

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA                   :       CRIMINAL ACTION  
  
                  v.   :  
  
COREY KEMP, et al.                         :       NO. 04-370-02, 03, 04, 05, 06

**MEMORANDUM RE EXCUSE OF JUROR NO. 11**

**Baylson, J.**

**April 28, 2005**

On April 27, 2005, the Court excused for cause under F. R. Crim. P. 23(b)(3) Juror No. 11, following extensive in camera hearings and procedures which are outlined below. Although the Court believed it had discretion to instruct the remaining eleven jurors to proceed with their deliberations, because the Court had required three alternate jurors to come to court every day and remain sequestered, the Court invoked the procedure stated in F. R. Crim. P. 24(c)(3) and after appropriate questions of Alternate Juror No. 13, seated Alternate Juror No. 13 as Juror No. 11, and directed the jury to begin their deliberations anew. Although all defense counsel objected to excusing Juror No. 11, after that was completed, no counsel objected to seating the alternate.

This Memorandum contains additional findings to those stated in open court, reviews the procedures used by the Court and discusses the relevant law.

**I.     Jury Voir Dire of April 19, 2005**

The reasons for the first voir dire of the jury on April 19, 2005 have been set forth in the two Court Memorandum Opinions dated April 21, 2005, one of which has been made public, and the other will remain sealed until the conclusion of the trial. The contents of these Memoranda will not be repeated.

## **II. Jury Voir Dire of April 25, 2005**

As a result of notes received on Monday, April 25, 2005, which indicated further issues concerning the conduct of deliberations, the Court once again, under the authority of United States v. Resko, 3 F.3d 684 (3d Cir. 1993), commenced a second voir dire of the jurors. At this time, before conducting the individual voir dire, the Court advised defense counsel that three questions would be asked and no counsel suggested additional questions. The three questions were as follows:

1. Is any juror or jurors refusing to deliberate?
2. Is any juror or jurors refusing to discuss the evidence or lack of evidence?
3. Is any juror refusing to follow the Court's instructions?

In responses, it was clear to the Court that eight of the twelve jurors communicated facts, in varying degrees of specificity, which would have warranted the Court in finding that Juror No. 11 was either not deliberating, refusing to consider evidence, and/or not following the Court's instructions. In addition, there were some indications of bias and prejudice on the part of Juror No. 11 which were not fully articulated. The Court heard arguments from counsel. The government asserted that there were sufficient grounds on the record to excuse Juror No. 11. Following the voir dire, the jury then forwarded to the Court another note in which the jury asserted in part that the Court had not asked the right questions and suggested additional questions. The Court took the matter under advisement.

On the morning of April 26, 2005, the Court advised counsel that the motion of the government to excuse Juror No. 11 would be denied because the Court could not say at that time, based on all jurors' responses, that there was not some possibility that the request to excuse

stemmed from Juror No. 11's view of the sufficiency of the government's evidence, the test used in one of the leading cases on this topic, United States v. Brown, 823 F.2d 591, 597 (D.C. Cir. 1987).

At that time the Court elected to give the jury a supplemental charge in which the Court reiterated each juror's sworn answers, at the time of the jury selection voir dire, that all the prospective jurors who were eventually empaneled did not have any bias or prejudice as to race or occupation, and that no juror had any bias against law enforcement agents. There was not then, or ever, any suggestion of racial bias. However, the Court included race because, from the jurors' general comments in the in camera voir dire, the allegations of bias were not specific and the Court wanted to be sure that race was not a factor in any deliberation. The Court continued to remind the jurors of their duty to deliberate, to try to reach a verdict, but not to give up any honestly held beliefs that arose out of the evidence or lack of evidence, and that they may not use bias or sympathy in their deliberations.

In the charge on the morning of April 26, 2005, the Court also advised the jury that the questions that the Court had asked during the in camera voir dire were the only ones that the Court felt were appropriate, but if there was continuing juror conduct where a juror refused to consider evidence or refused to follow instructions or expressed bias, these matters could and should be brought to the Court's attention. Although some exceptions were taken to the charge, the Court felt that the charge was appropriate given the jurors' notes. The jury continued its deliberations for the rest of the day on April 26, 2005.

On the morning of April 27, 2005, several notes were presented to the Court requesting instructions on various legal issues or the application of the facts to the law. In addition, there

was a further note from the Foreman asking how the Court should receive communications from the jury that a juror was biased in the deliberations. The Court answered these questions and advised the jury, in response to the last point, that further communications should be sent following which the Court would once again question the jurors individually. Almost immediately, the Foreman sent a note asking the Court to re-ask the questions that had been posed on April 25, 2005.

### **III. Jury Voir Dire of April 27, 2005**

The Court reconvened in camera, and after hearing arguments and objections from counsel, conducted the third voir dire of the individual jurors, asking the same three questions as before, plus additional questions about bias.

