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# **The Elephant in the Living Room: Race and Voir Dire**

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# I. CONFRONTING THE RACE ISSUE IN JURY SELECTION

by Jodie English and Jeff Robinson<sup>1</sup>

## INTRODUCTION

First, no one likes to talk about race, especially in public. Second, the criminal justice system is perhaps the most volatile forum for a discussion of race. Mix the two together, and you get voir dire on the issue of race in an open, public courtroom in a criminal case. Actual opinions held by jurors, whether expressed or not, will probably cover a broad range. Some people think racism died a long time ago, and they are tired of discussing it. Some feel that if the criminal defense lawyer raises the issue, she is playing the "race card". Some feel that minorities are simply more likely to be criminals and we should simply acknowledge that fact.

At the beginning, it is important not to fool ourselves. Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person's lifetime, can be significantly changed in the time allowed for jury selection in a criminal case? The jury selection process may not be the best tool to change people's viewpoints about race<sup>2</sup>, but our primary goal in jury selection cannot and should not be to change the opinions of jurors. Our

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<sup>1</sup> We wish to express thanks to the lawyers who shared their ideas for this paper. In addition to those named in the paper, our thanks goes to Teresa Olson of The Defender Association in Seattle, Washington,

<sup>2</sup> But see, Dasgupta, Greenwald, "On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals." In this study, which can be found at [www.newschool.edu/gf/psy/faculty/dasgupta](http://www.newschool.edu/gf/psy/faculty/dasgupta) participants reminded of pro-black exemplars exhibited less automatic preference for whites over African-Americans than participants who were reminded of pro-white or non racial exemplars. The authors' research suggests that there may be some benefit to encouraging prospective jurors to look at positive African-American role models as part of the selection or questionnaire process.

primary goal should be to discover what those viewpoints are, how strongly they are held and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case.

### **THE RACE CARD**

There is now a term to describe the behavior of those of us who dare raise the issue of race in a criminal trial - a lawyer plays the so called "race card" by interjecting the issue of race into the analysis of a factual situation where race is, according to some undefined group of people, irrelevant. According to the "race card" theory, the issue of race is raised in order to influence members of a certain race on the jury. Many believed this was exactly what happened in the presentation of the O. J. Simpson defense. This viewpoint reveals how deeply issues of race divide the people that live in this country.

Soon after the Simpson verdict, an African-American comedian in New York performed in front of a mostly black audience. He discussed his amusement at the anger exhibited by many white Americans as a result of the Simpson defense team suggesting that Detective Mark Furman's racial views were somehow relevant to the issue of his credibility as a police investigator, and therefore Mr. Simpson's guilt or innocence. The comedian posed a rhetorical question - if Jerry Seinfeld was accused of murder, and Louis Farrakhan was the only police officer who claimed to have found a bloody glove, would people think it inappropriate for Mr. Seinfeld's defense lawyers to discuss Mr. Farralman's views about Jewish people? The comedian's comment was met with a large amount of

laughter and applause. It is inconceivable to most African-Americans<sup>3</sup> that there could even be a debate on the appropriateness of exploring the racial bias of a police officer in a homicide prosecution where an African-American man is charged with killing two white people. And yet, for some white Americans, it is inconceivable that race has any relevance whatsoever in a jury's decision in such a case. Given this, we had better find out how our potential jurors define the "race card," and how that definition may reflect their broader viewpoint on issues of race.

### **STEREOTYPES CAN LEAD TO CONVICTION**

It is a mistake to assume that, all other things being equal, an African-American or other non-white juror is a better defense juror in a criminal case than a white juror. On the one hand, the experience of living as a non-white person in America will undoubtedly have an impact on a person's world view and life experience. Many African-Americans were both born and raised in the Deep South or have family members who were. The first-hand experiences of black people born in the pre-World War II years and those who grew up in the SOs and 60's are now the subject of documentary films on the horrors of racism. Their life experiences tell them that it is completely possible for a white police officer to be biased and prejudiced against an African-American defendant. As opposed to many white Americans, they would have no reason to believe that it would be very unlikely or rare for a white police officer to lie on the witness stand in a criminal case involving an African-American defendant.

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<sup>3</sup> The authors recognize that issues of race involve non-white defendants who are not African American. In this paper we hope to present issues and the methods of dealing with them that can apply to cases involving non-white defendants other than African Americans.

These same people are often deeply religious, hard working people. They believe in law and order. They can be politically conservative in many areas, with a notable exception being their views on civil rights for non-whites. In the garden-variety criminal case, some jurors of color would not be ideal jurors whether the defendant was non-white or not. It is necessary to go beyond the surface level of analysis to thinking about what it means to grow up non-white in America, and how the world view that a non-white person may have connects with the actual issues in dispute in a particular criminal case.

### **HOW DO YOU GET PEOPLE TO START TALKING?**

No one likes to talk about race - especially not in public. What follows are a series of questions, grouped into chapters (thanks to the organizational talents of Larry Pozner and Roger Dodd) that may be helpful in getting prospective jurors to talk about race. These questions have been developed for use with the "struck method" or "Donahue" style of jury selection - that is, a method of jury selection where the lawyer first addresses questions to the entire panel as opposed to questioning individual jurors one at a time. Follow up with individual jurors is critical.

## CHAPTER 1- WHAT IF NO ONE LOOKED LIKE YOU?

These questions are designed to get jurors to think about how a minority defendant might feel in the courtroom surrounded by people of a different race.

- I. Assume that you are on trial - the alleged victim was African-American - the judge and the lawyers are all African-American - the police officers were all African-American - all the jurors who make up your jury are African-American, and you are the lone white person in the courtroom:

What are you feeling?

Right now, as I describe this all black courtroom in which you are the only white face, what is going through your mind? Tell me about that.

Why do you feel this way?

What are you fearful of being the only one who is white in a sea of black faces?

Have you ever been in a situation where you were in the minority racially?

Tell me about that. How did that situation make you feel?

- II. Mr./Ms. \_\_\_\_\_ may be tried by an all white jury (this question takes on additional power if the prosecutor decides to strike a juror of color.)

How do you think/feel that an all white jury may affect the verdict?

Why? (ask several people) - If the lawyer finds that this question is not generating responses from the jury:

A. Try the Pozner/Dodd technique of reversal and ask the following: "How many people think that the fact that Mr./Ms. \_\_\_\_\_ may be tried by an all white jury will have no impact on the verdict?"

B. Why do you think this? Tell me more. Who feels otherwise?

C. Or, style the question so the prospective jurors have to choose: e.g. "Some people think an all white jury will have no impact, while others feel it will make it more difficult for my African-American client to get a fair trial. What do you think? Why? If the jury does end up being all white, how will you make sure the case is decided only on the evidence?"

## CHAPTER 2 - HOW OFTEN DO YOU SPEND TIME WITH MINORITIES IN YOUR EVERYDAY LIFE?<sup>4</sup>

### Questions for whites:

- I. **Neighborhood:** Do you live in a racially integrated area? Why or why not?

Why do you think your neighborhood is (or is not) integrated?

What do you hear/think about racial tensions in (your town) Cincinnati? How do those tensions affect your neighborhood?

- II. **Work:** Tell me whether you have contact with African-Americans at work. How often? Describe those contacts? Have you ever been supervised by or had a boss who was an African-American? How was that experience?

Have you held jobs in the past where you had frequent contact with African-Americans? Tell me about that.

- III. **Socializing:** Do you belong to any social club, political organization or religious groups that have no African-American members?

Why do you think no African-Americans are members of this club?

How often do you spend your leisure time with African-Americans? Do you have any friends who are African-American? If yes, please tell us about them - have you ever invited them to your home? Have you ever been invited to their home?

How would you feel if a family member wanted to marry someone who was African-American?

Tell me about a memorable experience you have had with an African-American - (Note that the question could call for either a positive or a negative experience).

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<sup>4</sup> Expert psychological testimony regarding the difficulty of cross-racial identification is premised on research involving persons who had infrequent contact with members of the opposite race. Thus, for example, a white person who works with, lives in a neighborhood with, spends time socializing with or is in a relationship with a non-white is generally better able to accurately identify non-whites than is a white person who has little contact with non-whites.

## CHAPTER 3 - ARE AFRICAN AMERICANS VIEWED AS MORE LIKELY TO COMMIT CRIMES?

- I. **Racial Hoaxing:**<sup>5</sup> How many people have heard of the Susan Smith case in South Carolina where Ms. Smith drowned her two children and then claimed that an African-American male had kidnapped them?

How many people have heard of the case in Boston where a man killed his wife then claimed that an African-American had attacked them in a car?" (Ask it this way to see if someone comes up with the name Charles Stuart).

Why do you think these white people chose to tell the police that an African-American male had attacked them?

Why did the police believe Susan Smith's story for nine days even though there wasn't a shred of evidence to support it?

If I (female defender) decided to falsely accuse a man of rape, for whatever reason, would it be easier to accuse an African American or a Caucasian? Why?

When you walked into the courtroom did anyone think Mr. Defendant was the lawyer and I (white male defender) was the client? (for those who do not raise their hand) Why not?

- II. **Racial Slurs:** What kind of derogatory stereotypes and words have you heard about African-Americans? (Perhaps make a list of them on the board.)

Do you think African-Americans are more prone toward violence or other kinds of crimes than whites?

Why or why not?

Do you think those opinions are widely held?

What do you think those opinions are based on?

How do you think those opinions will affect \_\_\_\_\_'s ability to get a fair trial? (If you have made a list of derogatory stereotypes, you can refer to it when asking this question.)

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<sup>5</sup> See, Russell, Kathryn K., **The Color of Crime, Racial Hoaxes, White Fear, Black Protectionism, Police Harassment and other Macroaggressions**, New York University Press, (1998): in addition to the Susan Smith and Charles Stuart cases, the author cites over sixty additional cases of racial hoaxing where blacks are blamed for white criminality.

## CHAPTER 4 · EVERYBODY IS PREJUDICED, HOW ABOUT YOU?

- I. **Self Disclosing helps others be truthful:** A very close friend of mine, a white person, a person that I know is not a bigot or a racist, told me that she was at a stoplight the other day when a young black male pulled up in a brand-new BMW. She said that her first thought was "drug dealer". Not son of a doctor, son of a lawyer, but drug dealer. Has anyone else ever had a similar experience? (You may be able to substitute yourself as the person making the assumption - if you can admit to such thoughts, the jurors may as well).

If you are sitting in your car at a stoplight, and 2 young black men approach the crosswalk, do you check to see if your doors are locked? Why check? Would you do the same thing if 2 young white men approached the crosswalk? Why, or why not?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

How many people walked into the courtroom, saw Mr. \_\_\_\_, and thought, "well, they have charged another innocent man?" Why or why not?

- II. **If African-Americans can admit to prejudice, whites can too:** Jesse Jackson tells the story about one night when he was walking down the streets of a large city and got nervous when he heard footsteps approaching from behind, and was then relieved when he saw that it was three young white males instead of three young black males - why do you think he was embarrassed about his thoughts?<sup>6</sup>

- III. **Making the target bigger:** If whites are encouraged to discuss their own experiences with being victims of discrimination, they may have an increased ability to understand the danger of prejudiced thinking in the courtroom.

Have you heard the saying that you should not judge a book by its cover? What does that mean?

Have you been judged by a cover - either because you are old, or young, fat, bald; a bleach blonde, have facial hair, drive a motorcycle, etc.

How did that make you feel?

What was unfair about how you were treated?

What is the risk to an innocent man if jurors rely on judging based on a surface characteristic like skin color rather than look to the evidence?

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<sup>6</sup> December 17, 1993, Wall Street Journal; the full quote from Jesse Jackson reads: "There is nothing more painful for me at this stage of my life, than to walk down the street and hear footsteps and start to think about robbery, and then to look around *and see it's somebody white and feel relieved.*"

## CHAPTER 5: LET'S TALK ABOUT "PLAYING THE RACE CARD"

What have you heard about "playing the race card?" Tell me more. Do you believe that African-Americans "play the race card?" Why do you believe that? How does it help African-Americans to "play the race card?" How does it hurt African-Americans to do so?

When is it necessary to look at the role race played in a criminal case? Under what circumstances? When might it make it harder to find the truth if race is ignored?

What is the risk to an innocent African-American defendant if his lawyers never mention race with the jury?

Can racists become police officers? What do you think of that? What have you heard? Can racists sit on juries.

How can a racist end up being a juror when an African-American defendant is on trial?

**CHAPTERS6-      WHAT WILL YOU DO YOU IF SOMETHING  
BAD STARTS TO HAPPEN IN THE JURY ROOM?**

Please tell us about experiences you have had where other people expressed racially prejudiced beliefs or opinions.

How do you feel when someone uses a racial slur or tells a racial joke?

What, if anything, do you do in response to hearing such language?

If your child used a racial slur, what would you tell your child?

What, if anything, do you think teachers should do to a white high school student who calls an African-American high school student by a racial slur?

If you hear a juror making an argument based on race prejudice or stereotypes, what would you do about it? (You are really hoping here for someone to say that they will tell the judge-if that suggestion does not come up, you might ask, "would anyone consider telling the judge?")

