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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. III, Defendant.	NO. MOTION FOR PARTIAL ATTORNEY CONDUCTED VOIR DIRE

Defendant, ; III, through his counsel, Assistant Federal Defender Carlton F. Gunn, moves this Court, pursuant to Rule 24(a) of the Federal Rules of Criminal Procedure, for thirty minutes per side of attorney-conducted voir dire in addition to the Court's voir dire. Defendant requests that the Court hear argument on

this motion at the final pretrial conference presently scheduled for December 4, 1997, at 4:00 p.m.

The motion is based upon the attached memorandum of law filed in support of this motion, all files and records in this case, and such further argument as may be presented at the hearing on this motion.

DATED this ____ day of November, 1997.

FEDERAL DEFENDER FOR
THE DISTRICT OF ALASKA

_____

CARLTON F. GUNN
Assistant Federal Defender

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UNITED STATES OF AMERICA, Plaintiff, vs. III, Defendant.	)	NO. MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL ATTORNEY CONDUCTED VOIR DIRE

I.

INTRODUCTION

III is charged in a nine-count indictment with two counts of being a felon in possession of a firearm, in violation of 18 U.S.C.

§ 922(g)(1), and seven counts of various hunting offenses in violation of Title 16 of the United States Code. Trial in this matter is presently set for December 15, 1997.

Mr. requests that the court permit each side in the case thirty minutes of attorney conducted voir dire, not as a substitute to court voir dire, but as a complement and addition to the court's voir dire. Supplemental attorney conducted voir dire, while not statutorily or constitutionally mandated, will add an important dimension to the voir dire process. It will most effectively advance the goal of obtaining an impartial jury through (1) the intelligent exercise of peremptory challenges by counsel and (2) full and informed consideration by the court of any challenges for cause which may be made.

II.

ARGUMENT

One right the constitution confers on a defendant is the right to an impartial jury. Voir dire plays a critical function in protecting this constitutional right. *Rosales-Lopez v. United States*, 451 U.S. 181, 188 (1981). Because of the crucial function of the peremptory challenge in acquiring an impartial jury, a "system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1893).

Rule 24(a) of the Federal Rules of Criminal Procedure grants the court broad discretion in conducting the voir dire examination. Included within the broad discretion is the right to control who conducts the voir dire; the rule specifically provides that the court may either permit counsel to conduct the entire voir dire examination, permit counsel to conduct some voir dire examination to supplement initial voir dire examination by the court, or permit no voir dire examination by counsel and conduct the entire voir dire examination itself. *See* Fed. R. Crim. Pro. 24(a).

The court's discretion under Rule 24(a) is not without limit, however. It is "subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 301 (1931). While attorney conducted voir dire is not essential to insure such fairness, there are several reasons it will advance that goal.

A. ATTORNEY CONDUCTED VOIR DIRE WILL PERMIT THE MOST INTELLIGENT EXERCISE OF PEREMPTORY CHALLENGES.

1. The Importance Of Voir Dire To Peremptory Challenges.

The dual purpose of voir dire is to provide enough information to exercise challenges for cause and enough information to exercise peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). These challenges are intended to advance the goal of meeting the constitutional requirement of an impartial jury. Challenges for cause are narrow in scope; they "permit rejection of jurors on

narrowly specified, provable and legally cognizable bas[e]s of partiality." *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Peremptory challenges, on the other hand, can be exercised "without a reason stated, without inquiry, and without being subject to the court's control." *Swain*, 380 U.S. at 220. *But cf. Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, discussed *infra* pp. 10-12.

Because of the narrow scope of challenges for cause, the peremptory challenge is often the most useful and important tool for a litigant in picking an impartial jury. As noted by the Supreme Court in *Swain*: "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories . . . . The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Swain*, 380 U.S. at 218-219.

In order for a peremptory challenge to serve its purposes, it must be intelligently exercised. This requires that the parties obtain sufficient information from the potential jurors upon which to base their challenges. As one court has noted: "Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977). *See also*

United States v. Corey, 625 F.2d 704, 707 (5th Cir. 1980) ("[t]his court has previously stressed that voir dire examination not conducted by counsel has little meaning").