As a result of these questions, eleven of the twelve jurors, i.e., all jurors except Juror No. 11, answered at least one of the questions affirmatively, with much more detail than had previously been expressed by most of the jurors. Most jurors stated that Juror No. 11 was biased against the government and had made statements indicating that she was unlikely to believe FBI agents because of their occupation. Several jurors stated Juror No. 11 had expressed bias against the government and/or the FBI from the very start of the deliberation, and consistently thereafter. The Court found that this was in direct contradiction to her sworn answers to the jury selection voir dire, in violation of the Court's instructions and in violation of the oaths that she had taken as a juror. The Court made certain findings on the record that will not be repeated.

The Court makes additional findings based on the record established. Although the Court cannot say that Juror No. 11 refused to deliberate in a formalistic sense in that all jurors indicated that she had been an active participant in speaking in the jury room on different points, a few

jurors felt that she was not deliberating in a good faith or rational manner. However, the Court does not base its decision to excuse Juror No. 11 on these few comments.

The Court takes more seriously the comments of all jurors, using their own words in varying degrees of specificity, that Juror No. 11 refused to consider the evidence or follow the instructions. Many specific instances were presented where one or more jurors had presented Juror No. 11, in response to Juror No. 11's questions or comments, specific evidence, such as testimony and documents, and Juror No. 11 refused to look at the material and refused to listen. The Foreman, whom the Court has previously found credible, was the most specific and articulate on this point, and the Court continues to credit his voir dire testimony.

As the Court noted on the record at the time, and above, all eleven of the twelve jurors, except for Juror No. 11, presented facts that warranted the Court in finding that Juror No. 11 was not following her oath and/or was not considering the evidence and/or was not following the Court's instructions and/or was inalterably biased against the prosecution. The answers of these eleven jurors warrants the Court finding that this bias went well beyond the absolute right of a juror to disbelieve a specific witness or witnesses in the case and that Juror No. 11 had come to the jury room from the very beginning of deliberations with preconceived biases and was unwilling to put those biases aside.

The Court also made findings that Juror No. 11 was not credible and that the other eleven jurors were credible. The Court specifically found her in "denial" of her words and actions during deliberations. The undersigned bases these findings on my observation of all the jurors and on the evident consistency of the eleven jurors who testified, individually out of the presence of each other, and the starkly inconsistent and irreconcilable testimony of Juror No. 11.

Although Juror No. 11 appeared articulate, she was disingenuous. This was particularly evident when, after the Court's questions were completed and Juror No. 11 had left the conference room, she herself, alone among all twelve jurors, asked to return to the conference room where the in camera hearing was taking place, and volunteered a statement that she found FBI agents credible on several specific points. The Court finds that Juror No. 11 went out of her way to make this incredible supplemental statement in order to deceive the Court and to try to "cover her tracks" in an attempt to persuade the Court that she was being fair and impartial as to FBI agents, with reason to know that the Court had received the testimony of all of the other eleven jurors that she was biased and/or unwilling to be fair and impartial.

As a result of the three separate sessions of the voir dire, culminating in the findings set forth above, and after hearing further argument of counsel, the Court decided Juror No. 11 should be excused for cause, as provided under Rule 23(b).

#### **IV. Legal Discussion**

As reviewed with counsel, there are several leading circuit decisions on this topic albeit no decisions of the Third Circuit. As noted above, the oldest case, and one frequently cited, as above, is United States v. Brown, which was followed by two decisions in the Second Circuit, and decisions in the Fifth and Ninth Circuits.

Judge Yohn of this Court in U.S. v. Siam, 2000 U.S. Dist. LEXIS 11181 (E.D. Pa. 2000), affirmed without opinion, 265 F.3d 1057 (3d Cir. 2001), excused a juror for cause under dissimilar facts, but accurately summarized the law at the time in an excellent rendition that deserves repeating:

In United States v. Brown, the D.C. Circuit held "that if the record evidence discloses any possibility that the [juror's] request to [be]

discharged stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." 823 F.2d at 596. Ten years later, in United States v. Thomas, 116 F.3d 606 (2d Cir. 1997), the Second Circuit "adopted the Brown rule as an appropriate limitation on a juror's dismissal in any case where the juror allegedly refuses to follow the law." Id. at 622. Last year, in United States v. Symington, 195 F.3d 1080 (9<sup>th</sup> Cir. 1999), the Ninth Circuit adopted a slightly less strict standard. After considering Brown and Thomas, the Ninth Circuit held "that if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." Id. at 1087. The Ninth Circuit "emphasized that the standard is any reasonable possibility, not any possibility whatever" and noted that "anything is possible in a world of quantum mechanics." Id. at 1087 n.5 (quoting United States v. Watkins, 983 F.2d 1413, 1424 (7<sup>th</sup> Cir. 1993) (Easterbrook, J., dissenting)).

Two other important decisions following Judge Yohn's opinion are U.S. v. Baker, 262 F.3d 124 (2d Cir. 2001) and U.S. v. Edwards, 303 F.3d 606 (5<sup>th</sup> Cir. 2002). In Baker, the Court upheld a conviction where a juror was dismissed under Rule 23(b), distinguishing Brown and Thomas and held: "Here the juror was not removed for her non-conforming view of the evidence. She was removed for her admitted refusal to perform her duty as a juror by deliberating together with the other jurors." Baker, 262 F.3d at 131. The Second Circuit held that the district court's finding on the question whether a juror has impermissibly refused to participate in the deliberation process is a "finding of fact to which appropriate deference is due," 262 F.3d at 130 (citations omitted), as "the trial judge's conclusion is 'based in large measure upon personal observations [of the juror's behavior] that cannot be captured on a paper record.'" Id. (quoting U.S. v. Ruggiero, 928 F.2d 1289, 1300 (2d Cir. 1991)).

