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NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with Fed. R. App. P. 32.1

**United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604**

Argued January 14, 2020

Decided July 7, 2020

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-2381

ANTHONY M. LEE,
Plaintiff-Appellant,

v.

HEATH PARSHALL,
Defendant-Appellee.

Appeal from the United
States District Court
for the Western District
of Wisconsin.

No. 3:16-cv-00524-wmc

William M. Conley,
Judge.

ORDER

The plaintiff Anthony M. Lee filed a suit under 42 U.S.C. § 1983, alleging that the defendant Heath Parshall, a police officer for the City of LaCrosse, used excessive force during Lee's arrest in violation of Lee's

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constitutional rights. After a trial, the jury found in favor of Parshall, and Lee now appeals.

Lee raises two challenges regarding the trial. First, he argues that the district court's conduct of the voir dire was constitutionally deficient. In addition, he argues that the district court erred in refusing to allow testimony as to a subsequent excessive force claim against Parshall, which occurred a year after Parshall's interaction with Lee.

With respect to the voir dire, Lee challenges the questioning of the jurors as to issues of race, police and crime. Those issues were significant in the jury selection process because the claim of excessive force arose in the context of an arrest of Lee, an African-American, by Parshall, a white police officer. Lee challenges the district court's decision to conduct the questioning of the jurors during the voir dire, rather than allow the attorneys themselves to question the jurors. In addition, Lee argues that the court failed to adequately explore the potential jurors' implicit biases.

The right to an impartial jury does not require that the attorneys themselves conduct the questioning. The district court has discretion to determine the manner in which voir dire is conducted, and that can include the judge handling the questioning of the potential jurors. Prior to voir dire, Lee presented the court with a list of proposed questions for the potential jurors, including twenty-one questions regarding the police, ten questions regarding race, and four questions regarding crime, and many of those questions in each

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category included additional follow-up questions or subparts, which operated to roughly double the total number of questions. The judge agreed to question the jurors as to the attitudes both supportive and hostile to the police, and to explore both explicit and implicit bias as to race-related matters. The judge did not ask all of the questions proposed by Lee, noting that some of the proposed questions were open-ended and potentially inflammatory and that “one of my concerns being that I create a situation of cross-fertilization of prejudice that may arise.”

It is well-established that the trial court has broad discretion as to the form and number of questions to be asked on voir dire. See *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); *Turner v. Murray*, 476 U.S. 28, 37 (1986); see also *Gardner v. Barnett*, 199 F.3d 915, 920-21 (7th Cir. 1999) (en banc) (noting that “litigants do not have a right to have a particular question asked”). The relevant question under the Constitution is whether the investigation in the voir dire is “‘reasonably calculated to resolve the doubts raised about the juror’s impartiality.’” *Oswald v. Bertrand*, 374 F.3d 475, 481 (7th Cir. 2004) quoting *Dyer v. Calderon*, 151 F.3d 970, 974-75 (9th Cir. 1998) (en banc). Thus, reviewing the voir dire process to determine if it was sufficient to detect or overcome racial bias on the venire, this court asks ‘whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present.’” *United States v. Jones*, 188 F.3d 773, 777 (7th Cir. 1999), quoting *United States v. Guy*, 924 F.2d 702, 707 (7th Cir. 1991). “We

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review the district court's selection of questions to be posed at voir dire for an abuse of discretion." *Jones*, 188 F.3d at 777.

Our review of the district court's selection of questions in this case reveals no abuse of discretion. The court questioned the venire at length as to each person's potential bias regarding the police, race and crime. For instance, the questions as to race identified that the case involved an African-American man accusing a white police officer of excessive force, acknowledged the historical struggles in our country involving such scenarios, and asked the potential jurors whether it would be difficult for them to serve as an impartial juror. The court emphasized to the jurors that such difficulties with impartiality could go in either direction, and that they should respond if it would impact their ability to view the evidence in either way. The court further discussed the potential for implicit bias, and asked that anyone who was unwilling to examine their own views and how they might be predisposed to view the evidence one way or the other, even unconsciously, to respond at that time. By allowing the jurors to signal the potential impact of a bias "in either direction," the potential jurors would be able to signal a concern with partiality without identifying the nature of their bias – and whether it favored the plaintiff or the defendant – thus increasing the likelihood of an honest response. The court also asked the potential jurors whether they or people that they knew had been discriminated against, whether for race or other characteristics. The court similarly explored any potential biases relating

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to the police and crime, with seven questions as to the police and three as to crime. Throughout all of the questioning, the judge made it clear to the potential jurors that if they were uncomfortable responding in open court they could do so at sidebar, and some chose to do so.

