

1994

Utah v. Vigil : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
Plaintiff/Appellee, :
v. :
 :
THOMAS M. VIGIL, :
 : Case No. 940614-CA
Defendant/Appellant. :
 : Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for three counts of theft by deception, second and third degree felonies, in violation of Utah Code Ann. § 76-6-404 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Tyrone E. Medley, Judge, presiding.

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellee,	:	
v.	:	
THOMAS M. VIGIL,	:	
Defendant/Appellant.	:	Case No. 940614-CA
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ARGUMENT

- I. THE INADEQUATE VOIR DIRE REQUIRES A NEW TRIAL.
- A. THE TRIAL COURT'S FAILURE TO ASK QUESTION 27
CONSTITUTES REVERSIBLE ERROR.

In response to Mr. Vigil's contention that the trial court erred in refusing to ask the prospective jurors requested voir dire question 27,¹ the State argues that this Court should not address the merits of the issue because Mr. Vigil has failed to provide legal authority in support of the question, and has failed to demonstrate how trial counsel was hampered in exercising peremptory and for cause challenges as a result of the trial court's failure to ask the question. State's brief at 20-21.

¹ Question 27 stated,
27. If, after hearing the evidence, you came to the conclusion that the prosecution had not proven the guilt of the accused beyond a reasonable doubt, and you found that a majority of the jurors believed the defendant was guilty, would you change your verdict only because you were in the minority?
(R. 709).

The legal authority demonstrating that the trial court should have asked the question is found on pages 13 through 14 of Mr. Vigil's opening brief. As noted on page 14 of the brief, "All that is necessary for a voir dire question to be appropriate is that it allow 'defense counsel to exercise peremptory challenges more intelligently.'" State v. Worthen, 765 P.2d 839, 845 (Utah 1988) (citation omitted).

Mr. Vigil's explanation of how the trial court's failure to ask the question hampered trial counsel's ability to exercise peremptory and for cause challenges appears on page 15 of Mr. Vigil's opening brief. As noted on page 15 of the brief, the voir dire was inadequate in the absence of the trial court's asking question 27 because "the voir dire never addressed ... whether [the prospective jurors] would maintain their independence in the deliberation process, or succumb to pressure from the majority."

The State argues on the merits regarding question 27 that Mr. Vigil has failed to demonstrate that asking question 27 would have revealed any biases. State's brief at 21. Mr. Vigil has no burden to make such a showing. The question is not designed to address bias, but is designed to assess the jurors' ability to maintain independence in the face of peer pressure during jury deliberations. Under Worthen, the question would have assisted Mr. Vigil in exercising his peremptory and for cause challenges, and the trial court abused its discretion in failing to ask it.

The State argues that "the multitude of questions posed by the trial court during voir dire provided ample insight into the jury pool to allow counsel to meaningfully evaluate each potential juror." State's brief at 21. The State not only fails to isolate any particular question asked by the trial court coming anywhere close to the content of question 27, but also fails to cite to the record.² This shortcoming is likely explained by the fact that the record does not contain one question asked by the trial court which paralleled or substituted for question 27.

Because the trial court failed to ask this requested question that would have provided meaningful assistance to Mr. Vigil in his exercise of peremptory and for cause challenges, or any question covering the substance of question 27, Mr. Vigil is entitled to a new trial. Worthen.

B. THE TRIAL COURT'S FAILURE TO ASK QUESTION 28
CONSTITUTES REVERSIBLE ERROR.

In addressing the trial court's failure to ask question 28,³ the State argues, again without citing to the record, that

² Such argument falls short of that legitimately expected and required of advocates appearing before this Court. See Uckerman v. Lincoln Nat. Life Ins. Co., 588 P.2d 142, 144 (Utah 1978) ("This Court need not, and will not, consider any facts not properly cited to, or supported by, the record.").

³ Question 28 inquired,

Are there any of you who are not in such a fair and impartial state of mind that you would not be satisfied to have a juror possessing your mental state judge the evidence if you or your loved ones were on trial here? In other words, would you want someone with your state of mind sitting as a juror on this case

the overall voir dire was generally adequate to address the potential jurors' fairness and impartiality because the trial court asked the jurors several specific questions. State's brief at 21-22.

