A Familiar and Recurring Evil: Why Defendants Should Ask Potential Jurors About Police Brutality*

Despite the constitutional guaranty of trial by a fair and impartial jury, racial bias has long plagued juries of Black defendants. Although voir dire, the process of questioning potential jurors during jury selection, could help defendants identify racially biased jurors, courts have been largely unwilling to hold that defendants have a right to ask questions about race during voir dire. However, in State v. Crump*, the Supreme Court of North Carolina held that Black male defendants involved in shootings with police do have this right. This Recent Development explores that holding and examines its future implications, ultimately arguing that the* Crump *holding can be used as a powerful tool to confront racial bias in juries. This Recent Development argues that, especially in an era where police brutality is well-known and well-documented, questions about race during voir dire will be most effective when they center on specific instances of racial bias and police brutality. By engaging in a frank conversation with potential jurors about their impressions of police interactions with Black people, attorneys can help secure their clients' constitutional right to an impartial jury.*

INTRODUCTION

On September 29, 2013, Ramar Crump called his mother to say what he thought was his final goodbye moments after realizing the men with whom he had exchanged gunshots were police officers.[1] Only fifteen days prior, Jonathan Ferrell, an unarmed Black man, had been shot and killed by police just thirteen miles away.[2] Although Crump survived his altercation with the police unharmed, he was convicted by a jury of several charges, including assault with a deadly weapon with intent to kill.[3] Ramar Crump is Black, but despite the likelihood that Ferrell's recent death was on Crump's mind, and despite the near certainty that many potential jurors were familiar with Ferrell's death and other highly publicized encounters between Black men and police, Crump's attorney was not permitted to ask a single question about race during voir dire.[4]

1. State v. Crump, 376 N.C. 375, 378, 851 S.E.2d 904, 908 (2020). Crump was ultimately convicted of several charges, including assault with a deadly weapon with intent to kill. *Id.*

2. Cleve R. Wootson Jr. & Derek Hawkins, *The Charlotte Police Shooting that Hasn't Gone Away*, WASH. POST (Sept. 21, 2016, 4:11 PM), https://www.washingtonpost.com/news/post-nation/wp/2016/09/21/the-charlotte-police-shooting-that-hasnt-gone-away/ [https://perma.cc/W5VA-HUKL (dark archive)].

3. *Crump*, 376 N.C. at 378–79, 851 S.E.2d at 909.

4. *Id.* at 388, 851 S.E.2d at 915.

In *State v. Crump*,[5] the Supreme Court of North Carolina reversed Crump's convictions, holding that the trial court abused its discretion and prejudiced Crump when it "categorically denied" his attorney's attempts to question potential jurors both generally about their racial biases and specifically about their impressions of police shootings of Black men.[6] In holding that a trial court cannot prohibit a defendant from asking about race during voir dire where the subject of race is relevant at trial,[7] the Supreme Court of North Carolina did what the U.S. Supreme Court has largely failed to do in noncapital cases.[8] Although *Crump* is certainly a step toward ensuring Black defendants in North Carolina are afforded impartial juries, to be most effective *Crump* must empower defendants to ask the types of specialized questions that research shows best help jurors identify their own racial biases. This Recent Development addresses why such an approach is necessary and argues that, post-*Crump*, defense attorneys should ask questions about high-profile instances of police brutality against Black people to both gauge reactions by jury members and to prompt those jurors to truly examine their own biases before deciding the guilt or innocence of Black defendants.

My analysis proceeds in four parts. Part I provides background on *State v. Crump*. Part II explores the right to an impartial jury and how *Crump* expands on that right for North Carolina defendants. Part III argues that race is a necessary subject for voir dire even though—and perhaps especially because—many jurors do not view themselves as racist or plagued with racial bias. Finally, Part IV argues that to best confront racial bias in juries and deliver on the promise of an impartial jury, it is necessary during voir dire to ask questions about specific instances of racialized violence that jurors are likely to recognize.

I. BACKGROUND OF *STATE V. CRUMP*

In the early hours of September 24, 2013, two men gained access to an underground poker game attended by about a dozen people.[9] The men forced the players to undress, barricaded them in a restroom, and took cash, cell phones, credit cards, and other personal items from the players.[10] In an attempt to locate the men who had taken items from them, the organizers of the poker game sent text messages to one of the stolen phones, providing false information about the time and location of another poker game to lure the person with the

5. 376 N.C. 375, 851 S.E.2d 904 (2020).

6. *Id.* at 388, 392, 851 S.E.2d at 915, 917–18 (quoting State v. Crump, 259 N.C. App. 144, 155, 815 S.E.2d 415, 423 (2018)).

7. *Id.* at 384, 388, 851 S.E.2d at 912, 915.

8. *See infra* notes 50–57 and accompanying text.

9. *Crump*, 376 N.C. at 376, 851 S.E.2d at 907.

