COMMISSION ON JUDICIAL SELECTION

APPLICATION

NEVADA SUPREME COURT
SEAT G

By

MICHAEL KING POWELL

COMMISSION ON JUDICIAL SELECTION
CERTIFICATION, WAIVER OF CONFIDENTIALITY AND RELEASE OF INFORMATION

I hereby certify that the answers and information provided herewith are true and correct to the best of my knowledge. *mkp* (initial)

I hereby certify that I meet the minimum qualifications to be a Supreme Court Justice as set forth in NRS 2.020. _*mkp*____ (initial)

I authorize any person or custodian of records, including, without limitation, the Commission on Judicial Discipline; the Department of Public Safety, Records and Identification Services; the Federal Bureau of Investigation; the Supreme Court of Nevada, Office of the Clerk; any credit reporting agency utilized by the Commission, and the State Bar of Nevada to release to the Commission on Judicial Selection any and all information that may be available concerning me _*mkp*_____ (initial)

I hereby release and discharge the Nevada Commission on Judicial Selection (Commission), its individual members, as now or hereafter constituted, and any other entity and/or individual(s) authorized herein to provide information to the Commission, of and from any and all claims, demands, liability and damages arising out of the release and use of such information concerning me, the undersigned, on file or otherwise available with any of the said entities and/or individuals._*mkp*____ (initial)

Should I be favorably considered, I will accept appointment to the Court indicated. *mkp*_____ (initial)

_/s/ *Michael K. Powell* __26 Aug 2016__
Signature of Applicant **Date**

__Michael King Powell_____
Printed Name of Applicant

STATE OF NEVADA
)
) ss.
COUNTY OF _Douglas_____)

The undersigned, upon oath, deposes and states as follows: That (s)he is the person whose signature appears herein above on the instrument entitled "Application ", that (s)he has read the same and is aware of the contents thereof; that the same is true and correct according to the best knowledge and belief of the undersigned; and that (s)he executed the same freely and voluntarily, and for the purpose of inducing the Nevada Commission on Judicial Selection to give favorable consideration to this Application for judicial office.

*/s/Michael K. Powell*_____ __Michael K. Powell_____
Signature of Applicant **Printed Name of Applicant**

SUBSCRIBED and SWORN to before me this_26th_ of August, 2016_____

*/sJordyn Mazzie*_____ (Seal)
Notary

SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 47)

Personal Information

1. Full Name: Michael King Powell
2. Have you ever used or been known by any other legal name (including a maiden name)? If so, state name and reason for the name change and years used. No
3. Work Address: P.O. Box 1554, Gardnerville, NV 89410
4. How long have you been a continuous resident of Nevada? 48 years
5. Age: 68

Employment History

6. Using the format provided in Attachment "A" please start with your current employment or most recent employment, self-employment, and periods of unemployment for the 20 years immediately preceding the filing of this Application.

Current or Last Employer: Self - solo practice

Phone Number: 775- 324-3004

Address: 59 Winter Street Reno NV 89501

From: Oct. 2011 To: Dec. 2014

Supervisor's Name: none

Supervisor's Job Title: none

Your Title: Private Attorney

Specific Duties: General practice of law. Consulting with state and federal private attorneys for appellate brief writing, trial preparation, federal sentencing and state post-conviction relief. Representing primarily low income clients in municipal and justice court.

Reason for Leaving: Suspended practice to help my spouse care for her elderly mother who

had a series of serious medical issues at the end of 2014.

<u>Previous Employer:</u> Office of he Federal Defender for the District of Nevada

Phone Number: 775 321-8451

Address: 201 W. Liberty Street, Suite 102 Reno, NV 89501 (Reno Branch office)

From: Jan 1999 To: Oct. 2011

Supervisor's Name: Michael Kennedy

Supervisor's Job Title: First Assistant Federal Public Defender

Your Title: Assistant Federal Public Defender

Specific Duties: Litigating appeals in the U.S. 9th Circuit Court of Appeals and the U,S. Supreme Court. Representing indigent defendants charged with felonies in U.S. District Court. Supervising Research Writer and paralegal.

Reason for Leaving: Retirement.

<u>Previous Employer</u>: Self – solo practice

Phone Number: 775 - 721-5732

Address: 309 W. 5th Street Carson City, NV and 1610 Highway 395 South Minden, NV

From: March 1996 To: Dec. 1998

Supervisor's Name: none

Supervisor's Job Title: none

Your Title: Private attorney

Specific Duties: General practice of law in Carson City and Douglas. Had contract with Washoe Tribe to provide all defense services in Tribal Court. Consulted with Ely Shoshone Tribe on HUD housing issues. Accepted appointed criminal defense cases in Carson City and Douglas County. Did appellate brief writing for other attorneys. Represented convicted individuals in Post conviction proceedings at trial level and on appeal. Part-time administrative hearings officer for Washoe Tribe Housing Authority.

Reason for Leaving: To take job with Federal Public Defender Office in Reno.

<u>Previous Employer</u>: Chuuk State Supreme Court

Phone Number:

Address: P. O. Box 187, Weno, Chuuk, Federated States of Micronesia 96942

From: Jan. 1994 To: Apr. 1996

Supervisor's Name: Hon. Soukichi Fritz

Supervisor's Job Title: Chief Justice

Your Title: Court Attorney

Specific Duties: My duties included: advising the justices of the court on all legal matters both internal and external; researching and drafting bench memos and all final opinions for both the trial division and the appellate division since the Judicial Act required all decisions to be published in English which was the second language of all the justices; redrafting the court's Juvenile Procedure Code to require any juvenile detainee be held separate from adults. I also organized the first appellate hearing session of the newly created court. The appellate session resolved all pending appeal cases. I was the Reporter of Decisions and prepared the first volume of appellate reports. A copy of that reporter, "Chuuk State Supreme Reports Vol. 1, Appellate Decisions 1989-1994"is on file the Nevada Supreme Court Library in Carson City(Call number REPT KF 4635 L3). As court attorney, I sued the state executive branch concerning the disposition of national funds designated for financial assistance to the court that the executive branch refused to release. The Chief Justice appointed me to serve as a Special Trial Division Judge in cases where the justices of the court all had a conflict.

Reason for Leaving: Return to the United States at the end of my contract.

Educational Background

7. List names and addresses of high schools, colleges and graduate schools (other than law school) attended; dates of attendance; certificates or degrees awarded; reason for leaving.