Lee has not identified any particular questions that the court omitted which would elicit further information as to the bias of any potential juror. Instead, Lee challenges more generally the court's decision to question the jurors rather than to allow the attorneys to ask the questions, the use of close-ended questions and fewer open-ended ones, and the use of terms such as "credibility," "weigh" and "testimony" in the questions which Lee argues are problematic because they are terms that are defined in jury instructions. None of those allegations render the process unconstitutional in this case. The questioning by the district court, taken as a whole, meets the standard of reasonably extensive examination such that the parties would have a basis for an intelligent exercise of the right to challenge, and which would reasonably assure that bias or prejudice would be discovered. *Art Press, Ltd. v. W. Printing Mach. Co.*, 791 F.2d 616, 618-19 (7th Cir. 1986). As such, the format and nature of the questioning fell within the court's discretion. Accordingly, Lee's constitutional challenge cannot succeed.

Lee's remaining claim fares no better. He argues that the district court should have allowed testimony as to a subsequent excessive force claim against Parshall, which occurred approximately a year *after*

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Parshall's interaction with Lee. He argues that under Federal Rule of Evidence 404(b), evidence of wrongs or other acts may be admissible to prove motive, opportunity, intent, knowledge and absence of mistake. Lee makes no argument as to how that incident, occurring a year after the one at issue here, could establish any of those states of mind as to the incident with Lee. In fact, he does not even describe the facts underlying that other incident, nor does he provide any argument as to how that incident relates to Parshall's state of mind in the incident with Lee. Lee merely states in a conclusory manner that the evidence is probative to show that Parshall had motive, opportunity, intent, knowledge and absence of mistake. Such "perfunctory and undeveloped arguments do not preserve a claim for our appellate review." *Ewell v. Toney*, 853 F.3d 911, 918 (7th Cir. 2017).

Accordingly, the decision of the district court is AFFIRMED.

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**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

[SEAL]

Everett McKinley Dirksen
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Room 2722 – Phone: (312) 435-5850
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Chicago, Illinois 60604

FINAL JUDGMENT

July 7, 2020

Before: ILANA DIAMOND ROVNER, Circuit Judge
DIANE P. WOOD, Circuit Judge
AMY J. ST. EVE, Circuit Judge

No. 19-2381	ANTHONY M. LEE, Plaintiff – Appellant v. HEATH PARSHALL, Defendant – Appellee
Originating Case Information:	
District Court No: 3:16-cv-00524-wmc Western District of Wisconsin District Judge William M. Conley	

The judgment of the District Court is **AFFIRMED**,
with costs, in accordance with the decision of this court
entered on this date.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANTHONY LEE,

Plaintiff,

—vs—

HEATH PARSHALL,

Defendant.

Case No. 16-CV-524-WMC

Madison, Wisconsin

June 17, 2019

8:36 a.m.

STENOGRAPHIC TRANSCRIPT OF
EXCERPT FROM FIRST DAY OF JURY TRIAL
(CONFERENCE AND VOIR DIRE)

HELD BEFORE

U.S. DISTRICT JUDGE WILLIAM M. CONLEY

APPEARANCES:

For the Plaintiff:

Murphy Desmond S.C.
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For the Defendant:

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* * *

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[60] MS. SHAFER: No experience.

THE COURT: All right. And do you have someone close who has worked in law enforcement?

MS. SHAFER: No.

THE COURT: All right. Thank you very much.

