BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

Note: Use the navigation button  *at the top of your screen to get back to the home page.*

5. TRIAL PROCEDURE

Jury instruction constitution okay
Jury polling by Judge tainted panel
Jury peremptories high strung juror
Jury peremptories denial of reason for challenge
Jury selection argumentative juror
Jury selection excused for religious holiday
Jury selection challenge for cause abuse of discretion
Jury selection judges personal knowledge of prosecutor
Jury selection peremptory challenge native American
Jury selection reference to O.J. Simpson case Batson
Jury selection voter registration lists fairness
Mistrial juror reading about pending charges
Other act evidence - jury instruction
Peremptory challenges juror disability
Peremptory challenges failure to remove juror for cause
Prosecutors comment that defendant tailored his testimony
Post Miranda silence commented on by prosecutor
PBA's witness reference to defendant's prior arrest
Records – original writing rule
Sentence probation exclusion from entire city
Sixth amendment crime specific rule
Sixth amendment cross of prosecution witness
Trial Judge gives juror a ride - impropriety
Trial judge gives supplemental instructions in jury room
Trial transcript does not capture gestures and grimaces
Voir Dire adequacy effects of pretrial information
Voir Dire peremptories ethnic issues
Witness Bruton reference to accomplice statement
Witness 5th amendment trial court discretion
Witness cross exam. Use of suppression transcript

ARRAIGNMENT 72 HOURS

United States v. Fullerton, 18~ F.3d 587 (6th Cir. 1999).

The failure to bring an arrestee before a magistrate for a probable cause determination until more that 72 hours after his warrantless arrest violated the Supreme Court decision of City *of Riverside v. McLaughlin,* 500 U.S. 44 (1991), which set a 48-hour standard for complying with the constitutional requirement of promptness in arraignments in the absence of proof of extraordinary circumstances to justify the delay.

The court said, however, that the suppression of a pager seized incident to a warrantless arrest on drug charges was not an appropriate remedy for a *McLaughlin* violation because the arrest, search, and detention occurred before the *McLaughlin* violation arose hours later.

"There is much confusion over the appropriate remedy for a M*cLaughlin* violation. The Supreme Court has specifically declined to address this issue. *Powell v. Nevada,* 511 U.S. 79, *85,* 11-i S.Ct. 1280, 128 L.Ed.2d 1 (1994). Fullerton makes the novel argument that the appropriate remedy for the failure to judicially determine probable cause within forty-eight hours of an arrest should be the suppression of evidence obtained incident to that arrest. As authority for this proposition, Fullerton cites *Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), which held that illegally obtained evidence must be excluded at trial. [Here, the officer] seized the pager from Fullerton at the time of Fullerton's arrest, before the *McLaughlin* violation occurred. Thus, the pager was not obtained pursuant to the *McLaughlin* violation. Because the agents had probable cause to arrest Fullerton on September 22. the arrest, search, and detention of Fullerton during the first forty-eight hours were lawful. Because the evidence in question, the pager, was obtained incident to the lawful arrest and dur-ing the first forty-eight hours, the district court properly admitted the pager at trial. Thus, while there was a *McLaughlin* violation, suppression of the pager is not the appropriate remedy."

BATSON – JUROR EQUIVOCATION

People v. Walker, 75 Cal.Rptr.2d 871 (Cal.App. 1998).

A court found a race-neutral justification for the excusal of an African-American potential juror on a prosecutors peremptory challenge. where the potential juror showed a reluctance to serve and her response to the question whether she could keep an open mind until called upon to render a decision was not unequivocal. There was at least one other minority person who did serve on the jury. "First, it is notable that a Black did serve on the jury. While the fact that the jury included members of a group alleged discriminated against is not conclusive, it is an indication of good faith in exercising peremptories. . . .

(People v. Turner, supra. 8 Cal.4thl 137. 168, 32 Cal.Rptr.2d 762, ~ P.2d 521.) Moreover, as the People correctly point out, the potential juror at issue here exhibited a reluctance to serve, claiming that she could not afford to because her employer would not pay her, then later admitting she did not know this for a fact and finally discovering that this was not the case. Her response to the question whether she could keep an open mind until called upon to render a decision was less than unequivocal. Thus, there was race-neutral justification for the excusal."

JURY SELECTION BATSON PRETEXTUAL JUSTIFICATION

People v. *Roberts,* 702 N.E.2d 249 (Il1.App. 1998).

A prosecutor claimed that a peremptory strike was exercised against a black prospective juror because the juror had given an untruthful response on a jury card regarding his employment. The court found this to he a pretextual justification for the strike impermissibly based on race, and therefore in violation of *Batson* v. *Kentucky.*

The prosecutor failed to offer additional reasons for the strike after the initial justification was deemed insufficient on the basis that the claim of untruthfulness by the prospective juror was not supported by the record.

> . . . . the State's proffered explanations are factually at odds. Initially, the State challenged the juror because his *voir dire* answers revealed he was unemployed and lived with his family. In its substituted explanation, the State challenged him because he was employed but had not disclosed this on his juror card. The inherent conflict of these two proffered explanations suggests that neither was genuine.
>
> "Because the State failed to provide a race-neutral explanation for excluding McClendon that was nonpretextual, the trial court's denial of defendants *Batson* motion was clearly erroneous."

Two judges concurred.

BATSON SUNGLASSES JUROR WITH AN ATTITUDE

People v. Martinez, 696 N 2d 771 (Ill. App. 1998).

A prosecutor offered these reasons for excluding two African-American *venire* persons from a jury: (1) That they exhibited poor demeanor by either wearing sunglasses in the courtroom or sitting in a defiant manner with their arms crossed; (2) That they were unmarried (one was an unwed mother), and (3) That one was unemployed.

The court ruled that these were race-neutral reasons and therefore the trial court's determination that there was no systematic exclusion of the *venire* persons based on race was not error.

BATSON – PEREMPTORIES RELIGION

United States v. Stafford 136 F.3d 1109 (7th Cir. 1998). When challenged on *Batson* grounds *(v. Kentucky,* ~6 U.S. 79 (1986)) a prosecutor claimed that a black prospective juror who stated that she was very involved with her church and liked to watch gospel programs on television was stricken because the juror would likely find it difficult to sit in judgment on a fellow human being. This was considered by the court as a race-neutral reason for the peremptory strike.

It denied the defendant's *Batson* claim, in the absence of a clear-cut basis to question the trial courts finding that the reason cited by the prosecutor was not pretextual. The court was reluctant to deal with the issue of the use of religion as a basis for peremptory challenges in the absence of clear case law on the subject.

"We need not pursue this interesting byway for it is a byway in this case. Allison's lawyer didn't cite religion as a basis for his *Batson* challenge. We can reverse therefore only if the use of religion as the basis for a peremptory challenge (as this case might be thought to involve) is a plain error. Fed.R.Crim.P. 5*2(b).* It is not. The constitutional status of peremptory challenges based on religion is unsettled, and this is enough to show that the judge's error in allowing Christine Thomas to be struck, if it was an error, was not a plain error. United States v. Olano 507 U.S. *725, 734,* 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993)

Baston Peremptories Juror Airs Prejudice to Judge

No Information Available at this Time

BATSON – JUROR REFUSES TO REMOVE HAT - PEREMPTORIES

People v. Morales, 719 N.E.2d 261 (Ill. App. 1999).

The failure of a female African-American juror to remove her hat in court was deemed a race-neutral basis for exercising a peremptory challenge to exclude her from the jury in a murder prosecution. This basis for its decision enabled the court on appeal to avoid dealing with the difficult issue of the prosecutor's other reason for his peremptory challenge, *i.e.,* that the juror worked for *Playboy Magazine.*

"At the *Batson v. Kentucky,* 176 U.S. 579 (1986) hearing, the prosecutor stated that he used a peremptory challenge as to Whitfield because she was an editor for Playboy Magazine and this is the type of publication that does not take a strong stand toward law enforcement.' He added that she had a baseball cap on in court and that showed disrespect to the court system and the legal system. The Illinois Supreme Court has upheld a venire members failure to remove a hat in court as a race-neutral basis for exercising a peremptory challenge *(People v.. Williams,* 164 Ill.2d 1, 18-19, 206 Il1.Dec. 592 N.E.2d 844, 851-52 (1994)). Since the record does not conflict with this assertion, we need not address the issue of Whitfield's employment at Playboy magazine, and we find that there was no *Batson* violation as to Whitfield."

BATSON PEREMPTORIES RACE RELATED ISSUES

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999).

The court rejected a contention that there is an exception to the rule of *Batson v. Kentucky, 47(* U.S. ~) (1986), prohibiting race-based reasons behind peremptory jury strikes, ft)r cases involving "race-related issues." It said that in cases that involve racially motivated crimes, counsel may question venire persons about race-related bias and strike them if there is a specific reason to believe that they would he incapable of confronting and suppressing their racism.

The defendants ask us to carve out an exception to *Batson* for cases involving 'race-related issues.' We decline to do so. The Supreme Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror.' *McCollum,* 505 U.S. at 89, 112 S.Ct. 2348. In cases that involve racially motivated crimes, counsel may question venire persons about race-related bias and strike them if there is specific reason to believe that they 'would be incapable of confronting and suppressing their racism.' Id. at 58, 112 S.Ct. 2348. In this case, the defendants attempted to base their strikes on an assumption of partiality based on race rather that comments by the venire persons that demonstrated racism. Accordingly, we affirm the district court's grant of the government's *Batson* challenge."

BATSON – RELIGIOUS BIAS TOWARD DEATH PENALTY

People v. Ervin, 990 P.2d 506 (Cal. 2000).

An explanation by a prosecutor that he excused three prospective jurors in a capital murder case because he thought they had a "religious bent" or bias that would make it difficult for them to impose the death penalty was a proper, nondiscriminatory ground for making the peremptory challenges. This was not, the court said, a blanket characterization or invidious discrimination and did not violate the rule of *Batson v. Kentucky,* 476 *CS.* 79 (1986).

