Judging the Jury

BY CARL HORN III

Background

Sometime in November of 2000 I received a routine "Jury Summons" in the mail, ordering me to appear for state court jury duty on a date in January 2001. Having no court or conferences scheduled for that week, having enjoyed serving on a DWI jury when I was in law school (in 1974 or 1975), and aware that the average length of jury service statewide is less than two days, I decided not to try to get excused.

I reported as directed, along with about 100 others, on January 22. After filling out some papers and watching the instructional film featuring Charles Kurault—which is quite good—I opted for what the jury coordinator called "the quiet room." About 30 minutes later, our handler called out 15 names, including mine. We 15 were handed over to a deputy sheriff, a nice guy with a gun and a good sense of humor, who led us through a labyrinth of connecting hallways to what turned out to be the Criminal Courts Building.

I knew that my plan to spend a day or two on jury duty was in serious jeopardy when I saw James Wyatt and Harold Bender, two prominent criminal defense attorneys, seated at a table with a single client—who looked like he could afford neither of them. Being a perceptive fellow, I realized that two appointed lawyers in a criminal case could mean only one thing: a capital murder trial! I briefly considered running, but knowing the judge and the lawyers, I decided to use my superior powers of persuasion instead.

The judge was Richard Doughton of Sparta. We had a case or two together while I was in the US Attorney's Office which, as best I could recall, we had resolved amicably. He recognized and smiled at me as we were led into the courtroom, which I interpreted as assurance of imminent excusal.

Judge Doughton gave some preliminary instructions—confirming that this was a capital murder case, in which the Defendant, Samuel Mahatha, was charged with killing Captain Stancil of the Mecklenburg County Sheriff's Department—then asked if there was any reason we couldn't serve on the jury for approximately the next four weeks.

Four weeks! I almost tore my rotator cuff raising my hand. At that point, during the next four weeks I had two civil jury trials and over 100 criminal hearings already scheduled. I was also scheduled to be the "duty judge" for two of the four weeks, a responsibility I split with Judge Brent McKnight, handling all requests for search warrants and complaints, unscheduled arrests, grand jury returns, etc.

Before I could state my name, Judge Doughton said, "Yes, Judge Horn." Another good sign, I thought. I respectfully advised His Honor of my multitude of conflicts. Instead of empathy, I was surprised—and that's an understatement—to hear Judge Doughton say, "I don't give work-related excuses, and I can't make an exception for you."

Since this was a capital case, the next step was individual voir dire. For some reason, I was the first of our group of 15—only two of whom were ultimately selected as jurors—to be called into the courtroom for voir dire. That will be an interesting transcript with all four lawyers and the trial judge regularly addressing me, the potential juror, as "Judge" and "Your Honor."

Surely, I reasoned, one side or the other will find a reason to strike me. I had run for Congress in 1984 as a "Reagan conservative," and had remained active in politics for several years after that. Then I had served as Chief Assistant US Attorney for six years, from 1987 to 1993, prosecuting, *inter alia*, James Wyatt's and Harold Bender's innocent clients. Although I consider both James and Harold friends, and I had testified as a character witness in federal court in Nashville, Tennessee, for one of Harold's clients, surely my background as a conservative activist and a prosecutor would get me stricken by the defense.

Then there were my unsettled views on capital punishment. In completing the written questionnaire and during voir dire, I told the lawyers how certain religiously-based opposition to the death penalty had moved me from the "pro" to the "unsure" column. In retrospect, I think the prosecutors doubted the sincerity of my protestations of conscience, considering them a ploy to get myself excused. (They were wrong, but I was one of the jurors leaning toward the death penalty before the trial's sentencing phase.)

The rest is history. I left the courtroom that day in a state of shock, having been advised by my judicial colleague that he would "try" to give me a day's notice prior to the first day of trial. For the next few days, while I hustled to get Judges McKnight, Cogburn, and Mullen to take my court and cover for me, I felt strangely like I had received a sentence and

was waiting for the call to self-report!

Serving On The Jury

By the first day of trial—Thursday, February 1, I think—the contrast between my dread of this horrendous inconvenience and the tremendously interesting experience it turned out to be could not have been sharper. The first noteworthy experience was meeting fellow jurors, this diverse cross-section of people with whom I would be kept in a little room for many hours in the coming weeks. Including our two alternates, there were 14 of us.

Our jury was diverse in every way you can imagine: in age (we ranged from mid-20's to mid-60's); in gender (nine men and five women); in socio-economic and educational backgrounds and, of course, racially. Our jury included three African-Americans, one Chinese-American, and a real character named Starla Cash, who had a Mexican mother and a Native American father and claimed Johnny Cash as "about" her fourth cousin.

More surprising than our diversity, however, was the unity and harmony we felt almost from the beginning. E Pluribus Unum. Paradoxically, although most of us had resisted being chosen, once we were commanded to come together for this serious and solemn purpose—literally to decide if a man lived or died—we experienced an uncommon level of interpersonal warmth and unity. In a short time, we were on a first name basis, sharing personal thoughts and concerns like a group of old friends.

