JURY SELECTION

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TABLE OF CONTENTS

Part VI: Jury Selection

JURY SELECTION

The Sixth Amendment to the U.S. Constitution guarantees a person accused of crime the right to "trial, by an impartial jury of the state and district" where the crime allegedly occurred.[1]

That "impartial" jury will be called upon to make the ultimate decision on the merits of the accused's case. Accordingly, who actually sits on that jury, how those individuals interact with one another or act together as a whole, will be critical in determining the outcome.

The selection of individual jurors is therefore one of the most critical stages in the criminal process. Obtaining jurors who will identify with your client, who are not offended by the particular crime charged and who can understand, empathize and ultimately agree with your defense is crucial. Once the jury has been selected, the advocate must tailor his or her evidence, witnesses, testimony and arguments to the jurors who end up in the box. However, most prosecutions provide for few alterations and only limited leeway for tailoring your defense to suit your audience. Accordingly, the jury "selection" process becomes even more critical.

In actual fact, the parties do not "select" or "choose" the jurors, they like or want to serve, rather they excise those they do not want to have as jurors in their case by exercising challenges whether peremptory or for cause. And the defendant has a right to be present during the empanelling unless personal, on the record, waiver of that right is made. ***US v. Gordon,*** 829 F.2d 119 (D.C. Cir. 1987). There is no harmless error analysis as to defendant's absence. To hold [the Defendant=s] absence harmless . . . therefore would be to reconstruct what might have eventuated had [the Defendant] been present, when that cannot not be truly reconstructed with a degree of certainty necessary to avoid the reasonable possibility of prejudice. ***U. S. v. Alikpo***, 944 F.2d 206, 210 (5th Cir. 1991).

See also ***U.S. v. Sanchez***, No. 94-60686 (5th Cir. 1996).
In an unpublished decision, the Fifth Circuit held the district court abused its discretion in impaneling an anonymous jury to hear the trial of a Galveston police officer who was accused of using the threat of arrest to coerce five suspected prostitutes to engage in

[1]The Supreme Court has held that the Sixth Amendment does not guarantee the right to a jury for sentencing. ***Spaziano v. Florida***, 468 US 447, 464-65 (1984). However, *Spaziano's* conclusion does not extend to capital punishment; a jury must make the essential findings required to impose the death penalty. *Hurst v. Florida,* 577 U.S. 92 (2016). For lesser offenses, he Supreme Court has held fast to the bright line rule that if maximum punishment for a crime is six months or less, no Sixth Amendment right to a jury attaches. ***Blanton v. City of North Las Vegas***, 489 US 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

various sexual acts with him against their will. Further, [i]n closer cases on the merits of requiring anonymity, there might be room for a harmless error analysis, but this is not such a case. The Fifth Circuit ordered a new trial.

CHALLENGES FOR CAUSE

Each party is afforded an opportunity to challenge any prospective panel member on the ground he or she fails to meet the statutory requirements or because of prior exposure to prejudicial information, personal biases or beliefs, education or profession. Jurors may also be challenged if, for some other lesser reason, they cannot fairly view the facts or apply the law that either side is entitled to rely upon or are otherwise prejudiced against either side. Challenges for cause are not limited in number, but rather by counsel's ability to elicit sufficient evidence to complain. In capital cases jurors should be questioned regarding their ability to consider mitigating evidence separately, apart from any statutory elements for imposing the death penalty, and on that basis alone, if appropriate, find the defendant not guilty. *See* ***Penry v. Lynaugh,*** 492 U.S. 302, 109 S.Ct. 2934, 106 L. Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304 (2002).

PEREMPTORY CHALLENGES

Peremptory challenges are challenges, specific in number, which are given to each side to be exercised without regard to reason or explanation.

FEDERAL:

FED. R. CRIM. P. Rule 24(b) provides:

(A) Defendants:
10 peremptory challenges jointly exercised

(B) Government:
6 peremptory challenges.

However, the Court "may allow the Defendant additional peremptory challenges and permit them to be exercised separately". FED. R. CRIM. P. Rule 24(b).

See ***US v. Banks,*** 687 F.2d 967 (7th Cir. 1982), *cert. denied*, 459 US 1212 (1983) (stating that the granting or denial of extra peremptory challenges within judge's discretion).

Also, counsel may request that peremptory challenges be made outside the presence of the panel members.

> ***US v. Severino,*** 800 F.2d 42 (2d Cir. 1986) (noting trial judge's denial of defense counsel's request to exercise peremptory challenges outside presence of prospective jurors was reversible error).

Where numerous defendants have been jointly charged for "mass" trial, with contradictory and mutually exclusive defenses, additional, separately exercised challenges should be allowed.

See ***US v. Mitchell***, 384 F. Supp. 564 (Dist. Colo. 1974);

Estes v. US, 355 F.2d 609 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1964);

Tasby v. US, 451 F.2d 394 (8th Cir. 1971), *cert. denied*, 406 U.S. 922 (1972).

Contra ***US v. Banks***, 687 F.2d 967 (7th Cir. 1982), *cert. denied,*459 US 1212 (1983) (holding multiple defendants have no right to extra challenges).

Furthermore, any additional challenges afforded the Government should preserve the proportional advantage held by the defense.

> ***US v. Scott***, 555 F.2d 522 (5th Cir.), *cert. denied*, 434 US 985 (1977).

And, Government may not enlarge list of venire persons in order to dilute affect of peremptory strike.

> ***US v. Ricks***, 802 F.2d 731 (C.D. Md. 1986).

In ***US v. Huey***, the Fifth Circuit found that the Government failed to elicit race-neutral explanation for peremptory challenges. The reason the Government articulated stated that Afro-Americans B as a class B would be biased and should not serve after hearing racial slurs contained on the tapes. The Fifth Circuit stated, A[t]his reason was

premised only on the race of these jurors; no mention was ever made of any nonracial characteristic of any individual juror. ***US v. Huey***, 76 F.3d 638 (5th Cir. 1996).

PURPOSEFUL DISCRIMINATION VIOLATES EQUAL PROTECTION

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 61 (1986).

The Supreme Court has held that purposeful discrimination in the exercise of a prosecution's peremptory challenges violates an accused's Fifth Amendment right to equal protection. Previously, to establish such a violation the defendant had the burden of showing: (1) that he was a member of a cognizable racial group, (2) that the prosecutor had exercised peremptory challenges to remove members of defendant's racial group, and (3) that from the prosecutor's strikes, an inference could be drawn that such strikes were made on account of race. ***Wingo v. Blackburn,*** 783 F.2d 1046, 1050-51 (5th Cir. 1986).

