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CASENOTE

Commonwealth v. Richardson : VoiR Dire and the Consent Defense to An Interracial Rape in Pennsylvania: Finding Twelve Not-Too-Angry Men

If a Presbyterian enters the jury box, carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others; unless you and your clients are Presbyterians you probably are a bad lot, and even though you may be a Presbyterian, your client most likely is guilty.

Beware of Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both-in-one, plead your client guilty and go down the docket. He learns about sinning and punishing from the preacher, and dares not doubt. A person who disobeys must be sent to hell; he has God's word for that.

. . . And do not, please, accept a prohibitionist: he is too solemn and holy and dyseptic. He knows your client would not have been indicted unless he were a drinking man, and anyone who drinks is guilty of something, probably much worse than he is charged with, although it is not set out in the indictment. Neither would he have employed *you* as his lawyer had he not been guilty.¹

I. INTRODUCTION

Citizens of the Commonwealth of Pennsylvania are free of the racial prejudices that grip the rest of the country. Such was the impression given by the Pennsylvania Supreme Court in *Commonwealth v. Richardson*,² a case involving a black man accused of raping a white woman.

In *Richardson*, the state's highest court held that a consent defense³ to a racially-mixed rape charge did not render that case racially sensitive. This holding meant that the trial court had not abused its discretion when it refused the defense counsel's request to pose the following questions to prospective jurors during voir dire:⁴

1. Are there any people on the jury who are prejudiced in any way against black people?
2. [Defendant] is a black man who is charged with raping a white woman.

1. Darrow, *Attorney for the Defense* 36, 37 ESQUIRE (May 1936).

2. 504 Pa. 358, 473 A.2d 1361 (1984) [hereinafter cited as *Richardson*].

3. As used in the law of rape, "consent" means consent of the will, and submission under the influence of fear or terror cannot amount to real consent. There must be an exercise of intelligence based on knowledge of the significance of consent, and there must be a choice between resistance and assent. If a woman resists to a point which further resistance would be useless, or when her resistance is overcome by force or violence, submission thereafter is not "consent."

4. "This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror . . ." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

- Because of the races of the two parties involved in this case, do you think you would have any difficulty being fair to either side?
3. Do you believe that black people are generally more dishonest than white people?
 4. Do you believe black men like to rape white women?
 5. If the woman were to testify that the incident happened one way and [defendant] would testify that the incident happened in an entirely different way, would you tend to believe the testimony of the complainant merely because she was white?⁵

The trial court had elected rather to rephrase question number two, which it asked as follows:

I have just been advised that the victim in this case was a white person. You see that the defendant is black. Would these racial differences present such a problem to you that it could interfere with your honest appraisal of the case and interfere with your ability to be completely fair to both the Commonwealth and the defendant?⁶

This was the only question the trial court allowed concerning racial prejudices of the veniremen.⁷

The focus of this note will be on the *Richardson* decision and why a consent defense should be a factor that renders a case racially sensitive. There will be an examination into the history and importance of voir dire, and why the trial court's refusal to allow the above questions might have decided William Richardson's fate before the opening statement.

II. THE HISTORY AND IMPORTANCE OF VOIR DIRE QUESTIONING

The practice of an attorney or the judge questioning the prospective jurors about their prejudices is not an ancient or a universal concept. Early English jurors were selected because of their knowledge of the case and the likelihood that they would be partial to the Crown.⁸ By the eighteenth century, English counsel could question jurors about their specific biases, such as family or economic relations, but questions concerning a bias toward the defendant because of a political affiliation were beyond the allowable limit of the examination.⁹

The American Revolution made possible the foundation for the voir dire system that would develop in the United States. For example, in Massachusetts colony, the practice of selecting jurors at a town meeting was eliminated by an act of Parliament and put in the hands of the court. The jury selection law that had been in effect had made it increasingly difficult for the crown to obtain the convictions it desired. The British government remedied this situation by forcing the colonial defendant to select from a list of citizens who were sure to be most partial to the prosecution.¹⁰

After the revolutionary war, the colonists were eager to remedy this situation. The first draft of the sixth amendment included as part of the right to a

5. *Richardson*, 504 Pa. at 361, 473 A.2d at 1362-63.

