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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES,)
 APPELLEE,)
))
v.) Case No: 03-3369
) Dist/AG
WILLIAM LEONARD PICKARD,) docket: 00-CR-40104-01-RDR
and CLYDE APPERSON,))
 APPELLANTS,) Case No: 03-3368
) Dist/AG
) docket: 00-CR-40104-02-RDR

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SUPPLEMENTAL MOTION TO REMAND TO TRIAL COURT FOR THE LIMITED
PURPOSE OF GRANTING A NEW TRIAL BASED ON NEWLY DISCOVERED
EVIDENCE OF JUROR MISCONDUCT PURSUANT TO FEDERAL RULE OF
CRIMINAL PROCEDURE 33

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COMES NOW, the Appellants, William Leonard Pickard, by and through his counsel, William K. Rork, of RORK LAW OFFICE, and also joining in this motion, Appellant, Clyde Apperson, by and through his counsel, Mark L. Bennett, and in support of this "SUPPLEMENTAL MOTION TO REMAND TO TRIAL COURT FOR THE LIMITED PURPOSE OF GRANTING A NEW TRIAL..." incorporating herein the same facts and authorities as stated in their original motion, would additionally, advise the Court as follows:

SUPPLEMENTAL FACTS

During voir dire examination conducted by Gregory Hough, (AUSA), of Clyde Cochran, potential juror, immediately before the voir dire examination of Scott Lowry (jury foreperson), Mr. Hough asks Cochran about his children and grand children, and whether any of them are studying to be in the legal profession or law enforcement, and he responds, "no." (ROA, Vol. 59, page 308, L. 11-12). Hough asks Cochran a question regarding his

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experience with negotiating contracts for the Kansas Children's Services League, and when negotiating contracts, if he has legal background, and Cochran responds in the negative. (ROA, Vol. 59, page 323, L. 5-7).

In the ROA, Vol. 60, page 429, beginning on line 5, during the voir dire examination by Hough, of potential juror Janet Wehrley, the question is posed "You recall the questions and were you able to hear the questions that have been asked to the other panel members over the last two days?" and Wehrley responds, "yes." Hough inquires on line 9, "you're smiling?" and she responds, "It's because I think I know them by heart." This question and answer portion, conducted right after the examination of Lowry exemplifies the fact that jurors heard the kinds of questions that were being asked, and as such, Lowry must have known when questioned immediately before, that he should indicate that he is in fact an attorney and went to Washburn University Law School.

The same question "Do you have any or does anyone in your family have any legal training or background," was posed to other potential jurors, Anita McLean and James Mason, during voir dire examination by Bennett, immediately after the voir dire examination of Juror Lowry. (ROA, Vol. 60, page 444, L. 14-15, and ROA, Vol. 60, page 455, L. 2-3). At this point, Lowry must have known that he was required to come forward with the fact that he was an attorney. Lowry was prompted several times, both before and after his examination to indicate that he had legal training and experience, yet he kept this information to

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himself, and did not reveal his qualifications.

The questions were posed to the above named potential jurors immediately after Hough asks, foreperson Lowry, "Now, sir, the questions that have been asked today and yesterday, did you hear the questions that I have asked and the two defense attorneys have asked?" Lowry responds, "Yes." Hough asks, "Any of those that would require any explanation?" Lowry responds, "No. (ROA, Vol. 59, page 295, L. 1-23). Based on the questions immediately following Lowry's examination, he must have known, as an attorney and officer of the court, that he should then have at least come forward with the fact that he was an attorney.

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SUPPLEMENTAL ARGUMENTS AND AUTHORITIES

The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, requires that a state provide an impartial jury in all criminal prosecutions. Jones v. Cooper, 311 F.3d 306, 310, (4th Cir. 2002), citing Irvin v. Dowd, 366 U.S. 717, 722, 6 L.Ed. 2d 751, 81 S.Ct. 1639 (1961). Due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment. Id. at 310, citing Morgan v. Illinois, 504 U.S. 719, 727, 119 L.Ed. 2d 492, 112 S.Ct. 2222 (1992). In Morgan, the court determined if even one [partial] juror is empaneled and the death sentence is imposed, the state is disentitled to execute the sentence.

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Id. at 728.

"The test for determining whether a new trial is required in the context of juror deceit during voir dire or on jury questionnaires is: **the defendant must first demonstrate that a juror failed to answer honestly a material question...and then further show that a correct response would have provided a valid basis for a challenge for cause.**" Jones, 311 F.3d at 310, citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 78 L.Ed. 2d 663, 104 S.Ct. 845 (1984). In Jones, the court observed, "The McDonough test is not the exclusive test for determining whether a new trial is warranted: a **showing that a juror was actually biased**, regardless of whether the juror was truthful or deceitful, can also entitle a defendant to a new trial." Id. at 310, citing Fitzgerald v. Greene, 150 F.3d 357, 363 (4th Cir. 1998). Here, Lowry failed to disclose upon several prompts by counsel both immediately before and after his voir dire examination, that he was an attorney and graduated from Washburn University Law School, which would have provided a valid basis for a challenge for cause as evidenced in the record on appeal. Here, the elements of the McDonough test are met and the Appellants' are entitled to a new trial, or at the very least, a hearing upon remand on this issue.

