

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF COLORADO
 3 Criminal Action No. 96-CR-68
 4 UNITED STATES OF AMERICA,
 5 Plaintiff,
 6 vs.
 7 TERRY LYNN NICHOLS,
 8 Defendant.

ff

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 10 REPORTER'S TRANSCRIPT
 (Trial to Jury: Volume 53)

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 ff

12 Proceedings before the HONORABLE RICHARD P.
 MATSCH,
 13 Judge, United States District Court for the District of
 14 Colorado, commencing at 10:30 a.m., on the 30th day of
 October,
 15 1997, in Courtroom C-204, United States Courthouse,
 Denver,
 16 Colorado.

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Transcription
Street,
629-9285

Proceeding Recorded by Mechanical Stenography,
Produced via Computer by Paul Zuckerman, 1929 Stout
P.O. Box 3563, Denver, Colorado, 80294, (303)

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APPEARANCES

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* * * * *

13

PROCEEDINGS

14

(In open court at 10:30 a.m.)

15

THE COURT: Please be seated.

16

Good morning.

17

ALL: Good morning, your Honor.

18

the

THE COURT: We're ready to proceed pursuant to

19

should

agreed order regarding peremptory challenges. And you

20

Panels A

have, as I do, the 64 jurors cleared for cause in

21

through F.

22

MR. TIGAR: Yes, your Honor.

23

you

THE COURT: And I will expect, then, to have

24

the panel

exercise these peremptory challenges by references to

25

want to

seats; and for convenience here, knowing that you may

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1

no

consult among yourselves on each side, you know, I have

2

there

problem with your doing that and simply then standing

3

lectern

where you are instead of taking the time to walk to the

4

each time, and so forth.

5 And our procedure, as agreed, is that we will
6 alternate the exercise of these challenges one at a
time, the
7 Government going first.

8 Mr. Tigar?

9 ARGUMENTS RE PEREMPTORY CHALLENGES

10 MR. TIGAR: Yes, your Honor. I know the Court
has had
11 the papers on our motion with respect to the
Government's
12 exercise of peremptory challenges under the statute of
13 Edward I.

14 THE COURT: Yes.

15 MR. TIGAR: I think the Government -- the
Court has
16 indicated a disposition to deny the motion, but I
wanted to
17 make sure the record was protected.

18 THE COURT: Yes. You did file your
submission. The
19 thrust of it is that no peremptory challenges should be
granted
20 to the Government; that the Rule 24(c) is, I guess --

21 MR. TIGAR: Violates the due process clause,
your
22 Honor, and the Sixth Amendment.

23 THE COURT: -- unconstitutional.

24 MR. TIGAR: Yes.

25 THE COURT: And I've been apprised of your

position.

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1 I reject it. The Government will enforce Rule 24(c)
and
2 exercise 20 peremptory challenges and 3 to the
alternates, and
3 we've agreed to the procedure that we'll use 23 out of
the 64.

4 MR. TIGAR: And I wanted to make sure that our
5 agreement to the proposed order does not constitute a
waiver of
6 our position.

7 THE COURT: Not at all.

8 MR. TIGAR: And second, your Honor, we and the
9 Government have each filed a memorandum concerning
Batson, not

10 I think that either side anticipates that the other
side will
11 exercise challenges in any way that could be subject to
12 question but simply to state our views on the law.

13 THE COURT: I have those, too; and I'm going
to
14 follow, if necessary, the three steps in the Puckett
case from
15 the Supreme Court.

16 MR. TIGAR: Yes, your Honor. And the only
17 disagreement we have with the Government's submission

is we

18 believe that the Holland rule they cite has been
effectively --

19 rule they site has been effectively overruled by
McCollum in

20 the sense that -- and Powers in the sense that we do
have

21 standing with respect to all of those categories. But
I don't

22 know if that issue is going to arise, your Honor; but I
wanted

23 to alert the Court that our position on standing is as
stated

24 in McCollum and Powers and the Edmondson case.

25 THE COURT: Well, I'm not going to worry about

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1 standing now. If you stand to exercise a challenge, it
may

2 come up; but, you know, I'm prepared to hear Batson
objections

3 by either side.

4 MR. TIGAR: Thank you, your Honor.

5 MR. MACKEY: Your Honor, if I may . . .

6 THE COURT: Yes.

7 MR. MACKEY: One final procedural question.
And I

8 don't necessarily expect this will happen; but if for
some

9 reason both parties waive a strike in the same round,
it's my
10 assumption that the process will nonetheless continue;
that we
11 will go on to strike in the succeeding rounds. Just a
question
12 of procedure.