6. *Id.* at 361, 473 A.2d at 1362.

7. BLACK'S LAW DICTIONARY, *supra* note 4 at 1395.

8. Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290, 292 (1972).

9. Van Dyke, *Voire Dire: How Should It Be Conducted to Ensure That Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L. Q. 65, 67 (1976).

10. Gutman, *supra* note 8, at 294-95.

fair trial the right to challenge members of the jury.¹¹ The framers eventually settled on the words, "an impartial jury" which, taken with the ninth amendment's reservation of unnamed rights for the states, had the effect of guaranteeing a right to challenge jurors in federal courts just as a citizen could in a state court.¹²

The first Supreme Court affirmation of this principle occurred in 1807 at the trial of Aaron Burr.¹³ Burr, who was vice-president at the time, was charged with treason for allegedly assembling a small army. The media publicity made the selection of an impartial jury a near impossibility; citizens began to take sides as they read more and more about the case.¹⁴

Chief Justice John Marshall ruled that the potential jurors must be allowed to be questioned in order to determine if they had formed an opinion about Burr's innocence. According to the Chief Justice, a juror with a preconceived notion was no different than a juror who was related to the defendant. "He will listen with more favor to the testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case."¹⁵ The decision in *Burr* was a persuasive precedent for state courts. In early cases all states except South Carolina followed the ruling and adopted some form of voir dire.¹⁶

The importance of the voir dire procedure in trials today should not be understated. One social science study indicated that forty percent of potential jurors have made their decision within four minutes of first being exposed to the courtroom, and eighty percent have made a decision before voir dire has ended.¹⁷ With this type of decisionmaking being conducted before the trial even starts, the need to give latitude to attorneys during voir dire becomes obvious. "Voir dire may be used legitimately to provide the advocate with the opportunity to obtain information to exercise peremptory challenges,"¹⁸ according to one litigating attorney and author who adds, "jurors . . . are not impartial. It is unrealistic to believe that an individual will not be affected by the prejudices and attitudes of a lifetime."¹⁹

There is also little doubt that both sides are putting more emphasis on voir dire. As Margret Covington, a consultant on jury selection,²⁰ stated, "the attorney must know as much as possible about what each prospective juror

11. *Id.* at 297.

12. *Id.* at 299.

13. *United States v. Burr*, 25 F. Cas. 49 (C.C.C. Va. 1807) (No. 14, 6929).

14. *Van Dyke*, *supra* note 9, at 68.

15. *Burr*, 25 F. Cas. at 50.

16. Gutman, *supra* note 8, at 308-09 n.54.

17. Johnson, *Voir Dire in the Criminal Case: A Primer*, TRIAL, Oct. 1983, at 60, citing Schuman, Shaver, Coreman, Eunich and Christie, *Recipe for a Jury*, PSYCHOLOGY TODAY May 1973, at 39.

18. Two types of challenges may be raised to remove a potential juror, challenges for cause and peremptory challenges. A challenge for cause requires the challenging party to give a reason, e.g., bias, relationship between juror and defendant. The decision to strike for cause is within the discretion of the court. A peremptory challenge may be used without a reason stated, but unlike challenges for cause they are limited in number. Johnson, *supra* note 17, at 60, 62, 63.

19. Johnson, *supra* note 17, at 60, 62, 63.

20. Ms. Covington is best known for assisting Richard "Racehorse" Haynes in the murder trial of Texas millionaire T. Cullen Davis.

thinks of the actual issues of the litigation and related issues."²¹ Not surprisingly, a training manual for prosecutors in Dallas County instructs that, "you are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that [d]efendants are different from him in kind rather than degree."²²

III. *COMMONWEALTH V. RICHARDSON: THE CRIMINAL CASE*

William Richardson, a black man, was accused of raping and engaging in deviate sexual intercourse with a white woman. The complainant testified that she knew the defendant because his brother lived across the hallway. When she answered the door on the morning of October 30, 1980 the defendant forced his way into her apartment. She further stated that the defendant led her toward her bed and started to take her clothes off, ignoring all her requests to be left alone. The complainant said she was too scared to try to resist physically, and that after disrobing her, Richardson laid her on the bed and had intercourse with her as she cried.