Although in McDonough the juror's incorrect response in voir dire was an honest mistake, **the test applies equally to deliberate concealment and to innocent non-disclosure, as our sister circuits have held.** Jones, 311 F.3d at 310, citing Zerka

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v. Green, 49 F.3d 1181, 1185 (6th Cir. 1995); United States v. Langford, 990 F.2d 65, 68 (2nd Cir. 1993); Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1141-42 (7th Cir. 1992); Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991); United States v. St. Clair, 855 F.2d 518, 522-23 (8th Cir. 1988); United States v. Scott, 854 F.2d 697, 698, (5th Cir. 1988).

Here, the test applies to both deliberate and innocent non-disclosure. Even if jury foreman Lowry (an attorney who must abide by the Model Rules of Professional Conduct), argues that he did not know he had to disclose the fact that he had legal training, his innocent non-disclosure would be enough to satisfy the first prong of the McDonough test. It is questionable however, that he did not know that he must disclose this material fact, given the fact that several other jurors were asked the same question, and that he indicated he heard all the questions asked of the other jurors and there was nothing he needed to talk about. *Supra*. In any event, the Appellants', at the very least, should be entitled to a remand to the trial court, for the limited purpose of a hearing to resolve this issue, without losing jurisdiction over the pending appeal on its merits.

As observed in Fitzgerald, "Failure to satisfy the requirements of the McDonough test does not end the court's inquiry, however, when the petitioner also asserts a general Sixth Amendment claim challenging the partiality of a juror based upon additional evidence occurring outside voir dire." Fitzgerald, 150 F.3d at 362. **Regardless of whether a juror's**

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answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias, or in exceptional circumstances, that the facts are such that bias is to be inferred. Fitzgerald, 150 F.3d at 363, citing McDonough, 464 U.S. at 556-57. See also Smith 455 U.S. at 215, (holding that 'the remedy for allegations of jury partiality is a hearing in which the defendant has the opportunity to prove actual bias.') Indeed, a trial judge might find that a juror is biased even in a situation where, when specifically asked, the juror professes that he or she could be impartial. United State v. Torres, 128 F.3d 38, 44, 1997 U.S. App. LEXIS 27765 (2nd Cir. 1997). Here, based on the severity of the failure of jury foreman Scott Lowry, an attorney and officer of the court, to disclose material information, that if disclosed, would have given counsel the ability to challenge his presence on the jury for cause, the appellants should be granted an opportunity to demonstrate actual bias, or that bias is to be inferred.

Implied or presumed bias is "bias conclusively presumed as a matter of law." Torres, 128 F.3d at 45, citing United States v. Wood, 299 U.S. 123, 81 L.Ed. 78, 57 S.Ct. 177 (1936). It is attributed to a prospective juror regardless of actual partiality. In contrast to the inquiry for actual bias, which focuses on whether the record at voir dire supports a finding that the juror was in fact partial, the issue for implied bias

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is whether an average person in the position of the juror in controversy would be prejudiced. Id. at 45, citing United States v. Haynes, 398 F.2d 980, 984 (2nd Cir. 1968). Blackstone states that exclusion of a prospective juror for implied bias is appropriate when it is shown:

“that he is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party’s master, servant, counselor, steward, **or attorney, or of the same society or corporation with him.**” Torres, 128 F.3d at 45, citing 3 W. Blackstone, Commentaries 480-481 (W. Hammond ed. 1890).

In the instant case, foreman Lowry was selected by the jurors to lead their deliberations. In a jury consisting in part of manual workers, homemakers, and secretaries, foreman Lowry’s position as an attorney more than likely influenced both his election and his influence upon deliberations. The fact that he went to Washburn University Law School and associated himself while there with various students of the small campus, is enough by itself to show implied bias, that he was of the same “society,” as the AUSA. Attached as an exhibit is an excerpt from a Washburn University School of Law Catalog, referencing the fact that the law school’s size makes it possible for every student to know every administrator, every student, and every professor. (See attached exhibit 1). Also attached is a brochure referencing the fact that the law school’s classrooms, library, clinic, study areas, computer

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5 labs, and administrative offices are all housed in one building.
6 (See attached Exhibit 2). The information evidences the fact
7 that the school is a small school, where more than likely all
8 students at the very least, recognize each other, and
9 demonstrates the close interaction of students that attend.
10 Lowry deceived the court and attorneys about his qualifications
11 to serve on the jury. To determine what occurred, and to
12 further examine the probability of actual, implied or inferred
13 bias, a hearing is necessary in which the entire panel is
14 questioned.

15 Dishonesty, of itself is evidence of bias. Burton v.
Johnson, 948 F.2d 1150, 1158-59 (10th Cir. 1991), citing United
State v. Colombo, 869 F.2d 149, 152 (2nd Cir. 1989);
Consolidated Gas & Equipment Co. of American V. Carver, 257 F.2d
111, 115 (10th Cir. 1958); United States v. Scott, 854 F.2d 697,
699 (5th Cir. 1988). Here, upon several prompts by each counsel
20 during voir dire examination, Lowry was dishonest in his failure
21 to disclose the material fact that he was an attorney who
22 graduated from Washburn University Law School, which is material
23 to his qualification to be a jury member.

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26 In Scott, it was noted, "the juror did not simply
27 misunderstand the question asked. Nor did he simply forget the
28 question that his brother was a deputy sheriff in a law
29 enforcement agency involved in the investigation. Rather, the
30 juror consciously censored the information. He believed it was
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his place, and not the place of the court or defense counsel, to determine whether his relations were a bar to jury service in this case. There is a strong inference that the juror wanted to serve on the jury and thought it unlikely that the court or defense counsel would permit him to do so. The juror was hostile to what he correctly perceived to be the interests of the defense and the court. This in itself, constitutes bias. Id. at 699.

