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The Morning After: Selecting Impartial Juries After Mass Shootings

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I. Introduction

102. In the early morning hours of June 12, 2016, the unthinkable happened in the small city of Orlando, Florida. The location that many believed was the happiest place on earth turned into the scene of America's largest mass shooting in history. A gunman, Omar Mateen, opened fire in Orlando's Pulse Nightclub frequented by members of the gay and lesbian community. By the time the Orlando Police Department had resolved the situation, fifty civilians were dead, including the shooter, and fifty-three others were injured.

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103. With the shooter deceased, no manhunt followed. While there were many questions as to why this occurred, many accusations linked the heinous actions of a deranged lunatic to radical Islamic groups, however there would be no trial. There would be no need to question and find an impartial jury to determine guilt or innocence. No motions would follow moving for a change of venue or perhaps even requesting recusal of a judge. From a judicial standpoint, there would be no repercussions felt in the courtrooms of Orange County, Florida where business as usual occurred Monday morning following the shooting.

104. Yet while there were no obvious ripples from the actions of this 'lone wolf' terrorist, did defendants in Orlando who were tried in the days and weeks following the shooting receive fair trials? Accused individuals who faced criminal charges involving robbery with a firearm, attempted murder, and burglary to a dwelling, were judged either guilty or not guilty by jurors who had been rocked by the news of the massacre. This article will explore the question of whether large scale acts of terrorism such as mass shootings should be grounds for cause strikes and preemptory challenges during jury voir dire. First, it will explore the case law on the use of challenges involving potential jurors who had been victims of crime being struck from juries. It will look at the rationale and reasoning for permitting otherwise qualified individuals to sit and hear cases. Next, this article will explore the commonalities which lead to juror bias, such as similarities in the type of crime and the nature of the victim. Finally, this article will present avenues for the judiciary to prepare for a community crisis event and ensure that the tragedy is not compounded by infecting the local jury pool with bias.

II. Issues with Jury Selection

A. Types of bias

105. The Sixth Amendment to the United States Constitution guarntees criminal defendants a "speedy and public trial, by an impartial jury."[2] Courts have long struggled with what is meant by an "impartial jury." While the phrase "impartial jury" appears simple to define, it is a phrase that the courts have struggled with for centuries. In 1908, The Supreme Court of the United States wrestled with the phrase in the case of *Crawford v. United States.* [3]

106. In *Crawford*, a defendant was found guilty for committing fraud against the United States government. The defendant appealed the guilty verdict all the way up

2 U.S. Const. amend. VI.

3 *Crawford v. United States*, 212 U.S. 183 (1909).

to the United States Supreme Court. The defendant agrued that salaried employees of the United States government were prohbited from serving as jurors by law. The Court found that the juror was not a "salaried" employee as defined in the code, nonetheless the employer-employee relationship created an implied bias where the United States government was the victim of the fraud in the instant case. In reaching this decision, the court began to look at the concept of implied bias in addition to actual bias for grounds to remove a potential juror.[4]

107. The court noted that the juror's employment was something of value to him. Yet while there was no evidence that if the juror had found the defendant not guilty, his income would have suffered, "[i]t is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial." Therefore, the defendant did not have to prove actual bias for the juror to be removed. It was enough to show the implication of bias based on the relationship. As such, the Court found the trial court errored by refusing to remove the juror.[5]

108. Approximately thirty years later, the Supreme Court provided some additional guidance for the phrase "impartial jury." Similar to *Crawford,* a juror had been struck due to his employment with the Federal Government. This time the Court attacked the code prescribing federal employees automatically could not serve on juries in certain cases. The Court found no law could relieve an attorney nor a judge of their job of finding bias. While admittedly there are two types of bias, actual and implied, either may be grounds for disqualification. However, the court pointed out that the Sixth Amendment's right to an impartial jury did not create absolutes.[6]

109. The Amendment prescribes no specific tests. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law. There were not grounds for a contention that Congress had undertaken to preclude the ascertainment of actual bias. All persons otherwise qualified for jury service are subject to examination as to actual bias.[7]

110. While *Crawford* and *Wood* seem to hold for different propositions, in fact, they speak to the same truth about an impartial jury. Assumptions of bias whether in favor or against the defendant, do not belong in jury selection. Rather it falls to the individual attorneys to use these presumptions as a starting block to ferret out true bias in their potential juries.

4 *Crawford v. United States*, 212 U.S. 183, 184-85, 193-94 (1909).

