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Jury Selection Handbook

THE NUTS AND BOLTS OF EFFECTIVE JURY SELECTION

SUPPLEMENT

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HISTORIC NEW RULE: JURY SELECTION AND IMPLICIT BIAS

The Washington Supreme Court is the first court in the nation to adopt rules aimed at eliminating implicit bias from jury selection in both civil and criminal cases. The new General Rule 37 (effective April 24, 2018) dramatically alters practices and procedures regarding exercising peremptory challenges. It remains to be seen whether this new rule will become a model for rule changes elsewhere.

Under the new rule, a party's objection to the exercise of a peremptory would only need to cite to the rule, such as "Object your Honor, General Rule 37." Then, any further discussion of the matter would be conducted outside the jury's presence. In responding to the objection, the party must state the reasons for the peremptory challenge.

Under *Batson*, "the person challenging the peremptory must 'make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." However, under GR 37, "(t)he court need not find purposeful discrimination to deny the peremptory challenge." Instead, if the judge decides that "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." The "objective observer" is defined by GR 37 as someone who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."

Regarding reasons offered for showing a race-and-ethnicity-neutral basis for the peremptory, GR 37(h) provides a list of presumptively invalid reason for exercising peremptories, such as "having prior contact with law enforcement officers." Additionally, GR 37(i) states that if the party exercising the peremptory wants to use a juror's questionable conduct ("juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers") as justification for the peremptory, the "party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner." If neither the judge nor opposing counsel corroborate the juror's behavior, the grounds for the peremptory shall be invalid

In making the determination of whether race or ethnicity was a factor in exercising the peremptory challenge, GR 37(g) provides a nonexclusive list of relevant factors paralleling those referred to in *Foster v. Chatman*, 136 S.Ct. 290 (2015), such as "whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors."

The following is the full text of the new rule:

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GR 37 JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
(iv) whether a reason might be disproportionately associated with a race or ethnicity; and
(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

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(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;
(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
(iv) living in a high-crime neighborhood;
(v) having a child outside of marriage;
(vi) receiving state benefits; and not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge. [Adopted effective April 24, 2018.]

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Understanding Washington's New General Rule on Racial Bias in Jury Selection

By Thomas M. O'Toole, Ph.D. and Taki V. Flevaris, J.D.

In 2018, Washington adopted GR37, which is a new general rule that changes how racial bias in jury selection is addressed. The rule is designed to provide courts with guidance for effectively eliminating racial bias in the use of peremptory strikes. The purpose of this article to explain GR37 and what it means for litigators and judges in Washington courts.

What is the rule and does it change the jury selection process?

GR37 outlines a process for handling concerns about racial bias in the use of peremptory strikes during jury selection. There are two key procedural components. The first deals with how the issue is raised. The rule states that a party may object to a peremptory strike on the basis of improper bias by merely citing the rule. The objection must be made before the venire member in question has been excused, unless new information is discovered. The court is also authorized to raise the objection on its own. The ensuing discussion must be held outside the presence of the venire, and the proponent must then state the reasons for the strike.

The second component provides guidance to judges on determining whether to allow the peremptory strike. Under the previous process established under *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial court was required to find that the side exercising the peremptory had engaged in purposeful discrimination in order to invalidate the peremptory. Under GR37, the court need only find that, under the totality of circumstances, an objective observer could view race or ethnicity as a factor. The rule defines an objective observer as someone who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."

The rule goes on to specify five non-exclusive circumstances that the trial court should consider in determining whether or not an objective observer could view race as a factor:

- The number and types of questions posed to the prospective juror;
- Whether the party exercising the peremptory challenge asked significantly more questions or different questions of the juror to be struck in contrast to other jurors;
- Whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
- Whether a reason might be disproportionately associated with race or ethnicity; and
- If the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or past cases.

GR37 also specifies a list of presumptively invalid reasons for striking a prospective juror, noting that the list contains "reasons for peremptory challenges [that historically] have been associated with improper discrimination in jury selection in Washington State . . . ." The presumptively invalid reasons are:

- Having prior contact with law enforcement officers;
- Expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- Having a close relationship with people who have been stopped, arrested, or convicted of a crime;

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- Living in a high-crime neighborhood;
- Having a child outside of marriage;
- Receiving state benefits; and
- Not being a native English speaker.

Finally, GR37 addresses reliance on the venire member's conduct as a reason for the peremptory strike, noting that reasons such as sleeping, inattentiveness, eye contact, general demeanor, or unintelligent or confusing answers also "have historically been associated with improper discrimination in jury selection in Washington State." GR37 thus requires reasonable notice that an attorney intends to rely on one of these reasons so that it can be corroborated by the judge or opposing counsel.

How did GR37 come about?

GR37 was born out of the Washington State Supreme Court's recognition that the *Batson* framework generally failed to achieve its designed purpose. In *State v. Saintcalle*, 178 Wn.2d 34 (2013), the court acknowledged "a growing body of evidence" showing that "racial discrimination remains rampant in jury selection," including in Washington. In multiple opinions, the Justices discussed studies of actual peremptory usage, laboratory studies, case outcomes, surveys of practitioners and judges, training materials, treatises, and investigative reports. While finding that the trial court below had not abused its discretion under *Batson*, the court expressed concern that *Batson* focuses only on purposeful discrimination, "whereas racism is often unintentional, institutional, or unconscious." The court also expressed concern that under the *Batson* framework, judges are seemingly required to brand attorneys practicing before them as racist, and may be reluctant to do so. The court went on to discuss a variety of potential avenues for addressing the shortcomings of *Batson*, including abolition of peremptory strikes altogether. It concluded by highlighting the need for continuing discussion and solutions to the problem.

Following the *Saintcalle* decision, the ACLU spent a period of time developing a proposed court rule. The proposal was finally submitted to the Supreme Court on July 14, 2016, followed by a comment period. Numerous stakeholders submitted comments on the proposed rule, including associations representing prosecutors, defenders, plaintiffs' lawyers, civil defense lawyers, and judges, along with numerous minority bar associations and civil rights organizations. Because the comments reflected disagreement among these groups, the Supreme Court convened a workgroup of these key stakeholders to meet, talk through the disagreements, and either reach consensus or crystallize and explain remaining disagreements. This work group spent approximately six months working on the issue and finally submitted its report to the Supreme Court on March 18, 2018. The report included a proposed framework with alternatives and explanatory statements from the stakeholders. The Supreme Court proceeded to adopt a final version of GR 37 on April 5, 2018, and it became effective on April 24, 2018.

What does GR37 practically mean for litigators?

GR37 effectively lowers the burden for parties objecting to a peremptory strike for reasons of racial bias. To invalidate a peremptory, the court need only find that an objective observer could view race or ethnicity as a factor. This means that when in doubt, the justice system will now err on the side of eradicating racial bias rather than upholding a peremptory

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strike. The rule shifts the focus away from the subjective intent of the attorney and/or party exercising the peremptory and—much like the longstanding appearance of fairness doctrine—focuses on how an outside observer might perceive the proceedings. Notably, race or ethnicity need only be perceived as *a* factor, rather than *the* factor or a predominant factor, in the use of a challenged peremptory.

