

**Appeal No. 02-1757**

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**IN THE UNITED STATES COURT OF APPEALS  
EIGHTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

**Appellee,**

**vs.**

**KEITH DWAYNE NELSON,**

**Appellant.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI**

**The Honorable Fernando J. Gaitan, Jr.**

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**OPENING BRIEF OF APPELLANT**

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## SUMMARY OF THE CASE AND REQUEST FOR ARGUMENT

Keith Nelson was charged by Indictment with two counts: (1) unlawful interstate transportation of a ten year old female who had been kidnapped for the purpose of sexual abuse, which action resulted in the death of the victim; and (2) traveling across state lines with the intent to engage in a sexual act with a female under the age of twelve, which resulted in the death of the victim. Upon Mr. Nelson’s plea of guilty to Count I, Count II was dismissed. Following a sentencing hearing, the jury returned a unanimous verdict sentencing Mr. Nelson to death.

Mr. Nelson presents five issues on appeal. The first three issues are intertwined and allege error for failure to grant a change of venue due to the overwhelming amount of pretrial publicity in the case, error in the conduct of voir dire, and error in the trial court’s rulings on various strike for cause motions by the defense and the government. Additionally, Mr. Nelson alleges error in the court’s instructions to the jury requiring them to impose the death penalty under certain conditions, and error in the admission of victim impact testimony that exceed the permissible boundaries of such evidence as established by statute and the Constitution.

Because this is a death penalty case oral argument is vital. Mr. Nelson requests that the Court allow him 30 minutes for such argument.

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## JURISDICTIONAL STATEMENT

Without any promise of leniency, Keith Nelson pled guilty to the offense of unlawful interstate transportation of a ten-year-old female who had been kidnapped for the purpose of sexual abuse, which action resulted in the death of the victim, under 18 U.S.C. §1201(a)(1) and (g), and §3559(d). Mr. Nelson proceeded to trial before a jury on the issue of whether he should be sentenced to life imprisonment or the death penalty. The United States District Court for the Western District of Missouri had jurisdiction over the case pursuant to 18 U.S.C. §3231. The trial was presided over by the Honorable Fernando J. Gaitan, Jr. Following trial, the jury returned a sentence of death against Mr. Nelson. On March 11, 2002, Judge Gaitan sentenced Mr. Nelson to death. Notice of appeal against this final judgment and sentence was timely filed on March 12, 2002. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291 and F.R.A.P. 3 and 4(b).

## STATEMENT OF ISSUES

- I. The District Court Erred in Denying Defendant's Motion for Change of Venue, Motion for Sequestered Jury, and Motion for Additional Peremptory Strikes, in That There Was Substantial Prejudicial Pre-trial Publicity in this Case.

*Irvin v. Dowd*, 366 U.S. 717 (1961)

*Coleman v. Kemp*, 778 F.2d 1487 (11<sup>th</sup> Cir. 1985)

*United States v. Tokars*, 839 F. Supp. 1578 (N.D. Ga. 1993)

- II. The Trial Court Erred in Conducting the Jury Selection Process Because the Process Employed by the Court Violated Mr. Nelson's Fifth, Sixth and Eighth Amendment Rights To Due Process, an Impartial Jury, Effective Assistance of Counsel and Freedom From Cruel and Unusual Punishment in That the Court Failed to Conduct or Allow Sufficient Questioning on Pretrial Publicity, Death Qualification, Mr. Nelson's Suicide Attempt, and Follow Up to Answers on the Juror Questionnaires.

*Morgan v. Illinois*, 504 U.S. 719 (1992)

*United States v. Beckner*, 69 F.3d 1290 (5<sup>th</sup> Cir. 1995)

*United States v. Bear Runner*, 502 F.2d 908 (8<sup>th</sup> Cir. 1974)

Fifth Amendment, United States Constitution

Sixth Amendment, United States Constitution

Eighth Amendment, United States Constitution

- III. The Trial Court Erred in Denying Mr. Nelson's Motions to Strike for Cause Juror Nos. 21, 38, 114, 116, and 141 Because These Jurors Revealed Biases that Made Them Ineligible to Serve Under the Law, and the Court Further Erred in Granting the Government's Challenges for Cause to Juror Nos. 33, 122 and 124 Because These Jurors All Indicated That They Could Follow the Law Despite Their Reservations About the Death Penalty. The Court's Rulings Violated Mr. Nelson's Constitutional Rights to Due Process, Equal Protection, an Impartial Jury, Effective Assistance of Counsel, and Freedom

From Cruel and Unusual Punishment as Guaranteed by the Fifth, Sixth, and Eighth Amendments.

*Wainwright v. Witt*, 469 U.S. 412 (1985)

*Irvin v. Dowd*, 366 U.S. 717 (1961)

*Witherspoon v. Illinois*, 391 U.S. 510 (1968)

Fifth Amendment, United States Constitution

Sixth Amendment, United States Constitution

Eighth Amendment, United States Constitution

- IV. The District Court Erred in Submitting Penalty Phase Instructions 1 and 22, Requiring That the Jury “Shall” Sentence the Defendant to Death if They Determine the Aggravating Factors Outweigh Any Mitigating Factors, Because Such Instructions Are Contrary to the Mandate of 18 U.S.C. §3593(e) in That the Statute Does Not Require a Death Sentence Even if the Jury Finds That the Aggravators Outweigh Any Mitigators.

*Jones v. United States*, 119 S.Ct. 2090 (1999)

*Barclay v. Florida*, 463 U.S. 939 (1983)

*Gray v. Lucas*, 677 F.2d 1086 (5<sup>th</sup> Cir. 1982)

18 U.S.C. §3593(e)

- V. The District Court Erred in Allowing Voluminous Victim Impact Testimony, Letters, and Photographic Evidence Because Introduction of Such Evidence Violated Mr. Nelson’s Sixth, Eighth, and Fourteenth Amendment Rights to Due Process and Freedom From Cruel and Unusual Punishment in that the Evidence Resembled a Funeral Eulogy and Went Far Beyond What the Court Contemplated in *Payne V. Tennessee*.

*Payne v. Tennessee*, 501 U.S. 808 (1991)

*Penry v. Lynaugh*, 492 U.S. 302 (1988)

*Zant v. Stephens*, 462 U.S. 862 (1983)

Fifth Amendment, United States Constitution

Sixth Amendment, United States Constitution

Eighth Amendment, United States Constitution

## STATEMENT OF THE CASE

On October 14, 1999, a complaint was filed charging Keith D. Nelson with kidnapping Pamela Butler and transporting her in interstate commerce from Kansas to Missouri. Mr. Nelson appeared in the United States District Court for the Western District of Kansas and waived extradition to the District of Missouri.

The grand jury returned a two count Indictment, charging defendant with a violation of Title 18, United States Code § 1201, murder by kidnapping, Title 18, United States Code § 2241, sexual relations with a minor resulting in death.

Defendant pled not guilty to the charges.

On April 5, 2000, the government filed its Notice of Intent to Seek the Death Penalty, alleging several statutory and non-statutory aggravating factors. On June 9, 2000, the government filed its Amended Notice of Intent to Seek the Death Penalty, adding five non-statutory aggravating factors.

An extensive hearing was held on Mr. Nelson's Change of Venue Motion in September, 2000. Following the hearing, the court took the matter under advisement. Prior to ruling on the venue motion the court decided to "test this venue" before ruling on the Change of Venue Motion. (November 28, 2000 Transcript, p. 3) To "test the venue" the court decided to send questionnaires dealing only with pre-trial publicity to 538 potential jurors.

After the questionnaires were completed and reviewed by the parties, another change of venue hearing was held regarding the analysis the potential jurors' responses to the questionnaire. At the conclusion of the hearing, defendant's Motion for Change of Venue was denied by the magistrate and the district court.

Subsequently, due to the withdrawal of one of defendant's attorneys and a continuance, those jurors were released. A new questionnaire was sent to another panel of potential jurors. This questionnaire contained some publicity questions and death penalty qualification questions.

Based on the potential jurors' responses to the new questionnaires and the fact that the pre-trial publicity continued up until the day of trial additional Change of Venue Motions were filed. All motions were denied. Additionally, as an alternative to a change of venue, defendant filed a Motion for a Sequestered Jury,

which was also denied. However, the district court did order that the jury be anonymous and that special procedures be instituted by the United States Marshals Office. (September 13, 2001 Transcript, p. 19) Defendant filed objections to all those special procedures, arguing they give the jury the impression that defendant is a dangerous individual and that special procedures had to be initiated to protect them. (September 13, 2001 Transcript, p. 20). Again, those objections were denied by the court. (September 13, 2001 Transcript, p. 20)

On October 25, 2001, four days before the trial was scheduled to begin, defendant plead guilty to Count I of the Indictment, pursuant to a written plea agreement. Under the terms of that agreement the only issue left was a penalty phase determination by a jury scheduled for October 29, 2001.

During the late evening hours of October 28, 2001, defendant attempted suicide by ingesting a large amount of prescription medicine. Defendant was rushed to a local hospital and the case was continued for one week. On October 31, 2001, defendant filed a Motion for a Competency Examination (Document 356) and a request for a 60 day Continuance to accomplish the Competency Examination. (Document 357) Instead of granting the competency examination request, the district court hired William Logan, a local psychiatrist and arranged for him to meet with defendant for a few hours to determine if he was competent to proceed with the penalty phase. (Document 365, November 7, 2001 Transcript).

After that meeting and the submission of a written report by Dr. Logan, the district court issued an Order, on November 8, 2001, denying defendant's Motion for a Competency Examination, and ordering jury selection to begin November 13, 2001. (Document 366)

On November 13, 2001, jury selection began and ended. Subsequently, the penalty phase of this case began on November 19, 2001 and concluded on November 28, 2001, when the jury returned a verdict sentencing defendant to death.

## STATEMENT OF FACTS

On October 12, 1999, ten-year-old Pamela Butler was abducted while rollerblading near her home in Kansas City, Kansas. Almost immediately, Keith Nelson became the prime suspect in the kidnapping, and a massive manhunt was launched in the Kansas City Metropolitan area by state, local and federal law enforcement personnel to locate both Pamela Butler and Keith Nelson. The search for Pamela Butler centered around the Grain Valley Christian Church, where 125

law enforcement officers from different agencies searched a wooded area around the church. (Transcript, p. 285)

Two days later, on October 14, 1999, Lauri Torrez, a civilian employee of the Kansas City, Kansas Police Department took her husband lunch and decided to look along the river dike by the 18<sup>th</sup> Street Expressway for Nelson. (Transcript, p. 239) As she drove along the dike road, Torrez spotted Nelson standing under the 18<sup>th</sup> Street bridge. (Transcript, p. 240) Torrez signaled to a nearby railroad worker, who called police. (Transcript, p. 242)

Officer Richard Keith, the arresting officer, was dispatched to the riverbank. (Transcript, p. 266) Upon his arrival, he handcuffed Nelson and waited until a helicopter arrived to transport Nelson to the hospital.<sup>1</sup> Officer Keith testified the scene was rather chaotic, with news people, bystanders and a news helicopter circling the area overhead. While waiting for medical assistance, Officer Keith stated some one in the crowd yelled, “where is the little girl.” Officer Keith turned to Nelson and Nelson said “I know where she’s at, but I’m not saying right now.” (Transcript, p. 269) Later that afternoon, Nelson was charged.

The next day, around noon, Pamela Butler’s body was found in a wooded area behind the Grain Valley Christian Church. That discovery was broadcast on all Kansas City television stations along with a live press conference from the site by United States Attorney Stephen Hill.

Shortly before trial, defendant entered a plea of guilty to Count I of the Indictment. The case was then continued for jury selection for a penalty phase hearing.

Prior to jury selection, defendant filed a Motion to Limit Victim Impact Evidence. The court issued an order placing limitations on the volume and content of the evidence. (Order dated November 15, 2001) However, during trial the court seemingly abandoned these restrictions, allowing six different witnesses to testify at length about their remembrances of Pamela Butler. In addition to their testimony, the court admitted three highly emotional letters authored by the victim’s eighteen-year-old sister, as well as six photos of Pamela with various friends and family. The testimony and evidence took on the feel of a memorial service to Pamela Butler rather than a capital sentencing hearing.

#### SUMMARY OF ARGUMENT

Throughout the entire pre-trial stages of this case the Kansas City community was bombarded with a virtual landslide of publicity regarding this crime, the defendant, the victim and the court proceedings. Every pleading,

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<sup>1</sup>Defendant had injured his knee and required surgery.

motion or hearing in this case attracted the attention of the media and became the subject of the victim's mother, Cherri West's 'press conferences.' As a result of the publicity, defendant's guilt became a forgone conclusion even before he was arrested. Defendant filed several motions for change of venue, sequestration of the jury and additional peremptory challenges. All motions were denied and defendant was forced to face a jury that knew about the case, and admitted they violated the court's order and read or heard the reports about his suicide attempt prior to trial. In effect defendant argues that in the face of the amount and nature of publicity in this case, the court clearly erred in taking absolutely no steps to insure that defendant's penalty phase was before a fair and impartial jury.

The district court also erred in conducting the voir dire process and in ruling on cause challenges proffered by the defendant and the government. The court conducted small group voir dire with ten jurors at a time, giving counsel for each side only 20 minutes (or 2 minutes per juror) to conduct follow up questioning on crucial issues of death qualification, pretrial publicity, Mr. Nelson's suicide attempt, and other questionnaire responses that revealed possible partiality on the juror's part. As to cause challenges, the court failed to grant defense challenges to jurors whose views substantially impaired their ability to follow the law. At the same time, the court improperly granted government cause challenges to jurors who indicated that they could follow the law despite their opposition to the death

penalty. The result was a voir dire process that failed to insure that Mr. Nelson's right to a fair and impartial jury was upheld.

The district court also erred in instructing the jury that if they find that the aggravating circumstances outweigh the mitigating circumstances, the law provides that the defendant "shall" be sentenced to death. The federal death penalty statute never provides for a mandatory death sentence, therefore, the court should have submitted Mr. Nelson's instructions, which stated that the jury "may" sentence him to death under these circumstances but that the option of returning a life sentence is always theirs.

Finally, the district court erred in overruling Mr. Nelson's objections to the victim impact testimony and exhibits presented at trial because the evidence was unduly prejudicial in violation of the federal statute governing the admission of evidence and in violation of Mr. Nelson's due process rights. While Mr. Nelson realizes that victim impact evidence can be admissible, the evidence allowed in this case went far beyond that contemplated by the statute, the Supreme Court, and the Constitution.

## ARGUMENT

### **I. The District Court Erred in Denying Defendant's Motion for Change of Venue, Motion for Sequestered Jury, and Motion for Additional Peremptory Strikes, in That There Was Substantial Prejudicial Pre-trial Publicity in this Case.**

#### **A. Standard of Review**

This Court reviews the denial of a Change of Venue for abuse of discretion. *United States v. Green*, 983 F.2d 100, 102 (8<sup>th</sup> Cir. 1992).

### **B. Argument**

“A fair trial in a fair forum is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955). As the Supreme Court acknowledged in *Irvin v. Dowd*, 366 U.S. 717 (1961), “. . . [A] juror must be as indifferent as he stands unsworn. His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. [...] The theory of the law is that a juror who has formed an opinion cannot be impartial. *Id.* at 722.

Defendant asserts that in this highly publicized and emotional case the district court abused its discretion in denying him a Change of Venue, denying his request for a sequestered jury, denying his request for extended voir dire, denying his request for additional peremptory challenges and, in taking absolutely no steps to insure that the jury that sentenced him to death was not influenced by the highly prejudicial and inflammatory publicity that surrounded this case from the beginning. Defendant asserts that the following summary of the pre-trial publicity generated by this case clearly demonstrates that the denial of a change of venue resulted in the judicial proceedings in this case being nothing more than a “hallow formality.” *Irvin v. Dowd*, 366 U.S. 717 (1961).