However, the Supreme Court went on to eliminate the first requirement, holding that a defendant has third-party standing to litigate the claim of race-based exclusion of jurors, whether or not the defendant and the jurors are members of the same race. ***Powers v. Ohio***, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Justice Kennedy, writing for the Court, noted that Congress has enacted criminal sanctions for such race-motivated exclusions, and that the policies underlying such sanctions include the notion that a venire man has a right not to be excluded from the jury based on the color of his skin. The Court went on to say that the traditional rules of third-party standing -- that the litigant has suffered an injury in fact, that he have a relationship to the third party, and that his own rights are somehow hindered by the deprivation of the third party's rights -- were all satisfied by the white defendant who had had blacks excluded from his jury due to race-based strikes.

A white-on-white murder precludes constitutional error through prosecutor's peremptory challenge of blacks. Decision rendered before ***Batson v. Kentucky,*** 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 61 (1986).

But see ***Esquivel v. McCotter,*** 791 F.2d 350 (5th Cir. 1986)(en banc);

Smith v. McCotter, 798 F.2d 129, 132 (5th Cir. 1986) (holding ***Batson*** does not apply retroactively in capital cases).

See ***US v. Townsley***, 856 F.2d 1189 (8th Cir. 1988), a pre-***Batson*** case held white co-defendants had standing to complain of the discriminatory exclusion of blacks asserted by their black co-

defendant as the white defendants were treated differently based on the fact they were being tried with a black defendant);

Hernandez v. State, 538 So.2d 521 (Fla. App. 1989) (noting member of any race may complain of the exclusion of any race from grand or petit jury). The Florida Courts are split though.

Smith v. State, 515 So.2d 149 (Ala. Cr. App. 1987) (stating white defendant may not complain of the exclusion of a black juror even if defense counsel is black).

Contra ***Campbell v. Louisiana,*** 523 U.S. 392 (1998)(Supreme Court decision holding that a white criminal defendant has the requisite standing to raise equal protection and due process objections against black persons in the selection of grand jurors.)

Three Fifth Circuit decisions that predated the decision, although noting the grant of certiorari in ***Batson,*** denied such claims of discriminatory use of peremptory jury challenges relying on ***Swain v. Alabama,*** 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed.2d 759 (1965).

See also ***Edwards v. Scroggy,*** 849 F.2d 204, 206-07 (8th Cir. 1988) (noting that the court found no denial in due process at exclusion of blacks from the jury based on ***Swain*** and the prosecutor's experience that blacks were more sympathetic to the defense than whites were);

Jones v. Davis, 835 F.2d 835 (11th Cir. 1988) (holding testimony of defense attorneys about prosecutor's track record striking all blacks from venire and one lawyer's testimony that while working in prosecutor's office he was told he had been a fool to leave a black on the jury established discriminatory use of peremptory challenges by prosecutor under ***Swain***);

Foster v. Chatman**,** 195 L.Ed. 2d. 1 (2016) (holding that the decision that Foster failed to show purposeful discrimination under the three-step process under *Batson* was erroneous.

RETROACTIVITY

Griffith v. Kentucky, 479 US 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding that ***Batson*** applies retroactively on direct review).

See also ***Allen v. Hardy,*** 92 L.Ed.2d 199 (1986) (holding that ***Batson***, would not be applied retroactively on *collateral review* of convictions that became final before that decision was announced).

See also ***Edmonson v. Leesville Concrete Co.,*** 500 U.S. 614, 111 S. Ct. 2077, 114 L.Ed.2d 660 (1991) (holding viable ***Batson*** challenge in civil trial). A ***Batson*** objection is timely made if made after the completion of selection of the jury, before the venire was dismissed, and prior to commencement of trial.

US v. Romero-Reyna, 867 F.2d 834 (5th Cir. 1989) (stating Hispanic defendant challenged the exclusion of Mexican American).

But see ***Jones v. Butler,*** 864 F.2d 348 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989) (noting that without this contemporaneous objection ***Batson*** will not apply retroactively).

Both the Fifth Circuit and the Texas Court of Criminal Appeals were quick to declare that the rule espoused in *Batson* would not have retroactive effect. But that position was squarely delegitimized by the Supreme Court in *Griffith v. Kentucky,* 479 U.S. 314 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

Several courts have held that the "discriminatory" use of a prosecutor's peremptory challenges (i.e. "group bias" directed at an identifiable group rather than "specific bias" which is the acknowledged purpose of peremptory challenges) violates a criminal defendant's Constitutional right to be tried by a jury of his peers drawn from a cross section of his community.

People v. Wheeler, 583 P.2d 748 (Cal. 1978) (noting that "[t]he use of peremptory challenges to remove prospective jurors on the sole ground of

group bias violates the right to trial by a jury drawn from a cross-section of the community" according to the California Constitution).

Specifying groups "defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic conditions, place of residence and political affiliation".

But see ***Willis v. Kemp,*** 838 F.2d 1510 (11th Cir. 1988) (stating at least one court has held that young adults are not cognizable class for purposes of jury selection);

Contra ***Swain v. Alabama,*** 380 US 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965);

Doepel v. US, 434 A.2d 449 (D.C. App. 1981).

See, e.g., ***Rija v. State,*** 721 S.W.2d 504 (Tex.App. 1986) (holding state's removal of only remaining black venire man did not raise an inference of purposeful discrimination);

US v. Clemons, 843 F.2d 741 (3d Cir. 1988) (stating that use of a threshold percentage for ***Batson*** challenges would short-circuit the fact-specific determination expressly reserved for trial judges);

State v. Neil, 457 So.2d 481 (Fla. 1984) (stating initial burden on defendant to show that there is a strong likelihood that peremptory challenges are being made in a racially discriminatory manner. If a court determines that such is the case, it shall call upon the prosecutor to show that the questioned challenges were otherwise motivated);

People v. Mutton, 217 Cal.Rptr. 416 (1985) (noting that the California Supreme Court held that black women are a "cognizable group" for purposes of California's rule against the discriminatory use of peremptory jury challenges);

People v. James, 518 N.Y.S.2d 266 (N.Y.A.D. 1987) (stating a prosecutor need not strike all black panel members for a prima facie case of discrimination to exist. Where 5 of the 6 black venire persons were challenged, and 50% of the

prosecutor's peremptory challenges were to black persons, discrimination was found);

State v. Jones, 358 S.E.2d 701 (S.C. 1987) (noting where the prosecutor uses peremptory challenges to remove members of the defendant's race, a ***Batson*** hearing should be held at the request of the defendant).

