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by Jason M. Murray

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White Ritual

Performing ceremonial rites
Hands holding black sticks
Pour black gold from sacred vessels
While black boots stomp in frenzied dance

Constant rubbing and striking
Columns of black smoke rise
From a black paved furnace
Before the priest's black robe

In the midst of a fiery furnace
Precious white metals
Refuse to yield white impurities
As white ashes form from raging fires

Burning crosses
Twelve white robes and ten white hoods
Blind eyes to exposed white bones
Peering through non-white flesh

Black hands clutch glittering fool's gold
Fallen angels receive praise amidst black smoke
The black night has lost her peace
As white justice is celebrated in the streets

—Jason M. Murray

During the ninth month of my federal judicial clerkship with a prominent black jurist, I sat in a tiny Tallahassee apartment and gave birth to this poem. It expressed old and new pain fueled by the images I had recently seen of Rodney King's brutal beating and the urban fires protesting the release of his attackers. More than a year before America heard the not-guilty verdict for King's attackers, I sat and watched in horror the Holliday videotape of the Rodney King incident. Television stations worldwide broadcast the images the day after the beating.

I developed a sick feeling in the pit of my stomach as my mind arrived at the sad conclusion that all of the officers would be acquitted—a conclusion born out of my memories of the Arthur McDuffie incident that caused Miami to erupt on May 17, 1980, in the most violent race riot in the history of the city. The poem reflected the painful memories of living through numerous racial disturbances sparked by the acquittal of white police officers charged with killing unarmed black citizens. In addition to the wounds inflicted by the McDuffie incident, I was still healing from the mental scars of racial disturbances in Miami following the police shootings of Nevel Johnson in 1982 and of two young black men, Clement Anthony Lloyd and Alan Blanchard, in 1989.

When several white police officers beat Arthur McDuffie to death while he was handcuffed, I reexamined my life's goal of one day becoming a successful trial attorney. It was December 1979, a few days after my 13th birthday. I reviewed my seventh-grade yearbook and read over the various autographs from teachers and friends wishing me success as a lawyer. Miss LoConte enthused, "Hope you make it as a lawyer. If you don't, nobody will!" Little Anita wrote, "Good luck in the future with your lawyer career. Someday I may even hire you." My parents tell me that as early as the second grade, my mind was made up and my goal of becoming an attorney was fixed. The McDuffie incident, however, made me question my resolve as my faith in our justice system was shaken to its core.

I heard the reports of how McDuffie, a 33-year-old father of two small children, who had served his country in the U.S. Marine Corps and succeeded as an insurance executive, was

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beaten to death by more than six white Dade County police officers. News reports indicated that as many as 12 and no fewer than six officers beat McDuffie to death. Nine were suspended in connection with the incident. The officers attempted to cover up their crime by filing false police reports. State Attorney Janet Reno charged one with second-degree murder and three with manslaughter and tampering with evidence. A fifth officer was charged with evidence tampering and leading the cover-up. Long before I knew that a race card existed, McDuffie's mother, Eula McDuffie, pulled it out and slammed it on the table for all of Miami to see. Television showed her grief-stricken response to the arrests of the officers: "They beat my son like a dog. They beat him just because he was riding a motorcycle and because he was black." Marvin Dunn, *Black Miami in the Twentieth Century* 271 (1997). McDuffie's mother made it clear to all who would listen that race was the motivating factor in the officers' attack on her son.

Reno assigned her most experienced prosecutor to the case. After learning of her choice, we were hit with the news that Judge Lenore Nesbitt granted the defense attorneys' motion to change venue. She believed that the local news coverage was so pervasive in Dade County that it would be impossible for the police officers to receive a fair trial there. I later listened to the news reports of how the police charged with McDuffie's beating death were being tried in Tampa by an all-male and all-white jury. Clearly, the team of defense lawyers had played its own race card by using its 34 peremptory challenges to remove all of the blacks from the pool of potential jurors.

For weeks, the news media provided a blow-by-blow account of the trial and the evidence presented in the courtroom. The state brought forth immunized police officers as key eyewitnesses. One described how an officer holding either a flashlight or a nightstick with both hands repeatedly struck McDuffie on the top of the head with such force that blood splattered onto the pant leg of another officer several feet away. Miami's black community expected that McDuffie's killers would be punished. We were all unprepared to hear the news of the verdicts on Saturday, May 17, 1980. After listening to a complicated case that included nearly four weeks of trial testimony, the jury took less than three hours to announce that the police officers were not guilty on all counts.

