

IN THE CRIMINAL COURT OF SULLIVAN COUNTY, TENNESSEE

STATE OF TENNESSEE	*	NO. S50, 556
	*	DEATH PENALTY
	*	
vs.	*	
	*	
SHAWN ANTHONY MULLINS	*	

DECLARATION OF MARJORIE FARGO

MARJORIE FARGO, deposes and states:

1. I am President and Director of Jury Services, Inc. of the National Capital Area and have been so employed since 1982. Located at 1009 Duke Street, Alexandria, Virginia 22314. Jury Services, Inc. is a consulting group of social scientists and lawyers specializing in the study of jury procedures, jury behavior and the pre-trial assessment of community opinion and prejudice toward civil and criminal trial litigants.

2. I have been employed full-time in the field of jury research and trial consultation since 1975. Prior to the incorporation of Jury Services, Inc. I was employed by the National Jury Project, Incorporated, and I served as its vice president. The National Jury Project is a nationwide trial consulting firm that provides social science research support and expert advice to attorneys in civil and criminal trials.

3. I graduated cum laude with a B.A. degree in sociology from the University of Florida, Gainesville and received a M. A. degree in sociology from George Mason University, Fairfax, VA. I was trained in survey sampling, survey design and data analysis during my employment on National Institute of Mental Health (NIMH) grant "Evaluating Southern Mental Health Needs" (1970 - 1974).

4. I am a member of the American Society of Trial Consultants (ASTC) and the American Sociological Association. I served on the Board of Directors of ASTC from 1989-1991, and in 2008 I received a Lifetime Achievement Award from this organization.

5. Some of my publications include "Voir Dire Tips for Jury Selection in Media Cases," Communications Lawyer, Vol. 25-2 Summer 2007; "Postverdict Juror Interviews" Chapter 25 in Handbook of Jury Research, American Law Institute-American Bar Association (1999); "Juror Questionnaires Can Supplement Voir Dire," Trial, Vol. 29, 10, 23 -27, (1993); "Make the Post-Trial Interview Work for You," Criminal Justice, vol. 3, #2, pp. 2-4, 38-41 (Summer 1988); "Post-Trial Interviews with Jurors," Chapter 13 and "Conducting Voir Dire," Chapter 17 in Jurywork: Systematic Techniques, Clark Boardman Company, Ltd. (1983).

6. I have been qualified as an expert to testify in pre-trial hearings on jury selection procedures in Federal and state courts in several states, including Alabama, California, Florida, Georgia, Maryland, Mississippi, North Carolina, Tennessee and Texas. I have had my affidavits on jury selection procedures accepted as that of an expert in many other states although I was not called to testify in those cases.

7. I have lectured and conducted seminars on *voir dire* and jury selection procedures and jury behavior for bar associations and public defenders in the U. S. and Canada and for other legal education programs such as the Association of Trial Lawyers of America (ATLA) National College of Advocacy, the National Institute for Trial Advocacy (NITA), the Practising Law Institute (PLI), and the Inns of Court Programs.

8. I have been retained as a consultant on jury selection procedures and jury behavior in over 500 criminal and civil cases. My firm has been retained both by plaintiff and defense counsel in civil litigation, and by counsel for both the government and defense in criminal cases. I have personally assisted defense counsel in capital cases since .(See CV attached to this affidavit).

9. My firm has been appointed by the court to assist defense counsel in the following capital cases¹ in the State of Tennessee: State v. Joe T. Baker (Sumner & Montgomery Counties,

1. My firm has also been court-appointed in Tennessee for jury selection consultation in a non-capital case: State of Tennessee v. Freddie Morrow (Docket No. 9676), in the Circuit Court for the 19th Judicial District in Robertson

