IN THE UNITED STATES SUPREME COURT

No. _____

CEDRIC MCDONALD,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondents-Appellees.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE COUNSEL IN FAILING TO OBJECT TO DISTRICT COURT'S USE OF A VIDEO IN VOIR DIRE, WHICH WAS DESINGED TO GET JURORS TO THINK ABOUT POSSIBLE UNCONSCIOUS RACIAL BIAS?

LIST OF PARTIES

1. All parties appear in the caption.

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8th Circuit Court

Order Denying Certificate of Appealability

Cedric McDonald v. United States, 18-293 (March 13, 2019)

United States District Court for Northern District of Iowa

Order Partially Granting Section 2255 Relief

McDonald v. United States, 3:17-3057 (Aug. 20, 2018)

JURISDICTION

Mr. McDonald is a federal prisoner seeking review of an 8th Circuit Panel decision affirming the denial of his Section 2255 Motion. Federal question jurisdiction exists under 28 U.S.C. § 1331. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

TIMELINESS

The 8th Circuit denied Mr. McDonald's Application for a Certificate of Appealability on March 13, 2019. Appx. B. This Petition is filed within 90 days of that date. See US Supreme Court Rule 13 (1) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."). That deadline falls on June 11, 2019. A document is considered timely filed it were

delivered on "if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing." Supreme Court Rule 29.2. This document was mailed via United States Postal Service on June 11, 2019, and post marked for delivery on that date. Thus, it is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 14th Amendment to US Constitution (Section 1)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Nature of the Case:

This case comes before this Court on an appeal from a denial of relief under 28 U.S.C. Section 2255. In his post-conviction, the Petitioner, Cedric McDonald, challenged March 17, 2015, conviction by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) (1), 924(a) (2), and 924(e) (1), and his June 30, 2015, sentence to 210 months of imprisonment, as an armed career criminal. The Court partially granted relief under Section 2255 and denied relief

on the claim that the district court improperly used a racially based video during jury selection, inserting race when Mr. McDonald did not want race brought up during his jury selection. Order; Appx. C. The District Court partially granted relief on his predicate felonies, finding that the prior burglary was wrongfully used as a predicate felony for the Armed Career Criminal Act (ACCA), but denied relief and a certificate of appealability on his claim of ineffective of counsel during jury selection. Ruling (Aug. 20, 2018); Appx. C. On March 13, 2019, the 8th Circuit affirmed the denial of the certificate. Appx. A. Mr. McDonald seeks certiorari review 8th Circuit's denial of a certificate of appealability.

REASON FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT AREA OF CONSTITUTIONAL LAW RELATING TO TRIAL COUNSEL'S DUTY TO OBJECT WHEN DISTRICT COURT INSERTS A RACIALLY BASED VIDEO DURING JURY SELECTION WITHOUT INQUIRING

This Court should grant certiorari under Rule 10 (a). This case raises important constitutional issues relating to the trial counsel's duty to ensure a jury selection process free of racial bias.

During jury selection, the District Court should a video, which he believed would help educate the jury about both intentional and unconscious race bias.

District Court Ruling; Appx. C. His expressed purpose in doing so was to address possible unconscious racial bias on part of jurors.

Mr. McDonald was not asked whether he consent to having the video shown or whether he even wanted the video. In fairness to district court, this Court has not provided much clarification on this area of law for nearly 40 years. What role, if any, does the Defendant have in directing whether questioning regarding racial prejudice should occur during jury selection? What role does counsel play in honoring in protecting a defendant's right to have a race free jury selection process?

- **This Court's past precedent in questioning regarding racial prejudice in voir dire.**

Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire. In *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931), the Court recognized the broad role of the trial court: "[T]he questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked." Id., at 310, 51 S.Ct., at 471. *See also Ham v. South Carolina*, 409 U.S. 524, 528, 93 S.Ct. 848, 851, 35 L.Ed.2d 46 (1973) (recognizing "the traditionally broad discretion accorded to the trial judge in conducting voir dire...."). Furthermore, Rule 24(a), Federal Rules of Criminal

Procedure, provides that the trial court may decide to conduct the voir dire itself or may allow the parties to conduct it. If the court conducts it, the parties may "supplement the examination by such further inquiry as [the court] deems proper"; alternatively, the court may limit participation to the submission of additional questions, which the court must ask only "as it deems proper."

Ham involved a black defendant charged with a drug offense. His defense was that the law enforcement officers had "framed" him in retaliation for his active, and widely known, participation in civil rights activities. The critical factor present in Ham, but not present in *Ristaino*, was that racial issues were "inextricably bound up with the conduct of the trial," and the consequent need, under all the circumstances, specifically to inquire into possible racial prejudice in order to assure an impartial jury. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976). Although *Ristaino* involved an alleged criminal confrontation between a black assailant and a white victim, that fact pattern alone did not create a need of "constitutional dimensions" to question the jury concerning racial prejudice. 424 U.S., at 596, 597, 96 S.Ct., at 1021, 1022. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. As *Ristaino* demonstrates, there is no per se constitutional rule in such circumstances requiring inquiry as to racial prejudice. Id., at 596, n. 8, 96 S.Ct., at 1021, n. 8.