5 *Crawford v. United States*, 212 U.S. 183, 196 (1909).

6 *United States v. Wood*, 299 U.S. 123 (1936).

7 *United States v. Wood*, 299 U.S. 123 (1936).

> All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror.[8]

111. But the issue of actual bias versus implied bias remained. And with the expansion of the criminal justice system, the issue expanded into the realm of bias as it applied to potential jurors being victims of crimes themselves. While the courts fought hard to determine the significance of one versus the other, little guidance was provided until approximately thirty years later in the case of *Brown v. United States*, where a defendant had been found guilty at trial of the crime of second degree murder. At trial, the defense attorney questioned jurors about potential bias based on having "anyone in their immediate family" being the victim of a crime. None of the members of the jury responded but it was later discovered that one juror had a brother who had been murdered. The defendant moved for a new trial based on this information which was denied by the trial court.[9]

112. In affirming the decision of the lower court, the Tenth Circuit Court of Appeals again recognized a distinction between actual bias and implied bias. It found that the defendant did not accuse the juror of actual bias in his decision making. Rather the concern was regarding potential implied bias. The court asked whether the case compeled "an imputation of inherent bias to the juror as a matter of law." For the court, the determination centered not on the juror's responses but on the attorney's questioning. The court found that no definition for immediate family was ever provided by the defense. With this lack of clarification, no implied bias could be imparted to the juror as it was an honest mistake.[10]

B. Bias when juror or family member is a victim of a crime

113. With the agreement that removal of a juror could be based on actual bias versus implied bias, the application of this revelation needed to be applied to those situations where the juror hearing a case was also the victim of the same or similar crime that a defendant was now charged with.[11] Actual bias, in these situations, was the easier of the two scenarios. Here the juror would admit he or she could not be fair based upon thier experience and the individual would be struck for cause.

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8 *United States v. Wood*, 299 U.S. 123 (1936).

9 *Brown v. United States*, 356 F. 2d 230 (10th Cir. 1966).

10 *Brown v. United States*, 356 F. 2d 230 (10th Cir. 1966).

11 See *Johnson v. Champion*, 9 F. 3d 117 (10th Cir. 1993).

114. However, implied bias posed a more difficult question. The issue of whether a juror may be struck for implied bias is a question of law.[12] Further, any doubts that a juror can be impartial must be made against the juror. This applies equally to actual and implied bias.[13]

> We have no psychic calibers with which to measure the purity of the prospective juror; rather, our mundane experience must guide us to the impartial jury promised by the Sixth Amendment. Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid. [14]

115. The case of *Burton v. Johnson* provides guidance on the issue of implied bias in the situation where a juror has been a victim of the same or similar crime to that with which the defendant is charged. In that case, the defendant, Shirley Burton, admitted to killing her husband to protect herself from his continued abuse. During the trial, her attorney used special *voir dire* procedures in an attempt to obtain an impartial jury.[15]

116. First, he requested the selection of jurors be based on an individual examination. Second, he provided the court with expert testimony indicating that because of the sensitive nature of familial abuse, it would be difficult for some potential jurors to speak about inherent bias based upon their own upbringing. The trial judge denied the request to have each individual member of the jury individually questioned but did split the panel up into two large groups to address the expert's concerns. The trial court further indicated that jurors could answer questions privately, but "he preferred answers in open court because inquiries in chambers were difficult."[16]

117. During the first group of potential jurors, the defense attorney asked about potential bias in hearing the case due to individual experiences with domestic abuse and child abuse. This prompted one brave juror to speak to the parties in chambers revealing that she could not be impartial since she had witnessed her father beat her mother. The juror was removed for cause, and the attorneys proceeded to question the second group of potential jurors.[17]

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12 See *Burton v. Johnson*, 948 F. 2d 1150, 1158 (10th Cir. 1991).

13 See *United States v. Nell*, 526 F. 2d 1223, 1230 (5th Cir. 1976).

14 *United States v. Nell*, 526 F. 2d 1223, 1230 (5th Cir. 1976).

15 *Burton v. Johnson*, 948 F. 2d 1150, 1151-53 (10th Cir. 1991).

16 *Burton v. Johnson*, 948 F. 2d 1150, 1151-52 (10th Cir. 1991).

17 *Burton v. Johnson*, 948 F. 2d 1150, 1152 (10th Cir. 1991).