Early in the pre-trial stages of this case, Defendant filed a Motion for Change of Venue, asserting he could not receive a fair trial in Kansas City, due to the extensive and prejudicial pre-trial publicity. In that Motion, defendant argued a change of venue was warranted because the residents of Kansas City and outlying areas were “bombarded with press coverage and commentary from every possible media source.” (Appendix I, p.2). Further, defendant argued that the community had developed a vested interest in the case, as demonstrated by:

- The Westridge Student Council donated \$500.00 from a bake sale to the Lost Children’s Network in the victim’s name (Appendix II, p. 234);
- Area motorcyclists conducted a charity ride in memory of the victim (Appendix I, p. 231);
- The plans to rename and rebuild a playground in Kansas City, Kansas in the victim’s name (Appendix I, p. 231);
- The 10 hour band concert held on Sunday October 24, 1999, to obtain donations for the family of the victim;
- The request to re-name the street the victim lived on “Pamela Butler Drive” (Appendix II, p. 235);
- 
  
- The enormous amounts of money donated to the victim’s family by the citizens of the community;
- The fact that the victim’s funeral was broadcast live on 3 of the 4 major television stations;
  - Dwayne Bowers Used Car Lot donated a percentage of their sales to the victim’s family and flew purple<sup>2</sup> balloons from the cars on the lot;

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<sup>2</sup>Purple was the victim’s favorite color.

- Dagwood Café displayed flowers and a collection box for the victim’s family and;
- The employees of the Overland Park Hy-Vee grocery store wore purple ribbons and took a collection for the victim’s family. (Appendix I, p. 55)

In addition, the abduction alarmed many parents causing them to take steps to protect their children. For example, a few days after the abduction Fox 4 News reported “frightened parents take steps to be prepared in case their children are abducted by getting Child Safety Cards.” (Appendix I, p. 55) That report also stated that proceeds from the sale of the Cards will be given to the Pamela Butler Fund. Even the FBI acknowledged the public response to crime has been “incredible” and “extraordinary.” (Appendix I, pp. 3, 163)

Attached to the Change of Venue Motion were several exhibits. Exhibit I was a Clip Report prepared by the Media Library, Inc. containing summaries of television news broadcasts about the case, from October 12, 1999 to November 20, 1999. (Appendix I, pp. 24-120) That report summarized 1037 news stories that were broadcast on the major Kansas City Television Stations during that 39-day period.<sup>3</sup> This clip report demonstrated that Keith Nelson emerged as the primary suspect in this case the morning after the kidnapping. (Appendix I, p. 25) This report also demonstrates that the media took an active role in the case from the beginning. Live reports were aired constantly from the victim’s home and the

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<sup>3</sup>This equates to an average of 26.5 news broadcasts about this case per day during that 39-day period.

locations where the police were searching for the victim and the defendant. In addition, even before the defendant was arrested, the television stations aired reports regarding his background and criminal history. For example, on October 13, 1999, KSHB TV 41 reported on their 10:00 p.m. broadcast that Keith Nelson had been in jail 7 times and, referred to him as a career criminal who currently had a \$40,000 bond out of Bates County, Missouri. That report also aired pictures of the schools Nelson attended and interviewed a convenience store worker who had seen him two months ago. (Appendix I, p. 30)

The next day, the arrest of defendant was aired live on at least one television station, while other stations reported the story and aired interviews with individuals present at the arrest scene.

The next day, when the victim's body was discovered in a wooded area behind the Grain Valley Christian Church, Stephen Hill, the United States Attorney, held a press conference at that location. During this conference, Hill described the type of charges he intended to file against the defendant. In addition, other law enforcement officials involved in the search gave numerous statements to the press including Larry McCormick, FBI Special Agent in Charge, who stated: "the agents worked overtime hoping they would find the child alive, and some cried when they saw the girl." (Appendix I, p. 53)

On October 16, 1999, the press reported Cherri West, the victim's mother's call for the death penalty. (Appendix I, p. 56) Those calls were echoed by federal

prosecutors after the grand jury returned the indictment, when the press widely reported that they “vowed to seek the death penalty.” (Appendix I, pp. 98-107)

Finally, on November 8, 1999, after Mr. Nelson was arraigned in court, West gave her first “press conference” on the courthouse steps stating: “she would have loved to jump up and hurt Nelson . . . she did not like the smile on his face . . . [and] he acts like he just doesn’t care.” (Appendix I, pp. 116-117) West’s comments were then aired over the next few days by all television stations. West continued to give these “press conferences” throughout this case and commented on all proceedings.

Also attached were copies of numerous articles that appeared in the Kansas City Star regarding the kidnapping, the search for the victim, and the arrest of defendant. (Appendix I, pp. 121-200) Five days after the kidnapping, the Sunday October 17, 1999, edition ran a lengthy piece recounting the case and quoting FBI spokesman Jeff Lanza as stating: “I don’t anticipate another person is going to be charged right now, as least in regards to the kidnapping.” (Appendix I, p. 129) Thus, five days after the abduction the FBI basically told the community that Keith Nelson was guilty.

That article went on to recount the outpouring of community support and involvement in this case:

. . . a stream of people delivered cards, money, food, hugs, handshakes and words of comfort. Several handed over \$20 bills. One girl gave a doll still in its store wrapper”. . .” Sonya McMannus of Leavenworth,

who took a stuffed puppy to Grain Valley Christian Church on Saturday morning, later in the day gave Butler a single rose. . . . Asked why she visited both places, McManus paused. Her chin quivered. ‘I have a daughter of my own, almost 6,’ she explained.”

(Appendix I, pp. 129-130) The article concluded with Paul Butler, the victim’s father calling for the death penalty: “The whole family is pressing for the death penalty. . . . If we get up a petition, everybody who has come to this house would sign it.” (Appendix I, p. 130) That same day another piece appeared in the Star recounting in great detail the kidnapping, the arrest of the defendant and the search for the victim. (Appendix I, pp. 135-143)

The next day, Monday October 18, 1999, the Star ran a piece reporting on the memorial service the day before at the Grain Valley Christian Church, the site where the victim’s body was located. That article again recounted the community involvement in this case:

. . . . Since Thursday, hundreds of people have left items on the doorstep of Pamela’s Kansas City, Kan. Home and at Grain Valley Christian Church.

On Sunday, the church’s alter was a testament to Grain Valley’s grief. Hundreds of teddy bears, Bennie Babies, Barbie dolls, roses, carnations, mums, candles and balloons stretched from one wall to the other.

(Appendix I, p. 160).

On October 22, the Star reported that the United States Attorney “vowed . . . to seek the death penalty against Keith Nelson” and quoted Stephen Hill, the United States Attorney: “We’ll make the best case possible for the death penalty.”

(Appendix I, p. 178) Again, the government told the community that Keith Nelson was guilty of this crime.

On Saturday November 6, 1999, the Opinion page of the Star contained a piece entitled “Outrage.” (Appendix I, p. 148) In that editorial the writer assumes the defendant’s guilt and states: “Fear will be the legacy that Keith Nelson leaves behind.” Id.

In addition, those newspaper articles contained numerous letters to the editors concerning this case written by citizens in the Kansas City community and articles calling for parents to be more protective of their children.

Finally, the newspaper articles quoted West’s statements to the press after defendant’s arraignment: “I didn’t like the smile on his face. . . As a mom, I wanted to jump up and grab him. . . I wanted to smack him. He acts like he just doesn’t care.” (Appendix II, p. 233)

The government filed its response, claiming that defendant had not met his burden of demonstrating that the publicity was prejudicial, and asserting the coverage thus far has been fair and factual. Contrary to the contents of the press coverage, the government further argued that in none of the publicity thus far has Keith Nelson been “demonized,” nor has “his guilt been touted as a forgone conclusion.” (Govt. 2/14/00 Response, p. 19)

In the **Remedies and Safeguards** section of the Government Response, the government cites cases suggesting additional pre-emptory challenges, individual

voir dire, sequestering the jury and impaneling a jury from another district as alternatives to a change of venue.<sup>4</sup> (Govt. 2/14/00 Response, pp. 13-15). And the publicity continued.

In preparation for the Change of Venue Hearing, defendant issued subpoenas to all television stations, radio stations, and newspapers in the Western District of Missouri. In response defendant received voluminous videotapes, cassette tapes, newspaper articles and transcripts of news broadcasts. In addition, defendant received funds to hire an expert, Dr. Thomas Biesecker, who reviewed all the pre-trial publicity, and testified at the change of venue hearing.

On September 18<sup>th</sup> and 21<sup>st</sup> a change of venue hearing was held before the magistrate. During that hearing, defendant submitted voluminous exhibits obtained pursuant to the subpoenas, including:

- Copies of articles from the Kansas City Star, The Blue Springs Examiner, the Grain Valley Examiner, and other newspapers distributed within this district;
- Video tapes and transcripts of news broadcasts from the local television channels;
- Tapes of a KMBZ radio talk show which devoted extensive hours to discussing this case and the defendant, and tapes and transcripts of other radio stations coverage of the case;
- Redacted copies of checks representing contributions to the Pamela Butler fund;

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<sup>4</sup>Eventually the defendant requested all these remedies and safeguards and that request was denied.

- Copies of web sites devoted to this case;
  - A tape and CD of two songs written about the victim in this case and sold in local stores including Best Buy.<sup>5</sup>

Defendant also presented testimony from Dr. Thomas Biesecker, a Communications Professor at the University of Kansas. Dr. Biesecker previously reviewed and analyzed all the exhibits received into evidence during the hearing and testified that:

The amount of press coverage that was present in the Kansas City Metropolitan Area was absolutely intense. Not only was the amount of publicity intense, but the type of information that was present in the community was inflammatory, as well. . . All of these lead me to conclude and my opinion is that this is a situation in which the community would be prejudiced against Keith Nelson were this case to come to trial in Kansas City.

(September 21, 2000 Transcript, pp. 193-194)

Dr. Biesecker testified his opinion was based not only on the amount of publicity this case generated, but also the content of that publicity. For example, some of the most damaging news accounts of this crime contained false information. The Kansas City Star and Fox 4 News reported that defendant attempted to escape from CCA during his pre-trial incarceration. However, at the hearing, James Perry, Chief of Security of CCA, testified he had no knowledge of any attempted escape. (September 18, 2000 Transcript, pp. 7, 9, 12, 13-14)

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<sup>5</sup> All of the exhibits obtained have been filed with this Court.

It was also widely reported that blood, DNA evidence, and hair matching the victim were recovered from the truck defendant was allegedly driving. Despite these widespread reports purporting to accurately report the evidence in this case, the government, during the change of venue hearing, admitted that these reports were false. (September 18, 2000 Transcript, p. 92; Change of Venue Hearing, Transcript September 21, 2000, pp. 90-91, 135; Defendant's hearing exhibits 92, 93, 94, 95).

Finally, it was reported that when Keith Nelson was arrested he refused to tell the authorities where Pamela Butler's body was unless he received medical treatment. Again, as established by the government's evidence at the suppression hearings, these reports are absolutely false. (See testimony of Officer Keith at Suppression Hearing).

Dr. Biesecker also testified that numerous media reports after defendant's arrest strongly suggested that he knew where Pamela Butler was and, therefore, must be guilty of this crime:

- "The worst is that 24-year old Keith Nelson - - even after he was caught Thursday- refused to tell investigators where they could find the 10-year-old Pamela Butler." Fox 4 News October 15, 1999, 10:00 p.m. (Exhibit 47);
- "Authorities say Nelson is not giving them any clues as to Pamela Butler's whereabouts." Fox 4 News October 15, 1999, midday (Exhibit 48);
- I think in especially in cases like this we ought to find some legal way of finding a new definition of what this guy's rights are and between the

military community and the medical community we can find a way to open up this guy's thoughts and find out where this girl is. — Caller, KMBZ 6-7PM 10/14/99 (Exhibit 76);

- If they torture him just right I'm sure they can find out where she is. I am absolutely positive. There are people that will tell you that if you torture a person right you can get whatever you want out of the person. — Caller, KMBZ 9-AM 10/15/99 (Exhibit 72).

According to Dr. Biesecker, reports such as these are highly prejudicial as they “clearly impl[y] that [Nelson] is guilty.” (September 18, 2000 Transcript, pp. 86-88)

Defendant also presented exhibits that demonstrated a substantial portion of the prejudicial publicity during the initial stages of this case was initiated by government officials:

- FBI Agent McCormick was quoted by the press as stating “there were no other suspects.” (Exhibit 50);
- The FBI was quoted on Fox 4 News with stating they are “done searching at the crime scene with plenty of evidence to make a case.” (Exhibit 40);
- Fox 4 News attributed the following statement to then United States Attorney Stephen Hill: “United States Attorney Steven Hill says there is a lot of evidence that points to Nelson as the one who killed Butler.” (Exhibit 41);
- The front page of the Kansas City Star reported: “Should Nelson not be sentenced to death in federal court Hill said he would work with Jackson County Prosecutor Bob Beard for a murder prosecution in state court.” (Exhibit 53);
- Officer Sims, Kansas City, Kansas Police: “We found him so we are a lot closer to finding her.” KMBZ Radio, 4:00 p.m., 10/14/99 (Exhibit 69);

- “Police say Nelson holds the key where Butler is at.” Scott Simon, KMBZ Radio Newsman, 7:00 p.m., 10/14/99 (Exhibit 71).

According to Dr. Biesecker, these statements from perceived authoritative sources give the strong impression that the government believes the defendant is guilty of this offense. (September 18, 2000 Transcript, pp. 80-86)

Dr. Biesecker also testified that his analysis of the content of the news reports revealed a “strong sense of personalization that individuals had” with the crime. (Change of Venue Hearing, September 21, 2000, p. 154) The following excerpts demonstrate the level of community involvement and personalization with this case:

- My 7 and a half-year-old daughter, my wife, and I are watching the news last night and we used it as a teaching experience for her. — Caller to KMBZ, 9-11AM 10/14/99 (Exhibit 65);
- I used to work at a large mall out in the southern part of the city, and I used to take my breaks out in the area where people walked around and I noticed with a fairly regular frequency that little kids would be playing around in the mall area, in the area between the stores basically unsupervised by any adults. — Caller, KMBZ 9-11AM 10/14/99 (Exhibit 65);
- Unfortunately, less than a month ago [I] went through the same thing with a domestic problem and my daughter was missing for a week and it was pure hell. — Caller, KMBZ 9 AM 10/14/99 (Exhibit 65);
- FBI Agent Jeff Lanza: “The community response to Pamela’s death has been incredible. You might expect it in a small town where everybody knows everybody else, but in a town the size of Kansas City it is extraordinary. It shows what a great community this is.” Kansas City Star, October 18, 1999. (Exhibit 22);

- I think I'm going to take half a day off and go see my daughter— Caller, KMBZ 9 AM 10/14/99 (Exhibit 65);
- And indeed when there's a fearful situation like this, when you've got somebody that is abducted, a ten-year-old innocent child, a young girl on roller skates. And it does hit home because, you know what we were all kids at one time out there playing in the neighborhood, "Hey mom, can I go outside and play before dinner?" — Tom Becka, KMBZ 9-11AM 10/14/99 (Exhibit 65);
- I have children myself so my heart goes out to the family and I sure hope that it turns out for the best — Caller, KMBZ 5-6 PM 10/14/99 (Exhibit 69);
- I have four daughters myself and one the exact same age as the child and you know I think we all kinda feel like, you know, I'm sure I speak for everybody in the city, you know, my first reaction is to just man, why, you know, why are we even giving this guy any medical attention at all? You know, he deserves an ass whippin'. — Caller, KMBZ 6-7 PM 10/14/99 (Exhibit 70);
- My heart goes out to the Butler family because they have endured that for days now. And it's almost inconceivable until it happens to you to imagine what it's like to lose your child or someone that close to you. — Caller, KMBZ 9 AM 10/15/99 (Exhibit 72);
- We have a little girl her age. I just couldn't imagine anything happening, it could happen. Mrs. West talked about her daughter being a tomboy and I have a tomboy. —Woman Offering Condolences at West House, KMBZ 4-6PM 10/15/99 (Exhibit 73);
- I was just calling because I'm a fairly new mother. I have a seven-week-old child and I just cannot imagine somebody doing that. It is awful, uh, the death penalty is too good for him. — Caller, KMBZ 4 PM 10/15/99 (Exhibit 73);
- I didn't know this little girl but her picture, her face will stay in my mind forever. And this look on my nine-year-old daughter's face when she came home from school today and we were watching the TV and she said, she was so excited, "They found her." And I said "Yes, but you know she was dead" and she had tears in her eyes. — Caller, KMBZ 12PM 10/15/99 (Exhibit 76);
- Steve Nicely, Kansas City Star Reporter: "In thirty four plus years in the news business, I don't remember another case that captured the attention and hearts of the metropolitan area residents like the abduction and murder of 10-year old Pamela Butler. I don't remember the last time I

saw TV newscasters reporting their stories in tears.” Kansas City Star, October 18, 1999 (Exhibit 22);

- This whole thing has just brought about some memories for me and I grew up there in the Armourdale area and now I’m a thirty-nine year old mother of three and I have two ten year old boys. And there was a classmate of mine back around 1970, I guess, she was murdered and it just brought it all back to me and it, and it still hurts, you know. — Caller, KMBZ 12 PM 10/15/99 (Exhibit 76);
- Pamela Butler’s death has, in many respects, galvanized the city I call home. Systematically, the innocence of our children is being dismantled. How do we as parents explain this to our children? Every child and every parent in the area has been victimized by this crime. Fear will be the legacy that Keith Nelson leaves behind. I will never again look at my son or daughter the same way, nor assume that what was safe for me as a child will be so for them. —Letter to the Editor, Kansas City Star, 11/9/99.