13 THE COURT: I don't understand the point.

14 MR. MACKEY: The question is if the
Government, for
15 example, in Round 12 hypothetically would waive its
strike in
16 Round 12, should the defense at that point waive as
well in
17 Round 12 --

18 THE COURT: I don't expect there to be any
waivers.

19 MR. MACKEY: All right.

20 THE COURT: I thought that the agreement was
that all
21 23 strikes would be exercised.

22 MR. MACKEY: I know the defense had taken that
23 position.

24 THE COURT: Well, I thought you had as well.

25 MR. MACKEY: And I expect that we will not,
but I

1 wanted to leave open that possibility as I've examined
--

2 THE COURT: I don't know how you would -- you
know, if

3 you were to waive a round, as you suggest, I don't know
how

4 that would be applied then when we're applying these
5 peremptories against a panel of 64. So I just don't
see how it

6 works procedurally.

7 MR. MACKEY: All right.

8 THE COURT: My understanding of our agreement
was that

9 you -- both sides would exercise all of the
peremptories

10 available both with respect to the -- we would pool
these

11 jurors and not separately do alternate jurors. And in
that

12 fashion -- you see, otherwise, we, I think, would have
great

13 confusion in trying to apply Rule 24 and the separate
14 challenges for the alternate jurors.

15 MR. MACKEY: I understand the Court's concern:
Who is

16 Juror No. 64? I understand.

17 We'll proceed accordingly.

18 THE COURT: Yeah. All 64 and divide it into
these

19 panels -- I'd expect both sides to exercise 23
challenges

20 apiece, alternating them.

21 MR. MACKEY: Thank you, Judge.

22 THE COURT: Does the defense agree to that
procedure?

23 MR. TIGAR: Yes, indeed, your Honor; and we
thought

24 that under Ross vs. Oklahoma, as construed in the Tenth

25 Circuit, we are required to exercise all 23 in order to

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1 preserve our objections to challenges for cause.
That's why we

2 sought the procedure, and we will exercise all 23.

3 THE COURT: All right. Well, now, we're in
agreement.

4 MR. MACKEY: Thank you, your Honor.

5 THE COURT: We'll start exercising them, with
the

6 Government first.

7 PEREMPTORY CHALLENGES AND RULINGS

8 MR. MACKEY: Your Honor, the United States
would

9 strike Juror E6.

10 THE COURT: That's panel E and Seat 6.

11 As I said, Mr. Tigar, you don't have to --

12 MR. TIGAR: Batson challenge, your Honor.
Roman

the
those
October 24.

13 Catholic juror identified as such in pleadings filed by
14 Government arguing with respect to the significance of
15 beliefs in the mind of the juror. Brief filed in that
16 connection by the Government identifying that on

is a

17 THE COURT: So, what is your point; that this
18 religious discrimination?

question is

19 MR. TIGAR: Yes, your Honor. The first
20 does Batson extend to religious discrimination.

21 THE COURT: Right.

recognize

22 MR. TIGAR: With respect to this type. We
23 that presents a legal issue under Prong 1; and if it
does, then
24 would -- if your Honor accepts that view, then the
burden would
25 shift under Phase 2.

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1 THE COURT: All right. Is there a response?

to

2 MR. CONNELLY: Your Honor, assuming it applies
based

3 religion, this was not a religion-based strike. It was

4 on the juror's views of the death penalty, which came
very
5 close to disqualifying that juror for cause. And it
was not
6 done for any prohibited reason. It was done solely
based on
7 her ability to fairly decide the death penalty issues
in this
8 case impartially. She approached a cause challenge.
We
9 thought she was disqualified for cause, but clearly
there are
10 neutral reasons tied to this case for striking her.

11 THE COURT: Response.

12 MR. TIGAR: Briefly, your Honor, and if I
could just
13 say this now, it may save some time later.

14 THE COURT: Very well.

15 MR. TIGAR: It is our position that the
purportedly
16 neutral explanation in fact raises an additional
Batson-based
17 challenge for cause. We would contend there is a
Batson
18 category of jurors with scruples with respect to the
death
19 penalty who are not Witherspoon excludable; that is to
say that
20 that constellation of moral and religious beliefs
constitutes a
21 Batson-protected category.

22 We recognize that the case law is sparse on

that

23 issue, but that is our position.

