UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

UNITED STATES	*	
v.	*	Criminal No. 06-CR-85-PB
RICHARD VILLAR	*	

DEFENDANT'S MEMORANDUM OF LAW REGARDING HARMLESS ERROR

"We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations."

Justice Anthony Kennedy, J.E.B. v. Alabama *ex rel.* T.B., 511 US 127,153, 114 S.Ct. 1419, 1434 (concurring opinion.)

BACKGROUND

On August 24, 2007, the Defendant, Richard Villar, was convicted by a jury of Conspiracy to Commit Bank Robbery and Bank Robbery involving the robbery of St. Mary's Credit Union on April 18, 2006 in Hudson, N.H. (Document No. 92, Jury Verdict). Within hours of the jury verdict, defense counsel received an e-mail from a juror who sat in seat 9 during the trial and is also referred to as Juror 66. The e-mail described statements made by other jurors and, in pertinent part, stated: "Their minds were made up from the first day. Here's one example, A man said 'I guess we're profiling but they cause all the trouble.'" See, Exhibit A, (e-mail correspondence from Juror 66). The Defendant is from Puerto Rico and visibly appears to be of Hispanic descent.

The Defendant immediately notified the Court of the communication. The Court

held a hearing at which Juror 66 authenticated the e-mail and testified that she had, indeed, sent it to defense counsel. Tr. August 28, 2007, p. 27. The Court ruled that F.R.E. 606 prohibited voir dire of the juror regarding the ethnic bias of the venire. Tr. August 28, 2007, p. 6-7, 25. The Defendant's Motion to Set Aside the Verdicts (Document No. 95) was denied by the Court and the Defendant appealed.

The First Circuit Court of Appeals held that "the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." United States v. Villar, 586 F.3d 76, 87 (2009). The Court went on to hold that the trial court did have discretion "to inquire into the validity of the verdict by hearing juror testimony to determine whether ethnically biased statements were made during jury deliberations and, if so, whether there is a substantial probability that any such comments made a difference in the outcome of the trial." Villar at p. 87. The case was remanded to this Court.

Upon remand, the Court held an evidentiary hearing on March 16, 2010. Juror 66 testified at the hearing and provided various examples of statements made by jurors, both before and during jury deliberations, that could be construed to demonstrate ethnic and racial bias against the Defendant. *See* Tr. March 16, 2010, pp. 5 - 39. Juror 66 also testified that such statements were made by jurors "constantly," *Id.* at 5, and that there was "general conversation every day" pertaining to race and nationality, *see,* Tr. March 16, 2010, p. 18.

After hearing the juror's testimony the Court, requested that the parties brief the issue of whether the doctrine of harmless error analysis can apply under the

circumstances of this case.

THE HIERARCHY OF ERROR

The law of federal criminal procedure has long recognized that an error that does not affect "substantial rights" should be disregarded. *See,* F.R.Cr.P. 52 (a). The Supreme Court has recognized that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967); *see also,* United States v. DiRico, 78 F. 3d 732, 736-737 (1st Cir., 1996). However, an error cannot be deemed to be "harmless" unless it can be declared that the error is harmless beyond a reasonable doubt. *See,* Chapman, 386 U.S. 18, 24, 87 S.Ct. 824, 828. The Court has gone on to rule that the harmless error inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993) (emphasis in original).

In addition to harmless errors, the Court also recognizes a class of errors that can never be harmless and are described as structural errors:

> In Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.,* at 307-308, 111 S.Ct.

> 1246 (internal quotation marks omitted). These include "most constitutional errors." *Id.,* at 306, 111 S.Ct. 1246. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.,* at 309-310, 111 S.Ct. 1246. *See also,* Neder v. United States, 527 U.S. 1, 7-9, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999). Such errors include the denial of counsel, *see,* Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963), the denial of the right of self-representation, *see,* McKaskle v. Wiggins, 465 U.S. 168, 177- 178, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the denial of the right to public trial, *see*, Waller v. Georgia, 467 U.S. 39, 49, n. 9, 104 S. Ct. 2210, 81 L. Ed.2d 31 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, *see,* Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L. Ed.2d 182 (1993).