The next question is for the group as a whole. Have you or anyone close to you ever had an experience interacting with a police officer that was particularly pleasant or particularly unpleasant? Just raise your hand if that applies to you.

I see a couple of hands. If we could pass the mic to the right. Juror 14.

MS. GURENO: Sure. Working on the Police Commission and doing the Citizen's Police Academy, I have had several interactions with police officers which were extremely pleasant. I appreciate the philosophy in the Middleton Police Department really being proactive about building community instead of trying to get someone for speeding or trying to do something like that, so they have a lot more warnings than tickets, for instance.

I also just heard about a very negative experience from a friend of mine, another soccer mom, who witnessed something up in Waunakee where a police officer may have used a little bit more aggression than necessary in a certain situation.

THE COURT: And either one of those experiences you think may impact your ability to be impartial in a case like [61] this?

MS. GURENO: I do not believe so. There are two sides to every story.

THE COURT: For the same reasons you've already described?

MS. GURENO: Yes, sir.

THE COURT: All right. If you could pass the mic to the other end. I think we had one other hand raised.

Juror No. 9.

MR. SCHROEDER: This may not be relevant at all, but it was in college, and I was on my way to an intramural water polo tournament league, and I was in a hurry and went through a red light. And I saw the police officer sitting in the parking lot, and I knew he was going to pull me over, so I pulled over. And back then you could get out of the car, and I was out of the car] and standing on the street by the time he even pulled up, and it was a very good experience with him. He was very nice about it. He did not write a ticket. He knew where I lived. He knew me because we lived directly across the street from the police station. But it was a very – it was a good experience.

THE COURT: A good experience because you didn't get ticket for the red light?

MR. SCHROEDER: Probably.

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THE COURT: Understood. Do you think that that might influence how you view police interaction like that –

[62] MR. SCHROEDER: I don't think so, no.

THE COURT: – in this case?

MR. SCHROEDER: It was so many years ago, and I don't believe so.

THE COURT: All right. Thank you.

Was there anyone else had a particularly pleasant or particularly unpleasant experience with a police officer or law enforcement? I see one more hand. If you could pass the mic.

Juror No. 6.

MS. VOIGHTS: Just being – I was speeding. I didn't get a ticket. I don't know. If that's what you're asking, I guess.

THE COURT: Anything about that experience you think would impact how you viewed the facts in a case like this?

MS. VOIGHTS: I don't think so. It was right after I got my license, so it was over ten years ago.

THE COURT: And I'm sure you learned your lesson, and that's how we'll leave it.

MS. VOIGHTS: Yes.

THE COURT: Thank you very much.

MS. VOIGHTS: Thank you.

THE COURT: Was there anyone else? Thank you.

Do any of you believe that a person employed in law enforcement is more or less credible as a witness than someone who is not employed in law enforcement? Said a different way, [63] would you weigh a law enforcement officer's testimony different than you would other witnesses? Thank you.

Have you or anyone close to you ever been detained or arrested by a law enforcement officer? So we're not talking about being stopped for a traffic ticket but actually being detained or arrested, and, again, if you raise your hand, we can discuss it at sidebar if you prefer.

All right. I see a number of hands. Since you have the mic, is this something you want to discuss at sidebar?

MS. VOIGHTS: No, it's fine.

THE COURT: You can go ahead then.

MS. VOIGHTS: My husband was arrested for drunk driving.

THE COURT: All right. And anything about his experience that you think may impact how you view the evidence here?

MS. VOIGHTS: I don't think so.

THE COURT: All right. Nothing particularly negative or positive out of that experience?

MS. VOIGHTS: No.

THE COURT: Thank you. You can pass the mic.

And would you like to discuss it at sidebar?

MR. PETERS: No. That's fine. It was a long time ago. I was pulled over for – basically I broke into my own apartment, but my wife – my ex-wife and I were going – were [64] separated, and there was something I wanted to get out of my house, and I couldn't get in there because she wasn't around, so I broke in through this back door. And one of the neighbors seen me break into the door, so they called the cops, and as we were leaving – my buddy and I were driving away, and the cops pulled us over, and it's the first time I ever had a gun pointed at me, and they handcuffed me. They didn't take me and arrest me or anything, but they did bring me – or they stood there and held me until my ex-wife called and, you know, told them that it was okay that, you know, I was to go in there. So that was it.

