

STATE V. ANDERSON

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I. FACTUAL AND PROCEDURAL BACKGROUND

Frank Winfield Anderson faced charges for armed robbery, conspiracy to commit murder and three counts of murder in the first degree.¹ The judge supervising his trial chose to use a written questionnaire for the jury selection process, a matter left to his discretion by Rule 18.5(d) of the Arizona Rules of Criminal Procedure.² This questionnaire was given to the venire persons on the day they reported for jury duty, and they were told to complete it and return the next day unless called and excused.³ Despite defense counsel's objection and request for oral voir dire to rehabilitate them, the judge dismissed three venire persons for cause based on their responses to two questions concerning the death penalty.⁴ Following Anderson's conviction, he was sentenced to death for each murder, to life with the possibility of parole in twenty-five years for conspiracy, and to twelve and one-half years for armed robbery, to be served consecutively.⁵ On direct appeal, the Arizona Supreme Court reversed his conviction and remanded the case for retrial, finding that the trial court's jury selection process violated the structural requirements of a fair trial.⁶

II. THE RIGHT TO AN IMPARTIAL JURY

In *Witherspoon v. Illinois*,⁷ the United States Supreme Court established that, in a capital case, a criminal defendant's right to an impartial jury under the Sixth Amendment is violated when the trial court excludes venire persons who

1. See *State v. Anderson*, 4 P.3d 369, 372 (2000).

2. See *id.*; see also 17 A.R.S. RULES CRIM.PROC., Rule 18.5(d) (2000).

3. See *Anderson*, 4 P.3d at 373.

4. See *id.*

5. See *id.*

6. See *id.* at 382. The court's opinion also addressed several evidentiary and pleading issues raised by the defendant. As those matters are highly fact-specific and were not instrumental to the court's decision, they are not discussed here.

7. 391 U.S. 510 (1968).

express a merely general objection to the death penalty.⁸ However, the *Anderson* court noted that *Witherspoon* does not prevent exclusion of venire persons who express an unequivocal objection to the death penalty.⁹ The standard to be applied in making this determination was set forth in *Wainwright v. Witt*.¹⁰ There, the Court held that "unmistakable clarity"¹¹ is not necessary to demonstrate a venire person's hostility to the death penalty, and established the proper standard as whether a venire person's views "would prevent or substantially impair the performance of his duties as a juror...."¹² Thus, the critical factor in selecting a jury in a death penalty case is to determine whether or not venire members can set aside their opposition to capital punishment and decide the case fairly and in accordance with the law.¹³ When a venire person expresses an objection to the death penalty, the trial court is duty-bound to examine that person's attitude and determine whether that person can disregard his or her distaste for capital punishment. If not, then the judge must exclude that person.¹⁴

III. THE RIGHT TO ORAL VOIR DIRE

Anderson contended that the trial judge's refusal to allow oral voir dire of the excluded venire persons violated his constitutional right to an impartial jury.¹⁵ The Arizona Supreme Court agreed, finding that the excluded venire persons' questionnaire answers alone were insufficient to determine "whether their attitudes toward the death penalty were so entrenched as to disqualify them from service."¹⁶ The court noted, "*Witherspoon* does not allow the trial judge to dismiss prospective jurors merely for expressing objections, which may turn out to be equivocal, to the death penalty."¹⁷ Oral examination of those venire persons was

8. The *Witherspoon* Court's holding is based on the principle that a jury excluding all those who express only a general objection to the death penalty is "uncommonly willing to condemn a man to die." *Id.* at 521.

9. See *Anderson*, 4 P.3d at 373, citing *Witherspoon*, 391 U.S. at 514. The difference between a "general objection" and an "unequivocal objection" is that a juror is able to disregard the former and decide the case according to the judge's instructions, whereas the latter influences a juror's decision no matter how impartial he or she may try to be. See *id.* at 373-74.

10. 469 U.S. 412 (1985).

11. *Id.* at 424.

12. *Id.*, quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980). The *Anderson* court noted that Arizona established the same standard in *State v. Martinez-Villareal*, 702 P.2d 670, 678 (1985). See *Anderson*, 4 P.3d at 374.

13. The court noted that unlike Illinois, in Arizona the judge is responsible for sentencing a defendant convicted of a capital crime, and therefore *Witherspoon* is not entirely applicable in this state. See *Anderson*, 4 P.3d at 374-75. The court stated that this fact was irrelevant, however, as the *Witherspoon* standard has been adopted in Arizona nonetheless, because a juror's attitudes toward the death penalty could influence his or her determination of guilt or innocence. See *id.* at 375.

14. See *id.* at 374, quoting *State v. Wiley*, 698 P.2d 1244, 1253 (1985), overruled on other grounds, *State v. Superior Court*, 760 P.2d 541 (1988).

15. See *id.* at 373, citing U.S. CONST. AMEND. VI; ARIZ. CONST. ART. II, § 23.

16. *Id.* at 374.

17. *Id.*

therefore necessary, the court held, to determine whether they could set aside their personal views.¹⁸ Otherwise, appellate courts must assume that anyone excluded could have been effectively rehabilitated by oral examination.¹⁹ Because clarifying venire persons' attitudes toward the death penalty is of such primary importance, the *Anderson* court held that a trial judge lacks the discretion to deny a defendant's request for oral voir dire under Rule 18.5(d).²⁰ Furthermore, the court held that "harmless error" analysis is inapplicable when a judge denies oral questioning.²¹ Such an error violates a defendant's right to an impartial jury and creates a structural defect in the trial, requiring reversal.²²

The court took care to state that not all violations of Rule 18.5 constitute fundamental error.²³ For example, had the judge asked appropriate rehabilitating questions himself, or if the questions at issue did not address a "significant issue," the court's ruling could have been different.²⁴ Similarly, if the venire persons had been excluded for cause based on their responses to the questionnaire, but the defendant had failed to object, no error would have been found.²⁵ Likewise, a judge may lawfully exclude venire persons whose questionnaire answers indicate grounds for disqualification not amenable to rehabilitation, such as a relationship to one of the parties.²⁶ Thus, the rule that emerges from *Anderson* is that in capital cases where a questionnaire is used to screen potential jurors, a party has an absolute right to conduct an oral examination of any venire person excluded for cause based on it, so long as further questioning could rehabilitate that person as a juror.

18. *See id.*

19. *See id.*, quoting *Gray v. Mississippi*, 481 U.S. 648, 662-63 (1987).

20. *See id.* at 375-76, citing *State v. Shone*, 945 P.2d 834, 836 (App. 1997). The dissent argued that the language of Rule 18.5(d) indicates that a party has a right to oral voir dire only after the judge has conducted a "thorough oral examination of prospective jurors." *See Anderson*, 4 P.3d at 382 (Martone, J., dissenting). That is, a party may rehabilitate a venire person only after the judge has conducted an oral examination. The majority dismissed this argument by pointing out that even if a judge has such discretion, Rule 18.5(d) still requires judges to conduct a "thorough oral examination" of the venire. *See id.* at 376.

21. *See id.* at 378-79.

22. *See id.* at 379.

23. *See id.*

24. *Id.*

25. *See id.*

26. *See id.*

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