

1 JEFF ADACHI, SBN #121287
Public Defender
2 City and County of San Francisco
MATT GONZALEZ
3 Chief Attorney
555 Seventh Street
4 San Francisco, CA 94103
Direct:(415) 553-9520
5 Main: (415) 553-1671

6 Attorneys for MICHAEL SMITH

7 **Superior Court of the State of California**
8 **County of San Francisco**

9 **People of the State of California,**

10 Plaintiff,

11 vs.

12 **Michael Smith,**

13 Defendant.

Ltd. Juris. No.: 16013940

**Motion to Allow Reasonable &
Effective Voir Dire on Issues of
Race, Implicit Bias & Attitudes,
Experiences and Biases
Concerning African Americans.**

Date:
Time:
Dept:

16 To the District Attorney of San Francisco and to the above-entitled Court:

17 The defendant Michael Smith hereby moves for an extended voir dire, based on the
18 specific facts of this case and the need to adequately question the jurors on their ability to
19 be fair and impartial in this case. Defendant specifically requests up to 90 minutes with
20 the first 24 jurors, and 45 minutes for each group of jurors thereafter. The legal
21 justification for this request is set forth below.

22
23 **1. Introduction**

24 Michael Smith is accused of violating Penal Code § 243(six counts) and 148 (one
25 count). The alleged facts contained in the police report are as follows:

26 On July 29, 2016, BART officers received a call that two suspects had threatened to
27 rob a man and that a black male wearing a Mickey Mouse shirt, tan shorts and a backpack
28 was armed with a gun. That call was made by Gilbert Rodriguez, who is identified as a

1 white male in the police report. Officers Trabanino, Wilson, Chung and Velasquez-Ocha
2 responded to the Embarcadero BART Station. Immediately upon seeing Michael Smith
3 and his girlfriend, Andrea Appleton, who was pregnant at the time, they ordered them to
4 the ground at gunpoint. They then took Mr. Smith down to the ground forcibly and three
5 officers jumped on top of him. After a brief struggle, Mr. Smith was taken into custody.
6 No firearm was found on Mr. Smith. Mr. Smith is an African-American male, age 22, as
7 is his girlfriend Andrea Appelton.

8 In this motion, Mr. Smith requests time to conduct voir dire in this case on the
9 following issues: 1) race and racism; 2) jurors' knowledge and awareness of implicit or
10 explicit bias and 3) attitudes, experiences and biases concerning African Americans.

11 **2. Argument**

12 **A. The Right to an Impartial Jury is a Fundamental Due Process Right**

13 In *Rosales-Lopez*,¹ the U.S. Supreme Court recognized voir dire plays a critical
14 function in assuring a criminal defendant that his Sixth Amendment right to an impartial
15 jury will be honored. A defendant is entitled to question prospective jurors on the issue
16 of possible racial bias.² In *Taylor*, the California Supreme Court, citing *Mu'Min v.*
17 *Virginia*,³ notes broadly that “the 14th Amend[ment] requires inquiry into racial prejudice
18 in cases involving a black defendant accused of violent crimes against a white victim.”⁴
19 To be sure, inquiries on voir dire regarding jurors’ racial biases are not limited to capital
20 cases.⁵ In *Wilborn*, an African–American defendant’s trial strategy was to challenge the
21 credibility of the white officers who stopped and then arrested him for a drug offense;
22 defense counsel asked that the prospective jurors be questioned about racial bias, but the
23 trial court refused to inquire into the subject, saying it “would rather not get into race.”⁶
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26 ¹ *Rosales-Lopez v. U. S.* (1981) 451 U.S. 182, 188.

27 ² *People v. Taylor* (2010) 48 Cal.4th 574, 608.

28 ³ *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424.

⁴ *People v. Taylor, supra*, 48 Cal. 4th at 608.

⁵ *See, e.g., People v. Wilborn* (1999) 70 Cal.App.4th 339, 343-346.

⁶ *Id.* at 345.