THE COURT: Anything about that experience you think may impact how you view the evidence?

MR. PETERS: No. Like I said, it was a long time ago, and it wasn't – they didn't treat me bad or – you know, they did handcuff me. I'm trying to explain my way out of this, but it took a while. But, no, it was fine.

THE COURT: All right.

Is this something you want to discuss at sidebar?

MS. CONE: No. My mother was involved with someone who she was basically questioned in her involvement in illegal activity, and she was living with us at the time, so the officers came to our house to take her down to the station.

THE COURT: And anything about that experience you think may impact how you view the evidence in this case?

MS. CONE: No.

[65] THE COURT: All right. Nothing particularly negative or positive about it?

MS. CONE: No.

THE COURT: Thank you. You can pass the mic forward, and I believe there were a few hands. Yes.

MR. STUEBER: I was arrested for drunk driving in 1989 and domestic abuse in 2000, handcuffed.

THE COURT: Anything about that experience, positive or negative, that you think may impact how you view the evidence?

MR. STUEBER: No.

THE COURT: All right. Did either of those go on to prosecutions?

MR. STUEBER: The drunk driving did, but deferred prosecution on domestic abuse.

THE COURT: All right. And, again, nothing about that experience you think might resonate in a way here that would cause you to identify with one side or the other?

MR. STUEBER: No.

THE COURT: All right. You say that with great confidence, so the reason you say that is because?

MR. STUEBER: Well, I mean, the process went the way it went. I was guilty as charged, and I paid my price to society.

THE COURT: All right. Thank you.

Was there anyone else who – yes. I see –

MS. SHAFER: Sidebar?

[66] THE COURT: Absolutely, yeah.

(Discussion held at sidebar at 10:32 a.m.)

THE COURT: We're just going to wait a moment until we have the attorneys. All right. And the mic is right here. And as you saw, you can't really hear it with the sound on.

MS. SHAFER: Sure.

THE COURT: But thank you very much for identifying yourself, and if you could just describe why you did.

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MS. SHAFER: Sure. My sister was underage driving and drinking, so she was arrested.

THE COURT: All right. And anything about her experience or what she relayed to you that you think may impact you in a case like this?

MS. SHAFER: No.

THE COURT: Okay. So your reason for sidebar was just you didn't want to out your sister?

MS. SHAFER: I wanted to protect her privacy.

THE COURT: Understood. Thank you very much for that. Unless there is follow up? Thank you.

(Sidebar discussion ends at 10:33 a.m.)

THE COURT: Was there anyone else who had raised their hand with respect to either you or someone close to you being detained or arrested by a law enforcement officer? Thank you.

Have you or someone close to you been convicted of a crime other than you've already disclosed, and, if so, I'm happy to [67] discuss the experience of someone close to you or yourself at sidebar, but if you could raise your hand at this time if you've been or someone close to you has been convicted of a crime. All right. I see a hand. Did you want to discuss that at sidebar?

MS. VOIGHTS: Yes, please.

THE COURT: Were there any other hands?

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(Discussion held at sidebar at 10:34 a.m.)

THE COURT: And if you could just speak into the mic –

MS. VOIGHTS: Sure.

THE COURT: – and explain your experience.

MS. VOIGHTS: My cousin has been arrested multiple times on drug charges.

THE COURT: Sure.

MS. VOIGHTS: My husband also has a criminal conviction, but this was before we were married. It was when he was 16. He stole some cars and did some jail time.

THE COURT: Thank you very much for raising your hand, and that's what this process is for.

MS. VOIGHTS: Sure. So I don't know much about his case just because we weren't together, and I never really asked other than all I know is he stole some property.

THE COURT: And the other case you know about because your cousin has described various experiences or have you gone to visit?

MS. VOIGHTS: I have not gone to visit him. I just [68] know it from family.

