Public Defender Services

# e-Mitigation News VOLUME 1, Issue 5

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## Uncovering Bias: Toward a More Effective Voir Dire

As the majority (95%) of criminal cases resolve through plea bargain, trials remain a critical part of criminal justice. Voir dire, and specifically the process of identifying which jurors to strike and which ones to keep, becomes a more difficult task when taking into consideration inherent biases everyone holds.

Are some jurors more biased against your defendant than others? The short answer is yes. Juror (and judge) bias has been studied by researchers, and discussions have evolved into what measures practitioners of the law should take to address these biases. Learning about implicit bias for use in practice and to guide the voir dire process is a timely subject with lasting effects.

Judge Mark W. Bennett of the Northern District of Iowa calls himself a "true believer" of implicit bias, having instructed jurors on this subject for more than 8 years from the bench. He has developed a set of jury instructions to educate jurors on the existence of their biases and holds them accountable by signing their name consenting to be fair during trial. To emphasize the importance of this process, Judge Bennett describes an instance where a juror initially said she would be unbiased but when she had to sign her commitment to the jury instruction, she admitted she would find the Hispanic defendant guilty simply because he is Hispanic.

This newsletter is intended to address the research underlying implicit bias and the law, and then consider remedies for this kind of bias. Judge Bennett offers specific suggestions based on his own research and practice in the courtroom, but other guidance from social scientists delves into what jurors truly see when they look at your defendant. The research will show that Caucasian jurors more frequently convict African-American defendants; women jurors more often believe child sex abuse victims; and jurors who believe in crime control over due process are more likely to convict.

A point before proceeding: from a social work perspective, addressing the potential for bias with jurors using the following research and recommendations seems logical and sound. The topic of implicit bias and the law is a recurring one in NAPD blog posts, ABA publications, the *Washington Post*, and even in *Mother Jones*. However, attorneys may find resistance in practice with some of the suggestions as proposed by other lawyers in other states. Consider how you might practically be able to apply the recommendations that follow, then shape the research to your practice.

## Bias, Stereotypes, and the IAT

The distinction between knowingly and willingly hiding something from someone else and unknowingly hiding something from yourself is the key to bias. Bias creeps into virtually every aspect of our daily lives. It can be innocent or profoundly consequential.

On the national stage, implicit bias is the underlying theme discussed in relation to police shootings. Bias is studied as the reason for disparate treatment of schoolchildren in the classroom. Even the U.S. Department of Justice has taken up the banner requiring training in implicit bias as a required part of the agency's core curriculum (The Atlantic).

Bias is also something that, inherently, lawyers know exists in jurors. But are you overlooking implicit bias and measuring only for explicit bias when conducting voir dire? Are you making your own assumptions about gender, class, professionalism, and race to inform your venire picks?

Implicit biases are automatic and unconscious attitudes and stereotypes we hold towards members of certain groups. The vast majority of Americans, across age, race, gender, and professional role, hold these biases, including lawyers and judges (Cornell Law).

To measure implicit bias, scientists at Yale, Harvard, the University of Virginia, and the University of

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Washington collaborated to create "Project Implicit," an online test-based research effort that measures the strength of associations between concepts. [Take the test here Implicit Association Test].

More than six million tests have been taken through Project Implicit since 1998. In a study of all persons who took the Implicit Bias Association test by 2007, researchers concluded that almost seventy percent of participants "demonstrated an implicit preference for 'White People' versus 'Black People'" (link here, with the original study here Psychology Press). This finding is even more striking when one considers that the respondents who chose to take the test were more likely to be aware of their own biases, yet still scored as predominantly biased.

The IAT looks at categories that are concepts, like "Fat People" or "Thin People," and then measures these categorical concepts against value judgments of good or bad. For example, you may believe that women and men are equally intelligent. After taking the IAT in the category that measures gender biases, you might find you score men above women in intelligence. This outcome is an implicit bias – something you did not know about yourself and may even have stated explicitly to the contrary. If seasoned defense attorneys and judges who practice impartiality possess implicit bias, then it is reasonable to presume a juror will also hold an implicit bias that could negatively effect your trial outcome.