By defining an "objective observer" as someone who "is aware that implicit, institutional, and unconscious biases . . . have resulted in the unfair exclusion of potential jurors in Washington State," GR37 broadens the traditional concept of racism and requires judges to recognize that racial bias may be at play even when its presence is not obvious or conscious—even to the attorney or party exercising the strike. In other words, it asks trial judges to dig deeper and think more critically when exploring the issue of potential racial bias.

It further suggests that attorneys need to dig deeper as well. Previously, under *Batson*, it was the obligation of the objecting party to establish the existence of purposeful discrimination. In contrast, GR 37 makes no mention of any evidentiary burden on either party. Once the rule has been invoked, the court is directed to determine whether or not the peremptory will be upheld based on the totality of circumstances. This suggests that whenever a genuine concern over racial bias is presented, attorneys exercising peremptory strikes should have very clear and convincing explanations for why race is not a factor in the decision to exercise the peremptory.

In a nutshell, GR 37 is to be invoked whenever there is a genuine concern that racial bias might be influencing the exercise of a peremptory strike. Under such circumstances, the peremptory will not be allowed unless there are one or more distinct reasons for the strike that are race-neutral and persuasive, so that an objective observer could not view race as a factor. As with all court rules, GR 37 is to be interpreted and applied sensibly and in light of its underlying purposes.

Important Considerations for Attorneys and Judges

At the heart of GR37 are the questions of what constitutes racial discrimination and how to identify bias in venire members. In this respect, GR37 takes a significant step forward in recognizing the reality that modern day racism is often "beneath the surface," and not necessarily an intentional or overt act.

GR37 forces attorneys to rethink how they identify bias in jury selection. We are a country that is obsessed with demographics and the differences between whites and blacks, men and women, old and young, and so on. It is easy (and perhaps lazy) to look at these factors first when evaluating a venire, and many attorneys do. GR37 asks attorneys to dig deeper. Demographics are meaningful only because we often assume people of similar demographics have similar experiences, beliefs, and attitudes. But research has shown that reliance on demographics is an inaccurate shortcut littered with problems. One solution is for attorneys to shift their focus to the actual experiences, beliefs, and attitudes and forget about the demographics. There is a great deal of research in psychology that suggests experiences and beliefs are the best indicators of bias and decision-making. Consequently, attorneys should focus on these characteristics and spend time exploring how they connect to the venire members' ability to serve in the case in question.

However, in order to accomplish a shift away from the focus on demographics, attorneys may need better jury selection conditions. Specifically, more voir dire time might be needed in order for them to dig deeper. In fact, some attorneys often rely on demographics because they

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have so little time to gather other meaningful information about venire members. This is something for judges to consider as part of their case management practices. A short, supplemental juror questionnaire may be another useful avenue for collecting meaningful information about venire members.

As GR 37 is implemented, concerns about variation among individual judges may also arise. Every attorney knows that judges fall all over the spectrum when it comes to personality, experience, personal beliefs, and how each of those impact a judge's decision making. With regard to GR 37, some attorneys may have concerns that a "liberal" judge could see race as a factor more often than is warranted, while "conservative" judges are too slow to conclude that race may have been a factor. There is no easy answer to this concern, which affects the entire justice system. At the same time, judge training and appellate review could promote consistency and clarity for the new framework over time, including with regard to the scope of discretion that trial judges will be afforded.

GR37 also provides an opportunity for judges to critically examine their own practices. GR37 provides a clear standard (the objective observer) for determining whether or not racial discrimination has occurred, including an express acknowledgment of institutional, implicit, and unconscious biases. But it is the trial judge who ultimately must determine what this hypothetical observer would know and could conclude with regard to the particular circumstances in each case. At the same time, research demonstrates that judges are not immune to the implicit, institutional, and unconscious racial biases that GR 37 highlights.1 One might question whether or not these biases could influence judges' own determinations of whether or not race was a factor in a peremptory strike. More broadly, this issue has significant implications about the need for further reforms to the justice system.

Conclusion

GR37 is a noble step forward in the effort to tackle racial bias in jury selection. However, racism is a complex issue with no simple solutions and continuing discussion moving forward is vital. Attorneys and judges need to critically evaluate their jury selection practices and dig deeper when it comes to determining whether or not to exclude a venire member. The research suggests that, not only will this help remove racial bias from jury selection, but it will also help attorneys become more effective at identifying actual bias in the jury pool.

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[1] *See, e.g.*, Jeffrey J. Rachlinski & Sheri L. Johnson, *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195 (2009).

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	
v.	Criminal No. 1:18-cr-00083-TSE
	Judge T. S. Ellis, III
PAUL J. MANAFORT, JR.,	
Defendant.	

DEFENDANT PAUL J. MANAFORT JR.'S MOTION FOR A CHANGE OF VENUE AND FOR OTHER RELIEF RELATING TO JURY SELECTION

Defendant Paul J. Manafort, Jr., by and through counsel, moves this Court for a change of venue and for other relief relating to jury selection. Mr. Manafort makes his motion based upon his Sixth Amendment right to trial by an impartial jury and pursuant to Rule 21of the Federal Rules of Criminal Procedure. The reasons in support of this motion are set forth in the accompanying memorandum of law.

Dated: July 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **PAUL J. MANAFORT, JR.**, **Defendant.**	**Crim. No. 17-cr-201-1 (ABJ)**

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR A CHANGE OF VENUE

The United States of America, by and through Special Counsel Robert S. Mueller, III, files this response to defendant Paul J. Manafort, Jr.'s motion (Doc. 393) for a change of venue. Manafort's motion should be denied. Manafort has not shown that pre-trial publicity is so likely to have prejudiced the jury pool that the venire must be presumed to be tainted, or that the nationwide publicity he identifies would be materially less prejudicial in another district.

BACKGROUND

Manafort has been indicted in neighboring districts on federal charges arising in part from his Ukraine work and witness tampering related to such charges. In October 2017, a grand jury in this District returned an indictment that, as since superseded, charges Manafort with conspiring to defraud and commit offenses against the United States, money laundering conspiracy, violating the Foreign Agents Registration Act, making false statements to the government, and attempting to tamper with witnesses and conspiring to do the same. Doc. 318. In February 2018, a grand jury in the Eastern District of Virginia returned an indictment that, as since superseded, charges Manafort with five counts of subscribing false tax returns, four counts of failing to file reports of foreign bank and financial accounts, and multiple counts of bank fraud and bank fraud conspiracy. *United States v. Manafort*, No. 18-cr-83 (E.D. Va. Feb. 22, 2018) (*Manafort EDVA*) (Doc. 9). The

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investigation and recent trial of the above charges have been the subject of extensive media coverage. *Cf. Skilling v. United States*, 561 U.S. 358, 379 (2010) ("[M]ost cases of consequence garner at least some pretrial publicity.").

