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Naming the Dragon: Litigating Race Issues During a Death Penalty Trial

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INTRODUCTION

The issue of racial disparity in the administration of the death penalty is a persistent theme in modern capital jurisprudence. Starting with *Furman v. Georgia*[1] and continuing on to *McCleskey v. Zant*,[2] courts have struggled to come to grips with this issue. This Article will not attempt to explore all of the legal ramifications of race and the death penalty, nor will it speak to its political import. Rather, it will attempt to tackle some of the practical problems facing a capital defense attorney in the courtroom by providing a brief overview of motions practice in this arena using a federal capital case that the author recently tried as an example. The Article will focus on two important areas of trial—voir dire and development of the theory of the case.

II. MOTIONS PRACTICE

There are many "global" approaches to race and the death penalty that one can litigate, primarily pretrial. For example, in the case of

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1. 408 U.S. 238 (1972).
2. 499 U.S. 467 (1991).

United States v. John Bass,[3] the question of racial discrimination in the application of the federal death penalty was raised in a pretrial motion to strike the notice of intent to seek the death penalty and included a request for discovery from the federal government. When a claim of selective prosecution—or in this context, selective selection for capital prosecution—is made, getting discovery is necessary to analyze whether or not the disparity noted can be explained by a race-neutral factor. The question is, what do you need to show in order to get the right to look at information that is normally not accessible to anyone outside the prosecutorial agency?

In *Bass*, the motion to strike the death penalty notice was premised on the fact that in the years from January 1995 through August 1998 (the three years prior to the filing of the motion), 57% of the defendants for whom Attorney General Janet Reno had authorized the death penalty were black.[4] African Americans were (and remain) vastly over-represented among federal capital defendants, regardless of whether the baseline for comparison is the proportion of African Americans in the population of the United States (13%)[5] or the racial composition of defendants in federal prosecutions. African Americans represent 38% of the prisoners in federal prisons,[6] 33% of the defendants convicted in federal courts of violent offenses, 38% of the defendants convicted of drug offenses,[7] and 27% of the offenders sentenced under the U.S. Sentencing Commission Guidelines.[8] Indeed, a former member of the Capital Review Committee (and distinguished panelist at the Race to Execution Symposium), Professor Rory Little, states that "statistical race disparity persists in federal death penalty prosecutions . . . . [T]he bare statistics are disturbing. Far more black than white defendants are being submitted for DOJ capital case review and are being authorized for capital prosecution."[9]

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3. 266 F.3d 532 (6th Cir. 2001).

4. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 479 (1999) (Court-ordered discovery revealed that, "of 296 defendants submitted for capital case review between January 27, 1995 and August 10, 1998, 55% were African-American and 80% were non-white. . . . [A]mong the eighty-one defendants actually authorized for death penalty prosecution: 57% were African-American and 72% were non-white.") (citations omitted).

5. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at tbl. 18, *available at* http://www.census.gov/prod/3/98pubs/98stats/sasec1.pdf (last visited Jan. 21, 2004).

6. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1997, at tbl. 6.43, *available at* http://www.albany.edu/sourcebook/1995/pdf/t643.pdf (last visited Jan. 21, 2004).

7. *Id.* at tbl. 5.17.

8. *Id.* at tbl. 5.28.

9. Little, *supra* note 4, at 478.

In a civil context, statistics like these would undoubtedly create the prima facie case necessary to get discovery in a race discrimination case.[10] In the selective prosecution context, however, the burden is substantially higher—in fact, nearly impossibly high. In the older case of *Wayte v. United States*,[11] the United States Supreme Court held that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards,"[12] and it was Mr. Bass's position that the same standard applied to his claim. However, the legal standard changed in 1996, and so, to succeed on his claim, Mr. Bass had to show that the federal prosecutorial policy had both a discriminatory *effect* and a discriminatory *intent* before Mr. Bass could even obtain discovery.[13] If this standard is as high as the prosecution maintained, it would seem that if a defendant was in a position to show both elements—discriminatory effect and intent—that he would not need to go further. Discovery would be unnecessary. If the standard is not that high—if Mr. Bass need only show both discriminatory effect and the inference of discriminatory intent—then Mr. Bass should be able to get discovery.