This issue has been tested on mock jurors. In the results of a 2010 study by Levinson, Cai, and Young (Ohio State Journal of Criminal Law), mock jurors completed the IAT looking at associations of guilty and not guilty and race. The mock jurors grouped words and photographs together as fast as they could and the speed of the association measured the strength of the association. The results found that mock jurors associated guilty and black more quickly (and more significantly) than guilty and white. The implicit associations also predicted judgments of the probative value of evidence. The results raise the issue of whether presumption of innocence is valid for black defendants. The results also call into question the validity of the voir dire process to ferret out bias in jurors.

## Beginning with Voir Dire

To attempt to minimize implicit bias, the lawyer must prepare to address it through voir dire. As Emily Coward of the North Carolina Public Defender Commission on Racial Equity puts it, race in the context of policing, crime, and punishment will be on the minds of jurors whether you discuss it or not (NAPD blog). To avoid the issue is to allow bias to creep into the determination of your client's guilt. Ignoring the topic and keeping mum on the issue of bias is no longer a successful defense strategy, Coward argues.

ACLU Deputy Legal Director, Jeff Robinson, cautions attorneys against making generic [albeit favorable] presumptions about jurors based on race and ethnicity. He says that while no one likes to talk about race, it is an imperative conversation to have with jurors in order to determine their perspectives. In his article, "Jury Selection and Race – Discovering the Good, the Bad, and the Ugly" (American Bar Association), he outlines possible questions to get jurors to talk about race. These questions include perspectives of what it might be and feel like to be a minority at work, in social settings, or in the criminal justice system; whether society has progressed past racism; and group questions and responses about stereotypes and prejudice.

Jonathan Rapping, founder of Gideon's Promise, argues in an article (and separate NAPD training) that jurors should take implicit association tests, and attorneys should make the argument about implicit bias during pretrial motions. He continues to point out that the discussion about implicit bias, even in the context of a motions argument that is shot down, serves the important purpose of educating the judge and prosecutor.

In her Connecticut Law Review article (link here), Anna Roberts believes it is misguided to use the IAT to screen jurors for bias. Instead she believes that the IAT should be optional (based on juror interest only) and used conceptually as part of a larger discussion with all jurors. She reflects on the videotaped juror orientation videos and how those videos can inform the jury pool of implicit bias while reinforcing their civic duties. Roberts notes that the more important issue on her radar is diversifying the jury pool, then tackling implicit bias.

Pamela Wilkins narrows her focus of implicit bias to jurors in capital cases (her focus on capital cases is due to the extreme racial disparity of defendants in capital cases and the permanency of the jury outcome). She deftly points out that juror education can occur in the context of the narrative the lawyer develops for the jury. She explains that we categorize people based on different schemas related to race, gender, function, and so forth. She gives the example of an Asian female mechanic, which – with the multiple descriptors – serves to diffuse the typical stereotype associated with "mechanic." In courtroom practice, Wilkins suggests (and Rapping separately

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reinforces) the importance of using multiple schema to develop and humanize your client. Describing your client as a locally employed, working, father of three, for example, may create a more empathic person for the jury than simply referring to him as "Mr. Shields."

Wilkins expounds on this concept by describing research that supports associating your client with positive counter-stereotypes to contradict the negative biases the jury (and society) may hold. If the client does not readily fit into a counter-stereotype, consider putting on character witnesses who exemplify the counter-stereotype. If the stereotype of your client is that he is reckless and dangerous, then consider putting on a character witness (such as an employer) who presents to the jury as stable and calm, and represents to the jury a client who is seen as steady, consistent, and reserved (without opening the door to negative character traits). These techniques are not failsafe, but Wilkins' point is not to eradicate stereotypes completely. Her suggestions are techniques for attorneys to employ so "jurors' implicit biases can be neutralized or countered," allowing the evidence to be comprehended in a more factual and impartial manner (from West Virginia Law Review).