Previously, Manafort moved to transfer the Eastern District of Virginia case from Alexandria, Virginia to Roanoke, Virginia, principally on the same grounds he now urges here. While not binding on this Court, on July 17, 2018, United States District Judge T.S. Ellis, III denied that motion. *Manafort EDVA*, Doc. 138. Judge Ellis explained that "substantial media attention does not, by itself, warrant a change a venue," and that a transfer would be appropriate only if the publicity was "'so inherently prejudicial that trial proceedings [are] presumed to be tainted.'" *Id.* at 2-3 (quoting *United States v. Bakker*, 925 F.2d 728, 732 (4th Cir. 1991)) (court's alteration). Judge Ellis contrasted those rare instances where the Supreme Court had found such a presumption applicable with Manafort's case. *Id.* at 3-4. Applying considerations identified in *Skilling v. United States*, 561 U.S. 358 (2010), Judge Ellis concluded that a "presumption of jury partiality" was unwarranted. *Id.* at 5-6. He noted that jurors would be drawn from a large jury pool and that nothing about the publicity that Manafort identified "suggest[ed] that impartial jurors cannot be found through an exacting *voir dire* process" or was "unique to this geographic area." *Id.* at 6. Judge Ellis additionally rejected Manafort's suggestion that potential jurors were "more likely aligned with the Democratic Party than the Republican party," explaining that "political leanings are not, by themselves, evidence that those jurors cannot fairly and impartially consider the evidence presented and apply the law as instructed by the Court." *Id.* at 6-7. Following a thorough voir dire, the district court empaneled a jury, and after a twelve-day trial, the jury found Manafort guilty of eight of the charged counts and was unable to reach a unanimous verdict on ten counts. *Manafort EDVA*, Doc. 264.

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Jury selection in this case is scheduled to begin on September 17, 2018, and trial is scheduled to begin on September 24. This Court will have prospective jurors complete a detailed questionnaire to aid in finding "a fair and impartial jury." Aug. 28 Hrg. Tr. 74. In light of the pre-trial publicity, the Court has explained that it will conduct a searching *voir dire*. *Id.* at 61, 74. And the Court has made clear that after "the questionnaire and the voir dire proceeding," the Court will continue to evaluate whether a fair and impartial jury can be seated. *Id.* at 74.

ARGUMENT

Manafort contends (Doc. 393 at 3-8) that because this case, the Eastern District of Virginia case, and Manafort's political work have attracted substantial publicity, this trial should be transferred to Roanoke, Virginia, where Manafort suggests that jurors are less likely to have followed the media coverage and to hold and be influenced by political views that Manafort views as unfavorable to him. That claim lacks merit. The common fact of extensive media coverage in high-profile cases does not mean that this jury pool must be presumed to be tainted. The Court should address the publicity that inevitably accompanies a case of this nature as courts ordinarily do and consistent with the Courts' prior ruling here, through a careful jury-selection process that includes a written questionnaire and thorough voir dire.

A. Transfer Based On Pre-Trial Publicity Requires An Extraordinary Showing

Crimes must ordinarily be prosecuted "in a district where the offense was committed." Fed. R. Crim. P. 18; U.S. Const. Art. III, § 2, cl. 3 ("trial shall be held in the state where the said crimes shall have been committed"); *see also* U.S. Const. Amend. VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."). Transfer to another district based on asserted bias is warranted only if "so great a prejudice against the defendant exists in the transferring district that the defendant

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cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a).

Important cases "can be expected to arouse the interest of the public." *United States v. Haldeman*, 559 F.2d 31, 60 (D.C. Cir. 1976). But public attention does not, by itself, warrant a change in venue. Rather, in evaluating a motion to change venue, the "critical question" is "'whether it is possible to select a fair and impartial jury.'" *United States v. Caldwell*, 543 F.2d 1333, 1342 (D.C. Cir. 1974) (quoting *Jones v. Gasch*, 404 F.2d 1231, 1238 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968)); *see United States v. Edmond*, 52 F.3d 1080, 1099 (D.C. Cir.), *cert. denied*, 516 U.S. 998 (1995); *United States v. Ehrlichman*, 546 F.2d 910, 916 n.8 (D.C. Cir. 1976); *United States v. Chapin*, 515 F.2d 1274, 1285-1286 (D.C. Cir. 1975).

"The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity." *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995) (per curiam), *cert. denied*, 516 U.S. 1098 (1996); *see, e.g.*, *Caldwell*, 543 F.2d at 1342-1343 ("widespread, uncomplimentary publicity" did not require conclusion that "a fair and impartial jury was completely unobtainable"); *see also United States v. Holton*, 116 F.3d 1536, 1547 (D.C. Cir. 1997) ("There is no general presumption of prejudice where jurors are exposed to media coverage"). Instead, potential jurors' exposure to pre-trial publicity and preconceived notions about the case are normally addressed through voir dire. *See, e.g.*, *Edmond*, 52 F.3d at 1099; *United States v. Sampol*, 636 F.2d 621, 680-681 (D.C. Cir. 1980); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.").

The "proper occasion" for deciding "whether it is possible to select a fair and impartial jury" is therefore normally "upon the voir dire." *Chapin*, 515 F.2d at 1285-1286 (quoting *Jones*,

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404 F.2d at 1238). Only in the most "'extreme circumstances'" should a court "presume[e] that a fair trial [i]s impossible in this jurisdiction" and that thorough voir dire cannot address any risk of bias. *Edmond*, 52 F.3d at 1099 (quoting *Haldeman*, 559 F.2d at 60, and contrasting to *Rideau v. Louisiana*, 373 U.S. 723, 724-726 (1963), where a confession was broadcast to the small jury pool); *see Childress*, 58 F.3d at 706 ("Simply put, the standard is high" for presuming jury prejudice); *see also Skilling*, 561 U.S. at 379-381, 382-383.

B. The Media Coverage At Issue Does Not Warrant Transfer

Manafort's showing falls short because the coverage relating to him does not rise to the extreme level warranting a presumption of prejudice, and national coverage, which reaches every district, cannot justify a change of venue to the district and division sought by Manafort.

1. Coverage related to Manafort does not warrant transfer

"Prominence does not necessarily produce prejudice." *Skilling*, 561 U.S. at 381; *see Dobbert v. Florida*, 432 U.S. 282, 303 (1977). As this Court has observed, "this jurisdiction has had very high-profile cases," and judges "have been able, through a questionnaire, followed by individual voir dire" to impanel fair and impartial juries. Aug. 28 Hrg. Tr. 74. The question at this stage is whether the pre-trial publicity is so extensive, inflammatory, and prejudicial that even with a detailed jury questionnaire and thorough voir dire, a jury should be presumed to be biased. *See, e.g.*, *Edmond*, 52 F.3d at 1099; *Caldwell*, 543 F.2d at 1342-1343.