Richardson's testimony was that he was in the building that morning to drive his brother to work. Finding his brother not yet ready, he decided to visit the complainant whom he had met before. She answered the door and asked him in. They both sat on the bed, he testified, and after talking and kissing, they got undressed and had sex.

Mr. Richardson denied using any force to either enter the alleged victim's dwelling, or to have sexual relations with her. This testimony was partially corroborated by his brother who, after telling the defendant he was not ready, witnessed him knock on complainant's door and enter without forcing his way in.²³

Richardson was found guilty. He was sentenced to terms of two to five years each for rape and deviate sexual intercourse.²⁴

IV. THE STRATEGY OF THE VOIR DIRE QUESTIONS IN *RICHARDSON*

A successful consent defense²⁵ would require Richardson and his counsel to convince the jurors that the complainant had willingly agreed to have sexual relations with a black man. It would also necessitate the jurors believing the story of a black as opposed to the contrary story told by a white. A prospective juror who possessed biases that would prohibit him from finding the defendant not guilty regardless of the evidence would have to be eliminated if this defense were to have a chance.

Questions three (the dishonesty question) and five (the contradictory testimony question) were designed to identify those who would feel that Richard-

21. Covington, *State-of-the-Art in Jury Selection Techniques: More Science than Luck*, TRIAL 84 (Sept. 1983).

22. Van Dyke, *supra* note 9, at 70, citing THE TEXAS OBSERVER, May 11, 1973 at 9.

23. Brief for Appellee at 5, *Commonwealth v. Richardson*, 504 Pa. 358, 473 A.2d 1361 (Pa. 1984).

24. *Id.*

25. 18 PA. CONS. STAT. ANN. § 3121 (Purdon 1983) lists the first element of the crime of rape as ". . . engag[ing] in sexual intercourse with another person not his spouse . . . by forcible compulsion." This force is described by the Pennsylvania Superior Court as, "only . . . such as to establish a lack of consent." *Commonwealth v. Rough*, 275 Pa. Super. 50, 418 A.2d 605 (1980). Therefore, a consent defense indicates that no force was used, both parties were willing, and there was no crime.

son, because of his skin color, was less likely to be telling the truth. Question two (the fairness question) and question one (general prejudice question) hoped to point out the future veniremen who would be unable to decide the case on its merits. Question four (the racial myth question) would expose those that would be less likely to accept the consent defense because of preconceived notions about the sexual drives of blacks.

Using these questions, defense counsel hoped to be able to exercise its peremptory challenges and challenges for cause to its best advantage. That is, they hoped to strike those that would be least likely to find Richardson not guilty. A question such as number four (the racial myth question) can be used as a demonstration of how this was to have been employed. The question is posed as a hypothetical to a potential juror "Mr. Smith do you believe black men like to rape white women?" Mr. Smith replies "Yes." Immediately a challenge for cause is requested by defense counsel. The standard for challenge for cause in Pennsylvania was enunciated by the Pennsylvania Superior Court in *Commonwealth v. Johnson*:²⁶

A prospective juror should be excused for cause in two situations: The first is when the prospective juror indicates by his answers that he will not be an impartial juror The second is when, irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the prospective juror has such a close relationship, albeit familial, financial, or situational with any of the parties, counsel, victims or witnesses.²⁷

Before Mr. Smith has been excused for cause, he would be questioned as to whether or not he could set aside his biases and prejudices and render an impartial judgment in spite of them.²⁸ Suppose, however, the hypothetical juror says, "No, I was brought up to believe this [or that] and I cannot change." The trial court would have to decide whether or not to excuse for cause, but even a refusal to do so, on the part of the court, would likely necessitate the use of a peremptory challenge by defense counsel.

