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Arthur H. Patterson

Nancy L. Neufer

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# REMOVING JUROR BIAS BY APPLYING PSYCHOLOGY TO CHALLENGES FOR CAUSE

*Arthur H. Patterson, Ph.D. and Nancy L. Neuffer, M.S.†*

## INTRODUCTION

Recent attention has been focused on the use of peremptory challenges in both civil and criminal litigation.<sup>1</sup> Much of this attention was triggered by *Batson v. Kentucky*,<sup>2</sup> and a concern that the use of potentially discriminatory peremptory challenges could influence the composition of, and thus the fairness of, seated juries. Interest in the impact of peremptory challenges on the impartiality of juries has also been heightened by increasing concern about the role of jury consultants<sup>3</sup> and the possibility that these consultants can assist trial counsel by actually creating biased juries.<sup>4</sup>

### I. PEREMPTORY CHALLENGES AS AN INSUFFICIENT METHOD

Although primary focus on the use of peremptory challenges has been during the *voir dire* process of jury selection, we believe that this attention is misplaced in an effort to ensure that the jury selection process results in truly fair and impartial juries.<sup>5</sup> Rather, a challenge for cause is a more appropriate method for minimizing or preventing biased individuals from being seated for jury duty.

The extensive procedures taken to ensure that fair juries sit for trial is instrumental to justice and the appearance of justice in our trial system. However, the importance of *each* member of a jury being impartial is

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† The authors are jury consultants with FTI Corporation, State College, Pennsylvania. Dr. Patterson received his Ph.D. in psychology from Northwestern University, and was formerly a member of The Administration of Justice Faculty of Pennsylvania State University. Ms. Neuffer received her M.S. in psychology from Pennsylvania State University.

<sup>1</sup> See Jeffrey J. Rachlinski, *Scientific Jury Selection And The Equal Protection Rights of Venire Persons*, 24 PAC. L.J. 1498 (1993).

<sup>2</sup> 476 U.S. 79 (1986), modified by *Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>3</sup> See STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 114 (1994).

<sup>4</sup> See generally Rachlinski, *supra* note 1.

<sup>5</sup> It is interesting to note that neither Stephen Adler nor Jeffrey Rachlinski (nor any other authors) have, despite extensive discussions of the role of jury consultants, demonstrated that such consultants have any real impact on the fairness of impaneled juries. The reason for this is that the value of jury consultants for jury selection is to aid in identifying *potentially biased* jurors, and to assist in implementing the "de-selection" procedure which actually occurs in jury selection to remove unfair jurors.

highlighted by the psychological research that demonstrates that when groups, such as juries, are used to make judgments, their level of performance typically does *not* rise to some higher level.<sup>6</sup> Rather, on difficult tasks where the solutions are not easily discernible, groups typically perform at the level of their average members.<sup>7</sup> Thus, the seating of a potentially biased juror raises grave implications for the fairness of a jury trial.

Psychologists have long studied how “information-processing”<sup>8</sup> and “decision-making are influenced by cognitive processes.”<sup>9</sup> Strong research support for the concept that bias will result from a juror’s preexisting attitude exists in the literature of social psychology. For example, Lee Ross studied social perception and found that people persevere in their initial attitudes, *even* in the face of contradictory evidence.<sup>10</sup>

Charles Lord and his associates studied the effects of prior theories on subsequently considered evidence and found that people who enter a situation with a prior attitude will interpret new information so as to strengthen that attitude.<sup>11</sup> It is important to note that even contradictory information will be interpreted to support one’s prior attitude.<sup>12</sup> Similarly, Peter Ditto and David Lopez found that information consistent with a preferred conclusion is examined less critically than is information inconsistent with a preferred conclusion.<sup>13</sup> Consequently, less information is needed to reach a preferred conclusion.<sup>14</sup>

Extensive evidence that pre-trial attitudes will impact jurors’ verdicts can be found in the research on the impact of pre-trial publicity. For example, John Carroll reviewed actual cases and experimental studies and consistently found an effect of publicity on jurors’ verdicts.<sup>15</sup>

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<sup>6</sup> See Daniel Gigone & Reid Hastie, *Proper Analysis of the Accuracy of Group Judgments*, 121 PSYCHOL. BULL. 149, 163 (1997).

<sup>7</sup> See *id.* at 166.

<sup>8</sup> See ALICE H. EAGLY & SHELLY CHAIKEN, PSYCHOLOGY OF ATTITUDES 260-61 (1993).

<sup>9</sup> See *id.* at 476.

<sup>10</sup> Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 889 (1975).