10. *Id.*

phone to this bait game.[11] On September 29, 2013, three men, one of whom was Ramar Crump, arrived at the address provided in the text messages for the bait game.[12] When one of the organizers of the bait game saw the three men, he realized Crump was armed and called the police to report a "suspicious vehicle . . . occupied by at least two black males [who] appeared [to be] loading up guns."[13]

Four officers were dispatched to the bait game location and were advised that at least two Black men with loaded guns were intending to commit a robbery.[14] Two of the officers, who were both armed—one with a shotgun—observed Crump's car and tried to plan a path through the other cars in the lot that would allow them to approach the car from the rear.[15] However, the route the officers took actually led them directly to the passenger side of Crump's car.[16] They did not announce themselves as police officers.[17]

The accounts of the officers and Crump differ as to who fired the first shot, but it is undisputed that the officers and Crump exchanged gunshots, after which the officers sought cover behind another vehicle in the parking lot while Crump and the other men tried to drive away.[18] As Crump tried to drive out of the parking lot, the officers shot at the car as it passed their hiding spot, shattering one of the windows and puncturing a tire.[19] The officers who had not exchanged gunshots with Crump began pursuing Crump's car, activating their lights and sirens.[20] It was only then that Crump and the other men realized they had exchanged gunshots with police officers.[21] Due to this realization, Crump feared he "might not make it out of this one" alive and called his mother to say his "final goodbye."[22] The men in Crump's car attempted to signal their surrender to the officers pursuing them by putting their hands up outside of the car windows and by waving a white t-shirt.[23] The men even called 911 in an attempt to surrender with an assurance that they would not be shot by officers.[24] The men never pulled over but were eventually stopped when officers

11. *Id.*
12. *Id.*
13. *Id.* at 376–77, 851 S.E.2d at 907–08.
14. *Id.* at 377, 851 S.E.2d at 908.
15. *Id.*
16. *Id.*
17. *Id.* The officers were, however, in uniform with badges and white patches on their shoulders. *Id.* at 390 n.7, 851 S.E.2d at 916 n.7.
18. *Id.* at 377, 851 S.E.2d at 908.
19. *Id.* The officers claimed that they believed they were being ambushed by Crump and the men as Crump was trying to navigate out of the parking lot. *Id.*
20. *Id.* at 377–78, 851 S.E.2d at 908.
21. *Id.* at 378, 851 S.E.2d at 908.
22. *Id.*
23. *Id.*
24. *Id.*

employed "stop sticks" to blow out the car's tires.[25] Officers searched the car and found some of the items taken from the September 24th poker game.[26]

Crump was indicted on a number of charges, including robbery, kidnapping, and assault with a deadly weapon with intent to kill.[27] A core factual dispute between the parties was who shot first.[28] As a result of this dispute, Crump's attorney suspected the State would argue that Crump's flight from the scene indicated his guilt on that point.[29] Accordingly, Crump's attorney said he expected that there would be testimony about Jonathan Ferrell's death and the way that Ferrell's recent shooting at the hands of Charlotte police affected Crump's state of mind when Crump was fleeing the police.[30] Because of this expectation, Crump's attorney attempted to ask potential jurors about their racial biases and their opinions about police shootings of Black men during voir dire for Crump's trial.[31] At first, Crump's attorney tried to ask generally about implicit bias against Black people, explaining that he was referring to the "concept that race is so ingrained in our culture that there's an implicit bias against people of a particular race, specifically African Americans."[32] Crump's attorney asked, "When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?"[33] The trial judge sustained the State's objection to that line of questioning.[34] Crump's attorney then tried to ask a more specific question about potential jurors' impressions regarding the shooting of Jonathan Ferrell.[35] Yet as soon as Crump's attorney asked jurors if they were familiar with the Ferrell story, the State objected and the trial court again sustained the objection.[36] In fact, Crump's attorney asked if he could ask *any* questions about potential jurors' opinions on shootings of civilians by police officers, and the judge responded that he thought these were impermissible "stake-out" questions.[37] After this exchange, Crump's attorney did not attempt to ask any other questions about race or police shootings.[38]

After Crump was tried and convicted, he appealed, challenging the trial court's refusal to allow him to question jurors about racial biases and police

25. *Id.*
26. *Id.*, 851 S.E.2d at 908–09.
27. *Id.*, 851 S.E.2d at 909.
28. *Id.* at 377, 851 S.E.2d at 908.
29. *Id.* at 390, 851 S.E.2d at 916.
30. *Id.*
31. *Id.* at 382–83, 851 S.E.2d at 911.
32. *Id.* at 382, 851 S.E.2d at 911.
33. *Id.*
34. *Id.* at 383, 851 S.E.2d at 911.
35. *Id.*
36. *Id.*, 851 S.E.2d at 912.
37. *Id.*
38. *Id.*

shootings of Black men.[39] The North Carolina Court of Appeals unanimously affirmed Crump's conviction, and Crump appealed to the Supreme Court of North Carolina.[40]

