction and the sentence of death of a defendant indicted for rape, the Court firmly declared that the peremptory challenge is one of the most important rights secured to an accused and noted:

> The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.[81]

The number of peremptory challenges allowed to the parties in a criminal prosecution is governed by statute.[82] Section 38-211 of the Code of Laws of South Carolina of 1962 provides, in part:

> **§38-211. Peremptory challenges in criminal cases.**—Any person who shall be arraigned for the crime of murder, manslaughter, burglary, arson, rape, grand larceny, breach of trust when it shall be punishable as for grand larceny, perjury or forgery shall be entitled to peremptory challenges not exceeding ten and the State in such cases shall be entitled to peremptory challenges not exceeding five.[83]

The power of the legislature of a state to prescribe any number

78. Swain v. Alabama, 380 U.S. 202, 217 (1965).
79. *Id.* at 220.
80. *Id.* at 202.
81. *Id.* at 219.
82. *See* State v. Woods, 189 S.C. 281, 309, 1 S.E.2d 190, 203 (1939).
83. S.C. CODE ANN. § 38-211 (1962). See Rule 24(b) of the Federal Rules of Criminal Procedure for the corresponding federal statutory provision for peremptory challenges.

of peremptory challenges is, however, modified only by the necessity of having enough jurors available.[84]

In *State v. Carson*,[85] an appeal from a conviction for the illegal manufacturing of whiskey,[86] the court decided that the *voir dire* examination of jurors may be conducted not only to develop grounds for a challenge for cause, but also to inform the parties so that they may make intelligent use of their peremptory challenges.[87] The court, in *United States v. Napoleone*,[88] noted further that the *voir dire* examination should be extensive, probing, and a necessary predicate for the effective exercise of the peremptory challenge.[89]

The popular concept of the peremptory challenge, and for that matter, the concept superficially recognized by many courts, has been that of a challenge, broad, sweeping, and unbridled. In the *Swain* case the Court held, as a matter of law, that the Constitution does not require an examination of a prosecutor's reasons for the exercise of his peremptory challenges in any given case.[90] The Court stated, moreover, that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury . . . ."[91] In *State v. Richburg*[92] the court specified that the five peremptory challenges given the state and the ten granted to the defendant under section 38-211 of the 1962 code may be used for any cause satisfactory to counsel or for no cause and that neither the trial judge nor the supreme court would interfere.[93]

In a criminal trial the prosecuting attorney is not, however, the representative "of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . ."[94] The interest of the

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84. Hayes v. Missouri, 120 U.S. 68, 70 (1887). The Court held that the number of peremptory challenges allowed an accused may well vary within different sections of the same state according to the density of the population and the difficulty of obtaining an impartial jury. *Id.* at 70.
85. 131 S.C. 42, 126 S.E. 757 (1925).
86. *Id.* at 43, 126 S.E. at 758.
87. *Id.* at 45, 126 S.E. at 758.
88. 349 F.2d 350 (3d Cir. 1965).
89. *Id.* at 353. This position is reaffirmed by the stand taken by the American Bar Association. See note 60 *supra*.
90. Swain v. Alabama, 380 U.S. 202, 222 (1965).
91. *Id.* at 222.
92. 250 S.C. 451, 158 S.E.2d 769 (1968).
93. *Id.* at 461, 158 S.E.2d at 773.
94. Berger v. United States, 295 U.S. 78, 88 (1935).

state in a criminal prosecution is, therefore, "not that it shall win a case, but that justice shall be done."[95]

Whatever the popular concept of the peremptory challenge may be, the peremptory challenge is not without its limitation. The *Sears* court, delineating the nature of this limitation, makes poignantly clear that a prosecutor who uses "peremptory challenges to accomplish an otherwise constitutionally impermissible result, the impaneling of a jury 'uncommonly willing to condemn a man to die' "[96] "is violating his obligation to assure the defendant a fair trial,"[97] and that such use is itself constitutionally impermissible. Distinguishing the *Swain* case where the Court refused to "hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his [peremptory] challenges *in any given case*,"[98] the *Sears* court continued:

> [I]n light of the *Witherspoon* definition of a capital jury which is "impartial" on the issue of imposing the death penalty it cannot be assumed that a prosecutor who uses peremptory challenges to remove all jurors who have reservations concerning the death penalty is acting on the basis of "acceptable considerations."[99]

In the future a prosecutor's use of the peremptory challenge will, therefore, be more closely scrutinized *against existing constitutional standards and within the scope of the voir dire examination as a whole* to determine whether a constitutionally permissible tool is being used to produce an unconstitutional result.

## IV. Conclusion

"A jury . . . is as human as the people who make it up."[100] "Impartiality . . . is a state of mind."[101]

The process of redefinition and reinterpretation of the jury system as it relates to challenges for cause and peremptory challenges is understandably a continuing search for a still better manner of attaining juror "impartiality." The translation of

95. *Id. at* 88. ABA Canons of Professional Ethics No. 5 provides, in part: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."
96. 74 Cal. Rptr. 872, 881, 450 P.2d 248, 257 (1969).
97. *Id.* at 881 n.5, 450 P.2d at 257 n.5.
98. 380 U.S. 202, 222 (1965) (emphasis added).
99. 74 Cal. Rptr. 872, 881-82 n.5, 450 P.2d 248, 257-58 n.5 (1969).
100. W. Douglas, We the Judges 389 (1956).
101. Irvin v. Dowd, 366 U.S. 717, 724 (1961).

theory into practice remains the arduous task of defining in terms of courtroom practice and procedure what is meant by "impartiality," "general objection," or "conscientious scruple." The totality of these processes is the jury system as it is now interpreted. The system is not perfect. The *Sears* case is representative of only another step toward making the system more nearly so.

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*See Park v. State, 170 S.E.2d 687 (Ga. 1969), and State v. Atkinson, Smith's Adv. Sht., No. 2, Op. No. 19004 (S.C. Jan. 13, 1970); both cases, decided after this comment initially was sent to the publisher, are especially useful in developing rules and guidelines as to the proper scope and depth of *voir dire* examinations.