

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)

vs.)

ALFRED W. TRENKLER)

Criminal No.:
92-10369-Z

DEFENDANT'S MOTION TO CONDUCT THE
EXAMINATION OF POTENTIAL JURORS
IN A MANNER LIKELY TO EXPOSE JUROR BIAS

Now comes defendant, Alfred Trenkler, and pursuant to Fed.R. Crim.P. 24(a), moves this Court to conduct its examination of potential jurors in a different manner than the approach utilized in defendant's co-defendant's trial.

As grounds in support of this motion, defendant states as follows:

1. A review of the voir dire procedure utilized during the case of United States v. Thomas A. Shay, indicates a method which, we believe, was unlikely to elicit candid responses from prospective jurors.

2. Specifically, as more particularly described in the affidavit of defendant's jury consultant, James W. Bergund (attached hereto as Exhibit A), although this Court attempted to elicit candid opinions and leanings held by the jurors questioned, we suggest the leading and suggestive language utilized were contrary to this goal.

3. Accordingly, we suggest this Court consider the following to pick a fair and impartial jury:


Have each juror complete the written questionnaire (Exhibit B) previously submitted to this Court, with this Court advising the jurors that:

- a. There are no right or wrong answers;
- b. Each juror has a First Amendment right to disagree with any law or procedural rule;
- c. No one will be criticized in any way for any answer they give;
- d. Honest answers are very important if our system of law is to work as intended by the framers of our Constitution;
- e. Those jurors whose answers appear to give rise to a cause excusal will be questioned privately at side bar;
- f. Moreover, at side bar, the words bias, fairness or prejudice should not be used in an effort to rehabilitate a juror;
- g. Rather, jurors should be asked if their opinions or beliefs are strongly held and are likely to influence their decision if they were jurors, and
- h. Whether they start out favoring one side of this case because of their beliefs or opinions.

4. Defendant submits, for the reasons set forth in Mr. Bergund's affidavit, that if the *voir dire* is conducted in the above manner, it is more likely that a fair and impartial jury will be selected in Alfred Trenkler's case.

WHEREFORE, Defendant respectfully requests this Court to conduct its examination of prospective jurors as suggested.


Respectfully submitted,
For the Defendant,
ALFRED W. TRENKLER,
By his attorneys,



Terry Philip Segal
BBO # 450760
Scott P. Lopez
BBO # 549556
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Boston, MA 02109
(617) 720-4444

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail on October 20, 1993.



Scott P. Lopez



UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)	
)	
vs.)	Criminal No.:
)	92-10369-Z
ALFRED W. TRENKLER)	

AFFIDAVIT OF JAMES W. BERGUND
IN SUPPORT OF DEFENDANT'S MOTION
TO CONDUCT THE EXAMINATION OF POTENTIAL JURORS
IN A MANNER LIKELY TO EXPOSE JUROR BIAS

I, James W. Bergund, on my oath, do hereby depose and say the following:

1. I have been retained by Terry Philip Segal, Esq., to assist in the selection of the jury for Alfred Trenkler's trial.
2. I hold doctoral degree in sociology from the University of California\Berkeley, and for the past fourteen (14) years have been employed full-time as a jury selection consultant.
3. Over the past 14 years, I have participated in jury selections in excess of one hundred (100) criminal cases in both Federal and State Courts throughout the United States.
4. Pursuant to Attorney Segal's request to examine the *voir dire* in the matter of U.S. v. Thomas A. Shay, Cr. No. 92-10369-Z, I have read two (2) Transcripts entitled "Motions/First Day of Trial" and "Third Day of Trial".

5. The Court conducted most of the questioning of the jurors at the Shay trial. In my opinion, the method employed by the Court was unlikely to elicit candid responses from the prospective jurors.

6. Specifically, the leading and suggestive language used by the Court defeated the Court's attempt to elicit opinions or biases held by the jurors.

7. For example, in explaining the circumstances of the case to the jurors, the jurors were informed of the significance of an indictment. The Court stated: "...the indictment is the document that contains the accusation, that's all it is, it's simply the accusation...." Shay Transcript (hereinafter "Tr.") 3-11, lines 21-23. The jurors are then not asked what they think the significance of an indictment is, but, rather, they are only asked whether they have heard of the case. Tr. 3-12, line 9.

