

Dissecting gag order's dynamics  
Judge's plan for unbiased jury in trucker trial could backfire  
By HARVEY RICE  
Copyright 2005 Houston Chronicle  
Feb. 28, 2005, 11:42PM

While the judge in the death-penalty trial of Tyrone Williams may have been trying to ensure an unbiased jury when she imposed a gag order, some consultants and lawyers say the order probably increased the chance of bias toward the prosecution.

Williams, 34, a Jamaican immigrant from Schenectady, N.Y., is accused of causing the deaths of 19 illegal immigrants sealed in the back of his tractor-trailer during a smuggling attempt in Texas in 2003.

On the first day of jury selection, which is continuing this week, several people were disqualified because they said they believe Williams is guilty.

Jury consultants attribute that prejudice to a gag order imposed by U.S. District Judge Vanessa Gilmore, who used one of the few tools available to a judge trying to ensure an untainted jury pool.

The media rely mainly on law enforcement for information in criminal cases, which usually means the information potential jurors receive in the media favors the prosecution, said Kathy Kellermann, a jury consultant in the Los Angeles office of Trial Behavior Consulting.

The gag order ensures that the public will hear only the prosecution's side, she said.

Austin jury consultant Douglas Keene said, "If all the public has heard is the worst possible spin on the case, then those who have formed an opinion can only have the worst opinion."

Compounding the problem is reporters' tendency to have closer relations with law enforcement than with the defense, Kellermann said.

Because reporters primarily rely on law enforcement-generated information from public records, media reports tend to use language that supports the prosecution, she said.

Even the word "victim" can prejudice public opinion, Kellermann said.

"The word 'victim' prejudices," she said. "We already assume they've been hurt. 'Accuser' is appropriate."

Charles Baird, a visiting professor at the South Texas College of Law and a former Texas Court of Criminal Appeals judge, said law enforcement is aware of its advantage and uses it.

One example, he said, is the "perp walk," in which a defendant in jail garb and chains is led in front of the cameras.

"The truth is, it's choreographed," Baird said.

Even if the gag order prevents the defense and prosecution from discussing the case publicly, it's nearly impossible to shield potential jurors from media exposure, said Houston jury consultant Robert Gordon.

Media-savvy lawyers find ways to evade gag orders by enlisting surrogates not covered by the orders, Kellermann said. Defense lawyers in the Williams case have not used surrogates.

Yet, for all its flaws, a gag order can be effective, Baird said.

"I think it's the only tool the judge has," he said. "If there is not a gag order, the judge cannot control the message and there is no telling what the lawyers will say."

Keene said the best use of a gag order is "to keep it from becoming a circus because the public jockeying is minimized."

He said that, although some prospective jurors may be biased toward the prosecution because of the gag order, they are quickly weeded out through questioning during jury selection in death-penalty cases.

"The people who glom on to those stories are probably bad for the defense, anyway," he said.

Kellermann said gag orders are most effective if imposed immediately, before a case has much media exposure. But normally, they come "when the judge gets sufficiently angered by one or both sides and would really like to get the trial under control again," she said.

Gilmore imposed her gag order on May 18, nearly a year after the arrests of Williams and others indicted in the case.

David Graeven, jury consultant at the San Francisco office of Trial Behavior Consulting, said gag orders in high-profile cases tend to encourage a newly discovered phenomenon: the stealth juror.

Stealth jurors lie in an effort to get onto juries, either so they can ensure conviction or because they oppose the death penalty, he said.

"I would be very concerned about it," Graeven said, noting that two such people, bent on conviction, were discovered in the California trial of Scott Peterson last year.

Peterson was convicted of murdering his pregnant wife, Laci, and their unborn son. He was sentenced to death.

The way to detect stealth jurors is to know their backgrounds and watch for inconsistent statements, Graeven said.

"One juror in a criminal case can make all the difference in the world," he said. "They can hang a case."

harvey.rice@chron.com