   Manor High School, Manor, Georgia: 1962 - 1965 (Graduated)
   Abraham Baldwin Agricultural Junior College, Tifton, Georgia: 1965 - 1967 (transferred to UNR)
   University of Nevada, Reno , Reno Nevada:1967 (left to enlist in USMC); 1970 - 1975
   Bachelor of Social Work 1974, BS Geology 1975 (Graduated)

8. Describe significant high school and college activities including extracurricular activities, positions of leadership, special projects that contributed to the learning experience.

   High School:

Varsity: basketball, baseball, track;
Future Farmers of America;
4-H Club
French Club
Senior Class President;
Class Salutatorian,
Summer farm worker
Ranch hand: Arlemont Ranch, Fish Lake Valley Nevada

ABAC Junior College:

Varsity basketball
Work Study Student US Dept. of Agriculture Soil Testing Lab

University of Nevada, Reno

1967:
Varsity basketball (was red shirted)

1970 -1975:
Tutor: Counseling and Testing Office (math, physics, chemistry)
Intern: Rebound (a private parolee counseling agency which helped Nevada parolees transition from prison to civilian life)
Volunteer Driver: Elderport (transporting low income seniors for medical/dental appointments, shopping and other activities)
Volunteer Driver: Meals on Wheels (delivering meals to home bound seniors)
Contributing photographer: "Sagebrush"
Informal group counselor: Vietnam Veterans

9. List names and addresses of law schools attended; degree and date awarded; your rank in your graduating class; if more than one law school attended, explain reason for change.

University of San Diego, Alcala Park, San Diego, California:
Juris Doctorate June 1978.
Rank: Tied for 105 of 210.

10. Indicate whether you were employed during law school, whether the employment was full-time or part-time, the nature of your employment, the name(s) of your employer(s), and dates of employment.

Graduate Research Fellow for Professor Neal Levy (Visiting Professor from UCLA) 1976, researched tort law for law review article
Keno Writer' Harold's Club: Summer 1976
Intern National Judicial College: Summer 1977
Researched and digested cases for the initial NJC publication "Function of the Trial Judge"

11. Describe significant law school activities including offices held, other leadership positions, clinics participated in, extracurricular activities.

President of Native American Law Students 1977-78
Student Member, Admissions Committee 1977-78
Treasurer of Student Bar Association 1977-78
Native American Legal Clinic Fall 1976
Research Intern National Center for the Rights of Immigrants Spring 1977
Criminal Law Clinic Fall 1977
Developed a curriculum and obtained a grant from the BIA for the University to conduct a six month training program for Tribal Court Advocates
Appellate Law Clinic Spring 1978
Scientific Evidence class project to develop sample foundations for the introduction of scientific expert testimony for a book by Professor Ed Imwrinkleried.
Summer Intern at National Judicial College 1977
Researched and digested cases for the NJC's publication "Function of the Trial Judge"

Law Practice

12. State the year you were admitted to the Nevada Bar.

1978

13. Name states (other than Nevada) where you are or were admitted to practice law and your year of admission.

United States Supreme Court 1982
United States Court of Appeals for the Ninth Circuit 1982
United States District Court for the District of Nevada 1981
Supreme Court of the Federated States of Micronesia, 1983
Chuuk State Supreme Court F.M.S. 1983
High Court of the Trust Territory of the Pacific Islands 1983.

14. Have you ever been suspended, disbarred, or voluntarily resigned from the practice of law in Nevada or any other state? If so, describe the circumstance, dates, and locations.

I was temporarily suspended until payment of fine by the F.S.M. Supreme Court Trial Division on June 15, 1990 in Pohnpei FSM. The contempt citation concerned a dispute as to whether the court had ordered me to personally appear and conduct the defense of a case in which our office had a conflict. The suspension was stayed and appealed. The contempt order was reversed by the Appellate Division and remanded for a dismissal of the citation. *See In re Michael K. Powell* 5 F.M.S. Intrm, 114 (App. 1991) (available at www.fsmsupremecourt.org/decision/index.html – last visited 8/22/2016)

15. Estimate what percentage of your work over the last 5 years has involved litigation matters, distinguishing between trial and appellate courts. **For judges**, answer questions 16-20 for the 5 years directly preceding your appointment or election to the bench.

70% appellate: 30% trial

16. Estimate percentage of time spent on (1) domestic/family and juvenile law matters, (2) civil litigation, (3) criminal matters, and (4) administrative litigation.

98% criminal: 2% juvenile

17. In the past 5 years, what percentage of your litigation matters involved cases set for jury trials vs. non-jury trials?

While at the Federal Public Defender all my trial cases were set for jury trial.
Since I left that office in 2011, all cases I have handled were set for non-jury trials.

18. Give the approximate number of jury cases tried to a conclusion during the past 5 years with you as lead counsel. Give the approximate number of non-jury cases tried to a decision in the same period.

None – all were resolved either by dismissal or plea negotiation

19. List courts and counties in any state where you have practiced in the past 5 years.

United States Supreme Court
United States Court of Appeals for the Ninth Circuit
United States District Court for the District of Nevada
Washoe County
Reno Municipal Court, Reno Justice Court, Sparks Justice Court
Douglas County
Appeared as expert witness in Douglas County District Court.

20. List by case name and date the five cases of most significance to you (not including cases pending in which you have been involved), and list or describe:
a. case name and date,
b. court and presiding judge and all counsel
c. the importance of each case to you and the impact of each case on you,
d. your role in the case.

State v, Mercado and Price. 1980-1982 First Judicial District Court (Carson City) Hon. Michael Fondi/ Hon. Howard McKibben Michael Powell for Mercado; P.J. Mullins for Price.; Robert Manley Deputy Attorney General (Mills Lane was special counsel for the State in the early stages of the district court proceedings, but withdrew before trial).

This was my first Death Penalty case. The homicide occurred at the Nevada State Prison in the restroom on the main yard. The indictment alleged the crime was committed by my client and three others who were all members of the Aryan Warrior prison gang. Judge Fondi started the case and fell ill as the trial was to start. Judge McKibben conducted the trial. The victim, Danny Jackson, was alleged to have been killed because he refused to continue to procure drugs for the gang. The gang leaders were not charged but instead became witnesses for the state and were given special privileges. I tried the case without co-counsel, the guilt phase of the trial lasting four weeks.

