September 14, 2016

Greetings, APDs!

This issue of Race Judicata will focus on resources for addressing race during voir dire, a challenging endeavor for even the most experienced of criminal defense attorneys. It has never been more important for defense attorneys to consider how to approach the topic of racial attitudes during voir dire. Since the subject of race in policing, crime, and punishment figures prominently in today’s public discourse, this topic will be on jurors’ minds whether you discuss it or not. If you avoid the issue where it is relevant, you may increase the likelihood that implicit or explicit racial bias will play a role in the jury’s determination of your client’s case. Fortunately, a number of recent publications contain helpful tips for addressing this topic thoughtfully and effectively:

**Resources on Talking to Jurors about Race**

[*Jury Selection and Race: Discovering the Good, the Bad, and the Ugly*](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_01_jpr_race_and_jury_selection_materials.authcheckdam.pdf) by Jeff Robinson

In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant’s immigration status.

\*\*Note that Jeff Robinson will be the keynote speaker at the NCAJ’s daylong seminar, [Combatting Racial Disparities in the Criminal Justice System (LIVE)](https://www.ncaj.com/index.cfm?pg=events&evAction=showDetail&eid=37331&evSubAction=listAll), taking place in Raleigh on Dec. 2, 2016.

The Northwestern Law Review recently published three articles addressing the subject of discussing race with jurors. [*Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1011&context=nulr_online) was written by St Louis County Deputy District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In [*Race Matters in Jury Selection*](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1013&context=nulr_online), Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: “If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client.” In [*The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1012&context=nulr_online), Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that “unless done with great skill and delicacy,” this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

[*Talking to Jurors About Race*](http://www.wispd.org/attachments/article/254/Building%20Theories%20and%20Themes%20around%20Racial%20Issues%20at%20Trial-%20Talking%20to%20Juries%20about%20Race.pdf)(PowerPoint presentation) by Archana Prakash

This PowerPoint presentation, prepared for a training for the Wisconsin State Public Defender’s Office, contains a number of questions that may be useful in facilitating rich discussions with potential jurors about race. It also contains a sample jury questionnaire and sample legal argument for individual voir dire.

Chapter Eight of the SOG’s Indigent Defense manual, [*Raising Issues of Race in North Carolina Criminal Cases*](http://defendermanuals.sog.unc.edu/race/82-raising-race-during-jury-selection-and-trial)*,* contains a section on addressing race during jury selection and at trial, with subsections on identifying stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors’ perceptions of your client, and reinforcing norms of fairness and equality.

In addition, the October 2016 NC Racial Equity Network (NC REN) training will address this topic in depth. While attendance at the trainings is limited to NC REN members, we will make videos of these trainings available to all NC indigent defense attorneys following the trainings.

\*\*Note that while our inaugural NC REN program is nearing its end, the SOG Indigent Defense Education Group has applied for a grant to create a second cohort of NC REN attorneys, so be on the lookout for announcements about this possibility down the road!

**What does Race have to do with the Presumption of Innocence?**

Aside from discussing racial attitudes with potential jurors and raising *Batson* challenges where appropriate (the subject of our June 2016 Race Judicata e-blast), what else can you do in jury selection to make sure that race doesn’t play an improper role in the jury’s evaluation of your client’s case? Another strategy is to explore potential jurors’ understanding of the presumption of innocence during voir dire and de-select jurors who may not be able to grant the full presumption of innocence to your client.

Many concerns have been raised by community members, social scientists, lawyers, and judges that minority defendants (and in particular, Black males) are not granted the full presumption of innocence by jurors at trial. In fact, researchers recently [concluded](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3958515/#pone.0092365-Levinson4) that mock jurors responded to jury instructions on the presumption of innocence in racially biased ways. Another [study](http://www.apa.org/news/press/releases/2014/03/black-boys-older.aspx) concluded the Black boys were viewed by police officers as both older and less innocent than White boys. In another study, [researchers determined](https://kb.osu.edu/dspace/bitstream/handle/1811/73195/OSJCL_V8N1_187.pdf) that study participants held implicit associations between the categories of “Black” and “guilty” and “White” and “not guilty” and that these associations influenced their evaluation of ambiguous evidence. Parents of children of color reasonably worry that [*The Presumption of Innocence Doesn’t Apply to My Child*](https://www.washingtonpost.com/news/in-theory/wp/2016/01/21/the-presumption-of-innocence-doesnt-apply-to-my-mixed-race-child/?utm_term=.9aeed1b804c4)*.*

In [*Presumed Fair? Voir Dire on the Fundamentals of our Criminal Justice System*](http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1535&context=shlr), Professor Vida Johnson makes the case for robust voir dire on the presumption of innocence, arguing that “the studies show that instructions alone do not serve to enforce the principles that are the foundation of a fair trial.” She notes that, while many jurors do not appreciate the significance or meaning of the presumption of innocence, most jurisdictions treat the right to voir dire on this subject as a matter within the trial court’s discretion. Professor Johnson provides practical tips for litigators interested in conducting voir dire on this topic, and explains how social science research can be used to secure the right to voir dire on this foundational principle of criminal justice.

Federal District Judge Mark Bennett, a pioneer in the field of addressing implicit bias in the courtroom, recently authored a brief piece in *The Champion* on the insufficiency of standard jury instructions on the presumption of innocence: [*The Presumption of Innocence and Trial Court Judges: Our Greatest Failing*](http://c.ymcdn.com/sites/www.7thcircuitbar.org/resource/resmgr/__2016_materials/Implicit_Bias-Bennett_Mark_T.PDF). In it, he argues that trial judges “vastly overestimate the ability of lay folks to fully appreciate and apply the most important presumption in law.” In a [video](https://vimeo.com/163018292) of Judge Bennett explaining his comprehensive approach to implicit bias education in the courtroom, he describes studies (cited above) concluding that minority defendants are less likely to receive the full benefit of the presumption of innocence. During jury selection, Judge Bennett incorporates his implicit bias presentation into his discussion of the presumption of innocence. Watch the video from minutes 7:00-11:20 to hear more about Judge Bennett’s efforts to ensure that all jurors serving in his courtroom fully embrace and respect the defendant’s entitlement to the presumption of innocence.

For more news on race and criminal justice, please check out the [News and Updates](http://ncids.com/pd-core/?page_id=2) section of PD CORE’s website.

*We would love for you to join our committee! You will find the link to do so on the bottom right portion of the* [*webpage*](http://ncids.com/pd-core/)*. If you have feedback about Race Judicata, we’d love to hear from you; feel free to reply to the original poster.*

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