

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No.

,

Defendant.

**CRIMINAL TRIAL MATERIALS RELATING TO JURY *VOIR DIRE*,
JURY SELECTION, AND PRELIMINARY INSTRUCTIONS**

Honorable Pamela Pepper

I. **PRELIMINARY MATTERS:**

A. Introduction

Welcome to the federal courthouse, and to Room 222. My name is Pam Pepper, and I'm a district court judge. Today, we begin a criminal trial in United States v. XXXXX, Case No. xx-cr-xxx. To my right is **Kris Wrobel**, my courtroom deputy, who'll be helping me during the trial. [To my left is _____, our court reporter.] You've also met our courtroom security officer, **Ed Graham**. We hope to complete jury selection this morning. If, during the process, you need to use the restroom, or need water, **Mr. Graham** will be happy to help you with any issues you may have.

B. Jury Selection Process

We begin the trial by selecting a jury. For this trial, we'll be selecting [**12-14**] jurors. There are several steps to the jury selection process.

In the first part of the jury selection process (called the *voir dire*), I will ask you questions. Your answers to these questions will allow the parties to get to know you, and to determine whether any of you have had experiences or feelings that might interfere with your ability to be fair and impartial in this case.

This is a criminal case. Each party in a criminal case has a right to a fair, impartial and unbiased jury. The jury selection process is designed to preserve and insure that right. Each of us, because of our experiences, background, education, and relationships with others, has developed certain

attitudes, opinions, philosophies, biases, sympathies and prejudices. No two of us think alike.

What we do, where we work, where we live, all tell something about who we are. I'm going to ask you questions about those things. The reason that we ask those questions is so that the parties and their attorneys may decide whether they believe there is anything about you or your background or experience that might influence you in the case.

In this country, we all have the right to believe whatever we like and to make decisions as we see fit. Outside of this courthouse, you can make decisions and judge people on any basis you choose—opinions about wealth, occupation, political party, religious affiliation, hair color, race, size, sex, national origin—whatever you think is important. As a human being, I have deeply-held opinions, and I suspect you have them, too. But I have taken an oath that says that as a judge, I will, to the very best of my ability, put my private views aside and decide cases on the facts and the law, and not on my personal views or biases.

If you are selected as a juror in this case, you must take an oath to do the same. The question that the parties and I must answer in jury selection is whether any of you have particular biases, such that you should not sit on the jury in this particular case. That is what we are trying to find out. So through your answers to my questions, the lawyers and I get to know you a little bit, so that we can determine whether we believe you can be fair and impartial in this

case. And you need to know a little about the case, so that you can make your own judgment about whether you should sit as a juror in it. As I tell you what I believe the case is about, I ask that you think about whether you feel there is any reason that you should not serve on this jury.

Many, if not all of us, have biases that we do not even recognize—“implicit biases.” We are influenced by information without even realizing it. It is hard to recognize these biases, and to set them aside. But it helps to be aware that, while I do not believe that I am biased against a person of a particular gender or race, I may unknowingly be influenced by those factors. Being aware helps us guard against making decisions based on implicit bias. I ask you to be aware, throughout this trial, that you may be influenced by implicit, or unconscious biases, and try to set those biases aside.

The second part of the jury selection process is the challenges for cause. That means that either of the lawyers can ask me to excuse a potential juror from service because the lawyer believes juror cannot or will not be fair and impartial in deciding the facts and applying the law in this case. A lawyer who wants to challenge a juror for cause will provide me with the reasons that he or she believes that particular juror can’t be fair and impartial. I, myself, may suggest excusing a juror, if I believe the juror’s answers show that he or she cannot be fair and impartial to both parties.

The third part of the process involves what are called peremptory challenges. Each side gets a certain number of peremptory challenges. When a

party makes a “peremptory” challenge to a juror, that means the lawyer does not have to state a reason for the challenge. The law allows parties to use peremptory challenges to excuse jurors, not only to insure that there will in fact be a fair jury, but also to insure that each side *believes* that the jury is a fair jury. The lawyers will make their challenges, and discuss them with me, outside your hearing.