The district court held that Mr. Bass had done enough to warrant discovery because of the combination of statistics and then-Attorney General Reno's expressions of concern at a press conference during which she discussed the racial disparity that the Department of Justice's study revealed. Attorney General Reno said that she was "troubled" by the study and that "an even broader analysis must be undertaken to determine if bias does, in fact, play any role in the federal death penalty system."[14] She called for studies by experts outside the Department.[15] Deputy Attorney General Eric Holder agreed with her concern, stating: "[N]o one reading this report can help but be disturbed, troubled by this disparity. We have to be honest with ourselves. Ours is still a race-conscious society, and yet people are afraid to talk about race."[16]

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10. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); *see also* David Crump, *Evidence, Race, Intent and Evil: The Paradox of Purposelessness in the Constitutional Race Discrimination Cases*, 27 HOFSTRA L. REV. 285 (1998); John H. Blume et al., *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771 (1998).

11. 470 U.S. 598 (1984).

12. *Id.* at 608 (footnote omitted).

13. United States v. Armstrong, 517 U.S. 456 (1996).

14. United States v. Bass, 266 F.3d 532, 535 (6th Cir. 2001) (citing Press Conference with Attorney General Janet Reno and Deputy Attorney General Eric Holder (Sept. 12, 2000) (transcript on file with author)).

15. *Id.*

16. *Id.*

After the district court ordered the Government to turn over discovery,[17] the Government informed the court that it would not comply with that order, so the court dismissed the death penalty notice as a discovery sanction.[18] A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's discovery order and remanded the case to the district court for further proceedings on issues of privilege, relevance, and undue burden that could not be addressed, either by the district court or on appeal, because the Government had refused to produce any documents, *in camera* or otherwise, for the trial judge's consideration.[19]

In a per curiam opinion, the United States Supreme Court granted certiorari and reversed. The Court stated:

> In *United States v. Armstrong,* we held that a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent. We need go no further in the present case than consideration of the evidence supporting discriminatory effect. As to that, *Armstrong* says that the defendant must make a "credible showing" that "similarly situated individuals of a different race were not prosecuted." The Sixth Circuit concluded that respondent had made such a showing based on nationwide statistics demonstrating that "[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites" and that the United States enters into plea bargains more frequently with whites than it does with blacks. Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants.* And the statistics regarding plea bargains are even less relevant, since respondent *was* offered a plea bargain but declined it. Under *Armstrong*, therefore, because respondent failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.

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17. The order told the government to turn over a complete list of all cases since 1995 in which the federal government has charged crimes under the Anti-Drug Abuse Statute, 21 U.S.C. § 848 (2000), including: (a) a breakdown by state, district, and office; (b) a list of the race, religion, and ethnic background of each charged defendant; (c) the name of each United States Attorney who handled each of these aforementioned cases; (d) a list of which of these aforementioned cases were recommended to the Attorney General as a death penalty case; (e) the race, religion, and ethnic background of each defendant whose case was recommended to the Attorney General as being a death penalty case; (f) a complete list of which of these were authorized as death penalty cases by the Attorney General's office; (g) a complete list of each of the defendants who entered into plea bargains, were found guilty and either sentenced to death or sentenced to less, or were acquitted; and (h) a complete list of the race, religion, and ethnic background of each defendant. United States v. Bass, No. 97-80235 (E.D. Mich. Oct. 2000) (order granting discovery of information pertaining to the government's capital charging practices).

18. FED. R. CRIM. P. 16(d)(1).

19. *Bass*, 266 F.3d 532.