I was working at my parents' seafood market in Coconut Grove when I heard the news. I was 13, and I was angry. I, along with the rest of Miami's black community, partly blamed the verdicts on the venue change and the racial composition of the jury. I remember as night fell seeing crowds of other angry black men and women gather along the side of Coconut Grove's Grand Avenue to protest the jury verdict and the judicial system that had failed us all. The news of racial disturbances in Miami's Liberty City and Overtown areas came streaming across the radio airwaves. Upon hearing the news of the events there, the protesters in Coconut Grove began to hurl rocks and bottles at white individuals passing by in cars. I stood and watched the crowd gradually grow and become violent. Fearing for my safety, my parents summoned me inside until it was time for us to leave for home. As we left, I can remember believing that the individuals rioting in the street were justified.

Following the McDuffie riots in Miami, and for much of the '80s, I found comfort in the words of Langston Hughes, here, from "Justice":

> That Justice is a blind goddess
> Is a thing to which we black are wise:
> Her bandage hides two festering sores
> That once perhaps were eyes.

The writings of James Weldon Johnson and Nikki Giovanni also helped me to cope with the realities of a judicial system that seemed unfair to black people.

While black people in Miami were still healing from the wounds of the McDuffie acquittal, the community again began to hemorrhage on December 28, 1982, from the police shooting of Nevel Johnson. Johnson was shot in the head by a Hispanic police officer making an unauthorized check of a video arcade that was suspected of permitting narcotics dealings. The officer did not have the appearance of a brown or black Hispanic from Central America, South America, or the Caribbean. Rather, he looked more like a direct descendent of the Spanish Conquistadors who led the conquest of the Americas in the 16th century. Miami's black community simply viewed this European-looking Hispanic as white. With the McDuffie slaying still fresh in the community's memory, the Overtown area of Miami immediately erupted into a full-scale riot right after the Johnson shooting. The reaction was so sudden that an angry mob trapped Johnson's shooter inside the video arcade with his partner.

At the time of the shooting, a friend and I were on our way home from dropping off his uncle at the Port of Miami. We ended up in Overtown just as angry citizens began to set police cruisers ablaze. I stopped a young man in the street and asked, "What's happening? What's going on?" He said, "They did it again! A white cop shot an unarmed brother in the video arcade in cold blood! The brothers have decided to take to the streets as they did after McDuffie!" My friend and I drove deeper into Overtown. Remembering some of the self-inflicted wounds the black community had suffered during the McDuffie riots, I stuck my head out the car window and yelled, "Brothers and sisters, this is not the way!" I still held on to my belief in the legal system and the idea that justice would prevail. My friend yanked me back into the car, and we quickly sped out of the riot area. Three days later we would return to the edge of Overtown, amid extra police protection, to march as members of the Orange Bowl Honors Band in Miami's premier tourist attraction—the Orange Bowl festival featuring a parade and football game.

On February 17, 1983, a Dade County grand jury charged the officer who shot Nevel Johnson with reckless and culpable negligence, which carried a maximum penalty of 15 years in prison. The officer quickly hired one of the defense

attorneys from the McDuffie case to represent him. Dunn, *supra*, at 303. As in the McDuffie case, the defense attorney recognized that race would be a significant factor in the trial and played one of the race cards in his hand. He asked Judge David Gersten to transfer his trial to another county because the riot would be fresh in the minds of potential Dade County jurors. The judge denied the request. Undaunted, the officer's attorney slipped from his sleeve another race card and struck all blacks from the jury panel. Nine months later the Florida Supreme Court, in *State v. Neil*, 457 So.2d 481, 486 (Fla. 1984), would ban this practice of using peremptory challenges "solely as a scalpel to excise a distinct racial group from a representative cross section of society." This trial, however, began on January 18, 1984, before an all-white jury that included five non-Hispanic whites and one white Hispanic.

