

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America
Plaintiff,

v.

Criminal Action
No. - -

Defendant

Defendant,

Each of you is a potential juror in the criminal case of United States v. [Defendant].

The first phase of jury selection occurred when you appeared at Century II to complete juror questionnaires. This is the second phase of jury selection. A third phase will follow in about a week. I'll explain the second and third phases in a little more detail in a few minutes.

I'm Judge _____. I'm a United States District Judge and this is my courtroom. The trial will take place here.

Introduce [prosecutors] -- have them introduce [assistant prosecutors].

Introduce [defense attorneys]. Have them introduce defendant.

During this second phase of jury selection, I will explain to you as a group certain things about jury service and your duties should you ultimately be selected to serve as one of the 12 jurors or one of 2 alternates who will decide the case. I then will ask you

some questions, again as a group, regarding your qualifications to serve as a juror. These questions will not be too extensive because the lawyers and I already have a lot of information from the questionnaires. Finally, I will allow the lawyers to question each one of you individually; that is, in the absence of the other potential jurors. I have allotted each side 5 minutes for individual questioning. While you are waiting to be questioned individually, I hope you will be comfortable in my jury room, where there will be refreshments. Mrs. _____, my courtroom clerk, will draw your names at random for the individual questioning. This means that some of you will be here only for part of the day; some will be here for most of the day. I apologize to those of you who will be questioned last. However, there is another group coming tomorrow, so we must finish this group today.

You are not confined to the jury room and may leave to go to the canteen in the basement or outside to smoke, but if you are not in the jury room when your name is called, Mrs. _____ won't search for you. Your name will be placed back in the wheel. You may not go home until you have been individually questioned or otherwise excused by the court. I will, however, take a lunch break for an hour around noon. After you have been individually questioned, you may go home. Some of you will have to return next

week for the third phase of jury selection. The clerk's office will notify those of you who will return.

During the third and final phase, the lawyers will exercise their peremptory challenges and the jury of 12 regular jurors and 2 alternates will be chosen and sworn. The evidentiary portion of the trial will then begin. I anticipate that the trial will take 2-3 weeks.

A trial of this length is not uncommon in federal court, particularly a trial involving the extremely serious issues which are present in this case. The jurors will not be sequestered and may go home at night, subject to certain instructions which I'll talk about in a moment.

I want to talk with you for a few minutes about jury service generally. I know some of you have served as jurors before; others have not. I hope that you are looking forward to jury service. On the other hand, I imagine that many of you may be somewhat nervous about the process of jury selection and the prospect of ultimately serving on a jury. Some of you may feel that jury service is inconvenient or an unfair intrusion on your daily life. I hope this is not the case, because it has been my experience that almost everyone finds jury service to be a valuable and meaningful experience.

Whatever your feelings may be at this point, you should understand that jury service is now, and has been for over 200 years, a high responsibility of citizenship. Many people believe --and I am one of them-- that in terms of responsibility of citizenship, jury service is second in importance only to military service. It is one of the very few ways that the average citizen can meaningfully participate in our form of democracy.

It is not my purpose here to give you a lecture in civic responsibility. Instead, I suggest it is appropriate for you to view jury service in a practical way. Someday, you or someone close to you may want to bring a civil lawsuit, or you may be sued by someone. Or you or someone close to you may be charged with a crime, or you may be the victim of a crime. In other words, you may become voluntarily or involuntarily involved in the judicial system and end up as a party in a jury trial. Should this happen, you will expect the jurors selected to decide your case to recognize and accept the importance of their public service and discharge their responsibilities accordingly. The parties in this case, the United States and the defendant, expect the same from you.

What are a juror's responsibilities? They are the same in every case, whether civil or criminal: first, to consider all the evidence with an open mind; second, to apply the law

which the judge says is applicable, whether or not the juror personally agrees with the law; and third, to decide the issues only on the evidence, the applicable law and the juror's common sense. A person who can live up to these responsibilities is said to be a "fair and impartial" juror, i.e., a person who can give both sides a fair trial.

You heard me place emphasis on the word decide. I did that because every person who takes an oath and becomes a juror assumes the responsibility to make decisions which directly affect other people. In other words, those persons selected as jurors become, in effect, judges of the factual issues. That is, the jurors judge what evidence is most believable and persuasive based upon the testimony of witnesses and other evidence which is received for the jury's consideration.