At the hearing, defendant also introduced redacted copies of 1,600 checks donated to the Pamela Butler Fund. (Exhibits 10, 11, 39) In addition to the checks, news reports established that several collections were taken at area grocery stores, factories and gas stations throughout the city. Finally, exhibits and testimony introduced at the hearing established that at least 3 of the 4 major television stations broadcast the victim’s funeral on live television.

Finally, Dr. Biesecker testified that in reaching his conclusion that a change of venue was warranted he relied on various statements in the media proclaiming defendant’s guilt and recommending forms of punishment:

- Keith Nelson is a piece of garbage — Serin Petro, KMBZ Radio Personality, 2-3PM 10/15/99 (Exhibit 73);
- I don’t think there’s anyone that’s not personally outraged that something like this can happen. And if this, if the facts are and the evidence is that, that seems to look like, it’s just devastating that something like this happened and ... people should be outraged —Phil Lavota, Assistant Jackson County Prosecutor, KMBZ 4-6PM 10/15/99 (Exhibit 73);
- As far as I’m concerned, that man needs to immediately undergo a sex

change and be forced to live as a prostitute. — Caller, KMBZ 11-12PM 10/15/99 (Exhibit 76);

□

- He needs to be electrocuted. He needs to be, uh uh, for years of pain, daily pain of any kind of sadistic pain we can think of giving this guy. And then eventually killing. —Caller, KMBZ 9-AM 10/15/99 (Exhibit 72);
- Well, I think progressive dismemberment is probably the best, a finger here, a toe there, just slowly over a period of thirty, forty hours and, as you know, let him know we're gonna go all the way, but just a little bit at a time. — Ron Freeman, KMBZ Radio Personality, 11-12PM 10/15/99 (Exhibit 76);
- Let him go to the general population for a while in prison and see what happens to him then. I mean, I think that, you know, the ... the prisoners would take care of him. Tom Becca, KMBZ Radio Talk Show Host, 9 am 10/15/99 (Exhibit 72);
- I think a lot of people want to see this guy strung up. And I think he needs to be terrorized until he tells where that little girl is. Caller, KMBZ, 9-11 am. 10/15/99 (Exhibit 72);
- I'd like to, like everybody else, like to have about 15 minutes with him. Lets see how fast he could run on the bad leg an, uh, you know, see how fast he could run and have me chasing him down Main Street with my car. Tom Becca, KMBZ Radio Talk Show Host, 9 am, 10/15/99 (Exhibit 72).

The hearing was continued for a few days and when it resumed defendant introduced Exhibit 100, a Kansas City Star article about the change of venue hearing. That article quotes Assistant United States Attorney Mark Miller, one of the prosecution team in this case, as stating defendant's change of venue testimony "sounds almost like voodoo." (Change of Venue Hearing Vol. II p. 140, Exhibit

100) At the conclusion of the hearing, the court took the motion under advisement and the publicity continued.

On October 13, 2000, defendant filed Supplemental Suggestions, which included a videotape of television broadcasts and newspaper accounts regarding the construction and dedication of the “Pamela Butler Memorial Playground.” (Appendix II, pp. 242-243) Those reports indicated that \$30,000 was donated for equipment and materials and \$20,000 of labor was donated for the playground’s construction. Also attached to that Motion was a front page story in the Kansas City Star recapping the events of this case from the past year. (Appendix II, p. 249) In that article, the author details circumstances of defendant’s pretrial detention, informing the public that every time defendant leaves his cell he is handcuffed and his movements video taped, that he is allowed one hour of exercise in a small yard “surrounded by a 15 foot high chain link fence topped with razor wire,” and that those familiar with his incarceration say “he is talkative—some say ‘mouthy’—prisoner who doesn’t get along well with others.” Finally, that article concluded with a quote from West, Butler’s mother, “Pamela will get to see you burn in hell.” (Appendix II, p. 246)

In response to that Supplemental Motion, the government ignoring the comments of West and the accounts of defendant’s incarceration, continued to claim the publicity is “factual” and stems from the evidence adduced at the hearings. (Govt. Response, 9/20/00 p.11) And the publicity continued.

Instead of granting defendant's Motion for a Change of Venue, the court decided to draft its own community attitude survey and have potential jurors complete the questionnaire. The court stated its purpose in using the questionnaire was to "test the venue." Defendant filed Objections to this procedure and re-asserted his Motion for a Community Attitude Survey.<sup>6</sup> Defendant also filed more Supplemental Suggestions including copies of the continuing publicity. (Appendix II, p. 239) In that Motion, defendant attached a copy of the front page story from a local newspaper and cited additional cases in support of his Motion for Change of Venue. The objections and the request for a Community Attitude survey were denied and 538 potential jurors completed the court's publicity questionnaire. Again, that ruling was reported in the press, and the publicity continued.

After the questionnaires were completed by the potential jurors and reviewed by the attorneys, the magistrate court again held a change of venue hearing. Prior to the beginning of the hearing, William Shull, one of defendant's two defense attorneys moved to withdraw from the case. The magistrate granted that motion and then proceeded to conduct the change of venue hearing.

Again, defendant presented testimony from Dr. Biesecker, who reviewed and analyzed the responses to the questionnaire. According to Dr. Biesecker the results of the questionnaire established:

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<sup>6</sup>Defendant filed a Motion for Funds to Conduct a Community Attitude Survey for use during the change of venue hearing. That request was denied.

- 94% of the people that completed the questionnaire knew something about the case. (Change of Venue Hearing, Vol. III, p. 336);
- None of the 538 people who completed the questionnaire believed Keith Nelson was not guilty. (Change of Venue Hearing, Vol. III, p. 342);
- Several of the potential jurors believed that hair and blood matching the victim was found in defendant's truck. (Change of Venue Hearing, Vol. III, p. 354) (of course, as established earlier, that information is absolutely false).

After completing his analysis of the questionnaires, Dr. Biesecker testified that in his opinion only 125 out of the 538 potential jurors demonstrated no positive bias. (Change of Venue Hearing, Vol. III, p. 378) Dr. Biesecker also testified that many of the responses in the questionnaires supported his earlier testimony that this case has invoked an intense emotional response and personalization with this case. (Change of Venue Hearing, Vol. III, p. 425) The following quotes from the questionnaires support that conclusion:

- Juror number 12 wrote: "My wife & I are both school teachers. We discussed this in our family & with our students. I gave my opinion that a person like that was evil & needed to be stopped. That he should never be allowed out in society again. I probably said something to the effect - "that if the parents of the girl got hold of him - they could do what ever they wanted to do to him."
- Juror number 20 wrote: "During the time the child was missing, my husband and I discussed how frightening it would be to have such a thing happen to a family member or friend."
- 
- Juror number 41 wrote: "I discussed how this case affected me emotionally more than most. I was in tears every time it was covered on the news."

- Juror number 46 wrote: “Certainly, empathizing with the family and feeling very angry about this horrendous crime was a topic of general conversation at home, at work, and with friends. We discussed the brutality of this crime, finding Keith Nelson less than an animal. We discussed what we would do if it had been our child, definitely concluding that the death penalty would be too good for him. No lost sympathy here.”
- Juror number 60 wrote: “I teach school-in a current events sort of class, we talked about this case as the details unfolded. On numerous occasions, my students and I (high school) looked at the crime details and talked about the suspect.”
- Juror number 91 wrote: “How horrifying it would be to have your child abducted from right in front of your home. How difficult it would be to have to live with the thoughts of your child's last moments alive, etc.”
- Juror number 100 wrote: “At the time I discussed it with my husband. How tragic it was that a child could not play safely near her home. Before she was found I'm sure I said she was probably dead.”
- Juror number 152 wrote: “We talked about the tragedy of our times, the loss of a little girl, and feeling unable to provide a safe world for children.”
- Juror number 167 wrote: “I spoke with my wife and her family. We didn't speak about information, we addressed issues like protecting our children & those of our neighbors by being more aware of people in the neighborhood. Many different opinions were discussed, the most prevalent was that, this was an act committed by a very sick individual.”
- Juror number 187 wrote: “Everyone I discussed the case with was outraged that a child could not play in front of her home w/o the possibility of a predator snatching & murdering them.”
- Juror number 265 wrote: “Discussed with my wife, we were saddened that the little girl had died. We think more about our children's safety when these crimes happen to children.”
- Juror number 296 wrote: “At the time of the crime, my daughter was eleven years old and JUST THE THOUGHT of anything remotely

similar ever happening to her and our family was highly unsettling and upsetting for me.”

- Juror number 301 wrote: “Since I have a child approximable (sic) the same age as Pamela, I’ve discussed with others about the need to be ever vigilant about our children. This case reaffirmed my belief that children need to be carefully watched at all times.”
- Juror number 304 wrote: “I have discussed with others how terrible this was to have happen. I have a granddaughter (sic) around the same age that plays outside by the street with her friends. I warned her to be careful. If anybody kidnaps her I told her to try to grab the steering wheel and wreck the car or truck.”
- Juror number 289 wrote: “Discussions usually centered on how to safe-keep our children/grandchildren from such crimes. On one or two occasions the discussion lead into the level of punishment for such a crime.”
- Juror number 397 wrote: “That it scares me, I have a young daughter also. I wonder what is wrong with people like this man that he would do something like this.”
- Juror number 423 wrote: “Just basically since we have children the same approximate age, how sad frightening, etc. Warning my child about approaching strangers, without knowing them. How sad the Butler family must feel; talked about the memorial service.”
- Juror number 506 wrote: “We discussed the tragedy of it and, as a teacher, the concern for children being unsafe in front of their own homes. We also talked about why someone would want to do such a thing to a child, or anyone for that matter.”
- Juror number 521 wrote: “I have discussed the situation with co-workers as to how awful and sad a tragedy it was. I also discussed the case with my husband and parents with regard to watching our son so that nothing like this would happen to us.”

(Appendix II, pp. 327-330)

After reviewing all of the juror questionnaires Dr. Biesecker concluded:

There is a rich amount of information available to members of the community about this case. There is specific information and recollection of the media coverage, both newspaper and television coverage, not only of the disappearance of Pamela Butler but also the capture of Keith Nelson.

There is a substantial amount emotional response to the issues that are in this case. A substantial amount of emotional response being visited by statements such as “he is a sick individual.” This is a terrible thing to have happen to our children. One respondent indicated that she cried for nights when event was taking place.

One individual reported that she had been asked by her prayer captain to pray for the recovery of Pamela Butler’s body. This is a case that sparked the interest and had emotional consequences and contact for the individuals in the community.

In terms of the profiles present in this group of responses, they are consistent with other cases where we have conducted change-of-venue surveys.

They are consistent with cases where I have recommended that the trial be moved, that the venue was tainted, and I would say that these responses also indicate that the venue was tainted and that the trial should be moved.

(Change of Venue Hearing, Vol. III, pp. 379-80)

After that change of venue hearing ended that day, West again gave a “press conference” on the courthouse steps. This time she commented on Shull’s withdrawal as an attorney for the defendant stating “How long does he get to keep postponing attorneys before my daughter gets justice.” (Exhibit 130, KSHB 41 5:00 p.m.) West went on to state: “I’m ready to bypass the trial and put him into the general population for 24 hours. He’d get justice.” (Exhibit 130, KSHB 41 5:00 p.m.) That newscast went on to report on the testimony in court that day

regarding the change of venue and the reporter stated: “But Cherri West doesn’t seem to care, believing ‘fair’ and ‘trial’ are two words that don’t belong together in this case.” (Exhibit 130, KSHB 41 5:00 p.m.) And the publicity continued.

A few days later, the parties presented argument to the court regarding the venue issue. During this hearing, the defendant offered additional exhibits, such as newspaper articles and videotapes of television coverage of this case since the change of venue hearing. (2/23/01 Hearing pp. 5-7, and Exhibits 130, 131). The television broadcasts (Exhibit 130) included “press conferences” given by West on the courthouse steps proclaiming defendant’s guilt:

- Take it to China, he still is going to be found guilty, they have enough evidence;
- Nelson should be put in population and let the other inmates take care of him;
- She can’t wait until Pamela, from heaven, can burn Nelson in hell and;
- There is plenty of evidence to prove Nelson is guilty.

(Exhibit 130) At the conclusion of the hearing, the court took the Change of Venue Motion under advisement, and the publicity continued.

Subsequently, the magistrate judge issued an Order denying Defendant’s Motion for Change of Venue. (Appendix I, p. 304) In that Order the Court found:

- (1) “. . . for the most part, the coverage has focused on reporting facts rather than sensationalism or inflammatory editorials; and
- (2) the results of the jury questionnaire “do not evince a ‘pattern of deep and bitter prejudice’ against defendant. . . “

(Appendix I, p.304). And the publicity continued.

Defendant filed an Appeal of that ruling pointing out, among other things:

- (1) That 85 of the potential jurors believed the false reports that items or blood belonging to the victim were found in defendant's truck;
- (2) Many of the potential jurors indicated they believed the false reports that defendant demanded medical attention **before telling where the victim was**. Not only did these responses demonstrate the jurors relied on false reports, they assumed his guilt;
- (3) The fact that after every hearing in the case, Cherri West, the victim's mother gives a press conference on the courthouse steps making highly prejudicial and inflammatory comments.

(Appendix II, p. 310). Finally, defendant argued the court ignored the strong evidence of community involvement and personalization with this case. The district court affirmed the magistrate's Order denying the change of venue, and the publicity continued.

Due to the withdrawal of one of defendant's attorneys, the case was continued and the jury panel that completed the venue questionnaire was released. Prior to the selection of a new jury, another questionnaire was sent to the potential jurors. That questionnaire addressed death penalty qualification issues and publicity issues, although the publicity questions were not as extensive as in the initial questionnaire.

Four days prior to trial, defendant entered a plea of guilty to Count I of the Indictment. After that plea, West again gave numerous "press conferences" on the

courthouse steps commenting on the plea, and her desire that defendant be executed. That press converge, along with the responses to the jury questionnaire by the potential jurors, led defendant to file a Motion for Change of Venue or in the Alternative for a Sequestered Jury, attaching other articles and video tapes of the continued publicity. For example, the day after the guilty plea, the front page of the Kansas City Star headline was “Nelson Admits He Murdered KCK Girl.” In that article, West is quoted as saying: “Why should he get to live and not her? . . . She can’t eat ice cream and cake, Why should he” . . .If it comes our way, then I’ll jump up and tell Pammy we won.” (Appendix II, p. 373) The October 29, 2001, edition of the Star again reported West’s “press conference” after defendant’s guilty plea: “After the hearing West said she still wanted Nelson executed. . . it was gut wrenching, West said later.” That article also contained a quote from West: “a little girl had to go through pain and torture so some man could get satisfaction.” (Appendix II, p. 378)

The government, ignoring West’s ‘press conference’ comments, filed a response to this Motion arguing it should be denied and claiming there is “nothing in the media coverage which states with particularity certain facts concerning the cruelty or heinousness of the death of a Pamela Butler.” Defendant’s Motion was denied by the court, and the publicity continued.

