

1992

## Utah v. Macial : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920316-CA
v.	:	Category No. 2
LOUIS LEE MACIAL,	:	
Defendant/Appellant.:	:	

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BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION OF THREE COUNTS OF  
DISTRIBUTION OF, OR OFFERING, AGREEING,  
CONSENTING OR ARRANGING TO DISTRIBUTE A  
CONTROLLED OR COUNTERFEIT SUBSTANCE, EACH A  
SECOND DEGREE FELONY, IN VIOLATION OF UTAH  
CODE ANN. § 58-37-8(1)(a)(ii) (SUPP. 1992),  
IN THE THIRD JUDICIAL DISTRICT COURT IN AND  
FOR SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE MICHAEL R. MURPHY, PRESIDING.

UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920316-CA
v.	:	Category No. 2
LOUIS LEE MACIAL,	:	
Defendant/Appellant.:	:	

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BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION OF THREE COUNTS OF DISTRIBUTION OF, OR OFFERING, AGREEING, CONSENTING OR ARRANGING TO DISTRIBUTE A CONTROLLED OR COUNTERFEIT SUBSTANCE, EACH A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (SUPP. 1992), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL R. MURPHY, PRESIDING.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff-Appellee, : Case No. 920316-CA  
v. :  
LOUIS LEE MACIAL, : Category No. 2  
Defendant-Appellant. :

---

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of three counts of distribution of, or offering, agreeing, consenting or arranging to distribute a controlled or counterfeit substance, each a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1992). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992), as the appeal is from a district court in a criminal case not involving a conviction of a first degree felony.

STATEMENT OF ISSUE PRESENTED AND STANDARD OF REVIEW

Did the trial court correctly determine that the prosecution's peremptory challenge of a juror was not racially motivated? A party attacking a peremptory jury challenge on equal protection grounds must establish a prima facie case of purposeful discrimination; if a prima facie case is established, the challenged party must then provide a race-neutral explanation to rebut the prima facie case. Batson v. Kentucky, 476 U.S. 79,

93-94, 106 S. Ct. 1712, 1721 (1986); State v. Span, 819 P.2d 329, 338 (Utah 1991).

On appeal, the trial court's factual findings of whether purposeful discrimination has occurred must be given deference and will only be set aside if clearly erroneous. State v. Cantu (II), 778 P.2d 517, 518 (Utah 1989); State v. Harrison, 805 P.2d 769, 778 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991). If inadequate factual findings exist, the matter must be remanded to the trial court for further determination. Batson, 476 U.S. at 100, 106 S. Ct. at 1725; State v. Cantu (I), 750 P.2d 591, 597 (Utah 1988). If purposeful discrimination in the use of the state's peremptory challenges is ultimately found, reversal of the defendant's conviction is mandated without regard to the harmlessness of the constitutional error. Batson, 476 U.S. at 100, 106 S. Ct. at 1725. Contra Harrison, 805 P.2d at 780; Cantu (I), 750 P.2d at 597 (both incorrectly holding that a "harmless beyond a reasonable doubt" standard is applicable).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies is included in the body of this brief.

#### STATEMENT OF THE CASE

Defendant was charged on November 6, 1991 with three counts of unlawful distribution of, or offering, agreeing, consenting or arranging to distribute a controlled or counterfeit substance, each a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1992) (Record [hereafter R.] at

6-8). A jury trial was held February 26, 1992, in the Third Judicial District Court for Salt Lake County, the Honorable Michael R. Murphy, district judge, presiding (R. at 45-46). Defendant was convicted as charged and sentenced on May 4, 1992 (R. at 116-19).

#### STATEMENT OF THE FACTS

The facts pertinent to this appeal involve the questioning and challenge of prospective juror Bettye English (a copy of the pertinent transcript pages is attached as an addendum). As with the other venire members, Ms. English gave a synopsis of her background at the outset of voir dire (R. at 152).<sup>1</sup> The court subsequently asked the panel if any of them "had been a party to any lawsuit, whether it's criminal or civil" (R. at 160). Eight people raised their hands, indicating their involvement; one of them was Ms. English. The first six persons called on stated their involvement in open court. When the court called on Ms. English, she asked to approach the bench. After an off-the-record conference with Ms. English (involving counsel), another prospective juror (No. 11) asked to approach. The court asked Ms. English and Juror No. 11 (R. at 195) to write notes about their involvement (R. at 160-62).

The court then asked if anyone had family members or friends in law enforcement. Ms. English responded that her daughter worked for the FBI. When asked what her daughter did,

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<sup>1</sup>The transcript is internally paginated and also stamped with record page numbers; citation to the transcript will be to the record page numbers.



Ms. English responded, "Am I supposed to say it out loud?" The court asked if her daughter was an agent; Ms. English responded that she did not know (R. at 164).

After voir dire, challenges for cause were registered, evidently outside of the presence of the panel. The State challenged Juror No. 11 and the court sustained the challenge on two bases (R. at 192-93). The first was that Juror No. 11 had been convicted of a felony which had been expunged. The court interpreted the jury qualification statute to disqualify a convicted felon even if the conviction had been expunged (R. at 192-93). The second basis was the court's observation that Juror No. 11 had been arrested and convicted of an offense similar to the one being heard. Juror No. 11 had demonstrated obvious emotion about narcotics agents and his own arrest and conviction (R. at 193-94).

