

## WHITE-COLLAR CRIME

## Expert Analysis

# Jurors Behaving Badly: How Courts Respond

*Robert G. Morvillo started this column 29 years ago, providing timely and insightful advice for practitioners. Bob passed away unexpectedly in December. This column is not only dedicated to him, but indeed, is the topic he chose prior to his passing.*

By  
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**T**he U.S. Constitution guarantees a criminal defendant the right to a fair trial decided by an impartial jury, the right to due process, and the right to be present at all stages of a trial. On occasion, these guarantees are threatened by the misconduct of jurors selected to hear the case and sit in judgment of the defendant. Even when a juror's actions implicate a defendant's constitutional rights, however, such a violation rarely results in the reversal of a conviction handed down by the panel on which that juror sat. Instead, courts typically uphold the judgment. Indeed, the Supreme Court has stated that "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time...after the verdict, seriously disrupt the finality of the process."<sup>1</sup>

The Second Circuit's recent decision in *United States v. Collins* has helped define the role of the district court in addressing juror conduct.<sup>2</sup> *United States v. Daugerdas*, a case pending in the Southern District of New York where a juror's conduct has been described by the defense as a "monstrous fraud on the court," likely will help define the extent to which a juror's deception during voir dire is reviewable post-trial.<sup>3</sup>

### How Bad Is Bad Enough?

In *Daugerdas*, five defendants were charged with a variety of crimes, including tax evasion, mail and wire fraud, and conspiracy to defraud the United States and the Internal Revenue Service. After an 11-week trial, the jury returned a split verdict, acquitting one defendant of all

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charges and finding the remaining defendants guilty of some or all of the charges against them. After trial, all convicted defendants filed a motion for a new trial based on false information provided by one of the jurors during voir dire.

No dispute exists regarding the factual misrepresentations made by the juror. After informing the court she was a stay-at-home wife with a bachelor's degree, Catherine Conrad was seated as Juror No. 1. Despite numerous inquiries intended to ferret out any bias among the prospective jurors, Conrad failed to reveal that she had received a law degree from Brooklyn Law School, was admitted to the New York bar in 2000, and had been suspended for

an indefinite period of time from the practice of law by the Departmental Disciplinary Committee based on an "admitted problem with alcohol dependency."

Conrad also failed to reveal that: i) she was the unsuccessful plaintiff in a civil personal injury lawsuit; ii) she had been arrested in New York on four occasions for shoplifting and driving under the influence and was serving a three-year term of probation on the shoplifting charges; iii) an outstanding warrant existed for her arrest in Arizona in connection with a disorderly conduct charge in that state; and iv) her husband, described to Arizona police by Conrad as a "Mafia boss in New York," had numerous felony convictions in New Jersey and had been incarcerated a number of times, including for one period in excess of seven years.<sup>4</sup>

The undisclosed information about Conrad came to light after a post-verdict letter sent by Conrad to the prosecution caused the defendants concern and spurred them to conduct a public records search. After discovering the breadth of Conrad's misrepresentations during voir dire, the defendants sought a new trial, arguing that Conrad withheld material information that would have resulted in her being excused from jury service. Specifically, they asserted that "Conrad's failure to respond truthfully to many of the Court's questions obstructed the voir dire process and resulted in Conrad being seated as a juror despite her psychological impairment and bias, thereby depriving defendants of their right to a fair trial."<sup>5</sup>

In *United States v. Colombo*, the Second Circuit previously recognized that a full and fair voir dire is necessary to protect a defendant's right to trial by an impartial jury, finding that: "there must be sufficient information elicited on voir dire to permit a defendant to intelligently

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exercise not only his challenges for cause, but also his peremptory challenges, the right to which has been specifically acknowledged by the Supreme Court....<sup>6</sup> In *McDonough Power Equipment Inc. v. Greenwood*, the Supreme Court held that to obtain a new trial where a juror fails to answer honestly, a party must demonstrate that: 1) a juror failed to answer honestly a material question on voir dire; and 2) a correct response would have provided a valid basis for a challenge for cause.<sup>7</sup>

In *Daugerdas*, the defendants argued that Conrad's behavior met the standard set forth in *McDonough*. First, they asserted that Conrad deliberately lied about her background in a calculated way. Distinguishing cases in which a juror may have misunderstood an arguably ambiguous voir dire question,<sup>8</sup> the defendants stated that the relevant questions put to Conrad were not "vague or ambiguous such that Conrad might not have known she was obligated to disclose the concealed information, particularly given her status as an attorney." Rather, the first prong of the *McDonough* test was satisfied because Conrad's lies were "deliberate, intentional, and material."