The defense was unable to employ this strategy when the trial court refused to ask all but the reworded question two. The jury that was impaneled consisted of eleven whites and one black.²⁹ A person such as Mr. Smith, who surely would have been challenged by Richardson's counsel if counsel had been able to ask the voir dire questions proffered, may have answered the court's reworded question number two honestly and sincerely in the negative, not even thinking about his prejudices.

After the guilty verdict was entered at the trial level, defense counsel appealed. The basis of the appeal was that the solitary racially-probing question asked did not provide the information necessary to properly exercise their peremptory challenges during jury selection. Therefore, defense counsel reasoned that the jurors selected could have had prejudices which influenced their decision in the case.

26. 299 Pa. Super. 172, 445 A.2d 509 (1982).

27. *Id.* at 176-77, 445 A.2d at 511, citing *Commonwealth v. Stamm*, 286 Pa. Super. 409, 429 A.2d 4, 7 (1981) and quoting *Commonwealth v. Colon*, 223 Pa. Super. 202, 299 A.2d 326 (1972).

28. *Commonwealth v. Hoss*, 469 Pa. 195, 204, 364 A.2d 1335, 1340 (1976).

29. Brief for Appellee, *supra* note 23, at 3. The question of whether or not the jury's racial make-up also contributed to Richardson's getting a fair trial was raised by the defense on appeal. However, the issue was not considered by the supreme court and will not be a focus of this Note.

V. THE SUPERIOR COURT DECISION

The superior court reversed the trial court and remanded the case for a new trial.³⁰ The court held that the trial court had acted incorrectly in not asking the first question (the general prejudice question). A potential juror could have prejudices about blacks that would not impair his ability to render a fair verdict in this case. The court also agreed it was proper to rephrase the second question (the fairness question) stating, "Even if the question as posed by appellant might be improperly constructed, the court [has] a duty to fashion a permissible inquiry into the subject."³¹

The court disagreed, however, with the trial court's refusal to ask questions three through five. The court's rationale was that since corroborating evidence existed for each side, the credibility of the victim and defendant was a crucial factor in determining this case. Questions three (dishonesty) and five (contradictory testimony) were specifically designed to inquire into the racial biases that would affect the jurors' determination of credibility. Because of the importance of this line of questioning, the superior court ruled that Richardson was entitled to probe into this area.³² Question four, regarding racial myth, was considered an appropriate question by the court because of the consent defense and the racial make-up of the parties. "Prejudice as to differing sexual drives between the races could definitely affect a juror's ability to be fair."³³

Before turning its attention to the facts of this case, the court reaffirmed the ground rules for voir dire questioning. "The scope of voir dire examination rests within the sound discretion of the trial court and will not be reversed absent an abuse of discretion."³⁴ And most importantly, "detailed voir dire on racial prejudice is not required merely because the defendant is black and the victim is white."³⁵ "Each case must be considered in light of the factual circumstances of the particular criminal episode."³⁶

For extensive voir dire such as the defense in *Richardson* requested, the court needed to see particular facts which made this case racially sensitive. The trial court's failure to note these facts and refusal to permit the voir dire questions would then constitute an abuse of discretion.

The superior court relied on the precedent established in *Commonwealth v. Christian*,³⁷ a case decided by the Pennsylvania Supreme Court in 1978. *Christian* similarly involved a black man who was charged with the rape of a white woman. The prosecution's case was based largely on circumstantial evidence including the defendant's proclivity to date white women.³⁸ In *Chris-*

30. *Commonwealth v. Richardson*, 315 Pa. Super. 349, 461 A.2d 1315 (1983).

31. *Id.* at 353, 461 A.2d at 1317.

32. *Id.*

33. *Id.*

34. *Id.* at 352, 461 A.2d at 1317, *citing* *Commonwealth v. Fulton*, 271 Pa. Super. 430, 413 A.2d 742 (1979).