II. THE RIGHT TO AN IMPARTIAL JURY AND THE RIGHT TO ASK POTENTIAL JURORS ABOUT RACIAL BIAS

A. *United States Constitutional Protections*

The Sixth Amendment to the U.S. Constitution provides criminal defendants the right to a trial by an "impartial jury."[41] The Fourteenth Amendment grants a right to "equal protection of the laws" while providing that a person is not to be deprived of their life, liberty, or property without "due process of law."[42] The U.S. Supreme Court has noted the importance of addressing racial bias as part of securing the grants of those rights, stating that racial bias in juries is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[43]

Voir dire, the process of questioning potential jurors during jury selection, is an important part of securing the constitutional guarantee of an impartial jury.[44] Voir dire allows attorneys to both identify potentially biased jurors whom they would like to strike from the jury[45] and engage generally with jurors in a conversational format, rather than simply presenting evidence at trial. This allows jurors to explore, through a guided conversation, subjects that are relevant at trial without also trying to parse through the evidence in a given case.

While the types of questions usually asked during voir dire vary depending on the facts of a case, defense attorneys conducting voir dire in criminal cases seek to identify whether a potential juror (1) harbors bias against their client; (2) understands the constitutional rights of defendants (like the right against self-incrimination) and can follow instructions from the judge; and (3) is sympathetic to the attorney's story of the case.[46] To achieve this second goal, a defense attorney might ask potential jurors: "The judge has told you that my client has a right to testify if he wishes and a right not to testify if he so wishes.

39. *Id.* at 379, 851 S.E.2d at 909.

40. *Id.* at 380, 851 S.E.2d at 909.

41. U.S. CONST. amend. VI.

42. *Id.* amend. XIV, § 1.

43. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

44. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1590–91 (2013).

45. *See id.* at 1590.

46. IRA MICKENBERG, VOIR DIRE AND JURY SELECTION 2–3 (2016), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/2016%20Regional%20Training%20for%20Indigent%20Defense%20Jury%20Selection%20Combined%20Materials.pdf [https://perma.cc/LFJ8-RHSE].

Can you follow those instructions and not hold it against my client if he chooses not to testify?"[47] To achieve the first and third goals, attorneys might ask a broad spectrum of questions about a juror's beliefs, life experiences, and knowledge of the experiences of those different from them.[48] For example, if a defense attorney's theory of the case involves the defendant being abused as a child, during voir dire that attorney would likely want to know if any of the potential jurors knew anyone who had been abused—or were abused themselves—and were sympathetic to the effects trauma had on the defendant.[49] Any questions asked during voir dire should be specifically tailored to an individual case and should seek to identify any jurors who might be biased against the defendant.

While the U.S. Supreme Court has begun to address protections against racially biased juries,[50] the Court has been hesitant to find a constitutional violation where defendants are not permitted to ask potential jurors about racial biases during voir dire.[51] And although the Court indicated in past cases that defendants have a right to ask about racial biases during voir dire,[52] its subsequent holdings indicate it has since changed course. In *Ristaino v. Ross*,[53] the Court held that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him."[54] In *Ross*, the Court clarified that its earlier holdings simply prescribed that courts consider "whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.'"[55]

47. *Id.* at 3.

48. *Id.* at 7–8.

49. *See id.* at 8.

50. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that peremptory challenges based solely on the race of a potential juror, often used by prosecutors to exclude Black jurors, were unconstitutional).

51. *See* Lee, *supra* note 44, at 1591–92 (explaining that while early cases suggested the Court was willing to uphold a constitutional right to ask about race during voir dire, it reversed course in subsequent cases).

52. *See* Ham v. South Carolina, 409 U.S. 524, 527 (1973) ("[W]e think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice."); Aldridge v. United States, 283 U.S. 308, 314–15 (1931) ("We think that it would be . . . injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred.").

53. 424 U.S. 589 (1976).

54. *Id.* at 594.

55. *Id.* at 596 (quoting 1 EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 155b (19th ed. 1832)). The Court has since emphasized *Ristaino*'s holding, stating in a later case that "[a]s *Ristaino* demonstrates, there is no *per se* constitutional rule . . . requiring inquiry as to racial prejudice." Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981).

The Court recently reaffirmed that "the Constitution at times demands that defendants be permitted to ask questions about racial bias."[56] But only in the context of a defendant charged with a capital offense—and even then, only when the defendant and victim were of different races—has the Court been willing to find that defendants are entitled to examine racial biases during voir dire. Specifically, the Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors . . . questioned on the issue of racial bias."[57] These holdings mean that while defendants can challenge the *exclusion* of jurors based on race, they are very limited in their ability to ask questions during voir dire that would limit the *inclusion* of racially biased jurors.

