

IN THE DISTRICT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED

APR 09 2009

SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA: TULSA COUNTY

The State of Oklahoma,

Plaintiff,

Vs.

Case No. CF-2007-5987

KIMBERLY GRAHAM,
Defendant.

MOTION FOR A NEW TRIAL

Comes now Kimberly Graham by and through her attorney Kevin Adams and in accordance with Title 22 O.S. § 951 and 952 moves this Court to grant a new trial in this matter. In support of this motion Counsel shows the Court the following:

Legal Basis for This Motion

This motion is made in accordance with Title 22 O.S. § 952, which states in relevant part:

A court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against a defendant by which his substantial rights have been prejudiced, upon his application in the following cases only:

... Fifth. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

.... Sixth. When the verdict is contrary to law or evidence.

Title 22 O.S. § 952

Procedural Background

Kimberly Graham was charged with five counts of misdemeanor manslaughter in violation of Title 21 O.S. § 711 (1) and one counts of leaving the scene of a fatality accident in violation title 47 O.S. § 1-102.1 on November 19, 2007.

A jury trial was held in this matter beginning on March 9, 2009. The jury trial concluded on March 12, 2009. At the conclusion of the trial Kimberly Graham was convicted of counts 1 through 6. In counts 1 through five the jury recommended punishment of 20 years DOC on Count 6 the jury recommended punishment of 7 years.

During the course of the deliberations the jury had a question regarding whether the sentences would be consecutive or concurrent. Without informing counsel for Ms. Graham that the jury had a question the court sua sponte responded to the jury that they had all of the law. Despite the judge's instructions to the jury, the jury had no instructions regarding whether the sentence would be imposed in a consecutive or concurrent manner. Counsel for Ms. Graham was not given an opportunity to have input into how the Court responded to the jurors question or to make a record regarding what Counsel believed the response should be to the jury.

Sentencing in this matter is scheduled for April 13, 2009, this motion has been timely filed in accordance with Title 22 O.S. §953.

OVERVIEW OF ARGUMENTS

PROPOSITION 1—Kimberly Graham was denied a was denied an impartial jury composed of a fair cross section of the community in violation of the Fifth, Sixth, and Fourteenth amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution by the trial Court's allowing the State to exercise a peremptory challenge against minority jurors without establishing a race-neutral reason.

PROPOSITION 2—The Court erred in failing grant Kimberly Graham's written demurer to the evidence based upon the state's failure to establish that Ms. Graham's blood alcohol level was between .05 and .08.

PROPOSITION 3—Kimberly Graham was denied a fair trial because she is entitled to an impartial judge. (*see Tumey v. Ohio*, 273 U.S. 510, 433, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927; *see also Chapman v. California*, 386 U.S. 18, 24 and fn.8, 87 S.Ct. 824, 828 and fn.8, 17 L.Ed.2d 705 (1967) Judge Gillert was not impartial during her trial. Judge Gillert Displayed open bias against and contempt for the defense throughout the entire trial. When a defendant shows that a judge is not impartial, reversal is automatic – a defendant need not show prejudice; *see also Stouffer v. State*, 2006 OK CR 46, 147 P.3d 245, 256 (Okla. Crim. App., 2006)).

ARGUMENTS AND AUTHORITIES

PROPOSITION 1—Kimberly Graham was denied a was denied an impartial jury composed of a fair cross section of the community in violation of the Fifth, Sixth, and Fourteenth amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution by the trial Court's allowing the State to exercise a peremptory challenge against minority jurors without establishing a race-neutral reason.

At the conclusion of the jury selection there were two minorities in the jury panel. When it came time to exercise each side's preemptory challenges, Assistant District Attorney Jason Rush, exercised his first preemptory challenge against a minority. Counsel for Ms. Graham believed that Mr. Rush was exercising his

preemptory challenge in a racially discriminatory manner because ADA Rush did not even know the name of the juror he was attempting to strike¹. Counsel for Ms. Graham objected and the Court refused to require the state to provide a non-race based reason for the strike. The entire aforementioned interchange is listed below:

And, Mr. Rush, on behalf of the State of Oklahoma, your first challenge.

MR. RUSH: Judge, the State would like to strike

Juror No. 6, Mr. Ramirez-Flores.

MR. ADAMS: And, Your Honor, we would ask a nonrace-based reason for that.

THE COURT: No, there doesn't need to be one. There's no reason for it. Is it Flores-Ramirez or Ramirez-Flores?

MR. RUSH: Judge, I don't know.

THE CLERK: The card has Flores-Ramirez.

THE COURT: Flores-Ramirez.

MR. RUSH: I just had him as Juror No. 6, Judge.

(See Exhibit A, Attached Transcript)

Undeterred by the defense's objection and bolstered the Court's ruling, with the state's second preemptory challenge the state moved to strike the last remaining minority from the panel. Once again Counsel for Ms. Graham requested a non-race based reason for the state striking the last remaining minority from the panel.

Counsel stated "Once again we would request a nonrace-based reason." (See attached Exhibit A, Transcript) The Court responded by stating that "Ms. Graham is white. There is no reason for them to be giving a race neutral reason for Hispanic or for Mr. Garland²." (See attached Exhibit A, Transcript) Counsel for Ms. Graham responded "Your Honor, for

¹ ADA Rush stated "Judge, the State would like to strike Juror No. 6, Mr. Ramirez-Flores". The prospective juror's name was actually Mr. Flores-Ramirez. ADA Rush latter stated "I just had him as Juror No. 6, Judge".

² Mr. Garland was of African-American decent.

the record Ms. Graham is Native American”. The Court responded “Well, nobody would know that³, but it doesn't really matter anyway.” The entire aforementioned interchange is listed below:

THE COURT: Second challenge on behalf of the State. MR. RUSH: No. 13, Mr. Garland.

MR. ADAMS: Once again we would request a nonrace-based reason.

THE COURT: Ms. Graham is white. There is no reason for them to be giving a race neutral reason for Hispanic or for Mr. Garland.

MR. ADAMS: Your Honor, for the record Ms. Graham is Native American.

THE COURT: Well, nobody would know that, but it doesn't really matter anyway.

(See attached exhibit A)

The Fifth, Sixth, and Fourteenth amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution entitles Ms. Graham is entitled to an impartial jury composed of a fair cross section of the community. Ms. Graham was denied a fair impartial jury composed of a fair cross section of the community by the Court’s refusal to require the state to give a race neutral reason for exercising their preemptory challenges.

It is well settled law that “racial identity between the accused and the prospective juror is not a precondition for a Batson challenge.” It has clearly been the law in the State of Oklahoma for over 15 years. In *Green v. State, 1993 OK CR 30, 862 P.2d 127, 1272 (Okla. Cr. 1993)* the Oklahoma court of Criminal Appeals ruled:

We need only address Green's second proposition because it raises a trial error which warrants reversal. Green claims three of the State's preemptory challenges were racially motivated and thus violative of the Equal Protection Clause of the

³ Counsel is unsure what the Court expects a Native American to look like, but attached as Exhibit B is Kimberly Graham’s United States Department of the Interior Bureau of Indian Affairs card establishing that Kimberly Graham is a federally recognized as being of Cherokee decent.

Fourteenth Amendment. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1985). We hold that the trial court's failure to require the State to provide a race-neutral explanation for the exercise of one of these peremptory challenges violated the principles set forth in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Accordingly, this case must be reversed and remanded for a new trial.

The peremptory challenge at issue was exercised to remove Juror Draper from the panel. The judge thought prospective Juror Draper was Hispanic. The State claimed she was Caucasian. Defense Counsel thought Ms. Draper was, like Green, an African-American. However, defense counsel argued that even if Ms. Draper were Hispanic and not African-American, she was still a member of a cognizable racial minority, the exclusion of whom could support a *Batson* challenge.

The United States Supreme Court held in *Batson* that "a defendant can raise an equal protection challenge to the use of peremptories at his own trial by showing that the prosecutor used them for the purpose of excluding members of the defendant's race." *Id.* at 96, 106 S.Ct. at 1722. In *Powers*, the Court extended *Batson* to allow a criminal defendant to "object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." *Id.* at ___, 111 S.Ct. at 1366 (emphasis added). The trial judge in this case apparently concluded that because Ms. Draper and Green were not of the same racial minority, Green could not make a *prima facie* case of discrimination under *Batson*.

Powers clearly holds that racial identity between the accused and the prospective juror is not a precondition for a *Batson* challenge. But for the trial court's conclusion that the racial difference between Green and prospective Juror Draper was fatal to his *Batson* challenge, the evidence Green presented would have constituted a *prima facie* case of discrimination. Under *Powers*, the trial court should have required the State to articulate a race-neutral reason for exercising its second peremptory challenge to remove Ms. Draper. Its failure to do so requires that this case be remanded for a new trial.

In accordance with then current United States Supreme Court jurisprudence, this Court has previously held that racial identity between a defendant and a prospective juror is a prerequisite to a *Batson* challenge. See *Litteer v. State*, 783 P.2d 971 (Okla. Cr. 1989); *Miller v. State*, 781 P.2d 846 (Okla. Cr. 1989), and *Nguyen v. State*, 769 P.2d 167 (Okla. Cr. 1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989). See also *Manuel v. State*, 751 P.2d 764 (Okla. Cr. 1988), and *Johnson v. State*, 731 P.2d 993 (Okla. Cr. 1987), cert. denied, 484 U.S. 878, 108 S.Ct. 35, 98 L.Ed.2d 167 (1987). To the extent that these and any other cases not specifically cited are inconsistent with today's holding, they are overruled.