2. The Contribution Of The Attorneys' More In-Depth Knowledge Of The Case.

One reason why a short period of attorney conducted voir dire after the court's general voir dire will contribute to more complete information about the potential jurors is the attorneys' more in-depth knowledge of the case. *See, e.g., United States v. Cleveland*, Crim. A. No. 96-207, 1997 WL 2554 at *3 (E.D. La. Jan. 2, 1997). Important follow-up questions are more likely to occur to an advocate than a judge for several reasons, including the fact that a judge "does not have the advocate's awareness that soon he will be making peremptory challenges based on inferences from what prospective jurors have said" and the fact that "the judge does not know the case of either party in detail, so that he cannot realize when responses have opened areas for further inquiry." Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 Stan. L. Rev. 545, 549 (1975). The Fifth Circuit has recognized:

> While Federal Rules [sic] of Criminal Procedure 24(a) gives wide discretion to the trial court, voir dire may have little meaning if it is not conducted at least in part by counsel. The "federal" practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strength and weaknesses of the case. . . . Experience indicates that in the majority of situations questioning by

> counsel would be more likely to fulfill this need [for information upon which to base the intelligent exercise of peremptory challenges] than an exclusive examination in general terms by the trial court.

United States v. Ible, 630 F.2d 389, 395 (5th Cir. 1980). *Accord United States v. Corey*, 625 F.2d at 707; *United States v. Ledee*, 549 F.2d at 993.

Voir dire conducted solely by the court interferes with the intelligent exercise of peremptory challenges because the court is usually less familiar with the facts and nuances of the case. Attorneys have been working for months on the case. They are most likely to know the areas of questioning that must be explored further in order to uncover the prejudices that are most pertinent to the evidence which will be presented at trial. They also act with an awareness that they will have to base peremptory challenges on the juror's answers.

3. The Contribution Of The Attorneys' Different Relationship To Potential Jurors.

A second reason why attorney conducted voir dire -- in addition to court voir dire -- will elicit more complete information from potential jurors arises out of the attorneys' relationship to the jurors. Psychological studies suggest at least two differences between attorney-juror relationships and judge-juror relationships that should enable attorneys to obtain more or different information from some potential

jurors. *See* Suggs and Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245, 253-58 (1981).

The first difference which may have an impact is the difference in status between judges and attorneys. Psychological studies suggest two things about the relationship between self-disclosure and the status of an interviewer: People (1) tend to disclose more to a person who is perceived to have higher status than they but (2) tend to disclose less if the status differential is too great. Suggs and Sales, *supra* at 253. In other words, a person is likely to provide the most self-disclosure to a person who is perceived to have somewhat greater status but not such greater status that the juror finds it impossible to identify with the interviewer. *See id.* at 253-54.

This suggests that supplemental attorney conducted voir dire can add an important dimension to the voir dire process. Potential jurors come from widely varying social backgrounds, ranging from the unemployed, to employed blue collar workers who have only a high school education, to college students, to established and well-educated professionals. For some of these individuals, the relative "status" of judges and attorneys may be such as to make the judge most likely to obtain complete self-disclosure. But for others it may be the status differential with attorneys that will result in complete self-disclosure. By having both attorneys and the court conduct voir dire, self-disclosure is most likely to be maximized.

A second difference in the juror-attorney relationship and the juror-judge relationship is also significant. As one set of commentators has noted, "the judge has an extremely difficult role to fulfill, both intellectually and emotionally. He must be the arbiter of fine points of law, coordinate the activities of all parties to facilitate a just result and remain above interparty rivalries, all of which require that he remain aloof and emotionally detached." Suggs and Sales, *supra* p.7, at 254. Attorneys are not so constrained. *See id.* This is reflected most superficially by the fact that it is the judge for whom jurors must stand upon his entry into the courtroom, not the attorneys.