As for the second prong of the *McDonough* test, defendants argued that Conrad's persistent lies alone revealed an "impermissible partiality" and a valid basis for challenging her service on the jury. In support of this argument, the defendants cited a Second Circuit decision holding that "a juror's unrestrained willingness to lie about material aspects of her background 'leads to an inference' that she was not able to decide the case 'with entire impartiality,' thereby prejudicing a defendant's right to a fair trial."<sup>9</sup> Further, the defendants argued that the revelation of any of the undisclosed pieces of information during voir dire would have provided sufficient grounds to excuse Conrad from jury service, pointing specifically to Conrad's admitted alcoholism, her negative experience with law enforcement and a law licensing authority, and the outstanding warrant in Arizona.

The government opposed the defendants' motion and the "extraordinary remedy" sought. First and foremost, the government noted the strong judicial policy against post-verdict inquiries into alleged juror misconduct, opining that these types of inquiries undermined finality, a jury's willingness to return an unpopular verdict,

and trust in the jury system.<sup>10</sup> Moreover, the government argued that the defendants had failed to meet the second prong of the *McDonough* test as they had not established that a valid challenge existed had Conrad answered accurately. Specifically, the government stated it was "aware of no case in which a juror's concealment of prior arrests, misdemeanor convictions, or civil judgments against the juror were deemed sufficient to sustain a challenge for cause."

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Further, the government asserted that the fact that a party may have exercised a peremptory challenge to strike the juror had they known all the concealed facts was irrelevant, asserting instead that the court was required to determine only "whether an accurate response at voir dire would have *required* that the juror be excused for cause had a challenge been raised."<sup>11</sup> According to the government, no such grounds existed. Finally, the government insisted that the defense's claim of bias by Conrad—inferred by the length to which she went to cover up her true background in order to serve on the jury—was undermined by, and inconsistent with, Conrad's actual voting record at trial, citing Second Circuit case law that a split verdict supports the conclusion that the jury carefully weighed the evidence and reached a reasoned verdict.

In reply, the defendants asserted that the government was attempting to minimize Conrad's misconduct, arguing that the outstanding warrant for Conrad's arrest in Arizona likely rendered Conrad a fugitive or, at a minimum, sustained a challenge for cause. The defendants further rejected the government's characterization of the second prong of the *McDonough* test, arguing that they need not demonstrate that the court was required by law to dismiss Conrad based on her accurate answers, but that the court would have dismissed her had all facts been known.<sup>12</sup> An evidentiary hearing

to examine whether a new trial is warranted because of Conrad's misconduct is scheduled to take place before Southern District Judge William H. Pauley III on Feb. 15, 2012.<sup>13</sup>

### How Should a Court Respond?

A defendant's post-trial motion seeking review of the verdict as a result of juror misconduct may not specifically address the alleged misconduct, but may be aimed at the manner in which the trial court handled issues related to the juror's behavior. Just last month, the Second Circuit issued an opinion in another juror misconduct case, *United States v. Collins*.<sup>14</sup> *Collins* did not deal directly with whether a juror's misconduct deprived a defendant of an impartial trial, but considered whether the court's response to such misconduct might lead to a constitutional deprivation of the defendant's right to be present at all stages of a trial. Joseph P. Collins was found guilty by a jury in the Southern District of New York of conspiracy, securities fraud, and wire fraud. Collins appealed his conviction arguing that the trial court committed prejudicial error by failing to disclose the contents of a jury note and engaging in an ex parte conversation with a juror accused of attempting to barter his vote.

The note in question was the fourth in a series of notes received from the jury during its sixth day of contentious deliberations. Although prior notes from the jury had been read into the record, the trial judge did not publicly read the fourth note, which was a "private note" received from Juror #1 detailing the misconduct of Juror #4. The presiding trial judge told counsel, without further explanation, that he had received the note and would be speaking privately with Juror #4. Defense counsel stated on the record that he was "not consenting" to the ex parte meeting. Nevertheless, the court conferred with Juror #4, discussed the juror's behavior, and encouraged him to keep an open mind.<sup>15</sup>

Reviewing the trial court's decision, the Second Circuit noted that the provision in Federal Rule of Criminal Procedure 43 that "[a] defendant in a criminal case has the right to be present at 'every trial stage'" is rooted in the Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause.<sup>16</sup> To protect this right, the court set forth a specific procedure for the handling of jury inquiries, which

includes reading the written inquiry into the record and providing counsel with an opportunity to suggest a response. The court further stated that, “[i]n general, the trial court should not respond to a jury note in an ex parte manner” as such communications are “pregnant with possibilities for error.”<sup>17</sup>

The Second Circuit then concluded that Collins was deprived of his right to be present at trial on two occasions—when the district court chose not to disclose the contents of the note and when the court engaged in an ex parte exchange with Juror #4. Further, the court held that the deprivation did not constitute harmless error, finding it could not say with “fair assurance” that the trial court’s errors did not “substantially sway” the judgment. In so finding, the court distinguished this case from other cases reviewing the trial court’s handling of juror misconduct. For instance, in one case in which a trial judge failed to disclose the contents of a note alleging juror misconduct and conducted ex parte interviews with two jurors, reversible error was not found because the trial judge limited the interviews to a factual inquiry, asked counsel afterwards if they had further suggestions, and offered counsel the opportunity to interview the jurors themselves.<sup>18</sup>

Contrasting the case at hand, the Second Circuit observed that “[t]he [trial] court singled out a dissenting juror, and emphasized to him the importance of reaching a verdict. We cannot ignore the possibility that Juror 4 walked out of the ex parte conference with the impression that he should not stand in the way of a prompt resolution of the case. Had the court initially shared the Note with counsel and solicited counsel’s input before responding, any mistaken impressions may have been avoided.”<sup>19</sup> Accordingly, the conviction was vacated and the case was remanded for a new trial.

