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King County Prosecutor  
Appellate Unit

NO. 107484-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Matter of Application for Relief from Personal Restraint  
Petition Of:

JEFFREY MCKEE,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglas McBroom, Judge

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PETITIONER'S SUPPLEMENTAL BRIEF

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A. ASSIGNMENTS OF ERROR

1. Petitioner's constitutional public trial rights were violated.

2. Petitioner's constitutional due process rights were violated.

3. Petitioner's constitutional right to effective assistance of appellate counsel was violated.

Issues Pertaining to Assignments of Error

1. A provision in the jury questionnaire asked whether jurors would prefer to discuss certain sensitive topics outside the presence of other jurors. While the prosecution and defense corroborated on the questionnaire, neither proposed that jurors be questioned in a closed courtroom setting. In explaining the questionnaire, however, the judge informed the jurors that if they preferred to discuss certain topics outside the presence of the other jurors, the discussion would occur in court, but no one other than the attorneys and court staff would be permitted in the courtroom. In keeping with this directive, several jurors were questioned in the closed courtroom.

a. Did this procedure violate petitioner's constitutional public trial right?

b. Under current case law, a violation of an accused's right to a public trial is presumptively prejudicial and may be raised for the first time in a personal restraint petition. In the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). To the extent this holding of Orange may be in jeopardy, was petitioner's constitutional right to effective assistance of appellate counsel violated by her failure to raise the public trial right violation on direct appeal?<sup>1</sup>

2. The jury in petitioner's case was instructed it must be unanimous in order to answer "no" to the Special Verdict asking whether petitioner was armed at the time of the charged offenses. This is an incorrect statement of the law under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and amounts to an error of constitutional magnitude under the due process clause, as held by this Court in State v. Ryan, 160 Wn. App. 944, \_\_\_ P.3d \_\_\_, 2011 WL 123976 (Wash. App. Div. 1).

a. Did the instructional error here violated petitioner's constitutional due process rights?

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<sup>1</sup> In the event this Court must reach the ineffective assistance of counsel issue, it should appoint substitute counsel to represent petitioner, as undersigned counsel was also appellate counsel, and therefore, has a conflict of interest. The issue is included herein to preserve it.

b. Did the error substantially prejudice petitioner such that he may raise the issue for the first time in this personal restraint petition?

c. Alternatively, should this Court reverse petitioner's firearm enhancements, on grounds his appellate attorney's failure to raise the due process violation on direct appeal amounted to ineffective assistance of counsel?<sup>2</sup>

## B. STATEMENT OF THE CASE

### 1. Case History

Following a jury trial in 2005, petitioner Jeffrey McKee was convicted of two counts of first degree rape while armed with a firearm. State v. McKee, 141 Wn. App. 22, 27, 167 P.3d 575 (2007), attached as Appendix A. For count one, the state alleged McKee picked up Lynae Korbut near Pacific Highway South, bought her beer and cigarettes, drove to a dead-end street and raped her at gunpoint. McKee, 141 Wn. App. at 28.

Regarding the gun, Korbut told police it was a chrome revolver. McKee, 141 Wn. at 31. At trial, however, Korbut admitted she never actually saw a gun. Rather, she presumed the object was

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<sup>2</sup> Again, in the event this Court must reach the ineffective assistance of counsel issue, it should appoint substitute counsel, as undersigned counsel has a conflict

a gun, based on its weight and feel against her temple. Id. When asked about her statement to police regarding a chrome revolver, Korbuto claimed she was merely referencing something shiny she may have seen. Id. When police searched McKee's home, the only gun they found was a black semiautomatic pistol. McKee, 141 Wn. App. at 31.

For count two, the state alleged McKee picked up Jamie Lee Ray near Pacific Highway South, drove her to the parking lot of a daycare center, put a small black handgun to her head and raped her. McKee, 141 Wn. App. at 28. Although Ray identified photos of McKee's truck and claimed his gun looked like the one yielded by her attacker, she did not identify McKee from a photomontage or in court. McKee, 141 Wn. App. at 29.

On direct appeal, McKee argued the evidence was insufficient to support the firearm enhancement for the conviction relating to Korbuto and that the evidence was insufficient to support the conviction relating to Ray. McKee, 141 Wn. App. at 30.

This Court rejected McKee's challenges and sided with the state on its cross-appeal of McKee's exceptional sentence below the standard range. McKee, 141 Wn. App. at 32, 34. The

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of interest. The issue is included herein to preserve it.

sentencing court had departed from the standard range, on grounds the complainants were prostitutes who willingly entered McKee's truck intending to engage in sex for money. McKee, 141 Wn. App. at 33-34. Under the circumstances, the trial court found the offenses less egregious than typical for first degree rape. Id. at 34. This Court disagreed and remanded for resentencing within the standard range. McKee, 141 Wn. App. at 34.

The mandate issued on September 21, 2008, and McKee was resentenced on November 3, 2008. See Mandate, attached as Appendix B; State v. McKee, 152 Wn. App. 1030 (2009), 2009 WL 3083779, attached as Appendix C. McKee appealed, challenging a condition of his community custody. State v. McKee, 152 Wn. App. 1030, \*1. This Court declined to reach the issue, on grounds it was not raised during the first appeal. Id., \*2. The Mandate issued on June 25, 2010. See Mandate, attached as Appendix D.

## 2. Facts Pertaining to Due Process Violation

The jury in McKee's case was instructed it must be unanimous in answering the special verdict forms. Number 25, the concluding instruction provided in relevant part:

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your

decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the questions, you must answer "no."

See Court's Instructions to the Jury, attached as Appendix E.

This instruction was proposed by the state. See State's Instructions to the Jury, attached as Appendix F.

### 3. Facts Relating to Public Trial Violation

The court first mentioned the jury questionnaire on March 29, 2005, indicating it would like to discuss it with the parties in greater detail after pretrial rulings. See page 10 of the Verbatim Report of Proceedings from March 29, 2005, attached as Appendix G.

Both sides had proposed its own version. The defense's proposed included 11 substantive questions and one addressing potential privacy concerns:

12. Would you prefer to answer any questions regarding your responses to the above questions out of

the presence of other jurors?

See Defense Proposed Juror Questionnaire, attached as Appendix H.

The state's proposed questionnaire contained eight substantive questions and one question similarly addressing potential privacy concerns:

9. If you answered "yes" to any of the questions asked above you may be asked additional questions about your answers. Ordinarily, these questions are asked in open court, with your fellow jurors present. **Would you rather discuss your answers in greater detail outside the presence of your fellow jurors?**

See State's Proposed Juror Questionnaire, attached as Appendix I (emphasis in original).

The following day, the court asked the parties to collaborate on a single questionnaire:

And then we have to talk about the jury questionnaire. What would like to do, if you guys can, if you counsel can get a minute before we reconvene in the morning, or while we are waiting for Mr. McKee to see how much of those – I want to give the jury, obviously, just one questionnaire, so take a look at – I mean, some of the questions you have asked are quite similar, so see if you can whittle it down and then we'll work on that.

See pages 345-346 of the Verbatim Report of Proceedings from March 30, 2005, attached as Appendix J.

Returning again to the questionnaire the following day, the court indicated it would leave the parties to formulate an agreed version and asked the prosecutor to make the necessary copies:

THE COURT: Look, here is what I will do: I'm just going to leave this to the two of you to agree on this questionnaire. I will ask any questions you both agree that should be asked on the questionnaire. Do you think that you are going [to] have a dispute?

MR. COOK: We can try to work out an agreement, your Honor.

THE COURT: I will ask any question either one of you wants asked on the questionnaire within reason.

MR. MINOR: Yes, your Honor.

...

THE COURT: . . . So we now we have solved the questionnaire issue, and I'm going to expect you, Mr. Cook, to provide Adrienne with –

THE BAILIFF: Is there a number on the top? I just want to make sure they are numbered. Is there a little slot with the juror number?

THE COURT: Oh, "Juror No. – " yea, Mr. Cook's has that. So when do you the final, put the juror number that you have got up here. And then you need to make the copies. Will you do that? Because you have got all of the equipment down there, and we have to do these one at a time.

MR. COOK: We could do that.

See pages 483-490 of the Verbatim Report of Proceedings from

March 31, 2005, attached as Appendix K.

On April 4, 2005, the court inquired as to whether the parties had reached an agreement as to the questionnaire:

THE COURT: So all we have to do is talk about the questionnaire. Have you had a chance to discuss the questionnaire between yourselves? I have said I'm going to ask every question. Mr. Minor has said that one of his questions was included by mistake. My questions is can you guys, given my ruling, then, all these questions are going to be asked, can you just put the questionnaire together yourself?

MR. MINOR: I'm willing to do that, Your Honor, yes I'm willing to do that.

THE COURT: Mr. Cook?

MR. COOK: Yes, and I could sign off on it and we can get a copy of it to the court perhaps in the morning.

See page 59-60 of the Verbatim Report of Proceedings from April 4, 2005, attached as Appendix L.

Before adjourning for the day, the court indicated it could resolve any disputes regarding the questionnaire in chambers the next morning:

So lastly, then, if you would put this together. If you have any disputes on it, let me know in chambers and I'll resolve them. If you have no disputes, I'd like, Mr. Cook, if you possibly can, to have 90 or so copies in our chambers tomorrow. Is that going to be possible, do you think?

MR. COOK: I think so, Your Honor.

See page 66 of the Verbatim Report of Proceeding from April 4, 2005, attached as Appendix M.

Voir dire began the following day on April 6, 2005. After excusing a number of jurors for hardship and before sending the remaining jurors downstairs, the Honorable Douglas McBroom explained the purpose of the questionnaire:

These questionnaires – you know, this is not the college boards. It's important that you give adequate information, but the way they are used is the attorneys looks at them – one of the questions, I believe, isn't there, on the questionnaire, counsel, a question that anybody wants to be talked to individually?

MR. MINOR [defense counsel]: Yes.

THE COURT: That's on the questionnaire?

MR. COOK: That is correct.

THE COURT: Okay. So that is one thing we do. I mean, if there's – if you have personal information you are hesitant to share in front of a bunch of people, we will talk to you individually. There will still be the court staff here and the lawyers, but anybody that wants to have sort of a semi-private – and of course nobody will be allowed in the courtroom – question and answer session about something that they just don't feel real comfortable talking about in front of a group full of people, that will be part of it. The rest of it the lawyers will use these questions to, you know, figure out what kind of questions to ask what people, so they are just not facing you cold turkey. So that is the reason for this. And I say that so that you don't need to, you know, spend a whole lot of time on

this, just fill it out as accurately as you can. And I don't have a questionnaire in front of me, but there's, what, twenty questions, something like that?

See Verbatim Report of Proceedings from April 6 and 7, 2005, attached as Appendix N, pages 72-73 (emphasis added).

Outside the jurors' presence, the court explained to the prosecutor that only those jurors who asked to be questioned individually would be questioned individually:

THE COURT: That's the only ones I'm going to allow individual questioning on is for the jurors, it's not for the parties.

MR. COOK: Okay.

COURT: It's for their privacy.

Appendix N, at page 76.

In keeping with the court's explanation to the jurors about the questionnaire and the opportunity to discuss it "sort of privately," individual voir dire was subsequently conducted of juror 2, 4, and 19.<sup>3</sup> Appendix N, at 79, 81-82, 86-87. Following the private voir dire of juror 19, the court indicated it would prefer to entertain challenges for cause immediately following each individual session. Appendix N, at 91. The defense accordingly challenged jurors 2 and 19. Id.

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<sup>3</sup> Juror 19 explained she requested individual voir dire because she did not want to discuss her daughter's rape "in public." Appendix N, at 89.

The court granted the request with regard to juror 2 but not 19.<sup>4</sup> Appendix N, at 91-93.

Also individually questioned were jurors 32, 33, 45, 48,<sup>5</sup> 57<sup>6</sup> and 71.<sup>7</sup> Appendix N, at 93, 96, 100, 106, 111-112. The court granted the defense's challenge to jurors 32 and 45, but denied it with respect to juror 48.<sup>8</sup> Appendix N, at 95, 105-106, 109-110.

The following day on April 7, juror 18 was also questioned individually. Appendix N, at 132. The defense's challenge for cause was granted. Appendix N, at 138.

The same morning, at the defense's request, the parties also individually questioned jurors 53 and 58. Appendix N, at 140, 144-145. Questioning of juror 53 concerned a radio news program the juror heard about McKee. Appendix N, at 139-142. The court

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<sup>4</sup> Juror 19 was later released for cause during general voir dire, however. See page 81-82 of the Verbatim Report of Proceedings from April 7, 2007, Volume I, attached as Appendix O.

<sup>5</sup> Juror 48 explained he requested individual voir dire because he "didn't want this information about the family to be heard in public." Appendix N, at 107.

<sup>6</sup> Juror 57 was excused by agreement. Appendix N, at 111-112.

<sup>7</sup> Juror 71 explained he requested individual voir dire because he preferred not to discuss his sister's rape "in open court." Appendix N, at 115.

<sup>8</sup> Juror 48 was later released for cause during general voir dire, however. See page 45 of the Verbatim Report of Proceedings from April 7, 2005, Volume II, attached as Appendix P.

granted the defense's challenge to this juror. Appendix N, at 143. Questioning of juror 58 also concerned potential knowledge of the case, but the defense made no challenge. Appendix N, at 145-146.

The parties also individually questioned juror 8, following receipt of a letter she wrote asking for a "private explanation of my concerns about availability to be a good juror." Appendix N, at 148. As she further explained, "the more I imagine explaining this in public the less possible it seems." *Id.* She was released by agreement. Appendix N, at 150.

C. ARGUMENT

1. PETITIONER'S PERSONAL RESTRAINT PETITION IS TIMELY.

McKee's appeal following his resentencing on remand from the Court of Appeals following his direct appeal mandated June 25, 2010. He therefore had one year from that date – June 25, 2011 – to file his personal restraint petition. RCW 10.73.090; In the Matter of the Personal Restraint Petition of Skylstad, 160 Wn.2d 944, 162 P.3d 413 (2007). Because June 25 was a Saturday, the personal restraint petition is due today, Monday, June 27, 2011. RAP 18.6(a).

RCW 10.73.090 prevents collateral attacks on a judgment and sentence to be filed more than one year after the judgment

becomes final. A judgment is not final until the conviction and sentence are both final. Skylstad, 160 Wn.2d at 946. McKee's sentence was not final until the mandate issued following the appeal of his resentencing. Skylstad, 160 Wn.2d at 948, 954-55. Accordingly, McKee's personal restraint petition is timely.

2. PETITIONER'S CONSTITUTIONAL PUBLIC TRIAL RIGHT WAS VIOLATED.

(i) The Violation

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. U.S. Const. amend. VI;<sup>9</sup> Const. art 1, § 22;<sup>10</sup> Presley v. Georgia, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, 723, \_\_\_ L. Ed. 2d \_\_\_ (2010); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). Additionally, the public and press have a right to a public trial. U.S. Const. amend. I;<sup>11</sup> Const. art 1, section 10;<sup>12</sup> Press-Enterprise Co. v. Superior Court of Cal., Riverside, Cty., 464 U.S. 501, 104 S. Ct. 819, 78 L.

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<sup>9</sup> The Sixth Amendment directs that "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

<sup>10</sup> Article I, section 22 of the Washington Constitution similarly guarantees that "[i]n criminal prosecutions the accused shall have the right . . . to have a . . . public trial."

<sup>11</sup> The First Amendment provides that "[c]ongress shall make no law abridging the freedom of speech."

Ed. 2d 629 (1984) (Press-Enterprise I); State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2005).

The right to a public trial in criminal cases extends to the jury selection phase of trial, and in particular the voir dire of prospective jurors. Presley v. Georgia, 130 S. Ct. at 724; In the Matter of Personal Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). In the federal context, there are exceptions to the general rule that the accused has the right to insist that the voir dire of the jurors be public. “[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.” Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Such instances are rare, however, and the balance of interests must be struck carefully. Waller, 467 U.S. at 45.

Under Waller, the courts must apply certain standards before excluding the public from any stage of a criminal trial:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must

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<sup>12</sup> Article I, section 10 provides that “[j]ustice in all cases shall be administered openly.”

consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller, 467 U.S. at 48.

In Presley, the Supreme Court held Presley's Sixth Amendment right to a public trial was violated, where the lower court excluded Presley's uncle from the courtroom during voir dire, without considering reasonable alternatives. Presley, 130 S. Ct. at 722, 724-725.

In Washington, there are similar standards the court must apply before excluding the public from a criminal trial:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In petitioner McKee's case, the court did not consider any of either the Waller factors or those required under Bone-Club before it sua sponte closed the courtroom. The only reason given by the court for closing the courtroom during individual voir dire was to protect the prospective jurors' privacy. Appendix N, at 76. The court did not indicate that it considered reasonable alternatives to closure or that it weighed the competing interests at stake, or considered any of the other factors required under Waller and Bone-Club. The court's courtroom closure during individual voir dire therefore violated McKee's state and federal constitutional right to a public trial. See e.g. Strode, 167 Wn.2d at 223 (trial court violated Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in unexceptional circumstances without first performing the required Bone-Club analysis); State v. Brightman, 155 Wn.2d 506, 515-516, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the trial court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis). This is a structural error that cannot be considered harmless. Strode, 167 Wn.2d at 223, 231; Strode, 167 Wn.2d at 236 (Fairhurst, J., concurring).

At the outset, any argument that the courtroom was not in fact closed should be rejected. In explaining the purpose of the jury questionnaire, the court here expressly stated that individual voir dire would be conducted in a “semi-private” setting with “the court staff here and the lawyers” but that, “of course nobody will be allowed in the courtroom.” Appendix N, at 72-73.

That the courtroom was in fact closed is also corroborated by several comments of the jurors who were individually questioned. For instance, juror 19 explained she requested individual voir dire because she did not want to discuss her daughter’s rape “in public.” Appendix N, at 89. Juror 48 explained he requested individual voir dire because he “didn’t want this about the family to be heard in public.” Appendix N, at 107. Juror 71 explained he requested individual voir dire because he preferred not to discuss his sister’s rape “in open court.” Appendix N, at 115. And finally, juror 8 explained she asked to give a “private explanation” about her prospects as a juror because “the more I imagine explaining this in public the less possible it seems.” Appendix N, at 148.

Under these circumstances, the state cannot overcome the strong presumption that the courtroom was closed. See e.g.

Brightman, 155 Wn.2d at 516. In Brightman, the Court held “once the plain language of the trial court’s ruling imposes a closure, the burden is on the state to overcome the strong presumption that the courtroom was closed.” Id.

In response, the state may attempt to argue that McKee somehow waived his right to challenge the courtroom closure. See e.g. State v. Strode, 167 Wn.2d at 229-230; State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009). Any such argument should be rejected.

In Strode, the state argued that Strode invited or waived his right to challenge the closure when he acquiesced, without any objection, to the private questioning of jurors. Strode, 167 Wn.2d at 229. The lead opinion disagreed that a contemporaneous objection was required:

However, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. Easterling, 157 Wn.2d at 173 n. 2, 137 P.3d 825; see also Brightman, 155 Wn.2d at 514, 122 P.3d 150; Orange, 152 Wn.2d at 800, 100 P.3d 291; Bone-Club, 128 Wn.2d at 257, 906 P.2d 325. We have held that a “defendant’s failure to lodge a contemporaneous objection at trial [does] not effect a waiver.” Brightman, 155 Wn.2d at 517, 122 P.3d 150 (citing Bone-Club, 128 Wn.2d at 257, 906 P.2d 325). Strode’s failure to object to the closure or his counsel’s participation in closed questioning of prospective jurors did not, as the

dissent suggests, constitute a waiver of his right to a public trial.

Strode, 167 Wn.2d at 229.<sup>13</sup>

The concurring opinion agreed that “failure to object, alone, does not constitute waiver of the right to a public trial.” Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring). Accordingly, a majority of the court held failure to object does not constitute waiver.

As in Strode, McKee’s acquiescence to the court’s chosen procedure did not constitute a waiver of his right to a public trial. As an initial matter, it should be noted that McKee did not advocate for a closed courtroom setting. His proposed jury questionnaire merely asked if jurors wished to answer questions about sensitive topics outside the presence of *other jurors*. Similarly, the state’s proposed questionnaire – which the court asked to be combined with the defense’s into one questionnaire – merely asked if jurors wished to answer questions outside the presence of other jurors. Appendices I-L. It was the court that sua sponte ordered the courtroom closed out of concern for jurors’ privacy. Appendix N, at

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<sup>13</sup> As will be argued in the upcoming section, the public trial right is considered such an issue of constitutional magnitude that it may also be raised for the first time in a personal restraint petition. See Strode, 167 Wn.2d at 231 (denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed); Orange, 152 Wn.2d at 814 (by improperly closing the courtroom during voir dire “the remedy for the presumptively prejudicial error [was], as in

72-73. In this respect, McKee's case is very different from Momah's. Cf. Momah, 167 Wn.2d at 146, 152 ("Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefitted from it"); see also Strobe, 167 Wn.2d at 234-35 (Fairhurst, J., concurring).

As the state may point out, the defense did request individual voir dire of jurors 53 and 58. Appendix N, at 140, 144-45. But it should be noted that it was the court that dictated the procedure for individual questioning, not counsel. Regardless, the request was born out of a desire to protect against tainting the remainder of the venire with prior knowledge about the case, *not concern for jurors' privacy*. Appendix N, at 139-43. Accordingly, to the extent waiver applies, it applies only to individual voir dire of jurors 53 and 58. See Momah, 167 Wn.2d at 152 (Momah's public trial right not violated by closure because "most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.").

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Bone-Club, remand for a new trial.").

In short, the court here conducted a significant portion of voir dire in private solely out of concern for the jurors' privacy. There is no "hint" the judge even considered McKee's public trial right. Bone-Club, 128 Wn.2d at 260 (court held closure a structural error, reasoning in part that "the record lacks any hint the trial court considered Defendant's public trial right"). And unlike Momah, McKee did not affirmatively assent to the closure, argue for its expansion or benefit by it. In fact, two of his challenges for cause were denied during individual voir dire. The circumstances here are analogous to those in Strode and require reversal of McKee's convictions.

As will be discussed in the next section, the presumptively prejudicial constitutional violation of McKee's public trial right may be raised for the first time in a personal restraint petition.

(ii) Because the Constitutional Violation Is Presumptively Prejudicial, It May Be Raised for the First Time in a Personal Restraint Petition.

Generally, when a petitioner claims a constitutional violation he needs to show he was prejudiced. In re Personal Restraint of Cook, 114 Wn.2d 802, 810-811, 792 P. 2d 506 (1990); In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835 (1984). The burden of showing prejudice, however, is waived where the error gives rise to

a presumption of prejudice. Personal Restraint of Orange, 152 Wn.2d at 804 (citing In re Personal Restraint Petition of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992)). Prejudice is presumed where there is violation of a petitioner's public trial right. Orange, 152 Wn.2d at 814.

The federal courts, like the Washington courts, generally require a post-conviction petitioner to prove actual prejudice rather than requiring the government to prove that the error was harmless. Compare Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 383 (1993) (habeas petitioner must prove error had "substantial and injurious effect" on verdict), with In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982) (personal restraint petitioner must prove actual prejudice from error). The Brecht Court "did not, however, change, and in fact reaffirmed, its longstanding doctrine treating 'structural' error as not subject to harmless error analysis and accordingly as prejudicial – hence reversible – per se." Liebman and Hertz, Federal Habeas Corpus Practice and Procedure (4th Ed., 2001), § 31.3 at p. 1379, citing Brecht, 507 U.S. at 629-30, 638. "Thus, even in habeas corpus proceedings adjudicated under Brecht, 'structural' errors, as opposed to 'errors of the trial type,' are always considered 'prejudicial' and accordingly

are reversible per se.” Id. at p. 1380.

Since Brecht, the federal courts have consistently found structural errors to be per se prejudicial, even on habeas review. See, e.g., Bell v. Cone, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (prejudice is presumed when petitioner was completely denied counsel, or the representation was so compromised as to be equivalent to denial of counsel); Cordova v. Baca, 346 F.3d 924, 930 (9th Cir. 2003) (because petitioner did not effectively waive his right to counsel in state-court trial, “[a]utomatic reversal of the conviction is the only lawful remedy”); Powell v. Galaza, 328 F.3d 558, 566-67 (9th Cir. 2003) (when trial court effectively directs a guilty verdict, the error is structural and requires no showing of prejudice; “[t]his principle applies on habeas review as well as on direct review”); Miller v. Dormire, 310 F.3d 600, 603-04 (8th Cir. 2002) (invalid waiver of right to jury trial was presumptively prejudicial, structural error).

The federal courts have specifically applied this principle to violations of the Sixth Amendment right to a public trial, when raised on habeas review. In Judd v. Haley, 250 F.3d 1308 (11th Cir. 2001), the Court explained that “once a petitioner demonstrates a violation of his Sixth Amendment right to a public

trial, he need not show that the violation prejudiced him in any way.” Id. at 1315. “The mere demonstration that his right to a public trial was violated entitles him to relief.” Id.

As a violation of the right to a public trial is structural error, Judd need not show that he was prejudiced by the closing of the courtroom. All he must demonstrate is that the trial court did not comply with the procedure outlined in Waller prior to its decision to completely remove spectators from the courtroom. Judd has successfully demonstrated that the closure of the courtroom in his case was not conducted in conformity with the standards articulated in Waller; therefore, he is entitled to relief on his Sixth Amendment claim.

Id. at 1319.

Similarly, in Walton v. Briley, 361 F.3d 431 (7th Cir. 2004), the state-court trial judge held two sessions after the courthouse had closed for the day, inadvertently preventing the public from attending. “Because Walton need not show specific prejudice, these facts are sufficient to show a violation of Walton’s right to a public trial.” Id. at 433. In Owens v. United States, 483 F.3d 48 (1st Cir. 2007), the federal defendant lost his direct appeal and then filed a habeas petition. Id. at 56. The First Circuit explained that his claim regarding courtroom closure required no showing of prejudice even though it was raised on collateral review. Id. at 63. See also, Carson v. Fischer, 421 F.3d 83, 94-95 (2nd Cir. 2005)

(“we have consistently held that prejudice is unnecessary in this context”).

The Washington courts have never suggested that a personal restraint petitioner could have a higher burden of proof than that of a federal habeas petitioner. In fact, the Washington case establishing the burden of proof in a personal restraint petition expressly adopted the federal habeas standard. In re Hagler, 97 Wn.2d at 824-26. The Hagler Court believed it important to stay in step with federal habeas law. Otherwise, “our state’s personal restraint procedure will come to be viewed as a necessary exhaustion of state remedies, rather than as a method by which serious constitutional claims may be heard.” Id. at 826.

Thus, whether raised on direct or collateral review, a violation of the right to a public trial is generally structural error and requires no showing of specific prejudice.

(iii) Petitioner \_\_\_\_\_ Received \_\_\_\_\_ Ineffective Assistance of Counsel on Direct Appeal, due to his Attorney’s Failure to Raise the Public Trial Right Violation.<sup>14</sup>

In addition to the reasons set forth above, this Court should

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<sup>14</sup> As indicated in note 1, this Court should appoint substitute counsel if it must reach the ineffective assistance of counsel claim, as undersigned counsel was appellate counsel and has a conflict of interest.

also reverse McKee's convictions because he received ineffective assistance of appellate counsel and would have been granted a new trial on appeal, had his appellate counsel performed effectively by raising the violation of his public trial right. Orange, 152 Wn.2d at 800.

The right to appeal includes the constitutional right to counsel. In re Brown, 143 Wn.2d 431, 451, 21 P.3d 687 (2001); Orange, 152 Wn.2d at 814. The constitutional right to counsel includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (adopted in State v. Jeffries, 105 Wash.2d 398, 418, 717 P.2d 722 (1986)).

A criminal defendant bears the burden of establishing a violation of that right by showing both deficient performance and resulting prejudice. State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance is established by proof that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." Id. Prejudice is established where "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at

335.

In Orange, the petitioner argued that he received ineffective assistance of appellate counsel based on the attorney's failure to raise the violation of his public trial right on appeal. The Supreme Court agreed. Because Orange would have been entitled to automatic reversal on direct appeal, appellate counsel could not have had a legitimate, strategic reason to omit the issue. Orange was prejudiced because, if not for appellate counsel's error, he would have won his appeal. Orange was therefore entitled to a new trial based on ineffective assistance of counsel. Orange, 152 Wn.2d at 814.

Another way to characterize the analysis is that, when appellate counsel was ineffective in failing to raise an issue, the petitioner is entitled to the direct appeal standard on post conviction review. See In re Dalluge, 152 Wn.2d 772, 789, 100 P.3d 279 (2004).

McKee's situation is no different than Orange's. Because McKee would have been entitled to automatic reversal on direct appeal, appellate counsel did not have a legitimate, strategic reason to omit the issue. McKee was prejudiced because, if not for appellate counsel's error, McKee would have won his appeal. The

remedy for counsel's failure to raise on appeal the violation of McKee's public trial right is remand for a new trial. Orange, at 814.

3. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN JURORS WERE INSTRUCTED THEY MUST BE UNANIMOUS TO ANSWER "NO" TO THE SPECIAL VERDICT.

A unanimous jury decision is not required to find the state has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the state has not proved the special verdict finding beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In keeping with this rule, it is manifest constitutional error to instruct the jury it must be unanimous in order to find the *absence* of such a special finding. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Ryan, 160 Wn. App. 944.

In Bashaw, Bertha Bashaw was convicted of three drug deliveries. Because the jury determined that each delivery took place within 1,000 feet of a school bus route stop, her maximum sentence was doubled by statute. Bashaw, 169 Wn.2d at 137. In the jury instruction explaining the special verdict forms, the jury was instructed: "Since this is a criminal case, all twelve of you must

agree on the answer to the special verdict.” Bashaw, 169 Wn.2d at 139 (citation to record omitted). On appeal, Bashaw argued that the jury instruction incorrectly required unanimity for finding that her actions did not take place within 1,000 feet of the school bus route stop. Bashaw, at 137.

The Supreme Court agreed:

Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, 72 P.3d 1083, it is not required to find the *absence* of such a special verdict finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis in original).

The state argued the error was harmless, but the court disagreed:

In order to hold that a jury instruction error was harmless, “we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999)). The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court’s instruction to a nonunanimous jury to reach unanimity.

149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” *Id.* at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48.

In Ryan, this Court held the nature of the error addressed in Bashaw was a constitutional due process violation. As this Court explained:

The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even

where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

Ryan, 160 Wn. App. 944, 2011 WL 1239796, \*2 (footnotes omitted).<sup>15</sup>

Accordingly, where Ryan's jury was instructed it must unanimously have a reasonable doubt to answer "no" to the special verdict, it was an error Ryan could raise for the first time on appeal and entitled him to vacation of the deadly weapon enhancement.

Ryan, 2011 WL 1239796, \*2-3.

(i) The Violation

The jury in McKee's case was instructed it must be unanimous in answering the special verdict forms. Number 25, the concluding instruction provided in relevant part:

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill

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<sup>15</sup> Cf. State v. Nunez, 160 Wn. App. 150, 163, 248 P.3d 103 (2011).

in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict forms “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the questions, you must answer “no.”

Appendix E (emphasis added).

As in Bashaw and Ryan, the jury here was instructed it must be unanimous to return a verdict. Although the last line of the instruction did not state the jury must unanimously have a reasonable doubt to answer “no” to the special verdict, the jury would have no reason to distinguish between a general verdict and special verdict. It was instructed it must be unanimous to return a verdict, any verdict, period. Accordingly, the error here is no different than that in Bashaw and Ryan. It was an error of constitutional magnitude that may be raised for the first time on appeal and is not harmless, as it resulted in a flawed deliberative process.

(ii) Petitioner Was Substantially Prejudiced

As indicated in the previous section, to obtain relief through a personal restraint petition, a petitioner claiming constitutional error must show that such an error was made and that it “worked to his actual and substantial prejudice.” In re Personal Restraint of Lile, 100 Wn.2d 224, 225, 668 P.2d 581 (1983). The petitioner bears the

burden of establishing prejudice by a preponderance of the evidence, but that burden “may be waived where the error gives rise to a conclusive presumption of prejudice.” St. Pierre, 118 Wn.2d at 328.

McKee was substantially prejudiced by the constitutional due process violation. At first, Korbut claimed the gun allegedly used in her attack was a chrome revolver, not a black semiautomatic of the sort found in McKee’s home. At trial, she admitted she did not in fact see a gun, but presumed an object pressed against her face must have been a gun. Under these circumstances, a reasonable juror could have had a reasonable doubt about the firearm allegation with respect to Korbut. Given a different instruction, jurors with reservations might have held to their positions or raised additional questions that would have led to a different result. The same is true with respect to Ray. She did not identify McKee and testified only that McKee’s gun resembled the one used by her attacker. Because McKee was substantially prejudiced, this Court should reach the issue raised herein and vacate McKee’s firearm enhancements.

(iii) Petitioner Received Ineffective Assistance of Counsel on Direct Appeal, due to his Attorney's Failure to Raise the Due Process Violation.<sup>16</sup>

In addition to the reasons set forth above, this Court should also vacate McKee's enhancements because he received ineffective assistance of appellate counsel and would have had a greatly reduced sentence, had his appellate counsel performed effectively by raising the due process violation. See Orange, 152 Wn.2d at 800.

As previously indicated, the right to appeal includes the constitutional right to counsel. In re Brown, 143 Wn.2d at 451; Orange, 152 Wn.2d at 814. The constitutional right to counsel includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. at 686.

A criminal defendant bears the burden of establishing a violation of that right by showing both deficient performance and resulting prejudice. McFarland, 127 Wash.2d at 334-35. Deficient performance is established by proof that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." Id. Prejudice is

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<sup>16</sup> As indicated in note 2, this Court should appoint substitute counsel if it must reach the ineffective assistance of counsel claim.

established where “there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 335.

In Orange, the petitioner argued that he received ineffective assistance of appellate counsel based on the attorney's failure to raise the violation of his public trial right on appeal. The Supreme Court agreed. Because Orange would have been entitled to automatic reversal on direct appeal, appellate counsel could not have had a legitimate, strategic reason to omit the issue. Orange was prejudiced because, if not for appellate counsel's error, he would have won his appeal. Orange was therefore entitled to a new trial based on ineffective assistance of counsel. Orange, 152 Wn.2d at 814.

Another way to characterize the analysis is that, when appellate counsel was ineffective in failing to raise an issue, the petitioner is entitled to the direct appeal standard on postconviction review. See Dalluge, 152 Wn.2d at 789.

Because McKee would have been entitled to vacation of his firearm enhancements on direct appeal, appellate counsel did not have a legitimate, strategic reason to omit the issue. McKee was prejudiced because, if not for appellate counsel's error, McKee's

sentence would be much shorter. The remedy for counsel's failure to raise on appeal the violation of McKee's due process rights is vacation of the firearm enhancements. See Orange, at 814.

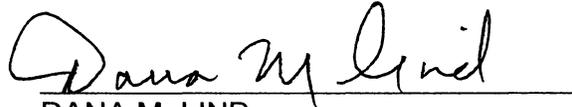
D. CONCLUSION

For the above reasons and the reasons set forth in the personal restraint petition, this Court should remand the case for a new trial and/or vacate McKee's firearm enhancements.

DATED this 27<sup>th</sup> day of June, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

DANA M. LIND

WSBA No. 28239

Attorney for Petitioner

## **APPENDIX A**

Westlaw

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Court of Appeals of Washington, Division 1.  
STATE of Washington, Respondent/  
Cross-Appellant,  
v.

Jeffrey R. McKEE, Appellant/Cross-Respondent.

No. **56504-4-I.**

July 23, 2007.

Publication Ordered Sept. 14, 2007.

**Background:** Defendant was convicted in the Superior Court, King County, Douglas D. McBroom, J., of two counts of first degree rape while armed with a firearm and imposed an exceptional minimum sentence. Defendant appealed, and state cross-appealed.

**Holdings:** The Court of Appeals, Baker, J., held that:

- (1) circumstantial evidence was sufficient to support finding that defendant was armed with a real gun when he raped victim;
- (2) evidence was sufficient to support conviction for first degree rape;
- (3) multiple offense policy did not serve as a mitigating factor to allow court to impose an exceptional minimum sentence;
- (4) fact that victims were prostitutes who may have been willing to have sex for money did not allow trial court to impose an exceptional minimum sentence;
- (5) court could not impose conditions of community custody unrelated to defendant's convictions;
- (6) Court would decline to address directly whether community custody provision barring defendant from possessing or perusing "pornographic materials" was unconstitutionally vague as applied; and
- (7) community custody provision barring pornographic materials was not overbroad in violation of defendant's free speech rights.

Convictions affirmed; remanded for resentencing.

West Headnotes

**[1] Sentencing and Punishment 350H ↪726(2)**

350H Sentencing and Punishment  
350HIV Sentencing Guidelines  
350HIV(B) Offense Levels  
350HIV(B)3 Factors Applicable to Severe Offenses

350Hk726 Dangerous Weapons or Destructive Devices

350Hk726(2) k. What Constitutes a Weapon. Most Cited Cases

For purposes of a firearm enhancement, the State must prove that the defendant was armed during commission of the crime with a "firearm," defined as a weapon from which a projectile or projectile may be fired by an explosive such as gunpowder. West's RCWA 9.41.010.

**[2] Sentencing and Punishment 350H ↪980**

350H Sentencing and Punishment  
350HIV Sentencing Guidelines  
350HIV(H) Proceedings  
350HIV(H)2 Evidence  
350Hk974 Sufficiency

350Hk980 k. Matters Related to Firearms and Destructive Devices. Most Cited Cases

The State seeking a firearm enhancement need not introduce the actual deadly weapon at trial; witness testimony alone may provide sufficient evidence. West's RCWA 9.41.010.

**[3] Sentencing and Punishment 350H ↪980**

350H Sentencing and Punishment  
350HIV Sentencing Guidelines  
350HIV(H) Proceedings  
350HIV(H)2 Evidence  
350Hk974 Sufficiency

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350Hk980 k. Matters Related to  
 Firearms and Destructive Devices. Most Cited Cases

Circumstantial evidence was sufficient to support finding that defendant was armed with a real gun when he raped victim and thus to support firearm enhancement; victim testified regarding the weight and feel of the gun, that she saw a "peripheral something to my head," and to the way in which defendant wielded it, and there was evidence defendant had a real gun and had access to other guns. West's RCWA 9.41.010.

**[4] Rape 321 ⚡51(7)**

321 Rape

321II Prosecution

321II(B) Evidence

321k50 Weight and Sufficiency

321k51 In General

321k51(7) k. Identity of Accused.

Most Cited Cases

Evidence was sufficient to support conviction for first degree rape, although victim was unable to identify defendant in a photomontage, in a lineup, or in court; victim described her attacker as a clean-cut white male with short blondish-brown hair and a medium build, and positively identified defendant's truck, including the floor mats, victim's description of the gun used in the rape was also consistent with the gun recovered from defendant's bedroom, victim's friend positively identified defendant in a lineup and in court as the man who picked up victim and also identified photos of defendant's truck, and state crime lab witness testified that victim's DNA was found in a semen stain in defendant's truck.