## CHAPTER 7 - MAY I SEE A SHOW OF HANDS?

Robert Hirschhorn<sup>7</sup> is a member of NACDL and an expert on jury selection techniques. He suggests asking a series of questions that can simply be answered by a show of hands - for example, making a statement and asking who agrees and who disagrees. This format can encourage more of the prospective jurors to express themselves, thereby expanding the pool of persons who can be asked follow up questions on an individual basis. Some questions that may work with this technique follow:

**Yes or No Questions:** How many say "yes?" - if so, please raise your hand. Now, how many say "no?" Again, please raise your hand.

Is racism by whites against African-Americans a thing of the past?

Do you believe there is more racial prejudice today than there was 30 years ago?

African-Americans commit more violent crimes per capita than whites.

Whites who encourage their children not to marry African-American are making a wise choice.

Whites are being discriminated against due to affirmative action programs.

Blacks use more illegal drugs than whites.

Have any of you ever seen an example of racism? (The lawyer can ask people who raise their hands to describe the incident and their feelings about it, and then ask other jurors about their reaction to the incident described.)

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<sup>7</sup> Robert B. Hirschhorn, 217 South Slemmons Freeway, Suite 203, Lewisville, TX 75067; (972) 434-5879; Fax: (972) 434-0176; [cebjury@gte.net](mailto:cebjury@gte.net)

## CHAPTER 8: IDEAS FOR QUESTIONNAIRES

Robert Hirschhorn also encourages petitioning the court for use of a questionnaire in cases where race is an issue. Prospective jurors may be more likely to reflect honestly and independently when answers are given in writing and individually as versus in the public and intimidating environs of a criminal court. Some sample questions follow. Be sure to leave several lines after each question so as to encourage fuller responses:

### RACIAL PREJUDICE: Personal Experience:

#### **A. Free response questions:**

Racial prejudice can take many forms. Tell us about your experiences with racial prejudice or where you have felt labeled.

Have you ever felt like you were the target of racial prejudice? Tell us about that situation or experience?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Please tell us about experiences you have had where other people expressed racially prejudiced beliefs or opinions?

How do you feel when someone uses a racial slur or tells a racial joke?

What has been your most memorable experience with someone who is African American?

When you are sitting at a stoplight two young Black men approach the crosswalk, do you check to see if your doors are locked? Why do you check?

Would you do the same thing if two young white men approached the cross walk?

Do you have any friends who are African American? If yes, please tell us about them.

How would you feel if a member of your family wanted to marry someone who was African American?

Have you ever invited someone who is African American to your home?

If your child used a racial slur, what would you tell your child?

Would you be more inclined to believe that a black police officer would be more likely to commit a crime than a white police officer? Why?

Is there any other feeling or opinion you have regarding race that you feel you should share with us?

**B. Multiple choice questions: Circle the answer that you feel is most true:**

I would not want my child to marry an African- American.

Strongly agree      Agree      Disagree      Strongly Disagree

I get angry when I hear negative remarks about African-Americans.

Strongly agree      Agree      Disagree      Strongly Disagree

Blacks are less disciplined than whites.

Strongly agree      Agree      Disagree      Strongly Disagree

No respectable white woman would ever have consensual sex with a black man.

Strongly agree      Agree      Disagree      Strongly Disagree

**RACIAL PREJUDICE: Beliefs about societal prejudice: Circle the answer that you feel is most true:**

Racial prejudice still exists.

Strongly agree      Agree      Disagree      Strongly Disagree

There is more racial prejudice today than there was 30 years ago.

Strongly agree      Agree      Disagree      Strongly Disagree

African-Americans commit more violent crimes per capita than whites.

Strongly agree      Agree      Disagree      Strongly Disagree

Whites who encourage their children not to marry African-American are making a wise choice.

Strongly agree      Agree      Disagree      Strongly Disagree

Whites are being discriminated against due to affirmative action programs.

Strongly agree      Agree      Disagree      Strongly Disagree

Blacks use more illegal drugs than whites.

Strongly agree      Agree      Disagree      Strongly Disagree

**CHAPTER 9: Batson v. Kentucky is good for something: maximizing the case for  
individual voir dire  
MOTION OF xxxxx FOR INDIVIDUALIZED  
VOIR DIRE BY COUNSEL AND INCORPORATED MEMORANDUM**

xxxx xxxxxx, by and through undersigned counsel, move the Court for an Order permitting defense and government counsel to voir dire the venire panel individually.

**MEMORANDUM IN SUPPORT**

1. Individualized voir dire by counsel is essential so that the defendants can effectively and adequately exercise his peremptory challenges in selecting jurors. In light of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, including Georgia v. McCollum, 112 S.Ct. 2348 (1992), and J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994), parties (including an accused) cannot exercise their peremptory challenges based on their personal race or gender biases or prejudices.

2. Case law now holds that where there is a prima facie case of racial discrimination in the exercise of a party's peremptory challenges, that party "must articulate a racially neutral explanation for the peremptory challenge." McCollum, 112 S.Ct. at 2359; see Batson, 476 U.S. at 98. Similarly, if there is a prima facie case of gender discrimination, counsel must offer a gender-neutral, non-pretextual explanation for the peremptory challenge. J.E.B., 114 S.Ct. at 1430. To enable the accused to exercise his peremptory challenges intelligently and adequately, and to ensure that they can be supported by a race and gender neutral explanation, individualized voir dire is essential.

3. The Supreme Court's decision in J.E.B. declared:

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Vair dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently, See, Nebraska Press Assn. v. Stuart, 427 U.S. 539,602 ... (1976) (Brennan, J., concurring in the judgement) (voir dire "facilitate[s] intelligent exercise or peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); United States v. Witt, 718 F.2d 1494, 1497 (CAIO 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges").

114 S. Ct. at 1429 (brackets in original). Because, as Justice O'Connor pointed out in her concurring opinion in J.E.B., litigants can no longer simply rely on their intuition in exercising peremptory challenges, 114 S.Ct. at 1432 (O'Connor, J., concurring), fairness dictates that defense counsel be given an opportunity to voir dire the venire panel individually to ensure that a fair and impartial jury is selected consistent with the dictates of Batson and its progeny.

**CONCLUSION**

For the foregoing reasons, the Court should enter an Order permitting defense and government counsel to voir dire the venire panel individually so that the accused can effectively and adequately exercise his peremptory challenges in selecting jurors.

Respectfully submitted,

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## MINI-CASE STUDY - COMBATting THE EFFECTS OF RACIAL STEREOTYPES IN CRIMINAL CASES

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**By Cynthia Strout & James McComas**

An unarmed 18-year-old white boy shoves a 16-year-old black male during a confrontation in their high school parking lot following a vocational construction class. In response, the black teen strikes the white teen in the head with a large claw hammer, resulting in a depressed skull fracture and neurological damage. The African-American youth is charged as an adult with 1st Degree Assault.<sup>1</sup> Trial will be held in Anchorage, Alaska, a predominantly white community, and the jury will be predominantly white.

The defense is self-defense, and will emphasize the unilateral and repeated unarmed aggression by the complainant against the accused, as well as the total failure of four nearby administrators and teachers to intervene. All of the authority figures are white.

Some white student witnesses describe the black teen as the aggressor, although for the most part their observations began with the hammer swing at the end of the incident. Some of the claims made by the white adults and students - for example, the accused swung the hammer and hit the complainant when his back was turned - are physically impossible. The only other black student attests to the complainant's unarmed aggression and use of racial slurs during the episode. Interestingly, the accused recalls no racial language.

Case analysis identifies "excessive force" as an immediate problem for the self-defense claim. Counsel also anticipate that racial stereotypes such as "Black Teen Male= Violent Criminal"

will influence the jury subconsciously, with "excessive force" serving as a race neutral and facially reasonable means of expressing such feelings. Finally, the same underlying stereotypes have probably already affected, and will continue to affect, witness perception, memory... and expression of the events.

The case is "presented" to a group of "average" white residents in an effort to gain insight into likely jury reactions. Beyond the predicted existence and impact of stereotypes, counsel also learn there is a strong, at times emotional, negative reaction to any perceived attempt by the defense to "play the race card." Further discussion identifies the core of this concern to be the use of a defendant's minority race or socioeconomic status as an "excuse" for criminal conduct.

Counsel develop a trial plan to address these sensitive, potentially outcome determinative racial issues. They move for, and obtain, a written juror questionnaire as the first step in the jury selection process. Race questions eliciting juror attitudes on the current significance of racial discrimination against African-Americans and juror reactions to hearing people use racial slurs are included.

During the oral voir dire, counsel first identify, then reject, any use of the "race card" as an excuse in the case. However, counsel also identify the ways in which race may legitimately arise during trial - such as explaining the complainant's motive to initiate aggression and the influences which might affect witness perception of the events.

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<sup>1</sup> 1<sup>st</sup> Degree Assault carries a presumptive (no parole) term of 7 years in prison.

Next, counsel share some of their own experiences in which unintended reliance on such stereotypes led them to make unwarranted assumptions or to take unnecessary precautions. This grants permission to jurors openly to discuss their own feelings and experiences. Once the fact of racial stereotyping is established, counsel discuss with potential jurors the sources, extent, and potential effects of unconscious racial stereotyping.

Ways of guarding against the influence of racial stereotypes are then discussed, including "race-switching" techniques. Race-switching is a mental exercise in which the same facts and events in the case are imagined, but with the racial status of the participants and witnesses reversed. John Grisham's book A Time To Kill, and the movie based on it, provide useful examples in this discussion.

At the evidentiary stage, Geoffrey Loftus, Ph.D., a noted research psychologist, is prepared to testify concerning the demonstrable effect racial stereotypes have on the perceptions/memories of eyewitnesses to surprising, violent, and/or ambiguous events.<sup>8</sup> As a result of the case going extremely well and a scheduling problem, Dr. Loftus is not actually called as a defense witness.<sup>9</sup>

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<sup>8</sup> See B.L. Duncan, Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks, 4 J. PERSONALITY & SOC. PSYCHOL. 590 (1976) (75% of 104 white undergrads described Black person shoving White person as "violent," 6% as "playing around;" only 17% described White person shoving Black person as violent; 42% described White person as playing around); Sager & Schofield, Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980)(both Black and White children tend to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites).

<sup>9</sup> Of course, the proposed testimony would not include the expert's opinion on the reliability or accuracy of any witness who testified, but rather would provide the jury with more general information, which they could apply in deciding whether or not racial stereotypes affected the testimony they heard. The admissibility of such testimony may vary from jurisdiction to jurisdiction. Certainly, anywhere courts admit expert testimony on the vagaries of eyewitness identification or "background" psychological testimony on the characteristics of sexually abused children, the proposed evidence would be admissible.

The defense does call several white character witnesses, even though the accused has been involved in tussles at school before when subjected to racial slurs. The main reason is to demonstrate to the jury that he has no prior police record, and thus does not fit the stereotypical image of an often-arrested black teenage male.

Finally, the defense proposes a jury instruction on racial stereotyping, which elaborates on, and makes mandatory compliance with, the instruction proposed by Professor Cynthia Lee in her article Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn.L.Rev. 367, 482 (1996). The trial judge<sup>10</sup> agrees to give the following instruction, noting that he personally engages in a race-switching exercise whenever he is called upon to impose sentence on a member of a minority race, in order to insure that he is not being influenced by racial stereotypes:

It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes. "Stereotypes" constitute well-learned sets of associations or expectations connecting particular behaviors or traits with members of a particular social group. Often, we may rely on stereotypes without even being aware that we are doing so.

As a juror, you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person's behavior is more or less likely because the individual belongs to any particular racial group.

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<sup>10</sup> The trial judge is the Hon. Milton M. Souter, Superior Court Judge, Third Judicial District in the State of Alaska.

Reliance on stereotypes in deciding real cases is prohibited both because every accused is entitled to equal protection of law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. "Race-switching" involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is African-American and the accuser is White, you should imagine a White accused and an African-American accuser.

If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.

The trial plan succeeds in getting the accused a truly fair trial, from a jury made up of nine white, two Alaskan Native-American, and one African-American jurors. They return a "Not Guilty" verdict on 1st Degree Assault, and all three lesser included offenses, in two hours. The following day, Juror No. 3, a middle class, middle aged, white woman leaves the following message for both counsel: "Thank you for the wonderful job you did in the trial. You have restored my faith in the justice system."

## INSTRUCTION No. \_\_

It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes.<sup>11</sup> "Stereotypes" constitute well-learned sets of associations or expectations connecting particular behaviors or traits with members of a particular social group. Often, we may rely on stereotypes without even being aware that we are doing so.<sup>12</sup> As a juror, you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person's behavior is more or less likely because the individual belongs to any particular racial group.<sup>13</sup> Reliance on stereotypes in deciding real cases is prohibited both because every accused is entitled to equal protection of law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.<sup>14</sup>

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<sup>11</sup> Social science research establishes that reliance on stereotypes is a common means by which people comprehend and interpret the world, particularly ambiguous interactions between people. Hofstadter, Metamagical Themes: Questioning the Essence of Mind and Pattern, 137 (1985); Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 *Stan.L.Rev.* 1161, 1187-89 (1995); Hamilton, A Cognitive-Attributional Analysis of Stereotyping, 12 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 52 (L. Berkowitz ed., 1979).