1991 & 1993); State v. James H. Dellinger, Gary Sutton, (Blount County, 1996); State v. Courtney Mathews, (Montgomery County, 1996); U. S. v. Donny Cable, et al., USDC M.D. Tennessee (Nashville, 1997); State v. Paul Dennis Reid, Jr., (Montgomery County, 1998); State v. Paul Dennis Reid, Jr. (Davidson County, 1998 & 1999); U.S. v. Antonio Carpenter, USDC W.D. Tennessee (Memphis, 1999); State v. Antonio Carpenter, (Fayette County, 1999), State v. Michael Lee McCormick (Chattanooga, 2000), State v. George Carlton Hyatte (Roane County, 2008) and State v. Chinu U. Kim (Montgomery County, 2009). In addition we assisted pro bono for the defense in Tennessee v. Ralph Cozzolino (Chattanooga, 1980).

10. Other jury consultants have been appointed in the following capital cases in Tennessee:

- A. Patsy Weber, M.S., Weber Trial Consulting (Memphis, TN): Tennessee v. Tony Carruthers (Shelby County, 1996); Tennessee v. Thomas Jerome Elders (Knox County, 1997); Tennessee v. William P. Torres (Knox County, 1997); Tennessee v. Karen R. Howell (Greene County, 1998); Tennessee v. Randy Blakeney (Knox County, 1998); Tennessee v. Anthony T. Jones (Knox County, 1998); Tennessee v. Michael Jason Roberts (Knox County, 1998); Tennessee v. Randall Best (Monroe County, 1998); Tennessee v. William Groseclose (Shelby County, 1998); Tennessee v. Antonio Jackson (Shelby County, 1998); Tennessee v. Carl Gayle Hamilton (Knox County, 1999); Tennessee v. Christopher Hein (Knox County, 1999); Tennessee v. Ydale Banks (Shelby County, 1999); Tennessee v. Terrell (Amos) Burgess (Shelby County, 1999); Tennessee v. Preston Carter (Shelby County, 1999); Tennessee v. Jason Garner (Shelby County, 1999); Tennessee v. Anthony Perry (Shelby County, 1999); U.S. v. Robert L. Carpenter, USDC W.D. Tennessee (Memphis, 1999).

- B. Charles Bebber, Ph.D. (Morristown, TN): Tennessee v. Billy Ray Irick (Knox County, 1986); Tennessee v. Danny Branham (Knox County, 1990); Tennessee v. David Clorr (Hamblen County, 1992); Tennessee v. Chris Tatrow (Cumberland County, 1996); Tennessee v. Christa Gail Pike (Knox County, 1996); Tennessee v. Thomas Dee Huskey (Knox County, 1999); Tennessee v. Charles Thrasher (Lincoln County, 1999); Tennessee v. Glenn Rogers (Montgomery County, 1999); Tennessee v. Arthur Copeland (Blount County, 2000); Tennessee v. Chris Davis (Davidson County, 2000).
- C. Patricia A. Maffeo, Ph.D. (Knoxville, TN): Tennessee v. Charles Eddie Harman (Montgomery County, 1996) [funds for conducting venue telephone survey as well as jury selection]; Tennessee v. Joseph L. Risner (Greene County, 1998).
- D. Maureen McLaughlin (Athens, GA): Tennessee v. Isaac Eugene Jones III (Hamilton County, 2004) and Tennessee v. Michael Lee McCormick (Hamilton County, 2003;2007).
- E. Denise de la Rue, J.D. (Atlanta, GA): Tennessee v. Kenneth Wayne Campbell (Washington County, 1997).

11. In view of my experience in assisting counsel in capital cases in the state of Tennessee and elsewhere, counsel for *Shawn Anthony Mullins* have asked me to prepare this affidavit in support of his motion requesting funds for the court-appointment of a jury selection expert to assist them in the trial of Mr. Mullins for capital murder and aggravated child abuse and neglect in the 2005 death of Christopher David Smith, a two year old child in Sullivan County, Tennessee. Christopher David Smith was the son of Heather Collins, Mr. Mullin's girlfriend. Christopher was in the care of Mr. Mullins on the evening he sustained a beating that lead to his death. The media reported the prosecution was seeking the death penalty primarily because the "beating was especially heinous, atrocious and cruel in that it involved torture or severe abuse beyond that necessary to produce death."