Please don’t feel insulted, or upset, if you are excused from service. As I indicated, each of us has certain attitudes, opinions, biases, etc. Each of us would find it hard to be fair in a particular kind of case. Even if I excuse you in this case, you may be perfectly qualified to sit on another case. On the other hand, even if you end up on the jury in this case, you may be excused from service in some future case.

Now—for your general information, the name of this case is United States of America v. XXXX. As I said before, this is a criminal case. The party who brought the lawsuit—the plaintiff—is the United States. The defendant is [XX]. The case arose out of an indictment. An indictment is a formal document used by the government to start a criminal case, and to bring that case to court. The indictment also advises and informs a defendant of the nature of the crime the government alleges that s/he committed. An indictment is *not* evidence against the defendant, and the fact that an indictment exists does not give rise to an inference of the defendant’s guilt.

This indictment contains [number of] allegation[s], or count[s].
That/those count[s] allege[s] that on or about [DATE], in the State and Eastern District of Wisconsin, **[DEFENDANT]**, [INSERT CHARGES].

[DEFENDANT] has pled not guilty to this charge/these charges. Because s/he has pled not guilty, the jury selected to try this case must find the relevant facts, and determine whether those facts prove that **[DEFENDANT]** is guilty of any of the charge in the indictment. In a criminal case, the government has the burden to prove that the defendant is guilty, and the government must prove the defendant's guilt beyond a reasonable doubt.

I'm going to start by asking **Ms. Wrobel**, to administer an oath to you, in which you promise to answer the questions I ask you truthfully. Your obligation to answer truthfully is a powerful one. At this point, the lawyers know little about you, and your answers to my questions help us determine whether you are qualified to serve as a fair juror in this case. It is critical that you answer candidly and completely, because your answers bear on the parties' right to a fair trial. If you would prefer to answer any question outside the hearing of your fellow jury panel members, please let me know, and you can give your answer to the lawyers and me privately at sidebar.

[Ms. Wrobel administers the oath.]

II. VOIR DIRE

A. The parties and I understand that jury service disrupts your usual routine, and is inconvenient to many of you. But it is a service that our

government asks of us as citizens, and it is critical to a fair and just legal system. There are people who feel they are too busy, or are sick, or have moral or religious objections to serving, regardless of what the case is about, or who the parties are. Those are not necessarily reasons for me or the parties to excuse a juror, but it is important that the parties know if you are not willing to serve.

Is there anyone here who believes that he or she should not be on the jury no matter what the case is about, or who the parties or witnesses are?

B. Before I start asking you questions about your qualifications to serve as jurors, I'll ask each of you to stand and provide a little background information about yourself. You see that we have an easel here, with several questions on it—you can refer to the easel as a reminder of the information I ask each of you to provide. That information includes:

1. Your juror number—not your name;
2. Your age;
3. The community or neighborhood where you live (not your street address), and if you've lived there less than ten years, any other places you've lived during that time;
4. Your marital status;
5. Your occupation, as well as that of your spouse or significant other, if you have one. If you're retired, share with us what you did before you retired; and

6. Your educational background—how far you went in school.

C. **[AUSA]**, could you please introduce yourself [and any representative seated with you at counsel table]. Does anyone here know **[AUSA]** **[Representative]**? Does anyone know anyone employed at the United States Attorney's Office? Does anyone know anyone employed at **[representative's agency]**?

D. **[DEFENSE COUNSEL]**, could you please introduce yourselves, tell us where you work, and introduce your client? Does anyone know **[DEFENSE COUNSEL]**? Does anyone know **[DEFENDANT]**?

E. Do any of you know any of the other members of the jury panel here in the courtroom today?

F. **[AUSA]**, could you tell the jurors the names of the witnesses you may possibly call in the case and their employers? Does anyone know any of these individuals?

G. **[DEFENSE COUNSEL]**, could you tell us the names of witnesses you may possibly call in this case? [IF THE DEFENDANT DOESN'T HAVE A LIST OF POTENTIAL WITNESSES, I'LL TAKE THIS OUT.] Does anyone know any of these individuals?