118. During the second round of questioning, the defense attorney again questioned the panel on potential bias along the same grounds as before. This time no jurors responded to inquiries about child abuse or domestic violence. A jury was empaneled, and after hearing testimony, found the defendant guilty of first degree murder. The defense filed a motion for new trial on grounds of inadequate *voir dire*. Attached to the motion was an affidavit filed by the defense attorney stating several jurors failed to disclose experiences with abuse. The trial court denied the motion.[18]

119. The defense then filed a second motion for a new trial. The motion specifically discussed the experiences of one juror, Mrs. G, who said her husband had a violent temper and physically abused his family. This juror asked to remain anonymous because she feared her husband would punish her if he discovered her statement. The trial court conducted a hearing at which Mrs. G testified when asked about experiences with domestic or child abuse, she did not "connect" her experiences with the question because she attempted to not think about her husband's conduct.[19]

120. Despite this evidence, the trial judge still denied the motion. On appeal to the New Mexico Supreme Court, the judges affirmed the decision of the lower court indicating that the defense had the opportunity to question witnesses about the topic and no bias affecting the verdict had been demonstrated by the defendant. The defense then filed a writ of habeas corpus, reviewed by a United States Magistrate for the District of New Mexico. The magistrate concluded Mrs. G was impliedly biased.[20]

121. On appeal, the United States Court of Appeals for the Tenth Circuit used the two-part test articulated by the United States Supreme Court in *McDonough Power Equipment v. Greenwood* to determine if the dishonesty of a juror was grounds for a new trial.[21] Under the test, it must first be determined that a juror lied about material queston during *voir dire*; and secondly, that an honest response would have resulted in a valid challenge for cause.[22]

122. In applying this standard to the Burton case, the Tenth Circuit noted that a finding of implied bias is a question of law for the court. Further, any doubt regarding the existence of bias must be resolved against the juror. There was no argument that Mrs. G lied about her own experiences regarding domestic abuse–evident in Mrs. G's own testimony. Yet the trial court concluded that there was no evidence

18 *Burton v. Johnson*, 948 F. 2d 1150, 1152-54 (10th Cir. 1991).

19 *Burton v. Johnson*, 948 F. 2d 1150, 1154 (10th Cir. 1991).

20 *Burton v. Johnson*, 948 F. 2d 1150, 1155 (10th Cir. 1991).

21 *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984).

22 *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984); *Burton v. Johnson*, 948 F. 2d 1150, 1156 (10th Cir. 1991).

that the juror's experience led to a bias against the defendant. The Tenth Circuit disagreed finding proof of implied bieas by the simple fact the juror chose to lie. As such, the appellate court ordered a new trial.[23]

123. Despite this finding, courts have routinely held back in the application of a *per se* rule of bias in a juror. This position was reaffirmed in the case of *United States v. Jones*. There a defendant appealed his conviction for bank robbery. During *voir dire*, one juror revealed that his daughter-in-law had been the victim of a bank robbery. When questioned further about the issue, the juror indicated that he had not really discussed the matter with his daughter-in-law, and it would not prevent him from being a fair juror in the instant case. The defendant moved to have the potential juror removed for cause, which the judge denied. The defendant was then forced to use a preemptory challenge to ensure the individual did not sit on the panel.[24]

124. On appeal, the defendant argued for a *per se* finding of bias in jurors who themselves, or their families, were victims of the crime being charged, or a similar crime. The circuit court rejected this argument and recognized the broad discretion that trial courts have in conducting *voir dire*.[25] More importantly, the court cited language from the case of *Irvin v. Dowd*:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.[26]

125. Put another way, it is impossible to assume that someone is biased based solely on their life experiences. Rather, it is necessary to question and explore those experiences in depth in order to truly ascertain if a person can sit in fair judgment of another. If the juror has the ability to set aside his or her bias and render a decision based solely on the evidence produced in trial, then he can sit as a juror. [27]

C. What constitutes a victim?

126. The mass shooting in the heart of Orange County, in downtown Orlando, had a deep effect on that large community. In the days, weeks, and months following the shooting, the community organized mass fundrasing efforts for the victims and

23 *Burton v. Johnson*, 948 F. 2d 1150, 1155, 1158-59 (10th Cir. 1991).

24 *United States v. Jones*, 608 F. 2d 1004, 1006, 1008 (4th Cir. 1979).

25 *United States v. Jones*, 608 F. 2d 1004, 1007 (4th Cir. 1979).