<sup>11</sup> Charles Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

<sup>12</sup> See *id.* at 2108.

<sup>13</sup> Peter Ditto & David Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568 (1982).

<sup>14</sup> See *id.* at 572.

<sup>15</sup> John Carroll et al., *Free Press and Fair Trial: The Role of Behavioral Research*, 10 LAW & HUM. BEHAV. 187, 191 (1986).

This phenomenon has been long recognized<sup>16</sup> and studied in both actual trials and laboratory research.<sup>17</sup>

It is not surprising that attitudes affect behavior.<sup>18</sup> What is surprising is the relative lack of effort by judges and trial litigators to use challenges for cause to remove prospective jurors holding potentially biasing attitudes from jury panels. While attention is focused on peremptory challenges, which are limited in some cases to as few as three per party,<sup>19</sup> jurors holding prejudicial attitudes are allowed to remain in the array, and eventually to be seated if the number of peremptory challenges is not sufficient to remove all of the biased jurors.

Such jurors remain eligible to sit on the impaneled jury by simply stating to the court that, despite having expressed prejudicial attitudes, or having had experiences highly likely to give rise to such attitudes, that they *can be* fair and impartial.<sup>20</sup> It is readily observable that people holding potentially prejudicial attitudes are regularly seated as jurors in civil and criminal trials. For example, the authors have recently observed jury selections where the following jurors were *not* removed for cause:

- ◆ a personal injury suit where the juror was currently a plaintiff in a class action medical device product liability suit;
- ◆ a race discrimination suit where the juror had been a plaintiff in a discrimination suit based on religious preference;
- ◆ a premises liability suit involving a violent crime where the juror had once been the victim of a violent crime;
- ◆ a criminal case involving a woman battered by her husband where the juror provided counseling to abused women;

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<sup>16</sup> See F. Gerald Kline et al., *Prejudicial Publicity: Its Effect on Law School Mock Juries*, 43 JOURNALISM Q. 113, 116 (1966); Bruce Hoiberg & Lloyd K. Stires, *The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. APPLIED SOC. PSYCHOL. 267 (1973); Edith Greene & Elizabeth F. Loftus, *What's New in the News? The Influence of Well-Published News Events on Psychological Research and Courtroom Trials*, 5 BASIC & APPLIED SOC. PSYCHOL. 211 (1984).

<sup>17</sup> See Geoffrey Kramer & Norbert Kerr, *Laboratory Simulation and Bias in the Study of Juror Behavior*, 13 LAW & HUM. BEHAV. 89 (1989).

<sup>18</sup> See generally ICEK AJZEN & MARTIN FISHBEIN, UNDERSTANDING ATTITUDES AND PREDICTING SOCIAL BEHAVIOR (1980); Russell Fazio & Mark P. Zanna, *Direct Experience and Attitude-Behavior Consistency*, 14 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 161, 178-202 (1981).

<sup>19</sup> See FED. R. CIV. PROC. 47(b).

<sup>20</sup> See *Swap Shop v. Fortune*, 365 S.W.2d 151, 152-54 (Tex. 1963) (in which a juror, once the trial had begun, notified the court that he had just realized that the defendant was the father-in-law of his close friend. The juror acknowledged a bias, yet was able to tell the court that this connection would not affect his ability to render a fair verdict and therefore continued to serve).

- ◆ a premises liability case involving rape where the juror stated she was inclined to make a large damages award because she was very upset by rape.<sup>21</sup>

All of the above jurors were able to be seated because they were able to say to the court that they could be fair and impartial jurors when dealing with the matter at trial. While such a statement clearly meets standard legal burdens of fairness and ability to serve as a juror, the statement fails psychological burdens of credibility.<sup>22</sup> It is of note that such a statement would generally not be considered adequate to rehabilitate a judge or lawyer who had a conflict involving the matter at hand. It would be clearly unacceptable for an officer of the court, who indicated a conflict, or a strong appearance of a conflict, to continue as a significant participant in the litigation simply because he or she made a statement indicating that he or she could “set the conflict aside and be fair and impartial.”

Yet lay jurors are allowed to make such statements. With the exception of pecuniary interests and some degree of consanguinity to a party, judges regularly allow jurors with the potential for bias to be seated.<sup>23</sup> The law fails to protect the parties of the litigation from this bias because the basic psychology underlying juror bias is not understood by court and counsel. Attorneys and judges with an understanding of the psychology of challenges for cause will be better equipped to ensure the selection of an unbiased jury.