**[5] Criminal Law 110 ⚡1139**

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited

Cases

**Criminal Law 110 ⚡1156.2**

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1156.1 Sentencing

110k1156.2 k. In General. Most Cited

Cases

(Formerly 110k1147)

**Criminal Law 110 ⚡1158.34**

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.34 k. Sentencing. Most Cited

Cases

(Formerly 110k1158(1))

Appellate review of an exceptional sentence is a three-step process; first, the appellate court determines under the "clearly erroneous" standard whether the record supports the reasons given by the trial court for imposing the exceptional sentence, second, the appellate court determines whether the trial court's reasons are sufficiently substantial and compelling to justify an exceptional sentence as a matter of law under a de novo standard of review, and third, the appellate court determines whether the exceptional sentence is clearly too excessive or lenient under the abuse of discretion standard. West's RCWA 9.94A.585.

**[6] Sentencing and Punishment 350H ⚡870**

350H Sentencing and Punishment

350HIV Sentencing Guidelines

350HIV(F) Departures

350HIV(F)3 Downward Departures

350Hk870 k. Other Particular

Grounds. Most Cited Cases

Multiple offense policy did not serve as a mitigating factor to allow trial court to impose an exceptional minimum sentence on defendant who was convicted of two counts of first degree rape while armed with a firearm; rapes were committed at different times against different women, each of whom

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was raped at gunpoint orally, vaginally, and anally.  
 West's RCWA 9.94A.535(1)(g), 9.94A.589.

**[7] Sentencing and Punishment 350H ↪ 870**

350H Sentencing and Punishment  
 350HIV Sentencing Guidelines  
 350HIV(F) Departures  
 350HIV(F)3 Downward Departures  
 350Hk870 k. Other Particular  
 Grounds. Most Cited Cases

A sentence is clearly excessive for purposes of the multiple offense policy if the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial, or trifling. West's RCWA 9.94A.535(1)(g).

**[8] Sentencing and Punishment 350H ↪ 857**

350H Sentencing and Punishment  
 350HIV Sentencing Guidelines  
 350HIV(F) Departures  
 350HIV(F)3 Downward Departures  
 350Hk853 Offense-Related Factors  
 350Hk857 k. Provocation, Participa-  
 tion or Condonation by Victim. Most Cited Cases

Fact that victims were prostitutes who may have been willing to have sex for money did not allow trial court to impose an exceptional minimum sentence on defendant who was convicted of two counts of first degree rape while armed with a firearm for two different rapes committed at different times against different women, each of whom was raped at gunpoint orally, vaginally, and anally. West's RCWA 9.94A.535.

**[9] Sentencing and Punishment 350H ↪ 1977(2)**

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(G) Conditions of Probation  
 350Hk1964 Particular Terms and Condi-  
 tions  
 350Hk1977 Rehabilitation and Ther-

apy  
 350Hk1977(2) k. Validity. Most  
 Cited Cases

**Sentencing and Punishment 350H ↪ 1980(2)**

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(G) Conditions of Probation  
 350Hk1964 Particular Terms and Condi-  
 tions  
 350Hk1980 Intoxicants and Controlled  
 Substances  
 350Hk1980(2) k. Validity. Most  
 Cited Cases

Community custody conditions, including that defendant not purchase or possess alcohol and that he participate in a substance abuse treatment evaluation and follow recommended treatment, were not reasonably related to the circumstances of defendant's rape with a firearm convictions and thus court could not impose those conditions of community custody.

**[10] Criminal Law 110 ↪ 1126**

110 Criminal Law  
 110XXIV Review  
 110XXIV(G) Record and Proceedings Not in  
 Record  
 110XXIV(G)15 Questions Presented for  
 Review  
 110k1113 Questions Presented for Re-  
 view  
 110k1126 k. Sentence or Judgment.  
 Most Cited Cases

Court of Appeals would decline to address directly whether community custody provision barring rape defendant from possessing or perusing "pornographic materials" was unconstitutionally vague as applied, as defendant was attempting to mount a pre-enforcement challenge with no factual record to evaluate. U.S.C.A. Const.Amend. 14.

**[11] Constitutional Law 92 ↪ 2262**

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92 Constitutional Law  
 92XXVIII Freedom of Speech, Expression, and Press  
 92XXVIII(Y) Sexual Expression  
 92k2262 k. Parolees and Probationers.  
 Most Cited Cases

**Sentencing and Punishment 350H ↪1983(2)**

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(G) Conditions of Probation  
 350Hk1964 Particular Terms and Conditions  
 350Hk1983 Other Particular Conditions  
 350Hk1983(2) k. Validity. Most Cited Cases

Community custody provision barring rape defendant from possessing or perusing "pornographic materials" was crime-related condition of community custody and thus was not overbroad in violation of defendant's free speech rights. U.S.C.A. Const.Amend. 1.

**[12] Sentencing and Punishment 350H ↪1963**

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(G) Conditions of Probation  
 350Hk1963 k. Validity or Reasonableness of Conditions in General. Most Cited Cases

An offender's constitutional rights during community placement are subject to Sentencing Reform Act-authorized infringements, including crime-related prohibitions. West's RCWA 9.41.010 et seq.

**[13] Constitutional Law 92 ↪2325**

92 Constitutional Law  
 92XIX Rights to Open Courts, Remedies, and Justice  
 92k2325 k. Prisoners and Pretrial Detainees.  
 Most Cited Cases

**Constitutional Law 92 ↪4828**

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(H) Criminal Law  
 92XXVII(H)11 Imprisonment and Incidents Thereof  
 92k4828 k. Transfer. Most Cited Cases

**Prisons 310 ↪236**

310 Prisons  
 310II Prisoners and Inmates  
 310II(E) Place or Mode of Confinement  
 310k236 k. Private Facilities or Management. Most Cited Cases  
 (Formerly 310k13.5(3))

**Prisons 310 ↪283**

310 Prisons  
 310II Prisoners and Inmates  
 310II(H) Proceedings  
 310k279 Requisites, Course, and Conduct of Proceedings  
 310k283 k. Time for Proceedings; Prior Notice and Hearing. Most Cited Cases  
 (Formerly 310k13.5(3))

State and Department of Corrections did not deny defendant due process and access to the courts by transferring him to a private prison in another state against his will and without a hearing, where he was allegedly unable to timely or efficiently prepare his statement of additional grounds for review because he lacked sufficient access to legal materials; defendant was not entitled to any pre-transfer hearing, and defendant asked for and received several extensions of time to file his statement. U.S.C.A. Const.Amend. 14.

**[14] Prisons 310 ↪283**

310 Prisons  
 310II Prisoners and Inmates  
 310II(H) Proceedings  
 310k279 Requisites, Course, and Conduct of Proceedings  
 310k283 k. Time for Proceedings; Pri-

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or Notice and Hearing. Most Cited Cases  
 (Formerly 310k13.5(3))

Department of Corrections is not required to provide a hearing before transferring a prisoner.

**[15] Privileged Communications and Confidentiality 311H ⚡80**

311H Privileged Communications and Confidentiality

311HII Family Privileges

311HII(B) Spousal Privilege

311Hk80 k. Confidential or Private Character of Communications. Most Cited Cases  
 (Formerly 410k192)

Testimony from defendant's ex-wife regarding defendant's vasectomy was not confidential and thus not subject to the spousal communications privilege, as ex-wife indicated that the vasectomy was openly discussed outside the marriage. West's RCWA 5.60.060.

**[16] Privileged Communications and Confidentiality 311H ⚡85**

311H Privileged Communications and Confidentiality

311HII Family Privileges

311HII(B) Spousal Privilege

311Hk85 k. Waiver of Privilege. Most Cited Cases  
 (Formerly 410k219(2))

The spousal communications privilege is waived where the communications are not confidential. West's RCWA 5.60.060.

**[17] Criminal Law 110 ⚡339.7(3)**

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k339.5 Identity of Accused

110k339.7 Photographs and Drawings

110k339.7(3) k. Manner of Exhibition; Suggestiveness. Most Cited Cases

**Criminal Law 110 ⚡339.8(4)**

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k339.5 Identity of Accused

110k339.8 Out-Of-Court or Pre-Trial Confrontation

110k339.8(2) Time and Manner of Confrontation; Suggestiveness

110k339.8(4) k. Number, Character, and Appearance of Lineup Participants. Most Cited Cases

Record did not support defendant's argument on appeal that live lineup and photomontage identifications were impermissibly suggestive in many ways and that the evidence should have been suppressed.

**[18] Criminal Law 110 ⚡339.6**

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k339.5 Identity of Accused

110k339.6 k. In General. Most Cited Cases

An out-of-court identification is admissible unless the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

**[19] Criminal Law 110 ⚡620(6)**

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k620 Joint or Separate Trial of Separate Charges

110k620(3) Severance, Relief from Joinder, and Separate Trial in General

110k620(6) k. Particular Cases. Most Cited Cases

Defendant was not entitled to separate trials on four counts of rape of four different women, despite argument that there were prejudicial similarities to a high-profile case and that joinder made the case more complicated and confusing, where jury heard

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no references to the other case, and the four counts were highly interconnected. CrR 4.3(a).

**[20] Criminal Law 110 ⚡620(1)**

110 Criminal Law  
 110XX Trial  
 110XX(A) Preliminary Proceedings  
 110k620 Joint or Separate Trial of Separate Charges  
 110k620(1) k. In General. Most Cited Cases

Joinder is appropriate when the offenses (1) are of the same or similar character, even if not part of a single scheme or plan, and (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a).

**[21] Criminal Law 110 ⚡620(5)**

110 Criminal Law  
 110XX Trial  
 110XX(A) Preliminary Proceedings  
 110k620 Joint or Separate Trial of Separate Charges  
 110k620(3) Severance, Relief from Joinder, and Separate Trial in General  
 110k620(5) k. Grounds. Most Cited Cases

Severance of joined charges is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. CrR 4.3(a).

**[22] Criminal Law 110 ⚡1169.1(10)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(Q) Harmless and Reversible Error  
 110k1169 Admission of Evidence  
 110k1169.1 In General  
 110k1169.1(10) k. Documentary and Demonstrative Evidence. Most Cited Cases  
 Any error in admitting photos of rape defendant's bedroom showing knives and toy guns, as well

a photo of his girlfriend's gun, on the basis that they were impermissibly suggestive and irrelevant did not prejudice defendant and thus did not warrant reversal of his convictions.

**[23] Searches and Seizures 349 ⚡148**

349 Searches and Seizures  
 349III Execution and Return of Warrants  
 349k147 Scope of Search  
 349k148 k. Places, Persons, and Things Within Scope of Warrant. Most Cited Cases

**Telecommunications 372 ⚡1473**

372 Telecommunications  
 372X Interception or Disclosure of Electronic Communications; Electronic Surveillance  
 372X(B) Authorization by Courts or Public Officers  
 372k1471 Conduct and Duration of Surveillance  
 372k1473 k. Scope; Minimization. Most Cited Cases

Gun found in defendant's bedroom and e-mails seized from his computer were within the scope of the search warrant such that seizure of the items was not unreasonable. U.S.C.A. Const.Amend. 4.

**[24] Searches and Seizures 349 ⚡124**

349 Searches and Seizures  
 349II Warrants  
 349k123 Form and Contents of Warrant; Signature  
 349k124 k. Particularity or Generality and Overbreadth in General. Most Cited Cases

A search warrant meets constitutional requirements if it describes the things to be seized with reasonable particularity under the circumstances. U.S.C.A. Const.Amend. 4.

**\*\*577** Dana M. Lind, Nielsen Broman & Koch PLLC, Attorney at Law, Seattle, WA, for Appellant/Cross-Respondent.

Jeffrey McKee/Doc# 882819 (Appearing Pro Se).

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Prosecuting Atty. King County, King. Co. Pros./App. Unit Supervisor, Patrick C. Cook, The Walthew Law Firm, Andrea Ruth Vitalich, King County Prosecutor's Office, Seattle, WA, for Respondent/Cross-Appellant.

BAKER, J.

**\*27 ¶ 1** Jeffrey McKee was convicted of two counts of first degree rape while armed with a firearm. The trial court, noting that the victims were prostitutes, imposed an exceptional minimum sentence. McKee challenges the sufficiency of the evidence on one of the firearm enhancements and one of the rape convictions, as well as community custody provisions barring him from using pornography or alcohol. The State cross-appeals the exceptional minimum sentence. We affirm **\*\*578** McKee's convictions and remand to the trial court to revise sentencing errors.

I.

**¶ 2** On June 4, 2003, Jearlean Bradford contacted King County Sheriff's Detective Sue Peters. Peters was acquainted with Bradford through her work with the Highway Intelligence Team (HITS), a group of officers who work to document and establish rapport with prostitutes working the area around Pacific Highway South between SeaTac and Shoreline. Bradford said that she was sitting at a bus stop when a white male in a clean, red pickup truck pulled over and offered to give her a ride and some beer money. Bradford accepted. Eventually Bradford agreed to perform oral sex for \$30. Bradford said that the man drove her to an area near a park, then suddenly grabbed her head, forced it toward his exposed penis, and ordered her to "suck his dick." Bradford said that when the man saw her "brothers" approaching, he pushed her out of the truck and drove away. Bradford provided a detailed description of the suspect and said that he was driving a red truck with Harley-Davidson floor mats and license plate number A98146J. The truck was registered to Jeffrey McKee.

**\*28 ¶ 3** On June 5, 2003, Detective Peters was

contacted by Lynae Korbust, whom Peters also knew through the HITS program. Korbust said that two nights earlier she was walking on Kent-Des Moines road near Pacific Highway South when a clean-cut white male in a red pickup truck pulled over and asked if she needed a ride. Korbust said she did not plan to proposition the man for sex because she thought he was an undercover police officer, but she accepted his offer of a ride. He drove her to a convenience store, where he bought her a wine cooler and a pack of cigarettes. Korbust said that after they left the store, she tried to give the man directions to where she wanted to go, but instead he drove to a dead-end road, exposed his penis, put a gun to her head, and ordered her to "suck my dick, bitch." Korbust said that after he forced her to perform oral sex at gunpoint, he ordered her to undress and then raped her vaginally and anally from behind. Korbust said that when he was finished, he threw her clothes out of the truck and left her naked in the street. She described her attacker in detail and said his red truck had Harley-Davidson floor mats and a license plate number beginning with "A."

**¶ 4** On June 18, 2003, Jamie Lee Ray reported to police that she had been raped a couple of weeks earlier by a clean-cut white male with short blondish-brown hair and a medium build. Ray said that she and her friend Muna Absiya were walking near Pacific Highway South when a man in a red truck pulled up and offered her a ride. Absiya recognized him as a man who had previously picked her up in his red truck and raped her orally and vaginally before she managed to escape. Absiya warned Ray not to get in the truck, but she did anyway. Ray said that the man drove to the parking lot of a daycare center, grabbed her by the hair, put a small black handgun to her head and said "suck my dick, bitch." After forcing her to perform oral sex, he ordered her to undress and raped her vaginally and anally at gunpoint. Ray said that when he was finished, he threw her and her clothes out of the truck and drove away.

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¶ 5 Jeffrey McKee was arrested and charged with four crimes: count I, first degree rape of Lynae Korbut while \*29 armed with a firearm; count II, attempted second degree rape of Jearlean Bradford; count III, second degree rape of Muna Absiya; and count IV, first degree rape of Jamie Lee Ray while armed with a firearm. After McKee was arrested, Bradford was unable to select him from a lineup, but said McKee “would be perfect if he lost 40 or 50 pounds.” Bradford did, however, identify McKee in court as the rapist. Korbut identified McKee in a photomontage, in a lineup, and in court. Absiya identified him in a lineup and in court as the man who had raped her and had picked up Ray. Absiya also identified photographs of the truck, noting the Harley-Davidson floor mats. Ray was unable to pick out McKee in a photomontage or lineup, nor could she identify him in court. However, she identified photos of McKee's truck, noting the seat covers and Harley-Davidson floor mats, and testified that McKee's gun looked like the \*\*579 one that was held to her head during the rape.

¶ 6 Jennifer Gauthier of the Washington State Patrol Crime Laboratory identified three DNA profiles in a semen stain on McKee's truck seat cover that were consistent with a mixture of genetic material from Ray, McKee, and an unknown female. Gauthier conservatively estimated that one in 9,400 individuals could potentially have contributed the DNA consistent with Ray's profile, but was confident that Ray's DNA was contained within the semen stain.

¶ 7 The trial court instructed the jury that evidence on each count was cross-admissible for the purposes of proving a common scheme or plan. The jury found McKee guilty as charged on counts I and IV, both with firearm enhancements, but not guilty on counts II and III.

¶ 8 McKee requested an exceptional minimum sentence below the standard range, arguing that the multiple offense policy of the Sentencing Reform Act of 1981 <sup>FN1</sup> (SRA) resulted in a clearly excessive sentence. Noting that the victims were pros-

titutes who were willing to have sex for money, \*30 the trial court granted McKee's request and ordered that the minimum base sentences for each of the rapes be served concurrently rather than consecutively. The trial court also imposed conditions of community custody, including restrictions on alcohol and pornography. McKee appealed, and the State cross-appealed the exceptional minimum sentence.

FN1. Ch. 9.94A RCW.

## II.

[1][2] ¶ 9 McKee argues that the evidence is insufficient to support his firearm enhancement for first degree rape of Lynae Korbut and his conviction for rape of Jamie Lee Ray. Evidence is sufficient to sustain a jury's verdict on a conviction or enhancement if, when viewed in the light most favorable to the State, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” <sup>FN2</sup> A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it.<sup>FN3</sup> All reasonable inferences must be drawn in favor of the State and against the defendant. <sup>FN4</sup> The reviewing court must defer to the jury's determination as to the weight and credibility of the evidence and its resolution of conflicting testimony.<sup>FN5</sup> For purposes of a firearm enhancement, the State must prove that the defendant was armed during commission of the crime with a “firearm,” defined as a weapon “from which a projectile or projectiles may be fired by an explosive such as gunpowder.” <sup>FN6</sup> The State need not introduce the actual deadly weapon at trial; witness testimony alone may provide sufficient evidence.<sup>FN7</sup>

FN2. *State v. Joy*, 121 Wash.2d 333, 338, 851 P.2d 654 (1993).

FN3. *State v. Thomas*, 150 Wash.2d 821, 874, 83 P.3d 970 (2004).

FN4. *State v. Salinas*, 119 Wash.2d 192,

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201, 829 P.2d 1068 (1992).

FN5. *Thomas*, 150 Wash.2d at 874-75, 83 P.3d 970.

FN6. RCW 9.41.010.

FN7. *State v. Bowman*, 36 Wash.App. 798, 803, 678 P.2d 1273 (1984); *State v. Goforth*, 33 Wash.App. 405, 412, 655 P.2d 714 (1982).

[3] \*31 ¶ 10 McKee argues that the evidence is insufficient to support the firearm enhancement because Korbut was unable to provide a detailed description of the gun at trial and because the only real gun accessible to McKee—the black semiautomatic recovered from his bedroom—did not match Korbut's initial description. Therefore, according to McKee, there is no evidence that the gun recovered from his residence was the actual weapon purportedly used against Korbut.

¶ 11 The record shows that Korbut initially told Detective Peters that the gun was chrome and looked like a .38 Special, which is a revolver. However, at trial, Korbut testified that although she was not able to see the make of the gun, she saw “this steel part of it.” She said she knew the gun was real because of the weight and feel of the steel, and testified that she did not bite McKee's \*\*580 penis during the rape because of the gun to her head. On cross-examination, when challenged regarding her description of the gun, Korbut testified that she knew it was a real gun because McKee was holding it like a real gun and because of the texture of steel against her head. She acknowledged that she previously said she saw chrome, but explained that although she “might have seen something shiny,” she could not give a specific description of the gun. When asked whether she saw a gun, Korbut said, “I saw a peripheral something to my head” and reiterated that it felt like a gun and was a gun because she would have bit McKee if it was not.

¶ 12 We hold that there is sufficient circum-

stantial evidence, viewed in the light most favorable to the State, from which a rational trier of fact could conclude beyond a reasonable doubt that McKee was armed with a real gun when he raped Korbut. Korbut's testimony regarding the weight and feel of the gun, seeing a “peripheral something to my head” and the way in which McKee wielded it, combined with evidence that McKee had a real gun and had access to other guns, provided the jury with sufficient evidence to support the firearm enhancement. Although \*32 McKee questions the credibility of Korbut's conflicting testimony, these are matters for the jury to decide.

[4] ¶ 13 McKee also argues that the evidence is insufficient to support his conviction for first degree rape of Jamie Lee Ray. He notes that Ray was unable to identify McKee in a photomontage, at the lineup, or in court, and contends that Ray's descriptions of her attacker and his truck was inconsistent with the actual appearance of McKee and his truck. He points to evidence showing that another white man in a red truck was raping prostitutes in the same area and argues that the DNA evidence was inconclusive.

¶ 14 We reject these claims. Ray described her attacker as a clean-cut white male with short blondish-brown hair and a medium build, and positively identified his truck, including the Harley-Davidson floor mats. Her description of the gun used in the rape was also consistent with the gun recovered from McKee's bedroom. Muna Absiya positively identified McKee in a lineup and in court as the man who picked up Ray. Absiya also identified photos of McKee's truck. This evidence, combined with Gauthier's testimony that she was confident that the semen stain in McKee's truck contained Ray's DNA, is more than sufficient to sustain the conviction.

[5] ¶ 15 We next evaluate the State's cross-appeal challenging the trial court's decision to impose an exceptional minimum sentence below the standard range. Appellate review of an exceptional sentence is a three-step process governed by RCW

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9.94A.585. First, we determine whether the record supports the reasons given by the trial court for imposing the exceptional sentence. This is a factual inquiry reviewed under the “clearly erroneous” standard. Second, we determine whether the trial court’s reasons are sufficiently substantial and compelling to justify an exceptional sentence as a matter of law under a de novo standard of review. Third, we determine whether the exceptional sentence\*33 is clearly too excessive or lenient under the abuse of discretion standard.<sup>FN8</sup>

FN8. *State v. Fowler*, 145 Wash.2d 400, 405-06, 38 P.3d 335 (2002).

[6][7] ¶ 16 The State first argues that the trial court abused its discretion by granting an exceptional minimum sentence based on application of the multiple offense policy as a mitigating factor. RCW 9.94A.535(1)(g) permits the trial court to impose a sentence below the standard range when the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is “clearly excessive” in light of the purposes of the SRA. A sentence is clearly excessive “if the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial, or trifling.”<sup>FN9</sup> McKee does not respond substantively to the State’s briefing on this point. Instead, he argues that the trial court’s decision was not based primarily on the multiple offense policy, but rather because RCW 9.94A.535 permits the court to depart from \*\*581 the standard felony sentencing range if it finds “substantial and compelling” reasons to justify the exceptional sentence and enters appropriate findings of fact and conclusions of law.

FN9. *State v. Hortman*, 76 Wash.App. 454, 463-64, 886 P.2d 234 (1994).

¶ 17 We agree that the multiple offense policy cannot serve as a mitigating factor in a case involving two first degree rapes committed at different times against different women, each of whom was raped at gunpoint orally, vaginally, and anally.

Nor do we find any other valid basis to support an exceptional minimum sentence in this case.

[8] ¶ 18 The record does not support the trial court’s reasons for imposing the exceptional sentence. The State does not dispute the trial court’s finding that Korbud and Ray willingly entered McKee’s truck for the purpose of engaging in prostitution or some other illegal activity. However, contrary to McKee’s argument, these facts do not provide support for the trial court’s finding that “the presumptive sentence for Jeffrey McKee is far in excess of the \*34 top of the range for crimes that are even more brutal than the crimes committed by McKee.” This is not a factual finding, but rather a reflection of the trial court’s personal opinion and subjective belief that raping a prostitute is not as brutal as raping a woman who “did not willingly start off ready to perform a sex act.” Thus, it is clearly erroneous.

¶ 19 We also reject McKee’s claim that the trial court’s reasons for imposing the sentence were substantial and compelling because his crimes were more like robbery than rape, and because prostitutes are not as traumatized by rape as other victims are. The court’s conclusions of law stated that “[o]peration of the multiple offense policy of RCW 9.94A.589 ... results in a presumptive sentence that is clearly excessive” because they “were initiators and/or willing participants in the illicit circumstances, or precursor offenses, leading to their rapes.” At sentencing, the court explained that the sexual relations were against the victims’ will only in the sense that they did not get paid, and that prostitutes are a “far cry from the innocent rape victim” the Legislature envisioned when enacting the very severe penalties for this crime. We disagree. The fact that Korbud and Ray may have been willing to have sex for money does not trivialize the trauma of being raped at gunpoint orally, vaginally, and anally. Such crimes are extremely egregious no matter whom they are perpetrated against. Korbud and Ray were in no sense willing participants in these acts. Accordingly, we hold that the trial court

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abused its discretion in imposing a sentence that was too lenient under the circumstances, and we remand to the trial court for resentencing within the standard range.

[9] ¶ 20 We next consider McKee's challenges to certain conditions of community custody. McKee argues that the trial court acted outside its statutory authority in requiring that he not purchase or possess alcohol and that he participate in a substance abuse treatment evaluation and follow recommended treatment. The State concedes error because these conditions are not reasonably related to the circumstances of McKee's alleged offenses. We accept the State's concession of error on this point.

[10] \*35 ¶ 21 McKee also argues that the community custody provision barring him from possessing or perusing "pornographic materials" is unconstitutionally vague and overbroad. The State initially conceded vagueness under *State v. Sansone*.<sup>FN10</sup> In that case, the offender was subject to the condition that he not possess pornography except as permitted by his therapist or Community Corrections Officer. While on community placement, he was discovered to be in possession of photographs of scantily-clad women. The trial court found him to be in violation of the condition and sentenced him to additional confinement. On appeal, we invalidated the provision as unconstitutionally vague because it was insufficient to provide the offender with fair notice of what materials could result in a violation, and we remanded to the sentencing court for imposition of a condition containing the necessary specificity.<sup>FN11</sup>

FN10. 127 Wash.App. 630, 111 P.3d 1251 (2005).

FN11. *Sansone*, 127 Wash.App. at 643, 111 P.3d 1251.

\*\*582 ¶ 22 However, pursuant to RAP 10.8, the State subsequently filed a statement of additional authorities citing our recent decision in *State v. Bahl*.<sup>FN12</sup> In that case, the offender argued that

community custody provisions concerning "erotic material" and "sexual stimulus material" were unconstitutionally vague and overbroad, and the State had conceded error under *Sansone*. We noted that in analyzing a vagueness challenge, the first step is to determine whether to review the rule on its face or as applied.<sup>FN13</sup> Vagueness challenges that do not involve First Amendment rights are to be judged not facially, but as applied in light of the facts of each case.<sup>FN14</sup> The offender had presented no actual conduct or factual record to review; rather, he "merely anticipates that he might be accused of engaging in \*36 conduct that violates the sentencing conditions."<sup>FN15</sup> Thus, we rejected the State's concession of error because, unlike *Sansone*, the term had not yet been applied and there was no factual record to evaluate.<sup>FN16</sup> WE FURTHER NOTED THAT one of the authorities relied on in *Sansone* was *United States v. Loy*,<sup>FN17</sup> in which the federal court concluded that it was appropriate to reach the merits of an offender's pre-enforcement challenge and determined that a prohibition against possessing pornography was unconstitutionally overbroad.<sup>FN18</sup> We stated that:

FN12. 137 Wash.App. 709, 159 P.3d 416 (2007).

FN13. *Bahl*, 137 Wash.App. at 716, 159 P.3d 416 (citing *City of Spokane v. Douglass*, 115 Wash.2d 171, 181-82, 795 P.2d 693 (1990)).

FN14. *Bahl*, 137 Wash.App. at 716, 159 P.3d 416 (citing *Douglass*, 115 Wash.2d at 182, 795 P.2d 693).

FN15. *Bahl*, 137 Wash.App. at 716, 159 P.3d 416.

FN16. *Bahl*, 137 Wash.App. at 717, 159 P.3d 416.

FN17. 237 F.3d 251, 266-67 (3rd Cir.Pa.2001).

FN18. *Loy*, 237 F.3d at 266-67.

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While we have followed *Loy* in concluding that a prohibition against possessing “pornography” is too vague as applied to possession of the photographs in *Sansone*, we have not yet agreed it is appropriate to evaluate conditions of sentence for vagueness in a pre-enforcement challenge. We are not inclined to do so in the absence of briefing on the pros and cons of that approach. We have reservations about the wisdom of making the appellate courts routinely available as editors to demand that trial courts rewrite sentencing conditions to avoid hypothetical problems.<sup>[FN19]</sup>

FN19. *Bahl*, 137 Wash.App. at 718, 159 P.3d 416.

Accordingly, “[b]ecause *Bahl* has not explained why his vagueness challenge requires evaluation of the conditions in a factual vacuum,” we declined to review it.<sup>FN20</sup>

FN20. *Bahl*, 137 Wash.App. at 719, 159 P.3d 416. *See also State v. Johnson*, No. 56786-1-I, 2007 WL 740961, 2007 Wash.App. LEXIS 443 (March 12, 2007) (reaching the same conclusion under similar circumstances).

¶ 23 In this case, McKee argues that the pornography condition is vague as applied because he was never alleged to have possessed or accessed pornography and it was not a factor in his offense; therefore, he has no way of knowing whether something he accesses will be deemed “pornography.” McKee is correct that the condition should be evaluated<sup>\*37</sup> as applied, but he cannot escape the fact that he is attempting to mount a pre-enforcement challenge with no factual record to evaluate. Thus, following *Bahl*, we reject the State’s concession of error and decline to address the issue directly. However, because we have already decided to remand to the trial court to correct the sentencing errors discussed above, the vagueness problem may be raised on remand so as to obtain a description of “pornographic materials” with suffi-

cient specificity to provide McKee with fair notice of what types of materials would constitute a violation.

[11][12] ¶ 24 McKee also argues that the pornography conditions were overbroad in violation of his right to free speech. However, an offender’s constitutional rights during community placement are subject to SRA-authorized infringements, including crime-related prohibitions.<sup>FN21</sup> Because the pornography restrictions in McKee’s case are crime-related conditions of community custody, we reject his overbreadth challenge.

FN21. *Bahl*, 137 Wash.App. at 714-15, 159 P.3d 416.

**\*\*583** ¶ 25 McKee, acting pro se, filed a statement of additional grounds for review (SAG) raising six additional issues not addressed by defense counsel. The State did not respond. None of McKee’s arguments have merit.

[13][14] ¶ 26 First, McKee argues that the State of Washington and Department of Corrections denied him due process and access to the courts by transferring him to a private prison in another state against his will and without a hearing, where he was unable to timely or efficiently prepare his SAG because he lacked sufficient access to legal materials. However, the Department of Corrections is not required to provide a pre-transfer hearing.<sup>FN22</sup> Moreover, McKee asked for and received several extensions of time to file his SAG.

FN22. *In re Pers. Restraint of Matteson*, 142 Wash.2d 298, 315, 12 P.3d 585 (2000).

[15][16] ¶ 27 Second, McKee argues that the trial court erred in allowing testimony from his ex-wife regarding McKee’s **\*38** vasectomy, in violation of the spousal communications privilege in RCW 5.60.060. However, the privilege is waived where the communications are not confidential.<sup>FN23</sup> The trial court ruled that this testimony was

167 P.3d 575  
 141 Wash.App. 22, 167 P.3d 575  
**(Cite as: 141 Wash.App. 22, 167 P.3d 575)**

Page 13

not confidential because McKee's ex-wife indicated that the vasectomy was openly discussed outside the marriage. Thus, there was no error.

FN23. *Swearingen v. Vik*, 51 Wash.2d 843, 848, 322 P.2d 876 (1958).

[17][18] ¶ 28 Third, McKee argues that the live lineup and photomontage identifications were impermissibly suggestive in many ways and that the evidence should have been suppressed. An out of court identification is admissible unless the procedure “was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”<sup>FN24</sup> The record does not support McKee's claims.

FN24. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

[19][20][21] ¶ 29 Fourth, McKee argues that the charges should have been severed and tried separately because of prejudicial similarities to the Green River Killer case and because it made the case more complicated and confusing. Joinder is appropriate when the offenses (1) are of the same or similar character, even if not part of a single scheme or plan; and (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.<sup>FN25</sup> “Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial.”<sup>FN26</sup> McKee has not met this burden. The jury heard no references to the Green River Killer, and the four counts were highly interconnected.

FN25. CrR 4.3(a).

FN26. *State v. Alsup*, 75 Wash.App. 128, 131, 876 P.2d 935 (1994).

[22][23][24] ¶ 30 Fifth, McKee argues that photos of his bedroom showing knives and toy guns, as well a photo of his girlfriend's gun, should not have been admitted because they were imper-

missibly suggestive and irrelevant. But McKee \*39 has not shown any prejudice. McKee also claims that the police should not have seized the real gun found in his bedroom nor emails from his computer because those items were outside the scope of the search warrant. A search warrant meets constitutional requirements if it describes the things to be seized with reasonable particularity under the circumstances.<sup>FN27</sup> This requirement was satisfied.

FN27. *State v. Dodson*, 110 Wash.App. 112, 120, 39 P.3d 324 (2002).

¶ 31 Sixth, McKee alleges cumulative error. Because McKee has shown no error, this argument fails as well.

¶ 32 In conclusion, we uphold McKee's convictions and remand to the trial court for resentencing consistent with this opinion.

¶ 33 Affirmed and remanded with instructions.

WE CONCUR: DWYER and BECKER, JJ.

Wash.App. Div. 1, 2007.  
*State v. McKee*  
 141 Wash.App. 22, 167 P.3d 575

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

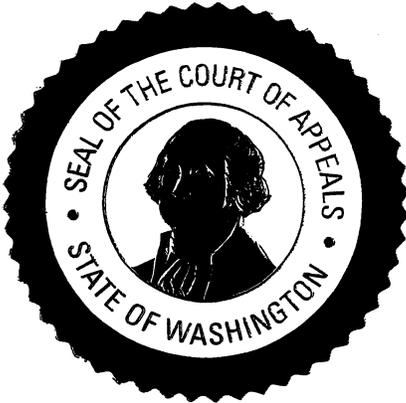
STATE OF WASHINGTON,	)	No. 56504-4-I-I	RECEIVED
	)		SEP 19 2008
Respondent/Cross-Appellant,	)		
	)	MANDATE	Nielsen, Broman & Koch, P.L.L.C
v.	)		
	)	King County	
JEFFREY R. McKEE,	)		
	)	Superior Court No. 03-1-01734-1.KNT	
Appellant/Cross-Respondent.	)		
	)	<b><i>Court Action Required</i></b>	

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on July 23, 2007, became the decision terminating review of this court in the above entitled case on September 21, 2008. An order denying appellant's motion for appointment of counsel and reconsideration was entered on September 5, 2007. An order granting a motion to publish was entered on September 14, 2007. An order denying a petition for review was entered in the Supreme Court on July 8, 2008. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

c: Patrick C Cook  
Leslie Colleen Boyd  
Dana M Lind  
Andrea Ruth Vitalich  
Jeffrey McKee  
Hon. Douglas McBroom  
Indeterminate Sentencing Review Board

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



**IN TESTIMONY WHEREOF**, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 12th day of September, 2008.

  
**RICHARD D. JOHNSON**

Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.



Westlaw

Page 1

Not Reported in P.3d, 152 Wash.App. 1030, 2009 WL 3083779 (Wash.App. Div. 1)  
**(Cite as: 2009 WL 3083779 (Wash.App. Div. 1))**

**H**

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA  
 2.06.040

Court of Appeals of Washington,  
 Division 1.  
 STATE of Washington, Respondent,  
 v.  
**Jeffrey McKEE**, Appellant.

No. 62605-1-1.  
 Sept. 28, 2009.

Appeal from King County Superior Court; Honorable Douglas D. McBroom, J.  
 Dana M. Lind, Nielsen Broman Koch PLLC, Attorney at Law, Seattle, WA, for Appellant.

Prosecuting Attorney King County, King Co. Pros./App. Unit Supervisor, Andrea Ruth Vitalich, King County Prosecutor's Office, Seattle, WA, for Respondent.

## UNPUBLISHED

COX, J.

**\*1** To challenge an issue for the first time in a second appeal, the appellant must demonstrate that the trial court, on remand, reviewed and ruled again on such issue.<sup>FN1</sup> Because **Jeffrey McKee** challenges a condition of community custody imposed in his sentence for the first time in this second appeal, we do not address his challenge.<sup>FN2</sup>

FN1. *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993); *State v. Traicoff*, 93 Wn.App. 248, 257, 967 P.2d 1277 (1998).

FN2. We deny McKee's Motion to Modify the ruling of the Clerk/Administrator denying his motion for a continuance to file his Statement of Additional Grounds. We also

deny his Motion to Stay Proceedings.

In 2005, a jury found McKee guilty on two counts of first degree rape, both with firearm enhancements.<sup>FN3</sup> McKee requested an exceptional minimum sentence below the standard range.<sup>FN4</sup> The trial court granted McKee's request and imposed the minimum base sentence for each of the rapes to be served concurrently rather than consecutively.<sup>FN5</sup> The trial court also imposed certain conditions of community custody including restrictions on alcohol and pornography, and mental health evaluation and treatment.<sup>FN6</sup> McKee appealed.<sup>FN7</sup>

FN3. *State v. McKee*, 141 Wn.App. 22, 28-29, 167 P.3d 575 (2007), *review denied*, 163 Wn.2d 1049 (2008).

FN4. *Id.* at 29.

FN5. *Id.* at 29-30.

FN6. *Id.* at 30

FN7. *Id.*

One of McKee's arguments on appeal was that the trial court did not have the statutory authority to impose the conditions of community custody prohibiting him from possessing alcohol and pornography.<sup>FN8</sup> McKee did not challenge the condition requiring mental health evaluation and treatment. The state cross-appealed the exceptional minimum sentence.<sup>FN9</sup>

FN8. *Id.* at 34-35.

FN9. *Id.* at 30.

In a published opinion,<sup>FN10</sup> this court upheld McKee's conviction and concluded that the trial court abused its discretion by imposing an exceptional minimum sentence.<sup>FN11</sup> Regarding the conditions of community custody, this court concluded

Not Reported in P.3d, 152 Wash.App. 1030, 2009 WL 3083779 (Wash.App. Div. 1)  
**(Cite as: 2009 WL 3083779 (Wash.App. Div. 1))**

that the conditions regarding alcohol were beyond the statutory authority of the trial court.<sup>FN12</sup> We also concluded that the condition regarding possession of pornography was valid, but we suggested that the trial court might clarify the definition on remand.<sup>FN13</sup> We remanded to the trial court for resentencing within the standard range, removal of the invalid conditions concerning alcohol, and clarification of the definition of pornography.<sup>FN14</sup>

FN10. *McKee*, 141 Wn.App. 22.

FN11. *Id.* at 34, 39.

FN12. *Id.* at 34.

FN13. *Id.* at 36-37.

FN14. *Id.* at 34-37.

At the resentencing hearing on November 3, 2008, the court imposed the low end of the standard range plus a firearm enhancement for each count, to be served consecutively. Addressing the community custody conditions, the trial court deleted the alcohol prohibition and clarified the definition of pornography. The court again imposed the condition requiring McKee to “obtain a mental health evaluation ... and complete all treatment recommendations” if directed. The court did not address any other sentencing condition.

McKee again appeals.

#### TIMELINESS OF APPEAL

McKee argues that the trial court erroneously imposed the mental health evaluation and treatment as a condition of community custody in violation of the Sentencing Reform Act of 1981(SRA). We do not reach the issue because his assertion is untimely.