24 THE COURT: Two rulings, then. First on the
general

25 legal underpinnings of this dispute, I am going to
assume that

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1 religion is a Batson category, along with race and
gender.

2 Some of the others that have already been recognized.
So I

3 would entertain the objection on that ground.

4 With respect to the second point raised,
scruples re

5 the penalty, I don't believe that's a definable
category.

6 Obviously, that's a matter that we discussed when there
were

7 motions to excuse people for their inability to serve
under the

8 statutory criteria and under the required criteria
applied by

9 the Supreme Court, Witt, Witherspoon, and so forth.

10 As I explained at that time, when we get to
these

11 issues about particular jurors and the responses of the

12 particular jurors, as I said before, there is no
talismanic

of all 13 question here. It has to be a matter of consideration
14 of the juror's answers in context.

15 And with respect to this particular juror,
it's clear 16 to me from my notes regarding uncertainty about the
ability to 17 follow the law with respect to punishment, it's -- and
some 18 emotional response from the juror, I think that the
19 Government's exercising a peremptory challenge here is
20 plausible, understandable; and the Batson challenge to
the 21 peremptory challenge is rejected.

22 So now, the defendant's first peremptory.

Honor: 23 MR. TIGAR: Defendant's first peremptory, your
24 B5.

25 THE COURT: B, as in boy?

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1 MR. TIGAR: B as in Bravo, your Honor, 5.

2 THE COURT: B5. Government?

3 MR. MACKEY: Thank you, your Honor. We would
next 4 strike Panelist B12.

5 THE COURT: B12.

6 MR. TIGAR: We renew, your Honor, with respect
to this
7 juror, the scruples challenge. We understand it's
previously
8 rejected by the Court; but to protect the record, we
raise it.

9 THE COURT: All right. Well, I'm rejecting
the
10 scruples category, I guess we'll refer to it for ease
of the
11 record here, and accept that peremptory challenge.
B12.

12 Defendant's next?

13 MR. TIGAR: Defendant challenges B, Bravo, 1.

14 THE COURT: B1.

15 Government?

16 MR. MACKEY: Yes, your Honor. Panelist F2.

17 THE COURT: F2.

18 MR. TIGAR: Defense challenges Charlie 4. C4.

19 THE COURT: C4.

20 I won't invite you each time. I'll just wait
till
21 you're ready, and you'll alternate and go ahead when
you're
22 ready.

23 MR. MACKEY: Thank you, your Honor.

24 The Government would next strike E5.

25 THE COURT: E5.

1 MR. TIGAR: Defense strikes Charlie 12, C12.
2 THE COURT: C12.
3 MR. MACKEY: Next, your Honor, for the
Government.
4 THE COURT: Yes.
5 MR. MACKEY: A7.
6 THE COURT: A7.
7 MR. TIGAR: Defense strikes Delta 2, D2.
8 THE COURT: D2.
9 MR. MACKEY: If your Honor please, A5.
10 THE COURT: A5.
11 MR. TIGAR: Defense strikes A6, Alpha 6.
12 THE COURT: A6.
13 MR. MACKEY: Your Honor, A9.
14 THE COURT: A9.
15 MR. TIGAR: Defense strikes C9, Charlie 9.
16 THE COURT: C9.
17 MR. MACKEY: Same panel, your Honor, C5.
18 THE COURT: C5.
19 MR. TIGAR: Defense strikes F, as in Foxtrot,
3. F3.
20 THE COURT: F3.
21 MR. MACKEY: Your Honor, for the Government,
E2.

22 THE COURT: E2.
23 MR. TIGAR: Defense strikes A10, Alpha 10.
24 THE COURT: A10.
25 MR. MACKEY: Your Honor, the Government's
tenth strike

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1 is as to Panelist D4.
2 THE COURT: D, as in Day?
3 MR. MACKEY: Yes, your Honor.
4 THE COURT: D4.
5 MR. TIGAR: Defense D as in Delta, 5. D5.
6 THE COURT: D5.
7 MR. MACKEY: Your Honor, E1.
8 THE COURT: E1.
9 MR. TIGAR: Defense challenges C2, Charlie 2.
10 THE COURT: C2.
11 MR. MACKEY: For the Government, your Honor,
C6.
12 THE COURT: C6.
13 MR. TIGAR: Defense strikes Bravo 10, B10.
14 THE COURT: B10.
15 MR. MACKEY: Your Honor, E8.
16 THE COURT: E8.
17 MR. TIGAR: Defense challenges Bravo 9. B9.