Reasons considered legitimate for the exclusion of venire men once a presumption of discrimination has arisen run the gambit.

Ex Parte Branch, 526 So.2d 609 (Ala. 1987) (holding six black jurors were either too educated, bewildered, too close in age and appearance to the defendant, grumpy or unkempt, if seven jurors had been excluded perhaps we would have new names for Snow White's little friends);

Chambers v. State, 724 S.W.2d 440 (Tex.App.--1987) (using body language);

Rogers v. State, 725 S.W.2d 477 (Tex.App. 1987) (noting distrust);

People v. Cartangena, 513 N.Y.2d 497 (1987) (striking due to education);

US v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987) (striking due to divorced and appeared to have low paying job);

US v. Forbes, 816 F.2d 1006 (5th Cir. 1987) (noting hostility shown by posture and demeanor);

US v. Woods, 812 F.2d 1483 (4th Cir. 1987) (striking because not familiar with venire man's fraternity);

Smith v. State, 1989 WL 21856 (Tex.App. B Houston [1st Dist.] 1989) (striking because wore jewelry and slouched) (unpublished decision).

HOLD THE PROSECUTOR'S FEET TO THE FIRE

At least one court, however, has held both (1) that a court may not stifle consideration of factors supporting an inference of discriminatory purpose by halting consideration of same after applying ***Batson's*** merely illustrative "pattern" of three or four strikes test and (2) that the prosecutor does not refute a prima facie case of discrimination by expressing only an empty hunch about a venire man but must state a "clear and reasonably specific' explanation of his 'legitimate reasons'" for excluding a juror peremptorily. ***US v. Horsley,*** 864 F.2d 1543 (11th Cir. 1989).

> "Initially, we hold that the vague explanation offered by the prosecutor in the instant case was legally insufficient to refute a prima facie case of purposeful racial discrimination. While the reasons given by the prosecutor 'need not rise to the level justifying exercise of a challenge for cause'. . . . The prosecutor must nevertheless give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges. . . . The prosecutor's explanation in the present case, 'I just got a feeling about him', obviously falls short of this requirement. As the ***Batson*** court concluded, 'If [such] general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause would be but a vain and illusory requirement'. . . . ***Batson*** noted that a pattern of strikes against black jurors might be a relevant circumstance to consider, the Court stated that the example was merely illustrative. . . . We have held that the number of black jurors struck is not dispositive to the issue of whether a prima facie case has been established. . . . Consideration of other factors which might have supported an inference of discriminatory purpose, the most obvious of which was the prosecutor's disparate treatment of venire men who were similar in relevant aspects except race. ***US v. Horsley,*** 864 F.2d 1543 (11th Cir. 1989) (citations omitted).

Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987) (noting that because prosecutor explained his reasons for excluding black jurors the presumption his reasons were proper disappears and a court may then determine, or later on, in the record review the true character of the exclusion).

> "When the defense moved for a mistrial on the ground that the prosecutor's decision to strike those three jurors was based on

improper racial considerations, the prosecutor volunteered the following explanation for his actions:

> I think the record should reflect that the fact that the three jurors were black was not my reason for striking them, but, instead, it was the background, education and knowledge to understand fairly sophisticated scientific evidence which I intend to bring to the jury in this case.
>
> The decision in ***Swain*** does not completely insulate a prosecutor's use of peremptory challenges in a given case. Although the Supreme Court declined to require an inquiry into a prosecutor's decision to remove blacks from a particular jury, we believe that where, as here, the prosecutor volunteers the reasons for his actions and makes them part of the record, he opens the issue up for review. The record is then no longer limited solely to proof that the prosecutor has used his peremptory challenges to strike all black jurors from the defendant's jury panel, and the presumption that the prosecutor has acted properly falls away. At that point, the court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination. ...[b]y volunteering his reasons for striking the black jurors, he made those reasons part of the record subject to our review. He is no longer 'cloaked by the presumption of correctness', and we may review his motives 'to determine whether the purposes of the peremptory challenges are being perverted'. ***Garrett v. Morris,*** 815 F.2d 509, 510, 513 (8th Cir. 1987).

The prosecution should not be permitted to peremptorily excuse minority jurors for reasons not explored in voir dire.

See ***Williams v. State***, 538 So.2d 1250 (Ala. Cr. App. 1988);

Avery v. State, 545 So.2d 123 (Ala. Cr. App. 1988).

Ex Parte Branch, 526 So.2d 6090 (Ala. 1987) (suggesting the standard for review of the trial court's finding regarding peremptory challenges is the "clearly erroneous@ standard).

See also ***Garrett v. Morris,*** 815 F.2d 509 (8th Cir. 1987) (suggesting exclusion of all blacks from jury panel because black jurors lacked background, education and knowledge to understand scientific evidence was pretext for racial discrimination).

On appeal, a district court's finding on a ***Batson*** challenge is accorded much deference, however, there is no need to remand the case to if it is obvious that the explanations given were pretextual – the appellate court can reverse the district court's finding.

See ***U.S. v. Stephens***, 514 F.3d 703 (7th Cir. 2008) ("deference is due only when a district court properly performs its task in the first instance")(reversing district court's finding that prosecutor discriminated against minorities and reinstating convictions).

REVERSE *BATSON* CHALLENGE DENIED

Several courts have held that a citizen accused of a race-motivated crime is not entitled to have all veniremen of the same race as the victim excluded for cause. ***Person v. Miller***, 854 F.2d 656, 665 (4th Cir. 1988), *cert. denied,* 489 U.S. 1011 (1989); ***U. S. v. Greer***, 968 F.2d 433 (5th Cir. 1991). Further, at least one court has held that such a defendant may not insist that the prospective jurors of the same race as the victim be examined on the issue of racial and ethnic bias. ***U.S. v. Greer***, 968 F.2d 433 (5th Cir. 1991). The same court held that the Jewish members of the venire may not be required to identify themselves. ***U.S. v. Greer***, 968 F.2d 433 (5th Cir. 1991).

See ***U.S. v. Watson***, 483 F.3d 828 (D.C. Cir. 2007) (blind potential jurors can be excluded so long as a rational basis can be provided for their exclusion – prosecution's use of visual materials is a rational basis);

U.S. v. Harris, 197 F.3d 870 (7th Cir 1999) (exclusion of potential juror because she had multiple sclerosis and required medication causing drowsiness was sufficient to pass rational basis muster).

DOES *BATSON* APPLY TO RELIGION?

