SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,	)	
Plaintiff,	)	
	)	No. 1234567 SEA
v.	)	
	)	NOTICE OF MOTION AND
	)	PRE-TRIAL MOTION
ARTHUR A. ACCUSED,	)	FOR VOIR DIRE
	)	AND JURY INSTRUCTIONS
Defendant.	)	ON RACIAL BIAS
_____	)	

TO DANIEL SATTERBERG, PROSECUTING ATTORNEY FOR KING COUNTY, STATE OF WASHINGTON AND/OR HIS REPRESENTATIVES:

PLEASE TAKE NOTICE that on March 1, 2020, at 8:30am, or as soon thereafter as the matter may be heard in Department 101 of the above-entitled court, counsel for and on behalf of Defendant Arthur A. Accused will move the court for voir dire of prospective jurors and jury instructions on racial bias.

This motion will be based on this Notice of Motion, the attached Statement of Facts, Points and Authorities and Argument, the attached Appendix, and upon any oral argument as may be presented at the hearing on this motion.

Dated this 28th day of January 2020
Respectfully submitted,

_____
Anne A. Advocate, Attorney at Law
Counsel for Defendant Arthur A. Accused

STATEMENT OF FACTS

[INCLUDE HERE ANY FACTS PRESENT IN YOUR CASE WHICH MAY BEAR UPON ISSUES OF RACIAL BIAS]

POINTS AND AUTHORITIES

AND ARGUMENT

I.

RACIAL BIAS HAS NO PLACE IN THE CRIMINAL JUSTICE SYSTEM

Both the United States Supreme Court and the Washington State Supreme Court have repeatedly stated that racial bias in the criminal justice system undermines public confidence in the validity of court judgments and jury verdicts. "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." *Rose v. Mitchell,* 443 U.S. 545, 555 (1979); "Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process" *Buck v. Davis,* 580 U.S. ___(2017) (slip op. at 22), quoting *Davis v. Ayala,* 576 U.S. ___(2015); *State v. Gregory,* 427 P3d. 621 (2018)

In fact, jury verdicts influenced in whole or in any part by explicit or implicit racial bias corrode the fundamental principle upon which our system of justice is based: Equal justice under the law. A justice system cannot be equal that treats people who come before it differently based on the color of their skin. As Chief Justice John Roberts noted, "Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this this guiding principle." *Buck v. Davis, supra* (at slip op. 21).

II.

EXPERIENCE AND RESEARCH HAVE SHOWN THAT RACIAL BIAS IS PERVASIVE IN THE CRIMINAL JUSTICE SYSTEM

It has long been known that racial bias is a common and corrupting influence in our criminal justice system. Capital punishment was effectively outlawed in the United States for four years in large part because of it in *Furman v. Georgia,* 408 U.S. 238 (1972). The death penalty in this state has been found to be unconstitutional due to evidence of pernicious and pervasive racial bias in its application in *State v. Gregory*, 427 P 3d. 621 (2018).

It is important to note in this regard that racial bias among jurors has effectively passed through even the very rigorous "death qualification" procedures which govern jury selection in capital cases. When the focus of questioning of prospective jurors is primarily on their ability to impose a death sentence and not on whether they harbor explicit or implicit bias based on race, this result is hardly surprising.

Research has consistently shown that racial bias at the very least has a strong correlation to outcomes in criminal trials and proceedings at all levels (see *McCleskey v. Kemp,* 481 U.S. 279 (1987); *State v. Gregory, supra*; COMPARATIVE REVIEW OF DEATH SENTENCES: AN EMPIRICAL STUDY OF THE GEORGIA EXPERIENCE, Baldus, et al, THE JOURNAL OF CRIMINAL LAW &

CRIMINOLOGY Vol. 74, No. 3 (1983); THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014, Beckett and Evans, (October 13, 2014) (Updated Beckett Report) [https://perma.cc/3THJ-989W]; State *v.* Quijas, 78591-5 (Wash. Ct. App. 2020)).

