

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES OF AMERICA** :  
 :  
 v. : **CRIMINAL NO. 21-CR-00708 (RCL)**  
 :  
**LEO CHRISTOPHER KELLY,** :  
 **Defendant.** :

**DEFENDANT’S MOTION FOR NEW TRIAL & JUDGMENT OF  
ACQUITTAL**

The defendant, Leo Kelly, through his attorneys, Kira Anne West and Nicole Ann Cubbage, respectfully files this motion for new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. In support thereof, the defendant states as follows:

On May 1<sup>st</sup>, this Court began a jury trial in this case. On May 9, 2023, the jury returned a verdict of guilty against Mr. Kelly, the defendant, on all counts. After the jury was dismissed, undersigned counsel asked permission to speak to members of the jury panel. Undersigned counsel asked permission of the Court’s law clerk and courtroom deputy. Permission was granted. Undersigned counsel spoke to several members of the jury panel in the hallway on the sixth floor of the courthouse. Undersigned counsel asked the jury members if there was anything she could have done differently in presenting the case. Juror number 1437 responded and led the conversation. She said “I used to work at the Capital as an intern, and once you’re in, you’re in. Even I couldn’t go on the floor.” She continued without hesitation: “this is our city. We live here. We know what went on.” This statement was made in the presence of at least 7 other jurors and undersigned counsel to include Ms. Cubbage. Undersigned counsel was aghast at this clearly biased statement. Clearly, juror #1437 had not been forthcoming and honest in her answers to the Court’s voir dire questions. Undersigned counsel ordered the

transcript which reveals the following:

Juror #1437 was questioned individually by the Court. Initially, this Court gave a blanket statement to the entire panel expressing the importance of a fair and impartial jury.

The Court said:

I thank all of you as good citizens being willing to help us pick a fair and impartial jury so that our system can still function even in these post-pandemic times. And the purpose of jury selection today is to select jurors who have no prior knowledge of the case or no bias toward either side of the case. In short, it's our aim to select a jury that will reach a verdict solely on the evidence presented in this on the evidence presented in this courtroom and the law as I instruct you about the law. *See* Exhibit 1, Transcript<sup>1</sup>, p. 4, l. 17-24.... I will ask you a series of questions the lawyers and I think will be helpful to us in selecting a fair and impartial jury. *Id.* at p. 5, l. 1-3. It's important that you be entirely straightforward with us in your responses so that we may more easily select the jury in this case. *Id.* at p. 6, l. 1-3.

The Court continued asking the entire panel a series of questions, and asked these questions about being impartial and unbiased:

No. 9 is real easy hopefully. Do any of you live or work at or near the U.S. Capitol? If you do, say yes to No. 9. *Id.* at p. 13, l. 18-19.

No. 20, do you have strong feelings or opinions about the events that took place at the U.S. Capitol on January 6 that would make it difficult for you to serve as a fair and impartial juror in this case?

No. 21, do you believe that people who are charged with criminal offenses for their participation in the events at the U.S. Capitol are likely guilty of criminal wrongdoing? *Id.* at p. 15, l. 23-25, p. 16, l. 1-4.

[No.] 27, no matter what you have heard or seen about events at the U.S. Capitol on January 6 and no matter what opinions you may have formed, could you put all of that aside and decide this case only on the evidence you receive here in this court, follow the law, and decide this case in a fair and impartial manner? *Id.* at p. 16, l. 22-25, p. 17. l. 1-2.

Do you have any personal beliefs that would make it difficult to follow my legal instructions, whatever they may be? *Id.* at p. 19, l. 14-16.

My final question, No. 40, is the catchall question. This asks whether there is any other reason that I haven't asked about that might make it difficult for you to sit fairly, impartially, and attentively as a juror in this trial. Perhaps you have a religious, moral, or philosophical reason why you believe it would be difficult for you to be fair in this case.

In sum, if there's some other reason it would make it difficult for you to sit as a fair and impartial juror in this trial, I would like to discuss it with you. Put yes to No. 40, and I

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<sup>1</sup> Exhibit 1, attached, is the transcript of the first day of jury selection only.

will talk to you individually about it when I call each of you back. *Id.* at p. 19, l. 25, p. 20, l. 1-10.

When juror number 1437 was due up, this Court questioned her individually based on the questions she answered and wrote down on her individual juror card.<sup>2</sup> She said:

THE COURT: Okay. And you watched this live on TV that day?

A PROSPECTIVE JUROR: Yeah, I was watching the news that morning and working from home and watched it as it all unfolded.

THE COURT: And you did say you thought you could put that aside and decide this case just on the evidence you saw here at the trial, is that right?

A PROSPECTIVE JUROR: Yes, I have served on a jury before, so I have -- you know, aware of how to, like, think about the law and think about the evidence and would like to think I could do that here too.