1 The Court of Appeal reversed concluding that under the circumstances of the case, the
2 trial court had an obligation to make “some inquiry”⁷ into racial bias and “[b]ecause none
3 was made, the appellate court concluded, the defendant was deprived of his right to an
4 impartial jury.”⁸

5 As demonstrated in the many cases that have been overturned based on the denial of
6 proper voir dire on the issue of racial bias, the trial judge’s exercise of discretion in the
7 questioning of prospective jurors during voir dire commands deference from an appellate
8 court, but it is not without limit.⁹ “[W]ith the heightened authority of the trial court in the
9 conduct of voir dire ... goes an increased responsibility to assure that the process is
10 meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of
11 prospective jurors.”¹⁰

12 Where racial bias is concerned, the judge’s duty to inquire comes from California law
13 as well as from the Sixth and Fourteenth Amendments to the United States Constitution.¹¹
14 “If the judge fails so abjectly in this duty that prospective jurors can conceal racial bias
15 with impunity, the judge’s failure violates the defendant’s right to a fair and impartial
16 jury and renders the ensuing trial fundamentally unfair.”¹² Without an adequate voir dire,
17 the trial *judge’s* responsibility to remove prospective jurors, who will not be able to
18 impartially follow the court's instructions and evaluate the evidence, cannot be fulfilled.¹³

21 ⁷ *Id.* at 348.

22 ⁸ *Id.*

23 ⁹ *People v. Mello* (2002) 97 Cal.App.4th 511, 516 citing: *Mu’Min v. Virginia*, *supra*, 500
24 U.S. at 424; *People v. Holt* (1997) 15 Cal.4th 619, 660-661; *People v. Wilborn*, *supra*, at
25 343-346.

26 ¹⁰ *Id.* at 516 citing: *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.

27 ¹¹ *People v. Mello*, *supra*, at 516; *Mu’Min v. Virginia* 500 U.S. 415, 424; *People v. Holt*
28 15 Cal.4th 619, 660-661; *People v. Wilborn* 70 Cal.App.4th 339, 343-346.

¹² *Id.* citing: *People v. Holt*, *supra*, 15 Cal.4th at 661; *People v. Wilborn*, *supra*, 70
Cal.App.4th at 346.

¹³ *Rosales-Lopez*, *supra*, at 188.; See also: *Connors v. United States* (1895) 158 U.S. 408,
413.

1 Similarly, lack of adequate voir dire impairs the *defendant's* right to exercise peremptory
2 challenges.¹⁴

3 In *Swain v. Alabama*,¹⁵ the Court noted the connection between voir dire and the
4 exercise of peremptory challenges: "The voir dire in American trials tends to be extensive
5 and probing, operating as a predicate for the exercise of peremptories"¹⁶ "[A]
6 suitable inquiry is permissible in order to ascertain whether the juror has any bias,
7 opinion, or prejudice that would affect or control the fair determination by him of the
8 issues to be tried."¹⁷

9 Recently, the California Supreme Court noted in *In re Boyette* that a "lack of adequate
10 voir dire impairs the defendant's right to exercise peremptory challenges where provided
11 by statute or rule. The ability of a defendant, either personally, through counsel, or by the
12 court, to examine the prospective jurors during voir dire is thus significant in protecting
13 the defendant's right to an impartial jury."¹⁸ Voir dire provides a means of discovering
14 actual or implied bias and a firmer basis upon which the parties may exercise their
15 peremptory challenges intelligently.¹⁹ Indeed, "voir"²⁰ means "to see" and "dire"²¹
16 means "to say" which suggests a duality; this duality is essential to the process of jury

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18 ¹⁴ *Id.*

19 ¹⁵ *Swain v. Alabama* (1965) 380 U.S. 202.

20 ¹⁶ *Id.*, at 218-219.

21 ¹⁷ *Mu'Min v. Virginia* (1991) 500 U.S. 415, 422.

22 ¹⁸ *In re Boyette* (2013) 56 Cal.4th 866, 888.

23 ¹⁹ *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602 (1976) (voir dire
24 "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors
25 that would dictate disqualification for cause"); *United States v. Whitt*, 718 F.2d 1494,
26 1497 (10th Cir.1983) ("Without an adequate foundation [laid by voir dire], counsel cannot
27 exercise sensitive and intelligent peremptory challenges").

28 ²⁰ *Voir Definition*, CollinsDictionary.com,
<http://www.collinsdictionary.com/dictionary/french-english/voir> (last visited Aug. 23,
2016).

²¹ *Dire Definition*, CollinsDictionary.com,
<http://www.collinsdictionary.com/dictionary/french-english/dire> (last visited Aug. 23,
2016).

1 selection. For if conducted properly, voir dire can inform litigants about biases of
2 potential jurors; and it can also enlighten prospective jurors that reliance upon
3 stereotypical and pejorative notions about a particular gender or race are both
4 unnecessary and unwise.

