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CHALLENGING JURY PANELS IN A PANDEMIC

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INTRODUCTION:

Anyone who has ever tried a criminal case to a jury knows that the panels of prospective jurors assembled and seated in the courtroom tend to consist of more white people than people of color who are generally represented in comparatively smaller numbers. And it is not particularly uncommon for jurors of color to seek excusal (or be excused peremptorily if not for cause), for a variety of reasons including: discomfort sitting in judgment of another person, distrust of the police (if not the justice system), or perhaps an unwillingness to be part of a process (consisting of mostly non-minority participants), that may well result in the conviction (and incarceration) of a fellow member of his/her race or community.

This is not to suggest that minority prospective jurors have a monopoly on aversion to jury service. Many white people voice (and others look for) reasons (some valid, others suspect), to avoid the responsibility of serving as a fact-finder in a criminal case, whether because they would be more inclined to believe a police officer over a "civilian" witness or they may operate under an assumption of guilt (by force of a formal accusation), rather than upon a presumption of innocence.

When a prosecutor (or conversely, a defense attorney), attempts to strike a prospective juror or jurors on account of their membership in a particular race, the available remedy is for opposing counsel to challenge the proposed strike by making a prima showing of purposeful discrimination in violation of the Equal Protection Clause of the Constitution. (Batson v Kentucky 476 US 79 (1986), People v Allen 86 NY2d 101 [1995], People v Kern 75 NY2d 738 [1990]).

If successful in doing so, the burden then shifts to the striking party to provide a race-neutral explanation (that need not be particularly compelling or persuasive: People v Smouse 2018 NY Slip Op. 02921 [4th dep't 2018]), for seeking to exclude a particular juror. The court must then determine whether the proffered explanation is a pretextual cover for purposeful discrimination. (Puckett v Elam 514 US 765 [1995]).

If so, the strike will be denied and the challenged juror will be allowed to be sworn in as a juror in the case. If the court accepts the explanation offered for the strike as neutral and non-pretextual, the proposed strike will stand and the prospective juror will be excused from service on that trial.

The use of peremptory challenges by a prosecutor to exclude minorities (41 out of 42 prospective jurors) from juries (in six trials of the same murder/robbery case over twenty years), reached epic proportions in Mississippi v Flowers 138 S. Ct. 2228 (2019), where the Supreme Court held that the trial court committed clear error in concluding that the State's peremptory strike of a particular black female juror was not motivated in substantial part by discriminatory intent.

In reaching its conclusion, the majority of the court, in a 7-2 decision, examined the State's pattern of peremptory strikes over the course of five previous trials (two of which were overturned based on evidentiary errors, one reversed on Batson grounds followed by two mistrials due to hung juries). The court found that the prosecutor's use of peremptory challenges to exclude a black female juror and the manner of and time spent questioning four other black candidates (who were also excluded), followed the same discriminatory pattern as the preceding trials. In the court's view, the State, over the course of several unsuccessful attempts to convict the defendant, had engaged in an "unrelenting effort" to exclude black jurors so that the defendant would be tried by as many white jurors as possible.

The dissenting justice, Clarence Thomas, contended that the majority, seemingly overcome by race-based "virtue-signaling," turned a blind eye to the racially neutral reasons offered by the state for striking the black juror. The majority, however, (led by Brett Kavanaugh), was struck by the "cold reality" of jury selection in criminal trials which reflected, in his view, a history of unequal treatment of black and white jurors, thereby re-affirming the goal of Batson to eliminate racial discrimination in the process of picking juries to ensure equal justice under the law.

A similar note was struck in People v Kern 75 NY2d 638 (1990), where the Court of Appeals stated that racial discrimination "has no place in our courtrooms and such conduct (whether by the prosecution or the defense as occurred in that case), is prohibited by the ...Equal Protection Clause (and the Civil Rights Clause) of our state constitution." In the court's view, the discriminatory exclusion of prospective jurors not only deprives citizens of their right and obligation to participate in civic service, but it undermines public confidence in the criminal justice system. And, racial discrimination which results in the EXCLUSION OF OTHERWISE QUALIFIED GROUPS OF CITIZENS violates the Constitution and strikes at the fundamental notions of democracy and representative government.