THE COURT: Okay. Any reason you couldn't be a fair and impartial juror if you were chosen to serve here?

A PROSPECTIVE JUROR: No.

*Id.* at 37, l. 18-25; p. 38, l. 1-7.

The Court pressed on with further questions of this juror giving her every opportunity to tell the parties that she once worked at the Capitol:

THE COURT: Any reason you couldn't follow the law and decide whether this defendant really crossed that line under the instructions I give to this jury?

A PROSPECTIVE JUROR: Yeah.

THE COURT: That's what you would have to do here is decide what the facts are here in this case, whether this defendant really crossed the line of the instructions I would give the jury. Do you think you could do that fairly?

A PROSPECTIVE JUROR: Yeah. I mean, I think that's what the purpose of these trials is, for each individual defendant to plead -- you know, for the government to give their case and defendants to give their case, and for us as the jury to determine that. And that's, you know, why I do think I

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<sup>2</sup> The parties were not given copies of these individual juror cards which were filled out by individual jurors and then collected by the Court for singular examination of each prospective juror. However, because the Court asked each individual juror about each question they noted, one can reconstruct what her answers to certain questions were. Defense counsel requests a copy of this card from juror number 1437 if it still exists.

could be an impartial juror, because on my last jury, I was really impressed with everybody and how thoughtful our jury was at examining the evidence – p. 39, l. 9-25. ...

THE COURT: I have found my juries contentious too.

Now I will ask you the hardest question. If you are sitting over there in his seat, would you want somebody like you on your jury in this kind of case where you have some views?

A PROSPECTIVE JUROR: Yeah, I think so, because like I said, I respect the court systems and I respect the rule of law. I almost went to law school. I didn't end up going, but, you know, I think what we have in this country is really important. *Id.* at 40, l. 7-15.

Later after many other prospective jurors were questioned, Mr. Rosen, the lead AUSA in the case, summed up succinctly what type of juror both sides were after, when he said:

MR. ROSEN: Your Honor, if I may be heard briefly. Obviously there are going to be a ton of people who have experiences with January 6 living in the district. The operative question from our perspective is not whether they had emotions associated with January 6. It's whether they can be fair and impartial.

So I think one of the curative questions that I would at least be interested in asking is if the Court were to impose the rules of law, as Your Honor will do, will they be able to follow your instruction despite their own either personal feelings on the matter or political feelings on the matter, because I think that kind of strikes at the core of ultimately whether a person can be fair.

*Id.* at p. 89, l. 7-19.

Federal Rule of Criminal Procedure 33 provides that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. This motion must be filed within 14 days of the verdict unless, as in this case, the otherwise specified by the Court. Fed. R. Crim. P. 33(b)(2). The decision of whether to grant a motion for new trial is “committed to the sound discretion of the trial judge.” *United States v. Reese*, 561 F.2d 894, 898 (D.C. Cir. 1977). This decision is subject to reversal “only for abuse of discretion or misapplication of the law.” *Id.* The defendant bears the burden of

showing that a new trial is in the “interest of justice.” *Id.* The defendant must show that the error influenced the jury to such a degree that a substantial right of the defendant to be affected.

“The necessity of truthful answers by prospective jurors if this [*voir dire*] process is to serve its purpose is obvious.” *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). In that case, the Supreme Court held that a movant may obtain a new trial by demonstrating “that a juror failed to answer honestly a material question on *voir dire*” and “that a correct response would have provided a valid basis for a challenge for cause.” *Id.*

In this circuit, the court of appeals held after *McDonough* that a district court was “obliged” to conduct a hearing to investigate bias when it was revealed a juror had concealed felon status during *voir dire*. *United States v. Boney*, 977 F.2d 624, 634-35 (D.C. Cir. 1992). While not holding that “any false statement or deliberate concealment” would justify a hearing, the court of appeals observed that a juror’s “serious and sensitive falsehood” suggests a potential bias and ought to be explored. *Id.* Thus, a juror’s concealment of a material and responsive fact during *voir dire* is a factor in determining bias. *See United States v. North*, 910 F.2d 843, 904 (D.C. Cir. 1990) (*per curiam*). Where concealment indicates bias, a new trial is warranted. *Cf. United States v. Williams-Davis*, 90 F.3d 490, 503 (D.C. Cir. 1996) (holding that the defendant had not shown that the dishonest juror was biased, in part because post-trial non-juror testimony indicated that the juror had revealed sympathy for the defendant).<sup>3</sup>

Here, the juror clearly had every opportunity to divulge a material fact that would and did cause bias: her time working in the Capitol. She had intimate knowledge of the layout of