18 THE COURT: B9.
19 MR. MACKEY: Your Honor, for the Government,
D3.
20 THE COURT: D3.
21 MR. TIGAR: Batson, your Honor, African-
American.
22 THE COURT: D3?
23 All right. Government response?
24 MR. MACKEY: Your Honor, we assume based on
the brief
25 that we filed this morning that for purposes of this
proceeding

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1 the Court will consider the motion as having made the
prima
2 facie case of the strike being generated for racially
3 inappropriate grounds. We'll respond with that
assumption.

4 This is our first opportunity to make as a
matter of
5 record some of the statistical information that is
called for
6 by virtue of the cases referred to in our brief.

7 THE COURT: All right.

8 MR. MACKEY: And I want to report to the Court
based
9 on our evaluation of the venire that Caucasians make up

up
10 87.5 percent of the venire, 64; African-Americans make
may
11 7.8 percent, your Honor, and Hispanics 4.7. And that
12 become a guiding principle for the course of the
challenges.

13 THE COURT: When you say "the venire" --

14 MR. MACKEY: The panel of 64.

15 THE COURT: Of the 64?

16 MR. MACKEY: Yes, your Honor. One of the
factors that

17 is referred to in the Hurd case and others is the
number of the

18 racial groups in the panel -- that's the reason for the
making

19 of this particular record -- and also the nature of the
crime

20 and the race of the defendant and the victim. And I
think it's

21 important in evaluation of this challenge that the
Court know

22 the statistical and sex makeup of the victims of the
Oklahoma

23 City bombing.

24 I would report to the Court that of the 168
persons

25 who died on April 19, 1995, 126 were Caucasian, 47 men,
69

victims 1 women and 10 children. There were 34 African-American
children. 2 of the bombing consisting of 9 men, 17 women, and 8
bombing, 3 There were 5 Hispanics who died in the Oklahoma City
4 including 4 adult men and 1 child.

female 5 There was 1 male Asian, 1 male -- excuse me --
American. 6 Asian, for a total of 2; and finally, 1 Native
That 7 was the racial and sex makeup of the victims of the
Oklahoma 8 City bombing.

underscore what 9 I mention that largely, your Honor, to
in this 10 we judge to be a principle of the Government's strike
crime. And 11 situation; and that is, this was an indiscriminate
12 for that reason, the Government would see no racial
motivation 13 in the selection of a jury.

would make 14 Your Honor, specifically as to Juror 176, I
15 a matter of record the race-neutral grounds.

16 THE COURT: All right.

particular 17 MR. MACKEY: First of all, your Honor, this
jail on 18 juror considered herself as having been wrongly put in

19 a particular occasion. She recited in her
questionnaire and

20 her testimony an incident involving herself where there
was a

21 domestic dispute, her husband was not arrested and she
was, and

22 she judged it to be unfair.

23 In questioning of this particular juror, your
Honor,

24 she answered Mr. Tigar by pointing out that her own
situation,

25 the incident that I referred to, was a fact where she
thought

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1 her husband "had told lots of lies and stuff," and that
might

2 influence her view of accomplice testimony. And that's
a

3 matter of record at transcript 3462.

4 Our second ground as to this juror, your
Honor,

5 relates to her death penalty answers, which at best
could be

6 described as unclear. This particular juror said, "I
don't

7 know," when asked whether the death penalty should ever
be

8 imposed and on what kinds of cases it should be
imposed, those

9 answers at Questions 124B and D.

10 This particular juror told the Court, "I've
thought
11 about it," meaning the death penalty, "and I don't know
how I
12 feel about the death penalty." She went on to say at
3532 that
13 she was very uncertain about the issue.

14 This juror gave several answers suggesting
that the
15 most important consideration for death penalty is
whether the
16 defendant was a repeat offender. More often than not,
she used
17 the description of a person who continually murdered
others as
18 being a kind of person, a kind of case, that would
justify the
19 death penalty.

20 When she was asked the question about whether
a single
21 criminal act that killed a lot of people, a question
asked by
22 the defense, such as bombing an airplane, her answer
was, "I
23 don't know."