12. In thinking about jury selection in cases involving emotionally charged issues such as the death penalty, one of the most important factors to consider is the fact that these cases are much different from the typical criminal case such as bank robbery or forgery. In every capital case the potential jurors are informed that in the event of a jury verdict of conviction of first degree/capital murder the jury will also be required to listen to further evidence and deliberate again to decide whether to impose the death penalty, or life without parole.

13. It has been well documented in numerous studies reported in texts such as *JURY WORK: Systematic Techniques* (National Jury Project, 2nd Edition, West Thompson), that jurors have strong feelings about the imposition of the death penalty that are related to religious training and belief, prior experience with crime, beliefs about the criminal justice system and other factors.

14. For many jurors their beliefs about the death penalty tend to be deeply held from childhood. Therefore many jurors enter the courtroom with strong and often fixed beliefs and concerns about these issues that they may have held for their entire adult life. These beliefs are often so deeply seated and strongly held that they are certain to influence jury behavior in a number of significant ways. For example, on such an emotionally charged issue as the death penalty (or issues such as abortion, and the First Amendment) you will find people who can best be described as "abolitionists." These are people whose religious, moral or personal feelings in opposition to the law involved are so strong that they could not serve as jurors.

15. Just as some jurors feel so strongly against the taking of a human life by another person or the state that they could never vote to impose the death penalty against anyone regardless of the circumstances or the Court's instructions, other jurors feel so strongly about crime, in particular the deliberate, intentional, premeditated taking of another's life, except in self-defense or accidental killings, that their beliefs and feelings would consciously or subconsciously impair their ability to ever impose a sentence less than death for a person convicted of capital murder, notwithstanding their honest desire to fulfill their duty as a citizen

by listening to the evidence and their intent to follow the instructions of the Court.

16. Since many jurors hold strong, often fixed preconceived notions about the death penalty, both the prosecution and the defense need to be able to explore juror bias in a more thorough and probing way than in other criminal cases in order to intelligently exercise "cause" and peremptory challenges. Detailed questioning of a juror about his or her religious and moral beliefs regarding the death penalty and life sentence or life without parole, views regarding the nature of the crime charged, unique characteristics of the victim and the defendant, beliefs about the issue of parole, aggravating and mitigating factors is necessary in order to determine whether a juror could keep an open mind and fulfill the legal requirements for jury service in a case involving the imposition of the death penalty.

17. Indeed, the "death qualifying" voir dire is a unique voir dire examination process that is quite different from the type of voir dire examination conducted in any other criminal case. The less experience an attorney has in conducting the death qualification of jurors, the more likely he or she is to benefit from the consultation with a jury consultant with experience in capital cases to prepare and to conduct the voir dire.²

18. In view of the complex requirements of death qualification attorneys need training to help them develop appropriate skills to elicit candid, thoughtful and complete information from prospective jurors in voir dire regarding about their views and to accurately assess a juror's ability to weigh and consider the merit of a life imprisonment and the death penalty. I view the primary role of the jury and trial consultant in a capital case as assisting counsel in three main capacities in fold task in preparing for and conducting voir dire in capital cases :

(a) to work with counsel to develop a juror questionnaire, voir dire questions and voir dire

2/ As noted in the training materials provided at various capital case preparation seminars (e.g. "Voir Dire and Mitigation in Capital Defense," sponsored by the Tennessee Association of Criminal Defense Lawyers (September 24 & 25, 1999); "Defending a Death Penalty Case," sponsored by the Multicounty Public Defender and the Georgia Indigent Defense Council (July 10 & 11, 1998); "Jury Selection in Capital Litigation," sponsored by the New Jersey Office of the Public Defender (August 12 & 13, 1997). See also, "Voir Dire for Capital Trials," by John L. Carroll in *The Champion*, pp. 23-32 (1984) and "Speaking the Truth: Voir Dire in the Capital Case," by John L. Carroll in *The American Journal of Trial Advocacy*, Vol. 3, No. 2 (Fall, 1979).