After Juror No. 11 was excused, the court said:

Let me just indicate this, that the note that Mrs. Bettye English wrote reads as follows -- I don't want this note in the file. She doesn't want it in the file. If I read it and put it on the record, that's good enough. That's fine. Dated 2-26-92. Reads: "I Bettye English, was attempting to sue the Board of Education because I was terminated from my job through discrimination because I did not have EEO involved -- [.]"

(R. at 202-203) (emphasis added). The court and counsel then discussed the fact that a detective who was a witness in the case told the prosecutor that the detective had gone to school with one of Ms. English's children (R. at 203-204). No challenge for cause was lodged against Ms. English.

Counsel exercised their peremptory challenges and the State struck Ms. English (R. at 43). Defense counsel objected to the striking of Ms. English, noting that she was the only black person on the panel and alleging that the State had stricken her "simply because she's a member of [a] minority race". Counsel noted that defendant "is Mexican-American or of Hispanic descent, and it's a violation of his due process under the . . . federal constitution [to strike Ms. English]." (R. at 215). The court asked the prosecutor to state his reasons for the peremptory challenge (R. at 215-16). The prosecutor responded:

I felt, based on her unwillingness to speak before the rest of the group about a matter that I didn't find -- I'm sure she felt that it was personal, naturally, but her note indicated she had a lawsuit against the school district. I didn't see it to be something that was so personal that it would be embarrassing to speak of before the group.

Frankly, I found her, for lack of a better term, to be somewhat whiny. I don't think she would be a good juror with the other jurors. And that was the sole basis. It had nothing to do with her race or anything else.

(R. at 216). The court found that explanation acceptable, stating:

All right. You have made the record. I mean -- well, what Mr. Behrens has said to me, to my mind, justifies, for reasons other than race, his peremptory challenge. What he has said here corresponded with my observations of Ms. English's demeanor, and that's why I ruled that the reasons stated by Mr. Behrens are not made up, they are not pretentious [sic] but, in fact, made sense to me. That is the reason he did what he did rather than doing it for reasons of race.

(R. at 216). At the conclusion of the trial, defendant renewed a motion for a mistrial based on the challenge to Ms. English (R. at 300-301).

#### SUMMARY OF ARGUMENT

Defendant has failed to demonstrate that the trial court finding that the prosecutor's challenge of one of the jurors was not racially motivated was clearly erroneous. The trial court correctly found that the prosecutor's explanation showed that exercise of the peremptory challenge was neutral and thus not purposeful racial discrimination.

#### ARGUMENT

##### POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE'S CHALLENGE OF MS. ENGLISH WAS RACIALLY NEUTRAL AND THUS NOT PURPOSEFUL DISCRIMINATION.

Defendant's claim is that the trial court erred in finding that the prosecution's challenge of Ms. English was not racially motivated.<sup>2</sup> A party attacking a peremptory jury

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<sup>2</sup>At the trial level, defendant claimed it was "a denial of his due process not to have any minorities on the jury" (R. at 215). On appeal, he claims a violation of an equal protection right (Brief of Appellant at 7). These are different claims requiring different analyses. A jury selection process which systematically excludes certain classes of people so that the jury pool does not represent a fair cross section of the community is a violation of due process under the sixth and fourteenth amendments to the United States Constitution. Duren v. Missouri, 439 U.S. 357, 358-9 (1978). A racially motivated peremptory challenge is a violation of the equal protection clause. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

In spite of defendant's use of different constitutional terminology at trial and on appeal, the State is not arguing waiver because counsel's use of the term "due process" at trial clearly was a misstatement. His argument did not involve the composition

challenge on equal protection grounds must establish a prima facie case of purposeful discrimination; if a prima facie case is established, the challenged party must then provide a race-neutral explanation to rebut the prima facie case. Batson v. Kentucky, 476 U.S. 79, 93-94, 106 S. Ct. 1712, 1721 (1986); State v. Span, 819 P.2d 329, 338 (Utah 1991).

On appeal, the trial court's factual findings of whether purposeful discrimination has occurred must be given deference and will only be set aside if clearly erroneous. State v. Cantu (II), 778 P.2d 517, 518 (Utah 1989); State v. Harrison, 805 P.2d 769, 778 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991). If inadequate factual findings exist, the matter must be remanded to the trial court for further determination. Batson, 476 U.S. at 100, 106 S. Ct. at 1725; State v. Cantu (I), 750 P.2d 591, 597 (Utah 1988). If purposeful discrimination in the use of the state's peremptory challenges is ultimately found, reversal of the defendant's conviction is mandated without regard to the harmlessness of the constitutional error. Batson, 476 U.S. at 100, 106 S. Ct. at 1725. Contra Harrison, 805 P.2d at 780; Cantu (I), 750 P.2d at 597 (both incorrectly holding that a "harmless beyond a reasonable doubt" standard is applicable).

In Harrison, this Court stated:

a prima facie case of improper discrimination  
in the exercise of peremptory challenges is

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of the jury venire from which the jury was selected, i.e., a due process fair cross section argument. His argument focused, instead, on the prosecution's peremptory challenge; thus, the claim at trial involved equal protection.

raised by showing (1) that defendant is a member of a cognizable racial group; (2) that the prosecutor used peremptory challenges to remove members of defendant's race<sup>3</sup> from the jury panel; and (3) that these facts and other relevant circumstances raise an inference that the panelists were removed because of their race.

805 P.2d at 774. As in Harrison, defendant has made no showing, other than to state for the record that Ms. English was black, that she was a member of a racial minority. Id. at 776.