"Defendant contends the prosecutor improperly excused prospective jurors based on a 'blanket characterization regarding religious persons' amounting to invidious discrimination. To the contrary, as the prosecutor explained, he excused these persons because he perceived they had a 'religious bent' or bias that would make it difficult for them to impose the death penalty, a proper, nondiscriminatory ground for making a peremptory challenge.

BATSON – GAYS

People v. Garcia, 92 Cal.Rptr. 2d 339. 2000 Cal.App. LEXIS 68 (Cal.App. 2000).

It has been held that prosecution peremptory challenges that excluded two lesbians from a jury was a denial of the right to a jury representing a cross-section of the community. The court noted that in 1994, the (U.S. Supreme Court arrived at the same conclusion with regard to the exclusion of women from jury panels. *J. E. B. v. Alabama ex rd. TB.,* 511 U.S. 12'. . . . whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are far from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." 511 U.S. at 129.

In the case of gays, the instant court said: "The pivot of our analysis is the definition of the term, 'cognizable group.' In *Rubio v .Superior Court,* supra, 24 Cal.3d 93, our Supreme Court,. . . held that the right under the California Constitution to a jury drawn from a 'representative cross-section of the community' is violated whenever a cognizable group' within that community is systematically excluded from the jury venire. [Fn. 4] It explained that, "Two requirements must thus be met in order to qualify an asserted group as "cognizable" for purposes of the representative cross-section rule. First, its members must share a common perspective arising from their life experience in the group, *i.e.,* a perspective gained precisely because they are members of that group. It is not enough to find a characteristic possessed by some persons in the community but not by others; the characteristic must also impart to its possessors a common social or psycho-logical outlook on human events....

"Lesbians and gay men qualify under this standard *[i.e.,* 'commonality of interest']. It cannot seriously be argued in this era of 'don't ask; don't tell' that homosexuals do not have a common perspective—'a common social or psychological outlook on human events'—based upon their membership in that community. They share a history of persecution comparable to that [which] blacks and women share. While there is room to argue about degree, based upon their number and the relative indiscernibility of their membership in the group, it is just that: an argument about degree. It is a matter of quantity, not quality.

“The matter is. . . remanded to allow the trial court to conduct a hearing to determine the validity of the prosecutor’s peremptory challenges to the two prospective jurors. If the trial court determines the prosecutor’s reasons for excusing the two jurors were not constitutionally valid, and grants defendant’s. . *Batson* v. *Kentucky, 476* U.S. *79* (1986)] motion, reversal and retrial is required. if the trial court determines the prosecutor’s reasons for excusing the two jurors were constitutionally valid, and denies defendant’s *Batson* motion, defendant’s conviction is ordered reinstated.”

COURT ROOM EXPERIMENT EYESIGHT

People v. .Smith. 702 N.F.2d 218 (Ill. App. 1998).

A trial court in a home invasion case asked a 74-year-old eyewitness questions about his ability to see without his glasses and conducted a brief in-court experiment in which the eyewitness took off his glasses and described what a deputy in the courtroom was doing. This was held not to be an abuse of discretion, considering that this was a bench trial. The judge's questions and experiment were not considered to indicate bias, hostility or lack of impartiality.

At a post-trial motion on the in-court experiment, the judge displayed a faulty recollection of the witness's ability to see without glasses, by erroneously attributing to him the ability to distinguish the gender of the deputy from a distance without glasses. The court said this did not result in prejudice to the defendant, where the experiment was directed at the defense attorney's cross-examination of the eyewitness about his eyeglasses, and the experiment was only one factor in the judge's belief that the eyewitness accurately identified defendant as the person who committed the home invasion.

We do not think this lapse in the judge's recollection of the experiment resulted in prejudice to Smith and so reversal is not required....

"The trial judge's experiment was directed at defense counsels cross-examination about eyeglasses. The experiment was just one factor in the court's decision to reject defense counsel's attempt at impeaching Willis. Though the judge's subsequent recollection of the experiment was faulty, what is clear is that he remained firm in his belief that Willis accurately identified Smith."

Two judges concurred.

BATSON – PEREMPTORIES – JUROR AIRS RACIAL PREJUDICE

Tolbert v, Gomez. 190 F.3d 985 (9th Cir. 1999).

A prosecutor's peremptory strike of an African-American prospective juror on the basis of his unusual request to approach the bench in order to express his strong concerns regarding racial prejudice was not the equivalent to striking him on the basis of his race. Thus, no error under *Batson v. Kentucky, 4*76 U.S. 79 (1986), occurred.

"Tolbert argues that striking Robertson on the basis of his opinions on race was equivalent to striking him on the basis of his race. We respectfully disagree. The assumption that race and an opinion on race are inseparable is antithetical to the very type of racial stereotyping that *Batson* forbids. Tolbert simply has not shown that Robertson's [prospective juror concern regarding the potential of racist attitudes of juries is 'a characteristic that is peculiar to any race.' *Purkett v. Elem.,* 514 U.S. 765, 769, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (quoting *EEOC* ***v.*** *Greyhound Lines, Inc.,* 635 F.2d 188, 190 n. 3 (3rd Cir. 1980)). Robertson's views about racial attitudes are shared by many not of his race or belonging to any racial minority. Thus, having failed to establish that Robertson's opinions about the importance of race was peculiar to his race, or that the opinions stood as a proxy for it, defense counsel did not raise even an inference that the prosecutor's challenge was based on Robertson's race, thereby violating the Equal Protection Clause. Accordingly, because nothing in this record vanquishes the presumption of correctness to which the state trial court's decision is entitled, the district court properly determined that Tolbert had not established a prima facie case *of* discriminatory use of a peremptory challenge."

DISCOVERY – PROSECUTION WITNESS CRIMINAL RECORD

Rowe v. State, 704 N.E.2d 110 (Ind.App. 1999). Applying *Brady Maryland,* 373

U.S. 83 **(**1963**),** a court ruled that there was a reasonable probability that the result of defendant's murder and attempted murder prosecution would have been different if the state had disclosed that its key witness had prior convictions for burglary and theft. Suppression of that evidence, the court ruled, violated defendant's due process rights. The witness had been presented by the state as reluctant to testify due to his intimate relationship with defendant, his testimony was devastating to defendant's insanity and intoxication defenses because it directly contradicted defendant's testimony regarding his habitual drug use and his claim that he and the witness used drugs just prior to the shooting, and if the witness had corroborated defendant's testimony concerning their drug use, the state could have revoked the witness's probation.

The court applied the rule that prosecution suppression of material, favorable evidence results in a violation of due process if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

"Suppression of material, favorable evidence will result in constitutional error if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . The touchstone of materiality is a reasonable probability' of a different result, and the adjective is important. *Id.* This showing of materiality does not require the defendant **t**o demonstrate by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.

In the present case, the suppression of Hodges' criminal record undermines confidence in the outcome of the trial because Rowe's intoxication and insanity defenses were completely hamstrung by Hodges' testimony. Based on the above, we conclude that Rowe has demonstrated a reasonable probability that the result of the trial would have been different had the State disclosed the evidence of Hodges' criminal record in response to Rowe's discovery request."

DOUBLE JEOPARDY CONTROLLED SUBSTANCE TAX

Commissioner of Revenue v. Mullins 428 Mass. 406, 702 N.E.2d I (Mass. 1998).

A taxpayer, who had previously pled guilty to possession of marijuana, sought abatement of a controlled substance tax on double jeopardy grounds. The Supreme judicial Court of Massachusetts ruled that the tax on “dealers” of marijuana was a “penalty,” for double jeopardy purposes since it imposed a high rate of taxation, had a deterrent purpose, was clearly conditioned on the commission of a crime, and bore no logical relationship to lawful possession.

The court ruled the tax constituted the “same offense” as possession with intent to distribute marijuana, for double jeopardy purposes, since the tax punished any person who possessed marijuana and intended to sell or distribute it. This conclusion, however, did not invalidate the tax. Instead, it merely restricted the ability of the Commonwealth to assess the tax against those who had suffered criminal penalties for the same possession of marijuana. It thus was merely abated in the taxpayer’s case.

“The CST [tax] punishes any ‘dealer’ who ‘possesses’ more than forty grains of marijuana and fails to pay the tax on the contraband. A ‘dealer’ is obviously someone who intends to sell or distribute his or her product, Thus, the CST punishes a person who possesses more than forty grams of marijuana and intends to sell or distribute it. This is the precise crime to which the taxpayer pleaded guilty. That crime and the activity to which CST is applied are so closely related in fact as to constitute in substance an identical offense for purposes of double jeopardy...

“Our conclusion does not render G.L. c. 64K invalid, hut only requires that taxes assessed under the statute be considered punishment for double jeopardy purposes. The Fifth Amendment does not prevent imposition of the tax; it merely restricts the ability of the Commonwealth to assess the tax against those who have suffered criminal penalties for the same possession of marijuana or controlled substances.

EXPERT WITNESS ACCELERANT SNIFFING DOGS

United States v. Marfi, 158 F.3d 60 (2nd Cir. 1998).

The expert testimony of a witness that investigators were alerted by an accelerant sniffing dog to traces of an accelerant at a fire scene was sufficiently reliable to he admitted in a prosecution for arson, insurance fraud, and mail fraud arising from defendant's alleged scheme to set fire to his own business for the insurance proceeds.

Further, any error in admitting the expert testimony was manifestly harmless in view of substantial other evidence indicating the defendant's use of the accelerant to set the fire.