24 Thirdly, your Honor, as to grounds for this
particular
25 juror and the basis for our motion is her demeanor.
This is a

and the 1 juror who appeared twice, both at the end of the day
occasions, 2 following morning; and we would note that on both
acclimated 3 even giving her the benefit of the doubt of becoming
judgment that 4 to the situation, she exhibited demeanor in our
hand. 5 did not seem appropriate for service in the matter at

6 Those are the bases for that motion to strike.

7 THE COURT: Thank you.

8 Do you have response, Mr. Tigar?

juror's 9 MR. TIGAR: Yes, your Honor. Her -- the
which if 10 answers with respect to the death penalty were ones
the end 11 anything would give the defendants some concern; but at
are the 12 of the day, she said that she could follow the Court's
13 instructions no matter how serious the crime. Those
14 questions to which counsel was referring.

your 15 With respect to the incident with her husband,
that 16 Honor, that was a mixed-race incident; and if anything,
challenge. 17 incident simply magnifies the Batson basis for our

juror;
was --
18 With respect to demeanor, your Honor saw the
19 and we certainly saw nothing inappropriate in what she
20 in her responses.

were
21 I've looked at the transcript, and her answers
22 straightforward.

23 THE COURT: Do you have any --

24 MR. TIGAR: I'm sorry, your Honor.

25 THE COURT: Do you have any dispute about the

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1 statistical information which Mr. Mackey provided here?
2 MR. TIGAR: No, your Honor, I don't. But in
our
3 respectful submission the fact that this crime, this
terrible
4 event, took the lives of a large number of people of
many
5 different races is irrelevant to the Batson
determination here.

6 THE COURT: Well, I'm speaking more to the
venire, the
7 64.

8 MR. TIGAR: Oh, I see, with respect to the
venire.

9 THE COURT: Yeah.

count; 10 MR. TIGAR: No, your Honor, I haven't done the
that 11 but that sounds about right to us. And, of course,
see a 12 doesn't become relevant until and unless we begin to
ground 13 pattern. If we do, then we might have some additional
Honor. 14 upon which to go back and consider these things, your

any 15 Our challenge as of this time isn't based upon
through a 16 pattern that has so far appeared. We've only gone
17 couple of these.

line with 18 THE COURT: All right. Well, you know, in
the 19 the teachings of the Supreme Court in the Puckett case,
proponent of 20 question for the trial judge is whether the first
neutral 21 the strike or challenge has come forward with a race-
whether the 22 explanation-- and the Government has -- and then
purposeful 23 objector or opponent of the strike has proved
24 discrimination. The answer is no on this juror.

25 And accordingly, the Batson objection to the

to D3 -- 1 peremptory challenge is rejected. D3 -- the challenge
2 peremptory challenge is accepted.

3 Defense next.

Delta 4 MR. TIGAR: Defense challenges D9, your Honor,
5 9.

6 THE COURT: D9.

7 MR. MACKEY: Your Honor, Alpha, A11.

8 THE COURT: A11.

9 MR. TIGAR: Defense challenges D7, Delta 7.

10 THE COURT: D7.

11 MR. MACKEY: If your Honor please, C1.

12 THE COURT: C1.

13 MR. TIGAR: Defense challenges A8, Alpha 8.

14 THE COURT: A8.

15 MR. MACKEY: Thank you, your Honor. B4.

16 THE COURT: B4.

17 MR. TIGAR: Defense challenges C7, Charlie 7.

18 THE COURT: C7.

19 MR. MACKEY: Your Honor, C10.

20 THE COURT: C10.

21 MR. TIGAR: Defense challenges C8, Charlie 8.

22 THE COURT: C8.

23 MR. MACKEY: Your Honor, for the record, on

behalf of

24 the Government, we would make a Batson challenge. I
note for

25 the record that defendant strikes D5 and C8 are
Hispanics.

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1 THE COURT: D5 -- well, all right. You're
making the

2 objection on C8.

3 MR. MACKEY: Based on the pattern, your Honor,
since

4 Hispanics only constitute -- there are only three in
the entire

5 64.

6 THE COURT: I just want -- the record is that
the

7 challenge is to -- or the objection is to the challenge
on C8.

8 MR. MACKEY: Yes, your Honor.

9 THE COURT: And included in it is the pattern
10 reflecting D5.

11 MR. MACKEY: Yes, your Honor.

12 THE COURT: Mr. -- let me just take a moment
to look

13 at C8.

