IN THE DISTRICT COURT OF LINCOLN COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. CF-95-104
	)	
JOSHUA D. STUMP,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION TO SUBMIT QUESTIONNAIRE TO PROSPECTIVE JURORS

The Accused is charged with Murder in the First Degree and, if convicted, could be sentenced to death. As such, this case requires great care throughout all proceedings to ensure that he is tried in a manner that does not violate his constitutionally guaranteed rights, that the verdict is certain, and that the death penalty is not imposed in a manner that is discriminatory, capricious, or cruel. Furman v. Georgia, 408 U.S. 238 (1972); Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978).

By granting this motion and requiring each individual drawn for the special venire to complete the questionnaire, this Court will ensure that the specific rights guaranteed to a capital defendant are exercised in a legitimate, meaningful, and time-efficient fashion.

The information derived therefrom will expedite voir dire, ensure proper excusal for cause, promote the judicious use of peremptory challenges, and reduce the likelihood of prejudicial error. Typically in death penalty cases, voir dire is extensive and rather time-consuming. This is obvious given the serious nature involved in proceedings involving the death penalty. The Accused's guilt or innocence as well as potentially his life rests in the hands of

those chosen to sit as jurors. The questionnaire as such will benefit both the defense and the State in ensuring that a qualified jury is chosen.

The use of the proposed questionnaire, by providing more detailed information, will assist defense counsel and the prosecution in the jury selection process which, in turn, will help protect the Accused's right to a fair trial by an impartial jury. This request is designed to facilitate the jury selection by ensuring that more information is available to counsel. Additionally, the advance completion of the questionnaire will benefit both the State and defense counsel by allowing a preliminary review of all potential jurors thus limiting voir dire to more specific grounds of questioning. Most importantly, voir dire on basic information about the venire is eliminated, and the jury selection process is expedited through the use of the attached questionnaire.

For these reasons, the Accused moves this Court to grant this motion and require those chosen to serve on the special venire to complete the attached questionnaire. In the alternative, the defense requests that this Court hold a hearing in which evidence concerning the need for such expansion of the juror questionnaire can be presented, and through which the Court can decide the acceptability of alternative questions.

The failure to order the use of the questionnaire would violate the Accused's rights to due process, to present a defense, to a fair trial, a fair and impartial jury, compulsory process, confrontation of witnesses against him, effective assistance of counsel, and against cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.

Respectfully submitted,

James T. Rowan

James T. Rowan, OBA #7787
Oklahoma Indigent Defense System
Capital Trial Division
P.O. Box 926
Norman, OK 73070-0926
(405) 329-4272
ATTORNEY FOR JOSHUA D. STUMP

CERTIFICATE OF SERVICE

This is to certify that on this 11th day of January, 1996, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid, to the office of Miles C. Zimmerman, Lincoln County District Attorney, P.O. Box 126, Chandler, Oklahoma 74834, and to the office of Barney K. Barnett, Lincoln County Assistant District Attorney, P.O. Box 126, Chandler, Oklahoma 74834.

James T. Rowan

James T. Rowan

IN THE DISTRICT COURT OF LINCOLN COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	**Case No. CF-95-104**
	)	
JOSHUA D. STUMP,	)	
	)	
Defendant.	)	

MOTION IN LIMINE RE: REMORSE

COMES NOW the Defendant, Joshua D. Stump, and moves this Court to prohibit the prosecutor from commenting on the Defendant's lack of remorse. In the first stage, such comment would be an improper comment on his right to remain silent and on his failure to submit to the coercive interrogation of law enforcement or agents of the State of Oklahoma. In the second stage, while remorse may be mitigational, commenting or arguing to the sentencer the Defendant's lack of remorse would amount to a non-statutory aggravating circumstance prohibited by Oklahoma statutory provisions and the state and federal constitutions.