Review of issues raised for the first time on appeal is governed by RAP 2.5(c)(1), which states:

If a trial court decision is otherwise properly before the appellate court, the appellate court may

at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

\*2 In *State v. Barberio*,<sup>FN15</sup> our supreme court held that this rule does not automatically permit review of every issue or decision that was not raised in an earlier appeal.<sup>FN16</sup> Rather, review in a second appeal is only guaranteed if the trial court “on remand, exercised its independent judgment, reviewed and ruled again on such issue....”<sup>FN17</sup>

FN15. 121 Wn.2d 48, 846 P.2d 519 (1993).

FN16. *Id.* at 50.

FN17. *Id.* at 50.

Accordingly, the deciding factor here is whether the trial court, on remand after the first appeal, reviewed the condition of community custody requiring McKee to undergo mental health evaluation and treatment. The record is clear. McKee did not challenge the mental health condition during his first appeal and the trial court did not revisit the condition. The trial court corrected the sentence to fall within the standard range plus the firearm enhancements, deleted the alcohol prohibitions, and clarified the definition of pornography. Because the trial court did not address the issue that McKee now raises for the first time in this second appeal, we do not reach it.

We affirm the judgment and sentence.

WE CONCUR: ELLINGTON and BECKER, JJ.

Wash.App. Div. 1, 2009.

*State v. McKee*

Not Reported in P.3d, 152 Wash.App. 1030, 2009 WL 3083779 (Wash.App. Div. 1)

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COPY TO COUNTY JAIL JUN 30 2010

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,	)	No. 62605-1-I	<b>FILED</b>
	)		<b>KING COUNTY, WASHINGTON</b>
Respondent,	)	MANDATE	JUN 29 2010
	)		
v.	)	King County	<b>SUPERIOR COURT CLERK</b>
	)		
JEFFREY McKEE,	)	Superior Court No. 03-1-01734-1.KNT	
	)		
Appellant.	)		
	)		

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on September 28, 2009, became the decision terminating review of this court in the above entitled case on June 25, 2010. An order denying a motion for reconsideration was entered on December 2, 2009. An order denying a petition for review was entered in the Supreme Court on June 1, 2010. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

62605-1-I  
Page 2 of 2

Pursuant to a Commissioner's ruling entered on December 14, 2009, costs in the amount of \$2,256.80 are awarded against judgment debtor JEFFREY McKEE as follows: costs in the amount of \$2,222.97 are awarded in favor of judgment creditor WASHINGTON OFFICE OF PUBLIC DEFENSE, INDIGENT DEFENSE FUND and costs in the amount of \$33.83 are awarded in favor of judgment creditor KING COUNTY PROSECUTING ATTORNEY.

c: Dana Lind  
Andrea Vitalich  
Hon. Douglas McBroom



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 25th day of June, 2010.

  
RICHARD D. JOHNSON

Court Administrator/Clerk of the Court of Appeals,  
State of Washington, Division I.

## APPENDIX E

**FILED**  
KING COUNTY, WASHINGTON  
MAY 02 2005  
SUPERIOR COURT CLERK  
BY STEPHANIE WALTON  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

The Honorable Douglas McBroom

STATE OF WASHINGTON	)	
	)	No. 03-1-01734-1 KNT
Plaintiff,	)	
v.	)	
	)	
JEFFREY R. MCKEE	)	
	)	
Defendant.	)	
_____	)	

COURT'S INSTRUCTIONS TO THE JURY

Date: May 2, 2005

Douglas D. McBroom  
Judge Douglas McBroom

188A  
65

No. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits

admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

No. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

NO. 4

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count. In deciding each separate count you may consider the evidence in the other counts only for the following purposes:

- (1) Whether or not a common scheme or plan exists among the different acts; and
- (2) If such a common scheme or plan does exist, you may use its existence in determining whether or not a crime occurred.

NO. 5

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

No. 6

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

NO. 7

Evidence has been introduced in this case regarding the defendant being held in custody since his arrest for the matters charged. This evidence was offered merely to place certain events in context. You must not consider the defendant's custody status as proof that he committed the crimes charged.

NO. 8

Evidence that a witness has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.

NO. 9

During the course of the trial one or both parties may have had an item or document marked with an exhibit number for identification purposes or may simply have displayed an item or document to you to help illustrate the testimony of a witness. Should you find that an item or document that was displayed or discussed in conjunction with a witness's testimony is not included among the exhibits given to you during your deliberations, you may nonetheless consider whatever testimony was given concerning such an item or document as long as the court did not sustain an objection to it or instructed you to disregard such evidence.

No. 10

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

No. 11

A person commits the crime of rape in the first degree when that person engages in sexual intercourse with another person by forcible compulsion when the perpetrator uses or threatens to use a deadly weapon or what appears to be a deadly weapon.

No. 12

To convict the defendant of the crime of rape in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 3, 2003 to June 4, 2003, the defendant engaged in sexual intercourse with Lynae Korbut;
- (2) That the sexual intercourse was by forcible compulsion;
- (3) That the defendant used or threatened to use a deadly weapon or what appears to be a deadly weapon; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. 14

A person commits the crime of attempted rape in the second degree when, with intent to commit rape in the second degree, he or she does any act which is a substantial step toward the commission of rape in the second degree.

No. 15

To convict the defendant of the crime of attempted rape in the second degree, as charged in count II each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 28, 2003 to June 4, 2003, the defendant did an act which was a substantial step toward the commission of rape in the second degree;

(2) That the act was done with the intent to commit rape in the second degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.

No. 16

A person commits the crime of rape in the second degree when that person engages in sexual intercourse with another person by forcible compulsion.

No. 17

To convict the defendant of the crime of rape in the second degree, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 1, 2001 to May 1, 2003, the defendant engaged in sexual intercourse with Muna Absiya; and

(2) That the sexual intercourse occurred by forcible compulsion; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to III.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to III.

No. 18

To convict the defendant of the crime of rape in the first degree, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 1, 2003 to June 18, 2003, the defendant engaged in sexual intercourse with Jamie Lee Ray;
- (2) That the sexual intercourse was by forcible compulsion;
- (3) That the defendant used or threatened to use a deadly weapon or what appears to be a deadly weapon; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count IV.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count IV.

No. 19

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.

No. 20

Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself.

No. 21

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 22

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

No. 23

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

No. 24

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I. A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there is a connection among the defendant, the crime, and the deadly weapon.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

No. 25

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form for each count.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".



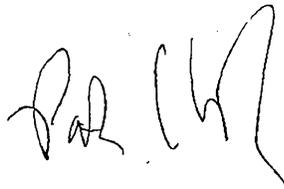
**FILED**  
KING COUNTY, WASHINGTON  
MAY 02 2005  
SUPERIOR COURT CLERK  
BY STEPHANIE WALTON  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	
	)	No. 03-1-01734-1 KNT
Plaintiff,	)	
	)	
vs.	)	
	)	
JEFFREY R McKEE	)	
	)	
Defendant.	)	

---

STATE'S INSTRUCTIONS TO THE JURY  
(With Citations)



Patrick C Cook  
Deputy Prosecuting Attorney

No. \_\_\_\_

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits

admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

WPIC 1.02

No. \_\_\_\_

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

WPIC 1.04

No. \_\_\_\_\_

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

WPIC 3.01

No. \_\_\_\_\_

In deciding each separate count you may consider the evidence in the other counts for the following purpose(s):

- (1) Whether or not a common scheme or plan exists among the different acts; and
- (2) If such a common scheme or plan does exist, you may use its existence in determining whether or not the predicate crime occurred.

WPIC 4.64

No. \_\_\_\_

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01

No. \_\_\_\_\_

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

No. \_\_\_\_

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

WPIC 5.01

No. \_\_\_\_

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

WPIC 5.05

No. \_\_\_\_

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

WPIC 6.51

No. \_\_\_\_

A person commits the crime of rape in the first degree when that person engages in sexual intercourse with another person by forcible compulsion when the perpetrator uses or threatens to use a deadly weapon or what appears to be a deadly weapon.

WPIC 40.01

No. \_\_\_\_

To convict the defendant of the crime of rape in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 3, 2003 to June 4, 2003, the defendant engaged in sexual intercourse with Lynae Korbit;

(2) That the sexual intercourse was by forcible compulsion;

(3) That the defendant used or threatened to use a deadly weapon or what appears to be a deadly weapon; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. \_\_\_\_

A person commits the crime of attempted rape in the second degree when, with intent to commit rape in the second degree, he or she does any act which is a substantial step toward the commission of rape in the second degree.

WPIC 100.01

No. \_\_\_\_

To convict the defendant of the crime of attempted rape in the second degree, as charged in count II each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 28, 2003 to June 4, 2003, the defendant did an act which was a substantial step toward the commission of rape in the second degree;

(2) That the act was done with the intent to commit rape in the second degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.

WPIC 100.02

No. \_\_\_\_

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

WPIC 10.01

No. \_\_\_\_

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

WPIC 2.10

No. \_\_\_\_

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I. A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there is a connection among the defendant, the crime, and the deadly weapon.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

WPIC 2.10.01 (Modified by State v. Schelin, \_\_ Wn.2d \_\_\_\_, 55 P.3d 632 (October 17, 2002)).

No. \_\_\_\_

A person commits the crime of rape in the second degree when that person engages in sexual intercourse with another person by forcible compulsion.

WPIC 41.01

No. \_\_\_\_

To convict the defendant of the crime of rape in the second degree, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 1, 2001 to May 1, 2003, the defendant engaged in sexual intercourse with Muna Absiya; and

(2) That the sexual intercourse occurred by forcible compulsion; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to III.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to III.

No. \_\_\_\_

To convict the defendant of the crime of rape in the first degree, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 1, 2003 to June 18, 2003, the defendant engaged in sexual intercourse with Jamie Lee Ray;

(2) That the sexual intercourse was by forcible compulsion;

(3) That the defendant used or threatened to use a deadly weapon or what appears to be a deadly weapon; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count IV.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count IV.

No. \_\_\_\_

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

WPIC 100.05

No. \_\_\_\_

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.

WPIC 45.01

No. \_\_\_\_\_

Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself.

WPIC 45.03 .

No. \_\_\_\_

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form for each count.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

No. \_\_\_\_\_

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

WPIC 160.00

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	
	)	No. 03-1-01734-1 KNT
Plaintiff,	)	
	)	VERDICT FORM
vs.	)	
	)	
JEFFREY R MCKEE	)	
	)	
Defendant.	)	

\_\_\_\_\_ We, the jury, find the defendant JEFFREY R MCKEE  
 \_\_\_\_\_ (write in not guilty or guilty) of the crime  
 of Rape in the First Degree as charged in Count I.

\_\_\_\_\_  
 Foreperson



IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	
	)	No. 03-1-01734-1 KNT
Plaintiff,	)	
	)	VERDICT FORM
vs.	)	
	)	
JEFFREY R MCKEE	)	
	)	
Defendant.	)	

---

We, the jury, find the defendant JEFFREY R MCKEE  
\_\_\_\_\_ (write in not guilty or guilty) of the crime  
of Attempted Rape in the Second Degree as charged in Count II.

---

Foreperson

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	
	)	No. 03-1-01734-1 KNT
Plaintiff,	)	
	)	VERDICT FORM
vs.	)	
	)	
JEFFREY R McKEE	)	
	)	
Defendant.	)	

---

We, the jury, find the defendant JEFFREY R McKEE  
\_\_\_\_\_ (write in not guilty or guilty) of the crime  
of Rape in the Second Degree as charged in Count III.

---

Foreperson

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	
	)	No. 03-1-01734-1 KNT
Plaintiff,	)	
	)	VERDICT FORM
vs.	)	
	)	
JEFFREY R MCKEE	)	
	)	
Defendant.	)	

---

We, the jury, find the defendant JEFFREY R MCKEE  
\_\_\_\_\_ (write in not guilty or guilty) of the crime  
of Rape in the First Degree as charged in Count IV.

---

Foreperson

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	
	)	No. 03-1-01734-1 KNT
Plaintiff,	)	
	)	VERDICT FORM
vs.	)	
	)	
JEFFREY R. MCKEE	)	
	)	
Defendant.	)	

We, the jury, return a special verdict by answering as follows:

Was the defendant JEFFREY R MCKEE armed with a firearm at the time of the commission of the crime in Count IV.

ANSWER: \_\_\_\_\_  
(Yes or No)

\_\_\_\_\_  
Presiding Juror



1 involves the items gained on the search warrant,  
2 essentially, and that has to do with the  
3 affidavit of the search warrants; is that  
4 correct, Mr. Minor?

5 MR. MINOR: Yes, your Honor.

6 THE COURT: And then the motion of  
7 suppression of identification, and that's what  
8 we are going to hear the witnesses on right now.

9 MR. COOK: That's correct, your Honor.

10 THE COURT: Are those the three motions we  
11 have left now?

12 MR. COOK: Those are the three primary  
13 motions that we have left. I think we have some  
14 other motions that are listed in the State's  
15 trial memorandum, and counsel has one that  
16 mirrors that, and that's the other suspect  
17 issue.

18 THE COURT: Oh, okay. So there are these  
19 other sort of miss -- I will call them  
20 miscellaneous motions?

21 MR. COOK: Correct.

22 THE COURT: And then we have the issue of  
23 the questionnaire, which I wanted to discuss it  
24 a little bit at length with you after we finish  
25 the pre-trial motions, okay?

1 MR. COOK: Okay.

2 THE COURT: Okay. You may call your  
3 witnesses then.

4 MR. COOK: Thank you, your Honor, I will  
5 call Detective Sue Peters.

6 (Witness sworn.)

7 THE COURT: Okay.

8 Whereupon,

9 DETECTIVE SUE PETERS,  
10 having been first duly sworn, was called as a witness  
11 herein, and was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. COOK:

14 Q. Once you are settled in, I will have you state  
15 your full name and spell your last name for the  
16 record.

17 A. It is Sue Peters, P E T E R S, I'm a detective  
18 with the King County Sheriff.

19 Q. How long have you been with the King County  
20 Sheriff?

21 A. Just over twenty-two years.

22 Q. Just briefly, if you can, give us a run-down of  
23 the units or departments that you have worked  
24 in.

25 A. I have worked in patrol with the Sheriff's

## **APPENDIX H**

**FILED**  
KING COUNTY, WASHINGTON  
MAR 29 2005  
SUPERIOR COURT CLERK  
BY STEPHANIE WALTON  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )  
Plaintiff, )  
v. )  
JEFFREY MCKEE, )  
Defendant. )

NO. 03-1-01734-1 KNT

*Def. Proposed*  
JUROR QUESTIONNAIRE

Answers given to the following questions are made with the understanding that they are made under penalty of perjury under the laws of the State of Washington:

1. Do you believe you have any knowledge of this case from any source?  
Yes \_\_\_\_\_ No \_\_\_\_\_
2. Does the information you now have about this case alone cause you to presume guilt, or cause you to sympathize with the complaint made by the alleged victim, or might cause you to lessen the burden the law places on the State to prove the guilt of the accused?  
Yes \_\_\_\_\_ No \_\_\_\_\_
3. Do you know anyone who has been sexually assaulted?  
Yes \_\_\_\_\_ No \_\_\_\_\_
4. In your day-to-day life, do you have a fear of being assaulted, sexually or otherwise, or is it a concern you find yourself thinking about on a regular basis, either as it may relate to yourself, friends or relatives?  
Yes \_\_\_\_\_ No \_\_\_\_\_

JUROR NO. \_\_\_\_\_

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5. Do you believe there is a likelihood you might tend to identify with the rape complainant in this case for any reason or identify her with friends or family members?

Yes \_\_\_\_\_ No \_\_\_\_\_

6. Do you believe that it is somehow a victimization of a rape complainant to require her to appear in court to testify? In other words, do you believe a rape complainant should not have to be subjected to questioning or have her credibility challenged?

Yes \_\_\_\_\_ No \_\_\_\_\_

7. Do you think you would be offended or embarrassed by having to sit and listen to matters of a graphic sexual nature in a public courtroom or to frankly discuss such matters with other jurors during the course of jury deliberations?

Yes \_\_\_\_\_ No \_\_\_\_\_

8. Are you a member or supporter of any organization or cause which seeks to address crime issues, especially crimes affecting women?

Yes \_\_\_\_\_ No \_\_\_\_\_

9. Will the fact that the complainant is white and the defendant is black enter into your decision in this case or causes you to believe you cannot render a fair verdict?

Yes \_\_\_\_\_ No \_\_\_\_\_

10. Do you have any training or other special knowledge about DNA or other forensic evidence?

Yes \_\_\_\_\_ No \_\_\_\_\_

11. Do you have any unalterable opinions about the validity of DNA evidence?

Yes \_\_\_\_\_ No \_\_\_\_\_

12. Would you prefer to answer any questions regarding your responses to the above questions out of the presence of other jurors?

Yes \_\_\_\_\_ No \_\_\_\_\_

\_\_\_\_\_  
JUROR SIGNATURE

JUROR NO. \_\_\_\_\_

## **APPENDIX I**

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**FILED**  
KING COUNTY, WASHINGTON  
MAR 29 2005  
SUPERIOR COURT CLERK  
BY STEPHANIE WALTON  
DEPUTY

Juror Number \_\_\_\_\_

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 JEFFREY R. McKEE, )  
 ) Defendant. )  
 )  
 )  
 )

No. 03-1-01734-1 KNT

*State Proposed*  
JUROR QUESTIONNAIRE

This questionnaire is designed to obtain information from you concerning your ability to be fair and impartial if you are selected as a juror in this case. Your responses will be available only to the judge, the defendant and the attorneys for both parties in this case, and will be destroyed if you are not selected. Even if you are selected, your responses will be sealed in the permanent case record and thus not be available for public scrutiny. If you cannot answer a question or do not understand a question, please indicate that problem in the response section. In answering this questionnaire, your oath as a prospective juror applies. You must answer truthfully. To the extent you feel that the questions call for personal information that you do not want to discuss in open court, indicate that in the appropriate area for question 9.

- 1. Have you, a relative or close friend ever been the victim of any form of sexual assault or sexual molestation?  
Yes \_\_\_\_\_ No \_\_\_\_\_
- 2. If you answered "yes" to question number 1, was the person who committed the sexual assault or sexual molestation a friend, relative, or stranger?  
\_\_\_\_\_
- 3. Have you, a relative or a close friend ever been accused of or been investigated for any form of sexual assault or sexual molestation?  
Yes \_\_\_\_\_ No \_\_\_\_\_

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4. Have you, a relative, or a close friend ever been a witness to any form of sexual assault or sexual molestation?

Yes \_\_\_\_\_ No \_\_\_\_\_

5. If you answered "yes" to question 1-4 was the matter referred to any governmental or social agency for prosecution or investigation?

Yes \_\_\_\_\_ No \_\_\_\_\_

6. Do you, a relative, or close friend have any specialized training, education or experience concerning sexual assault, sexual molestation or counseling?

Yes \_\_\_\_\_ No \_\_\_\_\_

7. Have you ever had a child or an adult report to you that he or she was the victim of some form of sexual misconduct by another person?

Yes \_\_\_\_\_ No \_\_\_\_\_

8. Is there any reason why you believe you could not be a fair juror in a case where the defendant is alleged to have committed sexual misconduct. If "yes", please explain.

Yes \_\_\_\_\_ No \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

9. If you answered "yes" to any of the questions asked above you may be asked additional questions about your answers. Ordinarily, these questions are asked in open court, with your fellow jurors present. **Would you rather discuss your answers in greater detail outside the presence of your fellow jurors?**

Yes \_\_\_\_\_ No \_\_\_\_\_

I declare under penalty of perjury under the laws of the State of Washington that the answers to the foregoing questions are the truth to the best of my knowledge.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
Juror Juror Number



1           it doesn't -- I need some sort of guidance on  
2           what is, you know, so suggestive that the Court  
3           should exclude it. I mean, as Mr. Cook says, I  
4           think you can come up with suggestiveness in  
5           almost any identification procedure; right, Mr.  
6           Cook? Isn't that what you're saying? You have  
7           a good lawyer, he could pick anything apart he  
8           wants to.

9           MR. COOK: I think he can pick it apart, I  
10          don't -- but I don't think that you could find  
11          suggestibility in all identifications, I think  
12          we have examples here where it obviously is not  
13          suggestive. It is not suggestive of who the  
14          suspect is, but I think that you can always pick  
15          everything apart and that's fine.

16          THE COURT: Okay. I'm going to -- I'm going  
17          to think about this and read some of these cases  
18          again to get a better feel, and I will rule on  
19          these identification motions tomorrow along with  
20          other motions that are left. And then we have  
21          to talk about the jury questionnaire. What I  
22          would like to do, if you guys can, if you  
23          counsel can get a minute before we reconvene in  
24          the morning, or while we are waiting for Mr.  
25          McKee to see how much of those -- I want to give





1 proof before I make a ruling on that, okay?

2 MR. MINOR: Yes, your Honor.

3 THE COURT: Now, where are we? Are there  
4 any more motions for either side?

5 MR. MINOR: I believe that covers the  
6 defense.

7 THE COURT: Then we are going to go to the  
8 questionnaires. Have you guys had a chance --  
9 have you counsel had a chance to look at the  
10 questionnaires?

11 MR. MINOR: I did, and I mistakingly  
12 included a question on mine that should not be  
13 there. And that's on the second page regarding  
14 race. That was an oversight on my part.

15 THE COURT: Oh, No. 9, yeah. That totally  
16 doesn't apply to this case.

17 MR. MINOR: Right. That is an oversight on  
18 my part.

19 THE COURT: That's out. Okay. Now, here is  
20 the question. Let me -- since I have got yours  
21 in my hand, Mr. Minor, why can't -- I mean, I  
22 ask the defendant -- I ask the jurors questions,  
23 general questions. No. 1, why can't that --  
24 let's just -- I'm just starting with this. Why  
25 do we have to have the jurors fill in that? Why

1           does this have to be a jury questionnaire  
2           question?

3           MR. MINOR: Let me, first of all, say that  
4           the question I show as No. 1, would be hopefully  
5           preceded by some very limited statement of facts  
6           that could be agreed to allow the jury some  
7           time to reflect on whether they have knowledge  
8           or believe they have knowledge of the case  
9           during the time they fill out the questionnaire.

10          THE COURT: Okay. On that point, let me ask  
11          you, what I usually do is what most judges  
12          usually do, is I read the charging language in  
13          the information. Would you prefer to have an  
14          agreed statement of facts than the charging  
15          language read?

16          MR. MINOR: I believe I would, your Honor.  
17          If you are speaking of the language that talks  
18          about defenses being connected, that's why they  
19          are charged together.

20          THE COURT: I read all four, here is what I  
21          would read. I would read, "The defendant is  
22          charged in the fourth count, information of the  
23          first count, that defendant Jeffrey R. McKee,  
24          through --" blah, blah, blah, "By forcible  
25          compulsion, did engage in sexual intercourse

1 with another person named LK. Count 2, that the  
2 defendant, by forcible compulsion, did  
3 attempt --" I mean, I just read the whole -- it  
4 is the middle paragraph of the charge.

5 MR. MINOR: Right. My only reservation, I  
6 would not want the first part read about -- or  
7 any part read regarding Norm Maleng.

8 THE COURT: No, I don't read that.

9 MR. MINOR: And the part about the offenses  
10 being charged together because of being tried  
11 or --

12 THE COURT: There is nothing in here that  
13 says that, is there?

14 MR. MINOR: I believe that normally there  
15 is.

16 THE COURT: Let me just read exactly what I  
17 read. "Count 1 charges that the defendant,  
18 Jeffrey R. McKee, in King County, Washington,  
19 during a period of time intervening between June  
20 3rd, 2003 to June 4th, 2003, by forcible  
21 compulsion, did engage in sexual intercourse  
22 with another person named LK, under  
23 circumstances where the defendant or an  
24 accessory used or threatened to use a deadly  
25 weapon, or what appeared to be a deadly weapon,

1           to wit, a handgun." And then I say, "Count 2,  
2           charges the crime of attempted rape as follows:  
3           That the defendant, Jeffrey R. McKee," et  
4           cetera, reading that paragraph. And, "Count 3  
5           charges the crime of rape in the second degree  
6           as follows. That the defendant, Jeffrey R.  
7           McKee --" "Count 4 charges the crime of rape in  
8           the first degree as follows." All right.  
9           Counsel intended to mention the time period?

10           MR. COOK: Yeah.

11           THE COURT: "Count 4 charges rape in the  
12           first degree as follows: That the defendant,  
13           Jeffrey R. McKee, in King County, Washington,  
14           during a period of time intervening between May  
15           1st, 2003 through June 18th, 2003, by forcible  
16           compulsion, did engage in sexual intercourse  
17           with another person named JLR, under  
18           circumstances where the defendant or an  
19           accessory used or threatened to use a deadly  
20           weapon, or what appeared to be a deadly weapon,  
21           to wit, a hand gun." I mean, if you want to see  
22           what I'm going to read, I just say, "In count 1,  
23           he is charged with this crime as follows," and  
24           then I read this paragraph, the charging  
25           paragraph. I don't read all the Norm Maleng

1           stuff or the series of acts connected together.  
2           I don't read that.

3           MR. MINOR:   That's fine.   Two questions:  
4           Does the Court, at the point of reading the  
5           information, intend to own use the initials of  
6           the --

7           THE COURT:   I'm happy to do whatever counsel  
8           wants me to do.

9           MR. MINOR:   I think the names need to be  
10          before the jury.

11          THE COURT:   Yeah, I would think so.   I mean,  
12          we are not keeping them secret.   So let me write  
13          these down now while we're thinking of it so I  
14          don't get stuck on this them.   How do you spell  
15          "Lynae"?

16          MR. MINOR:   L Y N A E.

17          THE COURT:   And it is --

18          MR. MINOR:   "Korbut" is K O R B U T.

19          THE COURT:   And then count 2 is JB, that's  
20          Jearlean.

21          MR. MINOR:   I think it is spelled  
22          J E A R L E A N, Bradford.

23          THE COURT:   Okay.   Count 3, is that you  
24          Numa?

25          MR. MINOR:   Muna Absiya, A B S I Y A.

1 THE COURT: Count 4 is "JL".

2 MR. MINOR: That's Jamie Lee Ray, or Jamie  
3 Ray, R A Y.

4 THE COURT: You want me to use Jamie Lee Ray  
5 or Jamie Ray.

6 MR. COOK: Jamie Lee Ray.

7 THE COURT: I'm glad I got that repaired.  
8 Let's get through this jury questionnaire so we  
9 can get this done here. I mean, I'm happy not  
10 to ask all these questions on the questionnaire.  
11 A lot of them are just the standard questions.  
12 "Does the information you now have about this  
13 case cause you to presume guilt or cause you to  
14 sympathize with the complainant, the alleged  
15 victim?" I will go ahead and ask those  
16 questions.

17 MR. MINOR: That's fine, your Honor.

18 THE COURT: Look, here is what I will do:  
19 I'm just going to leave this to the two of you  
20 to agree on this questionnaire. I will ask any  
21 questions you both agree that should be asked on  
22 the questionnaire. Do you think that you are  
23 going have a dispute?

24 MR. COOK: We can try to work out an  
25 agreement, your Honor.

1 THE COURT: I will ask any question either  
2 one of you wants asked on the questionnaire  
3 within reason.

4 MR. MINOR: Yes, your Honor.

5 THE COURT: I will put it that way.

6 MR. MINOR: One other point about the  
7 information, before I forget.

8 THE COURT: Yeah.

9 MR. MINOR: The language that talks about  
10 "or an accomplice."

11 THE COURT: Yeah, do you want to take that  
12 out?

13 MR. MINOR: If we could. I don't believe  
14 there are any facts that would suggest --

15 THE COURT: I'm going cross that out on all  
16 these counts. Certainly thought about that as I  
17 was reading it. Okay. So we now we have solved  
18 the questionnaire issue, and I'm going to expect  
19 you, Mr. Cook, to provide Adrienne with --

20 THE BAILIFF: Is there a number on the top?  
21 I just want to make sure they are numbered. Is  
22 there a little slot with the juror number?

23 THE COURT: Oh, "Juror No. --" yeah, Mr.  
24 Cook's has that. So when do you the final, put  
25 the juror number that you have got up here. And

1           then you need to make the copies. Will you do  
2           that? Because you have got all of the equipment  
3           down there, and we have to do these one at a  
4           time.

5           MR. COOK: We could do that.

6           THE BAILIFF: They need to be numbered on  
7           every page on top, okay, however many pages.

8           THE COURT: Okay. So that takes care of the  
9           questionnaire. I'm going to -- so just bring  
10          us -- bring us 80 questionnaires on Monday  
11          morning. And I'm going to -- or do you want to  
12          see me? I mean, if you have any disputes, I'm  
13          totally available, of course, to resolve them.  
14          Is that okay with you, Mr. Minor?

15          MR. MINOR: Yes, your Honor.

16          THE COURT: You look confused.

17          MR. MINOR: No, no.

18          THE COURT: Is there any -- okay. So that  
19          takes care of questionnaire. We are going to  
20          have 80 jurors here Monday morning or 75?

21          THE BAILIFF: They want to talk about  
22          whether they are going have Monday or Wednesday,  
23          because there is some question about finishing  
24          up the motions.

25          THE COURT: No, no, no, we are going to

**APPENDIX L**

1 other issue. Again, I have stated my strong inclination to  
2 let other suspect evidence in generally, but I do want to  
3 think about this and think about the Jordan case and other  
4 matters. And I will be ready with the ruling on that one at  
5 1:30.

6 We also have to discuss the questionnaire.

7 Were there any other pretrial proceedings that we  
8 have to discuss?

9 Thank you, Ms.Baskin.

10 MS. BASKIN: Your Honor if I may, I just have a  
11 question. Is this the last that I'll be required to be  
12 here, or do the parties to intend to call me again?

13 MR. MINOR: I do not.

14 THE COURT: You do?

15 MR. MINOR: I do not.

16 MR. COOK: You do not. That's it, then. Thanks.

17 Are there any other pretrial proceedings that need to  
18 be addressed, besides the one I have reserved until after  
19 lunch?

20 MR. MINOR: I don't believe so, Your Honor.

21 MR. COOK: I don't believe so, Your Honor.

22 THE COURT: So all we have to do is talk about the  
23 questionnaire. Have you had a chance to discuss the  
24 questionnaire between yourselves? I have said I'm going to  
25 ask every question. Mr. Minor has said that one of his

1 questions was included by mistake. My question is can you  
2 guys, given my ruling, then, all these questions are going  
3 to be asked, can you just put the questionnaire together  
4 yourself?

5 MR. MINOR: I'm willing to do that, Your Honor, yes  
6 I'm willing to do that.

7 THE COURT: Mr. Cook?

8 MR. COOK: Yes, and I could sign off on it and we can  
9 get a copy of it to the court perhaps in the morning.

10 THE COURT: Okay. That would be fine. So I'm sorry  
11 to say this, because I know your office isn't in town, I  
12 have got to think more about this motion. Can you wait  
13 until 1:30. I mean, do you have anything to do down here?

14 MR. MINOR: I can find something to do.

15 THE COURT: Okay. So all we have to do is have my  
16 ruling on this motion, and then the questionnaire, and then  
17 we're ready to roll. Is that right?

18 MR. MINOR: Yes, Your Honor. We had talked about  
19 before, doing it at the time, but there is still the issue  
20 of admissibility of the expert testimony on vasectomy and  
21 the--

22 THE COURT: I have to decided those issues. I  
23 haven't decided those issues yet.

24 MR. MINOR: You haven't decided that issue.

25 THE COURT: So I've got two issues to think about. I



1 THE BAILIFF: Won't get approval until tomorrow.

2 THE COURT: Of course, the officers can be told where  
3 to bring Mr. McKee.

4 So lastly, then, if you would put this together. If  
5 you have any disputes on it, let me know me in chambers and  
6 I'll resolve them. If you have no disputes, I'd like, Mr.  
7 Cook, if you possibly can, to have 90 or so copies in our  
8 chambers tomorrow. Is that going to be possible, do you  
9 think?

10 MR. COOK: I think so, Your Honor.

11 THE COURT: Okay. If you can sit down with Mr. Minor  
12 before he gets back to Seattle this afternoon and make a  
13 final decision on it, if you haven't done so already.

14 Is that it?

15 MR. MINOR: That's it.

16 THE COURT: Ready to go at nine o'clock Wednesday.

17 MR. MINOR: Yes, Your Honor.

18 MR. COOK: Yes, Your Honor.

19 THE COURT: Thank you, gentlemen. Thank you  
20 particularly for your very skillful briefs and arguments.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

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STATE OF WASHINGTON,  
Plaintiff,  
vs.  
JEFFREY MCKEE,  
Defendant.

No. 03-1-01734-1  
COA# 56504-4-I

VERBATIM REPORT OF PROCEEDINGS  
April 6 and 7, 2005

Heard before: THE HONORABLE DOUGLAS MCBROOM  
Regional Justice Center  
Kent, Washington

APPEARANCES:

PATRICK COOK, Deputy Prosecuting Attorney,  
representing the State;

DONALD MINOR, Attorney at Law, representing the  
Defendant;

WHEREUPON, the following proceedings were had and done, to wit:

Sheri Lenn Runnels, Official Court Reporter

COPY

1 APRIL 6, 2005

2 (The following occurred in  
3 the presence of the prospective  
4 jury panel:)

5 THE COURT: Please be seated.

6 Good morning, ladies and gentlemen. My name is Doug  
7 McBroom. I'm one of the King County Superior Court judges.  
8 I guess you probably met Andrea Darvas, who is another  
9 judge, this morning when she gave the jury welcome. I want  
10 to welcome you to this court. This is called our ceremonial  
11 courtroom, and we are just using it for this jury selection.  
12 My regular courtroom is upstairs. So this case will be  
13 tried in that courtroom, which is a little smaller than this  
14 one. We are unable to accommodate 75 jury panel members, so  
15 that's why we're down here until the jury gets selected.

16 So as I said, welcome. I wanted to introduce the  
17 people up in front here. You've met Adrienne, and I thank  
18 you and thank you on her behalf for allowing, first, to be  
19 numbered and lined up and sort of herded around. All that  
20 is necessary because you are going to be asked questions and  
21 the attorneys will be making notes according to your  
22 numbers, and sort of memorizing where various people are  
23 sitting in the courtroom during this voir dire process, so  
24 that's why numbers are important, and the exact sort of  
25 seating arrangements are important.

As you were told this morning, I'm sure, our system

1 of justice absolutely depends on citizens who are willing to  
2 serve as jurors. Jury service is perhaps the --voting is  
3 essential to the democracy and, obviously, the service is  
4 something that always takes longer than it does to go down  
5 and vote at the polls or vote at home on an absentee ballot,  
6 so it's a major sacrifice for citizenship that everybody is  
7 asked to make. Now, not everybody gets randomly pulled up  
8 as a jury member, so you can look at it either as a  
9 privileged or an onerous duty, but I think you will find,  
10 those of you who are seated on the jury, even those of you  
11 who aren't, who go through the voir dire process in the next  
12 day and a half or so will find this to be an extremely  
13 interesting experience, and certainly an educational  
14 experience as you watch our system of justice working.

15 Now, the first thing we're going to do is ask you all  
16 to again rise and raise your right hand so Stephanie can  
17 swear you in as jury panel members.

18 (PROSPECTIVE JURORS SWORN)

19 THE COURT: Thank you. Please be seated. And I  
20 guess I did not finish the introductions. Stephanie Walton  
21 is the court clerk, and she is in charge of swearing  
22 everybody in, which is the least of her duties. And she  
23 keeps track of everything and keeps all the exhibits in  
24 order, and is indispensable to running the court.

25 Jill Jordon is working with Adrienne and will be

1 working as bailiff during part of the trial when Adrienne is  
2 gone. And Sheri Runnels is the court reporter. And she is  
3 probably the hardest working person in the courtroom because  
4 she has to take down every single word that is spoken during  
5 this trial. And on her behalf, I ask you during the voir  
6 dire process to please speak up because she needs to get  
7 down everything that is said. And I'll talk a little bit  
8 more when the actual questioning on voir dire starts about  
9 what we're going to go ask you to do so she can keep an  
10 accurate record.

11 Now, before we start now with the actual jury  
12 selection process, I am going to tell you first a little bit  
13 about the case and the law that applies, our constitutional  
14 provisions on a criminal case, because this is a criminal  
15 case. And then we're going to go over the schedule of what  
16 we're anticipating. And the reason we have so many of you  
17 up here as jurors is this is a longer than usual trial. It  
18 is not the Rick Neuheisel vs University of Washington case  
19 that lasted six weeks or eight weeks, but this is a little  
20 bit longer than the usual four or five day trial that occurs  
21 in the courthouse here. So we've asked that a larger than  
22 usual number of jurors to come up here. And we'll be  
23 hearing from you if you feel that it's just too much to ask  
24 that you serve on this case. But I'll get to that in a  
25 moment.

1           So to introduce the lawyers and parties, this is a  
2 criminal action instituted by the State of Washington as the  
3 plaintiff. The State is represented by Mr. Pat Cook.

4           Mr. Cook, would you please rise and introduce  
5 yourself and tell them what you do.

6           MR. COOK: Thank you, Your Honor.

7           As the judge said, my name is Patrick Cook. I  
8 represent the State of Washington in this case. Good  
9 morning.

10          THE COURT: Okay. And Mr. Minor, please introduce  
11 yourself and your client.

12          MR. MINOR: Thank you.

13          Good morning. My name is Don Minor, and I'm defense  
14 counsel in this matter, and I represent Jeffrey McKee.

15          THE COURT: Okay. Thank you very much.

16          Now I will read you the charging part of the  
17 Information. The defendant is charged in an Amended  
18 Information with four counts. First count is as follows:  
19 That the defendant Jeffery McKee, in King County,  
20 Washington, during a period of time intervening between June  
21 3rd, 2003 through June 4, 2003, by forcible compulsion did  
22 engage in sexual intercourse with another person named Lynae  
23 Korbuto, under circumstances where the defendant used or  
24 threatened to use a deadly weapon, or what appeared to be a  
25 deadly weapon, to wit: a handgun.

1           Count two of the Information reads as follows: That  
2 the defendant Jeffrey R. McKee in King County, Washington,  
3 during a period of time intervening between May 28th, 2003  
4 through June 4, 2003 by forcible compulsion did attempt to  
5 engage in sexual intercourse with another person named  
6 Jearlean Bradford; attempted as used in the above charge  
7 means that the defendant committed an act which was a  
8 substantial step toward the commission of the above  
9 described crime with the intent commit that crime.

10           Count three reads that the defendant, Jeffrey R.  
11 McKee, in King County, Washington during a period of time  
12 intervening between January 1st, 2001 through May 1st, 2003  
13 by forcible compulsion did engage in sexual intercourse with  
14 another person named Muna Absiya.

15           And count four, that the defendant, Jeffery R. McKee  
16 in King County, Washington during a period of time  
17 intervening between May 1st, 2003 through June 18th, 2003,  
18 by forcible compulsion did engage in sexual intercourse with  
19 another person named Jamie Lee Ray, under circumstances  
20 where the defendant used or threatened to use a deadly  
21 weapon, or what appeared to be a deadly weapon, to wit: a  
22 handgun.