As in the McDuffie case, the Johnson-shooting trial lasted nearly two months, and it took the jury only a couple of hours to reach a verdict of not guilty. The news of the March 15, 1984, acquittal was another blow to my faith in the triumph of justice. I was forced to grapple with the reality that race matters in our American legal system—justice was indeed blind to the plight of blacks in America. Miami's black communities in Liberty City and Overtown immediately erupted again in violence following the acquittal. The verdict came just weeks before I received my college acceptance letter into Duke University and before I sat down to write one of the high school commencement speeches for the class of 1984. My speech encouraged rebellion. I urged the class of 1984 to refuse to accept the philosophy expressed in Voltaire's *Candide*, that "this is the best of all possible worlds." To the applause of an auditorium filled with graduates and their families, I exclaimed, "Today, I submit to you that the class of 1984 is ready, willing, and able to take its rightful place alongside of those great innovators and nonconformists of yesteryear and carry out their tradition of creating change and making progress."

I was forced to grapple with the reality that race matters in our American legal system.

Miami's next major racial disturbance happened during my first year of law school. On January 16, 1989—while Miami prepared itself to host Super Bowl XXIII—an off-duty police officer spotted two black men riding a motorcycle erratically through the streets of Overtown. The officer began to chase the motorcycle and used his radio to call in his location. A nearby Miami police officer, William Lozano, heard about the chase on his police radio and then heard the motorcycle coming toward him. Lozano, a Hispanic, stepped into the street with his weapon drawn to face the oncoming motorcycle. A perfect marksman, he fired a shot and fatally wounded the driver, Clement Anthony Lloyd. A few seconds later the motorcycle crashed into an oncoming car and seriously injured the passenger, Allan Blanchard. Dunn, *supra*, at 305-06. Blanchard died in the hospital the next day from his injuries.

As with the Nevel Johnson incident, Lozano was simply viewed as a white police officer and not a Hispanic. News of this new police shooting instantly traveled around the community, and within minutes of the motorcycle's crash, "black residents took to the streets throwing rocks and bottles at police officers. . . . Less than an hour later, the Miami Police Department called in all off-duty officers and all supervisors. Overtown was again slipping into full-scale riot." Dunn, *supra*, at 306. The news reported that violence spread from Overtown into the Liberty City and Coconut Grove areas. I sat in my law school apartment and watched the television in disbelief. In ritualistic fashion, it was happening again. This was Miami's fourth race riot of the 1980s.

The day after the Super Bowl, Lozano was charged with two counts of manslaughter with a firearm and faced a possible 60 years in jail. He hired the same defense attorney from the Nevel Johnson shooting case in hope that he could work his black-magic card tricks again. The Dade County state attorney chose Don Horn, a gifted black attorney from Overtown, to serve as the lead prosecutor for the *Lozano* case.

As expected, Lozano's attorney played the initial race card by requesting a change of venue, citing the extensive media coverage and the racial violence that had followed both the incident itself and the acquittals in similar police brutality cases. Judge Joseph P. Farina denied the motion to change venue. Jury selection began on October 23, 1989. After three weeks, the selection was abruptly stopped as the prosecutor began to challenge the defense attorney's familiar tactic of striking blacks from the jury. Marvin Dunn reports in his study that the attorney "had tried to dismiss a black, middle-aged mail-handler and union activist from Liberty City. . . . The prosecutor protested that the strike was racially motivated, and the trial judge agreed." Dunn, *supra* at 310. Judge Farina seated the disputed juror, completed jury selection, but halted the proceedings to allow Lozano's attorney to appeal. A few days later Florida's Third District Court of Appeal refused to hear the case. The appellate court's decision left an ethnically diverse jury in place.

Ultimately, the jury consisted of one black man, one black woman, one Hispanic, two white women, and one white man. I flew home on the first day of the trial to interview for a summer associate position in the Miami office of an international law firm. Racial tensions in the city were high. Following a day of interviewing and answering interesting questions about the Lozano trial, I received an offer of employment. Three weeks later, December 7, 1989, Miami held its collective breath as the jurors returned to the court-

room to announce their verdict. The jury found Lozano guilty of manslaughter, and blacks in Overtown openly rejoiced at the news of the verdict. Miami could finally exhale. Many pundits believed that the case had been won when the jury was picked. Blacks believed that the jury was a fair cross-section of Miami's community. Consistent with the Supreme Court's observation in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), public respect for our justice system and the rule of law was strengthened because of the diversity of the jury's composition.