In addition, experience has shown that racial bias very often infects jury deliberations and ultimately verdicts. (*Tharp v. Sellers,* 538 U.S. ___(2018); *United States v. Benally,* 546 F. 3d 1230 (10th Cir. 2008); *Buck v. Davis, supra*). Without direct questioning by this court and follow up by counsel focused on surfacing and addressing implicit and explicit racial bias among prospective jurors there is every possibility that racially biased jurors will be seated on the jury in *this* case.

III.

RACIAL BIAS AMONG JURORS INFECTS DELIBERATIONS AND UNDERMINES THE VALIDITY OF VERDICTS

The United States Supreme Court has recognized that racial bias among jurors poses a serious risk to the right to trial under the Sixth Amendment. This is a risk that requires particular attention by court. "All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution." *Pena-Rodriguez v. Colorado,* 580 U.S. ____(2017). The Court in *Pena-Rodriguez* regarded the possibility that racial bias may have influenced a criminal verdict as so dire a concern that it created an exception to the centuries-old rule (codified in Evidence Rule 606(b)) that prohibited jurors from impeaching their verdicts by revealing details of their deliberations. Judges are now permitted to consider affidavits from jurors in motions for new trials when racial bias may have played a part in the deliberations of a jury in reaching a guilty verdict in a criminal case.

The United States Supreme Court has repeatedly stressed that racial bias must be addressed in the criminal justice system and has endeavored to eradicate it. As Justice Powell wrote in *McCleskey v. Kemp, supra,*

> "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. *Batson v. Kentucky,* 476 U.S. 79, 85 (1986). Our efforts have been guided by our recognition that the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice, *Ex parte Milligan,* 4 Wall. 2, 123 (1866). *See Duncan v. Louisiana,* 391 U.S. 145, 155 (1968). Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." *Strauder v. West Virginia,* 100 U.S. 303, 309 (1880)." [*McCleskey v. Kemp, supra,* at pg. 309-310]

IV.

THE COURT HAS A TEMPLATE TO SURFACE AND ADDRESS EXPLCIT AND IMPLICIT BIAS

This court has both the authority and the procedural framework to conduct questioning and to permit questioning by counsel of prospective jurors on the issue of explicit and implicit bias. The case law that governs for cause challenges to prospective jurors based upon their views on the death penalty in the "death qualification" process of capital trials provides that authority and framework. The standard as articulated in *Wainwright v. Witt,* 469 U.S. 412 (1985), with slight alteration to reflect that racial bias cannot play *any role* in a juror's weighing of the evidence or in deliberations, can serve as the model for the court and counsel's inquiries. The Defense urges the court to use the following standard in assessing whether a juror should be removed for cause due to implicit or explicit racial bias:

> *Will the juror's explicit or implicit views on race prevent or impair the performance of their duties as a juror in accordance with the court's instructions and the juror's oath.*

As with "death qualification", this standard would not require that the juror's racial bias be proved with "unmistakable clarity" by statements that explicitly exhibit racial bias, but may also be shown implicitly by the juror's responses to questioning by the court and counsel that reveal racial bias.

As Justice Rehnquist observed in *Witt:*

> "[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Wainwright v. Witt, id* at 424-425)

Just as is the case with a prospective juror's feelings about the death penalty, and in fact to a greater degree when they are faced with reflecting on whether they harbor racially biased views, jurors may be unwilling or unable to articulate the true nature of those feelings. Nevertheless, a juror's responses to questions which exhibit a reliance or belief in racial stereotypes (for example) will often clearly reveal implicit racial bias that will lead the court to conclude that the juror will be unable to faithfully and impartially apply the law.

V.

PROSPECTIVE JURORS WHO HARBOR RACIAL BIAS AND THEREFORE CANNOT BE IMPARTIAL MUST BE EXCUSED BY THE COURT FOR CAUSE

As noted above, at the most fundamental level, the Sixth Amendment right to trial requires that the trier of fact be fair, impartial and unbiased. As the Supreme Court stated in *Witt,* "Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts." (*Wainwright v. Witt, supra,* at 423).

A juror who is biased based upon the immutable characteristic of race cannot fairly judge a defendant based upon the evidence and the law. To a lesser or greater extent, such a juror will judge the defendant (and likely the witnesses at trial as well) based upon the color of their skin. Whether that juror is racially biased to a lesser or greater extent is of no moment. *Any* bias based on race is impermissible and inconsistent with the Sixth Amendment.