26 *United States v. Jones*, 608 F. 2d 1004, 1007 (4th Cir. 1979) (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

27 *United States v. Jones*, 608 F. 2d 1004, 1007 (4th Cir. 1979).

victims' families, along with marchs, vigils, blood-drives, and other suport and recovery efforts.[28] The death toll was fifty, including the shooter, and more than that amount were injured. It is easy to imagine extensive threads of human interaction connecting the deceased and injured to thousands of others in the community: immediate and extended family members, friends, friends-of-friends, colleagues, neighbors, health care and emergency personal involved in the crisis, and a multitude of others. Vigils in the weeks after the shooting engaged tens of thousands of mourners who felt sympathy, compassion and outrage at a very personal level. The very motto of the recovery movement was "One Orlando," summarizing that the entire community was a victim of the shooting, and the entire community would recover together. [29]

127. It is easy to conceive that the pool of potential jurors for cases in the Ninth Judicial Circuit, which includes Orange and Osceola Counties, could be affected in the aftermath by bias in criminal cases, as a result of the shooting; particularly those involving firearms. Sadly, this is a dilemma which has become commonplace across the United States as one community after another falls prey to mass killings. [30]

128. The legal and practical challenge then is how to ensure fair and impartial jurors in such a community in the weeks, months, and potentially even years after a mass shooting. As a starting point, both judges and defense attorneys must have a thorough understanding of the term "victim" as defined in the law. Most state statutes and federal codes define the term "victim" on a crime-by-crime analysis. In Florida, where the shootings occurred, in the case of a murder charge, the "victim" is defined as a "human being."[31] In the United States Code, the same definition is provided in a trial for murder: "Murder is the unlawful killing of a *human* being with malice aforethought." [32]

129. However, if one looks at the definition of terrorism, (another crime which could certainly be associated with the Orlando shootings) the definition includes two different categories of "victim."[33] Those categories include any "human life" or

28 Photos Show Global Solidarity After Orlando Shooting, NATIONAL GEOGRAPHIC (June 13, 2016); Alli Knothe, *Two Funds for Pulse Victims Merge, Donation Pool Reaches $17 million*, TAMPA BAY TIMES (June 30, 2016); Kate Santich, *In Wake of Shooting, Hundreds of Fundraising Campaigns Launched*, ORLANDO SENTINEL (June 25, 2016).

29 See *About Us*, ONE ORLANDO FUND.

30 For a discussion of recent mass shootings, See J. Korevec, *McDonald Does Dallas: How Obscenity Laws on Hard-Core Pornography Can End the Nation's Gun Debate*, 88 UNIV. SO. CAL. L. REV. 165 (2014).

31 Fla. Stat. § 782.04(1)(a) (2016).

32 18 U.S.C § 1111 (2016) (emphasis added).

33 Fla. Stat. § 775.30 (2016).

a "civilian population."[34] If we look to the Federal Code's definition of victim in a terrorist act, we see again a similar definition to that of Florida, defining victim as either a "human life" or a "civilian population."[35]

130. Yet defining an entire population to be a victim is a far more broad definition of the term "victim" than under traditional jurisprudence. However, there is some precedent for this characterization. For instance, in the case of *Bowoto v. Chevron Corporation*, Nigerian protesters tried to sue Chevron for employing the Nigerian government to oust them during a sit-in.[36]

131. While the facts of the case were highly disputed between the respective parties, both agreed that sometime in May 1998, the plaintiffs occupied a barge owned by Chevron to protest their presence in the region. Unable to remove them on their own, Chevron requested the Nigerian government intervene. Ultimately, Special Forces answered the call and three days later removed the protestors by force. Unfortunately, in doing so military techniques were employed resulting in the death of an individual. It also was alleged that the remaining protestors were taken into government custody and tortured. Plaintiffs argued a vicarious liability claim under Crimes Against Humanity and the Alien Tort Statute, since the defendants had paid the Nigerian Government.[37] The defendants filed a motion for summary judgment which was subsequently granted by the court.

132. In granting the motion, the United States District Court for the Northern District of California took pains to review the requirement of a crime against humanity. In doing so, the court listed the two general elements consistent with every humanitarian crime, a "widespread and systematic attack" and an attack targeting "civilian population." Targeting a "civilian population" need not include the entire population. Rather to satisfy this requirement a showing that a certain group or certain individuals were purposely targeted is sufficient.[38] Therefore, the concept of a population being the victim of a crime, does have precedent.