On January 24, 1990, William Lozano was sentenced to seven years in prison. He appealed his conviction, claiming that the trial court erred in denying his motion to change the venue of the trial. The court of appeal agreed, *Lozano v. State of Florida*, 584 So.2d 19 (Fla. 3d DCA 1991), and reversed his conviction on June 25, 1991—a few months after the world became familiar with the videotaped beating of Rodney King. The court of appeal held:

> We simply cannot approve the result of a trial conducted, as was this one, in an atmosphere in which the entire community—including the jury—was so obviously, and, it must be said, so justifiably concerned with the dangers which would follow an acquittal, but which would be and were obviated if, as actually occurred, the defendant was convicted.

Id. at 22-23. The court noted that the record shows that "five out of the six actual jurors were directly affected by the pretrial publicity and fears of violence." *Id.* at 22 n.5. Several jurors indicated that they had heard there was going to be a riot if Lozano was found not guilty. The court reversed and remanded the case for a new trial.

Before Lozano's conviction was reversed, I sat in my little apartment and watched the familiar pattern of the King beating. I had seen the ritual of police brutality, trial, acquittal, and race riots for nearly a decade in Miami. Nothing in my legal education convinced me that Lozano's conviction would stand or that the Los Angeles police officers beating and stomping King before my eyes would actually be convicted. On March 15, 1991, four officers were arraigned on charges of assault with a deadly weapon and the use of excessive force in the King beating. As in the Miami cases, the defense attorneys played the race card first by claiming that the pretrial publicity and racial tensions made a change of venue necessary. The officers' trial was transferred from Los Angeles to the suburb of Simi Valley.

Simi Valley was a conservative and predominantly white city set amid the rolling hills of Ventura County. The prosecutors and the team of defense lawyers knew that jury selection in the case would be critical to the trial outcome. Because the number of blacks in the jury pool was so small, the defense lawyers had no problem, despite *Batson* and its progeny, playing the old and familiar race card of eliminating all blacks from the jury. The defense managed to select an all-white jury that was pro-law enforcement. Nevertheless, the chief prosecutor assumed, as did all blacks throughout the country, that all he needed to do was play the videotape in order to secure a conviction. Deputy District Attorney Terry White, a black prosecutor, played the entire videotape in his opening statement on March 5, 1992.

After sitting through a seven-week trial, the jury debated the fate of the white LAPD officers for seven days and returned to the courtroom on April 29, 1992, to announce the verdicts. The jury acquitted the officers of all charges, with the exception of one assault charge against one of the officers that resulted in a hung jury. *See Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996). Within two hours of the announcement of the verdicts, Los Angeles was in flames. The Supreme Court noted: "The verdicts touched off widespread rioting in Los Angeles. More than 40 people were killed in the riots, more than 2,000 were injured, and nearly $1 billion in property was destroyed." *Id.* at 87-88.

The national black psyche suffered additional pain the following year when Miami police officer William Lozano was retried in Orlando, Florida, after three change of venue hearings. *See State v. Lozano*, 616 So.2d 73 (Fla. 1st DCA 1993). Lozano was acquitted. The only thing that softened the blow was that on August 4, 1992, a federal grand jury indicted the four officers involved in the beating of Rodney King under 18 U.S.C. § 242 for violating King's constitutional rights under color of law. On April 17, 1993, a jury convicted two of the four LAPD officers involved in King's beating, and a federal judge later sentenced them to 30 months in prison. *Koon*, 518 U.S. at 81.

A New Context

The 1995 criminal trial of Orenthal James Simpson for the murders of Nicole Brown Simpson and Ronald Goldman introduced many Americans to the expression "playing the race card" in a context that had never before been used. For the first time, a *black* criminal defendant was accused of using racial prejudice as a means of obtaining a favorable verdict. Specifically, O.J. Simpson's defense team was accused of playing the race card when it indicated that part of the defense strategy would be to bring up the issue of racial bias on the part of Mark Fuhrman and the LAPD to cast doubt on the police investigation and evidence. According to the defense:

> [T]he most important evidence against O.J. Simpson had supposedly been found in unusual places by a thoroughly racist LAPD detective—a detective who had been caught on audiotapes made years earlier admitting the LAPD planted evidence—a detective who for some unknown reason had been present in places he had no legitimate reason to be.

Johnnie Cochran & David Fisher, *A Lawyer's Life* 31 (2002).

The prosecution filed the Simpson case in the downtown district of Los Angeles. This venue choice facilitated the selection of an ethnically diverse jury comprised of nine blacks, two whites, and one Hispanic. If the prosecution had filed in the district where the crime occurred, Santa Monica, the jury's composition probably would have been

predominantly white. Some pundits have opined that the prosecutors' choice of venue was likely a political decision based on concerns that a conviction by a largely white jury might spark racial disturbances similar to the riots that followed the acquittal of the four LAPD officers in the Rodney King beating.