The instant case is analogous to Scott. Here, Lowry consciously censored questions from the Judge, defense attorneys and prosecution and did not come forward with the information that he had legal training and in fact graduated within one year of the AUSA handling the case, and a classmate of another AUSA in the same office. He heard questions presented to other juror members both immediately before and after his examination, consisting of whether any of the jurors had legal training. The only inference to be made is that he wanted to serve on the jury and believed if he disclosed this information, the judge or defense counsel would not have allowed him to sit on the jury.

As other circuits have recognized, "certainly, when possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on voir dire, the result is a deprivation of the defendant's right to a fair

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trial." Id. at 699. The district court found the juror's failure to respond unreasonable. On the other hand, the court found that his belief that he was unaffected by his brother's employment with a policy agency involved in the investigation in the case was sincere. Id. at 699. The court opined, the record of voir dire strongly suggests that **he wanted to serve on the jury and feared that he would not be allowed to do so if he disclosed his brother's employment.** He contends that, despite the summary excusal of two prior venire members with close relatives in law enforcement, he understood his brother's employment would be grounds for excusal only if he believed that it would affect his judgment. Id. at 699. Here, Lowry's failure to disclose his legal training and where he attended law school evidences that he wanted to serve on the jury. The question, "for what reason?" remains to be answered. For whatever reason that Lowry wanted to serve on the jury, his failure to disclose material information with regard to his qualifications to serve on the jury, resulted in the deprivation of the Appellants' right to a fair trial, required by the Sixth Amendment.

"A juror may not conceal material facts disqualifying him because he sincerely believes that he can be fair in spite of them." Id. at 699. As Justice O'Conner observed in Smith v. Phillips: "Determining whether a juror is biased or has

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5 prejudiced a case is difficult, partly because the juror may be
6 unaware of it. The problem may be compounded when a charge of
7 bias arises from juror misconduct, and not simply from attempts
8 of third parties to influence a juror." Id., citing Smith v.
9 Phillips, 455 U.S. 209, 221-22, 102 S.Ct. 940, 71 L.Ed. 2d 78
10 (1982).

11 "A juror who lies materially and repeatedly in response to
12 legitimate inquiries about her background introduces destructive
13 uncertainties into the process...**A perjured juror is unfit to**
14 **serve even in the absence of such vindictive bias."** Dyer v.
15 Calderon, 151 F.3d 970, 983, 1998 U.S. App. LEXIS 18171 (9th
16 Cir. 1998). If a juror treats with contempt the court's
17 admonition to answer voir dire questions truthfully, she can be
18 expected to treat her responsibilities as a juror - to listen to
19 the evidence, not to consider extrinsic facts, to follow the
20 judge's instructions - with equal scorn. Id. at 983. **How can**
21 **someone who herself does not comply with the duty to tell the**
22 **truth stand in judgment of other people's veracity?** Id. at 983.
23 Having committed perjury, she may believe that the witnesses
24 also feel no obligation to tell the truth and decide the case
25 based on her prejudices rather than the testimony. Id. at 983.

26
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28 "More is at stake here than the rights of petitioner,
29 'justice must satisfy the appearance of justice.'" Id. at 983,
30 citing Offut v. United States, 348 U.S. 11, 14, 99 L.Ed. 11, 75
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5 S.Ct. 11 (1954). "An irregularity in the selection of those who
6 will sit in judgment 'casts a very long shadow.'" Id. at 983,
7 citing Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987). A
8 perjured juror is as incompatible with our truth-seeking process
9 as a judge who accepts bribes. Id. at 983, citing Bracy v.
10 Gramley, 520 U.S. 899, 117 S.Ct. 1793, 1797, 138 L.Ed. 2d 97
11 (1997). The court in Dyer, agreed with Chief Judge Winter:

12
13 "Courts cannot administer justice in circumstances in which
14 a juror can commit a federal crime in order to serve as a
15 juror in a criminal case and do so with no fear of sanction
so long as a conviction results. The government's brief
exhibits no concern over the possible criminality of the
juror's conduct and asks us to affirm without further
inquiry... Whether the government chooses to prosecute such
cases is not for us to decide. We need not reduce its
incentives to take such conduct seriously, however, by
giving the government cause to believe that overlooking
juror misconduct will preserve tainted convictions. Id. at
984, citing United States v. Colombo, 869 F.2d 149, 152
(2nd Cir. 1989).

20
21 In Columbo, the court observed, "the point is not that the
22 fact that the juror's brother-in-law was a government attorney
23 tainted the proceedings, but that her willingness to lie about
24 it exhibited an interest strongly suggesting partiality. The
25 deliberateness distinguishes this case from McDonough and Smith,
26 ('mistaken, though honest response to a question in McDonough,
27 not deliberate in Smith'). Columbo. 869 F.2d at 152.

28
29 The court in Colombo found that if in fact the juror's
30 brother-in-law was a government attorney, that is sufficient

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corroboration of the Kennedy affidavit to call for Klan's conviction to be vacated. Id. at 152. "Inquiry into a juror's state of mind by way of partial denial, explanation or protestations of impartiality would not reveal evidence that was under these conditions either trustworthy or sufficient to offset the deliberate violation of the oath. Id. at 152. We trust the juror will, if called to testify, be advised to seek counsel." Id. at 152.