<sup>12</sup> Reliance on racial stereotypes often operates at a subconscious level. C.R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 *Stan.L.Rev.* 317, 322

<sup>13</sup> The Black-as-violent stereotype is ingrained in, and pervades, American society. B.L. Duncan, Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks, 4 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1976) (75% of 104 white undergrads described Black person shoving White person as "violent," 6% as "playing around;" only 17% described White person shoving Black person as violent; 42% described White person as playing around); Sager & Schofield, Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts, 39 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1980) (both Black and White children tend to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites); C. Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 *Minn.L.Rev.* 367, 406-10, 464 n.389 (1996) (impact of racial stereotypes in specific self-defense cases and studies of effect of stereotypes on jury function in sexual violence cases). The American media and entertainment industries perpetuate, and widely disseminate, the Black-as-violent-criminal stereotype. C. Lee, supra, 81 *Minn.L.Rev.*, 403 n.107.

<sup>14</sup> White people's fear of being victimized by violent African-American criminals is a case in point. In 1994, African-Americans arrested for violent crimes constituted less than 1% of the total African-

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. "Race-switching" involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is African-American and the accuser is White, you should imagine a White accused and an African-American accuser.

If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.<sup>15</sup>

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American population, and less than 2% of male members of that group. FBI, U.S. Dept. of Justice, U.S. Uniform Crime Reports for the U.S. (1993 & 1994); Bureau of Census, U.S. Dept. of Commerce, Statistical Abstract of the U.S., 21 (1995). Overall, only 3% of all violent crimes involve African-American defendants and White victims. Kennedy, Comment: The State, Criminal Law, and Racial Disclimination, 107 Harv.L.Rev. 1255 (1994).

<sup>15</sup> This instruction is derived from a model instruction proposed by Associate Professor C. Lee, in her article Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn.L.Rev. 367,482 (1996).

18 U.S.C.A. § 3593(f):

(f) Special precaution to ensure against discrimination. – In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

(Added Pub.L. 103-322, Title VI, § 60002(a), Sept. 13, 1994, 108 Stat. 1964.)

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THAT MIGHT ELIMINATE RACIAL BIAS IN THE COURTROOM**

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**DOCKET NO.**

**STATE OF \_\_\_\_\_ : SUPERIOR COURT**  
**VS. : JUDICIAL DISTRICT OF \_\_\_\_\_**  
**JOHN DOE : MAY 1,2002**

**MOTION TO DISQUALIFY JURORS WHO ARE OPPOSED TO  
INTERRACIAL MARRIAGES'**

Pursuant to his rights to due process and to a fair trial by an impartial jury as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States constitution and \_\_\_\_\_ of the constitution of \_\_\_\_\_, the defendant moves the court to disqualify any and all jurors who would oppose a close relative marrying or dating a member of the race or ethnic group of the defendant. Since the Supreme Court ruled in Bob Jones University v. United States, 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed.2d 157 (1983), that a belief against interracial marriage reveals such a bias that any religious or educational institution that holds such views must lose its tax exempt status, then surely any prospective juror who holds similar views should lose their status of having the power to judge a black defendant whom they already believe is not good enough to marry a member of that juror's race.

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## A. History of Racial Prejudice

Racial prejudice is still a cancer to the body politic of this country as devastating as any cancer suffered by any citizen. "Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South." Ross v. Massachusetts, 414 U.S. 1080, 1085, 94 S. Ct. 599, 38 L. Ed.2d 486 (1973) (Marshall, J., dissenting from denial of certiorari). Our country suffers from "racial animus, which so long has distorted our system of criminal justice." Georgia v. McCollum, 505 U.S. 42, 58, 112 S. Ct. 2348, 120 L. Ed.2d 33 (1992).

The history of that cancer can be traced to the actual birth of our nation as evidenced by the virus of prejudice placed in our Constitution. That document starts off with "We the People" in the first sentence but in the fifth sentence it states that a black person can be only counted as 3/5<sup>th</sup> of a white person.

Our nation's capitol has a memorial to its most famous slave owner, Thomas Jefferson, who might have had children with one of his slaves but who certainly would not have married her due to his racist beliefs.

In his Notes On Virginia, Jefferson proclaimed concerning blacks and whites that

"the real distinctions which nature has made; and many other circumstances will divide us into parties, and produce convulsions, which will probably never end but in the extermination of the one or the other race. To these objections, which are political, may be added others, which are physical and moral .... They secrete less by the kidneys, and more by the glands of the skin, which gives them a very strong and disagreeable odour. ... They are at least as brave, and more adventuresome. But this may perhaps proceed from a want of forethought, which prevents their seeing a danger till it be present. ... They are more ardent after their female; but love seems with them to be more an eager desire, than a tender delicate mixture of sentiment and sensation. Their griefs are transient. Those numerous afflictions, which render it doubtful whether heaven has given life to us in mercy or in wrath, are less felt, and sooner forgotten with them. In general, their existence appears to participate more of

sensation than reflection.... Comparing them by their faculties of memory, reason and imagination, it appears to me that in memory they are equal to the whites; in reason much inferior.... [I]n imagination they are dull, tasteless, and anomalous.... [N]ever yet could I find that a black had uttered a thought above the level of plain narration.... [H]is imagination is wild and extravagant, escapes incessantly from every restraint of reason and taste, and in the course of its vagaries, leaves a tract of thought as incoherent and eccentric, as is the course of a meteor through the sky."

Thomas Jefferson, Notes On Virginia, reprinted in Philip S. Foner, Basic Writings Of Thomas Jefferson, Willey Book Company, pp. 144-146.

Jefferson compared black slaves in America to white slaves in Europe at earlier times and concluded concerning blacks in America that "their inferiority is not the effect merely of their condition of life". Id. 147-148. Jefferson noted that white slaves excelled in science and were tutors. Id. Jefferson conveniently failed to note that slaves in America were punished if they attempted to learn to read and write.

Regarding the emancipation of slaves and the possible mingling of the races, Jefferson believed that the white race should not be stained with the blood of blacks and stated that

"[t]his unfortunate difference in colour, and perhaps faculty, is a powerful obstacle to the emancipation of these people. Many of their advocates, while they wish to vindicate the liberty of human nature, are anxious also to preserve its dignity and beauty.... Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history. When freed, he is to be removed beyond the reach of mixture."

Id. 148-149.

There was not much if any improvement by the time of the Dred Scott decision in 1856 where the Supreme Court upheld the institution of slavery by merely publicly proclaiming that blacks were unfit to associate with whites and were inferior to whites because whites believed it so. The Supreme Court proclaimed in the Dred Scott decision that blacks had been regarded as

"beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters in public concern, without doubting for a moment the correctness of this opinion.... [Blacks are] no part of the people [of this country, and are] .... doomed to slavery .... [an] unhappy black race .... [in need of] strict police regulation .... and necessary thus to stigmatize."

Dred Scott v. Sandford, 60 U.S. 393, 19 Howard 393, 15 L. Ed. 691, 701-702, 703-705 (1856).

Even the Great Emancipator, President Abraham Lincoln, in his Emancipation Proclamation of 1863 chose only to free the slaves in the 11 Confederate states but not the slaves in the 4 slave owning Union states of Delaware, Kentucky, Maryland and Missouri. Lincoln was afraid of the political consequences, mainly that those 4 states would secede from the Union if he outlawed slavery there.

In 1896, the Supreme Court stated that it was constitutional to segregate the races on trains, opining that such a practice was "reasonable... with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort". Plessy v. Ferguson, 163 U.S. 537, 550, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

As late as 1966, the Supreme Court of Appeals of Virginia upheld a statute that prohibited interracial marriages. Loving v. Commonwealth of Virginia, 206 Va. 924, 147 S.E.2d 78 (1966). That case referred to the then recent case of Nairn v. Nairn, 197 Va. 80, 87 S.E.2d 749 (1955), which held that a state has the right "to preserve the racial integrity of its citizens ... [and] to regulate the marriage relation so that it shall not have a **mongrel breed** of citizens." Supra, 87 S.E.2d at 756(emphasis added). Fortunately, the decision of the

Supreme Court of Virginia in Loving v. Commonwealth was overturned by the United States Supreme Court in Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

More recently, one justice of the Connecticut Supreme Court stated in a footnote that a white person's belief against interracial marriages should not disqualify such a person as a juror as long as that belief is based on "religious, cultural, philosophical or other personally held conceptions". State v. Tucker, 226 Conn. 618,635, n. 19,629 A.2d 1067 (1993).<sup>2</sup> According to that justice, a white juror who believes that he or she would commit a sin by marrying a black person is perfectly qualified to sit in judgment of a black defendant. It is not surprising that an actual "survey conducted for the state judicial branch [of Connecticut] in 1998 revealed that 45.5 percent of the Connecticut residents polled agreed that 'Connecticut courts discriminate against minorities.' Connecticut Judicial Branch, Statewide Public Trust and Confidence Study". State v. Hodge, 248 Conn. 207,271, 726 A2d 531 (1999) (Berdan, J., dissenting).

Racism is not only a part of our past but still dominates our society as evidenced by recent studies as to how doctors discriminate in their actual treatment of patients based on race.

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<sup>2</sup> That decision totally ignores the principles set forth by the United States Supreme Court in Bob Jones University v. United States, *supra*, where the Court stated that even though "the University genuinely believe[s] that the Bible forbids interracial dating and marriage", such a religious belief is actually racial discrimination regardless of how the University tried to explain it. Bob Jones University v. United States, *supra*, 461 U.S. at 580-581, 592-595, 604-605. The Bob Jones case is more fully discussed later, pages 13-16. If a judicial nominee today expressed a belief that it is proper to be against interracial marriages because of "religious, cultural, philosophical or other personally held conceptions", that person's nomination would probably be withdrawn or at least would not make it past a legislative screening process. Fortunately as explained later in footnote 3, page 19, the Tucker decision does not constitute a precedent that affects this present motion because it did not address all the constitutional arguments raised in the present motion and the record was barren as to how such views against interracial marriages reveals that a juror is not impartial.

A recent study involving hundreds of heart doctors revealed that they treat black people different than white people. K. Schulman, The Effect Of Race And Sex On Physicians' Recommendation For Cardiac Catheterization, The New England Journal Of Medicine, February 25, 1999, pp. 618-626. The study involving 720 doctors who viewed videos of patients with similar symptoms, showed that the doctors were 40% less likely to order a cardiac catheterization for blacks than for whites. Id., 618, 623-624, Table 5. The study concluded that a

"patient's race and sex may influence a physician's recommendation with respect to cardiac catheterization regardless of the patient's clinical characteristics... Our finding that race and sex of the patient influence the recommendations of physicians independently of other factors may suggest bias on the part of the physicians. However, our study could not assess the form of the bias. Bias may represent overt prejudice on the part of physicians or, more likely, could be the result of subconscious perceptions rather than deliberate actions or thoughts. **Subconscious bias** occurs when a patient's membership in a target group **automatically activates a cultural stereotype** in the physician's memory regardless of the level of prejudice the physician has."

Id., 624-625 (emphasis added).

A more recent report by the Institute Of Medicine reveals more troubling facts on the depth and effects of racial prejudice. That report requested by Congress states that a

"large body of published research reveals that racial and ethnic minorities experience a lower quality of health services, and are less likely to receive even routine medical procedures than are white Americans. Relative to whites, African Americans - and in some cases, Hispanics - are less likely to receive appropriate cardiac medication (e.g., Herholz et al., 1996) or to undergo coronary artery bypass surgery (e.g., Ayanian et al., 1993, Hannan et al., 1999; Johnson et al., 1993; Petersen et al., 2002), are less likely to receive hemodialysis and kidney transplantation (e.g., Barker-Cummings et al., 1995; Epstein et al., 2000; Gaylin et al., 1993), and are likely to receive a lower quantity of basic clinical services (Ayanian et al., 1999) such as intensive care (Williams et al., 1995) even when variations in such factors as insurance, status, income, age, co-morbid conditions, and symptom expression are taken into account. Significantly, these differences are associated with greater mortality among African - American patients (Bach et al., 1999; Petersen et al., 1997)....

The health gap between minority and non-minority Americans has persisted, and in some cases, has increased in recent years ....

Evidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services. These disparities are associated with socioeconomic differences and tend to diminish significantly, and in a few cases, disappear altogether when socioeconomic factors are controlled. The majority of studies, however, find that racial and ethnic disparities remain even after adjustment for socioeconomic differences and other healthcare access-related factors (for more extensive reviews of this literature, see Geiger, this volume; Kressin and Petersen, 2001; and Mayberry, Mili, and Ofili, 2000)."

B. Smedley, Unequal Treatment, Confronting Racial And Ethnic Disparities In Health Care,

Summary. Institute Of Medicine, Washington, D.C., 2002, pp. 1-2, 4 (emphasis added).

Regarding the cause for such disparities, that report requested by Congress, Id., 2, points to the use of racial stereotypes and the role of prejudice. The report states that

"[t]hree mechanisms might be operative in healthcare disparities from the provider's side of the exchange: **bias (or prejudice) against minorities**; greater clinical uncertainty when interacting with minority patients; and **beliefs (or stereotypes) held by the provider about the behavior or health of minorities** (Balsa and McGuire, 2001) ....