B. *North Carolina Constitutional Protections*

The Supreme Court of North Carolina has found similar protections under Article I of the North Carolina Constitution,[58] holding that the state's constitution protects against the "corruption of [North Carolina's] juries by racism, sexism and similar forms of irrational prejudice."[59] Before *Crump*, the Supreme Court of North Carolina recognized the U.S. Supreme Court's holdings on the right to ask about race during voir dire in some contexts, but it also emphasized the discretion of the trial court as to the form and number of questions on race.[60] In *Crump*, the Supreme Court of North Carolina again referenced the discretion of the trial court to prescribe the "extent and manner" of questions during voir dire.[61] However, the court in *Crump* recognized a limit to that discretion, holding that despite its broad discretion, the trial court cannot altogether prohibit questioning on a "relevant topic."[62]

In *Crump*, the Supreme Court of North Carolina found that "the trial court flatly prohibited questions about racial bias and categorically denied [the] defendant the opportunity to ask prospective jurors about police-officer shootings of black men," and held that the trial court abused its discretion in denying Crump the opportunity to ask about racial bias.[63] In reaching this

56. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

57. *See* Turner v. Murray, 476 U.S. 28, 36–37 (1986).

58. N.C. CONST. art. I, § 24 (providing the right to a jury trial in criminal cases).

59. State v. Cofield, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987). In *Cofield*, the Supreme Court of North Carolina held that North Carolina's Constitution extends further than simply protecting against exclusion of jurors, holding that even the perception that North Carolina's juries are marred by prejudice is a violation. *See id.*

60. State v. Gray, 322 N.C. 457, 460, 368 S.E.2d 627, 629 (1988). Interestingly, in *Gray*, the Supreme Court of North Carolina cited *Turner v. Murray* as a case that held that a "defendant has the right to have the jurors interrogated on the issue of racial bias," without clarifying that the *Turner* Court cabined its holding to capital cases. *See id.* However, *Gray* has not been cited as providing a more expansive right than the one the U.S. Supreme Court granted.

61. State v. Crump, 376 N.C. 375, 382, 851 S.E.2d 904, 911 (2020).

62. *Id.* at 388–89, 851 S.E.2d at 915.

63. *Id.* at 389, 851 S.E.2d at 915.

holding, the court found that the questions about Ferrell and police shootings were relevant and that the inability to ask such relevant questions prejudiced Crump.[64] In finding the questions relevant, the court emphasized that the "connection between the question about the Ferrell case and the topic of racial bias was readily apparent" and, therefore, an appropriate and relevant topic for voir dire.[65]

To support this finding of relevancy, the court underscored both the officers' knowledge that Crump and the others in the car were Black men and the (correct) assumption by Crump's attorney that the State would use Crump's flight as evidence of guilt rather than consider that action in light of Black men's experiences with the police.[66] The relevancy holding is twofold: The court indicated that (1) general questioning about racial animus against Black people was relevant because a racially biased juror might improperly credit law enforcement testimony over Crump's version of events,[67] and (2) specific questions about police shootings of Black men were relevant because of the way that those incidents impacted Crump's state of mind when he realized he was fleeing from the police.[68]

After holding that these questions were relevant, the court found that the trial court prejudiced Crump when it denied him the opportunity to ask the questions. The court explained how the "inability to question prospective jurors about racial bias and police-officer shootings of black men deprived [Crump] of a crucial tool needed to mitigate the risk that his trial would be infected by racial prejudice."[69] Notably, for North Carolina defendants, this holding establishes another instance that "demands that defendants be permitted to ask questions about race,": cases "involving a black male defendant involved in a shooting with police officers."[70]

III. CONFRONTING WHITE JUROR BIAS

Post-*Crump*, Black defendants in North Carolina whose cases involve a shooting with police officers must be allowed to ask questions about race during voir dire. But should they ask? One scholar, Professor Sarah Forman, cautioned against asking jurors about race, indicating that jurors might feel attacked or uncomfortable.[71] Forman advised against attorneys attempting to expose jurors' hidden racial bias, cautioning that simply revealing that implicit bias existed in

64. *Id.* at 392, 851 S.E.2d at 917–18.
65. *Id.* at 385, 388, 851 S.E.2d at 913, 914.
66. *Id.* at 390–91, 851 S.E.2d at 916–17.
67. *Id.* at 390, 851 S.E.2d at 916.
68. *Id.* at 390–91, 851 S.E.2d at 916–17.
69. *Id.* at 392, 851 S.E.2d at 917.
70. *Id.* at 388, 851 S.E.2d at 915.
71. Sarah Jane Forman, *The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*, 109 NW. U. L. REV. ONLINE 171, 176 (2015).

a jury would not mitigate it.[72] However, despite these understandable worries about alienating jurors, other studies have shown not only the pervasiveness of racial biases in juries, but also how voir dire can help combat these biases.