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In the interests of justice, Lowry must not be allowed to lie or conceal his qualifications to sit on the jury. The fact that he is an officer of the court, deems his non-disclosure of a material fact even more serious than the non-disclosure of a material fact by a lay person, who may be completely ignorant. Here, the court cannot administer justice because Lowry has perjured himself in order to serve as jury foreman in this case. The fact that a guilty verdict was reached does not change the fact that misconduct occurred and the Appellants' were denied a right to a fair trial. The Appellants merely ask for a remand for an evidentiary hearing on this matter for the limited purpose of determining whether a new trial is warranted, without losing jurisdiction over the pending appeal on its merits.

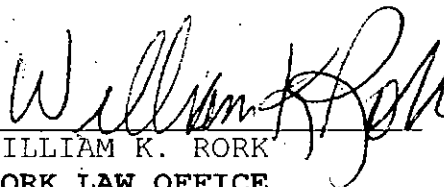
WHEREFORE, in line with the above and foregoing, these Appellants pray, in further consideration of this Appellant's "SUPPLEMENTAL MOTION TO REMAND TO TRIAL COURT FOR THE LIMITED

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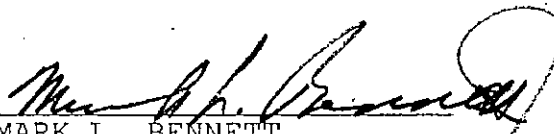
PURPOSE OF GRANTING A NEW TRIAL..." that this Honorable Court grant Appellants' original "MOTION TO REMAND TO TRIAL COURT FOR THE LIMITED PURPOSE OF GRANTING A NEW TRIAL..." for the limited purpose of an evidentiary hearing for a new trial, concerning jury foreman misconduct, and additionally request this Honorable Court stay the proceedings pending in the appeal process, but only if remand will not deprive this Honorable Court of jurisdiction of the pending appeal on the merits and consistent with the second and third procedures stated in Garcia herein.

Respectfully submitted,



WILLIAM K. RORK
RORK LAW OFFICE
Attorney for Pickard

and



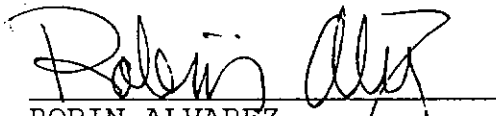
MARK L. BENNETT
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 14th day of June, 2004, I caused the original and seven copies of the above and foregoing "SUPPLEMENTAL MOTION TO REMAND TO TRIAL COURT FOR THE LIMITED PURPOSE OF GRANTING A NEW TRIAL..." to be filed with the Clerk of the United States Court of Appeals for the Tenth Circuit, by depositing the same in the U.S. mail, addressed to the Clerk, Mr. Patrick J. Fisher, and a conformed copy was hand delivered to Gregory G. Hough, (AUSA), at 444 S.E. Quincy, Suite 290, Topeka, KS 66683.


ROBIN ALVAREZ
Administrative Assistant

tc pckrd.smr

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APPELLANTS' EXHIBIT 1
RECORD ON APPEAL TRANSCRIPT IN PERTINENT PART, VOLUME 60

1 Q. Yeah, what was her occupation?
 2 A. Blue Cross/Blue Shield many years ago.
 3 Q. All right. Did you have children?
 4 A. Three.
 5 Q. All right. Now, you've heard my questions and
 6 you've listened to other people being
 7 questioned here. And let me ask you first,
 8 have you had any prior jury service?
 9 A. Yes, county.
 10 Q. In a criminal case or civil?
 11 A. Criminal.
 12 Q. And was that here in Topeka?
 13 A. Yes.
 14 Q. In federal or state court?
 15 A. State.
 16 Q. All right. And did the jury reach a verdict in
 17 that case?
 18 A. Yes.
 19 Q. Anything-- anything about the-- the case that
 20 disturbed you or any problem with the
 21 particular case?
 22 A. No.
 23 Q. You were-- you were satisfied, and you said the
 24 jury did reach a verdict--
 25 A. Yes.

1 Q. How are they employed?
 2 A. The oldest one is an engineer with Black &
 3 Veech in Kansas City and the second one is--
 4 her husband-- she's a part-time teacher and her
 5 husband's manager of a lumberyard. And the
 6 third one is a bookkeeper down in Texas.
 7 Q. Any grandchildren?
 8 A. Three.
 9 Q. Any of them adults?
 10 A. Not quite.
 11 Q. Okay. Any of them studying to be in the legal
 12 profession or law enforcement?
 13 A. No.
 14 Q. Were you able to hear all the questions that
 15 I've asked the jurors over the last couple of
 16 days?
 17 A. (Nods head up and down).
 18 Q. Any of those that would have pertained to you?
 19 A. No.
 20 Q. Okay. You indicated that you've been retired
 21 from car sales. How long have you been
 22 retired?
 23 A. Since '89.
 24 Q. Could you tell us, please, the activities that
 25 fill a normal day for you now that you're

1 Q. -- in that case. All right. And let me also
 2 ask you, have you been a-- participated in a
 3 criminal case of any sort as a witness or
 4 anything like that?
 5 A. No, sir.
 6 Q. All right. And you notice that we were
 7 concerned with drug charges here. And have you
 8 had any situation in your family or close
 9 friend where there's been some drug problems?
 10 A. No, sir.
 11 Q. All right. And as the way it looks to you, you
 12 can be completely impartial in this case and
 13 can decide the case based on the evidence as
 14 you hear it from the witness stand and the
 15 instructions of the Court. Do you have any
 16 problem with that?
 17 A. No, sir.
 18 THE COURT: All right. Mr. Hough.
 19 MR. HOUGH: Thank you, Judge.
 20 VOIR DIRE EXAMINATION OF MR. CLYDE COCHRAN
 21 BY MR. HOUGH:
 22 Q. Good afternoon, sir. Mr. Cochran, you
 23 indicated that you have three children. What
 24 are their ages?
 25 A. About 50 and 45 and 41.