35. *Id.* 353, 461 A.2d at 1317, *citing* *Commonwealth v. Boone*, 286 Pa. Super. 384, 428 A.2d 1382 (1981).

36. *Id.* *citing* *Commonwealth v. Christian*, 480 Pa. 131, 389 A.2d 545 (1978).

37. 480 Pa. 131, 389 A.2d 545 (1978) [hereinafter cited as *Christian*].

38. Other circumstantial evidence included the defendant's absence from his home on the night of the rape-murder, his presence in the general area of the crime scene, and a muddy substance on his clothes that resembled the mud from the area where the body was found. *Christian*, 480 Pa. at 134, 389 A.2d at 546.

tian, the supreme court ruled that the trial judge had erred in not allowing the following questions during voir dire:

2. This case involves a rape murder, the defendant in this case is black, do you feel that blacks have sexual drives that differ from whites?
3. There may be some evidence in this case that early in the night when this murder was committed the defendant, who is black, evidenced affection for a white girl. Do you believe there is anything wrong with a black man showing affection to a white woman?³⁹

The only racially-probing question that the trial court did allow in *Christian* was, "Have you had any dealings or experience[s] with Negro persons that might make it difficult for you to sit in impartial judgment on this case?"⁴⁰ The supreme court in *Christian* held that because of the racially sensitive nature of the case, the defense's trial strategy required extensive voir dire examination into racial prejudices. In particular, the court noted the state's attempt to show the defendant's sexual proclivity towards white women. The black defendant-white victim scenario did not itself make the case racially sensitive, but, "[t]he potentially prejudicial impact of such affiliations does become meaningful, however, where membership in a certain group [minority group or otherwise] is to be emphasized by the evidence presented at trial."⁴¹ The *Christian* court further commented that extensive voir dire was required because, "Assuming that a juror might possess racial bias, it is likely that evidence of this sort [defendant's previous advances toward white women] would inflame his prejudices and militate against a fair trial."⁴² The Pennsylvania Supreme Court granted *Christian* a new trial based on an inability to find that he had been given a chance to present his case before an impartial jury.⁴³

Analogizing the facts of *Richardson* to *Christian*, the superior court in *Richardson* held that the consent defense was a sufficient circumstance to render a case racially sensitive. Just as questions two and three in *Christian* (those the supreme court said should have been asked) were intended to identify jurors who could not be fair because of prejudices about sexual drives, the fourth question (the racial myth question) in *Richardson*, was so intended.⁴⁴ The court considered the consent defense to be at least as strong a reason to question possible bias as was the circumstantial evidence that was presented in *Christian*.

VI. THE PENNSYLVANIA SUPREME COURT DECISION

The Commonwealth elected to appeal the superior court's holding in *Commonwealth v. Richardson* to the Pennsylvania Supreme Court. On April 11, 1984, the supreme court reversed the order of the superior court, holding *Richardson* not to be racially sensitive, and finding no abuse of discretion by the trial court.⁴⁵ Writing for the majority, Mr. Justice Flaherty stated: "[The]

39. *Christian*, 480 Pa. at 135, 389 A.2d at 547. Question 4, "Do you feel that anyone so evidencing affection would be more likely to commit a crime than anyone else?" was also not asked at trial, but the supreme court did not think that it should be asked because, "it was too suggestive of the ultimate facts to be suggested at trial." *Id.* at 139, 389 A.2d at 549.

40. *Id.*

41. *Id.* at 137, 389 A.2d at 548 n.6.

42. *Id.* at 137, 389 A.2d at 548 n.7.

43. *Id.* at 140, 389 A.2d at 549.

44. 315 Pa. Super. at 353, 461 A.2d at 1317.