Although research in this area is not conclusive, there are indications that white jurors harbor racial biases against Black defendants, and that these biases affect their opinion on defendants' guilt or innocence. One empirical study found that juries formed out of jury pools consisting solely of white people convict Black defendants more often than white defendants.[73] That study also found that the presence of at least one Black person in the jury pool eliminated the conviction disparity between white and Black defendants.[74] Other studies using mock jurors found that white mock jurors who watched video summaries of rape trials were more likely to believe that the defendant in the trial was guilty when the version of the summary they watched depicted a Black defendant.[75] White jurors may also be more likely to ignore incriminating evidence at trial when a defendant is white, but are not willing to do so when a defendant is Black—even if the evidence is ruled inadmissible.[76]

Of course, Forman was not arguing that racial bias is nonexistent in juries, but rather that acknowledging that fact during voir dire might do more harm than good. Forman feared that jurors would think a defendant was "playing the race card" by highlighting racial issues in a case.[77] However, highlighting and making race salient in a case, especially where racial issues may not be immediately obvious to jury members, may actually have the opposite effect. When jurors are reminded of racial issues in a case—or when a trial is racially charged and the racial issues inherent in a case are obvious—white jurors tend to correct for implicit biases.[78] Another mock-juror study presented white jurors with different versions of facts in a case involving a fight between basketball teammates in a high school locker room.[79] When researchers presented jurors with the version of the facts that indicated the fight was motivated by racial animus toward the defendant, jurors were no more likely to convict the Black defendant than the white defendant.[80] However, when jurors were not alerted to the presence of racial animus as a factor in the fight, they were more likely to convict the Black defendant than the white defendant.[81]

72. *Id.* at 175–76.

73. Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 182 (2015).

74. *Id.*

75. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1006 (2003).

76. *Id.* at 1006–07.

77. Forman, *supra* note 71, at 176.

78. Sommers & Ellsworth, *supra* note 75, at 1013.

79. *Id.* at 1016.

80. *Id.*

81. *Id.*

This benefit of race salience has also appeared in studies using questioning during voir dire to emphasize race. In one such study, mock jurors were asked one of two versions of questions during voir dire.[82] One version, the "race-neutral" version, asked jurors about their experience with the criminal justice system, including whether they had ever been the victim of a crime or testified at trial.[83] The other version, the "race-relevant" version, alerted jurors that the trial "involve[d] an African American defendant and white victim" and asked how this might affect their reactions to the trial.[84] The "race-relevant" questions also asked if jurors harbored any bias that might prevent them from treating a Black defendant fairly and whether they thought a defendant's race impacted their treatment by police and the legal system as a whole.[85]

After being questioned, researchers split jurors into two groups (juries composed solely of white jurors and juries composed of both white and Black jurors) and instructed them to watch a summary of a trial involving a Black defendant charged with sexual assault and asked each juror individually whether they would vote guilty or not guilty.[86] All mock jurors (white jurors in all-white groups, white jurors in diverse groups, and Black jurors in diverse groups) were less likely to vote to convict after receiving race-relevant voir dire than their counterparts who had received race-neutral voir dire.[87]

The results referenced in the above studies can be attributed to the idea that as a whole, Americans find explicit prejudices and racism unacceptable and embrace the idea that we are an egalitarian society.[88] However, despite this belief, many Americans—and many white Americans in particular—harbor implicit biases against Black people that often go unchecked.[89] When race is not made salient, many white jurors will fail to examine whether their conclusions are the result of racial biases. However, when race is made an explicit issue in a case, these same jurors will likely remember the egalitarian ideals they hold and attempt to fulfill them.[90] By reminding white jurors of racial biases, and by engaging potential jurors in a discussion about race, lawyers can remind white jurors that racism is pervasive and ensure that jurors recognize and correct for their personal biases.[91]

82. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 602 (2006).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 603.

88. Lee, *supra* note 44, at 1570.

89. *Id.* at 1570–71; *see also* Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GRP. DYNAMICS 101, 105 (2002).

90. Lee, *supra* note 44, at 1587.

91. *Id.*

Forman worried that asking about racial bias would not allow for the revelation of racist jury members.[92] Even assuming this is true, the referenced studies reveal that the benefit of asking about race during voir dire may not be in identifying which jurors to exclude from the jury, but instead in alerting the jury as a whole to racial issues underlying a case. The phenomenon of race salience at trial indicates that even if Ramar Crump's jury makeup had not changed as a result of questioning about race, the mere fact that a discussion was had about race during voir dire could have affected the outcome. The court in *Crump* hinted at this by noting that they do not "impugn the integrity of the jurors who ultimately decided to convict," but that its ruling was instead based on the fact that Crump was deprived of "a crucial tool needed to mitigate the risk that his trial would be infected by racial prejudice."[93] Rather than thinking of questions about race during voir dire as a way to strike racist jurors, lawyers should consider questions about race as a mitigation technique and ask them in an attempt to alert the jury as a whole to racial biases.