The media coverage surrounding Manafort does not rise to the kind of "extreme circumstances" that warrant such a conclusion. *See Edmond*, 52 F.3d at 1099; *see, e.g.*, *Haldeman*, 559 F.2d at 61-62 (noting that while pre-trial publicity was "massive" and some was "hostile in tone and accusatory in content" it was mostly "straightforward, unemotional factual accounts" and not the type of "inherently prejudicial" and "unforgettable" publicity that warrants presumed

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prejudice); *see also Skilling*, 561 U.S. at 382-383 (news stories "were not kind" but "contained no confession or other blatantly prejudicial information" and "[n]o evidence of the smoking-gun variety invited prejudgment of his culpability."). The pre-trial publicity is not so "striking or prejudicial" that juror prejudice should be presumed. *See United States v. Gooch*, 23 F. Supp. 3d 32, 43 (D.D.C. 2014); *see, e.g., United States v. Poindexter*, 725 F. Supp. 13, 37-38 (D.D.C. 1989).

Transfer is additionally inappropriate given the size of the jury pool. Those rare cases where courts presume bias have not only involved highly prejudicial coverage, such as broadcast confessions, but have also typically involved "the saturation of smaller jury pools." *United States v. Lentz*, 352 F. Supp. 2d 718, 724 & n.12 (E.D. Va. 2005) (contrasting those areas with Northern Virginia); *see Skilling*, 561 U.S. at 382. Given the population of this District, it is especially unlikely that unbiased jurors cannot be found. *See Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991) (potential for prejudice mitigated in county with population of 182,537 that was part of the Washington, D.C. area); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (plurality op.) (reduced likelihood of prejudice where venire was drawn from a pool of over 600,000 individuals).

Voir dire "can serve in almost all cases as a reliable protection against juror bias" and "nationally publicized trials of widely publicized individuals serves to validate the efficacy of the voir dire for this purpose." *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (citing as examples "the Watergate defendants" and "the Abscam defendants"). Courts have long held that a trial judge's vigilance in voir dire is ordinarily capable of ferreting out bias and can be modulated to "the depth and extent of news stories that might influence a juror." *Mu'Min*, 500 U.S. at 427; *see Skilling*, 561 U.S. at 385; *id.* at 426 (Alito, J., concurring in part and concurring in the judgment); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring); *Haldeman*, 559 F.2d at 60, 62 n.37. And the detailed jury questionnaire approved by this Court

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will further aid in ferreting out any potential biases. *See Skilling*, 561 U.S. at 384, 388-389 & n.22; *United States v. North*, 713 F. Supp. 1444, 1444-1445 (D.D.C. 1989). Manafort has presented no reliable evidence that the jury pool holds such entrenched views that proceeding with voir dire in this venue is inappropriate.

2. National media coverage does not warrant transfer

Manafort's motion fails for the additional reason that any prejudice arising from pre-trial publicity in this case is not limited to this courthouse. This case has no "unique and extraordinary local impact." *United States v. Lindh*, 212 F. Supp. 2d 541, 552 n.15 (E.D. Va. 2002) (comparing to *United States v. McVeigh*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996) (Oklahoma City bombing). And court after court has recognized that where publicity is "national rather than local," a change of venue could serve little purpose. *Poindexter*, 725 F. Supp. at 38 n.54; *see United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991); *Levine v. United States Dist. Court for Cent. Dist. of Cal.*, 764 F.2d 590, 600 (9th Cir. 1985); *United States v. Herring*, 568 F.2d 1099, 1100 n.4 (5th Cir. 1978); *Lindh*, 212 F. Supp. 2d at 550-551; *United States v. Hill*, 893 F. Supp. 1039, 1041 (N.D. Fla. 1994); *see also United States v. Awadallah*, 457 F. Supp. 2d 246, 253 (S.D.N.Y. 2006) (perjury relating to September 11 attacks would elicit response nationwide).

Manafort's reliance on internet sources of publicity only underscores this conclusion. As a federal judge in Roanoke—Manafort's preferred venue—explained, "[b]ecause the internet is available in every judicial district," any "risk that prospective jurors will encounter [such] stories cannot be cured by a change of venue." *United States v. Cassell*, No. 06-cr-98, 2007 WL 419574 at *1 (W.D. Va. 2007); *see, e.g., United States v. Campa*, 459 F.3d 1121, 1148 n.243 (11th Cir. 2006) (the "high-tech age" counsels against transfer where prejudice "spread through multiple forms of media * * * would not stop at district lines").

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Manafort nonetheless asserts (Doc. 393 at 5-7) that because the Court is in Washington, D.C., prospective jurors are likely "to have closely followed the developments and news coverage in [his] case" and to allow their views of the 2016 presidential candidates to cloud their judgment of this case. Manafort states (*id.* at 7) that "[i]n comparison," Roanoke is a smaller "media outlet," and fewer people in Roanoke have broadband internet connections than "in Northern Virginia" (presumably a proxy for Washington D.C.). Manafort's assertions about news and internet consumption are open to doubt, and his speculation about the likely propensities of jurors in this district is unfounded. For example, the size of a "media market" reflects the area's population as much as its "preoccupation" with any type of news (*see id.* at 6); the number of media outlets near Washington (*id.*) says little about where the media is consumed; broadband internet access (*id.* at 7) does not describe the volume or content of internet use; and the suggestion that the jury pool is "preoccup[ied] with all things political" (*id.* at 6) rests not just on bare assertion but also a misunderstanding of the population and varied interests in this District.

As the Supreme Court has noted, quoting observations about D.C. jurors' trying a Watergate case, "[t]his may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." *Skilling*, 561 U.S. at 391 n.28 (quoting *Haldeman*, 559 F.2d at 62 n.37); *see United States v. Mitchell*, 551 F.2d 1252, 1262 n.46 (D.C. Cir. 1976) ("10 of the 12 jurors selected in that case claimed to have followed Watergate casually, if at all"), *rev'd on other grounds sub nom., Nixon v. Warner Communications*, 435 U.S. 589 (1978); *see, e.g.*, *North*, 713 F. Supp. at 1444 ("while some of the public becomes thoroughly engrossed in such a story many do not"). Even if prospective jurors have followed the media coverage, that does not itself warrant a presumption of prejudice. *See*

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Childress, 58 F.3d at 706. And political leanings do not mean that jurors cannot be fair and impartial, consider the evidence presented by both sides, and follow the Court's legal instructions. *See Chapin*, 515 F.2d at 1287 (distinguishing between public sentiment about President Nixon and juror bias against one of his staffers); *cf. Jones*, 404 F.2d at 1237-1238 (discounting assertion of prejudice that "will accrue * * * vicariously"). In short, Manafort has not met his burden to establish the kind of "extreme circumstances" necessary to presume that a "fair trial [i]s impossible in this jurisdiction." *See Edmond*, 52 F.3d at 1099 (quoting *Haldeman*, 559 F.2d at 60).

CONCLUSION

For the foregoing reasons, Manafort's motion for a change of venue should be denied.

Respectfully submitted,

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Special Counsel

Dated: August 31, 2018 By: */s/ Andrew Weissmann*

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	
v.	Criminal No. 1:18-cr-00083-TSE
	Judge T. S. Ellis, III
PAUL J. MANAFORT, JR.,	
Defendant.	