A large body of research in psychology has explored how **stereotypes** evolve, persist, **shape expectations, and affect interpersonal interactions**. Stereotyping can be defined as the process by which people use social categories (e.g., race, sex) in acquiring, processing, and recalling information about others. The beliefs (stereotypes) and general orientations (attitudes) that people bring to their interactions help to organize and simplify complex and uncertain situations and give perceivers greater confidence in their ability to understand a situation and respond in efficient and effective ways (Mackie, Hamilton, Susskind, and Rosselli, 1996).

Although functional, social stereotypes and attitudes also tend to be systematically biased. These biases may exist in overt, explicit forms, as represented by traditional bigotry. However, because their origins arise from virtually universal social categorization processes, they may also exist, often **unconsciously**, among people who strongly endorse egalitarian principles and truly believe that they are not prejudiced (Dovidio and Gaertner, 1998). In the United States, because of shared socialization influences, there is considerable empirical evidence that even well-meaning whites who are not overtly biased and who do not believe that they are prejudiced typically demonstrate **unconscious implicit negative racial attitudes and stereotypes** (Dovidio, Brigham, Johnson, and Gaertner, 1996). Both implicit and explicit stereotypes significantly shape interpersonal interactions, **influencing how information is recalled and guiding expectations and inferences in systematic ways**. They can also produce self-fulfilling prophecies in social interaction, in that stereotypes of the perceiver influence the interaction with others in ways that conform to stereotypical expectations (Jussim, 1991)"

Smedley, Unequal Treatment, Confronting Racial And Ethnic Disparities, supra at 8-10  
(emphasis added).

Regarding actual prejudice, the report states that healthcare professionals are not much different than the rest of society.

"Prejudice is defined in psychology as an unjustified negative attitude based on a persons' group membership (Dovidio et al., 1996). Survey research suggests that among white Americans, prejudicial attitudes toward minorities remain more common than not, as **over half to three quarters believe that relative to whites, minorities - particularly African Americans - are less intelligent, more prone to violence, and prefer to live off welfare** (Bobo, 2001). It is reasonable to assume, however, that the vast majority of healthcare providers find prejudice morally abhorrent and at odds with their professional values. But healthcare providers, like members of society, may not recognize manifestations of prejudice in their own behavior.

While there is no direct evidence that provider biases affect the quality of care for minority patients, research suggest that healthcare providers' diagnostic and treatment decisions, as well as their feelings about patients, are influenced by patients' race or ethnicity .... [I]n a study based on actual clinical encounters, van Ryn and Burke (2000) found that doctors rated black patients as **less intelligent**, less educated, more likely to abuse drugs and alcohol ... than white patients, even after patients' income, education, and personality characteristics were taken into account. These findings suggest that while the relationship between race or ethnicity and treatment decisions is complex ... , **providers' perceptions and attitudes toward patients are influenced by patient race or ethnicity, often in subtle ways.**"

Smedley, Unequal Treatment, Confronting Racial And Ethnic Disparities, supra at 10-11  
(emphasis added).

### **B. Racial Prejudice Causes Actual Prejudice To A Defendant In A Courtroom**

In a courthouse as in a hospital, a decision maker's subconscious bias can be devastating to the target of the prejudice because the decision maker interprets the evidence through the prism of racial stereotypes. "Social science data on prejudice and communication supports the hypothesis that the unexplored continent of subtle racial imagery used in court is vast. Social science literature documenting the persistence of negative attitudes toward African Americans is overwhelming." S. Johnson, Racial Imagery

In Criminal Cases, 67 Tu. L.Rev. 1739, 1762(June 1993). Racism not only runs wide but it runs deep in this country going back to childhood.

"Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings. Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level. ...

Individuals learn cultural attitudes and beliefs about race very early in life, at a time when it is difficult to separate the perception's of one's teachers, usually a parent, from one's own. In other words, one learns about race at a time when one is highly sensitive to the social contexts in which one lives ....

Lessons learned at this early development stage are not questioned: They are learned as facts rather than as points of view.

Furthermore, because children learn lessons about race at this early stage, most of the lessons are tacit rather than explicit. ... Small children will adopt their parent's beliefs because they experience them as their own. If we do learn lessons about race in this way, we are not likely to be aware that the lessons have ever taken place. If we are unaware that we have been **taught to be afraid of blacks or to think of them as lazy or stupid, then we may not be conscious of our internalization of those feelings and beliefs.**

All of these processes, most of which occur outside the actor's consciousness, are mutually reinforcing. Furthermore, there is little in our environment to counteract them; indeed, **our culture often supports and rewards individuals for making hostile misjudgments that exaggerate the differences** between themselves and members of a racial out-group."

C. Lawrence, The Id, The Ego, And Equal Protection: Reckoning With Unconscious Racism,

39 Stan.L.Rev. 317,323, 337-338 (January 1987) (emphasis added).

The racism learned at an early age translates into the later use of racial stereotypes.

"Case studies have demonstrated that an individual who holds **stereotyped** beliefs about a 'target' will remember and **interpret past events in the target's life history** [such as revealed in a black defendant's testimony about the alleged crime] in ways that **bolster and support his stereotyped beliefs** and will perceive the target's actual behavior as reconfirming and validating the stereotyped beliefs. While the individual may be aware of the selectively perceived facts that support his categorization or simplified understanding, he will not be aware of the process that caused him to deselect the facts that do not conform with his rationalization .... The decision maker who is unaware of the selective perception that has produced her stereotype will not view it as a stereotype. She will believe that her actions are motivated not by racial prejudice but by her attraction or aversion to the attributes she has 'observed' in the groups she has favored or disfavored."

Id., 339\_ (emphasis added).

"A stereotype is used as a **guideline**; where gaps are left, an individual **will fill them in with stereotyped beliefs.**" Id., 339, note 91 (emphasis added).

"[S]tereotypes operate as 'person prototypes' or 'social schemas'. As such, they function as implicit theories, **biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information** about people. These biases are **cognitive** rather than motivational. They operate absent intent to favor or disfavor members of a particular social group. And, perhaps **most significant for present purposes, they bias a decision maker's judgment long before the 'moment of decision'**, as a decision maker attends to relevant data and interprets, encodes, stores, and retrieves it from memory. These biases 'sneak up on' the decision maker, **distorting** bit by bit the data upon which his decision is eventually based."

L. Krieger, The Content Of Our Categories: A Cognitive Bias Approach To Discrimination And Equal Employment Opportunity, 47 Stan.L.Rev. 1161, 1188 (July 1995) (emphasis added).

The most devastating stereotype that is used in a criminal courtroom with a black defendant is the "Black-as-criminal stereotype", the belief that blacks are "more likely to be criminals", or as one observer has noted: "crime has become a metaphor to describe young black men". C. Lee, Race And Self Defense: Toward A Normative Conception Of Reasonableness, 81 Minn.L.Rev. 367,403 (1996) (emphasis added).

Some of the other most common stereotypes that are devastating in a courtroom concern the belief that blacks are more violent, less intelligent and less trustworthy than whites. Concerning violence and intelligence, as mentioned above "[s]urvey research suggests that among white Americans, prejudicial attitudes toward minorities remain more common than not, as over half to three quarters believe that relative to whites, minorities - particularly African Americans - are less intelligent, [and] more prone to violence". Smedley, Unequal Treatment, Confronting Racial And Ethnic Disparities, supra at 10. There is the

"image of African Americans as [being] **more violent and more criminal** than whites .... [There] are portrayals of persons of color as animal-like or subhuman .... Social science data on prejudice and communication supports the hypothesis that the unexplored continent of **subtle racial imagery used in court is vast**. Social science literature documenting the persistence of negative attitudes toward African Americans is **overwhelming....** Modern racists do not want to associate with persons of color largely because of the **stereotypes** they still hold. A 1990 survey by the National Opinion Research Center of the University of Chicago found that more than half of all whites believe that black people are **less intelligent**, less hardworking, and less patriotic and more to the point here - **more prone to violence than whites.**"

Johnson, Racial Imagery In Criminal Cases, *supra* at 1751, 1753, 1762-1763 (emphasis added).

"One of the stereotypes most often applied to African Americans males is that they are **more dangerous, more prone to violence**, and more likely to be ... gang members than other members of society .... TS]tudies suggest that stereotypes about Blacks as **violent or dangerous people influence perception and judgment.**" Lee, Race And Self Defense, *supra* at 403, 406 (emphasis added).

Concerning the stereotype about a propensity to lie,

"[b]lack **dishonesty** is another racial image that has been exploited by prosecutors. At one time it was relatively common to find cases in which attorneys argued that African Americans are **generally less trustworthy witnesses....** One variation on the **dishonesty** image is that African Americans are **likely to lie** when they testify for each other and likely to tell the truth when they testify against each other."

Johnson, Racial Imagery In Criminal Cases, *supra* at 1755-1756 (emphasis added).

"Black women have also suffered from the perception that they are **untrustworthy**, criminal, or dangerous." Lee, Race And Self Defense, *supra* at 403 (emphasis added).

The above studies on how biased people rely on racial stereotypes in making decisions can be understood more vividly by recalling the scene in the movie 12 Angry Men where one of the jurors during the deliberations actually articulates how the other jurors should use racial and ethnic stereotypes to find the defendant guilty. The juror played by Ed Begley states:

"you know how these people lie, its born in them - I mean - what the heck - I don't have to tell you - they don't know what the truth is.... They don't need any real big reason to kill somebody either.... They get drunk, they're real big drinkers all of them. You know that - and bang someone is lying in the gutter. Well - nobody is blaming them for it - that's the way they are by nature - you know what I mean - violent.... Human life don't mean as much to them as it does to us - look they're lushing it up and fighting all the time - if somebody gets killed - so somebody gets killed- they don't care. Oh sure - there are some good things about them too - I am the first to say that. I've known a couple who were OK but that was the exception - you know what I mean. Most of them - its like they have no feelings, they can do anything.... This kid is a liar. I know it, I know all about them - listen to me - they're no good- there is not a one of them who is any good... Listen to me - this kid on trial here - his type - well don't you know about them. There is a danger here, these people are dangerous, they're wild - listen to me.."

Henry Fonda then responds, "it is always difficult to keep personal prejudice out of a thing like this. Where ever you run into it -prejudice always obscures the truth." As noted earlier, there is an "unexplored continent" of racial prejudice in criminal cases. Johnson, Racial Imagery In Criminal Cases, supra at 1762.

### **C. Examples of How Specific Stereotypes Prejudice A Defendant**

In crimes involving the element of intent such as the intent to commit larceny, burglary or arson, a juror who believes that blacks are not good enough to marry whites would be more inclined to conclude that a black rather than a white had the mental state required for the crime. Jurors who believe that blacks are criminals would be more inclined to conclude that a black defendant had the intent to permanently keep a car rather than take a joyride, had the intent to commit a crime within a building rather than the intent to merely seek shelter, and had the intent to destroy a building that was set ablaze by a match rather than merely the intent to light a cigarette and then carelessly throwing away the match.

Another example is when a black claims self defense. In that situation the stereotypes are devastating because the court instructs the jury that the defendant must not have been the initial aggressor, must have "reasonably" believed that another was threatening him with force and

must have used only that degree of force which he "reasonably" believed was necessary to defend himself. (See for example Conn. Gen. Stat., Sec. 53a-19). A white juror who believes blacks are more violent than whites would be more inclined to find that a black defendant was the initial aggressor, and a juror who believes that blacks are less intelligent than whites would be less likely to find that a black defendant's actions were reasonable. "In self defense cases ... , racial stereotypes ... may influence [the jury's] ... assessment of whether the defendant's use of force against the victim was reasonable." Lee, Race And Self Defense, supra at 401.

Whites who believe that blacks are not good enough to marry whites do not magically stop using racial stereotypes in cases where the both the defendant and the victim are black. The concept that racial prejudice is a moot issue in cases where the defendant and the victim are both black is a concept that actually depends on the racial stereotype that all blacks are alike or that "they're all the same". The concept that race becomes a mooted issue in such situations relies on the assumption that any juror who might be racist will treat the black victim and the black defendant both the same and thus the defendant should have no complaints. But a defendant has a constitutional right to a fair and impartial jury which means a jury that treats the defendant the same as all people not just the same as people that a juror believes are inferior. More importantly in situations where the defendant and the state's witnesses are black, the bias is not negated since allowing a juror who believes that "they're all the same" to sit in judgment of a black defendant presents that juror with the opportunity to also act on his or her belief that "they all belong in jail".

**D. The Supreme Court's Rulings In Bob Jones University And Brown v. Board Of Education Support Disqualification Of Jurors Who Oppose Interracial Marriages**

The defendant has a right to an impartial jury under the Sixth and Fourteenth Amendments to the United States constitution and ---- of the state constitution. A

"defendant has a right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." Georgia v. McCollum, *supra*, 505 U.S. at 58.

The United States Supreme Court has clearly held that people who hold beliefs against interracial marriages are people who are not impartial and who do have a racial animus. In Bob Jones University v. United States, *supra*, the Supreme Court first noted that

"the sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race....

Since May 29, 1975, the University has permitted unmarried Negroes to enroll; but a disciplinary rule prohibits interracial dating and marriage. The rule reads:

*'There is to be no interracial dating.*

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside of their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled."