Mercado was charged as an aider and abetter– specifically with being in the restroom and helping strangle Jackson. At trial, we presented evidence Mercado was on the basketball court at the time of the homicide and not in the bathroom. The state changed its theory in its rebuttal argument

arguing a different factual theory of aiding and abetting. I raised an objection, but that objection was ruled on direct appeal as not sufficiently contemporaneous. My client was convicted. The penalty hearing lasted a week and over my client's objection I called his father as a mitigation witness. The jury hung. I requested the impanelment of another jury on the theory that the imposition of the death penalty constitutionally required a jury. Judge McKibben rejected that request, and I sought mandamus in the Supreme Court which was denied. In accordance with former Nevada law, a three judge panel conducted another penalty hearing. My client did not receive the death penalty. I did not litigate the unsuccessful appeal. Fortunately our system does have built-in corrective procedures and the conviction was set aside in post conviction.

From a defense attorney prospective, death penalty cases are the most significant cases one can undertake. Such cases are particularly difficult when there is substantial doubt – as I believed in this case – that the defendant was factually guilty. As a third year lawyer, I should not have accepted the appointment initially as I was not sufficiently experienced. I did not undertake another death case until I had attended the premier death penalty training institute in Arley, Virginia sponsored by the NAACP Legal Defense Fund.

Brewster, et al v. Barkley-Hollander 1982 First Judicial District Court, Carson City Hon. Michael Fondi, Michael Powell/John Lambrose/later John Abby for plaintiff ; David Hoy for defense.

This case arose when the out-of-state defendant corporation purchased an existing mobile home park in Carson City and attempted to evict all of the current tenants in order to develop a Planned Unit Development. I believed that the evictions were not only unfair as many of the mobile homes were on foundations but were in violation of recently passed landlord tenant legislation. I conceived the idea of pursuing the case as a class action, so residents could pool their resources to help fund the litigation. I was lead counsel and the district court granted class certification and enjoined the evictions. The defense appealed. The case was eventually resolved by negotiation while the appeal was pending

.

It was important to me as a lawyer in the community to protect the rights and homes of the residents who were at a distinct financial disadvantage in the litigation and ensure their access to the courts. The case demonstrated that even small firms can make a difference.

Federated States of Micronesia v. Raitoun, 1984, FSM Supreme Court Trial Division Chuuk State; Hon. Richard Benson; Michael Powell for the defense; David Brown Assistant FSM Attorney General for the government.

This was a homicide case. The defendant, Raitoun, was at home and came out to see who was throwing rocks at his house. The victim, intoxicated, continued to throw rocks. In front of Raitoun's sister, he engaged in culturally taboo conduct which traditionally could result in the loss of life between linages. Raitoun approached the victim with a stick but did not strike him. The victim then charged Raitoun ramming his head into Raitoun's stomach. Raitoun picked up the victim by the waist and apparently hyper flexed the victim's neck. The victim died after being transported by boat to another island.

I defended this case while I was the Public Defender in Chuuk State, Federated States of Micronesia. The constitution of the then newly formed nation was modeled on the U.S. Constitution but also had provisions that were designed to protect and preserve traditional customs and culture. The national courts had jurisdiction over all crimes at the time that had a punishment greater than one year. The justices of the national court were all non-citizen lawyers from the

United States and all trials were to the bench. With the help of the local trial staff in the office, we asserted several traditional defenses as well as standard common law defenses. We sought to have the national court judge appoint two traditional chiefs as assessors to sit with him as additional finders of fact concerning the traditional issues. The trial court refused, and we sought a writ of mandamus from the appellate division which was denied. Most importantly, we moved to dismiss the case as the parties had resolved the dispute in the traditional manner. A post-settlement trial would have negated the cultural resolution. The defendant was found not guilty, but the trial judge rendered a written opinion to explain that the traditional defenses were rejected. *See FSM v. Raitoun* 1 FSM Intrm. 590 (1984) (available at www.fsmsupremecourt.org/legal index)(last visited on 8/22/2016). The result was that many disputes, both of a civil and criminal nature were brought to the public defenders office in the first instance for settlement.

As an American lawyer, who had witnessed the cultural displacement of Native American populations, I felt it necessary to uphold the constitutional preservation of indigenous culture to prevent a similar catastrophic loss of culture. Additionally, it was obvious that traditional methods of dispute resolution were better suited to a comprehensive final resolution in the local context than the adopted adversarial legal system. I was counsel of record and the first to assert the constitutional protections for custom in a criminal case in the national courts. Later, when I became the head of the FSM Defender system (1988), I made it the policy of the FSM Defenders Office to assert tradition and custom when relevant in the national courts based on the constitutional provisions. Later, as a Special Trial Division Judge in Chuuk, I utilized the traditional chiefs as additional finders of fact.

State v, Isom, First Judicial District Carson City (Hon Michael Fondi) 1985 Michael Powell counsel for Isom, Noel Waters for State.

This was a felony third DUI trial. Ms. Isom was asleep in her car at a closed gas station in Carson City when a deputy sheriff, suspecting a possible burglary, investigated. The defendant was a sympathetic individual as the victim of domestic abuse which had precipitated her leaving her home and drinking that night.

The felony DUI statute was fairly new at the time, and there were almost no appellate cases in Nevada interpreting the requirement that the defendant be in actual physical control of the vehicle. Other states had reached the conclusion that sleeping in a vehicle did not constitute actual physical control. I counseled my client to waive the jury and try the case to the bench as I thought the legal issue predominated. She testified. She was convicted. I appealed.

The Supreme Court in a 3-1-1 decision affirmed the conviction. The concurring opinion held that the finder of fact – the judge – could have concluded that she was over the legal limit before she had reached the gas station.

I should not have counseled my client to waive a jury. While there is no way to know the outcome had the case been tried to a jury– a jury might have not convicted given the circumstances. Even if the jury had convicted, the legal issue would have been preserved depending on how the judge instructed the jury. The important lesson for me was not to get caught up in legal issues I thought were more important and to have a jury decide the facts rather than a single judge. My short sightedness in this case bothered me because had I tried the case to a jury – Ms. Isom might not have been convicted and done prison time. I have never again counseled a client in a criminal case that went to trial to waive a jury

Regas v. 8th Judicial District Court (Hon. Donald Mosley - later Hon. Michael Cherry took over

the case while original proceedings were being litigated in the Supreme Court) S.Ct. No. 45183 2005-2006, Nevada Supreme Court (en banc) Original Writ of Mandamus: Michael Powell/Michael Kennedy for Petitioner Regas; David Rodgers/Chris Owens for State (Later T. Pitaro/D. Chesnoff for other added petitioners).

This was an extremely complex case that stemmed from the 2002 Hell's Angels and Mogol shoot-out at Harrahs in Laughlin. A federal indictment was returned first and the federal defender office was appointed to represent Mr. Regas. Before the federal trial began, the state obtained a grand jury indictment. We were now defending Mr. Regas, a Hell's Angel, simultaneously in the state and federal courts.