45. *Richardson*, 504 Pa. 364 at 363, 473 A.2d at 1364.

superior court concluded that the instant case was particularly race-sensitive, as a result of the mere fact that the defense alleged that intercourse between the black defendant and white woman was consensual. We disagree"⁴⁶

Mr. Justice Flaherty noted that the defense of consensual intercourse was "frequently employed in rape cases"⁴⁷ regardless of the race of the parties involved. According to the rationale of the court, this meant that there was an absence of race-related issues, and extensive voir dire questioning was not necessary. The court agreed with the lower court that abuse of discretion by the trial court was the proper criteria, but held that no abuse had occurred.

Distinguishing *Christian* based on the different factual settings, Mr. Justice Flaherty noted, "[t]he [*Christian*] case was rendered racially sensitive by the prosecutor's trial strategy of attempting to establish the black defendant's sexual proclivity for white women."⁴⁸ In *Christian*, the Commonwealth based its case on the racial differences of the parties. The prosecutor's attack, therefore, had made the *Christian* case racially sensitive. This forced the court to allow extensive voir dire.

However, the Pennsylvania Supreme Court did not feel that the consent defense in *Richardson* would raise racially-sensitive questions. The court reasoned that in *Richardson*, as opposed to *Christian*, membership in a minority group was not emphasized by any of the evidence presented by either side.⁴⁹

Anticipating the unasked question of "Why not let the voir dire questions in anyway?," the state supreme court believed the questions the defense wanted to pose would only inflame the jury. As the majority stated:

Asking potentially offensive questions regarding racial stereotypes in a case such as this would serve no legitimate interest of the defendant, but might focus jurors' attentions upon skin color rather than upon the guilt or innocence of the accused, thereby characterizing as important the fact that defendant is black and victim is white.⁵⁰

Rather than to risk putting an idea in a juror's mind that might not have already been there, the court chose to disallow extensive voir dire.

The concurrence by Mr. Justice Larsen displayed a different analysis, but arrived at the majority's result. Mr. Justice Larsen believed that a consent defense *was* necessarily a racially sensitive situation in a case involving a racially mixed rape charge. However, he concluded that the single question that was asked by the trial court (rephrased question two) would have exposed any biases the jurors possessed, and therefore there was no abuse of discretion by the trial court and William Richardson was not denied a fair trial.

Mr. Chief Justice Nix filed the lone dissenting opinion. He wrote that, "it is unrealistic to argue that racial overtones do not permeate the trial where a black man is charged with the rape of a white woman and the defense asserted is consent."⁵¹ The Chief Justice also emphasized that the opinions that a man might harbor with regard to a factual situation such as this might not be evident, even to that man. The limited question allowed by the trial court was

46. *Id.*, 473 A.2d at 1363.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*, 504 Pa. at 364, 473 A.2d at 1364.

51. *Id.*

particularly insufficient to reveal these prejudices according to the Chief Justice.

In a vehement conclusion, Mr. Chief Justice Nix quoted Supreme Court Justice Thurgood Marshall, and thereby accused his own brethren on the court of ". . . ignor[ing] as judges what we all must know as men . . ."⁵² He characterized the majority's position as "ostrich-like;" and claimed that by ignoring the realities of the world, that they had served to encourage the prejudices they were claiming to combat.⁵³

VII. ANALYSIS

Less than twenty years ago, sixteen states had laws prohibiting interracial marriages.⁵⁴ Lynchings of blacks accused of raping whites is not ancient history. A study by the National Association for the Advancement of Colored People (NAACP) reported that 2,214 blacks had been lynched during the period from 1889 to 1914. Of these, 629 of the victims (28.4%) had been accused of raping white women. During the same period, the report revealed the lynching of 1,010 white men, 8.4% of whom had been accused of rape.⁵⁵

It does not seem likely that prejudices and stereotypes, particularly prejudices about differing sexual drives, which had been building for hundreds of years could be eliminated within the last twenty years. Rather than ignore the biases that exist, the court would have been wiser to admit to them in hopes of changing the attitudes of society.