Green v. State, 1993 OK CR 30, 862 P.2d 127, 1272 (Okla. Cr. 1993)

In fact in *Layman v. State, F-2004-198*, an unpublished decision, the Oklahoma Court of Criminal Appeals overturned the conviction and life sentence of Clonnie Layman because “The trial court erroneously overruled Layman’s objection by finding that Layman could not challenge Juror Warrior’s exclusion because Layman was white and Juror Warrior was black.” (See Unpublished Opinion *Layman v. state, F-2004-198*, attached as Exhibit C) This is exactly what the Court did in this particular case, the Court declined to require the State to provide a race neutral reason for the exclusion of two minority jurors because of the Court’s inappropriate assumption that Ms. Graham was “white”. Even after being informed that Ms. Graham was a member of a recognizable minority group the Court made a racially insensitive remark (at best), “Well, nobody would know that” and continued to erroneously claim that it did not matter.

Powers v. Ohio is a United States Supreme court decision that is well established and is recognized in every Federal Jurisdiction at both the District Court and Appellate levels and in every state jurisdiction in the United States, including of course Oklahoma.

Ms. Graham was denied an impartial jury composed of a fair cross section of the community in violation of the Fifth, Sixth, and Fourteenth amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution

PROPOSITION 2—The Court erred in failing grant Kimberly Graham’s written demurer to the evidence based upon the state’s failure to establish that Ms. Graham’s blood alcohol level was between .05 and .08.

The state introduced no evidence during the trial of Ms. Graham’s blood alcohol content. At the conclusion of the state’s evidence counsel for Ms. Graham filed a written demurrer to the

evidence. Without fully reading the demurrer or requiring the state to respond to the demurrer the Court denied the defendant's demurrer.

The predicate misdemeanor to First Degree Manslaughter in this matter is Driving While Impaired. “[Driving while impaired] is a proper predicate offense for a charge of misdemeanor manslaughter.” *Bell v. State*, 2007 OK CR 43, ¶ 5, 172 P.3d 622. “Driving While Impaired is a lesser included offense to Driving Under the Influence.” *Bernhardt v. State*, 1986 OK CR 76, ¶ 3, 719 P.2d 832. The jury must always be given instructions defining the terms “under the influence” and “with impaired ability.” *Id.* ¶ 4. “The rationale behind this rule is simple: These terms, particularly the term ‘under the influence,’ are not terms of common understanding or knowledge.” *Id.* ¶ 5.

The Oklahoma Uniform Jury Instruction (OUJI) for First Degree Manslaughter is found at OUJI-CR 4-94 and the OUJI for Driving While Impaired is found at OUJI-CR 6-24. In order for Ms. Graham to be convicted of First Degree Manslaughter, the State must prove beyond a reasonable doubt each of the following elements from OUJI-CR 4-94 and OUJI-CR 6-24:

MANSLAUGHTER IN THE FIRST DEGREE

BY MISDEMEANOR-MANSLAUGHTER -

First, the death of a human;

Second, occurring as a direct result of an act or event which happened in the commission of a misdemeanor;

Third, caused by the defendant while in the commission of a misdemeanor;

Fourth, the elements of Driving While Impaired defendant is alleged to have been in the commission of are as follows:

DRIVING WHILE IMPAIRED -

CHEMICAL TEST EVIDENCE DEFINED

If you find that a chemical analysis of the defendant's blood/breath was performed on a sample taken from the defendant as soon as practical after the fatality accident, then the results of this analysis may be considered by you as to the issue of whether the defendant's ability to drive a motor vehicle was impaired.

If you are convinced that the amount of alcohol, by weight or volume, in the defendant's blood was more than five-hundredths of one percent (0.05%), then you may consider this evidence on the issue of whether the defendant's ability to drive a motor vehicle was impaired by alcohol. However, no person may be found to have been under impaired ability solely because of a blood alcohol count above 0.05%. You must find, *in addition*, and beyond a reasonable doubt, that the person's driving was affected by the consumption of alcohol to the extent that the public health and safety were threatened, or that the person's operation of a motor vehicle violated a State statute or local ordinance. (Emphasis added).

No chemical analysis, neither breath test nor blood test, was ever administered to Ms. Graham because she did not stop at the scene and she was not arrested until she voluntarily surrendered to police the morning after the incident. However, the absence of any chemical test, either breath or blood, is fatal to the charges of First Degree Manslaughter in this matter.

In *Bell v. State*, 2007 OK CR 43, 172 P.3d 622, the defendant was also charged with First Degree Manslaughter, in violation of OKLA. STAT. TIT. 21 § 711. In order to convict the defendant the Court stated:

[t]he State had to present evidence that the victims died as a direct result of an act or event which happened while Bell committed the misdemeanor, driving while impaired. To prove Bell was driving while impaired, the State had to show she was driving a motor vehicle on a highway and her ability to drive was impaired by alcohol. **In addition to a blood alcohol concentration of .05 to .08 percent**, the State **must also show** that (a) the driver's ability to operate the vehicle was so affected by alcohol that public health and safety was threatened, or (b) the driver violated a state statute or local ordinance in the vehicle's operation **Without this element, there is no predicate misdemeanor for the misdemeanor manslaughter charge.**

Id. ¶ 12. (Emphasis added).

The Tenth Circuit has also interpreted Oklahoma law in a similar manner. "The statute [OKLA. STAT. TIT. 47 § 756] merely requires some evidence, **in addition to a blood alcohol**

content in the applicable range, that the defendant operated a motor vehicle while his physical or mental abilities were affected by alcohol to the extent that the public health and safety were threatened.” *U.S. v. Sain*, 795 F.2d 888, 891 (10th Cir. 1986) (emphasis added).

Applying *Bell* and *Sain* to the case at bar, in order to sustain a misdemeanor manslaughter charge, the State must present evidence of “a blood alcohol concentration of .05 to .08 percent” **and** evidence “the driver’s ability to operate the vehicle was so affected by alcohol that public health and safety was threatened.” The State presented absolutely no evidence regarding Ms. Graham’s blood alcohol concentration.

When an element is missing, there can be no predicate misdemeanor for First Degree Manslaughter. *See Bell*, 2007 OK CR 43, ¶ 12. The State may argue that adequate evidence of blood alcohol concentration has been presented and the State may also argue that OKLA. STAT. TIT. 47 § 757 permits the introduction of competent evidence of whether a person was under the influence of alcohol. However, *Yell v. State*, 1993 OK CR 34, 856 P.2d 996, addressed the issue of quantifying blood alcohol concentration:

While the code provides at 47 O.S. 1991 § 757 that competent evidence bearing on the question of whether a person was under the influence may be introduced at trial, it is clear that evidence other than that derived from chemical tests may not be used to quantify alcohol levels. Title 47 O.S. 1991 § 756 specifically limits the methods of quantifying alcohol levels to chemical tests designed to analyze blood or breath.

The State simply cannot present evidence of Ms. Graham’s blood alcohol concentration without a chemical test that analyzed her blood or breath. Without blood alcohol concentration evidence, a critical element is missing and the State cannot sustain First Degree Manslaughter charges against Ms. Graham.

The issue of Kimberly's Grahams intoxication is legitimate factual issue, not just a legal loop hole. There was trial testimony in this matter from two witnesses⁴ that just moments before the accident that she showed no signs of intoxication. The testimony regarding the amount of alcohol that Ms. Graham drank varied, because two witnesses testified that two of the beers she ordered she only drank half of. There was no evidence that Ms. Graham consumed over nine drinks on the night of the accident. The police never established a time period that she ingested the drinks that Ms. Graham admitted to drinking in her written statement. In Ms. Graham's trial testimony she stated that she had her first drink after the local evening news. This was similar to Ms. Graham's written statement. Ms. Graham weighs in excess of 300 pounds. There is a real question concerning whether someone who weighs in excess of 300 pounds and drank nine drinks over a 5 hour period was actually intoxicated.

In *Medicolegal Investigation of Death; Guidelines for the Application of Pathology to Crime Investigation, (4th Edition)* by Spitz and Fischer page 1227, it states "It is generally agreed that the concentration of alcohol decreases by 0.015%-0.02% per hour, although it has been our experience that the rate of metabolism may be significantly higher in a large number of individuals." The *Medicolegal Investigation of Death* is a book that is generally relied upon and referred to by Forensic Pathologist throughout the United States.

The accident occurred at approximately 11:00 pm. The local evening new is over at 5:30 pm. Over a five hour period, even with normal rate of absorption of alcohol, a normal individual's alcohol level would decrease anywhere from .075% to .1%. That is assuming that Ms. Graham's absorption of alcohol is normal. While counsel concedes that reintegration of

⁴ Erin Waller barely knew Kimberly Graham and was formerly employed as the bar tender at the Town Pump the last place Ms. Graham visited before the accident she testified that Ms. Graham showed no signs of slurred speech, trouble walking or other signs of intoxication and even correctly guessed her age. Tammy Gwinn was a friend of Kimberly Graham and she also testified that Kimberly Graham did not appear to be intoxicated.

alcohol evidence would not be admissible under Title 47 O.S. 1991 § 756, it is important to keep in mind that there is a legitimate factual question as whether Ms. Graham's alcohol level would have been legally sufficient for DWI even if the state had a blood alcohol or breathalyzer test.