1 retired?
 2 A. Well, we have some property. I've been doing a
 3 lot of repair work on that and mowing machines,
 4 yard work.
 5 Q. The rental properties, investment properties?
 6 A. (Nods head up and down).
 7 Q. You do all of your own repairs at those?
 8 A. Oh, 75 percent.
 9 Q. And how many of those do you own?
 10 A. Two now.
 11 Q. Ever been any problems with those that have
 12 required the police to come? For instance, a
 13 burglary or noise complaint or anything?
 14 A. Not from our standpoint, no.
 15 Q. Nothing that caused your involvement at all?
 16 A. No.
 17 Q. The questions that we've asked earlier about
 18 individuals cooperating with law enforcement in
 19 criminal investigations, were you able to hear
 20 all of those questions?
 21 A. Pretty much, yes.
 22 Q. Okay. Do you have any disagreement with law
 23 enforcement using individuals who have been
 24 involved in criminal activity to provide them
 25 with information about that criminal activity?

1 Kahmeyer had one opinion, you had a different
 2 opinion, would you be able to maintain your
 3 opinion and your belief, in spite of the fact
 4 that you know each other outside of the
 5 courtroom?
 6 A. Yes, I would.
 7 Q. Okay. Can you tell me a little bit about the
 8 facts as you recall them in the Florida drug
 9 case that you sat on?
 10 A. It was a-- he was accused of possessing
 11 marijuana, a very small amount of marijuana.
 12 Q. Okay. And how did they find out about that,
 13 did they have a tip or did they buy from him or
 14 what?
 15 A. I believe several witnesses saw him with it, I
 16 believe that's-- it's been a number of years,
 17 so--
 18 Q. How long ago was it?
 19 A. Probably about seven years.
 20 Q. Okay. When did you move to Kansas?
 21 A. Almost four years ago.
 22 Q. Now, you negotiate contracts for the Kansas
 23 Children's Services League?
 24 A. Uh-huh.
 25 Q. And among the things that you do, you have the

1 A. Both.
 2 Q. Okay.
 3 A. Sometimes together.
 4 Q. Okay. Now, being the wife of a minister, do
 5 you have any problems sitting in judgment of
 6 another individual?
 7 A. No.
 8 Q. Okay. Do you understand that while God may
 9 forgive, there's a completely separate issue of
 10 the criminal justice system dealing with people
 11 that commit or are alleged to commit crimes?
 12 A. Yes, I do.
 13 Q. You don't have any problem participating in
 14 that?
 15 A. No.
 16 Q. Okay. Do you believe that if the facts of the
 17 case required a guilty verdict, that you would
 18 be able to return a verdict of guilty?
 19 A. Yes, I do.
 20 Q. You can say that unequivocally?
 21 A. Absolutely.
 22 Q. Okay. Likewise, the prosecution did not meet
 23 its burden, would you be able to return a not
 24 guilty verdict?
 25 A. Yes, I would.

1 breakfast buffet at Carlos O'Kelly's and you
 2 bring in Ms. Kansas. Correct?
 3 A. Yes.
 4 Q. I want to thank you for that all-you-can-eat
 5 buffet. When negotiating contracts do you have
 6 like legal background to do that or--
 7 A. No, I do not.
 8 Q. What training and experience do you have?
 9 A. It's mostly experience. Prior to working here,
 10 I also negotiated for a home building company
 11 in Florida, and that was mostly for the-- what
 12 they purchase. They were a general contractor.
 13 And their insurance and their-- their health
 14 benefits and things like that.
 15 Q. Okay. Do you have any educational background
 16 like in college?
 17 A. My undergraduate degree is in theater and I'm
 18 currently pursuing an MBA.
 19 Q. Where are you seeking the MBA?
 20 A. Baker.
 21 Q. Did you ever utilize your theater degree after
 22 you graduated?
 23 A. Yes, I've been actually a professional singer
 24 for about 21 years, musical theater.
 25 Q. Is that singing and acting or do you just sing?

1 Q. A couple more questions about the Florida case.
 2 You indicated that that was in-- it was a state
 3 court case. Were there six or twelve jurors
 4 involved?
 5 A. Six.
 6 Q. Okay. And did law enforcement officers and lay
 7 people testify?
 8 A. Yes.
 9 Q. Okay. Were any of the lay people that
 10 testified rewarded in any fashion for their
 11 testimony, such as reduced charges or reduced
 12 sentence or anything like that?
 13 A. No, they were not.
 14 Q. Okay. Do you have any problem with the concept
 15 of that happening in this case?
 16 A. No.
 17 Q. Would you be able to consider the fact of that
 18 reward along with everything else in making
 19 your determination of guilt or innocence?
 20 A. I'm sorry, say that again.
 21 Q. Would you be able to consider the fact of any
 22 agreement that a witness had with the
 23 prosecution as merely one more factor in
 24 determining whether or not a witness was
 25 telling the truth?