5 **B. Code of Civil Procedure Section 223 Allows Counsel to Examine Any and**
6 **All Prospective Jurors.**

7 Civ. Proc., section 223, amended in 2000, provides that counsel for each party, on
8 completion of initial examination by the court, "*shall have the right to examine*, by oral
9 **and** direct questioning, **any and all of the prospective jurors.**"²² This amendment
10 eliminated the previous need for counsel to demonstrate good cause to be allowed to
11 examine prospective jurors that existed for a short window of time. Defense counsel is
12 entitled to a "reasonable inquiry" into specific legal doctrines that are both "material to
13 the trial and controversial."²³ A doctrine is considered "controversial" if it is likely to
14 invoke strong feelings and resistance to [its] application."²⁴ "[L]ack of adequate voir dire
15 impairs the defendant's right to exercise peremptory challenges where provided by
16 statute or rule . . ." ²⁵ The statute is clear that the defense shall have the right to examine
17 any and all prospective jurors. This mandate is not met with a limitation of voir dire
18 where the venire will consist of 18-24 potential jurors. It must be that if everyone is to be
19 examined, particularly in a serious case where bias is a component, then counsel must be
20 given a significant amount of time in order for the court to abide by this statute. To be
21 sure, at the very least, counsel cannot meaningfully discuss the potential bias in this case
22 without having a seven to ten-minute discussion with each potential juror. Therefore, the
23 request for four hours of voir dire appears to be proper and sufficient.

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27 ²² Code of Civil Procedure section 223 (emphasis added).

28 ²³ *People v. Balderas* (1985) 41 Cal.3d 144, 183-184; *People v. Love* (1960) 53 Cal.2d
843, 852, fn. 1.

²⁴ *People v. Johnson* (1989) 47 Cal.3d 1194, 1225.

²⁵ *Rosales-Lopez v. U.S.*, *supra*, at 188.

1 **C. Extensive Questioning on Jurors' Racial Biases Must Be Allowed in this**
2 **Case Which Alleges an Assault on BART Police by an African American**
3 **Defendant.**

4 The U.S. Supreme Court has held that, upon request, voir dire questions concerning
5 race must be allowed upon a showing that the circumstances of the case might suggest a
6 'reasonable possibility' that racial prejudice would influence the jury.²⁶

7 In *Aldridge v. U.S.*, the U.S. Supreme Court reversed an African American
8 defendant's murder conviction where the trial judge refused a defense request to question
9 jurors on racial prejudice.²⁷ *Aldridge* was convicted of first degree murder and sentenced
10 to death in the killing of a white police officer. In rejecting the government's argument
11 that allowing inquiry into racism would be detrimental to the administration of the law in
12 the courts, the Court said: "We think that it would be far more injurious to permit it to be
13 thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors
14 and that inequities designed to elicit the fact of disqualification were barred."²⁸ Allowing
15 questioning of jurors on the issue of racial bias is not confined to serious or violent cases.

16 For instance, in *Ham v. South Carolina*²⁹, where an African American civil rights
17 activist was charged with marijuana possession, the court held that a trial judge's refusal
18 to question prospective jurors as to possible racial prejudice violated the defendant's
19 constitutional rights.³⁰ The Court went further than it had in *Aldridge*, holding that "the
20 Due Process Clause of the Fourteenth Amendment requires that ... the [defendant] be
21 permitted to have the jurors interrogated on the issue of racial bias."³¹ The law has
22 evolved significantly from *Ham* to the present with a few, for lack of a better term,
23 hiccups along the way.

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26 ²⁶ *Id.* at 192.

27 ²⁷ *Aldridge v. U.S.* (1931) 283 U.S. 308.

28 ²⁸ *Id.* at 314.

29 ²⁹ *Ham v. South Carolina* (1973) 409 U.S. 524, 529.

30 ³⁰ *Ham v. South Carolina* (1973) 409 U.S. 524, 529.

31 ³¹ *Id.* at 527.