DEFENDANT PAUL J. MANAFORT JR.'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR A CHANGE OF VENUE AND FOR OTHER RELIEF RELATING TO JURY SELECTION

Defendant Paul J. Manafort, Jr., by and through counsel, files this memorandum in support of his motion for a change of venue and for other relief relating to jury selection. Mr. Manafort makes his motion based upon his Sixth Amendment right to trial by an impartial jury and pursuant to Rule 21of the Federal Rules of Criminal Procedure.

1. Procedural Background

On June 29, the Court addressed Mr. Manafort's motion for a hearing inquiring into improper government leaks to the media. (Dkt. 43). The Court stated that any hearing to assess any alleged leaks would take place following the trial. The Court further noted that if defendant was seeking a change of venue, he should file a motion by July 6, 2018.

At the June 29 hearing, the Court also explained how jury selection would be conducted. First, the Court informed counsel that it would not use the proposed jury questionnaire. Second, the Court described the jury selection process itself. Specifically, the Court noted that it would ask

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approximately 60 potential jurors about exposure to media coverage, but that it would not inquire into who anyone voted for or whether they subscribe to certain publications. Upon defendant's request, the Court granted permission to file supplemental briefing by July 6, 2018.

2. Pretrial Publicity

The investigation into "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump" and "any matters that arose or may arise directly from the investigation" has dominated the news cycle in the United States at least since the moment of Mr. Mueller's appointment as Special Counsel on May 17, 2017. *See* May 17, 2017 Appointment Order. From the outset, a significant portion of the media coverage has focused on Mr. Manafort – the first individual indicted by the Special Counsel and the first individual to face a trial arising from the probe.

While federal courts often address issues of pretrial publicity in high-profile cases, it is difficult to conceive of a matter that has received media attention of the same magnitude as the prosecution of Mr. Manafort. There are several reasons for this unrelenting news coverage.

First, the Special Counsel investigation focuses on issues relating to a sitting United States President. While Mr. Manfort's indictment and upcoming trial before this Court have little to do with President Trump, as the Court noted, in a much-reported statement:

> Given the investigation's focus on President Trump's campaign, even a blind person can see that the true target of the Special Counsel's investigation is President Trump, not [Manafort], and that [Manafort's] prosecution is part of that larger plan.

Court's Order on Motion to Dismiss, Doc. 97, at 11, n.15.[1]

Unsurprisingly, then, the nation's attention remains fixed on Mr. Manafort's trial.

[1] *See, e.g., 'Even a blind person' can see Mueller using Manafort to 'target' Trump: judge,* The Washington Times, June 28, 2018. Available at: https://www.washingtontimes.com/news/2018/jun/28/even-blind-person-can-see-mueller-using-manafort-t/

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Second, the subject matter of the Special Counsel's investigation has a direct relationship to the political process. This prosecution involves the President's former campaign manager. As a result, for many Americans, Mr. Manafort's legal issues and the attendant daily media coverage have become theatre in the continuing controversy surrounding President Trump and his election. This controversy continues to engender strong partisans on both sides of every issue. As a result, it is difficult, if not impossible, to divorce the issues in this case from the political views of potential jurors.

Third, the high profile of the Special Counsel himself, a former FBI Director, has turned the Special Counsel's investigation into something the media has portrayed as a showdown between Mr. Mueller on one hand and the President on the other.

Fourth, the reporting on this prosecution has often been sensationalized and untethered from the facts in the case. For example, while the recent indictment of Konstantin Kilimnik, a defendant in the D.C. prosecution, involved little more than an effort to make contact with a former associate, the reporting about Mr. Kilimnik has focused primarily on his alleged background in Russian intelligence.[2]

Fifth, on June 15, 2018, the U.S. District Court for the District of Columbia revoked Mr. Manafort's release and remanded him into custody. This event, less than 45 days before the trial scheduled before this Court, unleashed a spate of intensely negative news coverage suggesting that Mr. Manafort violated the law.[3] Indeed, even the President's response on Twitter; observed that

[2] *See, e.g., Russian charged with Trump's ex-campaign chief is key figure*, The Washington Post, July 2, 2018. Available at: https://www.washingtonpost.com/politics/russian-charged-with-trumps-ex-campaign-chief-is-key-figure/2018/07/02/c34bfc74-7e1c-11e8-a63f-7b5d2aba7ac5_story.html?utm_term=.3d9d016fd126

[3] Notably, this coverage included televised video of the van carrying Mr. Manafort arriving at the Northern Neck Regional Jail. Available at: https://www.cnn.com/videos/politics/2018/06/16/paul-manafort-arrives-to-jail-ctn.cnn

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Mr. Manafort received a "tough sentence," incorrectly suggesting that Mr. Manafort had been sentenced for committing a crime.[4]

Finally, while this matter has received national media attention, the coverage, and the degree to which the public has followed that coverage, has been most intense in and around Washington, D.C. The Alexandria Division[5] of the Eastern District of Virginia is part of the greater Washington, D.C. metropolitan area and lies, at least in part, inside-the-Beltway.

3. Applicable Law and Argument

Under the Sixth Amendment, all criminal defendants have the right to trial by "indifferent" jurors "free from outside influences," who will "base their decision solely on the evidence," undisturbed by personal prejudice or public passion. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court reviewed the denial of a change of venue motion in a high-profile white-collar crime prosecution. The government charged Skilling, the former CEO of Enron Corporation, with more than 25 counts of securities fraud, wire fraud, and making false statements in relation to Enron's financial strength. *Id.* at 369. The trial took place in Houston, the site of the company's headquarters. Skilling filed a motion seeking a change of venue, which the district court denied. *Id.* at 369-70. Following his conviction, Skilling appealed, first to the Fifth Circuit and then to the Supreme Court, complaining

[4] *See 'Very unfair!': Trump complains about Manafort's jailing on witness tampering allegations,* The Washington Post, June 15, 2018. Available at: https://www.washingtonpost.com/politics/nothing-to-do-with-our-campaign-trump-seeks-to-distance-himself-from-manafort-before-hes-jailed/2018/06/15/79267402-70b7-11e8-bf86-a2351b5ece99_story.html?utm_term=.1fcf5272051b

[5] The Alexandria Division consists of the City of Alexandria and the counties of Arlington, Fairfax, Fauquier, Loudoun, Prince William and Stafford, as well as any other city or town within the geographical boundaries of those counties.

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that the district court's failure to order a change of venue deprived him of a fair trial. *Id.* at 375-377.

The Supreme Court noted the extensive pre-trial publicity surrounding the Enron collapse, which included not only hard-news stories but also special interest pieces mocking the Enron executives and inciting sympathy for Enron investors. *Id.* at 375, n. 8. However, the Supreme Court rejected Skilling's claim holding that the record did not support a finding of presumed prejudice and, as a result, "declining to order a venue change, did not exceed constitutional limitations." *Id.* at 383-85.