IV. ASKING ABOUT HIGH-PROFILE POLICE BRUTALITY INSTANCES DURING VOIR DIRE

Given the conclusion that defendants should ask about race when they have the right to ask about race, how should they frame questions? *Crump* established a right for Black male defendants in North Carolina to ask about race when their case involves a shooting with police officers, but it left the form of those questions to the discretion of the trial court.[94] However, the court did hint at what types of questions might be preferable when it stated that the initial questions asked by Crump's attorney about general implicit bias were "somewhat confusingly phrased" but that putting the question of racial bias in the context of the Ferrell case "clarif[ied]" the inquiry.[95] Despite this indication that defendants should frame their questions around concrete sets of facts or instances, some attorneys may still prefer to ask generalized questions like "do you harbor racial bias?" However, vague questions are unlikely to be as advantageous for defendants as more specific questions about events jurors are likely familiar with.

92. *See* Forman, *supra* note 71, at 177. Forman feels that the time afforded to voir dire is insufficient to parse the racial biases of every potential juror and might ultimately anger jurors who felt they were accused of being racist. *See id.* at 175–76.

93. State v. Crump, 376 N.C. 375, 391–92, 851 S.E.2d 904, 917 (2020).

94. *Id.* at 388, 851 S.E.2d at 915. Although *Crump* cabined its holding to shootings between Black men and police officers, these types of questions would be helpful for any attorney arguing that racial bias impacted an interaction between their client and the police. Attorneys in those cases should still cite *Crump* and argue that its holding should be extended.

95. *Id.* at 389, 851 S.E.2d at 915.

A. *Aversive Racism and the Problem with Asking "Are You Racist?"*

As exhibited by the phenomenon of race salience at trial, jurors are unlikely to think of themselves as racist and will try to correct for individual biases when race is made salient.[96] However, despite people's hope that they do not exhibit racial biases, results from Harvard's Implicit Association Test show that even people who self-report as not holding racist beliefs or racial biases are more likely to associate negative words with names they associate with Black people rather than names they associate with white people.[97] In other words, many people—non-Black people in particular—harbor implicit biases against Black people.[98]

This disparity between self-reported lack of biases and implicit prejudice is known as "aversive racism" because although people are averse to explicit racism and to thinking of themselves as racist, they nonetheless exhibit prejudice.[99] This aversion to admitting one's own prejudices means people are unlikely to answer affirmatively to questions that ask whether they harbor biases or racist beliefs.[100] In fact, although not race-specific, studies have shown that jurors do lie or withhold information during voir dire and that one motivation for this is an unwillingness to admit something they see as embarrassing.[101] Jurors who exhibit aversive racism would likely be embarrassed to identify themselves as racist in front of their peers, so questions such as "are you racist?" or "do you harbor racial prejudices?" are likely to be ineffective in getting jurors to self-identify as racist or to identify the racial issues in a given case.

The North Carolina Office of Indigent Defense Services seems to have recognized the problems arising from asking potential jurors if they are racist—the Office's training manual on voir dire and jury selection explicitly cautions against such questions.[102] Instead, that manual recommends attorneys ask about specific instances a juror has experienced that involved racial bias. The manual suggests that a better prompt for potential jurors is "tell us about the most serious incident you ever saw where someone was treated badly because of their

96. *See supra* notes 77–91 and accompanying text.

97. *See, e.g.*, Lee, *supra* note 44, at 1571–72.

98. *Id.* at 1572. Even Black Americans exhibit some bias against Black people, although this percentage is lower than for other groups. *Id.*

99. *Id.*

100. *See* Sommers, *supra* note 82, at 601.

101. *See generally* Richard Seltzer, Mark A. Venuti & Grace M. Lopes, *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 460 (1991) (concluding that the authors' study supports previous studies showing that jurors lie during voir dire for a myriad of reasons).

102. MICKENBERG, *supra* note 46, at 7. Other questions suggested by that training manual include: "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your []race . . ."; "[t]ell us about the most significant interaction you have ever had with a person of a different race"; and "[t]ell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their []race . . . and turned out to be wrong." *Id.* at 11.

race."[103] Similarly, although researchers in the above-referenced study (finding that race-relevant voir dire affected the likelihood that a juror would vote to convict) did in fact ask general questions about whether mock jurors harbored racial biases, they also asked more specific questions on how race affects the treatment of defendants in the legal system.[104]

B. *Potential Benefits of Asking About Police Brutality as a Way To Contextualize Racial Bias*

While the suggested questions in the North Carolina Office of Indigent Defense Services training and those used by the voir dire study are certainly more specific than the initial questions asked by Crump's attorney about implicit bias, they still fail to ascertain jurors' specific attitudes about police shootings and Black men. In order to best make race salient in a particular case, attorneys should try to identify analogous instances to the fact situation at hand. In future cases where attorneys hope to use *Crump*'s holding to secure the right to ask about race during voir dire, they need look no further for an example of analogous instances than the second line of questioning attempted by Crump's attorney.