Because the Court removed the requirement that the state prove that Ms. Graham's blood alcohol range was in the applicable range an individual who had a blood alcohol level of just 0.01 or 0.02 could be convicted of the same offense if the state was able to convince the jury that their consumption of alcohol was such that their ability to operate the vehicle was so affected by alcohol that public health and safety was threatened, or the driver violated a state statute or local ordinance in the vehicle's operation. Counsel does not believe this is what was intended by the legislature or the case law surrounding DWI and/or misdemeanor manslaughter. Counsel believes that if the requirement that the state prove the blood alcohol level in the appropriate range made the statute unconstitutionally vague as applied to Ms. Graham's case and conviction at the previous trial.

PROPOSITION 3—Kimberly Graham was denied a fair trial because she is entitled to an impartial judge. (see *Tumey v. Ohio*, 273 U.S. 510, 433, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927; see also *Chapman v. California*, 386 U.S. 18, 24 and fn.8, 87 S.Ct. 824, 828 and fn.8, 17 L.Ed.2d 705 (1967) Judge Gillert was not impartial during her trial. Judge Gillert Displayed open bias against and contempt for the defense throughout the entire trial. When a defendant shows that a judge is not impartial, reversal is automatic – a defendant need not show prejudice; see also *Stouffer v. State*, 2006 OK CR 46, 147 P.3d 245, 256 (Okla. Crim. App., 2006)).

Attached as exhibits D1-D13; are thirteen sworn affidavits from witnesses who personally observed Judge Gillert's actions throughout the trial. Judge Gillert's behavior throughout the trial was described as follows:

Frank Hail who witnessed the trial described Judge Gillert's negative behavior towards the defense and stated that "I wasn't a juror but if I had been I think that would or could have

influenced my memory of that certain piece of evidence.” Mr. Hail thought it “that was rude for a Judge to do when someone's life is on the line.” Mr. Hail’s complete description of Judge Gillert’s behavior is below:

I was there from the time the opening statements were given until the jury delivered the verdict. The thing that bothered me the most, was when the prosecuting attorney would speak the judge would listen and be very polite. But when the defense attorney, Mr. Adams would speak to him he acted very rude and even would cover his face with his hands like he was asleep and even showed disrespect by showing a smirky sort of "I can't believe you would say or go there" type of smile. I saw this happen so many times throughout this trial. When it first happened, I thought to myself that was rude for a Judge to do when someone's life is on the line. I wasn't a juror but if I had been I think that would or could have influenced my memory of that certain piece of evidence. Also when Mr. Adams would ask the Judge something I would get a feeling that he just wanted to hurry up and get this over, like it was a done deal. Then I kept noticing it happening nearly every time the defense lawyer was talking.

I just wanted to say what was in my heart. I know that if I was in her shoes or anyone else's, I would and you would also want the jury to form its own opinion from the facts not glares and faces.

(See attached Exhibit D1)

Rachell Belden stated that during the trial described Judge Gillert treated defense counsel with “with disrespect and contempt” and treated the prosecuting attorney “with courtesy and respect”. Mrs. Belden described how Judge Gillert “was obvious with his behavior in front of the jury.” Rachell Belden’s complete description of Judge Gillert’s behavior is below:

While the defense lawyer was talking judge Gillert would place his forehead in the palm of his hand looking downward and other times he would place both his hands on his forehead in the same manner. Judge Gillert did not exhibit this behavior when the prosecution was talking. The judge was extremely attentive in what the prosecuting attorney had to say.

While speaking and interacting with the defense lawyer judge Gillert treated Mr. Adams with disrespect and contempt. While dealing with the prosecuting attorney judge Gillert treated him with courtesy and respect. Judge Gillert was obvious with his behavior in front of the jury.

Judge Gillert even treated the defense witnesses worse than he treated the prosecuting witnesses.

I began watching the judge's expressions on Wednesday after I began to notice what I would describe a clear bias against the defense.

The way the judge conducted himself during the trial gave me the feeling that he had already determined that Kimberly Graham was guilty and he did not want to hear the defense's side of the case. The judge's behavior seemed very unprofessional and one-sided.

During the jury selection when Ms. Graham's attorney asked for a reason the state was striking the minorities from the jury the judge reacted in an openly disrespectful manner in an angry tone and said that Ms. Graham was not entitled to a reason because she was "white". When Ms. Graham's attorney informed the judge that Kimberly Graham was Native American he was dismissive when he said that nobody would know she was Native American.

(See exhibit D2)

Christopher Belden only attended the trial on Wednesday afternoon, but during his time in the trial he witnessed Judge Gillert acting disrespectful towards the defense lawyer and not towards the prosecutor. Mr. Belden also witnessed the jury pay attention to the judge's reactions.

Christopher Belden's complete description of the Judge's reaction is listed below:

While the defense lawyer was talking judge Gillert would rub his face with his hand, he would act disrespectful towards the defense lawyer acting as if the defense lawyer was wasting everybody's time. The judge act interested in what the prosecuting attorney had to say and did not treat the prosecutor with disrespect.

During the trial I watched the jury and I observed them paying attention to the judge's reactions.

(See Exhibit D3)

Teresa Replogle described Judge Gillert's actions as "very disrespectful towards defense counsel throughout the portion of the trial that I witnessed". Ms. Replogle went on to say "I even heard Judge Gillert comment to defense counsel that his closing argument should not take

"that long" because "nobody is that good." When Judge Gillert said that his was very flippant."

Ms. Replogle's complete description of the Judge's reaction is listed below:

I witnessed Judge Gillert acting disinterested while the defense counsel was talking. I feel that his disinterest was greater during the closing argument of Defense counsel. The judge acted very disrespectful towards defense counsel throughout the portion of the trial that I witnessed. I even heard Judge Gillert comment to defense counsel that his closing argument should not take "that long" because "nobody is that good." When Judge Gillert said that his was very flippant.

While the prosecuting attorney was talking the judge would pay attention to what he said. I did not witness Judge Gillert acting disrespectful towards the district attorney.

In my opinion Judge Gillert's behavior was obvious to anyone in the courtroom.

(See Exhibit D4)

Cindy Merryman described how she witnessed Judge Gillert's actions as "pitiful" and "unprofessional". Ms. Merryman had commented to her family before the verdict that the "judge appeared biased against the defense." Ms. Merryman gave her opinion that Judge Gillert's behavior would have been obvious to anyone in the courtroom". Ms. Merryman witnessed the judge "roll his eyes as if Mr. Adams was wasting his time". Ms. Merryman's complete description of Judge Gillert's actions are below:

I witnessed Judge Gillert place his head in his hands numerous times, shifting back and forth in his chair, shifting to one side and then to the other repeatedly. This occurred whenever Mr. Adams was questioning witnesses and during Mr. Adams's closing argument. I also witnessed the judge roll his eyes as if Mr. Adams was wasting his time on one occasion.

While the prosecuting attorney was talking the judge would sit up in his chair and was very attentive. While the prosecutor was talking the judge would watch the jury and their reactions and watch the reactions of the audience. The Judge would did not act attentively while Mr. Adams was talking and appeared openly disinterested.

I also witnessed him tell Mr. Adams, when discussing the closing arguments, that nobody is that good and he stated words to the effect that if Mr. Adams went to long in his closing that he would make him hurry up.

In my opinion he exhibited open and obvious bias against Mr. Adams and the defense throughout the entire trial that I witnessed. I even commented, during the trial and before the verdict, to members of Kimberly's family and to my husband that the judge appeared biased against the defense. After the trial my exact words to my husband was that the behavior of the judge was "pitiful".

In my opinion his bias would have been obvious to anyone in the courtroom. In my opinion his behavior appeared to be unprofessional.

(See Exhibit D5)

Warren Ragsdale stated that many times while the defense was talking that "judge Gillert would look out the window or have weird expressions on his face like in disbelief or contempt. He would gaze out the window for periods of time with a "smirk" on his face." Mr. Ragsdale's complete description of Judge Gillert's behavior is listed below:

The judge did not appear to be interested in the trial and what the attorney for Ms. Graham had to say. He appeared interested in what the prosecutor had to say. Many times when the defense was talking judge Gillert would look out the window or have weird expressions on his face like in disbelief or contempt. He would gaze out the window for periods of time with a "smirk" on his face. His lips were very tight and almost tight and almost in a smile. He would rock his chair very quickly when the attorney for Ms. Graham was speaking. He even put his head in his hands during the closing argument by Ms. Graham's attorney for minutes at a time. His tone was negative when talking towards the defense attorney. The judge's mannerisms were completely different when the different sides were speaking.

The judge did not show any disrespect or contempt for the prosecution, but he did for the defense.

(See Exhibit D6)

Denney Merryman gave his opinion that Judge Gillert's actions created a "negative environment towards the defense during the trial..." According to Mr. Merryman Judge Gillert "expressed an open bias against the defense. This occurred whenever Mr. Adams was

questioning witnesses and during Mr. Adams's closing argument." Mr. Merryman described how Judge Gillert acted towards the state, "While the prosecuting attorney was talking the judge would sit up in his chair and pay attention like he was interested in what he had to say. I never witnessed Judge Gillert acting disrespectful towards the district attorney." Mr. Merryman's full description of Judge Gillert's behavior is below:

I witnessed Judge Gillert rubbing his eyes, scribbling on his pad, looking around, placing his head in his hands while defense counsel was talking. He gave the impression that defense counsel was wasting his time. In my opinion Judge Gillert's actions expressed an open bias against the defense. This occurred whenever Mr. Adams was questioning witnesses and during Mr. Adams's closing argument. The judge acted very disrespectful towards defense counsel throughout the portion of the trial that I witnessed. I even heard judge Gillert comment to defense counsel that his closing argument should not take "that long" because "nobody is that good."