United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149; 126 S. Ct. 2557, 2563-2564 (2006) (holding that denial of the Sixth Amendment right to counsel of choice can never be harmless and falls within the category of errors described as structural.) While harmless errors may be assessed “quantitatively” and in relationship to other evidence in a case, structural errors are not mere errors in the trial process but are basic protections without which “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” Rose v. Clark, 478 U.S. 570, 577-578, 106 S. Ct. 3101, 3106 (1986). The consequences of structural errors are “necessarily unquantifiable and indeterminate.” *See,* Gonzalez-Lopez, 548 U.S. at p. 150, 126 S. Ct. at p. 2564. Such consequences effect the substantial rights of the Defendant.

There is also a third category of error that has been examined by the Supreme Court. This third category of error creates a “presumption of prejudice.” *See,* Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450 (1954). In Remmer, a juror was approached and solicited to take a bribe. The juror reported the contact to the judge

who advised the prosecutor of the solicitation, *ex parte*. The FBI then investigated by interviewing the juror and rendering a report, *ex parte,* to the court and the prosecutor. In Remmer, the Court held that:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer, 347 U.S. 227, 229, 74 S.Ct. 450, 451. Remmer has never been overruled by the Supreme Court, although it may have been limited by Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982), wherein the Supreme Court favorably considered a process that included a hearing at which the determination of the prejudicial effect of a juror's personal bias based upon his prospective employment is considered. In Smith, a sitting juror had applied for employment with the prosecutor's office. The trial court had conducted a hearing and determined that "it in no way reflected a premature conclusion as to [respondent's] guilt or prejudice against the [respondent] or an inability to consider the guilt or innocence of the [respondent] solely on the evidence." Smith, 455 U.S. at 213-214, 102 S.Ct. at 944. In Smith, the Court favorably referenced the "presumptively prejudicial" language in Remmer, *see*, Smith, 455 U.S. at 215-216, yet did not further discuss the application of this standard. The First Circuit has recognized an "ongoing debate" regarding the ongoing vitality of the presumptively prejudicial standard set forth

in Remmer. *See*, United States v. Tejeda, 481 F.3d 44, 51 (2007) (collecting cases.)

In this case, the issue correctly recognized by the Court is what standard applies when a sitting jury is determined to include individuals who are racially or ethnically biased against the defendant. The Defendant respectfully argues that trial before such a jury is a structural error that can never be harmless.

A JURY THAT INCLUDES JURORS WHO ARE RACIALLY OR ETHNICALLY BIASED AGAINST THE DEFENDANT IS A STRUCTURAL ERROR THAT CAN NEVER BE HARMLESS.

Empaneling a jury that is free of racial and ethnic prejudice is one of those constitutional requirements that is a touchstone of minimal notions of due process. (An impartial jury is required as both a matter of the Sixth Amendment and fundamental fair play required by the due process clause. This case involves these fundamental constitutional protections. The right to a racially/ethnically unbiased jury is so fundamental that a denial of the right is equivalent to the outright denial of a jury and, therefore, constitutes structural error.

> The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Those on the venire must be indifferently chosen to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice.