In reaching this conclusion, the Court focused on the following factors and differentiated Skilling from defendants in prior cases requiring a venue change. Specifically, the Court pointed to: (1) the size and characteristics of the community; (2) whether the news stories contained blatantly prejudicial information; (3) the time between the reported events and the trial; and (4) evidence that the jury verdict undermined possible juror bias. *Id.* at 382-84.

While the Court used these standards to evaluate error in the district court's decision to deny a change of venue, several of the factors support the requested change of venue in Mr. Manafort's case. First, as to the size and characteristics of the community, the Alexandria Division of the Eastern District of Virginia is far less populous than Houston. Perhaps more importantly, while having a substantial population, the individuals residing in the division are far more likely to have closely followed the developments and news coverage in the Manafort case in light of the division's close connection with the nation's capital. This may be the rare case where a juror's predisposition may directly tie to their vote in the last presidential election. It is not a stretch to expect that voters who supported Secretary Clinton would be predisposed against Mr. Manafort or that voters who supported President Trump would be less inclined toward the Special Counsel.

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Notably, however, voters in the Alexandria Division voted 2-to-1 in favor of Secretary Clinton (66% Clinton; 34% Trump).[6] This split is more balanced in other places in Roanoke, Virginia, located in the Western District of Virginia.

A simple Google search for articles about Russian collusion shows 2,900,000 results. As the Court has pointed out, public interest in this case is far beyond what the Court would expect. In fact, the amount of media coverage of the Special Counsel's investigations is astounding. A Google search for articles relating to Paul Manafort reveals 1,390,00 results. Reviewing these articles, one is hard pressed to find any that are not unfavorable to Mr. Manafort. The news coverage here has contained prejudicial information, including, but not limited to the false news coverage as detailed in Mr. Manafort's prior "leaks" motion (Dkt. 43), coverage of Mr. Manafort's recent jailing,[7] and allegations regarding connections with Russian intelligence.[8]

Nowhere in the country is the bias against Mr. Manafort more apparent than here in the Washington, D.C. metropolitan area. The phrase "inside-the-beltway" was coined to capture the area's preoccupation with all things political. The Washington media market, including Maryland and Virginia suburbs, is the sixth largest TV market in the United States with over 2,321,610 TV

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[6] *See* https://results.elections.virginia.gov/vaelections/2016%20November%20General/Site/Presidential.html

[7] *See, e.g., Judge sends Paul Manafort to jail, pending trial*, CNN, June 15, 2018. Available at: https://www.cnn.com/2018/06/15/politics/judge-sends-paul-manafort-to-jail-pending-trial/index.html;

Judge Orders Paul Manafort Jailed Before Trial, Citing New Obstruction Charges, The New York Times, June 15, 2018. Available at: https://www.nytimes.com/2018/06/15/us/politics/manafort-bail-revoked-jail.html; and

Paul Manafort ordered to jail after witness-tampering charges, The Washington Post, June 15, 2018. Available at: https://www.washingtonpost.com/local/public-safety/manafort-ordered-to-jail-after-witness-tampering-charges/2018/06/15/ccc526cc-6e68-11e8-afd5-778aca903bbe_story.html?utm_term=.95bcb30d02c6

[8] *See, e.g., Special counsel: Manafort, Gates worked with Russian intelligence agent*, CBS News, March 28, 2018. Available at: https://www.cbsnews.com/news/special-counsel-manafort-gates-worked-with-russian-intelligence-agent/; and

Manafort and ally with Russian intel ties face new obstruction charges, CNN, June 8, 2018. Available at: https://www.cnn.com/2018/06/08/politics/paul-manafort-indictment-robert-mueller/index.html

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homes. *See Top 100 Media Markets*, News Generation.[9] The Washington, D.C. metropolitan area has over 60 online news outlets in addition to websites run by major print and broadcast media companies. Gloria & Hadge, *An Information Case Study, Washington, D.C.*, New America Foundation, Aug. 5, 2010.[10] It ranks first in the nation in households with computers (82.9%) and internet access (80% of adults receiving information online). For news consumption, the city's major mainstream print and broadcast outlets command the most online page views in the United States. In comparison, Roanoke is the 70th largest media outlet in the United States and 38% of households in Roanoke lack broadband compared to 3% in Northern Virginia. *See* John Edwards, *Bringing broadband to rural Virginia*, The Roanoke Times, February 28, 2018.[11] Roanoke represents a venue where the media coverage is substantially less than in the D.C. metropolitan area.

The time between the reported events and the trial has been very short. Unlike in *Skilling*, where the news coverage of the Enron bankruptcy more than four years before the trial had diminished, the news coverage in Mr. Manafort case continues apace. Indeed, the news coverage of the Special Counsel's investigation (starting in May 2017); Mr. Manfort's indictment in the District of Columbia (October 2017); Mr. Manafort's indictment in the Eastern District of Virginia (February 2018); and Mr. Manafort's remand (June 2018), has all taken place in the year leading up to the scheduled July 25 trial. Moreover, some of the most prejudicial coverage has been in the

[9] Available at: https://www.newsgeneration.com/broadcast-resources/top-100-radio-markets/ (last visited July 6, 2018).

[10] Available at: https://web.archive.org/web/20130909224854/http://mediapolicy.newamerica.net/publications/policy/an_information_community_case_study_washington_dc

[11] Available at: https://www.roanoke.com/opinion/commentary/edwards-bringing-broadband-to-rural-virginia/article_b50ec107-7b88-515d-ab44-e8d133c7a62b.html

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last month. Based upon all of these factors and the intense, unfavorable pretrial publicity, Mr. Manafort asks the Court to transfer this matter to Roanoke Virginia, well outside of the Washington metropolitan area.

Mr. Manafort also asks the Court to adopt the voir dire practices approved by the Supreme Court in *Skilling*. These include: (1) the use of a jury questionnaire; (2) voir dire by the Court designed to address the topics included in Mr. Manafort's proposed voir dire questions (Dkt. 102); and (3) a substantial increase in the number of jurors in the venire that will be summoned to Court for the trial. 561 U.S. at 370-75.

In reviewing the *Skilling* trial for actual prejudice, and finding none, the Supreme Court carefully reviewed and generally approved of the jury selection process used by the district court. *Id.* at 386-98. The Supreme Court described the detailed questionnaire, which included 77-questions over 14 pages that were generally open-ended allowing the jurors to provide meaningful information. *Id.* at 371. The questionnaire was sent out to 400 prospective jurors. *Id.* at 372. The Supreme Court demonstrated the importance of the questionnaires by finding they "confirmed that, whatever community prejudice existed in Houston generally, Skilling's juror were not under its sway." *Id.* at 391. In addition to the questionnaire, the Supreme Court favorably noted that the district court in *Skilling* asked questions related to pretrial publicity to each juror individually. Id. at 389. This approach is similar to the practice the Court has indicated it would apply in Mr. Manafort's case.