1 Q. Okay. Anything at all about having been
2 employed in government service previously that
3 would make your jury service here difficult?
4 A. No.
5 Q. You recall the questions and were you able to
6 hear the questions that have been asked to the
7 other panel members over the last two days?
8 A. Yes.
9 Q. You're smiling?
10 A. It's because I think I know them by heart.
11 THE COURT: Thank you.
12 Q. (BY MR. HOUGH) Of those questions can you tell
13 me, ma'am, which of them you would have
14 answered differently than any other panel
15 member or questions that as the prosecutor or
16 as a defense attorney we should know your
17 answers to?
18 A. I can't think of anything.
19 Q. Okay. You would have specifically no problem
20 listening to all the testimony, whether a
21 witness had an agreement or not, and consider
22 that testimony. Is that correct?
23 A. Yes, I would.
24 Q. And you would follow the Court's instructions
25 on what weight to give those witnesses'

1 testimony under whatever circumstances?
2 A. Yes.
3 Q. Do you think you could give the prosecution a
4 fair trial?
5 A. Yes, sir.
6 Q. Would you agree that the prosecution, as well
7 as the defendants are entitled to a fair trial?
8 A. Yes.
9 Q. Thank you, ma'am.
10 A. You're welcome.
11 MR. HOUGH: Pass for cause.
12 THE COURT: Mr. Bennett.
13 VOIR DIRE EXAMINATION
14 BY MR. BENNETT:
15 Q. Good morning, Ms. Wehrly.
16 A. Good morning.
17 Q. The-- you indicated in response to one of Mr.
18 Hough's questions that you have no problem
19 believing the police if a police officer were
20 to testify, correct?
21 A. Yes, sir.
22 Q. But in considering what-- strike that. You
23 wouldn't just automatically accept the
24 statement or the testimony as being true just
25 because it was a police officer that you're

1 hearing it from, would you?
2 A. No, I wouldn't.
3 Q. You would measure that testimony by the same
4 yard stick that you'd measure anybody else's
5 and then decide whether or not to believe it,
6 would you not?
7 A. Yes.
8 Q. Okay. Now, have you seen anything in the media
9 with regards to this case?
10 A. I read it in the St. Marys Star when it
11 occurred when it first came out.
12 Q. All right. About when would that have been
13 that you-- when you say when it occurred, when
14 do you recall it was that you read that article
15 approximately?
16 A. I don't--
17 Q. Let me see if I could help you. The defendants
18 were arrested on November the 6th, 2000. And
19 now with that framework, November 6th to now,
20 can you give me any idea when it might be that
21 you had read it in the St. Marys paper?
22 A. I'm not sure when they published it in there.
23 So whenever they did, that's when I read it.
24 Q. So sometime between November 6th and now?
25 A. Yes.

1 Q. Now, the article that you read, and I don't
2 want you to tell me what was in it, but do you
3 recall any of the contents of the article so
4 far as what the alleged facts were?
5 A. No, sir.
6 Q. Okay. Have you read anything concerning this
7 matter in the last week or ten days?
8 A. No.
9 Q. Okay. Do you have an opinion at this time of
10 what the outcome of this lawsuit should be?
11 A. No, sir.
12 Q. Do you know of any reason, whether I've asked
13 you, whether the court has asked you, or
14 whether Mr. Hough has asked you or whether it's
15 been asked of some other potential juror, do
16 you know of any reason why you could not be
17 completely fair and impartial in your
18 consideration of this case?
19 A. No.
20 Q. Do you have any hesitancy at all because of the
21 type of case that it is?
22 A. No.
23 Q. You could listen to the evidence, judge it
24 fairly, and then arrive at your verdict?
25 A. Yes, sir.

1 it's in the paper, set that away and don't read
 2 it until after we're done.
 3 A. Yes, sir.
 4 Q. Okay. You've heard the questions that have
 5 been asked of previous panel members I would
 6 assume?
 7 A. Yes, sir.
 8 Q. Any of those that the Court, myself, or either
 9 defense attorney would need your answers that
 10 would in any way affect your ability to fairly
 11 decide this case?
 12 A. No, sir, I don't think so.
 13 Q. Okay. None of the issues that we've discussed
 14 with previous potential jurors would be
 15 problems for you?
 16 A. No, sir.
 17 Q. Okay. You indicated that your son-in-law is a
 18 prison guard in Illinois?
 19 A. Yes, sir.
 20 Q. How long has he worked there, to your
 21 knowledge?
 22 A. I believe he's been there probably ten years.
 23 Q. Okay. And have you at any family gathering
 24 ever discussed his work with him?
 25 A. Not other than generalities. Like he's on

1 A. I have two daughters, one is 28 and one is 26.
 2 Q. As they were growing up I would assume that
 3 there would be some conflict between them from
 4 time to time?
 5 A. They're girls, yes.
 6 Q. I'm one of three boys so this is music to my
 7 ears. My mother would have sworn it was just
 8 boys dealing with those types of issues.
 9 A. No.
 10 Q. You had to use your good common sense in
 11 resolving those types of issues, correct?
 12 A. Yes, sir.
 13 Q. Any given day issues arise you have to use your
 14 good common sense to resolve, correct?
 15 A. Yes.
 16 Q. Would you use that same good common sense in
 17 determining what the evidence in this case that
 18 you hear means?
 19 A. Yes.
 20 Q. And in applying it to the Court's instructions
 21 to make a decision?
 22 A. Yes, sir.
 23 Q. Thank you, ma'am.
 24 MR. HOUGH: Pass for cause.
 25 THE COURT: Thank you. Mr. Bennett.