However, again as in Harrison, the State did not argue to the trial court that defendant had failed to make out a prima facie case. Id. at 777. The issue of whether defendant made out a prima facie case of improper discrimination "became irrelevant when the prosecutor failed to contest it at trial." Id. at 777. See also, United States v. Johnson, 941 F.2d 1102, 1108 (10th Cir. 1991) ("the first issue of whether prima facie case of discrimination exists becomes moot whenever the prosecutor offers a race-neutral explanation for his peremptory challenges and the trial court rules on the ultimate factual issue of whether the prosecutor intentionally discriminated"); United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987) ("when the prosecution's explanation is of record, we will review only the district court's finding of discrimination *vel non*").

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<sup>3</sup>The Utah Supreme Court has noted:

Powers [v. Ohio], \_\_\_ U.S. \_\_\_, 111 S. Ct. 1364 (1991)] clearly eliminated any standing requirement which Batson imposed and held that a defendant of any race may challenge the discriminatory use of peremptory challenges on equal protection grounds.

Span, 819 P.2d 329, 339 (Utah 1991) (footnote omitted).

When defendant objected to the State's use of a peremptory challenge to strike Ms. English, the court asked the State to explain its reasons (R. at 215-26). The State then presented its explanation which the trial court found to be race-neutral (R. at 216-17). That finding should be accorded "great deference on review" because it "turns largely on credibility." Id. at 778. The Utah Supreme Court, in State v. Cantu (II), 778 P.2d 517 (Utah 1989), stated that

an explanation given by a prosecutor for the exercise of a peremptory challenge must be "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate."

Cantu (II), 778 P.2d at 518 (quoting State v. Butler, 731 S.W.2d 265, 268 (Mo.App. 1987)).

When asked by the court, the prosecution explained the peremptory challenge:

[B]ased on her unwillingness to speak before the rest of the group about a matter that I didn't find -- I'm sure she felt that it was personal, naturally, but her note indicated she had a lawsuit against the school district. I didn't see it to be something that was so personal that it would be embarrassing to speak of before the group.

Frankly, I found her, for lack of a better term, to be somewhat whiny. I don't think she would be a good juror with the other jurors. And that was the sole basis. It had nothing to do with her race or anything else.

(R. at 216) (emphasis added). The court found that explanation to be acceptable:

[W]hat Mr. Behrens has said to me, to my mind, justifies, for reasons other than race, his peremptory challenge. What he has said here corresponded with my observations of Ms.

English's demeanor, and that's why I ruled that the reasons stated by Mr. Behrens . . . made sense to me.

(R. at 216) (emphasis added). The trial court based its finding of no Batson violation on its own observations of the demeanor of the prospective juror. Since that court is in a better position to make those observations than an appellate court, this Court should defer to that finding. Harrison, 805 P.2d at 778.

Ms. English exhibited unwillingness to speak up before the other jurors, which was evident in both her reluctance to openly state that she had attempted to sue the Board of Education for job discrimination (R. at 162) and her question about whether she should vocally tell what her daughter did for the FBI (R. at 164). This reluctance was so noticeable that when counsel spoke in chambers about whether Ms. English's child had gone to school with one of the police witnesses, the court said, "Let's bring her in. With her[,] I don't want to do it out there in public. She has this thing about --" (R. at 203-204).

The prosecutor's explanation, based on the obvious reluctance of Ms. English to speak up in front of the other venire members, has no connection to race; consequently, it is race-neutral.<sup>4</sup> It is also related to the case being tried

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<sup>4</sup>At trial, defendant did not articulate the Cantu (II) test for judging the prosecutor's explanation of the peremptory challenge. Defendant merely objected that he thought the challenged was solely on the basis of race. Because the different factors of the Cantu (II) test were not specifically raised, the trial court did not enter findings on each of the factors. The record supports implicit findings that the factors are met.

because it involves Ms. English's reluctance to speak up in front of the panel on this case.

The third requirement stated in Cantu is that the explanation be "clear and reasonably specific." Cantu (II), 778 P.2d at 518. The prosecutor did not challenge Ms. English just because she was "whiny," he articulated his concern that she was unwilling to speak out in front of the rest of the jury panel, and thus, "would [not] be a good juror with the other jurors." (R. at 216). Jurors have to communicate with each other during their deliberations and be willing to articulate their positions; Ms. English had shown herself unwilling to divulge much in front of the rest of the jury panel. The prosecutor was "reasonably specific" in giving this explanation for the challenge.

Finally, the reason was legitimate as evidenced by the trial court's statement that the explanation corresponded with his own observations of Ms. English (R. at 216). The record also supports the explanation. Ms. English would not speak out about her involvement in litigation even though six others had already divulged their involvement in open court (R. at 160-66). She instead asked to approach the bench and then wrote a note to the court about her involvement (R. at 162 and 203). Next, she was hesitant to explain what her daughter did for the FBI, although others had already divulged their relationship with law enforcement in open court (R. at 164). Her hesitancy to speak out was so noticeable that the court was going to bring her into chambers to ask her whether her child had gone to school with one



of the witnesses, stating that she had a "thing" about speaking up in open court (R. at 204). The prosecutor's explanation for challenging Ms. English meets the test set out in Cantu (II).