QUERY - HOW DOES ***BATSON'S*** OPENING OF THE EQUAL PROTECTION FLOOD GATES EXCLUDE "PROTESTANTS AND CATHOLICS" JEWS AND BUDDHISTS:

The United States Supreme Court in ***Swain v. Alabama,*** forewarned that: "With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and White, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to demands and traditional standards of the equal protection clause would entail a radical change in the nature and operation of the challenge."

And yet the Court, later, in ***Batson,*** opened the equal protection floodgates on prosecutorial exercise of peremptory challenges.

> "In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the court directly to reconsider one of its own precedents. On the other hand, the state has insisted that petitioner is claiming a denial of equal protection and that we must reconsider ***Swain*** to find a Constitutional violation of this record. We agree with the State that resolution of *Petitioner's claim properly turns on application of Equal Protection principles* and express no view on the merits of any of petitioner's Sixth Amendment arguments." ***Batson v. Kentucky,***476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 61 n. 4 (1986).

DISABILITIES?

The Supreme Court has not held that disabilities are a suspect classification and therefore are protected by ***Batson***. *See*: ***Cleburne v. Cleburne Living Center, Inc.***, 473 U.S. 432 (1985) (holding the mentally retarded are not a suspect class), and ***Board of Trustees of the University of Alabama v. Garrett***, 531 U.S. 356 (2001) (holding classifications on disabilities are subject to rational basis review).

EXCEPTION TO WAIVER WHEN CAUSE IS SHOWN FOR FAILURE TO OBJECT TO JURY COMPOSITION

Although the accused had failed to object to the composition of the juries that had indicted, convicted and sentenced him to death, he did not waive same. A district attorney's memorandum which was designed to result in under-representation of blacks and women on the master jury list was concealed by county officials and was only discovered by an attorney involved in civil litigation attacking the jury selection system thus demonstrating the unavailability of the memo to the accused. ***Amades v. Zant,*** 486 US 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

LOCATION OF MAKING STRIKES

At least one court has held that requiring an accused to exercise his peremptory challenges in the presence of prospective jurors denied him a fair trial.
US v. Severino, 800 F.2d 42 (2d Cir. 1986).

PROSECUTION IS ENTITLED TO A *BATSON* EQUAL PROTECTION CHALLENGE

The Supreme Court has held that the prosecution is entitled to preclude defendants from exercising their peremptory strikes in a racially discriminatory fashion. In ***Georgia v. McCollum,*** 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), the Court filled the gap left by Batson, holding that a defendant's use of peremptory challenges is "state action" for equal protection purposes, and that the prosecution has standing to litigate the issue of racial discrimination on the part of a defendant.

EXCLUSION OF THOSE OPPOSED TO THE DEATH PENALTY VIOLATES THE SIXTH AMENDMENT

The mere expression of opposition to the death penalty does not constitute cause to exclude a juror absent an unequivocal expression of the inability to impose the same. ***Witherspoon v. Illinois,*** 391 US 510, 88 S.Ct. 1770, 10 L.Ed.2d 776 (1968).

See also ***Adams v. Texas,*** 448 US 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) (holding exclusion of jurors who would not say that death penalty would not affect their deliberations on any fact issue was improper); *but see Fuller v. State,* 829 S.W.2d 191 (Tex. Crim. App. 1992) ("Although [the venireperson] was never asked whether her views might substantially interfere with her ability honestly to answer the special punishment questions prescribed by law, this Court no longer requires specific inquiry on that subject as a prerequisite to the exclusion of a prospective juror for bias or prejudice against the death penalty.").

United States v. Tipton, 90 F.3d 861 (4th Cir. 1996) (holding the Sixth's Amendment's guarantee of an impartial jury is violated by exclusion of prospective juror simply because he expresses some reservations about imposing the death penalty in any case);

Gall v. Parker, 231 F.3d 265, (6th Cir. 2000)(holding exclusion of venireman who was uncertain about his views on death penalty was reversible error, warranting federal habeas relief, in capital murder case, inasmuch as venireman's discomfort with death penalty did not appear to prevent or substantially impair performance of his duties as juror in accordance with instructions and oath);

Wicker v. McCotter, 783 F.2d 487, 493 (5th Cir. 1986);

Moore v. Estelle, 670 F.2d 56 (5th Cir.), *cert. denied,* 458 US 111 (1982).

The test of whether a prospective juror may be excluded is whether the juror demonstrates that his or her beliefs "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". ***Wainwright v. Witt,***

469 US 412, 420, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). On appeal a court must look at the entire voir dire to examine if an exclusion was made based on the proper standard. ***Darden v. Wainwright,*** 477 US 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986);

See also ***Milton v. McCotter,*** 765 F.2d 434 (5th Cir. 1985);

Adams v. Texas, 448 US 38, 100 S.Ct. 2521, 65 L.Ed.2d 581(1980) (holding exclusion on grounds broader than ***Witherspoon*** is improper);

PROSECUTOR'S UNEXERCISED PEREMPTORY CHALLENGE IS OF NO CONSEQUENCE ON APPEAL WHERE *WITHERSPOON* QUALIFIED JUROR IS WRONGLY EXCLUDED

The United States Supreme Court refused to consider that a prosecutor had one unexercised peremptory challenge when a juror, who opposed the death penalty but nonetheless could impose it, was improperly excluded. Finding that a harmless error analysis was not appropriate because of the practical application of same to the jury selection process. To say at a point later in time that one can surmise how a prosecutor would exercise a peremptory challenge "would ...insulate jury-selection error from meaningful appellate review....".

Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (stating the relevant inquiry is Whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error);

Davis v. Georgia, 429 US 122, 975 S.Ct. 399, 50 L.Ed.2d 339 (1976) (holding exclusion of just one juror who only had a general sentiment against the death penalty invalidates the death sentence).

But see ***Ross v. Oklahoma,*** 487 US 81, 108 S.Ct. 2273 (1988) (limiting ***Gray v. Mississippi,*** 481 US 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) to its facts). The court's failure to deal correctly with a valid challenge for cause and, thus, the defendant's use of a peremptory challenge to rectify the same does not violate the Sixth Amendment's guarantees as long as the resultant jury is impartial;

Brown v. Estelle, 591 F.2d 1207 (5th Cir. 1979) (holding error in sentencing before jury in Texas may require reversal of conviction).

DEATH QUALIFIED JURY IS STILL A FAIR CROSS SECTION OF THE COMMUNITY

Finding that the fair cross section requirement applies to the jury venire, not petit juries, and that ***Witherspoon*** excludables (those who would be impaired by their unequivocal rejection of imposing a death penalty) were not a distinctive group for fair cross section purposes. The United States Supreme Court further found that a defendant being jointly tried with his Capital co-defendant before a death qualified jury was not deprived of his Sixth and Fourteenth Amendments' right to an impartial jury drawn from a representative cross-section of the community.