THE COURT: Family knowledge?

MS. VOIGHTS: Right.

THE COURT: Yeah. Anything about his experience or the experience of your husband that you think may impact how you view the evidence in a case like this?

MS. VOIGHTS: I don't think so.

THE COURT: It wouldn't cause you to identify with one side or the other in a case?

MS. VOIGHTS: I don't think so because I don't know many of the details on really either one.

THE COURT: All right. Unless there were follow-up questions, I appreciate your identifying yourself. Thank you.

MS. VOIGHTS: Thank you.

(Sidebar discussion ends at 10:35 a.m.)

THE COURT: All right. I'll just confirm, although I don't think there was anyone else, but anyone else, either yourself or someone close to you, been convicted of a crime? Thank you.

Besides what we have already discussed generally, do you or someone close to you have strong feelings about law enforcement generally, whether positive or negative? So particularly strong feelings about law enforcement, positive or negative? Thank you.

These questions are more specific to the case itself, and [69] again, keeping in mind that the goal of this

process is just to identify anyone whose background or experience might influence them, I just ask you to be as candid as possible for the benefit of the parties for whom this whole process is intended to provide them assurances of an impartial juror.

The plaintiff is currently in prison. Does anyone have such a strong positive or negative opinion about prisoners that it might be difficult for you to be objective in this case, in other words, that because plaintiff is currently in prison, that you would just viscerally find it difficult to view the evidence objectively as presented in the courtroom? And, again, it would be understandable, but you should raise your hand if that's a concern for you. Thank you.

Similarly, the defendant is a police officer. Does anyone have such a strong positive or negative opinion about police officers that it might be difficult for you to be objective in this case, in other words, that you're predisposed in a way that it would be difficult for you to listen to the evidence presented and decide the case based on that evidence? Again, you can raise your hand if that applies to you. You should raise your hand if that applies to you. Thank you.

The plaintiff is, as I think someone observed, also African-American. The defendant is a white police officer. We're at a point in our history where people have acknowledged incidents that have been horrific on both sides of that [70] equation, but certainly it's an issue that our country has struggled with since we were founded, having been founded with slavery as part of our Constitution.

Would anyone find it difficult to serve as an impartial juror in a case in which an African-American man is accusing a white police officer of excessive force? And, again, this would be in either direction, but if you think that it would impact how you view the evidence, how you judge the evidence, positively or negatively for either side, this would be the time to raise your hand.

I will just add that, you know, we're learning more and more about bias but also implicit bias, and I would just ask if anyone feels that they aren't willing to examine their own views in how they may be predisposed to view the evidence one way or the other even unconsciously, that this would be the time to just raise your hand and step off of this particular jury. If you're comfortable you can listen to the evidence and decide it based on the evidence, then that's fine, but if not, this would be the time to raise your hand. Thank you.

Does anyone believe that prisoners do not or should not have any constitutional rights? If that applies to you, this would be the time to raise your hand.

Does anyone believe that prisoners should not be allowed to file lawsuits? Again, if that applies to you, you should raise your hand.

[71] Does anyone believe that private citizens should not file a lawsuit against a police officer for actions that he took in the line of duty? Again, you can raise your hand if that applies to you.

Does anyone believe that a police officer arresting a person can or should be able to use any level of force,

in other words, force beyond what is reasonable under the circumstances?

Have you or someone you know ever been discriminated against because of race, ethnic background, gender, religion, or sexual preference? I see one hand. I see a couple hands. And I'm happy to discuss with either of you at sidebar, but why don't we start – is this something you want to discuss at sidebar or something you want to discuss –

MS. SHAFER: Sidebar.

THE COURT: That's fine. That's absolutely fine.

(Discussion held at sidebar at 10:41 a.m.)

THE COURT: You already know the drill, so we'll just wait a moment.

Thank you again for identifying yourself, and if you could describe your experience.

MS. SHAFER: Sure. It was a telecommute agreement from working from home, and I had one, and a male colleague of mine had one, and he got his signed by a supervisor once a year, and I had to get mine discussed and signed with my supervisor once every three months –

* * *

[83] MS. DAVIS: Thank you.