> The Sixth Circuit's decision is contrary to *Armstrong* and threatens the "performance of a core executive constitutional function." For that reason, we reverse.[20]

If there was any question after *Armstrong* about what it takes to get discovery in order to mount a selective capital prosecution claim, *Bass* laid it to rest. Unless one can show that a white capital defendant's case looks exactly like a black capital defendant's case, but the white defendant is not facing capital prosecution, one cannot get discovery.[21] Without discovery, it is impossible to meet the burden necessary to show there is no racially neutral way to explain the disparity and prevail. In other words, you cannot get there from here.

Although the Supreme Court has created a veritable catch-22 for selective prosecution claims, that should not discourage the filing and litigating of this and other motions. A capital defender should file any motion for which there is a good faith basis. This should be done because it is the right thing to do for the client, because it might just work, and very importantly, because it may lay the groundwork for a successful appeal. Failure to object to improper evidence, procedure, or other trial issues almost certainly waives the issue for appellate review.[22] Worse yet, if it is not objected to in the correct way in state court, it is almost certainly insulated from federal review.[23]

This is especially true in a capital case because there is no way to anticipate what motion or objection that courts have thus far deemed as losing may ultimately lay the groundwork for a successful attack in the future. For example, for many years, lawyers representing capital defendants in Illinois filed motions asking for the right to "reverse-*Witherspoon*"[24] capital juries. These lawyers figured that if the prose-

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20. United States v. Bass, 536 U.S. 862, 862-63 (2002).

21. Reading the Supreme Court's opinion in *Bass*, one would never get the idea that there was a substantial jurisdictional question before the Court, as presented in Mr. Bass's Brief in Opposition to a Grant of Certiorari. To quote from the brief: "The law is clear that 'the Government [may] not take an appeal in a criminal case without express statutory authority.'" Brief in Opposition to Petition for Certiorari at 5, United States v. Bass, 536 U.S. 862 (2002) (No. 01-1471) (quoting United States v. Wilson, 420 U.S. 332, 336 (1974) (citing United States v. Sanges, 144 U.S. 310 (1892)). In this case, the Government purported to rely on 18 U.S.C. § 3731 (2000). But § 3731 nowhere authorizes the Government to appeal the sort of district court order at issue here, which was an order dismissing the Government's notice of intent to seek the death penalty, and not—as specified by the explicit text of the statute defining what orders are appealable—an order "dismissing an indictment or information . . . as to any one or more counts." In the absence of authority to appeal, this Court has no jurisdiction to consider the case on certiorari because this is not a case "'*in* the court[ ] of appeals'" as required by 28 U.S.C. §1254 (2000). Brief in Opposition to Petition for Certiorari at 5, *Bass* (No. 01-1471). The Supreme Court did not even mention the issue.

22. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

23. *Id.*

24. *See* Witherspoon, v. Illinois, 391 U.S. 510 (1986).

cution had the right to find out who would never be able to impose the death penalty,[25] lawyers for the defense should be able to find out who would never consider anything *other* than death. These motions were denied time and again. The denial of these motions was affirmed time and again.[26] Then the Supreme Court decided *Morgan v. Illinois* [27] and agreed that defense lawyers should be allowed to "reverse-*Witherspoon*" capital juries. If the trial lawyers in *Morgan* had not made the record, and had not been willing to hear the words "denied" one more time, this right would not exist.

III. JURY SELECTION[28]

Jury selection is actually a process of elimination; potential jurors are called for jury duty, during which they are questioned and either seated, excused for cause, or excused by a peremptory challenge by either side. Generally, a challenge for cause involves a juror who has a relationship with a party or witness, has some personal experience that would cause him or her to be unfair, or is legally unable to sit. In capital cases, the group of potential jurors excludable for cause is much larger because anyone who is against the death penalty can be so excused.