Buchanan v. Kentucky, 483 US 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987) (holding that although death qualified jury might be more conviction prone, said court, those excluded do not constitute a cognizable class for fair cross section purposes).

But see ***Cannon v. Gibson,*** 259 F.3d 1253, (10th Cir. 2001) (holding that the due process clause of the Fourteenth Amendment and the Sixth Amendment's guarantee of an impartial jury operating together, prohibit the imposition of the death penalty if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.)

RIGHT TO INSPECT JURY LISTS

See 28 U.S.C. ' 1861
28 U.S.C. ' 1867(f)

Test v. US, 420 US 28, 95 S.Ct. 749, 42 L.Ed.2d 786 (1975).

MOTION TO QUASH

A selection method resulting in the systematic exclusion of an identifiable group from representation upon the Grand or Petit Jury constitutes a denial of the indicted defendant's Fifth Amendment right to "due process" and equal protection and, in the case of a "petit jury", to his Sixth Amendment right to a jury comprised of a representative cross-section of the community.

See ***Coleman v. Alabama,*** 389 US 22 (1967);

Jones v. Georgia, 389 US 24 (1967) (noting burden upon state to explain disparity);

Sims v. Georgia, 389 US 404 (1967) [selection method];

Castaneda v. Partida, 430 US 482 (1977).

"RULE OF EXCLUSION"

In order to establish that an "equal protection violation" has occurred in the context of grand jury selection, the defendant must show that:

(1) the procedure employed resulted in substantial under-representation of a particular class or identifiable group,

(2) such group is one that is a recognizable, distinct class, singled out for different treatment,

(3) the degree of under-representation must be proved by comparing the percentage of the group in the total population to the percentage called to serve as grand jurors over a significant period of time [i.e. 10 years].

See ***Castaneda v. Partida,*** 430 U.S. 495 (1977)(stating prima facia discrimination found in county where 76.1% of its population are Mexican-Americans, while the average percentage of that

group on grand jury over the preceding 10 years was 39% and comprised 50% of the grand jury that indicted defendant);

US ex rel Barksdale v. Blackburn, 610 F.2d 253, 268 (5th Cir. 1980);

Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988) (holding where women made up 52.78% of population but comprised only 39.36% on the master jury list constituted under-representation of women about which male defendant could successfully assert a fair cross section complaint).

CAVEAT: Compliance with the Jury Selection and Service Act must be scrupulously maintained to make a successful objection to under-representation of a class. ***US v. Gerena,*** 677 F. Supp. 1266 (D. Conn. 1987) (holding defendant failed to file a *sworn* statement of facts supporting alleged under-representation).

And once a "presumption of discrimination" is raised by such a "statistical showing" the burden shifts to the prosecution to rebut same.

"Once the defendant has shown substantial under-representation of his group, he has made out a prima facia case of discriminatory purpose, and the burden shifts to the state to rebut that case."

Castaneda v. Partida, 430 US 482 (1977);

Davis v. State, 374 SW2d 242, 242-4 (Tex. Cr. App. 1964);

State v. Neil, 457 S.W.2d 481 (Fla. 1984).

See also ***Ross v. Harper,*** 716 F.2d 1528 (11th Cir. 1983) (suggesting the prima facia tests for an equal protection claim and a fair cross-section claim are almost identical);

Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983) (holding the two tests differ however, in the way in which they can be rebutted).

Compare ***Castaneda v. Partida,*** 430 US 482 (1977) (stating that prima facie case rebutted under equal protection clause by proving absence of discriminatory intent), *with* ***Duren v. Missouri,*** 439 US 357 (yr.) (holding prima facie case rebutted under 6th Amendment by proving significant governmental interest justifying imbalance of classes).

Protestations that racial bias played no part in the selection are insufficient to meet the prosecution's burden.

Castaneda v. Partida, 430 US 482, 498 n.136 (1977);

Alexander v. Louisiana, 405 US 632 (1972);

Hernandez v. Texas, 347 US 475 (1954).

Systematic exclusion or exemption of females from petit jury service denies defendant's Fifth Amendment right to "due process" and Sixth Amendment right to jury comprised of a representative cross-section of his community.

Taylor v. Louisiana, 419 US 522 (1975) (stating Louisiana statute exempted women unless they volunteered);

Duren v. Missouri, 439 US 357 (1979).

A defendant need not be a member of class to complain of systematic exclusion.

Peters v. Kiff, 407 US 493 (1972) (holding white anglo has standing to complain of systematic exclusion of blacks);

Taylor v. Louisiana, 419 US 522 (1975) (stating that male has standing to complain of systematic exclusion of women from petit jury);

US v. Sneed, 729 F.2d 1333 (11th Cir. 1984);

US v. Cross, 708 F.2d 631 (11th Cir. 1983).

Cf ***Castaneda v. Partida,*** 430 US 482, 494 (1977) (holding language to the effect that "in order to show that an equal

protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial under-representation of his race or of the identifiable group to which he belongs").

NOTE: The court in ***Cross*** stated that the language in ***Castaneda*** that a defendant must be a member of the under-represented group or race was "at best dictum". ***US v. Cross,*** 708 F.2d 631, 633 (11th Cir. 1983).

An evidentiary hearing must be provided.

Coleman v. Alabama, 377 US 129 (1964).

UNQUALIFIED RIGHT TO INSPECT JURY LIST

There is an unqualified right to inspect the lists from which such jurors are drawn in order to raise such Constitutional challenges.

Test v. US, 420 US 28 (1975).

"The appellants are correct in asserting that the District Court's denial of their motion for inspection and copying of jury records was reversible error. The Supreme Court's decision in ***Test v. United States,*** 420 U.S. 28, 95 S.Ct. 749, 42 L.Ed.2d 786 (1975), is dispositive of the issue. The Court held in ***Test*** that a litigant has an unqualified right to inspect jury lists under not only the plain text of the provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. ' 1867(f), but also the Act's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community', 28 U.S.C. ' 1861." ***Government of Canal Zone v. Davis***, 592 F.2d 887, 889 (5th Cir. 1979).

"This provision makes clear that a litigant has essentially an unqualified right to inspect jury lists."

See also 28 U.S.C. ' 1861;

28 U.S.C. ' 1867(f).

LENGTHY JURY LIST MAY RESULT IN VIOLATION OF RIGHT TO TRIAL BY JURY

An overly-large list, unaccompanied by limiting instructions, serves to dilute the effect of peremptory challenges, thus violating an essential part of a defendant's right to trial by jury. ***US v. Ricks,*** 802 F.2d 731 (D.C. Cir. 1986).