23           All right. Now, those are just the charges. And I  
24 want to emphasize those are just charges, that what I have  
25 just read to you is not evidence of anything. The defendant

1 has entered a plea of not guilty to each of these four  
2 counts that I have read to you, and that plea puts in issue  
3 every element of the crime, each of the four crimes charged.  
4 The Information is only an accusation against the defendant  
5 which is to inform him of the charge. You are not to  
6 consider the filing of the Information or its contents as  
7 proof of the matters charged. It is your duty to determine  
8 the facts in this case from the evidence which will be  
9 produced in court. It is also your duty to accept the law  
10 from the court regardless of what you personally believe the  
11 law is or ought to be. You are to apply the law to the  
12 facts and in this way decide the case. That's what juries  
13 do, they determine what the facts are, they get written  
14 instructions of the law from the court, and then they apply  
15 the facts or apply the law to the facts that they determine  
16 them to be.

17 Now, a defendant is presumed innocent. This  
18 presumption continues throughout the trial unless you find  
19 during your deliberations that it has been overcome by  
20 evidence beyond a reasonable doubt. The State has the  
21 burden of proving each element of the crime beyond a  
22 reasonable doubt. Now, defining a reasonable doubt is a  
23 term that everybody is familiar with and has probably used  
24 at some point or another in their life, but it has a very  
25 strict legal definition. A reasonable doubt is one for

1 which a reason exists and may arise from the evidence or  
2 lack of evidence. It is such a doubt as would exist in the  
3 mind of a reasonable person after fully, fairly, and  
4 carefully considering all of the evidence or lack of  
5 evidence. Now, you'll get a written definition of a  
6 reasonable doubt when I give you the instructions at the end  
7 of the case, but that's something that you should keep in  
8 mind, the definition of a reasonable doubt as you hear the  
9 evidence in the case.

10 Now, in a civil case the plaintiff must prove his or  
11 her case by a preponderance of the evidence, that is, by the  
12 greater weight of the evidence. And I'll tell you that the  
13 contrast with that the burden of proof of the plaintiff,  
14 which is the State in this case, in a criminal case, in a  
15 criminal case the State must prove every element of the  
16 crime charged beyond a reasonable doubt. Also, a civil case  
17 has less stringent requirements for a jury in reaching a  
18 verdict. In a civil case the verdict need not be unanimous,  
19 ten of 12 jury members can decide a civil case. In a  
20 criminal case it takes all 12 jury members for a verdict.  
21 So that is the general gist of the case and/or what the case  
22 is about. It's not the gist of it, it's what the case is  
23 about. That is, the four-count Information as I read you.

24 Now, before we go on with voir dire I'm going to tell  
25 you about the scheduling in this case, and then I'm going to

1 give you all an opportunity to tell us if there's a real  
2 good reason that you cannot serve in the case. Today is  
3 Wednesday, April 6th. We will be selecting the jury today  
4 all morning and probably all afternoon, and probably at  
5 least part of the day, if not the whole day, tomorrow, which  
6 is April 7th, Thursday. Then April 8th is a non jury trial  
7 day. So you can go to your jobs April 8th, Friday, you are  
8 not required to be here. All the courts in this courthouse  
9 and the downtown courthouse have hearings on other matters.  
10 They are involved ultimately with jury trials, but that is a  
11 non jury day, so we hear non jury issues that day. Then we  
12 meet again on Monday, April 11th and we will start at nine  
13 a.m., hopefully, every morning. Sometimes we're a little  
14 late, but you are required to be here at nine, or a few  
15 minutes before. So we will be in session the 11th, 12th and  
16 13th. Then my personal life kicks in. My daughter, who has  
17 been delivering babies in all sorts of unspeakable parts of  
18 the world for the last six years is finally getting married,  
19 and I'm very happy about that. And we have people coming in  
20 from various parts of the country so I'm going to take that  
21 Thursday, which is the 14th, off. Then the 15th I'm going  
22 to take off, but you wouldn't be here, anyway. That's  
23 Friday. And then I'm going to take --the wedding is the  
24 17th of April. I'm going to take Monday the 18th off to bid  
25 everybody good bye, so there is going to be a hiatus from

1 Thursday through Monday, we're going to lose two court days  
2 because I'm going to do this and nobody is going to convince  
3 me not to. So those are two court days we miss, the 14th  
4 and the 18th. Then we're back in court on the 19th,  
5 Tuesday, the 20th and the 21st. Okay, so now we're--

6 THE BAILIFF: Twenty-first is only half-day.

7 THE COURT: Adrienne just reminded me, we have  
8 something scheduled on the morning of the 21st, so we will  
9 just have half a day. So here's what we've got so far, just  
10 to bring you all up to date. You'll be off this Friday,  
11 you'll be off next Thursday, Friday and Monday. Let's not  
12 talk about the 21st, that's just confusing. You'll be off  
13 the 22nd of April. That's about two-and-a-half weeks from  
14 now, and that's because it's a non-jury day. Then we'd meet  
15 again on the 25th, 26th, 27th and 28th. That's the last  
16 week in April. By that time the case should be nearing its  
17 completion. But I want to be conservative in telling you  
18 now what the time commitment is. So it's possible the case,  
19 and maybe it's probable, I don't know, we'll all keep you  
20 advised during the course of the trial how we're doing in  
21 terms of scheduling. And we really can't precisely predict  
22 because we don't know how long each witness is going to be  
23 on the stand giving direct examination, cross-examination,  
24 so there's some guesswork involved here. But as the trial  
25 progresses we can begin to narrow it down and let people

1 know the schedule. So to be utterly conservative, the  
2 evidence in this trial may go into the week of May 2nd and  
3 the last part of that week, and then you'd be deliberating,  
4 and in all likelihood, you know, on the outside you'd be out  
5 of here, finished with this jury service by May 6th. So  
6 today is April 6th, and I'm talking May 6th. May 6th, by  
7 the way, is a Friday. If a jury is deliberating they do  
8 come in and deliberate on Fridays, even though the court  
9 isn't hearing evidence in jury cases. So this is what we're  
10 looking at as the outside. As I say, now, it may contract a  
11 bit depending on how fast things go, it may contract a  
12 substantial bit. But to be very conservative I'm saying in  
13 this case we will keep those 14 people that we pick for the  
14 jury, and we pick 14, including two alternates, here for the  
15 better part of this month. That is April and possibly into  
16 May. Now, here is the hard part. This is where I ask those  
17 of you who would find it absolutely impossible, a hardship  
18 beyond belief for you to serve as a jury member for that  
19 length of time on those days. And remember, we're not  
20 asking you to give up a whole month, the days off are every  
21 Friday, plus the two days I'm taking off for my daughter's  
22 wedding, the 14th and the 18th, and part of the 21st that  
23 we've just talked about. So it's not as if your life is  
24 utterly consumed by the trial. You do have--and also we end  
25 every day at four o'clock promptly. We may slop a little

1 over if a witness is almost finished and we need to finish  
2 him, we may recess a little early if one side or the other  
3 runs out of witnesses to call. But you have the afternoon.  
4 And remember, it's daylight savings, so you have a better  
5 part of the day. I'm trying to make that sound good. You  
6 know, it may not be good, but I'm trying to make it sound  
7 good.

8 Okay. the last thing, before I ask to you raise your  
9 hands, those of you, hopefully none of the 75 of you will  
10 raise your hand, but I have a sneaking hunch that a fair  
11 number of you will. I have to decide on these hardship  
12 issues, and the great fear that I have is that somebody will  
13 raise their hand and I'll say, okay, that's a good enough  
14 hardship to go, and the person sitting right next to them,  
15 who now sort of wants to do this, you know, or not want to  
16 do this, but now willing to make this sacrifice that we're  
17 asking for, didn't raise their hand, and so I have let  
18 somebody go for a lesser reason than somebody who didn't  
19 even raise their hand has been let go, then they can't help  
20 but resent that. We don't want resentment, we want people  
21 that are sitting here because they see this as a very, very  
22 important duty as citizens. So I'm going to go through and  
23 get down all the names of people that I'm going to ask for  
24 hardship excuses, but I'm going to be hard on granting those  
25 because everybody here, all 75 people, have other things to

1 do, and all 75 people, if they are consumed sitting on a  
2 jury for a month or three weeks, that's going to create a  
3 hardship on other people, on the families, on their working  
4 mates, people are going to have to do more work because you  
5 are not going to be there to do your share. You believe you  
6 are doing your share of work for everybody when you're  
7 serving on a jury, though, so those are not excuses that  
8 will probably get a hardship discharge for any jury member.  
9 The kind of things that will be health issues that are  
10 serious. And by that I mean I would expect doctor's  
11 appointments, et cetera, can be remade. But if somebody has  
12 a health issue or a physical issue that makes it hard for  
13 them to sit on the jury, or if somebody has an aged parent  
14 at home, or child, and they've just managed to get care for  
15 that person for these two days, but there is no way they  
16 could get that person taken care of, generally if somebody  
17 has prepaid vacation plans, you know, I will let them go.  
18 I'm not looking to cost anybody hundreds or thousands of  
19 dollars by keeping them here and making them lose a cruise  
20 to the orient or something like that. So we just have to  
21 play that by ear. All right.

22 Now, I will ask the question and ask each of you  
23 raise your numbers, and I'm going to read off the numbers,  
24 and then I'm going to go through the people that I have read  
25 off numbers and get the information that I need, and then

1 I'll retire for a bit and I'll have the lawyers with me, and  
2 then we'll excuse some of you that raised your hand and some  
3 of you perhaps not. But here's another thing, before I ask  
4 it. The reason we have to be a bit hard on this is we  
5 need--each lawyer is going to have eight peremptory  
6 challenges, and we need 14 jurors, so you've got 14 plus  
7 eight, plus eight and that totals 30, and then there are  
8 always challenges for cause. And in this case, for example,  
9 somebody may have been a victim of a similar type of  
10 offense, or have somebody that they know or love as a victim  
11 of a similar type offense, and that kind of person would  
12 probably be--there might be a challenge for cause. So now,  
13 it's quite likely that we need, out of 75 of you, we're  
14 going to need at least 45 of you or 50 sitting here so that  
15 we have enough for that that the constitutional rights of  
16 both parties are observed, and we're able to pick a jury  
17 following all the rules for jury selection. Okay. The 64  
18 dollar question: Everybody that feels it would be too great  
19 a hardship to serve on a jury for the length of time that I  
20 have just read, please raise your numbers.

21 I see a whole bunch of you we are not going to  
22 excuse. Okay. Now, I'm going to, those of you in the back  
23 can lower your numbers for a bit. I'm just going to start  
24 reading the numbers, and then when I read your number, lowe  
25 it. Okay. Number 2, 4, 5, 7, 9, 11, 12, 13, 14. Now, why

1 don't you, say, from 15 to 40, raise your numbers. I don't  
2 want to wear are out your arms. 15, 16, 17, 18, 19, 20, 22,  
3 23, 26, 32, 34. I take back what I just said. 26, 32, 34.  
4 Now we go to 35, 37, 38, 39, 40, 43, 42, 45 and 46.

5 THE COURT: Okay 50 to 75, raise your numbers. 47,  
6 51, 56, 57, 59, 62, 63, 64, 68, 69, 70, 24 and 75. Okay.  
7 63, 68, 70.

8 Thank you. Now, I'm going to count and see how many  
9 we've got.

10 So we have got 75 people sitting here and we've got  
11 43 people that want to not be sitting here, and that leaves  
12 us with 32. And we're going to need probably 45. So there  
13 are going to be some people upset, but I'm just going to do  
14 the best I can. Okay. And first off, I want to thank all  
15 of you who didn't raise your numbers. Again, we recognize  
16 that it's a huge sacrifice that you are being asked to make.  
17 I'm sure that you feel, those of you who didn't raise your  
18 numbers, have important matters that are going to be  
19 interfered with by this, but you didn't raise your numbers.  
20 Thank you, thank you.

21 Okay. Number 2, what is your hardship?

22 JUROR 2: Actually, I have a prepaid ticket to the  
23 Philippines in August and I won't have the hours to cover  
24 the time I'm going to be away from work.

25 THE COURT: Prepaid ticket to the Philippines in

1 performing your duties as well as his own, something like  
2 that, or everybody cooperating and, you, of course, would  
3 have to be checking in, which you can do by phone, by the  
4 way, and you can go there-- where is your company located?

5 JUROR 4: In Seattle.

6 THE COURT: Where in Seattle?

7 JUROR 4: Near the First Avenue bridge.

8 THE COURT: So that's about a 25-minute drive?

9 JUROR 4: Yeah.

10 THE COURT: So you'd get there by 4:25. At the  
11 latest every day?

12 JUROR 4: Right.

13 THE COURT: Okay. Well, I'll certainly keep that in  
14 mind.

15 Okay. Number 5 is Mr. Woolhiser.

16 JUROR 5: I know you said that for job, but I have  
17 engineering assignments that are time-critical, so--

18 THE COURT: Who do you work for?

19 JUROR 5: I work for the Boeing Company.

20 THE COURT: Okay. They pay jury service, of course.

21 JUROR 5: Yes.

22 THE COURT: Okay. So you wouldn't lose money.

23 JUROR 5: But I have time-critical tasks that need to  
24 be done.

25 THE COURT: What does time-critical mean?

1 JUROR 5: That they are due on a certain date.

2 THE COURT: What happens if they aren't done?

3 JUROR 5: Our customer, the Air Force, won't get  
4 their products.

5 THE COURT: The Air Force. Federal government runs  
6 its own court system, that has juries called in to hear  
7 cases involving federal crimes. I think the federal  
8 government can just wait. That would be my view. But I'm  
9 going to go through the rest of these.

10 Number 7, Ms. Tott.

11 JUROR 7: I have a prepaid trip for April 24th  
12 through May 2nd.

13 THE COURT: Where is that and how much money is  
14 involved?

15 JUROR 7: It's northern Canada, it's a bear hunt.

16 THE COURT: Oh, my goodness. I can see why that  
17 would have to be a prepaid. A bear hunt, though?

18 JUROR 7: Yes.

19 THE COURT: I like bears. You shoot those bears?

20 JUROR 7: Yeah.

21 THE COURT: I like them, and I'm a little afraid of  
22 them, so I like to see them from a distance. Okay. Prepaid  
23 trip. And this is an expensive trip?

24 JUROR 7: Yeah.

25 THE COURT: You'd lose a whole lot of money if you

1 miss this trip. I must say in my long career as a judge and  
2 a lawyer, I have never heard that kind of request, excuse  
3 for jury service.

4 Number 9 is Ms. Marston.

5 JUROR 9: Last month my mother was diagnosed with  
6 cancer, and she's due to start chemotherapy soon. I have  
7 promised her that I would be available to take her to  
8 chemotherapy and other medical appointments.

9 THE COURT: Okay. I'm sorry.

10 JUROR 9: Thank you.

11 THE COURT: Okay. Number 11 is Mr. McMaster.

12 JUROR 11: I'm in the middle of a 45-day trial period  
13 for a promotion I accepted at work, and I have medical  
14 concerns about being able to do the job.

15 THE COURT: Okay. What work is that?

16 JUROR 11: I'm a school custodian.

17 THE COURT: Okay. You're on a 45-day trial period?

18 JUROR 11: To accept or reject a promotion. And I  
19 have medical concerns about being able to do the job.

20 THE COURT: The job as school custodian?

21 JUROR 11: Right.

22 THE COURT: So wait a minute. So is this they are  
23 looking at 45 days or you're looking--

24 JUROR 11: We're looking at each other. Under the  
25 contract either party has 45 days to go back to the position



1 I was in or--

2 THE COURT: How much have you got in that so far?

3 JUROR 11: I started on February 9th, and it's 45  
4 working days, so the way I have it fixed, it's April 13th,  
5 next Thursday.

6 THE COURT: Okay. So you would be here today and  
7 tomorrow, then you'd be off Friday, and so you'd be here the  
8 11th, 12th and 13th. So you'd miss those three days, and  
9 then you'd be back on the 14th, so you are four days short  
10 of the 45 at this point. What school district is that?

11 JUROR 11: Seattle.

12 THE COURT: Okay. Who's the man that is in charge of  
13 making the decision for this for the school district?

14 JUROR 11: That would be Frank Griffin.

15 THE COURT: Do you have his phone number?

16 JUROR 11: 252-0609, I believe.

17 THE COURT: Okay. Is he the head custodian?

18 JUROR 11: He's the manager of the grounds and  
19 custodial services. And I would like to point out, if I  
20 could, as far as the medical concerns, I got the results of  
21 an MRI on my knee on Monday, so my concern about--and I  
22 wouldn't be mentioning this except I'm seriously considering  
23 going back to my other building, which affects the person  
24 who took my place there, and all that is--

25 THE COURT: So what is the MRI showing?

1 JUROR 11: Arthritis and a tear. And so my concern  
2 is if I'm there for a day and then gone for three or four  
3 days, I don't really get a feel for the degree that it's--

4 THE COURT: Yes, but you have already done it for 40  
5 days.

6 JUROR 11: Right.

7 THE COURT: You have a pretty good feel by now?

8 JUROR 11: Right.

9 THE COURT: Okay. Well, we'll think about that one.  
10 By the way, if anybody needs to go to the restroom, we've  
11 got one right back there, just raise your hand, we're going  
12 to break. We need to take a 15 minute break in the morning  
13 and the afternoon. And I'll explain to you, because it can  
14 be kind of frustrating why do we take so many breaks for the  
15 trial. There have been studies that jurors are best when  
16 they allow for about an hour, and then they need a break,  
17 because then things start to--their attention starts to flag  
18 a little bit. And also, for all the court personnel, and in  
19 particular the reporter, who gets writer's cramp.

20 JUROR 23: I'd like to take advantage of that offer

21 THE COURT: Adrienne, would you take him back. And  
22 we're just going to wait. Actually, I think I can go on.

23 JUROR 23: I'm 23.

24 THE COURT: So we've got a ways to go, and I'm not  
25 concerned. Generally speaking, in a voir dire process every

1 single panel member has to be here for every question, but I  
2 think this is a type of situation where that rule can be  
3 overlooked, because these aren't questions essentially about  
4 being fair in this case.

5 Now, so we go down to number 12, which is Ms. Lovell.

6 JUROR 12: My daughter is graduating from college on  
7 the east coast on May 15th,

8 THE COURT: What college?

9 JUROR 12: University of Pennsylvania.

10 THE COURT: Great. Congratulations. Philadelphia.

11 JUROR 12: I'd like to be there and see her walk  
12 after I paid for it.

13 THE COURT: Okay.

14 JUROR 12: I'm leaving here on the 13th of May.

15 THE COURT: You know, I can guarantee you that you  
16 would--

17 JUROR 12: You can guarantee?

18 THE COURT: I can guarantee you. I mean, this case,  
19 what I said is the 6th is the outside. The 13th you're  
20 going to be out of here.

21 JUROR 12: This is a promise from the judge, right?  
22 Because I will be at her graduation.

23 THE COURT: You are going to your daughter's  
24 graduation.

25 JUROR 12: Okay.

1 THE COURT: Okay. So thank you. Thanks for being  
2 very frank about that. So I'm not going to have a problem  
3 with that.

4 Okay. Number 13 is Ms. Starikov. Is that is  
5 correct?

6 JUROR 13: Yeah. Hi. I am a full time mom. And I  
7 take care of my daughter all day.

8 THE COURT: How old is she?

9 JUROR 13: She's 17 months. And she is at home all  
10 the time.

11 THE COURT: Okay

12 JUROR 13: And I felt it important to serve my two  
13 days, so I arranged for my mom. And she took days off work  
14 to do that, so I'm not going to be able to do that for a  
15 whole month of this. I don't have anybody to watch her.

16 THE COURT: Your mom took two days off work? Where  
17 does she work?

18 JUROR 13: We have a jewelry store downtown, European  
19 Creations.

20 THE COURT: Okay. And she works in it?

21 JUROR 13: It's her jewelry store.

22 THE COURT: Her store?

23 JUROR 13: Yeah.

24 THE COURT: Okay. 64 is leaving the courtroom now.

25 JUORR 13: I also have plane tickets to New York on

1 the 7th of May, which is the day after you said.

2 THE COURT: You have tickets to New York?

3 JUROR 13: Yeah.

4 THE COURT: You are going take your 17 month old?

5 JUROR 13: Yeah, yeah, and my husband. Her great  
6 grandfather is turning 97, and we have two weddings as well.

7 THE COURT: Very well.

8 JUROR 13: That's where most of our family lives.

9 THE COURT: Okay. I'm not worried about that because  
10 you will be out of here by that time. But there is the  
11 other issue, certainly. Thank you very much.

12 Number 14, Mr. Gregg.

13 JUROR 14: I am also an engineer for the Boeing  
14 Company, and I am perfectly willing to serve, but my manager  
15 has reminded me as a lead engineer of an Army contract,  
16 unfortunately, Senator McCain is threatening to disrupt, we  
17 have a series of meetings I'm supposed to go to in St.  
18 Louis, which is next week for, for example, leading a team  
19 of engineers doing some work that is pretty critical to  
20 getting approval in the middle of May that would satisfy  
21 Senator McCain, we hope. But without that, the program gets  
22 cancelled, and my manager said--he will remind me that I'm  
23 the reason that we lost 500 jobs in the Puget Sound region.  
24 So, that's my problem.

25 THE COURT: That's heavy. Five-hundred jobs. You're

1 the lead engineer?

2 JUROR 14: I'm the lead engineer on the longest term  
3 problem that we have to solve before we reach that May date,  
4 and then a date in August as well.

5 THE COURT: Okay. You don't think I could call  
6 Senator McCain and say, hey, back off?

7 JUROR 14: We'd be happy for to you call Senator  
8 McCain.

9 THE COURT: So a Superior Court judge in the state of  
10 Washington. I think I'd have to be several levels above  
11 where I am right now to be heard, probably.

12 Okay. Number 15 is Mr. Keen.

13 JUROR 15: I am a commissioned sales person and I  
14 also travel, about 30 percent of my job is responsible for  
15 the western third of North America,

16 THE COURT: What do you sell?

17 JUROR 15: Software.

18 THE COURT: For who?

19 JUROR 15: A company called I-Graphics.

20 THE COURT: So you're commissioned, you don't get any  
21 salary, you just take--

22 JUROR 15: I'm 50-50, yeah.

23 THE COURT: Okay

24 JUROR 15: And also have three small children at home  
25 that I am responsible for feeding as well, so--

1 THE COURT: So you need the commissions?

2 JUROR 15: Definitely need the commissions.

3 THE COURT: You'd lose money?

4 JUROR 15: Yes.

5 THE COURT: What about, I mean, again, you know,  
6 there's a lot of holes in this. I mean, it's a month  
7 commitment or somewhere near that, but there are a lot of  
8 holes in it where you can go tend to business. Now, it  
9 really, really boils down to about a little more than half  
10 time here at the courthouse. How about that consideration,  
11 can you do your work, at least for the next three weeks or  
12 so, on that basis, do you have to go traveling?

13 JUROR 15: It makes it extremely difficult. In fact,  
14 even in between here and during breaks we've had it's almost  
15 all the time taking care of business, I've got customers  
16 calling, I've got calls waiting already.

17 THE COURT: So you can take care of business on the  
18 phone?

19 JUROR 15: I can do some of it that way. But it's  
20 hard to continue to perpetuate business. The other thing is  
21 that I try and do is I'm going through this is, also, now,  
22 like I said, the travel is definitely an important part of  
23 it. And as it works out, whenever our--you know, if I'm  
24 gone, I'll actually be putting in the same hours during the  
25 evening to make up for what I'm doing during the day, so

1 I'll still be working.

2 THE COURT: That is totally expected, of course.

3 JUROR 15: Right, I understand that, but it will put  
4 another nine, ten hours on top of what we're doing here.

5 THE COURT: That's why I've got all these cases that  
6 I haven't finished yet. So at four o'clock I go back to my  
7 office and stay till seven, and then I take a bunch of stuff  
8 home. Not to feel sorry for myself, I love this job, but--

9 JUROR 15: The president of our company spoke to me,  
10 tried to acknowledge that I was gong on jury duty, and he  
11 asked if there was any way I could be dismissed, and so I--

12 THE COURT: What is his name?

13 JUROR 15: Hs name is Ken Callera.

14 THE COURT: You have his phone number

15 JUROR 15: I surely do. 503 404-6014.

16 THE COURT: So he's in Portland?

17 JUROR 15: Correct.

18 THE COURT: You are Mr. Keen, right? Okay.

19 Okay. 16 is Mr. Story.

20 JUROR 16: Yes. I'm the estimator for a small  
21 company, and when we make sales I do house estimates, and I  
22 oversee insulation crews. It would be a hardship for the  
23 crews, they would not have any work if I can't do estimates  
24 for three weeks.

25 THE COURT: Well, you could do estimates, you know,

1 you could do them on Fridays, you could do them after work,  
2 after here. I mean, it's not like you couldn't do them.

3 JUROR 16: Right. My schedule is booked up for  
4 weeks, and I have two children that I share custody with  
5 half time.

6 THE COURT: What time do you pick them up, do you  
7 pick them up on the weekends?

8 JUROR 16: No, we have half time, so I have them  
9 three days a week, two days another week.

10 THE COURT: I don't want to get personal, but I mean  
11 is your wife, is your relationship such that if one person  
12 is jammed, the other person will step in and--

13 JUROR 16: We try to work things out, if we make it  
14 for shorter periods of time.

15 THE COURT: Because I do family law cases, and I see  
16 so often people that can't even talk to each other and they  
17 wind up in court, and they are fighting over the kids and  
18 the property. And now, that's horrible for the kids. But  
19 the thing that really, really bothers me is by the time the  
20 case is over now, most of their estate has been spent on  
21 legal fees, which is so silly. But people do that. Okay.  
22 So you're an estimator. What is the small company?

23 JUROR 16: Sutter Home and Hearth.

24 THE COURT: Okay. So just to sum it up, without the  
25 estimates you don't get the work because you have to have

1 estimates before you can get the work, and then if you don't  
2 have the work, the workers can't work. Is that sort of what  
3 it boils down to?

4 JUROR 16: Right.

5 THE COURT: But you can go out and get estimates in  
6 the off times, in the times off, which are frequent and a  
7 lot, and keep it going to some extent?

8 JUROR 16: Correct.

9 THE COURT: Okay. Number 17 is Ms. Bender.

10 JUROR 17: I am one of two managers at a restaurant,  
11 and now as restaurant managers, we both work about 45 to 50  
12 hours a week and--

13 THE COURT: What restaurant?

14 JUROR 17: Purple Cafe and Wine Bar in Woodinville.

15 THE COURT: How big a restaurant is that?

16 JUROR 17: We hold about 120 people, so it's medium  
17 sized restaurant. But as you know, I mean, it's not really  
18 something that I can work at home.

19 THE COURT: But evenings are when--

20 JUROR 17: The evenings are part of the time. A lot  
21 of the time it does require two managers being there, so  
22 they have to find someone who has the capability, who knows  
23 restaurants.

24 THE COURT: You must have assistant managers?

25 JUROR 17: We actually don't have. We have two

1 locations, the Kirkland one and Woodinville.

2 THE COURT: What if somebody gets sick? I mean, you  
3 have two managers.

4 JUROR 17: But for a month, you know, it's taking  
5 away from this major, and they are salaried at 40 plus hours  
6 a week.

7 THE COURT: But even in a month there is a lot of  
8 time off, and the main time of work is around dinner time,  
9 which you'd be obviously there

10 JUROR 17: Right.

11 THE COURT: Okay. 6 thank you.

12 Number 18 is Mr. London.

13 JUROR 18: I've got kind of a variety of factors.  
14 I'm self-employed and so, you know, any time that I'm here  
15 means I'm the only one doing the work. I'm a solo  
16 practitioner attorney. And I teach part time at Bellevue  
17 Community College, and I don't always know whether the  
18 classes are going to go. And when I got the summons, I  
19 didn't know if class was going to go, but it is going, so  
20 that's starting, and I just moved--

21 THE COURT: What hours do you teach?

22 JUROR 18: Teaching things actually online, so that's  
23 perhaps, assuming it's going to be all right for me to get  
24 on the internet and do that, that might not be a problem in  
25 and of itself. I might raise that.

1           And then I just actually moved my elderly parents  
2 down here and was sort of in the midst of trying to get them  
3 settled. And that requires me to drive my mother around.  
4 My father is in a nursing home right now. They are in the  
5 midst of trying to sell their house in Ohio. We don't know  
6 whether that is going to go.

7           THE COURT: How old are they?

8           JUROR 18: In their seventies. My father has  
9 Parkinson's disease, so he's, you know, functionality is  
10 going down, which is why he's in a nursing home.

11          THE COURT: Is you mom going to go into an apartment?

12          JUROR 18: She's living in an apartment, right, in a  
13 house right now, but it is still sort of a temporary  
14 solution we have.

15          THE COURT: You have to look for something, but if  
16 you put that off for three weeks.

17          JUROR 18: But the thing is it's conditional on their  
18 house is on the market in Ohio, and most of their stuff is  
19 in their house still. And if the house sells, then we're  
20 going to have to deal with the logistics of getting their  
21 stuff moved out of there, disposing of it. And so there is  
22 just a lot of urgencies involved in that right now.

23          THE COURT: Okay. Did you grow up in North Hampton?

24          JUROR 18: I was born there. My dad was a professor  
25 at Smith College.

1 THE COURT: So how long did you stay there?

2 JUROR 18: We moved from there to Champlain, Illinois  
3 in 1968, and my dad taught there, and then finished his  
4 career at Cleveland State University.

5 THE COURT: You are not heartbroken over the outcome  
6 of the--

7 JUROR 18: I shed a tear. I did all my college, law  
8 school and stuff, in the big town, so now it would have been  
9 nice to have Wisconsin there, too.

10 THE COURT: My dad was a solo practitioner. We solo  
11 practitioners are the last of the free men, we can do  
12 anything we want whenever we want, except when we walk out  
13 of the office everything stops but overhead.

14 JUROR 18: Exactly.

15 THE COURT: Okay. I've got all that. I've got notes  
16 of all that. Thank you very much.

17 19, Ms. Johnson.

18 We are going to take a 15-minute recess in about five  
19 minutes. So Ms. Johnson.

20 JUROR 19: Your Honor, my company has decided to  
21 close our office here, and my position is being moved to  
22 corporate headquarters in Connecticut, which is going to  
23 happen in June. But starting last week, skipping this week  
24 and then next week and every other week I have people coming  
25 that I'm training them to do my job and to make customer

1 calls.

2 THE COURT: So are you losing your job?

3 JUROR 19: I'm losing my job. I'm not happy.

4 THE COURT: You're training people to take over?

5 JUROR 19: Yes.

6 THE COURT: That hard, I would say

7 JUROR 19: Yes. You've got to have a good attitude  
8 for that.

9 THE COURT: Okay. So this goes on until June each,  
10 what, every other week, is that what you said?

11 JUROR 19: The office is closing the end of June, and  
12 my job terminates at the end of June. We have to close up  
13 the office, you know, all the accounts are going back to  
14 corporate and--

15 THE COURT: So you'd have two months after the trial  
16 was over to catch up on all that, and plus you'd have all  
17 the Fridays, and then also the time on the 14th, 15th, 18th,  
18 20th.

19 JUROR 19: Your Honor, you don't understand. There  
20 are people coming in next week that I'm supposed to train.

21 THE COURT: I did understand that

22 JUROR 19: Okay.

23 THE COURT: So how long are they going to be here to  
24 be trained?

25 JUROR 19: They will be here like for a week at a

1 time.

2 THE COURT: So people are coming in next week for a  
3 week. And are there people coming the week after?

4 JUROR 19: I believe that the week after that is kind  
5 of clear, and then the week after that there's another  
6 individual who is coming.

7 THE COURT: So they are going to be here, people are  
8 going to be here the 11th through the 15th, and then the  
9 25th through the 29th. Is that it?

10 JUROR 19: I think those are the dates. I don't--

11 THE COURT: Can you double check that during the  
12 lunch period?

13 JUROR 19: Um-hum. Could you call my manager?

14 THE COURT: What is your manager's name?

15 JUROR 19: Jim Good.

16 THE COURT: Jim Good?

17 JUROR 19: Yes.

18 THE COURT: And what is his number?

19 JUROR 19: 425 825-5450.

20 THE COURT: What is your company?

21 JUROR 19: Roller Bearing of America.

22 THE COURT: Roller Bearing?

23 JUROR 19: Yes. We specialize in the aerospace  
24 industry.

25 THE COURT: How big a company is that?

1 JUROR 19: I don't know.

2 THE COURT: Thousands of employees?

3 JUROR 19: No, it's not.

4 THE COURT: Hundreds?

5 JUROR 19: Well, we were a division of Ingersoll  
6 Rand, the bearing division, and they sold us to RBC almost a  
7 year and a half ago when they wanted to get out of the air  
8 freight business, so it's a smaller company. Nothing like  
9 Ingersoll Rand.

10 THE COURT: But it's hundreds of employees. How many  
11 offices?

12 JUROR 19: Your Honor, I'm guessing maybe 1,500. And  
13 the office here has been downsized to like three people.

14 THE COURT: My last question, number one, if you're  
15 not here to train these people in your job, somebody else  
16 has got to train them, one of these 1,500 people has got to  
17 train them? And would it be fair to say, I mean, I  
18 understand that you are a caring employee, but you're losing  
19 your job and you are losing two weeks of training people to  
20 take over your job for a big company. It doesn't sound  
21 like--it sounds like you may --

22 JUROR 19: Your Honor, corporate America is going in  
23 that direction in the last few years.

24 THE COURT: No, I understand.

25 JUROR 19: Ingersoll Rand brought people from Indiana

1 to be trained in jobs that were lost.

2 THE COURT: There's been some talk about what jerks  
3 they are for doing that. But okay. I got that. But, I  
4 mean, this sounds more like a hardship to this company than  
5 a hardship to you, that's where I'm coming from here. And  
6 I'm very concerned about personal hardships to people in  
7 this room. I'm not so concerned about hardships to some big  
8 company. Not that I'm heartless when it comes to big  
9 companies, we just need, if we're going to run this system,  
10 this constitutional system of criminal justice, we've got to  
11 we have to have jurors, period. So that's where I'm coming  
12 from.

13 We'll do one more and then we'll take our break.

14 Mr. Fluke, that is John Fluke, 20. Of the John  
15 Fluke--

16 JUROR 20: Yes, sir,

17 THE COURT: So what is it?

18 JUROR 20: Well, it's not about John Fluke. It's  
19 about the company, it's about Cell Therapeutics. I'm  
20 chairman of the board and as of this date, last count we had  
21 11 class action lawsuits in progress.

22 THE COURT: Wait a minute. Start over with that  
23 again. What board is this?

24 JUROR 20: Cell Therapeutics, Incorporated.

25 THE COURT: Adrienne's husband is a cardiologist.

1 She whispered to me. She will tell me later.

2 Okay. Why don't I come back to you then. I'll hear  
3 what Adrienne has to say, and maybe I'll shorten this up.

4 So we'll take our 15 minute break. Adrienne is going  
5 to take you all back down. And this is a big hassle, but it  
6 has to be. So she is going to take you all back down to the  
7 jury room. You'll sit there for ten minutes, and you will  
8 be getting up and coming back up.

9 (RECESS)

10 THE COURT: Somehow we lost 15 minutes, which is too  
11 bad. What we're going to do is go until noon, which is just  
12 a half an hour. I'm going to try to speed this up. And  
13 then we're going again at one o'clock, instead of 1:30.  
14 Which is 1:30 is the usual court time for an hour and a half  
15 lunch. We're going to come back at one o'clock so we can  
16 get as far as possible. We certainly want this jury seated  
17 sometime tomorrow, and so all but 14 of you will be out of  
18 here. So I just want to make sure you understood that.

19 Okay. Mr. Fluke, Adrienne told me all about Cell  
20 Therapeutics. Then I realized I knew all about it myself,  
21 just needed to jog my memory. But you're a board member, I  
22 understand there's litigation involving that company. So  
23 does that make it a hardship for to you serve as a juror?

24 JUROR 20: Well, I am a chairman of the audit  
25 committee and--

1 THE COURT: Of the what committee?

2 JUROR 20: Audit committee. And the board has  
3 assigned us the job of overseeing the response to this  
4 litigation. So we've had a series of meetings. There is a  
5 meeting scheduled on the 12th and 13th and 19th of April,  
6 nine a.m, 12 noon respectively.

7 THE COURT: Okay. That's the audit committee?

8 JUROR 20: Yes.

9 THE COURT: That is what I mean. And there's  
10 auditors working there now thinking things out, what  
11 happened, right?

12 JUROR 20: Independent auditors. What they are  
13 supposed to do. But it's not their job to deal with this,  
14 nor actually can they.

15 THE COURT: Tell me that again

16 JUROR 20: Auditors are not involved in response to  
17 the situation, but--

18 THE COURT: What I'm hearing is how can you--the  
19 12th--let me see. The 12th, 13th and 14th, That's Tuesday.  
20 12th, 13th and 19th. Okay. Those are all court days for  
21 sure. What happens if you're--I mean, how long are these  
22 meetings going to last?

23 JUROR 20: Well, they are a little bit unpredictable,  
24 and they involved our New York attorneys as well as Seattle  
25 attorneys and San Francisco attorneys, and so getting all

1 these things squared away is pretty difficult. We managed  
2 to do these three dates.

3 THE COURT: So you've got, just to summarize, you've  
4 got this audit committee, that audit committee is a  
5 committee of the board?

6 JUROR 20: Yes.

7 THE COURT: And you are the chair?

8 JUROR 20: Yes.

9 THE COURT: How many are on the committee?

10 JUROR 20: There's Phil Nudelman.

11 THE COURT: Nudelman of Group Health.

12 JUROR 20: And Max Lang, and actually in Zurich on  
13 the German board, so--

14 THE COURT: And so then you're getting together with  
15 the New York attorneys on these three days, is that it?

16 JUROR 20: Yes.

17 THE COURT: And anybody else?

18 JUROR20: Members of management, as we call them.

19 THE COURT: And the attorneys are preparing for  
20 litigation that is coming up?

21 JUROR 20: Right.

22 THE COURT: Maybe. Unless the case is resolved.

23 JUROR 20: Unless a judge like yourself will dismiss  
24 it. There's one other conflict. On April 26th is the  
25 PACCAR annual meeting, annual shareholders' board meeting.

1 I'm the not chair of the audit committee, but I'm the audit  
2 committee financial expert so my presence is required.

3 THE COURT: That's on April 26th?

4 JUROR 20: Yes, the 26th.

5 THE COURT: That is two weeks, Tuesday. Okay. Big  
6 important meetings. Okay. Thank you.

7 So now we go to number 22. Mr. Blanchette.

8 JUROR 22: Yes, my concerns or reasons would be  
9 twofold. One would be medically related and the other would  
10 be job related, and the interplay between the two. I'm  
11 project manager, I have a number of projects.

12 THE COURT: For?

13 JUROR 22: For HDR Engineering.

14 THE COURT: Are you an engineer?

15 JUROR 22: Yes, I am. And these are very large  
16 projects. They are regional projects in excess of hundreds  
17 of millions of dollars, and so I am a key person in that  
18 process, in those projects. We have meetings scheduled  
19 throughout the month that I'm expected to be in attendance,  
20 present, and I have a lot of history with these projects so  
21 that makes me a key person there. So I know that I will  
22 have to be putting in a lot of time outside of the courtroom  
23 either evenings, mornings and weekends, too.

24 THE COURT: To keep up?

25 JUROR 22: To keep up. And the medical related part

1 of this is that I do have a heart condition which I manage  
2 with medication, but in times of stress there is a risk of  
3 having an event, which I've had before, and I would like to  
4 avoid that if at all possible.