Under *Witherspoon v. Illinois,*[29] the State has the right to exclude, for cause, anyone who could not consider giving the death penalty. *Adams v. Texas,*[30] as interpreted in *Wainwright v. Witt,*[31] modified the "automatic" and "unmistakably clear" language of *Witherspoon*'s footnotes nine and twenty-one, which allowed the exclusion for cause only when jurors unqualifiedly expressed their unwillingness to consider the death penalty.[32] While this relaxed somewhat the rigors of inquiry on one side of the question, in the long run it complicates

25. *Id.*

26. *See, e.g.*, People v. Brisbon, 478 N.E.2d 402 (Ill. 1985); People v. Caballero, 464 N.E.2d 223 (Ill. 1984); People v. Ramirez, 457 N.E.2d 31 (Ill. 1983); People v. Jackson, 582 N.E.2d 125 (Ill. 1991).

27. 504 U.S. 719 (1968).

28. Some of the introductory material for this section of this Article has been adapted from the jury selection chapter in STEPHEN L. RICHARDS ET AL., ILLINOIS DEATH PENALTY DEFENSE LAW AND PRACTICE MANUAL (2003), published by the Office of the State Appellate Defender of Illinois and the Center for Justice in Capital Cases at the DePaul University College of Law.

29. 391 U.S. 510 (1968).

30. 448 U.S. 38 (1980).

31. 469 U.S. 412 (1985).

32. *Compare Witherspoon*, 391 U.S. at 520, *with Adams*, 448 U.S. at 45 ("*prevent or substantially impair* the performance of his duties as a juror . . . ") (emphasis added), *and Witt*, 469 U.S. at 424 ("standard is whether the jurors' views would '*prevent or substantially impair* the performance of his duties as a juror . . .'") (emphasis added).

matters. This is because "death-qualification" now becomes a three-dimensional phenomenon for the interrogator.

First, jurors who are "substantially impaired" by virtue of anti-capital punishment views must be identified. Second, jurors who are "substantially impaired" by virtue of *pro*-capital punishment views must be identified.[33] In *Morgan v. Illinois,*[34] the Supreme Court held that the venire must be questioned regarding pro-capital punishment, potentially disqualifying views—primarily the inability to truly consider mitigating evidence and vote for a sentence other than death, assuming a conviction for first degree murder. If potential jurors cannot consider mitigating evidence, they must be excused.[35] Third, venire members who are substantially impaired must be identified *in considering lawful mitigating evidence.*[36] Inquiry into a prospective juror's thoughts and feelings on the death penalty is a far more complex process than simply whether that juror is "for or against" capital punishment. It is imperative to discover if the juror is generally favorable to or against the concept, and whether he or she can listen to both aggravating and mitigating evidence, and actually consider each.

Racial prejudice inherent in capital jury sentencing was considered in *McCleskey v. Kemp.*[37] The United States Supreme Court acknowledged in *McCleskey* that the statistical evidence "indicates a discrepancy that appears to correlate with race."[38] Refusing to overturn an entire capital sentencing system due to this improper influence, the Court attempted to tackle the problem in other, less "radical" ways. One of those ways is requiring special procedures in jury selection:

> Because of the range of discretion entrusted to a jury in capital sentencing hearings, 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 be less favorably inclined towards

33. Antideath penalty venire members may be referred to as "*Witherspoon-Witt* excludables," or "WEs." *See* Lockhart v. McCree, 476 U.S. 162, 167 n.1 (1986).

34. 504 U.S. 719 (1992).

35. Indeed, in his dissent in *Morgan,* Justice Antonin Scalia complains, "Presumably, under today's decision a juror who thinks a 'bad childhood' is never mitigating must also be excluded." *Id.* at 745 n.3 (Scalia, J., dissenting).

36. Sometimes phrased in now-outdated *Witherspoon* terms, courts refer to such jurors as having "automatic death penalty" views. This means they are jurors biased in favor of the death penalty under all circumstances after a conviction for murder. After *Witt,* "automatic" is not the applicable standard. Nevertheless, these potential jurors are often referred to as "automatic death penalty jurors" or "ADPs."

37. 481 U.S. 279 (1987).

38. *Id.* at 312.

> 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 stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[39]

The issue of racial discrimination in the selection of juries and the venire from which they are chosen has been difficult for the courts to grapple with. The Equal Protection Clause[40] forbids the prosecutor from challenging prospective jurors solely on the basis of race or on the assumption that members of the defendant's race will be unable to be impartial jurors.