Batson v. Kentucky, 476 U.S. 79, 86-87, 106 S.Ct. 1712, 1717-1718 (1986) (citations

omitted). The pivotal role played by the petit jury in our system of justice demands that race or ethnicity can never be a consideration for the selection of jurors. *Id.*

The right to be tried by an impartial and racially/ethnically unbiased jury is just as important as those other fundamental constitutional rights that the Supreme Court has recognized to constitute structural error if denied. The denial of a racially impartial jury is the type of error that prohibits a criminal trial from reliably serving its purpose as a "vehicle for the determination of guilt or innocence." *See,* Rose v. Clark, 478 U.S. 570, 577-578, 106 S. Ct. 3101, 3106 (1986). In this regard, a non-racially biased jury is as important as the right to counsel safeguarded by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792. A lawyer is useless if the jury, by its very composition, is biased against the defendant based upon an improper motive, like race. In McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944 (1984), the Court found that the denial of self-representation was a structural error that can never be harmless because it is an all or nothing denial of a constitutional right. *See,* McKaskle, 465 U.S. at p.177 fn 8. Self-representation before a jury cannot be a right that is more important than having an unbiased jury. Denial of a public trial has also been declared to be structural error. *See,* Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210 (1984), Owens v. United States, 483 F.3d 48 (1st Cir., 2007). The requirement that the trier of fact not harbor racial or ethnic prejudice against the defendant must be just as important as the right to have a trial conducted in public.

The Supreme Court has vigorously recognized that discrimination in jury selection is extremely harmful and can infect an entire proceeding:

> Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will *infect the entire proceedings*. *See,* Edmonson, 500 U.S., at 628, 111 S.Ct., at 2087 (discrimination in the courtroom "raises serious questions as to the fairness of the proceedings conducted there"). The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

J.E.B. v. Alabama, ex rel. T.B. , 511 U.S. 127,139, 114 S.Ct. 1419, 1427 (1994) (emphasis added). Error that infects an entire proceeding is precisely the type of error that has been found to be structural and never harmless. A racially or ethnically biased jury is a defect that effects the entire framework within which a trial proceeds rather, than an error in the trial process itself. It is the type of error that "transcends the criminal process." *See,* Arizona v. Fulminante, 499 U.S. 279, 311, 111 S.Ct 1246, 1265 (1991). Therefore, it can never be harmless. This point was aptly stated by the Supreme Court in Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987). In Gray, a capital murder case, the trial court misapplied the death qualified juror analysis required by Witherspoon v. Illiniois, 319 U.S. 510, 88 S.Ct. 1770 (1968) and improperly excluded a death qualified juror. Recognizing that the right to an impartial jury undergirded the

Witherspoon analysis, the Court stated:

> Because the Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury, Wainwright v. Witt, 469 U.S., at 416, 105 S.Ct., at 848, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S., at 23, 87 S.Ct., at 827. The right to an impartial adjudicator, be it judge or jury, is such a right. *Id.,* at 23, n. 8, 87 S.Ct., at 828, n. 8, citing, among other cases, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge). As was stated in Witherspoon, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'" 391 U.S., at 521, 88 S.Ct., at 1776, quoting, Fay v. New York, 332 U.S. 261, 294, 67 S.Ct. 1613, 1630, 91 L.Ed. 2043 (1947)."

Gray v. Mississippi, 481 U.S. at p. 668, 107 S.Ct. at p. 2057. In this case, the issues raised by Juror 66's e-mail and testimony go directly to the impartiality of the adjudicator and, therefore, can never be harmless.

Failure to provide an impartial trier of fact has been recognized as a structural error for more than 80 years. The Court recognized that an impartial trier of fact was a fundamental requirement that can never be harmlessly denied in Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927). Tumey involved a relatively minor matter - the prosecution of a possession of liquor case in the Mayor's Court of North College Hill, Ohio. The mayor and the marshals who prosecuted the cases in the court were paid a percentage of the fines collected. The Court found that the judicial payment

arrangement violated due process and that the weight of the evidence against the defendant was irrelevant: “No matter what the evidence was against him, he had the right to have an impartial judge.” Tumey, 273 U.S. at p. 535. There is no reason why an adjudicator’s impartiality based upon a pecuniary interest is more antithetical to the fundamental nature of a criminal trial than is the racial or ethnic animus or bias of the trier of fact.