8. Thereafter, the Court informs juror No. 6 at side bar that: "The law says that when a police officer testifies, that person is not either more believable or less believable than anyone else. Do you have a problem with accepting that?" Tr. 3-15, lines 13-16.

9. The Court also questioned Juror No. 8 on the same issue as follows: "There is a rule that says a police officer is not by virtue of his or her status any more or less believable than anybody else, and there will be lots of police officers testifying

in this case. Do you have any problem accepting that principle?" The juror responds "no." Tr. 3-27, lines 9-14.

10. The Court also stated to Juror No. 6: "It (the law) also says that a defendant in a criminal case is innocent until the government proves him guilty beyond a reasonable doubt," and the juror responds "yes" despite the fact that no question has been asked. Tr. 3-15, lines 17-21.

11. The Court then proceeds to state "And he, therefore, doesn't have to prove his innocence, he doesn't have to take the stand or explain anything, and the jury may not hold it against him if he decides not to take the stand. Do you have any problem with that proposition." Tr. pp. 3-15-3-16, lines 22-25 & 1. Juror No. 6 responded "no". Tr. p. 3-16, line 2. Finally, the Court asks "Is there is any reason why [this juror] cannot be fair and impartial in this case", to which the jurors responds "No." Tr. 3-16, lines 7-8.

12. Although juror No. 6 was ultimately excused for personal reasons (i.e. surgery), the questions asked and the responses received are representative of the Court's questioning of the other jurors during *voir dire*.

13. In my opinion, when the Court tells a juror what "the law says" and follows this statement with a question phrased in a challenging format i.e. "do you have a problem with that," this approach suggests to the juror what the Court wishes to hear, and as a result, renders the juror's response unreliable.

14. This technique of eliciting responses to a declaration, by an authority figure, laden with clues as to the appropriate response, is probably the least likely method to effectively elicit candid responses from the one questioned.

15. Indeed, any opinion survey using this methodology would be considered of no value because of the leading and suggestive nature of the predicate statements, and the environment in which the inquiry is conducted.

16. For example, in an article entitled *Anticipatory Belief Change: Persuasion of Impression Management*,¹ the authors describe the relationship between "pre-communication persuasion" and "anticipatory belief change". In describing "anticipatory belief change," in a context that is most analogous to a judge conducted *voir dire* the authors state:

Another explanation for anticipatory belief change is based on the desire of individuals to maintain cognitive consistency (cite omitted). Learning before a message is presented that a person who is knowledgeable on the topic of communication disagrees with one's own position creates a state of inconsistency among the recipient's cognition and evokes pressures to reduce the inconsistency. Changing one's attitude before the message is delivered to agree more with the position of the communicator would be one way of restoring cognitive consistency. Furthermore, knowledge that an expert disagrees with one's own position may be an argument sufficiently powerful to stimulate attitude change toward the communicator's position.²

¹R. Glen Hass and Robert W. Mann, *Journal of Personality and Social Psychology*, 1976 Vol. 34, No. 1, p. 105.

²Id. p. 105.

...people tend to fear appearing gullible or being unable to resist social pressure. By adopting a communicator's position following forewarning of an impending persuasive attack, but before the message is actually presented, an individual can preserve self-esteem by avoiding the appearance of having succumbed to the persuasive force of the presentation. The illusion of agreeing all along or having been persuaded only slightly will be established and one's self-esteem maintained.

As a result, the authors of this article conclude "The data suggest that pre-communication changes in measured opinion result from a desire to manage the impression others form of us."³

17. To eliminate the distortions created by pre-communication messages, the authors of the above article suggest employing a format in which the "subject" (in this case, a juror) is given the impression that "no one is paying attention to [their] attitude."⁴ In other words, that there are no right or wrong answers.

18. In another article, similar in content to the above, entitled *Processing Effects of Expectancy-Discrepant Persuasive Messages*,⁵ the authors examined the cognitive effects on the subjects of a variety of persuasive messages. They refer to research in which it was found that "recipients form judgments from cues that are peripheral to the logic of the message, e.g., source characteristics, background features, and contextual cues...."⁶ Viewed in this light, message intake demands little in the way of

³Id. at 110.