(Sidebar discussion ends at 10:56 a.m.)

THE COURT: All right. With apologies, it appears the parties are in agreement that I missed a question, and I thought I had asked it. I know I asked it of at least a few of you who came up secondary, but I want to be sure. So for any of you if you could raise your hand, and, again, I'm happy to discuss this at sidebar, but have you or someone close to you ever been a victim of a crime? And if that applies, you should raise your hand.

All right. I see one tentative hand. Is it something you want to discuss at sidebar? I don't know if we have the mic handy, but if you could just describe –

MS. GURENO: In college my apartment was robbed while we were sleeping.

THE COURT: All right.

MS. GURENO: So we had to call the cops.

THE COURT: I can imagine that would be a fairly traumatic experience, but the way you reacted, it sounds like you didn't –

MS. GURENO: Yeah. The invasion of privacy, that feeling was pretty bad. It was a college apartment complex, and they were having a big party down the hall, so, yeah, it was someone had broken in, broken the lock.

THE COURT: Was this a dorm room or an apartment?

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANTHONY LEE,

Plaintiff,

Case No. 16-cv-524-wmc

v.

HEATH PARSHALL,

Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant Heath Parshall in accordance with the jury's verdict.

Approved as to form this 19th day of June, 2019.

/s/ William M. Conley

William M. Conley
District Judge

/s/ Peter Oppeneer	6/19/19
_____ Peter Oppeneer	_____ Date
Clerk of Court	

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**United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604**

August 5, 2020

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-2381

ANTHONY M. LEE,
Plaintiff-Appellant,

v.

HEATH PARSHALL,
Defendant-Appellee.

Appeal from the United
States District Court for
the Western District of
Wisconsin.

No. 3:16-cv-00524-wmc
William M. Conley,
Judge.

ORDER

No judge of the court having called for a vote on the Petition for Rehearing and Rehearing En Banc, filed by Plaintiff-Appellant on July 21, 2020, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing and Rehearing En Banc is **DENIED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANTHONY LEE,

Plaintiff,

16-cv-524

v.

HEATH PARSHALL,

Defendant.

PLAINTIFF PROPOSED VOIR DIRE

(Filed May 17, 2019)

In addition to the courts' standard voir dire questions, Plaintiff submits that voir dire should also be conducted by the attorneys for the parties in this matter.

Argument for expanded voir dire procedures begins from the premise that the Fifth and Seventh Amendments to the Constitution guarantee the right to a fair and impartial jury in a civil case.

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S. Ct. 984, 90 L. Ed.

The Supreme Court has repeatedly reaffirmed the importance of impartiality in civil case juries, *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct.

2077, 2088, 114 L. Ed. 2d 660 (1991). (“Civil juries, no less than their criminal counterparts must follow the law and act as impartial factfinder.”).

The Court has similarly reaffirmed that the voir dire process is critical to assure the selection of an impartial jury. *Rosales-Lopes v. U.S.*, 451 U.S. 182, 188, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981). (“Without an adequate voir dire the trial judge’s responsibility to remove prospective jurors who will not be able to follow the court’s instructions and evaluate the evidence cannot be fulfilled.”). Even while upholding restricted questioning, the Court has recognized that “[v]oir dire serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.” *Mu’Min v. Virginia*, 500 U.S. 415, 111 S. Ct. 1899, 1908, 114 L. Ed. 2d 493 (1991). The Court has repeatedly reiterated that, “part of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.” *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct. 2222, 2230, 119 L. Ed. 2d 492 (1992). See also *Butler v. City of Camden, City Hall*, 352 F.3d 811, 63 Fed. R. Evid. Serv. 232 (3d Cir. 2003) (stressing need for adequate voir dire to permit intelligent exercise of peremptory challenges).