Many criminal defense lawyers (and others) believe that white, suburban, older jurors tend to be more conservative, law enforcement/prosecution-oriented and are, therefore, more likely to convict, especially where the accused is a minority (and the victim is not). Minorities, on the other hand, are often thought of as being dubious (and in some cases, contemptuous) of law enforcement (whether because of personal experience or general beliefs), and may bring a perspective to jury deliberations that focuses more on evidence of reasonable doubt than proof of the defendant's guilt.

A study of racial composition of jury pools in felony trials in two Florida counties from 2000 to 2010 revealed that juries formed from all-white jury pools convicted black defendants 16 percent more often than they did white defendants, and that the disparity was eliminated when there was at least one black person in the jury pool. (Bayer, Anwar and Hjalmarsson: The Impact of Jury Race in Criminal Trials, 127 QUARTERLY JOURNAL OF ECONOMICS, 1017-1055 [2012])

Of course, theorizing about peoples' proclivities and verdict tendencies based on race, ethnicity or socio-economic background can be a risky business since there are always exceptions to every rule and, as noted in People v Allen supra, 86 NY2d 101(1995), "while generalizing about peoples' traits in order to predict their bias as jurors may be an integral part

of jury selection, there are LIMITS to the practice. And, “the elimination of a potential juror because of generalizations based on race, gender, other status that implicates Equal Protection concerns, is an ABUSE OF PEREMPTORY STRIKES.”

While minority jurors are generally fewer and farther between (unless the trial is in Buffalo City Court and the court has granted the defendant’s request for a city-only jury), the question is whether minority numbers in attendance for jury selection will be even lower in a Pandemic now that jury trials are getting closer to resuming in Erie County.

A recent poll conducted by the National Center for State Courts (NCSC) showed that those LEAST LIKELY to report for jury duty during the pandemic were BLACK WOMEN, HISPANIC WOMEN and OLDER WHITE WOMEN. Those MOST LIKELY to appear were younger white men, conservative white men and white men without a college degree. (Article by Cara Bayles: Can You Get a Fair Trial During the Pandemic?” law360.com 8/30/20).

So what is defense counsel to do if there are few, if any minorities on his or her jury panel? One option is to forge ahead with voir dire and hope that you can select a jury of six (in the case of a misdemeanor) or 12 (for a felony) people who are: fair and open-minded, able to resist rushing to judgment, willing to consider your arguments and deliberate upon the law and facts without being bullied by other jurors, and never lose sight of the paramount principles of presumption of innocence and the prosecution’s never-shifting burden of proof beyond a reasonable doubt.

Another option is to consider CHALLENGING THE JURY PANEL. If counsel does so, he/she must be mindful of the requirements as to timing (BEFORE jury selection begins), form (IN WRITING) and substance (i.e. a factual showing that the PROCESS by which prospective jurors were selected violated his/her DUE PROCESS (and/or equal protection) rights to a trial by a fair and impartial jury selected from a representative cross section of the community by INTENTIONALLY OR SYSTEMATICALLY EXCLUDING A SUBSTANTIAL AND IDENTIFIABLE GROUP OF PEOPLE. (Duren v Missouri 439 US 357 [1979], Taylor v Louisiana 419 US 522 [1975], Peters v Kiff 407 US 493 [1972]).

RELEVANT NEW YORK STATUTES: CPL 360.15 and JUDICIARY LAW ART. 500:

CPL 360.15:

1. A challenge to the panel is an objection made to the entire panel of prospective trial jurors returned for the trial of the action and may be taken to such panel (or any additional panel that may be ordered by the court).

Such a challenge may be made ONLY BY THE DEFENDANT and ONLY ON THE GROUND that there has been SUCH A DEPARTURE from the requirements of the APPROPRIATE LAW (Judiciary Law Article 500), in the DRAWING OR RETURN of the panel as to result in SUBSTANTIAL PREJUDICE to the defendant.

2. A challenge to the panel MUST BE MADE BEFORE THE SELECTION OF THE JURY COMMENCES, and, if not, such challenge is DEEMED to haven been WAIVED.

Such challenge MUST BE MADE IN WRITING (but see People v Parks 41 NY2d 36 [1976]), setting forth the FACTS constituting the ground(s) of the challenge.

If such facts are DENIED by the People, witnesses may be called and examined by either party. All issues of fact and law arising on the challenge must be TRIED AND DETERMINED by the court.