Bob Jones University, *supra*, 461 U.S. at 580-581.

The Court held that the University's tax-exempt status should be revoked because

"there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of **elementary justice**. Prior to 1954, public education in many places still was conducted under the pall of Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed 256(1896); racial segregation in primary and secondary education prevailed in many parts of the country.... This Court's decision in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873(1954) [banning segregated schools as unconstitutional], signaled an end to that era....

An unbroken line of cases following Brown v. Board of Education establishes beyond doubt this Court's view that **racial discrimination** in education violates a most **fundamental national public policy, as well as rights of individuals....** In Norwood v. Harrison, 413 U.S. 455, 468-469, 93 S. Ct. 2804, 37 L. Ed.2d 723(1973), we dealt with a nonpublic institution [and stated that] 'A private school - even one that discriminates - fulfills an important educational function; **however, that legitimate educational function cannot be isolated from discriminatory practices. Discriminatory treatment exerts a pervasive influence on the entire educational process.**' "

Bob Jones University, supra, 461 U.S. at 592-594 (first three emphasis added, last emphasis in original).

The Supreme Court further noted that

"[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination ... Given the stress and anguish of the history of efforts to escape from the shackles of the **'separate but equal'** doctrine of Plessy v. Ferguson, [supra], it cannot be said that educational **institutions that, for whatever reasons, practice racial discrimination**, are institutions exercising 'beneficial and stabilizing influences in community life'(citation omitted)....

The **governmental interest at stake here is compelling**. As discussed [earlier], the Government has a fundamental, overriding interest in **eradicating racial discrimination** in education - discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."

Bob Jones University, supra, 461 U.S. at 595, 604 (emphasis added).

The Supreme Court found irrelevant the fact that the University "now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage." Id., 605. The University's argument that it was "not racially discriminatory" because it allowed blacks and whites to associate in class, was an argument that was rejected by the Court. Id. The Court simply concluded that "[a]lthough a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination .... [and] therefore ... the IRS properly" ruled that Bob Jones University did not qualify for tax-exempt status because it practiced racial discrimination. Id.

The Supreme Court in the earlier landmark case of Brown v. Board of Education, which banned segregated schools as unconstitutional, stated that "modern authority" reveals that "[s]egregation ... has a detrimental effect upon the colored children .... [because] separating the

racism is usually interpreted as denoting the **inferiority** of the negro group." Brown v. Board of Education, supra, 347 U.S. at 494 (internal citation and citation marks omitted, emphasis added).

Racism must be eradicated not only from universities and the classroom but also from the courtroom. The same litmus test for racism that was used in the Bob Jones case should also be used to detect and eliminate racism in the courtroom. It is clear that the Supreme Court in the Bob Jones and Brown v. Board of Education cases held that people who are against interracial marriage and for segregation are people who practice racial discrimination, and no religious spin will lessen the fact that such people are racist. The belief that the races should not intermarry is a litmus test that reveals that such a person is a racist regardless of any other beliefs, be they sincere or condescending, such as the belief that blacks and whites can be integrated in other aspects of life such as attending the same school or country club together.

Studies show that many people who initially appear not to be racist are shown to be racist when their attitudes on interracial marriage are scrutinized. For example, one study reveals that when family attitudes toward interracial marriage are closely examined, several hidden attitudes can be uncovered. K. Kouri, M. Lasswell, Black-White Marriages: Social Change and Intergenerational Mobility, Marriage and Family Review, The Haworth Press, Inc., Vol. 19, No. 4, 1993, pp. 241-255. In one example a white woman encouraged her son to spend time with a young black woman from their church, but was distressed when her son chose to marry the woman. Id., 252. In another example, one white woman's family advocated racial integration and had encouraged her to form friendships with people of other races since childhood but reacted negatively when she married a black man. Id.

Many civil rights cases have been brought to remedy situations where whites discriminate by making decisions based solely on their views against interracial marriage.

See Parf v. Woodmen of the World Life Insurance Company, 791 F.2d 888 (11<sup>th</sup> Cir. 1986) (civil rights violated when a company fails to hire an insurance salesman due to his interracial marriage); Gresham v. Waffle House, Inc., 586 F. Supp. 1442 (N.D. Georgia, 1984) (civil rights violated when a company fires a white woman from her job because of her marriage to a black man); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4<sup>th</sup> Cir., 1980) (civil rights violated when a principal expels a white student for having an interracial romantic relationship with a black student); Bills v. Hodges, 628 F.2d 844 (4<sup>th</sup> Cir., 1980) (civil rights violated when white women are evicted from their apartment because they date black men); Holiday v. Belle's Restaurant, 409 F. Supp. 904 (W.D. Penn., 1976) (civil rights violated when a white employee is fired because her employer believed she was married to a black man); Faraca v. Clements, 506 F.2d 956, 958 (5<sup>th</sup> Cir., 1975) (civil rights violated when a mental health center refused to hire a white person married to a black person because of "grave concern about the effects of the racially mixed couple on visitors and possible adverse reactions from state legislators").

In a case where the Connecticut Supreme Court held that it was error for the trial court not to allow the defense attorney to question jurors about their beliefs on interracial marriage but ruled that such an error was harmless, the dissenting opinion pointed out that:

"the importance of allowing such a question is underscored by a recent article in the New York Times .... [quoting] Doctor Richard D. Alba, chairman of the sociology department at the State University of New York at Albany, and a specialist in ethnic intermarriage and race relations ... [who stated that] a white person's view on interracial marriage 'is like the tip of the iceberg. It is the visible expression of a host of attitudes and informal contacts that are otherwise hard to measure.'"

State v. Smith, 222 Conn. 1, 30-31, 608 A.2d 63 (1992) (Berdan, J., dissenting).

The belief against interracial marriage is still quite pervasive in this country. Studies reveal that "66 percent of whites ... oppose a close relative's marrying a black person" and

"20 percent of whites still believe interracial marriage should be illegal." Smith, supra, 222 Conn. at 30 (Berdan, J., dissenting).

Thus the Bob Jones University case supports the principle that the belief against interracial marriage is a litmus test that reveals a juror's bias and to eradicate that bias from the courtroom as from a classroom, that juror must be removed.<sup>3</sup>

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<sup>3</sup> Many people misconstrue some Supreme Court cases as holding that an inquiry into a potential juror's racial prejudice is not necessary. For example in Ristaino v. Ross, 424 U.S. 589, 598, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), the defendants were black and the victim was white, and the Court held that an inquiry into racial prejudice was not constitutionally required because the circumstances of the case did not suggest a significant likelihood that racial prejudice would infect the trial. However, the trial court in that case actually gave the defendant's attorney the opportunity to provide the court with reasons why jurors should be questioned specifically about racial prejudice. The defendant's counsel replied that he could furnish "[n]o [such reason], just the fact that the victim is white and the defendants are black." Id., 591. The Supreme Court ruled that the "circumstances thus did not suggest a significant likelihood that racial prejudice might infect [the] trial. **This was made clear to the trial judge when [the defendant] was unable to support his motion concerning voir dire by pointing to racial factors...**" Id., 598 (emphasis added). Thus Ristaino is not a precedent that holds that a racial inquiry is not required but is only a case that strongly suggests that lawyers should do a better job in providing the courts with authorities on how racial prejudice and stereotypes do infect the trial of a black defendant.

In Rosales-Lopez v. United States, 451 U.S. 182, 191, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) the Supreme Court in a plurality opinion stated an inquiry into any prejudice against people of Mexican descent was not constitutionally required. However, the opinion actually states that an inquiry into race is required "where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury". Id., 191. The opinion further states that in addition to situations involving violent crimes and parties of a different race "[t]here may be **other circumstances that suggest the need for an inquiry**, but the decision as to whether the total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury remains primarily with the trial court, subject to case-by-case review by the appellate courts". Id., 192 (emphasis added). In that case, the defendant who was of Mexican decent requested the court to ask prospective jurors about any prejudices against people of Mexican descent and the court refused to ask that question but did ask questions concerning any feelings about aliens. As in many other cases, the defendant's attorneys in the Rosales-Lopez case both at the trial level and at the appellate level provided no analysis of how racial bias would affect his case.

Since the Court in the above cases was not provided with the depth of analysis that had been provided herein, nor had the benefit of the analysis in the Bob Jones case which came later, it cannot be argued that the Court believes that an inquiry into a potential juror's racial prejudice is not critical. "The authority of a former decision as a precedent must be

The court can take judicial notice of the fact that the Senate Judiciary Committee recently rejected a nominee for the United States Court of Appeals For The Fifth Circuit partly because of his earlier position that the criminal laws against inter-racial marriages

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limited to the points actually decided on the facts before the court... While the doctrine of stare decisis relates only to legal principles, the positive authority of a decision is coextensive only with the facts on which it is founded." C.J.S., Courts, Secs. 162-163. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925). "[W]e do not normally take Supreme Court opinions to contain holdings on matters the Court did not discuss..." Sweeney v. Westvaco Co., 926 F.2d 29, 40(1) Cir. 1991). "In order for a decision to be given stare decisis effect with respect to a particular issue, that issue must have been actually decided by the court." Moore's Federal Practice, Sec. 134.04[5] at 134-37 (3d ed. 2000). "It is the general rule that a case resolves only those issues explicitly decided in the case.... [T]he precedential value of a decision should be limited to the four corners of the decision's factual setting.... [T]he statement of a rule of law in a given case must be tempered by the facts which give rise to its pronouncement." State v. Ouellette, 190 Conn. 84, 91-92, 459 A.2d 1005 (1983) (internal citations and citation marks omitted).

Furthermore, the opinion in State v. Tucker, *supra*, mentioned earlier, page 5, has limited value as a precedent not only because it ignored the Supreme Court's ruling in the Bob Jones University case but because in Tucker the record as to how such a view against inter-racial marriages showed an actual bias was very limited. The defendant's counsel merely argued that such views should disqualify the juror and did not raise a constitutional argument. State v. Tucker, *supra*, 226 Conn. at 633-636, including note 17. Since the defendant used peremptory challenges to excuse the jurors who opposed interracial marriages, on appeal the court did not decide any constitutional issue but merely found that the "trial court did not abuse its discretion" in overruling the defendant's request that the jurors who opposed inter-racial marriages be excused for cause since the "record lacks adequate factual support for the defendant's argument" that such views were cause for disqualification. Id., 631-632, 635-636.

The present motion does provide the record that was missing in the Tucker case and does present constitutional arguments, including those raised in the Bob Jones University case, that were not decided in the Tucker case where the challenged jurors did not sit. Since the Tucker case did not decide the constitutional issues presented in the present case, then it is not a precedent. A decision "resolves only those issues explicitly decided in the case." State v. Ouellette, *supra*, 190 Conn. at 91. See C.J.S., Courts, *supra*, Secs. 162-163, Webster v. Fall, *supra*, 266 U.S. at 511. Furthermore, the present motion provides a far more extensive record than in the Tucker case and presents factual arguments concerning the use of stereotypes etc. not made in that case. The "precedential value of a decision should be limited to the four corners of the decision's factual setting.... The statement of a rule of law in a given case must be tempered by the facts which give rise to its pronouncement." State v. Ouellette, *supra*, 190 Conn. at 91-92 (internal citations and citation marks omitted).

should be strengthened. Since judges can be rejected for such views then jurors should also be rejected.

**E. The Court Has A Constitutional Duty To Disqualify Those Who Oppose Interracial Marriages In The Same Way It Has A Statutory Duty To Disqualify Felons**

To eradicate racism in the courtroom as in a classroom, it is not enough to just allow an inquiry into a juror's belief against interracial marriage and then require the lawyer to use a peremptory challenge. Rather it is the court's duty, after the voir dire process, to disqualify jurors who are not impartial.

A defendant has a right to an "impartial jury" under the Sixth Amendment and \_\_\_ of the constitution of the state of \_\_\_\_\_, "Both the federal and state constitutions guarantee to an accused the right to a public trial by an impartial jury ... [which includes the right to] an adequate voir dire to identify unqualified jurors." State v. Patterson, 230 Conn. 385,391,645 A.2d 535 (1994) (internal citation and citation marks omitted).

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. (citations omitted). '*Vair dire* plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored. Without an adequate *voir dire* the **trial judge's responsibility to remove jurors who will not be able impartially** to follow the comt's instructions and evaluate the evidence cannot be fulfilled.' Rosales-Lopez v. United States, 451 U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981)(plurality opinion)."

Morgan v. Illinois, 504 U.S. 719, 729-730, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

The "**obligation** to impanel an impartial jury lies in the first instance with the **trial judge**". Rosales-Lopes v. United States, *supra*, 451 U.S. at 189 (emphasis added). "The right to [a] jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. **Primary responsibility** for securing this guarantee rests with the **trial court**" State v. Day, 233 Conn, 813, 843, 661 A.2d 539 (1995) (internal citations and

citation marks omitted, emphasis added). "The trial court, when empaneling a jury, has a **serious duty** to determine the question of actual bias". State v. Ziel, 197 Conn. 60, 65, 495 A.2d 1050 (1985) (emphasis added).

