RACE JUDICATA
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When better than on the eve of Martin Luther King Jr. Day to think about race and the criminal legal system? Let's begin with some news (more can be found on the website):

- New data from Asheville shows that "21-24 percent of traffic stops involved black drivers and 41-49 percent of searches of either drivers or passengers involved African-Americans" although African-Americans "make up 12 percent of Asheville's population."
- Bryan Stevenson gave a (characteristically) moving lecture on "The Shadow of White Supremacy."
- An op-ed in the New York Times considers law enforcement's move towards "predictive policing" and the risks to communities of color posed by "the self-fulfilling nature of using historical crime data."
- The News & Record describes the harm of the new law restricting judges' ability to waive costs and fees: "The effect is to maintain a court system unique in the country for the amount of money it squeezes out of people unfortunate enough to be caught in the justice system." For strategies to combat the new law in your individual cases, check out the ACLU.
- Meanwhile, the Civil Rights Corps secured a victory in New Orleans in a lawsuit claiming "that judges there have an inherent conflict of interest in determining whether defendants can pay the fines that pad the court's budget."
- Activists issued a 2017 Police Violence Report collecting and analyzing the 1,147 police killings in 2017, as well as suggesting reforms that could prevent such killings. Of note, the data shows that "Black people were more likely to be killed by police, more likely to be unarmed and less likely to be threatening someone when killed."

Now, let's continue with a jury selection dilemma inspired by true events: Imagine you're picking a jury. Your case involves questioning the credibility of a police officer, so you're asking open-ended questions about attitudes towards law enforcement. Juror no. 6 tells you that he has read, and now believes, that police racially profile Black people in traffic stops, and he can't help but notice that your client is Black. Juror no. 2 chimes in that Juror no. 6 is right, police *do* treat Black people worse than they treat White people, which is why he joined Black Lives Matter. The prosecutor then moves to strike both of these jurors for cause based on their bias against law enforcement. How should you shape your rehabilitation questions and arguments?

Assuming Jurors no. 2 and 6 haven't otherwise given you reason to de-select them, it's time to deploy ordinarily hostile caselaw to your advantage. These jurors have expressed opinions that are functionally equivalent to pro-law enforcement opinions routinely held to be within parameters for a qualified juror. Law enforcement officers who assert that they can be fair and impartial in the case being tried may remain. *See State v. Simmons*, 205 N.C. App. 509, 519-20 (2010). The same result occurs even when the juror/officer knew the testifying officers and "had heard the defendant's case discussed by other police officers." *State v. Hunt*, 37 N.C. App. 315, 319-20 (1978). Why not, then, the BLM activist who, upon deft questioning from you, agrees that he can reserve judgment on *this* officer's credibility until he's heard *this* evidence?

You do not have to extract disavowals of their opinions from these jurors in order to keep them. Consider the example of *State v. Whitfield*, 310 N.C. 608 (1984), in which the defendant appealed the trial court's denial of his motion to strike for cause jurors biased in favor of the state. One juror was

related to an assistant district attorney, and another was a police officer. *Id.* at 792-93. Both said that they could not positively rule out having a pro-prosecution bias. *Id.* at 793. But both ultimately "indicated that [they] would render a fair and impartial decision." *Id*. To the Court, the jurors' responses regarding their bias "represent nothing more than total honesty and their import is characteristic of any prospective juror whose individual biases are not instantly shed upon being summoned for jury duty." *Id.*

"[T]he operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law . . . ." *State v. Smith*, 352 N.C. 531, 545 (2000). The North Carolina Supreme Court has approved the following reasoning of a trial judge in a capital case: "She said she could follow the law. I know she certainly indicated a leaning one way or the other but the law doesn't prevent that but she indicated she could fairly consider both possibilities and I think she said any number of times it would depend on the circumstances so I'll deny that . . . ." *State v. Moses*, 350 N.C. 741, 757 (1999). Likewise, a potential juror who said that he would "possibly" but not "automatically" assign greater credibility to law enforcement witnesses was deemed qualified. *State v. McKinnon*, 328 N.C. 668, 676-77 (1991). Relying on *McKinnon*, the Supreme Court approved the retention of a lieutenant who agreed that he "attach[ed] a great deal of credibility to law enforcement officers," who felt "a closeness to law enforcement officers" in his "bones," and who would "be more inclined to assign more credibility to the officer over . . . the civilian" witnesses. *State v. Cummings*, 361 N.C. 438, 453-56 (2007).

The potential jurors who believe (consistently with statistical and anecdotal evidence) that police interact differently with Black than White civilians have merely stated an initial skepticism of police officers *in general* that is no more problematic than the law enforcement officers and sympathizers who stated an initial trust of police officers *in general*. Some bias is clearly allowed! So long as the potential jurors agree that they will evaluate the witnesses' credibility based on the evidence presented and will follow the law, they are qualified. It's worth reminding your judge that excluding qualified jurors upon challenge by the State is a constitutional error. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Now, some believe that it is not possible to rehabilitate a juror, i.e. to convince the juror to act inconsistently with his or her preconceived notions or biases. Even so, it *is* possible to elicit from a juror a commitment to fairness such that you can save them from being stricken for cause—as the State did in the above cases. When rehabilitating Jurors no. 2 and 6, consider talking with them about these topics (hat tip to the inestimable Butch Frazier):

- Moral obligation to society
- Duty as to sworn oaths
- Civic responsibility to community
- Opportunity to make a difference – and jury service is a rare opportunity
- Chance to stand up for beliefs
- Empower them to be the voice of the community

For more tips and strategies on jury selection and race, check out Chapters 7 and 8 of the Race Manual.

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. If you have feedback about Race Judicata, we'd love to hear from you; feel free to reply to the original poster.