While the prosecuting attorney was talking the judge would sit up in his chair and pay attention like he was interested in what he had to say. I never witnessed Judge Gillert acting disrespectful towards the district attorney.

In my opinion his bias would have been obvious to anyone in the courtroom. In my opinion his behavior was very unprofessional. It was my opinion that the judge's behavior created a negative environment towards the defense during the trial and effected the outcome of the trial.

(See Exhibit D7)

Carli Reimer stated that she witnessed "Judge Gillert treat the defense attorney disrespectfully while the defense attorney was acting respectful towards the judge. I never saw Judge Gillert act disrespectfully towards the prosecuting attorney." Ms. Reimer described Judge Gillert's behavior as "sarcastic at times towards Mr. Adams in front of the jury on more than one occasion". Ms. Reimer described how she never witnessed Judge Gillert acting disrespectful towards the prosecuting attorney. Ms. Reimer witnessed Judge Gillert "roll his eyes and have long exhales of air like he was bored and the defense attorney was wasting his time." Ms. Reimer

gave her opinion that Judge Gillert's behavior was worst while Kimberly Graham was testifying. Ms. Reimer has never met or spoken to Kimberly Graham. Ms. Reimer's full description of Judge Gillert's behavior is below:

I witnessed Judge Gillert treat the defense attorney disrespectfully while the defense attorney was acting respectful towards the judge. I never saw Judge Gillert act disrespectfully towards the prosecuting attorney.

The Judges' behavior was sarcastic at times towards Mr. Adams in front on the jury on more than one occasion.

When the prosecutor was taking the judge would sit up in his seat and act very interested in what was being said. However, when the defense attorney was talking judge Gillert would appear disinterested and bored. Judge Gillert would rub his forehead, rub his head and place his hands behind his head all while the defense lawyer was talking.

I witnessed judge Gillert roll his eyes and have long exhales of air like he was bored and the defense attorney was wasting his time.

It appeared to me that the judge showed favorable bias towards the prosecutor and negative bias against the defense throughout the trial. In my opinion his behavior was the worst while Kimberly Graham was testifying.

(See Exhibit D8)

Carole Munsie also witnessed Judge Gillert roll his eyes several times while the defense was talking. Carole Munsie also witnessed Judge Gillert deeply exhale several times while the defense was talking "thereby showing his disapproval and disgust with the defense." Ms. Munsie's described Judge Gillert's behavior as " the defense he showed a lack of respect for and the prosecution he showed honor for." Ms. Munsie, stated "I was concerned during the trail because of the judge's behavior. I told myself that it was ok because he did not like the defender and defendant because he was not going to make the decision the jury was. Now with reflection I feel that if I could see what the judge thought by his tone of voice and body language then surely

the jury could as well and I am concerned that it affected their judgment even if subconsciously.”

Ms. Munsie’s complete description of Judge Gillert’s behavior is listed below:

I witnessed Judge Gillert treat the defense attorney with disrespect. Judge would turn his head like he was not listening and could care less about what was going on while the defense was talking, the tone of the judge’s voice while talking to the defense was totally different with the two sides; showing his respect for one side and lack of respect for the other. It was the defense he showed a lack of respect for and the prosecution he showed honor for.

I witnessed the judge roll his eyes several times while defense was talking. I witnessed judge Gillert deeply exhale several times while the defense was talking, thereby showing his disapproval and disgust with the defense.

I never witnessed judge Gillert exhibit negative behavior, like the rolling of eyes or the deep exhaling, while the prosecutor was talking, judge Gillert’s body language was approving of all that the prosecutor would say or do.

I was concerned during the trial because of the judge’s behavior. I told myself that it was ok because he did not like the defender and defendant because he was not going to make the decision the jury was. Now with reflection I feel that if I could see what the judge thought by his tone of voice and body language then surely the jury could as well and I am concerned that it affected their judgment even if subconsciously.

(See Exhibit D9)

Leonard Reimer is Ms. Graham’s pastor and has only known her for approximately a year. Mr. Reimer described how Judge Gillert acted as “if he wanted to root for or congratulate the prosecuting attorney.” Mr. Reimer described how Judge Gillert acted during the closing arguments. “Especially in the closing statements Judge would listen to the prosecuting attorney with interest and a smile on his face and he would place his hand on his chin as if to say that he felt the prosecuting attorney was doing a good job. Whenever Mr. Adams was talking Judge Gillert would look away, show open disinterest, he would even huff (a long exhale). Whenever Mr. Adams would hit a favorable fact for the defense the judge would react negatively.” Mr. Reimer’s full description of Judge Gillert’s behavior is listed below:

Judge Gillert's actions and words did not demonstrate that he was being fair. I felt that Judge Gillert's responses to attorney Adams were short and abrupt. Judge Gillert's behavior was openly disrespectful to the defense. Judge Gillert was not act disrespectful to the prosecuting attorney. Whenever attorney Adams attempted to say something whether it was an objection or in addition the judge would act disgusted, like it was out of place or should not be happening. Judge Gillert would not do that with the prosecuting attorney. While the prosecutor was talking the Judge would show real interest in what he had to say. Judge Gillert acted as if he wanted to root for or congratulate the prosecuting attorney.

Especially in the closing statements Judge would listen to the prosecuting attorney with interest and a smile on his face and he would place his hand on his chin as if to say that he felt the prosecuting attorney was doing a good job. Whenever Mr. Adams was talking Judge Gillert would look away, show open disinterest, he would even huff (a long exhale). Whenever Mr. Adams would hit a favorable fact for the defense the judge would react negatively.

I told Kimberly's father the first day of the trial that I was very concerned about the manner in which the judge was acting. And as a result I began watching his reactions closely.

In my opinion Judge Gillert's behavior was obvious to anyone in the courtroom.
(See Exhibit D10)

Catherine Graham is Kimberly Graham's sister. She described Judge Gillert's actions as if they "judge appeared one-sided in favor of the prosecution, he would pay attention to what the prosecutor had to say. The judge did not act disrespectful towards the prosecutor. Judge Gillert did not act sarcastic or demeaning towards the prosecutor like he did to Mr. Adams." Catherine Graham also witnessed Judge Gillert roll his eyes in response to "questions, objections or statements by" defense counsel. Catherine Graham's complete description of Judge Gillert's behavior is listed below:

During the trial judge Gillert displayed much disrespect in his actions towards Kevin Adams. Throughout the closing statement judge Gillert would look away, for several minutes at a time, would have his head down, with his head in his hands. The tone of judge Gillert's voice was sarcastic and demeaning towards Mr. Adams. Judge Gillert acted that way towards Mr. Adams throughout the entire trial.

The judge appeared one-sided in favor of the prosecution, he would pay attention to what the prosecutor had to say. The judge did not act disrespectful towards the prosecutor. Judge Gillert did not act sarcastic or demeaning towards the prosecutor like he did to Mr. Adams. Judge Gillert's behavior was obvious throughout the entire trial to anyone in the courtroom.

I witnessed judge Gillert roll his eyes on more than one occasion in response to questions, objections or statements by Mr. Adams. I never witnessed this behavior in response to Mr. Rush.

(See Exhibit D11)

Leon Graham, Kimberly Graham's father, said "You can't imagine how I felt, sitting there as a parent, thinking and feeling that the judge has already gotten my daughter convicted before the trial ever began." Mr. Graham's complete description of Judge Gillert's behavior is listed below:

When the defense attorney was talking, the judge would sometimes cover his face with both hands. Sometimes he would smirk. Sometimes put his hand on the side of his head as if he was shielding his view of the defense attorney. The judge's reactions were negative against and biased against the defense lawyer and the defense. When the defense attorney would object or use the word "objection" it was very easy to hear the sarcasm in the judge's voice when he would respond.

When the DA was speaking, the judge would act totally different. He would sit up straight and act as though he was listening and paying close attention as to what he was saying. The judge treated the prosecutor with respect and treated the defense lawyer with disrespect.

You can't imagine how I felt, sitting there as a parent, thinking and feeling that the judge has already gotten my daughter convicted before the trial ever began.

(See Exhibit D12)

Mildred Graham is the mother of Kimberly Graham. Mildred Graham described Judge Gillert's behavior when defense counsel was speaking. "When Mr. Adams spoke, Judge Gillert slump in his chair and cover his face with his hands. Judge Gillert's tone of voice was sharp and impatient for Mr. Adams." Mildred graham also stated that "It is my opinion that Judge Gillert

did not give my daughter Kimberly Graham a fair trial. In my opinion he was biased in his actions and his words.” Mildred Graham’s complete description of Judge Gillert’s behavior is listed below:

Judge Gillert was respectful and attentive when Mr. Rush spoke. He would sit straight in his chair and make eye contact with courtroom. When Mr. Adams spoke, Judge Gillert slump in his chair and cover his face with his hands. Judge Gillert’s tone of voice was sharp and impatient for Mr. Adams.

It is my opinion that Judge Gillert did not give my daughter Kimberly Graham a fair trial. In my opinion he was biased in his actions and his words.

(See Exhibit D13)

Counsel could produce several more affidavits that described Judge Gillert’s behavior in a similar manner. If the state or Judge Gillert takes the position that the above described behavior did not occur than counsel request the opportunity to conduct an evidentiary hearing during which counsel would present the above witnesses and others who witnessed Judge Gillert’s behavior throughout this trial. If the position is taken that this behavior, by Judge Gillert did not occur, counsel also request the opportunity to subpoena members of the bar, who would be reluctant to come forward voluntarily, that under oath would testify that Judge Gillert has acted similarly in past trials and has a reputation for acting in the manner as described above.