In Baker, the facts are different only in that the juror herself had told the district court judge that she had made up her mind in advance of the beginning of the deliberations and within

a half hour determined that she would not deliberate with her fellow jurors. The notes from the other eleven jurors strongly supported these statements. In distinguishing Thomas, in which the Second Circuit had followed Brown, the court in Baker noticed a subtle but important difference.

The Baker opinion stated:

The stringent rule announced in Thomas applies to removal of a juror by reason of the juror's determination to vote without regard to the evidence. It is based on the difficulty in detecting the difference between a juror's illegal act of nullification, by deciding to vote against the weight of the evidence, and the juror's failure to be convinced of the defendant's guilt. In order to guarantee the defendant the right to a unanimous jury and to protect the defendant against efforts to achieve unanimity by removing jurors who disagree with the majority, Thomas ruled that a juror may not be removed for refusal to allow his or her decision to be governed by the evidence unless it is clear the motivation for the removal is not in fact the juror's nonconforming view of the sufficiency of the evidence to convict.

262 F.3d at 131.

In this regard, although Juror No. 11 in this case denied any misconduct, in other respects Baker is on point. The Court specifically finds that the decision to excuse Juror No. 11 is not based on the juror's nonconforming view of the sufficiency of the evidence to convict, but rather based on her demonstrated refusal to consider the evidence, refusal to follow the instructions of the law of the Court, that bias may not have any role in the jurors' deliberations, and her demonstrated bias against the prosecution, and against FBI agents because of their occupation. Thus, the Court finds that although Juror No. 11 went through the motions of deliberations in discussing the case, in fact she was not deliberating because of her bias, her refusal to listen, and her refusal to consider evidence that was presented to her during the deliberations in response to her comments and questions, all well documented by the voir dire testimony of the other jurors.

Although defense counsel accused the undersigned of bias, and speculated that because of her bias against FBI agents, Juror No. 11 was voting with the defense, the Court cannot make such a finding. Many of the counts in the indictment, particularly those charging mail and wire fraud, those charging conspiracy to commit honest services fraud, as well as those charging money laundering and bank fraud and particularly other charges against Defendant Kemp charging him with fraud concerning his church, did not depend to any significant degree on the credibility of FBI agents. It would be complete speculation to conclude that Juror No. 11 was favoring the defense on any or all of these counts. Furthermore, the Court, assiduously during all three voir dire processes, told each juror, before asking any questions, not to reveal in any way how the jury or any juror was voting in the deliberations as to guilt or innocence. This was in accord with the Baker holding. Id. at 132. The undersigned and counsel have “no clue” how the jury stands on any count as to any defendant.

Also consistent with Baker, this Court believes that it exercised a great deal of restraint. The Court denied the government’s request on April 25, 2005, and instead elected to give a supplemental charge and to require the jury to continue deliberations. It was not until after the third voir dire, when all eleven of the twelve jurors, except for Juror No. 11, gave testimony that indicated that “good cause” grounds existed for the excuse of Juror No. 11, that the Court so acted.

In the most recent case on this topic, U.S. v. Edwards, 303 F.3d 606 (5<sup>th</sup> Cir. 2002), the facts are dissimilar in that it concerned extra-judicial communications, but after inquiry by individual voir dire, the other jurors reported that one juror was refusing to participate in deliberations. The Fifth Circuit agreed that the district court judge had discretion to excuse this

juror for just cause and abuses this discretion “only ‘when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.’” Id. at 631 (quoting Whitehead v. Food Max of Miss., Inc., 277 F.3d 791, 792 (5<sup>th</sup> Cir. 2002)). In Edwards, the district court had found that the juror in question “was unable to follow instructions and that he had displayed a lack of candor.” Id. The court, after reviewing Brown, Thomas and Symington, reiterated the test stated in those cases and found that the juror in question was violating the court’s instructions and that the district court had not abused its discretion in discharging the juror. Id. at 631-34.

**V. Public Access**

After Juror No. 11 was excused, Defendants and the media demanded immediate unsealing of the jury voir dire. The Court has stated from the outset that all proceedings would be unsealed. This issue is not whether, but when. This Court’s prior Memoranda show abundant authority for the Court’s exercise of discretion as to the timing of the unsealing, and the Court has placed its reasons for waiting until the verdict or discharge of the jury on the record at several points since the voir dire started. The fact that on April 22, 2005 the Third Circuit dismissed PNI’s Motion for Summary Reversal of this Court’s Sealing Order reinforces the propriety, if not the wisdom, of sealing pending conclusion of the trial.

BY THE COURT:

s/Michael M. Baylson  
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