While the trial court did ask several questions which may have elicited answers regarding specific biases addressed in the questions, the trial court did not ask one question as broad as question 28, which is designed to give the jurors the opportunity to reveal the biases or weaknesses that the jurors were aware of that the trial court and parties may not have anticipated in drafting specific questions. There were no questions asked that adequately substituted for question 28.

The State indicates question 28 was covered in substance when the trial court stated,

Members of the jury panel, let me also say to you that I hope by now certainly you have got the impression that it is going to be your responsibility to be fair and impartial to both sides of this particular lawsuit.

State's brief at 22, quoting R. 701.

This argument misunderstands the fundamentally inquisitive nature of voir dire. Voir dire is supposed to be a sensitive probing inquiry, to cull from the jurors blatant and latent biases. See e.g. State v. Worthen, 765 P.2d 839, 844-856 (Utah 1988). A trial court's admonition to prospective jurors

trial here? In other words, would you want someone with your state of mind sitting as a juror on this case if you were the defendant?
(R. 709).

that it is their responsibility to be fair and impartial is no substitute for a general question asking the jurors to reveal their known biases. Id.

C. THE TRIAL COURT'S FAILURE TO EXAMINE FURTHER THOSE POTENTIAL JURORS EXPOSED TO MEDIA COVERAGE CONSTITUTES REVERSIBLE ERROR.

In response to Mr. Vigil's contention that the trial court committed reversible error in refusing to examine jurors Wylie and Reese *in camera*, the State argues that the voir dire of these jurors was adequate under State v. Ontiveros, 835 P.2d 201 (Utah App. 1992). State's brief at 23-27.

In Ontiveros, two prospective jurors who ended up serving on the jury were exposed to media coverage of Mr. Ontiveros' case. Id. at 205. They could not remember any details, and the trial court asked three separate follow up questions to determine that the jurors would not be biased as a result of the media coverage. Id. at 205. In affirming the trial court, this Court indicated that trial courts generally should conduct voir dire with an eye toward safeguarding the defendants' constitutional rights to fair trials, but found that in Mr. Ontiveros' case, the trial court's voir dire was adequate, and that further voir dire would have risked improperly exposing the jurors to facts about the case. Id.

In contrast, the record in this case demonstrates that two jurors were exposed to media coverage of attempted adoptions, and indicates that both jurors recalled at least some details of

what they had seen and read.⁴ The trial court asked one of these jurors only one follow up question asking her to assess her own partiality,⁵ and did not obtain a straight answer from the other juror in asking her three follow-up questions. Comparison of

⁴ The State cites to pages 714-17 of the record, contending that the trial court "asked the potential jurors if they had been exposed to media accounts of adoption proceedings and questioned those jurors who indicated they had seen such stories, where they had seen them, what they remember about the stories, and whether they would be influenced by what they had seen or heard." State's brief at 27 n.4 ¶2. Pages 714 to 717 of the record do not support this representation, and are included in Appendix 1 to this brief.

The record demonstrates that prospective juror Wylie had seen a program somewhere within six months prior to trial, and had read a magazine article about the subject (R. 715). The colloquy was as follows:

THE COURT: Let me ask you this question, Ms. Wylie, As a result of the documentary or the article in the magazine, and considering the nature of today's case, would any of that information interfere with your responsibility to be fair and impartial?

MS. WYLIE: No, not really.

THE COURT: You are certain you could remain fair and impartial to both sides of this case?

MS. WYLIE: I think, yes.

THE COURT: Obviously, you use the word "think." Do you have a hesitation?

MS. WYLIE: I don't remember the story in that detail, you know. I think I can listen impartially. (R. 715-716).

Prospective juror Reese said that she had seen a show called "Attempted Adoption," wherein a "child was up for adoption and then their minds were changed and the natural parents got the child back." (R. 717). When the court asked, "Would any of that information interfere with your abilities to be fair and impartial to both sides of this lawsuit?" she answered, "No." (R. 717).

⁵ This Court has previously recognized that it is the trial court's responsibility to craft specific and probing questions to assess juror bias, rather than to ask jurors to assess their own biases. E.g. State v. Woolley, 810 P.2d 440, 441 (Utah App.), cert. denied, 826 P.2d 651 (Utah 1991).

this case to Ontiveros thus demonstrates that the trial court abused his discretion and that a new trial is in order.