Racial discrimination and bias has been identified as a structural error in the context of the operation of a gand jury. In Hillary v. Vasquez, 474 U.S. 254, 106 S.Ct. 617 (1986), African Americans were systematically excluded from the grand jury that charged the defendant with murder in California. The Court held that intentional racial discrimination by the state in the selection of grand jurors was a structural error that could never be deemed to be harmless.

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. *See,* Tumey v. Ohio, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927) (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. See, Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) *(per curiam);* Sheppard v. Maxwell, 384 U.S. 333, 351-352, 86 S.Ct. 1507, 1516, 16

> L.Ed.2d 600 (1966). Like these fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.

Vasquez v. Hillary, 474 U.S. 254, 263-264, 106 S. Ct. 617, 623 (1986). Thus, even though a properly selected impartial petit jury may have found the defendant guilty, the racial prejudice and discrimination in the indictment process creates a systemic flaw that requires automatic reversal regardless of prejudice. *Id.* The structural flaw is no less compelling when the racial or ethnic discrimination occurs in the petit jury. That is why it is also structural error to seat a juror who should be excused for cause. See, United States v. Martinez Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 782 (2000).

The requirement of an impartial jury is so fundamental that other errors that might normally be considered to be trial process errors, subject to harmless error analysis, become structural errors when they impinge upon the right to an impartial jury. In Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993), the defendant was convicted after the trial court provided a constitutionally incorrect reasonable doubt instruction to the jury. The Court held that a constitutionally insufficient reasonable doubt instruction could never be harmless error and fell within the class of errors identified as structural error. The Court reasoned that the defendant was entitled to a verdict rendered by a jury and not a judge. 508 U.S. at p. 278, 113 S. Ct. at p. 2081. The improper instruction vitiates the connection between the facts found by the jury and

the requirement that the finding be made beyond a reasonable doubt. Because it is impossible to speculate as to what the jury would have done if instructed properly, the Court found that harmless error analysis would subject the defendant to a verdict from a judge rather than a properly instructed jury. Therefore, the error was deemed to be structural. *Id* at 281, 2082. The Court went on to state:

> Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: In Fulminante, we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S., at 309, 111 S.Ct., at 1265, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," *Id.,* at 307-308, 111 S. Ct., at 1252, 1264. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, Rose, *supra,* 478 U.S., at 577, 106 S. Ct., at 3105. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S., at 155, 88 S. Ct., at 1451. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Id at p. 281-282, 2082-2083. Similarly, permitting a jury verdict rendered by racially and ethnically biased jurors denies the Defendant basic protections that are not measurable. The deprivation of an impartial jury is, by its very nature, unquantifiable indeterminate and, therefore, qualifies as structural error. If this Court finds that jurors were racially or ethnically biased, the Defendant must be granted a new trial because

such a verdict is the result of structural error that can never be deemed to be harmless.

FIRST CIRCUIT CASE LAW DOES NOT SUPPORT HARMLESS ERROR ANALYSIS ON THESE FACTS

The Government argues that two First Circuit cases, as well as the opinion ordering remand, require this Court to find that harmless error analysis is required in this case. The Government's reliance on these cases is misplaced.

In Untired States v. Tejeda, 481 F.3d 44 (2007), a drug distribution conspiracy case, two jurors reported to the Court that they had observed an elderly man in the courtroom gallery make a throat slitting gesture. The jurors were questioned by the court and each indicated that they did not know whom the gesture was made towards, and that they did not know if the gesture was associated with any of the parties in the courtroom. Each of the jurors indicated they could be fair and impartial. Subsequently during trial, the remaining jurors were questioned. Except for one juror, they had all heard about the incident but had not seen it occur. They reported that they had not discussed the incident and each juror advised the judge that he or she could be fair and impartial. *See*, Tejeda at p. 48-49. The jury convicted the defendant. At trial, the defendant did not argue that there was either a structural error or a presumption of prejudice that must be applied to the gesture. *See*, Tejeda at p. 50. The First Circuit refused to identify the claimed error as structural. In fact, the First Circuit refused to

find that an error even existed. The Court held that the trial judge did not abuse his discretion in the manner in which he addressed the issue. Tejeda is completely distinguishable from the case at bar.