On January 24, 1995, the nation watched opening day of the trial of the century—the criminal trial of O.J. Simpson. After listening to more than 100 witnesses for more than 100 days, the jury spent only a few hours deliberating the case, announcing on October 3, 1995, "We the jury in the above entitled action find the defendant, Orenthal James Simpson, not guilty of the crime of murder." Many blacks in communities across the nation rejoiced at the news of the verdict. Many whites, on the other hand, were angered by the verdict and alleged that Simpson got away with murder because the defense lawyers played the race card.

In fact, a white member of O.J. Simpson's own defense team, Robert Shapiro, stated the position the loudest. He was widely quoted as saying that "not only was the race card played, but it was dealt from the bottom of the deck." *USA Today* reported on October 18, 1996, that Shapiro was "deeply offended" by the comments in the closing argument of his black co-counsel, Johnnie Cochran. Sally Ann Stewart, "In victory, defense divided," *USA Today*, Oct. 18, 1996. Cochran compared police detective Mark Fuhrman to Adolph Hitler:

> And now we have it. There was another man not too long ago in the world who had those same views who wanted to burn people who had racist views and ultimately had power over people in his country. People didn't care. People said, "He's just crazy. He's just a half-baked painter." And they didn't do anything about it. This man, this scourge, became one of the worst people in this world, Adolph Hitler, because people didn't care, didn't try to stop him. He had the power over his racism and his anti-religionism. Nobody wanted to stop him, and it ended up in World War II.

Raymond M. Brown, "The 'Good Person' Question: Valid Query or Hobson's Choice?," 2 *Journal of the Institute for the Study of Legal Ethics* 153, 161 (1999) (quoting *California v. O.J. Simpson*). Shapiro, a Jewish lawyer, responded to a reporter: "To me, the Holocaust stands alone as the most horrible human event in modern civilization . . . To compare [Hitler] in any way to a rogue cop in my opinion is wrong." Stewart, *supra.*

But Johnnie Cochran's closing argument in the O.J. Simpson trial does not fit the mold of a traditional lawyer appeal to racial prejudice in a criminal trial. It has long been settled that statements by attorneys calculated to stimulate or appeal to racial, national, or religious prejudices of a jury are condemned and may require a court to declare a mistrial. C. R. McCorkle, Annotation, *Statement by Counsel Relating to Race, Nationality or Religion in Civil Action as Prejudicial*, 99 A.L.R.2d 1249 (1965). In *United States v. Grey*, the court declared: "Appeals to racial prejudice are foul blows and the courts of this country reject them. Where, as here, the facts are such as to indicate that such prejudicial tactics may have had a substantial influence upon the result of a trial, reversal for new trial is ordered." 422 F.2d 1043, 1046 (6th Cir.), *cert. denied*, 401 U.S. 967 (1970). Courts have found that prosecutors' appeals to prejudice threaten core American values such as the right to trial by an impartial jury. *See United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973).

Opinions and comments about Simpson seemed to come from different worlds.

Yet, typically, "express appeals to racial prejudice invite the jury to maintain the fiction that the defendant is separate and somehow inferior to themselves . . . . Implied appeals to racial prejudice usually take the form of an argument based on untested racial predilections." Steven D. DeBrota, "Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine," 64 *Ind. L.J.* 375 (1988). The typical appeal to racial prejudice is illustrated in *Miller v. North Carolina*, 583 F.2d 701, 704 (4th Cir. 1978), the appeal of the trial of three black male defendants alleged to have raped a white woman. The *Miller* court noted that the prosecutor

> repeatedly referred to the defendants as "these black men" and ultimately argued that a defense based on consent was inherently untenable because no white woman would ever consent to having sexual relations with a black: "Don't you know and I argue if that [i.e., consent] was the case she could not come in this courtroom and relate the story that she has from this stand to you good people, because I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us, . . ."