H. The attorneys estimate that this trial will last XX days—until sometime on [XX date]. Are there any of you who have travel, doctor's appointments, or other commitments that you cannot change, that would

prevent you from attending and committing to paying attention for the next XX days?

I. Our trial days start at 9:00 a.m., and, unless something unusual happens, end by 5:00 p.m. During each trial day, we take a morning break, a lunch recess, and an afternoon break. We also may take breaks when the lawyers and I need to discuss legal issues. Is there anyone who has any health problems—including hearing problems, vision problems, disabilities or medication issues—that would make it difficult for you to follow that schedule, or to hear or see testimony and other evidence?

J. Have any of you read, or heard, anything about this case, or the defendant, before you came here today?

K. have any of you ever served on a grand jury, either in federal or state court? If so, when and for how long? Was there anything about that experience that would make it difficult for you to serve as a juror at a trial?

L. Has anyone ever served on a jury before—either in state or federal court?

1. Was it a criminal case or a civil case?
2. Were you the foreperson?
3. Did the jury reach a verdict?
4. Is there anything about that experience that would make it difficult for you to be fair and impartial in this case?

M. Do any of you have any legal training or experience? Do any of you have any specialized knowledge of the law?

N. Has anyone ever been a party to a lawsuit—in other words, have you ever sued anyone, or had someone sue you? If so, please tell us what kind of lawsuit it was, and how long ago it took place. Was there anything about that experience that would make it difficult for you to be fair in this case?

O. Have any of you ever been a witness, or an expert witness, in any kind of proceeding where you testified under oath (including a deposition)? If so, please tell us about that experience.

P. Is there anyone who, because of particular feelings about our judicial system—including judges and lawyers—would not be able to serve as a fair and impartial juror in the case?

Q. Is there anyone who has strong feelings about the federal government—including government agencies like the **[name of investigating agency]**—that might affect your ability to listen fairly and impartially to the evidence in this case, and to render a verdict in accordance with that evidence and with the law that I provide you?

R. Do you have any relatives or close friends who are lawyers? What is your relationship with that person, and what kind of law do they practice? Do they talk to you about their work? Is there anything about your relationship with that person which would make it difficult for you to be fair and impartial in this case?

S. Do you have any relatives or close friends who work in law firms or legal offices—perhaps as paralegals, administrative assistants, investigators? Who are they, and what kind of work do they do? Do they talk to you about their work? Is there anything about your relationship with that person, or anything they've told you, that would make it difficult for you to be fair and impartial in this case?

T. Have you, or any close family member or friend, ever been employed in the court system, either municipal, state or federal? If so, please describe the job.

U. Have any of you ever been employed by, or volunteered for, a law enforcement agency—local, state or federal? If so, please share the name of the agency, when you worked there, and what you did.

V. Do you have any close family members or friends who are employed by a law enforcement agency? If so, please share the name of the agency and what they do.

W. Specifically, do you have any close family members or friends who are employed by the **[name investigating agency/agencies]**? If so, please tell us your relationship with them, and what job they hold with that agency.

X. Have any of you, a close family member or a close friend ever had any experience with federal, state or local government that might affect your ability to be fair and impartial in this case?

Y. Is there anyone who has strong feelings about the police or law enforcement—positive or negative—that might affect your ability to serve as a fair and impartial juror in a case involving investigation or testimony by law enforcement officers?

Z. Is there anyone who would find it difficult to assess the testimony or credibility of a law enforcement officer the same way you would assess the testimony or credibility of any other witness?

AA. Have any of you, or any of your close family members or friends, ever been employed in corrections (*i.e.*, as a prison guard or a probation officer or in some other capacity)? If so, please tell us who, and describe the job.

BB. Have any of you ever served in the military? If so, in what branch, in what capacity and during what period?

CC. Have you, a close family member or a close friend ever been arrested? [Follow-ups: How long ago? What law enforcement agency? Anything about that experience that would make it difficult for you to be fair in this case?]

DD. Have you, or any close family members or friends been convicted of a crime? [Follow-ups: State or federal court? Anything about that experience that would make it difficult for you to be fair in this criminal case?]