1 tower duty or he has whatever kind of duty, but
 2 that's it.
 3 Q. Anything at all about your relationship with
 4 your son-in-law that would in any way affect
 5 your ability to fairly decide the case based
 6 upon the law that the Judge gives you?
 7 A. No, sir.
 8 Q. You understand that it would be your job and
 9 the job of the other eleven people chosen with
 10 you to decide what the facts of the case are,
 11 that's your job?
 12 A. Yes, sir.
 13 Q. You're comfortable with that?
 14 A. Yes, sir.
 15 Q. The law, however, is something that the Court
 16 gives you, Judge Rogers would give you in the
 17 form of written instructions or oral, having
 18 read them to you, and it's not optional about
 19 following them. If he says that you have to do
 20 "X", you have to do "X", you understand that?
 21 A. Yes, sir.
 22 Q. Okay. And in dealing with your children-- how
 23 many children do you have?
 24 A. I have two.
 25 Q. And their ages?

1 VOIR DIRE EXAMINATION
 2 BY MR. BENNETT:
 3 Q. Ms. McLean, were you able to hear the names of
 4 the witnesses or potential witnesses that were
 5 identified when they were read yesterday?
 6 A. Yes, sir.
 7 Q. Was there anyone on that list that you
 8 recognized?
 9 A. No, sir.
 10 Q. All right. Do you know any of the parties in
 11 this lawsuit or the attorneys that are
 12 involved?
 13 A. No, sir.
 14 Q. Do you have any-- anyone in your family have
 15 any legal training or background?
 16 A. No, sir.
 17 Q. When the Court instructs you as to the law that
 18 governs this case and that you must apply to
 19 the facts, if you disagree with that-- what he
 20 tells you the law is or how you should consider
 21 certain things, could you still follow those
 22 instructions even if you disagreed?
 23 A. Yes, sir.
 24 Q. All right. Do you have or have you ever had
 25 anyone discuss the-- this case in your

1 A. 18, 21, 24.
 2 Q. How are they employed?
 3 A. The two oldest ones are both students at
 4 K-State and the youngest one is a senior at
 5 Chapman High School, going to K-State next
 6 fall.
 7 Q. What are your two oldest studying, do they have
 8 career plans?
 9 A. My oldest daughter is going to finish up with
 10 two majors, a minor in ag education,
 11 environmental service, horticulture. And my
 12 second daughter is in restaurant, hotel
 13 management in that course at K-State.
 14 Q. Okay. And between the two of them would they
 15 get you the really choice football tickets?
 16 A. No, they do not.
 17 Q. You need to work on that. Have you heard all
 18 the questions that have been asked the panel,
 19 either by myself or either of the defense
 20 attorneys, over the course of the last two
 21 days?
 22 A. Yes, I have.
 23 Q. And of those questions are there any of those
 24 that you would have answered that any of the
 25 other jurors answered that we should know

1 A. No.
 2 Q. All right. Do you or anyone in your family
 3 have any legal training or background?
 4 A. No, none whatsoever.
 5 Q. Can you and will you listen to the Court's
 6 instructions and apply those instructions
 7 whether you agree with them or not?
 8 A. Yes.
 9 Q. Do you know of any reason why you would not
 10 want a person that's presently in the state of
 11 mind that you're in sitting on a case if you
 12 were the-- on this case if you were the
 13 defendant?
 14 A. No, sir.
 15 Q. Okay. Can you be totally fair and listen to
 16 all the evidence and not make up your mind
 17 until you've heard all of the evidence?
 18 A. Yes, sir.
 19 Q. You understand that the plaintiff will put-- or
 20 the government will put their evidence on first
 21 and then the defendants can put on their
 22 evidence after they've cross examined
 23 government witnesses. And if that's the
 24 procedure can you and will you wait before you
 25 start formulating any opinion until you've

1 about?
 2 A. No, sir.
 3 Q. Okay. You're not presently under a doctor's
 4 care?
 5 A. No, sir.
 6 Q. Not taking any prescription medication?
 7 A. No, sir.
 8 Q. Can you think, sir, of any reason, whether we
 9 have asked you or not, that would keep you from
 10 returning a verdict based on the evidence,
 11 whether it's a verdict of guilty or not guilty?
 12 A. No, I do not.
 13 Q. You'd follow the law the Judge gives you?
 14 A. Yes.
 15 Q. Thank you.
 16 MR. HOUGH: Pass for cause, Judge.
 17 THE COURT: All right. Mr. Bennett.
 18 VOIR DIRE EXAMINATION
 19 BY MR. BENNETT:
 20 Q. Good morning, Mr. Mason.
 21 A. Good morning, sir.
 22 Q. Mr. Mason, have you had occasion to see or hear
 23 anything about this case in the media?
 24 A. No, I have not.
 25 Q. None at all?