First, the nature of the issue in Tejeda is completely different and occurred in a manner that is quantifiable and could be addressed by the trial court in relationship to the evidence. In Tejeda, the problem occurred at a time when the trial court could assess its effect on the jury. The effect of the gesture was quantifiable because the observant jurors could be questioned and provide answers as to what effect, if any, the gesture had on their view of the case and their role as jurors. It also occurred at a time when the court could inquire as to whether or not their observation led them to abandon their impartiality. Indeed, the trial court determined that the gesture had no effect on the jury and that the jurors remained fair and impartial. *See*, Tejeda at p. 50. Presumably, if the trial court in Tejeda found that the gesture did have an effect on a juror's impartiality, that juror would have been excused or a mistrial granted.

In the case at bar, the Court cannot take remedial measures if the ultimate conclusion is that the verdict in this mater was not rendered by twelve fair and impartial jurors. There is no present way to quantify the effect of the racial and ethnic bias. The bias cannot be quantitatively or qualitatively assessed in the context of the verdict rendered. If the Court finds that a juror harbored racial bias, then the entire verdict is vitiated because a juror's racial bias cannot be reliably quantitatively separated from the juror's view of the evidence. In Tejeda, because of the timing of the issue, the trial judge did, in fact, have the opportunity to determine what effect, if any, the offending

gesture had on the jurors. In this case, both the nature of the problem, ethnic bias, and the timing of the problem prohibit the court form reliably determining its effect on the verdict and, therefore, it is a structural error that requires reversal regardless of the Court's independent review of the evidence.

It cannot be disputed that it is far easier to ascertain whether a juror saw a gesture and what effect that gesture may have had on an individual juror than what effect racial or ethnic bias may have on an individual juror. This is particularly clear under circumstances where the juror comes from the view that "those people cause all of the trouble." Thus, this case is far closer to the facts in Gray v. Mississippi or Tumey v. Ohio than it is to the Tejeda case. If this Court finds that there was racial bias or ethnic prejudice then, just as in Sullivan v. Louisiana, the Defendant has been denied the benefit of a fair and impartial jury, an error that can only be structural.

Similarly, the Government's reliance on Tavares v. Holbrook, 779 F.2d 1 (1985) is misplaced. As in Tejeda, the Tavares trial court found that the singular racial remark made by a juror (referring to an female African American witness as Sapphire) did not effect the fairness and impartiality of the jury. The trial judge's ruling in this regard came after a complete voir dire of the jury panel. Tavares at p. 2. The First Circuit found that no racial bias was "reasonably supported by the sworn statements of the jurors revealed in the record." Tavares at p. 4. In Tavares, neither the trial court nor the First Circuit was ever in a position to determine whether any error should be analyzed as a structural error or as harmless error because there simply was no error found to exist.

Finally, the Government erroneously asserts that the opinion remanding this case to the Court "expressly instructed" the Court to conduct harmless error analysis. In fact, the opinion does not instruct this Court to conduct harmless error review. The gravity of the opinion is to reposit with the Court, the discretion to determine how best to conduct an investigation into the matter. In fact, the guidance provided by the United States Supreme Court requires this Court to vacate the conviction and grant a new trial if it finds that jurors who rendered a verdict in this matter harbored racial and ethnic bias against the Defendant. If this court finds such bias, then the verdict can only be deemed to be the result of structural error that affects the framework in which the trial proceeds, rather than simply an error in the trial itself. *See,* Neder v. United States, 527 U.S. 1, 14, 119 S. Ct. 1827, 1836 (1999) (citations omitted).