1 Just three years after *Ham*, in *Ristaino v. Ross*,³² the United States Supreme Court
2 dealt with two discreet questions. “[W]hether a defendant is entitled to require the asking
3 of questions specifically directed to racial prejudice and whether *Ham* announced a
4 requirement applicable whenever there may be a confrontation in a criminal trial between
5 persons of different races or ethnic origins.”³³ The court held, on the former issue, that
6 such an inquiry is not always required absent a showing of a significant likelihood that
7 racial prejudice might infect the trial.³⁴ In *Ristaino*, defendant failed to adequately
8 articulate that there were racial factors in play in his particular case. He then relied on the
9 status of the victim as a “security guard acting as a policeman”³⁵ to justify his request for
10 inquiry on race. It is not surprising that the trial court allowed inquiry as to bias
11 regarding police officers, but not as to race.³⁶ It is equally understandable that the trial
12 court and the High Court found that the defendant’s proffer was inadequate where the
13 defense attorney himself, inartfully stated: “[t]here is only one thing. The only reference
14 I would make to the facts of this case—the victim[]s being white, and that he was a
15 security guard in uniform and acting as a policeman.”³⁷ With nothing more to support a
16 racial component to the case, the Court found that the trial court’s decision to not allow
17 questioning based on racial bias was within the Constitution.³⁸

18 On the latter issue, the *Ristaino* court answered that *Ham* did not announce a
19 requirement of “asking . . . a question specifically directed to racial prejudice” whenever
20 there is a possibility of “a confrontation in a criminal trial between persons of different
21 races or different ethnic origins.”³⁹ The *Ristaino* Court explained that the determination
22 of whether questions directed at ascertaining racial prejudice amongst prospective jurors
23 are warranted is based upon the specific circumstances and “racial factors” of each case.⁴⁰

24 ³² *Ristaino v. Ross, supra.*

25 ³³ *Id.*

26 ³⁴ *Id.* at 598.

27 ³⁵ *Id.* at 599 (J, Marshall dissenting).

28 ³⁶ *Id.* at 598.

³⁷ *Id.* at 591 n.2.

³⁸ *Id.* at 598.

³⁹ *Ristaino v. Ross, supra*, at 590.

⁴⁰ *Id.* at 598.

1 As this area of law evolved from *Aldridge* to *Rosales-Lopez* and beyond, what has
2 become abundantly clear is that the examination of prospective jurors on the issue of race
3 is warranted in cases involving a violent criminal offense and racial difference between
4 defendant(s) and the complaining witness(s). As stated in *Rosales-Lopez*, “*Aldridge* and
5 *Ristaino* together fairly imply that federal trial courts **must make** such an inquiry when
6 requested by a defendant accused of a violent crime and where the defendant and the
7 victim are members of different racial and ethnic groups.”⁴¹ As the High Court
8 articulated, although judges are understandably hesitant to discuss the possibility that
9 justice in a court of law may turn upon the pigmentation of skin, “this must be balanced
10 against the criminal defendant’s perception that avoiding this inquiry does not eliminate
11 the problem, and that his trial is not the place in which to elevate appearance over
12 reality.”⁴² In re-stating the principle announced in *Aldridge*—that it would be “far more
13 injurious to permit it to be thought that persons entertaining a disqualifying prejudice
14 were allowed to serve as jurors and that inequities designed to elicit the fact of
15 disqualification were barred”—The Court once again acknowledged the critical
16 importance of conducting voir dire regarding racial bias.⁴³ The *Rosales-Lopez* Court
17 articulated a standard that if the circumstances indicate that there was a ‘reasonable
18 possibility’ that racial prejudice would influence the jury,⁴⁴ then inquiry as to racial bias
19 would be required. *Rosales-Lopez* further explained:

20 This supervisory rule is based upon and consistent with the
21 “reasonable possibility standard” articulated above. It remains an
22 unfortunate fact in our society that violent crimes perpetrated against
23 members of other racial or ethnic groups often raise such a
24 possibility. There may be other circumstances that suggest the need
25 for such an inquiry, but the decision as to whether the total
26 circumstances suggest a reasonable possibility that racial or ethnic
27 prejudice will affect the jury remains primarily with the trial court,
28 subject to case-by-case review by the appellate courts.⁴⁵

⁴¹ *Rosales-Lopez v. U.S.*, *supra*, at 192 (emphasis added).

⁴² *See, e.g.*, *Rosales-Lopez*, *supra*, at 191.

⁴³ *Id. citing: Aldridge*, *supra*, at 314-315.

⁴⁴ *Id.* at 192.