EE. Have you, or any close family members or friends, ever been the victim of a crime? [Follow-ups: Who was the victim? Anything about that experience that would make it difficult for you to be fair in this case?]

FF. Have any of you, or any close family members or friends, been a witness to a crime? [Follow ups, if necessary.]

GG. Have any of you, or any close family members or friends, ever had a direct interest in the outcome of a criminal case? [Follow-ups, if necessary.]

HH. [Questions specific to the particular case.]

II. Do any of you have any moral or philosophical objections to sitting in judgment of another person or entity?

JJ. I realize you don't know much about the case, but is there anything that you have heard up to this point that would make it difficult for you to be fair and impartial to both the government and the defendant?

KK. At both the beginning and the end of the trial, I am going to give you instructions on the law that governs this case. Is there anyone who is unable to follow that law, and those instructions, even if you do not agree with them?

LL. Is there anyone who, if you were selected to serve as a juror, would not be able to render a verdict based on the evidence (which consists of the testimony of the witnesses and the exhibits that I admit at trial) and on the law that I will provide you?

MM. Is there anyone who would like to tell me or the parties anything outside the hearing of the other jurors that might impact your ability to be a fair and impartial juror to both the government and the defendant in this case?

NN. Is there anything about this case that reminds you of something in your own life? Is there anything about that similarity that would make it hard for you to be fair to both the government and the defendant in this case?

OO. Do any of you have any reason at all—perhaps something I haven’t asked you about—why you could not sit as a fair and impartial juror in this case?

PP. Here’s my final question: If you were the government, or the defendant, in this case, is there any reason that you would not want someone with your views or frame of mind sitting on your jury?

III. POST-VOIR DIRE PROCEDURE

A. The court consults with the lawyers and excludes from consideration any jurors challenged for cause.

B. The government has six peremptory challenges and the defendant has 10 peremptory challenges. Fed. R. Crim. P. 24(b)(2). [12-14] jurors will serve. From the first or last 28 remaining jurors, the parties will make their peremptory strikes by alternating—the government will start with one strike, and the defense will make two, for the first four rounds. In the last two rounds, each side will make one strike. This should result in 12 remaining jurors.

[IF THE PARTIES SUGGEST ALTERNATE JURORS:]

C. Once the lawyers have exercised their peremptory strikes and selected twelve jurors, each side will exercise 1 additional strike out of the next 4 jurors. The 2 remaining jurors will be the alternates.

D. The court gets the final list. If, for any reason, either side has not exercised all its strikes, the court will eliminate the appropriate number of juror's names from the bottom of the list.

E. The court hands the list back to **Ms. Wrobel**, who reads the numbers of the jurors and the alternates (not distinguishing between them).

The court then instructs the venire as follows:

1. If **Ms. Wrobel** called your number and you are in the jury box, please remain seated.
2. If **Ms. Wrobel** called your number and you are in the back of the room, please move into the jury box.
3. If **Ms. Wrobel** did not call your number at all, please move to the back of the room and stay there until I excuse you.

F. The jurors get settled. **Ms. Wrobel** calls the roll of the jurors' numbers, and asks each to respond with "here" and to raise his or his hand.

G. **Ms. Wrobel** administers the oath to the jury. The balance of the venire are excused or instructed to report elsewhere.

H. The court thanks the jury panel for their time and cooperation.

IV. PRELIMINARY INSTRUCTIONS:

A. MEMBERS OF THE JURY

We are now ready to begin the trial. I'm going to start by giving you some instructions to help you better understand your functions as jurors and how you should conduct yourself during the trial. I am confident that if I spend a few minutes with you now, you will be able to discharge your function as a

juror more intelligently and effectively, and will be able to reach a just verdict at the end of the trial.

B. OPENING STATEMENTS

When I have completed these opening instructions, the government may make an opening statement. After that, the defense may do so. But neither party is required to make an opening statement. If the lawyers do make opening statements, what they say in those statements is not evidence. The statements are introductions—road maps—to the evidence the parties intend to produce.

