Jury Selection and Attorneys as Agents of Their Clients

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Who has the final say about whether to strike a prospective juror – the defendant or his lawyer? That's the question addressed by the court of appeals today in *State v. Freeman*.

The defendant in *Freeman* was charged with murder. During jury selection, the defendant and his attorney disagreed about whether to use a peremptory strike on a prospective juror. The attorney wanted to keep the juror, in part "because I generally don't like using my last strike when we don't know who else we're going to get." The defendant wanted to strike the juror.

Defense counsel informed the trial judge of the impasse, and the judge said "I don't see how that's my issue. You consult with your client and you decide how to proceed." The lawyer decided to keep the juror. The case proceeded, the defendant was convicted, and he appealed. The court of appeals held that when a lawyer and a client reach an impasse over a tactical decision, the client's wishes must control. Because the defendant's wishes were overridden by the lawyer in *Freeman*, the court concluded that the defendant was effectively denied his full complement of peremptory challenges. Under *State v. Locklear*, 145 N.C. App. 447 (2001), that requires a new trial.

The court's explanation of how impasses over tactics must be resolved was based on *State v. Ali*, 329 N.C. 394 (1991), another jury selection case. In *Ali*, the defendant wanted to accept a prospective juror whom his attorneys wanted to strike. After noting the conflict, the attorneys yielded to the defendant's wishes and the prospective juror was accepted. On appeal, the defendant argued that he was deprived of his Sixth Amendment right to the assistance of counsel when his attorneys yielded to him on a tactical issue. The state supreme court held otherwise, finding that although attorneys normally make tactical decisions, the client has the ultimate authority over them when there is an impasse, based on "the principal-agent nature of the attorney-client relationship." *See also State v. Mitchell*, 353 N.C. 309 (2001) (where defense counsel wanted to attempt to rehabilitate a prospective juror but the defendant did not, it was proper for counsel to yield to the defendant's wishes).

Without questioning *Ali* or *Freeman* on their facts, I wonder how far the agency rationale extends. Taken to its logical conclusion, it raises some difficult questions. For example, the *Ali* line of cases suggests that the ultimate authority over which questions to ask a witness belongs to the defendant. That's a tactical decision, after all. *Cf. State v. Brown*, 339 N.C. 426 (1994) (noting that the defendant "held strong opinions about trial strategy, jury instructions, and the examination of witnesses" and holding that it was proper for defense counsel to defer on these issues). But what if the client insists on asking an ethically improper question, such as one designed solely to embarrass the witness? What if the client insists on asking a question that is clearly not in the client's interest? Something along these lines apparently happened in *Brown.* Should the lawyer acquiesce, risking professional discipline or a later finding of ineffectiveness? Move to withdraw? *See generally* Rule of Professional Conduct 1.2 cmt. 2 (suggesting, without mandating, that a lawyer withdraw when an impasse is reached over matters of tactics). Should the court allow the defendant to pose such a question himself, if counsel refuses? In *Ali*, the court said that when there is an impasse, the lawyer should make a record of it and then yield to the client. That doesn't seem sufficient if the client's choice is not merely contrary to the lawyer's preference, but actually improper or unreasonable.

As an aside, most authorities outside the state seem not to have endorsed the agency rationale to the extent that our

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courts have. Specifically with respect to jury selection, the majority rule appears to be contrary to *Ali* and *Freeman*.

- "Courts have found that decisions concerning . . . whether . . . to strike a prospective juror . . . are strategic decisions for counsel to make." Peter A. Joy & Kevin C. McMunigal, *Do No Wrong: Ethics for Prosecutors and Defenders* 81 (2009).
- "Strategic and tactical decisions should be made by defense counsel . . . [including] what jurors to accept or strike." *ABA Standards for the Defense Function* 4-5.2 (1993).
- "Decisions on selection of a jury are among the many entrusted to counsel rather than to defendants personally. . . . A patient can decide whether to undergo an operation, but once that decision has been taken the surgeon is in charge of implementation; so too with lawyers and trials." *United States v. Boyd*, 86 F.3d 719 (7th Cir. 1996).

For an interesting discussion of some related issues, see Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. Rev. 621 (2005).

Defense lawyers, what are your thoughts? Does the idea of deferring to your client's wishes on tactical issues make you uneasy? Have you been in situations where it was problematic? Or do you think the concerns raised above are overblown?

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