The original state indictment contained 73 counts some of which sought, among other things, to hold the Hell's Angels defendants vicariously liable for the death of other Hell's Angels who were killed by members of the Mongols. I first filed an original writ on a novel double jeopardy issue seeking a stay of the state proceeding to allow the federal trial to go first. This writ was summarily denied by the Court.

I then pursued a second original action in the Nevada Supreme Court after the District Court denied our pretrial writ. The second writ sought to challenge the State's presentation of evidence to the Grand Jury and the State's instructions on vicarious liability which I believed were contrary to the controlling law and Nevada Supreme Court precedent. Additionally, I challenged the State's over- creative use of the nineteenth century Challenge to Fight statute which I believed had been misconstrued. These were the same issues presented to the District Court.

At this point, I was the only defense attorney that believed the compromise of the Grand Jury function was serious enough that the Nevada Supreme Court would entertain the issue. I drafted the original petition and the supporting points and authorities. My determination to have the compromise of the grand jury function reviewed caused me to expend several hundred hours in a compressed time frame while simultaneously preparing for trial with co-counsel. Once the petition was filed and circulated, other defense counsel joined the petition including the Mogol defendants. The Court en banc granted the writ in part and remanded.

I researched, drafted and presented a total of four writs during the process – two pretrial writs in the district court and two extraordinary writs in the Supreme Court. I argued portions of the issues before the three justice panel and before the en banc court. Ultimately all charges, state and federal, were dismissed with prejudice against Mr. Regas. The resolution of this case reaffirmed to me that perseverance and belief in the system more frequently than not succeeds.

The over all impact of these and other cases I have litigated is that I have gained knowledge and perspective from every case. But for the most part, I have learned more about myself and the law from my losses.

21. Do you now serve or have you previously served as a mediator, an arbitrator, a part-time or full-time judicial officer, or a quasi-judicial officer? To the extent possible, explain each experience.

    Yes.
    Part-time judicial officer in the Chuuk State Supreme Court - Trial Division. Between 1994 and 1996, I served as the General Counsel (court attorney) to the Chuuk State Supreme Court in Weno, Chuuk, Federated States of Micronesia. This is a unified court

in that the justices sit both as trial judges and appellate judges. I was assigned by the Chief Justice as a Special Trial Division Judge to preside over a significant land case in which all the justices of the court had declared a conflict. The case was also one of first impression concerning the citizen ownership of tidelands. I opted to sit with a traditional leader and chief as an additional finder of fact on the case. I authored an opinion. *See Sellem v. Maras*, 7 FMS Intrm. 1(Chuuk S. Ct. Tr. 1995)(available at www.fsmsupremecourt.org/Legal Index)(last visited 8/22/16). The case was conducted in the local language with a simultaneous translation. No party took an appeal from the decision.

Washoe Tribe Housing Authority: Part-time administrative hearing officer.

22. Describe any pro bono or public interest work as an attorney.

In private practice took cases on a reduced fee basis.
Assisted numerous individual in Douglas and Washoe Counties with drafting and filing Homestead protection.
Defended several low income individuals in employer/employee disputes.
Drafted simple wills for low income seniors.
Lectured ESL classes at WNCC and TMCC regarding immigration issues and individual rights.
At the request of the Federal Magistrates, represented individuals cited by federal authorities at Burning Man who were not entitled to appointment of counsel (before the creation of lawyers for burners)
Private Practice Pro bono cases mostly for low income Hispanic residents of Reno and Sparks defending them in Reno Municipal Court and in the Reno and Sparks Justice Courts primarily in traffic matters

23. List all bar associations and professional societies of which you are or have been a member. Give titles and dates of offices held. List chairs or committees in such groups you believe to be of significance. Exclude information regarding your political affiliation.

American Bar Association
Clark County Bar Association
National Association of Criminal Defense Lawyers
Nevada State Bar,
Washoe County Bar Association

24. List all courses, seminars, or institutes you have attended relating to continuing legal education during the past 5 years. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?
I am currently in compliance with CLE.

NLADA Appellate Defender Training Institute (20.5 hours)
Computer Based Child Porn.
Plea Negotiation and Witness Proffers
Bureau of Prison Placements
The Practice and Ethics
Criminal History in Federal Sentencing
Defending Child Porn Cases

Hearsay Objections
Federal Bail Reform Act
U.S. Supreme Court Padilla Decision
Using USSG 5K1.1 (safety valve)
2012 United States District Court Conference
2014 United States District Court Conference
2016 United States District Court Conference
Ethics in the E-World
Abuse, Addiction & Mental Health: Impairment in Legal Professionals

25. Do you have Professional Liability Insurance or do you work for a governmental agency?

No. I am currently not actively practicing law at the moment.

Business and Occupational Experience

26. Have you ever been engaged in any occupation, business, or profession other than a judicial officer or the practice of law? If yes, please list, including the dates of your involvement with the occupation, business, or profession.

Ranch Hand Summer Arlemont Ranch, Fish Lake Valley, Nevada, 1964
Punch Press Operator, General American Transportation, March - August, 1967
East Chicago, Ill.
Geologist Assistant Foote Mineral, Silver Peak, Nevada Summer, 1970
Keno Writer, Palace Club Reno, Nevada Summer, 1971
Assistant Framer, Parr Construction Reno, Nevada Summer, 1972
Data Entry, Pacific Intermountain Express Reno, Nevada Summer, 1973
Assistant Geologist, Foote Mineral Silver Peak, Nevada, Summer, 1974
Contract Exploration Geologist Key Mineral, Reno, Nevada, 1975
Keno Writer, Harold's Club Reno, Nevada Summer, 1976

27. Do you currently serve or have you in the past served as a manager, officer, or director of any business enterprise, including a law practice? If so, please provide details as to:
a. the nature of the business
b. the nature of your duties,
c. the extent of your involvement in the administration or management of the business,
d. the terms of your service,
e. the percentage of your ownership.

Powell & Lambrose, Law Practice, Carson City. Nevada;
Managing Partner , oversaw clerical and bookkeeping staff, equipment acquisition, office rental and the completion and filing of all necessary government reports. 1981-1983.
Fifty Percent owner.

28. List experience as an executor, trustee, or in any other fiduciary capacity. Give name, address, position title, nature of your duties, terms of service and, if any, the percentage of your ownership.

None

Civic, Professional and Community Involvement

29. Have you ever held an elective or appointive public office in this or any other state? Have you been a candidate for such an office? If so, give details, including the offices involved, whether initially appointed or elected, and the length of service. Exclude political affiliation.