5 THE COURT: Well, types of stress, let me ask,  
6 because the last thing that anybody wants, obviously,  
7 because this is our court, all of us, it's not just me, but  
8 any of us would not want to jeopardize anybody's health.  
9 But the stress, I mean, it could be stressful here serving  
10 on a jury, but it's more intellectual.

11 JUROR 22: I think it would be a combination, I think  
12 it would be more how to get everything done and make sure  
13 that I have sleep and that kind of thing. I can provide you  
14 the condition, if that is needed.

15 THE COURT: Okay. So summing it up, you're the  
16 project manager for HDL Engineering, which builds water  
17 supply systems into the hundreds of millions, and you are a  
18 key person, and you have a bunch of meetings scheduled over  
19 the next month. And it sounds like you could handle that.  
20 The part that's concerning is that to do all this, to serve,  
21 to spend the time on the jury that I have outlined, and to  
22 do your job, which because you are project manager, really  
23 cannot be put on hold, it has to keep going, would cause you  
24 stress, could cause a heart problem. Does that fairly  
25 summarize?

1 JUROR 22: Yeah.

2 THE COURT: Okay. Thank you very much.

3 Mr. Trelease.

4 JUROR 23: Your Honor, never mind.

5 THE COURT: You know, as you sit here--

6 (Applause)

7 THE COURT: Thank you very much. Thank you very  
8 much.

9 Number 26 is Ms. Rue.

10 JUROR 26: I have a preplanned prepaid vacation to  
11 Mexico for a wedding April 24 through April 30th.

12 THE COURT: Okay. It's a wedding for a friend of  
13 yours, huh?

14 JUROR 26: Yes.

15 THE COURT: April 20--

16 JUROR 26: 23rd through the 30th, that full week.

17 THE COURT: Where in Mexico?

18 JUROR 26: Outside of Puerto Vallarta.

19 THE COURT: That sounds pleasant. My daughter just  
20 got back from ten days in Chiapas, and there is still the  
21 Zappatistas are still down there. That's been peaceful for  
22 such a long time, but it's not that peaceful now. Actually,  
23 the Zappatistas have turned it into now sort of bandits and  
24 criminals, which often happens, I guess.

25 Number 32 is Ms. O'Donal.

1 JUROR 32: Yes. I have a preplanned and prepaid  
2 vacation for May 5th,

3 THE COURT: Where is that going to?

4 JUROR 32: To Dallas.

5 THE COURT: Where?

6 JUROR 32: Dallas.

7 THE COURT: Dallas, Texas?

8 JUROR 32: Um-hum.

9 THE COURT: Prepaid, you mean you bought your own  
10 airline tickets in advance?

11 JUROR 32: Yes, I did.

12 THE COURT: You have, what, family down there?

13 JUROR 32: Yes, I do.

14 THE COURT: There is no other reason to go to Dallas.  
15 I go to Abilene, Texas where my in-laws are. I think by May  
16 5th--it's a long shot that this case would be even still  
17 going on May 5th. Is it the evening or the morning?

18 JUROR 32: Morning.

19 THE COURT: Morning. That is Thursday.

20 Okay. Ms. Bergquist, number 34.

21 JUROR 34: Prepaid vacation.

22 THE COURT: When?

23 JUROR 34: May 4. It's my anniversary. We're going  
24 to Palm Springs.

25 THE COURT: Palm Springs. And when is it, May four?

1 JUROR 34: May 4, morning of May 4.

2 THE COURT: And the prepaid, again, is a plane  
3 ticket?

4 JUROR 34: Airplane, hotel. Another couple, also.

5 THE COURT: And it's your wedding anniversary?

6 JUROR 34: Right.

7 THE COURT: These prepaid airlines tickets, all of  
8 us, unless we have a death in the family, are something I  
9 guess we buy our airlines tickets in advance. You can  
10 obviously change those, usually costs 50 bucks, but you've  
11 got a hotel and you've got another couple making these  
12 plans?

13 JUROR 34: Right.

14 THE COURT: And the May 4 morning you're leaving?

15 JUROR 34: Correct.

16 THE COURT: I mean, to keep you on the jury would be  
17 a gamble on my part. We're going to have two alternates,  
18 and so if by some chance the case should go that long, you  
19 know, and we had a real crisis, we could put in an  
20 alternate. So anyway, I'm thinking out loud

21 JUROR 34: That would be fine.

22 THE COURT: Okay number 35, Mr. Suhr.

23 JUROR 35: Suhr. If I don't work, the Office of  
24 Support Enforcement, they'll get mad at me.

25 THE COURT: The Office of Support Enforcement for the

1 State of Washington?

2 JUROR 35: Yes, sir,

3 THE COURT: Who is your supervisor?

4 JUORR 35: Actually, they want their money, and they  
5 take it out of my check. I work for myself and at the  
6 Muckleshoot Indian casino.

7 THE COURT: Oh, I see. You don't work for the Office  
8 of Support Enforcement?

9 JUROR 35: No, no.

10 THE COURT: I was just about to absolutely cross your  
11 number off the list here because I know any State of  
12 Washington employee can forget it as far as asking. Okay.  
13 But you work for the Muckleshoot Indian casino.

14 JUROR 35: If Support Enforcement doesn't get their  
15 money from my check, then I get in trouble by them.

16 THE COURT: And the Muckleshoot casino doesn't give  
17 you paid time off for your duty?

18 JUROR 35: It all depends on.

19 THE COURT: On what?

20 JUROR 35: Like on the security officer, if I have to  
21 go testify in a deal for them, yes, I do get paid, but I'm  
22 not sure on this.

23 THE COURT: Okay. Who is your supervisor there?

24 JUORR 35: Rocky Oliver.

25 THE COURT: Okay. What is his telephone number?

1 JUROR 35: 804-4444, extension 3101.

2 THE COURT: 804-4444, extension 3101.

3 THE COURT: 3101.

4 THE COURT: Okay. Thank you.

5 Mr. Rizk.

6 JUROR 37: Yeah. Next week is spring break, Your  
7 Honor, for our kids, and we have tickets to go down to  
8 California. And this trial goes into May. My job requires  
9 me to travel. I'm scheduled to be in Chicago for the first  
10 week of May.

11 THE COURT: Okay. So spring break for your kids next  
12 week, and you've got tickets to go to California?

13 JUROR 37: Yes, Your Honor.

14 THE COURT: Airline tickets?

15 JUROR 37: Yes.

16 THE COURT: Are you going to Disneyland? And then  
17 you've got a trip to Chicago for work on the first week of  
18 May. How old are your kids?

19 JUROR 37: They're eight and ten.

20 THE COURT: That would be kind of tough to deprive  
21 them of Disneyland at that point in their lives. I think  
22 that's when I went to Disneyland, when I was ten.

23 Ms. Sanders.

24 JUROR 38: Yes.

25 THE COURT: Mr. Sanders. Leslie Sanders.

1 JUROR 38: Yes. Lots of people get fooled by that  
2 first name.

3 THE COURT: Okay

4 JUROR 38: I have a prepaid package to Las Vegas. I  
5 leave on the 30th of April and return on the 5th, my wife  
6 and I and another couple. It's air, hotel and car package.

7 THE COURT: What are the terms of the cancellation  
8 for that week?

9 JUROR 38: It is nonrefundable, period. We did an  
10 online booking. It's nonrefundable.

11 THE COURT: But, I mean, you can pay-- say the  
12 tickets are nonrefundable, but can you pay a little extra  
13 and they can switch it, is that possible here?

14 JUROR 38: Well, I don't know if it's possible, but  
15 there's another couple involved that are also--they have  
16 scheduled vacation time, so I'm retired so it makes no  
17 difference to me, but they have scheduled vacation time.

18 THE COURT: Okay. Number 39, Mr. Smith.

19 JUROR 39: Yes. My company doesn't pay for my time.

20 THE COURT: What company?

21 JUROR 39: For me to be here. It's name is Webber  
22 and Thompson.

23 THE COURT: What kind of company is that?

24 JUROR 39: It's an architectural office.

25 THE COURT: Are you an architect?

1 JUROR 39: I'm an architectural intern.

2 THE COURT: Architectural intern. I mean, you are a  
3 paid employee of the office, though?

4 JUROR 39: I'm a paid employee, but I don't have a  
5 license to practice architecture, but I work as a paid  
6 employee.

7 THE COURT: Do you have a family?

8 JUROR 39: I'm single.

9 THE COURT: How do you know Webber and Thompson  
10 doesn't pay for jury service?

11 JUROR 39: I checked the company's employee manual.

12 THE COURT: How big a company?

13 JUROR 39: It's about 55 people.

14 THE COURT: Who is the human resource manager?

15 JUROR 39: Let's see. I think you'd probably talk to  
16 Blaine Webber.

17 THE COURT: Wayne?

18 JUROR 39: Blaine, B-L-A-I-N-E, Webber.

19 THE COURT: What is his telephone number?

20 JUROR 39: I don't know his direct line, but the  
21 office number is 344-5700.

22 THE COURT: Thank you. Mr. Babbitt.

23 JUROR 40: Yes, I begin a new job on April 25th.

24 THE COURT: What new job?

25 JUROR 40: I'm going to be a CT technologist,

1 operating a CT scanner.

2 THE COURT: Where?

3 JUROR 40: Northwest Hospital and Medical Center.

4 It's up near Northgate.

5 THE COURT: Northwest Hospital, did you say?

6 JUROR 40: Northwest Hospital and Medical Center.

7 And it's located--

8 THE COURT: Oh, yeah, I know where it

9 JUROR 40: --just north of Green Lake. It's near  
10 Northgate.

11 THE COURT: Okay. Who are you working for as a CT  
12 scanner?

13 JUROR 40: Well, my manager's name will be Charles  
14 Nagle.

15 THE COURT: Okay. Are you working now?

16 JUROR 40: Yeah, I work at that hospital now. I take  
17 X-rays.

18 THE COURT: Okay. Well, I mean, there's other CT  
19 scanners there, right? I mean, you're not going to be the  
20 only one?

21 JUROR 40: Yeah, yeah, there are other techs.

22 THE COURT: So you just have to--you basically start  
23 this new job April 30th?

24 JUROR 40: 25th.

25 THE COURT: So if you are on the jury, somebody else

1 would have to do that job for a week or so? That is about  
2 what it boils down to?

3 JUROR 40: Yeah, there will be a training period, so  
4 I would be working with a mentor for a month or two, until  
5 I'm trained and can operate unsupervised.

6 THE COURT: Okay. Thank you.

7 Ms. Takekawa-To, correct?

8 JUROR 42: Yes. I work for a small non profit. Our  
9 cash flow is very tight, and my job is to raise money and I  
10 need to work.

11 THE COURT: What non profit do you work for?

12 JUROR 42: Wing Luke Asian museum.

13 THE COURT: Oh, really. I know the director.

14 JUROR 42: That's okay with me. He's on leave right  
15 now.

16 THE COURT: I performed a wedding for her best  
17 friend. What is her name, now, what is the director's name?  
18 I know her, but I'm trying to--

19 JUROR 42: Ron Chew.

20 THE COURT: Yeah, okay. So what you're saying is you  
21 have to raise the money and you couldn't do that, you  
22 couldn't spend as many hours doing that if you had to spend  
23 half your time here on the jury, right?

24 JUROR 42: Right.

25 THE COURT: Number 43, Ms. Quint.

1 JUROR 43: I have prepaid for five non refundable  
2 airline tickets and hotel and a car to take my daughter and  
3 her family on a vacation for spring break, and they are in  
4 three different school districts, and for them to all have a  
5 spring break at the same time is difficult, so we have  
6 trouble scheduling this vacation.

7 THE COURT: Where are you going?

8 JUROR 43: Palm Springs. Also, I have not been able  
9 to hear any of the conversation going on in this room.

10 THE COURT: Really, you have hearing problems?

11 JUROR 43: I guess so.

12 THE COURT: You didn't know about it before?

13 JUROR 43: I knew it was marginal, but I'm having a  
14 terrible time hearing what anybody is saying.

15 THE COURT: Okay. It's different than--I mean, if  
16 you didn't know, it's probably one problem, see these little  
17 black things on the tables and in front of the jury box  
18 there are microphones, so all the trial, of course, takes  
19 place up here. None of it takes place back there where you  
20 are sitting

21 JUROR 43: That won't be a problem.

22 THE COURT: I think now there's plenty of  
23 amplification in this room and if there wasn't, we have  
24 special equipment for the hard of hearing. What it  
25 does --sounds like you are hard of hearing. It sounds like

1 we've got bad acoustics here, is basically--

2 JUROR 43: The other thing is if I could be excused  
3 for the 11th, 12th and 13th of April I could be available  
4 for the rest of the time.

5 THE COURT: Number 45 is Ms. Petaia.

6 THE COURT: How do pronounce your first name?

7 JUROR 45: Ilaoa.

8 THE COURT: Is that Samoan?

9 JUROR 45: Yeah.

10 THE COURT: Okay. What is going on?

11 JUROR 45: My job can only guarantee to pay ten days  
12 of jury duty. And after ten days, that will be a hardship  
13 for me.

14 THE COURT: What where do you work?

15 JUROR 45: Clark American.

16 THE COURT: Are they a truck manufacturer?

17 JUROR 45: No, it's a check printing company.

18 THE COURT: Okay. And do you have a family?

19 JUROR 45: No, I'm single.

20 THE COURT: So you're single. So let's say if this  
21 trial-- I mean, ten days of actual time in trial, of course,  
22 we're losing two days here, so that would leave you with  
23 eight days, and it would probably be another six or seven  
24 days you'd go without pay. What is the human resources guy  
25 there, what is his name or person?

1 JUROR 45: The lady is Dana.

2 THE COURT: Do you have her number?

3 JUROR 45: Area code 253--

4 THE COURT: In Tacoma? Is she in Tacoma?

5 JUROR 45: No, here in Seattle, Kent.

6 THE COURT: 253--

7 JUROR 45: 872-8828.

8 THE COURT: Okay. Got a lot of phone calls to make  
9 so I'm hoping we'll get through them. Okay.

10 Number 46, Ms. Ballew--

11 Is there anything else you want to say?

12 JUROR 45: That's it.

13 THE COURT: Okay. Thank you. Ms. Ballew, 46.

14 JUROR 46: I get severe migraine headaches. I suffer  
15 from migraine headaches three to six days of the week, and  
16 when I get one I can't really function and I have to take  
17 medicine that makes me either sick or I have to just go and  
18 lie down.

19 THE COURT: Three to six days a week you get these?  
20 You are not having one now, though, obviously.

21 JUROR 46: Not yet.

22 THE COURT: Okay. Hopefully I haven't given you one.  
23 Okay. Are you okay?

24 JUROR 46: Yes.

25 THE COURT: What happens? I mean, is this really is

1 something that would make it just impossible for you if you  
2 had a headache, you know, where we couldn't really postpone  
3 the case for a day

4 JUROR 46: Right. Like I'm fine, and then when I get  
5 a headache I can take a pill and then, depending on which  
6 pill I take, it can be fine in half an hour, or I cannot be  
7 fine in a half hour and have to go to sleep, or I can get  
8 really sick. It depends on the day.

9 THE COURT: So it's touch and go basically if you are  
10 on this jury, you might make it through or maybe everything  
11 would come to a screeching halt if you had--

12 JUROR 46: And if I have one, I can't focus.

13 THE COURT: Okay. Thank you very much.

14 Number 47 is Mr. Schmidt.

15 JUROR 47: Your Honor, I have two issues. The first  
16 is that one of my cousins has terminal cancer, and then last  
17 night he has so many hours or days to live. I expect to  
18 need to be in Oregon sometime in the next week.

19 THE COURT: Okay.

20 JUROR 47: Second point is I am an attorney in a  
21 three-person firm. One of my clients is expecting me in  
22 Alaska sometime in the next two to three weeks for a  
23 negotiation. The date is not yet set because the other side  
24 has not set the date and they are waiting for their  
25 customer, but at some point I'll be expected to be there,

1 which, unfortunately, overlaps with the time in this case.

2 THE COURT: Okay. I'm not so concerned about that as  
3 I am your cousin. I mean, you're planning to go down there  
4 and be with your cousin?

5 JUROR 47: I am planning on being there for the  
6 funeral. Timing is such he may be gone now, I simply don't  
7 know yet.

8 THE COURT: Okay. You don't know when the funeral  
9 would be because he's not dead yet. Okay.

10 The last one for this morning is Mr. Darby, number  
11 51.

12 JUROR 51: Yes, Your Honor. I was supposed to be on  
13 jury duty earlier this year but I had ended up having to  
14 postpone it because I had shoulder surgery. During the time  
15 of that surgery they found out I need to go see a  
16 specialist, and I just saw the specialist on Friday and they  
17 just made arrangements for me to have a biopsy of my liver  
18 next Wednesday, and I'll be down for like three or four  
19 days.

20 THE COURT: Okay. I think we have time for one more.  
21 Number 56. Mr. Rutherford.

22 JUROR 56: Yes, right here. I'm a lead engineer  
23 working on a project up in British Columbia, and work for  
24 Akers International. The project involves renovation of an  
25 old hydroelectric project with the city of Palmer, and--

1 THE COURT: The Powell River. That is in Alaska. I  
2 thought that was in Canada

3 JUROR 56: Yeah, Canada, Alaska, but British Columbia

4 Someone else had said Alaska. I've been intimately  
5 involved in the planning of this project. They have a deep  
6 watering hydro facility beginning in early May, and during a  
7 two week period have to go in and repair some damage to the  
8 penstock actually cover some areas where there's some  
9 penetration, and it's all has to be orchestrated very  
10 carefully because there's some danger to workers involved,  
11 and now structural solution, and there is like no one else  
12 in my office who knows the projects as well as I do. Every  
13 Thursday there is a meeting, with all our clients, Powell  
14 River energy and North Sea Canada mill, but the project in  
15 the middle, a paper mill, so that's completely involved with  
16 that, and so--

17 THE COURT: The project--okay. I'm sorry? I know  
18 what it is, and I've gone over the Powell River, and I've  
19 seen the paper mill and the logs floating. And so what's  
20 the--tell me again what--this is in the paper mill, is that  
21 right?

22 JUROR 56: It's in the paper mill. There's three  
23 hydroelectric projects built in the twenties. They're  
24 inside the paper mill and they've been poorly maintained for  
25 many decades by the paper mill. Our client, Powell River

1 Energy, is working on issuing dam safety and, you know,  
2 safety in the power house and trying to make repairs, and  
3 I've been kind of a key member of a team that's planning  
4 this work.

5 THE COURT: This work is going to happen in the first  
6 part of May, is what you said?

7 JUROR 56: That is right. Every Thursday we have a  
8 meeting and, you know, I'm sort of scheduled.

9 THE COURT: So a Thursday meeting is the only thing  
10 that really interferes with jury service for you, for the  
11 rest of this month, at least these Thursday meetings, is  
12 that fair to say?

13 JUROR 56: That is critical about putting extra time  
14 in, in order to keep up with things, so--

15 THE COURT: So being something that they expect you  
16 to put extra time in. Okay. Thank you very much.

17 So we're going to start with 57 at one o'clock this  
18 afternoon, so that will kind of rush you a little bit for  
19 lunch, but I know we all want to get through this. So I'll  
20 see you this afternoon.

21 And Counsel, I'd like to see you for a little bit  
22 right now.

23 (PROSPECTIVE JURY PANEL ABSENT)

24 THE COURT: Counsel, are we agreed on this, we get  
25 finished with people, excuse the people we agree on, and

1 then I'm going to send them down to fill out their  
2 questionnaires. Is that right?

3 MR. MINOR: Yes, Your Honor.

4 MR. COOK: Yes.

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## 1 AFTERNOON SESSION

2 (PROSPECTIVE JURY MEMBERS PRESENT)

3 THE COURT: Okay. Our schedule is I've got about 13  
4 or 14 more jurors to question individually, then I will  
5 excuse some jurors. Certainly, not by any means, all the  
6 jurors that would be excused because they've asked to be,  
7 but there will be some that are going to be excused. The  
8 rest of you will be sent back to the jury room to fill out a  
9 questionnaire that will be used by the attorneys in  
10 questioning you, and that will take probably a half hour.  
11 Then we'll come back and continue with the jury selection.

12 But just to finish up this first phase here, I want  
13 to go back to you, Mr. Rutherford. I have this letter from  
14 Mr. Reed and had some questions about it. The Powell River  
15 Energy, Incorporated has requested that you attend a meeting  
16 tomorrow. Is that meeting in Powell River?

17 JUROR 56: It is, yes.

18 THE COURT: Why do you have to go? Why can't it be  
19 done on the phone, and why couldn't it be done Friday?

20 JUROR 56: They have the meeting every Thursday, a  
21 lot of people are involved. You know, there's--

22 THE COURT: I mean, from where, from Seattle or  
23 Powell River?

24 JUROR 56: No, Powell River, from the mill, quite a  
25 few different people from the mill who have different roles,

1 and then representatives from Powell River Energy,  
2 Incorporated and so I've made some arrangements if I can't  
3 go.

4 THE COURT: Oh, good. Okay

5 JUROR 56: It's difficult because they would want me  
6 there.

7 THE COURT: I understand that. No, I mean,  
8 absolutely, I'm sure they want you there, I'm sure it's  
9 important you be there, but everybody has something  
10 important to do, except I have this. It's important. But  
11 okay. Then the other question is I have this letter is  
12 we're concerned because the project is slipping behind  
13 schedule. What does that mean? I mean, does that  
14 mean--once again, we all have projects that are slipping  
15 behind schedule, you know, because we're here or because we  
16 haven't gotten around to it, or because something else has  
17 come up. I mean, is it more than that?

18 JUROR 56: Well, there is an outtake plant for this  
19 power plant, and they have very specific dates for it to be  
20 now dewatered, to do the work, and so there's that hard  
21 point where we have to get all the work done necessary to  
22 make that successful. And this is now--it's one of the  
23 power plants that supplies electricity to the community for  
24 Powell River and the mill, so all of this needs to be pretty  
25 well carefully coordinated.

1 THE COURT: I mean, is this going to--is your absence  
2 going to make it--I mean, right now it's on schedule, right?

3 JUROR 56: We're just on schedule.

4 THE COURT: And if you are absent at this meeting  
5 tomorrow and you are sitting here as a juror for the next  
6 two and a half or three weeks, is it going to slip further  
7 behind schedule or is it going to slip--you are on schedule.  
8 How far behind schedule is your absence going to make it?

9 JUROR 56: Well, I'm the one who is doing the  
10 scheduling.

11 THE COURT: So you can set the schedule for whatever  
12 you want, basically?

13 JUROR 56: You have to make it work for one guy to  
14 have the opportunity to do the work, so it's a lot of  
15 coordination. So, you know, we're now working on updating.  
16 The schedule will have to be sent to someone else to present  
17 tomorrow if I'm not there.

18 THE COURT: Okay. Got it. Okay.

19 Number 57. Mr. Bergstrom.

20 JUORR 57: Yes. I'm a biology professor at the  
21 University of Washington. I request a reschedule. The  
22 courses that I'm teaching this quarter, our off time on the  
23 4th of May, though I'm currently scheduled to travel out to  
24 the east coast to give a pair of invited lectures, one at  
25 the University of New Hampshire on the 5th of May, one in

1 Washington, D.C. on the 8th of May, which is indeed a  
2 Sunday.

3 THE COURT: Okay. So you'd be leaving the evening of  
4 May 4?

5 JUROR 57: Morning of May 4.

6 THE COURT: Morning. That's for the University of  
7 New Hampshire?

8 JUROR 57: Correct.

9 THE COURT: Okay. Number 59, Mr. Marshall.

10 JUROR 59: Yes. My wife and I are sole proprietors  
11 of a book store in Seattle.

12 THE COURT: What book store?

13 JUROR 59: Episcopal book store.

14 THE COURT: Oh, okay.

15 JUROR 59: We have difficulty once a year getting one  
16 week off, arranging schedules so we can have a week  
17 vacation. Three or four weeks now for me, which is  
18 basically half the store, would really be difficult for us.

19 THE COURT: Okay. You have no other employees in the  
20 store?

21 JUROR 59: We have five part time college students.

22 THE COURT: Where is it located?

23 JUORR 59: Fremont, between Fremont and Wallingford.

24 THE COURT: And this is the Episcopal book store?

25 JUROR 59: That is correct.

1 THE COURT: Okay. Thank you.

2 Number 62, Ms. Hayne.

3 JUROR 63: Yes, Your Honor. I'm fine. You answered  
4 my question about the May 6, so I'm good.

5 THE COURT: Let's give her another hand.

6 (Applause)

7 Okay. Mr. Richter.

8 JUROR 63: Yes. I have a family event scheduled out  
9 of state on the first of May, and I have, like some others,  
10 purchased tickets and they are not refundable.

11 THE COURT: Where out of state is it?

12 JUROR 63: It's in southern California, San Diego.

13 Family event, it's a one-time event that brings aunts,  
14 uncles, grandparents.

15 THE COURT: Like a family reunion?

16 JUROR 63: It's a first communion for a grandson, and  
17 everyone is coming to see that.

18 THE COURT: Okay. May 1st is Sunday.

19 JUROR 63: We are leaving on the 28th.

20 THE COURT: The day we have half a day off, right?

21 THE BAILIFF: No, that is the 21st.

22 THE COURT: And coming back when?

23 JUROR 63: On the 3rd.

24 THE COURT: Okay. Thank you.

25 Mr. Berzin.

1 JUROR 64: For the past few months I've been  
2 struggling with substance abuse problems, and it's been  
3 increasingly harder for me to function at work and just  
4 general life, as you can imagine. And as of Monday I  
5 decided to do a self-imposed detox. And the past few days  
6 I've been struggling with the symptoms involved with that.  
7 I've been through it before, unfortunately, and I'm  
8 feeling--I know that I'll have trouble concentrating as a  
9 normal person.

10 THE COURT: I certainly appreciate your frankness.  
11 And good luck on that.

12 Okay. Mr. Rockafeld, number 68

13 JUROR 68: Yes, Your Honor. I am a single father of a  
14 12 year old boy who is on spring break next week, and I am  
15 on vacation as well. And if I am not there to watch him, no  
16 one else is able to.

17 THE COURT: Okay. You guys going to do anything  
18 together?

19 JUROR 68: We will remain within the state. We don't  
20 have any airline tickets, but we will be traveling out to  
21 the ocean.

22 THE COURT: Okay. Number 69, Ms. Nielsen.

23 JUORR 69: I have a family reunion and wedding in  
24 Utah last week of April, and have non-refundable tickets for  
25 my husband and myself April 26 to be gone for a week.

1 THE COURT: I understand this is a really bad time  
2 because the spring break is included in this. Lots of  
3 people make plans.

4 Okay. Number 70, Ms. Jenkins.

5 JUROR 70: Yes. Right now I'm going to school. I  
6 have a morning class and an evening class, and I also have a  
7 prepaid vacation trip.

8 THE COURT: Let's talk about school first. What  
9 school?

10 JUROR 70: I'm going to two schools right now. South  
11 Seattle and Green River Community College.

12 THE COURT: And what, Green River?

13 JUROR 70: Yes. Green River Community College.

14 THE COURT: What are the classes?

15 JUROR 70: I'm taking English at Green River on  
16 Mondays and Wednesdays, which I'm missing that class right  
17 now, and taking microbiology on Tuesdays and Thursday  
18 nights.

19 THE COURT: You studying to be a nurse or--

20 JUROR 70: Nurse.

21 THE COURT: And when is the microbiology class?

22 JUROR 70: It's at night, Tuesdays and Thursdays.

23 THE COURT: So you can go to that?

24 JUROR 70: Yes.

25 THE COURT: When is the English class?

1 JUROR 70: It's in the mornings on Mondays and  
2 Wednesdays.

3 THE COURT: What time?

4 JUROR 70: From 10:15 to 12:30.

5 THE COURT: Mondays and Wednesdays?

6 JUROR 70: Yes.

7 THE COURT: Okay. So you wouldn't have to miss the  
8 microbiology class, but you would have to miss the English  
9 classes for three weeks. Okay. Then what is this prepaid  
10 vacation?

11 JUROR 70: I'm going to Jacksonville, Florida on the  
12 21st and returning on the 26th this month.

13 THE COURT: That is to visit family?

14 JUROR 70: Immediate family there, yes.

15 THE COURT: What are the dates?

16 JUROR 70: The 21st, leave on the 21st, coming back  
17 on the 26th of month.

18 THE COURT: So you're missing one of your--

19 JUROR 70: One of my English classes, yes, sir,

20 THE COURT: And you've got the tickets?

21 JUROR 70: Yes. Tickets and hotel. And they are  
22 non-refundable.

23 THE COURT: Okay. Number 74, Ms. Okigwe?

24 JUROR 74: Actually, I'm okay.

25 THE COURT: Great. Another hand.

1 Okay. The last one is Ms. Sefrioui.

2 JUROR 75: Your Honor, my manager quite on me.

3 THE COURT: You're what?

4 JUROR 75: My manager quit, so since first of April  
5 so I don't have a manager for my store.

6 THE COURT: You have--wait a minute. Your manager  
7 quit?

8 JUROR 75: Yes.

9 THE COURT: Manager of what?

10 JUROR 75: I have a store. I have a retail store,  
11 candy store, in Seattle Center.

12 THE COURT: You own the candy store?

13 JUROR 75: Yes.

14 THE COURT: And your manager quit?

15 JUROR 75: Yeah.

16 THE COURT: And how many employees do you have?

17 JUROR 75: On weekdays I have two.

18 THE COURT: And is either one capable of--I mean, do  
19 they have to be supervised, do you go there every day?

20 JUROR 75: Yeah, I have to open at morning, close at  
21 night, do paperwork and supervise.

22 THE COURT: And are these employees capable of doing  
23 that, or since your manager is gone you're the only one that  
24 can do it?

25 JUROR 75: Right. They cannot do it. They are not

1 trained to do that.

2 THE COURT: Okay. I want to meet with counsel again.  
3 This will be a very brief meeting, and then we'll come out  
4 and we'll excuse some people, and then we'll send the rest  
5 of you down to the do the questionnaires. But let me meet  
6 with counsel.

7 (SIDEBAR CONFERENCE)

8 THE COURT: Our first wave of let go excusals --a  
9 word I just made up --is 21 people that by no means  
10 is--we've still got a lot of spare people, so I'm going to  
11 be excusing more people later, but we're going to do the  
12 questionnaires, see how those come out and see how many more  
13 we can excuse. Again, we need 14 people, and we need eight  
14 challenges, and then we need some more people because there  
15 may be challenges for cause for one reason or another. So  
16 to pick the jury we need something like 40 to 45 people.  
17 And we still have got some room there. But first I want to  
18 thank those of you that showed up, and I'm about to excuse  
19 you, your jury service is not over, you have to go down to  
20 the jury room. You may get sent out on a short trial either  
21 this afternoon, although probably not. I don't know what is  
22 going on this afternoon or tomorrow, so you're excused from  
23 this case, you are not excused from jury service.

24 So Adrienne, if you'd stand by the door and collect  
25 the numbers of these people as they go.

1           And thank you for being in my court. I call it my  
2 court, it's really the county's court. But you get to  
3 feeling proprietary up here. Anyway, here are the people  
4 that we are excusing in the first go around. Ms. Tott,  
5 number 7. Hit a bear for all of us. But be careful up  
6 there.

7           Okay. And number 9, Ms. Marstone. And number 13,  
8 Ms. Starikov. And number 22, Mr. Blanchette. Number 26,  
9 Ms. Rue. Number 34, Ms. Bergquist. Number 37, Mr. Rizk.  
10 Unusual name

11           JUROR 37: Thank you.

12           THE COURT: Thank you. Okay. Number 38, Mr.  
13 Sanders. Number 43, Mss. Quint. Number 46 Ms. Ballew.  
14 Number 47, Mr. Schimdt. Number 51, Mr. Darby. Number 56,  
15 Mr. Rutherford. And go up there to Powell River and tell  
16 them what a hard time I gave you.

17           JUROR 56: Thank you.

18           THE COURT: Okay. We're not going to make you miss  
19 your invited lectures, Mr. Bergstrom, but we're going to  
20 keep you here for a while.

21           Okay. Number 59, Mr. Marshall

22           JUROR 59: Thank you.

23           THE COURT: Number 63, Mr. Richter. Number 64, Mr.  
24 Berzin. And thank you again for being open with us. It's  
25 hard. Number 68, Mr. Rockafield. Number 69, Mr. Neilsen.

1           Number 70, Ms. Jenkins. And number 75, Ms. Sefrioui.

2           Okay. Now, do not despair, those of you that feel  
3 that you had better excuses, and some of the people I let go  
4 I'm sure there are some of you. We are going to make every  
5 effort not to keep anybody here against their will. For one  
6 reason, it's tough to be a good juror if you are not mad as  
7 heck, and not--

8           THE BAILIFF: Mr. Minor.

9           THE COURT: Yes, Mr. Minor?

10          MR. MINOR: Did I miss somebody?

11                               (SIDEBAR CONFERENCE)

12          THE COURT: I skipped one number, 35, Mr. Suhr.

13          Okay. I hope I adequately instructed everybody to go back  
14 to the jury room. I did, didn't I? So those jury members  
15 will be back there.

16          I believe there's fifty-four left, which, as I said,  
17 is way more than we need even now, so we're in good shape.  
18 And more people are going to be excused, but we're going to  
19 have you fill out the questionnaires. These  
20 questionnaires--you know, this is not the college boards.  
21 It's important that you give adequate information, but the  
22 way they are used is the attorneys look at them--one of the  
23 questions, I believe, isn't there, on the questionnaire,  
24 counsel, a question that anybody wants to be talked to  
25 individually?

1 MR. MINOR: Yes.

2 THE COURT: That's on the questionnaire?

3 MR. COOK: That is correct.

4 THE COURT: Okay. So that is one thing we do. I  
5 mean, if there's--if you have personal information you are  
6 hesitant to share in front of a bunch of people, we will  
7 talk to you individually. There will still be the court  
8 staff here and the lawyers, but anybody that wants to have  
9 sort of a semi-private--and of course nobody will be allowed  
10 in the courtroom--question and answer session about  
11 something that they just don't feel real comfortable talking  
12 about in front of a group full of people, that will be part  
13 of it. The rest of it the lawyers will use these questions  
14 to, you know, figure out what kind of questions to ask what  
15 people, so they are just not facing you cold turkey. So  
16 that is the reason for this. And I say that so that you  
17 don't need to, you know, spend a whole lot of time on this,  
18 just fill it out as accurately as you can. And I don't have  
19 a questionnaire in front of me, but there's, what, twenty  
20 questions, something like that?

21 MR. MINOR: Seventeen.

22 THE COURT: Seventeen. Most of them are not long.  
23 Most of them are just yes or no answers, I guess. So that  
24 will be quick. Okay. So with all that, Adrienne will take  
25 you down to the jury room, give you the questionnaires. The

1 rest of the court will take their break right now, and then  
2 she will come down and pick up the questionnaires in about  
3 25 or 30 minutes. She will bring them up here, and then  
4 we'll give the attorneys 15 or 20 minutes to look through  
5 the question a little. And so the next time you'll all be  
6 back here --I mean, it's a quarter to two right now, it will  
7 be about a quarter to three, and then we're going to have  
8 a--first I'm going to ask some general questions, and then  
9 we have the first round of attorney questions. So that's  
10 our schedule. So you're basically not out of here for  
11 approximately 55 minutes. During that 55 minutes, please  
12 fill out the questionnaires. We'll see you about 20 minutes  
13 to three or so.

14 (PROSPECTIVE JURY PANEL ABSENT)

15 THE COURT: Counsel, I hope you have no place to go.  
16 Mr. Cook can obviously go to his office. Adrienne will  
17 call. I'd like you both back here immediately when we come  
18 up with the questionnaires, because here's what I'd like to  
19 do. I'd like to get them back at quarter to three, I'd like  
20 to ask my general questions, and then I'd like to give you  
21 each a half hour of voir dire time. I have a few more  
22 general instructions to read, too.

23 THE BAILIFF: I'm going to have to copy those, so  
24 it's going to take awhile.

25 MR. COOK: We need to go through the questionnaires

1 and find out who needs to be individually questioned.

2 THE COURT: If there's individual questions, we're  
3 not going to get started at all with any of it.

4 MR. COOK: Sorry to interrupt, Your Honor.

5 THE COURT: You're right.

6 MR. COOK: I would suggest once we get the  
7 questionnaires and have a chance to them, see who needs to  
8 be individually questioned, perhaps we can flag those people  
9 and begin with individual questions. But that will probably  
10 carry into tomorrow as well.

11 THE COURT: You are pessimistic, Mr. Cook. Okay. I  
12 just don't--I want to use every minute of this because it's  
13 a long case. If you don't use every minute in a long case,  
14 the case becomes impossible to run. Let's see, we're going  
15 to go and get the questionnaires back. So my only request  
16 to you then is to say be back here as soon as we have the  
17 questionnaires so you can get them to us. Be within one  
18 minute of the courtroom when Adrienne brings up the  
19 questionnaires.

20 MR. COOK: I would prefer to have an opportunity to  
21 review all of them and have counsel review them.

22 THE COURT: All 75 of them?

23 MR. COOK: Right.

24 THE COURT: Why?

25 MR. COOK: Well, so that we can then discuss it and

1 decide who needs to be individually questioned.

2 THE COURT: No. The only ones we're individually  
3 questioning are the ones that ask to be individually  
4 questioned.

5 MR. COOK: Okay

6 THE COURT: That's the only ones I'm going to allow  
7 individual questioning on is for the jurors, it's not for  
8 the parties.

9 MR. COOK: Okay.

10 THE COURT: It's for their privacy.

11 MR. COOK: All right. If you take them home and now  
12 somehow come back and make a huge good case to me that  
13 someone has to be individually questioned, I'll think about  
14 it, but that is for the jurors' privacy sake.

15 MR. COOK: Okay. Then will we have an opportunity to  
16 review all of the questions at that point?

17 THE COURT: No. I think as far as we're probably  
18 going to get today is through the individual questions.

19 MR. COOK: Right. Does the court intend to bring in  
20 everyone and release them except for the ten that need to be  
21 questioned?

22 THE COURT: No, I intend to bring in the ten that  
23 want to be questioned, see how long it takes us. If it  
24 takes us--if we can get done with it in a half an hour,  
25 maybe we can then --we've got a whole hour to get started on

1 other stuff.

2 MR. COOK: I've been accused of being pessimistic  
3 before.

4 THE COURT: While they are individually going through  
5 the individual questions, Jill could make copies of the rest  
6 of the questionnaires.

7 THE BAILIFF: Probably Jill has to be someplace, so  
8 I'm probably going to end up doing it.

9 THE COURT: Okay. I don't want to waste the jury's  
10 time. I want to give you time that you need to go through  
11 the questionnaires, too.

12 MR. COOK: I would anticipate that individual  
13 questionnaires, the individual questioning might take some  
14 time for each person.

15 THE COURT: Well, I'm only going to give you two,  
16 three minutes, I'm not going to let you go. I mean,  
17 questions of the--what I would anticipate is you ask  
18 individual questions, why do you want to be individually  
19 questioned. Because I was raped. You know, and then you  
20 talk about that. The rest of the questionnaires can be--I'm  
21 not going to allow questioning on all these general  
22 questions. I mean, this isn't like individual voir dire.  
23 This is only questioning for the reasons that they want to  
24 keep private.