Part of the problem is that the judicial system continues to reinforce the notion of differing sexual drives among whites and blacks. Also, the system reinforces the concept that rape is more heinous when a black man victimizes a white woman. One study by a noted criminologist highlighted the fact that blacks are punished more severely for rape than are whites. Of 455 men executed in the United States for the crime of rape, between 1930 and 1967, 405 (89%) were black.⁵⁶ In Virginia the discrimination is even more egregious.⁵⁷

These figures become even more egregious when the focus is narrowed to black on white rape. The criminologist noted that after studying rape convictions in Georgia from 1945 to 1965, "[o]ur current analysis suggests that racial combinations of defendant and victim form the most important discriminatory variable: black defendants who rape white women are most likely to receive the death penalty."⁵⁸ A black man convicted of raping a white woman was eighteen times more likely to be executed as contrasted with a black man who raped a black woman or a white man raping either, a white woman or a black woman.⁵⁹

These figures are reinforced by the report of a black bar association studying rape convictions in Baltimore, Maryland in 1967. Excluding life and

52. *Id.*, 504 Pa. at 366, 473 A.2d at 1365, quoting *Ross v. Massachusetts*, 414 U.S. 1080, 1085 (1973) (Marshall, J., dissenting from denial of certiorari).

53. *Id.* at 366, 473 A.2d at 1365.

54. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

55. S. BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 223-24 (1975).

56. N. GAGER & C. SCHURR, *SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA* 165 (1976); citing M. WOLFGANG, *RACE, JUDICIAL DISCRETION AND THE DEATH PENALTY*.

57. J. SCHWENDINGER & H. SCHWENDINGER, *RAPE AND INEQUALITY* 110 (1983).

58. S. BROWN MILLER, *supra* note 56, at 215.

59. *Id.* at 216.

capital punishment sentences, a black man found guilty of raping a white woman was given an average sentence of 15.4 years.⁶⁰ The numbers dropped off drastically for the other categories, white men raping black women—4.6 years, white men raping white women—3.67 years, and, most incredibly, black men convicted of raping black women received an average prison term of only 3.18 years.⁶¹ As one writer put it, “heavier sentences imposed on black men for raping white women is an incontestible historical fact.”⁶²

The judicial system has spent the last fifty years telling people of this country, that is, those who sit in the jury boxes, how much more dangerous are black men who rape white women, and that these persons deserve heavier punishment than others. However, in the Commonwealth of Pennsylvania, the highest court states the belief that jurors can brush all of this sociology aside and view a black defendant accused of the rape of a white woman no differently than they would any other rape defendant. This position seems best summed up by Chief Justice Nix’s expression: “ostrich-like.”

The court further erred by failing to consider the reasons the alleged victim might have for claiming the sex was non-consensual. According to one author, “some charges of rape against black men by white women seem to be very clearly (sic) examples of voluntary sex, the discovery of which embarrass the female partner.”⁶³ The author estimates that this happens approximately twenty-five percent of the time in reported rape cases (a figure which is disputed by other writers).⁶⁴ Realistically, it is impossible to determine the actual percentage in which this occurs, but it would be naive to think that it never happens. The courts must realize that there are differences between consent defenses in interracial and intraracial rape cases, and deal with society’s perception of these differences during voir dire.

The court further refused to acknowledge the importance of the preconceived credibility the jurors would attach to the two parties. In *Commonwealth v. Futch*,⁶⁵ the Supreme Court of Pennsylvania found an abuse of discretion by the trial court—when voir dire questions concerning the credibility of prison guards as opposed to inmates was in issue.⁶⁶ The court found that it was improper to deny the following voir dire questions:

- (1) Would the fact that all of Mr. Futch’s material witnesses are incarcerated at Western Penitentiary make their testimony any less believable than any witnesses that the Commonwealth may produce who are not prisoners?
- (3) Would you give any more credence to a prison guard than you would to a prisoner simply because he is a prison guard?