"Under *Daubert v. Merrell Dow Pharmaceuticals Inc..* 509 L'S. 579, 113 S.Ct, 2786, 125 I..Ed.2d 469 (1993), it is the district court that is charged with determining that expert testimony both rests on a reliable foundation and is relevant to the task at hand.' *Id.* at 597, 113 S.Ct. r86. As a result, we will not overturn the district judge's decision to admit expert testimony unless it was manifestly erroneous. *See General Elec. Co .v. Joiner,* —U.S. —, ~, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997). Although the defendant cites some studies and a proposed amendment to the National Fire Protection Associations *Guide for Fire and Explosion Investigation* to the effect that dog-sniff evidence is not always reliable, all that these sources suggest is that special weight should not be assigned to k9-sniff evidence in the absence of any corroborating evidence.
We conclude that the trial judge did not abuse his broad discretion under *Daubert* in admitting the testimony. We note further that, even if we were to assume *arguendo* that the district judge's decision to allow this expert testimony was erroneous, there was substantial additional evidence offered at trial demonstrating that an accelerant was used by the defendant to start the fire. Thus, any error in admitting the dog-sniff testimony would have been manifestly harmless.

EXPERT WITNESS – DRUG TRADE TOOLS

Taylor v. State, 995 S.W.2d 279 (Tex. App. *1999).*

The testimony of an expert witness explaining the potential unlawful use of various items seized from defendant's vehicle, such as balance sheets, law enforcement radio frequencies, plastic bags, scales, and cutting agents, and describing a type of accounting system often used by drug dealers, was ruled relevant and admissible. The court said the evidence would permit the jury to make a more informed decision in defendant's trial on a charge of possession of drugs.

"In this case, the information provided by the expert explained to the jury a potential use of devices for unlawful purposes and described the account-keeping system often used by drug dealers. Such evidence is clearly relevant, in that it would permit the jury to make a more informed decision. Thus, it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. We cannot conclude under these facts that the trial court erred by finding the evidence to be relevant. This contention of error is overruled."

EXPERT WITNESS OFFICER – GANG CULTURE ADMISSIBILITY

Utz v. Commonwealth, 505 S.E.2d *380* (Va.App. 1998).

The issue in this case was whether a police detective was qualified to give expert testimony concerning gangs in a murder prosecution involving a victim and the defendant who were members of different gangs. This court said ‘yes” to admissibility of such evidence. The detective had received hundreds of hours of gang-related training, he was a member of a gang task force, he taught classes and conducted lectures about gangs for law enforcement organizations and civic groups, he had conducted surveillance of local gangs, and he regularly received reports from local police departments regarding gang activity. The court found that he was familiar with the victim’s gang and defendant’s gang.

Defendant’s theory of the case was self-defense and the witness testimony tended to rebut it; some of his testimony actually may have benefited the defendant.

“Based on Kozich’s extensive experience with and knowledge of gangs, he was qualified to testify as an expert. Because the subject matter was beyond the common knowledge and experience of ordinary jurors, the trial judge did not abuse his discretion in allowing Kozich to testify about gang culture in order to show motive and intent and to rebut appellant’s claim of self-de-fense. Moreover, the evidence showed that the victim was a member of another gang that occupied the area where the shooting occurred. That evidence was beneficial to appellant and supported his theory that the victim was the aggressor, thus belying the prejudice that appellant claims he suffered.”

EXPERT WITNESS – MARIJUANA "HIGH TIMES" MAGAZINE EDITOR

United States v. Kelley, 6 F.Supp.2d 1168 (D.Kan. 1998).

A proffered expert witness who had co-founded the magazine *"High Times"* advocating legalization and use of marijuana, and wrote a column for the magazine, lacked specialized knowledge concerning marijuana and its cultivation and growth, and thus could not testify as an expert witness regarding the processing and use of marijuana, the intent of a grower, and the general practices of marijuana harvesters. The decision to exclude his testimony came in a prosecution of defendants who had allegedly grown and harvested marijuana.

The court said the witness's writings had never been recognized as valid research, his qualifications were largely provable only through his own opinion of himself, and he did not have familiarity with the methods of harvesting marijuana in the particular state, as opposed to other regions where such methods might differ.

That [he] . . . regularly writes a popular advice column for *High Times* tells the court nothing about the scientific reliability of his opinions expressed therein."

EXPERT WITNESS SOCIAL WORKER – CHARACTERISTICS OF SEXUAL ASSAULT VICTIM

Welfare of K.A.S., 585 N.W.2d 71 (Minn.App. 1998**).**

The expert testimony of a social worker concerning the emotional and behavioral characteristics typically displayed by child victims of sexual assault was admissible in a juvenile prosecution for first and second-degree criminal sexual conduct. The court said the testimony likely assisted the jury in understanding the evidence.

It found that at least some of the testimony was relevant and had a reasonable basis in fact, although it also said the question of admissibility was a close one.

“Here, the expert primarily testified about common emotional and behavioral characteristics exhibited by children who have been sexually abused. The expert also testified about the disclosure process of sexually abused children. The expert did not give an opinion as to whether KG. had been sexually abused.

“Once again, whether the expert testimony was admissible is a close issue, but we conclude the district court did not abuse its discretion by admitting the evidence. The testimony probably assisted the jury in understanding the evidence, and at least some of the testimony was relevant and had a reasonable basis in fact. But we repeat that the admissibility was close, and the impermissibility of the prejudicial value approached the probative. Looking at the trial as a whole, we conclude that the interests of justice do not mandate a new trial solely on the issue of juvenile delinquency”

FAIR TRIAL – CONTACT BY JUROR WITH POLICE OFFICER

May v. State, 697 N.E.2d 70 (Ind.App. 1998).

A juror's out-of-court contact with a police officer who was a witness in a criminal case the juror would be sitting on, during which the juror invited the officer to his home to watch a boxing match on TV did not require that the juror be excused or replaced with an alternate. The court was satisfied that the meeting happened by chance, their conversation was brief and did not directly involve the trial.

Additionally, the juror fully disclosed during v*oir dire* that he had a casual social relationship with the officer, and when questioned about the communication, he stated he would remain impartial in the case.

"Here, there is no question that the extrajudicial contact occurred. However, by all accounts. Juror Hoover and Officer Ohlheiser met by chance, their conversation was brief, and it did not directly involve the trial proceedings. The brief communication did not, in itself, place May in substantial peril.

We next consider the content of the communication. We agree with May [defendant] that ,Juror Hoover displayed a comradery with the witness and, thus, potential partiality. However, the record supports a determination that the underlying social relationship was casual. Furthermore, that social relationship was not a surprise. During voir dire, Mr. Hoover indicated he was acquainted with Officer Ohlheiser. . . . The function of voir dire is to ascertain if jurors can render a fair and impartial verdict in accordance with the law and the evidence. May was able to explore the boundaries of any link between Mr. Hoover and Officer Ohlheiser during voir dire and could have sought Hoovers dismissal with a peremptory challenge or a challenge for cause. Objections concerning a juror's qualification must he timely made.

"Further, juror Hoover assured the court that he would maintain his impartiality. The trial court was in the best position to assess Mr. Hoover's honesty, integrity and his ability to perform as an impartial juror. We cannot say that May was placed in substantial peril. The trial court did not abuse its discretion in refusing to replace Juror Hoover with an alternate."

FAIR TRIAL – ALLOWING JURY TO ASK QUESTIONS

Flores v. State, 965 P.2d 901 (Nev. 1998).

The Supreme Court of Nevada, noting that the practice of jury-questioning of witnesses is firmly rooted in both common law and American jurisprudence, ruled that allowing juror-inspired questioning of witnesses in a criminal case is not prejudicial per se, but is a matter committed to the sound discretion of the trial court.

The court then set down rules of procedure for allowing the practice.

“To minimize the risk of prejudice, however, the practice must be carefully controlled by the court. Accordingly, inclusion of juror questions must incorporate certain procedural safeguards to minimize the attendant risks. These safeguards include: (I) initial jury instructions explaining that questions must he factual in nature and designed to clarify information already presented; (2) the requirement that jurors submit their questions in writing; (3) determinations regarding the admissibility of the questions must be conducted outside the presence of the jury; (4) counsel must have the opportunity to object to each question outside the presence of the jury; (5) an admonition that only questions permissible under the rules of evidence will he asked; (6) counsel is permitted to ask follow-up questions; and (7) an admonition that jurors must not place undue weight on the responses to their questions.

“In the case before us, the district court employed the foregoing safeguards. These were sufficient to eliminate the risk of prejudice to Flores. Consequently, we conclude that the practice of juror-questioning, as implemented by the district court here, did not violate Flores’s Sixth Amendment right to trial by a fair and impartial jury.”

FAIR TRIAL RESTRAINT BY STUN BELT

People v. Mar. 92 Cal.Rptr.2d 771 (Cal.App. 2000).

A manifest need existed for the use of a physical restraint on defendant while he testified and therefore the trial court did not abuse its discretion by refusing to allow removal of an electronic stun belt from him during his testimony. Justification for the restraint was found in the facts that defendant was on trial for assaulting a jail guard, he had previously been convicted of escape and assaulting a police officer, and had on two recent occasions threatened correctional officers and his own defense attorney. The defendant did not object per se to the restraint and no indication existed that his mental faculties were impaired during his testimony by use of the restraint.

INFORMATION AMENDMENT PRJUDICE TO DEFENDANT

Smith v. State, 718 N.E.2d 794 (Ind. App. 1999).

No error was found in allowing the prosecution to amend a vague information charging defendant with neglecting her infant daughter for the entire nine months of the child's life, to charge defendant with murder, neglect of a dependent resulting in serious bodily injury, and neglect of a dependent. The court noted that defendant had moved to have the original information dismissed and the amendment did not affect her ability to prepare a defense or the applicability of evidence that existed under her defense to the original information.

"We note initially that the trial court may permit an amendment to an information at any time before or during trial with respect to any defect, imperfection, or omission so long as the amendment does not prejudice the substantial rights of the defendant. IND.CODE ~ 35-34-1-5(c). The test of whether the State should be allowed to amend an information is whether the amendment affects the availability of a defense or the applicability of evidence that existed under the original information.