25 MR. COOK: Right.

1 THE COURT: Did you hear everything I said, Mr.  
2 Minor. Are we on the same page?

3 MR. MINOR: Yes, Your Honor.

4 THE COURT: Okay. Are there any particular locations  
5 in south King County that I need to ask them whether they  
6 are familiar with?

7 MR. COOK: I don't think so, Your Honor.

8 THE COURT: Okay..

9 MR. COOK: Pacific Highway, counsel mentioned.

10 THE COURT: Yes. Are you familiar with Pacific  
11 Highway. Everybody is going to say they've driven on it.  
12 Do you want me to ask that, Mr. Minor?

13 MR. COOK: Pacific Highway.

14 MR. MINOR: Well, if the court doesn't, I will, but  
15 familiarity with the Des Moines area and Pacific Highway.

16 (RECESS)

17 THE COURT: Okay. Which one wants to be privately  
18 interrogated.

19 THE BAILIFF: The very last one, Your Honor, 17.

20 THE COURT: Oh, 17, I didn't turn the page.

21 First one. I'm looking at Juror 3 says no, she doesn't  
22 want to answer, her answer says, in great detail.

23 We don't need to question her.

24 MR. COOK: I hope I didn't jot down the wrong number.

25 THE COURT: Number 17 says she doesn't want to be

1 questioned. What is going on here? Does juror 3 want to be  
2 questioned outside the presence?

3 THE BAILIFF: That is what I got from Pat.

4 THE COURT: Okay. No. See, that is as far I've  
5 found two, number 3 does not need it, 41, and number 17 does  
6 not need it. Number 3 and number 17 should be taken back to  
7 the jury room. Jurors 3 and 17, take them back say sorry,  
8 we made a mistake.

9 THE BAILIFF: Check number 2. 2 came up here and  
10 said she asked to be--

11 MR. MINOR: That was my oversight. I probably--

12 THE COURT: Okay. Let's start with juror number 4,  
13 then.

14 (PROSPECTIVE JUROR 2 PRESENT)

15 THE COURT: You are here because you answered the  
16 last question on the questionnaire --have a seat --that you  
17 wanted to be talked to individually. Now, this has nothing  
18 to do with your desire to be excused. We'll get to that

19 JUROR 2: Yeah.

20 THE COURT: So, I will just open up the questioning,  
21 start with Mr. Cook. And let me ask the question. What is  
22 it that you wanted to talk about in sort of a more private  
23 setting?

24 JUROR 2: In 1989 I was date raped.

25 THE COURT: Okay. We'll start with that, then.

1 Mr. Cook.

2 MR. COOK: Thank you, Your Honor.

3 Do you think that that experience would impact your  
4 ability to be fair and impartial in this case?

5 JUROR 2: I really don't know.

6 MR. COOK: You mentioned it was 19--

7 JUROR 2: '89.

8 MR. COOK: Was that here in the United States, the  
9 Northwest?

10 JUROR 2: Yes.

11 MR. COOK: Okay. Is it something that was reported,  
12 did you report it to the police?

13 JUROR 2: No, because I thought I was the one at  
14 fault, because I ended up in a situation that I didn't want  
15 to be put in. And so I put the blame on myself.

16 MR. COOK: Okay. Did you ever tell anybody about it  
17 besides today?

18 JUROR 2: Just one friend, a long time ago.

19 MR. COOK: Okay. I don't think I have any more  
20 questions for you. Thanks.

21 THE COURT: Mr. Minor.

22 MR. MINOR: The matter that you answered yes to in  
23 terms of wanting to speak privately, does it relate to any  
24 other questions you were asked on the questionnaire, other  
25 than the matter you mentioned in terms of your feelings

1 about this kind of case?

2 JUROR 2: Also, because being victimized the last  
3 couple of months by the break in and, also my cousin being  
4 killed by the police on the 21st, so I don't know if I'm  
5 actually capable of really thinking, 'cause we just buried  
6 him this weekend.

7 MR. MINOR: One of the questions asked if you would  
8 tend to identify with the alleged victims of rape.

9 JUROR 2: I probably would.

10 MR. MINOR: And I'm asking, is that something you  
11 want to discuss out of the presence of other jurors?

12 JUROR 2: Yes. You all have to remember, in my  
13 culture, when I came, from about 22 years ago, rape is one  
14 crime that is punishable by death in the Philippines now.

15 MR. MINOR: Was there any other matter in particular  
16 that you wanted to discuss out of the presence of other  
17 jurors?

18 JUROR 2: I don't know what else is there right now.  
19 I can't really think.

20 MR. MINOR: I'm sorry.

21 JUROR 2: I'm just getting nervous.

22 THE COURT: Nothing to be nervous about. We're all  
23 here sort of privately.

24 JUROR 2: Yeah, 'cause it is very personal questions.

25 THE COURT: Yeah.

1 MR. MINOR: I'm sorry.

2 JUROR 2: It is very personal questions.

3 MR. MINOR: All right. You also indicated that you  
4 have a fear of being sexually assaulted even today. Is that  
5 correct?

6 JUROR 2: Pardon me?

7 MR. MINOR: You say you have a fear of being sexually  
8 assaulted even today?

9 JUROR 2: Assaulted, yes. Sexually, no. I could  
10 defend myself now.

11 MR. MINOR: I'm sorry?

12 JUROR 2: I know I could defend myself now.

13 MR. MINOR: My question is, is that something you  
14 wanted to discuss out of the presence of other jurors?

15 JUROR 2: Yes.

16 MR. MINOR: Thank you

17 THE COURT: Thank you very much.

18 Mrs. Estrella, you can go back to the second floor  
19 jury room. We will be calling all of you up as soon as we  
20 finish up the individual questions.

21 JUROR 2: Okay. Thank you.

22 THE COURT: The next one is number 4. Sorry.

23 (PROSPECTIVE JUROR 4 PRESENT)

24 THE COURT: I'm just go to ask you one question. Can  
25 you just give me roughly what it is that you have that you

1 would rather discuss outside the presence of--

2 JUROR 4: Well, my uncle was accused of rape. And I  
3 don't know if he was actually in a courtroom environment or  
4 not. I'm not really sure all the details about it, but just  
5 I know that basically broke my family up in some way,  
6 because my stepmom, it was her friend that was the accuser.  
7 And my dad obviously is married to my stepmom, so my grandma  
8 was pretty upset, as you can imagine, so that's basically  
9 why I don't want to share that with everybody.

10 THE COURT: Right. No, that's okay.

11 Mr. Cook.

12 MR. COOK: Did you indicate you don't know the  
13 details of it? But what information do you have about it?

14 JUROR 4: Well, I think it happened supposedly when  
15 he was a lot younger, like maybe after high school. I'm not  
16 really clear on that because I didn't ask really about that.  
17 But the consensus kind of in my family was that the girl was  
18 kind of crazy. But I don't know. Like maybe she was  
19 reaching for answers to her own problems or something.

20 MR. COOK: And do you know how long ago that was?

21 JUROR 4: I would suspect 30 years.

22 MR. COOK: And why did you hear about it? You  
23 learned about it from--

24 JUROR 4: From my sister and my grandmother.

25 MR. COOK: Okay. Is there anything else that you

1 wanted to talk about outside the presence of the other  
2 jurors?

3 JUROR 4: No.

4 MR. COOK: That is what triggered you to check the  
5 box?

6 JUROR 4: Yes.

7 MR. COOK: Do you think that experience would affect  
8 your ability to be fair and impartial deciding the case,  
9 considering what little information you have about this  
10 case?

11 JUROR 4: You know, I don't think so.

12 MR. COOK: Okay. At this point do you feel like you  
13 would favor one side over the other?

14 JUROR 4: Yeah, I don't know. Not at this point, no.

15 MR. COOK: I don't have any more questions. Thanks.

16 THE COURT: Okay. Mr. Minor.

17 MR. MINOR: Follow up on the last question asked. On  
18 the questionnaire it asked if there was anything that would  
19 cause you to presume guilt. Do you remember that question?

20 JUROR 4: Presume guilt. Sort of, yeah.

21 MR. MINOR: Or cause you to sympathize with the  
22 complaints made by the alleged victims, or might cause you  
23 to lessen the burden the law applies to the State to prove  
24 guilt, and you responded yes.

25 JUROR 4: I responded yes?

1 MR. MINOR: According to the questionnaire I have,  
2 yes

3 JUROR 4: Maybe I didn't understand the question.

4 MR. MINOR: Can I show him?

5 JUROR 4: Can I see it?

6 MR. MINOR: It's number two.

7 JUROR 4: Presume guilt. Oh, well, I would need to  
8 change two, because maybe I didn't read it correctly.

9 THE COURT: All right. As I read the question it  
10 says make you sympathize with the complaints made by the  
11 alleged victims. I mean, anybody would sympathize.

12 JUROR 4: I would sympathize, but I don't know if I  
13 would -- that wouldn't make me change the burden, yeah.

14 THE COURT: Okay

15 JUROR 4: So it's kind of a yes/no question.

16 THE COURT: Yeah, it is. Okay. That basically  
17 answers it. It's a bad question

18 JUROR 4: Well, yeah, it's kind of a question--yes,  
19 no, I guess, but it make sense, but--

20 THE COURT: Okay. Any more questions, Mr. Minor?

21 MR. MINOR: Well, just to follow up, question number  
22 11 you were asked do you believe there is a likelihood that  
23 you might tend to identify with the rape complainant or  
24 complainants in this case for any reason or identify her  
25 with friends or family members, and you said you don't know.

1 JUROR 4: Right. I've never been in this situation  
2 before. I can't say whether I would really identify with  
3 any of them, but I would say more likely no, but I haven't  
4 seen the other--I don't know the complainant, so I, you  
5 know, can't really say for sure. I was trying to be honest.

6 MR. MINOR: Nothing further.

7 THE COURT: Okay. Thanks so much. If you go back  
8 down to the second floor jury room, we'll be down to get you  
9 in a bit.

10 (PROSPECTIVE JUROR EXCUSED FROM COURTROOM)

11 Okay. This is in no way a substitute for the general  
12 voir dire session that we're going to have. I'll give you  
13 an opportunity to ask all your questions, but if you keep  
14 your questions to this private thing to--and I didn't mind  
15 that last question you asked because that's something that  
16 you would probably want to ask this juror individually. But  
17 keep them to reasons, I mean, is there anything about this  
18 experience that you just related to us that would make it  
19 difficult for you to be a juror in this case, not the  
20 general questions, is there anything, because you are going  
21 to ask that of all the jurors.

22 Okay, so number 19. I mean, these individual  
23 sessions are to address the things that these jurors want to  
24 keep private and they identify --

25 (PROSPECTIVE JUROR 19 PRESENT)

1 THE COURT: Ms. Johnson. We're here because you have  
2 stated that you wanted to discuss something out of the  
3 presence of the whole jury. Can you tell me what that is?

4 JUROR 19: Well, actually, Your Honor, my oldest  
5 daughter was raped when she was in college,

6 THE COURT: Okay. I'll have each attorney ask  
7 questions about that.

8 Mr. Cook.

9 MR. COOK: Good afternoon. I need to ask you a  
10 little bit about that. If you could, can you tell me a  
11 little bit about what happened with your daughter?

12 JUROR 19: Well, she was in college, and apparently  
13 there was a party, fraternity party, and a lot of drinking,  
14 and she had had, you know, a couple of drinks, and she was  
15 raped. You know, she said no. It didn't work. So--  
16 And I got a call in the middle of the night. This was over  
17 at WSU, and of course I had to go over in the middle of the  
18 night. I took a friend with me who is an attorney, and we  
19 filed charges. They were never -- nothing ever came of it,  
20 but I know, I went through like three or four years of  
21 counseling in a small fortune, you know, to get her head  
22 straight again. She's fine now.

23 MR. COOK: So were you one of the first persons that  
24 she told about this?

25 JUROR 19: No, she was taken to the emergency room.

1 I got a call from the emergency room over at Pullman. And  
2 so, no, I wasn't the first one. In fact, I wasn't able to  
3 talk to her until I got over there. I drove over now in the  
4 middle of the night.

5 MR. COOK: Did the police, any police agencies get  
6 involved?

7 JUROR 19: Um-hum.

8 MR. COOK: You indicated you filed charges. Does  
9 that mean that you went and your daughter talked to the  
10 police?

11 JUROR 19: They were already involved when I arrived.

12 THE COURT: Why didn't anything happen?

13 JUROR 19: Because my daughter wouldn't testify.  
14 It's one of those situations, you know, that it was--she  
15 just couldn't go through it. It was too intimidating for  
16 her to go through all of it. That's why we did so much  
17 counseling. I immediately got her into counseling.

18 MR. COOK: Now, were charges actually filed at any  
19 point?

20 JUROR 19: No.

21 MR. COOK: Now, the matter was investigated by the  
22 police?

23 JUROR 19: Was investigated.

24 MR. COOK: And you don't know beyond that if criminal  
25 charges were filed or not?

1 JUROR 19: I don't think they were, because my  
2 daughter would not testify. I don't know if that had  
3 anything to do with it, but that's the way that it was left  
4 with me. And I wanted to do it for her, I just wanted to be  
5 her mother and be supportive and do whatever I needed, you  
6 know, to help her. I wasn't going to force her, I felt like  
7 at the time now that it should have been drug out now, I  
8 mean, that was my personal feelings, but it wasn't really me  
9 that it happened to, it was my daughter. And it's the way  
10 she felt about it.

11 THE COURT: Is there anything else about that  
12 experience that you would rather discuss outside the  
13 presence of the other jurors?

14 JUROR 19: Well, I would not like to discuss it in  
15 public.

16 MR. COOK: I don't have anymore questions for you.  
17 Thanks.

18 THE COURT: Mr. Minor.

19 MR. MINOR: How, if at all, might what happened to  
20 your daughter affect your judgment as a juror in this kind  
21 of case?

22 JUROR 19: I consider myself a very open minded  
23 person, and I honestly don't know if that I feel like it  
24 wouldn't. I don't--I just can't honestly tell you that it  
25 would not, but I feel like that with my open mindedness that

1 it probably wouldn't.

2 MR. MINOR: How long ago did the incident with your  
3 daughter occur?

4 JUROR 19: 1990.

5 MR. MINOR: And is it a matter discussed with her  
6 since then, you discuss it with her or does she bring it up?

7 JUROR 19: Oh, it was brought up now for about three  
8 or four years, at least three years, because there was  
9 counseling, a lot at the beginning, then it kind of trailed  
10 off. And then she might have mentioned it a couple of times  
11 since then in another context.

12 MR. MINOR: Do you find yourself getting emotional  
13 about the matter when the subject comes up?

14 JUROR 19: I did today when I filled out the  
15 questionnaire, because I felt like I had to be totally  
16 honest. So to be very frank with you, it's brought up a lot  
17 of stuff, when I started filling out the questionnaire, it  
18 did. And I was filling it out honestly, it did, it brought  
19 a lot of it out.

20 MR. MINOR: In terms of what happened to your  
21 daughter?

22 JUROR 19: Yes.

23 MR. MINOR: Thank you.

24 JUROR 19: Your're welcome.

25 THE COURT: Thank you, Ms. Johnson.

1 JUROR 19: You're welcome.

2 THE COURT: If you would go down to the second floor.  
3 Steph will take you out. And we'll call you back in a bit.

4 THE COURT: I don't think I made it clear, if you  
5 feel like you want a challenge for cause on any of these  
6 jurors because of what they discussed privately, I'd  
7 appreciate you doing it now, not waiting until--I mean, do  
8 you follow me on that?

9 Is that the way you had in mind?

10 Mr. Minor?

11 MR. MINOR: Well, I didn't know the court wanted to  
12 raise the challenges now, but I would raise a challenge for  
13 cause for 2 and 19.

14 THE COURT: 2 and 19. Okay. This is what I wanted  
15 to do, I want challenges for cause right off because I can't  
16 remember these questions. We are going to have hundreds of  
17 questions asked. So 2 and 19.

18 Okay. Mr. Cook, 2 is the woman from the Philippines.  
19 What do you think?

20 MR. COOK: I have no objection.

21 THE COURT: Okay. Number 2, I will grant your  
22 challenge on number 2. So strike Ms. Estrella. And you can  
23 tell her that she has to come back tomorrow.

24 Okay. Why don't you put a star by the people that  
25 get a challenge now, so you can tell them that they are no

1 longer on the jury.

2 THE BAILIFF: What about 19?

3 THE COURT: Okay. Now, 19 is Ms. Johnson. And let  
4 me hear your argument on that, Mr. Cook, do you have one?  
5 She's the woman who was just here, whose daughter was raped.  
6 She seemed like a very --I, quite frankly, don't see her as  
7 a challenge for cause, but I'll hear you. Do you have any  
8 objection?

9 MR. COOK: Your Honor, I'll defer to the court on  
10 that matter. I don't have an objection.

11 THE COURT: Okay. Give me a little more reason why  
12 she should be off. She says she's open minded. You know,  
13 you asked her if she will be open. I mean, you are going to  
14 get that same answer from everybody, if that is the kind of  
15 question you're going to ask. I'm going to follow it up. I  
16 mean, because if you say, you know, people are trying to be  
17 honest and they are going to say I don't know, now, what is  
18 going happen when all of the evidence is in. I know I  
19 believe in the system, I know I'm open minded. That is the  
20 kind of person I am. Do you want her off?

21 MR. MINOR: She indicated she didn't know how she  
22 would be affected by the experience.

23 THE COURT: But you ask every juror in this panel  
24 that and they'll say that.

25 MR. MINOR: I understand, Your Honor. But she says

1 her daughter was raped. That is the nature of the charges  
2 here.

3 THE COURT: She says she is open minded. She says  
4 that there is no reason she couldn't be a fair juror. So  
5 I'm going to deny your challenge for cause on Ms. Johnson.

6 MR. MINOR: May I make one other comment?

7 THE COURT: Sure.

8 MR. MINOR: She indicated that filling out the  
9 questionnaire today brought back a lot of things from that  
10 experience.

11 THE COURT: Okay. I'm going to hold that in abeyance  
12 right now. I'm going to deny. I'll reconsider it if you'll  
13 bring it back up to me before we start preemptories, Mr.  
14 Minor.

15 MR. MINOR: Yes, Your Honor.

16 THE COURT: Okay. Now, the next one is juror number  
17 32. Bring her in.

18 (PROSPECTIVE JUROR 32 PRESENT)

19 THE COURT: O'Donal. That is an Irish name, must be.

20 JUROR 32: Yeah.

21 THE COURT: O'Donal?

22 JUROR 32: Yes.

23 THE COURT: We're looking at your questionnaire, and  
24 you answered number 16, you were a victim yourself. Is that  
25 the reason you wanted to discuss this in private?

1 JUROR 32: Right.

2 THE COURT: Now, I'll let the attorneys ask you a few  
3 questions.

4 Mr. Cook.

5 MR. COOK: I apologize that I have to ask these  
6 questions. But if you could just tell me about that, what  
7 happened or how long ago it was?

8 JUROR 32: It was actually--I think it was about--no  
9 no --15 years ago, and I was going out with this guy, and he  
10 took me to someplace, I didn't know where I was, and he  
11 attempted to try to have sex with me. And so basically it  
12 was attempted rape, because I fought with him for about an  
13 hour until he got tired. So I don't really know what else  
14 to say about this. It was a really bad experience, and I  
15 just don't think I'm a good person to judge someone else in  
16 a case like this, just because I was a victim myself.

17 MR. COOK: Okay. Can I ask you, was it ever  
18 reported?

19 JUROR 32: I didn't report it, no.

20 MR. COOK: Can you tell me why?

21 JUROR 32: I think the reason why is because it  
22 didn't actually happen. It was at a point where all of my  
23 clothes was off, and he was trying, but I was fighting, you  
24 know, so it didn't actually happen. I think I was just too  
25 ashamed to report it because I knew this person,

1 MR. COOK: I don't have any more questions.

2 THE COURT: Okay. Mr. Minor.

3 MR. MINOR: You indicated in one of your responses  
4 that you, based on the information you have about this case,  
5 presume guilt. Is this a question that you wanted to  
6 discuss out of the presence of other jurors?

7 JUROR 32: No.

8 THE COURT: Let me ask you, why would you presume  
9 guilt? You haven't heard a bit of evidence yet. Why would  
10 you?

11 JUROR 32: Well, because it's just really hard for  
12 me. Actually, I haven't even talked about this in a very  
13 long as time, so either just---

14 THE COURT: So if it was another kind of criminal  
15 case, even a serious case like murder or armed robbery or  
16 something like that, could you sit as a juror in that case  
17 or would you presume guilt when you started?

18 JUROR 32: No, I could sit on that case.

19 THE COURT: Is there something different about a sex  
20 case?

21 JUROR 32: To me it is. To me it is.

22 THE COURT: Okay. Do you have any challenge, Mr.  
23 Minor?

24 MR. MINOR: Yes, Your Honor.

25 THE COURT: Okay. I think I will grant that

1 challenge.

2 Ms. Robinson, you'll be a great juror in any kind of  
3 case, but maybe not this time, so we're going to dismiss you  
4 from this case. You need to go back to the jury room, tell  
5 them you're dismissed from this case, but you're still ready  
6 to get sent out either today, which probably won't happen,  
7 or maybe tomorrow

8 JUROR 32: Okay.

9 THE COURT: So thank you very much.

10 So number 13 is off--no, juror number 32. I'm sorry.

11 Was she 32?

12 THE BAILIFF: She was 32.

13 THE COURT: Okay. Now we're up to 45. I don't have  
14 33 here. Is this 33?

15 MR. MINOR: Yes, 33.

16 THE COURT: Okay.

17 THE BAILIFF: You have a copy of the questionnaire?

18 THE COURT: All right. I don't need it.

19 (PROSPECTIVE JUROR 33 PRESENT)

20 THE COURT: Okay. Mr. Hansen. I don't have your  
21 questionnaire in front of me, but you answered the  
22 questionnaire about being questioned individually. What was  
23 the reason?

24 JUROR 33: On the questionnaire it led me to believe  
25 that any form of sexual assault of any kind was going to be

1 MR. COOK: And you were sad? Was it the details of  
2 the case?

3 JUROR 33: Just the personal memories that it brought  
4 back to me.

5 MR. COOK: Okay. And were you a victim or was  
6 someone in your family a victim?

7 JUROR 33: All of my sisters, I'm told.

8 MR. COOK: And you indicated you were told. How do  
9 you know about that?

10 JUROR 33: Well, it's kind of a family experience.  
11 My father sexually assaulted all of my sisters in one form  
12 or another, I'm told. And based on the experience that I  
13 had in my home, I don't doubt it.

14 MR. COOK: Was that ever investigated by law  
15 enforcement?

16 JUROR 33: I don't remember this directly, I would  
17 have been about eight or nine at the time, but I was told by  
18 my younger sister that she was taken to a court and  
19 interviewed and she was unable to remember the details  
20 sufficient to create a legal accusation, but it was  
21 investigated.

22 MR. COOK: Is there anything else about that family  
23 experience that you think that we should know about?

24 JUROR 33: Well, I think it helps me to understand  
25 the seriousness of this type of a charge.

1 MR. COOK: Do you think that you would be able to be  
2 fair and impartial in this case?

3 JUROR 33: I think I could. And in fact, I think my  
4 experience makes me realize how important being fair and  
5 impartial when charges are of this seriousness of a nature.

6 MR. COOK: I don't have any more questions. Thanks.

7 THE COURT: Okay. Mr. Minor.

8 MR. MINOR: Your experience would make sure you  
9 realize how important it is?

10 JUROR 33: How important it is to be fair and  
11 impartial, yes.

12 MR. MINOR: You indicated in your answer today that  
13 the last time you were questioned about this matter you were  
14 not able to maintain your composure.

15 JUROR 33: That is correct.

16 MR. MINOR: Was that was during a voir dire process?

17 JUROR 33: Yes.

18 MR. MINOR: How long ago was that?

19 JUROR 33: Seven or eight years.

20 MR. MINOR: Did any of those feelings arise today  
21 when you filled out the questionnaire?

22 JUROR 33: In a little bit. This is something I'm  
23 sure I'll get over in 40 or 50 years.

24 MR. MINOR: For our purposes here, can you tell me  
25 what effect, if any, you think your personal experience with

1 your sister might have on your composure or your ability to  
2 view the evidence in this case?

3 JUROR 33: I'm confident that I will be able to  
4 maintain my composure at this point, and I am confident I'd  
5 be able to hear the evidence and discuss it clearly. And I  
6 don't think that it will affect my ability to discern the  
7 truthfulness of the evidence. That is, I don't think that  
8 I'm predisposed one way or another for the guilt of an  
9 individual based on my personal experience

10 MR. MINOR: Thank you.

11 THE COURT: Okay. Thank you very much. If you would  
12 then go back to the second floor jury room, and we'll call  
13 you back up here. Thank you.

14 Okay. Now, I've got 35 is off already. I've  
15 got--isn't 35 off the jury already, Mr. Suhr?

16 THE BAILIFF: 45.

17 THE COURT: 45 is the next one. Okay. Bring in 45.  
18 Please.

19 (PROSPECTIVE JUROR 45 PRESENT)

20 THE COURT: Mr. Petaia, is that right?

21 JUROR 45: Um-hum.

22 THE COURT: Mr. Petaia?

23 JUROR 45: That is correct.

24 THE COURT: You said you did want to talk in private  
25 or semi-private. Why?

1 JUROR 45: Because it's not a subject I would like to  
2 discuss with too many people.

3 THE COURT: Well, can you tell us, is it just not a  
4 subject in general or did you have some particular  
5 experience that makes it difficult for you to discuss?

6 JUROR 45: I never had any experience with it, but I  
7 try to avoid it as much as I can.

8 THE COURT: Okay. Mr. Cook, why don't you go ahead  
9 and ask questions.

10 MR. COOK: Well, is there anything that, when you  
11 answered this questionnaire, was there anything that came to  
12 mind from your personal experience that you thought that  
13 either side should know about?

14 JUROR 45: Well, only from watching TV, and when they  
15 had those rape things on TV and they have to have two sides.

16 MR. COOK: You just think it's a sensitive subject to  
17 talk about, is that fair to say?

18 JUROR 45: That is correct.

19 MR. COOK: And you don't feel comfortable talking  
20 about it in a group setting?

21 JUROR 45: In a crowd. Or if it's a close friend of  
22 mine, then I'll talk to my close friend.

23 MR. COOK: It looks like you marked yes to a couple  
24 of questions. One was do you believe that somehow it's a  
25 victimization to have a rape complainant be required to come

1 into court. Can you tell me about that, why you checked  
2 that box?

3 JUROR 45: That's what I'm saying about watching  
4 television, on the some of the cases they have charges and  
5 they need to have two sides on it, remember.

6 MR. COOK: And what is it that you saw on television?  
7 What are you thinking of, anything in particular?

8 JUROR 45: I guess the charge of was brought in of by  
9 the rapee, the person that did the rape, and then it was  
10 asked for the victim to appear, to tell her story.

11 MR. COOK: And is that just something that you saw on  
12 the news?

13 JUORR 45: No, it's a show.

14 MR. COOK: TV show?

15 JUROR 45: Premier show, serial show.

16 MR. COOK: So that just is a subject matter itself,  
17 that is something that you would find to be difficult to  
18 talk about in front of others?

19 JUROR 45: That is correct.

20 MR. COOK: I don't have any more questions

21 THE COURT: Mr. Minor.

22 MR. MINOR: So if you were selected on the jury where  
23 the charge is rape, would you not discuss with the other  
24 jurors the evidence about rape that has been presented to  
25 you?

1 JUROR 45: It's going to be hard for me to discuss  
2 with them, and probably be agreeable with others.

3 MR. MINOR: I'm sorry?

4 JUROR 45: Probably all be agreeable with the other  
5 jurors over what they're saying.

6 THE COURT: So if they said not guilty, you'd say not  
7 guilty, if she said guilty, you'd say guilty, without  
8 thinking it through yourself, is that what you are saying?

9 JUROR 45: That is correct.

10 THE COURT: How could you? I mean, how could you do  
11 that?

12 JUROR 45: Because it's hard for me to express  
13 details of what was brought up in the crime.

14 THE COURT: Can you think about it yourself? I mean,  
15 you can understand the English language?

16 JUROR 45: Right.

17 THE COURT: Can you think independently? I mean, I  
18 know most people--

19 JUROR 45: Yes, can I.

20 THE COURT: So couldn't you think about the evidence  
21 and come to your own conclusion on it and stick with it,  
22 or listen to at least what the other people had to say and  
23 either accept what they had to say or not?

24 JUROR 45: Yeah, I had to, of course, I have to  
25 listen to myself, too, and see what I think about first.

1 THE COURT: I'm concerned if you say that, oh, well,  
2 I'll go along with whatever the other jurors-- I mean, you  
3 know, as in these cases, there are differences of opinion  
4 and it's a process of 12 people to work it out. But now,  
5 everybody has to contribute, everybody has to have things in  
6 their own mind, they have to be able to listen to the person  
7 across the table from them, and they have to be able to  
8 express their own thoughts

9 JUROR 45: Right.

10 THE COURT: Can you do that in a jury room setting?

11 JUROR 45: Yeah, I'll be able to do that, yeah

12 THE COURT: Mr. Minor.

13 MR. MINOR: So you would be able to discuss sexual  
14 matters with other jurors?

15 JUROR 45: I will try the best I can.

16 MR. MINOR: What about in one other question I asked,  
17 you were asked if you would find it difficult to sit and  
18 listen to evidence of graphic sexual matters. Do you think  
19 you would--do you know what kind of evidence is, or what you  
20 do--

21 JUROR 45: That is the main--that is the main word, I  
22 started, my mind starts to want to steer away from it.  
23 And--'cause it's not a comfortable situation for me.

24 MR. MINOR: You just don't want to have to deal with  
25 that kind of evidence?

1 JUROR45: Right.

2 MR. MINOR: Is that something that you think is  
3 individual to you, or is that a cultural issue?

4 JUROR 45: More cultural than my own personal.

5 MR. MINOR: Thank you.

6 I do have a challenge for cause, Your Honor.

7 THE COURT: Okay. let me just ask a few more follow  
8 up questions. You say it's uncomfortable. I mean, I guess  
9 what we're trying to understand is, it's uncomfortable, I  
10 mean, for a lot people because there's a lots of taboos  
11 around sex and stuff. But now, this is serious business,  
12 obviously. We're in a court of law, and the jury has a  
13 function and the judge has a function. Now, everybody the  
14 lawyers have functions and, you know, at that point when  
15 you're here, you know, you have to stop pussy footing  
16 around. Can you do that? I mean, can you act as a juror?  
17 I mean, it's uncomfortable to talk about somebody hurting  
18 them, and there's all kinds of stuff that happens in this  
19 courthouse, that is, you know, it's not Walt Disney. I mean,  
20 can you listen to this kind of stuff and be a fair juror or  
21 not?

22 JUROR 45: I can listen, but I don't know if--how to  
23 stay focus on trying to make my decision on that.

24 THE COURT: Well, you don't know if you'd stay  
25 focused?

1 JUROR 45: I mean, to follow through with all the  
2 evidence that is presented and--

3 THE COURT: Okay. I'm going to dismiss you for  
4 cause. Thank you very much. You may return to the second  
5 floor.

6 JUROR 45: Thank you.

7 THE COURT: And number 45 is dismissed.

8 (JUROR 45 EXCUSED FROM COURTROOM)

9 THE COURT: I have no idea whether he is as wishy  
10 washy as he said, or if he just wants off jury duty, but he  
11 doesn't -- sounds like he either knows exactly what to say to  
12 get himself off the jury.

13 THE BAILIFF: This is 48.

14 THE COURT: Okay. Mr. Barber, you said that you  
15 wanted to speak outside the presence of the whole crew of  
16 jurors. Is it because you might identify the complainants  
17 with your wife? Is that the reason you would like to  
18 discuss this outside, or is there some other reason?

19 JUROR 48: Just the family issue there, on some of  
20 the other questions you asked about relatives and--

21 THE COURT: Okay. And you have a relative, you've  
22 got a relative, that is, your wife who was victim?

23 JUROR 48: No, no, no. It was a cousin that was the  
24 victim

25 THE COURT: Okay. Mr. Cook, you may ask questions.

1 MR. COOK: Thank you, Your Honor.

2 Can you tell us about the situation with your cousin  
3 being a victim?

4 JUROR 48: Just what I was told through my mother.  
5 She came to me--this is probably 14, 15 years ago, sat me  
6 and my brother down and told us that my older cousin had  
7 raped my other cousin. And this was all. I don't know if  
8 it was witnessed by my other cousins. All I know is that my  
9 two cousins were involved, and he went to jail for it.

10 MR. COOK: And you learned about this 15 years ago?

11 JUROR 48: Yeah, when it happened.

12 MR. COOK: Okay. So that was just after it happened?

13 JUROR 48: Right.

14 MR. COOK: Okay. Have you talked to people about  
15 that besides your mom?

16 JUROR 48: No.

17 MR. COOK: Okay. And then you indicated that there  
18 is another reason why you wanted to talk outside the  
19 presence of the other jurors. Is that right?

20 JUROR 48: No other reason, no. I just thought that  
21 those kind of questions might come up, and I didn't want  
22 this information about the family to be heard in public.

23 MR. COOK: Okay. And that's the one incident with  
24 your cousins and your other cousin, that's what you would  
25 like to not talk about in public?

1 JUROR 48: Right, correct.

2 MR. COOK: Okay. I don't have any more questions for  
3 you. Thanks.

4 THE COURT: Mr. Minor.

5 MR. MINOR: Just so I'm clear, you responded yes to  
6 the question about whether the information you now have  
7 about this case would cause you to presume guilt or cause  
8 you to sympathize with the alleged victim. Do you recall  
9 that question?

10 JUROR 48: Yes.

11 MR. MINOR: Is that something you wanted to discuss  
12 out of the presence of other jurors?

13 JUROR 48: We could.

14 MR. MINOR: Well, my question is would it require you  
15 bringing up the family matter you did not want to discuss?

16 JUROR 48: That's actually related to it. That's why  
17 I didn't want to talk about it in public. For me, the issue  
18 with the family--and I have talked about it only briefly  
19 with my wife, I told her that it happened, and, you know, I  
20 told her--she says, okay, I don't want to be left alone with  
21 him if I ever come in contact with him. And that was about  
22 the extent of the conversation.

23 MR. MINOR: And when you say that you might tend to  
24 identify with the rape complainant or her family or friends,  
25 again, is that the family issue that you did not want to

1 discuss in the presence of the others?

2 JUROR 48: Yes.

3 MR. MINOR: And finally, is there any reason you  
4 believe you could not be a fair juror in a case where the  
5 defendant is alleged to have committed sexual misconduct?  
6 Does that raise the family issue?

7 JUORR 48: Yeah. In terms of it, just how I related  
8 it to my wife is afraid of my cousin, her not wanting to be  
9 around him. It's--for me it's a protection issue, right. I  
10 want to keep her safe. She doesn't feel safe around him.

11 MR. MINOR: All right. So am I understanding you to  
12 say, or are you saying that you believe what happened with  
13 respect to your family, your cousins, would play a part in  
14 how you might decide this case?

15 JUROR 48: I'm not sure. It's a part of me that, you  
16 know, it's there. I don't want it to play a part in this  
17 case or any other dealings I have with other people, but  
18 it's something that I had to make sure it was known.

19 MR. MINOR: Have you ever had to deal with this issue  
20 before in a jury setting?

21 JUROR 48: No. I was dismissed the last time I  
22 was--right before I walked in the courthouse.

23 MR. MINOR: All right. Your Honor, I do have a  
24 challenge for cause.

25 THE COURT: Let me ask a couple questions. You

1 said--you just--I mean, this is obviously a deep and very  
2 dramatic experience in your family, but, I mean, this isn't  
3 that case, and the real question is can you listen to the  
4 facts of this case, understanding it's a separate set of  
5 facts entirely, there is nothing--has nothing to do with you  
6 or your family. It is evidence in this case. Could you  
7 just evaluate that evidence without bringing your whole  
8 family thing in and somehow projecting it under the  
9 evidence, if this case--I mean, is that question clear?  
10 It's a dumb question

11 JUROR 48: Yeah, you know, not bringing in emotional  
12 garbage.

13 THE COURT: Yeah

14 JUROR 48: I could definitely say I would try to, but  
15 100 percent guarantee, now, there is that slight one percent  
16 that maybe--

17 THE COURT: Like you're 99 percent sure you could sit  
18 and listen to the facts and keep that separate from the--

19 JUROR 48: Yeah, for the most. I mean, I don't like  
20 to put two things like that together. It's not fair for  
21 anybody, right, whatever it may be, but, you know, this is  
22 something I've never had to deal with before, so this is  
23 new.

24 THE COURT: Okay. I'm going to deny the challenge  
25 for cause, so you're still on the jury. And you need to go

1 back to the second floor. And we're going to have you back  
2 up, all of you back up, in just a couple of minutes.

3 (JUROR 48 EXCUSED FROM COURTROOM)

4 Number 57, I suggest that we don't waste very much  
5 time on him, Counsel. I mean, looks to me like he's off the  
6 jury.

7 MR. MINOR: I haven't had a chance to look.

8 THE COURT: Briefly, Mr. Minor.

9 THE COURT: What do you think, Mr. Minor?

10 MR. MINOR: I would agree.

11 (PROSPECTIVE JUROR 57 PRESENT)

12 THE COURT: Okay. Mr. Bergstrom, we have looked at  
13 your questionnaire, and apparently your sister was raped.

14 JUROR 57: That's right, sir.

15 THE COURT: And that was very, obviously, as it would  
16 be for anybody, a horrible experience for you, as well,  
17 obviously, not to mention your sister who was.

18 And what is the DNA typing experience that you have?

19 JUROR 57: I'm a professor at the University of  
20 Washington. I work in collaboration--

21 THE COURT: I wasn't putting it together. You were  
22 the one going to give lectures, anyway.

23 JUROR 57: That is right, sir.

24 THE COURT: You know, I was going to talk to counsel  
25 just before you walked in. And it just sounds like you

1 bring some stuff to this case that this makes --you'd be a  
2 great juror on almost any case but this.

3 JUROR 57: Yeah, I will have a--I'd been struggling  
4 to put aside my impotent rage of what happened to my sister.

5 THE COURT: I bet. Well, thanks very much.

6 JUROR 57: I certainly have spent some more time  
7 thinking about that than I had in a while, sir.

8 THE COURT: Okay. Thanks. You're excused from this  
9 jury. Thank you.

10 One more, 71.

11 (PROSPECTIVE JUROR 71 PRESENT)

12 THE COURT: And we're here, of course, because you  
13 said that you would like to discuss some answers in greater  
14 detail outside the presence of the jury. And why is that?  
15 What is it that you were--

16 JUROR 71: Yeah. The question is about someone you  
17 know being sexually assaulted.

18 THE COURT: Okay. Mr. Cook, why don't you go ahead.

19 MR. COOK: Can you tell me about that what you know  
20 about it?

21 JUROR 71: I can. My sister was sexually assaulted  
22 when she was in high school.

23 MR. COOK: Okay. And how did you learn about it?

24 JUROR 71: She told me about it later. It wasn't  
25 ever reported to the police.

1 MR. COOK: Okay.

2 JUROR 71: It's had a pretty devastating impact on  
3 her life, though. And the reason I didn't want to talk  
4 about it in front of everybody is because I get kind of  
5 emotional about it.