EVEN IF THE COURT DETERMINES THAT HARMLESS ERROR ANALYSIS APPLIES, THE GOVERNMENT CANNOT PROVE BEYOND A REASONABLE DOUBT THAT THE JUROR BIAS WAS HARMLESS

If this Court uses a harmless error analysis, the Government will be unable to meet its burden of proof to demonstrate that the ethnic bias described by Juror 66 was harmless beyond a reasonable doubt. It warrants repeating that the appropriate formulation of the harmless error analysis is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081 (1993) (emphasis in original). The Government simply cannot meet this burden beyond a reasonable doubt.

Juror 66 testified that she specifically heard improper references that the Defendant was Hispanic or an illegal immigrant on at least five occasions that she could

recall. The first occasion is the example illustrated in her e-mail to counsel admitting to racial profiling. *See*, Exhibit A, Tr. March 16, 2010 p. 5. She also related an occasion when a male juror opined that he could not understand why time and money was being spent on an illegal alien. Tr. March 16, 2010, p. 7. Juror 66 also related a conversation between two jurors at the close of the Government's evidence when a female juror stated "I can tell he's guilty", to which another juror responded "Yeah, you can tell that just by looking at him." Tr. March 16, 2010, p. 14. Juror 66 also described that a juror, who is believed to reside in Allentown, stated that "well, we don't have any of those people in our town and I'm really glad." Tr. March 16, 2010, p. 19. Finally, Juror 66 was also able to specifically relate a conversation between two jurors wherein the gist of the conversation was that "these people are always in trouble" and "if we don't convict him, he will go out and do it again." Tr. March 16, 2010, p. 23. In addition to the foregoing specific conversations, Juror 66 also testified that such statements "could have been (made at) anytime during the trial because it went on constantly." Tr. March 16, 2010, p. 5. Juror 66 went on to describe the nature of these conversations between the jurors: "You know, it's been a long time, but there were so many statements like that made all through the course of time in the jury room, that I don't know whether he did, but there were many statements like that." Tr. March 16, 2010, p. 6. Likewise, the juror testified: "I can't tell you that because many people made these kinds of statements and I can't single this man out. This is the man - - this is the one I gave you for an example, but he may have made others. But there were so many that I can't attribute more than one to him." Tr. March 16, 2010, p. 7. When asked by the Court whether she could recall any more specific statements, the juror answered: "It

was just constantly that." Tr. March 16, 2010, p. 19. Likewise, on cross-examination by the prosecutor, the following exchange occurred:

> Q. Okay. So there's four jurors?
> A. There are four. And there were more.
> Q. There were more jurors or more statements?
> A. More statements, more jurors.

Tr. March 16, 2010, p. 22. In sum, Juror 66 related five individual specific improper ethnic references made by various jurors, and remembers that there were many others, the specifics of which were presently beyond her recollection. Given the pervasive nature of the remarks, as related by Juror 66, it is not possible for the Court to be convinced beyond a reasonable doubt that the guilty verdict in this case was surely unattributable to the racial and ethnic biases of the various jurors.

The Government argues that none of the offensive remarks were made during deliberations. The argument is irrelevant because the Defendant was entitled to be tried by fair and impartial jurors. *See,* Gray v. Mississippi, 481 U.S. 648, 107 S. Ct. 2045 (1987), Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927). Racially biased jurors cannot, by definition, be fair and impartial. Moreover, the argument offered by the Government is not supported by a complete reading of the record. In fact, Juror 66 testified that such statements were made constantly. In making its assertion, the Government obviously relies on the following exchange:

> Q. By MR. FEITH: And again, just so we're clear on the record, this is a statement that is made by an individual after a lunch break during the days of the trial?
> A. Yes.