The importance of intelligent exercise of peremptory challenges has been propelled to the forefront of the voir dire debate by the requirement that parties can be required to offer a “neutral explanation” for excluding members of cognizable groups from juries. *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 90

L. Ed. 2d 69 (1986) (holding modified by, *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). Here, Plaintiff is African-American and the alleged police misconduct was committed by a white police officer. Counsel may want to raise or respond to a *Batson* challenge. Adequate voir dire by counsel is virtually the only mechanism by which counsel can obtain information necessary to avoid discriminatory exercise of challenges, to supply the “neutral explanation” that *Batson* requires, and to provide grounds for a full *Batson* challenge.

In *Montiel v. City of Los Angeles*, 2 F.3d 335, 340-41, 37 Fed. R. Evid. Serv. 1008, 26 Fed. R. Serv. 3d 832 (9th Cir. 1993), the court, in reviewing a *Batson* Challenge, stated:

In our view, this case presents a good reason why, in certain situations, district courts should exercise their discretion . . . to expand the amount of time permitted parties to voir dire jury panels. Providing parties with an opportunity to question more fully prospective jurors often flushes-out parties’ true motivations in exercising their preemptory challenges. At the very least, it provides the trial judge with a more complete picture when *Batson* objections are presented.

Here, Plaintiff is African-American and the majority of prospective jurors are likely to be white and thus, there is a danger that racial bias will taint the jury’s evaluation of evidence and its decision.

This case is appropriate for inquiry concerning racial bias as a civil rights suit involving a African-American plaintiff and white police officer defendant. Racial bias cannot be revealed through a standardized closed-ended question inquiring whether any member of the jury panel harbors prejudice against the plaintiffs because they are African-American.

Further, the question of liability in a police misconduct case often rests on the jury's determination of credibility of testimony of the defendant police officers. A juror inclined to give greater weight to such testimony or to believe that police officers are more likely than ordinary citizens to give truthful or accurate testimony would be unable to be fair and impartial.

Courts have long recognized the need to voir dire inquiry concerning jurors' views about the credibility of testimony by law enforcement officers.

The Ninth Circuit has held it reversible error to refuse to ask jurors if they would view the testimony of a law enforcement officer as inherently more credible than that of a lay witness:

If the jurors were to give undue weight to the testimony of law enforcement officers because of their official positions, the jurors would be precluded from properly weighing and evaluating the facts relating to the central issue in the case. The type of inquiry proposed by counsel was therefore necessary in order to probe for bias associated with the identity and relationship of the parties and the nature of the controversy. Without such inquiry, the voir

dire did not adequately probe the prospective jurors for bias or partiality and Darbin was deprived of the informed exercise of his right to challenge prospective jurors. Under the circumstances here involved, the refusal to inquire on voir dire into the favorable bias jurors might accord the testimony of law enforcement officers constitutes an abuse of discretion, and a violation of the provisions of FRCP 47(a) regarding supplemental examination. *Darbin v. Nourse*, 664 F.2d. 1109, 1115, 72 A.L.R. Fed 627 (9th Cir. 1987).

Here, the court should allow counsel for the parties to conduct voir dire.

In the event that the court does not allow counsel to conduct voir dire, Plaintiff proposes the following additional voir dire:

POLICE

1. Have you or anyone close to you ever been employed in any capacity by any law enforcement agency? (If no, have you or anyone close to you ever applied for a job in law enforcement?)
 - Is that yourself or someone else?
 - If someone else, what is their relationship to you?
 - What position did you/he/she hold?
 - For how long?

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- Have any complaints of misconduct or excessive force been filed against (you) (them) (him) (her)?
2. Do you ever have occasion to discuss police work—especially the dangers involved in police work—with your (insert the related party)? IF Y ES: What did you discuss? What are your impressions about the dangers of police work? What concerns do you have about your _____'s safety on the job?
 3. What contact have you had with police officers or other law enforcement officers through your work? In your neighborhood? In your social life? How much faith (or respect) would you say you have in (for) the _____ Police Department? Why is that?
 4. In general, do you think you'd be inclined to give greater weight to the testimony of a police officer than you would to an ordinary citizen, because he is a police officer? IF Y ES: Why is that?
 5. Many people feel that police testimony should be given greater weight than the testimony of an ordinary citizen. How many of you feel that way? Why is that?
 6. Do you think that police receive any kind of special training about how to testify in court? IF YES: What kind of training? Why? How do you think that training affects how they present themselves as witnesses? IF NO: How often do you think they testify in court? How do you think they prepare themselves to testify?