6 MR. COOK: Okay. Can you tell me, just tell me a  
7 little bit more about how it impacted her?

8 JUROR 71: It's impacted her self-esteem. And her  
9 behavior following that event was very self destructive in  
10 terms of heavy drinking and just dangerous, dangerous  
11 behavior.

12 MR. COOK: This was when she was in high school.  
13 Were you also--

14 JUROR 71: I was in college at the time.

15 MR. COOK: And so it was a period of time ago?

16 JUROR 71: Yes, it was a number of years ago.

17 MR. COOK: Is she in better shape now?

18 JUROR 71: Now, yeah, it's been at least ten years or  
19 so.

20 MR. COOK: You don't know very much about this case,  
21 but the court read the Information to give you an idea of  
22 the nature of the charges. How do you think your experience  
23 with your sister would or wouldn't impact your ability to  
24 sit as a fair and impartial juror in this case?

25 JUROR 71: I think I can be impartial. I'd have some

1 question about my ability to be completely objective just  
2 based on my strong feelings about this subject.

3 MR. COOK: Okay.

4 JUROR 71: The additional other factor I would say is  
5 my wife is very terrified of being assaulted. And so it's  
6 something we talk about a lot and discuss.

7 MR. COOK: And I think you checked, there was a  
8 question along those lines, and you marked that as well.  
9 Was it your wife that is afraid of being assaulted or do you  
10 also have the fear as well?

11 JUROR 71: Not me, no.

12 MR. COOK: Coming in today, having not heard any  
13 evidence or anything, do you favor one side over the other?

14 JUROR 71: I don't think so.

15 MR. COOK: I don't have any more questions for you.  
16 Thanks.

17 THE COURT: Mr. Minor.

18 MR. MINOR: Of your wife's fear of being sexually  
19 assaulted, is that something you did not want to discuss in  
20 the presence of other jurors?

21 JUROR 71: No, not too much, I wouldn't mind  
22 discussing that.

23 MR. MINOR: The question about whether you would tend  
24 to identify with the rape complainant or complainants in  
25 this case for any reason or identify her with friends or

1 family, is that something you want to discuss out of the  
2 presence of other jurors?

3 JUROR 71: No, not necessarily discuss that with  
4 others.

5 MR. MINOR: You said that, if I understood you  
6 correctly, discussing the subject of what happened to your  
7 sister brings up emotions if you discussed it in the  
8 presence of others. Is that correct?

9 JUROR 71: That is correct. I prefer not to discuss  
10 it in open court.

11 MR. MINOR: Okay. My question to you is the subject  
12 matter itself of rape or attempted rape, aside from what  
13 happened to your sister--and my question, I guess, is  
14 whether you can put aside what happened to your sister in  
15 listening to any evidence about charges of rape or  
16 discussing charges of rape with other jurors in deciding the  
17 case, can you put aside what happened to your sister or your  
18 emotions regarding what happened to your sister?

19 JUROR 71: I believe I can.

20 MR. MINOR: That's all I have.

21 THE COURT: Okay. Thank you. You can stay here  
22 because you're the last one out.

23 So we're going to bring the jurors up, I'm going to  
24 read them the rest of the jury selection instructions.

25 You're number 71, right?

1 JUROR 71: Right.

2 THE COURT: So you sit in your seat and you will be  
3 joined by everybody else.

4 MR. COOK: If could I approach and have a brief  
5 sidebar?

6 THE COURT: You know, Mr. Fuhlman, why don't I step  
7 outside, because we may be discussing a few things while  
8 we're getting the rest of the jurors.

9 (JUROR 71 EXCUSED FROM COURTROOM)

10 MR. COOK: I marked that 17 wanted to speak, and I  
11 think I missed that. It's number 18. I show number 18  
12 checked--

13 THE COURT: Okay. We're getting all the rest of the  
14 jurors up, so we'll take 18 tomorrow then.

15 MR. COOK: Okay. I'll go through and make sure I  
16 didn't miss something else. I think I looked at the number  
17 17 and jotted down 17, because that's the--

18 THE COURT: Mr. Cook, I thought you were being a  
19 little scattered as you were sitting there.

20 MR. COOK: I checked that we--all three of us would  
21 cross-reference this, and so--

22 THE COURT: Cross-reference what?

23 MR. COOK: The individual questions.

24 THE COURT: I'm sorry. It sounds like I pushed you  
25 along and I got you confused. It's number 18.

1 MR. COOK: Right.

2 THE COURT: Okay. Asking these Ann Schindler  
3 questions. I think I'll probably get through those today.  
4 You guys both have your forms, so mark them down.

5 MR. MINOR: Yes, sir,

6 (PROSPECTIVE JURORS PRESENT)

7 THE COURT: Okay. I apologize for keeping you most  
8 of the afternoon for just 18 minutes of time left. I do  
9 have to see you again, though, to give you some final  
10 instructions. And the 14 people that are left on the jury  
11 will be very glad that we're using every minute. The rest  
12 of you, I'm sorry that you were kept. If I could have let  
13 you go an hour-and-a-half ago I would, but I couldn't. I  
14 had reasons that I couldn't. But we are very conscious of  
15 your time and the importance of your time, and we will  
16 endeavor to use--

17 Yes, sir?

18 JUROR: Can you turn your mic up, please?

19 THE COURT: Sorry. You know, I turned it down  
20 because it was ringing. Can you hear me now?

21 Okay. All we're going to go do in the next 15  
22 minutes, I have some instructions to read, and then I'll  
23 start some general questions.

24 And here are the instructions. We're going to now  
25 start the voir dire process. In order that the case can be

1           tried before an impartial jury, the lawyers and I will ask  
2           you questions, not to embarrass you or to pry into your  
3           private affairs. And some people asked to have an  
4           individual talk, and apparently there is another one that we  
5           missed, it was juror 18. We'll get to you tomorrow morning  
6           first thing. But anyway, the point of these questions is to  
7           determine if you are unbiased and without preconceived ideas  
8           which might affect the case. In the voir dire questioning  
9           you should not withhold any information in order to be  
10          seated or not to be seated on any particular jury. You  
11          should be very straightforward in your answers, and give us  
12          the whole truth and participate in the process. The lawyers  
13          are good, but they are not Oprah Winfrey. They will stand  
14          up and they will ask questions to all of you, you know, but  
15          the process and their ability to pick a fair jury depends on  
16          all of you volunteering. When you hear a question asked, if  
17          you think there is something the lawyers should know, please  
18          volunteer it. It is presumed when a jury has been selected  
19          and accepted by both sides, each of the jury members will  
20          keep an open mind until the case is finally submitted, and  
21          will accept the instructions of the court and will base any  
22          decision upon the law and facts uninfluenced by any other  
23          considerations. The purpose of the questions on voir dire  
24          is to determine if the state of mind that you have, that is,  
25          you can come in as much as humanly possible and listen to

1 the facts and weigh the facts independently. I mean, we all  
2 bring with us experiences and biases, perhaps, but the job  
3 of jurors is to listen to the facts totally objectively.  
4 That's your job. Okay.

5 Now, a few more things. The remarks that I make and  
6 the questions I permit the lawyers to ask and the  
7 instructions I give are directed to the attention of every  
8 juror whether they are in the jury box or on the benches.  
9 And many of you on the benches will be in the box before  
10 this selection process is over.

11 The attorneys have the right and duty to challenge  
12 jurors. There's two kinds of challenges. A peremptory  
13 challenge, each lawyer has eight, doesn't have to give any  
14 reason, can just, you know, based on their own instincts in  
15 terms of who they want on the jury. Sometimes they'll  
16 challenge a person because they want the next person on the  
17 jury. Sometimes they'll issue a peremptory challenge  
18 because they think that that person wouldn't be a fair juror  
19 for his side.

20 Now, we have an adversary system here. So each side  
21 is now, obviously, trying to look for their advantage. But  
22 the idea is that the way it works out is it comes out pretty  
23 even, because, you know, the jurors that appear to be way  
24 over on one side or the other, they get challenged off the  
25 jury. And that brings me to the other kind of challenge for

1 cause. And there's fewer jurors than there were before  
2 because there are some people that came in that had  
3 experiences that they just felt that they couldn't do it,  
4 you know, in this kind of a case. And those are the kind of  
5 jurors that would be challenged for cause. And there  
6 probably will be a few more as the questions go on.

7 There will be 14 jurors chosen. Two will be  
8 alternates. None of us will know who the alternates are.  
9 At the end of all the evidence and the instructions I'll  
10 pick two numbers out of a box, a spinning box that we have,  
11 and the only antique in this building, I think. But those  
12 two will then be designated alternate jurors. But that's  
13 after the whole case. So all 14 that are in the box will be  
14 listening to the evidence, not knowing which two will be  
15 alternates. That is how we choose that.

16 And I read you earlier, but I want to remind you that  
17 the defendant has entered a plea of not guilty. The State  
18 has the burden of proving each element of the charges, and  
19 that burden is the burden, the heaviest burden in the law,  
20 the burden of beyond a reasonable doubt. So those are the  
21 instructions I have given you earlier, I will give you that  
22 again at the end of the case.

23 Now, I'm going to spend the next ten minutes asking  
24 some general questions. And if your answer is yes--if I can  
25 find my general questions -- if your answer is yes or maybe,

1 yes, or even maybe, please raise your number. And I'm going  
2 to read that off. The attorneys will be making notes, and  
3 this gives them another little--some of these questions are  
4 a little duplicative of the written questions that you've  
5 already answered, but I'm going to ask them, anyway. And  
6 this just helps the attorneys with a little more  
7 information.

8 Okay. Do any jurors anticipate any difficulty in  
9 following the court's instructions, regardless of what you  
10 believe is or ought to be --in other words, can you listen  
11 to the --we've got law in this country, though it is a  
12 country of laws, not men, as they say. So can you listen to  
13 the law? Yes. Figured so.

14 Okay. Any of you have religious or philosophical  
15 views which may cause to you feel uncomfortable sitting as a  
16 juror in a criminal case? As jurors you are going to be  
17 asked to make a judgment of facts, and also a judgment of  
18 another person. The other persons are going to be the  
19 witnesses, they may be the defendant. Anybody religiously  
20 or philosophically opposed to that way of working? Okay.  
21 No response.

22 Now, the evidence will show that the events described  
23 here may have taken place around on the Pacific Highway in  
24 the Des Moines area. I know that you jurors are from all  
25 over the county, and I'm not going to ask you if you're

1 familiar--probably there's nobody here that hasn't driven  
2 down Pacific Highway at some time or another. That's Highway  
3 99. But you will hear some locations exist in the case.  
4 And we'll be asking you not to go try and do your own  
5 investigation. The point is that you listen to the evidence  
6 and make your decision on the evidence you hear in court.  
7 Okay.

8 Now, some of these are duplicative. Have any of you  
9 ever been the victim of a crime? And I want to define that  
10 as something above a car prowler, because it seems like when I  
11 ask that question everybody has had something stolen out of  
12 their car. I have, certainly. And so anything like a home  
13 burglary or assault in the street or something. Okay.  
14 Crime victim. Okay. I'm going to read off your numbers.  
15 1, 10, 12, 14, 18, 48, 60, 61, 62, 74, 67.

16 If I'm reading these numbers too fast, Counsel, let  
17 me know. Just trying get through these questions before  
18 four o'clock.

19 Now, have any of the prospective jurors here ever  
20 witnessed a crime, watched it happen, raise your numbers.  
21 Anybody? Number 8. That's the only one, number 8.

22 How many of you have served on a criminal case jury?  
23 Whole bunch of you. This isn't a brand new educational  
24 experience for a lot of people. Okay. Number 6, number 10,  
25 14, 19, 23, 24, 27, 29, 30, 38, 40, 41, 53, 54 and 55. And

1 31.

2 And same question on a civil case. How many of you  
3 have served on a civil case jury? 3, 10, 11,14, 30. Oh,  
4 wait. 15, 24, 27, 29, 30 and 61. 24.

5 Okay. Do any of you have experience as law  
6 enforcement officers, including military police, IRS, FBI,  
7 city police, sheriff? Any of those things?

8 Do any of you have any close friends or relatives  
9 that are active law enforcement officers. Okay. 5, 6, 14,  
10 15, 29, 27, 17, 48, 61, 65, and 5, 29, 10.

11 I have two questions, or there are questions--and the  
12 way these questions are phrased kind of makes me  
13 uncomfortable. Have you ever had an extremely pleasant or  
14 unpleasant experience with a police officer. Now, I've had  
15 some wives of police officers that are both. So the  
16 question, the first question is pleasant experience with a  
17 police officer. I think the real meaning of this question  
18 is any of you that now have such a high impression of police  
19 offices, of which several will be witnesses in this case,  
20 that just because they are police officers, they've got to  
21 be--their testimony has to be accepted, period, and they  
22 can't make a mistake, they can't tell an untruth. Anybody  
23 feel that way about police officers?

24 Number 39, you do feel that way about police  
25 officers?

1 JUROR 39: Yes.

2 THE COURT: Okay. Now, the next question about that,  
3 unpleasant experience with police officers, got a war story?  
4 Number 74, you have. Okay, and 28.

5 I had a case which I bet some of the people have  
6 heard about. Mayor Schell got hit in the head by somebody  
7 wielding a loudspeaker. I mean, a bullhorn. And we picked  
8 a jury. And I swear, I'd never seen this before, there were  
9 two members on this first jury--it was a hung jury, because  
10 two members weren't going to believe a police officers, a  
11 city employee, or anything for anything. And of course they  
12 never said that in the voir dire. And that's why in voir  
13 dire it is so important you get honest answers. But she  
14 just wasn't going to buy it if the police officer is saying  
15 it. And it had to be, you know, they had to be, you know,  
16 slanting their testimony for some reason. So that's--I  
17 mean, it does happen. But anyway, hopefully, most of  
18 you--and we have the two jurors that raised their numbers on  
19 that, but I want to be able --8, what is your bad  
20 experience, good, bad?

21 JUROR: Bad.

22 THE COURT: Okay. Was a bad experience. Would you  
23 translate that to any police officer that takes the witness  
24 stand?

25 JUROR 8: No.

1 THE COURT: And that is a no?

2 JUROR 8: That's a no.

3 JUROR 20: Your Honor, I don't know if I mentioned  
4 this. I'm a member of the Seattle Police Foundation Board  
5 of Trustees.

6 THE COURT: Okay. Thank you. That's very important  
7 to disclose. What does the Police Foundation do?

8 JUROR 20: Provides funding for expenses, that sort  
9 of thing, for the police department.

10 THE COURT: Okay. Do any of you know anybody  
11 employed by the prosecuting attorney, that would be the King  
12 County prosecutor, the United States attorney, anybody like  
13 that? Okay, number 10, number 18, 25, 21, 29, and 20.

14 Do any of you know any public defenders or criminal  
15 defense attorneys that aren't public defenders. 18 and 21.

16 Do any of you know anyone connected with the courts  
17 or the judicial branch, like me, Stephanie --Okay, number 3,  
18 8, 10. Bunch of people. 17, 18, 25, 29, 32, 61, 74, 20.

19 Have any prospective jurors ever been arrested? Now,  
20 there's convictions on the jury questionnaire. But has  
21 anybody ever been arrested for something other than a  
22 traffic offense that they want to let us know about? Okay  
23 number 28. Anybody else?

24 Now, the schedule --got one more minute to go. The  
25 schedule will be, as I told you, we have to take 15 minute

1 breaks in the morning and the afternoon. The schedule is  
2 approximately we'll go from nine to 10:30 or so, depending  
3 on--we won't interrupt witnesses necessarily, but around  
4 10:30 we take a 15-minute break. Then again at noon, then  
5 go 1:30 to four with a 15 minute break about 2:30. So that  
6 will be the schedule. People can stand up in the jury box  
7 if they have a bad back or bad legs, but basically you're  
8 sitting four hours a day. Anybody that that would cause a  
9 physical adjustment? By that I mean, you get sore? Okay.

10 Just a couple more here. There may be evidence in  
11 this case about drugs. Although I can't think of any--this  
12 is--I'm reading off a form here.

13 There's a couple of charges involving weapons. Do  
14 any of you have such strong feelings about weapons that it  
15 would just-- you even hear the word, it would influence you  
16 and make it impossible for you to be anywhere? No.

17 Is there anyone that we haven't talked to  
18 individually that asked for individual?

19 Anybody ever been personally sexually abused or  
20 physically abused? Anybody, other than those individuals,  
21 okay. Not that all the individuals have been physically  
22 abused, but okay.

23 Skimming over some of these, do any of you have  
24 specialized training or identification or experience in the  
25 area of sexual--you know, like Rape Relief or that kind of

1 thing, sexual crime counseling volunteers?

2 Number 44.

3 Okay. those are all of the questions that I have on  
4 this form.

5 Have you ever called the police to help you out--for  
6 okay. Now, what, Counsel, there's almost three-quarters of  
7 the people in the room. I'm not going to read those  
8 numbers. Just keep that in mind, that there's a lot of  
9 people here that have called for help. Okay.

10 That's it. Those are all the general questions that  
11 I am going to ask.

12 Tomorrow we have questions that each of you will  
13 stand individually and give answers from the blackboard or  
14 the chalkboard that we have, and that will give the  
15 attorneys a chance to look at each of you and give each of  
16 you a chance to stand up in front of the rest. Then the  
17 attorneys will ask questions generally, although I don't cut  
18 people off, I give each side a half hour, half hour, start  
19 with the prosecutor, then the defense attorney, then the  
20 prosecutor comes back for half an hour, and then the defense  
21 attorney comes back for half an hour. So we should be able  
22 to complete all of that I'm hoping tomorrow morning before  
23 lunch and have a jury selected. So we will have at  
24 lunchtime, if all goes well, fourteen people as jurors, and  
25 the rest of you will be probably released from jury service

1 this time around.

2 Mr. London, we will get to you the very first thing.  
3 It was just an oversight.

4 JUROR 18: It's all right.

5 THE COURT: So the last instruction I have to give  
6 you is you have been summoned and you're still on the panel  
7 on a criminal case. I've read you the Information. It is  
8 important that you can tell your wives or husbands you are  
9 sitting on a jury and it's a criminal case. And I am  
10 talking too much, I guess. It's for a criminal case, but  
11 please don't discuss the nature of the case, because the  
12 whole point is for you to keep your minds free of any  
13 extraneous influence or-- actually, those of you picked  
14 throughout the trial, obviously, that's also impossible.  
15 But you're not supposed to talk about the case as jurors  
16 with anybody. So that's it.

17 Now, another thing is you may come in tomorrow and  
18 happen to run into one of the lawyers going down the hall.  
19 They are instructed not to be friendly. They have to just  
20 ignore you. If they are in an elevator and you get in, they  
21 may step out. Whole reason being that lawyers are supposed  
22 to stay away from jurors, for obvious reasons, and we just  
23 now don't even want to have the slightest appearance of  
24 that. So please don't think that they are nasty people.  
25 They are not. And it doesn't apply to me. I can be as

1 friendly as I can be. And I'm a friendly guy. So that's  
2 it. You are excused.

3 Now, the last thing I have to tell you is this is the  
4 note I got from Adrienne just now. Please come in by 8:50  
5 or so.

6 You're saying nine?

7 THE BAILIFF: Between 8:50 and nine.

8 THE COURT: I have got another matter that may slop  
9 over a little bit after nine o'clock. I won't let it go  
10 more than 15 minutes after nine. So you will be hopefully in  
11 my courtroom, which is on the fourth floor, because we got  
12 it down now to enough people that can fit in there, by 9:15  
13 at the latest. And as I said, we'll get through this jury  
14 selection in the morning and have 14 people in that box.

15 Have a good evening. Thank you again for --

16 JUROR 25: What do you want us to do with the  
17 numbers?

18 THE COURT: This is very important. I forgot this.  
19 Put your numbers down on the bench. Please read those  
20 numbers because we have lists of who is number what. But if  
21 you all remember, it will make it a whole lot easier. See  
22 you tomorrow.

23 (PROSPECTIVE JURORS ABSENT)

24 MR. MINOR: Would the court sign an order granting  
25 Mr. McKee the right to wear dress socks to court?

1 THE COURT: Oh, I don't think I can, I don't think I  
2 have the authority. You've got, what, white socks?

3 THE DEFENDANT: Yeah, I got pure white socks.

4 THE COURT: Why can't this be done? Is there any  
5 problem with that, Officers?

6 JAIL OFFICER: I don't know, Your Honor. I don't  
7 know.

8 THE COURT: Well, I can't sign an order. I mean, the  
9 jail is none of my business. I can't tell the officers what  
10 to do. Can you take him some dress socks?

11 MR. MINOR: I attempted to take him some. They would  
12 not accept them, and he's been told that if the court signs  
13 an order, they will.

14 THE COURT: I'll sign it if he's been told that, I'll  
15 sign anything you want. What can't you bring the dress  
16 socks and give him a couple minutes for him to change, and  
17 he can do that, change socks in the courtroom.

18 JAIL OFFICER: It's been done before.

19 THE COURT: I'll sign the order. If you want to make  
20 it easier, you can just bring some dress socks to court.

21 MR. MINOR: Thank you.

22 THE COURT: Although, then he will go down with the  
23 dress socks and take them away or--

24 THE DEFENDANT: I have to have them on and off here,  
25 is what they'll do.

1 THE COURT: Why don't we leave them here.

2 JAIL OFFICER: If he's talking about changing his  
3 socks every day before breaks and stuff, no, that's not  
4 going to happen.

5 THE DEFENDANT: I just want to wear dress socks, is  
6 all, if I had --

7 JAIL OFFICER: If he brings them in, we will do  
8 something. He's not changing socks six times a day.

9 THE COURT: Okay.

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APRIL 7, 2005

MORNING SESSION

(PROSPECTIVE JUROR 18 PRESENT)

THE COURT: Good morning, sir

JUROR 18: How are you?

THE COURT: Sorry we left you out yesterday  
inadvertently.

JUROR 18: That's okay.

THE COURT: I'll just ask you the first question.  
You asked to be talked to outside the presence of everyone  
else. Can you tell me why?

JUROR 18: Well, just that there's some of the stuff  
I wanted to talk about in terms of things that have happened  
with friends of mine. They were friends. They were told to  
me in confidence, and I didn't necessarily want to bring  
those up in front of everybody else.

THE COURT: Okay. Mr. Cook.

MR. COOK: Thank you, Your Honor.

I see that you listed three events. Is that right?

JUROR 18: Well, yeah. It's an ex-girlfriend of  
mine, a friend of another ex-girlfriend of mine. And then I  
also listed my grandmother, who wasn't sexually assaulted,  
but who was murdered in 1968 in Oakland in her home.

MR. COOK: Can we start with the first one?

JUROR 18: Yeah.

1 MR. COOK: Okay. Can you just tell me about it?

2 JUROR 18: Well, I'd been dating this woman for maybe  
3 six weeks, and we were getting along very well, but there  
4 was something going on and, you know, eventually it just--it  
5 sort of came out that when she was--probably ten years  
6 earlier after her freshman year in college she had been home  
7 for the summer and had gone to a party and had been having a  
8 bad time and left early, and then had been abducted by five  
9 men and, you know, sexually assaulted and basically left for  
10 dead behind a Tasty Freeze in her town where she was from.  
11 And as we talked more about it, I think that I may have been  
12 the first person who wasn't a member of her family who she  
13 had ever really talked to about it. So we talked quite a  
14 bit about it, and I spent a lot of time trying to encourage  
15 her to maybe get some psychotherapy and do something to try  
16 and address that situation, which she has done. But I think  
17 that, you know, that along with some of the other situations  
18 that I talked about, when you have somebody who you're very  
19 close to who has been through that and you talk with them  
20 about it, I think it really sort of changes your perspective  
21 on a lot of things, and I'm just not sure, given the nature  
22 of this case how that would play out for me in terms of  
23 being objective about it. I mean, I think that if somebody  
24 is going to be on trial for something like that it's very  
25 important this they get a fair trial, and I'm not convinced

1 that I could be completely fair.

2 MR. COOK: To stay on that event just another second,  
3 she told her family, is your understanding?

4 JUROR 18: Yeah.

5 MR. COOK: But do you know if it was ever reported to  
6 law enforcement?

7 JUROR 18: I don't know that it ever was. I think it  
8 was something that she--I don't have a --since it wasn't  
9 something that was pursued, she had a lot of fear about it.  
10 I mean, you know, she had had, even ten years later, some  
11 PTSD symptoms and so on. And this happened on the east  
12 coast.

13 MR. COOK: Okay. And the second incident?

14 JUROR 18: Mia Zappata was one of my brother's best  
15 friends in college, and he moved out here with her and a  
16 bunch of people from Yellow Springs, Ohio.

17 THE COURT: From where?

18 JUROR 18: Yellow Springs, Ohio, correct.

19 THE COURT: Ohio is where Mia Zapata was from?

20 JUROR 18: She's actually from Louisville, Kentucky  
21 originally. And so I had dealings with them. Now, I do  
22 professional entertainment law, and so I did some--I helped  
23 their band out some back in the day, and the other guys in  
24 the band are all still really good friends of mine and, you  
25 know, it's just--that's just a situation that's been very

1 enmeshed in my life since 1993 when it happened.

2 MR. COOK: Did you follow the trial?

3 JUROR 18: I did. To a certain extent. You know, it  
4 was hard.

5 MR. COOK: Did you actually go to the court much?

6 JUROR 18: I didn't to go this trial. I wasn't in a  
7 position where I could. I did actually pretty recently talk  
8 at some length with Andy Kessler, the guitar player in the  
9 band. We just happened to get on the phone on something  
10 else and the issue of the trial came up. I wanted to know  
11 how he was doing, about a year later, how it all played out.  
12 You know, I think that they are very happy that some sort of  
13 resolution was found. But on the other hand, you know,  
14 that's not going to bring her back. So--

15 MR. COOK: Okay. And then the other incident that  
16 you wanted to make us aware of was the fact that your  
17 grandmother was murdered?

18 JUROR 18: Yeah. And then, as I said, another  
19 girlfriend of mine, I found out sort of through her, that  
20 one of her best friends had been sexually assaulted,  
21 although I don't have as many details about that.

22 MR. COOK: Okay. And you have some concern--

23 THE COURT: What about your grandmother?

24 JUROR 18: My grandmother--that was when I was five,  
25 somebody broke into her house in the hills in Oakland and

1           blew her head off with a shot gun, evidently. I didn't  
2           really know all the details of that until I was older.

3           THE COURT: Was it a burglary or--

4           JUROR 18: I'm not sure. It was never really--it was  
5           not very clear exactly what the motive for that was. You  
6           know, this was sort of a big--I think that for my parents  
7           it's something still, you know--I actually found out when I  
8           was in high school. You know, when I was five nobody told  
9           me that that's what had happened. But when I was in high  
10          school my dad sort of disclosed that that had happened, and  
11          that that was maybe one of the reasons why my mom in that  
12          period had a lot of anxieties about home security and so on.  
13          But I don't know. I just think that the issue of violent  
14          crime, and particularly violent crime against women, it's  
15          just something that is sort of important, for better, for  
16          worse, flowed through my life a lot and colors my  
17          perspective on things.

18          MR. COOK: Do feel like you are coming into this to  
19          favor one side over the other?

20          JUROR 18: I'd like to believe that I wouldn't, but  
21          I'm not convinced that--you know, I just have this worry  
22          that, you know, if we moved into it a little bit and it  
23          looked like there were some facts that seemed to maybe say  
24          that the defendant was guilty, that it would be hard not to  
25          sort of rush to judgment a little bit there for me just in

1 light of because I think that when you know people that have  
2 been through these sort of things, it's very hard  
3 psychologically not to want to see some sort of resolution.  
4 Does that make sense?

5 MR. COOK: Sure.

6 THE COURT: But wouldn't it be pretty horrible to  
7 have a wrong resolution, whether it is one side or another?

8 JUROR 18: Yes, yes, it would. It would, definitely.  
9 But I think that when you start to get into things like your  
10 own subconscious motivation for things, I don't know, I  
11 don't know if any of you have read Malcolm Gladwell has a  
12 book called Blink that just came out, a lot about sort of  
13 intuitive judgments and snap judgments. And he talks a lot  
14 about orchestral audience auditions where the moment they  
15 put a blind screen up and people couldn't see who was  
16 playing, the outcome of the audition really changed a lot.  
17 And it had to do with people making kind of judgments about  
18 things not even really flowing right off the top of their  
19 head, and I guess I feel like here, I think it is really  
20 important for him to get a fair trial, and I'm not sure with  
21 me being a part of the jury would help that.

22 MR. COOK: Okay.

23 THE COURT: Mr. Minor, do you have any challenge to  
24 this juror, or do you have a challenge now or do you want to  
25 go ahead and ask some questions?

1 MR. MINOR: Well, I do have a challenge, but I wanted  
2 to follow up with one question.

3 You answered the question of whether or not you had  
4 any knowledge of this case--

5 JUROR 18: Now, I think I thought that I did, but I  
6 think that the reality is that I don't. I thought I had  
7 some dim sense of something that happened more up in  
8 Shoreline, and then when he said, the judge said earlier  
9 yesterday that it was down south. I don't think that I did.

10 MR. MINOR: Yes, Your Honor, I do have a challenge  
11 for cause.

12 THE COURT: Okay. Mr. London, I think you'd be a  
13 good juror in this case because I think you could be  
14 objective. I mean, I think you could intellectually be  
15 objective, and I hate to let you go, but you also have  
16 issues with your--

17 JUROR 18: I do. I mean, it had seemed like you  
18 wanted to keep things--keep the issues separated, so I  
19 didn't want to get into all of this.

20 THE COURT: Now, certainly you had a good reason to  
21 want out of this, but a lot of people did. So anyway, I  
22 sort of arbitrarily made a bunch of decisions. Anyway, I am  
23 going to grant the defendant's challenge for cause. But you  
24 do need to return to the jury room. I have no idea whether  
25 they have some short case that maybe you could sit on or

1 whether they'll just let you go.

2 JURRO 18: Thank you very much.

3 THE COURT: Thank you.

4 Now we have 53 and 58.

5 THE COURT: Mr. Watt

6 JUROR 53: Yes, sir.

7 THE COURT: You did not ask for a private interview,  
8 but the attorneys want-- I'm not sure which it was. Was it  
9 you, Mr. Minor.

10 MR. MINOR: Yes, Your Honor.

11 THE COURT: Okay. So Mr. Minor will ask you a few  
12 questions

13 JUROR 53: Sure.

14 MR. MINOR: You answered yes to the question you  
15 believe you have some knowledge of this case?

16 JUROR 53: Yes, because I wasn't absolutely sure, and  
17 I may be wrong, but I believe I remember when he was  
18 arrested. And I'm kind of a news junkie, I watch--I live in  
19 Federal Way, and I read all the papers and listen to talk  
20 radio, and I think I saw him in an orange jumpsuit a couple  
21 months ago, I guess, or as soon as I walked in the courtroom  
22 I recognized him from somewhere. And I think I had this  
23 vision in the orange jumpsuit being either arrested or  
24 arraigned.

25 MR. MINOR: Let me ask you this. Do you think you

1 have any recollection of any alleged facts surrounding the  
2 case he's charged with?

3 JUROR 53: Well, that was another concern because the  
4 name was extremely familiar, McKee. And I may be wrong on  
5 this, but, you know, the Dori Monson show on KIRO talk  
6 radio --I may be wrong, but I recollect, I thought he did  
7 like a half an hour segment on this case. The name was so  
8 familiar to me, and--

9 MR. MINOR: Do you know how long ago that would have  
10 been?

11 JUROR 53: No, sir. I'm guessing maybe the end of  
12 last year.

13 MR. MINOR: Do you believe that you have formed any  
14 opinions about Mr. McKee or the charges against him based on  
15 what you believe this case to be about?

16 JUROR 53: I was concerned if this Dori Monson  
17 segment, if I listen to this DORI Monson segment, I wouldn't  
18 be--I wouldn't be impartial. I mean, I was outraged at this  
19 segment. But I'm not sure if we're talking about the same  
20 case. But there was enough doubt in my mind I thought this  
21 McKee case coming up on this talk radio show, and I was  
22 just--all with this Dorry Dori, I mean, I was swayed by the  
23 Dori Monson show, if this is the correct case. And I'm not  
24 sure that it is.

25 MR. MINOR: But if I'm understanding you correctly,

1 whatever was said by Dori Monson outraged you about the  
2 person he was talking about?

3 JUROR 53: Correct. And I realize this is just a  
4 talk radio show host, but--

5 THE COURT: Who could be a real pain in the neck  
6 sometimes. She's okay.

7 JUROR 53: Yes. I don't like Ron Sims. But  
8 I recognized the name, and if there was a series--some  
9 pretty, I guess, heinous crimes towards--or during last  
10 summer, now, the arson case and some other cases, that this  
11 one stood out. I'm not sure why.

12 MR. MINOR: All right. Let me ask you this.  
13 Recognizing that you were outraged about the subject matter  
14 of the Dori Monson segment--

15 JUROR 53: Yes, sir.

16 MR. MINOR: And the fact that you think you recognize  
17 Mr. McKee--

18 JUROR 53: Yes, sir.

19 MR. MINOR: Do you think you would be able to set all  
20 of this aside and come to some judgment solely based upon  
21 the evidence presented here or do you believe that you would  
22 be, if you particularly believe that this is one and the  
23 same case that Mr. Monson was talking about, do you believe  
24 that you would be influenced by that in reaching a decision?

25 JUROR 53: Unfortunately, I do feel that I would be

1 if I was sitting on a jury. And, I mean, we were told just  
2 very skeletal facts when the judge read the charges against,  
3 I was afraid if they filled in the details it would start  
4 the memory of possibly that talk radio show that whatever  
5 case he was talking about outraged me. And I couldn't be  
6 sure it wasn't this one.

7 MR. MINOR: Well, I just wanted to be certain that I  
8 understand your position if you have a concern about your  
9 ability to fairly decide this case based on a belief that it  
10 could be the case that you have read or heard about?

11 JUROR 53: Yes, sir.

12 MR. MINOR: In the news, correct?

13 JUROR 53: That is correct.

14 MR. MINOR: And particularly if this turns out in  
15 your mind to be one and the same case that Mr. Monson was  
16 talking about?

17 JUROR 53: Yes, sir.

18 MR. MINOR: You would in this instance be influenced  
19 by what Mr. Monson said?

20 JUROR 53: I believe I would.

21 MR. MINOR: Thank you.

22 THE COURT: Okay. Any questions, Mr. Cook?

23 MR. COOK: Yes, Your Honor.

24 THE COURT: Make it short because I'm going to grant  
25 the motion, I anticipate.

1 MR. COOK: Well, that's fine.

2 MR. MINOR: All right. I did have a motion for  
3 cause.

4 THE COURT: Okay. I'm going to grant that motion.  
5 Thank you very much, Mr. Watt.

6 Can I ask you a couple of questions?

7 JUROR 53: Yes, sir.

8 THE COURT: Because one, you were a Navy pilot?

9 JUROR 53: Yes, sir.

10 THE COURT: And the reason-- how tall are you?

11 JUROR 5: Almost six five.

12 THE COURT: Yeah, I'm six four. And I was, you know,  
13 I was really-- of course that was in about 1958, and I was  
14 too tall so they--

15 JUROR 53: I just retired from the reserves, so--

16 THE COURT: So they must have changed the height  
17 restriction.

18 JUROR 53: Yeah, they did.

19 THE COURT: Because six one, or--

20 JUROR 53: They totally changed them. My son's as  
21 big as me, and he's just got in.

22 THE COURT: And the other question I had was you said  
23 you served on a jury in the Navy. How does that work? That  
24 is a court-- all I know about is what I've seen in the  
25 movies, there's no real juries in there--

1 JUROR 53: No, but they'll have a court martial, and  
2 just it's usually not a jury of 12, but they'll have a court  
3 martial made up of three or four officers.

4 THE COURT: So does the courts martial or the  
5 officers that are finding facts they get to ask questions  
6 and they sit in like a jury in civil cases?

7 JUROR 53: They're pretty much like a jury.

8 THE COURT: Oh, really?

9 JUROR 53: But I was a senior member on that jury.  
10 And then they also have a program if JAG doesn't have enough  
11 lawyers to handle a case, then they'll pick someone at  
12 random, so I did serve as a prosecutor on one case. I'm one  
13 and one.

14 THE COURT: Good. Quit while you're ahead, then.  
15 Well, thanks very much. And you do need to return to the  
16 jury room. It's possible that you can get sent out on  
17 another case. I will miss seeing on you on this jury,  
18 however

19 JUROR 53: Okay. Thanks.

20 (DISCUSSION OFF THE RECORD)

21 THE COURT: And you are Ms. Gilmore, right?

22 JUROR 58: Yes. Hi.

23 THE COURT: You did not ask for this private session,  
24 but I think that there was something on your questionnaire  
25 that made one of the attorneys want to ask you some

1 questions outside the presence of the jury.

2 Mr. Minor, you want to start?

3 MR. MINOR: Yes. There is a question do you have any  
4 knowledge of this case from any source.

5 JUROR 58: Yes.

6 MR. MINOR: And though you marked no, you wrote, "Not  
7 sure, though. He looks a little familiar?"

8 JUROR 58: Yes. Explain that?

9 MR. MINOR: Yes

10 JUROR 58: I just have an image of possibly seeing  
11 it, just an image of seeing someone who looks like he does  
12 in an orange suit on the television screen. I don't have  
13 any history, I don't remember the story, it's just kind of  
14 this vague thing in my head. I don't watch the news a lot  
15 or read the paper very much, but that's just this image that  
16 I have that came to my mind.

17 MR. MINOR: Let me ask you, is this an image that you  
18 think is recent or sometime ago?

19 JUROR 58: See, I don't really know. I would say  
20 sometime ago. I honestly can't--it's just sort of this, I  
21 can't be more definite than that, sir. It's just, I'd say,  
22 within a year, I don't know, a few months. I don't know.  
23 I'm sorry.

24 MR. MINOR: That's all right. Do you think the same  
25 person you have a memory of seeing, that that might somehow

1 play a part in how you might decide this case?

2 JUROR 58: No, I don't.

3 MR. MINOR: Do you think that you could totally put  
4 aside any memory of any image of seeing this person in an  
5 orange jumpsuit?

6 JUROR 58: Yes.

7 MR. MINOR: Thank you. That's all I have

8 THE COURT: Mr. Cook?

9 MR. COOK: No follow up questions.

10 THE COURT: Thank you. You may return to--well, I  
11 guess, Adrienne, just bring up the rest of the jury.

12 (JUROR 58 EXCUSED FROM COURTROOM)

13 THE COURT: But I'm going to have a little conference  
14 with counsel, so stick your head in before you bring the  
15 jury in.

16 Okay. We've got 47 jurors left. So here's my plan,  
17 if you both agree. We will go through the voir dire, see  
18 how many more we lose for challenges for cause and, of  
19 course, we can let anybody over, I mean, anything above 30.  
20 Also, we've got seventeen spare jurors left at this point.  
21 And what I would propose is that we go down the list of  
22 people that want to be excused. And I'm not going to, if  
23 they want to be excused, one party doesn't want to excuse  
24 them, I'm not going to excuse them. But see who we can  
25 excuse from this list. Does that sound reasonable?

1 MR. MINOR: Yes, Your Honor.

2 THE COURT: Before we start the challenges, so we can  
3 let people go. Because if I don't do that, there's somebody  
4 that has maybe one of these people that had a good reason  
5 that we didn't let go is going to wind up in the box, so 46  
6 we have--I mean, it turns out we have 47 jurors, 75 became  
7 maybe 48. Just let two go. We have got eighteen extra  
8 jurors here.