II. THE ERRONEOUS JURY INSTRUCTION REQUIRES A NEW TRIAL.

The State maintains that the trial court was correct in giving Jury Instruction 28.⁶ State's brief at 27-36. Where Mr. Vigil contends that there was no reliance and hence no theft by deception in the context of this case because the prospective adoptive parents by statute gave the Vigils money as a charitable contribution, knowing that they could not buy the Vigils' consent to the adoption, the State argues that theft by deception did occur, because in giving the Vigils the charitable contributions, the prospective adoptive couples relied on the Vigil's statements

⁶ Instruction No. 28 provided,

Under Utah law, any person, agency, or corporation may pay maternity expenses, related medical or hospital, and necessary living expenses of the mother preceding and during confinement. However, that act of paying is by law considered an act of charity and may not be made for the purpose of inducing the mother, parent or legal guardian to place the child for adoption, consent to an adoption, or cooperate in the completion of an adoption.

Whether a person consents to the adoption of his or her child is a personal and private act of that person and may not be bought or bartered for under the law. A natural parent at any time may choose not to consent to an adoption. By so choosing, that person does not subject himself or herself to criminal responsibility unless you find from the evidence and beyond a reasonable doubt each and every element of the offense of Theft by Deception, as charged in the Informations have been established.

(Emphasis added).

As trial counsel noted, the instruction was incorrect in grafting a theft by deception exception onto the statute mandating that all monies given to birth mothers are charitable contributions, Utah Code Ann. section 76-7-203 (R. 1170-71).

that they intended to give their baby up for adoption. State's brief at 30-31.

Because this interpretation of the prospective adoptive parents' contributions renders the contributions conditional, it seems inconsistent with the law requiring the contributions to be charitable donations.⁷

Assuming the State's argument to be correct, these facts still do not constitute theft by deception because all of the representations of the Vigils' intent to give their baby up for adoption had no pecuniary significance as a matter of fact or law. See Utah Code Ann. § 76-6-405 (2) ("Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance[.]"); Utah Code Ann. § 76-7-203 (proscribing the selling of children), supra, n 7.

The State has not addressed this point anywhere in its brief.

⁷ Utah Code Ann. § 76-7-203 provides,

Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree. However, this section does not prohibit any person, agency, or corporation from paying the actual and reasonable legal expenses, maternity expenses, related medical or hospital, and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to an adoption, or cooperate in the completion of an adoption.

Yet, the State concedes that trial counsel preserved their objection to Instruction 28. State's brief at 33.

In instructing the jury that theft by deception can occur in the context of an adoption, Instruction 28 misstated the law. Given that the Instruction was the crux of the whole case, the Instruction was prejudicial to Mr. Vigil, and the conviction cannot stand. See State v. Sherard, 818 P.2d 554, 560 (Utah App.) ("[B]eyond the substantive scope, correctness and clarity of the jury instructions, their precise wording and specificity is left to the sound discretion of the trial court.' However, said instructions must not incorrectly or misleadingly state material rules of law.") (citation omitted), cert. denied, 843 P.2d 516 (Utah 1992).

III. MR. VIGIL SHOULD BE ALLOWED TO PRESENT HIS DEFENSE IN A NEW TRIAL.

The State argues that the trial court correctly excluded the testimony of Rolland Oliver and in refusing the requested Jury Instructions⁸ because the testimony and

⁸ The trial court refused to give the following two requested Instructions:

INSTRUCTION NO. 8

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

instructions were irrelevant. State's brief at 36-46.

The State argues that Rolland Oliver's testimony and the Jury Instructions were irrelevant because they did not pertain to Mr. Vigil's criminal intent under the theft by deception statute. State's brief at 40-41, 45-46.

Under Utah Code Ann. §§ 76-6-401 and 405, the State was required to show that Mr. Vigil intentionally took the property of the prospective adoptive parents by means of intentional deceit. See State v. Taylor, 884 P.2d 1293, 1297 (Utah App. 1994). In seeking to prove this, the State relied heavily on the fact that the Vigils were involved with three adoptive couples,

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(R. 295).

INSTRUCTION NO. 9

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client[;]

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction[;] and

(3) the client consents in writing thereto.

(R. 296).

arguing that the Vigils acted with intentional deceit because they could not have honestly intended to give their baby up for adoption to three different couples (R. 1175; 1308).