AUTHORITY:

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)
Brecht v. Abrahamson, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)
Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 929 (1976)
Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)
Okla. Stat. tit. 701.10 et seq
U.S. Const. amend. V, VIII, XIV and corollary state constitutional provisions

Respectfully submitted,

James T. Rowan

James T. Rowan, OBA #7787
Oklahoma Indigent Defense System
Capital Trial Division
P.O. Box 926
Norman, OK 73070-0926
(405) 329-4272
ATTORNEY FOR JOSHUA D. STUMP

CERTIFICATE OF SERVICE

This is to certify that on this 11th day of January, 1996, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid, to the office of Miles C. Zimmerman, Lincoln County District Attorney, P.O. Box 126, Chandler, Oklahoma 74834, and to the office of Barney K. Barnett, Lincoln County Assistant District Attorney, P.O. Box 126, Chandler, Oklahoma 74834.

James T. Rowan

James T. Rowan

IN THE DISTRICT COURT OF LINCOLN COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. CF-95-104
	)	
JOSHUA D. STUMP,	)	
	)	
Defendant.	)	

MOTION TO PROHIBIT PROSECUTION FROM EXCLUDING POTENTIAL JURORS WHO EXPRESS RESERVATIONS REGARDING THE DEATH PENALTY AND BRIEF IN SUPPORT THEREOF

COMES NOW the Accused and moves this Court for an order prohibiting the prosecution from systematically excluding potential jurors who express reservations about the death penalty.

In support of this motion, the Accused submits the following:

ARGUMENT AND AUTHORITY

The Sixth and Fourteenth Amendments guarantee to an accused a fair trial by a panel of impartial jurors. *See* Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1659 (1961). When circumstances create the "likelihood or appearance" of bias, the right to due process is denied, Peters v. Kiff, 407 U.S. 493, 502, 92 S.Ct. 2163, 2168 (1972), and our criminal justice system has "always endeavored to prevent even the probability of unfairness." *In re* Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955).

The United States Supreme Court has held that a capital defendant's right under the Sixth and Fourteenth Amendments to an impartial jury prohibited the exclusion of potential jurors "simply because they voiced general objections to the death penalty or expressed conscientious

or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct 1770, 1777 (1967). *See also,* Battenfield v. State, 816 P.2d 555, 558.9 (Okl.Cr.1991). The Witherspoon court explained that "[a] man who opposes the death penalty no less than one who favors it, can make the discretionary judgement entrusted to him by the State and can thus obey the oath he takes as a juror." *supra.*, 88 S.Ct. *at* 1775. The court stated that by sweeping from the jury "all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle,... the State produced a jury uncommonly willing to condemn a man to die." *supra.*, 88 S.Ct. *at* 1776. The court declared further that "a state may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *supra.*

Although the State has the power to challenge for cause prospective jurors in capital murder cases it "does not extend beyond its interest in removing those jurors who would frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 2051 (1987), *citing* Wainwright v. Witt, 469 U.S. 412, 423, 105 S.Ct. 844, 851 (1985).

As a result of Witherspoon and its progeny, "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment... is whether the jurors views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 105 S.Ct. 852. Potential jurors who are excused under this standard are referred to as "Witherspoon-excludables".

The Accused objects to the State going beyond the "Witherspoon-excludables" by using its peremptory challenges to remove every prospective juror who expresses some reservations about capital punishment. Permitting prosecutors to excuse peremptorily every prospective juror who expresses some reservations about capital punishment directly implicates the concerns expressed in Witherspoon. Witherspoon did not turn on the fact that jurors were excused for cause but on the fact that the resulting jury, "[c]ulled of all who harbor doubts about the wisdom of capital punishment - of all who would be reluctant to pronounce the extreme penalty [would be] a jury uncommonly willing to condemn a man to die,... a tribunal organized to return a verdict of death." Witherspoon 88 S.Ct. *at* 1776. The ultimate outcome of a jury organized to return a verdict of death is no less partial when achieved through peremptory challenges than when achieved through challenges for cause; the violation of the Sixth Amendment's guarantee of an impartial jury is just as unconstitutional. The United States Supreme Court concluded in Witherspoon that a state may not entrust the determination of whether a man should live or die to a jury that had been swept of all potential jurors who expressed opposition to the death penalty. *supra.*

The Accused is simply asking this Court to reaffirm the principles of Witherspoon and hold that the State cannot achieve through its use of peremptory challenges what for cause is prohibited under Witherspoon.