Crump's attorney tried to ask jurors if they were familiar with the shooting of Jonathan Ferrell,[105] an unarmed Black man who was shot and killed by Charlotte police fifteen days before Ramar Crump was arrested.[106] In the early morning hours of September 14, 2013, Ferrell was involved in a car crash and knocked on the door of a nearby home to seek help.[107] The resident of the home called 911 and told police officers that a Black man was breaking in her front door, and three police officers were dispatched to her home.[108] When the police officers arrived, Ferrell started to walk toward their car and was shot at with a taser; after this Ferrell tried to run away into the darkness but ended up running toward another officer, who fired twelve shots at Ferrell.[109] Ten shots hit Ferrell, and he died at the scene.[110] Protests erupted throughout the city of Charlotte when a deadlocked jury failed to convict the officer who killed Ferrell.[111]

At Crump's trial, a core factual dispute was who (Crump or police) fired the first shot, meaning jurors would have to decide whether to credit the

103. *Id.* at 7.
104. *See supra* notes 82–87 and accompanying text.
105. State v. Crump, 376 N.C. 375, 383, 851 S.E.2d 904, 911–12 (2020).
106. Wootson & Hawkins, *supra* note 2.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

testimony of Crump or that of the officers.[112] Crump's attorney said that he wanted to ask about the Ferrell case because he assumed the State would argue that Crump's failure to pull over when being pursued was indicative of his guilt.[113] Crump's attorney wanted to gauge whether potential jurors were aware of Ferrell's shooting because he intended to argue that that incident, as well as similar incidents of Black men being shot by police, went to Crump's state of mind when fleeing.[114] Crump's attorney was correct in his assumption about the State's argument; at trial, counsel for the prosecution argued that Crump's "refusal to immediately surrender to law enforcement officers was motivated not by a fear that he would not survive his interaction with the police, but instead by a desire to escape apprehension."[115]

Had the jury had a conversation during voir dire about the Ferrell case, it seems likely that issues of race would have been made salient in this case. A jury that had engaged in conversation about Ferrell's death would have been more prepared to understand Crump's actions—his failure to pull over, putting his hands up outside of his car window, his 911 call to attempt to arrange a safe surrender—within the context of Black men's experiences with the police. Perhaps this line of questioning would have revealed—and allowed Crump to strike—a potential juror who harbored racial animus and who would automatically credit testimony of police over that of a Black man. However, even if this line of questioning did not change the makeup of the jury, it would have presented an important tool for Crump to make race salient and mitigate implicit biases in his case.

Crump's attorney is not the only attorney who has recognized the potential need to engage with jurors about police shootings of Black men during voir dire. One public defender, Patrick Brayer, recounted his experience conducting voir dire nine days after and ten miles away from where Michael Brown was shot and killed by police in Ferguson, Missouri.[116] Brayer recognized that regardless of whether or not he brought up Michael Brown, jurors all harbored their own views on law enforcement and race and that these views could affect their deliberation.[117] Yet despite feeling as though he should have discussed Michael Brown with jurors, Brayer ultimately chose not to due to his worries that the subject would be too controversial and would create resentment toward his client.[118] In reflecting on that experience, Brayer realized that his failure to bring up Brown's death did not keep the jurors from letting their own

112. State v. Crump, 376 N.C. 375, 390, 851 S.E.2d 904, 915 (2020).

113. *Id.*

114. *Id.*, 851 S.E.2d at 916–17.

115. *Id.* at 391, 851 S.E.2d at 915–16.

116. Patrick C. Brayer, *Hidden Racial Bias: Why We Need To Talk with Jurors About Ferguson*, 109 NW. U. L. REV. ONLINE 163, 163 (2015).

117. *See id.* at 164.

118. *Id.*

biases impact their judgments. Instead, it ensured that they would form a "racial identity status" to interpret the events of the case based solely on their own experiences, and that this identity model would likely lack the depth that a model formed through conversations with other jurors with different experiences would.[119]

Brayer's reflections lie at the heart of the concept of race salience and strike at why aversive racism is so insidious: failing to discuss race and policing with jurors does not mean they will be unaffected by racial bias. Instead, it means jurors are left totally to themselves to form conclusions about how race affected a particular case rather than having the opportunity to engage with their fellow jurors, confront—and often correct for—their own biases, and move forward as more fair judges of the issues in a case.