Wilkins' emphasis on expanding a client's narrative and creating an archetypal character to portray to the jury is a tried and true part of death penalty work. The same techniques prove useful for every case where a client's fate is argued either in front of a jury or before a judge at disposition. These narratives are further ways to alter the listener's implicit bias when the individual biases are not fully known.

## Breezing Through the Research

Simply asking a potential juror if he or she is biased is not effective; the response will inevitably be 'no' because people are often immune to knowing their implicit biases. Attorneys must utilize different methods of getting to juror bias and a great deal of research exists towards this end. The following section summarizes some of the research categories and strategies on implicit bias and the law.

### Race

Researchers have examined juror and defendant race to look for potential bias in criminal cases. Cohn, Bucolo, Pride, and Sommers (July 2009) looked at the role of race and racial attitudes by Caucasian jurors. In their paper, "Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes" (retrieved from Wiley Online Library), they find it helpful in reducing racial bias against African-American defendants when the judge specifically instructs jurors not to let racial bias factor into their decisions.

In "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering" (link here), people's implicit biases were measured using the Implicit Association Test (IAT). The participants were then tested for memory and case facts after reading case examples. The findings indicated people tended to misremember information along racial lines, and the author concluded that implicit memory biases likely exist in legal decision-making and require interventions. Specifically, he recommends using counter-stereotypes (like Wilkins also suggested), and recommends allowing juror notetaking, question asking (of the judge), and transcript access. Levinson concludes by saying more research is needed in this area, but prior work points to the benefits of having a more racially diverse bar (what he calls a "counterstereotypic community of lawyers and judges") and striving for more diverse juries, both of which could more broadly help the problem of implicit memory bias.

Witness testimony that brings race to the forefront is also helpful when the testimony focuses on racial salience by pointing out prejudice against the defendant leading up to the act. In other words, witness testimony that underscores white people were acting in a prejudiced manner against the black defendant prior to the crime, helps provide reasonable justification for what led the defendant to commit the crime. Cohn, Bucolo, Pride, and Summers found that emphasizing racial issues during a trial reduced Caucasian juror bias against African-American defendants. Not emphasizing racial bias increased conviction rates by 66%.

Another study by Bucolo and Cohn titled, "Playing the Race Card: Making Race Salient in Defence *[sic]* Opening and Closing Statements" (9/2010), notes that when a defense attorney makes an African-American defendant's race prominent in opening and closing statements, then Caucasian jurors tended to avoid racial bias and were less likely to find an African-American defendant guilty (link here).

The latter study on opening and closing arguments makes subtler claims in its findings of impact on racial bias as compared to the previous study. Regardless, the outcomes of these experiments used with mock jurors does merit consideration. In both studies, researchers manipulate characteristics of inherent juror bias in an effort to create the best outcome for a defendant. These studies suggest that a simple argument of facts and the law

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are no longer persuasive enough to approach a jury case; juror psychology must be considered as well.

### Sex

In a study of children's testimony in child sexual abuse cases, findings by Bottoms and Goodman (1994) showed women were more likely than men to find alleged child victims credible. Corroborating testimony from a child victim (such as from a sibling) increased the credibility of another child victim in the same study [Bottoms, B. L. and Goodman, G. S. (1994), Perceptions of Children's Credibility in Sexual Assault Cases. Journal of Applied Social Psychology, 24: 702–732].

Other studies have similar findings, suggesting that women jurors are more likely to convict defendants in sex crimes. An older study by Hymes, Leinart, Rowe, and Rogers (1993) looked at racial bias in acquaintance rape. They found conviction to be negatively correlated with race, not positively correlated with gender. The findings in "Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions" found that both Caucasian and African-American defendants were rated as more guilty by mock jurors when the victim's race was different from the race of the juror [Hymes, R. W., Leinart, M., Rowe, S., & Rogers, W. (1993). Acquaintance rape: The effect of race on defendant and race of victim on white juror decisions. Journal of Social Psychology, 133(5), 627].