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7. What have you read or heard about incidents where police have used excessive force?
8. Do you believe that a police officer arresting a person on suspicion of committing a crime can use any level of force?
9. What are your opinions about how the problem of police misconduct out to be handled?
10. What's your immediate reaction when you hear that someone is charging the police with brutality?
11. What have you read or heard about recent instances of police brutality?
12. Do you have an opinion about which is more important—law and order or preserving everyone's constitutional rights? If so, what is your opinion?
13. Have you ever expressed any opinions in conversations with others concerning the problem of police brutality? If so, what opinions have you expressed?
14. Do you have any opinions about how the problem of police misconduct should be handled by society? If so, what are your opinions?
15. Would you require Mr. Lee to prove his case by anything more than a preponderance of the evidence [explain this concept], because he is charging officer Parshall with a violation of his constitutional rights?

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16. Are you willing to enforce the civil rights of Mr. Lee as you would any other right he and you are entitled to as citizens of this country?
17. Are you willing to enforce the civil rights of Mr. Lee even though he is presently incarcerated?
18. This is a lawsuit brought by a private citizen against a member of the Police Department. Do you feel that citizens who believe they have been treated illegally and unfairly have a right to bring suit against police officers?
19. What problems do you have with the idea of an ordinary citizen suing a police officer because of actions he claims he took in the line of duty?
20. Some people think that even though the police make mistakes and use more force than necessary, that is the price we have to pay for police protection. What's your opinion about that?
21. This case involves a claim by Mr. Lee that the defendant police officer beat him after he had given himself up for arrest.
 - a. First, is there anything about these facts and, in particular, the charges that the officer physically abused Mr. Lee which would prevent or make it difficult for you to be a fair and impartial juror?
 - b. Would you have any hesitancy in reaching a verdict for Mr. Lee merely because

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this is a civil rights case against a police officer?

RACE

1. Tell me about the contacts you have had with African-American people in your life. OR In your personal life what kind of contact do you have with people of races other than your own? OR What is the racial composition of your neighborhood, your kids' schools, your workplace?

Do you have any close friends who are of races other than your own?

- What races are your friends?
 - What sorts of things do you do together?
 - Do you visit in one another's homes?
2. Have you ever had any negative experiences with African-American people?
 3. What sorts of negative or derogatory comments about African-American people have you heard over the years?
 - How do you feel about those comments?
 - Have you said some of those things yourself?
 4. How much of a problem do you think racial discrimination is today?
 5. Some people feel racial discrimination is a thing of the past, that today people of different

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racers are treated pretty much the same by our society. What do you think?

6. In what ways, if any, do you think racial discrimination continues today?
7. Have you or someone you know ever been discriminated against because of race, ethnic background, gender, religion or sexual preference? Please explain.
8. If you were the parent of a young African-American man or teenager today, what concerns would you have for him and how our society is likely to treat him?
9. Have you ever been in a situation in which you felt racial tension? Please explain.
10. Have you ever felt afraid of someone of a race other than your own? Please explain.

When you walk down the street and teenagers of a different race are walking toward you, how do you feel? OR Have you ever felt fearful for your safety or concerned about your belongings when in the presence of people of another race? Please describe the situation.

CRIME

1. Have you, or someone close to you, ever been the victim of a crime?
 - Tell me about that.
 - How did you feel about that?
 - Was the perpetrator found?

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- What happened to the perpetrator?
 - Where you involved in the criminal case?
How?
2. Have you ever been a member of a victims' rights group?
- Tell me about that.
 - What led you to get involved?
3. Do you think America is 'soft on crime'?
- Explain.
4. What is your opinion about the number of African-American males serving time in prison in the United States?
- Explain.

Dated this 17th day of May, 2019.

MURPHY DESMOND S.C.

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