⁴⁵ *Id.*

1 In order for a court to abide by the Constitutional standards of *Aldridge* and its
2 progeny, an inquiry regarding race bias must be made, upon the request of the defendant,
3 where there is a crime of violence involving a defendant and victim of different races,
4 and there is a reasonable possibility that racial prejudice would influence the jury. In the
5 case now before this court, such is the circumstance. Defendant is charged with
6 committing battery on BART police in an incident involving allegations made by a white
7 male; he is African-American, the key witness is white and the complaining witnesses are
8 White, Black, Latino and Asian. There is no question that the issue of race must be
9 addressed in voir dire. To further make the point, there is a plethora of psychological
10 research studies and papers published after *Aldridge*, *Ham*, *Ristaino*, and *Rosales-Lopez*
11 that support this position. Not only has the case law evolved, but our understanding of
12 bias, implicit bias, psychological factors, and how those factors could influence a jury
13 and detrimentally impact an African American defendant are now well established.
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15 **D. Defendant Must Be Allowed to Address Implicit Bias in Voir Dire Due to**
16 **the Potential Impact that Race May Play in the Outcome of This Trial.**

17 The cases above make it clear that when racial attitudes may have an impact on
18 the jurors' judgment and decision-making in a particular case, questioning regarding race
19 must be allowed. California law is in accord.⁴⁶

20 voir dire examination serves to protect [a criminal defendant's right
21 to a fair trial] by exposing biases, both known and unknown on the
22 part of potential jurors. Demonstrated bias in the responses to
23 questions on voir dire may result in a juror's being excused for
24 cause. Hints of bias not sufficient to warrant challenge for cause may
25 assist parties in exercising their peremptory challenges.⁴⁷

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28 ⁴⁶ *People v. Wilborn*, *supra*, 70 Cal.App.4th at 339; *People v. Mello*, *supra*, 97
Cal.App.4th at 516; *People v. Holt*, *supra*, 15 Cal.4th at 660-661.

⁴⁷ *In re Boyette*, *supra*, at 888-889.

1 Accordingly, in questioning the jurors on racial bias, defense counsel should also be
2 allowed to voir dire on the subject of not only explicit, but implicit bias. This takes time
3 and effort but is essential.

4 Research by psychologists have clearly demonstrated that race has the potential to
5 impact trial outcomes.⁴⁸ According to the National Center for State Courts, unlike
6 explicit bias—which reflects the attitudes or beliefs that one endorses at a conscious
7 level—implicit bias is the bias in judgment and/or behavior that results from subtle
8 cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at
9 a level below conscious awareness and without intentional control. Implicit bias may
10 develop from a history of personal experiences that connect certain racial groups with
11 fear or other negative affect or stereotypes. Recent developments in the field of cognitive
12 neuroscience demonstrate a link between implicit (but not explicit) racial bias and neural
13 activity in the amygdala, a region in the brain that scientists have associated with
14 emotional learning and fear conditioning.⁴⁹

15 Although people may not even be consciously aware that they hold biased attitudes,
16 over the past few decades, scientists have developed new measures to identify these
17 unconscious biases, including the Implicit Association Test (IAT). The IAT measures the
18 amount of time that an individual takes to associate negative and positive words with
19 images of African American and white individuals viewed on a computer screen. Of the
20 14 million who have taken the race IAT, seventy-five percent have demonstrated an
21 implicit bias favoring whites and disfavoring African Americans.⁵⁰

25 ⁴⁸ Samuel R. Sommers, *Race and the decision making of jurors*. The British
26 Psychological

27 Society, *Legal and Criminological Psychology*, 2007, 12, 171-187.

28 ⁴⁹ *Helping Courts Address Implicit Bias*, National Center for State Courts,
www.ncsc.org/ibreport

⁵⁰ Banaji & Greenwald, *Blindspot: Hidden Biases of Good People* 69 (2013)

1 In the context of juror decision-making, implicit bias studies demonstrate a tendency
2 to implicitly associate African Americans with crime⁵¹ and racial biases in the context of
3 detain-release decisions, verdicts, and sentencing.⁵² However, the great body of research
4 has shown that effect of implicit bias can be substantially reduced by taking certain
5 steps.⁵³ Among them is the simple task of making people aware of their biases; once
6 people are made aware of their own implicit biases, they can begin to consider ways in
7 which to address them and ameliorate any unintended potential impact the bias may have
8 on their decision-making. For instance, according to the National Center for State Courts,
9 scientists have uncovered several promising implicit bias intervention strategies that may
10 help individuals who strive to be egalitarian: 1) consciously acknowledge group and
11 individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather
12 than a color-blindness strategy in which one tries to ignore these differences); 2)
13 routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful,
14 deliberative, and self-aware process for inspecting how one's decisions were made); 3)
15 identify sources of stress and reduce them in the decision-making environment; 4)
16 identify sources of ambiguity and impose greater structure in the decision-making
17 context; 5) institute feedback mechanisms; and 6) increase exposure to stereotyped group
18 members (e.g., seek out greater contact with the stigmatized group in a positive context).
19 Thus, during voir dire, counsel can help jurors avoid relying on unconscious bias by
20 making them aware that such biases exist.⁵⁴ By simply raising awareness of implicit bias
21 in voir dire, it will not only allow for more seamless disclosure of possible biases by