### Authoritarianism

In "Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments" (2014), Devine and Caughlin reviewed 272 published and unpublished studies looking at juror characteristics to see if particular attributes were associated with guilty verdicts (from American Psychological Association). In their review, demographics such as juror education level, prior experience as a juror, the defendant's physical attractiveness, gender, and race did not show any real effect on guilty verdicts. Juror authoritarianism (possessing a belief that emphasizes crime control over due process) was a better predictor of guilty verdicts in homicide and death penalty cases, which led the researchers to suggest that authoritarianism needed elucidated in the jury pool.

Devine and Caughlin summarized their findings by stating "several juror and defendant characteristics were associated strongly enough with guilt judgments to warrant the attention of scholars and legal practitioners." Specifically, to avoid juror bias they recommended maximizing the jury pool (since not all eligible jurors report for duty), sending out more substantive questions (or using standardized court-approved questions) for preemptory challenge, and limiting jurors' awareness of defendant's personal characteristics. While concrete recommendations, these changes are not easily implemented in all places. (For additional insight into demographic venireperson factors and the *Batson* challenge process, follow the link to Judge Mark W. Bennett's Harvard Law and Policy Review article, from the American Bar Association.

(Separately, a copy of Judge Bennett's jury instructions that include a statement about implicit bias follow at the end of this newsletter.)

### Publicity

A study by Ruva, Dickman, and Mayes (2014) found that mock-jurors were pro-defense and less likely to vote guilty if exposed to positive pretrial publicity over time (from Sage Publications). Of course, this study, in practice, is tempered by the recommendations of the West Virginia Rules of Professional Conduct regarding trial publicity and an attorney's out of court conduct.

A different study cautions that the defense efforts to portray the defendant in a positive light through pretrial publicity may inadvertently risk a fair trial. Negative publicity may outweigh any good collateral earned and threaten a defendant's right to a fair trial [Daftary-Kapur, T., Dumas, R. and Penrod, S. D. (2010), Jury decision-making biases and methods to counter them. Legal and Criminological Psychology, 15: 133–154]. This article also looks at the issues of jury instructions and juror comprehension of scientific evidence. The researchers come down decisively on the risks of the aforementioned issues and offer helpful suggestions to address juror bias. For addressing the various issues associated with jury instructions, for example, the authors suggest that creating flow charts or rewriting the instructions for comprehensibility can help overcome implicit bias. Additionally, incorporating a flow chart to complement the jury instructions can help make the verbal instructions less ambiguous.

### Countering Bias: Beyond Batson

A law review article by Antony Page (incidentally, cited by the U.S. Supreme Court in Miller-El v. Dretke) explores the question of implicit biases held by attorneys. His conclusion is the acknowledgement that good people often discriminate and often do so without being aware of it. Page continues by noting this implicit,

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unknown bias is the heart of the Batson issue. According to Page, attorneys unintentionally rely on implicit bias when using peremptory challenges, which he calls Batson's blind spot [Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 BOSTON UNIVERSITY LAW REVIEW 155 (Feb. 2005) (cited by the Supreme Court in Miller-El v. Dretke, 125 S.CT. 2317, 2341, 2343 (2005) (Breyer, J., concurring)].

Dasgupta and Greenwald (American Psychological Association) take on counters to bias, considering whether exposure to pictures of admired and disliked exemplars reduced automatic preference for persons of a particular age group or race. Beginning with the IAT, participants' attitudes were measured before being exposed to pictures of exemplars (pictures of 40 well-known Black and White individuals organized into categories of admired Black individuals, admired White individuals, disliked Black individuals, and disliked White individuals; a similar organization was done for older and younger persons). After exposure to the pictures, testing for explicit bias, and a retake of the IAT, participants were found to have reduced racial bias (at least temporarily) when exposed to admired members of a particular racial group. This research, while small, is hardly translatable to a jury (it would be impossible if irrelevant to sneak in pictures of Martin Luther King Jr., Denzel Washington, and Pope Francis during voir dire). Yet the message to take to a jury is that the media's portrayal of race in the criminal justice system is biased (disproportionately so) against Black defendants, and media exposure can unduly bias jurors towards determinations of guilt, per the researchers.

