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### Dean (Sean) v. Sheriff, 138 Nev. Adv. Op. 2 (Jan. 13, 2022)

Terra Shepard

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HABEAS CORPUS: INTRODUCTION OF RACIAL ANIMUS IS INEFFECTIVE  
ASSISTANCE OF COUNSEL

**SUMMARY**

During voir dire, Dean’s defense counsel discussed racial stereotypes in a careless manner. The Court concluded that counsel’s performance was unreasonable and resulted in prejudice to Dean. The district court erred in denying Dean’s petition for a writ of habeas corpus.

**FACTS AND PROCEDURAL HISTORY**

Dean was charged with attempted murder with the use of a deadly weapon and related offenses. Counsel questioned prospective jurors about racial bias, insisting that prospective jurors must be aware of racial stereotypes about African Americans, such as being “violent” or “sneaky.” One vocal prospective juror disavowed racial prejudice. Counsel asked the juror about further racial stereotypes, such as whether Dean had a propensity for violence because he is Black.

The jury found Dean guilty. The district court sentenced him to prison. The court of appeals affirmed. Dean filed a petition for a writ of habeas corpus, alleging ineffective assistance of counsel because counsel introduced racial stereotypes during voir dire. The district court denied the petition and Dean appealed.

**DISCUSSION**

Ineffective assistance of counsel occurs when counsel’s performance is less than objectively reasonable and results in prejudice.<sup>2</sup> Prejudice occurs when there is a reasonable probability of a different outcome that is sufficient to undermine confidence in the actual outcome of the proceedings.<sup>3</sup> For postconviction relief, a petitioner must show both unreasonable performance and prejudice.<sup>4</sup> In reviewing a petition, the Court defers to the district court’s factual findings if they are supported by substantial evidence and not clearly erroneous.<sup>5</sup> Questions of law are reviewed de novo.<sup>6</sup>

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<sup>1</sup> By Terra Shepard.

<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d 504, 404 (1984).

<sup>3</sup> *Strickland*, 466 U.S. at 687–88; *Johnson v. State*, 133 Nev. 571, 576, 402 P.3d 1266, 1273 (2017) (quoting *Strickland*, 466 U.S. at 694).

<sup>4</sup> *Strickland*, 466 U.S. at 697.

<sup>5</sup> *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

<sup>6</sup> *Id.*

A fair and impartial jury is a constitutional right.<sup>7</sup> Jury selection is an important part of enforcing that right.<sup>8</sup> Counsel may choose to raise the issue of racial bias during voir dire, and in some instances is compelled to.<sup>9</sup> But discussing racial bias must be done carefully and responsibly.<sup>10</sup>

Here, counsel's probe for possible racial bias was flawed. Counsel suggested that all African Americans, including Dean, were sneaky and violent. This was not objectively reasonable, especially given Dean's charges involving violence, because it could tend to alienate jurors or legitimize racial prejudice. Counsel's stated motive was to bring out unconscious racial bias, but that did not make his conduct reasonable. The vocal prospective juror was offended and angry about counsel's questioning during voir dire and denied making assumptions based on race. Counsel chose to continue asking "problematic racial questions," which undercut his purpose to reveal unconscious bias. Counsel's performance was deficient because there was no reasonable basis for how he chose to look for racial bias.

This deficient performance prejudiced Dean because his repeated suggestion that African Americans are violent undermined Dean's defense. Counsel's suggestion that African Americans are sneaky could have undermined Dean's credibility. The Court found that counsel's remarks about not judging Dean by his race did not cure the prejudicial effect of his earlier statements. Therefore, the Court was not confident in the outcome of the trial. Counsel's deficient performance resulting in prejudice meant that Dean had ineffective assistance of counsel.

The Court also noted that the trial court's inaction heightened its lack of confidence in the outcome. Judges have the duty and right to exercise reasonable control an attorney's participation in voir dire.<sup>11</sup> This is especially important to remove racial prejudice from the justice system. The trial court should have intervened in counsel's offensive questioning.

## **CONCLUSION**

Counsel's offensive questioning tainted the jury pool because it introduced racial prejudice. Therefore, it was objectively unreasonable and prejudiced Dean. The Court reversed the denial of the habeas petition and remanded for further proceedings.

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<sup>7</sup> Turner v. Murray, 476 U.S. 28, 36, n.9 (1986).

<sup>8</sup> Gomez v. United States, 490 U.S. 858, 873 (1989).

<sup>9</sup> See State v. Bates, 149 N.E.3d 475, 484 (Ohio 2020) (counsel may be ineffective for not questioning a juror admitting racial bias).

<sup>10</sup> See Middleton v. State, 64 N.E.3d 895, 901 (Ind. Ct. App. 2016).

<sup>11</sup> Whitlock v. Salmon, 104 Nev. 24, 28, 752 P.2d 210, 213 (1988).