strategy to elicit jurors' candid and honest views on issues of punishment, criminal justice experiences, and case related media coverage and trial issues;

(b) to assist trial counsel in understanding community opinion toward the nature of the crime the client is charged including opinions about aggravating and mitigating factors and the impact on jurors of exposure to media coverage of the case such that counsel can develop voir dire questions and communication skills appropriate to eliciting candid responses from jurors during the voir dire examination, and

(c) to work in court with trial counsel to formulate appropriate follow-up questions and to evaluate the juror answers and provide guidance to counsel with respect to the intelligent exercise of cause and peremptory challenges.

19. In addition to accomplishing these tasks, my firm also has provided the following types of assistance to trial attorneys in capital cases:

(a) analysis of the strengths and weaknesses of the evidence in the case;

(b) advice with respect to preparation of mitigation hearing, opening statements, closing arguments and general case strategy taking into consideration the nature of the evidence, media coverage and any special circumstances surrounding the case;

(c) qualitative and quantitative analysis of media coverage of the murder, investigation and arrest of defendants with respect to the likely impact of the coverage on juror's prejudgment about the appropriate verdict and sentence in the case;

(d) the design and conduct of quantitative and qualitative community research studies such as focus groups, mock trials and telephone surveys to determine public opinion regarding the case and impact on jury verdict and sentencing preferences;

(e) preparation of affidavits in support of various motions to secure a change of venue or specialized voir dire procedures based on the specific facts and circumstances surrounding the case;

(f) voir dire training sessions with counsel to assist counsel in gaining skill with the death

qualifying voir dire process;

(g) quantitative and qualitative summary and analysis of completed written juror questionnaires to assist counsel in developing the appropriate voir dire strategy for each specific juror;

(h) coordination of the expert and lay witnesses in the mitigation phase of the case; and

(I) post trial interviews with jurors in preparation for re-hearing of sentencing phases or new or additional trials.

20. In the case of Tennessee v. Shawn Anthony Mullins it is my professional opinion that the appointment of a jury consultant would be appropriate. A 2008 national opinion poll indicates there is still significant support for the death penalty in the U.S. A 2008 Gallup survey found that two thirds (64%) of Americans respond “yes” when asked the question “Are you in favor of the death penalty for a person convicted of murder?” The same poll found that almost half (48%) believe the death penalty is not imposed often enough and only a fifth (21%) say the death penalty is imposed too often.³

21. Tabulation of data conducted by my firm over the years from actual juror questionnaires completed by randomly selected prospective jurors in several counties in Tennessee confirm these national statistics. For example a recent tabulation of juror questionnaires of Roane County, Tennessee in connection with a capital case indicated that (41.7%) of the panel believed in the concept of “any eye for an eye” with respect to the death penalty. A similar percentage (40.3%) said that there are certain crimes that “always” merited the death penalty. In addition over three quarters of the panel (76.4%) said they believe the death penalty is appropriate in at least some murder cases, while only (15.3%) indicated they could not

3. <http://www.gallup.com/poll/111931>.

personally impose the death penalty.⁴

22. Some of these prospective jurors voluntarily referenced the murder of a child as an example of the type of case meriting the death penalty. Examples of juror verbatim remarks include statements such as: “If **someone kills a child or abuses a child** or kills just for the thrill of it, they should be put to death,” “In some cases **especially involving children** I believe in capital punishment,” and “I believe a person should have to pay for taking a life, **or abusing a child.**”