The State was allowed to amend the information after Smith moved to have the original charge dismissed. . . . The trial court did not err in allowing the State to amend the original charge, which was impermissibly vague. *,See* I.C. § *35-34-1-5(c).* The amendment did not affect the ability of Smith to prepare a defense or the applicability of evidence that existed under the original defense. The trial court thus properly allowed the amendment to the original charge."

INSTRUCTION – REASONABLE DOUBT

Truesdale v. Moore, 142 F.3d 749 (4th Cir. 1998).

A jury instruction, defining reasonable doubt" as "real doubt" and substantial doubt,' did not violate due process, so as to entitle a defendant to *habeas corpus* relief.

The instruction in question also contrasted "substantial doubt" with "weak doubt," "slight doubt," and "whimsical, fanciful or imaginary doubt."

The court did make clear that the substitution of "substantial doubt" for "reasonable doubt" in jury instructions might violate due process without a clarifying explanation, hut said the mere use of the words "substantial doubt" is not a constitutional violation. This court has discouraged trial courts within its circuit from attempting to define "reasonable doubt" at all. "[Petitioner] challenges the trial court's instruction on reasonable doubt. We have disfavored any attempt on the part of federal trial courts to define reasonable doubt, although we have been reluctant to reverse where the instruction as a whole in no way diluted the government's burden of proof. .This same inquiry about whether the government benefited from a diluted burden of proof must inform our collateral review of this sentence. Truesdale charges that by equating reasonable doubt with 'a real doubt' and a substantial doubt' the instruction led the jury to believe that it could convict him based upon a lower standard of proof. While in the proper case, substituting substantial doubt' for 'reasonable doubt' might violate due process, the mere use of the words 'substantial doubt' does not do so.

See. E.g. victor v. Nebraska 511 U.S. 1, 19-20, 114 S.Ct. 1239, 1249-5U, 12 L.Ed.2c1 583 (1994). In fact, we rejected a due process challenge to very similar instructions before, finding that 'the full instruction tempered any risk of confusion from the substantial doubt language.' *Kornahrens,* 66 F.3d 175, 179-80 4th Cir. 199i **).** As in Victor and *Adams,* the instruction used *at* Truesdale's trial ('Contrasted 'substantial doubt' with 'weak doubt,' 'slight doubt.' and whimsical, fanciful or imaginary doubt,' This contrast clarifies that the term 'substantial doubt' was used in the sense that Victor allowed, to mean doubt that is 'not seeming or imaginary,' rather than in the sense I 7ctor condemned, which is doubt 'specified to a large degree.' S*ee Victor,* 511 U.S. at *19-20,* S.Ct. at 1250; *Adams.*41 F.3d at 181. Because the jury was clearly instructed that they need not

feel doubt ‘to a large degree’ in order to acquit and that any doubt that was not fanciful or imaginary would suffice for acquittal. the instruction did not lessen the government’s burden.”

INSTRUCTIONS FAILURE TO GIVE MENTAL STATE

Caldwell v. State, 722 N.E.2d 81i (Ind. 2000).

A trial judge's failure to either give a murder defendant's requested instruction clarifying the consequences of verdicts of guilty hut mentally ill, and not responsible by reason of insanity, or to admonish the jury following the prosecutor's misleading statement during closing argument that a verdict of riot responsible would allow the defendant to go free, was reversible error. The court noted that the issue for the jury's consideration in the case was defendants mental state at the time he shot the victim.

"In this case, the prosecutor's closing remarks created an erroneous impression of the law. . . . these comments were given to the jury directly before deliberations began and implied that Caldwell would he able to walk out of the courtroom with the jury if he was found to he not responsible by reason of insanity. The State argues that its closing argument did not create an erroneous impression because the jury could have returned a verdict of not guilty thereby letting Caldwell "walk out of the courtroom' with the jury. Although Caldwell did not stipulate to the facts or admit to the murder, neither did he contest them. Based on the evidence presented and Caldwell's closing argument, the sole issue for the juror's consideration appears to have been Caldwell's mental state at the time of the murder. As a result, the chances of a not guilty verdict were slim to none, and there was a real possibility that the jury would interpret the prosecutor's statement to mean that a verdict of not responsible would let Caldwell go free. Because the prosecutor created an erroneous impression of what would happen to Caldwell if he was found not responsible by reason of insanity, the trial court's failure to either admonish the jury or give the tendered instructions was reversible error."

JOINDER COMMON SCHEME OR PLAN BENCH TRIAL

Purvis v. Commonwealth, 31 Va.App. 298, 522 S.E.2d 898 (Va.App. 2000).

Two different burglaries were not part of a "common plan," for purposes of joinder for trial under state court rules. The burglaries were of two different types of businesses and occurred almost two months apart, there was no evidence of a conspiracy or other common plan underlying the offenses, any factual similarities did not show the existence of a plan tying the offenses together, and any conclusion that some factual similarities permitted a finding that the offenses were committed by the same persons as part of a plan would be speculative at best.

Joinder, therefore, was erroneous, but the court ruled the error was harmless. There was no evidence that the trial court considered the inadmissible evidence in convicting defendant of either burglary, as the evidence regarding each offense was brief and defense counsel argued the evidence of each offense separately. The trial court did not use a harmless error analysis prospectively as a basis for denying defendant's motion to sever, but rather, its mistake was in believing that trying cases before a judge rather than a jury made joinder lawful, when, as a matter of law, there was no difference under joinder law.

JUROR REMOVAL FOR CAUSE – PRIOR CONVICTION

State v. Madrigal, 721 N.E.2d *52* (Ohio 2000).

While noting that the better practice would have been to question a juror, on the record, to determine the status of his previous felony conviction, for which defendant suggested the juror might have been pardoned and therefore able to serve as a juror, the mere fact that the same prosecutor and police officer involved in the instant prosecution were also involved in the prosecution leading to the juror's conviction was enough to remove the juror for cause. The trial court's removal of the juror was not an abuse of discretion.

"The determination of whether a prospective juror should be disqualified for cause . . . is a discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion. . . . 'Given this record, it cannot be said that the trial judge abused her discretion. The better practice in this case would have been to question the juror, on the record, to determine the status of his previous conviction. However, the fact that the same prosecutor and police officer were involved in the case would have been enough to remove the juror for cause. Accordingly, this proposition of law is overruled."

JUROR EXCUSED FOR CAUSE BELIEF IN CREDIBILITY OF PROSECUTION WITNESSES

State v. Faucher, 596 N.W.2d 770 (Wis. 1999).

A prospective juror who knew a prosecution witness and on three occasions during a special voir dire expressed his view that he considered the witness' credibility to be unimpeachable, was objectively biased and should have been struck by the trial court for cause. The court noted that despite his best and most sincere efforts to do so, the juror could not truly set aside his strongly held belief that the witness would not lie when he was called upon to answer the only question he was likely to face, namely, whether the witness or the defendant was telling the truth at trial.

"The circuit court did not consider whether juror Kaiser was objectively biased. Upon concluding that Kaiser was sincere in his willingness to set aside his opinion, the circuit court ended its inquiry. The circuit court's decision not to dismiss Kaiser was based solely on Kaiser's statement that he could set aside his opinion, and the court's erroneous belief that it had to 'believe his response.' On examination of the record, we conclude as a matter of law that a reasonable judge can reach only one conclusion; that is that the juror was objectively biased."

JURY SELECTION EXCUSAL FOR CAUSE LAW ENFORCEMENT RELATIONSHIP

Lilly v. Commonwealth 499 S.E.2d 522 (Va. 1998).

The refusal of a trial court to excuse three prospective jurors in a capital case for cause was not reversible error. In the first situation the juror stated during *voir dire* that lie was acquainted with the police chief, to whom defendant had made an incriminating statement. The juror stated that he might give more credence to the chief's testimony but upon further examination he stated that he could set aside his acquaintance with the chief and consider the testimony of all witnesses on au equal footing.

In the second instance a juror stated during voir *dire* that lie was a second cousin and "real good friend" of a law enforcement official who was a prospective witness for the prosecution, but also testified that such relationship and friendship would not be a factor in considering that official's testimony against that of other witnesses in the case.

In the third instance a juror had read a newspaper article about defendant's past. but the juror testified that the article did not prejudice her. The court applied a manifest error standard to the trial court's exercise of discretion.

CONSTITUTION IS A SUFFICIENT JURY INSTRUCTION

Weeks v. Angelone, 120 S.Ct. 727, 2000 WL 33S24, No. *99-5746* (2000).

After his conviction for capital murder, the prosecution sought to prove at defendant's penalty phase two aggravating circumstances, and 10 witnesses appeared in mitigation for defendant. The jurors sent the trial judge a note during deliberations and asked whether, if they believed defendant was guilty of at least one of the aggravating circumstances, they had to return the death penalty, or whether they had to decide whether to return the death penalty or a life sentence.

The judge responded by referring them to a part of the instructions which stated, "If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two [aggravating circumstances], and as to that alternative, you are unanimous, then you may fix the punishment . . . at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment at [life] imprisonment." After further deliberations of two hours, the jury returned the death penalty, saying, "[H]aving unanimously found that [defendant's] conduct in committing the offense [satisfied one of the aggravating circumstances], and having considered the evidence in mitigation . . . , [we] unanimously fix his punishment at death." On state appeal, state habeas corpus. and federal habeas corpus, defendant unsuccessfully claimed error in the trial judge's selective use of the instructions. 176 F.3d 249.

The Supreme Court affirmed *5-4* in an opinion written by the Chief Justice. It ruled there is no constitutional violation when a trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question during deliberations about the proper consideration of mitigating evidence. The Court said a jury is presumed both to follow its instructions and to understand a judge's answer to its question. A contrary presumption, it noted, would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer. In this case the presumption was buttressed by the facts that each of the jurors affirmed the verdict in open court when they were polled, they deliberated for more than two hours after the judge answered their question, and defense counsel argued (luring closing argument that they could find both aggravating factors proven and still not sentence defendant to death.