The other factors defendant cites in arguing that the challenge was not race-neutral are that (1) the prosecution did not demonstrate that the juror had a bias which justified the challenge; and (2) because similarly situated jurors were treated differently. Defendant did not articulate these factors below so the court did not address them. See State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989) ("some form of *specific* preservation of claims of error must be made a part of the trial court record" in order to allow appellate review). To the extent that defendant's general objection that the challenge was racially motivated preserved these factors for argument, they are without merit.

The prosecution did not demonstrate that Ms. English had a particular bias because she was not challenged for bias. No one alleged that there was a "group bias" shared by Ms. English. This factor, quoted in Cantu (II), is only one of several whose presence "'will tend to show that the state's reasons are . . . an impermissible pretext.'" 778 P.2d at 518 (quoting State v. Slappy, 522 So.2d 18, 22 (Fla. 1988)). The fact that there was no allegation of either group or individual bias demonstrates that this factor is not relevant to this case.

Defendant's claim that Ms. English and Juror No. 11 were similarly situated is without basis in the record. While both of them handed notes to the judge to inform of their legal

involvement, the similarity ends there. By note, Juror No. 11 informed the court that he had been convicted of a crime similar to the charges here and had strong feelings about his arrest and about narcotics agents (R. at 192-93). The conviction had been expunged which explained the secrecy Juror No. 11 displayed by informing the court by a note. Based on this information, the court granted a challenge for cause and defendant did not object (R. at 192-94).

This situation is vastly different from Ms. English's. Her note informed the court about an attempted law suit regarding job discrimination which demonstrated little reason for the secrecy she showed (R. at 203). There also appeared to be little reason why she could not answer in open court when asked what her daughter did for the FBI; when informed she should "say it out loud," she said she wasn't sure what her daughter did (R. at 164). An attempted lawsuit and an answer that she did not know what her daughter did for the FBI did not justify the mystery with which Ms. English imbued them. Juror No. 11's expunged felony conviction was justifiably concealed from open court.

Juror No. 11's excusal for cause precludes any comparison with Ms. English's excusal on peremptory challenge. The reasons for and point at which they were excused show that they were not similarly situated. Since they were not similarly situated, a comparison of their excusals does not demonstrate a racially biased peremptory challenge.


In sum, defendant has failed to show that the trial court's finding that the challenge of Ms. English was not racially motivated is clearly erroneous. The prosecutor gave a legitimate, neutral and clear and reasonably specific explanation for the challenge which was related to the case. An objection to the prosecutor's use of a peremptory challenge is valid only when the challenge is based "solely" on the juror's race. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 1719 (1986).

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm defendant's conviction and sentence.

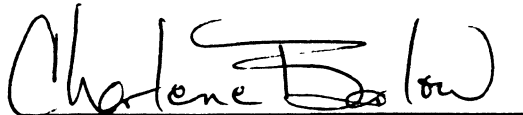
RESPECTFULLY submitted this 2<sup>d</sup> day of November, 1992.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Ronald S. Fujino and James A. Valdez, SALT LAKE LEGAL DEFENDER ASSOC., Attorneys for defendant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 2<sup>d</sup> day of November, 1992.



## **ADDENDUM**

1 including the Ensign. We get the National Geographic,  
2 the Sky and Telescope.

3 THE COURT: What I didn't catch, Mr. Asper, is  
4 what you do for a living.

5 MR. ASPER: I work with the National Weather  
6 Service. I have been there 31 years.

7 THE COURT: All right. Thank you.

8 Ms. English?

9 MS. ENGLISH: Bettye English. I live in the  
10 Salt Lake area. I attended the University of Utah and  
11 Westminster College. I graduated. An elementary  
12 teacher, early childhood education. I'm not employed at  
13 the moment. I'm originally from Texas.

14 I'm married. My husband is a paramedic at  
15 Tooele Army Depot. He has a degree in psychology, a  
16 degree in commercial art. He's originally from Ohio. I  
17 think he was born in Kentucky, though. I'm not sure.

18 I have four grandchildren, six children of my  
19 own, and I raised two foster sons.

20 I subscribe to Ebony magazine, Field and  
21 Stream. We take the Tribune when we can afford it. A  
22 lot of teacher magazines that I get. I can't remember  
23 all of them.

24 THE COURT: All right. Thank you, Ms. English.

25 Mr. Beckett?

1 was innocent?

2 MS. WILSON: Not guilty.

3 THE COURT: In the criminal case where the  
4 defendant was found guilty, do you remember what the  
5 charges were?

6 MS. WILSON: I do not specifically remember.  
7 It's too long.

8 THE COURT: What about the criminal case where  
9 the jury verdict was not guilty? Do you remember what  
10 the charges were there?

11 MS. WILSON: This was a fraud-type case in that  
12 instance.

13 THE COURT: All right. Thank you. Did I miss  
14 anyone? Anyone else serve as a juror? Mr. Kapos?

15 MR. KAPOs: Fifteen years ago I was dismissed  
16 on a case because I knew the defendant.

17 THE COURT: Anyone else? The record should  
18 indicate there's no further showing of hands.

19 Have any of you -- now, when I ask you these  
20 questions, I don't care about divorce cases, but have any  
21 of you been a party to any lawsuit, whether it's criminal  
22 or civil, whether you were a plaintiff or a defendant  
23 and, if so, please raise your hand.