This Court again issues relating to race and jury selection in *Rosales-Lopez v. United States*, 451 U.S. 182, 189–90, 101 S. Ct. 1629, 1634–35, 68 L. Ed. 2d 22 (1981). In that case, this Court again reaffirmed that there is no constitutional duty to inquire into racial prejudice. Id. "Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion." Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions. In the federal court system, we have indicated that under our supervisory authority over the federal courts, we would require that questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated. Ristaino, supra, at 597, n. 9, 96 S.Ct., at 1021, n. 9. This Court reaffirmed that it is the Defendant, not the Court, that is in the best position to explore whether racial prejudice should be inquired upon in jury selection. Thus, the defendants specifically requested voir dire concerning racial prejudice, satisfying one requirement for application of the "nonconstitutional" standard. *See Rosales-Lopez*, 451 U.S. at 191, 101 S.Ct. 1629 (leaving to the defendant, in the first

instance, the determination of whether he or she "would prefer to have the inquiry into racial or ethnic prejudice pursued").

In 1986, this Court had no trouble reversing in a capital case where the court failed to inquire into racial prejudice during jury selection, especially where there was a black defendant and white victim. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. *Turner v. Murray*, 476 U.S. 28, 35, 106 S. Ct. 1683, 1687–88, 90 L. Ed. 2d 27 (1986).

- **Application to this Case**

This case shows what happens when the shoe is on the other foot. What happens a Defendant does not want the court to inquire into his racial background and does not want to make an issue?

Mr. McDonald contends that the video used to remove racial prejudice, and make jurors aware of their own implicit racial basis itself tainted the jury. To obtain relief, this Court would have to make a finding that the video that it uses to remove racial prejudice deprived Mr. McDonald's of a jury selection process without regard to the color of his skin.

Mr. McDonald was certainly irritated at the beginning of trial. Just before trial, he wanted to fire his trial counsel, and this exchange occurred:

> THE COURT: Okay. I'd like to get started.
>
> Mr. McDonald, I was just told by Mr. Primmer that you want to fire him. That's not happening today. You're not going to jack around the system, and you're not going to jack me around. I'm going to give you a super fair trial, but you're not -- what's your grounds for firing your lawyer?
>
> THE DEFENDANT: I think that I'm sitting in here -- I think that -- I don't think that he can see through white people as I can him or any other black person can. I think that I'm sitting here in a slave port. I believe that this is a slave trade system camouflaged by a court system, and I don't think that he's going to represent me correct.

Trial Tr. Vol 1, p. 2, LL 3-14. This Court then replied that it would deny the motion to terminate counsel, finding it "baseless, frivolous." Tr. 2, LL 13-15.

Below, Mr. McDonald's counsel could find little, or no case law relating

to prejudice arising from showing of videos designed to remove racial prejudice. Most of relating to racial issues in jury selection arise from a fair cross section, or improperly striking jurors on account of race. *Powers v. Ohio*, 499 U.S. 400, 404-05, 111 S. Ct. 1364, 1367, 113 L. Ed. 2d 411 (1991) ("This Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct."). "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race. on the false assumption that members of his race as a group are not qualified to serve as jurors, *see Norris v. Alabama*, 294 U.S. 587, 599 [55 S.Ct. 579, 584, 79 L.Ed. 1074] (1935); *Neal v. Delaware*, 103 U.S. 370, 397 [26 L.Ed. 567] (1881).

Looking at the case law, the District Court below relied heavily on *Rosales-Lopez* and did not have any guidance from this Court on the situation where a Defendant did not want race brought up during selection. District Court at p. 6; Appx. C. The Court noted that race was not an issue and the Defendant did not demonstrate that the video prejudiced the jury. *Id.* That is the point. Race should not be injected into proceedings unless the Defendant requests inquiry into racial prejudice.

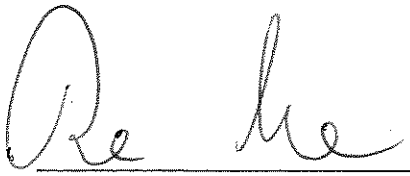
This time is now ripe for this Court to provide guidance on the important

issue of a Constitutional law. Since full merits briefing was not done below, this Court should grant, vacate and remand for full merits briefing before the 8th Circuit Court of Appeals. At the very least, Mr. McDonald has shown the substantial denial of a constitutional right. See 28 U.S.C. Section 2253 (c) (2) (certificate should be granted based upon a substantial showing of a denial of a constitutional right.).

CONCLUSION AND REQUESTED RELIEF

Under these circumstances, the most prudent course is to grant the Writ, vacate, and remand with an order to grant a certificate of appealability.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on June 11, 2019, I mailed an original and 10 copies to the Supreme Court via United States Postal

Service Express Mail to:

United States Supreme Court
Clerk's Office
1 First Street, N.E.,
Washington, D.C. 20543

and one copy to:

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