Mr. Manafort submits that a fair trial will impossible without a change of venue to Roanoke, Virginia. Mr. Manafort also respectfully asks the Court to adopt the additional steps discussed above when summoning the venire and conducting voir dire.

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WHEREFORE, Defendant Manafort respectfully requests that the Court transfer this case to Roanoke, Virginia for trial and asks the Court to adopt the procedures described above in its jury selection process.

Dated: July 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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The Critical Importance of Practicing Your Voir Dire

By Thomas M. O'Toole, Ph.D.

Despite what Allen Iverson might say (search "Allen Iverson" and "practice" on YouTube if you do not get this reference), practice is essential to the successful development of any skillset. In competition, competitors get better by practicing. This is why it is surprising to me that most attorneys do not practice their voir dire before the day of jury selection, particularly when so many also preach about primacy theory and the need to make a good impression right off the bat.

Statistics indicate that fewer and fewer cases make it to trial, which means most attorneys have had few opportunities to conduct voir dire. Even for experienced attorneys, it may have been years since the last time they picked a jury. Additionally, jury selection is not something that comes natural to most attorneys as it is the opposite of what most attorneys are used to doing – arguing as opposed to listening. Many attorneys admit that they do not like voir dire and that it is the one thing about trial that makes them nervous. The anecdote to all of this is PRACTICE. Practice will make you better.

Some of the best attorneys at voir dire that I have seen are former prosecutors. These are attorneys who have spent a lot of time in the courtroom picking juries, meaning they have more practice than most. They have done it so many times that they have honed their skillset and can conduct an effective and efficient voir dire. Despite this experience, some former prosecutors will still tell you that they still practice their voir dire.

This article addresses the importance of practicing voir dire and how to effectively do so.

Let's start with some clarity on what constitutes practice. I've often had attorneys tell me they practiced their opening statement when the reality is that they just sat in their office and silently read through it to themselves. That is not practice. Like opening, true practice requires that you stand up and deliver the voir dire. How something reads on paper and how it sounds when it comes out can be very different. You may find that a voir dire question you have scripted for yourself does not sound right, or is too choppy, when delivered. This is something that should be discovered during practice, not during the actual voir dire. The latter has the potential of making you look disorganized, nervous, inarticulate, and ill-prepared, which is not the ideal first impression. When these mistakes happen in live voir dire, it is not unusual for an attorney to just scratch the question and move on, which means a potentially important issue has been skipped over.

If you are in federal court, practice becomes even more important since you will likely only receive ten to fifteen minutes for your voir dire, which means you must be incredibly organized and efficient. Every error takes away from your precious time to learn important information about your jury pool.

While practicing the delivery of your voir dire by yourself is a step in the right direction, it is even more valuable to practice in front of a group of people. This will create a more "real-

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world" feel to the practice. It also creates an opportunity to get feedback on your questions. Sometimes, a question makes perfect sense to you, but the potential jurors do not understand what you are trying to ask. Maybe it is because you know the issues in your case too well and certain questions make sense to you, but not too someone totally unfamiliar with the case. Practicing with a group of people will get you that feedback. An easy way to get a group of people is to ask folks from your office to volunteer to meet for thirty minutes or so and play the role of prospective jurors. If you work in a small office, consider getting a group of friends together at your house. Another option is to recruit some mock jurors in order to create a more real-world environment of unfamiliar faces.

As you practice your questions with office members, friends, or mock jurors, track the information that you are learning from their answers. This will help you determine whether the questions you are asking are getting you the desired – that is meaningful – information. Sometimes, the idea of a particular question might seem brilliant, but when you ask it, you find that you do not learn what you thought you might learn.

I have had some attorneys express concerns about some voir dire questions, noting that they will probably only result in a few raised hands. However, this is exactly the point. You only have a few peremptory strikes, so you want to ask questions that identify those ideal candidates for a strike. A question that results in nearly everyone raising their hand does little to help you differentiate genuine strike candidates from the rest of the venire.

This process will also help you plan for how you are going to track the answers during voir dire. Ideally, you will have a colleague, paralegal, assistant, or someone else in court during jury selection who will track jurors' answers for you. It is incredibly difficult to both conduct voir dire and track all the information at the same time. However, if you have no other choice than to do both, practicing ahead of time will help you figure out the best process for effectively completing both tasks. There are also a variety of jury selection software programs for iPads and PCs out there, such as iJuror or JuryLens, that you may want to consider.

Practice sessions help you hone your questions as well. In many respects, voir dire is an art. Knowing what information you need to get does not guarantee you will get it. The "art" is in crafting questions that make jurors feel comfortable disclosing this information, which involves not only the language, but the delivery as well. This may not be a big deal with simple issues, such as whether a potential juror has ever ridden on a train, but it becomes much more difficult on sensitive issues, such as political beliefs, demographic issues (e.g., financial situation), and other personal issues. Research has shown that people will often answer these kinds of questions based on what they believe the questioner wants to hear or what the socially-acceptable or appropriate answer is rather than providing the honest answer. Consequently, it is important to craft and deliver questions that make jurors feel comfortable being honest.

One type of question that is very effective is the forced-choice question. A forced-choice question presents two sides to an issue and asks who tends to agree with one particular side (i.e. the opinions that are a problem for you and your client). This kind of question is effective because, as you present the two sides, you are presenting them as reasonable, but divergent views. You are not casting any kind of judgment. For example, consider the following question:

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"I want to ask you about guns. I have some friends who hunt regularly and own quite a few guns. Consequently, they are very comfortable around guns. I have other friends who do not hunt and do not own any guns. Some of them openly tell me that being around guns makes them very nervous and uncomfortable. By a show of hands, how many of you are more like that second group of friends and, for whatever reason, are just very uncomfortable around guns?"

In this example, I am presenting both sides as perfectly reasonable. Indicating that I have friends on both sides helps accomplish this. I conclude by asking very innocently, who tends to be like that second group of friends. This simple technique can help diffuse some of the issues that might prevent prospective jurors from fully disclosing their views.

Even after practicing, it is important that you not be afraid to make mistakes when you conduct your actual voir dire. Everyone makes mistakes and jurors understand this. How you cope with that mistake impacts your credibility. If a question comes out the wrong way or you misspeak, back up and start over. Some light-hearted self-deprecation works wonders here. I have seen attorneys make simple comments (after they make a mistake) along the lines of, "Wow, I really botched that one up. Let me try again." It is okay to do this. It humanizes you and can contribute to your overall likability in the jurors' eyes.

In summary, one of the most accurate claims about jury selection is that, while you cannot win your case during jury selection, you can certainly lose it there. Voir dire is a critical moment in any case. It creates first impressions about you as an attorney and about the case. Consequently, it is critically important to practice and refine your strategy so that you can perform at your best. The actual voir dire at trial should never be the first time you "practice" your questions.