9 MR. COOK: Your Honor, will we take a brief break so  
10 we can sort that out?

11 THE COURT: Absolutely.

12 MR. COOK: Just to make sure --

13 THE COURT: Absolutely, yes.

14 MR. COOK: --we're on the right page?

15 THE COURT: Okay. Bring in the jury.

16 THE BAILIFF: Well, they have to come up.

17 THE COURT: They have to come up? They're not out  
18 there?

19 THE BAILIFF: Five minutes by the time they all run  
20 up here.

21 THE COURT: Okay. Mr. Paschal, Juror 4, Donald  
22 Paschal. Number 4, he works for Burgess Enterprises, sells  
23 espresso, dispatches people. There is a letter, "While we  
24 may be able to allow Mr. Paschal to serve a two or three day  
25 period, it creates extreme hardship on our business.

1 Burgess Enterprises is a small struggling business that is  
2 currently working a strategy program to get back on its  
3 feet. As our service manager, part time sales person and  
4 computer network administrator, Don is an integral part of  
5 our turnaround planning process and its success. There is  
6 no other employee or employees capable of taking over Don's  
7 responsibilities if he is out for an extended period of  
8 time. His absence will put our business at a substantial  
9 risk. Please either put Mr. Paschal on a short case so he  
10 can fulfill his civic obligation or release him from jury  
11 duty until another time, presumably another time when this  
12 company is perfectly willing to have him do his civic duty."

13 Okay. that's number four.

14 And number 8, number 8 did not ask to be excused.  
15 That's Diane Lemcio. And this letter is from her. "Is it  
16 possible at this point to request time for a private  
17 explanation of my concerns about availability to be a good  
18 juror. I know that you did it yesterday, and that may have  
19 been the only opportunity, but the more I imagine explaining  
20 this in public the less possible it seems. I have a recent  
21 and ongoing problem with the court and corrections system,  
22 which has exhausted my resources, anyway, and I don't think  
23 my subsequent view is likely to be of service to either  
24 side."

25 THE BAILIFF: The jury is all standing around.

1 THE COURT: Bring in Ms. Lemcio, number 8, and we'll  
2 talk to her for about a minute.

3 What about Mr. Paschal, I think this letter is a  
4 bunch of hooey. On the other hand, maybe I should let him  
5 go.

6 MR. COOK: I don't have a problem with--

7 THE COURT: How about you, Mr. Minor?

8 MR. MINOR: I would let him go, Your Honor.

9 THE COURT: Tell Mr. Paschal he can go back to the  
10 jury room. Hopefully, he will get sent to another case.

11 And then bring in Ms. Lemcio.

12 Step right up here and take the witness stand.

13 Maybe your first time on the witness stand, or is it?

14 JUROR 8: Second.

15 THE COURT: Second. Okay. You're experienced, then.  
16 Okay. We got your letter. Thank you very much for letting  
17 us know this. Was there something you wanted to talk to us  
18 about, can you just give me a rough idea of what that is  
19 about?

20 JUROR 8: For the last two months I've been trying to  
21 negotiate a county court and corrections system in New York  
22 State on behalf of my brother who was incarcerated there.  
23 It's an appalling experience, and it's not done yet.

24 THE COURT: Negotiated. You mean figure a way to get  
25 him released?

1 JUROR 8: Just to get him into a drug rehabilitation  
2 program. His public defender got him to sign a pretrial  
3 waiver so he had no end date if he wanted to get into a  
4 rehab program, and then they put him in solitary confinement  
5 because he had been working for the drug task force  
6 undercover, and people came into the jail that knew him and  
7 threatened his life. He was in solitary confinement for  
8 five weeks, and he started to lose his mind, with no end  
9 date. The public defender disappeared. It was truly  
10 horrible.

11 THE COURT: I take it that has some--obviously, you  
12 are emotionally affected by this.

13 JUROR 8: It has exhausted me, all of my--everything  
14 has gone to that. And I thought I could cope with this  
15 fine, but I'm not coping with it fine. It's the same.

16 THE COURT: Well, I congratulate your brother, he's  
17 certainly lucky to have a sister like you.

18 JUROR 8: We're trying. He's worth it.

19 THE COURT: Counsel, I think that Ms. Lemcio should  
20 be released from this case.

21 MR. MINOR: Yes, Your Honor.

22 THE COURT: Okay. Thank you very much, and good luck

23 JUROR 8: Thank you.

24 THE COURT: My goodness. Go back to the jury room.  
25 Maybe you'll get sent out on a civil case or something

1 JUROR 8: That would be good.

2 (JUROR 8 EXCUSED)

3 THE COURT: I don't know, maybe she hates the  
4 criminal justice system and/or who knows, but she didn't  
5 seem to me--just I was close enough to her to look into her  
6 eyes and emotionally she's not set up for this. This is my  
7 thought.

8 (PROSPECTIVE JURORS PRESENT)

9 THE COURT: Ladies and gentlemen, welcome to my more  
10 modest surroundings than our large ceremonial courtroom.  
11 But there is room for us all in here now.

12 First I'll give you the schedule for this morning and  
13 for part of this afternoon. We have been in session here  
14 for about the last 40 minutes or so, 45, so we are going to  
15 take our break at 11 o'clock, which is 50 minutes from now,  
16 and then we'll take our lunch recess at noon, and we'll  
17 reconvene again at one o'clock, just to keep things moving  
18 along here. So we'll take a 15 minute break at 11 o'clock.  
19 The plan for what we're going to do for the rest of today, I  
20 am going to read you the witness list, which I haven't done  
21 yet. And then I will go through the questions on the board  
22 there. It would be each individual standing and reading the  
23 answer, or telling us the answers as. And as I explained  
24 yesterday the purpose of that is to give the attorneys a  
25 chance to look at each of you individually standing, and

1 also to get you sort of used to talking in front of this  
2 large group of people. Then we have two half-hour sessions  
3 for each attorney, so it is a total of two hours of  
4 questioning by the attorneys. Then after that is done, we  
5 do the challenges. But before we do the challenges we're  
6 going to count the number of jurors left. And right now  
7 we're in pretty comfortable shape. We need 30 jurors to  
8 make the jury selection here, we've got 46 or 47, so we're  
9 about 16 over. I'm going to go over it again. Those of you  
10 who have asked to be excused from this case probably because  
11 it's so long, and so we'll be excusing some more people, but  
12 we just have to keep enough here. And we may lose some  
13 during this process of attorney questioning, so that's why  
14 I'm postponing it until after the attorney questioning, and  
15 then we'll go ahead with the challenge part of the jury  
16 selection, which only takes about ten nets or so. This will  
17 take us into the mid-afternoon. And at that point all but  
18 14 of you will be released to go back to the jury room. And  
19 very probably there will be no further cases and you'll be  
20 released from your jury service for this time at that point.  
21 And then there will be 14 of you with us for the rest of  
22 this case. So that's the schedule. We are not going to  
23 have opening statements in the case until Monday morning.  
24 I'm assured by the attorneys that we're going to roll right  
25 along, and we should keep to our schedule, and hopefully be

1 done with this case by the end of the month, very early next  
2 month. So that's all I can tell you at this point.

3 Now, I'm going to read a list of people who may be  
4 called as witnesses. And there is no certainty at all that  
5 these people will be called as witnesses.

6 Counsel, can you just approach for a second?

7 (SIDEBAR CONFERENCE)

8 THE COURT: It lists some, but probably not all of  
9 these people will testify in this case. I'm going to read  
10 the list slowly, and what I'd like to you do, if any of you  
11 know any of these people, raise your number, then we'll  
12 figure out if anybody knows any of these people.

13 Muna M. Absiya, Jamie Lee Ray, Randall Libby, Ph.D,  
14 Ronald Fitzgerald, Shaye Teufel. I've got my eyes on the  
15 list, Counsel, if you see anybody raise their hand, let me  
16 know.

17 Eileen Bowman, Chandra Rieke-Smith, John McDowell,  
18 Nicole Carrier, Bruce McDowell, Detective Christins Bartlett  
19 of the King County Sheriff's Office, Detective Sue Peters,  
20 King County Sheriff's Office, Detective Jack Ziminsky, King  
21 County Sheriff's Office.

22 Somebody's got a hand up, number 10.

23 JUROR 10: Bruce McDowell rings in my mind.

24 THE COURT: Bruce McDowell?

25 JUROR 10: I went to high school up here in Des

1 Moines, and was this Bruce McDowell in that school. I don't  
2 what his age is, you know, Im--

3 THE COURT: Did he go to high school with you?

4 JUROR 10: He may have. I'm not guaranteeing that.  
5 He may have.

6 THE COURT: Okay.

7 JUROR 10: That's not a unique name, but-

8 THE COURT: Right

9 JUROR 10: You know.

10 THE COURT: Okay. Thanks.

11 Number 50.

12 JUROR 50: Actually, I had an occasion to know Sue  
13 Peters, Detective Sue Peters, years ago.

14 THE COURT: Okay. And a question, now, or you're  
15 pretty sure you knew her? She will be testifying, along  
16 with probably, I guess, numbers of other witnesses here.  
17 Does the fact that you know her, would that necessarily mean  
18 that you'd put, you know, more weight on her testimony than  
19 you would on all the other witnesses or could you consider  
20 her testimony along with all the other witnesses using the  
21 same standards to--

22 JUROR 50: I believe I would use the same standards.

23 THE COURT: Okay. Thank you. Okay. Now I'll go  
24 back to my reading here.

25 Okay. So, counsel, Bruce McDowell is a possible.

1 Sue Peters sounds like it is pretty definite.

2 Okay. William Ortega, Detective Jesse Anderson,  
3 Detective Denny Gulla, Detective Robin Cleary. These are  
4 all King County Sheriff's detectives. Detective Mary Lisa  
5 Priebe-Olson, Anthony Grant, Anthony Mascaren, Brenda  
6 Pierce, Detective Andrew McCurdy. I'm not looking up, but I  
7 guess we don't have anybody. Detective Belinda Ferguson,  
8 Detective David Heckelsmiller of the Tukwila Police  
9 Department.

10 Number 5, all right, you know Detective  
11 Heckelsmiller?

12 JUROR 5: Yes.

13 THE COURT: How long have you known him?

14 JUROR 5: For about four or five years, but he's a  
15 very good friend of my wife. His wife and my wife grew up  
16 in school together.

17 THE COURT: Okay. And you are Mr. Woolhiser. And  
18 where do you know him from? His wife is a very good friend  
19 of your wife's. Are you good friends?

20 JUROR 5: And we like have Fourth of July together  
21 and stuff, and sometimes we go out to meals and stuff.

22 THE COURT: Okay. So he's more than just a casual  
23 acquaintance, he's a friend? Would there be anything about  
24 your relationship with him which would cause to you put more  
25 weight on his testimony than you would on any other--and

1 maybe that's not even enough of a question. I mean, would  
2 you look at him and think, I mean, you know, it's not so  
3 much the two of, you know, whether lies are being told,  
4 that's not so much the issue, it's the issue of, you know,  
5 whether a person now has really good enough reason to know  
6 when he is testifying whether he or she is biased in any way

7 JUROR 5: I consider him a very good person and stuff  
8 so I kind of would have a tendency to believe him.

9 THE COURT: Okay. I think given that strength of  
10 that relationship we can release number 5, Mr. Woolhiser.

11 Does either counsel want to speak to me at side bar  
12 about that?

13 MR. MINOR: No, Your Honor.

14 THE COURT: Okay. Mr. Woolhiser, thank you very  
15 much. Thank you for your frankness as well. And we'll see  
16 you next time you get one of those little post cards in the  
17 mail.

18 JUROR 5: Thank you, Your Honor.

19 THE COURT: I have called off Brenda Pierce, have I  
20 not? I think I did.

21 Brenda Pierce. Next one, Dana Christianson. Next  
22 one, Lisa Harr.

23 I'm not going to ask counsel, I'm going to ask the  
24 jury panel, Lisa, L-I-S-A, is that Lisa or Lisa, or it could  
25 be either one. Okay. Robert McKee, Sr., Robert McKee, Jr.,

1 Officer Seese, Officer James Seese, Tukwila Police  
2 Department, Officer Devlin, Tukwila Police Department,  
3 Phyllis Stoner, Naomi Sugar. She works at Harborview.  
4 Karissa Tom, Jennifer Gauthier, who is a scientist who works  
5 for the Washington State Patrol, Wesley Ewart, King County  
6 Sheriff's Office. Okay. That's it.

7 Now, I would like you to answer the questions, so  
8 take a look, and we would start off with Mr. Wilson. And I  
9 would like you, Mr. Wilson, to rise and say my name is Pat  
10 Wilson, or Patrick Wilson.

11 JUROR 1: My name is Pat Wilson.

12 THE COURT: Okay. And give us your jury number

13 JUROR 1: Number 1.

14 THE COURT: And then tell us the answers to those  
15 questions.

16 JUROR 1: My name is Patrick Wilson. I live in  
17 Bryant in the northeast neighborhood of Seattle, and I work  
18 for Boeing up in Everett on the 787, preplanning for the  
19 production. My wife is an attorney, real estate attorney,

20 THE COURT: Does she work for a firm.

21 JUROR 1: Yeah.

22 THE COURT: Which firm?

23 JUROR 1: Perkins Coie.

24 THE COURT: Good firm to work for.

25 JUROR 1: Yeah. She works a lot of hours.

1 THE COURT: My daughter worked for that firm for  
2 about three years and then she left, and she's now an  
3 environmental lawyer, making much less money.

4 JUROR 1: Well, they definitely get the hours out of  
5 those attorneys, I think. And the effort.

6 Other jury experience, I was called out twice. First  
7 time I got in a trial and it stopped before it started  
8 because it settled. And the next one I was never--my number  
9 never came up. That was two years ago.

10 Favorite leisure activities, I don't know, I don't do  
11 a lot. I spend time with friends.

12 Primary sources of news. I haven't been hearing a  
13 lot of news lately. I guess national news, CNN or a little  
14 bit of local TV. And I get the paper every day, but I read  
15 it for the first time in weeks yesterday. That's it.

16 THE COURT: Okay. Thanks very much.

17 Now, Ms. Dubuque, I've been dying to ask you, but you  
18 didn't raise your hand about knowing any judicial officers.  
19 We have a judge Joan Dubuque. Any relation to her?

20 JUROR 3: It's my husband's sister.

21 THE COURT: Oh, really?

22 JUROR 3: Yes.

23 THE COURT: Okay. So you did know a judicial  
24 officer?

25 JUROR 3: I raised my hand. I think your last

1 question was if you knew somebody from the King County court  
2 system. I did raise my number.

3 THE COURT: Okay. Well, let me --your husband's  
4 sister, and then yet there's another brother in the family,  
5 isn't there, they have a disabled child, I know.

6 JUROR 3: Yes.

7 THE COURT: Yeah, I know. We know them.

8 JUROR 3: That is one of his older brothers.

9 THE COURT: We like those people very well.

10 JUROR 3: Oh.

11 THE COURT: Do you ever talk to Judge Dubuque about  
12 her cases?

13 JUROR 3: Rarely talk about that.

14 THE COURT: Would that make any--I mean, can you sit  
15 here as a juror? I presume maybe you're even interested to  
16 know what goes on in these proceedings where your  
17 sister-in-law works, but would you be a fair juror?

18 JUROR 3: I think I could.

19 THE COURT: Great.

20 Go ahead.

21 JUROR 3: I'm Sally Dubuque. I live in Ballard, and  
22 I work for the Boeing Company here in Kent. I'm an  
23 industrial engineer. My husband is unemployed right now.  
24 He was working at Home Depot and had a kidney failure so  
25 he's been on personal leave. And I have a son at home who

1 goes to UW full time. I was on jury duty years and years  
2 ago, probably ten, 15 years ago, and I was on a couple of  
3 civic cases. My hobbies are mainly I love gardening, I love  
4 plants, and my church, and I love camping. And I also love  
5 cooking. And my primary source of news is television and  
6 the newspaper.

7 THE COURT: Okay. Thanks very much.

8 Mr. Bickford.

9 JUROR 6: Doug Bickford. I live in Federal Way area.  
10 I'm a retired engineer from the Boeing company, and although  
11 I have worked part time a couple years since I retired in  
12 2000. And my wife is a homemaker. And my other jury  
13 experience was in Benton County court, about 1980, I think.

14 THE COURT: In Pasco?

15 JUROR 6: Prosser. Which was a drunken driving case.  
16 And my leisure activities, I like to restore old tools, like  
17 old carpenter tools and things like that.

18 THE COURT: You know, I've got a bunch of my  
19 grandfather's old tools, I just can't let them go. We have  
20 them out at our lake cabin.

21 JUROR 6: They're pretty interesting. I guess my  
22 primary source of news would be the newspaper.

23 THE COURT: Thank you very much.

24 Takes us to Mr. Arvisais.

25 JUROR 10: My name is Jerold Arvisais--

1 papers when I can. But it's something that chews up so much  
2 time that I don't get too much. Most of my news comes in  
3 sound bites.

4 THE COURT: Thank you very much. I think we got a  
5 good idea of your life.

6 Okay. The next is Mr. McMaster. And I definitely  
7 still have you on the list here so don't get mad at me yet

8 JUROR 11: I would never do that.

9 THE COURT: Okay

10 JUROR 11: Juror 11. And my name is Robert McMaster.  
11 I live in Shoreline, Washington, near the community college,  
12 pretty close to the north King County line. I'm a school  
13 custodian. I'm currently the head custodian at the middle  
14 school in northwest Seattle, recently started at that  
15 position. I live alone. I have been on jury duty two other  
16 occasions. Once in the mid-nineties I was on a civil--this  
17 was a civil case involving the Washington State supervisor  
18 the Washington State Patrol, retired employee who was fired  
19 from a job that he got after he left the State Patrol that  
20 he was claiming that the supervisor interfered with his  
21 employment. The last time I was on jury duty was in  
22 December of 2001. I was here and was not selected on a  
23 case. Primary sources of news would be television news, and  
24 I subscribe to the newspapers on a daily basis.

25 THE COURT: Thank you very much. It's amazing how

1 many people--I mean what the difference is, because I'll get  
2 people that have lived in this county for 25 years and never  
3 been called for jury duty, and then the person sitting next  
4 to him has been called eight times or something for jury  
5 duty. Now, it's random and it's all by computer, but random  
6 certainly doesn't necessarily mean even steven, I have found  
7 out.

8 Okay. Number 12, Ms. Lovell. And again, I'm  
9 promising you, you are going to go to your daughter's  
10 graduation.

11 JUROR 12: Thank you.

12 THE COURT: I mean, this case is going to be over or  
13 somebody is going to get their heads rapped

14 JUROR 12: Okay.

15 THE COURT: No, that's not--I really didn't mean  
16 that. But there is just no chance you are going to miss  
17 that graduation. I promise.

18 JUROR 12: My name is Mary Lovell. I live in Madrona,  
19 which is sort of in the central area of Seattle. I'm a  
20 school therapist at the student health center at University  
21 of Washington. My husband is a civil engineer and he works  
22 as a consultant. My two children are away at college. I've  
23 never been called for jury duty ever.

24 THE COURT: You're one of those just skated out  
25 somehow.

1 JUROR 12: Well, I don't know. My favorite leisure  
2 activities. Well, I ride my bike to work every day, and I  
3 like to ski. I like to garden. Rarely listen to the news.  
4 I rarely listen to television or the radio. I do read  
5 papers a lot, so I read the local paper and I read the New  
6 York Times a lot.

7 THE COURT: Okay.

8 Mr. Gregg, number 14. I think the expired license  
9 plates is not criminal, it's certainly painful. My wife got  
10 one of those, it costs like 80 bucks or something like that.

11 JUROR 14: Just in case. I thought I had missed it.

12 THE COURT: We're not looking at you askance because  
13 you had that experience.

14 JUROR 14: I realize that. I'm Joe Gregg. I live in  
15 the southeast corner of Renton. I'm an engineer at the  
16 Boeing Company. My wife is a retired school teacher, and  
17 I'm sitting next to one of these people. I've been called  
18 12 times in King County since arriving here 24 years ago.  
19 And I was called in Harris County, Houston, Texas before  
20 coming up here. I have served once as foreman, two  
21 criminal, two civil, and one of the criminal cases was  
22 drugs, one of the criminal cases was child molestation.

23 Leisure activities. I'm trying to remember the last  
24 time I had some leisure to have activities. Board games and  
25 other social events. Boy, it's been a long time. And

1 primary sources of news. Because I travel so much, although  
2 I do watch television and I read the newspapers, sometimes  
3 it's local, sometimes it's out of town, and so there are  
4 gaps in both national and local events for me.

5 THE COURT: Thank you. And you sound like you have  
6 done more than your share of civic duty as a juror, so I'm  
7 going to put a big star. And you also asked to be excused.  
8 I'm going to put a star there because I think it's a little  
9 much to ask to you to do--

10 JUROR 14: Not at all. I also served 31 years in the  
11 armed serves, partly as a reservist, so I understand service  
12 and I accept it.

13 THE COURT: Well, thank you.

14 Okay. The next juror is Mr. Keen, number 15.

15 JUROR 15: Yes. Juror number 15. My name is Dave  
16 Keen and I live in unincorporated Woodinville. I'm in  
17 software sales, high tech industry. My wife is a homemaker  
18 and responsible for three children under the age of seven in  
19 our home, so we keep quite busy.

20 Other jury experience. I have served on a jury in  
21 '96 and 2001. One was a moving violation, another was a  
22 DUI, respectively

23 THE COURT: Jury trial on moving violation?

24 JUROR 15: In Austin, Texas, believe it or not.

25 They actually have those. So it was my honor to

1 serve on both of those, but I still prefer not to be part of  
2 this jury, so--

3 THE COURT: I understand.

4 JUROR 15: My favorite leisure activities. I spend a  
5 lot of time with my children, so bike riding, playing, and  
6 having fun with them. And when I'm able to get away, I like  
7 to play golf and go wake boarding. And my primary sources  
8 of news, I tend to watch the ten o'clock or 11 o'clock news,  
9 depending on how late my kids are up and how much work I've  
10 gotten accomplished. I also use the internet as primarily  
11 one of my sources, forms of doing research and news.

12 THE COURT: Thank you. Wake boarding. You know,  
13 when I was a kid it was surfboarding, but it's all different  
14 because the surfboard was actually attached, and wake board  
15 is like a snow board

16 JUROR 15: Yeah.

17 THE COURT: Okay. So no resemblance to surfboarding,  
18 which was really not much of a sport.

19 Number 16, Mr. Story.

20 JUROR 16: My name is Mike Story. I live in the Rose  
21 Hill neighborhood of Redmond, Kirkland. My occupation is  
22 I'm an estimator for Sutter Home and Hearth. I live with--I  
23 have two boys in my house, an 11 year old and 15 year old.  
24 Other jury service. The first time I've been called up. My  
25 favorite leisure activities would be fly fishing, skiing, I

1 ride a road bike, I have a white water raft. Primary  
2 sources of news would be the radio, internet, paper,

3 THE COURT: Okay. Thanks very much.

4 Ms. Bender, did you get back to the restaurant last  
5 night?

6 JUROR 17: No, I didn't have to, so it was nice, I  
7 actually got some sleep. I was saying I got like 12 hours  
8 sleep last night, which is more than I've gotten in such a  
9 long time.

10 THE COURT: You must have needed that.

11 JUROR 17: Yeah. I am Alisa Bender. I live in  
12 Kenmore. I am the manager of a restaurant, the Purple Cafe  
13 and Wine Bar in Woodinville. I live with my boyfriend who  
14 is a wine server at the restaurant and also a line cook.

15 THE COURT: Wine cook?

16 JUROR 17: A line cook.

17 THE COURT: A wine cook?

18 JUROR 17: What?

19 THE COURT: A wine cook, would be that would be like  
20 cooks with wine?

21 JUROR 17: Line cook. I have never served before. I  
22 have been called twice and I was away at school both times  
23 so got out of it. My leisure--

24 THE COURT: Got out of it? Now, come on.

25 JUROR 17: I wasn't in the county.

1 THE COURT: Okay

2 JUROR 17: I was in Whatcom County, so I couldn't.  
3 Favorite leisure activities. Snowboard, I wake  
4 board, hang out with friends, so on. And primary sources of  
5 news would probably be TV.

6 THE COURT: Thank you.

7 Number 19, Ms. Johnson

8 JUROR 19: Hi. My name is Judy Johnson, and I live  
9 in Redmond. I'm inside sales for a bearing manufacturer.  
10 And I have an empty nest. I was a single parent for three  
11 children. My husband died about 27 years ago. I do have a  
12 kitty at home.

13 THE COURT: You have somebody to take care of her?

14 JUROR 19: Yes, and she didn't like me very much when  
15 I came home last night. But as I was totally stressed out.  
16 I have been called several times for jury duty. I have  
17 served on a couple of juries, both criminal. One was a drug  
18 case, which was a guilty verdict, and the other involved  
19 breaking and entering and drugs, and we ended up with a hung  
20 jury. We went through like three foremen, and it took six  
21 days to do that. I love to garden, I love to read. I walk  
22 every night a couple of miles. I love to spend time with my  
23 children when that's available, when they are available. I  
24 get my news from the internet and the radio and channel  
25 five.

1 THE COURT: And we talked to you individually, but  
2 you felt that you can go ahead with--

3 JUROR 19: I don't know. I gave it a lot of thought  
4 last night.

5 THE COURT: Did you really?

6 JUROR 19: I was pretty stressed out, as you can  
7 probably tell. I'm having a really hard time.

8 THE COURT: Oh, really?

9 JUROR 19: Yes.

10 THE COURT: Well, we'll talk about that then, okay.

11 JUROR 19: I appreciate that.

12 THE COURT: Because I thought you were quite brave  
13 yesterday, but it's tough.

14 JUROR 20: John Fluke. I live in the southwest  
15 corner of Shoreline. Occupation these days is I'm chairman  
16 of my family company, I serve on the boards of five  
17 companies. It takes a lot of time. My wife's occupation is  
18 a sole proprietorship that produces a weekly radio show for  
19 Junior Achievement, for kids. I was impanelled on a jury  
20 about three or four years ago in a domestic violence case in  
21 Bellevue, was dismissed, not a peremptory, but a challenge.  
22 And leisure activities, I mostly enjoy my three children, so  
23 they do take up a lot of my time. Primary sources of news  
24 are Rush Limbaugh and guys like Rush, and KIRO radio.

25 THE COURT: Hopefully you come up with a balanced

1 view

2 JUROR 20: That's the objective. Wall Street Journal  
3 and Economist.

4 THE COURT: Thank you. Fluke Manufacturing was sold  
5 to another--

6 JUROR 20: It was sold to Danver in 1998.

7 THE COURT: Okay. Your company made what?

8 JUROR 20: Electronic instruments.

9 THE COURT: Yeah, that's what I thought. Okay. That  
10 was certainly a very well known company for most of my life,  
11 but I hadn't heard about your father lately, that's why.  
12 Okay.

13 Let me see here. Next is Ms. Hosford.

14 JUROR 21: I am Hillary Hosford and I have listed my  
15 address on my information, which is my parent's address  
16 because I've been moving around a lot. But recently live in  
17 the Leschi neighborhood. At the moment I work for World  
18 Vision, which is a non-governmental organization. I'm  
19 leaving in about three weeks four weeks--yeah, four weeks.

20 THE COURT: To where? Where are you headed?

21 JUROR 21: I'm going to graduate school back east.

22 THE COURT: What are you going to be studying?

23 JUROR 21: International Studies.

24 THE COURT: We're going to be done in four weeks for  
25 sure.

1 JUROR 21: I'm not going to move until June, so  
2 that's fine. My roommate is a genetic counselor. I have  
3 been called for jury duty before but I didn't go because I  
4 was in school in California.

5 Favorite leisure activities. Running, go to the gym,  
6 cooking, reading.

7 Primary sources of news, NPR and on the internet,  
8 CNN, BBC, New York Times.

9 THE COURT: Now, World Vision, you work for--

10 JUROR 21: International relief and development.

11 THE COURT: Great. So were you involved in the  
12 relief effort in the tidal wave at all?

13 JUROR 21: Oh, yeah. Yeah.

14 THE COURT: Okay. That must have been interesting  
15 but horribly sad, I guess.

16 JUROR 21: Yeah.

17 THE COURT: Okay. Next is, Mr. --I'm getting lost  
18 here--number 23, Trelease.

19 JUROR 23: My name is Ben Trelese, juror number 23.  
20 I live in the Ravenna neighborhood, just north of the  
21 University of Washington. My occupation, I'm a software  
22 developer, I work for a small non-profit up in Canyon Park,  
23 which does consulting. My wife is a director at Group  
24 Health. And I have two young boys, nine and six, who are in  
25 school.

1           Prior juror experience. I've been called once before  
2 and served on a jury in this building about six years ago.  
3 My recollection is a bit hazy. I believe it was a fairly  
4 straightforward assault case.

5           I'm not that interesting. Let's see. Favorite  
6 leisure activities. I'm learning to rollerblade with my  
7 kids, which is a lot of fun. And I love to cook, and  
8 partially complete projects around the house. My primary  
9 sources of news--

10           THE COURT: Your wife loves that, too.

11           JUROR 23: Yeah. That is not my wife's favorite  
12 activity.

13           THE COURT: Just put down the hammer and come back to  
14 it sometime later.

15           JUROR 23: Primary sources of news, newspaper in the  
16 morning during my commute, and the web while I'm here.

17           THE COURT: Thank you. I had a boyhood friend in  
18 Spokane named Dean Trelease. Is that any relation?

19           JUROR 23: Probably distantly, but nobody that I  
20 know.

21           THE COURT: Okay. Then next is number 24.

22           JUROR 24: My name is Katherine Junkin. I live in  
23 Federal Way, and I'm a retired secretary. My husband is a  
24 retired physician from Canada. I've been on a jury a couple  
25 times up here. One was a malpractice, and another was a

1 cocaine drug thing.

2 THE COURT: So they let you on a malpractice jury  
3 with a physician husband?

4 JUROR 24: I wasn't married to him then.

5 THE COURT: Okay

6 JUROR 24: In California, back in the seventies. I  
7 was called and was on several juries, before computers.  
8 Activities. The Red Hat Society.

9 THE COURT: What's that?

10 JUROR 24: Yeah. You have seen these women that wear  
11 the red hats and purple outfits and go out to lunch, and--

12 THE COURT: Yes.

13 JUROR 24: We do that.

14 THE COURT: Yeah, okay.

15 JUROR 24: Not my husband, but my friends. And news  
16 sources. The internet and the radio, and TV.

17 THE COURT: Thank you very much. Which brings us to  
18 juror number 25, Ms. Amsbary.

19 JUROR 25: My name is Deborah Amsbary. I live in the  
20 Eastlake neighborhood of Seattle. And my occupation is I'm  
21 a project manager at an advertising and marketing agency.  
22 My main client is actually World Vision. It's my largest  
23 client.

24 And occupations, my husband is a recent graduate of  
25 law school, and is a clerk for a State Supreme Court

1 justice.

2 THE COURT: Oh, wonderful. Which one?

3 JUROR 25: Johnson.

4 THE COURT: Oh, good.

5 JUROR 25: Favorite leisure activity. I'd have to  
6 say running, swimming and hanging out with friends.

7 And primary sources of news would be television, a  
8 little bit of internet and radio.

9 THE COURT: Okay. Thank you very much, and do you do  
10 any computer work: You must do a whole lot in your job?

11 Okay.

12 JUROR 27: Number 27.

13 THE COURT: What?

14 JUROR 27: Number 27.

15 THE COURT: Number 27, Ms. Holtz, right?

16 JUROR 27: Right. I'm also in Federal Way. And I've  
17 lived in the neighborhood for 30 years now. And occupation  
18 was I'm a retired postal employee. Worked there for 32  
19 years. And others at home, well, I live alone and I enjoy  
20 maintaining my home.

21 And favorite leisure. My home area. And I have  
22 grandchildren. And I enjoy them, of course.

23 And then primary sources of news. I like CNN, NBC,  
24 which is, you know, the stock market and a few other things.

25 And I think I had a jury experience in Oregon. And

1 might have--it was six jurors, yeah, and the guy tried to  
2 outrun the policeman, so that didn't quite work. And then  
3 also I have been called once to Seattle, and I served on two  
4 there. A robbery case that turned into another robbery.  
5 The other one was a city versus an employee.

6 THE COURT: In this state we can have six person  
7 juries if the parties agree in civil cases, but in criminal  
8 cases, no six person juries except in municipal court, you  
9 know, misdemeanor cases there's six person juries a lot.

10 JUROR 27: Well, this was in a small town area,  
11 northeast Oregon, Hepner, and we were lucky to get six.

12 THE COURT: Okay. Mr. Hudec.

13 JUROR 28: Peter Hudec. I was born in  
14 Checkoslovakia. In am in states over 30 years. Recently 20  
15 years in Auburn area. And I am semi-retired. And my wife  
16 work at hospital. I was going to jury before, but it's  
17 never happened.

18 I like to go out dancing, work in my yard.

19 News I get from--sometime I read newspaper, and I  
20 read.

21 THE COURT: Okay. Thanks very much. What are exotic  
22 metals, by the way? It says involved in exotic metal  
23 forming

24 JUROR 28: It's a company I work for.

25 THE COURT: I see. Yeah, okay.

1 Ms. Kramer, number 29.

2 JUROR 29: Sue Kramer. I live in West Seattle. I  
3 might as well say I've been there all my life. I lived out  
4 in Renton for 15 years, but I am back there. I always  
5 worked in an office, worked at Boeing three times, Lockheed,  
6 King County for three and a half years, for the park  
7 department. I wish I would have stayed at one place so I  
8 had a retirement. But we've been retired for 13 years and  
9 my husband worked for Seattle PD for 30 years,

10 THE COURT: Police officer?

11 JUROR 29: No, he retired.

12 THE COURT: No. Was he a police officer?

13 JUROR 29: Yes, he was.

14 THE COURT: So you worked for the county and your  
15 husband was a 30 year police officer. You think that--I  
16 mean, you don't --can you be a fair juror in a criminal case  
17 your think?

18 JUROR 29: I was on one other case, a criminal case.

19 THE COURT: So you are not going to come in and say  
20 my husband's a police officer, I'm going to believe anything  
21 any police officer says?

22 JUROR 29: Oh, no, just the facts.

23 THE COURT: Okay. Great. Thank you. It's all I  
24 wanted to know, just the facts, ma'am, that's it.

25 JUROR 29: And then during the week I exercise six

1 days a week, and I'm secretary of my church group and we're  
2 in a--I'm in a poker club and--

3 THE COURT: No Red Hat club?

4 JUROR 29: No, no hats. And then when the weather is  
5 nice we go camping and fishing in the spring and fall, and  
6 in the summer we motorcycle, and we photograph, so--

7 THE COURT: Sounds like you guys have found the key  
8 to a good life.

9 JUROR 29: Yeah.

10 THE COURT: Both retired?

11 JUROR 29: And my news. We get the paper, and I  
12 listen to the news every nights on TV, world news and  
13 regular local news.

14 THE COURT: Thanks very much.

15 Ms. Comer, number 30. Is that right?

16 JUROR 30: Yes. My name the Paula Comer. I live in  
17 Auburn between Covington and Black Diamond, southeast  
18 Auburn. My occupation is admitting registrar at Valley  
19 Medical ER.

20 Occupation of others in my home. My husband is a  
21 newly returned worker to Darigold, who when he was locked  
22 out a year ago for nine months, and so he's been back to  
23 work. Used up all of our savings and--

24 THE COURT: Did that happen in Spokane? I remember  
25 that was an issue that--

1 JUROR 30: No, it's just Issaquah and the Rainier  
2 Avenue plant.

3 THE COURT: We live about five blocks from the  
4 Rainier Avenue plant.

5 JUROR 30: We have one son at home. We have three  
6 boys, but two are out of the state, or one is out of the  
7 country. And one is at home, currently going to Green River  
8 Community College and working part time.

9 And other jury experience. I served for two weeks in  
10 1979 in the King County Superior court in downtown Seattle.  
11 I was on three juries.

12 THE COURT: Those were, just for everybody's  
13 information, that was in the days when you were called for  
14 jury service for two weeks. And so you were sitting in that  
15 room for two weeks. So we've now got it down to two days so  
16 at least we're not totally wiping out people's lives with  
17 that

18 JUROR 30: And I forgot that I had also served in the  
19 early nineties at the Aukeen District Court. I forgot to  
20 put that on my biography. But I served the two weeks in '79  
21 on two criminal and one civil. And then in Aukeen District  
22 Court it was a criminal case, as I recall. And then I had  
23 jury duty, but didn't get to serve on a jury.

24 THE COURT: Okay. Was that here or--

25 JUROR 30: King County Superior Court.

1 THE COURT: This is the King County Superior Court.

2 JUROR 30: But up in Seattle.

3 THE COURT: Okay.

4 JUROR 30: Okay. And favorite leisure activities.

5 Reading, some sewing, cooking. My primary source of news is  
6 mostly the newspaper, but some evening news.

7 THE COURT: Thanks so much.

8 THE COURT REPORTER: I need to take a recess now.

9 THE COURT: Well, I had hoped to get through this one  
10 row.

11 Well, we will reconvene at 11:15.

12 And I'm going to give you this instruction every  
13 time, all the way through the trial, don't talk about this  
14 case, that is just verboten to talk about the case at all  
15 because we don't want opinions exchanged.

16 See you at 11:15.

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1 don't know.

2 MR. COOK: I don't have any more  
3 questions.

4 THE COURT: Okay. I think that you  
5 did a very good job of questioning that juror  
6 and I think we have a good idea that she can be  
7 a good juror. And I am going to deny the  
8 challenge for cause on Ms. Bender.

9 I'm going to recess, except that I do  
10 have, from Ms. Johnson, you have the problem  
11 with your company is moving, too, as well,  
12 right? Weren't you asking for dismissal on  
13 that basis? Okay. You said that you thought  
14 about all your questions last night and you  
15 began to question whether you could really do  
16 this.

17 JUROR NUMBER 19: I'm sorry, I  
18 couldn't hear you.

19 THE COURT: You began to question  
20 whether you could really sit as a juror on this  
21 type of case.

22 JUROR NUMBER 19: It goes back to our  
23 conversation that it brought up a lot of stuff  
24 and I had like an hour drive home, a lot of  
25 time to think about it. And it was very





1 shoe store and not the shoes themselves. Okay.  
2 In other words, you can't be a juror in any old  
3 case because you would come in before you heard  
4 one shred of evidence, you would look at the  
5 parties and say, that guy wins, this guy loses.  
6 Is that what you are saying?

7 JUROR NUMBER 48: It's a combination  
8 of everything.

9 THE COURT: If we all did this, there  
10 would be no jury system in this country.

11 JUROR NUMBER 48: Sure. But I also  
12 add my statements I made earlier yesterday and  
13 I thought those were clear.

14 THE COURT: Okay. Mr. Minor.

15 MR. MINOR: I do have a challenge for  
16 cause.

17 THE COURT: Thank you, Mr. Barber,  
18 we'll excuse you. That certainly won't work in  
19 this system.

20 Do you have any more questions?

21 MR. MINOR: Yes. Juror 49 --

22 THE BAILIFF: 49 is gone.

23 MR. MINOR: 50.

24 THE COURT: That's Mr. Johns.

25 MR. MINOR: You answered, yes, to the