If a challenge to the panel is ALLOWED, the court must DISCHARGE that panel and ORDER the RETURN of ANOTHER PANEL.

JUDICIARY LAW (JL) SECTION 500:

Article 500 of the Judiciary Law states that it is the policy of this state that all litigants in the courts of this state entitled to a trial by jury SHALL HAVE the right to grand and petit (trial) JURIES selected at RANDOM from a FAIR CROSS SECTION of the COMMUNITY IN THE COUNTY (or other governmental subdivision) wherein the COURT CONVENES; and that

ALL ELIGIBLE CITIZENS SHALL HAVE the OPPORTUNITY to serve on grand and petit juries in the courts of this state, and SHALL HAVE an OBLIGATION to serve when summoned for that purpose, unless excused.

Under the Judiciary Law, grand jurors shall be drawn at random from the list of persons qualified as jurors in the county. (See JL 501, 509: [qualification of jurors]; 510: qualifications: 1.US citizen and resident of the county, 2. not less than 18 years old, 3. not convicted of a FELONY, 4. able to understand and communicate in the English language.

SOME CASES INVOLVING CHALLENGES TO THE JURY PANEL:

Case law addressing statutory and constitutional challenges to jury panels based on alleged violations of JL 500 and/or the constitution suggests that successfully persuading a court to strike an entire jury panel is no easy task that requires more than pointing out the paucity or absence of minority faces in the courtroom.

In People v Shedrick 104 AD2d 263 (4th dep't 1984), the Fourth Department rejected the defendant's argument that the three-district system of drawing jurors in Steubenville County violated JL 500 and the Due Process Clause of the Constitution.

The defendant was tried and convicted of Murder 2d degree arising from a home invasion in which he bludgeoned an elderly couple who had returned unexpectedly and found him inside stealing property.

On appeal, he argued, inter alia, that he was indicted by an illegally constituted grand jury and improperly convicted by a trial jury that was drawn by a process that deprived him of a jury that represented a fair cross-section of the entire county because the juries consisted only of prospective jurors drawn from a particular locale (Hornell) instead of also including residents of Bath NY (where the crime occurred) and Corning New York.

The court noted that in 1904, the Steubenville County Board of Supervisors had created the tri-district jury system pursuant to state enabling legislation that permitted counties to adopt jury districting plans that would be more convenient for county residents (e.g. if the County Court was sitting in Bath, prospective jurors who resided in the other two districts would not have to travel cross county for jury service).

Although county authority to create such districts was repealed in 1944, the court found that the new state legislation did not render the Steubenville County system to be illegal because it did not expressly (or by implication), abolish existing districts that had been lawfully created.

The defendant also argued that the districting system violated JL 500's requirement that jurors be drawn at random from from the ENTIRE COUNTY. The court rejected this argument, holding that section 500 requires only that juries be selected from a fair cross section of the community IN (rather than OF) the county or other governmental subdivision in which the court convenes. (In this case, although the defendant was arraigned in Bath (which held just under one-third of the county population), where the crime occurred, he was tried in Corning (where 43% of the overall population resided), after the court denied his motion for a change of venue to an entirely different county.

The court also noted that the district-system comported with JL 500, the stated purpose of which is to promote a fair, efficient and economical system of jury selection. And, since the statute did not, as noted above, undo district systems that were lawfully instituted, the court declined to read section 500 as abolishing such practice.

DUE PROCESS:

The defendant contended also that the Steubenville County selection system violated the Sixth and 14th Amendments to the Federal Constitution because the juries were NOT selected from a group of people that reasonably represented a fair cross-section of the community. (citing, inter alia, Duren v Missouri supra, People v Parks 41 NY2d 36 [1976] and People v Guzman 60 NY2d 403 [1983]). The deliberate exclusion of a particular community group or class of persons, he argued, violates the constitutional right to a jury trial. (People v Parks supra at p. 42).

The court stated that in order to meet his PRIMA FACIE burden of demonstrating that a SUBSTANTIAL and IDENTIFIABLE segment of the community was not included in the jury pool, the defendant had to show that the PROCESS used to select jurors SYSTEMATICALLY EXCLUDED that group from service.