Thus it is the court's responsibility and duty to guarantee that the defendant has an impartial jury and therefore the court should not require a defendant to use his peremptory challenges to do the court's work unless the court is willing to give him unlimited peremptory challenges. Among the court's constitutional duties is to make sure that the defendant has "an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice", Georgia v. McCollum, *supra*, 505 U.S. at 58, and to fulfill that constitutional duty the court should disqualify jurors who are opposed to interracial marriages in the same way as the court has a statutory duty to disqualify convicted felons without requiring an attorney to explain to the court why a felon's impartiality is tainted in a specific case. See \_\_\_ (for example, *Conn. Gen. Stat., Sec. 51-217(a)(2)*, 28 U.S.C., *Sec. 1865(b)(5) disqualifying convicted felons*). The court should use the same simple litmus test that the government uses in tax cases to identify bias and which ignores any spin that might be offered as an excuse for the bias.'

The belief against interracial marriage is the type of implied bias that requires mandatory disqualification. In a case involving juror disqualification, the Second Circuit stated that an

"[i]mplied bias or presumed bias is 'bias conclusively presumed as a matter of law.' (citation omitted). It is attributed to a prospective juror regardless of actual partiality. In contrast to the inquiry for actual bias, which focuses on whether the record on voir dire supports a finding that the juror was in fact partial, the issue of implied bias is whether an average person in the position of the juror in controversy would be prejudiced. (citation omitted). And in determining whether a prospective juror is impliedly biased, 'his statements upon voir dire about his ability to be impartial are

totally irrelevant.' (citation omitted) .... Moreover, disqualification on the basis of **implied bias is mandatory.**"

United States v. Torres, 128 F.3d 38, 45(2<sup>nd</sup> Cir. 1997)(emphasis added).

The type of matters within the scope of implied or presumed bias are a juror's relationship with one of the parties, a juror's personal history as a victim of the crime allegedly committed by the defendant on trial, or "past experiences [that] are strongly correlated with bias in jurors and thus **suggest a very high risk of partiality**". Id., including note 7(emphasis added). Certainly a belief that a white person should not marry a black person shows a "very high risk of partiality" which should disqualify such a juror from sitting in judgment of a black defendant just as such a belief disqualifies an educational institution from having tax-exempt status.

Furthermore, if an attorney is able to elicit that a juror believes that whites should not marry members of the defendant's race, and that juror is not automatically excused and the defendant's attorney as a practical matter is not able to excuse that juror due to the lack of, or too few remaining, peremptory challenges, then the defendant will be stuck with not only a racist juror but a hostile juror. To elicit from a juror that he or she is prejudiced requires asking personal and embarrassing questions which can only make the juror feel hostile toward the lawyer who asked the questions or who obviously submitted the questions for the court to ask. Thus once prospective jurors fail the litmus test, they cannot remain on the jury because not only are they prejudiced toward blacks and other minorities in general but also they would be hostile to the defendant who caused their embarrassment.

Furthermore, litmus test questions are needed and not just the opportunity to ask many questions since general questions do not reveal racism. "[R]acial prejudice ... [can] operate and remain **undetected** .... [There are] **subtle less consciously** held racial attitudes

[which] could ... influence a juror's decision." Turner v. Murray, 476 U.S. 28, 35, 106 S.Ct. 1683, 90 L.Ed.2d 27(1986)(emphasis added).

Lawyers are not psychologists and are no better at diagnosing the cancer of racism than they are at diagnosing lung cancer by reading chest x rays.

"The racial images that a juror carries in her head are rarely revealed by voir dire .... Even when trial courts permit inquiry concerning racial prejudice, questions are often limited in number .... Attorneys who have been permitted to conduct extensive voir dire report that prospective jurors reveal racial prejudice only after numerous sensitive and specific questions have been asked. In part, this is because most modern racists do not have categorically hostile attitudes toward minorities and, therefore, general questions will not probe inconsistencies. A juror may sincerely answer that she has no bias against black people that would impair her partiality, while still believing that **interracial marriage** is wrong and that black people are more **violent** than white people. Moreover, even extensive questioning, which is rare, is unlikely to eliminate all persons whose deliberations will be influenced by racial imagery."

Johnson, Racial Imagery In Criminal Cases, *supra* at 1769-1770(emphasis added).

Thus, since the I.R.S. can automatically disqualify as a tax exempt institution any charity or school that is against interracial marriages without persuading anyone that such institutions are racist, then surely a defendant whose liberty is at stake should be able to automatically disqualify any potential juror who is against interracial marriages without persuading the court that such a juror is racist. The defendant in a criminal case should be allowed to rely on the same litmus test that the government uses to detect racism.

Furthermore, allowing a juror to sit in judgment of a defendant when that juror would oppose a close relative dating or marrying a member of the defendant's race or ethnic group not only violates the defendant's constitutional rights to an impartial jury but also can violate his rights to a minimum jury of six (*or 12*) people under the federal and state constitution if members of the defendant's race or ethnic group are also on the jury. See Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978)(at least a six person jury is required

under the United States constitution) (also for example see Article IV of the Amendments to the Connecticut constitution, Conn. Gen. Stat., Sec. 54-82(c) regarding 6 person juries).

Jurors who are biased simply will not listen to jurors of the defendant's race or ethnic group during jury deliberations resulting in the jury not functioning in its full capacity performing all of its duties. As part of his right to a jury trial the defendant has a right to a jury that will perform its duties. The courts instruct jurors that one of their duties as part of the deliberative process, is to listen to and give deference to the opinions of other jurors. Judges instruct jurors that "(i)t is your **duty** as jurors to **consult** with one another and to deliberate with one another with a view towards reaching an agreement. ... In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if convinced it is erroneous." Federal Jury Practice And Instructions, Civil And Criminal, Devitt, Blackmar, Wolf, and O'Malley, Fourth Edition, Sec. 20.01(emphasis added).

When jurors have trouble reaching a decision, the judges instruct the jurors that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.... It cannot be ... that [a juror] should close his [or her] ears to the arguments of men [or women] **who are equally honest and intelligent as himself.**" Allen v. United States, 164 U.S. 492, 501-502, 17 S.Ct. 154, 41 L.Ed. 528(1896)(emphasis added). In Connecticut, the judges instruct jurors that

"(i)t is the **duty** of each juror to discuss and consider the opinions of the other jurors ... [and give] due regard and **deference** to the opinions of each other. In conferring together you ought to pay proper respect to each other's opinion and listen with an open mind to each other's argument.... [A] dissenting juror or jurors should consider whether his or her opinion is a reasonable one when the evidence does not lead to a similar opinion in the minds of the other jurors, men and women who are **equally honest and equally intelligent**, who have heard the same evidence..."

State v. Wooten, 227 Conn. 677, 704-705, note 13, 631 A.2d 271(1993) (emphasis added).

If a juror believes that a member of his family should not date or marry a member of the race or ethnic group of another juror on the panel, then that first juror at least subconsciously will not truly perform his or her duty of consulting with or giving deference to the opinion of the other juror because the first juror really believes that the second juror is inferior and less intelligent. Thus the biased juror does not fully perform his or her duties nor does he or she permit the other jurors to fully perform their duty of expressing their opinions. In such situations the jury does not function as a complete 6-person jury. Thus a juror who opposes a relative marrying a member of the race or ethnic group of another juror actually has a \_\_\_ (for example "quality which will impair the capacity of such person to serve as a juror", see Conn. Gen. Stat., Sec. 51-217(a)(1), and is "incapable, by reason of mental ... infirmity, to render satisfactory jury service", see 28 U.S.C., Sec. 1865(b)(4),) and thus should be disqualified.

#### **F. Conclusion As To Defendant's Constitutional Rights**

Thus allowing a juror to sit in judgment of a defendant when that juror believes that a member of the defendant's race or ethnic group is not good enough to date or marry a close member of the juror's family violates the defendant's federal and state constitutional rights to due process and to a fair trial before an impartial jury as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States constitution and \_\_\_ of the constitution of the state of \_\_\_\_\_. Such a juror should also be disqualified in accord with \_\_\_ (for example see Conn. Gen. Stat., Sec. 51-217(a)(1) which states that the court shall disqualify anyone who has "any quality which will impair the capacity of such person to serve as a juror"; Conn. Gen. Stat., Sec. 54-82(f) which states that the court shall disqualify anyone who "would be unable to render a fair and impartial verdict"; 28 U.S.C., Sec. 1865(b)(4) which states that the court should disqualify anyone who "is incapable, by reason of mental or physical infirmity, to render

*satisfactory jury service"; and 28 U.S.C., Sec. 1866(c)(2) which states that the court should disqualify anyone who "may be unable to render impartial jury service.)*

Allowing such jurors who oppose interracial dating or marriages to sit in judgment of the defendant also violates his federal and state constitutional rights to a minimum jury of 6 (or 12) jurors because such jurors would be incapable of performing their duty of listening to other jurors who are of the same race or ethnic group as the defendant, and the views of the other jurors would not be fully evaluated by all of the jurors.

Therefore the court should disqualify any and all jurors who would oppose a close relative marrying or dating a member of the race or ethnic group of the defendant.

**G. Jurors Who Oppose Interracial Marriages Should Be Disqualified As A Matter of Public Policy And To Protect The Rights Of Other Jurors**

Irrespective of the defendant's constitutional rights, this court should disqualify any and all jurors who oppose interracial dating or marriage in order for the court to advance the "national policy" of "eradicating racial discrimination", Bob Jones University, supra, 461 U.S. at 593, 604, and to protect the constitutional rights of other jurors. Minorities have a right to not only sit as jurors but to fully participate as jurors by having their views considered by all other jurors.

"[D]enying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. ... [A]n individual juror ... does possess the right not to be excluded from [a jury] on account of race .... [T]he harm from discriminatory jury selection practices extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."

Georgia v. McCollum, supra, 505 U.S. at 48-49 (internal citations and citation marks omitted).

"Discrimination in jury selection, whether based on race or gender, causes harm to ... the individual jurors who are wrongfully excluded from participation in the judicial process.... All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of stereotypical presumptions that reflect and reinforce patterns of historical discrimination."

J.E.B. v. Alabama, 511 U.S. 127, 140-142, 114 S.Ct. 1419, 128 L.Ed.2d 89(1994).

As mentioned above, courts instruct jurors that their duties include arguing their point of view and also listening to and giving deference to the opinions of other jurors. Jurors who oppose a close relative dating or marrying a member of another's juror's race or ethnic group are not going to give deference to that juror's opinions which then violates that other juror's right to participate as a full member of the jury.

The courts have a responsibility of protecting the rights of jurors even though obviously they are not parties in any case. The Supreme Court has held that the courts should protect a juror's constitutional right to the equal protection of the laws by not allowing parties to use a peremptory challenge based on gender, J.E.B. v. Alabama, supra, 511 U.S. 127, and by not allowing a defendant to use a peremptory challenge based on race. Georgia v. McCollum, supra, 505 U.S. at 42.

Similarly the courts should protect a juror's constitutional right to fully participate as a juror by not allowing biased people to sit as jurors who would ignore the views of other jurors and thus violate their right to fully participate as jurors. By allowing such biased jurors to sit would be similar to allowing jurors to sit who view black jurors as having only 3;5<sup>th</sup> the value of white jurors.

## **H. Conclusion**

Fifty years ago Thurgood Marshall and others achieved a major goal towards eradicating racism in classrooms when in the case of Brown v. Board of Education they persuaded the Supreme Court to finally ban school segregation that had been practiced under the guise of separate but equal schools. Unfortunately, there has never been any real effort to eradicate the racism that permeates our nation's courtrooms and which taints most verdicts

involving black and other minority defendants. In the courtroom, as in the classroom, the racism is founded on the belief that blacks and other minorities are inferior to whites and should be kept separate from whites. In the schools, the racism was practiced by administrators who kept blacks separate from whites. In the courts, racism is practiced by white jurors who believe that blacks and other minorities are not good enough to marry whites and should be kept separate when it comes to such a close and personal relationship as marriage. Such jurors who believe that blacks and other minorities are inferior and should not marry whites are jurors who not only have a general bias but also are jurors who will use negative racial stereotypes at least subconsciously in making judgments about the case. It is not the general bias but the stereotypes used by biased jurors that are so devastating in a courtroom. As Henry Fonda said in 12 Angry Men, "prejudice always obscures the truth".

Therefore, the court should disqualify any and all jurors who would oppose a close relative dating or marrying a member of the defendant's race or ethnic group. Allowing such jurors to sit in judgment of the defendant violates his right to due process, to a fair trial by an impartial jury, and to complete jury as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States constitution and \_\_\_\_\_ of the constitution of \_\_\_\_\_. Allowing such jurors to participate in the criminal justice system would actually endorse racial prejudice rather than advance the government's "fundamental, overriding interest in eradicating racial prejudice". Bob Jones University, supra, 461 U.S. at 604.