The case was then set to begin the penalty phase on October 29, 2001. However, the night before defendant ingested a large amount of prescription

medicine in a suicide attempt and was rushed to a local hospital. Instead of beginning voir dire the next day, the case was continued for a week. Again, this suicide attempt was the top story of the day. The November 1, 2001, headline of the front page of the Metropolitan Edition of the Star read: “Killer’s Lawyers Asking for A Delay—suicide attempt prompts request.” (Appendix III, p. 384) Five days later on November 6, 2001, the headline on the front page of the Metropolitan section of the Star was: “Nelson’s Suicide Attempt Called A Ploy To Delay Penalty Trial.” (Appendix III, p. 385)

Again, on November 15, 2001, a final Motion for Change of Venue was filed. Again, defendant argued that the publicity surrounding his plea and the suicide attempt was highly prejudicial warranting a change of venue. Defendant also argued that virtually all of the potential jurors ignored the court’s instruction not to read or listen to any news reports of the case. (Appendix III, p. 379) Attached to that Motion were several exhibits, including videotapes from the major television stations, transcripts of news broadcasts and newspaper coverage since the guilty plea, and defendant’s attempted suicide.

A review of the video tapes from the television coverage reveals that the day defendant plead guilty, October 25, 2001, Fox Channel 4 ran stories regarding the plea during at 5:00 p.m., 5:42 p.m., 6:00 p.m., 9:00 p.m., 9:30 p.m. and 10:00 p.m. (Exhibits to November 15, 2001 Change of Venue Motion) In each of those

broadcasts West calls for the death penalty and claims that the defendant smirked and demonstrated no remorse for his crime during the plea:

- “If Pamela don’t breathe he shouldn’t either”; “don’t feel he feels sorry for what he did. . . he is like happy what he did. . . smirking.” (5:42 broadcast);
- “I want the death penalty.” (6:00 p.m. broadcast);
- “he thinks it is a joke. . . has no feelings” West (9:30 p.m. broadcast)
- 
- “he thinks it is a joke” (10:00 p.m. broadcast)

That same night Paul Butler, the victim’s father, was interviewed on the news, and echoed West’s call for the death penalty stating he believes the defendant wants to die “he don’t want to live no more.” (10:00 broadcast) Finally, Channel 4 reporters went to the Coffee Cup, a restaurant close to the scene of this crime, interviewed some of the patrons, and reported that everyone there was hoping for the death penalty. (9:00 p.m. broadcast)

The next day, Channel 4 again reported on the plea and re-ran the interviews with Butler, West and at the Coffee Cup at 6:12 a.m., 6:31 a.m., 7:00 a.m., 7:21 a.m., 7:31 a.m., 8:01 a.m., 8:30 a.m., 8:46 a.m., 12:09 p.m., 5:00 p.m., 5:30 p.m., 6:00 p.m., 9:00 p.m., 9:30 p.m. and 10:00 p.m. In addition, during the 5:00 p.m. broadcast there was a live report from the victim’s elementary school depicting “Pam’s Garden,” a memorial garden site erected by students at the school. That report also aired live interviews with one of the victim’s teachers,

Terry Yadrich<sup>7</sup> and the principal of her school. In those interviews, Yadrich stated she was “glad he pled guilty” and the principal referred to the victim as an “angel.” This segment was repeated during the 6:00 p.m., 9:00 p.m., 9:30 p.m. and 10:00 p.m. broadcasts.

The next morning, October 27, 2001, the station again broadcast’s West’s statement “I want the death penalty,” and Butler’s interview in which he stated “he don’t want to live no more.” (5:00 and 5:30 a.m. broadcast)

Similarly, KCTV Channel 5's top story at 5:00 p.m. was defendant’s guilty plea. In that story, the station also broadcast’s West’s ‘press conference’ in which she claimed the defendant “doesn’t have any feelings in him” and her desire to “throw the switch.” West further stated “If it comes out our way I’ll jump up and tell Pammy we won.” (KCTV 5 5:00 p.m.) The newscast went on to recap the case including footage of the defendant’s arrest and the massive manhunt for the victim’s body.

KMBC Channel 9's 5:00 p.m. broadcast top story reported the plea and the anchor stated “her abduction and murder broke this community’s heart.” That reporter went on to state that “two years ago West said she wanted the death penalty and she still may get her wish.” The broadcast went on to re-cap the abduction, and stated “no one in the news room will ever forget that day.”

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<sup>7</sup>This person was also a government witness at the penalty phase during the victim impact portion.

Likewise the guilty plea was the top story on the 10:00 p.m. broadcast during which the news anchor referred to this case as the “story that gripped the metro.” This broadcast also ran footage of West’s press conference after the plea in which she stated “I still want the death penalty, I still want the death penalty.” Finally, the broadcast ended with footage of the search for the victim and time line of the events in the case. This same information was again repeated during the 6:00 a.m. broadcast the next morning.

The October 25, 2001, 5:00 p.m. broadcast on NBC 41 referred to this case as the “story that broke hearts across the metro and the United States.” That broadcast went on to show file footage of the case including the defendant’s arrest and the search for the victim. Likewise, this newscast also aired West’s ‘press conference’ in which she claimed the defendant “thinks it’s a joke” and reported that West is adamant in wanting the death penalty and personally wanted to be present when it is carried out. (KSHB 41 5:00 p.m.) During the 10:00 p.m. broadcast one of the reporters did live interviews with the victim’s sisters at their home. During those interviews, the sisters recalled witnessing the abduction of the victim. That newscast ended with West’s interview calling for the death penalty. (KSHB 41 10:00 p.m. broadcast)

The next day, the 5:00 and 6:00 p.m. newscast reported the plea, re-capped the case and broadcast an interview with a former Assistant United States Attorney commenting on what evidence the government is likely to present during the

penalty phase of the trial. (KSHB 41 10:00 p.m.) Finally, on October 28, 2001, the night before jury selection was to begin, the 10:00 news cast re-capped the plea and broadcast a segment of West's 'press conference' the day of the plea in which she stated " I would like to pull the switch. As a mother as a parent there is not anyone here who would not like to do that."

The next day, October 29, 2001, jury selection was scheduled to begin. Fox 4 news broadcast that fact along with details of the earlier plea throughout their morning news broadcasts. (See Fox 4, 5:00 a.m., 5:30 a.m., 6:00 a.m., 6:13 a.m., 6:30 a.m., 6:45 a.m., 7:00 a.m., 7:20 a.m., 7:31 a.m., 7:45 a.m., 8:04 a.m., 8:30 a.m.) Some of these broadcasts also included the prior interview with Butler in which he admitted he "want[ed] to do bad things to him [defendant]," and his belief that the defendant "don't want to live." West's interviews were also replayed in which she stated she "wanted the death penalty."

However, instead of picking a jury that day, the case was continued for one week due to defendant's attempted suicide the night before. Once again, news of that suicide attempt again became the top story of the day. (See Fox 4, 12:00 p.m., 12:25 p.m., 5:00 p.m., 6:00 p.m., 9:00 p.m., 10:00 p.m.; KCTV 5, 5:00 p.m., 10:00 p.m., NBC 41, 5:00 p.m., 6:00 p.m., 10:00 p.m.)

KCTV 5's account of the suicide attempt contained the reporter's statement that "those close to Pamela Butler's family wish his attempt had been successful" and included West's statement that she would "like to throw the switch" herself.

This broadcast also aired a ‘press conference’ with West commenting on the evidence that has yet to be introduced: “Wait until the trial comes, then see what Pamela went through then everybody will feel the same way I do.” (KCTV 5)

KMBC Channel 9 aired an interview with West in which she commented on defendant’s suicide attempt calling it a “chicken way out” and stating it wasn’t “fair on Pamela’s behalf for him to do that.” (KMBC 6:00 p.m.) NBC 41 News’ 6:00 p.m. broadcast aired an interview with West in which she called the defendant’s suicide attempt a “chicken way out,” and wondered “why he didn’t take his life then instead of [her] daughter’s.” Finally, NBC 41 aired an interview with West in which she stated the “only reason he attempted suicide is the easy way out. . . not remorseful. . . Every time I see that man he is has always been cracking a smile. . . not one tear down his face or a sad emotion.” (NBC 41 10:00 p.m.)

That final Motion for Change of Venue was also denied, and the publicity continued.

Prior to trial, defendant also filed a Motion for a Competency Examination, based on the suicide attempt. That Motion was denied and again, that Motion and the denial of the Motion became the top story of the day and the subject of West’s ‘press conference.’ When asked by reporters if she believed that defendant should have a competency examination West replied: “you were in the courtroom do you think he is crazy.” (NBC 41 5:00 p.m., exhibit to New Trial Motion.)

Right before trial, West's continued 'press conferences' finally became a concern to both the prosecution and the court. In the November 8 conference with the court and the parties, the government stated they had a long talk with West about the problems her 'press conferences' were causing, and asked her to stop. (Nov. 8, 2001 Transcript, p. 10) The defense then disclosed they had a discussion with the government the day defendant attempted suicide. In that discussion the defense stated it would allow West to sit through the trial, even though she was a government witness, if she would stop giving 'press conferences.'" (Nov. 8, 2001 Transcript, p. 11) The government passed that offer to West. However, instead of accepting that offer, West told the press she had been told not to talk about the case and went on to comment on the competency ruling. (Nov. 8, 2001 Transcript, pp. 12-13) During the conference, the court agreed with the defense that West has shown no willingness to stop talking (Nov. 8, 2001 Transcript, p. 13) Despite this acknowledged problem, the court took no steps to insure that the jury was not influenced by West's continued 'press conferences' right before trial. Eventually West agreed not to give any press conferences during the trial in exchange for the defendant allowing her to sit through the entire trial. Thus, West stopped polluting the news with her prejudicial statements only when it was in her interests. However, defendant asserts by that time the damage was already done.

Even the jurors that eventually heard this case acknowledged, in the jury questionnaires, that they had read or heard about this case. (Appendix IV, V)

Further, virtually all of the potential jurors acknowledged they violated the court's instruction and heard or read about the defendant's attempted suicide. Even in the face of this evidence, the court denied the Change of Venue, the request for additional peremptory challenges and the request for a sequestered jury.

In fact, instead of taking any steps to shield the jury from the continuing media coverage, the court highlighted the perceived dangerousness of the defendant by instituting special procedures for the jury. Over the defendant's strenuous objection, the court had the jurors meet each morning at a secret location and were driven to the courthouse by U.S. Marshals. The jury had a private dining room during the trial that was guarded by U.S. Marshals. The jurors' names were withheld from the public, and the Marshals established a 'buffer zone' in the courtroom, not allowing anyone to sit in the first row of the gallery. All of these special procedures did nothing to shield the jury from publicity. They only inferred to the jury that the defendant was dangerous and special precautions needed to be taken for their safety. Moreover, these special procedures were instituted despite the fact that defendant had never caused any problem in the courtroom.

During the trial, the media coverage continued. Live broadcasts were aired on the courthouse steps on every television station in town. Likewise the Star ran an article every day recounting the testimony the previous day. (See Exhibits to New Trial Motion)

Defendant asserts that based on the facts of this case, a change of venue was warranted based not only on presumed prejudice, but the demonstrated special interest that all area residents had in this trial, as reflected in their widespread participation in and support for the search for the child, the family and their concern for the safety of their own children, and the highly emotional media coverage, combined with incriminating and derogatory publicity about the defendant, much of it from public officials and prosecution sources.

In addition, this is not a case where pretrial publicity was the only basis for a change of venue. The evidence adduced at the change of venue hearing as well as the additional exhibits provided to the district court clearly demonstrated personalization with this case on the part of the Kansas City area residents. For example, the evidence established enormous amounts of money donated to the victim's family by community members, the attendance of large numbers of residents who never knew the victim nor her family at the funeral and visitation, the purchase of CDs with the victim's picture, the renaming of public parks in the victim's memory, and the emotional and psychological impact on the citizens of Kansas City that was reported in the news and the subject of letters to the editor.

Defendant asserts the publicity surrounding this case, much of which was inflammatory and derogatory to the defendant, deprived him of his constitutional right to due process of law. The environment in the Kansas City area was so permeated with hostility that the judicial proceedings in this case were nothing

more than a “hallow formality.” *Irvin v. Dowd*, 366 U.S. 717 (1961). As the Supreme Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966):

[T]he Court has ... pointed out that legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. And the Court has insisted that no one be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.

*Id.* at 1517.

In *Coleman v. Kemp*, 778 F.2d 1487 (11<sup>th</sup> Cir. 1985), the court recognized the heavy burden on a defendant requesting a change of venue due to prejudicial pre-trial publicity. However, in that case the court found that the defendant had met the high standard of “presumed prejudice.” In reaching that conclusion, the court focused on the facts of the case and the contents of the publicity. Crucial to the court’s decision to grant a change of venue were the following factors:

- The law enforcement statements that the evidence was overpowering” and there was “no point in looking for anyone else.”
- The overwhelming showing of guilt prior to trial
- The reports of the defendant’s prior criminal record
- Publicity calculated to provoke hostility including the newspapers description of the defendant smirking and other characterizations of remorselessness
- The fact that the family wanted the death penalty pervaded the community

As the change of venue hearing reflected, all the above factors were present in this case. The abduction, search and eventual discovery of the victim was

extensive and pervasive. The arrest and subsequent pre-trial proceedings were followed every step of the way by the media and widely reported. Every pleading, motion or hearing in this case attracted the attention of the media and for the most part were commented on by West during the courthouse steps 'press conferences.' The defendant's guilt became a forgone conclusion before he was arrested. Many reports portrayed the defendant in a highly detrimental light and reaffirmed the public belief in his guilt.

For example, the defendant was portrayed in local press as a dangerous individual who manipulates women and has been a constant threat to human life. A report dated November 25, 1999, in the Kansas City Star reports that Keith Nelson was accused of pouring acid into a swimming pool because he was jealous of his girl friend's acquaintances there. The article goes on to refer to the "darker side" of the defendant, claims that he has spent "most of his adult life behind bars" and that he had threatened to kill several people. There were constant references to the defendant's prior criminal record which created a widespread belief in his guilt. Several news reports from area television stations have reported Keith Nelson as the "probable" perpetrator. (Channel 41 News at Ten, October 16, 1999)

Several area police departments announced wide spread programs to protect children from the same fate as befell Pamela Butler. Lee's Summit aggressively promoted "Video Print" program for children and Kansas City, Kansas, along with other Police Departments publicly promoting their "Amber Alert" system for

kidnapped or missing children. Every time a presentation is made for any such programs, Pamela Butler and Keith Nelson were sounded as the critical examples why parents must act.

Many articles and media presentations tried to sensationalize the case with references to “blood-curdling screams” from the child (Kansas City Star, Oct. 23, 1999); or references to “horror, sorrow and tears.” (K.C. Star, October 17, 1999)

Virtually everyone in the Kansas City area assumed that the defendant was guilty and that presumption was reinforced in every possible way, including the appearance of the mother of the victim on the Montel Williams television show in which she (falsely) stated that the defendant had picked out her daughter specifically and had stalked her with the intent of kidnapping her.

On the opinion page of the Kansas City Star for November 6, 1999, one individual characterized Keith Nelson as leaving a “legacy of fear” throughout Kansas City. An opinion in the October 27, 1999 issue of the same paper argued that no medical care should have been given defendant because of what he had done. Another reference in the same issue suggested that animals deserved more respect than Keith Nelson.

The vicious attacks on the defendant and the over whelming presumption of his guilt pervaded the Kansas City community. In letters to the editor of the Kansas City Star, various persons have claimed vehemently that “the death penalty is too easy a punishment for the monster who killed Pamela Butler” (October 19,

1999); referred to him as a “inhuman monster” (October 19, 1999); claimed that taxpayers would be wasting their money to “support the accused” (October 22, 1999).