133. Even the state home to the Pulse nightclub shooting has a legitimate basis to argue for this conclusion. Since July 1, 2011, the State of Florida has maintained a list of "scrutinized companies" that the local governments and state agencies are forbidden to do business with because of their treatment of entire populations.[39] These companies must have ties either to the Country of Sudan or Iran Petroleum

34 Fla. Stat. § 775.30 (2016).

35 18 U.S.C. § 2331 (2016).

36 *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010 (N.D. Cal. 2007).

37 *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010 (N.D. Cal. 2007).

38 *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010 (N.D. Cal. 2007).

39 *Protecting Florida's Investment Act*, STATE BOARD OF ADMINISTRATION OF FLORIDA (Aug. 2, 2016).

Energy Sector.[40] Florida Statutes Section 215.473(1)(m) defines "[m]arginalized populations of Sudan" to include

> [T]he portion of the population in the Darfur region that has been genocidally victimized; the portion of the population of South Sudan victimized by Sudan's north-south civil war.[41]

134. Therefore, implicitly in this statute is the understanding that an entire population can be the victim of a crime.

135. Debatably, it could pose an arduous task for a trial attorney to argue that a mass shooting was a crime against humanity as recognized by the courts. Establishing that an isolated incident would arise to the level of both a widespread and systematic attack is troublesome. However, if we look at the cumulative effect of these events on American psyche, this prong potentially could be met. Who among us, after Aurora, Colorado, does not go into a movie theater and immediately check for the exists? Who among us, after the Boston Marathon bombing, does not look for a safe outlet in case of emergency at a sporting event? Even elementary schools have now taken greater precautions to keep children safe after Newtown, Connecticut. If we do not take these events as isolated incidents, but rather as a concentrated attack on our safety and way of life, is it truly a far stretch of reasoning to believe that the concerns that encroach in a movie theater or in a sporting event, do not also make their way into a courtroom?

136. Arguably, in a situation such as the Pulse shootings, where the entire civilian population of Orange County, Florida, may be considered a victim, it is impossible to find an unbiased juror as the entire community is affected. Even if the extent of the civilian population could be limited to the City of Orlando, or even downtown Orlando, the threads of community would render the entire pool of potential jurors in Orange County, Florida, biased, as it is difficult to imagine any citizen of the county who did not know someone who lived or worked within the affected civilian population.[42]

137. In the aftermath of a mass shooting, or similar large-scale attack resulting in extensive human harm, it is reasonable to view the entire community as a victim of the attack. In such case, the task to find unbiased jurors from the affected community in the weeks, months, and even years afterward is a nearly impossible task.[43]

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40 Fla. Stat. § 215.473 (2016).

41 Fla. Stat. § 215.473 (2016).

42 Fla. Stat. § 215.473 (2016).

43 Judge Carlos A. Samour, Jr., *Effectuating Colorado's Capital Sentencing Scheme in the Aurora Theater Shooting Trial*, 93 DENVER L. REV. 577, 578-579 (2016).

Yet, it is up to the judicial system to ensure unbiased juries are provided to criminal defendants.[44]

D. What constitutes a similar crime?

138. While the question of whether a potential juror was a victim or close family or friend to a victim of a similar crime is obvious when dealing with a trial for murder after a mass killing, what about potential juror bias in cases of disparate or lesser crimes? Even civil cases, such as tort cases brought against gun manufactuturers could be subject to jury bias in a community recovering from a mass shooting. It is possible that such community members would seek to "send a message" to the maker of the gun or guns which hurt the community.

139. Many non-murder crimes are committed with firearms, including assault, battery, burglary, kidnapping and rape. While such crimes may not be identical to a mass shooting, there are certainly parallels which could create actual or implied juror bias in a community recently subject to a mass shooting. These crimes are often violent in nature, and they often carry a risk of death to the victim.[45] These crimes often create a long-lasting sense of fear or apprehension in the victim, even sometimes resulting in post-traumatic stress syndrome.[46] Considering such similarities, it is highly possible that a mass shooting in the community could infect potential jurors in a wide variety of criminal cases.