The essence of Mr. Vigil's defense was that he became involved with the three couples because of the inadequate services provided by the first two attorneys, Bushman and Giffen, and not because he intended to take the property by means of deceit (R. 1297-1301). Rolland Oliver's testimony would have explained norms of adoption proceedings, and thus elucidated the shortcomings of the attorneys' performance (R. 1151-1158). The Jury Instructions similarly would have clarified shortcomings in the attorneys' performance that the non-law-trained jury may otherwise have failed to appreciate.

Because the evidence would have made less probable the State's assertion that the Vigils acted by means of deception or with the intent to deceive, the evidence was relevant under Utah Rules of Evidence 402. The Jury Instructions were relevant to the defense in the very same way.

The State argues that the trial court properly excluded the evidence under Rule 403, because of the limited relevance of the evidence in the State's view, and the likelihood that the evidence would have misled the jury. State's brief at 42-43. In so arguing, the State does not contest the fact that the evidence was presumptively admissible. See State v. Dunn, 850 P.2d 1201, 1221-22 (Utah 1993).

The State suggests that the evidence was properly

excluded because the presentation of the evidence would have required "a trial within a trial" concerning proper adoption proceedings, and cites State v. Lindgren, 910 P.2d 1268 (Utah App. 1996), for the proposition that the trial court was not acting "beyond the limits of reasonability" in excluding the evidence. State's brief at 43.

Lindgren actually demonstrates that the trial court's exclusion of the evidence constitutes reversible error. The case recognizes that "[a] criminal defendant has the right to introduce evidence tending to disprove his or her specific intent to commit a crime[,] . . . even if it is not particularly strong." Id. at 1271. The Lindgren opinion demonstrates that unless the proffered evidence pertaining to specific intent is cumulative to other evidence presented, the trial court should admit the same, and may ameliorate any confusion of the issues for the jury by giving the jury limiting instructions. Id. at 1273.

Because Mr. Oliver's testimony was not cumulative to the evidence presented and was essential to Mr. Vigil's defense that he was involved with the three couples as a result of difficulties with the performance of the attorneys, rather than as a result of an intent to deceive, the Court committed reversible error in excluding the evidence. Id.

The trial court's failure to give the Instructions embodying the theory of the defense also requires a new trial. State v. Ontiveros, 835 P.2d 201, 205 (Utah App. 1992) ("[T]he

defendant has a right to have his or her theory of the case presented to the jury in a clear and comprehensible manner.") (citation omitted).

IV. THE ABSENCE OF PROPER DEFENSE INSTRUCTIONS
REQUIRES A NEW TRIAL.

The State does not contest Mr. Vigil's argument that the trial court should have instructed the jury that "Theft by deception does not occur ... when there is only falsity as to matters having no pecuniary significance[.]" Utah Code Ann. § 76-6-405(2). See page 35 of Mr. Vigil's opening brief.

The State does not contest Mr. Vigil's argument that this omission was prejudicial error which should be addressed through the plain error and/or ineffective assistance of counsel doctrines. See Mr. Vigil's opening brief at 35-38.

Mr. Vigil maintains that this error requires a new trial.

In responding to Mr. Vigil's contention that the trial court should have instructed the jury in accordance with the good faith defenses codified in Utah Code Ann. § 76-6-402,⁹ the State

⁹ Section 76-6-402 provides in relevant subpart,

.... (3) It is a defense under this part that the actor:

(a) Acted under an honest claim of right to the property or service involved; or

(b) Acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or

(c) Obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

contends that the trial court and trial counsel may have reasonably omitted this Instruction because it was inconsistent with the Vigils' defense that they had no intent to deceive the prospective adoptive parents, but were motivated to seek out new prospective adoptive parents because of difficulties with attorneys Bushman and Giffen. State's brief at 47-50. In support of this argument, the State speculates that trial counsel and the trial court may have been trying to avoid two nonsensical defense arguments created by the State in support of its position on appeal.¹⁰

Rather than defeating the Vigils' defense, the good faith defenses provided by the statute complemented the defense. The argument presented by trial counsel was that because the Vigils were truthfully seeking out prospective adoptive parents in three successive couples, and had received legal advice that money provided by prospective adoptive couples was a charitable

¹⁰ The hypothetical arguments appear on page 48 of the State's brief as follow:

For instance, counsel may have determined that an argument under section 76-6-402(3)(a) might confuse the jury by implying defendant was arguing that **even if defendant did knowingly or intentionally deceive the victims** he nonetheless was justified in believing he was acting "under an honest claim of right." Similarly, counsel may have feared that an argument under subsection b would have implied that defendant believed that "he had the right to obtain or exercise control over the [victims'] property" even if he had to mislead the victims in order to get them to make a "charitable contribution" under section 76-7-203.

contribution, the Vigils accepted all of the money paid to them in good faith (R. 750-753; 1292-1307). Contrary to the hypothetical arguments created by the State, Mr. Vigil's defense never encompassed a concession that Mr. Vigil knowingly or intentionally deceived the prospective adoptive parents, or misled them.

The failure to instruct the jury on the good faith defenses was prejudicial because there were no defense Instructions given. Given the evidence concerning legal advice to the Vigils that the money was considered a charitable contribution, and the evidence that the Vigils sought out additional prospective adoptive couples after having had difficulties with the first two adoption attorneys, the jurors may have acquitting the Vigils had they been informed of the good faith defenses provided by Utah law.

Trial counsel's failure to request the Instructions on the absence of pecuniary significance and on the good faith defenses, as provided by statute, and the trial court's failure to instruct the jury in accordance with this law constitute ineffective assistance of counsel and plain error, which this Court should address on appeal by granting Mr. Vigil a new trial. See State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 110 S.Ct. 62 (1989); State v. Verde, 770 P.2d 116, 122 n.12 (Utah 1989); State v. Moritzky, 771 P.2d 688, 692 (Utah App. 1989).

V. AS A MATTER OF LAW, CHARITABLE CONTRIBUTIONS CANNOT BE THE OBJECT OF THEFT BY DECEPTION.

The State argues that a prospective adoptive couples' charitable contributions to the Vigils can be the object of theft by deception, because the prospective adoptive parents parted with their charitable contributions in reliance on the Vigils' deceitful representations that they intended to give up their child for adoption. State's brief at 28-32, 35-36.

Because this interpretation of the prospective adoptive parents' contributions renders the contributions conditional, it seems inconsistent with the law requiring the contributions to be charitable donations.¹¹

Assuming arguendo that the State is correct, the charitable contributions still cannot be the object of theft by deception because the Vigils' representations that they intended to give up their child for adoption had no pecuniary significance. See Utah Code Ann. § 76-6-405(2) ("Theft by

¹¹ Utah Code Ann. § 76-7-203 provides,

Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree. However, this section does not prohibit any person, agency, or corporation from paying the actual and reasonable legal expenses, maternity expenses, related medical or hospital, and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to an adoption, or cooperate in the completion of an adoption.

deception does not occur, however, when there is only falsity as to matters having no pecuniary significance . . .").

Because the facts at issue here cannot constitute the crime of theft by deception under Utah law, this Court should order this case dismissed.

CONCLUSION

Mr. Vigil requests that this case be dismissed. In the alternative, he seeks a new trial, wherein the voir dire is adequate, the jury is instructed properly, and he is allowed to present his full defense.

DATED this 2nd day of April, 1996.

A handwritten signature in black ink, appearing to read 'Patrick L. Anderson', written over a horizontal line.

PATRICK L. ANDERSON
Attorney for Mr. Vigil

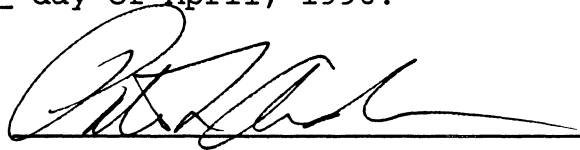
CERTIFICATE OF DELIVERY

I hereby certify that I shall cause to be served eight copies of the foregoing Reply Brief of Appellant to the Utah Court of Appeals and two copies of the foregoing Reply Brief of Appellant to the Attorney General's Office, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 2nd day of April, 1996.



PATRICK L. ANDERSON
Attorney for Mr. Vigil

I delivered/mailed a copy of this motion to the Attorney General's Office this 2nd day of April, 1996.