In ***Ricks,*** the court held that if a list contains more names than are needed, the court must expressly point out the portion of the list which contains the correct numbers of venirepersons from which actual selection will be made in order to achieve a jury.

COUNSEL SHOULD BE PERMITTED TO VOIR DIRE PROSPECTIVE JURORS

Under the Federal Rules the trial court has the discretion to allow counsel to conduct voir dire.

"Rule 24 ...

> (a) Examination. The Court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit ...the attorney ...to supplement the examination by such further inquiry as it deems proper or shall submit to the prospective jurors such additional questions ...as it deems proper."

Aldridge v. US, 283 US 308 (1931);

Sellers v. US, 271 F.2d 475 (D.C. Cir. 1959);

Morford v. US, 339 US 258 (1950);

Blueth v. Denno, 313 F.2d 364 (2d Cir. 1963).

"Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." ***Rosales-Lopez,*** 451 US 182, 188 (1981).

See ***US v. Sutton,*** 732 F.2d 1483 (10th Cir. 1983);

US v. Reeves, 730 F.2d 1189 (8th Cir. 1984);

Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984);

US v. Blanton, 719 F.2d 815, 822 (6th Cir. 1983), rehg en banc, *cert. denied*, 104 S.Ct. 1592 (1984) (noting trial judge must exercise discretion in determining proper method of conducting voir dire).

See also ***Gomez v. United States,*** 490 U.S. 858 (1989) (holding that permitting a magistrate judge to conduct jury selection in lieu of an Article III district judge violates the defendant's basic and fundamental trial right "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside.")

Of the federal courts approximately 51 districts have judge conducted voir dire, in 22 it is conducted by Court and Counsel, and by Counsel alone in 12. *The Jury System in Federal Courts,* 26 F.R.D. 409, 466.

Note that the Fifth Circuit has stated that while FED. R. CRIM. P. Rule 24 gives wide discretion to the trial court, voir dire may have little meaning if not conducted at least in part by counsel. The Fifth Circuit has endorsed A.B.A. procedures whereby the trial judge explains basic points of law and procedure to the venire and then permits questioning by opposing counsel.

See ***US v. Ible,*** 630 F.2d 389 (5th Cir. 1980);

US v. Ledee, 549 F.2d 990 (5th Cir.), *cert. denied,* 434 US 902 (1977).

The need for attorney conducted voir dire is particularly acute when publicity is pervasive.

Silverthorne v. US, 400 F.2d 627, 637 (9th Cir. 1968).

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, trial courts must take strong measures to ensure that the balance is never weighed against the accused."

The questioning of prospective panel members is perhaps the only occasion counsel will have for personal interaction with jury. It is the only occasion, save the verdict, that counsel will have the opportunity to hear from the jurors. And while the trial court may have concern for jurors challengeable for cause, counsel's primary concern is in intelligently exercising his peremptory challenges. Courts have noted as early as 1893, that voir dire examination "is often conducted in great part by counsel whose experience has taught them exactly what are the crucial points involved in the inquiry". ***US v. Barber,*** 21 Dist. Col. 456, 463 (1893).

Knowing the right buttons to push in this regard might just result in a request to conduct voir dire being granted, what will result is a fair trial and judicial economy. "It is the parties, rather then the court, who have a full grasp of the nuances and the strength and weaknesses of the case." ***US v. Ible,*** 630 F.2d 389, 395 (8th Cir. 1980).

The burden may be on Defendant to demonstrate a need for voir dire conducted by counsel rather than the court.

People v. Butler, 162 Ca. Rptr. 913 (Cal. App. 1980);

State v. Allen, 380 So.2d 28 (La. 1980) [abuse of discretion standard];

US v. Baldwin, 607 F.2d 1295 (9th Cir. 1979);

Silverthorn v. US, 400 F.2d 627 (9th Cir. 1968).

The party requesting specific voir dire questioning bears the burden of showing a reasonable possibility of prejudice unless the case falls into one of three areas in which courts recognize the possibility of prejudice:

(1) a case involving racial overtones,
(2) a case involving matters concerning which the community harbors strong feelings,

(3) a case involving other forms of bias or distorting influence that have become evident through experience with jurors. ***US v. Robinson,*** 475 F.2d 376 (D.C. Cir. 1973).

FAILURE OF TRIAL JUDGE TO PERMIT QUESTIONS PERTAINING TO BIAS HELD TO BE REVERSIBLE ERROR

Where a defendant, accused of importation and possession of marijuana, specifically requested that the trial judge ask the panel if they would be unduly influenced by the testimony of police officers, and the judge refused, the court found reversible error.

See ***US v. Contreras-Castro,*** 825 F.2d 185 (9th Cir. 1987).

The court held that the issue of whether failure to ask venire members such questions is subject to several considerations, including:

> "...the importance of the officer's testimony to the government's case as a whole; the extent to which the government agent-witness' credibility is challenged; the extent to which the government agent's testimony is corroborated by non-agent witnesses; and the extent to which the question concerning the venire person's attitude toward government agents is covered in other voir dire questions and in the jury instructions. ***US v. Contreras-Castro***, 825 F.2d 187 (9th Cir. 1987).

In ***Rosales-Lopez v. US***, 451 US 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981), a plurality of the court opined that in cases where the victim of a violent crime is of a different race then the accused there exists a possibility of prejudice. The court went on to hold in ***Turner v. Murray,*** 476 US 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), that in such cases where a death penalty might be imposed the accused is entitled to have the jury questioned regarding possible racial bias.

See also ***US v. Brown,*** 799 F.2d 134 (4th Cir. 1986) (holding that the court's refusal to ask prospective jurors if they knew witnesses in case, and failure to read list of witnesses' names was reversible error. Defendant lacked ability to determine whether prospective jurors could render fair judgment).

However, the trial court's burden to make independent inquiry [i.e. regarding prejudicial pretrial publicity] may be reduced where "defense counsel is permitted to inquire", ***Brown v. State,*** 601 P.2d 221 (Alaska 1979); or increased, where it prohibits same. ***Silverthorne v. US,*** 400 F.2d 627 (9th Cir. 1968).