My job as the judge is different. It is my responsibility to determine what evidence is admissible, outline for the jurors the factual issues for decision and to instruct jurors on the law applicable to the particular case and how they are to apply that law to the facts. However, I will not be the 13th juror. I will not sit with the jury in the jury room and tell the jurors what their decision must be. Jurors are not advisors; they are decision makers who must make their decisions within limitations imposed by the law.

Why do we use what may seem to some of you an unnecessarily long and

complicated process to select a jury? Because when the parties give someone else the responsibility for making decisions which affect them, they have the right to know something about the decision makers. Not every person is the right juror for every case. The only way to determine who will be the right jurors for this or any case is to learn something about the persons called for jury duty. Ordinarily, this is accomplished by questioning the jurors as a group on all subjects. However, because this case involves the death penalty, I have decided to allow the lawyers to question you individually, primarily on your views about the death penalty. I'm sure you all appreciate why this is necessary and I won't dwell on it further except to say this: we will depend on your truthful and candid answers to questions. We cannot read your minds.

Before I turn to the specifics of this case, I want to comment on one other general subject. All jurors are instructed in every case that from the beginning to the end of the trial they may not talk about the case or read, listen to or watch reports about the trial, or do any independent investigation about the case. This instruction applies to each of you beginning as of this moment and remains in effect until you are excused from further service as a juror in this case. This means that you cannot go home and talk with your spouse, co-worker, friends or neighbors about the questions you are asked here today.

You cannot go to the library and read old newspaper stories about the Mandarin Restaurant robbery and the cases which have been brought as a result. You cannot read any newspaper articles or watch or listen to television or radio accounts about this case. Finally, to the extent you believe you already may know something about the case, you must put that knowledge aside and be prepared to approach jury service based upon the facts of this case and the law which applies to it.

The reasons for these rules are time-tested and valid.

The integrity of the judicial process depends upon jurors who will follow the rules, even if they disagree with them. A person who cannot follow these instructions while away from the scrutiny of the judge simply cannot be a fair and impartial juror.

Let me now turn to this case. All of you know that this is a robbery and murder case and that the United States is seeking the death penalty in the event the defendant is convicted of first degree murder of Barbara Sun during the robbery of the Mandarin Restaurant. The case is here in federal court because federal law allows it to be brought here. You must not speculate about why the case is here rather than in state court. The fact that this is a federal court makes the case no more important, or no less important, than if this was a state court.

The defendant has entered a plea of not guilty to all charges and he is presumed to be innocent until such time, if ever, that the United States can prove he committed the crimes charged to the satisfaction of all jurors beyond a reasonable doubt. The defendant has no burden to prove that he is not guilty.

This concept is universal to all criminal trials in the United States, whether tried in federal or state court.

I'm sure most of you have heard the term "beyond a reasonable doubt." Here is what it means:

Proof beyond a reasonable doubt is proof that leaves the jurors firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on their consideration of the evidence, the jurors are firmly convinced that the defendant is guilty of the crimes charged, the jurors must find him guilty. If on the other hand, the jurors think there is a real possibility that the defendant is not guilty, the jurors must give him the benefit of the doubt, and find him not guilty. Read again.

It is just as important for you to understand what beyond a reasonable doubt does

not mean. It does not mean proof beyond all doubt, or beyond any doubt or 100% proof.

The United States' burden is not that high.

One the other hand, proof beyond a reasonable doubt is not a mere feeling or suspicion that a defendant possibly or even probably committed the crimes charged.

In the first or guilt phase of this case, the jury will determine whether the United States has met its burden of proof; i.e., the jury will determine whether the defendant is guilty or not guilty of the crimes charged. The matter of punishment, i.e., the sentence the defendant might receive, cannot enter into the jury's determination whether the defendant is guilty or not guilty of the crimes charged. If the jury finds the defendant not guilty of all charges, obviously the jury's job will be over. If the jury finds the defendant guilty of certain of the crimes for which the death penalty is not authorized, the jury's job will also be over and I will determine the sentence.

On the other hand, if the jury finds the defendant guilty of murder, i.e., the unlawful killing of _____ with malice aforethought committed during the Mandarin Restaurant robbery, then the trial will move to a so-called penalty phase. The penalty phase, in effect, is another trial. During the penalty phase, it will be the jury's job to determine whether or not the death penalty should be imposed.