Finally, implicit bias can be considered in relation to confessions and coercion. A study of false confessions contemplates the ways in which innocent suspects are impacted by police-induced confessions and alibi witnesses. In the study, alibi witnesses have less confidence in the innocence of a defendant if the defendant has confessed (even if the alibi witness originally offered support and corroboration of the defendant). Here, as in the other studies, the bias of associating guilt with a confession – even a coerced confession – contradicts the presumption of innocence and "strips the confessor of a vital source of exculpatory evidence" (Law and Human Behavior).

## Steps to Take: Choose Your Path

Even when categorized by topic, a great deal of research exists on implicit bias in the criminal justice system. Knowing which juror characteristics may more likely contribute to a guilty verdict is as much of an answer as you will get from the science. Just as it is a blanket stereotype to think all women are interested in fashion, it is just as presumptive a stereotype that women jurors will convict in sexual assault cases.

The research offers reasons for defense attorneys to ask more probing questions of jurors – all jurors. The research findings can help counsel recognize the specific kinds of juror biases that exist, and encourages counsel (and the judge) to name these forms of bias in an attempt to confront and counter them.

The perspectives from judges, attorneys, and researchers offer practical points about helpful steps to take in voir dire. Some of the suggestions include implementing the Implicit Association Test or asking experiential questions to ferret out bias in juror answers. These suggestions may seem lofty at best and disallowable at worst. The fundamental point is to take steps towards empaneling a fairer jury using the methods that are allowable in the courtroom.

In the jury charge conference, in addition to the written instructions, attorneys may be allowed to create flowcharts to compliment the written instructions. Next, attorneys can encourage judges to educate jurors on implicit bias and avoidance of such bias during the trial and deliberations (see Judge Bennett from Iowa's sample instructions). Finally, attorneys can deselect jurors who clearly possess bias based on their history and experience in analogous situations. The majority of these strategies are contingent upon the judge and prosecutor, but defense counsel's discretion to deselect jurors based on bias remains independent.

A cautionary tale remains. In spite of a significant amount of research focused on implicit bias and resolving implicit bias, there is not a great deal of agreed upon solutions. Attorneys can attempt to assess the implicit bias of jurors during voir dire by asking questions in a different way or using analogous situations that parallel defense theory. The remaining suggestions to counter implicit bias include slowing down in the voir dire process (especially when evaluating peremptory challenges); confronting jurors on implicit bias; and striving for juries that are more diverse.

When judges (or others) educate jurors on race and known biases, there is some promise that bias decreases. Thus far, promoting education and cultural diversity has been the only reliable way to decrease implicit bias. Cultural diversity in the legal field must

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consist of diverse jurors, judges, and lawyers. Overall, more research needs to be conducted on ways to overcome implicit bias in the legal field.

*For more information on this and any mitigation topic, please contact Stephanne Thornton, Criminal Justice Specialist, at the Public Defender Corporation Resource Center (304) 558-3905 stephanne.c.thornton@wv.gov*