Of course, a trial or the events that gave rise to a trial need not happen in such close proximity to a high-profile police shooting of a Black person in order to justify the discussion of police shootings during voir dire. Many jurors are likely to be familiar with police shootings or other police killings of Black people. Jurors in close proximity to Ferguson are not the only jurors familiar with the killing of Michael Brown—thousands of people across the United States took to the streets to protest his killing at the hands of police and the subsequent failure to indict the police officer who killed him.[120] In the summer of 2020, the death of George Floyd at the hands of police led millions of people in the United States to participate in Black Lives Matter protests.[121] With the widespread movement to bring attention to police brutality, it would be nearly impossible for a potential juror to not be familiar with stories like Jonathan Ferrell's, Michael Brown's, or George Floyd's.

The prevalence of stories of police brutality in the United States means that rather than attorneys framing their questioning of potential jurors around instances in their own lives where they observed racial bias, attorneys can instead point to examples of police killings of Black people that jurors are likely already familiar with. These events both provide context for jurors to talk about race and are likely more analogous to a fact situation that, in North Carolina post-*Crump*, gives rise to the right to ask about race during voir dire than are events that a juror may have personally observed. Additionally, as Brayer pointed out, the prevalence of these stories in the national consciousness means

119. *Id.* at 165–66.

120. *Ferguson Grand Jury Decision Sparks Protests Nationwide*, CBS NEWS (Nov. 24, 2014, 11:54 PM), https://www.cbsnews.com/news/ferguson-grand-jury-decision-sparks-protests-nationwide [https://perma.cc/RM69-WSEZ].

121. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/8HDW-PAXE (dark archive)] (estimating that between fifteen and twenty-six million people participated in Black Lives Matter protests in the United States during summer of 2020).

that jurors are already likely to know about them and have opinions surrounding these events; bringing these instances out into the open during voir dire provides the best chance for defendants to mitigate racial bias that might otherwise go unaddressed.

Once attorneys adopt the practice of bringing up police brutality and questioning about racial bias during voir dire, they will still be left to sort through what to do with the answers they receive. Some answers might reveal that a potential juror is unable to be impartial and should be struck from the jury—for instance, an attorney should likely strike a juror who denied the existence of systemic racism or who revealed that they were always inclined to side with police in police brutality cases regardless of the underlying facts. However, even if no juror expresses a view that makes an attorney question their impartiality, these questions are still valuable because of the aforementioned mitigating factors of race salience.

C. *Trial Court Discretion and Police Brutality Questions*

Black male defendants in North Carolina whose cases involve a shooting with police who want to ask about police killings of Black people during voir dire can rely on *Crump*'s holding to ensure they are allowed to bring up race during voir dire. However, as *Crump* emphasized, the trial court has broad discretion over the "extent and manner" of questions.[122] For example, the trial court can forbid "stake-out" questions—questions that attempt to ascertain what a juror's decision would be under a specific set of facts.[123] Despite the *Crump* majority's suggestion that the questions specifically about Ferrell were preferable to more general inquiries about racial bias so as to avoid stake-out hypotheticals,[124] some trial court judges might still be unwilling to allow inquiries into a potential juror's thoughts and opinions surrounding highly publicized instances of police brutality.

To avoid accusations of using stake-out questions, attorneys can carefully frame questions as aiming to invoke conversations about race rather than asking jurors how they would have voted in similar cases. Additionally, attorneys should invoke not only the right to ask about race in cases involving a Black male defendant and the police, but also should adhere to the *Crump* majority's seeming preference for specific, rather than general, inquiries into racial issues. Admittedly, some judges might still cabin questioning to the less helpful—although not entirely useless, as talking about race at all can help make race salient—types of questions about race generally. But when allowed, attorneys

122. State v. Crump, 376 N.C. 375, 382, 851 S.E.2d 904, 911 (2020).

123. *Id.*

124. *See supra* notes 63–68 and accompanying text.

should frame questions around specific factual instances of police brutality against Black people.

CONCLUSION

Racial bias in juries has been described as a "familiar and recurring evil," but the U.S. Supreme Court has largely failed to provide defendants the right to ask about race during voir dire despite the fact that this would be an important way to mitigate racial bias. In *State v. Crump*, the Supreme Court of North Carolina identified a fact situation in which defendants have the right to ask about race, providing Black men whose cases involve shootings with the police a basis for voir dire questions about race. Post-*Crump*, defendants and their attorneys should be empowered not only to ask about race and make issues of race salient in a case during voir dire, but to frame their questions around specific factual circumstances. As jurors are already likely to be familiar with instances of police brutality across the nation, and as they will likely have formed opinions about those instances that will affect their opinions about a case, attorneys should make an affirmative effort to have open discussions about police brutality during voir dire. Perhaps a few people who harbor extreme racial animus will be struck from juries; but more importantly, all jury members will move forward as a group that has engaged with their own complicated feelings surrounding race and policing. By encouraging jurors to openly engage in these discussions, defense attorneys can hope to make the evil of racial bias in juries less familiar and less recurring.

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