Because the jury, not the court, will determine the sentence,

I have decided to allow you to be questioned individually about the death penalty. I'm sure you recognize that when the lawyers question you mainly about your views on the death penalty, neither side is taking the position that the guilt phase is but a formality. Unless the jury finds the defendant guilty of first degree murder, it will never be called upon to determine the sentence. Rather, the lawyers must ask penalty phase questions now because the same jurors will hear the guilt phase and, if there is one, the penalty phase. The lawyers will not have the opportunity to question you twice.

There are several things which are unique to jury service in a death penalty case. I want you to listen carefully as I explain them because you may be asked about them during individual questioning.

You may recall that you were asked in the juror questionnaire regarding your views about the death penalty. Your answers, and those you give today, will allow us to determine whether you will be able to be a fair and impartial juror should you be called upon in this case to decide whether or not to sentence the defendant to death.

A potential juror is not qualified for or disqualified from service merely because he or she has personal views or opinions for or against the death penalty as a punishment

for murder. On the contrary, persons who personally oppose the death penalty may serve as jurors so long as they clearly state their willingness and ability during their jury service to put aside their own beliefs and instead follow the law given by the court. Stated another way, your personal views for or against the death penalty will not disqualify you from being a juror unless they will prevent or substantially impair your ability to decide all of the issues in the case based solely on the evidence and the law which I tell you applies, whether or not you may personally agree with that law. This is the essence of what it means to be a judge of the facts.

I'm going to give you an overview of the law which a jury must follow in order to determine whether a person convicted of murder shall be sentenced to death or to life in prison without release, which under federal law means exactly what it says: life in prison; no parole, no early release for good behavior.

Under federal law, a defendant cannot be sentenced to death merely because he or she has been convicted of murder. On the contrary, the law requires the United States to prove additional factors regarding the crime and the defendant before the jury can consider the death penalty. These additional factors must be proved beyond a reasonable doubt to the satisfaction of all the jurors before the death penalty can be imposed. The

United States must prove a so-called intent factor, which requires proof of what the defendant intended at the time the alleged crimes were committed. The United States also must prove one or more so-called aggravating factors, which are circumstances regarding the offense or the character and background of the defendant which support imposition of the death penalty.

After the United States presents its evidence of these factors, the defendant will then have the opportunity, but is not required, to present evidence of so-called mitigating factors. Mitigating factors are not a defense to the crimes charged. Rather, they are circumstances regarding the offense, the character and background of the defendant or other circumstances which would support imposition of the only other sentence the jury is authorized impose: life imprisonment without release. Should the defendant elect to present such mitigation evidence, he is not required to prove it beyond a reasonable doubt, but rather that it is more probably true than not true. Moreover, he is not required to prove the existence of mitigating factors to every juror in order for them to be considered.

Before the jury can consider imposition of the death sentence, it will have to unanimously find beyond a reasonable doubt the existence of the intent factor and at least

one aggravating factor. The jury will further have to be unanimously persuaded that the aggravating factor or factors outweigh any mitigating factors which one or more jurors find to exist. Even if one or more jurors do not find any mitigating factors, the jury will still have to be unanimously persuaded that any aggravating factors proven are themselves sufficient to justify a death sentence. Absent such unanimous agreement, the jury cannot vote to impose death upon a defendant. Let me note two more points for you:

First, although the death penalty cannot be imposed by a jury absent the unanimous findings I have just discussed, I want to emphasize that even if a jury makes such findings, it is never required to impose a sentence of death upon a defendant.

Second, if the jury unanimously finds that the death penalty should be imposed upon this defendant, this court would be required to sentence him to death. In other words, I could not change your decision. You --and not the court-- would bear the full responsibility for deciding whether or not this defendant should be executed.

Obviously, what I have just stated is only an overview of the law applicable to a jury's consideration of the death penalty. I'm sure that the procedures which must be followed sound confusing at this point. If this case were ever to require a penalty phase

trial--and I am by no means suggesting it will, because I emphasize again, the defendant, as he sits here is presumed innocent under the law of the charges brought against him-- I would instruct the jury in much more detail about its duties.

I'm now going to ask some general questions of you as a group. After that, the individual questions will begin.

Mrs. _____, swear the panel.

October 23, 1996