As stated by the Oklahoma Court of Criminal Appeals in *Stouffer v. State*, 2006 OK CR 46, paragraph 10, 147 P.3d 245, 256 (Okla. Crim. App., 2006):

We recognize that every defendant is entitled to an impartial judge. *Tumey v. Ohio*, 273 U.S. 510, 533, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927). When a defendant shows that a judge is not impartial, reversal is automatic — a defendant need not show prejudice. *Chapman v. California*, 386 U.S. 18, 24 and fn. 8, 87 S.Ct. 824, 828 and fn. 8, 17 L.Ed.2d 705 (1967).

Counsel believes that the affidavits attached and an evidentiary hearing in which Counsel will produce these witnesses and others, if the allegations are disputed, clearly establish Judge

Gillert's bias and impartiality throughout the entire trial of Kimberly Graham. However, counsel feels ethically obligated to continue with the analysis further.

During the jury deliberation of this matter the jury sent out a note to the Court. Counsel has never seen the note, but it is his understanding that the note asked a question concerning whether the sentences would be consecutive or concurrent. Counsel first learned of the note after walking into Judge Gillert's office area after the jury had been deliberating for some time.

When counsel walked into the Judge's office area Judge Gillert was talking with Jerry Truster, a local attorney. Counsel inquired whether or not there had been any communication with the jury. Judge Gillert responded that approximately forty-five minutes before that the jury had sent out a note asking whether the sentences would be consecutive or concurrent. The Court informed counsel that he told the jury that they had all the law and the evidence. Counsel asked Judge Gillert whether he was being serious or whether he was joking. Judge Gillert assured counsel he was being serious. Counsel was never informed of the note or given an opportunity to suggest or argue what the jury should be told in response to the question.

Counsel notes for the record that the note was not accurate, the jury had not been instructed regarding concurrent or consecutive sentences. In a previous case when faced with a similar note Counsel requested that another Tulsa County Judge inform the jury how the Judge intended on running the sentences. (State v. Courtney Tracy, Tulsa County Case CF-2006-1534) When counsel made the request that trial judge complied with the request.

Counsel left the judge's office area and sat on a bench outside the office. When Jerry Truster exited the office area counsel inquired whether or not Jerry Truster and the Court had been discussing counsel's case. Jerry Truster informed counsel they had been not. Counsel then told Jerry Truster that the reason counsel asked Judge Gillert whether or not he had been joking

or not was because counsel detected what he believed was the slightest smile when the Court told counsel about the note. Counsel and Jerry Truster then sat outside and discussed the case for a few minutes until Jerry Truster had to leave.

Counsel has never had a judge in either State or Federal Court respond to a jurors question regarding a matter of law without first inquiring of both the defense and the state. Counsel was able to locate a United State Supreme Court decision on point.

Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object.

Shields v. United States, 273 U.S. 583, 588 (1927)

While counsel has been unable to locate a case in Oklahoma on point, the America Bar Association standards provide the following:

Standard 15-5.3. Additional instructions

(a) After the jury has retired to deliberate, the court should have no communication of any kind with the jurors, until counsel have been notified of the proposed communication, and have had an opportunity to be heard on any issues arising.

(See American Bar Association standard 15-3, Additional instructions)

Counsel was not notified of the note and was not given an opportunity to respond. This is a case with multiple counts and compelling arguments concerning whether any sentence on those counts should be run consecutively or concurrently. The jury was not instructed properly on the current state of the law, which would have been that it will be up to trial Court to make that determination. The jury had no instructions regarding consecutive or concurrent nature of the charges.

Counsel points out that it appears at least to counsel that the jury intended the sentences to run concurrently. The reason counsel argues this is because the jury convicted Ms. Graham of five counts of manslaughter and gave her 20 years per count. The jury was instructed as to the 85% rule. If the jurors would have intended for the sentences to run consecutively why would they have accessed a 7 year sentence for leaving the scene of a fatality accident? Based upon the Court's instructions, if the jury believed the sentences would run consecutively, a 7 year sentence instead of a 10 year sentence on leaving the scene of a fatality accident would be meaningless.

For the record Counsel has tried four other jury trials in front of Judge Gillert and has never had Judge Gillert instruct the jury on a substantive issue of law without first consulting counsel.⁵

Conclusion on Judicial Basis

It cannot be disputed that Kimberley Graham was entitled to a fair and impartial judge during her trial. (*see Tumey v. Ohio*, 273 U.S. 510, 433, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927; *see also Chapman v. California*, 386 U.S. 18, 24 and fn.8, 87 S.Ct. 824, 828 and fn.8, 17 L.Ed.2d 705 (1967) Counsel believes that the affidavits attached to this motion and the arguments made within this brief clearly establish that Judge Gillert displayed open bias against and contempt for the defense throughout the entire trial. Not only do the affidavits establish his impartiality and bias demeanor against the defense, but they describe his negative body language, negative tone of voice, the rolling of his eyes, the placing his head in his hands, the sarcasm and general disrespectful tone towards the defense throughout the entire trial.

⁵ State v. Clem, CF-2001-6080; State v. White, CF-2002-401, State v. Lay, CF-2004-2320, State v, James, CF-20043354

Furthermore, Judge Gillert made a ruling concerning jury selection that was exactly opposite of more than fifteen years of established law, made a racially insensitive remark towards Kimberly Graham and ruled upon the defense's written demur without fully reading it or even requiring the state to respond. Furthermore, Judge Gillert responded to the jury's questions without giving counsel an opportunity to be present and to object, an action that denied Ms. Graham of her Right to Due Process and her Right to counsel. Judge Gillert's actions in not consulting Counsel regarding the jury note flies in the face of over 80 years of established law.

Certainly it cannot be said that Judge Gillert, who has been an attorney almost as long as Counsel has been alive, did not know that he was committing error. Judge Gillert is a former First Assistant prosecutor and has been a Judge for many years. Counsel believes that his rulings regarding Ms. Graham not being entitled to a race neutral reason because she is "white"; his refusal to require the state to provide a race-neutral reason for their preemptory strikes of the only two minority jurors remaining on the jury; his racially insensitive remarks; his failure to fully read and consider counsel's written demurrer; his failure to require the state to answer the defense's demurrer—opting instead to answer for the state; and his decision to answer the jury's note without informing counsel and giving counsel an opportunity to respond simply evidences what his body language and tone displayed throughout the trial. That he was biased against the defense during Ms. Graham's trial.

When a defendant shows that a judge is not impartial, reversal is automatic – a defendant need not show prejudice; see also *Stouffer v. State*, 2006 OK CR 46, 147 P.3d 245, 256 (Okla. Crim. App., 2006)). Counsel believes that both lack of impartiality and prejudice occurred

during Ms. Graham's trial. Counsel request that, whichever judge that rules on this motion grant Ms. Graham a new trial.

Our system of justice is too precious, our freedoms are too valuable and our Constitutional Rights came at too great of a price to allow Ms. Graham's conviction to stand under these circumstances.

Trial judges are responsible for protecting and upholding the honor, dignity, and integrity of the proceedings held before them.....The total failure to constrain this prosecutor, combined with the obvious annoyance displayed by the court that defense counsel was "interrupting the flow" of the State's argument, suggests that the trial judge may have forgotten, at least momentarily, where she was sitting and what she was wearing.

Mitchell v. State, 2006 OK CR 20, 102 (Okla. CR. 2006)

CONCLUSION

Counsel specifically reserves the right to raise other issues on appeal of this matter and in reliance with *Runnels v. State, 1995 OK CR 27, 896 P2d 564, 565 (OK CR 1995)* has chosen to file this motion the issues contained without waiving the right to raise addition issues on appeal.

Counsel does not file this motion lightly. Counsel tried his first jury trial in front of Judge Gillert; at the conclusion of that trial Judge Gillert was kind and gave counsel welcomed direction and advice. Counsel has tried other cases in front of Judge Gillert in the past, in which Judge Gillert was tolerant and fair to all parties involved. This motion for new trial was filed after careful consideration and much hesitation. Counsel simply could not resolve his ethical duty to his client

with his personal desire not to file this motion. Counsel's obligation to his client must prevail.

For all of the reasons stated above, both collectively and independently, Counsel request that the Court grant Ms. Graham a new trial; and order that the charges of First Degree Manslaughter be dismissed and that the state be directed to instead file charges of Negligent Homicide.

Respectfully Submitted,



Kevin Adams, OBA# 18914
Attorney for Kimberly Graham
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Office (918) 582-1313
Facsimile (918) 582-6101
Cell (918) 230-9513

CERTIFICATE OF DELIVERY

I hear by certify that a copy of the foregoing instrument was mailed or delivered on April 9, 2009 to the office of the following:

Jason Rush
Assistant Tulsa County District Attorney
500 S. Denver
Tulsa, OK 74103

Judge Gillert
Assistant Tulsa County District Attorney
500 S. Denver, Room 406
Tulsa, OK 74103



Exhibit A

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IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
 vs.) Case No. CF 07-5987
)
 KIMBERLY ELIZABETH GRAHAM,)
)
 Defendant.)

PARTIAL TRANSCRIPT OF JURY TRIAL
(PEREMPTORY CHALLENGES ON MARCH 10, 2009)
HELD MARCH 9-12, 2009
BEFORE THE HONORABLE TOM C. GILLERT
IN TULSA, TULSA COUNTY, OKLAHOMA

* * * * *

COPY

APPEARANCES:

FOR THE STATE: MR. JASON RUSH
District Attorney's Office
Tulsa County Courthouse
500 South Denver
Tulsa, OK 74103

FOR THE DEFENDANT: MR. KEVIN ADAMS
MR. ROB HENSON
406 South Boulder, Suite 400
Tulsa, OK 74103

REPORTED BY: JANA HARRINGTON, CSR, RPR
Tulsa County Courthouse
500 South Denver, Suite 405
Tulsa, OK 74103

P R O C E E D I N G S

(The following proceedings occurred on March 10, 2009 following voir dire:)

THE COURT: Let's go back on the record. This is a hearing held outside the presence of the jury to exercise the peremptory challenges.