I have never held elective office.

I was an applicant for appointment to a District Court judgeship in the Third Judicial District.

I was an unsuccessful candidate for the newly created Seat F on the Nevada Supreme Court in 1998

30. State significant activities in which you have taken part, giving dates and offices or leadership positions.

Board Member, Nevada Indian and Rural Legal Services, Carson City 1980 - 1983
Volunteer Attorney for Carson City Abused Women's Center 1983.
Conducted educational classes for the United Nations Plebiscite in Chuuk State prior to the national vote on independence. 1983- 1984

31. Describe any courses taught at law schools or continuing education programs. Describe any lectures delivered at bar association conferences.

Adjunct Faculty, College of Micronesia, Chuuk Campus. Taught constitution law.
Adjunct Faculty, National Judicial College. Taught "Essential Skills for Tribal Court Judges".
Federal Public Defenders Office, Reno/Las Vegas. Taught CLE classes to federal defender staff and the CJA panel attorneys in Reno and Las Vegas. The topics included: federal detention issues; federal sentencing guideline interpretation particularly with reference to defendants charged with federal immigration offenses; and federal appellate procedure and brief writing.

32. List educational, military service, service to your country, charitable, fraternal and church activities you deem significant. Indicate leadership positions.

Served in the United States Marine Corps, 1968-74. Combat veteran served in Vietnam 1968- 1969 with the First Reconnaissance Battalion, First Marine Division. Received two meritorious combat promotions in rank.
Extern Sponsor and Intern mentor for Washoe School District, Secondary Gifted and

Talented Program.
Facilitated bringing the Carson City Sheriffs Deputies the protection of the Fraternal Order of Police

33. List honors, prizes, awards, or other forms of recognition.

Awarded WICHE scholarship to attend law school.
Whose Whose in American Colleges and Universities, 1978

34. Have you at anytime in the last 12 months belonged to or do you currently belong to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, creed, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices, and whether you intend to continue as a member if you are selected for this vacancy.

No

35. List books, articles, speeches and public statements published, or examples of opinions rendered, with citations and dates.

Opinion rendered: *See Sellem v. Maras*, 7 FSM Intrm. 1 (Chuuk S. Ct. Tr 1995)(available at www.fsmsupremecourt.org/Legal Index/Chuuk - last visited 8/22/16)

36. During the past 10 years, have you been registered to vote? Have you voted in the general elections held in those years?

Yes, registered in Douglas County and have voted in all general elections.

37. List any vocational interests and hobbies.

Camping in rural Nevada in particular where I grew up in Esmeralda County, gardening, photography, travel, carpentry (my wife and I built our house in rural Douglas County)

Conduct

38. Have you ever been convicted of or formally found to be in violation of federal, state or local law, ordinance or regulation? Provide details of circumstances, charges and dispositions.

Yes. I was charged and found guilty of Failure to Come to a Full and Complete Stop in Reno Police Court– fined $10.00 (Reno 1970)

39. Have you ever been sanctioned, disciplined, reprimanded, found to have breached an ethics rule or to have acted unprofessionally by any judicial or bar association discipline commission, other professional organization or administrative body or military tribunal? If yes, explain. If the disciplinary action is confidential, please respond to question 71.

See answer to question 14

40. Have your ever been dropped, suspended, disqualified, expelled, dismissed from, or placed on probation at any college, university, professional school or law school for any reason including scholastic, criminal, or moral? If yes, explain.

Yes. I was placed on academic probation at UNR when I returned from Vietnam and re-enrolled in classes. This was due to the fact that I had not completed all my classes and did not formally withdraw when I left school to enlist in the Marine Corps. As a result I was given failing grades in several classes. The University instituted a program to review such situations for returning veterans and after examining my case the failing grades were converted to a grades of incomplete. My academic probation was lifted.

41. Have you ever been refused admission to or been released from any of the armed services for reasons other than honorable discharge? If yes, explain.

No

42. Has a lien ever been asserted against you or any property of yours that was not discharged within 30 days? If yes, explain.

No

43. Has any Bankruptcy Court in a case where you are or were the debtor, entered an order providing a creditor automatic relief from the bankruptcy stay (providing in rem relief) in any present or future bankruptcy case, related to property in which you have an interest?

No.

Other

44. If you have previously submitted a questionnaire or Application to this or any other judicial nominating commission, please provide the name of the commission, the approximate date(s) of submission, and the result.

Yes. Applied to the Nevada Commission for Judicial Selection for a Third Judicial District Court position. I was one of the three applicants nominated but was not selected. 1988

45. In no more than three pages (double spaced) attached to this Application, provide a statement describing what you believe sets you apart from your peers, and explains what particular education, experience, personality or character traits you possess or have acquired that you feel qualify you as a good supreme court justice. In so doing, address both the civil (including family law matters) and criminal processes (including criminal sentencing.)

See Attachment 1

46. Detail any further information relative to your judicial candidacy that you desire to call to the attention of the members of the Commission on Judicial Selection.

Clerked for the Hon. Michael J. Wendell, Department 8, Eighth Judicial District 1978-79. At the end of my clerkship Judge Wendell asked me to represent him in an appeal from a contempt order he issued to an assistant District Attorney. Normally the District Attorney's

Office would represent the judge in such matters, but the judge believed that office would have a conflict in defending him on appeal.

Served as the Chief Appellate Deputy and later as the Chief Deputy at the Nevada State Public Defender's Office Carson City, NV 1985 -88.

Served as the Chief of the FSM National Public Defender service Palikir, Pohnpei 1988-1991. I was the administrative head of the national defender system and responsible for all national, state and local defender services nationwide which included training and supervising approximately 25 personnel (4 US attorneys) and 10 local trial counselors, 4 investigators and other administrative staff. I carried an active appellate and trial caseload including civil conflict case from Micronesian Legal Services. I convinced the national Congress to appropriate a $500,000.00 scholarship fund to send FSM citizens that had U.S. college degrees on to law school in the United States. I also served as Chief Legal counsel to the Committee on Custom and Tradition during the first Constitutional Convention held in 1990. I along with other convention counsel successfully defended the Convention against a civil suit brought by th national government over funding of the Convention.

47. Attach a sample of no more than 10 pages of your original writing in the form of a decision, "points and authorities," or appellate brief generated within the past 5 years, which demonstrates your ability to write in a logical, cohesive, concise, organized, and persuasive fashion.