140. However, courts have drawn distinctions regarding the similarity of crimes when addressing potential juror bias. For example, in *Lugo v. State*, the Florida Supreme Court examined the issue of juror bias based upon a juror who failed to disclose that he had been the victim of a violent crime. In *Lugo*, the defendant was found guilty of a series of horrific crimes against the murdered victim, including kidnapping, torture, extortion, which occurred over a period of a month, as well as the unusually violent murder attempts and eventual murder. A juror failed to disclose that he had been a victim of a violent battery in which he had been knocked to the ground and punched at his workplace. The court drew a distinction between the juror's one-time victimization through a battery, and the month-long systematic kidnapping, torture, extortion, and violent murder by the defendant. The court stated, "the [juror's] workplace incident was not sufficiently material or relevant to service on Lugo's jury," the court denied the defendant's request for a new trial.[47]

44 U.S. Const. amend. VI.

45 See Fla. Stat. § 782.04 (2016).

46 D. Kilpatrick, B. Saunders, A. Amick-McMullan, C. Best, L. Veronen & H. Resnick, *Victim and Crim Factors Associated with the Development of Crime-Related Post-Traumatic Stress Disorder*, BEHAVIOR THERAPY VOL. 29 ISSUE 2, 199-214 (Spring 1989).

47 *Lugo v. State*, 2 So. 3d 1, 14 (Fla. 2008).

141. The Lugo case failed to create a bright-line test for similar crimes and its effect on juror bias. Rather, the court addressed the issue of similar crimes effect on juror bias from a common-sense, or subjective, approach. In *Lugo*, the crimes at issue were significantly more prolonged, violent, and resultant in far more dire consequences than the battery suffered by the juror. In viewing these disparities between the crimes, the court determined that implied basis should not be found.[48]

142. In the aftermath of a mass shooting or an act of terrorism in a community, it is important to make best attempts to define what constitutes a similar crime in the context of potential juror bias. The definition will likely depend on the nature of act which harmed the community. In Orange County, Florida, the site of the largest mass shooting in America, any violent crime involving a firearm might well meet this definition, as might murders of multiple victims from the local community regardless if a firearm was used. As there were allegations that the shooting was motivated by an anti-gay ideology, hate-crimes of any nature against the lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") community might rightfully be place on the list of criminal offenses for which heightened juror scrutiny should be employed.

143. Alternatively, there seems to be little need to place drug offenses, non-armed robberies and assaults, bribery, extortion and the multitude of other non-violent crimes on a list for heightened juror scrutiny. It is unlikely that the juror's view of these types of crimes would be biased after the mass shooting.

144. It should be left to the officers of the court, judges and attorneys alike, to make the determination after these events occur as to whether a community crisis event, such as a mass shooting or bombing, creates widespread implied bias in the potential jury pool. However, the judiciary must also develop a plan to address these terrible events, before they occur, to prevent compounding the tragedy by allowing obviously biased jurors to issue wrongful convictions.

III. Tools to Avoid Jury Bias in the Aftermath of a Mass Shooting or Similar Terrorist Event

A. Blanket recusal of the local court and transfer of venue

145. Perhaps the simplest method to avoid jury bias in a community affected by a crisis like a mass shooting is to issue an automatic blanket recusal of the court for

48 *Lugo v. State*, 2 So. 3d 1 (Fla. 2008).

designated similar crimes for an appropriate period of time. Such blanket recusal could be effectuated by an administrative order of the chief judge. In doing so, the court will save each judge in each case from the need to engage in case-by-case judicial inquiry and extensive *voir dire*, thereby saving judicial resources in a community which is now under the added strain of recovering from an attack. Further, it allows for consistent administration of justice within the courthouse, such that all defendants charged with the enumerated crimes are treated equally - rather than some judges granting recusals and changes of venue while other judges refuse to move the case. Lastly, the blanket recusal and transfer order may well prevent a multitude of appeals that are based upon juror bias from flooding the local appellate court.

146. Certainly, if such a blanket order were to remain in place for several months or years, many logistical issues would need to be addressed to ensure due process to the accused and judicial expediency. Most likely, arrangements would need to be made with nearby counties or circuits to accept the high number of transferred cases and to retain sufficient judges in the recipient jurisdiction, either by creation of new judicial seats or by employment of retired judges, to address the additional caseload.[49] Very likely, the state legislature would need to take on a role in creating and funding any such judicial positions.

147. Due to the complexities of such a blanket recusal and transfer in the aftermath of a community crisis, it is important for the judicial, executive, and legislative branches to develop a model order, as well as emergency procedures, which can be quickly and simply (or as simply as feasible) implemented within the affected jurisdiction.