And, Mr. Rush, on behalf of the State of Oklahoma, your first challenge.

MR. RUSH: Judge, the State would like to strike Juror No. 6, Mr. Ramirez-Flores.

MR. ADAMS: And, Your Honor, we would ask a nonrace-based reason for that.

THE COURT: No, there doesn't need to be one. There's no reason for it.

Is it Flores-Ramirez or Ramirez-Flores?

MR. RUSH: Judge, I don't know.

THE CLERK: The card has Flores-Ramirez.

THE COURT: Flores-Ramirez.

MR. RUSH: I just had him as Juror No. 6, Judge.

THE COURT: First challenge on behalf of the defense.

MR. ADAMS: No. 1, Gayle Reece.

THE COURT: Second challenge on behalf of the State.

MR. RUSH: No. 13, Mr. Garland.

MR. ADAMS: Once again we would request a nonrace-based reason.

1 THE COURT: Ms. Graham is white. There is no reason
2 for them to be giving a race neutral reason for Hispanic or
3 for Mr. Garland.

4 MR. ADAMS: Your Honor, for the record Ms. Graham is
5 Native American.

6 THE COURT: Well, nobody would know that, but it
7 doesn't really matter anyway.

8 Second challenge on behalf of the defense.

9 MR. ADAMS: No. 9, David Smith.

10 THE COURT: Mr. Smith.

11 Third challenge by the State.

12 MR. RUSH: No. 11, Ms. Haire.

13 THE COURT: Third challenge by the defense.

14 MR. ADAMS: And what point is the jury to?

15 THE COURT: Say again?

16 MR. ADAMS: What point are we to in the jury?

17 THE COURT: Third challenge.

18 MR. ADAMS: No. 15, No. 16, No. 17? I'm just asking
19 what point we're to in the box. The jury rotates, the first
20 12.

21 THE COURT: Your alternate right now is the last
22 person that was called. And so let me see. That would be Mr.
23 Denton. Mr. Denton is the last person, the next-to-last
24 person is Mr. Hope.

25 MR. ADAMS: We would strike No. 16, Mr. Brant.

1 THE COURT: Mr. Brant.
2 Fourth challenge by the State.
3 MR. RUSH: Judge, No. 14, Mr. Johnson.
4 THE COURT: Mr. Johnson.
5 Fourth challenge by the defense.
6 MR. ADAMS: No. 20, Monica Bradley.
7 THE COURT: Ms. Bradley.
8 Fifth challenge by the State.
9 MR. RUSH: No. 5, Mr. Hope.
10 THE COURT: Mr. Hope.
11 Fifth challenge by the defense. And, again, by way
12 of reminder, it's Denton and then Baker are the last two.
13 MR. ADAMS: Ms. Baker being on the jury and Mr.
14 Denton being the alternate?
15 THE COURT: Yeah, he's the last. As we stand now, he
16 would be the alternate.
17 MR. ADAMS: No. 10, Ms. Horton.
18 THE COURT: Ms. Horton.
19 All right. And as I discussed, Mr. Denton, having
20 been the last one called, is at least at this point the
21 alternate. You have a challenge to the alternate.
22 The State of Oklahoma?
23 MR. RUSH: We'd waive, Judge.
24 THE COURT: Challenge to Mr. Denton as the alternate.
25 MR. ADAMS: We would exercise our challenge to Mr.

1 Denton.

2 THE COURT: Okay. We need to bring everybody back in
3 and call an additional juror.

4 (END OF PROCEEDINGS REQUESTED TO BE TRANSCRIBED)

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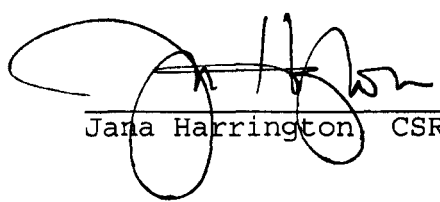
C E R T I F I C A T E

STATE OF OKLAHOMA)
) SS
COUNTY OF TULSA)

I, Jana Harrington, a Certified Shorthand Reporter in and for the State of Oklahoma, do hereby certify that the foregoing partial transcript of proceedings heard on March 10, 2009, in the city of Tulsa, Tulsa County, Oklahoma, in the matter of State of Oklahoma vs. Kimberly Elizabeth Graham, Case No. CF 07-5987, transcribed from my machine shorthand notes, is true and correct to the best of my ability.

I am not an attorney for or a relative of either party.

IN WITNESS WHEREOF, I have hereunto set my hand and stamp this 19th day of March, 2009.



Jana Harrington, CSR, RPR

My Commission Expires:
December 31, 2010

JANA HARRINGTON
Oklahoma Certified
Court Reporter
Exp. 12/31/2010

Exhibit B



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
TAHLEQUAH AGENCY

Certificate of Degree of Indian Blood

This is to certify that Kimberly Elizabeth Graham

born 9/6/1970 is 1/16 degree Indian blood
of the Cherokee Tribe.

4/13/89

Date

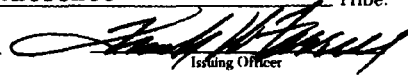

Issuing Officer

Exhibit C

FEB 28 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

CLONNIE A. LAYMAN,)	
)	
Appellant,)	NOT FOR PUBLICATION
v.)	Case No. F-2004-198
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

In McIntosh County District Course Case No. CF-2002-159, Clonnie Layman was tried by jury and convicted of Count I: Trafficking in Illegal Drugs (Methamphetamine) in violation of 63 O.S.Supp.2002, § 2-415, after former conviction of a felony and Count II: Driving Under the Influence of Alcohol in violation of 47 O.S.2001, § 11-902. The Honorable Gene F. Mowery sentenced Layman to life imprisonment and a \$200,000.00 fine for Count I and one (1) year imprisonment and a \$1000.00 fine for Count II to be served concurrently. Layman appeals these Judgments and Sentences.

Layman raises the following propositions of error:

- I. The trial court committed reversible error by allowing the State to exercise a peremptory challenge against a minority juror without establishing a race-neutral reason Mr. Layman was denied an impartial jury composed of a fair cross section of the community in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.
- II. Instructional error left Appellant's jury without proper guidance on a clearly established lesser offense to Count II, which denied Mr. Layman a fair trial.

- III. Mr. Layman was unfairly prejudiced by the admission of irrelevant evidence regarding typical methamphetamine prices and amounts sold and submitted to the O.S.B.I. in unrelated drug cases.
- IV. Irrelevant, improper, and misleading evidence resulted in an inflated sentence.
- V. The instruction regarding the fine for trafficking was incorrect, prejudicial and should be modified.
- VI. Error at Mr. Layman's trial resulted in an excessive sentence, especially in light of the significant mitigating evidence presented on his behalf.
- VII. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find Layman is entitled to a new trial. We find in Proposition I that the trial court erred in not requiring the State to assert a race-neutral reason for excluding Juror Warrior with a peremptory challenge.¹ We do not address Propositions II, III, IV, V, VI and VII due to the relief recommended in Proposition I.

Decision

The Judgments and Sentences of the District Court are **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

¹ The trial court erroneously overruled Layman's objection by finding that Layman could not challenge Juror Warrior's exclusion because Layman was white and Juror Warrior was black. This is not the standard. *Green v. State*, 862 P.2d 1271, 1272 (Okl.Cr.1993)(racial identity between accused and a prospective juror is not a precondition to a *Batson* challenge).

ATTORNEYS AT TRIAL

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P.O. BOX 54153
TULSA, OKLAHOMA 74145
ATTORNEY FOR DEFENDANT

GREG STIDHAM
KAREN VOLZ
ASSISTANT DISTRICT ATTORNEYS
MCINTOSH COUNTY COURTHOUSE
EUFAULA, OKLAHOMA 74432
ATTORNEYS FOR THE STATE

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCURS IN RESULTS
JOHNSON, J.:	CONCURS
LILE, J.:	DISSENTS

ATTORNEYS ON APPEAL

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ATTORNEY GENERAL OF OKLAHOMA
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112 STATE CAPITOL
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

Exhibit D

STATE OF OKLAHOMA)
) ss
COUNTY OF TULSA)

I, Frank Hail, of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) on March 11th and 12th, 2009.

To Whom It May Concern:

I am writing this letter to voice my opinion of what I saw at the trial of Kimberly Graham on March 10th thru 12th in Tulsa OK. Court house.

I was there from the time the opening statements were given until the jury delivered the verdict. The thing that bothered me the most, was when the prosecuting attorney would speak the judge would listen and be very polite. But when the defense attorney, Mr. Adams would speak to him he acted very rude and even would cover his face with his hands like he was asleep and even showed disrespect by showing a smirky sort of "I can't believe you would say or go there" type of smile. I saw this happen so many times throughout this trial. When it first happened, I thought to myself that was rude for a Judge to do when someone's life is on the line. I wasn't a juror but if I had been I think that would or could have influenced my memory of that certain piece of evidence. Also when Mr. Adams would ask the Judge something I would get a feeling that he just wanted to hurry up and get this over, like it was a done deal. Then I kept noticing it happening nearly every time the defense lawyer was talking.