14 All right. Mr. Tigar?

15 MR. TIGAR: Yes, your Honor. Juror C8,

according to

16 my notes, was an in-home day-care provider and first
learned of

17 the bombing from one of the parents who came to pick up
their

18 child at the day-care center, and they related that
there was a

19 day-care center in the federal building, your Honor.
That is

20 the -- an extremely close connection to day-care
provision; and

21 based on our prediction that the first witnesses -- or
among

22 the first witnesses in this case will be the people who
were

23 involved in that process in Oklahoma City, as well as
the

24 opening statement which we reviewed from the last case,
which

25 focused on that, if the Court will recall, for its
first X

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1 number of minutes, it was our prediction that this
juror's

2 response to that testimony would be such as to
influence the

3 jurors' judgment in an innocence phase of the trial and

4 particularly should we get to a penalty phase.

5 In addition, your Honor, we would note with

respect to

6 this juror that although her own ethnic background is
Hispanic,

7 the -- this is a neutral challenge in the sense that
she is

8 married to a non-Hispanic and thus doesn't have the
degree of

9 ethnic identification that would sustain a McCollum
challenge.

10 THE COURT: Well, she also marked two races on
page --

11 she marked for herself two races.

12 MR. TIGAR: Yes, your Honor.

13 THE COURT: Hispanic/Latino, White/Caucasian.

14 MR. TIGAR: Yes, your Honor. And with respect
to D5,

15 since the Government has talked about a pattern, this
is

16 somebody who returned her first questionnaire, wrote on
it that

17 Terry Nichols was guilty, crossed out "guilty." And I
don't

18 remember if she wrote "involved" or "responsible," but
we asked

19 her about that. That is an extremely strong expression
of

20 opinion. And in our view, you know, she wrote -- "Is
there any

21 other reason that would prevent you from serving on the
jury?"

22 She wrote "yes" and then provided that explanation,
your Honor.

five in 23 That certainly puts her among the top four or

24 terms of the strength of expression of opinion.

rejoinder to 25 THE COURT: All right. Do you have any

6209

1 that?

2 MS. WILKINSON: Just briefly, your Honor.

3 THE COURT: Very well, Ms. Wilkinson.

citing to 4 MS. WILKINSON: I believe that Mr. Tigar is

5 transcript page 2888.

6 THE COURT: On which one now?

subject -- 7 MS. WILKINSON: Of the juror that is the

8 THE COURT: C8?

many 9 MS. WILKINSON: C8. Yes. Sorry. We have so

10 numbers, it's --

11 THE COURT: And the page again?

I 12 MS. WILKINSON: Page 2888. It began on 2887.

is 13 believe if this is the only reason that defense counsel

14 challenging this juror, she responded that she had no

that there 15 discussion with the parent about that fact, meaning

16 was a day-care center in the building. And she just
said the

17 person left right away and then she turned on the
television.

18 I did not hear Mr. Tigar give any other bases for
challenging

19 this juror.

20 Based upon that and the pattern of challenging
the

21 prior juror, we would say this would qualify under
Batson.

22 THE COURT: All right.

23 Well, I'm rejecting the Batson objection. You
know,

24 we have again all these appellate opinions about this
process,

25 but certainly intuitive and counterintuitive notions
are still

6210

1 a part of the process, I think, so long as there can be
a

2 plausible explanation for it. And certainly advocates
on each

3 side can have different intuitive feelings about
responses. So

4 I'm satisfied that this is not a discriminatorily
motivated

5 exercise of a peremptory challenge, so the Batson
objection is

6 rejected.

7 I believe we're ready for No. 19.

8 MR. MACKEY: Government's 19, your Honor, is
against
9 Panelist B7.

10 THE COURT: B7?

11 MR. MACKEY: Yes, your Honor.

12 MR. TIGAR: Defense challenges D10, Delta 10.

13 THE COURT: D10.

14 MR. MACKEY: Government's 20, your Honor, is
against
15 Panelist F1.

16 THE COURT: F1.

17 MR. TIGAR: Batson, your Honor, African-
American.

18 THE COURT: Okay.

19 All right, Mr. Mackey.

20 MR. MACKEY: Your Honor, as to this juror, F1,
the
21 basis for the Government's strike is as to her views on
the
22 death penalty. Her questionnaire began with answers,
such as,
23 "I don't really believe in the death penalty. I don't
know
24 what it solves, putting someone to death. I could not
sentence
25 a person to death."