B. Case-by-case analysis for recusal and transfer of venue

148. Alternatively, change of venue requests can be posed by attorneys on a case-by-case basis. However, the practice of additional pleadings in a multitude of cases could slow judicial efficiency throughout the courthouse.[50] Again, this slowed judicial economy would occur when the jurisdiction is already suffering from a community tragedy and is not in a position to waste resources. Such case-by-case approach may also result in a patchwork of results in which one judge grants the change of venue, and a different judge down the hall denies it. This, in turn, may lead to a

49 Gretchen Morgenson & Geraldine Fabrikant, *Florida's High-Speed Answer to a Foreclosure Mess*, NEW YORK TIMES (Sept. 4, 2010).

50 Per its 2013 report, the Ninth Judicial Circuit for Orange and Osceola County, Florida claimed a criminal caseload of 500-800 cases per docket. See 2012 Annual Report and 2013 User Guide published by the Ninth Judicial Circuit.

greater number of appeals based upon juror bias, and increased potential for new trials, in the years which follow the crisis event.

C. In-depth jury screening and jury training

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.[51]

149. If wholesale transfers of venue are not practically, politically, legally, and/or financially possible, an alternative course of action would be heightened juror screening, followed by heightened jury training.[52] As a practical matter, jury experts and psychologists with expertise in handling mass crisis events should be employed to assist the court administration in creating either a mandatory, or recommended, jury questionnaire to assist with *voir dire* for screening jurors after a community crisis event.[53] This questionnaire would serve as extra protection against undetected jury bias.

150. It is incumbent upon the court, after the occurence of a community trauma such as a mass shooting, to allow sufficient and liberal strikes in subsequent trials of violent crimes.[54] It is well-settled that any ambiguity or uncertainty about a jurors ability to remain impartial should be resolved in favor of excusing the juror.[55]

> When a party seeks to strike a potential juror for cause, the trial court must allow the strike when 'there is basis for any reasonable doubt' that the juror had 'that state of mind which [would] enable him to render

51 *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007).

52 These tatics were used in the *People of the State of Colorado v. Holmes* case wherein the jury was empaneled within Arapahoe County, the location of the mass shootings. Judge Carlos A. Samour, Jr., *Effectuating Colorado's Capital Sentencing Scheme in the Aurora Theater Shooting Trial*, 93 DENVER L. REV. 577, 580 (2016).

53 A helpful start to such a list for such questionaire can be found at 84 Am. Jur. Trials 109 VIII. Trial 79 Voir Dire, I. Evans and A. Rostron (2016). Excerpts of judical training and questioning of the jury against bias can be found in *Lugo v. State*, 2 So. 3d 1, 14-15 (Fla. 2008).

54 When a court fources a defendant to use a peremptory challenge to the cure the court's denial of cause challenge, it may constitute reversible error if the defendant exhausts all of their remaining peremptory challenges. See *Busby v. State*, 894 So. 2d 88, 96-97 (Fla. 2004).

55 See *Burton v. Johnson*, 948 So. 2d 1150, 1158 (10th Cir. 1991); See also *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007); *Cottrell v. State*, 930 So. 2d 827, 829 (Fla. 4th DCA 2006) (quoting *Huber v. State*, 669 So. 2d 1079, 1081 (Fla. 4th DCA 1996)); *Smith v. State*, 907 So. 2d 582, 585 (Fla. 5th DCA 2005).

> an impartial verdict based solely on the evidence submitted and the law announced at the trial.'[56]

151. Even where the defense counsel fails to raise a concern regarding juror bias in the aftermath of a mass murder or terrorism act, it falls to the court to prevent a biased juror or jurors from serving. As noted in *Carratelli II*,

> [J]ury selection error justifying post-conviction relief is so fundamental and glaring that it should have alerted a trial judge to intervene, even in the absence of a proper objection, to prevent an actually biased juror from serving on the jury, thereby irrevocably tainting the trial. [57]

152. This does not, obviously, excuse a defense attorney from fulfilling his or her duty to thoroughly question jurors, not only with regard to their experience as a victim of a crime, or close relationship to a victim of a crime, but also how that crime affects their ability to remain impartial.[58] This applies also to questions regarding the community crisis and its effect on the juror's partiality in the specific case. The defense attorney needs to also recognize that, if the crisis event appeared to be motivated by a hate crime against a certain group, that the element of that expression of hate (both the perpetrator(s) and the victim(s)) and its effect on juror bias also be thoroughly explored).