Until 1986, a defendant who wanted to challenge racial discrimination in jury selection had to meet the *Swain v. Alabama*[41] standard. This required a defendant to prove purposeful discrimination throughout the prosecutorial arena (i.e., the state).[42] This burden proved too much for an individual defendant to bear, both in terms of scope and resources, so in *Batson v. Kentucky*,[43] the Supreme Court changed the manner by which a defendant might challenge racial discrimination by the prosecution in jury selection. There are two kinds of challenges to potential jurors that an attorney can make: challenges for cause and peremptory challenges.[44] Challenges for cause can be made by either party or *sua sponte* by the trial judge when it becomes apparent that the particular potential juror cannot be fair to one side or the other, or has some other impediment to serving as a juror.[45] Peremptory challenges are limited in number and can be made by either side, for any or no reason, are given to each side by rule or statute, and are limited in number.[46] Defense attorneys, for years, had been challenging what they perceived to be racially discriminatory uses of peremptory challenges that excluded all or most minority jurors. The *Batson* Court held that when the defense believed that this was occurring, an objection could be made to the trial judge, and if the trial judge found that a prima facie case had been made, the prosecution would have to give "race-neutral" reasons for the exclusions. If the trial court accepted these explanations, the trial would continue. If not, a mistrial would be declared.[47] This procedure was supposed to fix the problem.

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39. Turner v. Murray, 476 U.S. 28, 35 (1986).
40. U.S. CONST. amend. XIV, § 1.
41. 380 U.S. 202 (1965).
42. *Id.* at 227.
43. 476 U.S. 79 (1986).
44. THOMAS A. MAUET, TRIAL TECHNIQUES 37-39 (6th ed. 2002).
45. *Id.* at 37-38.
46. *Id.* at 38.
47. *Batson*, 476 U.S. at 97.

It has not, however, exactly had that effect. Once defense counsel has made the objection and established a prima facie showing, prosecutorial tendering and judicial acceptance of "racially neutral" explanations that have proven acceptable to reviewing courts has become nearly pro forma. For example, in *People v. Randall*,[48] before reversing the case and remanding for a *Batson* violation, the court observed:

> Having made these observations [about the function of a *Batson* challenge], we now consider the charade that has become the *Batson* process. The State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations." It might include: too old, too young, divorced, long, unkempt hair, free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, "lived in an area consisting predominantly of apartment complexes," single, overeducated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same "age bracket" as defendant, deceased father and prospective juror's aunt receiving psychiatric care.
>
> Recent consideration of the *Batson* issue makes us wonder if the rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury. We are reminded of the musing of Justice Cardozo, "We are not to close our eyes as judges to what we must perceive as men."[49]

Of course, *Batson* is only relevant to the issue of exclusion of identifiable groups from jury service. It has nothing to do with the far more pervasive and dangerous issue of racial bias *among* jurors. It is those attitudes that the capital defender must explore and expose. This requires some skills that are not necessarily comfortable for many (if not most) attorneys.

"Jury selection has three main goals: (1) to elicit information from jurors; (2) to educate jurors on the defense case while defusing the prosecutor's case; and (3) to establish a relationship between the ju-

48. 671 N.E.2d 60 (Ill. App. Ct. 1996).

49. *Id.* at 65-66 (footnotes omitted).

rors and the defense attorney and his or her client."[50] Probably the single most important thing a lawyer can do in furtherance of these goals is to *listen*. Some psychologists refer to this skill as attending behavior; it includes a relaxed attentive posture, eye contact, and verbal following.[51]

In the *Bass* case, which was ultimately tried (and resulted in a life verdict), the prospective jurors completed a nineteen-page jury questionnaire prior to their in-court voir dire. In one juror's questionnaire, racial bias seemed to "peek out." By listening carefully and giving the juror the opportunity to recognize her own stereotypes, counsel was successful in getting her to "take herself off the jury." The following colloquy took place after the court had questioned the juror about her availability, and the Assistant United States Attorney had asked her about various legal concepts:

> MS. LYON: Good morning, Mrs. Smith. How are you?
>
> JUROR SMITH[52]: Fine, thank you. How are you?
>
> MS. LYON: A little nervous too.
>
> JUROR SMITH: Yeah.
>
> MS. LYON: I have a few questions to ask you, but before I do I just want you to know that none of us—this isn't a test, you know, and there's no right answer. Whatever you feel is what you feel. And you should feel comfortable about telling us that. That is all anybody, the Judge, the prosecution and the Defense wants to know. Okay?
>
> JUROR SMITH: Uh-hmm.
>
> MS. LYON: All right. I wanted to talk with you about one of the answers that you gave in your questionnaire when you were asked if there's any other information we should know about. And you said that many of your family members are quite prejudiced against black people, possibly because the workers in or with—and then I couldn't read the last little part of it. But maybe you can just tell me what you were thinking about there.
>
> JUROR SMITH: Well, my husband—I did not know him then, but he was a Pontiac policeman during the riots. I think it was in '67. And that was mostly black against white at that time. And, you know, he has relayed things about what happened during that time.
>
> My father-in-law, he is deceased now, but he was a Bloomfield Township police officer. And in the line of duty he killed a black man and used to brag about it, and very prejudiced towards black

50. Cathy E. Bennett et al., *How To Conduct a Meaningful and Effective Voir Dire in Criminal Cases*, *in* MICHIGAN CLINICAL LAW PROGRAM, CRIMINAL CONCENTRATION HANDBOOK SUPPLEMENT 50 (Andrea D. Lyon ed., 2d ed. 1999).

51. ALLEN E. IVEY, MICROCOUNSELING: INNOVATIONS IN INTERVIEW TRAINING 30 (1971).

52. The juror's name has been changed to protect her privacy.

people. And I heard this quite often. My husband relays this quite often.

My daughter works for the Auburn Hills Police Department. She, you know, grew up disliking black people from what she has heard. And just—the whole family just thinks like this.

Now, I really can't say that I am prejudiced, but I've heard this. And so there's a lot of disliking of black people in my family.

MS. LYON: I'm not sure if I'm hearing you properly. So, I'm going to follow up a little bit with that and just ask you. It sounds to me like you are both worried that you have been affected by this yourself.

JUROR SMITH: Yes.

MS. LYON: And a little bit ashamed about that.

JUROR SMITH: Yes.

MS. LYON: Is that right?

JUROR SMITH: Yes.

MS. LYON: I wanted to make sure I was hearing you.

Obviously, you know I'm sitting next to Mr. Bass here who is an African-American man.

What do you think I should do here?

JUROR SMITH: What do I think—

MS. LYON: Let me ask you the question in a different way. I'm sorry. I know it's very uncomfortable. I'm really not trying to make you uncomfortable. I'm sorry.

You were saying earlier that sometimes your daughter expresses what I guess I could fairly say are kind of racist attitudes. Would that be fair?

JUROR SMITH: Very fair, yes.

MS. LYON: What do you say to her when she does that?

JUROR SMITH: I basically just listen. I didn't write it on the form, but my granddaughter, she's 16, and she's—has some girlfriends and they are starting to date and she is dating a black guy, and my daughter is totally furious about that. I just sort of listen. I don't really say a whole lot about it. That's something I guess that she will have to deal with.

MS. LYON: How do you feel about your granddaughter's boyfriend?

JUROR SMITH: Well, I've never met him. But I just basically grew up that you date within your race.

MS. LYON: So, would it be fair to say that this bothers you?

JUROR SMITH: Yes, it does.

MS. LYON: Would you feel—I'm trying to figure out how to ask this question without being rude. So you have to forgive me here. But would you think that this might not be the best case for you to be a juror on because of some of the things we're talking about right now?

JUROR SMITH: Yeah. I think that would be a true statement, yes.