Q. Not during deliberations at all?

A. No.

Q. None of the statements that you have testified to occurred during deliberations?

A. No.

Tr. March 16, 2010, p. 28. However, this portion of the testimony can not be read in insolation. It must be considered along with the witness's testimony that the racially biased statements made by various jurors were constant and the fact that she could not identify all of the specifics because there were so many. Additionally, the prosecutor's lead-in question was not about every statement made by every juror, but was initially limited to one particular statement that the juror identified as occurring before deliberations had started. Finally, the answer itself, "No," is ambiguous and could mean that the prosecutor's leading question was incorrect. In fact, on at least one occasion, the Juror indicated that the prosecutor had confused her. Tr. March 16, 2010, p. 25.

On the record as it presently exists[1], the Government fails to establish beyond a reasonable doubt that the verdict rendered in this case was not attributable to the racial and ethnic biases of various jurors as described by Juror 66. The weight of the trial as assessed by the Court is irrelevant to this determination because the determination must be based on the effect of the error - that is the effect of the racial bias - on the verdict rendered. It cannot be said on this record that the verdict was not attributable to racial or ethnic bias and prejudice.

[1]The Defendant understands that the Court has employed an "incremental" approach to its investigation of jury bias in this matter and the record may yet be expanded.

THE WEIGHT OF THE TRIAL EVIDENCE AGAINST THE DEFENDANT WAS NOT OVERWHELMING AND DOES NOT SUPPORT A FINDING OF HARMLESS ERROR.

The weight of the Government's case in this matter rested upon two female witnesses, each of whom were receiving benefits from the Government in return for their testimony. Each of them gave inconsistent statements to the police before trial and their testimony at trial was inconsistent in significant respects. Additionally, although the investigators accumulated a large amount of physical evidence, none of that evidence implicated the Defendant. Fingerprints that were analyzed did not match the Defendant. The Government failed to even attempt to forensically analyze a number of items that might have shed light on the identity of the perpetrator of the crime. Three eyewitnesses outside of the bank testified that they had ample opportunity to observe two individuals (whom the Government argued were the Defendant and co-defendant) outside of the bank, yet, not one of them identified the Defendant as being one of those individuals. Similarly, none of the bank employees identified the Defendant as the perpetrator. In fact, the employee with the longest experience in the bank testified that the man she believed to be Hispanic, wearing the mask and carrying something believed to be a firearm, was the taller of the two men. Upon review of surveillance photographs, the investigating detective testified that the man in the mask did, in fact, appear to be of the same height or the taller of the two in the surveillance photos. This fact substantially undermined the Government's theory that the robbery was committed by the Defendant and Co-Defendant Gagnon, as the Defendant is shorter than Gagnon. Gagnon was positively identified by a scar on his hand as being the robber who did not wear a mask but wore a hooded sweatshirt.

In addition, the Defendant presented two alibi witnesses (one of whom was his brother, who has Hispanic features), each of whom testified that the Defendant was in Nashua either on the day in question or around the time in question.

The Defendant respectfully suggests that the evidence of guilt was not overwhelming and that it would be error for this Court to find the juror bias issue to be harmless error.

CONCLUSION

Th right to a trial by an impartial jury is fundamental. The denial of that right under the circumstances as they occurred in this case is structural error requiring a new trial. Even if not structural error it cannot be demonstrate beyond a reasonable doubt that the jury verdict in this case was unattributable to the racial and ethnic biases of the jurors as identified by Juror 66. Finally the weight of the evidence in this matter was not overwhelming and it was a reasonably close case on the issue of identification.

This Court must, therefore, continue with its incremental investigation of the racial and ethnic biases of the jurors and eventually grant the Defendant a new trial.

Respectfully submitted,
Richard Villar, Defendant
By his Attorneys,
BRENNAN CARON LENEHAN & IACOPINO

Date: April 6, 2010 ` By: /s/ Michael J. Iacopino

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been forwarded, even date herewith, and in the manner specified herein: electronically served through ECF: Assistant United States Attorney Terry Ollila, United States Attorney's Office, James C. Cleveland Federal Bldg., 55 Pleasant St., Room 352, Concord, NH 03301-3941.

/s/Michael J. Iacopino

Michael J. Iacopino, Esq.