This is important to the question of jurors' self-disclosure. Psychological studies show -- consistent with common sense -- that people tend to be less willing to talk and reveal themselves to those who must remain at least somewhat detached. Suggs and Sales, *supra* p. 7, at 254-55. Permitting the attorneys to conduct some follow-up voir dire in addition to the court's voir dire will counter this problem in the voir dire process.

In sum, attorney conducted voir dire in addition to the court's voir dire takes advantage of both the attorneys' greater knowledge of the underlying facts of the case and the differences between the attorney-juror relationship and the judge-juror relationship. Permitting attorney conducted voir dire in addition to court voir dire will

bring the best of both worlds to the process and maximize the information obtained in voir dire.

4. The Ability Of The Court To Control And Limit Voir Dire Abuse.

There is a concern expressed by some commentators that attorneys may abuse the voir dire process, either by seeking to improperly ingratiate themselves with jurors or argue their theory of the case or by showing no concern for efficiency. *See* Suggs and Sales, *supra* p. 7, at 250-51. The great advantage of allowing attorney conducted voir dire only as a supplement to court voir dire is that the court can fairly and reasonably control and limit such abuse.

First, if the court begins by conducting its own voir dire, it can reasonably limit the voir dire it allows the attorneys to conduct. If the court has already conducted its own voir dire, the court can legitimately expect the attorneys not to repeat the questions it has already asked and not to simply go on and on in an effort to establish rapport with the jurors. The court can rightfully demand that the attorneys limit themselves to new areas of examination or follow-up examination which has not already been covered and which is clearly relevant to the case at bar.

In addition, the court can legitimately place a specific time limit on attorney conducted voir dire when it begins with its own voir dire. The thirty-minute limit on voir dire which is proposed in this motion is eminently justifiable when basic

voir dire has already been conducted by the court. An attorney who is given only thirty minutes for additional voir dire examination is unlikely to waste his precious thirty minutes on mere prattling attempts at ingratiation which provide little, if any, actual information.

B. ATTORNEY CONDUCTED VOIR DIRE WILL AID THE PARTIES IN COMPLYING WITH THE REQUIREMENTS OF BATSON V. KENTUCKY.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause prohibits challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable to impartially to consider the State's case against a black defendant." *Id.* at 79. Thus, peremptory challenges must be made in a non-racially discriminatory manner in order to be constitutional. Discriminatory exercise of peremptory challenges on the basis of gender is also barred. *See J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994).

Batson set up a system where a party may establish a prima facie case of discriminatory use of peremptory challenges.[1] First, a litigant must show that the opposing party has exercised peremptory challenges with intent to exclude members of a cognizable racial group or other protected class. *Id.* at 96. Second, a litigant may

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[1]After *Batson*, a string of Supreme Court cases have extended its reach to parties other than the government. Criminal defendants and civil litigants are thus also barred from discriminating in the exercise of peremptory challenges. *See Georgia v. McCollum*, 112 S.Ct. 2348 (1992); *Edmonsen v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

rely on the fact that the nature of peremptory strikes permits those who are inclined to discriminate to do so. *Id.* Finally, a litigant must show facts and other relevant circumstances that raise an inference that opposing counsel used peremptory strikes to exclude members of the group in question. *Id.* In deciding whether the litigant has made a prima facie showing, the trial court may consider all relevant circumstances, including the attorneys' questions and statements during the voir dire examination. *Id.* at 96-97.

Once a party makes a prima facie showing, the burden shifts to the opposing counsel to offer a neutral explanation for the challenge. *Id.* at 97. "[Counsel] must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id.* at 99 n.20 (*quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

Complete and effective voir dire is a basic premise which underlines the rationale of *Batson* and its progeny -- in two respects. First, a complete and effective voir dire eliminates any need to rely on generalizations and stereotypes about people. As the Supreme Court recognized in *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994):

> If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire

> provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.

Id. at 1429. Simply put, there is no reason for counsel to rely on stereotypes and generalizations about people if he is permitted to ask specific questions about them.