Based on the strength of the prosecutor's arguments, the three black defendants were convicted by an all-white jury in North Carolina and originally sentenced to death. The Fourth Circuit Court of Appeals reversed the district court's denial of the defendants' petition for federal habeas corpus relief, holding:

> Where the jury is exposed to highly prejudicial argument by the prosecutor's calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required. In such a case, the impartiality of the jury as a fact-finder is fatally compromised. Because the contam-

> ination may affect the jury's evaluation of all of the evidence before it, speculation about the effect of the error on the verdict is fruitless.

Id. at 708; *see also Kornegay v. State*, 174 Ga. App. 279, 280 (1985) (defense counsel in an interracial rape case stated in closing argument:

> I told them [when I went to see them before trial], "Y'all are the sorriest bastards I have ever seen," telling these [referring to defendants]. I said, "Y'all niggers 40 or 50 years ago would be lynched for something like this, but you're not under the law guilty of rape because these people are just as guilty as you are.").

Cochran's Hitler reference, however, made no use of any racial epithets in describing the witnesses, victims, or defendant. Cochran's argument did not invite the jury to maintain a fiction that the defendant is separate and somehow inferior to the members of the jury. Cochran's Hitler reference also was not based on any untested racial stereotypes or predilection of the witnesses, victims, or defendant.

Instead, Cochran and the O.J. Simpson defense team used the issue of racial bias to cast doubt on the police investigation and evidence, and for that, the defense was accused of playing the race card. According to Cochran, however, Fuhrman made the issue of race a relevant factor in the case. Once race becomes a relevant factor in a case, black attorneys "face an unduly restrictive set of choices, each of which carries impossible burdens." Margaret M. Russell, "Beyond 'Sellouts' and 'Race Cards': Black Attorneys and the Straitjacket of Legal Practice," 95 *Michigan L. Rev*. 766, 771 (1997). Russell noted:

> Saddled with the tacit professional expectation of being responsible for identifying, fixing, or rationalizing away race problems outside the courtroom, Black attorneys who raise such concerns in court often face a heavy burden of justifying either that race really exists as an issue at all or that they are competent to address the topic of race in a fair and reasoned manner. When Black attorneys articulate racism as a primary factor in a particular case they may encounter fractious demands that they "prove it," or harsh accusations that they are "playing the race card" or otherwise engaging in unprofessional behavior.

Cochran's first accuser was black prosecutor Christopher Darden, who said that the defense was engaging in unprofessional conduct. Darden argued that Cochran's effort to impeach Fuhrman with testimony related to the detective's use of the epithet "nigger" was unfair.

> If you allow Mr. Cochran to use this word and play the race card . . . the direction and focus of the case changes: it is a race case now. It becomes an issue of color . . . It becomes a question of who is the blackest man up here. . . . It's the filthiest, dirtiest, nastiest word in the English language . . . . It will do one thing. It will upset the black jurors. It will say, whose side are you on, "the man" or "the brothers"? . . . There's a mountain of evidence pointing to this man's guilt, but when you mention that word to this jury, or any African-American, it blinds people. It'll blind the jury. It'll blind the truth. They won't be able to discern what's true and what's not.

Id. at 787 (quoting Kenneth B. Noble, "Issue of Racism Erupts in Simpson Trial," *N.Y. Times*, Jan. 14, 1995, at 7). Blacks across the country simply did not believe Darden's argument that race was not a factor in Simpson's arrest and prosecution. Following the trial, Darden later wrote: "I had naively believed my presence would, in some way, embolden my black brothers and sisters, show them that this was their system as well, that we are making progress . . . [I]nstead I was branded an Uncle Tom, a traitor used by The Man." Christopher A. Darden & Jess Walter, *In Contempt* 13-14 (1996). He knew that in the black communities, O.J. Simpson's trial was being watched with great interest.

One barbershop that I frequently visited in Liberty City would always have its television tuned in to the Simpson trial. During breaks in the trial coverage, the employees and the customers would have lively discussions about the evidence and the performance of the lawyers. In response to Darden's argument that race was not a factor, one of the barbers asked, "How can he in good conscience make such an argument in light of the racist views expressed by detective Fuhrman and the shameful history of this country?" A customer waiting his turn for the barber's chair chimed in, "Has he forgotten about this country's history of castrating and lynching black men who allegedly could not control their animal lusts around pure and helpless white women?" Someone else in the barbershop asked the rhetorical question, "Has Darden forgotten about Emmett Till and the countless other black men and black boys that were sacrificed on the altar of injustice to save the reputation of a white woman or appease the guilt of her white male protector?" Invariably, someone would say, "Let's ask the lawyer what he thinks," and all eyes would turn toward me.