## II. THE PSYCHOLOGY OF CHALLENGES FOR CAUSE

Thorough *voir dire*, covering details of the case and jurors' related attitudes and experiences, is an important tool for uncovering bias. However, biased jurors will still be seated if they can be rehabilitated simply by stating that they can be fair and impartial. A number of factors that impact the court and counsel's ability to seat a fair and impartial jury by relying on traditional *voir dire*<sup>24</sup> and peremptory challenges are presented below. From these factors it will be apparent that prospective jurors' statements that they can be fair and impartial must be carefully

<sup>21</sup> Case examples on file with authors.

<sup>22</sup> Whether the prospective juror states that he or she can be fair and impartial because the juror truly believes this to be true or because the juror is responding to pressure from the judge or counsel is irrelevant. Such statements are, for all but exceptional jurors, contradicted by the psychological research.

<sup>23</sup> See e.g., ADAM NOSSITER, *OF LONG MEMORY: MISSISSIPPI AND THE MURDER OF MEDGAR EVERS* (1994); JAMES R. MCGOVERN, *ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL* (1982).

<sup>24</sup> See *JURYWORK: SYSTEMATIC TECHNIQUES* (Elissa Krauss & Beth Bonora eds., 1996) (discussing the *voir dire* process from both the legal perspective—statutes and case law—and the consultant's objectives).

evaluated in light of their personal experiences and attitudes relevant to the case at trial.

#### A. LACK OF KNOWLEDGE OF OWN BIASES

Psychologists have long known that people often do not know what affects their behavior, and are largely out of touch with their own cognitive states.<sup>25</sup> In a review of the research literature on human inference and shortcomings in social judgment, Richard Nisbett and Lee Ross found that judgments are often biased by attitudes.<sup>26</sup>

Given that people are often unaware of the cognitive factors affecting their biases, it would appear that jurors would be unqualified to render an opinion as to their own ability to be fair. After all, they are placed in a position where they are asked to perform a task with which they are generally inexperienced, by following rules they have not yet been given, while applying those rules to a set of facts yet unknown to them. The unique nature of jury service strongly suggests that prospective jurors may not be accurate judges of their own ability to set aside experiences and attitudes in order to judge the facts of a case fairly and impartially.

We are familiar with numerous examples where jurors' lack of awareness of their own cognitive states rendered them biased, despite their affirmation of their ability to be fair and impartial. In one case, for example, involving a business dispute with a Japanese company as the defendant, a juror stated that he felt absolutely no bias toward the Japanese defendant.<sup>27</sup> Counsel later learned that the juror would buy an American-made product rather than a Japanese product, *even if* the Japanese product was of higher quality and lower cost.<sup>28</sup> The juror was simply unaware that he held attitudes about Japanese businesses that would impact his ability to be fair and impartial in the trial of this matter.

#### B. LIMITATIONS OF SELF-REPORT OF POTENTIALLY BIASING EXPERIENCES AND ATTITUDES

The dangers of relying on individuals' self-reports about their thoughts and behaviors are well known.<sup>29</sup> People often do not accurately remember matters on which they are being asked to report. They may not remember because they failed to store the event in memory, or be-

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<sup>25</sup> See Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231 (1977).

<sup>26</sup> RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 7 (1980).

<sup>27</sup> See text accompanying note 22.

<sup>28</sup> See text accompanying note 22.

<sup>29</sup> See Beth Azar, *Poor Recall Mars Research and Treatment*, 28 *MONITOR* 1, 29 (1977).

cause they stored it and are now unable to retrieve it, or the memory has become distorted.<sup>30</sup> The memory may, then, resurface when stimulated by trial testimony and/or the deliberation process.<sup>31</sup> Individuals also do not like to admit that they engage in undesirable actions, or report on personal and sensitive issues such as drug use, spousal abuse or abortions.<sup>32</sup>

By nature, the *voir dire* process relies entirely on self-reports by prospective jurors. The experiences and attitudes of jurors that might lead to bias are often personal and sensitive, involving such things as crime victimization, mental and physical health, prejudices regarding various races, religions, national origins, genders and sexual orientations, bankruptcy and other financial experiences, drug use, abortions, family tragedies, just to name a few. It is naive, at best, to accept jurors' claims that they can be fair and impartial in cases where their self-report of attitudes and experiences indicates a potential for bias.