The rationale of this holding was that a juror may be influenced by the official status of the guard and may confuse this status for truthfulness. “The crux of the case at bar is the credibility of the prison guards’ testimony contrasted with the credibility of the prison inmates’ testimony,” wrote Justice

60. *Id.*

61. *Id.*

62. *Id.*

63. J. MACDONALD, *RAPE: OFFENDER AND THEIR VICTIMS* (1971).

64. C. HURSCH, *THE TROUBLE WITH RAPE* 82 (1977).

65. 469 Pa. 422, 366 A.2d 246 (1976).

66. *Futch* concerned an inmate who was on trial for the murder of another inmate. Two guards were to testify that they saw Futch stab the victim Charles Ganss. Futch’s defense was that he was in another part of the prison at the time of the incident. His alibi witnesses were also prisoners.

Eagen. "On these facts a juror who would believe the testimony of a prison guard simply because of his official status would be subject to disqualification for cause."⁶⁷ The majority believed that probing into this bias was crucial because "it bears on a juror's objectivity with respect to the most critical aspect of the case."⁶⁸

The fifth question in *Richardson*—

(5) If the woman were to testify that the incident happened one way and the [defendant] would testify that the incident happened in an entirely different way, would you tend to believe the testimony of the complainant merely because she was white?⁶⁹

also bears on the juror's objectivity with respect to the most critical aspect of the case. In fact, this question is merely a mirror of question number three in *Futch*. Credibility was also the key issue in *Richardson*. It was the words of a black man against the words of a white woman. The outcome would be determined based on who the jury believed.

The court in *Futch* assumed that the jurors might believe the guards simply because of their status. This could be true, but it seems even more probable that a white woman claiming rape would be perceived as more honest than a black man claiming consensual intercourse. However, the court in *Richardson* seemingly ignored *Futch*, perhaps thinking that only uniforms influence jurors.

The court also failed to give any indication of how future cases of this type will be decided. The *Christian* court was concerned with the jurors' ability to give a fair trial to an accused who had previously dated white women and therefore, that court allowed for a probing voir dire. The facts in *Richardson* would seem to show an even more compelling need for extensive examination of the veniremen. *Richardson* admitted to having sex with a white woman. If the *Christian* jurors' prejudices were "inflamed"⁷⁰ by the defendant's acts, the *Richardson* jurors' stereotypes and biases should be thought of as burning out of control. Perhaps the majority thought that the dangerous prejudices that existed in 1978 had disappeared in only six years.

VIII. CONCLUSION

The Pennsylvania Supreme Court erred when they held that a consent defense does not render an interracial rape case racially sensitive. The Justices' desire to put the racial problems of our nation behind them has forced them to ignore the reality that racism towards interracial sex still exists in the United States. As one writer stated, "No single event ticks off America's political schizophrenia with greater certainty than the case of a black man accused of raping a white woman. Facts are irrelevant to the public imagination. Objectivity is thrown out the window."⁷¹

William Richardson needed the opportunity to extensively question prospective jurors, more so than most defendants because of the racial overtones of this case. The Pennsylvania Supreme Court erred in failing to reach this

67. *Id.* at 429, 366 A.2d at 248.

68. *Id.* at 430, 366 A.2d at 249.

69. *Id.*

70. *Christian*, 480 Pa. at 131, 389 A.2d at 548 n.7.

71. S. BROWNMILLER, *supra* note 56, at 210.

conclusion. The error could well have determined Richardson's fate. As Chicago attorney and former president of the American Trial Lawyers Association Leonard Ring recently wrote, "jury selection is one of the important, if not the most important phases of the trial. The best case, with the best lawyer is a loser with the wrong jury."⁷²

If the state's highest court is not going to allow voir dire questioning into an area such as racial prejudices, perhaps the concept of voir dire should be totally done away with. Twelve names could be drawn at random, and those twelve would decide the case no matter what knowledge of case, biases, prejudices, etc ... they might possess, the idea being that the bias of one juror would eliminate the contrary bias of another. This is not a perfect solution, but it is no worse than conducting a voir dire and not allowing questions on a crucial aspect of the jurors' background.

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72. Ring, *Voir Dire: Some Thoughtful Notes on the Selection Process*, TRIAL, July 1983, at 73, 75.