Once the barbershop quieted down, I gave my assessment of the defense's impeachment evidence for Fuhrman. I told them that long before race was ever raised as an issue in the Simpson case, the defense claimed that the police and the prosecution had made a "rush to judgment." The defense had to show that the police did not conduct a thorough and complete investigation designed to lead them to the killer(s) but rather looked only for evidence to support its early theory or judgment that Simpson had committed the murders. I expressed that it was perfectly appropriate for the defense to impeach a key prosecution witness—who had conducted the investigation—by establishing that he had lied under oath. The evidence greatly supported the defense's position that the police don't always tell the truth. The fact that the evidence established that Fuhrman was a racist was an added bonus for the defense.

After a brief lunch and haircut at the barbershop, I would return to my law office, where many of the white attorneys would stop me in the halls to ask me my opinion about the

Simpson trial. I was the only black attorney in the Miami office of a large international law firm and, undoubtedly, the only black attorney many of my white colleagues had the pleasure of knowing. At that time, the National Association for Law Placement (NALP) reported that blacks accounted for a very small percentage of the less than 3 percent of partners of color in the nation's major law firms, and a small percentage of the less than 15 percent of associates of color in these firms. NALP defined "attorneys of color" as including African Americans or blacks, Asians/Pacific Islanders, American Indians, Hispanics of any race, and multicultural individuals.

My white colleagues also would seek out my opinion because I was a litigation associate who had spent a year clerking for a federal appellate court judge. Their questions would always include the preamble, "I know you don't buy into Cochran's playing the race card . . ." They assumed that I would agree race and racism were not an issue in the case. In addition, their questions assumed that I agreed O.J. Simpson was guilty. Some white lawyers would attempt to bolster their assumptions about my judicial conservatism by stating that I bore a striking resemblance to Christopher Darden. More vehemently than Peter denied Christ, I responded to this observation with the statement "I do not look like the man!"

It was obvious to me that whites and blacks viewed the Simpson case in radically different ways. The opinions and comments seemed to come from different worlds. Because many whites were convinced of Simpson's guilt (despite the presumption of "innocent until proven guilty"), Cochran's articulation of racism was consistently met with the accusation that he played the race card. Cochran noted that blacks held a different view:

> Within the African-American community I was a hero. The Reverend Dr. Calvin Butts, the dynamic pastor of Harlem's famed Abyssinian Baptist Church, explained, "Our people were cheering because a black man had used his talents, his gifts, and his ability to upset the system and bring forth a verdict no one thought possible." Black people often come up to me simply to say thank you. They say, "Thank you for standing up for us," "Thank you for showing the world that competence comes in all colors."

Cochran & Fisher, *supra* at 113.

The O.J. Simpson case greatly expanded the original meaning of the phrase "playing the race card." Historically, the term was understood as an attempt *by whites* to use racial prejudice as a means of obtaining a favorable verdict in a civil or criminal dispute involving blacks. Whites played the race card to win arguments among themselves. Blacks, however, had no deck of cards, and the laws of slavery, segregation, and Jim Crow effectively prevented them from challenging or disputing whites. The O.J. Simpson case redefined the phrase such that playing the race card is now an allegation that someone has unnecessarily brought race or racism into a debate in order to hide or obfuscate the truth. Although the finger-pointing phrase can be applied equally to whites and blacks, it is often reserved for blacks who raise the issue of racism to explain reality.

In modern parlance, playing the race card is used in several contexts. It can mean that someone has made a racist statement or taken a racist position, falsely accused another person of being a racist, or tried to add race into an otherwise race-neutral situation.

In F.J.W. Enterprises, Inc. v. Johnson, the court noted that the accusation of playing the race card had "become a 'buzz word,' since the O.J. Simpson case, indicating that one has unnecessarily and improperly inserted the issue of race into a case." 746 So.2d 1145, 1147 (Fla. 5th DCA 1999). Because the phrase has been redefined and is now forever associated with *California v. Simpson*, the Florida court in *Johnson* pointed out that the unjustified accusation that a party or his attorney played the race card, when race is legitimately raised as an issue, may warrant a new jury trial when a question of liability is a close one.