⁴Id. at 110.

⁵James M. Hunt and Michael Smith, Psychological Reports, (1989), pp. 1359-1376.

⁶Id. at 1359.

cognitive effort and produces shallow processing. As a result, a "pre-message expectancy is generated, which presumably guides intake and which is said to be biased in that it is skewed toward the communicator's own best interest."⁷

19. For our purposes, when a particular message is anticipated by a juror, the probability of agreement on a "shallow processing" basis is very likely. At a minimum, an introductory message introduces a bias variable rendering the subject's response as a poor measure of the subject's "pre-message opinions, values or biases".

20. To avoid this obstacle and achieve more accurate results, an approach that "disconfirms" the subjects' expectancies will be more likely to stimulate "curiosity and directed thinking,"⁸ and "greater depth of message processing,". The subjects can also be expected to "devote considerable effort and capacity to message analysis, thereby processing message text at a deep (rather than shallow) analytical level."⁹

21. The above authors conclude that under circumstances in which subjects (i.e. jurors) are exposed to a "pre-message instruction" from a credible source, on a subject in which the credible source is an expert, and where the subjects lack expertise, answers obtained are likely to be "false positive"

⁷Id. at 1360-1361.

⁸Id. at 1361.

⁹Id. at 1371-2.

responses and, therefore, a poor measure of the subjects' beliefs or opinions.¹⁰

22. Finally, in an article examining the "durability" of actual belief change when one agrees to a persuasive message that is contrary to the subject's pre-message beliefs, the authors found that initial compliance does not substantially alter pre-existing attitudes. These authors commented:

To change a person's attitude, it is necessary to know the primary salient beliefs upon which the attitude is based and then to construct a message that provides information that either changes the person's subjective perception that the attitude object has certain attributes or influence the evaluation of those attributes.¹¹

Thus, even though the subject (i.e. juror) may indicate compliance with the "pre-message instruction", the pre-message instruction is unlikely to have any effect on the subject's pre-existing attitudes.

23. From the above, it is my opinion that it is reasonable to conclude that when a juror expresses agreement to a statement by a judge as to "what the law is" or "what the rules are," the juror's agreement is not an accurate reflection of that juror's pre-existing beliefs or opinions, and any instruction given by the Court is unlikely to modify the juror's pre-existing beliefs or opinions.

¹⁰Id. at 1372.

¹¹Barry M. Katz, *Effects of Persuasive Communication on Beliefs, Attitudes, and Career Choice*, *Journal of Social Psychology*, 1302 (2) p. 142.

24. In addition, questioning jurors in the manner used in the Shay case will prevent Mr. Trenkler from obtaining reliable information about jurors' opinions, and thereby create the risk that unqualified jurors would be seated to judge him.

25. To minimize the bias created by the "pre-message" method utilized in the Shay case, I suggest the following procedure:

Have each juror complete a written questionnaire with the Court advising the jurors that:

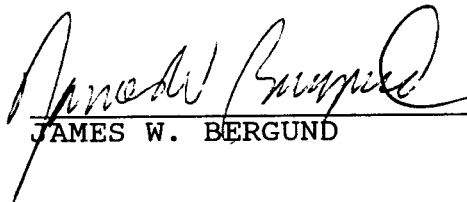
- a) There are no right or wrong answers;
- b) Each juror has a 1st Amendment right to disagree with any law or procedural rule;
- c) No one will be criticized in any way for an answer they give;
- d) Honest answers are very important if our system of law is to work as intended by the framers of our Constitution;
- e) Those jurors whose answers appear to give rise to a cause excusal will be questioned at side bar;
- f) Moreover, at side bar, the word bias, fairness or prejudice should not be used in an effort to rehabilitate a juror;
- g) Rather, jurors should be asked if their opinions or beliefs are strongly held and are likely to influence their decision if they were jurors, and
- h) Whether they start out favoring one side of this case because of their beliefs or opinions.

26. I would further recommend that the Court examine the results of the juror surveys attached hereto as Exhibit A and examine this data in the context of this motion. These surveys indicate that many jurors who were not qualified to serve in a criminal case because of their opinions were nevertheless seated as jurors. They also presumably were questioned about the same issues discussed in every criminal trial, e.g. presumption of innocence, the significance of a defendant's failure to testify and the credibility of law enforcement.