I just wanted to say what was in my heart. I know that if I was in her shoes or anyone else's, I would and you would also want the jury to form its own opinion from the facts not glares and faces.

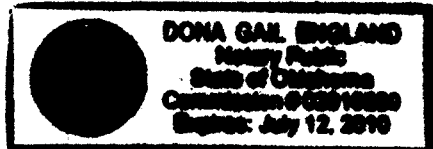
Also the judge said himself that he had received a note from the jury asking if sentence would run continuous or concurrent meaning they weren't sure what that meant and he said he told them you have the instructions with you read them instead of clarifying it for them.

Thank you for listening.
Frank Hail
(918) 476-4916

Frank L. Hail
FRANK L. HAIL

SUBSCRIBED AND SWORN to before me this 8 day of April, 2009.

Dona Gail England
Notary Public



STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Rachell Belden of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) I attended the trial proceedings of Kimberly Graham except for Monday.

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

While the defense lawyer was talking judge Gillert would place his forehead in the palm of his hand looking downward and other times he would place both his hands on his forehead in the same manner. Judge Gillert did not exhibit this behavior when the prosecution was talking. The judge was extremely attentive in what the prosecuting attorney had to say.

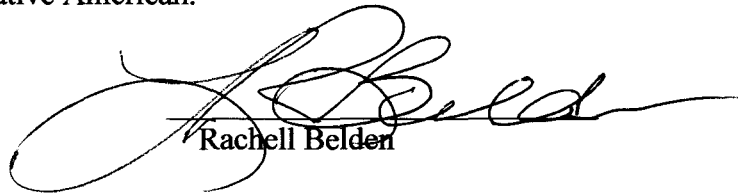
While speaking and interacting with the defense lawyer judge Gillert treated Mr. Adams with disrespect and contempt. While dealing with the prosecuting attorney judge Gillert treated him with courtesy and respect. Judge Gillert was obvious with his behavior in front of the jury.

Judge Gillert even treated the defense witnesses worse than he treated the prosecuting witnesses.

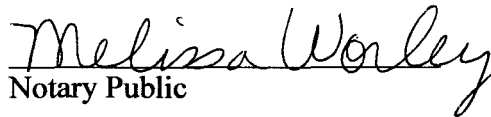
I began watching the judge's expressions on Wednesday after I began to notice what I would describe a clear bias against the defense.

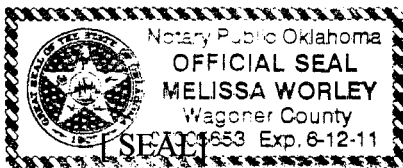
The way the judge conducted himself during the trial gave me the feeling that he had already determined that Kimberly Graham was guilty and he did not want to hear the defense's side of the case. The judge's behavior seemed very unprofessional and one-sided.

During the jury selection when Ms. Graham's attorney asked for a reason the state was striking the minorities from the jury the judge reacted in an openly disrespectful manner in an angry tone and said that Ms. Graham was not entitled to a reason because she was "white". When Ms. Graham's attorney informed the judge that Kimberly Graham was Native American he was dismissive when he said that nobody would know she was Native American.


Rachell Belden

SUBSCRIBED AND SWORN to before me this 8 th day of April, 2009.


Notary Public



My commission expires:

6-12-11

STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Christopher Belden of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) I attended the trial proceedings of Kimberly Graham on Wednesday afternoon.

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

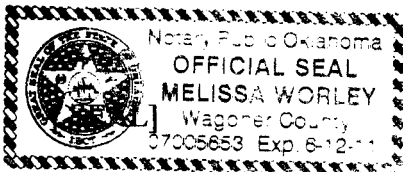
While the defense lawyer was talking judge Gillert would rub his face with his hand, he would act disrespectful towards the defense lawyer acting as if the defense lawyer was wasting everybody's time. The judge act interested in what the prosecuting attorney had to say and did not treat the prosecutor with disrespect.

During the trial I watched the jury and I observed them paying attention to the judge's reactions.

Christopher S. Belden
Christopher Belden

SUBSCRIBED AND SWORN to before me this 8 th day of April, 2009.

Melissa Worley
Notary Public



My commission expires:

6-12-11

STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Teresa Replogle of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) during Tuesday through Thursday of the trial.

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

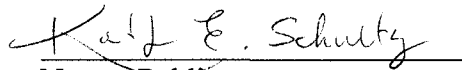
I witnessed Judge Gillert acting disinterested while the defense counsel was talking. I feel that his disinterest was greater during the closing argument of Defense counsel. The judge acted very disrespectful towards defense counsel throughout the portion of the trial that I witnessed. I even heard Judge Gillert comment to defense counsel that his closing argument should not take "that long" because "nobody is that good." When Judge Gillert said that his was very flippant.

While the prosecuting attorney was talking the judge would pay attention to what he said. I did not witness Judge Gillert acting disrespectful towards the district attorney.

In my opinion Judge Gillert's behavior was obvious to anyone in the courtroom..


Teresa Replogle

SUBSCRIBED AND SWORN to before me this 8 th day of April, 2009.


Notary Public

KATHRYN E. SCHULTZ
NOTARY PUBLIC--STATE OF OKLAHOMA
CREEK COUNTY
My COMMISSION EXPIRES Aug. 25, 2012
COMMISSION #08008746
[SEAL]

My commission expires:

Aug. 25, 2012

STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Cindy Merryman of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) on March 11th and 12th, 2009.

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

I witnessed Judge Gillert place his head in his hands numerous times, shifting back and forth in his chair, shifting to one side and then to the other repeatedly. This occurred whenever Mr. Adams was questioning witnesses and during Mr. Adams's closing argument. I also witnessed the judge roll his eyes as if Mr. Adams was wasting his time on one occasion.

While the prosecuting attorney was talking the judge would sit up in his chair and was very attentive. While the prosecutor was talking the judge would watch the jury and their reactions and watch the reactions of the audience. The Judge would did not act attentively while Mr. Adams was talking and appeared openly disinterested.

I also witnessed him tell Mr. Adams, when discussing the closing arguments, that nobody is that good and he stated words to the effect that if Mr. Adams went to long in his closing that he would make him hurry up.

In my opinion he exhibited open and obvious bias against Mr. Adams and the defense throughout the entire trial that I witnessed. I even commented, during the trial and before the verdict, to members of Kimberly's family and to my husband that the judge appeared biased against the defense. After the trial my exact words to my husband was that the behavior of the judge was "pitiful".

In my opinion his bias would have been obvious to anyone in the courtroom. In my opinion his behavior appeared to be unprofessional.

Cindy Merryman
Cindy Merryman

SUBSCRIBED AND SWORN to before me this 25th day of March, 2009.

[Signature]
Notary Public

[SEAL]

My commission expires:

6/20/09

STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Warren Ragsdale of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) I attended the trial proceedings on March 11th and March 12th.

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

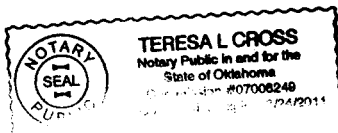
The judge did not appear to be interested in the trial and what the attorney for Ms. Graham had to say. He appeared interested in what the prosecutor had to say. Many times when the defense was talking judge Gillert would look out the window or have weird expressions on his face like in disbelief or contempt. He would gaze out the window for periods of time with a "smirk" on his face. His lips were very tight and almost tight and almost in a smile. He would rock his chair very quickly when the attorney for Ms. Graham was speaking. He even put his head in his hands during the closing argument by Ms. Graham's attorney for minutes at a time. His tone was negative when talking towards the defense attorney. The judge's mannerisms were completely different when the different sides were speaking.

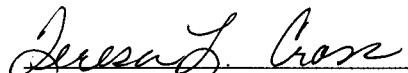
The judge did not show any disrespect or contempt for the prosecution, but he did for the defense.

I am related to Kimberly Graham I am her uncle.


Warren Ragsdale

SUBSCRIBED AND SWORN to before me this 8 th day of April, 2009.




Notary Public

[SEAL]

My commission expires:

8/24/2011

STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Denney Merryman of lawful age, being first duly sworn upon oath, states that:

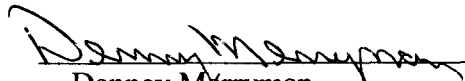
I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) during the last two days of the trial.

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

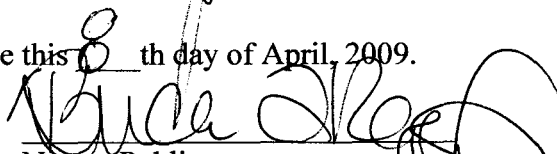
I witnessed Judge Gillert rubbing his eyes, scribbling on his pad, looking around, placing his head in his hands while defense counsel was talking. He gave the impression that defense counsel was wasting his time. In my opinion Judge Gillert's actions expressed an open bias against the defense. This occurred whenever Mr. Adams was questioning witnesses and during Mr. Adams's closing argument. The judge acted very disrespectful towards defense counsel throughout the portion of the trial that I witnessed. I even heard judge Gillert comment to defense counsel that his closing argument should not take "that long" because "nobody is that good."

While the prosecuting attorney was talking the judge would sit up in his chair and pay attention like he was interested in what he had to say. I never witnessed Judge Gillert acting disrespectful towards the district attorney.

In my opinion his bias would have been obvious to anyone in the courtroom. In my opinion his behavior was very unprofessional. It was my opinion that the judge's behavior created a negative environment towards the defense during the trial and effected the outcome of the trial.