1 The voir dire, as the Court may recall, was
barely 2
 3 stronger; and I would highlight a number of her
answers, your 4
 5 Honor. At page 5490, she said, "I'd probably have
nightmares 6
 7 if I did something like that," referring to voting for
the 8
 9 death penalty; on the same page, said, repeating the
 10 questionnaire, "I don't see any purpose in putting a
person to 11
 12 death."
 13

14 Further, at 5500, "I just don't think I could
sentence 15
 16 a person to death. I don't know. I don't know. I
still feel 17
 18 bad for Gary Davis having been executed. I feel sorry
for 19
 20 him."

21 Your Honor, our view is given her very strong
22 anti-death-penalty views, she's too much of a risk; and
23 therefore the Government would move to strike F1.

24 THE COURT: Mr. Tigar?

25 MR. TIGAR: If your Honor please, it's our
position 26
 27 that that explanation is not a neutral explanation
within the 28

18 meaning of Batson and its progeny; that is to say that
to
19 attempt to excuse a race-based peremptory by citation
of views
20 that are well within the category of persons eligible
to serve
21 on juries in capital cases and views that are protected
by the
22 First Amendment does not as a matter of law cure a
Batson
23 challenge based on race. And therefore, your Honor,
we'd
24 respectfully submit that the explanation should be
rejected.

25 THE COURT: Well, I'm satisfied that this was
a

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1 race-neutral explanation and that there is no evidence
of
2 purposeful racial discrimination with respect to this
person.

3 Now, of course, this gets over into the
argument made
4 by the defense with respect to scruples concerning the
penalty.

5 MR. TIGAR: Yes, your Honor.

6 THE COURT: And I rejected that as a category,
but I
7 believe the challenge is a valid one and the objection
to it is

8 denied. F1 -- F1 is excused.

9 MR. TIGAR: Defense challenges, your Honor,
B8, Bravo

10 8.

11 THE COURT: B8.

12 MR. MACKEY: Thank you, your Honor.
Government would

13 strike C3.

14 THE COURT: C3.

15 MR. TIGAR: Defense challenges D8, Delta 8.

16 THE COURT: D8.

17 MR. MACKEY: Thank you, your Honor.

18 Government's next strike is against Panelist
E12.

19 THE COURT: E12.

20 Mr. Tigar?

21 MR. TIGAR: Defense challenges D1, Delta 1.

22 THE COURT: D1.

23 MR. MACKEY: Your Honor, for the Government,
E9.

24 THE COURT: E9.

25 MR. TIGAR: Batson, your Honor, African-
American.

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1 THE COURT: Okay.

2 All right. Your response, Mr. Mackey?

3 MR. MACKEY: Your Honor, the race-neutral
grounds on

4 which the Government is relying as to E9 are as
follows. And

5 while I will mention to the Court I was intrigued by
the

6 possibilities, careful evaluation of all of the factors
in mind

7 here lead to this motion to strike E9.

8 First of all, your Honor, it begins with the
9 questionnaire; and I do acknowledge and accept great
distance

10 was made in the course of the oral voir dire from some
of the

11 questions on the questionnaire to the attitude
exhibited to

12 your Honor. We nonetheless cannot shake some of the
very stark

13 and difficult language that he chose to recite in his
14 questionnaire. And that's referred to in question --
or

15 answers on 164 and 165. A very strong and clear
message was

16 sent on paper, your Honor, that this was not a process
that he

17 wanted to participate in or would be serious about if,
in fact,

18 selected.

19 We remained concerned, your Honor, both from
the basis

20 of the questionnaire as well as his answers as to
whether he

21 would stay focused on detailed evidence that may
develop and

22 unfold over many weeks or months of testimony.

23 The second ground, your Honor, is a life
experience

24 from this juror that we have to apply to the evidence
that we

25 expect and the issues that may well arise in the course
of this

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1 trial, and that is his past that's reflected in answers
to

2 Questions 103 and 105 and 108, questions that the Court
3 reviewed with him. He used and affirmed the notion of
a rush

4 to judgment in connection with his own past
experiences.

5 That's the second ground, your Honor.

6 The third ground, your Honor, has to do with
his

7 particular status in the community and the risk that,
given

8 that status, he may well prove to be a disruption to
the rest

9 of the members of the jury.

10 And finally, your Honor, as to the death
penalty, we

11 would note that in his answer on Question 124B, he said
that he
12 would give the death penalty if the conviction involved
little
13 circumstantial evidence. Those collection of reasons,
your
14 Honor, serve as grounds for our motion.