> THE COURT: Any objection?[53]
> MR. LEIBSON (Assistant Unites States Attorney): No.
> THE COURT: Thank you for answering honestly and bringing it to our attention. Please take this form to the fifth floor. And they will tell you what the next step is, which is probably to go home with thanks. Thank you very much.[54]

As is apparent from the excerpt, litigating race in the courtroom is not always about pounding the table or making a scene—sometimes it is about making the space for honest and equitable responses.

IV. DEVELOPING THE THEORY OF THE CASE WHEN RACE IS A SALIENT FACTOR AT TRIAL

Theory of the case is not what one might think at first—at least not in a trial court. It is not the legal theory (although that might be part of it). The theory of the case must encompass the facts, favorable and unfavorable, and it must answer the central question the jury has.[55] For example, if the defense is "mistaken identity," *why* was a mistake made? Was it poor opportunity to observe? A weakness in the observer? Bias? Finding out the answer to the central question of the case informs the direction that both investigation and motions practice will take.

Assume for a moment that a defendant is charged with double homicide—murder in the first degree. In most states, a multiple first degree murder will qualify, or make eligible, a defendant for the death penalty.[56] A thorough reading of the police reports, the defendant's statement, and the beginning investigation reveal that the defendant had been threatened by one of the two deceased men on numerous occasions, had been attacked by that same person twice—once shot at but not injured—and that the two deceased individuals invited the defendant to go outside of the bar he was in the night of the incident. The defendant shot and killed both men almost immediately upon getting outside the bar. In his statement to the police, the defendant said he was afraid of them. When asked, if that was the case, why did he follow them out of the bar, he only said, "I had to."

Now the legal defense is obvious—self-defense. But in developing the theory of the case, the problem is the fact that the defendant fol-

53. At this point, Judge Arthur J. Tarnow was directing his question to the prosecution table to see if it had any objection for an excusal for cause.

54. Transcript of Trial vol. 3 at 18-22, United States v. Bass, 266 F.3d 532 (6th Cir. 2001) (No. 97-CR-80235-01).

55. *See, e.g.*, MAUET, *supra* note 44, at 23-28.

56. For example, in Illinois, a multiple murder is one of twenty aggravating factors that would allow the prosecution to seek the death penalty. 720 ILL. COMP. STAT. 5/9-1(b)(3) (2002).

lowed the man he was afraid of and his companion outside. Just saying the words "self-defense" will not suffice. Instead, defense counsel needs to figure out what "I had to" meant. Was the defendant afraid for his family? Had he been told that there was a "hit" out for him? Did one of the deceased say to him before walking out that they were coming back in with deadly weapons? These are some examples of what might answer that question and allow the defense to credibly put forward a self-defense presentation.

Suppose, however, that the "answer" to the question of why the defendant followed the two men out of the bar is that he had been afraid for so long he just had to end it before they got him. A jury might reject that explanation and convict the defendant but spare his life. That is because the theory of mitigation should enfold the (failed) defense and tell the story of the defendant's life, and hopefully walk the jury through the defendant's environment so that, while the jury may not forgive the crime, they can see a reason to spare him.

In order to present an effective theory of mitigation—reasons to punish with less than death—defense counsel must perform a rigorous examination of the client's life and other relevant circumstances. It is beyond the scope of this Article to examine these concepts in detail, but suffice it to say the theory of the case must dovetail, or at least not fight with, the theory of mitigation.[57] One cannot say first that the prosecution has the wrong man, then turn around in the sentencing phase and say this "wrong man" is sorry for what he has done.

With these considerations as a backdrop, how does one "litigate" race at trial? At a capital sentencing hearing? It differs depending on whether racial issues are salient or not salient.

If race is a salient part of the case, it should be addressed directly by the capital defense attorney. Race may be salient because of the race of the witnesses, victims, their families, or all three, and the defendant. It may be salient because there is a direct racial element to the offense—a hate crime for example, or a clash between gangs of different races. Race may also be more obviously salient—the crime may have been committed by or against a white supremacist, or by or against a black nationalist. For example, there is no question that a minority defendant charged with the murder of a white victim or victims is facing a tough situation.[58] Telling a jury that this "should not matter" may be a nice sentiment, but it ignores reality. In today's society, it is unlikely that a juror (or a jury) will *consciously* treat the minority de-

57. *See* Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991).