24 Mr. Giles, can you tell us what that was?

25 MR. GILES: I have one existing right now, but

1 I was partners in a dry cleaners. We're being sued by  
2 the people we were renting from.

3 THE COURT: All right. Any other cases?

4 All right. Mr. Page, did I see your hand? I  
5 assume you have some small claims matters?

6 MR. PAGE: Some pending right now with the  
7 business, collections.

8 THE COURT: Any other matters?

9 MR. PAGE: No.

10 THE COURT: All right. Mr. -- I'm sorry,  
11 Ms. Thompson.

12 MS. THOMPSON: We have had one where someone  
13 stole a machine. The fellow was picked up for murder.  
14 We have quite a few small claims.

15 THE COURT: All right. Anyone else?  
16 Mr. Richards?

17 MR. RICHARDS: I had a case about three years  
18 ago against an ex-partner in the business.

19 THE COURT: All right. And, let's see,  
20 Mr. Dalton.

21 MR. DALTON: I had a case about four years ago,  
22 small claims incident.

23 THE COURT: All right. I know.

24 MR. HODGSON: I have a claim on a lien waiver,  
25 about three years I was in defense of a person that had

1 received a speeding ticket and he wasn't driving. It  
2 turned out to be his brother. That's about it.

3 THE COURT: Anyone else? Ms. English?

4 MS. ENGLISH: Well, may I approach the bench?

5 THE COURT: You may, along with counsel.

6 (Conference off the record.)

7 THE COURT: Thank you, Ms. English.

8 Mr. Hodgson?

9 MR. HODGSON: May I approach?

10 THE COURT: We'll take a note. If you want to  
11 write a note to me, write it. Let me just tell you, I  
12 don't want a snowball to start. Our effort is to pick a  
13 jury. I love jurors, but I do need to keep some distance  
14 with you. We need to proceed expeditiously and if we  
15 start getting everybody sending up notes, we may be here  
16 all day and you don't want to do that, do you?

17 All right. Any of you been witnesses before in  
18 any case other than the case you have already told me  
19 about and other than any divorce cases? If so, raise  
20 your hand.

21 Dr. Thorell.

22 DR. THORELL: Expert witness in a lawsuit case.

23 THE COURT: All right. Anyone else? The  
24 record should indicate that there's no further showing of  
25 hands.



1 Lake County force.

2 THE COURT: The courthouse bailiffs?

3 MR. KAPOŠ: Yes.

4 THE COURT: Who are they?

5 MR. KAPOŠ: They're jail bailiffs.

6 THE COURT: What are their names? Are they

7 close personal friends?

8 MR. KAPOŠ: Well, yes, Congas and another Greek

9 boy. I can't think of his name. Gambrulos.

10 THE COURT: All right. Anyone else?

11 Ms. English?

12 MS. ENGLISH: My daughter works for the FBI.

13 THE COURT: All right. What does she do?

14 MS. ENGLISH: Am I supposed to say it out loud?

15 THE COURT: I mean is she an FBI agent?

16 MS. ENGLISH: I'm not sure. She didn't tell

17 me.

18 THE COURT: She doesn't tell you? Okay. I

19 don't tell my wife what I do either.

20 Let's see, Mr. Apedaile?

21 MR. APEDAILE: I have a really close friend,

22 Kenneth Daily, on the Salt Lake City police.

23 THE COURT: Close friend personally? Great

24 golfing buddy?

25 MR. APEDAILE: Yes.

1 prosecuted?

2 MS. LEWIS: No. They weren't able to find  
3 anything.

4 THE COURT: All right. Thank you.

5 Ms. Freed, did I see your hand up?

6 MS. FREED: Yes. Same thing, vandalism,  
7 windows shot and things taken off the cars, parts and  
8 spare tires.

9 THE COURT: Any prosecutions?

10 MS. FREED: No.

11 THE COURT: All right. Did I see other hands?  
12 Mr. Kapos?

13 MR. KAPOK: Ten years ago I had a pickup  
14 stolen. It was never found. And during the past year I  
15 have had several break-ins in my little business where I  
16 think they were just looking for a place to sleep at  
17 night.

18 THE COURT: Okay. Anyone else? Mr. Asper?

19 MR. ASPER: About seven or eight years ago our  
20 home was broken into, intended burglary, and I believe  
21 it's by professionals but they haven't heard anything  
22 since then. A few of the items were recovered, that  
23 that's about it.

24 THE COURT: All right. Ms. English?

25 MS. ENGLISH: My son had an electric car stolen

1 from the house, and someone broke into his truck and took  
2 a jack and CB and stuff like that. We haven't recovered  
3 it.

4 THE COURT: Has there been any prosecutions?

5 MS. ENGLISH: No.

6 THE COURT: All right. Thank you, Ms. English.

7 I have indicated to you generally what this  
8 case is about. It involves charges -- again, I'm  
9 emphasizing the word "charges" -- of drug offenses. And  
10 I want to ask you some questions about that, because  
11 those types of matters are in the news media a lot, and I  
12 need to inquire whether or not you have such strong  
13 feelings about those types of matters that you would be  
14 unable to try this case in a fair and unbiased manner,  
15 remembering that Mr. Macial is presumed innocent,  
16 maintains that presumption, until the State proves, if at  
17 all, his guilt beyond a reasonable doubt.

18 So all I'm trying to probe is whether or not  
19 you might have such strong feelings concerning controlled  
20 substances or drugs that you would be unable to proceed  
21 in the fashion that I have described. If you do have  
22 such strong feelings, please indicate by raising your  
23 hand.

24 Ms. Thompson?

25 MS. THOMPSON: I have an ex-son-in-law who was

1 as a juror. And in this case I don't think that's the  
2 case. And I think she should serve as a juror and would  
3 be a very fine juror. And I don't think the challenge is  
4 sufficient for cause.