The Court thought there was little risk that the jury considered itself precluded from considering mitigating evidence, and only a showing of a reasonable likelihood that the jury felt so restrained would qualify as constitutional error. Defense counsel had not even mentioned the point in his oral motion to set aside the death penalty and ranked the point as number ***44*** on his direct appeal in state court.

Justices Stevens, Ginsburg, Breyer and Souter dissented in whole or in part.

Jury Polling by Judge with Dissenting Juror

Jeiks v. State, 720 N.E.2d 1171 (Ind.App. 1999). State.

A trial court tainted further deliberations and placed a defendant in a position of grave peril by engaging a dissenting juror in a colloquy during the polling of the jury. The court ruled that reversal of defendant's auto theft conviction was therefore required. Prior to sending the jury hack for further deliberations after the dissenting juror stated that he thought it would he unproductive, the trial court engaged in an extended colloquy with the dissenting juror concerning the elements of the crime of auto theft, the state's burden of proof on the charge, and the jury's role in deciding the case.

"We agree with Jelks that the trial court erred in engaging in this colloquy [with the juror during its polling of the jury. The statute clearly provides that the remedy for juror dissent that arises during the polling procedure is to return the jury for deliberations, not engage in an extended colloquy about the elements of the crime, the State's burden, or the role of a juror. By doing so, the trial court tainted further deliberations and placed the defendant in a position of grave peril. Jelks' conviction on this verdict must be reversed."

JURY – PEREMPTORIES - HIGH STRUNG JUROR

State v. Haigler, 515 S.E.2d 88 (S.C. 1999).

A race-neutral reason for exercising a prosecutorial peremptory strike against a black female venire person existed where the prosecutor stated that he exercised the strike because the lead detective in defendant's case knew that the venire person was a high-strung, critical person who would likely polarize the jury. The mere fact that the venire person did not reveal during *voir dire* that she was acquainted with the lead detective was irrelevant to whether the prosecutor's explanation for exercising the peremptory strike was a pretext for racial discrimination.

A second reason for exercising the peremptory strike, *i.e.,* that she had served on a criminal jury that returned a not guilty verdict, was also not a pretext for discrimination, even though the prosecutor seated a white man who also had served on a criminal jury that returned a not guilty verdict. The two prospective jurors were not similarly situated, in that the female had served on a criminal jury five years earlier and definitely remembered the verdict, whereas the male had served on a criminal jury some 20 years earlier and was not sure about the verdict. Also indicative of a lack of prejudice was the fact that even though the prosecutor struck four black prospective jurors. he seated four blacks on the regular jury and two black alternate jurors.

JURY PEREMPTORIES –DENIAL OF REASON FOR CHALLENGE

Bausley V. State, 997 S.W.2d 313 (Tex. App. 1999).

Where the only reason put forward by the state for the exercise of a peremptory strike against a prospective juror was that he had been rated a "bad juror" based on his service on a prior jury, defendant was entitled to question the prosecutor who assigned that rating at a *Batson* hearing *(Batson v. Kentucky,* +76 U.S. 79 (1986)). The court said the trial *Co*urt improperly limited defendant's questioning in that regard to the prosecutors involved in exercising the peremptory strike, neither of whom knew why the juror had been rated "had," and thus, defendant was deprived of his ability to develop evidence that the prosecution's race-neutral explanations were, in fact, untrue or pretextual.

The court ruled that the error was a "structural error" and therefore not subject to a harmless error analysis: reversal and remand were ordered.

We note, however, that the Supreme Court has determined that racial discrimination in the process of selecting a grand jury is not amenable to a harm analysis because it calls into question the objectivity of the institutional fact finder and 'undermines the structural integrity of the criminal tribunal itself.' *Vasquez* v. *Hillery,* 106 S.Ct. 617, 88 L. Ed.2d 598 (1986) (plurality opinion); *see Fulminante [Arizona v.,* 499 U.S. 279 (1991)], 494.) U.S. at 310, 111 S.Ct. 1246..

"After examining these cases, we see no meaningful distinction between the issues and concerns raised in the unlawful exclusion of members of the defendant's race from a grand jury and a petit jury. Like the selection process of a grand jury, the selection process at trial affects the framework and structural integrity of the criminal tribunal as well as the fairness of the underlying proceeding. And like the racial discrimination in the grand jury selection process in *Vasquez,* the *Batson* error in these cases 'calls into question the objectivity of those charged with bringing a defendant to judgment.' *See Vasquez,* 47-I U.S. at 261. For these reasons, we conclude the *Batson* error occurring in this case is not subject to a harm analysis

JURY SELECTION – ARGUMENTATIVE JUROR

Pye v. State, 505 S.E.2d 4 (Ga. 1998).

Where a prosecutor stated during *voir dire* that an African-American prospective juror was struck because inquiries in the community led the prosecutor to believe that the juror was argumentative and might prevent a return of a unanimous verdict, this was a race-neutral explanation under *Batson v. Kentucky* for his exercise of a peremptory strike against the juror.

The State exercised a peremptory strike because inquiries in the community led the prosecutor to believe that the prospective juror was argumentative and might prevent the return of a unanimous verdict. The State 'may rely on information and advice provided by others so long as this input is not predicated upon the race of the prospective juror.' *Barnes v. State,* 269 Ga. 345, 350(6), 496 S.E.2d 674 (11998). See also *Lewis v. State,* supra at 681(2), 424 S.F 2d 626. The trial court did not err by accepting the State's reason for the strike of this juror, because there was no discriminatory intent inherent in the State's explanation and it was not so implausible as to render the explanation pretextual. See *Purkett v. Elain,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 83i (1995); *Jackson v. State,* 265 Ga. 897, 898(2), 463 S.E.2d 699 (1995)."

JURY SELECTION JUROR EXCUSED FOR RELIGIOUS HOLIDAY

Turrentine v. State, 965 P.2d 955 (Okla. Crim. App. 1998).

A trial court excused a prospective juror who after being told that the trial would likely last into a second week, stated that she would not appear in court on Monday of the second week because she was Jewish and would he observing the religious holiday of Rosh Hashanah. This did not impermissibly discriminate among religions because the reason the court would be in session on Rosh Hashanah, hut not on Easter or Christmas, was because the latter days had been designated state holidays, not religious holidays.

Nor did the court's action deprive the murder defendant of his Sixth Amendment right to a jury drawn from a fair cross-section of the community. Defendant was unable to show underrepresentation of Jewish persons on juries by systematic exclusion of them in the jury selection process.

. . . to establish a prima facie violation of the fair cross-section requirement, an appellant must show (1) the group alleged to be excluded is a 'distinctive' group in the community; *(2)* the representation of this group in venires is not fair and reasonable in relation to the number of such persons in the community; (3) this underrepresentation is caused by systematic exclusion of that group in the jury selection process. *Duren v. Missouri 4*39 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). . . . Appellant has not made such a showing in this case. Accordingly, we find that trial court's exclusion of Mrs. Dormont from the jury panel did not render Appellant's jury unconstitutionally partial. . .

The chief judge and three judges concurred.

JURY SELECTION SEX CASE ABUSE OF DISCRETION

United States v. Lowe, 145 F.3d 45 (1st Cir. 1998).

A trial court refusal to strike prospective jurors for cause in a prosecution involving a sex offense was not a clear abuse of discretion, even though one prospective juror had been sexually molested and the other was the victim of an attempted rape. The trial court had questioned each juror about her experiences to ascertain any potential bias and, based on observations of the jurors' demeanor, concluded that each could be impartial.

No abuse of discretion was found.

"We find that the district court did not abuse its discretion in denying Lowe's motions. 'There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury.' *Gonzalez-Soberal,* 109 F.3d at 69-70 **(**quoting *United States v. McCarthy* 961 F.2d 972, 976 (1st Cir.1992)). In the instant case, the judge asked each juror several questions regarding their experiences with sexual abuse to ascertain any potential bias. We decline to second-guess the district court's determination that jurors number 18 and 19 could he impartial at trial because 'it is the fundamental task of the district court judge to make this sort of distinction.' *Cambara,* 902 F.*2d* at 148. The trial judge is in the best position to assess a potential juror's credibility by observing her demeanor, reaction to questioning, and overall behavior on the stand. Moreover, nothing in the record suggests that the district court judge lacked judgment or was prejudiced toward Lowe.

JURY SELECTION JUDGE'S PERSONAL KNOWLEDGE OF PROSECUTOR

State v. Ross, 961 P.2d 241 (Or.App. 1998).

Assuming that a prosecutor acted with race-neutral reasons in using a peremptory challenge as to the only African-American juror on the prospective panel, the trial judge's reliance, in part, on his personal knowledge about the prosecutor, in making his assessment about whether the defendant carried her burden of proof regarding her charge of purposeful discrimination, was error, requiring a new trial.

The reviewing court said the integrity of the process to prevent the challenge of jurors for other than race-neutral reasons would be compromised if a trial judge were permitted to consider his personal knowledge about the prosecutor in making his assessment about whether the defendant carried her burden of proof regarding purposeful discrimination. A trial judge's assessment of the appropriateness of a race challenged peremptory strike must he completely objective.

"It could be that the prosecutor acted with race-neutral reasons for exercising the peremptory challenge, but the process of making the decision about that issue was tainted by the trial court's consideration of the contacts with the prosecutor outside the confines of the trial. *["I base that on the* fact *that, in part, I know [the prosecutor],* and *I know that he does not exclude jurors based* an *their race."* (Emphasis added.)] The integrity of the process to prevent the challenge of jurors for other than race-neutral reasons is compromised if a trial court is permitted to consider its personal knowledge about the prosecutor. A trial court must confine its decision-making process to what occurred during vo*ir dire* and the evidence that is probative on that issue. Consequently, by including the subjective opinion about the prosecutor's character in its consideration of the issue, the trial court erred in making its assessment about whether defendant carried her burden of proof regarding purposeful discrimination. Under these circumstances, the only appropriate remedy is to reverse the trial court and remand for a new trial."