## Resources:

*Take the test and learn your own biases:*

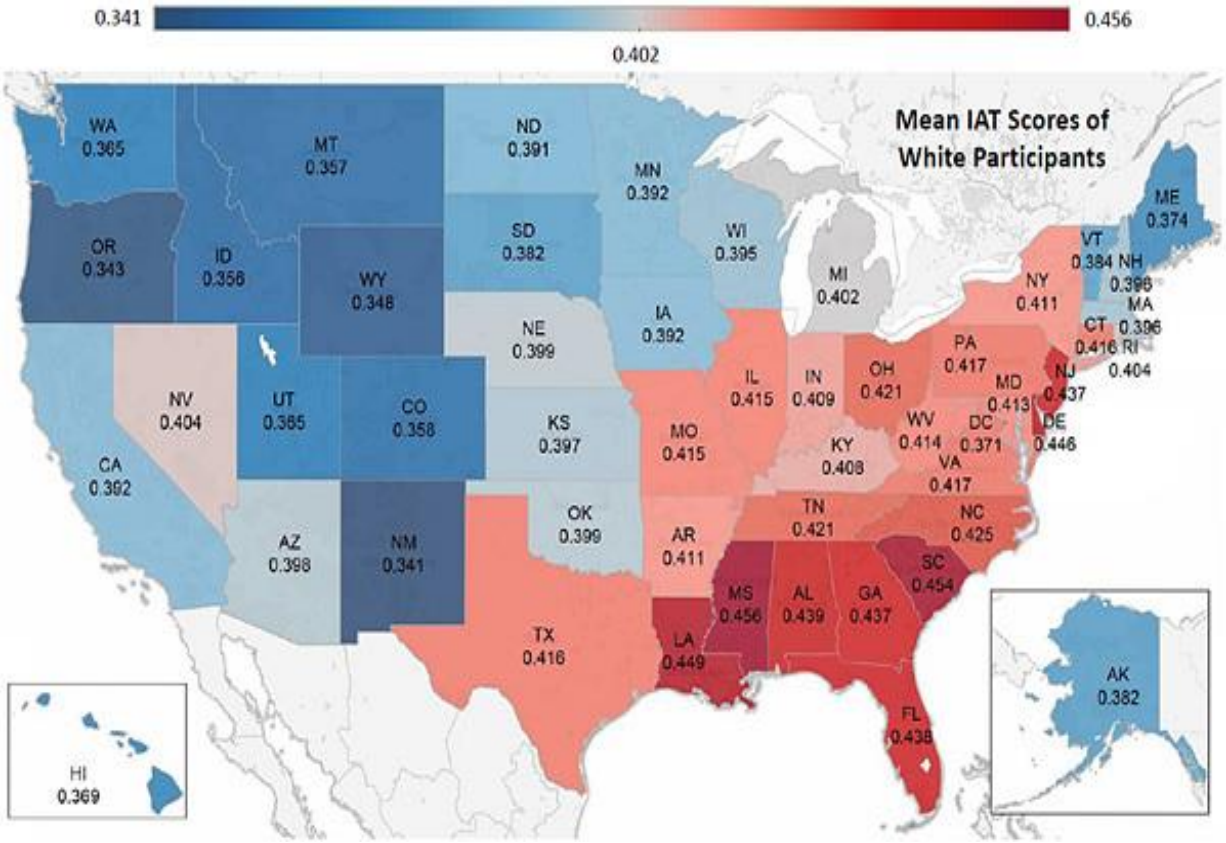
Project Implicit: Implicit Association Test
https://implicit.harvard.edu/implicit/takeatest.html

PBS *Independent Lens* blog, "Test Your Implicit Bias with Science" posted February 20, 2015 (http://www.pbs.org/independentlens/blog/implicit-test/)

From *The Washington Post* December 8, 2014 post of Wonkblog by Chris Mooney https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/):

Cautionary note: People who have taken the IAT to score on this chart have done so independently to test their implicit bias, meaning they may be less biased than average, but scoring higher by virtue of taking the test at all. Results from this map represent scores through 2012.

Red indicates the highest level of bias; blue represents the lowest level of bias; and gray represents states with a middle-level of bias.




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# Appendix D:
# Jury Instructions from Judge Mark Bennett (N.D. Iowa)

These instructions are read at the start of trial.

INSTRUCTION No. 16 – CONDUCT OF JURORS DURING TRIAL

You must decide this case solely on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict

Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over

When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.

During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.

Do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation about this case, the law, or the people involved on your own.

Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.

Do not read any news stories or articles, in print, on the Internet, or in any "blog," about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you will know more about this case than anyone will learn through the news media—and it will be more accurate.

Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.

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Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining two Instructions at the end of the evidence.

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