27. As a final matter, I was recently retained to assist with the jury selection in the matter of Nevada v. Jaeger. In this case, the defendant was charged with attempted murder of a police officer and the case was highly publicized. At the request of the defense, the trial judge had each juror complete a written questionnaire similar to the one proposed by the defense in the instant case. During *voir dire*, the judge asked the jury panel whether they disagreed with the presumption of innocence and the reasonable doubt standard. In addition, after instructing the jurors that the indictment was of no evidentiary significance, that if the defendant did not testify it could not be held against him, and that the testimony of police officers should not be accorded greater credibility simply because they were police officers, the judge then asked whether any of the jurors disagreed with these concepts. Only one (1) juror raised his hand in response to the above series of questions. However, an examination of the completed juror questionnaires indicated that at least fifteen (15)

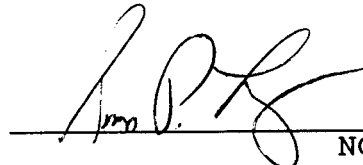
to twenty (20) jurors disagreed with all or some of these concepts. During follow-up questioning on these issues, approximately twelve (12) jurors were excused for cause as a result of their disagreement with these legal protections. I believe this is an example of the persuasive force of instructions which precede relevant questions. In sum, if the parties in the above case had relied entirely on the oral examination of the jury panel by the presiding judge we would not have been able to identify the biases of those jurors who were ultimately excused for cause.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 20TH DAY OF OCTOBER, 1993.

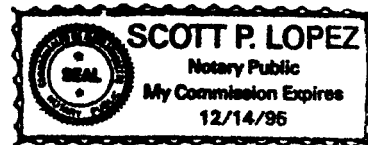


JAMES W. BERGUND

SWORN AND SUBSCRIBED BEFORE ME THIS 20TH DAY OF OCTOBER, 1993.



NOTARY PUBLIC
MY COMMISSION EXPIRES: 12/14/95



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MONDAY, FEBRUARY 22, 1993

The View From The Jury Box

When a National Law Journal/Lexis poll asked nearly 800 people who served on civil and criminal juries nationwide in 1992 more than 100 questions on what they thought of the jury system and the lawyers who labor within it, the answers were a surprising blend of conventional wisdom affirmed and debunked. Among the highlights:

★ Paid experts were thought be-

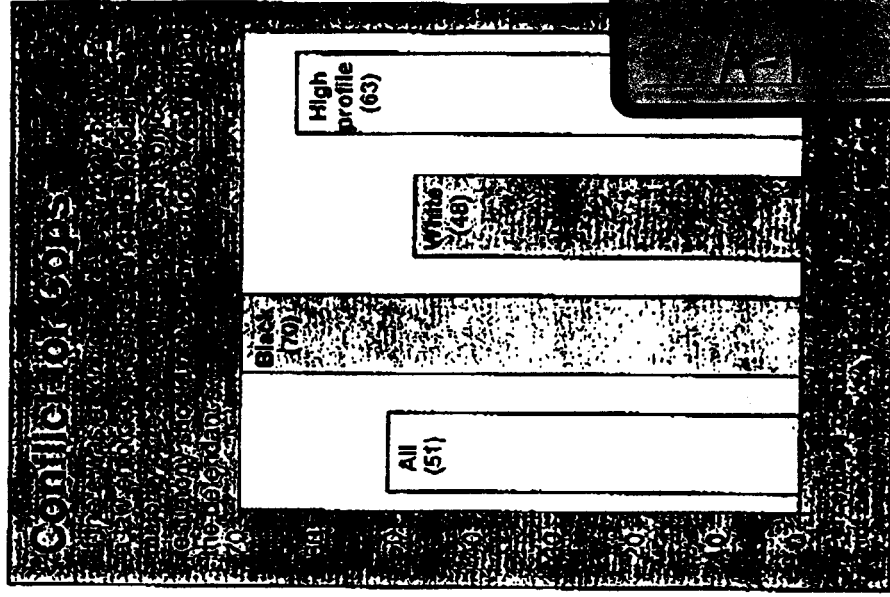
lievable by 89 percent.