The evidence also established that government officials were the source of a considerable amount of the prejudicial publicity about this case. These included leaks of the government’s investigation, repeated statements of intention to seek the death penalty, and derogatory, inflammatory remarks about the defendant. For example, in the Kansas City Star for October 22, 1999, the United States Attorney personally announced that he had already asked the Attorney General for the death penalty in the case although obviously the investigative portion of the case was only just beginning. He plainly told the public that the defendant was guilty based on the most minimal of facts. U.S. Attorney Hill even raised the plea for vengeance when he told the press that if Nelson escaped the death penalty in federal court that Hill would then work with the Jackson County prosecutor for a murder prosecution in state court. Hill has even appeared on area television stations to explain the death penalty in such cases. (KCTV, 8:00 a.m., October 16, 1999)

FBI Spokesman Jeff Lanza has emphasized the horrible nature of the crime and personalized it for the entire community when he told the public and the press that “because of the tender age of the victim, it’s very troubling emotionally to a lot

of the investigators, even the ones who have seen very bad things over the years”.  
(K.C. Star, October 17, 1999)

The impact of these press reports is demonstrated in the responses of many of the potential jurors in their answers to the questionnaire. Almost all knew of the case, almost all believed in the defendant’s guilt and many expressed strong feelings about the defendant and this case. Despite this, a change of venue was denied.

West and Butler’s calls for the death penalty for the defendant were reported in the press from the day of his arrest until the day jury selection began. In the few weeks prior to the commencement of this trial, the press literally inundated the community with West’s ‘press conferences’ regarding her desire “to throw the switch herself,” and her description of defendant’s alleged “smirk” during his guilty plea. The community was constantly told by West and some of the reporters that defendant demonstrated no remorse during his plea, but instead, “smirked,” a characterization defendant strongly disputes. Despite this virtual landslide of prejudicial publicity, all motions for change of venue, additional peremptory strikes, extended voir dire or sequestration of the jury were denied.

Further, on the day of jury selection virtually all the potential jurors acknowledged having heard or read about the defendant’s suicide attempt, a direct violation of the court’s instruction not to listen to reports or read newspaper accounts regarding this case. Despite this, the court denied a change of venue

stating: “During the voir dire examination which took place on Tuesday, November 13, 2001, although the potential jurors indicated that they had heard information regarding the case, they all indicated that they could ignore this information and decide the case based solely on the evidence presented to them in the Court.” (Appendix VII, p.1157) That Order further denied the defendant’s motion for a sequestered jury, stating the court would “employ other procedures designed to ensure that the jury is shielded from outside publicity.” (Appendix VII, p. 1157) Those other measures consisted of only giving the standard jury instruction not to listen to news reports or read newspaper articles about this case.

In *United States v. Tokars*, 839 F. Supp. 1578 (N.D. Ga. 1993), defendant was granted a change of venue due to prejudicial pre-trial publicity. In reaching that determination, the court considered the voluminous news reports surrounding the case, as well as the community attitude survey conducted by the defense. The government argued that most of the news reports were merely factual and insufficient to warrant a change of venue. The court, agreeing that the “bulk” of the news reports were factual in nature, found that from the combination of the volume of reports and the “emotional nature of some of the coverage” one can “infer that a widespread bias exists which could interfere with a fair trial.” *Id.* at 1582.

The same situation existed in this case. There was widespread press coverage of this case. While, as the magistrate court found, much of that coverage was factual, the evidence before this Court demonstrates that a substantial portion

of the publicity was extremely emotional in nature. Moreover, much of the prejudicial publicity occurred right before trial during West's constant 'press conferences.' Thus there was no cooling off period between the publicity and the trial.

Finally, defendant recognizes the line of cases in which a change of venue is denied because of other safeguards. *See e.g. United States v. Blom*, 242 F.3d 779 (8<sup>th</sup> Cir. 2001); *Pruett v. Norris*, 153 F.3d 579 (8<sup>th</sup> Cir. 1998). However, unlike those cases, no safeguards were employed to shield the jury from the publicity, nor were any safeguards employed during the jury selection procedures to insure that defendant was tried by a jury unaffected by the publicity. It is clear the district court erred in denying defendant's change of venue, mandating reversal of his death sentence.

**II. The Trial Court Erred in Conducting the Jury Selection Process Because the Process Employed by the Court Violated Mr. Nelson's Fifth, Sixth and Eighth Amendment Rights To Due Process, an Impartial Jury, Effective Assistance of Counsel and Freedom From Cruel and Unusual Punishment in That the Court Failed to Conduct or Allow Sufficient Questioning on Pretrial Publicity, Death Qualification, Mr. Nelson's Suicide Attempt, and Follow Up to Answers on the Juror Questionnaires.**

A. Standard of Review

Although the district court has wide latitude in conducting voir dire, the court of appeals reviews the lower court's conduct for abuse of discretion. *United States v. Paul*, 217 F.3d 989, 1003 (8<sup>th</sup> Cir. 2000). The propriety of the court's refusal to conduct further voir dire questioning "must be judged in the light of all of the attendant circumstances." *United States v. Bear Runner*, 502 F.2d 908, 912 (8<sup>th</sup> Cir. 1974). If the voir dire process denies or impairs a party's challenges to jurors, the error is reversible and does not require a showing of prejudice. *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (overruled on other grounds by *Batson v. Kentucky*).

B. Argument

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."

*Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citations omitted). The importance of the voir dire process to the accomplishment of this fair hearing requirement has been noted by the Court:

*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. . . . Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.

*Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (citation omitted).

The voir dire conducted and allowed by the court in Mr. Nelson's case failed to insure that he was provided a fair trial by twelve impartial jurors.

At the heart of the problem was the fact that the court arbitrarily constrained counsel to twenty minutes of questioning for each group of ten potential jurors. This fact, combined with the content of the court's questioning, made it impossible to determine the jurors' true feelings and in many cases to even ask basic follow-up questions to disturbing information gathered on the juror questionnaires.

The process of selecting the jury began with the dissemination of over 600 juror questionnaires. The questionnaire consisted of thirty-two pages and contained ninety-four questions.<sup>8</sup> After reviewing the completed

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<sup>8</sup> Copies of relevant juror's questionnaires are included in the Appendix. An example can be found at Appendix III, pp. 444-474.

questionnaires, the government and defense counsel agreed on a number of jurors to strike for cause. (Cause Transcript, pp. 6-7)<sup>9</sup> Each side then made additional challenges for cause based upon the juror questionnaire responses, and the court either granted those challenges or stated that the juror would be brought in for voir dire questioning. *See* Cause Transcript.

Voir dire questioning was scheduled to consume four days but instead began and ended on November 13, 2001. Potential jurors were divided into two large groups, the first group consisting of 48 people, the second of 49 people. In the large groups, the court read the charge in the indictment that Mr. Nelson pled guilty to, and explained the concepts of aggravating and mitigating circumstances and the weighing process. (Transcript, pp. 9-13,

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<sup>9</sup> Refers to the transcript of the Strikes for Cause Conference, dated October 9, 2001.

181-85) The court then went on to ask a few background questions to establish whether any venirepersons knew any of the attorneys or witnesses and whether they could follow the court's instructions and the law.

(Transcript, pp. 13-20, 185-92) The court's questions were framed so that they could normally be answered "no." (Transcript, p. 15)

Following the large group questioning by the court, the potential jurors were divided into small groups of ten. As to each of the small groups, the court began the questioning by asking the following:

You have been told that the defendant has pled guilty to the murder of Pamela Butler as charged in Court 1 of the indictment. Further you were instructed about the statutory procedure you will follow to reach your sentencing decision, that is, how aggravating and mitigating evidence relate to the sentencing decision of either life imprisonment without parole or death.

If, after listening to the evidence and weighing the aggravating evidence against any mitigating evidence and finding that you could legally impose the death penalty, by a show of hands, would you always vote to impose the death penalty?

(Transcript, pp. 23-24, 57-58, 88-89, 123-24, 148-49, 195-96, 230-31, 268-69, 302-03, 348-49) Recognizing that the question was "a mouthful," the court read it twice to each small group. (Transcript, pp. 23, 57, 89, 123, 148, 196, 231, 269, 303, 348)

Next, the court asked each small group:

For any reason, whether it's a matter of moral or religious or philosophical beliefs or as a matter of conscience or personal beliefs, or for any reason, can you say that you would never vote to impose the death penalty under any circumstances in accordance with the statutory procedure that I have previously outlined, that is, the weighing of the aggravating and mitigating factors?

(Transcript, pp. 24, 58, 89-90, 124-125, 149, 197, 231-32, 269-70, 304, 349)

Again, the court read the question twice to all but one group of ten.

(Transcript, pp. 24, 89, 125, 149, 197, 232, 269, 304, 349)

Finally, the court asked each small group about their knowledge of

Mr. Nelson's suicide attempt, which occurred the week before the voir dire:

. . . Have you heard or read any media reports about the defendant recently attempting suicide?

(Transcript, pp. 25, 59, 90, 125, 150, 197, 232, 270, 304, 350) At least half, and more frequently all, of the jurors from each small group responded affirmatively, prompting the follow-up question of:

. . . Would you be able to set aside what you heard or read and make your sentencing decision based solely on the evidence and testimony presented here in the courtroom? Would anyone be unable to do that?

(Transcript, pp. 25, 59, 90, 125, 150-51, 197-98, 232, 270, 304-05, 350) Based on this question, no one indicated an inability to "set aside" Mr. Nelson's recent suicide attempt.

The effect of this generalized questioning by the court was to get the vast majority of the jurors to commit that they were "death qualified" and could follow the law. Following this questioning, each side was allowed 20 minutes, or 2 minutes per person, to voir dire each small group. Due to the frequent inconsistencies and lack of clarity of many of the answers on the questionnaires and during the voir dire -- especially in the areas of death qualification and pretrial publicity -- it was impossible to determine a juror's impartiality or lack thereof within these time constraints. Consequently, Mr.

Nelson's constitutional rights were violated when he was denied adequate questioning in the areas of death penalty qualification, pretrial publicity, the suicide attempt, and other follow up to relevant questionnaire answers.

### **1. Death Penalty Qualification**

To determine whether a prospective juror's views on the death penalty make him excludable from the jury for cause, the test is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (citation omitted). The court's questioning on the issue of death qualification did not adequately reflect this standard and instead had the effect of "educating" even automatic death penalty jurors that the proper response was not to "automatically" impose the death penalty in every case.

One example of how the court's questioning instilled the improper "automatic" standard in the jurors' minds, and how the time limitations on the questioning made it impossible to adequately explore the jurors' true opinions, is seen in the voir dire of Juror 52. This juror indicated on her questionnaire that she believed in the death penalty because of verses from the bible. (Transcript, p. 110) During defense counsel's voir dire, she confirmed that her beliefs came from the bible verses that espoused "an eye for an eye, tooth for a tooth." (Transcript, p. 110) She reasoned that this belief also translated into "a life for a life." (Transcript, p. 111) The juror went on to say that if someone intentionally took a life, the appropriate punishment would be death, but, that she could consider other options based on the situation involved. (Transcript, p. 111)

Defense counsel attempted to square these inconsistent views by establishing that the death penalty was only an option if the murder was intentional and asking the juror if her "eye for an eye" view wouldn't always dictate the death penalty in intentional murder cases. (Transcript, pp. 111-113) The court interrupted counsel's questioning, suggesting different questions so that "we don't have to waste time . . ." and telling counsel that his question was confusing and "[t]he issue really is whether or not you can weigh the mitigating factors and the aggravating factors and come to a decision, or are you already predisposed one way?" (Transcript, pp. 112-113) To the court's question, the juror responded that she didn't think she'd made up her mind and she thought she could do a life sentence. (Transcript, p. 113) Having been shut down by the court, and due to the time constraints, counsel was forced to move on at this point.

Voir dire of this juror illustrates three problems with the process adopted by the court. First, the general questioning on unfamiliar principles of law is insufficient to determine whether the juror satisfies the *Witt/Witherspoon* standard. As the Court pointed out in *Morgan*, the standard for determining death qualification “would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath.” *Morgan v. Illinois*, 504 U.S. at 734-35. Second, the court’s admonishment to defense counsel and interjection of the general inquiry also obstructed Mr. Nelson’s ability to obtain an impartial jury. “[T]he trial judge is an authority figure in the courtroom. Psychological studies show that when people are questioned by authority figures, they become less candid and open.” *Berryhill v. Zant*, 858 F.2d 633, 642 (11<sup>th</sup> Cir. 1988) (Clark, J., specially concurring) (quoting the district court order). Having just witnessed the judge criticize defense counsel, it is especially not surprising that this potential juror agreed with the judge, likely in an attempt to get “her turn” over with.

The final problem is that “[j]urors are in a poor position to make determinations as to their own impartiality.” *United States v. Beckner*, 69 F.3d 1290, 1293 (5<sup>th</sup> Cir. 1995). For this reason, asking a potential juror general questions about whether she can follow the law is insufficient. Indeed, “a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.” *Morgan*, at 735. Voir dire must be allowed to identify which “prospective jurors function under such misconception.” *Id.* at 736. In the example of Juror 52, it is clear that this woman did not understand the conflict between her belief in “a life for a life,” and her belief that she could weigh the aggravators and mitigators and consider a life sentence. Denial of the opportunity and the time to adequately question this juror to get to the heart of her position violated Mr.

Nelson's constitutional guarantees. *See Morgan*, at 729.<sup>10</sup>

## 2. Pretrial Publicity

The time limitations imposed by the court on voir dire prevented defense counsel from asking any follow up questions on the issue of pretrial publicity with very few exceptions. Follow up on this issue was crucial because between 94% and 95% of those who filled out juror questionnaires in this case had prior knowledge of the case. (Venue Transcript, p. 336)<sup>11</sup> Furthermore, the juror questionnaires revealed that the effect of the pretrial publicity was that most prospective jurors believed that Mr. Nelson was guilty and many had been exposed to "facts" about the case that were untrue. Based on these facts, it is quite likely that many of the venirepersons had also developed opinions about the appropriate punishment based on the publicity they had been exposed to.

"Because jurors exposed to pretrial publicity are in a poor position to determine their own impartiality, . . . district courts must make independent determinations of the impartiality of each juror." *United States v. Beckner*, 69 F.3d 1290, 1291 (5<sup>th</sup> Cir. 1995). To accomplish this, the voir dire conducted by the court must give "reasonable assurances that prejudice would be discovered if present." *Id.* at 1292. No such reasonable assurances exist here because there was no voir dire on the issue that would have allowed the court to make an independent determination of impartiality.

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<sup>10</sup> Juror 52 is not the only juror whose responses caused the need for extensive additional questioning. As counsel pointed out, many of the jurors' voir dire responses were quite different from their questionnaire responses, which obviously necessitates further probing. (Transcript, p. 121) Another example is Juror 116, who espoused an "eye for an eye" belief and also said that he could consider life imprisonment, which he thought would be worse than the death penalty. (Transcript, pp. 260-61) During his questioning of this juror, the court called defense counsel to the bench and told him that he was way over his time and that the court would be cutting him back pretty quick. (Transcript, p. 260) Because of this restriction, defense counsel was never able to square this man's belief in "an eye for an eye" with his ability to consider other punishments and his belief that life imprisonment was a more severe punishment than death. The court subsequently denied the defense's challenge for cause to this juror. (Transcript, pp. 266-67)

<sup>11</sup> Refers to the transcript of the hearing on Mr. Nelson's motion for change of venue.

Instead, the court relied entirely on the jurors' responses on the questionnaires as to whether they had heard anything in the media about the case.<sup>12</sup> Specifically, the questionnaire asked whether the potential jurors had heard about statements made by one of Keith Nelson's coworkers, about any statements Keith Nelson made after his arrest, about any materials found in Keith Nelson's truck, about Keith Nelson's past history, and about the criminal charges filed against Keith Nelson in this case. Finally, the

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<sup>12</sup> Questions 31-44 on the questionnaire, Appendix III pp. 451-457, dealt with exposure to pretrial publicity.

questionnaire required the jurors to determine their own impartiality, asking: “Do you feel that you could be absolutely fair to the defendant Keith Nelson if chosen to serve on this jury, despite anything you may have previously heard or read about this case?”<sup>13</sup> The jurors were given the option to check “Definitely,” “Probably,” “Probably Not,” or “Definitely Not.”