See attachment 2

ATTACHMENT 1
RESPONSE TO QUESTION 46
MICHAEL K. POWELL

First, any individual that aspires to serve on the Nevada Supreme Court must have a comprehensive knowledge of how statutory and constitutional provisions are analyzed. Secondly, the individual must be familiar with the rules that constrain the court's review of lower court decisions. Thirdly, one must be able to clearly and concisely explain how the court reaches its decision. Finally, all judicial officers must realize that they bring their experiences with them to the bench. The wider the scope of such experiences, the better one can understand multiple perspectives and divergent points of view. I have a unique combination of these factors.

A good portion of my legal career in both the state and federal courts has been devoted to the application of the canons of statutory construction to the analysis of statutory law. Courts use this body of law to aid their interpretation of the language of a statutes or constitutional provisions and to resolve or harmonize conflict. In one of my first cases as a new lawyer in Carson City (1979), I represented David Small --the then District Attorney. The Attorney General's office brought a misdemeanor charge based on a nineteenth century statute that prohibited an elected office holder from being under the influence of alcohol on the job. A conviction would have resulted in the forfeiture of his office. I challenged the statute based on recent legislation that decriminalized public intoxication. Using the canons of construction, I successfully argued that the later enactment had repealed the older statute by implication.

Much of my recent federal criminal practice involved statutory interpretation with regard to sentencing. Many federal statutes and sentencing guidelines contain provisions that enhance a sentence based on prior offenses. The prior conviction may be state or federal but must contain all the generic elements the U.S. Supreme Court requires for each category of crime.

Appellate courts have developed Standards of Review which restrain the scope of their review of lower court decisions. I have extensive experience in the application of these standards which can be critical to the outcome of a case. Primarily there are two extremes – legal issues and factual issues. Because the Nevada Supreme Court is a court of last resort – any purely legal issue is reviewed without limitation as if the lower court decision does not exist. On matters of fact decided in the lower court –

the appellate court's review is extremely limited. An appellate court may not alter a plausible factual ruling unless it is clearly erroneous based on the record. Appellate courts are not fact finders and should not re-weigh factual matters even when the court would have come to a different conclusion. The harder cases involve the application of the rules to mixed questions of law and fact which requires the court to determine which aspect predominates. Knowledge of and adherence to these rules provides predictability to lower court judges and attorneys.

I have spent most of my career writing legal analysis. I litigated more than 100 appeals in the Nevada Supreme Court, both criminal and civil and at least 150 appeals in the U.S. Court of Appeals for the Ninth Circuit, all criminal. I brought 69 cases before the U.S. Supreme Court – eight of which resulted in my writ of certiorari being granted, the judgement vacated and the case remanded.

I had the opportunity to participate in the internal dynamics of an appellate court while working for the Chuuk State Supreme Court. I was entrusted with the task of writing a number of trial and appellate opinions for that court, all civil. The appellate opinions in the first reporter – which I produced – are available in the Nevada Supreme Court Library. As a Special Trial Division Judge of that court, I also wrote my own opinions. Because the opinions were in English, a second language for the majority of the citizens and legal practitioners in that jurisdiction, the opinions needed to be straight forward. I possess the ability to write clearly, concisely and with reasoned reflection.

For members of a multi-judge court, it is imperative that an exchange of perspectives take place in order to aid the clarity of the decision making process. I have learned that one must respectfully and attentively listen to points of view or opinions different from one's own. Otherwise, it is impossible to fully understand or properly analyze any issue.

I have worked both in public service and as a solo and small firm practitioner as well as handling a wide range of civil and criminal cases. Most recently I worked in criminal law exclusively. While in private practice on the civil side, I represented individuals in cases involving; divorce, child custody, domestic abuse, employer/employee disputes, landlord/ tenant disputes, general contract negotiation, commercial real estate syndications, partnership agreements, condemnations, inverse condemnations,

zoning, wills and probate, workers compensation, and construction contracts. I also represented many juveniles in both the state and federal courts. My breadth of experience gives me familiarity with many areas of the law that may come before the Court.

Additionally, I have worked in all the major economic sectors of the Nevada economy. Growing up in Esmeralda County, I boarded at the JV Bar ranch in Lida during the winter months because Lida had more children than Goldpoint and the county could only afford one school. After school, I tended stock on the ranch. During the summers, I helped my father with assessment work on the family mining claims.

I have toiled in the mining industry as a geologist, in the gaming industry as a Keno writer and in the construction industry as an assistant framer. Outside of Nevada, I have labored in agriculture and in factories. This range of experience is broader than most and sets me apart by providing me with a keener insight into issues that arise in these industries.

Nevada has a unique and complicated regional diversity. North and south – rural and urban. Cases come to the Court from all areas of the state. I have lived and worked in both rural and urban Nevada – north and south. At one time or another, I have represented individuals in the majority of the counties in the state. The diversity of my living and working experiences within Nevada would bring a deeper perspective of regional issues that come before the Court.

My thirty-eight years as a legal practitioner in multiple jurisdictions, within and without Nevada, have provided me with a unique set of experiences upon which the Court may draw. Years of litigating in the state and federal appellate courts has honed my analytical and writing skills which would enable me to explain the Court's decisions with precision and lucidity. A willingness on my part to express and consider other views would contribute to the decision making process of the Court. This combination of experience, expertise and personality would be an aid to the Court.

ATTACHMENT 2

QUESTION 47

WRITING SAMPLE OF MICHAEL K. POWELL

EXCERPT FROM 121 PAGE OPENING BRIEF IN

UNITED STATES v. KAHRE, CA NO. 09-10472;09-10528;09-10529

FILED IN THE NINTH CIRCUIT COURT OF APPEALS

B. The Trial Court's Evidentiary Rulings, Comments, Instructions and Conduct Denied the Appellants Their Fifth and Sixth Amendment Rights to a Fair Trial and to Present a Complete Defense by Impermissibly Shifting the Burden of Proof, by Erroneously Restricting the Defense on the Essential Elements of Criminal Intent (i.e., Acted Willfully, Acted Corruptly, Acted with Lack of Good Faith), and Projecting the Appearance of Advocacy and Partiality.