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<sup>3</sup> The D.C. Circuit’s interpretation of *McDonough*, regarding it to require the movant to demonstrate bias, is at odds with other circuit courts’ interpretation that authority. Later and better-reasoned appellate precedents focus on whether a reasonable judge, learning the information the juror failed to disclose in *voir dire*, would have excused the juror for cause, even if disqualification would not have been mandatory. *See Sampson v. United States*, 724 F.3d 150, 165-166 (1st Cir. 2013); *United States v. Parse*, 789 F.3d 83, 100, 111 (2d Cir. 2015). In this case, a truthful response from the juror would have provided a valid basis for a challenge and satisfied such a standard, without inquiry as to the juror’s motive or demonstration of actual bias. Although this Court is bound by existing D.C. Circuit precedent, Defendant Kelly urges that those precedents ought to be reconsidered or reviewed by the circuit court sitting *en banc* or by the Supreme Court and preserves the right to seek such review on appeal.

the crime scene (the Capitol and the grounds around the Capitol), the rules regarding access to the building, and the layout of the building. She may even know people still working at the Capitol that were working on January 6, 2021. This is a fact that this Court could have struck the juror for cause if in fact a follow up question regarding her personal knowledge and experience at the Capitol was allowed based on a truthful answer from the juror. Yet the juror hid this from the Court. And what makes this particularly unfair to Mr. Kelly is that this juror was the foreperson of the jury. The prosecution of J6 cases has been described by the government as the single most important and largest prosecution in history. The juror at issue here is a victim of the J6 riot. Anyone who worked at the Capitol has the life experience of being in the exact same position as everyone present on January 6, 2021. This juror identified personally with the employees of the Capitol, the members of the House and Senate who were present, and the police officers that protected the building. There is no way she was unbiased and this clearly is an example of *per se* bias.

Finally, there was not sufficient evidence presented by the government that a reasonable jury could find beyond a reasonable doubt that Mr. Kelly intended to obstruct a judicial proceeding or that he had knowledge of where any so called perimeter was which was intended to keep out visitors. There was no such evidence presented by the government of Mr. Kelly's intent-no tweet, no email, no text message. The government could not point to any evidence in their closing argument to show that Mr. Kelly intended to obstruct or impede the official proceeding, that he acted knowingly, with awareness that the natural and probable effect of his conduct would be to obstruct or impede the official proceeding or that his actions contributed to the obstruction of any official proceeding. There was no evidence presented that he acted corruptly.

This Court must affirm if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury is "entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation." *United States v. Harrison*, 103 F.3d 986, 991 (D.C.Cir. 1997). Applying a "highly deferential" standard, *United States v. Williams*, 836 F.3d 1, 6 (D.C. Cir 2016), this Court must decide "whether the evidence, considered in the light most favorable to the government, was sufficient to permit a rational trier of fact to find all of the essential elements of the [statute were met] beyond a reasonable doubt." *United States v. Wilson*, 240 F.3d 39, 43, DC.C. Cir. 2001).

Undersigned counsel knows that this Court knows what the elements are of all the offenses charged in this case. As noted *supra*, what is lacking here is any *mens rea* on the part of Mr. Kelly to commit any offense. During trial, the government never presented a shred of evidence that Mr. Kelly intended on going to the Capitol that day or that he had any intention of ending up on the Senate Floor. And all Mr. Kelly did was pray and take photographs, much like Luke Mogelson of the New Yorker Magazine, who has not been prosecuted.<sup>4</sup> As this Court knows from trying so many of these cases and accepting plea agreements in J6 cases, there is generally a mountain of social media, text messages, emails and co-defendant statements that show a defendant's intent. Here, there is none of this.

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<sup>4</sup> Mr. Mogelson actually engaged in much more conduct on the Senate floor than Mr. Kelly, yet he received the George Polk award in Journalism for his reporting. "Last year, when many American streets became conflict zones, *The New Yorker* assigned Mogelson, a veteran war correspondent, to cover the unrest—and help decode it. He published three pieces that, collectively, captured the seismic tumult of 2020: the first a vivid chronicle of the racial-justice uprising in Minneapolis following the killing of George Floyd; the second a portrait of anti-lockdown militias in Michigan; the third an exploration of the battle waged by antifascist activists in Portland against right-wing groups." See *The New Yorker*, **February 24, 2021**. One wonders if Mr. Mogelson sent anyone a text that said #stop the steal. Under the sufficiency of the evidence applied to Mr. Kelly, that was enough to say he was there to obstruct Congress.





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**v.**   :  
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**LEO CHRISTOPHER KELLY,**                   :  
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  :  
**Defendant.**                                       :

**CRIMINAL NO. 21-CR-708(RCL)**

**ORDER**

This matter having come before the Court pursuant to a Motion for new trial, it is  
ORDERED that the parties shall appear for a hearing at \_\_\_\_\_ on  
\_\_\_\_\_, 2023.

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ROYCE C. LAMBERTH  
United States District Judge