All but one of the 97 prospective jurors that were questioned by the court and counsel had heard of the case at least once. 47 of the 97 had been exposed to the case by some form of media “frequently.” 44 potential jurors said that they “definitely” could be fair to Mr. Nelson despite the pretrial publicity they had been exposed to. 44 said they could “probably” be fair, and 9 could “probably not” be fair. Therefore, based upon this question alone, over half of the jurors questioned -- 53 of the 97 -- had doubts about their own ability to be fair. A juror who could “probably” be fair and impartial is not a qualified juror. “‘Probably’ is not good enough.” *United States v. Sithithongtham*, 192 F.3d 1119, 1121 (8<sup>th</sup> Cir. 1999). Despite the adverse effect that the pretrial publicity had on Mr. Nelson’s right to a fair and impartial jury, counsel was given no opportunity to determine which jurors should be disqualified on this basis. Follow up was essential to square inconsistent answers and to ask questions that could aid in the trial court’s independent determination as to whether each juror could be impartial in spite of what he/she read and what opinions that information caused the juror to form.

In fact, counsel was only able to briefly question two of the 97 prospective jurors on the issue of publicity. The first of those two jurors, No. 84, stated on her questionnaire that she had “frequently” been exposed to television, radio, and newspaper coverage of the event, and “frequently” had conversations about the case with friends, family, coworkers, etc. This potential juror then stated that she had formed the opinion that Keith Nelson was “definitely guilty,” and that it was “quite unlikely” that she could set this opinion aside. Inexplicably, and despite her unequivocal assertions that Keith Nelson was guilty and that such opinion could not be changed, this juror responded that she could “definitely” be absolutely fair to Mr. Nelson despite what she had previously heard about the case.<sup>14</sup>

During voir dire, counsel briefly questioned No. 84 about whether, based upon these views, she felt the death penalty was the appropriate punishment. The potential juror responded that she would like to hear the other side. (Transcript, p. 161) In response to whether she had already

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<sup>13</sup> See Appendix III, p. 457, question 44.

<sup>14</sup> See Appendix VI, p. 971 for a copy of this juror’s questionnaire.

decided what should happen in the case, No. 84 responded, “I don’t know. No.” (Transcript, p. 162) Counsel was then forced to move on to the next venireperson, without determining specifically what it was that No. 84 had been exposed to that caused her to develop such steadfast opinions, and without attempting to square her contention that she could “definitely” be absolutely fair with her position that Keith Nelson was “definitely guilty” and that such position was “quite unlikely” to change. Clearly, this is the juror who can state with absolute conviction that she can be fair, but is unaware that under the law her opinions preclude her from being impartial and following the court’s instructions. *See Morgan*, 504 U.S. at 735-36 (“A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception.”) The absence of questioning by the court or an adequate opportunity for counsel to question precluded the court from making the required independent determination of No. 84’s impartiality.

The other venireperson that was subject to any questioning about the effects of the pretrial publicity in this case was No. 87. The questioning is a telling illustration of the importance of follow up *voir dire* on the publicity issue. On his questionnaire, No. 87 indicated that he had been exposed to the case through television, radio, newspapers and conversations with others. He had formed the opinion that Mr. Nelson was probably guilty, although it was somewhat likely that he could set this aside because the media is filled with misinformation. He stated that he could “probably” follow the law and “probably” be absolutely fair to Mr. Nelson despite the media influence.<sup>15</sup> This potential juror was asked during *voir dire* if he could make a decision based on the evidence in the courtroom as opposed to what he heard about the case in the media. (Transcript, p. 167) He responded that he wouldn’t have a problem doing that but that he had pretty much made up his mind and did not believe that would change, no matter what was presented. (Transcript, p. 167) Naturally, the juror was struck for cause. (Transcript, pp. 175-76) What is unknown is how many other jurors, whose questionnaires stated that they could “probably” be fair despite what they had heard in the media, could indeed only “probably” be fair and were therefore subject to being struck for cause. If even one partial juror is impaneled, the government is disentitled to execute any death sentence that is imposed by the tainted jury. *Morgan*, 504 U.S. at 729. As it stands, the 52 potential jurors whose questionnaires indicated they could “probably” or “probably not” be absolutely fair, and who were not subject to any follow up

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<sup>15</sup> See Appendix VI, p. 1002 for a copy of this juror’s questionnaire.



questioning, were all partial jurors.<sup>16</sup>

The best example of how Mr. Nelson was prejudiced by the time limitations imposed by the court is seen in juror No. 114. During the small group questioning this juror was involved in, defense counsel ran out of time and had no opportunity to question this juror at all.<sup>17</sup> Counsel then moved to strike the potential juror for cause on the basis of his questionnaire response that there was a lot of press in the town where he lives and that he thinks about the case each time he drives by the church where the victim died. (Transcript, pp. 265-66) Not surprisingly, the request was summarily denied, as counsel had no opportunity to develop the full effects of the publicity on this potential juror. In truth, it is impossible to know for certain whether No. 114 could be an impartial juror because there was insufficient questioning to establish the fact. The Supreme Court has “not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections.” *Morgan*, 504 U.S. at 730. Certainly, whether the massive pretrial publicity in this case influenced jurors in a way that may effect their partiality is one such inquiry.

“Excessive pretrial publicity can deny a defendant of his right to be tried by a fair and impartial jury.” *Berryhill v. Zant*, 858 F.2d at 639 (citation omitted) (Clark, J., specially concurring). “There is no doubt that the trial judge has the duty to neutralize the effect of any known area of prejudice.” *United States v. Bear Runner*, 502 F.2d at 910. If the voir dire is so limited as to prevent any prejudice from being uncovered, the defendant is deprived of his rights to due process and an impartial jury. *Berryhill*, at 641.

The trial judge has an obligation to make an independent determination of each juror’s impartiality. Allowing jurors to decide their own impartiality violates this obligation and renders the voir dire process “insufficient to provide a reasonable assurance that prejudice would be discovered if present.” *Beckner*, 69 F.3d at 1294. The Supreme Court has recognized that even when a juror insists that he will not be influenced by media, and that he can decide the case based only upon the evidence

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<sup>16</sup> As to the 14 people who actually sat on the jury, 1 stated she could “probably not” be fair (141), 5 stated they could “probably” be fair (5, 52, 91, 95, 163), and 8 stated they could “definitely” be fair (20, 65, 85, 98, 106, 132, 147, 159).

<sup>17</sup> Defense counsel noted that he spent 24 minutes questioning this small group, and had been called up to the bench once by the court to remind him of the time restrictions and tell him that the court would be “cutting him back pretty quick.” (Transcript, pp. 260-61, 265-66)

produced in court, media exposure can be so prejudicial that disqualification of the juror is required despite such assurances. *Marshall v. United States*, 360 U.S. 310 (1959). The media exposure in this case was certainly highly prejudicial to Mr. Nelson. Because the trial court failed to make an independent determination as to whether such publicity effected the jurors' partiality, Mr. Nelson's constitutional rights have been violated and a new trial is required.

### 3. Mr. Nelson's Suicide Attempt

Voir dire in this case was conducted on November 13, 2001. On October 28, 2001, Mr. Nelson attempted suicide. Media reports largely suggested that the attempt was contrived to delay the trial. During the small group voir dire, the court asked two questions crafted by the government (quoted at the beginning of this argument) as to whether the potential jurors had heard about the suicide attempt and whether they could set aside anything that they had read. While the vast majority of the people had heard about the suicide attempt, no one responded that they could not set aside what they had read.

Due to the time constraints imposed upon counsel's small group voir dire questioning, there was no time to follow up on the court's perfunctory inquiry as to whether the potential jurors could "set aside" what they read. The problem presented is similar to that which arose due to counsel's inability to follow up on other pretrial publicity issues. The problem is even worse here, however, as there was no opportunity from the juror questionnaire to even know **how much** media exposure the prospective jurors had to this issue, **what** they heard, and what impressions they formed. Again, the jurors were impermissibly allowed to make their own determinations of their ability to be impartial, a determination they are not qualified to make. *See Beckner*, 69 F.3d at 1291, 1293.

The publicity surrounding Keith Nelson's suicide attempt was very prejudicial to Mr. Nelson. On November 6, 2001, the headline on the front page of the Metro Section of the Kansas City Star referred to the suicide attempt as a "ploy" to delay the trial. Throughout the day, the news broadcasts ran interviews of the victim's family talking about how they wished the attempt had been successful, and how they could "pull the switch" on Mr. Nelson themselves. The prosecutor was quoted in the paper as saying that Mr. Nelson's actions surrounding the suicide attempt demonstrated that his mental health was just fine and that he was merely attempting to manipulate the system. Despite being instructed not to listen to or read any media accounts of the case when they filled out their

questionnaires, a vast majority of the prospective jurors had indeed heard media accounts of the suicide attempt.

These widespread violations of the court's order reinforce the need to follow up with these jurors as to what impressions they have formed from the negative publicity surrounding the suicide attempt, as well as any further publicity they were exposed to in violation of the court's order after they completed their juror questionnaires. This is especially true when the publicity touches on Mr. Nelson's mental condition, which routinely is used as mitigating evidence in the penalty phase of capital trials, the very task the jurors were about to undertake. "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin v. Dowd*, 366 U.S. 717, 727 (1961). For this reason, failure to discover what opinions such damaging publicity spawned here, and to determine their lasting effects, violated Mr. Nelson's constitutional right to an impartial jury as determined through "an adequate *voir dire* to identify unqualified jurors." *Morgan*, 504 U.S. at 729.

#### 4. Other Follow Up Questioning

In addition to the obvious "hot topics" that required follow up questioning to determine impartially, several jurors revealed issues on their questionnaires that required individual attention to determine what effect they would have on the venireperson's ability to sit on Mr. Nelson's jury. For example, Juror No. 141 indicated on her questionnaire that something about her beliefs could "possibly" make it difficult for her to sit in judgment of another person.<sup>18</sup> During *voir dire*, No. 141 stated that she was leaning towards the death penalty, which obviously concerned defense counsel and rightfully caused him to spend his time questioning her on this area. (Transcript, pp. 327-330) Counsel then moved to strike No. 141 on the basis that she may not be able to sit in judgment of another person, based on the questionnaire response. The request was denied and No. 141 sat on the jury that sentenced Mr. Nelson to death. (Transcript, pp. 345-46)

The absence of any follow up questioning on this problem, which definitely would have further established the fact that this potential juror was ineligible to serve, leaves this Court with no assurance that Mr. Nelson's constitutional right to an impartial jury was honored in this case. Immediately following the denial of this requested cause strike, defense counsel again pleaded with the court to waive the time limits the court had

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<sup>18</sup> This was in response to Question 54 on the juror questionnaire. (Appendix V, p. 771)

imposed on the basis that such limits were “imped[ing] our ability to fairly inquire of the jury on Mr. Nelson’s behalf.” (Transcript, pp. 346-47) Again, the request was summarily denied. (Transcript, p. 347)

Several other jurors warranted follow up questioning to reveal potential bias. For example, at least five venirepersons, Nos. 20, 71, 81, 91

and 149, indicated they had family in law enforcement. No. 91 stated that they “deeply respect” their family member that is a state trooper. Potential juror Nos. 15, 20, 21, 40, 67, 77, 102, 112, 123, 126, and 161 had all served on a criminal jury before, in some cases where a verdict was not reached. Nos. 19, 21, 35, 39, 45, 64, 69, 85, 107, 112, 116, 123, 133, 142, and 161 had toured or visited a person in jail before. The only possible purpose of these questions on the juror questionnaires was to screen down for follow up the number of potential jurors who had experiences that could effect their partiality. The questions themselves reveal nothing about how the experience might impact the venireperson’s partiality. Oftentimes, prospective jurors with relatives in law enforcement have opinions that prevent them, consciously or subconsciously, from judging the credibility of a police officer the same as the credibility of a lay witness. Those with prior jury experience are often given the government or defendant’s version of the “real story” after the trial. At times these experienced jurors come away with incorrect and prejudicial impressions of the jury system. Perhaps most importantly in this case, those who have visited a correctional facility may be effected by that experience to the extent that it influences their determination of a life or death sentence. Of course, here, we have no idea how these jurors’ experiences may have effected their partiality because no time existed for questioning on any of the issues.

## 5. Conclusion

In reviewing the voir dire process, “the exercise of the trial court’s discretion, and the restriction upon inquiries at the request of counsel, are subject to the essential demands of fairness.” *Morgan*, 504 U.S. at 730 (citation omitted). Fairness demands more than a cursory “once over” of 100 prospective jurors in one day, especially where the defendant’s life is at stake, and especially where juror questionnaires have revealed a plethora of potential disqualifying biases.

“[T]he right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated.” *Bear Runner*, 502 F.2d at 912, n. 2 (citation omitted). “A searching voir dire is a necessary incident to the right to an impartial jury.” *Id.* at 911. In addition to the challenge for cause, the peremptory challenge “has long been recognized as ‘one of the most important rights secured to the accused’.” *Swain v. Alabama*, 380 U.S. at 219. Under the circumstances of this case, the court’s voir dire and restrictions upon counsel’s voir dire were insufficient to insure that unqualified jurors were struck for cause and that counsel could make informed peremptory challenges.

**III. The Trial Court Erred in Denying Mr. Nelson’s Motions to Strike for Cause Juror Nos. 21, 38, 114, 116, and 141 Because These Jurors Revealed Biases that Made Them Ineligible to Serve Under the Law, and the Court Further Erred in Granting the Government’s Challenges for Cause to Juror Nos. 33, 122 and 124 Because These Jurors All Indicated That They Could Follow the Law Despite Their Reservations About the Death Penalty. The Court’s Rulings Violated Mr. Nelson’s Constitutional Rights to Due Process, Equal Protection, an Impartial Jury, Effective Assistance of Counsel, and Freedom From Cruel and Unusual Punishment as Guaranteed by the Fifth, Sixth, and Eighth Amendments.**

A. Standard of Review

Again, this Court must review the trial court’s conduct during voir dire for abuse of discretion. *United States v. Paul*, 217 F.3d 989, 1003 (8<sup>th</sup> Cir. 2000). Where the voir dire process denies or impairs a party’s challenges to jurors, the error is reversible and does not require a showing of prejudice. *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (overruled on other grounds by *Batson v. Kentucky*). Likewise, erroneous rulings on cause strikes based on a juror’s “death qualification” are not subject to harmless error analysis. *Gray v. Mississippi*, 481 U.S. 648, 665 (1987).

B. Argument

In assessing whether a potential juror’s views on the death penalty prevent him from qualifying as a fair and impartial juror, the “standard is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). This standard “does not require that a juror’s bias be proved with ‘unmistakable clarity.’” *Id.* The district court failed to comply with this standard, resulting in the following erroneous denial of defense challenges for cause and improper granting of government challenges for cause.