JURY SELECTION PEREMPTORY CHALLENGES NATIVE AMERICANS

State **v.** *Locklear,* 505 S.E.2d P7 (N.C. 1998).

After first determining that Native Americans are a "racial group" cognizable for *Batson* purposes, this court held that a Native American defendant failed to show that the prosecutor acted with discriminatory intent in exercising his peremptory challenges against three Native American prospective jurors.

The first juror had four relatives who were currently or had been in jail or prison. The second expressed opposition to the death penalty. The third juror was challenged in part on the basis of her prior conviction for possession of marijuana, despite the fact that the prosecutor did not challenge white jurors with drug and DUI convictions. The prosecutor stated that the strike of the third juror was also based in part on her demeanor, and this was race-neutral.

"Defendant's only rebuttal was that the State had passed several white jurors despite drug and DWI convictions, in apparent re-sponse to the prosecutor's reasons for excusing [the third challenged prospective juror].

We have previously rejected a defendant's attempt to show discriminatory intent by 'finding a single factor among the several articulated by the prosecutor. . . and matching it to a passed juror who exhibited that same factor.'. . . In this case, the prosecutor pointed to [the prospective juror's] demeanor as well as her prior drug conviction as the basis for the challenge.

". . . Given the prosecutor's articulation of racially neutral reasons for challenging [the] prospective jurors . . ., which are supported by the record, and given defendant's inadequate rebuttal, we cannot conclude that the trial court erred in denying defendant's *Batson* claim as to these three jurors."

JURY SELECTION REFERENCE TO O.J. TRIAL BATSON

Valdez v. People, 966 P.2d 587 (Cob. 1998). State.

A prima facie case of purposeful discrimination by a prosecutor in the exercise of peremptory challenges was established by his references to racial bias during the *voir dire* process and his use of three of his five challenges to eliminate potential African-American jurors. These potential jurors composed only 27% of the *venire,* and the final jury included four African-Amen cans. The prosecutor had elected not to use his remaining two challenges to remove any additional potential jurors. A reference to the prosecutor to the O J Simpson case was also ruled inappropriate.

“This case did not have any apparent racial issues. [f.n. The defendant is Hispanic; however, the racial or ethnic identity of the two victims is not part of the record. Although the victims do not have Spanish surnames, we are unable to say more about their identity.] The prosecutor’s statements show his own concern with the racial composition of the jury, the defendant, and the two counsel. Furthermore, his remarks about different cultures, references to the O.J. Simpson case, and concerns about people’s backgrounds with regard to race suggest a fear that a certain cognizable racial group of jurors would be unable to he impartial, an assumption forbidden by the Equal Protection Clause. *See Batson,* 476 U.S. at 89, 106 S.Ct. 1712. In fact, the trial judge noted that the reference to the O.J. Simpson murder trial was inappropriate in this case. The prosecution’s implicit references to racial bias during voir dire certainly support the defendant’s argument that he established a prima facie case under *Batson....”*

One justice concurred and three justices dissented.

JURY SELECTION VOTER REGISTRATION LISTS FAIRNESS

United States v. Sanchez, 156 F.3d 875 (8th Cir. 1998).

Without proof that certain racial or ethnic groups faced obstacles in the voter registration process, statistics showing that various racial and ethnic minorities were less represented in the jury pool than in the general population did not establish a violation of the Sixth Amendment fair-cross-section requirement. The Eighth Circuit Court of Appeals examined the method of jury selection used by the district court under which potential jurors in the district were drawn exclusively from the voter registration lists of each of the state's ninety-three counties.

Ethnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of voter registration lists and cannot establish the 'systematic exclusion' of allegedly under-represented groups. . . . Absent proof that certain racial or ethnic groups face obstacles in the voter registration process, Sanchez's claim must fail. See *Floyd.* 996 F.2d at 949; *Garcia. 991* F.2d at 491 (exclusion not systematic unless 'inherent in the particular jury-selection process utilized') (quoting *Duren,* 439 U.S. at *366,* 99 S.Ct. 664). Despite counsel's painstaking efforts to develop an adequate record below and to assemble the data underlying Sanchez's claim, we lack the authority to depart from this circuit's well-settled law. . . . We. . . hold that when jury pools, are selected from voter registration lists, statistics alone cannot prove a Sixth Amendment violation."

Mistrial Juror Reading About Pending Unrelated Charges

State v. Myers, 603 N.W.2d 390 (Neb. 1999).

This case involved a newspaper article read by 11 jurors and one alternate in a narcotics prosecution, which revealed that defendant also faced a separate trial on a murder charge. The court ruled that defendant was deprived of a fair trial, and thus a denial of his motion for a mistrial was an abuse of discretion. The trial court had sustained a motion excluding and prohibiting the state from admitting evidence regarding the murder charge. and three jurors who read the article in its entirety specifically remembered the fact that the defendant also faced the murder charge.

“Three jurors who read the article in its entirety specifically remembered the facts that Myers also faced a murder charge. Upon being questioned about the article, it was the first thing mentioned by those jurors. All three expressed some degree of surprise upon learning about the murder charge.

“The district court had sustained a motion in limine excluding and prohibiting the State from admitting evidence regarding the murder charge. Myers’ motion in limine was premised on the fact that knowledge of a separate murder charge was more prejudicial than probative, and the district court concluded that Myers’ murder charge and the evidence in support of that charge was prejudicial enough to exclude the fact from this trial. Thus, we conclude that the newspaper article was prejudicial to Myers. “Therefore, the district court abused its discretion in denying Myers’ motion for a mistrial, and Myers is entitled to a new trial.”

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Peremptory Challenges Juror Disability Rational Basis

United States v. Harris. 197 F.3d 870 (7th Cir. 1999).

In a case of first impression, the Seventh Circuit Court of Appeals ruled that the use up a peremptory challenge to strike a potential juror because of her disability or the medication she took to control her disability, which made her prone to drowsiness, had a rational relationship to the state's legitimate purpose of providing the defendant with a fair trial, and did not violate the equal protection rights of either defendant or the potential juror.

. . . . .peremptory challenges made on the basis of a person's disability are scrutinized under rationality review. Consequently, the strike must be rationally related to the state's legitimate purpose of selecting an impartial jury.

"Ordinarily, a peremptory challenge of a member of a class subject only to rationality review will not be scrutinized by the court. However, because Harris contests even the rationality of Ms. Wilson's exclusion, we will briefly discuss the peremptory exercised here. If the government has struck Ms. Wilson because of an irrational animosity toward or fear of disabled people, this would not he a legitimate reason for excluding her from the jury. .. However, the government in this case struck Ms. Wilson because its stated concern, accepted by the district court, was that she would become drowsy and would not be able to pay attention during the trial. This is a legitimate concern that is rationally related to the provision of a fair trial for Harris. Therefore, the government's use of its peremptory challenge to strike Ms. Wilson for reasons related to her disability did not violate the equal protection rights of either Harris or Ms. Wilson."

PEREMPTORY CHALLENGE – FAILURE TO REMOVE JUROR FOR CAUSE

United States ***v.*** *Martinez-Salazar,* 120 S.Ct. *774,* 2000 WL 33±-t9, No. 98-1255 (2000).

Under the Federal Rules of Criminal Procedure (Rule *24)* defendants had 10 peremptory challenges exercisable jointly in the selection of 12 jurors, and another such challenge exercisable in the selection o an alternate juror. One prospective juror indicated several times that he would favor the prosecution, so defendants challenged him for cause, but the trial court, over objection, declined to excuse him. The defendant then used a peremptory challenge to remove the juror and the defendants subsequently exhausted all of their peremptory challenges. At the close of the jury selection process. the trial court read the names of the jurors to he seated and asked if the prosecutor or defense counsel had any objections to any of the jurors. Defendant's attorney responded: "None from us."

The Ninth Circuit Court of Appeals ruled that the trial court's error in failing to remove the prospective juror for cause resulted in a violation of defendant's Fifth Amendment due process rights because it forced him to use a peremptory challenge curatively, thereby impairing his right to the full number of peremptory challenges that he was entitled to. 146 F.3d 653.

On appeal, the United States Supreme Court reversed in an opinion written by Justice Ginsburg, ruling that a defendant's exercise of peremptory challenges pursuant to Rule 24 is not denied or impaired when the defendant chooses to use such a challenge to remove a juror who should have been excused by the trial court for cause.

The Court said that peremptory challenges, although important in reinforcing a defendant's constitutional right to trial by an impartial jury, are auxiliary in nature and not of federal constitutional dimension.

Turning to rights under Rule 2~, the Court said no violation occurred when the trial court compelled defendant to challenge the juror peremptorily, thereby reducing his allotment of peremptory challenges by one. After objecting to the trial court's denial of his for-cause challenge, he had the option of letting the juror sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal, or using a

peremptory challenge to remove the juror. In choosing to remove the juror rather than taking his chances on appeal, defendant did not “lose” a peremptory challenge, he used the challenge in line with a principal reason for peremptories, *i.e.,* to help secure the constitutional guarantee of a trial by an impartial jury.

Although defendant had to make a hard and immediate choice, this is not unusual in the fast-paced realities of the jury selection process. The Court noted that challenges for cause and rulings upon them are made on the spot and under pressure, and attorneys as well as the court in that process must he prepared to decide quickly, often between shades of gray.

Since defendant received the exact number of peremptory challenges that federal law allowed, he could not complain of either constitutional or procedural rule violations.

Justice Souter filed a concurring opinion; Justice Scalia filed an opinion concurring in the judgment, joined by Justice Kennedy.

PROSECUTOR'S COMMENT THAT DEFENDANT TAILORED HIS TESTIMONY

Portuondo ***v.*** *Agard,* 120 SCt. 1119, 2000 WL 238231, No. 98-1170 (2000).