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23 ⁵¹ Eberhardt, J., Goff, P., Purdie, V., & Davies, P. (2004). *Seeing Black: Race, crime, and*
24 *visual processing*. *Journal of Personality and Social Psychology*, 87, 876-893.

25 ⁵² Gazal-Ayal, O., & Sulitzeanu-Kenan, R. (2010). *Let my people go: Ethnic in-group*
26 *bias in judicial decisions - Evidence from a randomized natural experiment*. *Journal of*
27 *Empirical Legal Studies*, 7, 403-428.

28 ⁵³ Casey, P., Warren, R., Cheesman, F., & Elek, J. (2012). *Helping courts address*
implicit bias: Resources for education. Williamsburg, VA: National Center for State
Courts.

⁵⁴ Casey, P., Warren, R., Cheesman, F., & Elek, J. *Helping courts address implicit bias:*
Resources for education. Williamsburg, VA: National Center for State Courts.

1 potential jurors, but it will also allow for self-reflection that will guard against having
2 these biases play a role in the decision-making process.

3 Counsel should be given some latitude in questioning jurors on their implicit biases.
4 As reported by the National Center for State Courts "[s]cientists realized long ago that
5 simply asking people to report their attitudes was a flawed approach; people may not
6 wish or may not be able to accurately do so. This is because people are often unwilling to
7 provide responses perceived as socially undesirable and therefore tend to report what they
8 think their attitudes should be rather than what they know them to be."⁵⁵ In the context of
9 voir dire, this means that counsel should be given the opportunity to explore jurors'
10 implicit biases, such as their emotional reaction to a young African American being
11 charged with a crime and certain assumptions they might make about him or her because
12 of race, or their experiences with young African American men and whether they are
13 afraid of such young men based on their initial perceptions.

14 Studies using mock juries have demonstrated repeatedly that the race of the defendant
15 and the complaining witness are salient factors that affect the jurors' perception and
16 judgment of the facts of the case and evaluation of the testimony.⁵⁶ These studies have
17 shown that the race of a defendant influences the decisions of many criminal juries and
18 that juror bias is often influenced by the specific racial issues involved in a given trial.⁵⁷
19 This is particularly true where the jury is not diverse and does not include members of the
20 same race as the defendant. "The problem of the effect of the racial composition of the
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23 ⁵⁵ *Id.*

24 ⁵⁶ Baldus, D.C., Woodworth, G & Pulaski C.A. Jr. (1990) *Equal justice and the death*
25 *penalty: A legal and empirical analysis*. Boston: Northeastern University Press; Guinther,
26 J. (1988) *The jury in America*. New York: Facts on File Publications; Lynch M. &
27 Haney C. (2000) *Discrimination and instructional comprehension: Guided discretion,*
racial bias, and the death penalty. *Law and Human Behavior*, 24, 337-358.

28 ⁵⁷ Hans V.P. & Vidmar, N. (1986) *Judging the jury*. New York: Plenum; King, N.J.
(1993) *Postconviction review of jury discrimination: Measuring the effects of juror race*
on jury decisions. *Michigan Law Review*, 92, 63-130.