In brief summary, evidence during the guilt or innocence phase proved that Samuel Mahatha went to a Harris Teeter in the UNCC area about 12:30 a.m. on the evening of the murder (his second or third beer run of the day); that he concealed a box of frozen crab legs under his shirt and left the store while his companion paid for the beer; that Captain Stancil, working off duty but in uniform, stopped Mahatha in the parking lot; that another customer arrived and overheard Mahatha and Captain Stancil engaged in a "loud argument" while she walked first to a locked entrance and then around to the open entrance; that Mahatha shot Captain Stancil in the face as this customer was entering the store; that Mahatha removed Captain Stancil's service weapon, a 9 mm Glock handgun, from its holster as he lay on the pavement dying; and that Mahatha ran away to his Grandmother's house, where he and the handgun were both found the next day.

On the basis of this evidence, the State had charged Samuel Mahatha with First Degree Murder based on premeditation and deliberation—which we were instructed needed only to be brief—and/or based on the "felony murder rule," the felony being the theft of Captain Stancil's gun after he was shot; and with Armed Robbery (of the gun).

To prove "premeditation and deliberation," the State pointed to the time between when Captain Stancil stopped Mahatha in the parking lot and the shooting: long enough, the prosecutors argued, to have an argument, and long enough for the other customer to arrive, walk through the parking lot to the wrong door, then walk back around and enter the store. The State also put on evidence that an unrelated, earlier murder had been committed with the same gun. Prosecutors argued that the Defendant killed Captain Stancil to avoid being arrested and found in possession of what was already a murder weapon. (The jury ultimately agreed with the prosecution on "premeditation and deliberation," but did not find the evidence of the other murder persuasive.)

The jury's only question during deliberation on guilt or innocence was whether shooting Captain Stancil, then deciding to steal his gun—which we decided was what had probably occurred—was sufficient to prove "Armed Robbery." (If not, we would have to find the Defendant not guilty of both Armed Robbery and First Degree murder under the felony murder rule.) The defense argued that there must be an intent to rob before the shooting, but the prosecution rejoined—correctly, as it turned out—that this would not be in the judge's instruction on the law.

In a twist I thought a little strange, the judge didn't instruct us one way or the other on this key point. Instead, he simply read us the elements of Armed Robbery, which I wrote down word-for-word. During deliberations, when I read each element aloud, 11 heads nodded or voices spoke in the affirmative. There being no opinion to the contrary, we quickly concluded our discussion, completed and signed the form, and prepared to return to the courtroom to announce our verdict.

The press reported that our jury took only 20 minutes to return a guilty verdict on all counts. Actually, that was an exaggeration. It didn't take us nearly that long! Of the 25 minutes we spent in the jury room, we spent the first ten minutes waiting for the verdict form (having been instructed not to begin our deliberations until we had it), and the last five minutes waiting to return to the courtroom. The actual deliberations took less than ten minutes.

The sentencing phase, as they say, was a whole different ball game. Where the defense had been relegated more-or-less to refuting the obvious during the guilt or innocence phase, the sentencing phase had a different tone and momentum from the start.

While the prosecution had little more of substance to present, the defense had clearly saved its best for last. During our brief deliberation on guilt or innocence, several jurors had questioned why the defense had not put on certain evidence or made certain arguments. The answers came when this evidence was presented and these arguments were made during the sentencing phase.

It should be noted that the prosecution lost its aura of trustworthiness and objectivity in the minds of many jurors—that is, it lost the moral high ground—during the sentencing phase. By unnecessarily harsh cross-examination of sympathetic defense witnesses, a majority of the jury went from regarding the prosecutors as "cool-headed" to seeing them as cold-hearted. (These sympathetic defense witnesses included special education teachers who had taught and tested "Sammy" Mahatha, consistently concluding that he was "borderline retarded" and emotionally disturbed; a pediatrician who testified as an expert on spinal meningitis, which Mahatha had as a young child and can cause brain damage; and the Defendant's twin brother, a decorated army ranger, whose sharp appearance and polite manner was living proof that the Defendant's mental and emotional limitations were probably physiological in origin.)

The bottom line: whereas defense efforts to absolve the Defendant of responsibility for killing Captain Stancil because of his personal limitations or alcohol consumption struck the jury as hollow during the initial phase of the trial, James Wyatt's plea during the sentencing phase that we not "execute a third grader"—the Defendant's estimated "mental age"—rang an increasingly responsive chord.

Jury deliberations following the sentencing phase took a little longer—about an hour—although that was partly due to the lengthy verdict form. The outcome was never

in doubt, although whether we unanimously recommended life, or the Defendant received life because we could not reach a unanimous verdict, was briefly in question.

When we first retired to deliberate on sentence, before we began to address the many aggravating and mitigating factors on the five-page verdict form, I took a poll on which way the jury was leaning on the ultimate question. A show of hands confirmed what I expected: nine for life, three for death.

Rather than discussing the life or death issue further, at that point I turned our attention toward alleged aggravating factors. (You may be unaware, as I was, that aggravating factors in a capital case must be found unanimously and beyond a reasonable doubt, while mitigating factors need only be found by one juror and then only by a preponderance of the evidence.)