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RACIAL BIAS IN JURY SECLECTION: *BATSON* AND *FLOWERS v. MISSISSIPI* 2019

On June 21, 2019, the United States Supreme Court in *Flowers v. Mississippi* reversed the murder conviction and sentence to the death of black defendant Curtis Flowers. Justice Brett Kavanaugh, writing for the majority stated that Curtis Flowers had not been provided with "(e)qual justice under law" because his criminal trial was not "free of racial discrimination in the jury selection process." Justice Kavanaugh wrote that the decision broke "no new legal ground."

The case before the Supreme Court involved the 1996 murder of four people in a Tardy Furniture Store in Winona, Mississippi. Curtis Flowers at that time was 26 years-old. The prosecution's theory was that Flowers was a disgruntled former employee of Tardy's who had been fired. The same District Attorney, Doug Evans, prosecuted Curtis six times. Two trials resulted in hung juries and the Mississippi Supreme Court reversed three other convictions for prosecutorial misconduct and racial bias in jury selection. The Mississippi Supreme Court upheld the sixth conviction and death penalty in which the jury was composed of one black man and 11 whites. It was the sixth conviction and sentence that was before the United States Supreme Court.

Justice Kavanaugh's opinion meticulously explored the trial record and found instances suggesting racial bias played a part in the exercise of the District Attorney's peremptory challenges. He wrote the following in referring to the first four trials that spanned a decade, "We cannot ignore the history. We cannot take that history out of the case." During the six trials, Evans had struck 41 of 42 black jurors, including five of the six black jurors in the case before the United States Supreme Court. Justice Kavanaugh wrote, "The state's decision to strike five of the six black prospective jurors is further evidence suggesting that the state was motivated in substantial part by discriminatory intent."

Justice Kavanaugh also pointed to "dramatically disparate questioning" of black prospective jurors in order to find a pretext for exercising a peremptory challenge. He noted that District Attorney Evans asked black jurors an average of 29 questions in contrast to the 11 questions of white prospective jurors—an average of one question each.

Additionally, Justice Kavanaugh pointed out that the one black prospective juror who was "similarly situated to white jurors who were not struck by the State."

Justice Kavanaugh concluded as follows regarding the accumulated facts:

> We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not "motivated in substantial part by discriminatory intent." *Foster v.*

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> *Chatman*, 578 U.S. ___, ____(2016) (slip op. at 23) (internal quotation marks omitted). In reaching that conclusion, we break on new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

Justice Clarence Thomas wrote a scathing dissent (in which Justice Gorsuch partially joined), that ended as follows:

> If the Court's opinion today has a redeeming quality, it is this: The State is perfectly free to convict Curtis Flowers again. Otherwise, the opinion distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts. Any competent prosecutor would have exercised the same strikes as the State did in this trial. And although the Court's opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims' families. I respectfully dissent.

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JUROR BIAS—WHAT CAN BE DONE ABOUT IT?

By Ronald H. Clark

Faced with juror bias during deliberations, the foreman of a King County Superior Court (Seattle, WA) jury took matters into his own hands. At the conclusion of deliberations, the foreman told the media, "The jury was biased." Politically biased. He said that a few of the jurors were aligned with the political views of the defendants in a first-degree assault case, and this led to seven days of jury deliberations, ending with a hung jury with nine of the twelve jurors in favor of convicting the defendants.

In an effort to dislodge the three jurors from what he perceived as their bias, the foreman took an unusual step in order educate the recalcitrant jurors about implicit bias. He asked the judge to allow the deliberating jury to re-watch an anti-bias video that the prospective jurors are required to watch during their orientation. A video on unconscious bias is also show in the U.S. District Court of Western Washington and it can be viewed here. Judge Kristin Richardson granted the request and it was shown. But, the jury foreman said that it "didn't do any good."[1]

The circumstances that resulted in criminal assault in the first-degree charges were political in nature. On the night of Trump's inauguration on January 20, 2017, defendants Marc and Elizabeth Hokoana, who were Trump supporters, went to the University of Washington campus where right-winger Milo Yiannopoulos was schedule to speak. The evidence showed that Marc Hokoana fired a pepper spray at anti-fascist protesters and Elizabeth Hokoana shot Joshua Dukes in the abdomen. Elizabeth Hokoana claimed self-defense, saying that she shot Dukes because he had a knife and was going to cut her husband.

Can anything be done to eliminate juror bias from juror decision-making?

A recent article by Thomas M. O'Toole, Ph.D. entitled, "New Survey Data on Whether Jurors Follow the Law"[2] paints a grim picture in regards to whether jurors are able to follow the law that runs contrary to their biases. O'Toole's company Sound Jury Consulting conducted a national online survey of 400 jury-eligible respondents on the issue. The survey concluded that "a shocking 75 percent of all respondents agreed that, 'If the judge's instructions about the law that applies to the case went against my beliefs about right and wrong, I would tend to decide the case based on my beliefs about what is right or wrong.'"

Research has established that people have difficulty identifying their own biases. Further, research has shown that people are mistaken if they think that they can

[1] Greg Gilbert, Seattle Times (August 13, 2019).

[2] Thomas M. O'Toole, Ph.D., "New Survey Data on Whether Jurors Follow the Law," King County Bar Bulletin, 9 (May 2019)

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set aside their prejudices of which they are aware. Consequently, the premise that a jurors are qualified to serve if they assure the court that they can set aside their biases is faulty.[3]

Considering the research, one could conclude that given the current law regarding how challenges for cause are ruled on—if the prospective juror can set aside an actual bias, then the challenge should be denied—nothing can be done to eradicate juror bias. In *Jury Selection Handbook: The Nuts and Bolts of Effective Jury Selection* we discuss challenges for cause at length.

Paul Luvera, retired founder of Luvera Law Firm, the only Washington lawyer who has been inducted into the National Trial Lawyers Hall of Fame and referred to as the best trial lawyer west of the Mississippi, has proposed solutions in his article "Washington Law on Jury Challenges for Bias Undermines Litigants' Constitutional Right to an Impartial Jury." Luvera states, "The simplest solution would be for the law to provide that once a trial judge has found that a prospective juror has actual bias, granting a challenge to that person serving on the jury should be mandatory despite assurances that the juror could disregard the bias."[4]

Another solution that Luvera offered is as follows: "Another reasonable solution would be for the judge to apply the same standard in evaluating a prospective juror's bias as applied under the Judicial Conduct Code . . . Applying this test, the court could appropriately exercise its discretion by disqualifying a prospective juror from serving if his or her impartiality could reasonably be questioned irrespective of any assurances about 'following the law' or 'disregarding' such bias in deliberations."[5]

Yet another of Luvera's solutions is for the judge to apply an "appearance of fairness standard.[6]

Luvera's proposed solutions deserve serious consideration. Challenges for cause are intended to keep people with actual bias out of the jury room, and adoption of the solutions could ensure that challenges for cause do what they are designed to do. A jury foreman should not have to try to deal with a biased seated juror.

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[3] Paul Luvera, "Washington Law on Jury Challenges for Bias Undermines Litigants' Constitutional Right to an Impartial Jury", 33, NW Lawyer (May 2019)

[4] *Id.* at 35.

[5] *Ibid.*

[6] *Ibid.*