After protesting to my colleagues at the law firm that I bore no resemblance to Christopher Darden, I found his face staring back at me in the mirror years later, during my representation of several clients. These clients had heeded the call to implement a variety of programs to increase the hiring and training of minorities as well as the amount of business conducted with minority-owned equipment suppliers and advertisers. During the ordinary course of business, disputes arose over contracts and various other business matters with blacks and black-owned companies. When disputes could not be resolved through good faith negotiations, litigation would ensue. While litigating some of these disputes, I have faced eloquent black attorneys who argued their client's position with passion and integrity. Like Darden, however, I have thought on occasion that a black attorney representing a black-owned business or a black individual unnecessarily and improperly inserted the issue of race into a case.

In one case, a franchisee asked and expected the black community in South Florida to show up at a court hearing in hope of preventing a judge from enjoining the company's trademark infringement following the termination of its franchise. Despite the fact that the franchisee had breached its franchise agreements and had defaulted on several loans, its counsel inserted racial issues and attempted to gain the assistance of black organizations and community activists in its defense. After a close examination of the facts and much soul searching, I arrived at the conclusion that race was not an issue in the case. I was presented with the challenge of getting the case resolved without being branded as an Uncle Tom and a tool used by "the Man."

Achieving Colorblindness

Margaret Russell pointed out in her study that "when Black attorneys take on advocacy obligations that require the subordination and decontextualization of issues of race in the service of other objectives, they may be labeled as

'sellouts' who have abandoned their communities." Russell, *supra* at 771-72. When issues of race are irrelevant to a case but nevertheless have been inserted by an over-zealous black lawyer attempting to use racial prejudice, I have been both disappointed and angered—disappointed that a black lawyer, like the boy from Aesop's fable, stooped to falsely crying wolf as a litigation tactic without thinking about the ramifications of his actions; angered that I was placed in the position of arguing that a black lawyer, crying wolf, is lying and should be ignored.

Because racism is still a real problem in America, it is unpleasant to make Darden's argument that a black attorney is unnecessarily inserting the issue of race into a case—or playing the race card. It is particularly distasteful when race takes the form of economic blackmail—the presence of race issues often drives up the price of settlement and increases the chance of a higher damage award at trial. In one of my cases, a black attorney refused to accept a reasonable settlement offer under the pretext that we had devalued the damage to his client because his client was black. The attorney stated that we would have offered more to settle the case if his client had been white. He dismissed our substantial settlement offer by advising me that my client could keep its "nigger money." The statement was clearly unjustified in light of our jury verdict research and mock trial results. Nevertheless, counsel believed that he could use issues of race to inflame the passions of a jury and warned us that we did not want to take the case to trial.

Now that *Batson* and its progeny have made it possible for blacks actually to serve on juries, some black attorneys have converted the white ritual of using racial prejudice into a black magic designed to heat the blood of black jurors. Today, whites and blacks play the race card as a litigation tactic for obtaining a favorable outcome. Card play begins with jury selection, and jury selection begins long before a panel of jurors ever is assembled in a courtroom. Experienced trial lawyers are aware that the venue selected for a trial will greatly influence the composition of the jury. Cases that involve race can be won or lost with the initial venue choice for the trial. The initial Simi Valley trial of the officers involved in beating Rodney King clearly illustrates the importance of venue. *Batson* is of little help when the number of a particular racial group on the jury panel is very small because of the demographics of a community. Attorneys who are true race card players know that it is difficult to detect the misuse of peremptory challenges to exclude a distinct racial group when members of the racial group are so few in number that no flagrant pattern of exclusion can be shown.

Attorneys are less likely to play the race card, however, when the racial composition of the jury suggests that the lawyers will have an audience unreceptive to race-based arguments. White lawyers would not dream of appealing to racial prejudices against blacks in front of a jury comprised of a significant number of blacks. Similarly, black attorneys would not believe that the passions of a predominantly white jury could easily be inflamed by issues of race. The prospect of unrepresentative juries—racially skewed or dominated by a particular racial group—invites lawyers and litigants to take a chance with playing the race card. Improper appeals to racial prejudices or the unnecessary insertion of race issues into a case are best neutralized by an impartial jury.

Today, the only true impartial jury is one that is ethnically diverse and racially balanced. Diversity and racial balance are the only true deterrents to attorneys' playing the race card. Judicial colorblindness is best achieved by the presence of different colors on our juries. Truth is not black and white. Rather, truth is the spectral color of light viewed through flawless diamonds. Through such wonderful diversity we eliminate prejudice and find truth.