

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

**COMMONWEALTH OF VIRGINIA**

vs.

██████████,   
 Accused

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Case No.: ██████████

Trial Date: ██████████

**MOTION TO REMOVE PORTRAITURE OVERWHELMINGLY DEPICTING WHITE JURISTS HANGING IN TRIAL COURTROOM**

COMES NOW the accused, ██████████ Jr., by counsel, Bryan Kennedy and Natalie Villalon and moves this Honorable Court to remove the portraits decorating the trial courtroom for the duration of trial. In making this motion, ██████████ relies on his rights under the Fifth and Fourteenth Amendments to the Federal Constitution, and Canon 3B(5) of the Canons of Judicial Conduct.

**PLEASE TAKE NOTICE** that the Honorable David Bernhard, who has been assigned to this case, has set a motions docket on December 22, 2020, at 10:00 a.m. Counsel will seek to make argument on this motion at that time.

**STATEMENT OF FACTS**

██████████ is an African American man. His trial will likely take place in one of two courtrooms, 4J or 5J, due to COVID-19 restrictions. Both courtrooms are decorated with prominently displayed portraits of former judges of the Fairfax County Circuit Court. Seventeen portraits currently hang in courtroom 5J. Of those seventeen, twelve depict white men. One of these white men is Judge Harry Carrico, who authored the Virginia Supreme Court’s opinion in *Loving v. Commonwealth*, upholding Virginia’s ban on interracial marriage. *See Loving v. Commonwealth*, 206 Va. 924, 925 (1966), *rev'd sub nom. Loving v. Virginia*, 388 U.S. 1, (1967).

Of the remaining five portraits, four depict white women. Judge Bruce Lee, an African American man, is the lone non-white exception.

Ten portraits hang in courtroom 4J. Of those ten, six depict white men, and three depict white women. Finally, there is the portrait of Judge Marcus D. Williams, the Fairfax Circuit Court's first African-American judge.

## ARGUMENT

### **I. The display of these portraits would violate this Court's duty of judicial impartiality.**

This Court has a duty and obligation to ensure that these proceedings are fair and impartial in both reality and perception. The Canons of Judicial Conduct provide that:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but limited to bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, *and shall not permit staff, court officials and others subject to the judge's control to do so.*" (emphasis added)

Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 3B(5). Consistent with that principle, this Court has committed to addressing systemic racism within the Fairfax judicial system, including by identifying "whether there are symbols in the courthouse and courthouse grounds that carry implications of racism, such as public displays of historical figures who have demonstrated racial hostility" and by "mak[ing] clear neither intentional racism, implicit bias nor systemic racism have any place in the Fairfax Circuit Court." Fairfax Circuit Court Initial Plan of Action to Address Systemic Racism and Enhance Civic Engagement with Our Community at 2 (August 13, 2020), *available at* <https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/fairfax-cir-ct-plan-address-racism-enhance-civic-engagement.pdf>.

The portraits manifest a bias, intentional or not, against non-white citizens of the Commonwealth, including [REDACTED] who is African American. Across Virginia and the Commonwealth, symbols and memorials of the Confederacy are being removed from public locations, including the Fairfax County Courthouse. *See, e.g., Report of Actions of the Fairfax County Board of Supervisors at 37-38 (September 15, 2020), available at <https://www.fairfaxcounty.gov/boardofsupervisors/sites/boardofsupervisors/files/assets/meeting-materials/2020/board/sept15-board-summary.pdf>. Removing Confederate iconography, while important, does not erase Virginia's history of racial segregation, or its ongoing reckoning with racial disparities. Nowhere are these disparities starker than the criminal legal system. Although incarceration rates in the United States are the lowest in decades, black men are still five times as likely to be imprisoned as white men. E. Ann Carson, *Prisoners in 2019*, United States Department of Justice Bureau of Justice Statistics, NCJ 255115 (October 2020), available at <https://www.bjs.gov/content/pub/pdf/p19.pdf>.*

This disparity is apparent in the portraits themselves. Not only do the white faces outnumber the black by a factor of 13, at least one of these persons, Judge Harry Carrico explicitly endorsed Virginia's ban on interracial marriage. In an era where the public is reckoning with institutional bias, the display of these portraits sends a message that non-white citizens, including Mr. Shipp, are, and will be, treated differently. In order to ensure [REDACTED] right to a fair trial, this Court should remove the portraiture in the trial courtroom.

A reasonable person could infer that the Court was manifesting a bias against black and other non-white citizens through choice of portraits in the courtroom, whether the Court intended to do so or not. The display of some of these portraits, including that of Judge Harry Carrico, could be interpreted as lauding segregation. This Court has the power to change the decoration of

the trial courtroom in this case. The best way to avoid an appearance of prejudice on the basis of race is for the Court to order the removal of portraits during the pendency of the trial.

**II. The display of these portraits violates [REDACTED] right to due process and equal protection of the law under the Fourteenth Amendment.**

The display of these portraits would violate [REDACTED]pp’s right to fair trial. “Because ‘trial by jury in criminal cases is fundamental to the American scheme of justice,’ the Due Process Clause of the Fourteenth Amendment guarantees that right in state criminal prosecutions. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 551, 96 S. Ct. 2791, 2799 (1976). “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955). In addition to preventing actual bias, “our system of law has always endeavored to prevent even the probability of unfairness.” *Id.* Attention to the presentation of the courtroom is an important part of protecting the right to a fair trial. As Chief Justice Warren observed:

[T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to “the integrity of the trial process.”

*Estes v. Texas*, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring). Allowing these portraits to be displayed during [REDACTED] trial undermines the integrity of the trial process and his right to a fair trial because it associates whiteness with authority and the law. This could implicitly denigrate [REDACTED] dignity and credibility in the eyes of the jury.

The display of these portraits during [REDACTED] trial also violates his right to equal protection under the law. The central purpose of the Fourteenth Amendment was to put an end to governmental discrimination based on race. *Strauder v. W. Va.*, 100 U.S. 303, 306-307 (1879).

The choice of portraits, intentionally or not, manifests a preference by this Court for one race over all others, and specifically harms [REDACTED].

WHEREFORE, [REDACTED] requests that this Court remove the portraits to ensure his right to a fair trial and equal protection under the law, and to protect this Court's duty of judicial impartiality.

Respectfully submitted,

[REDACTED]  
By Counsel

OFFICE OF THE PUBLIC DEFENDER

By:

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Motion was hand delivered this 17th day of December, 2020, to the Office of the Commonwealth's Attorney, 4110 Chain Bridge Road, Fairfax, Virginia 22030.

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Bryan Kennedy