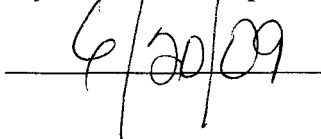

Denney Merryman

SUBSCRIBED AND SWORN to before me this 8th day of April, 2009.


Notary Public

[SEAL]

My commission expires:



STATE OF OKLAHOMA)
COUNTY OF ROGERS *Wagon*) ss.

Carli Reimer of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) I attended the entire trial. .

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

I witnessed Judge Gillert treat the defense attorney disrespectfully while the defense attorney was acting respectful towards the judge. I never saw Judge Gillert act disrespectfully towards the prosecuting attorney.

The Judges' behavior was sarcastic at times towards Mr. Adams in front on the jury on more than one occasion.

When the prosecutor was talking the judge would sit up in his seat and act very interested in what was being said. However, when the defense attorney was talking judge Gillert would appear disinterested and bored. Judge Gillert would rub his forehead, rub his head and place his hands behind his head all while the defense lawyer was talking.

I witnessed judge Gillert roll his eyes and have long exhales of air like he was bored and the defense attorney was wasting his time.

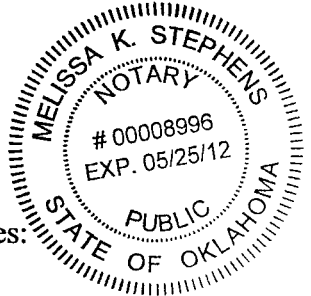
It appeared to me that the judge showed favorable bias towards the prosecutor and negative bias against the defense throughout the trial. In my opinion his behavior was the worst while Kimberly Graham was testifying.

I am not related to Kimberly Graham, I have never spoken to her, my husband is her pastor.

Carli Reimer
Carli Reimer

SUBSCRIBED AND SWORN to before me this 8th day of April, 2009.

Melina K. Stepls
Notary Public



[SEAL]

My commission expires:
5/25/12

STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Carol Munsie of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) I attended the entire trial except for Monday.

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

I witnessed Judge Gillert treat the defense attorney with disrespect. Judge would turn his head like he was not listening and could care less about what was going on while the defense was talking, the tone of the judge's voice while talking to the defense was totally different with the two sides; showing his respect for one side and lack of respect for the other. It was the defense he showed a lack of respect for and the prosecution he showed honor for.

I witnessed the judge roll his eyes several times while defense was talking. I witnessed judge Gillert deeply exhale several times while the defense was talking, thereby showing his disapproval and disgust with the defense.

I never witnessed judge Gillert exhibit negative behavior, like the rolling of eyes or the deep exhaling, while the prosecutor was talking, judge Gillert's body language was approving of all that the prosecutor would say or do.

I was concerned during the trial because of the judge's behavior. I told myself that it was ok because he did not like the defender and defendant because he was not going to make the decision the jury was. Now with reflection I feel that if I could see what the judge thought by his tone of voice and body language then surely the jury could as well and I am concerned that it affected their judgment even if subconsciously.

I am not related to Kimberly Graham, I know Kimberly Graham because I am friends with her mother. I attended the trial for moral support.

Carol A Munsie
Carol Munsie

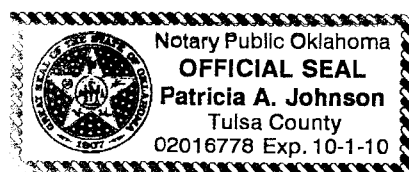
SUBSCRIBED AND SWORN to before me this 8th day of April, 2009.

Patricia A. Johnson
Notary Public

[SEAL]

My commission expires:

10-1-10



STATE OF OKLAHOMA)
)
COUNTY OF ~~ROGERS~~ *Wagon*) ss.

Leonard Reimer of lawful age, being first duly sworn upon oath, states that:

I attended the trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987) I attended the entire trial. .

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

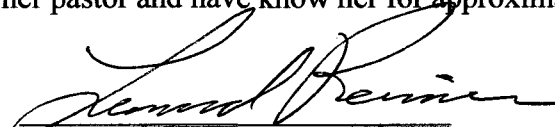
Judge Gillert's actions and words did not demonstrate that he was being fair. I felt that Judge Gillert's responses to attorney Adams were short and abrupt. Judge Gillert's behavior was openly disrespectful to the defense. Judge Gillert was not act disrespectful to the prosecuting attorney. Whenever attorney Adams attempted to say something whether it was an objection or in addition the judge would act disgusted, like it was out of place or should not be happening. Judge Gillert would not do that with the prosecuting attorney. While the prosecutor was talking the Judge would show real interest in what he had to say. Judge Gillert acted as if he wanted to root for or congratulate the prosecuting attorney.

Especially in the closing statements Judge would listen to the prosecuting attorney with interest and a smile on his face and he would place his hand on his chin as if to say that he felt the prosecuting attorney was doing a good job. Whenever Mr. Adams was talking Judge Gillert would look away, show open disinterest, he would even huff (a long exhale). Whenever Mr. Adams would hit a favorable fact for the defense the judge would react negatively.


I told Kimberly's father the first day of the trial that I was very concerned about the manner in which the judge was acting. And as a result I began watching his reactions closely.

In my opinion Judge Gillert's behavior was obvious to anyone in the courtroom.

I am not related to Kimberly Graham, I am her pastor and have know her for approximately a year.


Leonard Reimer

SUBSCRIBED AND SWORN to before me this 8th day of April, 2009.


Notary Public

[SEAL]

My commission expires:

5/25/12



STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Catherine Graham of lawful age, being first duly sworn upon oath, states that:

I attended the entire trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987).

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

During the trial judge Gillert displayed much disrespect in his actions towards Kevin Adams. Throughout the closing statement judge Gillert would look away, for several minutes at a time, would have his head down, with his head in his hands. The tone of judge Gillert's voice was sarcastic and demeaning towards Mr. Adams. Judge Gillert acted that way towards Mr. Adams throughout the entire trial.

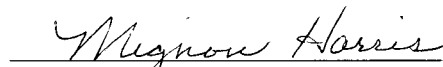
The judge appeared one-sided in favor of the prosecution, he would pay attention to what the prosecutor had to say. The judge did not act disrespectful towards the prosecutor. Judge Gillert did not act sarcastic or demeaning towards the prosecutor like he did to Mr. Adams. Judge Gillert's behavior was obvious throughout the entire trial to anyone in the courtroom.

I witnessed judge Gillert roll his eyes on more than one occasion in response to questions, objections or statements by Mr. Adams. I never witnessed this behavior in response to Mr. Rush.

I am the sister of Kimberly Graham.


Catherine Graham

SUBSCRIBED AND SWORN to before me this 8 th day of April, 2009.


Notary Public

[SEAL]

My commission expires:

10/16/2010

STATE OF OKLAHOMA)
) ss.
COUNTY OF ROGERS)

Leon Graham of lawful age, being first duly sworn upon oath, states that:

I attended the entire trial proceedings of Kimberly Graham (Tulsa County Case No. CF-2007-5987).

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

When the defense attorney was talking, the judge would sometimes cover his face with both hands. Sometimes he would smirk. Sometimes put his hand on the side of his head as if he was shielding his view of the defense attorney. The judge's reactions were negative against and biased against the defense lawyer and the defense. When the defense attorney would object or use the word "objection" it was very easy to hear the sarcasm in the judge's voice when he would respond.

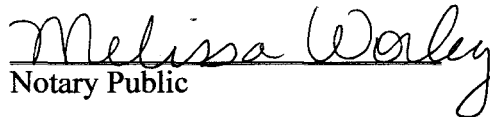
When the DA was speaking, the judge would act totally different. He would sit up straight and act as though he was listening and paying close attention as to what he was saying. The judge treated the prosecutor with respect and treated the defense lawyer with disrespect.

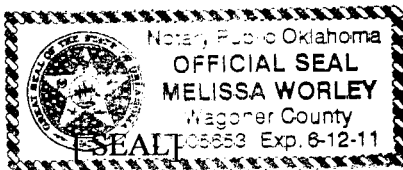
You can't imagine how I felt, sitting there as a parent, thinking and feeling that the judge has already gotten my daughter convicted before the trial ever began.

I am the father of Kimberly Graham.


Leon Graham

SUBSCRIBED AND SWORN to before me this 8 th day of April, 2009.


Notary Public



My commission expires:

6-12-11

STATE OF OKLAHOMA)
) ss.
COUNTY OF WAGONER)

Mildred Graham of lawful age, being first duly sworn upon oath, states that:

I attended the entire trial proceedings of my daughter, Kimberly Graham (Tulsa County Case No. CF-2007-5987).

During the proceedings that I observed, I witnessed the following actions by Judge Gillert.

Judge Gillert was respectful and attentive when Mr. Rush spoke. He would sit straight in his chair and make eye contact with courtroom. When Mr. Adams spoke, Judge Gillert slump in his chair and cover his face with his hands. Judge Gillert's tone of voice was sharp and impatient for Mr. Adams.

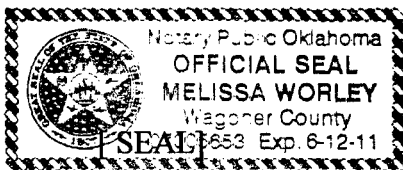
It is my opinion that Judge Gillert did not give my daughter Kimberly Graham a fair trial. In my opinion he was biased in his actions and his words.

I am the mother of Kimberly Graham.

Mildred Graham
Mildred Graham

SUBSCRIBED AND SWORN to before me this 8 th day of April, 2009.

Melissa Worley
Notary Public



My commission expires:

6-12-11