5 MR. VALDEZ: My challenge isn't on the basis of  
6 her disability. I agree with you in terms of people that  
7 are disabled. My concern is her equivocation concerning  
8 the drug issue and the four-year-old child that is the  
9 recently adopted child.

10 THE COURT: You know, my equivocation is, in  
11 part, understanding the question, and in her case, when I  
12 asked in open court, it was a little more difficult  
13 because I was further away. And even if she had perfect  
14 hearing, people, you know, wonder, "What in the world is  
15 this judge saying?"

16 And I think that it's proper, as the Supreme  
17 Court says, that even though they use the term  
18 "rehabilitate," I think that's the wrong term, because if  
19 they need rehabilitation, they shouldn't be on the jury  
20 anyway. But I think it was clarified in her answers that  
21 she would not have such a bias and prejudice. She also  
22 clarified if her -- I think, that the child is not going  
23 to interfere with her attention and she promised to set  
24 that aside. So the challenge to Ms. Lewis is overruled.

25 The challenge to Mr. Hodgson is sustained on

1 two grounds. One, my reading of the statute indicates  
2 that the purpose for expungement is to allow people to  
3 get on with that part of their life that may be -- that  
4 they need to get on with, economically and in such a way  
5 so their past history does not interfere with that. And  
6 that is that they do not have to report to the employers  
7 or in those types of circumstances a conviction or an  
8 arrest that has been expunged.

9 The statute on qualifications of jurors appears  
10 to be unequivocal and unconditional on its face. And  
11 that's how you construe it, and that is an expunged  
12 felony is still a felony for the purpose of the juror  
13 qualifications statute.

14 Additionally, my observation -- the reason why  
15 I was asking questions of Mr. Hodgson is because I was  
16 watching his demeanor and his facial expressions were  
17 such that he was going through, in our presence, some  
18 type of upheaval and reliving the incident that he has  
19 revealed to us. And that is the plea of guilt he made to  
20 a felony drug charge. And when you combine that with his  
21 statement that, "Well, you folks have never woke up to  
22 the barrel of a .45," and indicating that he would  
23 believe his cousin, without any further statement, is  
24 pregnant with a concept that any other narcotics agent he  
25 would not believe.

1           And I think that his demeanor and his answers  
2       were such that he is biased and prejudiced against  
3       narcotics agents, because of his past experience and then  
4       he could not serve as a juror and be unbiased. So I am  
5       going to grant that and sustain that challenge for cause.

6           Are there any other jurors we need to talk  
7       about?

8           MR. VALDEZ: I don't think so. That puts us at  
9       a problem because of the appellate attorney in our  
10      office, if there's a conviction on this, may look at this  
11      aspect and this issue and may want to use that as an  
12      issue for appeal.

13          THE COURT: I get reversed all the time.

14          MR. VALDEZ: Well, with you the problem is that  
15      we told Mr. Hodgson this wouldn't go any further.

16          THE COURT: I understand. And I need to --

17          MR. VALDEZ: I don't think it would go any  
18      further than the eyes of the person who responds in the  
19      appellate, and I guess it would be the appellate court in  
20      this matter. But to an extent, that is public and --

21          THE COURT: Well, let me do this, let me issue  
22      an oral order right now, is that the discussions on the  
23      record are -- here with Mr. Hodgson and the note he sent,  
24      are hereby ordered sealed and will be unsealed only upon  
25      order of the Court further on the order of the Court.

1           So what's important is that Gayle understands  
2   that what will happen, in essence, is that if that is  
3   necessary, what I'll do is issue an order that it's  
4   unsealed solely for the purposes of appeal, and no  
5   reference can be made to the person's name in any  
6   briefing. We'll refer to the person as Juror No. 11.

7           MR. VALDEZ: That's the best way to do it.

8           MR. BEHRENS: Perhaps we could bring him back  
9   in and tell him what we're doing, just so he knows we're  
10   not going to mention it?

11          THE COURT: All right.

12          MR. VALDEZ: The other thing, for the record,  
13   if you may, Judge, in order that I can -- we'll probably  
14   do it anyway, but I just want to make sure -- in order  
15   that no undue attention is brought to the people that  
16   have been challenged for cause and that may be justified  
17   for cause, you ask that we not excuse them until after.

18          THE COURT: I don't do. Some judges do.

19          (Whereupon, Mr. Hodgson returned to the jury  
20   room.)

21          THE COURT: The record should indicate that  
22   Mr. Hodgson is present. Mr. Hodgson, the reason why we  
23   brought you back in is to explain to you what has  
24   happened.

25          MR. HODGSON: Okay.

1 THE COURT: I have ruled that the law  
2 prohibiting people who have been convicted of a felony  
3 from serving as a juror is not changed or amended by the  
4 expungement statute, which means even though your record  
5 has been expunged for purposes of serving on the jury, it  
6 has not been expunged according to my ruling and,  
7 therefore, you're disqualified from serving as a juror.

8 MR. HODGSON: Okay.

9 THE COURT: The main reason why we wanted to  
10 talk to you on the record is that the promise I made to  
11 you about keeping this private, this issue, if Mr. Macial  
12 is convicted, there's a good likelihood that my ruling or  
13 rulings may be appealed, which means that they'll need a  
14 transcript of these discussions we have had with you in  
15 order to determine whether or not I excluded a juror that  
16 I should not have.