The Defendant

By \_\_\_\_\_  
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**Statutes**  
**That Would Automatically Disqualify From Jury Service Anyone Who**  
**Would Oppose A Close Relative Dating Or Marrying Someone Of A**  
**Different Race Or Ethnic Group**  
**(Similar To Statutes That Disqualify Felons)**

Federal Statutes - Option 'A' Involving Criminal Cases Only .....30  
Federal Statutes - Option 'B' Involving All Cases .....33  
Connecticut Statutes - Option 'A' Involving Criminal Cases Only .....36  
Connecticut Statutes - Option 'B' Involving All Cases .....38

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**P.L. \_\_\_\_\_ AN ACT CONCERNING DISQUALIFICATION OF JURORS  
DUE TO RACIAL OR ETHNIC BIAS SO AS TO PREVENT SEGREGATIONISTS  
FROM SERVING AS JURORS**

**Federal Statutes - Option 'A' Involving Criminal Cases Only**

**The United States Code, Chapter 28, Section 1865 is hereby amended by adding clauses  
(6) and (7) in subsection (b) as grounds for disqualification, and  
adding subsection (c):**

Sec. 1865 Qualification for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, or the clerk under supervision of the court if the court's jury selection plan so authorizes, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, or the clerk if the court's jury selection plan so provides, shall deem any person qualified to serve on grand and petit juries in the district unless he-

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understands the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service;

(5) has a charge pending against him for a commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored;

(6) is of a different race than the defendant on trial in a criminal case and states on a juror qualification form or during voir dire that he or she would oppose a close relative marrying or dating a member of the defendant's race; or

(7) is of a different ethnic group than the defendant on trial in a criminal case and states on a juror qualification form or during voir dire that he or she would oppose a close relative marrying or dating a member of the defendant's ethnic group.

(c) If a potential juror is of a different race or ethnic group than that of the defendant on trial in a criminal case and expresses an opinion, either on the juror qualification form or during any voir dire, that he or she would oppose a close relative marrying or dating a member of the defendant's race or ethnic group, then that potential juror shall be excused by the judge or clerk for cause in accord with the above procedures or upon challenge for good cause made pursuant to 28 U.S.C., Sec. 1866(c)(2)(4) shall be excluded by the court on the grounds that such juror may be unable to render impartial jury service.

**The United States Code, Chapter 28, Section 1866(c) is hereby amended by adding the italicized words in clauses (2) and (4):**

Sec. 1866 Selection and summoning of jury panels

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, That any person summoned for jury service may be (1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service under subsections (b) and (c) of this section or, if the court's jury selection plan so provides, the name of such person shall be reinserted into the qualified jury wheel for selection pursuant to subsection (a) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, *such grounds to include but not be limited to that person's opposition to a close relative dating and or marrying someone of a different race and or ethnic group as setforth in subsection (c) of section 1865 of this title*, or (3) excluded upon peremptory challenge as provided by law; (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, *such good cause to include but not be limited to that person's opposition to a close relative dating and or marrying someone of a different race and or ethnic group as setforth in subsection (c) of section 1865 of this title* or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms during the period, specified in the plan, between two consecutive filings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

**The United States Code, Chapter 28, Section 1869(h) is hereby amended by adding the following second and seventh sentences, and the italicized words 'own' and 'his own' in the sixth sentence:**

Sec. 1869 Definitions

For purposes of this chapter-

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored. *Each such juror qualification form shall and must also include the question: "Are you opposed to a close relative marrying or dating a member of a race or ethnic group different than their own?"* The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his *own* religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning *his own* race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service. *However, the juror qualification form shall inform the prospective juror that he or she must provide a response to the question on interracial-interethnic dating and marriage, and that although their own race or ethnic grouping has no bearing on their qualification for jury service, their views and opinions about people of other races and ethnic groups are important and do have a bearing on their qualification for jury service.*

**P.L. \_\_\_\_\_ AN ACT CONCERNING DISQUALIFICATION OF JURORS  
DUE TO RACIAL OR ETHNIC BIAS SO AS TO PREVENT SEGREGATIONISTS  
FROM SERVING AS JURORS**

**Federal Statutes - Option 'B' Involving All Cases**

**The United States Code, Chapter 28, Section 1865 is hereby amended by adding clauses (6) and (7) in subsection (b) as grounds for disqualification, and adding subsection (c):**

Sec. 1865 Qualification for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, or the clerk under supervision of the court if the court's jury selection plan so authorizes, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, or the clerk if the court's jury selection plan so provides, shall deem any person qualified to serve on grand and petit juries in the district unless he-

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understands the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service;

(5) has a charge pending against him for a commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored;

(6) *expresses an opinion, either on the juror qualification form or during voir dire, that he or she would oppose a close relative marrying or dating a member of a race different than their own; or*

(7) *expresses an opinion, either on the juror qualification form or during voir dire, that he or she would oppose a close relative marrying or dating a member of an ethnic group different than their own.*

*(c) If a potential juror expresses an opinion, either on the juror qualification form or during voir dire, that he or she would oppose a close relative marrying or dating a member of a race or ethnic group different than their own, then that potential juror shall be excused by the judge or clerk for cause in accord with the above procedures or upon challenge for good cause made pursuant to 28 U.S.C., Sec. 1866(c)(2)(4) shall be excluded by the court on the grounds that such juror may be unable to render impartial jury service.*

**The United States Code, Chapter 28, Section 1866(c) is hereby amended by adding the italicized words in clauses (2) and (4):**

Sec. 1866 Selection and summoning of jury panels

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, That any person summoned for jury service may be (1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service under subsections (b) and (c) of this section or, if the court's jury selection plan so provides, the name of such person shall be reinserted into the qualified jury wheel for selection pursuant to subsection (a) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, *such grounds to include but not be limited to that person's opposition to a close relative dating and or marrying someone of a different race and or ethnic group as set forth in subsection (c) of section 1865 of this title*, or (3) excluded upon peremptory challenge as provided by law, (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, *such good cause to include but not be limited to that person's opposition to a close relative dating and or marrying someone of a different race and or ethnic group as set forth in subsection (c) of section 1865 of this title* or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms during the period, specified in the plan, between two consecutive filings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

**The United States Code, Chapter 28, Section 1869(h) is hereby amended by adding the following second and seventh sentences, and the italicized words 'own' and 'his own' in the sixth sentence:**

Sec. 1869 Definitions

For purposes of this chapter-

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored. *Each such juror qualification form shall and must also include the question: "Are you opposed to a close relative marrying or dating a member of a race or ethnic group different than their own?"* The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his *own* religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning *his own* race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service. *However, the juror qualification form shall inform the prospective juror that he or she must provide a response to the question on interracial-interethnic dating and marriage, and that although their own race or ethnic grouping has no bearing on their qualification for jury service, their views and opinions about people of other races and ethnic groups are important and do have a bearing on their qualification for jury service.*

P.A. \_\_\_\_\_ **AN ACT CONCERNING DISQUALIFICATION OF JURORS  
DUE TO RACIAL OR ETHNIC BIAS SO AS TO PREVENT SEGREGATIONISTS  
FROM SERVING AS JURORS**

**Connecticut Statutes - Option 'A' Involving Criminal Cases Only**

**Connecticut General Statute, Section 51-217(a) is hereby amended by adding  
clauses (9) and (10) as grounds for disqualification:**

Sec. 51-217. Qualification of jurors. (a) All jurors shall be electors, or citizens of the United States who are residents of this state having a permanent place of abode in this state and appear on the list compiled by the Jury Administrator under subsection (b) of section 51-222a, who have reached the age of eighteen. A person shall be disqualified to serve as a juror if such person (1) is found by a judge of the Superior Court to exhibit any quality which will impair his capacity to serve as a juror, except that no person shall be disqualified on the basis of deafness or hearing impairment; (2) has been convicted of a felony within the past seven years or is a defendant in a pending felony case or is in the custody of the Commissioner of Corrections; (3) is not able to speak and understand the English language; (4) is the Governor, Lieutenant Governor, Secretary of the State, Treasurer, Comptroller or Attorney General; (5) is a judge of the Probate Court, Superior Court, Appellate Court or Supreme Court, is a family support magistrate or is a federal court judge; (6) is a member of the General Assembly, provided such disqualification shall apply only while the General Assembly is in session; (7) is seventy years of age or older and chooses not to perform juror service; (8) is incapable, by reason of a physical or mental disability, of rendering satisfactory juror service; or (9) is *of a different race than the defendant on trial in a criminal case and states on the juror questionnaire or during voir dire that he or she would oppose a close relative marrying or dating a member of the defendant's race;* (10) is *of a different ethnic group than the defendant on trial in a criminal case and states on the juror questionnaire or during voir dire that he or she would oppose a close relative marrying or dating a member of the defendant's ethnic group.* Any person claiming a disqualification under subdivision (8) of this subsection must submit to the Jury Administrator a letter from a licensed physician stating the physician's opinion that such disability prevents the person from rendering satisfactory juror service. In reaching such opinion, the physician shall apply the following guideline: A person shall be capable of rendering satisfactory juror service if such person is able to perform a sedentary job requiring close attention for six hours per day, with short work breaks in the morning and afternoon sessions, for at least three consecutive business days.

**Connecticut General Statute, Section 51-232(c) is hereby amended by adding the following third and fifth sentences, and the italicized words 'his or her own' in the fourth sentence:**

Sec. 51-232. Summoning of jurors. Juror questionnaire. Reduction of panel. Cornthouse.

(c) The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. *Each confidential juror questionnaire shall also include the following question: "Are you opposed to a close relative marrying or dating a member of a race or ethnic group different than their own?"* The questionnaire shall inform the prospective juror that information concerning *his or her own* race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. *However, the questionnaire shall inform the prospective juror that he or she must provide a response to the question on interracial-interethnic dating and marriage, and that although their own race or ethnic grouping has no bearing on their qualification for jury service, their views and opinions about people of other races and ethnic groups are important and do have a bearing on their qualification for jury service.* Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaire shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record.

**Connecticut General Statute, Section 54-82f is hereby amended by adding the following third sentence:**

Sec. 54-82f. Voir dire examination. In any criminal action tried before a jury, either party shall have the right to examine, personally or by his counsel, each juror outside the presence of other prospective jurors as to his qualifications to sit as a juror in the action, or as to his interest, if any, in the subject matter of the action, or as to his relations with the parties thereto. If the judge before whom the examination is held is of the opinion from the examination that any juror would be unable to render a fair and impartial verdict, the juror shall be excused by the judge from any further service upon the panel, or in the action, as the judge determines. *If a potential juror is of a different race than the race of the defendant in a criminal case and expresses an opinion, either on the juror questionnaire or during voir dire, that he or she would oppose a close relative marrying or dating a member of the defendant's race, then that potential juror shall be excused by the judge for cause; and if a potential juror is of a different ethnic group than the ethnic group of the defendant in a criminal case and expresses an opinion, either on the juror questionnaire or during voir dire, that he or she would oppose a close relative marrying or dating a member of the defendant's ethnic group, then that potential juror shall be excused by the judge for cause.* The right of such examination shall not be abridged by requiring questions to be put to any juror in writing and submitted in advance of the commencement of said action.

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**Connecticut General Statute, Section SI-232(c) is hereby amended by adding the following third and fifth sentences, and the italicized words 'his or her own' in the fourth sentence:**

Sec. 51-232. Summoning of jurors. Juror questionnaire. Reduction of panel. Courthouse.

(c) The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination, *Each confidential juror questionnaire shall also include the following question: "Are you opposed to a close relative marrying or dating a member of a race or ethnic group different than their own?"* The questionnaire shall inform the prospective juror that information concerning *his or her own* race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. *However, the questionnaire shall inform the prospective juror that he or she must provide a response to the question on interracial-interethnic dating and marriage, and that although their own race or ethnic grouping has no bearing on their qualification for jury service, their views and opinions about people of other races and ethnic groups are important and do have a bearing on their qualification for jury service.* Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaire shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record:

**Connecticut General Statute, Section 54-82f is hereby amended by adding the following third sentence:**

Sec. 54-82f. Vair dire examination. In any criminal action tried before a jury, either party shall have the right to examine, personally or by his counsel, each juror outside the presence of other prospective jurors as to his qualifications to sit as a juror in the action, or as to his interest, if any, in the subject matter of the action, or as to his relations with the parties thereto. If the judge before whom the examination is held is of the opinion from the examination that any juror would be unable to render a fair and impartial verdict, the juror shall be excused by the judge from any further service upon the panel, or in the action, as the judge determines. *If a potential juror expresses an opinion, either on the juror questionnaire or during voir dire, that he or she would oppose a close relative marrying or dating a member of a race different than their own, then that potential juror shall be excused by the judge for cause; and if a potential juror expresses an opinion, either on the juror questionnaire or during voir dire, that he or she would oppose a close relative marrying or dating a member of an ethnic group different than their own, then that potential juror shall be excused by the judge for cause.* The right of such examination shall not be abridged by requiring questions to be put to any juror in writing and submitted in advance of the commencement of said action.

**END**

**Cases collected at [www.capdefnet.org/hat/contents/constitutional issues/jury misconduct](http://www.capdefnet.org/hat/contents/constitutional_issues/jury_misconduct)**

**Racism and National Origin Discrimination**

**United States v. Henley, 238 F.3d 1111 (9<sup>th</sup> Cir. 2001)**

Remanded for hearing in light of Dutkel, *infra*, in federal prosecution where co-defendant attempted to bribe juror. Court found that attempted bribery of the juror was, prima facie, jury tampering, therefore, invoking a strong presumption of prejudice, manifest in juror's resulting intense anxiety. Court found error in trial court's rejecting without hearing "African-American defendants' claim that juror who allegedly used the word "nigger" was racially biased, without making any findings concerning whether juror actually made a racist statement, and if so, its specific content" and required lower court to conduct hearing on issue, and, specifically, excepting juror testimony concerning racial bias exempt from Rule 606(b) prohibitions.