At issue at defendant's trial was whether the jury believed the testimony of the victim and her friend or the conflicting testimony of defendant. In his summation the prosecutor argued as to the defendant's credibility that he had the opportunity during trial to hear all the other witnesses testify and to tailor his **own** testimony accordingly. The defendant argued that the prosecutor's comments violated his Fifth and Sixth Amendment rights to be present at trial and confront his accusers, and his Fourteenth Amendment right to due process.

On appeal to the Supreme Court, in an opinion written by Justice Scalia, the Court ruled that the prosecutor's comments did not violate defendant's Fifth and Sixth Amendment rights. The Court noted the prosecutor's comments concerned defendant's credibility as a witness and were in accord with the Court's longstanding rule that when a defendant takes the stand, his credibility may be assailed like that of any other witness a rule that serves the trial's truth-seeking function. That the comments were generic rather than based upon a specific indication of tailoring did not render them infirm, nor did the fact that they came at summation rather than at a point earlier in the trial. The Court upheld the trial court's recitation of an interested-witness instruction that directed the jury to consider the defendant's deep personal interest in the case when evaluating his credibility, and also noted that the prosecutor's comments did not rely on any specific evidence of actual fabrication. Neither the Fifth nor Sixth Amendments were violated.

Defendant also argued that it was improper to comment on his presence at trial because state law required him to he present. This was disposed of by noting that no promise of impunity is implicit in a statute requiring a defendant to be present at trial, and there is no authority for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial, violates due process.

Justice Stevens filed an opinion concurring in the judgment, in which Just ice Breyer joined. Justice Ginsburg filed a dissenting opinion, in which Justice Souter joined.

POST-MIRANDA SILENCE USED BY PROSECUTOR – NOT HARMLESS

Commonwealth v. Clarke, 48 Mass.App.Ct. -i82. 722 N.E.2d 987 (Mass.App. 20001).

It was reversible error for a prosecutor to use defendant's *post-Miranda* silence against him by arguing in a rape prosecution that defendant stopped a detective's questioning of him when he realized that the alleged victim could describe the house where the offense occurred and that he thereafter changed his defense of misidentification to a claim that the victim was a prostitute. The court said the prosecutor's argument improperly suggested that defendants silence showed a consciousness of guilt.

PBA - WITNESS REFERENCE TO DEFENDANT'S PRIOR ARREST

State v. Sanders, 717 So.2d 234 (La.App. 1998).

The testimony of a police witness about a prior arrest of defendant was admissible to establish a factual basis that the witness had for reasonable suspicion that defendant and his companion were engaging in criminal activity justifying a stop and frisk, The defendant had given a false name to the police witness, stating that he had a prior arrest, and the witness had a reasonable suspicion that he had been given a false I.D. when the reported arrest did not match the name given, justifying the stop and frisk.

"LSA-C.E. art. 404 states that other crimes evidence may be admitted for purposes other than to attack the character of the accused. The fact that Sanders gave a suspected false name to the deputy was revealed when he reported an arrest record that did not match the name he gave to the deputy. We find that Mr. Sanders' criminal past was not introduced to make the jury believe he was a bad man, but rather that information was an integral part of Deputy Arnold's fact basis for his reasonable suspicion for the stop and frisk. As such, the introduction of this evidence was admissible."

RECORDS ORIGINAL WRITING RULE

Efurd v. State, 976 S.W.2d 928 (Ark. 1998).

The probative value of a jailor's typed transcription of her handwritten notes of defendant's conversation to his wife in jail implicating the defendant in the abuse of their child was not substantially outweighed by its prejudicial effect. The court said that the jailor's typewritten rendition of her hand-written notes of defendant's conversation with his wife in jail was admissible even though the jailor was unable to produce the original handwritten notes, where there was no allegation that the jailor exercised bad faith in losing or destroying her handwritten notes, and the jailor testified that she had transcribed the notes without making any changes, hut simply could not find them when asked for them at the pretrial hearing.

[Defendant] argues that the original writings were required under Ark. R. Evid. 1002. That rule provides in relevant part that. to prove the content of a writing, recording or photograph, the original writing is required, except as otherwise provided in these rules or by statute. The original writing is not required, however, if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in had faith. Ark. R. Evid. 1UU4(1).

Here, no one asserts jailor Powell exercised bad faith in losing or destroying her handwritten notes. She, on the other hand, testified that she typed and transcribed without change her handwritten notes, hut she simply could not find the handwritten notes after she was asked for them at a pretrial hearing. Based on these facts, we cannot say the trial court abused its discretion in allowing Jailor Powell to testify to those state-ment she overheard made by the Efurds."

SENTENCE PROBATION EXCLUSION FROM ENTIRE CITY

State v. Franklin,604 N.W.2d 79 (Minn. 2000).

A probation condition set by a trial court excluding the probationer, convicted of assaultive conduct involving a police officer and a particular area of the city, from being in the entire city during the period of probation, was not reasonably related to the general purposes of probation. rehabilitation and the preservation of public safety, and thus, was an abuse of discretion. The court said the condition potentially infringed upon the probationer's fundamental rights to travel, association and religion (her church was in the city). The trial court only identified an apartment complex very near the city's border, a problem site for the probationer because she had threatened the victim-officer in that area.

"Geographical exclusions like the one here are not presumptively invalid, but, when we juxtapose Franklin's exclusion from Minneapolis with the general purposes of probation, we conclude that this exclusion is invalid. Given the contested conditions' potential infringement on Franklin's fundamental rights and the paucity of support for that infringement in the record, we conclude that an insufficient nexus exists between the exclusion from Minneapolis and Franklin's rehabilitation or the preservation of public safety. Accordingly, we hold that the district court abused its discretion when it excluded Franklin from the entire city of Minneapolis as a condition of her probation. In making this holding, we do not seek to discourage district courts from finding creative and effective means for achieving the goals of probation. However, when such means have a potential impact on the probationer's fundamental rights, the sentencing court must establish a record that is capable of being 'reviewed carefully' by an appellate court."

CONSENT TO ONE OFFICER GOOD FOR ANOTHER

State v. Kimberlin, 977 P.2d 276 (Kan. App. 1999).

It has been held that when two or more police officers are present at a home responding to a call from a resident of the home and there is evidence of violent behavior in the home, a consent given to one officer to enter the home necessarily, as a matter of law, provides consent for adequate backup officers to also enter the home for the safety of the first officer.

“Our concern in this case is officer safety. Melanie [resident] did not hesitate to call for police help in the early hours of the morning when defendant was committing acts of violence, and she did not hesitate to accept that help. In fact, she left the dwelling with the police officers, who took her to a safe haven where she would be protected from further violence. Despite the fact that she requested the presence of the police officers and despite the fact that she invited Officer Tilton into the house, we are asked to conclude that Officer Eubank [backup] had no right to be in the house. We believe that he did. Once Melanie invited Officer Tilton into the house, she also impliedly invited such backup officers as might he necessary to protect the safety of Officer Tilton.

“To accept defendant’s reasoning means that an officer might be required to enter a dangerous situation alone and without back-up. A person whose behavior set in motion the involvement of the police will not he permitted to deny entrance of backup officers after having invited one officer into the home.”

SIXTH AMENDMENT CROSS OF PROSECUTION WITNESS CUSTODIAL STATEMENT

Commonwealth v. Romero, 722 A.2d 1014 (Pa. 1999).

State. The admission of a prosecution witness's custodial statement implicating defendant in a murder as substantive evidence against defendant violated defendant's confrontation rights, where the witness refused to answer questions regarding the truth of the statement.

"A similar claim was addressed in *Douglas v. Alabama,* 380 U.S. US, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). in *Douglas,* the defendant's accomplice, who had been tried previously, was called by the state to testify at the defendant's trial. When the accomplice refused to testify on Fifth Amendment grounds, the state was permitted to read the accomplice's custodial confession, which expressly inculpated the defendant, to the jury during cross-examination. The state then called three police officers to identify the document as the custodial confession made and signed by the accomplice. In reviewing the defendant's conviction, the United States Supreme Court found that the indirect admission of the accomplice's out-of-court inculpatory statement violated the defendant's confrontation rights because the defendant had been unable to cross-examine the accomplice as to its truth. *Id.* at 419, 85 S.Ct. at 1077. The Court further stated that the opportunity to cross-examine the police officers was not adequate to redress the denial of the defendant's confrontation rights since '[that] evidence tended to show only that [the accomplice] made the confession and cross-examination of the officers as to its genuineness could not substitute for cross-examination of [the accomplice] to test the truth of the statement itself.' *Id,* at 420, 85 S.Ct. at 1(r': *see also Lee v. Illinois, 476* U.S. 530, 541, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514(1986)

"Like the accomplice in *Douglas,* Barhosa refused to answer questions regarding the truth of his custodial statement as it related to Appellant's involvement in the murder of Mr. Bolasky. Thus, under the rationale of *Douglas,* it was error to admit Barhosa's extrajudicial statement, through the testimony of Captain Bucarey, as substantive evidence against Appellant."

The court, however, ruled that admission of the statement was harmless error, where the evidence of defendant’s involvement in the murder that was extracted from the erroneous admission of the witnesses statements was merely cumulative of other, properly admitted evidence establishing defendant’s guilt beyond a reasonable doubt.

TRIAL JUDGE GIVES JUROR A RIDE – IMPROPRIETY

State v. *Johnson,* 723 N.E.2d 1054 (Ohio 2000).

When a trial judge gave a juror a ride to her car after realizing that she had missed her bus, this was considered to be an act of kindness, but even though the case was not discussed, it created an appearance of impropriety. This was compounded by the fact that the defendant, who had observed the juror get into the judge's car from the window in his jail cell, rather than the judge, first brought the matter to the attention of the parties when court convened the next morning.

Nevertheless, the contact between the juror and judge was ruled harmless error where both the judge and the juror testified that they had not discussed the case, there was no evidence that the judge's action influenced the juror, and defendant did not show any actual prejudice.