**1. Improperly Denied Challenges for Cause**

As stated in Mr. Nelson’s second argument on appeal, *supra*, the voir dire process allowed by the trial court was insufficient to enable any of the parties to make intelligible decisions on which venirepersons’ biases justified a strike for cause. Based upon the record that was made, there are five jurors that the court erred in refusing requested defense cause strikes on who did not meet the *Witt* standard for impartiality.

a. Juror No. 21

Mr. Nelson first moved to have this juror struck at the pretrial conference on cause strikes. (Cause Transcript, p. 22) The basis of the challenge was No. 21's questionnaire response that her view on the death penalty was: "I think if a person takes someones life they should have theirs taken. Only if the death was intentional or premeditated." (Appendix V, p. 894) The challenge was also based on the potential juror's hardship that she couldn't afford to be away from her job and that her husband is disabled and can't take care of the kids and the house. (Appendix V, p. 904)

During voir dire, defense counsel began to follow up on the juror's apparent automatic death penalty views when the juror responded that she would also have a hard time with a child involved and that she had a ten-year-old daughter. (Transcript, p. 48) Defense counsel then asked whether, given these circumstances, "might this be a difficult case for you to be able to sit as the fair and impartial juror you'd like to be?" No. 21 responded, "[i]t could be." (Transcript, p. 48) Having established this, defense counsel naturally moved on. At the conclusion of the small group voir dire, defense counsel noted the emotional nature of the juror's response and the fact that she thought it would be difficult for her to be fair and impartial in moving to strike the juror. (Transcript, p. 54) The court denied the request without explanation. (Transcript, p. 55)

b. Juror No. 38

Defense counsel moved to strike this prospective juror on the grounds that he would base the punishment totally on the crime and would not be able to consider mitigating circumstances. (Transcript, p. 86) No. 38's responses on the issue prove this to be his unequivocal position. He began by stating that he hadn't determined the appropriate punishment because he would want to know what led to the death, whether it was a state of panic or premeditated. (Transcript, p. 76) Counsel asked if he would be willing to consider background or character as mitigating circumstances, at which time the following exchange occurred:

VENIREPERSON 38: I would be willing to weigh that into it, but I think that the question at hand is the crime itself, and I'm open minded to all evidence and anything that would be entered into the court. But I think the sentence is based on the crime itself.

MR. BERRIGAN [defense counsel]: So that type of information really wouldn't carry much weight with you is what I'm hearing you say?

VENIREPERSON 38: At this point it would be hard to say without hearing that evidence.

MR. BERRIGAN: Okay. Well, would it at least be fair to say that in your view, much more important to you would be information about the crime?

VENIREPERSON 38: Correct.

MR. BERRIGAN: An you have some doubt as to the relevance, I suppose, in assessing the punishment, as to information about the defendant's background or personal characteristics?

VENIREPERSON 38: Yes. Like I said, it would be hard to say without actually hearing what it would be, but at this point I would say the evidence surrounding the crime itself would be my opinion.

MR. BERRIGAN: That would be determinative?

VENIREPERSON 38: Correct.

(Transcript, pp. 76-77)

This venireperson's acknowledgement that although he would listen to all of the evidence, his determination of the appropriate sentence would be based upon the facts of the crime renders him "substantially impaired," at best. Obviously, No. 38 is unable to realistically consider mitigating circumstances, a clear violation of the instructions he would receive as a juror. Even if the juror's answers are given their most liberal interpretation in an attempt to justify the trial court's error, at the very least he indicates that the defense would have the burden of proof to convince him that he should not render punishment solely on the facts of the crime. This view, too, violates the jury instructions and makes this juror unqualified to serve.

c. Juror No. 114

This venireperson was seated in the seventh small group for voir dire. (Transcript, p. 229) Before counsel could question him, the court called counsel to the bench and told him that he had gone way over his time and that the court would be cutting him back pretty quick. (Transcript, p. 260) Counsel finished questioning the juror he was in the middle of talking with

and sat down. (Transcript, p. 262) Mr. Nelson then moved to strike No. 114 for cause based upon his questionnaire responses since he had not had sufficient time to do follow up questioning. (Transcript, pp. 265-66) The request was denied. (Transcript, p. 266)

A look at No. 114's questionnaire shows that, absent follow up questioning revealing contrary information, this juror was "substantially impaired" due to the publicity he had been exposed to. In response to Question 32, asking whether he had heard or read anything about the case, No. 114 replied that there was a lot of press in the area where he lived and that he thinks about the victim each time he drives by the church near where she died. Obviously, this case hit an emotional nerve with this juror, making it unlikely that he could be impartial. No. 114 stated that he had "frequently" been exposed to media coverage of the case, that such coverage made him believe that Mr. Nelson was "probably guilty", that Mr. Nelson would "probably" need to present evidence to overcome this opinion, that he could "probably" follow an instruction on the presumption of innocence, and that he could "definitely" be fair to Mr. Nelson despite what he had read and heard.

Such responses call out for follow up questioning. A juror who would "probably" put the burden of proof on the defendant and would "probably" follow an instruction on the presumption of innocence is not an impartial juror. These are principles of law that leave no room for equivocation. Given No. 114's views, it was imperative for counsel to follow up to determine whether No. 114 was predisposed to sentence Mr. Nelson to death based on the media influences he had encountered and the opinions he had formed. Absent such follow up, there is no assurance that No. 114 would be impartial. Therefore, striking him for cause was the only option that did not violate Mr. Nelson's constitutional rights.

d. Juror No. 116

This venireperson was also in the seventh small voir dire group with No. 114. (Transcript, p. 229) In fact, it was No. 116 that defense counsel was questioning when the court called him to the bench and told him that he was way over his time. (Transcript, pp. 260-61) Although further questioning was obviously needed of this juror, as it was left, No. 116's views on the death penalty and on this specific case "substantially impaired" his ability to follow the law. No. 116 stated during voir dire that he believed in "an eye for an eye." (Transcript, p. 261) He had "kind of waffled on" that since hearing about aggravating and mitigating circumstances, but believes "if you do something you've got to pay for it." (Transcript, p. 261) He believes he could consider a sentence other than death in this case

because he believes life in prison without parole would be worse than death, and because “there could be other stuff that we don’t know about yet until we get in the courtroom.” (Transcript, p. 261-62) Nothing in these answers reveal that No. 116 has moved away from his “eye for an eye” view. The idea that life is worse than death is certainly not a proper consideration and is a view that reflects an inability to follow the jury instructions.

A look at this juror’s answers to the publicity questions on the questionnaire confirms his partiality. No. 116 was frequently exposed to the publicity and discussed Mr. Nelson’s guilt and what his punishment should be with others. (Appendix VII, p. 1071-77) He formed an opinion that Mr. Nelson was “definitely guilty,” it was “quite unlikely” that he could set this opinion aside, he felt the defense would “definitely” need to present evidence to overcome this opinion, he could “probably not” follow an instruction on the presumption of Mr. Nelson’s innocence, yet he could “definitely” be absolutely fair to Keith Nelson. (Appendix VII, pp. 1071-77) Obviously, No. 116’s idea of “absolutely fair” was to convict Mr. Nelson and sentence him to death. Any other interpretation of these answers defies logic. The test for juror qualification is “whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality.” *Irvin v. Dowd*, 366 U.S. at 723. Such presumption is raised here and not refuted by any follow up questioning. Therefore, No. 116 should have been struck for cause due to his views on the death penalty and his prejudice against Keith Nelson.

e. Juror No.141

As previously stated, this juror should have been disqualified for cause based on her questionnaire response that she would possibly be unable to sit in judgment of another person.<sup>19</sup> Due to the trial court’s restrictions on voir dire, there is no other information on this juror’s view that would confirm or disprove this juror’s partiality. However, a “presumption of partiality” is certainly raised by the juror’s opinion that she may not be able to sit in judgment of another person. *See Irvin*, 366 U.S. at 723. Because nothing was done to disaffirm this opinion, it can not be said that this juror could be fair and impartial.

Indeed, a look at this juror’s questionnaire and her voir dire responses only confirms her partiality. During voir dire, No. 141 said, “I think based on what we might hear, I could go either way. . . . And hopefully make a fair judgment.” (Transcript, p. 328) She admitted that she was leaning towards the death penalty based upon what she knew at the time. (Transcript, p. 329)

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<sup>19</sup> See Appendix V, p. 771.

And although she “thought” she could set aside anything she heard or read and make a fair judgment based on what was presented to her, (transcript, p. 330) her questionnaire responses reveal that this was nothing more than wishful thinking in an environment where she naturally wanted to appear fair. In responding on the questionnaire, this juror indicated that she had frequently been exposed to publicity on the case, that she felt Mr. Nelson was “probably guilty,” that it was “somewhat unlikely” that she could set aside what she heard and read and decide the case based on the evidence presented, that Mr. Nelson would “definitely” have to present evidence to overcome her opinions, that she didn’t know if she could follow an instruction on the presumption of innocence, and that she could “probably not” be fair to Keith Nelson.<sup>20</sup> Nothing this juror said ever disputed the fact that, even based upon her own judgment, she was probably not fair and impartial due to her exposure to pretrial publicity.

As to her death penalty views, No. 141’s own descriptions that she “thinks” and “hopes” she can be fair are disqualifying. Considering the totality of this juror’s responses illustrates a prime example of the principle that “[j]urors are in a poor position to make determinations as to their own impartiality.” *Beckner*, 69 F.3d at 1293. This juror’s assertions that she “thinks” she can be fair are belied by her own words again and again. Because defense counsel was forced to use his peremptory challenges on other jurors improperly “qualified” by the court, and because the trial court twice denied defense counsel’s cause challenge to this juror,<sup>21</sup> No. 141 served on the jury that sentenced Mr. Nelson to death. Mr. Nelson was thereby denied his constitutional guarantee to “a fair trial by a panel of impartial, indifferent jurors.” *Irvin*, 366 U.S. at 722.

## **2. Improperly Granted Challenges for Cause**

The following three potential jurors were all struck for cause at the government’s request on the basis that their views against the death penalty “substantially impaired” their ability to follow the law. The court erred in granting these challenges because each of the venirepersons indicated that they could follow the process outlined in the jury instructions despite their reservations about the death penalty. “It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases.” *Lockhart v. McCree*, 476 U.S. 162, 176 (1986).

### **a. Juror No. 33**

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<sup>20</sup> See Appendix V, p. 767.

<sup>21</sup> See Cause Transcript, p. 84, Transcript, p. 345.

Juror No. 33 initially stated that she could not envision a situation where she would be able to impose the death penalty. (Transcript, pp. 72-73) Having heard about the process of weighing the mitigating and aggravating circumstances, No. 33 stated that she could go through the weighing process and make a determination as to whether a death sentence was justified. (Transcript, p. 73) She indicated that it would be “difficult” to choose to take another human being’s life, but that she could follow the instructions and her oath and do what she was “required to do as a juror.” (Transcript, pp. 73-74) When asked whether this would involve considering both punishments, No. 33 stated “yes.” (Transcript, p. 74) Defense counsel opposed the government’s strike for cause. Despite the fact that defense counsel quoted the juror’s response verbatim, the court stated that he didn’t agree that this was the juror’s position and granted the strike. (Transcript, p. 85)

b. Juror No. 122

This juror stated that he was “strongly opposed” to the death penalty, but not “completely opposed.” (Transcript, p. 241) He stated that he could “possibly” envision the death penalty as an appropriate punishment in some cases, and that he would be able to consider both punishments in spite of his opposition to the death penalty. (Transcript, pp. 249-50) A person who states that he would “possibly” feel the death penalty was appropriate in some circumstances is not disqualified under *Witt. Gall v. Parker*, 231 F.3d 265, 331 (6<sup>th</sup> Cir. 2000). There was no other questioning of this potential juror that would contradict his expressed ability to consider the death penalty and show that his views “substantially impaired” his ability to follow the law.

c. Juror No. 124

No. 124 initially gave inconsistent answers, telling the government in answering general questions that he could impose the death penalty depending on the situation and that he could not ever impose a death sentence. (Transcript, pp. 236, 243-44) In response to defense counsel’s questions about whether No. 124 could “vote for the death penalty in the appropriate case knowing the process you have to go through?,” this juror responded, “yes.” (Transcript, p. 259) Again, defense counsel confirmed: “You could go through the weighing and consider the death penalty as a possible punishment?,” and again, No. 124 responded, “yes.” (Transcript, p. 260) Over defense counsel’s objection, the court struck this juror for cause. (Transcript, pp. 263-64)

This juror told both the government and the defense that he could impose the death penalty under the right circumstances in spite of the fact

that he did not believe in the death penalty. Nothing in the questioning indicated that his opposition to the death penalty “substantially impaired” his ability to follow the law. For this reason, the cause strike should not have been granted.

### **3. Conclusion**

Juror Nos. 21, 38, 114, and 116 all expressed views that would “substantially impair” their ability to follow the law and consider a life sentence in Mr. Nelson’s case. Furthermore, the prospective jurors expressed opinions that raised the “presumption of partiality,” and therefore should have mandated exclusion of these jurors. *See Irvin*, 366 U.S. at 723. The court has an obligation to grant a challenge for cause if actual bias or prejudice is revealed during voir dire. *United States v. McCullah*, 76 F.3d 1087 (10<sup>th</sup> Cir. 1996). Both voir dire and/or the extensive juror questionnaires in this case revealed such bias or prejudice in this case. Therefore, a new trial is required by the court’s failure to act to exclude these jurors.

As to all three of the improperly excluded jurors, each was struck for cause based on his or her opposition to the death penalty. As stated previously, the standard is not what their view is, but whether such view “substantially impairs” the venireperson’s ability to follow the law. The questioning of these three jurors does not reveal any such impairment of their ability to serve. “A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty.” *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). Due to the nature of the jury selection process, the erroneous exclusion of a juror who is qualified under *Witherspoon-Witt* cannot be harmless error. *Gray v. Mississippi*, 481 U.S. 648, 665 (1987). Therefore, the improper exclusion of the above jurors mandates a new penalty phase hearing.

#### **IV. The District Court Erred in Submitting Penalty Phase Instructions 1 and 22, Requiring That the Jury “Shall” Sentence the Defendant to Death if They Determine the Aggravating Factors Outweigh Any Mitigating Factors, Because Such Instructions Are Contrary to the Mandate of 18 U.S.C. §3593(e) in That the Statute Does Not Require a Death Sentence Even if the Jury Finds That the Aggravators Outweigh Any Mitigators.**

##### **A. Standard of Review**

This Court reviews *de novo* the correctness of the elements of a given instruction or the definition of legal terms included in a jury instruction. *United States v. Medrano*, 5 F.3d 1214, 1218 (9<sup>th</sup> Cir. 1993); *see also United States v. Smith*, 13 F.3d 1421, 1424 (10<sup>th</sup> Cir. 1994). This Court can only affirm the submission of an instruction “if the entire charge to the jury, when read as a whole, fairly and adequately contains the law applicable to the case.” *United States v. Brown*, 33 F.3d 1002, 1003-04 (8<sup>th</sup> Cir. 1994).

B. Argument

The district court erred in requiring the jury to sentence Mr. Nelson to death upon a determination that the aggravating factors outweighed any mitigating factors. The Federal Death Penalty Act (FDPA) allows the jury to reject the death sentence even if the weighing process comes out in favor of death. The statute provides that the jury:

shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

18 U.S.C. §3593(e).

In contrast, Instruction 1 told the jury:

You must then engage in a weighing process. If you unanimously find that the aggravating factor or factors which you all found to exist sufficiently outweigh any mitigating factor or factors which any of you found to exist to justify imposition of a sentence of death, or, if, in the absence of a mitigating factor or factors, you find the aggravating factor or factors alone are sufficient to justify imposition of a sentence of death, the law provides that the defendant shall be sentenced to death.

(Transcript, p. 14, Appendix VII, pp. 1169-71)<sup>22</sup>. Nowhere in the statute does “the law provide” that the jury’s determination must be death if the aggravating factors outweigh any mitigating factors. In contrast to the one-

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<sup>22</sup> Instruction 22 similarly instructed that the jury “shall” return a death sentence. (Appendix VII, p. 1173)

step process in the court's instructions which makes the weighing process outcome determinative of a mandatory sentence, the statute sets out a two-step process of (1) weighing the aggravators and mitigators and then (2) recommending the sentence determined appropriate by the jury.

To properly instruct the jury, the court should have submitted Mr. Nelson's proposed Instructions, which provided that after the weighing process, the jury "may" recommend a sentence of death. Mr. Nelson's proposed instruction further provided: "Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence." (Appendix VII, pp. 1161-67)

The Supreme Court has not been faced with this specific issue. However, the Court did approve an instruction on the jury's sentencing recommendation that contained the exact language quoted above in Mr. Nelson's proposed instruction. See *Jones v. United States*, 119 S.Ct. 2090, 2100 (1999). Furthermore, a look at state death penalty statutes that, like the federal statute, do not provide for a "mandatory" death penalty, shows that the courts have consistently upheld instructions that make clear to the jury that they always have the option of rejecting the death sentence.