It is well-settled that the peremptory challenge is not exempt from scrutiny under the Sixth Amendment. The United States Supreme Court has repeatedly recognized that "peremptory challenges are a creature of statute and are not required by the Constitution." Ross v. Oklahoma, 487 U.S. 81, 89, 108 S.Ct. 2273 (1988). Thus, when a constitutional right

conflicts with the statutory right of peremptory challenges, the constitutional right prevails. *See* Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986); Gray, *supra.*, 107 S.Ct. *at* 2053-55. (State may not use peremptory challenges to violate Equal Protection Clause).

Although a prosecutor is ordinarily entitled to exercise peremptory challenges for any reason that is related to his views concerning the outcome of the case, he may not violate any of the constitutional commands set out in the United States and Oklahoma Constitutions. "[T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon, *supra.*, 88 S.Ct. *at* 1776-77 *n.* 20. Systematically excluding jurors who express reservations regarding the death penalty tips the scales toward death and deprives the Accused of the impartial jury which he is entitled to. *See* Adams v. Texas, 448 U.S. 38, 50, 100 S.Ct. 2521, 2529 (1980). No defendant can constitutionally be put to death at the hands of a tribunal so selected.

It is repugnant to the Unites States and Oklahoma Constitutions to allow prosecutors to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment so as to produce a jury that is uncommonly willing to sentence a person to death.

Witherspoon and its progeny are rooted in the Sixth and Fourteenth Amendments' constitutional right to an impartial jury, a right which goes to the very integrity of our criminal justice system. If this Court allows the State to achieve, through peremptory challenges, what for cause is clearly prohibited under Witherspoon and its progeny, the capital defendant's right to an impartial jury will be rendered meaningless and sanction the abusive use of the peremptory challenge.

WHEREFORE, premises considered, the Accused requests that this Honorable Court prohibit the State from consistently excluding potential jurors who express reservations regarding the death penalty.

Respectfully submitted,

James T. Rowan

James T. Rowan, OBA #7787
Oklahoma Indigent Defense System
Capital Trial Division
P.O. Box 926
Norman, OK 73070-0926
(405) 329-4272
ATTORNEY FOR JOSHUA D. STUMP

CERTIFICATE OF SERVICE

This is to certify that on this 11th day of January, 1996, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid, to the office of Miles C. Zimmerman, Lincoln County District Attorney, P.O. Box 126, Chandler, Oklahoma 74834, and to the office of Barney K. Barnett, Lincoln County Assistant District Attorney, P.O. Box 126, Chandler, Oklahoma 74834.

James T. Rowan

James T. Rowan

IN THE DISTRICT COURT OF LINCOLN COUNTY

STATE OF OKLAHOMA

FILED JAN 12 1996 8:55 am Linda Siler, Ct. Clk. Lincoln Co. Okla. By ____ Deputy

STATE OF OKLAHOMA,	)	
Plaintiff,	)	
-vs-	)	Case No. CF-95-104
JOSHUA D. STUMP,	)	
Defendant.	)	

MOTION TO REQUIRE THE STATE TO PROVIDE VICTIM IMPACT STATEMENTS PRIOR TO TRIAL AND REQUEST FOR EVIDENTIARY HEARING AND BRIEF IN SUPPORT THEREOF

COMES NOW the Accused, Joshua D. Stump, and moves this Court, pursuant to 22 O.S. § 984.1(C) and Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), to require the State to provide written victim impact statements of the immediate family members ten (10) days prior to trial and that this Court hold a pretrial hearing on the admissibility of the specific statements and witnesses.