### C. SOCIAL DESIRABILITY RESPONSES

During *voir dire* prospective jurors do not want to answer questions in a manner which they perceive to be socially undesirable.<sup>33</sup> Douglas Crowne and David Marlow have labeled this "social desirability," and have studied how people seek approval through giving socially desirable responses.<sup>34</sup> Many authors have noted that prospective jurors perceive admitting to bias to be socially undesirable.<sup>35</sup>

If some jurors hold attitudes that are prejudicial to one of the parties, yet believe that they will be seen as socially undesirable if they admit to being prejudiced, then some subset of those prejudiced jurors will state that they can be fair and impartial in order to obtain approval from the judge, counsel, or other jurors. Obviously, seating such a juror will result in a biased jury.

### D. SOCIAL PRESSURE TO CONFORM

Similar to social desirability, many prospective jurors will not want to appear to be deviant in any way from their fellow jurors or what they

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<sup>30</sup> See *id.* at 1.

<sup>31</sup> See generally Charles L. Gruder et al., *Empirical Tests of the Absolute Sleeper Effect Predicted From the Discounting Cue Hypothesis*, 36 J. PERSONALITY & SOC. PSYCHOL. 1061 (1978).

<sup>32</sup> See Charles F. Cannell & Robert L. Kahn, *Interviewing*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, 526-95 (Gardner Lindzey & Elliot Aronson eds., 1968).

<sup>33</sup> See DOUGLAS P. CROWNE & DAVID MARLOWE, *THE APPROVAL MOTIVE: STUDIES IN EVALUATIVE DEPENDENCE* 13 (1964).

<sup>34</sup> *Id.* at 13.

<sup>35</sup> See generally David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245 (1980).

believe to be the attitudes of their fellow jurors.<sup>36</sup> Research has shown that conformity is motivated by emotional rewards and punishments.<sup>37</sup> Conformity leads to feelings of pride, while non-conformity leads to feelings of shame.<sup>38</sup> Jurors will certainly want to avoid the "shame" of expressing bias, and therefore be deviant when other jurors state that they can be fair and impartial. Pride can be obtained by denying bias and conforming to the stereotypical role of the fair juror.

The pressure to conform is especially high when it is perceived as coming from high status individuals.<sup>39</sup> In the courtroom, the judge is perceived by jurors as a very high status person. If the judge conveys pressure to conform by declaring fairness and impartiality, it would be likely that many biased jurors would make such a declaration. It is common for judges to lecture prospective jurors on their duty to be fair and impartial, and their legal requirement to set aside any personal beliefs and follow the law as given to them by the judge.<sup>40</sup>

#### E. LYING

There is ample evidence that some prospective jurors will lie while answering questions during *voir dire*, despite being under oath. Linda Marshall conducted a study, funded by the National Institute of Justice, of actual jurors from criminal trials and found that almost one in five (18%) withheld information during questioning.<sup>41</sup> Dale Broeder conducted an empirical study of *voir dire* in twenty-three trials.<sup>42</sup> He concluded that jurors often lie during *voir dire* and noted that *voir dire* was not effective in revealing juror biases.<sup>43</sup>

There is no way of knowing if jurors are lying when they tell the court that they can be fair and impartial. However, if the juror has previously reported experiences or attitudes that predispose him or her to bias

<sup>36</sup> See Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31, 36 (1955) (for seminal social psychological research on how social pressure leads to conformity in expressed opinions).

<sup>37</sup> See Thomas J. Scheff, *Shame and Conformity: The Deference-Emotion System*, 53 AM. SOC. REV. 395, 396 (1988).

<sup>38</sup> See *id.* at 400.

<sup>39</sup> See Serge Moscovici, *Social Influence and Conformity*, in 6 THE HANDBOOK OF SOCIAL PSYCHOLOGY 347 (Lindzey et al., 3rd ed. 1985).

<sup>40</sup> Moscovici makes an important distinction between "conversion" and "compliance." *Id.* In conversion, the juror will change an opinion in order to conform. *See id.* In compliance, the juror will state that he or she can be fair and impartial in order to comply with the conformity pressure from the judge, but will still retain his or her private opinion. *See id.*

<sup>41</sup> Linda L. Marshall, *Juror, Judge, and Counsel Voir Dire Perceptions and Behavior in Two Illinois State Courts*, (1983) (unpublished partial Ph.D. dissertation, Boston University) (on file with author).

<sup>42</sup> Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

<sup>43</sup> *Id.* at 528.

in the case at trial, the potentially prejudiced party can have little confidence in the juror's statement of fairness, and can only be assured of an impartial jury if a challenge for cause is granted.