## Conclusion

Even though misrepresentations made by a prospective juror and misconduct by sitting jurors may impact a defendant’s constitutional right to a trial by an impartial jury, to date, courts have been reluctant to reverse a conviction based on a juror’s behavior. Whether the outcome in *Daugerdas* goes against this trend given the breadth and magnitude of the lies told

by the juror in that case will be important to observe. If the convictions are sustained, circumstances that would justify a reversal will be hard to imagine. Despite the uphill battle, counsel should always be alert for juror misconduct. Further, as evidenced by the Second Circuit’s decision in *Collins*, trial courts must be diligent in responding to juror misconduct in a way that properly includes the parties.

## Leader and Innovator

Bob Morvillo led the white-collar criminal defense bar for more than 40 years. He was an innovator and expert in the legal world and a mentor to many. I owe much of my development and insight into the profession to the 31 years I spent as his colleague. His partners, colleagues, many friends in the New York legal community, and the white-collar criminal defense bar around the country will miss him.

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1. *Tanner v. United States*, 483 U.S. 108, 120 (1987).
2. \_\_\_F.3d\_\_\_, 2012 WL 34044 (2d Cir. Jan. 9, 2012).
3. No. 09 Cr. 581 (WHP) (S.D.N.Y.).
4. Memorandum of Law in Support of Defendants’ Motion for a New Trial or, in the Alternative, for an Evidentiary Hearing Concerning Juror No. 1 (“Defendants’ Memorandum of Law”), *United States v. Daugerdas*, 90 Cr. 581 at pp. 2-3 (S.D.N.Y. Aug. 15, 2011).
5. Defendants’ Memorandum of Law at pp. 3-4.
6. *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (internal citations omitted). In *Colombo*, a juror was alleged to have deliberately withheld the fact that her brother-in-law was a lawyer for the government during voir dire because she wanted to sit on the case. The Second Circuit held that if it was determined on remand that the juror’s brother-in-law was in fact a government lawyer, the defendant’s conviction should be vacated.
7. 104 S. Ct. 845, 850 (1984).
8. See, e.g., *McDonough*, 104 S. Ct. at 849 (juror did not respond affirmatively to question about previous injuries to members of juror’s immediate family “that resulted in any disability or prolonged pain or suffering” because he did not believe son’s broken leg sustained as a result of an exploding tire constituted such an injury); *United States v. Stewart*, 433 F.3d 273, 304 (2d Cir. 2006) (affirming decision by district court rejecting motion for new trial where “certain ambiguities in the voir dire questions developed by the parties made it unclear that [juror’s] responses deliberately concealed the truth”).

9. Defendants’ Memorandum of Law at p. 27 (citing *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997)).

10. Memorandum of Law of United States in Opposition to Defendants’ Motion for a New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure (“Government’s Opposition Memorandum”), *United States v. Daugerdas*, 09 Cr. 581 at pp. 4-5 (S.D.N.Y. Sept. 9, 2011).

11. Government’s Opposition Memorandum at pp. 10, 13 (emphasis in original).

12. Defendants Daugerdas, Guerin and Field’s Supplemental Reply in Support of Defendants’ Motion for New Trial or, in the Alternative, for an Evidentiary Hearing Concerning Juror No. 1, *United States v. Daugerdas*, 09 Cr. 581 (S.D.N.Y. Oct. 27, 2011).

13. Order, *United States v. Daugerdas*, 09 Cr. 581 (S.D.N.Y. Nov. 29, 2011). Also at issue during the hearing is whether one of the defendants, David Parse, waived his right to challenge the apparent misconduct of Conrad because his attorneys had a copy of the 2010 opinion from the New York Supreme Court, Appellate Division, showing that a Catherine M. Conrad was a suspended attorney seeking reinstatement from a suspension due to an alcohol disability before jury voir dire began. Parse’s attorneys did not reveal this to the court when it was first discovered as they found it “inconceivable” that the subject of the disciplinary decision was the same individual as the prospective juror.

14. \_\_\_F.3d\_\_\_, 2012 WL 34044 (2d Cir. Jan. 9, 2012).

15. Id. at \*\*2-3 (detailing substance of conversation between trial judge and Juror #4).

16. Id. at \*4.

17. Id. (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978)).

18. Id. at \*7 (referring to *United States v. Chang An-Lo*, 851 F.2d 547 (2d Cir. 1988)).

19. Id. at \*7.