In support of this motion, the Accused states the following:

ARGUMENT AND AUTHORITY

The United States Supreme Court, in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), held that although the Eighth Amendment erects no per se bar against victim impact evidence, "[i]f in a particular case, a witness' testimony... so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." *supra. at 2612.* JUSTICE O'CONNOR, in her concurring opinion, examined the VIS evidence in Payne in light of the due process requirement of fundamental fairness.

The VIS evidence in Payne involved one witness - the grandmother of the surviving three-year-old victim, who testified that he cried for his murdered mother and sister and did not understand why they didn't come home. JUSTICE O'CONNOR opined that the testimony was not so inflammatory as to render the defendant's trial fundamentally unfair. *supra.*

Based on Payne, it is quite apparent that this Honorable Court has a duty under to Due Process Clause and Article II, § 7 of the Oklahoma Bill of Rights to examine each VIS and witness *in camera* to determine whether the written statements and/or testimony infects the sentencing proceeding as to render it fundamentally unfair.

Due to the lack of guidance by the United States Supreme Court as to what VIS evidence may run astray of the Due Process Clause, this Court must examine each written statement or testimony to ensure that the jury's verdict is not "impermissibly based on passion." *supra. at 2614 (citing Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989)).*

The rules of evidence have not been suspended by Payne to make way for unrestricted VIS evidence in a free-for-all manner. "If [a] person is to be executed, it should be as a result of a decision based on reason and reliable evidence." *supra. (JUSTICE SOUTER, quoting Gholson v. Estelle, 675 F.2d 734, 738 (CA5 1982)).*

WHEREFORE, the Accused respectfully requests that, pursuant to 22 O.S. § 984.1(C), this Honorable Court require the State to provide victim impact statements ten (10) days prior to trial, and further, that this Honorable Court conduct a pretrial evidentiary hearing under Payne v. Tennessee to determine whether any victim impact statements that are proffered by the State are not violative of the Due Process Clause and are reliable and relevant under the rules of evidence.

Respectfully submitted,

James T. Rowan

James T. Rowan, OBA #7787
Oklahoma Indigent Defense System
Capital Trial Division
P.O. Box 926
Norman, OK 73070-0926
(405) 329-4272
ATTORNEY FOR JOSHUA D. STUMP

CERTIFICATE OF SERVICE

This is to certify that on this 11th day of January, 1996, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid, to the office of Miles C. Zimmerman, Lincoln County District Attorney, P.O. Box 126, Chandler, Oklahoma 74834, and to the office of Barney K. Barnett, Lincoln County Assistant District Attorney, P.O. Box 126, Chandler, Oklahoma 74834.

James T. Rowan

James T. Rowan

IN THE DISTRICT COURT OF LINCOLN COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	**Case No. CF-95-104**
	)	
JOSHUA D. STUMP,	)	
	)	
Defendant.	)	

MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE OF JURORS AS FAR AS DEATH PENALTY IS CONCERNED

COMES NOW the Accused, Joshua D. Stump, and requests individual sequestered voir dire of jurors concerning the issue of the death penalty so that his attorney can determine whether or not the jury will give him a fair and impartial hearing on sentencing if he is convicted of First Degree Murder. Individual voir dire is necessary to maximize the likelihood that the members of the panel will respond honestly to questions concerning bias, prejudice, and attitudes about the death penalty, life without the possibility of parole, and life imprisonment. Also, this avoids contaminating unbiased and unprejudiced members of the panel when prejudicial information, such as pre-trial media publicity, is disclosed while the jury panel undergoes voir dire. Further, if other jurors are permitted to remain in the courtroom during voir dire regarding the death penalty, answers given by one juror, in their presence, will be instructive to the audience of potential jurors who await their turn and who wish to sit at all costs.