In rejecting the defendant's argument, the court noted that while the district system resulted in a less-than-full-county jury draw, there was no showing that a DISTINCTIVE GROUP or CLASS of people (other than more residents of the county), was excluded. (citing Duren v Missouri 439 US 357 supra at p. 364). The defendant made no claim, for example, that jurors from Bath were in any way (e.g. ethnically, economically or politically), different from residents of the other districts, or that any alleged disparity was reflected in the jury pool. (citing People v Waters 123 Misc2d 1057 [Suffolk County Court 1984]. Without such a showing, the court concluded, there was no basis to conclude that the jury selection system in that county was constitutionally infirm.

Such a claim (systematic exclusion of African Americans and Hispanics from the jury pool) was advanced in People v Henderson 128 Misc2d 360 (Buffalo City Court 1985).

The defendants argued that the ERIE COUNTY selection system which draws prospective jurors from all of Erie County for Buffalo City Court criminal trials (as with trials in superior court), unlike other local city, town and village courts (which for the sake of convenience, limit their venires to local residents), systematically and dramatically reduced the pool of available minority jurors to a point that their numbers were not fairly representative of their numbers in the community.

In support of their position, the defense called a statistician who testified that at that time, African Americans over age 18 represented 23% of the city's population and only 9% of the county-wide population. Consequently, they were available 61% less frequently than they would be if a CITY-ONLY jury system was used. (In 2020, African Americans represent about 36.53% of the city population: [i.e. 93,185 out of 254,291 people] and 12.9% of the county population: [i.e. 93,185 out of 1,124,400 people.]. In contrast, white people represent 47.1% of the city population and 75% of the county population.] (see world population review.com).

It was also established (by testimony from the Erie County Commissioner of Jurors) at the hearing in the Henderson case that changing over from a county-wide to a city-only drawing of jurors was as simple as pressing a key on a computer. It was explained, however, that Buffalo City Court used county-wide juries to promote the policy of a fair, efficient and economical system by way of a CENTRALIZED JURY POOL inasmuch as Buffalo City Court (unlike the other city, town and village courts) is located right across the street from the downtown jury assembly office, and it conducts business DURING DAYTIME HOURS (unlike many justice courts which work at night).

The court, citing People v Shedrick and People v Guzman supra, held that while the county-wide system resulted in fewer minorities in the panel, it was not indicative of a system that either targeted them for exclusion or systematically excluded them from service, especially where the commissioner showed that the process was reasonably related to a legitimate state purpose (of maintaining a centralized jury selection system that was fair, efficient and economical).

In the court's view, African Americans and Hispanics were not excluded on account of a discriminatory purpose (i.e. to exclude them on account of their race), but rather, as an inadvertent consequence of the county's efforts to maintain a centralized jury pool and because they happened to be represented in greater numbers in the city as opposed to the county. (citing Duren v Missouri supra). (By the same reasoning, a commercial fisherman who fishes in locations where schools of fish are concentrated is likely to catch more fish of a particular species than by casting a wide net all over the lake).

It is worth noting that since the late 1990's (after Johnnie Cochrane made a public pronouncement after the Cynthia Wiggins case about the meager numbers of minorities in the jury pool), that criminal defendants in Buffalo City Court can request and receive a city-only drawn jury. The Judiciary Law has also EXPANDED THE LIST OF SOURCES from which jurors' names are drawn to include: utility subscribers, licensed operators and registered owners of motor vehicles, state and local taxpayers, persons applying for or receiving family assistance, medical assistance or safety net assistance, recipients of unemployment benefits and volunteers for jury service (who have filed their names and addresses with the commissioner).

While a city court can provide a city-drawn jury, what it cannot do is compel one. In Matter of Ogelsby v McKinney 7 NY3d 561 (2006), the Court of Appeals affirmed the Appellate Division's ruling (28 AD3d 153 [4th dep't 2004]), which granted declaratory relief (converting the Article 78 proceeding to one for declaratory judgment) to the Onondaga County Commissioner of Jurors and the District Attorney, holding that JL 500 does NOT MANDATE a city-only jury for criminal defendants tried in the City Court of Syracuse.

The Court held, as a threshold matter, that an Article 78 proceeding was inapplicable because the city court judge, in striking the panel and directing that it be replaced by a city-only jury, did not lack jurisdiction to act or exceed his authority. (citing Matter of State of NY v King 36 NY2d 59 [1975]).