APPENDIX I

1 mistaken, there is a likelihood that this particular case
2 received media exposure. What I would like to know at
3 this particular time, and I will give you an opportunity
4 to search your memory, members of the jury panel, whether
5 or not any member of the jury panel recalls reading or
6 seeing on television or hearing on the radio anything
7 regarding this particular case? And if so, would you
8 please just indicate this by raising your hand at this
9 time. (Pause) The record may reflect that there are two
10 hands raised: Ms. Floor has her hand raised and Ms.
11 Anderson has her hand raised. Thank you very much, Ms.
12 Floor and Ms. Anderson.

13 Now, let me also ask somewhat of a related
14 question, members of the jury panel. I would like to
15 know at this time whether or not any member of the jury
16 panel has seen any recent television programs or received
17 any other information depicting attempted adoptions? Let
18 me restate that. I would like to know whether any member
19 of the panel has seen any recent television programs or
20 received any other information depicting attempted
21 adoptions. And if so, would you please indicate this by
22 raising your hand at this time and keep those hands up
23 there long enough for me so I can see who has their hand
24 raised. Mr. Pepper has his hand raised and Ms. Wylie has
25 her hand and Mr. Jerman has his hand raised.

1 And, Mr. Pepper, again, I might cut you off
2 here. Identify for me what program you think you heard
3 or saw.

4 MR. PEPPER: It was one of the news magazine
5 shows.

6 THE COURT: How long ago?

7 MR. PEPPER: Last week.

8 THE COURT: Thank you very much, Mr. Pepper.
9 And, Ms. Wylie, what program was it?

10 MS. WYLIE: I don't know. Just a documentary.

11 THE COURT: How long ago was that?

12 MS. WYLIE: Within six months and then in the
13 Ladies Home Journal I think there was an article too.

14 THE COURT: Do you recall the subject matter of
15 the documentary or the article in the Ladies Home
16 Journal?

17 MS. WYLIE: I just know its adoption and then
18 they changed their mind.

19 THE COURT: Was that the subject matter of
20 those issues?

21 MS. WYLIE: Uh-huh.

22 THE COURT: Let me ask you this question, Ms.
23 Wylie. As a result of the documentary or the article in
24 the magazine, and considering the nature of today's case,
25 would any of that information interfere with your

1 responsibility to be fair and impartial?

2 MS. WYLIE: No, not really.

3 THE COURT: You are certain you could remain
4 fair and impartial to both sides of this case?

5 MS. WYLIE: I think, yes.

6 THE COURT: Obviously, you use the word
7 "think." Do you have a hesitation?

8 MS. WYLIE: I don't remember the story in that
9 detail, you know. I think I can listen impartially.

10 THE COURT: Thank you very much, Ms. Wylie.
11 Mr. Jerman, you had your hand raised.

12 MR. JERMAN: Yes.

13 THE COURT: What program was it, sir?

14 MR. JERMAN: I am not sure. I can't recall
15 whether it was a documentary or a news report. We have a
16 place we stay in in Arizona occasionally.

17 THE COURT: How long ago was it?

18 MR. JERMAN: This winter.

19 THE COURT: Was it an incident -- Did it
20 involve a situation in Arizona?

21 MR. JERMAN: No, I thought it was a national.

22 THE COURT: Would that exposure to that
23 information prevent you from being fair and impartial to
24 either side of this lawsuit?

25 MR. JERMAN: No.

1 THE COURT: Thank you very much, Mr. Jerman.
2 The record may reflect that there is an additional hand
3 raised. Just one second. Ms. Reese, you have your hand
4 raised?
5 MS. REESE: Yes. I watched a television
6 program documentary within the last three months
7 "Attempted Adoption."
8 THE COURT: Do you remember the thrust or major
9 points of the program you saw?
10 MS. REESE: The major thing was that the child
11 was up for adoption and then their minds were changed and
12 the natural parents got the child back.
13 THE COURT: Would any of that information
14 interfere with your abilities to be fair and impartial to
15 both sides of this lawsuit, Ms. Reese?
16 MS. REESE: No.
17 THE COURT: Mr. Jones, Mr. Brown and Mr.
18 Scowcroft, would the three of you approach the bench for
19 a moment, please.
20 (Off the record discussion between Court and
21 counsel.)
22 THE COURT: Mr. Jones, with the exception of
23 the conversation we had at side bar, do you pass the
24 panel for cause, sir?
25 MR. JONES: Yes.