Further, it is possible that a jury seeing the Court excuse certain jurors because of their beliefs in the death penalty, might think that any adverse feeling toward the death penalty requires excusal. This thought process could easily cause jurors who eventually sit on the jury

to be more inclined to impose the death penalty rather than life imprisonment or life without the possibility of parole. Due process and equal protection require a fair and impartial jury, and individual voir dire of potential jurors on the issue of capital punishment is necessary to ensure the Accused's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution.

Finally, members of the venire panel have been exposed to the arbitrary factor of parole, which has been recently given extensive media coverage. Clearly, what the jurors think about a life sentence or life without parole and whether or not they have heard or read any recent comments in the media are important factors in getting a fair and impartial jury.

WHEREFORE, premises considered, the Accused respectfully requests this Court to grant this motion for individual sequestered voir dire on the issue of punishment.

Respectfully submitted,

James T. Rowan

James T. Rowan, OBA #7787
Oklahoma Indigent Defense System
Capital Trial Division
P.O. Box 926
Norman, OK 73070-0926
(405) 329-4272
ATTORNEY FOR JOSHUA D. STUMP

A F I D A V I T

STATE OF OKLAHOMA)
) ss:
COUNTY OF CLEVELAND)

I, James T. Rowan, being of lawful age and duly sworn upon oath, depose and state that I am the attorney of record for the Accused and that the information contained in this instrument is true and correct to the best of my knowledge and belief; and individual sequestered voir dire on the issue of punishment is necessary so that the Accused might get a fair and impartial jury, a jury not organized to sentence him to death.

James T. Rowan
James T. Rowan

SUBSCRIBED and **SWORN** to before me this 11th day of January, 1996.

Brenda S. Childs
NOTARY PUBLIC

My Commission Expires:

3-8-99
(SEAL)

MICROFILM ROLL # / **PAGE#** 949

CERTIFICATE OF SERVICE

This is to certify that on this 11th day of January, 1996, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid, to the office of Miles C. Zimmerman, Lincoln County District Attorney, P.O. Box 126, Chandler, Oklahoma 74834, and to the office of Barney K. Barnett, Lincoln County Assistant District Attorney, P.O. Box 126, Chandler, Oklahoma 74834.

James T. Rowan

James T. Rowan

IN THE DISTRICT COURT OF LINCOLN COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. CF-95-104
	)	
JOSHUA D. STUMP,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

The trial court is charged with the responsibility of ensuring that voir dire examination of prospective jurors is conducted in such a way that jurors are not prejudiced by pre-trial publicity. First degree murders attract extensive media coverage. It is likely that numerous jurors will remember following news of the alleged murder in the media. Unless individual sequestered voir dire is conducted, it is inevitable that the extensive pre-trial publicity both at the time of the alleged murder and the preliminary hearing, will taint the panel with prejudice precluding the selection of an impartial jury.

In order to determine the effect of pre-trial publicity on each individual prospective juror, it will be necessary to describe in some detail the purported facts of this case. Jurors will have a natural tendency to blurt out other things they may have seen or heard which, whether true or false, would have a prejudicial impact on the panel as a whole.

The prosecutor seeks the death penalty against the Accused. This fact raises additional problems. Qualifying a jury in this death penalty case requires that the jurors be interviewed in an atmosphere free from influence and peer pressure so that they can freely express their opinions. To deal with special circumstances, the courts have resorted to special remedies. It

is recommended that the following standards be adopted in this jurisdiction to govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

(a) **Method of Examination**

> Whenever there is believed to be a significant possibility that individual veniremen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror, with respect to his exposure, shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recorder whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude toward the trial.