The second way in which a complete and effective voir dire is a necessary premise to the *Batson* decision is that "the voir dire process aids litigants in their ability to articulate race-neutral explanations for their peremptory challenges." *J.E.B.*, 114 S.Ct. at 1429 n. 17. Whether a litigant is trying to prove a prima facie case of discrimination or trying to rebut one, an in-depth and extensive voir dire is essential. An attorney who must defend his peremptories should have sufficient information to provide a neutral explanation that will survive a *Batson* challenge. The court in *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994) stated that "the stronger the objective evidence of discrimination, the more we will require by way of verifiable facts" to rebut the challenge. *Id.* at 1429-30. If an attorney is required to explain and point to "verifiable facts", he should be allowed to obtain those facts.

This suggests the need for and inherent fairness of allowing attorney conducted voir dire. If an attorney is going to be required to justify the inferences he draws and/or the impressions he gets from a juror's answers, he ought to be allowed to ask appropriate follow-up questions or ask questions in a way which will maximize the

information he feels he needs to avoid relying on generalizations and stereotypes. An attorney conducting voir dire is able to do this more effectively than the court because the attorney knows what factors he is concerned about and knows the underlying circumstances of the case and what characteristics in jurors are relevant to those circumstances.

C. ATTORNEY CONDUCTED VOIR DIRE WILL HELP AVOID REVERSIBLE ERROR ON APPEAL.

The denial or impairment of the right to exercise peremptory challenges requires reversal of a conviction, without a showing of prejudice. *Lewis v. United States*, 146 U.S. 370, 376 (1892). A court which insists on conducting all voir dire itself may create grounds for reversal. The Ninth Circuit noted in *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979):

> The trial judge [may] insist on conducting a voir dire examination, but if he does so, he must exercise a sound judicial discretion in the acceptance or rejection of supplemental questions proposed by counsel. Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality.

Id. at 1297. The court went on to reverse the defendant's conviction for failure of the trial court to conduct a voir dire that created "reasonable assurances that prejudice would be discovered if present." *Id.* at 1298.

Other convictions have been reversed for insufficient voir dire as well. *See, e.g., United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987) (failure to ask whether jurors would give greater credence to law enforcement officer testimony); *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987) (failure to ask whether jurors knew any of government's witnesses); *United States v. Ible*, 630 F.2d at 394-95 (failure to ask about jurors' moral or religious beliefs about alcohol); *United States v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980) (failure to ask jurors in assault case whether they had ever been victim of crime involving knife or gun); *United States v. Allsup*, 566 F.2d 68, 70 (9th Cir. 1977) (failure to ask jurors about views on insanity defense); *United States v. Segal*, 534 F.2d 578, 581 (3d Cir. 1976) (failure to ask jurors whether they had been employed by agency prosecuting case); *United States v. Dellinger*, 472 F.2d 340, 368-69 (7th Cir. 1972) (failure to ask jurors about attitudes toward Vietnam War, "youth culture", and relationship with law enforcement officers in case arising out of protest demonstration); *United States v. Poole*, 450 F.2d 1082, 1084 (3d Cir. 1971) (failure to ask jurors in bank robbery case whether they or any family member had been victim of robbery or other crime).

There will be no possibility of such a reversal if the court permits counsel thirty minutes of voir dire each. A defendant would hardly be in the position to complain about a failure of the court to ask a particular voir dire question when he

himself failed to ask the question. Granting counsel thirty minutes for voir dire transfers the burden of asking mandatory voir dire questions to counsel and removes that burden from the court. Any risk of reversal due to insufficient voir dire will thereby be eliminated. *See, e.g,, United States v. Rigsby*, 45 F.3d 120, 125 (6th Cir. 1995) (rejecting claim of error based on failure of court to ask particular voir dire question where defense attorneys were allowed to conduct additional voir dire after initial voir dire by court), *cert. denied*, 514 U.S. 1134 (1995).

III.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court allow counsel to conduct limited voir dire in the above-entitled case.

DATED this ____ day of November, 1997.

FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF ALASKA

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Carlton F. Gunn
Assistant Federal Defender