17 MR. HODGSON: Okay.

18 THE COURT: I have ordered that the transcript  
19 of our discussions with you and your note be sealed.

20 MR. HODGSON: Thank you.

21 THE COURT: They can be unsealed only upon my  
22 order, if the matter does go on appeal. Then what I'll  
23 do is order that a transcript can be seen only by the two  
24 lawyers who are handling the appeal and any reference  
25 they make -- in any reference they make to this portion



1 of the transcript, they are not to refer to you by name  
2 but to refer to you as Juror No. 11. So all the  
3 information will be out, but we're talking about  
4 hypothetical Juror No. 11.

5 In fact, let me order this to the court  
6 reporter: That all discusses we have had in this, rather  
7 than reading "Mr. Hodgson," "The Court," "Mr. Behrens,"  
8 and "Mr. Valdez," will read instead, "Mr. Hodgson, Juror  
9 No. 11." And any reference, any answers to questions  
10 that Mr. Hodgson gave out in the courtroom, rather than  
11 referring to him as Juror Hodgson should be referred to  
12 him as Juror No. 11.

13 Is that all right?

14 THE REPORTER: Yes.

15 THE COURT: Then we have a double protection  
16 that way.

17 All right. Furthermore, I did rule in this  
18 case to the juror disqualification under the statute that  
19 it appeared to me that -- and I don't mean -- this is  
20 more the legal term, not meant to be nasty -- that I  
21 think you would be natural to serve as an unbiased juror  
22 in this case.

23 MR. HODGSON: Okay.

24 THE COURT: So there are two reasons that I  
25 have excluded you from the jury. What we're going to do

1 MR. VALDEZ: I don't think there's anything we  
2 have done here that has prejudiced Mr. Macial. We talked  
3 about specific concerns, these jurors --

4 THE DEFENDANT: Uh-huh.

5 MR. VALDEZ: -- and some of their answers. The  
6 woman I was concerned with because she said she had a  
7 four-month-old child at home and she was -- or wanted to  
8 make sure that she would be able to listen despite her  
9 disability, be able to listen and concentrate on the  
10 testimony.

11 She said that she could, and the judge decided  
12 that she could stay on the potential jury panel.

13 THE DEFENDANT: Okay.

14 MR. VALDEZ: The other individual, he handed us  
15 a note, and I don't know if you saw the note --

16 THE DEFENDANT: No. To me, anyway, I don't  
17 know how to read that much, you know.

18 MR. VALDEZ: We asked him --

19 THE DEFENDANT: I understand a little bit, not  
20 much, you know. But this is --

21 MR. VALDEZ: We asked him some questions, but  
22 the judge, as the judge, decided he didn't think he could  
23 be impartial, so he'll be excused, along with a couple of  
24 other people.

25 THE COURT: Okay. Let me just indicate this,

1       that the note that Mrs. Bettye English wrote reads as  
2       follows -- I don't want this note in the file. She  
3       doesn't want it in the file. If I read it and put it on  
4       the record, that's good enough. That's fine. Dated 2-  
5       26-92. Reads: "I Bettye English, was attempting to sue  
6       the Board of Education because I was terminated from my  
7       job through discrimination because I did not have EEO  
8       involved -- " I have to start again.

9               All right. The other note from Mr. Hodgson I  
10       intended to give to the court reporter to keep --

11              MR. VALDEZ: That's fine.

12              THE COURT: -- with her notes.

13              MR. VALDEZ: That's fine.

14              THE COURT: Okay. Then you can put a caption  
15       on there in handwriting.

16              All right. Do you want to take a short break?

17              Mr. Behrens brought one thing to my attention.  
18       I don't know if she answered that she didn't know anybody  
19       that was -- might have been testifying, but Det. Sampson,  
20       apparently, indicated to Mr. Behrens that he had gone to  
21       school with her son, although I don't think that she  
22       remembered that.

23              MR. VALDEZ: Who is the "she"?

24              MR. VALDEZ: Ms. English.

25              MR. BEHRENS: She didn't even say her son. She

1       said her kid.

2               THE COURT: Let's bring her in. With her I  
3 don't want to do it out there in public. She has this  
4 thing about --

5               MR. BEHRENS: Okay.

6               THE COURT: Don't you think we ought to make a  
7 record on it? Do you want to make a record?

8               MR. BEHRENS: She stood up and they were asked  
9 if they knew anybody, and she didn't indicate. The fact  
10 that he went to school with one of her children --

11              THE COURT: There's no reason for any further  
12 voir dire of her?

13              MR. VALDEZ: That's correct.

14              MR. BEHRENS: I don't see any reason.

15              THE COURT: Okay.

16              (Whereupon, the following proceedings  
17 were had in open court:)

18              THE COURT: The record should indicate that the  
19 jury panel is present. Mr. Behrens is present,  
20 Mr. Valdez is present, Mr. Macial is present.

21              I'm sorry that it took us, obviously, a lot  
22 more time than we expected. Rest assured, we were  
23 working all the time. We're not fooling around with the  
24 exceptions noted on the record thus far, do you pass this  
25 panel for cause?

1 MR. BEHRENS: What was the charge?

2 THE COURT: Armed robbery.

3 MR. VALDEZ: I had a case with your version to,  
4 but I can't remember.

5 Judge, you need to put something on the record.  
6 I don't know if I'm required to, but maybe to be safe, I  
7 probably ought to.