23. Child abuse is a very serious problem in the U.S. According to the United States Department of Health and Human Services Administration for Children & Families 2006 Report of Child Maltreatment an estimated 905,000 children were found to be victims of child abuse and neglect based on a rate of 12.1 per 1,000.⁵ This report also stated that 1,530 children died in the U.S. in 2006 from abuse and neglect. While the report indicated that most (82.4%) of child victims were abused by a parent acting alone or with another person, victims abused by non-parental perpetrators accounted for 10.0%. This national data suggest that prospective jurors are very likely to know someone who has been a victim, a witness or accused of child abuse or neglect, or to have been a victim or possible perpetrator themselves. Jurors are also likely to hold strong negative feelings about the perpetrators of child abuse, especially someone who inflicted such abuse on a child that it resulted in the child's as referenced by the juror remarks cited in the previous paragraph.

24. Counsel for Mr. Mullins has provided me copies of some of the print and electronic media coverage of this case that appeared in the *Times News* and the *Bristol Herald Courier*. In addition to containing photographs of the child Christopher and the accused Mr.

4. State of Tennessee v. George Carlton Hyatte, Case No. 13256, Roane County.

5. <http://acf.hhs.gov/programs/cb/pubs/cm06/chapter3.htm#child>.

Mullins, some of the articles contained allegations filed against Mr. Mullen by family members of Christopher's father with Child Services. The media articles say these allegations were to be discussed with Mr. Mullins and Ms. Collins in an upcoming interview with county child protective services scheduled to occur in April— three days after the the child died.. These news stories recount details of the abuse of Christopher attributed to Mr. Mullins including:

- picking the child up by his head
- kicking, throwing and knocking him to the ground
- putting a bucket over his head and striking the bucket as the child walked around
- forcing the child to inhale marijuana and consume alcohol.

Although these were allegations filed by the child's extended family member, in light of the child's death and the murder charges now filed against Mr. Mullin, any perspective juror who had read or heard news broadcasts detailing these allegation and the family's concern about Christopher's maltreatment by Mr. Mullins can reasonably be expected to have reached some conclusions about Mr. Mullins character and credibility as well as potentially formed an opinion about his guilt and potential penalty for the murder charges.

25. Due to the fact that this case involves a child victim and allegations of a history of abuse in addition to the fact that the state seeks the death penalty, I believe this is a case in which counsel could benefit from assistance of a jury consultant. In this case, John Eldridge Esq., counsel for defendant Shawn Mullins requested this affidavit from me regarding the range of fees and expenses that are likely to be involved in order for my firm to provide assistance in this case for the following services:

- A. review of case materials;
- B. consultation with respect to case preparation at the guilt and penalty phases of the trial;
- C. preparation of voir dire questions and a pre-voir dire juror questionnaire;
- D. review and tabulation of data from completed juror questionnaires;

- E. practice voir dire training sessions with mock jurors to prepare for the death qualifying voir dire examination of jurors;
- F. public records check (including blogs, Face book, My space, Twitter and other social networking sites) of potential jurors;
- G. in-court assistance in the selection of a jury.

26. In recent years in those capital cases in which no pre-trial research or voir dire training sessions were involved. on the average the courts have authorized payment to Jury Services, Inc. ranging from \$ 25,000 - \$ 50,000 (plus travel expenses) per case (depending on the number of days of jury selection).

27. Our firm has received court appointed fees ranging from \$ 50,000 - \$ 90,000 (plus travel expenses) in cases involving pre-trial research such as a venue survey or focus group/voir dire practice sessions, as well as review of lengthy jury questionnaires and multiple days of jury selection.

28. Our normal hourly fee rate for the professional services for senior trial consultants with Jury Services Inc. is \$275.00 per hour or higher. In my capacity as president I have authorized a reduction of our fee to the rate of \$ 185 - \$195.00 per hour in state court capital cases in order to provide jury selection and trial assistance to indigent defendants. Our firm would be available to work with defense counsel to provide any of the services outlined above.

Respectfully submitted,

Marjorie S. Fargo

Date: _____