★ More than one-third assessed the wealth of the defendant before assessing damages in civil suits.

★ A majority said they would not give more weight to a police officer's testimony than to a defendant's.

★ One-quarter presumed a defendant was guilty if brought to trial.

Complete results in pullout section.



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Presumed Innocent?

28 percent of respondents said that if a criminal case gets to trial, the defendant is guilty or probably guilty.



Probably not guilty

should have the three-strike rule. If three inadmissible statements or evidence come in... you need to start the trial over."

Defense attorney Mr. Hubert said the 10 percent who answered "sometimes" gave the most honest answer.

Good Marks All Around

When it comes to honest answers, jurors gave themselves the highest marks in voir dire.

According to the poll, when asked if every answer they gave the lawyers and judges was totally open and frank, 98 percent of all jurors said yes; only 1 percent answered no. Of the 1 percent who said they lied, one in four said they did so because they wanted to be on the jury, 20 percent said they wanted off the jury, and 25 percent said they felt ill at ease.

Jurors also handed out kudos to lawyers for their voir dire performance. Almost nine out of 10 said that lawyers

Methodology

THE SURVEY was conducted by Penn + Schoen Associates Inc. at its New York telephone interviewing facility. A total of 783 interviews were conducted - 433 with jurors from routine criminal cases, 300 with jurors from civil cases, and 50 with jurors from cases considered "high profile" that had received widespread media attention.

To conduct the survey, Penn + Schoen Associates drew a random selection of judges from lists of state and federal courts. The judges and their clerks were then asked to cooperate with the study by releasing the names of jurors who had recently served in trials. The interviews were conducted over the period from Aug. 31 to Nov. 5, 1992.

The list of jurors received from the cooperating courts were sampled to locate cooperating jurors. No more than four jurors were selected from any one trial.

For high-profile cases, Penn + Schoen Associates received a list of such cases from The National Law Journal, and the judges in those cases were called on to cooperate in a similar manner.

Only jurors who said they had served in a trial that went to verdict were included in the sample.

For larger states where law prohibited release of jurors' names, recent jurors were located by adding screening questions to statewide polls being conducted in those states.

The theoretical margin of error for a random sample of 783 would be +/- 3.5 percent. The random cluster sampling method used here for the non-high-profile interviews, however, would have a sampling error of approximately +/- 5 percent. No sampling error can be calculated for the high-profile cases, as they were not selected at random.

Ruling on gays hits snag

Justice Department trying to block it

New York Times News Service

WASHINGTON — Five weeks after President Clinton hailed a judge's ruling that the Pentagon's ban on homosexuals in the military is unconstitutional, the Justice Department is trying to keep that ruling from taking effect.

Administration officials say that allowing the decision in the case of Petty Officer Keith Meinhold to take effect could upset a fragile compromise reached in January by Mr. Clinton and Congress to delay lifting the ban until July 15.

Mr. Clinton and senior aides count on using the interim to persuade Congress to support his pledge to lift the ban. In January, Mr. Clinton delayed issuing his promised executive order on the subject in the face of opposition from Republicans and some Democrats in the Senate.

The administration's argument was rejected last month by U.S. District Judge Terry Hatter Jr., who in January ordered the Navy to reinstate Petty Officer Meinhold, a 30-year-old sailor who was discharged last year after proclaiming his homosexuality on national television.

Judge Hatter had also permanently enjoined the Pentagon from discharging gays and lesbians "in the absence of sexual conduct which interferes with the military mission."

The Justice Department on Wednesday filed an appeal of Judge Hatter's decision with the 9th U.S. Circuit Court of Appeals in San Francisco.

Under the compromise Mr. Clinton and Congress reached, in a six-month interim period military personnel who reveal their homosexuality cannot be discharged but may be placed on standby reserve without pay or benefits. If Judge Hatter's decision is allowed to stand, administration officials fear that individuals placed on standby reserve might sue the government, challenging the basis of the proceedings against them or claiming that the limbo status would effectively discharge them.

Meanwhile, a new poll has found that Americans are sharply divided over whether gay men and lesbians choose their sexual orientation, a split that shapes attitudes on everything from homosexuals in the military to gay life in general.