15 THE COURT: Response?

16 MR. TIGAR: With respect to the questionnaire,
your
17 Honor, that is not, in our respectful submission, a
neutral
18 basis. Many people -- a number of people -- several at
19 least -- were impatient with the questionnaire. I
think that
20 in questioning by your Honor, the juror proved himself
to be
21 someone who was well aware of his rights and in the
process
22 became extremely well aware of his responsibilities.
His
23 unequivocal statement at the end about his willingness
to
24 participate and the manner in which he would do so, it
seems to
25 us, removes any questionnaire-based concerns about this
juror.

1 With respect to the life experience, your
Honor, the
2 juror had the feeling that that life experience related
in some
3 way to the juror's race and celebrity status, if the
Court will
4 recall. To the extent it deals with race, it is, I
think,
5 common knowledge that many people who -- many African-
Americans
6 believe that law enforcement treats them in a different
way
7 than it treats others. Thus, to say that somebody had
a bad
8 experience with law enforcement when a Batson challenge
is
9 based on African-American status really is to let one
set of
10 circumstances, i.e. a feeling about the justice system,
do
11 proxy for another.

12 With respect to obstruction, the obstruction
challenge
13 appears to be based on the fact that the juror is
somebody who
14 is well known to a large number of people. That,
again, your
15 Honor, does not seem to be a valid ground of
distinction.

16 And again, with respect to focus, the juror
made clear
17 that he understands these things, he's somebody in
business for

18 himself, he's used to making important decisions and
willing to
19 participate in the process fully.

20 So we respectfully submit that those are not
proper
21 answers to a Batson challenge.

22 THE COURT: All right. Well, I'm adhering to
the
23 caution given by the Supreme Court in Puckett, of
course, that
24 it is not for the Court to evaluate and agree or
disagree with
25 the grounds stated so long as they are neutral and do
not

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1 indicate purposeful racial discrimination. I'm
satisfied with
2 the Government's explanation that race is not a factor
in this
3 decision; and accordingly, the Batson objection is
rejected.
4 The challenge is granted, and E9 is excused.

5 MR. TIGAR: Your Honor, defense challenges E7.
Echo
6 7.

7 THE COURT: E7.
8 All right. That completes the peremptory
challenges,

9 and I want you to remain after we recess to double-
check these
10 numbers with the clerk so that we're very clear that
there
11 hasn't been a transposition of number or something --
so that
12 we're clear.

13 Now, what I intend to do, I have directed that
the
14 entire venire be brought to the courthouse; and they
will be.
15 And my purpose here now is to meet with them in the
adjacent
16 courtroom, which will not be a public meeting. And I
intend to
17 separate out the persons who have been excused through
the
18 exercise of these peremptory challenges, advise them of
that,
19 thank them for their participation in the process, and
excuse
20 them. And they will then leave the courthouse.

21 We'll then proceed with our 18, and we will
convene
22 here; and one at a time I will do a brief additional
voir dire
23 with respect to each one of them. And then after we
have our
24 jurors and alternate jurors selected, I intend to give
them
25 instructions, both -- cautionary instructions, of
course. We

1 won't swear them at this time. I'll reserve the
administering
2 of the oath until Monday morning. But I do intend to
give them
3 not only cautionary instructions but also the
preliminary
4 instructions about the trial process so that they will
be
5 informed of that and may save us some time Monday
morning so
6 that we can immediately after the administering of the
oath
7 proceed with opening statements.

8 Any objection to that proposal?

9 MR. MACKEY: None, your Honor.

10 MR. TIGAR: No, your Honor. I assume that the
Court
11 will be keeping in reserve the jurors --

12 THE COURT: Oh, yes. I have the additional
persons
13 who have been qualified available in the event that in
the voir
14 dire there is a determination that somebody now needs
to be
15 excused for cause because of whatever happens in the
voir dire.
16 Yes. And then if it's necessary to replace them, we'll
use

17 that process and then determine what number of
peremptory

18 challenges additional should be granted.

19 So I think that if we recess till 1:15 --

20 Mr. Manspeaker, does that seem --

21 MR. MANSPEAKER: I believe that will be
sufficient.

22 THE COURT: We'll recess till 1:15,
anticipating by

23 that time we'll be ready for this final voir dire.

24 Court is in recess.

25 (Recess at 12:42 p.m.)

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REPORTER'S CERTIFICATE

8 I certify that the foregoing is a correct
transcript from

Dated

9 the record of proceedings in the above-entitled matter.

10 at Denver, Colorado, this 30th day of October, 1997.

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Paul Zuckerman

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