Standard of review

Whether the trial court improperly shifted the burden of proof is reviewed *de novo*. *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001). Although this Court generally reviews the district court's evidentiary rulings for an abuse of discretion, it reviews the decision *de novo* if the rulings preclude presentation of a defense. *See United States v. Ross*, 206 F.3d 896, 898 -899 (9th Cir 2000)(Ruling on motion in liming to exclude an affirmative defense.). A district court has considerable discretion in the management of his court room but must be ever mindful of the sensitive role [he] plays in a jury trial and avoid even the appearance of advocacy or partiality. *United States v. Harris*, 501 F.2d 1, 10 (9th Cir. 1974). A district court is also entitled to comment on the evidence as long as he makes it clear the jury is the finder of fact, but must not add to the evidence and comments should not be one-sided. *Quercia v. United States*, 289 U.S. 466, 470 (1933). Reversal is warranted "[i]f the record . . .leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality." *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986).

Argument

The Federal Rules of Evidence start with the proposition that "[a]ll relevant evidence is admissible." *United States v. Cruz-Garcia*, 344 F.3d 951, 954 (9th Cir. 2003 (quoting FRE 402 and reversing and remanding for new trial due to failure to permit introduction of defense FRE 404(b) evidence). Evidence tending to make a consequential fact "less probable" is just as relevant as evidence tending to make it "more probable." *United States v. Morgan*, 581 F.2d 933, 936-37 (D.C. Cir. 1978). "Evidence need not prove conclusively the proposition for which it is offered, nor make that proposition appear more probable than not, but it must in some degree advance the inquiry." 2 Joseph McLaughlin, *Weinstein's Federal Evidence* § 401.04[2][b] at 401-20 (2nd ed. 2002).

1. The trial court would not allow evidence or argument that gold clause contracts central to the gold clause payroll system devised and utilized by R.Kahre to pay (and measure payments to) workers were legal despite a congressional statute (31 U.S.C. §5118) legalizing such contracts.

The trial court ruled and instructed that appellants would not be allowed to present evidence and argument that gold clause contracts central to the payroll system devised and utilized by R.Kahre to pay (and measure payments to) his workers and workers for 30 plus companies were legal despite a congressional statute (31 U.S.C. § 5118) legalizing such contracts. EOR 531, 556, 639, 1962, 5058, 6732, 7525, 7540, 10388.

The issue of first impression which arose here was not the legality of gold clause contracts but rather the federal income tax consequences of their legal use. Contrary to the trial court's ruling, there is nothing illegal, without more, in exchanging circulating post-1985 United States minted gold and silver coins paid as legal tender for services or labor for currency, whether it is exchanged at a coin shop or for convenience as part of R.Kahre's payroll system. EOR 10388 ("I am not going to let [appellants] get on the

stand and testify that ... the law is such that payment in gold coin in exchange for dollars is a legal procedure.”).

Not being able to present proof and argument concerning the legality of gold clause contracts – whether or not the appellants were wrong on the federal income tax consequences of their legal use – made the mere existence of the gold clause payroll system appear illegal and thus objectively unreasonable when it was perfectly legal and objectively reasonable. This ruling, instruction and restriction on highly relevant evidence regarding what is legal or illegal diluted the government’s burden of proof. A criminal tax prosecution requires proof beyond a reasonable doubt that appellants knew their actions were unlawful to prove appellants acted willfully, or acted corruptly or acted with lack of good faith. EOR 9541 (conspiracy charge requires proof of willfully and did not have good faith); EOR 9545-9546 (willfully and good faith defined); EOR 9567 (tax evasion charges require proof of acting willfully and lack of good faith); EOR 9560-9562 (obstruction charges require proof of acting corruptly–intent to secure an unlawful benefit).

2. The trial court would <u>not</u> allow evidence or argument that regarding the lack of notice before the trial court’s first-in-the-nation ruling imposing a specific legal duty to value payments in post-1985 circulating United States coin money as “property” at its commodity dollar value rather than as “money” at its congressionally assigned dollar value.

The trial court repeatedly and purposely instructed the jury on its pretrial ruling as to how payments made to workers in circulating post-1985 United States gold and silver money which is legal tender pursuant to congressional statutes (31 U.S.C. §§5103 & 5112) must be valued. It emphasized that for federal tax purposes the coins are valued

as "property" at its commodity market dollar value rather than as "money" at its congressionally assigned dollar value. EOR 10388 ("One thing I will introduce into evidence is as to what the law is.").

Despite the fact that no prior court decision or specific tax code provision or Treasury regulation or Internal Revenue Service ruling addressed the federal income tax consequences of the legal use of gold clause contracts, the trial court prohibited the appellants from presenting evidence and argument that this pretrial ruling was the first-in-the-nation construing the federal income tax consequences of gold clause contracts. These instructions and rulings further diluted the government's burden of proof –the element of willfulness implicit in all criminal tax charges requires proof (not instruction) that the appellants knew that the law imposed the specific legal duty to value this legal tender as "property" not as "money" and proof (not instruction) that the appellants' acted voluntarily and intentionally with specific intent to violate that known legal duty. *United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984) (conspiracy to defraud tax prosecution conviction reversed for failure to "present evidence as to the appellants specific intent to violate the underlying substantive count ... .").

The fact that this first-in-the-nation ruling came in 2007 during the proceedings in this case was highly relevant evidence negating the essential elements of criminal intent (*i.e.* acted willfully, acted corruptly, acted with lack of good faith) in this criminal tax prosecution. *United States v. Vallejo*, 237 F.3d 1008, 1023 (9th Cir. 2001) (reversed and remanded for a new trial for exclusion of evidence which was relevant to defendant's

lack of knowledge and criminal intent).

3. The trial court restricted the presentation of evidence of appellants' beliefs in the federal tax consequences of gold clause contracts central to the gold clause payroll system to appellants' own testimony (shifting the burden of proof) rather than allowing introduction of appellants' contemporaneous statements of their beliefs admissible under Federal Rule of Evidence 803(3) to show state of mind and lack of criminal intent.

The trial court restricted the presentation of evidence of appellants' good faith beliefs in the federal tax consequences of gold clause contracts central to the gold clause payroll system to the appellants' own testimony (shifting the burden of proof) rather than allowing the introduction of appellants' contemporaneous statements of their beliefs during the relevant alleged conspiracy period despite the fact that Federal Rule of Evidence 803(3) makes the same admissible when offered to show state of mind and lack of criminal intent.

a. Exclusion of appellants' contemporaneous statements of their beliefs admissible under Federal Rule of Evidence 803(3) to show state of mind and lack of criminal intent.