The court also commented on the judge's election to personally conduct the hearing into whether the juror should be excused, rather than following the better practice of having another judge conduct the hearing. This was not the best procedure to follow but it did not create reversible error, where the record did not indicate that the judges conduct and involvement in the hearing were such that he improperly influenced the proceedings.

TRIAL JUDGE GIVES SUPPLEMENTARY INSTRUCTIONS IN JURY ROOM

Commonwealth v. Patry, 48 Mass.App.Ct. 470, 722 N.E.2d 979 (Mass.App. 2000).

A trial court's giving of supplemental instructions to the jury in the deliberation room, despite the fact that both the prosecutor and defense counsel were present and defense counsel expressly waived defendant's presence, violated a defendant's Sixth Amendment right to a public trial. The trial judge entered the deliberation room from her lobby rather than from the court room and did not enter the courtroom to inform members of the public that the proceedings were about to occur in the deliberation room and to invite their presence. The defense attorney waived the defendant's presence without ever discussing the issue of his right to a public trial with him.

The court refused to conduct a harmless error analysis and ordered a new trial for the defendant. It also chastised the trial court for utilizing such a procedure.

"[Aside from the constitutional violation], we think that judges should not enter jury rooms at any time to conduct the court's business, even with the parties' consent or at the invitation of the jury. Jury rooms are often small, cramped, and designed to hold a limited number of people. Because of the closeness, the proceedings can easily descend into a sense of informality and intimacy that may not he conducive to the proper administration of justice.

"Courtrooms, on the other hand, are designed to accommodate the public. Moreover, the judge's raised bench, the flags, and the distance between the judge and the jury all contribute to maintaining respect and dignity in the courts proceedings.

TRIAL TRANSCRIPT DOES NOT CAPTURE GESTURES

State v. Thompson, 328 Or. 248, P.2d 1999 WL ~'441, (Or. 1999).

Defendant contended that the trial court erred in denying his motion to strike a portion of the prosecutor's rebuttal argument, during which he argued to the jury that the jury could consider defendant's "personal attacks" against him, which involved defendant's allocution statements that may have been accompanied by gestures. In a unanimous decision and an opinion written h~ Justice George A. Van Hoomissen, former dean of the National College of District Attorneys, the court held that appellate courts should defer to a trial judge's discretion in such cases because a "trial transcript does not capture body language, voice inflection, or other subtle nonverbal cues that are part of direct communication."

The court held that the trial court had not abused its discretion in denying the motion to strike because the Court's review of the record indicated that the prosecutor's statements had not denied defendant a fair trial.

"In *Wright [State v..* 323 Or. 8, 913 P.2d 321 (1996)], 323 Or. at 12, this court considered whether the trial court erred in denying a motion for mistrial after a witness 'glared' at the defendant. The trial judge stated that, in his observation of the incident, 'it wasn't of sufficient magnitude to cause a mistrial or incite the jury *Id.* On review, this court reasoned that the case 'presents a Classic example of why this court defers to a trial court's assessment of the need for a mistrial in most circumstances: The trial judge is in the best position to assess the impact of the incident and to select the means (if any) necessary to correct any problem resulting from it.' *Id.* (citations omitted).

"The reasoning in *Wright* applies to a motion to strike as well. A trial transcript does not capture body language, voice inflection, or other subtle nonverbal cues that are part of direct communication. Although in this case, unlike in *Wright,* the trial judge did not explain on the record why he denied defendant's motion, we infer that the judge found that the prosecutor's remarks were not 'improper.' Our review of the record provides no clue as to whether defendant's tone of voice, facial expression, or gestures, if any, accompanying his statements, created an implicit threat that would he relevant to his future dangerousness. That is why this court defers to the

trial judge’s discretion. Here, we find no abuse of discretion by the trial judge’s denial of defendant’s motion to strike

VOIR DIRE ADEQUACY PRETRIAL INFORMATION

State v.. Barton, 998 S.W.2d 19 (Mo. 1999).

A trial court's preventing defendant from asking specific questions regarding the source of a prospective juror's pretrial information about the case was ruled an appropriate limit on the scope of the *voir dire* in a capital murder trial, where there was a full inquiry into whether the venire person who had been exposed to pretrial publicity could be fair, impartial, and unbiased.

The court made it clear that the control of the *voir dire* process is within the discretion of the trial judge, and that only an abuse of that discretion and likely injury to a defendant would justify a reversal on appeal.

"The trial court did not abuse its, discretion. Appellant's contention that he should have been permitted to identify the source of the venire persons' pretrial information rests upon a faulty premise. The source of the jurors information is not essential to determining whether they are biased or prejudiced.

VOIR DIRE ETHNIC ISSUES

Commonwealth v. Serrano, 48 Mass. App. Ct. 163, 718 N.E.2d 863 (Mass. App. 1999).

A prosecutor's exercise of a peremptory challenge against the sole African-American member of a jury *venire men* did not deprive a Hispanic defendant of his state constitutional right to he tried by an impartial jury in a case where three Hispanic *venire* members remained after the exercise of the challenge and were eventually seated on the panel. The court emphasized that the drug offenses were not of the type that might he expected naturally to excite racial biases against the defendant.

"In this case it is of some import that the offense'; charged were not of a type that might be expected naturally to excite racial biases. The issue of jury composition requires the greatest scrutiny where defendant and victim belong to different racial groups—particularly where the crimes in question are violent or sexual in nature.

"Finally, it is significant, although certainly not dispositive, that the defendants, all Hispanics, were members of a different group than the challenged juror, who was African-American. . . . While it is seldom addressed directly, the issue lurking behind contested peremptory challenges usually is some notion—whether anchored in reality or not—that group solidarity among members of traditionally disempowered minorities will encourage a juror of the same racial, ethnic or even gender group as the defendant to be more inclined to render a verdict in the defendant's favor. These considerations are less relevant where a contested juror and defendant are not members of the same minority group. For this reason, the prosecutor's conduct in this case was not inherently suspect."

JURY SELECTION EXCUSAL FOR CAUSE LAW ENFORCEMENT RELATIONSHIP

Lilly v. Commonwealth 499 S.E.2d 522 (Va. 1998).

The refusal of a trial court to excuse three prospective jurors in a capital case for cause was not reversible error. In the first situation the juror stated during *voir dire* that lie was acquainted with the police chief, to whom defendant had made an incriminating statement. The juror stated that he might give more credence to the chief's testimony but upon further examination he stated that he could set aside his acquaintance with the chief and consider the testimony of all witnesses on au equal footing.

In the second instance a juror stated during voir *dire* that lie was a second cousin and "real good friend" of a law enforcement official who was a prospective witness for the prosecution, but also testified that such relationship and friendship would not be a factor in considering that official's testimony against that of other witnesses in the case.

In the third instance a juror had read a newspaper article about defendant's past. but the juror testified that the article did not prejudice her. The court applied a manifest error standard to the trial court's exercise of discretion.

WITNESS 5TH AMENEDMENT TRIAL COURT DISCRETION

United States v. Gaitan-Acevedo, 148 F.3d 577(6th Cir. 1998).

A codefendant who had entered a guilty plea was permitted to invoke the Fifth Amendment privilege against self-incrimination when called as a defense witness. This was ruled not to be an abuse of discretion, in view of the trial court's conclusion that the plea agreement did not protect the codefendant from prosecution in other jurisdictions for crimes committed in another state. A "reasonable danger" of prosecution was sufficient to sustain the trial court's exercise of discretion. "A defendant's right to force a witness to testify must yield to that witness' assertion of his Fifth Amendment privilege against self incrimination, where it is 'grounded on a reasonable fear of danger of prosecution.' *See United States v. Damiano,* 579 F.2d 1001, 1003 (6th Cir. 1978); *Brown v.* ***C***ain, 104 F.3d 741. 749 (5th Cir. 1997) ('a witness' right against self-incrimination will outweigh a defendant's right to force that witness to testify.), *cert. denied,* — U.S. , 117 S.Ct. 1489, 137 L.Ed.2d 699 (1997). The trial judge, 'necessarily is accorded broad discretion in determining the merits of a claimed [Fifth Amendment] privilege.' *United Slates v. Lyons 70*3 F.2d 815, 818 (5th Cir. 1983).

"After careful examination, the lower court concluded that Lillie's plea agreement did not protect him from prosecution in any district other than the Eastern District of Michigan. Lillie's testimony, thus could have subjected him to further prosecution in other jurisdictions for crimes committed in Arizona. This 'reasonable danger' of prosecution was sufficient to support the court's decision. The district court did not abuse its discretion."

BRUTON CONFRONTATION REFERENCE TO ACCOMPLICE STATEMENT

Hill v. State, 953 P.2d 1( )‘77 (Nev. 1998).

Error under *Bruton v. United States,* 391 U.S. 123 (1968), did not occur when a police officer testified that defendant’s accomplice gave a statement to the police and a prosecutor referred to the fact of the statement in closing argument but the contents of the nontestifying accomplice’s statements were never admitted into evidence and the jury could not have inferred that the accomplice blamed defendant for the crime (sexual assault and murder). The case arose in the context of the issue of defense counsel’s effectiveness vis-a-vis dealing with the asserted *Bruton* error.

‘We note again that the specific comments of Marshall’s [accomplice] hearsay statements were never admitted into evidence. This was due to the successful efforts of Hill’s counsel to exclude these potentially prejudicial accusations. Only the fact that Marshall made statements existed [sic] was known to the jury. Therefore, we conclude that no *Bruton v. United States* 391 U.S. 123 (1968)] violation occurred.

Moreover, a careful review of the record ha’ failed to disclose any reference to Marshall’s statement that would lead the jury to believe that Marshall blamed Hill for the sexual assault and murder. Accordingly, we conclude Hill’s claim of ineffective assistance of counsel with respect to this claim has no merit.”