(b) **State of Acceptability**

> Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge or cause no matter how slight his exposure. If he has been exposed to and remembers information that will be introduced at trial or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgement will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial.
>
> A prospective juror who has been exposed to and remembers reports of highly significant content of a confession or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

Permitting defense counsel to inquire of jurors individually and outside the presence of other jurors not only allows a deeper probing for prejudice, but also prevents other members of the panel from being coached by answers given in their presence. This procedural device was commended by the supreme court in Nebraska Press Ass'n. v. Stuart, 96 S.Ct. 2791 (1976) wherein the court stated: Indeed, it may sometimes be necessary to voir dire prospective jurors individually or in small groups, both to maximize the likelihood that all members of the venire

will respond honestly to questions concerning bias and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information. *at 2812.*

It is counsel for the Accused's duty to help the court make accurate rulings on issues of law, evidence, and procedure. That the prosecution seeks the death penalty requires that this Court grant individual sequestered voir dire in order to ensure that the Accused receives effective assistance of counsel and a fair and impartial trial. The Louisiana Code of Criminal Procedure at Article 784 provides for individual sequestered voir dire of jurors where there are special circumstances such as pretrial publicity or death penalty issues. The Connecticut Code of Criminal Procedure at Section 858 approves of individual sequestered voir dire -- so does the Texas legislature in death penalty cases. *See* Texas Code of Criminal Procedure *at* Article 35.17. Because this is a death penalty case and jurors must answer questions concerning the death penalty, it is important that the jurors be questioned concerning these issues in a manner that would not be offensive to other jurors or school other jurors in ways to answer questions.

The lawyers for the respective parties should be permitted to conduct the voir dire concerning death penalty and knowledge of the case because high respect of jurors for judges and their position of authority many times causes jurors to feel they must agree with what they think the judge wants them to say. To create an environment where jurors feel free to express their true thoughts and feelings, it is necessary that the lawyers for the parties conduct the voir dire. Where examination of the court is abridged or conducted with leading questions, several cases have reached the conclusion that such examination is an outright denial of a fair and impartial trial. *See, e.g.,* People v. Mordino, 396 N.Y.S.2d 737 (1977). Because the judge is not an advocate and must decide on evidentiary and law issues during trial, it is extremely

important that the judge permit the lawyers to conduct voir dire on these sensitive issues. Also, although it may be unintentional, a judge can, by facial expressions, tone of voice, or even attitude, exert a powerful influence over jurors who view the judge as an authority figure.

The Sixth Amendment right to assistance of counsel has been interpreted to mean the right of effective aid of counsel; Avery v. Alabama, 308 U.S. 444 (1940). The right to a fair trial has been interpreted to include the right to an effective voir dire. Ham v. South Carolina, 409 U.S. 524 (1973) *at 532.*

Counsel for the Accused will be better able to determine whether jurors are fair and impartial if the requested individual voir dire proceeding is permitted. The test for determining impartiality is that questions must be sufficiently probing to disclose prejudices. The bald assurance of a juror's impartiality is insufficient. The common practice of asking leading and suggestive questions is insufficient to probe for possible prejudice. Jurors do not readily agree that they are biased and prejudiced in spite of being so. By asking open-ended questions rather than leading ones, a lawyer for an accused is able to probe the juror and ask meaningful questions rather than suggesting desired answers.

The aforementioned special circumstances require special remedies to be imposed in this jury trial to ensure that a fair and impartial jury is empaneled to try the case. The special remedy which will provide a procedural safeguard of effective assistance of counsel and a fair and impartial trial is individual, sequestered, lawyer-conducted voir dire.

Respectfully submitted,

James T. Rowan

James T. Rowan, OBA #7787
Oklahoma Indigent Defense System
Capital Trial Division
P.O. Box 926
Norman, OK 73070-0926
(405) 329-4272
ATTORNEY FOR JOSHUA D. STUMP

CERTIFICATE OF SERVICE

This is to certify that on this 11th day of January, 1996, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid, to the office of Miles C. Zimmerman, Lincoln County District Attorney, P.O. Box 126, Chandler, Oklahoma 74834, and to the office of Barney K. Barnett, Lincoln County Assistant District Attorney, P.O. Box 126, Chandler, Oklahoma 74834.

James T. Rowan

James T. Rowan