Just as is true when a juror exhibits any other bias for or against a party to an action, a juror who exhibits racial bias must be excused for cause. Such a juror simply cannot conscientiously apply the law and find the facts.

VI.

THE COURT MUST TAKE A PROACTIVE ROLE IN PREVENTING RACIAL BIAS FROM PLAYING ANY PART IN JURY DELIBERATIONS IN THIS CASE

The cases and studies cited above clearly show that racial bias has infected and continues to infect the criminal justice system. This should come as no surprise for two reasons. First, our juries reflect the feelings, views and biases of the community from which the are drawn. No one can seriously argue that racism and racial bias do not exist in the United States. These issues are pervasive and persistent, despite all our efforts to overcome them. It would be unreasonable to assume that randomly selected prospective jurors will not share the same characteristics present in the wider community.

Second, courts generally do not question prospective jurors in any meaningful way on explicit or implicit racial bias. Asking a prospective juror, "Can you put aside your opinions and feelings and judge this case impartially based on the evidence and the law?" is not a question that invites serious reflection or a candid response. It asks for a "yes" and it very often gets exactly that.

For these reasons, in addition to questioning prospective jurors on the issue of racial bias, the Defense is requesting that the court incorporate the two jury instructions attached to this motion in Appendix A. These instructions are designed to clearly impress upon the jurors the necessity to reflect upon and disclose during the jury selection process any implicit or explicit racial bias they may harbor. Further, the second instruction reinforces these points and directs jurors to disclose to the court any comments made by any juror during deliberations which indicate racial bias. The intent of this second instruction is to prevent any such comments being made in the first place and, if they are made, to prevent them from infecting the jury's deliberations.

In sum, it is dangerous to ignore the issue of racial bias in questioning prospective jurors because by doing so, we essentially invite that bias into the jury room. As the Washington Supreme Court has said, *"*As part of their constitutional role, courts ultimately have the obligation of ensuring those before them receive due process of law." (*State v. Pierce*, NO. 96344-4, (2019); *State v. Oppelt*, 172 Wn. 2d 285, 288). This court cannot meet that obligation if it fails to address potential racial bias that may influence a juror or jurors in this case and fails to instruct the jurors against allowing such bias to play any role in their deliberations or verdict.

VII.

CONCLUSION

For all the reasons discussed above, the Defense requests that this court:

1. Question prospective jurors as part of its initial *voir dire* on the issue of racial bias, both implicit and explicit;

2. Allow follow up questioning by counsel on the issue of racial bias, both implicit and explicit, as a basis for challenges for cause;

3. Incorporate the two instructions in the attached Appendix in the jury instructions to be read by the court to the jury.

Respectfully submitted,

_____

Anne A. Advocate, Attorney at Law

Counsel for Defendant Arthur A. Accused

APPENDIX A

REQESTED INSTRUCTION 1 (TO BE READ AT THE COMMENCEMENT OF JURY SELECTION):

Prospective members of the jury: Racism has no place in our system of justice. I want you to clearly understand that you may not serve on this jury if you harbor views which cause you to be in any way prejudiced or biased based upon race. It is your duty consistent with your oath that you honestly reflect upon and truthfully disclose any potential bias or prejudice you may hold based upon race during the *voir dire* process.

Any prospective juror who fails to disclose such racial prejudice or bias and is thereafter selected to deliberate in this matter will be acting to subvert justice and will violate their oath and the direct order of this court.

Statements made by any juror during deliberations which exhibit racial prejudice or bias should be immediately brought to the attention of the court. Were you to fail to report such statements and/or allow them to in any way influence your deliberations in this matter, you would undermine the validity of any verdict you may reach.

REQUESTED INSTRUCTION 2 (TO BE READ AT THE CLOSE OF TRIAL):

As jurors, you have sworn an oath to fairly and impartially weigh the issues in this case based upon the evidence presented and the law as I have provided it to you in these instructions. You are reminded that no racial or other bias may play any part in your deliberations. Any juror who allows implicit or explicit racial or other bias to influence their deliberations acts to subvert justice and to violate their oath. Statements made by any juror during deliberations which exhibit racial bias or prejudice must immediately be brought to the attention of the court.