> "In a disappointing and rather confusing opinion, the Eleventh Circuit recently held that "group questioning and nonverbal responses" constituted permissible voir dire, even in a capital case. ***McCorquodale v. Balkcom***, 721 F.2d 1493, 1496 (11th Cir. 1983) (holding that the court there approved a procedure asking jurors to stand and then step forward in response to successive questions, while placing its stamp of permiture on equivocal verbal responses to other questions, relying on the trial court's "ability to observe (the juror's) tone of voice and demeanor or indecisiveness").
>
> How would the court "observe the tone of voice and demeanor" of the jump-up puppets who weren't allowed to say anything?

The court's questioning especially diminishes the possibility of selecting a jury disposed to your case or remedying on appeal the inclusion of a biased juror on the panel as the judge's finding regarding the bias of a particular juror is presumed correct. ***Jones v. Butler,*** 864 F.2d 348 (5th Cir. 1988).

> "The prospective juror, Martha Pate, had lived near the victim and knew her by sight, had visited the funeral home to view her body, had worked at Angola prison for eighteen months six years before the trial, and had worked four years earlier as a hospital lab clerk for a doctor who testified for the state." "...Implicit ...in not excusing her for cause, was a finding that Pate was not biased." "...Even though the court made no express findings of non-bias, the questioning the ruling reflected is sufficient." ***Jones v. Butler,*** 864 F.2d 348 (5th Cir. 1988).

SUPREME COURT NOT SWAYED BY STUDIES SHOWING RACIAL BIAS IS CONSIDERATION IN DECIDING WHO LIVES OR DIES

The Supreme Court has held a statistical study showing that racial considerations were taken into account in death penalty cases was not sufficient to demonstrate either a violation of the Equal Protection Clause or that the death penalty was imposed in an arbitrary and capricious manner. The accused must show discriminatory application of a death statute in his or her case or must show that the legislature enacted the statute with a discriminatory purpose to demonstrate an Equal Protection Flaw. ***McClesky v. Kemp***, 481 US 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

VOIR DIRE

PRETRIAL PUBLICITY

Some Circuits have held that where panel members have been exposed to pretrial publicity the court must ascertain what in particular each juror has heard or read, how it effects their attitude toward the trial, and regardless of response, to make an independent determination as to their fairness.

> ***Silverthorne v. US,*** 400 F.2d 627 (9th Cir. 1968);
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> ***US v. Dillinger,*** 477 F.2d 340 (7th Cir.)*, cert. denied,* 410 US 970 (1973);
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> ***US v. Davis,*** 583 F.2d 190 (5th Cir. 1978);
>
> ***US v. Chagra,*** 669 F.2d 241 (5th Cir. 1982).

However, the Supreme Court recently held that a defendant cannot compel the judge to inquire of each venire member concerning the contents and extent of publicity to which he or she has been exposed. ***Mu'min v. Virginia,*** 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991).

If jurors potentially have been exposed to prejudicial publicity, the court should make an inquiry to determine the existence of actual exposure.

See ***U.S. v. Gray***, 788 F.2d 1031, 1033 (4th Cir. 1986) (reversible error because court failed to inquire whether jurors were

actually exposed to newspaper articles highly prejudicial to defendant.)

U.S. v. Becker, 69 F.3d 1290, 1293 (5th Cir. 1995) (reversible error when court failed to conduct adequate *voir dire* regarding jurors' exposure to pretrial publicity because court's inquiry insufficient to discover potential juror bias.)

U.S. v. Thompson, 908 F.2d 648, 649-50 (10th Cir. 1990) (reversible error because court failed to conduct *voir dire* and ask jurors, some of whom had been observed reading newspaper, whether they read highly prejudicial news article concerning inadmissible withdrawn guilty plea by defendant.)

When there exists a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," the judge should grant a continuance until the threat abates or allow a change of venue to another area where publicity about the case is less pervasive.

See ***Spivey v. Head***, 207 F.3d 207 1263, 1270-71 (11th Cir. 2000) (no error in denying motion for change of venue despite extensive media coverage because pretrial publicity was not inflammatory and did not saturate the community)

Rule 21 of the *Federal Rules of Criminal Procedure* governs the transfer of criminal cases due to extensive publicity. FED. R. CRIM. P. 21(a). Under Rule 21, upon the motion of the defendant, the court shall transfer the proceeding to another district if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain fair and impartial trial in that district.

In ***Patton v. Yount,*** 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), the Supreme Court noted that the question the trial court must consider is not whether the publicity has caused jurors within the community to recall a particular case, but whether the publicity has given jurors such fired opinions that they cannot judge the defendant's guilt impartially. ***Patton v. Yount,*** 467 U.S. at 2891.

See ***US v. Kelly,*** 722 F.2d 873 (1st Cir. 1983), *cert. denied,* 104 S.Ct. 1425 (1984) (suggesting its absurd to assert that each juror's mind be a "tabula rasa");

US v. Wilson, 715 F.2d 1164 (7th Cir.), *cert. denied,* 104 S.Ct. 434 (1983) (noting jury's mere familiarity with articles discussing narcotics ring does not establish prejudice);

US v. Manzella, 782 F.2d 533, 543-544 (5th Cir. 1986) (noting one paragraph in a medium length newspaper article published during trial, referring to defendant's prior conviction did not warrant reversal as to defendant or co-defendants).

Preferably out of the hearing and presence of the other members of the panel.

US v. Tropiano, 418 F.2d 1069, 1079-80 (2d Cir. 1969), *cert. denied,* 397 US 1021 (1970);

Silverthorne v. US, 400 F.2d 627 (9th Cir. 1968);

Patriarca v. US, 402 F.2d 314, 318 (1st Cir. 1968), *cert. denied,* 393 US 1022 (1969);

US v. Chagra, 669 F.2d 241 (5th Cir. 1982).

"...An appellant can establish both that pretrial publicity about his case raised "a significant possibility of prejudice, ***US v. Davis,*** 583 F.2d 190, 196 (5th Cir. 1978); and that the *voir dire* procedure followed by the district court in his case failed to provide a "'reasonable assurance that prejudice would be discovered if present.'" ***US v. Hawkins,*** 658 F.2d 279 (5th Cir. 1981).

"The district court erred in not undertaking a more thorough examination of those panel members exposed to publicity. Under the circumstances of this case, where the nature of the publicity as a whole raised a significant possibility of prejudice, the ...court should have determined what in particular each juror had heard or read and how it affected his attitude toward the trial, and should have determined for itself whether any juror's impartiality had been destroyed. The ABA Standards Relating to Fair Trial and Free Press recommend that the district court examine each juror individually and out of the presence of other jurors to determine what he heard or read and

how it has affected his attitude towards the trial." ***US v. Davis,*** 583 F.2d 190, 196 (5th Cir. 1978).