Almost immediately, one of the three jurors who had indicated he was leaning toward death spoke up and said, "I'll go for life." As we were discussing mitigating factors—and before the life or death issue was back on the table—the remaining two jurors concurred. Almost as quickly and harmoniously as we had agreed that the Defendant was guilty as charged, we had agreed that life imprisonment rather than the death penalty was the proper punishment in this case.

Observations and Lessons

Attention Span—Being a juror is very different from being a lawyer in the courtroom. Active participation in the trial keeps a lawyer alert and awake. Being a juror is a passive, and even a sleepy experience, like being a student in class again. (Remember that?) Think of a juror as having a limited attention span, especially as the time since the last break increases.

The Schedule—There is a sense of being powerless over your own life and schedule when you are a juror. You are told when to report to the courthouse, then promptly escorted to a little room where you must remain unless and until the judge calls for you. Once you're in the courtroom, you can't even get up to go to the bathroom, for goodness sake! So while you think jurors are hanging on your every word and nuance, scintillated by your cleverness or carefully pondering the evidence, in fact, the juror may be thinking that there are only 15 minutes before he or she can go to the bathroom. For smokers, the urge for a break appears to be even stronger. As a judge, I plan to do a better job keeping a predictable schedule with regular breaks at least every two hours. As a lawyer, you may win more points with the jury by politely reminding the judge that it is time for a break than by one more "brilliant" question or comment.

Critiquing Lawyers (And the Judge)—The jurors with whom I served regularly critiqued the lawyers, and occasionally the judge, not always with utmost respect. Although there was never a violation of the oft-repeated instruction not to discuss "the evidence," that did not prevent commentary on the lawyers' appearance or haircuts, general evaluation of how a particular lawyer was doing, a roll of the eyes to communicate disapproval of something that had been said or done, or a big yawn to indicate, "Boring!" Nor were the judge's statements, facial expressions, and instructions—particularly an instruction he repeated verbatim over and over again—off limits for comment or criticism. The bottom line: if you suspect the jury is talking about you, it's not paranoia. They probably are!

Lawyer Jokes—They tell them. "Did you hear the one about...."

"Talking Down" To The Jury—Avoid it. Although some of our jurors had more education than others, a bright-minded interest in issues of the day and in the trial, and a pervasive "common sense," were the rule rather than the exception. In fact, several jurors asked me different versions of the same question, "Why do lawyers take so many words to say (or prove) something so obvious?"

Typical Juror "Values"—Expensive "jury consultants" notwithstanding, most of the individuals on our jury, irrespective of race or socio-economic background, subscribed to what you might call "traditional American values." Politically speaking, several would have probably identified themselves at one end of the spectrum or the other, but this didn't play much inside the jury room. Therefore, for example, neither the defense effort to portray the Defendant as a pathetic individual who had been abandoned by his mother, as an alcoholic, or as a semi-homeless person (which might be regarded as arguments from the left) nor the prosecution's overly harsh cross-examination of the helping professionals (which might be regarded as an argument from the right) were very successful. Instead, "traditional American values" (not dissimilar from what President George W. Bush has called "compassionate conservatism") led our jury, first, to hold a killer legally and morally accountable, but then to recommend life in light of the Defendant's apparent personal limitations.

Less May Be More—At the expense of violating this very principle, I repeat that jurors question and even resent unnecessary repetition. Serious thought should be given to proving your case, or disproving your opponent's case, as succinctly and efficiently as possible. Of course, the more mundane (a.k.a. boring) the subject matter, the more rigorously this principle should be applied.

Tone Matters—As I mentioned, unnecessarily harsh cross-examination of certain sympathetic defense witnesses caused the jury's impression of the prosecution to shift during the sentencing phase. Quite apart from the truth or falsity of the individual points, the angry tone of the prosecutor's questions probably did as much to help the defense as any of their direct evidence. Present company excluded, remember that jurors are usually laymen, and among laymen at least, how you say something is often as important as what you say.

Conclusion

Although I jokingly referred to myself as in "clinical depression" after being selected to serve on the Mahatha jury, in fact, this turned out to be one of the most professionally interesting and personally fulfilling experiences of my adult life.

At the conclusion of the sentencing phase of the trial, Judge Doughton joined us in the jury room for the first time. As we judges are wont to do, he thanked us for our service, asked if we had any questions, and generally made himself available for small talk for a few minutes. Still in his black robe, at some point he shook my hand, smiled a bit sheepishly, and "apologized" for refusing to excuse me.

I briefly told the good judge what I have written here, to which he responded, "I've always thought it would be really interesting to serve on a jury. I never have."

"Just wait until we summon my next jury panel," I assured my surprised colleague. How much I wish I could deliver on that one! ■

Judge Horn is Chief US Magistrate Judge, Charlotte, North Carolina, and served as foreman of the jury which found Samuel Mahatha guilty of Armed Robbery and First Degree Murder earlier this year, then recommended life imprisonment. These remarks, sharing his unusual experience as a judge on the jury, were originally delivered at a meeting of the American Inn of Court in Charlotte.