As to the merits, the Court stated that while JL 500 does not COMMAND that all juries be selected county wide, it is the norm to which exceptions are permissible. For example, the Office of Court Administration (OCA) permits towns and villages, as noted above, to draw from lists of residents of their own geographical areas (22 NYCRR 28.7[a]) which spares a resident of one town (e.g. Clarence) from having to travel across the county (at night) for a trial in the town of Collins. Village courts can also draw jurors from lists from the town in which the village is situated. (No similar rule was provided for city courts located near the courts of county-wide jurisdiction).

In the Court's assessment, the Commissioner of Jurors in Ogelsby violated no law or regulation by providing a panel drawn from the county as a whole for a City Court trial. The court also rejected the argument that the procedure violated the criminal defendant's constitutional right to a jury drawn from a fair cross-section of the community. (citing Taylor v Louisiana 419 US 522 [1975]). And, while a defendant is entitled to a jury that is randomly drawn from a fair cross section of the community, he/she is not deemed to be entitled of a jury of any particular composition (Id. at p.530).

The Court also stated that it was aware of no authority suggesting that the "community" from which a jury is selected must be IDENTICAL to the area over which the (trial) court has jurisdiction, nor does logic or fairness (viewed in terms of jurors who live near the defendant) support such a requirement.

A possible adverse consequence of requiring city-only juries for City-Court criminal cases, the Court noted, could be the diversion of city residents from felony trials in County and Supreme Courts which draw from county-wide juries. (Just how realistic a concern this would be is questionable given the comparatively small number of jury trials conducted in City Court, even before the Pandemic. It might also be argued that the need for city-only jury pools is greater for city defendants on trial for felonies allegedly committed in the city where the consequences of a conviction are that much greater).

In People v Parks supra 41 NY2d 36 (1976), the Court of Appeals rejected the defendant's constitutional challenge to a provision (JL 599 [7]) which (under then-existing law) allowed women to be exempted from jury service upon an affirmative request to the Commissioner of Jurors (after receipt of the jury summons) for relief from duty. The issue, as the Court framed it, was whether the statute (which was subsequently repealed in light of Taylor v Louisiana 419 US 518 [1975]), resulted in the SYSTEMATIC EXCLUSION of women from the jury panel.

The defendant, citing Taylor supra, made an oral motion (which the court entertained without objection), to dismiss the panel as violating his right to a jury drawn from a fair cross section of the community. The trial court, relying in part on a memo from the Administrative Judge, that women, according to court statistics, represent 33% percent of jury panels in Nassau County, denied the defendant's motion.

In Taylor supra, the US Supreme Court struck down a provision of a Louisiana law which prevented women from serving on a jury at all UNLESS they had previously filed with the clerk a WRITTEN REQUEST to be subject to jury service. (Here, by contrast, women were summoned but could be exempted upon request).

The Court in Taylor held that while the law did not disqualify women from service, in operation, its SYSTEMATIC IMPACT was that only a VERY FEW WOMEN (significantly disproportionate to the overall number of eligible women in the community), were called for jury duty. The court observed that "since the Sixth Amendment entitles a criminal defendant to a jury drawn from panels representative of the community, ... it is no longer feasible to hold that women as a

class may be excluded or given an exemption BASED SOLEY ON (GENDER) if the CONSEQUENCE is that criminal jury venires are ALMOST TOTALLY MALE. (419 US at p.533).

The court in Parks held that the defendant (unlike in Taylor), failed to establish that the exemption for women in the Judiciary Law at that time resulted in the SYSTEMATIC EXCLUSION of women from the jury pool. The question, in the court's view, was NOT whether the statute was unconstitutional on its face, but whether its APPLICATION resulted in the exclusion of women so as to create all-male juries. Since women jurors in Parks were summoned to serve (and could only be exempted upon an affirmative request to be excused), and were found to represent a third of the panels, it could not be said that they were systematically excluded.

GRAND JURY:

In People v Guzman 60 NY2d 403 (1983), the defendant argued that he was indicted by an illegally constituted Grand Jury and convicted by a trial jury drawn from a pool that systematically excluded Hispanics in violation of his DUE PROCESS and EQUAL PROTECTION rights under the Constitution.