"The drug related nature of the charges against appellants commanded prominence in the vast majority of the local coverage, as did the government's allegation of a large, ongoing conspiracy involving over twenty individuals. Several of the articles referred to the racketeering and criminal enterprise charges... The clear teaching of ***Davis*** is that when a significant possibility exists that a juror will be ineligible to serve because of potentially prejudicial publicity, it is the obligation of the district court to determine whether that juror can lay aside any impression or opinion due to the exposure. Of course, this does not mean that every case involving exposure to pretrial publicity automatically requires the "time consuming, probing, preferably individual voir dire described in ***Davis,***" ***United States v. Gerald,*** 624 F.2d at 1298; nor does it mean that such an examination, when necessary, must always be conducted apart from the other jurors. As in ***Davis,*** "[w]e recognize the district court's need for flexibility in interrogating jurors as to possible prejudice." ***US v. Davis,*** 583 F.2d at 197. What it does mean, however, is that when the nature of the publicity as a whole raises a significant possibility of prejudice, and a juror acknowledges some exposure to that publicity, more than the abbreviated questioning conducted in ***Davis*** and in the case sub judice is necessary: "The juror is poorly placed to make a determination as to his own impartiality. Instead, the trial court should make this determination." ***US v. Hawkins,*** 658 F.2d 279, 284-85 (5th Cir. 1981).

See also ***Jordan v. Lippman,*** 763 F.2d 1265 (11th Cir. 1985) (holding trial court's failure to conduct voir dire or to allow defense counsel to make inquiries of jury panel members when viewed in context of "barrage of inflammatory publicity", violated defendant's constitutional rights to an impartial jury and due process).

In ***US v. Witt,*** 718 F.2d 1494 (10th Cir. 1983), the Tenth Circuit held that where the trial court deems individual questioning of venire men during voir dire to be unnecessary to ensure a fair trial it may question the entire panel provided the court ensures impartiality.

To establish such juror partiality, the defendant must show that the publicity either prejudiced an individual juror or caused pervasive hostility in the community. ***Murphy v. Florida,*** 421 US 794, 95 S. Ct. 2031, 44 L.Ed.2d 589 (1975).

See ***Atwell v. Blackburn,*** 800 F.2d 502, 507 (5th Cir. 1986) (noting defendant failed to make *prima facie* showing that practice of not serving summons in a particular housing project affected the impartiality of his *grand jury* venire, and therefore all relief sought was denied).

The Eighth Circuit has specified procedures for determining whether trial publicity has deprived a defendant of a fair trial. ***US v. Burchinal,*** 657 F.2d 985 (8th Cir.), *cert. denied*, 454 US 1086 (1981).

A court must first examine the publicity potential for prejudicing jurors. ***US v. Burchinal,*** 657 F.2d 985 (8th Cir.), *cert. denied*, 454 US 1086 (1981). *See also* ***US v. O'Keefe,*** 722 F.2d 1175 (5th Cir. 1983) (holding prejudice may be shown by evidence that extrinsic matter tainted deliberation). If a danger of prejudice exists, the court should question the jurors to determine if they have been exposed to the publicity and if so to gauge its effect. Finally, the court must decide what measures are necessary to protect the accused.

> ***US v. Burchinal,*** 657 F.2d 985 (8th Cir.)*, cert. denied,* 454 US 1086 (1981);
>
> ***US v. O'Keefe,*** 722 F.2d 1175 (5th Cir. 1983);
>
> ***US v. Spawr Optical Research Inc.,*** 685 F.2d 1076 (9th Cir. 1982), *cert. denied*, 461 US 905 (1983).

However, the Supreme Court in ***Nebraska Press Association v. Stuart***, 427 US 539 (1976), held there is a strong presumption against use of prior restraints to prevent publicity before and during trials. There is a presumption against use of prior restraints on the media and the defendant bears "the heavy burden of demonstrating in advance of trial that without prior restraint a fair trial will be denied". ***Nebraska Press Association v. Stuart***, 427 US 539, 569 (1976).

APPELLANT MUST INCLUDE PREJUDICIAL PUBLICITY IN THE RECORD

For purposes of appeal, defense counsel must see that the record reflects the nature and extent of the publicity so that the appellate court may determine whether the publicity was prejudicial. The voir dire procedure described in ***US v. Davis*** is not required where there are only unsupported general allegations of prejudicial pretrial publicity.

> ***US v. Gerald,*** 624 F.2d 1291, 1298 (5th Cir. 1980);
>
> ***US v. Brunty,*** 701 F.2d 1375, 1378 (11th Cir. 1983).

OTHER EVIDENCE RECEIVED BY THE JURY PREJUDICES SAME

The Fourth Circuit found that a presumption of prejudice arose when an outside comment, "fry the son of a bitch", was heard by members of a capital case jury while lunching. ***Stockton v. Virginia,*** 852 F.2d 740 (4th Cir. 1988).

JURY SELECTION DISCOVERY

Given the limited voir dire afforded Counsel in Federal criminal trials, Counsel would be well advised to utilize alternative methods to gain relevant information about prospective panel members.

> ***US v. Hasimoto,*** 878 F.2d 1126 (9th Cir. 1989) (holding defense counsel entitled to juror tax information prior to selecting jury based on 26 U.S.C. ' 6103(h)(5) which creates a statutory right to juror tax information in "Tax Criminal Cases").

One should argue that the unfair imbalance in data available to the prosecution regarding jurors entitles the defense to the prosecution's jury selection data.

See ***Lasavio v. Mayber,*** 496 P.2d 1032 (Col. 1972) (en banc) (holding police records of prospective jurors utilized by prosecution, should be discoverable by the defense, “[t]he requirements of fundamental fairness and justice dictate no less.");

Commonwealth v. Smith, 215 N.E.2d 897, 901 (Mass. 1966) (holding that such information "should be as available to the defendant as to the district attorney);

People v. Aldridge, 209 N.W.2d 796 (Mich. App. 1973) (stating information compiled by prosecutor regarding prospective juror's adverse contacts with police discoverable under ***Brady)***;

People v. Murtishaw, 631 P2d 446 (Ca. 1981) (en banc) (holding that depriving one unable to afford such investigations of prospective jurors, discovery of such jury dossiers compiled by the prosecution violated "due process" noting that such an historic "pattern of inequality reflects on the fairness of the criminal process").

A Court, in extraordinary circumstances, further crippled the defense by disallowing a community attitudinal survey to help prepare for intelligent jury selection based on how issues are determined on a demographic basis.

US v. Lehder-Rivas, 669 F. Supp. 1563, 1567 (M.D. Fla. 1987).