For example, in Florida, the statute instructs that the jury "deliberate and render an advisory sentence" based on (a) whether sufficient aggravating circumstances exist, (b) whether sufficient mitigators exist which outweigh the aggravators, and (c) "[b]ased on these considerations, whether the defendant should be sentenced to life or death." Fl. St. §921.141(2). In upholding the statute, the Court in *Barclay v. Florida*, 463 U.S. 939, 964 (1983), noted that this third stage requires the sentencer to determine "whether, even though the first two criteria have been met, it is nevertheless not appropriate to impose the death penalty." The court pointed out the Florida court's recognition that while findings under sections (a) and (b) of the statute establish a "'presumption', that presumption may be overcome." *Id.* at 961, n. 3.

The Florida statute is remarkably similar to §3593(e), which requires (a) that an aggravator is found to exist, (b) a determination of whether the aggravators sufficiently outweigh the mitigators to justify death, and (c) "[b]ased upon this consideration," whether the defendant should be sentenced to death, life imprisonment, or a lesser sentence. 18 U.S.C. §3593(e). Therefore, under the reasoning in *Barclay*, the instruction given by the district court here improperly stated the law and "affirmatively misled [the jury] regarding its role in the sentencing process" in violation of *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

Likewise, in *Buchanan v. Angelone*, 522 U.S. 269 (1998), the Court upheld the state court’s instruction based on a Virginia statute that never required imposition of the death penalty. In doing so, the Court pointed out:

The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they “may fix” the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they “shall” impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

*Id.* at 277. *See also Weeks v. Angelone*, 528 U.S. 225, 231 (2000) (upholding same instruction that, following the statute, allowed for the imposition of a life sentence even if the aggravators were found).

The Mississippi statute is also worth comparison due to its similarity to the federal statute. In Mississippi, the jury must find (a) whether sufficient gateway factors (analogous to the 18 U.S.C. §3591(a)(2) factors) exist, (b) whether sufficient aggravating circumstances exist, (c) whether sufficient mitigators exist which outweigh the aggravators, and (d) “[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility for parole, or death.” Miss. Code §99-19-101(2). In *Gray v. Lucas*, 677 F.2d 1086, 1106 n.16 (5<sup>th</sup> Cir. 1982), the trial court instructed the jury that:

. . . in the event that you find that the aggravating circumstances outweigh the mitigating circumstances you may impose the death sentence, but should you find that the mitigating circumstances overcome the aggravating circumstances, then in that event, you shall not impose the death sentence.

In upholding the instruction, the Fifth Circuit pointed out that the jury may still sentence the defendant to life even if it finds that the aggravating circumstances outweigh the mitigating circumstances. *Id.* at 1106. The court noted that the “trial judge’s careful use of ‘may’ and ‘shall not’ indicates that a finding that the aggravating circumstances outweigh the mitigating circumstances allows, but does not require the jury to impose the death penalty.” *Id.* at 1106 n.16.

Further evidence that the court’s instruction here was contrary to the requirements of the statute comes from looking at cases where the underlying state statute does provide for a mandatory death penalty if certain conditions are met. The most well known example is the Court’s ruling in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (plurality opinion). In

*Blystone*, the Court upheld the Pennsylvania statute against a constitutional challenge that it provided for a mandatory death penalty. The statute provided that “[t]he verdict must be a sentence of death if” the jury finds at least one aggravator and no mitigators or if the aggravators outweigh the mitigators. *Id.* at 302 (emphasis added). Under this statutory scheme then, the court’s “shall” language used by Mr. Nelson’s court would have been appropriate. In fact, in *Boyde v. California*, 494 U.S. 370, 374, 377 (1990) the plurality court upheld a jury instruction which stated the jury “shall” impose the death penalty if the aggravating circumstances outweigh the mitigating circumstances. As in *Blystone*, the *Boyde* Court was reviewing a state statute (California) which required the death penalty if the jury found aggravating circumstances outweighed mitigating circumstances. *Id.* See also *Walton v. Arizona*, 497 U.S. 639, 644, 649-52 (1990) (plurality opinion) (“shall” language upheld because Arizona statute provides that the death penalty shall be imposed if the aggravators outweigh the mitigators).

Clearly, the trial court’s mandatory language here was wrong in light of the statutory provisions of the FDPA which do not call for mandatory imposition of the death penalty if the jury finds that the aggravating circumstances outweigh any mitigating circumstances the jury finds. Therefore, the district court’s instruction did not “fairly and accurately contain the law applicable to the case.” The jury was told in unambiguous terms that the law required them to impose the death sentence if they found that the aggravators outweighed the mitigators. Because the court’s instructions did not contain the law applicable to the case under 18 U.S.C. §3593(e), a new penalty phase is required.

**V. The District Court Erred in Allowing Voluminous Victim Impact Testimony, Letters, and Photographic Evidence Because Introduction of Such Evidence Violated Mr. Nelson’s Sixth, Eighth, and Fourteenth Amendment Rights to Due Process and Freedom From Cruel and Unusual Punishment in that the Evidence Resembled a Funeral Eulogy and Went Far Beyond What the Court Contemplated in *Payne v. Tennessee*.**

**A. Standard of Review**

The issue before the Court raises questions of the adequacy of the district court’s legal determinations. Therefore, this Court’s review of the claim is *de novo*. *Odem v. Hopkins*, 192 F.3d 772, 774 (8<sup>th</sup> Cir. 1999). In determining whether the district court erred in allowing the victim impact evidence, this Court must consider whether such evidence was “so unduly

prejudicial that it renders the trial fundamentally unfair.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

B. Factual Background

Six victim impact witnesses testified and presented exhibits throughout the government’s two day presentation of evidence. Pretrial, the defense attempted to control the introduction of this highly volatile evidence by filing a Motion to Limit the Admission of Victim Impact Evidence. The district court purported to put some restriction on the evidence, ordering that it be limited to: A quick glimpse of the life of the victim, as well as a demonstration of the loss to the victim’s family and society; a general profile of the victim, including information about the victim’s family, education and interest and; a factual, non-emotional account, free of inflammatory comment or reference. (Order, November 15, 2001) However, at trial the court apparently abandoned these restrictions, allowing voluminous, cumulative and emotional evidence that invoked tears in the eyes of some jurors. (Transcript, p. 538)

The first victim impact witness was Penny Butler, the victim’s 13-year-old sister. (Transcript, p. 179) Miss Butler testified about witnessing the abduction and then went on to talk about her relationship with her sister, Pam. She talked about playing games with Pam and riding bicycles together. A picture of the two sisters on bicycles was introduced into evidence. (Transcript, pp. 179, 182-83) Miss Butler reminisced about her favorite day with her sister. (Transcript, p. 180) She talked about Pam helping her with her homework even though Penny was the older sister, and the fact that Pam liked math and did well in school. (Transcript, p. 181) She introduced into evidence a photo of a doll that was made in the likeness of Pam that she keeps in her bedroom to remember Pam by, and talked about her love for Pam and how that love was returned. (Transcript, pp. 178-79, 181-82)

Immediately after Penny Butler’s testimony, her 18-year-old sister Casey Eaton testified. Ms. Eaton testified about witnessing the abduction and feeling “sad and tore up” before her body was discovered. (Transcript, pp. 187-93) Again, she talked about how Pam did well in school and liked to play outside with Penny and Holly when not in school. (Transcript, pp. 186-87) Over strenuous objection, a tearful Eaton read a letter she wrote to Pam entitled “Pammy’s Letter To My Loving Sister.” (Transcript, p. 199)<sup>23</sup> Realizing the highly inflammatory effect of this evidence, the court required

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<sup>23</sup> The complete text of this emotional letter as it was read into the transcript is found in the Addendum.

the government to read two other letters that were introduced entitled, “The Way I Remember You,” and “God, Can I Ask You Why.” (Transcript, pp. 201-203) The first letter was a moving reminiscent of times Ms. Eaton had with her sister and how she feels her absence now. The second was a plea to God to let her sister come home.<sup>24</sup> Both letters were read as Ms. Eaton, who had been tearful throughout, sat on the witness stand.

On the second day of the government’s evidence, it presented four additional victim impact witnesses. The first was Jenna Fries, a twelve-year-old classmate and neighbor of the victim. Miss Fries cried into a tissue throughout most of her testimony. (Transcript, p. 537) As with the previous

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<sup>24</sup> The text of both letters as read into the transcript appears in the Addendum.

witnesses, Miss Fries talked about playing outside and riding bikes with Pam, and how Pam was a good student who liked math and music but not spelling. (Transcript, p. 533, 535-36) She related stories about getting “lemon dollars” for being good in school, being on safety patrol together, and -- through tears -- told about giving the weather together over the intercom at school. (Transcript, pp. 534-35) She talked about knowing something was wrong the day Pamela was taken because “it didn’t feel right” when they said good-bye that day. (Transcript, p. 536)

Next was Elizabeth Holly Woods, a 13-year-old neighbor and friend of the victim. She described Pam as her “best friend.” (Transcript, p. 542) Miss Woods and Pam talked about Pam wanting to be a model and a doctor and different careers. (Transcript, p. 543) The two went to movies and roller skating and had sleepovers every weekend. (Transcript, p. 543) Pam talked to the witness about her family and her love for her mom and especially her sisters. (Transcript, p. 543) Over objection, she introduced photographs of herself with Pam. (Transcript, pp. 548-49) Finally, Miss Woods opined that Pam taught her how to appreciate life, that she had a good spirit, and that the witness had “no doubt that she’s in heaven.” (Transcript, p. 549)

The victim’s mother, Cherri West, followed Miss Woods. Ms. West introduced more photographs of her daughter, including her favorite picture of Pam. (Transcript, pp. 558, 564) Ms. West again talked about her daughter’s school activities, good grades, and career plans. (Transcript, pp. 559, 561, 563) She also stated that she has left Pam’s room in tact to remind her of Pam. (Transcript, p. 565) Finally, she detailed the day she found out her daughter had been abducted, her search for her daughter, finding out that she was dead, and identifying her body in a photograph. (Transcript, pp. 566-69)

To end what had now become more of a memorial service complete with memorabilia of the deceased’s life than a capital sentencing hearing, the government presented Terrell Yadrich, the victim’s fourth grade teacher at John Fisk Elementary School. Ms. Yadrich reiterated what a good student Pam had been and all of her school activities. (Transcript, pp. 572-74) She described Pam as “a precious girl.” (Transcript, p. 572) Ms. Yadrich also broadened the victim impact evidence to the entire school, talking about how well Pam was liked among the other students and the staff. (Transcript, p. 572)

#### Argument

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court modified its rule on the admission of victim impact testimony, overruling in part the

decision in *Booth v. Maryland*, 482 U.S. 496 (1987). In *Payne*, the Court found that the sentencing jury may be entitled to “evidence of the specific harm caused by the defendant,” and held that “[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision. . .” *Id.* at 825, 827. In so doing, the *Payne* Court approved of the admission of the first category of evidence previously rejected by *Booth* - “personal characteristics of the victims and the emotional impact of the crimes on the family.” *Booth*, at 502. This approval, however, did not come without significant restrictions.

In allowing the parade of highly emotional witnesses and evidence before the jury here, the district court ignored the factual and legal limitations of *Payne*. Justice Rehnquist, for the majority, wrote that “[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” *Id.* at 825. Justice O’Connor similarly commented on the individual court’s duty to restrict what evidence is admitted as victim impact evidence:

The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory .

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\* \* \*

We do not hold today that victim impact evidence must be admitted, or even that it could be admitted.

*Id.* at 831 (O’Connor, J., concurring). Finally, Justice Souter explained that “there is a traditional guard against the inflammatory risk, in the trial judge’s authority and responsibility to control the proceedings consistently with due process . . .” *Id.* at 836 (Souter, J., concurring).

In evaluating what the *Payne* Court considered to be consistent with due process, the differences in the evidence admitted in *Payne* and the evidence admitted by Mr. Nelson’s trial court are critical. In *Payne*, the evidence consisted of one witness, the victim’s grandmother, who responded to one question, how her grandson had been affected by the murders of his mother and sister. *Id.* at 814. The witness’s answer, *in todo*, was as follows:

He cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He

comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.

*Id.* at 814-15. It is doubtful, and certainly not suggested by *Payne*, that had the evidence come even close to the volume and content admitted in Mr. Nelson's case, the Court would have found it to be consistent with the dictates of due process and the right to be free from cruel and unusual punishment found in the Fifth and Eighth Constitutional Amendments. In *Payne*, one witness gave a brief statement as to the impact the crime had on the victims. Here, six witnesses went on at length with often tearful and emotionally charged testimony that resembled a memorial service, not a court of law.

The admission of the three letters (Government Exhibits 37-A, 37-C and 37-E) written by the victim's sister, Casey Eaton, and titled "Pammy's Letter To My Loving Sister," "The Way I Remember You," and "God, Can I Ask You Why," is an example of the trial court failing to perform the gatekeeping function envisioned by the *Payne* Court to insure that the Constitution is not violated. (*See* Transcript, pp. 194, 198) All three of the letters are highly emotional and cumulative of the testimony. (Transcript, pp. 199-203) The final letter begs God to let Pamela come back. The first letter was read to the jury by the tearful witness. (Transcript, pp. 198-200) After the reading of this letter, the trial court apparently realized the improper nature of the evidence coming in and required the government to read the final two letters while the witness sat on the witness stand. (Transcript, pp. 199-200) Given the content of the letters and the fact that they were read as the witness sat in the presence of the jury, this was hardly an adequate remedy. All three of the letters, especially in concert, were unduly inflammatory pieces of evidence that rendered the trial fundamentally unfair in violation of the limitations of *Payne*. As suggested by the Court, the holding in *Payne* must be balanced against a core principle of our Constitution and of death penalty law, that the decision to impose death must be a "reasoned moral response", free of "arbitrary and capricious action." *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1988); *Zant v. Stephens*, 462 U.S. 862, 874 (1983). To the contrary, Ms. Eaton's inflammatory testimony and written words could not help but invoke the passions of the jury and evoke a verdict based on emotion rather than reason.

In addition to violating Mr. Nelson's Constitutional guarantees as defined in *Payne*, the district court also violated the requirement of 18 U.S.C. §3593(c) that evidence be excluded "if its probative value is

outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” The only possible effect of the volume of evidence admitted by the court, as seen on the faces of the jurors, was to ignite sympathy for Pamela Butler and evoke anger and a thirst for vengeance against Keith Nelson. Both the Constitution and the statute condone a death sentence rendered on such premises.

As one commentator on the victim impact issue has recently noted, it is “clear that the increasing use of the emotionally potent testimony is occurring in a context almost entirely free of procedural controls and substantive limits, raising the specter of a return to the era of unfettered decisionmaking condemned over twenty-five years ago by the Supreme Court in *Furman v. Georgia*.” Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 Ariz. L. Rev. 143, 176 (Spring 1999). “[F]airness and fundamental respect for our system of justice demand that steps be taken immediately to impose meaningful limits on what impact evidence is to be allowed, how it is to be presented, and to what use it is to be put.” *Id.* at 192. It was the district court’s duty to impose such limits mandated by our Constitution. This Court must remedy the district court’s failure by granting a new trial.

#### CONCLUSION

Appellant, Keith Nelson, respectfully requests that for the reasons set forth above, the district court’s judgment and sentence of death be reversed, and that Mr. Nelson be granted a new penalty phase trial. Mr. Nelson requests any further relief the Court deems just and appropriate.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the foregoing brief was prepared in Microsoft Word 97 format. The number of words contained in the brief is 24,999 as calculated by the word processing software. A disk containing the brief has be served on the Court and the government. Both disks have been scanned and are virus free.

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that two copies of the foregoing Opening Brief of the Appellant was served by regular United States Mail, postage prepaid, on Ms. Sheryle L. Jeans, Assistant United States Attorney, 400 East Ninth Street, Fifth Floor, Kansas City, Missouri, 64106, on this 16<sup>th</sup> day of September, 2002.

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