The process in Kings County (not unlike JL 509, 510, 513, 516, 517, 518), commenced with a random computer selection (described as "race-blind"), of a pre-determined number of prospective jurors who were summoned to report to the commissioner's office to be examined with respect to their qualifications for jury service . Recipients who answered the summons were sent a questionnaire (seeking pedigree information and information regarding prior criminal convictions). An oral interview of prospective jurors is then conducted to verify their answers.

Anyone deemed not qualified (e.g. foreign citizen, too young, prior felon, not of good character [old rule since removed), was excused and those deemed qualified were finger-printed on "race-neutral" cards (presumably to verify the absence of felony convictions) . Their names were then placed in a MASTER POOL and later drawn from a sealed drum as needed.

The defendant argued that this process resulted in a systematic under-representation of Hispanics from the pool. The trial court denied his motion to strike the panel, and the Appellate Division affirmed, finding that the defendant failed to establish systematic exclusion.

The Court of Appeals affirmed, holding that the defendant had not met his PRIMA FACIE BURDEN of establishing that a substantial and identifiable segment of the community (here, Hispanic people), was not included because the process used to select grand jurors "systematically excluded that group from service."(citing Peters v Kiff supra).

The People did not dispute that Hispanics constituted a substantial and identifiable group, nor did they contest their under-representation on the panel. What they argued, however, and what the Court accepted was that their low numbers were NOT the result of any systematic exclusion inherent in the process of drawing jurors, (all prospective jurors, regardless of race, were sent summonses), but because Hispanics responded in lower numbers to the questionnaires, or demonstrated difficulty understanding English during the interviews, and many Hispanic women sought to be excused on account of child-care responsibilities.

EQUAL PROTECTION:

The court noted that a prima facie showing of an equal protection violation is established by showing that the under-represented group is a recognizable, distinct class that has received disparate treatment under the law. A substantial degree of such under-representation over a significant period of time can be shown by a statistical analysis of disparities between the group in the total population and the proportion of that group on the jury lists.

A showing that the selection process is susceptible of abuse or is not racially neutral can, according to the Court, support a PRESUMPTION OF DISCRIMINATION as shown by statistical analysis (Rose v Mitchell 443 US 545 [1979]). A prima facie case can be made out without explicitly proving that such discrimination was caused by systematic exclusion. (Duren v Missouri supra). As with challenges to individual jurors under Batson v Kentucky supra, once a prima facie showing of discrimination has been established, the opponent must show that the under-representation was due to non-discriminatory factors or by permissible race- neutral selection criteria.

The Guzman court held that while the defendant had made out a prima facie case in support of an Equal Protection violation, the People established that the under-representation of Hispanics on the grand jury and trial jury was due, not to the process by which jurors were summoned, but to their low response rate to the summonses, problems with the English language and issues related to child care (i.e. non-discriminatory factors). In short, the selection process was deemed to be race-neutral and the low representation of Hispanics was not found to be the result of purposeful discrimination. (See also People v McLellan 49 AD3d 1203 [4th dep't 2008]).

FINAL THOUGHT:

As is evident, it may well be no easy lift to persuade a court (especially one that may be champing at the bit after a year of no jury trials, and ever mindful of standards and goals) to dismiss an entire jury panel which may, (because of lingering COVID concerns), be smaller in number than before the Pandemic.

On the other hand, if the panel that has been summoned is devoid of minority representation altogether (or is very small in proportion to its representation in the community), counsel may want to come prepared with a written motion at the ready to challenge the panel and hopefully get a hearing to determine what, if any steps the Commissioner of Jurors Office has taken to ensure that minorities, who reportedly are more likely to contract and die from COVID-19 than non-minorities* (and who may, therefore, be even less likely to come to the courthouse and congregate in a jury room), are fairly represented in the jury pool.

(*See article by Carlos Del Rio MD: COVID-19 and its Disproportionate Impact on Racial and Ethnic Minorities in the United States: CONTAGION, August 20, 2020; contagion live.com).

Under these unusual circumstances, procedures that may have previously qualified as non-discriminatory before may not pass muster now, especially where the result is the absence of a substantial and identifiable group of people from the jury panel. And, while having members of of one's own community in the venire cannot guarantee a favorable outcome (ultimately, that should be determined by the quality and persuasiveness of the evidence), knowing that one's fate will be in the hands of at least some people to whom he/she can relate may be cause for hope for a chance of leaving the courtroom not in handcuffs when it's over.