**United States v. Rouse, 100 F.3d 560 (8<sup>th</sup> Cir. 1996)**

New trial ordered based on evidence of racial prejudice in jury room; the court declared that racial prejudice in the jury room can not and will not be tolerated or condoned.

**United States v. Heller, 785 F.2d 1524 (11<sup>th</sup> Cir. 1986)**

Tax evasion conviction was *reversed* because jurors made anti-Semitic "jokes" and religious remarks. The court dismissed the jurors' denial that they were only joking, remarking that the bigotry in this case was "reminiscent of a less civilized era." *Id.* at 1528.

**Jimenez v. Heyliger, 792 F.Supp. 910 (D. Puerto Rico 1992)**

Medical malpractice verdict was reversed and remanded for a new trial because security guard, placed in charge of the jury, stayed inside the deliberation room, brought jurors requested items related to the defendant's claim he had not committed negligence. An additional ground of misconduct consisted of remarks an alternate juror made to a bailiff concerning the plaintiff's national origin which indicated that other jurors had discussed her ethnicity and national origin.

**Tobias v. Smith, 468 F. Supp. 1287 (W.D.N.Y. 1979)**

Habeas corpus petition requesting evidentiary hearing on jury misconduct was granted because of racist remarks, including one juror's remark that "You can't tell one black from another" and a second juror admonished his fellow jurors not to accept the word of a black person over that of a white person.

**State v. Johnson, \_ N.W.2d \_, 2001 WL 694730 (S.D. June 20, 2001)**

Reversal of rape conviction required where defendant was African-American, victim was Caucasian, and where one juror commented to another juror, "I have a rope," to which the other juror responded, "I have a tree," despite trial court's finding that jurors were just joking and could be fair.

**State v. Phillips, 731 A.2d 101 (N.J. App. Div. 1999)**

Trial court's inadequate inquiry concerning dismissal of African-American juror who complained about racial comment made by another juror during deliberations required new trial; court made no effort to identify which juror made racial comment, or to question jurors individually about the incident.

**Connecticut v. Sanliago, 245 Conn. 301, 715 A.2d 1 (Conn. 1998)**

Case remanded for further proceedings where juror alleged to have used racial epithet ("spic") to describe defendant. Court sanctioned wide-ranging inquiry into circumstances in which remark

made, and persons involved, because of extreme importance of avoiding convictions based on race.

**Fisher v. State, 690 A.2d 917 (Del. 1996)**

New trial ordered where defendant was convicted by less than 12 impartial jurors; one juror told other jurors that any African-American male in the area where defendant was arrested was guilty of drug dealing.

**Wright v. CTL Dist., Inc., 650 So.2d 641 (Fla. Dist. Ct. App. 1995)**

Civil verdict was reversed and remanded for an evidentiary hearing because jurors allegedly made racist remarks about the plaintiff and bailiff answered jurors' legal questions, rather than getting the judge to respond to the jurors' questions.

**After Hour Welding, Inc. v. Lanell Management Co., 324 N.W.2d 686 (Wis. 1982)**

Civil verdict for plaintiff was reversed and remanded for an evidentiary hearing because one juror overheard another juror make an anti-Semitic remark about a corporate officer being "A Cheap Jew." *Id.* at 688.

**Tapia v. Barker, 206 Cal. Rptr. 803 (Cal. Ct. App. 1984)**

Civil judgment reversed when Mexican-American civil plaintiff was discriminated against by jurors who negatively remarked on his race during deliberations.

IN THE CIRCUIT COURT OF CHILTON COUNTY  
STATE OF ALABAMA

STATE OF ALABAMA )  
 )  
 )  
 v. ) Case No. CC 88-170  
 )  
 CLARENCE CLIENT )  
 )  
 )

MOTION TO PERMIT EXTENSIVE VOIR DIRE  
ON THE ISSUE OF RACIAL BIAS

Clarence Client respectfully moves this Court to allow counsel for Mr. Client to voir dire prospective jurors extensively on the issue of racial prejudice, pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 1, 5, 6, 7, 8, 9, 11, 13, 15, and 16 of Article I of the Alabama State Constitution, and applicable state law. Mr. Client also relies on Turner v. Murray, 476 U.S. 78 (1986), where the Supreme Court reversed a capital conviction because the trial court failed to allow counsel to voir dire potential jurors on the issue of racial bias, and Brown v. State, 571 So.2d 345, (Ala.Cr.App. 1990), vacated, 501 U.S. \_\_\_, 111 S.Ct. 2791, 115 L.Ed.2d 966, adhered to on remand 586 So.2d 991 (Ala.Cr.App. 1991), appeal pending, \_\_ So.2d \_\_ (Ala. 1992), where the Court of Criminal Appeals most recently reversed a sentence of death

because of the trial court's failure to allow individual voir dire of prospective jurors on the issue of pretrial publicity.

I. Clarence Client is accused of participating in the robbery-murder of Victor Victim. Mr. Client and his alleged accomplices are African American. The victim, Mr. Victim, was a white man. The circumstances of this offense as alleged by the state - namely, several young, black men robbing and killing an elderly white, store owner - include all the stereotypical elements of interracial crime. As a result, there is a heightened risk that racial prejudice will infect all aspects of the trial. In fact, Mr. Client will establish at an evidentiary hearing that the state is seeking the death penalty on impermissible racial grounds. See Motion to Bar the Death Penalty Because the State is Arbitrarily and Discriminatorily Seeking the Death of Mr. Client on Impermissible Racial Grounds. The risk of prejudice is particularly high with regard to potential jurors who do not share the same professional responsibility as this Court.

2. Any potential juror who bears the slightest racial prejudice will inevitably experience difficulty being fair and impartial in this case. Such a juror would have a hard time setting aside his prejudice and giving the defendant the benefit of any doubt. In fact, such a juror might even experience increased racial prejudice because of the facts of this case.

3. Clarence Client's previous trial was marred with racial tension and racial bias. Mr. Client asked the Court to dismiss his appointed attorney because he believed they were racially prejudiced against him. The state prosecutor employed his peremptory strikes in a racially discriminatory fashion, using fourteen of his seventeen peremptory challenges to exclude black jurors. In addition, the state made no attempt to correct the systematic and historic underrepresentation of African-Americans in the grand and petit jury pools from which Mr. Client's juries were chosen.

4. This case is highly charged with race-sensitive issues. It is the classic example of interracial crime and carries with it all the risks of racial prejudice attendant to interracial crime. For that reason, Mr. Client must be permitted to voir dire potential jurors thoroughly on the issue of racial prejudice.

5. In Turner v. MulTay, 476 U.S. 28 (1986), the Supreme Court declared that a black defendant in a white-victim case has a constitutional right to question jury venire members on their racial prejudices. The Supreme Court explained:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence-prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stilled up by the violent acts of petitioner's crime, might incline a juror to favor the death penalty.

Id. at 35.

6. The Turner Court reasoned that the petitioner had shown a constitutional violation because the trial judge's refusal to permit voir dire on racial attitudes created an unacceptable risk that "racial prejudice may have infected petitioner's capital sentencing." Id. at 36.

7. The Supreme Court thus concluded: "We hold that a capital defendant accused of an interracial crime is entitled to have jurors informed of the race of the victim and questioned on the issue of racial bias." Id. at 36-37.

8. In a similar vein, it is well established in Alabama that where there is a "significant possibility of prejudice" as a result of the pretrial publicity surrounding a capital case, a criminal

defendant is entitled to extensive and individual voir dire on the issue of pretrial publicity. Brown v. State, supra.

9. It is axiomatic that the constitutional guarantees of a fair trial by an impartial jury and equal protection of the law require that jurors not come into the trial proceedings with opinions about the defendant and his guilt that have been improperly shaped by racial prejudice. First, it is unacceptable for racial prejudice to infect any capital trial. Turner, supra. Second, a capital jury must render a verdict based solely on the evidence presented in court. Irvin v. Dowd, 366 U.S. 717, 723 (1961); Spies v. Illinois, 123 U.S. 131 (1887); Holt v. United States, 218 U.S. 245 (1910); Reynolds v. United States, 98 U.S. 145 (1878).

10. The United States Constitution and the State Constitution of Alabama assure to every person accused of a criminal offense a presumption of innocence. The Supreme Court has acknowledged that the most priceless safeguard of individual liberty and dignity is the Sixth Amendment right to trial by an impartial jury.

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the language of Lord Coke, a juror must be "indifferent as he stands unswome." Co Litt 155b. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in Brumby's Trial 416 (1807). "The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155 [(1878)].

Irvin v. Dowd, 366 U.S. at 722 (footnotes omitted).

11. Impartiality of the jury is so crucial because that body is invested with the awesome responsibility of deciding the fate of an accused person and resolving sometimes difficult questions

of culpability and criminal responsibility. The input and reasoned involvement of each juror is essential to the proper functioning of the criminal justice system. The Supreme Court has recognized that

[a] trial . . . is, at bottom, nothing more than the sum total of a countless number of small discretionary decisions made by each individual who sits in the jury box. The difference between conviction and acquittal turns on whether key testimony is believed or rejected; on whether an alibi sounds plausible or dubious; on whether a character witness appears trustworthy or unsavory; and on whether the jury concludes that the defendant had a motive, the inclination, or the means available to commit the crime charged. A . . . biased juror sits with blun-ed vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he cannot judge because he has prejudged.

Turner v. Murray, 476 U.S. 28, 42-43 (1986) (Brennan, J., concurring in part and dissenting in part).

12. The "right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." Ham v. South Carolina, 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part). The oldest, most common, and most important of the steps that may be taken to insure jury impartiality are the challenge for cause and the peremptory challenge. Id. at 532; see also Johnson v. Louisiana, 406 U.S. 356, 379 (1972); Swain v. Alabama, 380 U.S. 202, 209-222 (1965).

13. The rights to challenge for cause and peremptory challenge are meaningless, however, if they are unaccompanied by the right to a full and adequate voir dire. Ham v. South Carolina, 409 U.S. at 532; Swain v. Alabama, 380 U.S. at 221; Turner v. Murray, 476 U.S. 28, 40 (1986). The United States Supreme Court has long recognized that

[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to

remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges.

Rosales-Lopez v. United States, 451 U.S. 182,188 (1981) (citations omitted).

14. The Alabama Supreme Court has also repeatedly recognized the importance of voir dire in assessing whether peremptory strikes are used in a racially biased manner and has evaluated the scope and nature of voir dire in assessing the integrity of the overall jury selection process. See Ex Parte Branch, 526 So.2d 609 (Ala. 1987); Williams v. State, 548 So.2d 501, 504 (Ala.Cr.App. 1990); Parker v. State, 568 So.2d 335 (Ala.Cr.App. 1990).

15. The Sixth, Eighth and Fourteenth Amendments to the United States Constitution command that, in capital cases in which there is a significant possibility of prejudice due to racial bias, the defendant must be granted special procedures, including voir dire adequate to uncover juror prejudice.

16. Statistical studies show that race plays an extraordinary role in the imposition of the death penalty. The Alabama Supreme Court has recognized, for instance, that "pre-Furman juries may have exercised their 'untrammelled discretion' on a racial basis in cases of rape involving a black defendant and a white victim." Beck v. State, 396 So.2d 645, 653 (Ala. 1980). The statistics reviewed by the Supreme Court clearly reflect racial discrimination against black defendants and against defendants in white-victim crimes in the imposition of the death penalty. The statistical breakdown by race of defendant and race of victim for all persons on death row in Alabama at the time of Furman v. Georgia, 408 U.S. 238 (1972) (even excluding the rape offenses) clearly reveals pervasive prejudice against black defendants and in favor of white victims:

Black Defendant

White Defendant

White Victim	7	6
Black Victim	3	0

Beck v. State, 396 So.2d at 653 n.3. These statistics reveal the highest number of death sentences in black-on-white crime. Notably absent is any death sentence imposed for white-on black crime. This is so even though African-Americans are disproportionately victims of homicide. In fact, black citizens are nearly six times more likely to be murdered than whites, according to a study of the United States Justice Department. See "Study: Crime Hits Blacks Hardest," USA Today, at 3A (Apr. 23, 1990).

17. Today, black defendants accused of killing white people are much more likely to be sentenced to death than white defendants or defendants in black-victim crimes. Nearly sixty percent (60%) of Alabama's death row is black. Sixty-six percent of the people executed in the state of Alabama since reintroduction of the death penalty in 1976 were black. Moreover, over eighty percent of the capital cases in which the death penalty is imposed in Alabama involve white victims, even though African-Americans are much more likely to be the victims of homicide in this state.

WHEREFORE, Mr. Client respectfully requests this Court:

- (a) allow him to present evidence and argument on this motion;
- (b) schedule a hearing on this motion;
- (c) enter an order, similar to the attached proposed order, granting the motion and permitting the defendant to conduct extensive voir dire on the issue of racial bias; and
- (d) grant any other relief that is just and proper under the circumstances of this motion.

Respectfully submitted,

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Counsel to Mr. Client