#### F. PERSEVERANCE OF BELIEFS

It is well accepted by psychologists that biases affect reasoning.<sup>44</sup> Significantly, psychologists have also studied how biases persevere in the face of contradictory evidence. Peter Ditto found that less information is needed to reach a preferred conclusion because information consistent with that conclusion is examined less critically than is inconsistent information.<sup>45</sup>

If jurors hold biases about a party or an issue at trial, there is the possibility that they will simply reject testimony or evidence that is contradictory to their biases.<sup>46</sup> The effect of bias on information processing is potentially so strong that studies have shown that contradictory information (including evidence and testimony) can actually be interpreted to support one's prior attitude.<sup>47</sup>

In light of this research, we cannot reasonably expect that all jurors who hold biased attitudes relevant to the case at trial will be able to be fair and impartial simply because they have stated that they can. Instead, we should expect that, unless those jurors are excluded for cause, some of them will persevere in their biased beliefs, and cognitively process trial testimony in a manner that is prejudicial to one of the parties.

#### G. JUDICIAL INSTRUCTION TO SET BIASES ASIDE

Again, we cannot reasonably expect jurors to be able to set aside their biases simply because a judge instructs them to do so. Consider a juror who expresses a prejudicial attitude, and then accedes to the judge's instructions by stating that he or she will set his or her attitude aside so to be fair and impartial in this case. David Wegner and his associates have found that asking an individual to *not* think about something causes an active cognitive search to see whether that thought is present.<sup>48</sup> This has the paradoxical effect of making the thought more cognitively accessible.<sup>49</sup> Thus, the juror who is told to not think about a bias will find that bias to be even more accessible in his or her processing of the trial testimony and evidence.

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<sup>44</sup> See, e.g., Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

<sup>45</sup> Ditto & Lopez, *supra* note 13, at 568.

<sup>46</sup> See Ross et al., *supra* note 10, at 889.

<sup>47</sup> See Lord et al., *supra* note 11, at 2099.

<sup>48</sup> David M. Wegner & Ralph Erber, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. PERSONALITY & SOC. PSYCHOL. 903 (1992).

<sup>49</sup> See *id.* at 907.

The inability of jurors to set aside or disregard information has been well studied in areas such as pre-trial publicity,<sup>50</sup> inadmissible evidence,<sup>51</sup> limiting uses of evidence,<sup>52</sup> and severance.<sup>53</sup> Given all of the psychological factors discussed above, we should not expect jurors to be able to set aside biases simply because of judicial instruction to do so.

## CONCLUSION

It is apparent that peremptory challenges are not the answer to potential juror bias. Often times, there are an insufficient number of peremptory challenges available to remove all potentially biased jurors. When a plaintiff's final peremptory challenge is exercised, and a replacement juror is seated, a challenge for cause is the only remedy available if the replacement juror is biased.

Yet, that remedy is not available to the prejudiced party if the juror states despite having reported experiences or attitudes that psychological research literature would indicate can lead directly to bias that he or she can put any bias aside, and be fair and impartial.

To ensure fair and impartial juries, juries with no appearance of prejudice, judges must liberally grant challenges for cause. If judges come to know that (1) jurors' experiences and attitudes can cause biased reasoning, (2) testimony and evidence will be interpreted to favor a biased perception, (3) jurors' self-reports of fairness are often not credible, and (4) judicial instruction does not solve the problem, then they should grant challenges for cause as the rule, rather than the exception in cases of apparent bias.

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<sup>50</sup> See Carroll et al., *supra* note 15, at 195. Note that the prejudicial effects of pre-trial publicity endured, despite judicial instructions.

<sup>51</sup> See Dale Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 756-61 (1958) (finding that limiting instruction was an inadequate remedy for jurors' use of inadmissible evidence); Thomas R. Carretta & Richard Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291 (1983).

<sup>52</sup> See Sarah Tanford & Michele Cox, *Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgments*, 2 SOC. BEHAV. 165, 173-78 (1987) (finding that jurors used impeachment evidence for liability purposes despite limiting judicial instructions); Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477, 483-86 (1988); see also Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors use Credibility Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 43-47 (1985) (concluding that evidence of prior convictions affects verdicts despite limiting instructions).

<sup>53</sup> See Edith Greene & Elizabeth F. Loftus, *When Crimes are Joined at Trial: Institutionalized Prejudice?*, 9 LAW & HUM. BEHAV. 193, 201 (1985); Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. APPLIED SOC. PSYCHOL. 453, 461 (1982) (finding that despite judicial instructions to consider charges separately, when crimes were joined, convictions increased).

A fair and impartial trial by jury can only be ensured by removing, for cause, prospective jurors who have experiences or attitudes that indicate a significant potential for prejudice in the matter at trial. Accepting such jurors' statements, that they can set aside their biases and be fair, creates the great risk of seating biased jurors, and a clear appearance of prejudice to a party.