C. CHARGES AND ELEMENTS OF THE OFFENSE

As I indicated during jury selection, there is/are [XXX] charges, or counts, in the indictment. To prove the defendant guilty of [the charge in Count X], the government must prove each of the following [XX] elements beyond a reasonable doubt:

List elements.

[Repeat for each count.]

D. EVIDENCE

Evidence is:

1. Testimony of witnesses given in the court, both on direct and cross-examination, regardless of who called the witness;
2. Exhibits that I admit into the trial record; and
3. Any facts to which the parties agreed or stipulated, or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You must decide the case solely on the evidence offered and received at trial.

E. ORDER OF PROOF

Normally, the government presents its witnesses and exhibits supporting its case first, but sometimes we make exceptions to accommodate a witness. If that happens in this case, I will alert you that a witness is testifying out of order. After the government presents its case, the defendant may—but is not required to—present witnesses or present any evidence. If the defendant presents evidence, the government then may offer additional evidence to rebut the defendant’s case. The party or lawyer who called the witness to testify first asks that witness questions, and then the opposing party may cross-examine that witness.

F. OBJECTIONS

At times during trial, one of the lawyers may object to another lawyer’s effort to introduce evidence. That is okay—it is part of a lawyer’s job to object if the lawyer believes I should not admit the evidence. I don’t allow the lawyers to argue about objections to evidence in your presence. I’ll base my ruling on objections solely on the law, which is why you, as jurors, are not involved in that process. You must not infer from any ruling that I make or from anything that I say during the trial that I hold any views for or against either party.

During the trial, I will sustain objections to questions, which means I won't allow the witness to answer, or if the witness already has answered, I will instruct you that you must disregard the answer and dismiss it from your minds. You should not draw any inference from an unanswered question, and you may not consider that testimony in reaching your decision. This is because the law requires that you make your decision solely upon the competent evidence before you.

G. CREDIBILITY OF WITNESSES

If somebody were to ask me what a juror's most important function is, I would say, without hesitation, that it is to weigh the credibility or believability of the witnesses. You cannot intelligently discuss a verdict without first collectively discussing the testimony that you have heard. It is most important for you to consider, as you listen to the testimony of the various witnesses, whether they are believable. But, I urge you not to prejudge the credibility of any witness until you have heard all the testimony in the case.

In judging the credibility of a witness, you should remember that if the witness' testimony does not match the facts as they occurred, it could be because the witness is lying, or because the witness did not accurately see or hear what the witness is testifying about, or because the witness' recollection of the event is faulty, or because the witness did not give clear testimony.

There is no magical formula for evaluating the witness' credibility; however, you should bring with you to this courtroom all your experience and

background from your own lives. In everyday life, you determine for yourselves whether what other people say to you is reliable or not. The same tests that you use in your everyday life are the tests which you apply in your deliberations here; whether the witness has an interest in the outcome of the case; the bias or prejudice of a witness, if there is any; the witness' demeanor and behavior on the stand; the opportunity that the witness had to observe the facts; and how probable the witness' testimony is when you view it in the light of all the other evidence in the case. These are all important factors to consider when you determine the overall weight and credit that you give to that witness' testimony.

If it appears that there is a discrepancy in the evidence, you will have to consider whether there is a way to reconcile that apparent discrepancy. If that is not possible, you must determine which of the conflicting versions you will accept as appealing more to your good judgment and common sense.

H. RULES FOR CRIMINAL CASES

As I've indicated before, this is a criminal case. There are three critical rules you must follow in a criminal case.

First, you must presume that the defendant is innocent of each charge unless, and until, the government proves that s/he is guilty of that charge. The defendant begins the trial with a clean slate. Earlier I mentioned that the defendant has been charged in an indictment; an indictment is the formal document that brings a criminal case into federal court. It contains allegations.

It is not evidence or proof of the defendant's guilt or anything else. You must presume the defendant innocent of the charges in the indictment unless and until the government proves her guilty of them.

Second, the burden of proof remains with the government throughout the trial; it never shifts to the defendant. In other words, a defendant does not have the burden to prove his/her innocence, or to present any evidence or to testify on his/her own behalf. In fact, because the defendant has the absolute right to remain silent, the law prohibits you from considering the fact that the defendant may not have testified, in arriving at your verdict.