The trial court refused to allow witnesses to testify about what defendants explained to him about his belief and thus their state of mind and intent regarding valuation despite the state of mind exception in Rule 803(3) of the Federal Rules of Evidence. EOR4443,6201. *See United States v. Pheaster*, 544 F.2d 353, 376 (9th Cir. 1976)(state of mind exception hearsay evidence is admissible if it bears on the state of mind of the declarant and if that state of mind is an issue in the case.).[1] The court's general position

[1] In the original trial the previous judge allowed such testimony. *See* 121CDE1578 (R/T 08/02/07 pp. 214-215. Numerous witnesses testified regarding contemporaneous statement of Lori Kahre's belief in how gold and silver coin were to be valued.

was that only the government could present a defendant's out-of-court statement and confined itself to Rule 801. EOR8004-06. This again deprived the defendants of the opportunity to demonstrate relevant facts bearing on their beliefs–and removed relevant evidence from the jury's consideration concerning their lack of criminal intent. The appellant most impacted by this restriction was L.Kahre who did not testify in the 2007 trial but successfully defended the charges by introducing her contemporaneous statements of her good faith beliefs under Federal Rule of Evidence 803(3) in the cross and direct examination of witnesses. *See* 121CDE2381 (L.Kahre's opposition to government motion in liming).

b. The trial court shifted the burden of proof by its evidentiary rulings and told the jury that the defendants had to testify in order to present a good faith defense.

The court below ruled that any evidence of good faith could only be presented if the defendant testified. EOR10392,[10442?]. This is a due process violation. *See United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001) (trial judge comment that places burden on defendant to come forward with evidence disproving the prosecution's case violates Fifth Amendment). Good faith belief negates the willfulness and intent requirement of a tax violation and is therefore not an affirmative defense which the court may properly assign a defendant. *See Cheek v. United States*, 498 U.S. 192, 202(1991).

It universally acknowledged that "influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference and may prove controlling." *Quercia v. United States*, 289 U.S. 466,

470 (1933).

The lower court's evidentiary rulings in the presence of the jury compounded its burden shifting violation by clearly stating that the defendant must testify to present the defense. EOR3876(appellant L.Kahre must testify before other documentary evidence is admitted); EOR5400-01(Court *sua sponte* interrupts defense cross-examination and comments that if defendant (Cline) wants to take the stand and testify then she can do so but counsel can not ask witness these questions.); EOR6619**(**Court informs the jury that there is **no** issue as to the **illegality** of Mr. Kahre's actions stating "Now, not paying your taxes in the manner in which Mr. Kahre did not pay his taxes is illegal. All right? There's– there's not an issue in this case about that." The court continues that the only issue for the jury is one of a defense which is whether or not he believed what he was doing was legal or simply a subterfuge in order to avoid paying taxes).

The court's rulings required the defendants to shoulder a burden which could only be accomplished by testifying. This is a Fifth Amendment violation of the right to remain silent. Its comments clearly communicated to the jury during the trial that the defendants had a burden. This is contrary to *Cheek*, 498 U.S. at 202 (government required to carry the burden of negating a defendant's "claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws.").

4. The trial court communicated its view concerning the lack of reasonableness of appellants' beliefs by its questioning and comments but prohibited appellants from introduction of similar beliefs by witnesses who were also participants to show the reasonableness of appellants' beliefs.

The trial court communicated its own view of the lack of reasonableness of appellants' interpretation of the law in assessing appellants' good faith beliefs by its questioning and comments then precluded appellants from showing, as they did with multiple government and defense witnesses in the 2007 trial, the objective reasonableness of their actions based on the testimony of similar beliefs held by the numerous participants in the gold clause payroll system. The evidentiary rulings and comments shifted the burden of proof.

a. The court through its questioning of the defendants imposed a reasonableness requirement on their good faith beliefs.

When examining witnesses "a judge must be aware of his sensitive judicial position and be on guard to avoid even the appearance of advocacy or partiality." *United States v. McDonald*, 576 F.2d 1350, 1358 (9th Cir. 1978). "Interrogation of witnesses by a judge in a criminal case creates a unique risk that the judge will be perceived as an advocate." *United States v. Orr*, 68 F.3d 1247, 1250 (10th Cir. 1995). If the primary witnesses the court decides to examine are the defendants– the perception of advocacy is no longer a risk but a reality.

The court undertook examination of both R.Kahre and Loglia. Each appellant based their good faith beliefs on the fact that gold clause contracts central to the gold clause payroll system were legal pursuant to 18 U.S.C. §5118 and that Congress alone had the exclusive power to set the dollar value of United States coin and currency used as legal tender. Loglia was the most articulate witness at expressing the good faith basis for the defendants' beliefs based on the gold clause contracts. The trial court repeatedly interrupted Loglia's direct testimony and engaged in extensive examination. EOR7490-

92,7498, 7522, 7526, 7731-37. The trial court commented during Loglia's testimony that his beliefs must be reasonable and credible. EOR7498**(**Court allows published decision Loglia relied on to be admitted as evidence but "strongly admonishes" jury telling them that his reliance must be reasonable or credible and the legal proposition is not the law.). The lower court did the same with its examination of R.Kahre. EOR7247-7249 This is contrary to *Cheek*. *Cheek*, 498 U.S. at 203 (court characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it.").

b. The court's extensive interruption of the direct examination of Loglia belittled his beliefs and the court told the jury it could not understand his beliefs directly communicating to the jury the court's opinion that the defendants did not have a good faith belief.

The court belittled Loglia's testimony and the information upon which be based his good faith beliefs. The court compared his reliance on older cases to one who still believes in segregation based on overruled law. EOR7522. The court informed the jury that a letter from an IRS official supporting Loglia's position will be admitted but probably is "phoney" as it had seen a lot of phoney letters from the FBI, IRS etc. EOR7490-92. The court commented that older Supreme Court case law on the valuation of gold currency and paper currency as money "doesn't represent the law that applies to this case, **nor did it ever, by the way**." EOR7526.

The court re-characterized Loglia's testimony as "he's testified that he believes that congress, which passed the tax laws, left a loophole that whoever wishes to avoid paying taxes simply uses gold and silver" Okay? That's what he's testified to, and said

it about four or five times." The defense objected. EOR7731-33. The court ends with three pages of examination by informing the jury that "I'm having difficulty understanding what you're saying I'm just trying to clear it up for the jury." EOR7734-37. This extensive questioning of the most informed of the appellants on their belief in gold clause contracts during his direct examination had the unmistakable and direct effect of communicating to the jury that the court rejected any good faith belief on the part of the defendants. As the Supreme Court in *Cheek* pointed out "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden. .." " *Cheek*, 498 U.S. 203-204. It's not the proper function of the trial court to impeach a defendant as it communicates to the jury the court disbelieves one version of the evidence. *United States v. Mazzilli*, 848 F.2d 384, 388 (2nd Cir. 1988).