153. The court should acknowledge that locating a sufficient number of unbiased jurors from the community juror pool in the aftermath of a community crisis event will be exceedingly difficult.[59] With this reality in mind, the judiciary should, either via administrative order for all similar cases or via judicial order on a case-by-case basis, allow more strikes for cause than what would be allowed under normal circumstances. The decision to permit additional preemptory strikes is left to the sole discretion of the court. It is well established law that a defendant is not automatically entitled to additional bites at the apple in this arena. Numerous cases stand for this proposition even when on the face of the case, the refusal to grant additional challenges appears unfair or "not very generous." What matters is that ultimately a fair and impartial jury is impaneled to hear the case.[60] Therefore it is incumbent upon the defense to tailor his or her argument for additional challenges in terms of the ultimate jurors left to hear the case and not a mere numbers game.

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56 *Singer v. State*, 109 So. 2d 7, 23-24 (Fla. 1959).

57 *Carratelli v. State*, 915 So. 2d 1256, 1261 (Fla. 4th DCA 2005).

58 See *Roberts v. Tejada*, 814 So. 2d 334, 343 (Fla. 2002); See also *Lugo v. State*, 2 So. 3d 1 (Fla. 2008).

59 See Judge Carlos A. Samour, Jr., *Effectuating Colorado's Capital Sentencing Scheme in the Aurora Theater Shooting Trial*, 93 DENVER L. REV. 577, 580 (2016).

60 See *United States v. Hueftle*, 687 F. 2d 1305, 1309-10 (10th Cir. 1982).

154. Once the jurors are selected, the court needs to ensure that the community jurors will receive training specifically related to their obligation to remain unbiased. Jurors cannot allow the recent crisis event to affect their adjudication of guilt or innocence in the courthouse.

IV. Preparing the Judiciary for Future Crisis Events

155. It is a disturbing but unavoidable fact that community attacks, such as mass shootings and bombings, have become a regular event throughout America. Just as law enforcement agencies across the country develop response plans for such events, so too must the judiciary. For the judiciary, the goal must be to ensure justice continues in an efficient and unbiased manner for those facing trial, even in the wake of a devastating community attack. A key element in such plans should be to address and eliminate the implied juror bias which will inevitably arise in the local jury pool after a community tragedy.

V. Conclusion

156. On June 12, 2016, shortly after the Pulse Nightclub massacre, Orlando Mayor Buddy Dyer gave an interview with CNN about the shooting. During that interview, Mayor Dyer stated, "So it's not just 50 individuals that have been impacted, it is our entire community."[61] Florida Governor Rick Scott stated during a news brief, "...this is an attack on our people. An attack on Orlando. An attack on Florida. An attack on America. An attack on all of us."[62] Vice President Joe Biden wrote, "Last night, at least fifty innocent people gathering to celebrate love and life were brutally killed in an act of pure hate and unspeakable terror. Scores of others were injured in the attack. They were our brothers and our sisters; our friends, neighbors, and loved ones."[63] The common thread in all of thse statements is the reality that acts of terrorism and mass shootings create victims out of all of us. We all feel the sting of violence from these events. Courts must recognize the connection that these horrific crimes create between potential jurors and violence in general. If judges are unwilling to recognize this new reality, it then falls to the defense attorney to initiate the conversation about the topic during the *voir dire* process. And even if jurors are unwilling to admit actual bias from these events, prolific defense attorneys must explore the effect of these crimes on jury pools to discover implicit bias.

61 *Interview with Orlando Mayor Buddy Dyer; Orlando Nightclub Shooting Deadliest Mass Shooting in U.S. History*, CNN (June 12, 2016).

62 *Quotes from leaders on the mass shooting in Orlando*, NEWS 4 JAX (June, 13, 2016).

63 *Quotes from leaders on the mass shooting in Orlando*, NEWS 4 JAX (June, 13, 2016).

157. If the goal of terrorists is to instill fear in the hearts of the populace, the legal system must take steps now to ensure that the judicial process is not corrupted by the radical propaganda of these deranged madmen. Almost half of all Americans believe terrorism is an attack on our way of life.[64] There is no truer way to thwart this repulsive ambition than to ensure the rights and guarantees that citizens enjoy during the judicial process remain in order to weather these attacks. Only then, do we truly win against the War on Terror.

64 Cliff Saunders, *Poll: American Way of Life under Threat*, KTRH.