1 jury and its verdict is most noticeable when the trial involves a blatantly racial issue."⁵⁸
2 Other studies have found that when descriptions of the crime are identical, white jurors
3 are more likely to vote to convict African American defendants than white defendants
4 and give longer sentences to African American defendants.⁵⁹ Given the numerous
5 studies, it is clear that jurors' negative attitudes regarding defendants of a different race—
6 particularly African Americans—can be ferreted out and overcome through sensitive and
7 probing questions on voir dire.⁶⁰

8 Jury composition affects the outcome of cases because "there is an even more extreme
9 form of attribution error that whites tend to commit when they interpret and judge the
10 behavior of minority group members.⁶¹ This tendency has been coined the "ultimate
11 attribution error" because it is so pervasive and pernicious.⁶² In a recent study that
12 examined the impact of jury racial composition on trial outcomes using felony trials in
13 Florida over a ten year period between 2000-2010, researchers found that juries formed
14 from all-white jury pools convict African American defendants 16% more than white
15 defendants. However, that same study found that this gap in conviction rates is entirely
16 eliminated when the jury pool includes at least one African American member. The
17 findings showed that "the application of justice is highly uneven and raise obvious
18 concerns about the fairness of trials in jurisdictions with a small proportion of African
19 Americans in the jury pool."⁶³ Studies have also shown that diversity of the jury affects

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21 ⁵⁸ Fukurai, H., Butler, E.W. and Krooth, R (1993) *Race and the jury: Racial disenfranchisement and the search for justice*. New York: Plenum Press.

22 ⁵⁹ Foley, L.A. & Chamblin, M. H. (1982) *The effect of race and personality on mock jurors' decisions*, *Journal of Psychology*, 112, 47-51; Klein, K & Creech. B. (1982) *Race, rape and bias: Distortion of prior odds and meaning changes*. *Basic and Applied Social Psychology*, 3, 21-33.

24 ⁶⁰ Lynch M. & Haney C., *supra*, *Discrimination and instructional comprehension: Guided discretion, racial bias, and the death penalty*. *Law and Human Behavior*, 24, at 355.

25 ⁶¹ Haney, C. (2004) *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathetic Divide*. *De Paul Law Review* Vol. 53 Num. 4 p. 1583.

26 ⁶² *Id.* at 1583 *citing*: Anthony Amsterdam & Jerome Bruner, *MINDING THE LAW* 247 (2000).

27 ⁶³ *Id.*

1 the quality of the deliberations. In San Francisco, where 57% of the persons charged
2 with crimes are African American, African Americans constitute 5.7% of the population
3 and an even smaller percentage of the jury pool.⁶⁴ "Compared to all-white juries, racially
4 mixed juries tended to deliberate longer, discuss more case facts, and bring up more
5 questions about what was missing from the trial."⁶⁵

6 Thus, it is critically important that, in a case involving the accusation of a serious
7 crime of violence, coupled with the racial difference between the complaining witness,
8 who is Asian, and the defendants, who are African American, both the defense and the
9 prosecution are given sufficient time to voir dire the jury on the issues of race and racism,
10 both explicit and implicit, thereby enabling the jurors to express their feelings and
11 attitudes towards the defendant⁶⁶, the charges in this case⁶⁷, defendant's ethnicity and
12 other issues related to bias they may feel.

13 **3. Conclusion**

14 For the foregoing reasons, Defendant requests up to 90 minutes with the first 24
15 jurors, and 45 minutes for each group of jurors thereafter.

16 Counsel will be respectful of the court's time and the prospective jurors' attention.
17 Counsel does not seek a limitless voir dire, but rather requests that counsel be given leave
18 to question each juror in both a meaningful and efficient manner.

19 Dated:

Respectfully Submitted

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21 _____
22 JEFF ADACHI
23 Public Defender
24 Attorney for MICHAEL SMITH

25 ⁶⁴ Anwar, S., Bayer, P & Hjalmarsson, R. (2010) Impact of Jury Race in Criminal Trials,
26 The Quarterly Journal of Economics, Oxford Journals.

27 ⁶⁵ Samuel R. Sommers, Race and Juries: The Effects of Race-Salience and Racial
28 Composition on Individual and Group Decision-Making (2002) (unpublished Ph.D.
dissertation, University of Michigan) (on file with the Chicago-Kent Law Review).

⁶⁶ *People v. Simon* (1927) 80 Cal.App. 675, 685.

⁶⁷ *People v. Harrison* (1910) 13 Cal.App. 555, 558.

1 **Proof of Service**

2 I, the undersigned, say:

3 I am over eighteen years of age and not a party to the above action. My business
4 address is 555 Seventh Street, San Francisco, California 94103.

5 On _____, I personally served copies of the attached on the following:

6 ATTN:
7 San Francisco District Attorney, 2nd Floor
8 850 Bryant Street
9 Francisco, CA 94103

10 I declare under penalty of perjury that the foregoing is true and correct.

11 Executed on _____ in San Francisco, California.

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