1 heard every bit of evidence and the Court has
 2 instructed you now you can go back in your jury
 3 room and commence your deliberations?
 4 A. Yes, sir.
 5 Q. Okay.
 6 MR. BENNETT: Pass the juror for
 7 cause, Your Honor.
 8 THE COURT: Mr. Rork.
 9 VOIR DIRE EXAMINATION
 10 BY MR. RORK:
 11 Q. Did you say that you had not been on a prior
 12 jury before?
 13 A. No, sir. I've been called two times at
 14 Dickinson County, but always released right
 15 away.
 16 Q. With respect to your job as a linesman, do you
 17 have to supervise other people?
 18 A. No, sir, I do not.
 19 Q. You do not. And as part of your employment
 20 duties, have you ever been called upon to have
 21 to discipline other employees?
 22 A. No, sir, I do not.
 23 Q. The fact that some of the testimony you may
 24 hear in this case involves people going to the
 25 Netherlands and/or Netherlands activities, do

APPELLANTS' EXHIBIT 2
CATALOG EXCERPT REGARDING STUDENT INTERACTION

Our Students

The word "diverse" comes immediately to mind when describing the students at Washburn Law. Some students are recent college graduates as young as twenty; others are accomplished individuals seeking a new course for their lives. Some are international students; some are disabled; and some are parents. Our students come from varied backgrounds and lifestyles. Thirteen percent of students entering the School of Law are students of color — African Americans, Asian Americans, Hispanics, and Native Americans. More than forty percent are women. This diversity is a crucial aspect of the Washburn educational experience. As students bring their unique views of the world to the daily life of the law school, they enrich the lives of all.

Student Life • Learning at Washburn University School

of Law takes place in a caring environment. Students interact with and receive support daily from peers, faculty, and alumni. The law school's size makes it possible for every student to know every administrator, every student, and every professor. To improve the quality of life for law students, the School of Law provides a variety of nonacademic support services:

- Counseling services for students and their families or partners;
- Free access to an on-campus doctor and general medical service for students;
- Access to university employment resources for spouses or partners; and
- Small, short-term interest-free emergency loans.

The Typical Washburn Entering Class* •

Entering minority student enrollment has averaged 15%.

*based upon a five-year average

AGE	GENDER
Average age27	Male 57%
Age range20-68	Female 43%
Younger than 24.....44%	
24-30.....38%	
31>.....18%	
	RESIDENCY
	Kansas Resident 61%
	Non-resident 39%

Student Organizations • Student

organizations accommodate the wide interests of students and add to the cultural and intellectual life of the law school community.

Student Organizations* Include:

- | | |
|----------------------------------------------------------------|--------------------------------------------------|
| Asian American Law Students Association (AALSA) | Native American Law Students Association (NALSA) |
| Black Law Students Association (BLSA) | Republican Law Students Soccer Club |
| Buddhist Legal Society | Sports and Entertainment Law Society |
| Business Law Students Society | Tax Law Society |
| Catholic Legal Society | Veteran's Legal Association of Washburn |
| Christian Legal Society | Washburn Advocacy Society |
| Democratic Law Students | Washburn Law Volunteer Society |
| Environmental Law Society | |
| Equal Justice Works | |
| Family Law Students Society | |
| Hindu Legal Society | LEGAL FRATERNITIES |
| Hispanic American Law Students Association (HALSA) | Phi Alpha Delta |
| International Law Society | Phi Delta Phi |
| J. Reuben Clark Legal Society | |
| Jewish Legal Society | STUDENT SERVICE PROJECTS |
| Lesbian & Gay Network | Blood Drive |
| Mozart Society | Clothing Drive |
| Muslim Legal Society | Toys for Tots |
| National Organization for the Repeal of Marijuana Laws (NORML) | |

*Organization activity is dependent upon student interest

APPELLANTS' EXHIBIT 3/
CATALOG EXCERPT REGARDING SIZE OF CAMPUS

Our Facilities

Our Building • Washburn Law's classrooms, library, clinic, study areas, computer labs and administrative offices are all located in a modern 87,000 square-foot building. Everything students need for their legal studies is in one convenient location. Well-lighted parking lots adjacent to the building provide adequate free parking for faculty, staff, and students.

Sophisticated Technological Learning Environment

Now in its second century, Washburn University School of Law continues its reputation as a leader in incorporating relevant technologies in the classroom, the courtroom, and the library.

Our students have access to a high-speed wireless network throughout the law building. Our classrooms are equipped with the latest teaching technology and computer software. There are three computer labs for student use. Students can take advantage of group and one-on-one computer training.

The law school's new Bianchino Technology Center, housed in the recently renovated Robinson Courtroom, provides students access to state-of-the-art technology designed to prepare them for 21st century practice. In the Bianchino Technology Center, students learn to present

evidence persuasively using equipment comparable to that available in the most sophisticated courtrooms.

Law Library • *National Jurist* recently ranked Washburn's law library one of the top 20 law school libraries. Its collection includes more than 360,000 volumes. Each year the library adds more than 8,000 volumes to its collection.

The library is known for its innovative use of technology. The Washburn



Law Library was one of the first law libraries in the country with a web-based, online catalog. Students have free access to collections at Washburn University's Mabee Library, the Kansas Supreme Court Library, and other law school libraries. The library is also home to WashLaw, one of the

nation's most extensive legal research portals. Westlaw, Lexis/Nexis, and hundreds of other commercial research sources are available to students at no charge. Students give the library high praise. Professional librarians are on duty over 80 hours per week to answer questions, provide individualized instruction, and help students polish their research and computer skills. Students may choose among a variety of study environments: individual carrels, study tables, lounge seating, or quiet corners. When they need a break, they can retreat to the Book Nook, which is stocked with New York Times best-sellers, popular magazines, and newspapers.

A view of the Capitol from campus.