According to the latest *New York Times/CBS News Poll*, Americans who say individuals cannot change their orientation — 43 percent of those surveyed — are more sympathetic to the gay view on these issues

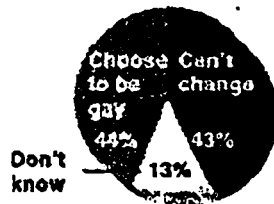
than the 44 percent who see it as a choice. The country is split evenly, 43 percent to 43 percent, on whether gays and lesbians should be allowed to serve in the military. But support is higher, just over half, among those who think sexual identity cannot be changed; it is much lower, less than a third, among those who think being gay or lesbian is a choice.

The poll, as well as independent interviews with 50 people over the last four days, found an America conflicted about homosexuality — not wanting to appear bigoted but not too tolerant, either. People oppose job discrimination against gay men and women by a big majority, yet they are evenly split on such basics as whether homosexual relations should be illegal.

The poll of 1,154 adults was conducted nationwide Feb. 9-11 and had a margin of error of plus or minus three percentage points.

HOW THE PUBLIC VIEWS GAY ISSUES

Do you think being homosexual is something people choose to be, or do you think it is something they cannot change?



Total adults	Those who say homosexuality... is a choice cannot be changed	
	Choice	Cannot be changed
JOBS AND RIGHTS		
78%	Say gays and lesbians should have equal rights in terms of job opportunities	69% 90%
42	Say it is necessary to pass laws to make sure gays and lesbians have equal rights	30 58

PERSONAL JUDGMENTS		
46	Say homosexual relations between consenting adults should be legal	32 62
36	Say homosexuality should be considered an acceptable alternative lifestyle	18 57
55	Say homosexual relations between adults are morally wrong	78 30
43	Favor permitting gays and lesbians to serve in the military	32 64
34	Would permit their child to play at the home of a friend who lives with a gay or lesbian parent	21 50

Based on telephone interviews with 1,154 adults nationwide conducted Feb. 9-11. Margin of error: plus or minus 3 percentage points.

Dallas Morning News/NTT



SUPPLEMENTAL JUROR QUESTIONNAIRE
 PLEASE READ CAREFULLY AND COMPLETELY ANSWER
 EACH OF THE FOLLOWING QUESTIONS:

1. Describe your employment including your duties, number of people supervised and length of time so employed. (If retired or unemployed, describe principal occupation when employed.) _____

2. Describe your spouse's employment. _____

3. If you have children over the age of 18, describe their employment or school they are attending. _____

4. If you have served in the Armed Forces state:
 Total Years served _____ Branch _____ Last Rank _____
5. If graduated from college state:
 Degree(s) _____ Major(s) _____
6. Listed below are certain leisure time activities. We are interested in your answers, however this portion of the questionnaire is optional, and you need not reply to any or all of these items.
 - a. Hobbies _____
 - b. Clubs, groups, unions or other organizations _____
 - c. Newspapers or magazines you read _____
 - d. Favorite TV programs _____
7. If there was a conflict between the testimony of a law enforcement officer and a defendant in a criminal case, would you be more inclined to give more weight to the testimony of the law enforcement officer.
 Yes () No () Reasons (if any) _____

8. Do you believe that homosexual relations between consenting adults is:
 - a) Morally Wrong - Yes () No () Explain _____
 - OR b) Should be illegal - Yes () No () Explain _____
9. If a person is arrested, indicted and brought to trial, would that cause you to believe that he/she is probably guilty.
 Yes () No () Explain _____

10. If a defendant in a criminal trial was accused of unlawful conduct that resulted in the death of a police officer, would your opinions or beliefs influence you in such a way, that it might be difficult for you not to be significantly influenced by these opinions or beliefs if you were to serve as a juror on a case involving these accusations?
 Yes () No () Explain _____

11. If a defendant in a criminal trial does not testify during his/her trial, would that cause you to believe that this is some evidence of the defendant's guilt.
 Yes () No () Explain _____

12. Have you, any family member or close personal friend ever been employed by a law enforcement agency of any kind. Yes () No ()
 If Yes, state name of agency and relationship of the person to you. _____