Third, the government must prove the defendant's guilt as to each charge beyond a reasonable doubt.

I. CONDUCT DURING TRIAL

As far as your own conduct during the trial, I must caution you that you may not discuss this case, either among yourselves or with anyone else, during the trial. In fairness to the parties, you must keep an open mind throughout the trial, reaching your conclusion only during final deliberations after all the evidence is in, and you have heard the attorneys' closing arguments and my instructions on the law. Only then will you then be in a position to intelligently and fairly exchange your views with the other jurors in trying to reach a decision.

It is a normal human tendency to talk with people with whom you come into contact each day about what is going on in your life. I appreciate that it is

tempting when you go home in the evening to discuss this case with your spouse or significant other, or other members of your household, or friends. Do not give in to this temptation. Do not let any third person to discuss this case in your presence. If anyone tries to talk to you about the case, despite you telling them not to, you should report that fact to me, through **Mr. Graham**, as soon as you are able.

Also, during the time you serve on this jury, do not speak, whether in or out of the courtroom, with any of the parties, their lawyers or any witnesses. I don't just mean that you cannot talk to them about the case; you may not speak to them at all, even to pass the time of day. They won't talk to you, either—if they see you in a hallway or on the sidewalk, they will not greet you or acknowledge you. They are not being rude. They are following my instructions, just like you must follow them, to insure the absolute impartiality they are entitled to expect from you as jurors.

Because you will be deciding this case solely on the evidence received along with my instructions on the law, you must not make any independent investigation of the facts or the law.

This means, for example, you must not read or listen to media accounts, including anything on social media. You may not visit a location you hear about during the testimony, or conduct experiments. You may not Google or otherwise look up things you've heard about at the trial online, or research anything you've heard about in books or magazines or other resources.

J. CLOSING ARGUMENTS

After the parties have introduced all the evidence and both parties have rested (or finished their cases), the parties will have an opportunity to present you with closing arguments, or summations. I will talk more about the function of a closing argument after you've heard all the evidence. For now, I will tell you that while the closing arguments are very important, they are not evidence, and you are not bound by them. The function of a closing argument is to give the parties the opportunity to explain their view of the evidence, and to tell you what conclusions they believe you should draw from the evidence.

After the lawyers finish their closing arguments, I will instruct you on the rules of law applicable to the case, and you then you will go back to the jury room to deliberate. Your function as jurors is to determine what the facts are, and to apply the rules of law I give you to the facts. The conclusion you reach will be your verdict. You will determine what the facts are from all the testimony that you hear and from the exhibits that I admitted into evidence. You are the sole and exclusive judge of all the facts—not me, not the lawyers, not anyone else. I will make every effort to preside impartially during this trial and not to express any opinion concerning the facts. If, from something I say or do, you believe that I have expressed an opinion, you must disregard it. Any views I may have on the facts are completely irrelevant.

I do caution you that under your oath as jurors, you are duty bound to accept the rules of law that I give you, whether you agree with them or not. As

the sole judges of the facts in this case, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it.

K. TAKING NOTES

I've already introduced [NAME], our official court reporter, who will be making a record of the trial. He/she will not, however, type up a transcript of each day's testimony; you will not have transcripts available to refer to when you are deciding the case.

If you would like to, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you so that you do not hear other answers by witnesses. When you leave the courtroom during breaks, you will leave your notebooks on your chairs; **Mr. Graham** will make sure they are there for you when we resume.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you take notes or not, each of you must form and express your own opinion as to the facts of the case.

If you do not take notes, you should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors.

V. OTHER MATTERS:

Before the lawyers present their opening arguments, there are a few matters that I would like to discuss with you:

- A. Hours;
- B. Promptness;
- C. Publicity (avoid the internet, media coverage);
- D. Court facilities (jury room, washroom, and corridors);
- E. Smokers/Outside breaks for non-smokers;
- F. No cafeteria—will need to leave for lunch each day, or bring with;
- G. Cannot come back into courtroom without **Mr. Graham** from this point forward;
- I. If necessary to communicate with me, do so through **Mr. Graham**.