8 I'm going to object to the State's peremptory  
9 challenge of Ms. English. Ms. English, as the Court will  
10 note, was the only black person in the jury. I think  
11 that the only reason that the State may have pre-empted  
12 her is because they may feel and -- I'm sorry if I  
13 misrepresent what your feelings are, Mr. Behrens --  
14 Mr. Behrens and I usually get along in the best of times,  
15 but I think that there may be, in his mind, the feeling  
16 that simply because she's a member of the minority race,  
17 and in fact she is black, that she might be more  
18 sympathetic to the defendant.

19 The defendant, the record ought to note, is  
20 Mexican-American or of Hispanic descent. It's a denial  
21 of his due process not to have any minorities on the  
22 jury, whether they be black or Hispanic, and it's a  
23 violation of his due process under the state constitution  
24 and under the federal constitution.

25 THE COURT: All right. Mr. Behrens, could you

1 state for the Court what your reasons for exercising  
2 peremptory challenges on Ms. English are?

3 MR. BEHRENS: I felt, based on her  
4 unwillingness to speak before the rest of the group about  
5 a matter that I didn't find -- I'm sure she felt that it  
6 was personal, naturally, but her note indicated she had a  
7 a lawsuit against the school district. I didn't see it  
8 to be something that was so personal that it would be  
9 embarrassing to speak of before the group.

10 Frankly, I found her, for lack of a better  
11 term, to be somewhat whiny. I don't think she would be a  
12 good juror with the other jurors. And that was the sole  
13 basis. It had nothing to do with her race or anything  
14 else.

15 THE COURT: All right. You have made the  
16 record. I mean -- well, what Mr. Behrens has said to me,  
17 to my mind, justifies, for reasons other than race, his  
18 peremptory challenge. What he has said here corresponded  
19 with my observations of Ms. English's demeanor, and  
20 that's why I ruled that the reasons stated by Mr. Behrens  
21 are not made up, they are not pretentious but, in fact,  
22 made sense to me. That is the reason he did what he did  
23 rather than doing it for reasons of race.

24 MR. VALDEZ: Perhaps I ought to respond to  
25 that, because my perception of her demeanor was nothing

1       like that. Of course, we all have different  
2       perspectives.

3               THE COURT: It's like beauty; it depends on who  
4       the beholder is.

5               MR. VALDEZ: That's correct.

6               THE COURT: And I know, obviously, there can be  
7       differences of opinion. That's why some people would  
8       strike some jurors and some would not. But I'm  
9       satisfied.

10              We'll see you at 1:30.

11              MR. BEHRENS: Yes.

12              MR. VALDEZ: Yes.

13              THE COURT: Okay.

14              (Luncheon recess, 12:10 p.m.)

15              THE COURT: The record should indicate that the  
16       jury is now present.

17              Is counsel read to proceed with opening  
18       statement?

19              MR. BEHRENS: We are, your Honor.

20              THE COURT: Mr. Behrens.

21              MR. BEHRENS: Thank you, your Honor.

22              MR. VALDEZ: Judge, it would be my motion to  
23       exclude the witnesses.

24              THE COURT: Members of the jury, Mr. Valdez has  
25       invoked what is called the exclusionary rule. That rule,

1 THE COURT: That's what I mean, now. Then come  
2 back and go straight through with jury instructions.

3 MR. VALDEZ: That's fine.

4 MR. BEHRENS: That's fine.

5 THE COURT: All right. Members of the jury,  
6 we're going to take a recess from ten to fifteen minutes.  
7 I'll try to keep it as close to ten as possible.

8 Remember the admonition. We'll see you as  
9 quickly as we can. No shorter than ten nor, hopefully,  
10 longer than fifteen minutes.

11 (Whereupon, the jury exited the courtroom.)

12 THE COURT: The record should indicate that the  
13 jury has exited.

14 Do you want to go ahead and make your motion?

15 MR. VALDEZ: Well, my motion was going to be  
16 for a directed verdict. I don't think that the State has  
17 provided sufficient evidence in order to give it to the  
18 jury. One witness is a gentleman, I guess, who we're  
19 going to believe. I need to make it for the record.

20 THE COURT: You do. And it's a question of who  
21 they are going to believe and, therefore, reasonable  
22 minds could differ.

23 MR. VALDEZ: I should probably also renew my  
24 motion for a mistrial. And the basis is that the jury  
25 selection process in this case, in that a juror was not



1 included who I consider to have probably been more of a  
2 peer to Mr. Macial than anybody else without, I think,  
3 sufficient ground or reason.

4 THE COURT: What juror are you talking about?

5 MR. VALDEZ: Mrs. English.

6 THE COURT: All right. Your motion is noted.  
7 Motion for a new trial is denied.

8 Have you had an opportunity to look at those  
9 instructions?

10 MR. VALDEZ: I have gone through them. I don't  
11 think there's anything there that I have a problem with.

12 MR. BEHRENS: I only got as far as the long  
13 instruction. We won't need No. 13. That's the expert  
14 witness instruction.

15 THE COURT: You're right. What I'll do is just  
16 tell them we jump from 12 to 14. So, Gene, would you  
17 remove Exhibit 13 from all their sets and I'll just tell  
18 them, "Don't pay any attention to the fact that we have  
19 skipped a number, but we just don't have a 13."

20 If you want to go ahead and take a few minutes  
21 and look at those, I'll stand here and stare at you.  
22 It's like watching somebody eating.

23 All right. We'll start in ten minutes, then  
24 we'll do jury instructions.

25 MR. BEHRENS: Actually, I like your last ones