58. McCleskey v. Zant, 499 U.S. 467 (1991).

fendant worse because he is black, Hispanic, or another minority. But studies tell us that his life may be viewed as less valuable to many, if not most, jurors.[59]

When race is a salient part of the case, direct comment through cross-examination, direct examination, or in opening or closing statements is warranted—not politically correct rhetoric, but an honest unveiling of the obvious. Some of the same techniques discussed in the context of voir dire apply here: self-disclosure, not judging the feelings the jurors might have, and helping jurors to get to the place at which they can understand and adjust for what they feel.

V. Developing the Theory of the Case When Race is Not Salient

In cases in which race is not salient, race may still remain a factor. For example, if both the victim and the defendant are black, prejudice is still a concern. At the Race to Execution Symposium, Dr. Craig Haney spoke of the "empathic divide" in our society.[60] This divide means it is difficult to communicate in any viscerally impactful way to jurors whose lives are usually so different than that of the capital defendant. For example, let us return to the self-defense example above. Suppose the deceased individuals and the defendant are all members of the same minority group. And assume further that the reason the defendant was armed was because of the dangerousness of the neighborhood in which he lived. Telling the jury that the neighborhood was dangerous only distances them further from the defendant. Showing them, however, is a different matter.

In another case, the author wished to communicate how dangerous her client's neighborhood was, in order to truly explain the fact that her client had been armed. Enlisting the help of an undergraduate film student, a video camera was set up in that neighborhood on a bright, sunny day and run all day. At first, people in the neighborhood played to the camera, but, after a while, they paid no attention to it. The student then edited it down to a manageable length. It was positively terrifying. On this beautiful day, with a nice breeze in the air, there were drug deals, fights, and one group of young people chasing an obviously terrified teenager home—it said everything that

59. See, for example, David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1661 (1998), which found evidence of race-of-victim disparities in 90% of states studied and race-of-defendant disparities in 55%.

60. *See* Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the Will of the People*, 3 Psychol. Pub. Pol'y & L. 303 (1997).

words could and much more. It is certainly possible that a trial judge might keep this kind of evidence out of a trial, but not at a sentencing hearing with its relaxed standards for admissibility.[61]

Again, it is important not to shy away from speaking directly to the issue—and to do so by connecting those things that are usual to humankind: love, hope, joy, loss, grief, and despair. They might come in different forms on "different sides of the track," but they come nevertheless.[62]

VI. Speaking Up

There are many times when confronting racial attitudes is necessary in the courtroom. The problem with doing it is not just the how to, or the when to, or even the why—it is fear. When a lawyer speaks up about these issues, he or she is inviting anger from the prosecution, and potentially the judge. The jury may resent the lawyer raising the issue—jurors may be hostile and see the capital defender as "playing the race card."

That fear, however, does not relieve the capital defender of the duty to speak up. How to, when to, and to whom to speak—well, that is what the lawyer must decide. But remaining silent is not an option. Silence in these circumstances may very well cost your client his life.

VII. Conclusion

There is a myth about dragons; the way one gets power over a dragon, it is told, is through knowledge and use of the dragon's true name.

The courtroom is no different—it is, at times, a fire-breathing lethal enemy. Facing the racial issues in your case—salient or not—will reveal that dragon's true name and allow the defense team to conquer this seemingly indomitable foe.

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61. Lockett v. Ohio, 438 U.S. 586 (1978).

62. For a fascinating look at how jurors' racial attitudes affect the narrative they both hear and tell about a capital trial, see Benjamin Fleury-Steiner, *Narratives of the Death Sentence: Toward a Theory of Legal Narrativity*, 36 Law & Soc'y Rev. 549 (2002).