UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

UNITED STATES OF AMERICA

v. Case No.: 3:07CR192-NBB-SAA

RICHARD F. SCRUGGS,
DAVID ZACHARY SCRUGGS,
SIDNEY A. BACKSTROM,

DEFENDANTS' MOTION FOR RECONSIDERATION OF ANONYMOUS JURY ORDER, OR ALTERNATIVELY FOR A SUPPLEMENTAL JURY QUESTIONNAIRE; FOR TRANSFER OF VENUE; AND FOR EXPANDED VOIR DIRE PROCEDURES, WITH COMBINED MEMORANDUM OF LAW

I. INTRODUCTION

Defendants Richard F. Scruggs, David Zachary Scruggs and Sidney A. Backstrom hereby move this Court to reconsider its order granting the government's motion for an anonymous jury, Doc. 146, as it is erroneous under controlling Fifth Circuit law. Defendants further submit that, to the extent that the extraordinary pre-trial publicity of this case animated the Court's decision, the more appropriate approach is a change of venue, and Defendants therefore renew their motion for a transfer of venue pursuant to Federal Rule of Criminal Procedure 21(a). Defendants further move that, should the Court continue with its plan to empanel an anonymous jury, the Court utilize a detailed supplemental juror questionnaire, consistent with the law of the Fifth Circuit. Finally, Defendants move this Court to expand its the voir dire procedures in this case, given the widespread publicity; the high-profile nature of the case, the Defendants, and potential trial witnesses; and the Court's plan to utilize an anonymous jury.

II. ARGUMENT

A. The Court Should Reconsider the Order Granting an Anonymous Jury

Defendants respectfully submit that the Court erred in granting the government's Motion for an anonymous jury. The Court identified three factors in granting the motion: 1) the "uncontradicted" testimony by Tim Balducci of attempts to influence the judicial process and the vague threat that jurors "would be subject to intimidation, pressure, and approaches by agents of the defendants"; 2) the "lengthy incarcerations and substantial monetary penalties" the Defendants would face; and 3) the "extensive publicity" that this case has drawn. Doc. 146, at 3-4. The Court wrongly applied Fifth Circuit precedent in reaching these conclusions, and therefore should reconsider its decision.

First, the Court recognized that the decision to empanel an anonymous jury must be based on more than "mere allegations or inferences." *Id.* at 3 (citing *United States v. Sanchez*, 74 F.3d 562 (5th Cir. 1996). Yet the Court then did precisely what it counsels against, relying on "mere allegations" and inferences to establish the need for an anonymous jury. The conduct for which Defendants have been indicted involves an alleged agreement to give a state court judge money in exchange for sending a case to arbitration. It requires a serious and speculative leap to conclude that because Defendants are accused of conspiring to bribe a judge, they also are likely to tamper with jurors. There is no evidence before the Court—nor even a specific claim or suggestion—that Defendants have ever tampered with a jury, even though these Defendants have litigated hundreds of jury cases in their esteemed legal careers. This is in stark contrast to *United States v. Edwards*, where the district court was presented with "very credible evidence" in the form of "numerous affidavits" from state police, attorneys in former cases, and others demonstrating that there had been active jury tampering in the previous trials of Governor Edwin Edwards. 119 F. Supp. 2d 589, 596-97, 608-09 (M.D. La. 2000) (describing questionable jury practices in Edwards's first two trials). These factors were expressly noted in the Fifth Circuit's *Edwards* opinion. *United States v. Edwards*, 303 F.3d 606, 614 (5th Cir. 2002). Similarly, in *United States v. Salvatore*, another Fifth Circuit case where an anonymous jury was approved,

the government submitted evidence that showed an ongoing investigation into jury tampering in connection with the previous acquittal of one of the defendants in state court, while two other defendants had pled guilty to jury tampering in a prior case. 110 F.3d 1131, 1143-44 (5th Cir. 1997), *abrogated on other grounds by Cleveland v. United States*, 531 U.S. 12 (2000). *See also United States v. Riggio*, 70 F.3d 336, 338 (5th Cir. 1995) (defendant "had been accused of jury tampering in a previous case"); *United States v. Childress*, 58 F.3d 693, 703 (D.C. Cir. 1995) (during previous trial of criminal associates, a potential witness had been shot, another witness's mother had her house firebombed, and audience members in the courtroom "glared menacingly" at witnesses and jurors during trial).

Here, the government offered no affidavits, no evidence, nothing except the blanket assertion that a Defendant accused of agreeing to bribe a judge on a civil matter must also be willing to tamper with jurors. And the Court similarly made no factual finding that jury tampering was likely to occur. Doc. 146, at 4 ("There is also consideration that the jurors would be subject to intimidation, pressure, and approaches by agents of the defendants. That is the tactic that has been alleged by the government to have been used with the judges in this case and the 404(b) case, according to the testimony before the court at this time."). Because the Court's reasoning was predicated only on a speculative inference,[1] with no basis in fact, this factor cannot support the use of an anonymous jury here.[2]

[1] Were this inference proper, every federal prosecution for bribery of a federal juror under 18 U.S.C. § 201, would justify an anonymous jury. Yet Defendants are unable to locate a single juror-bribery case in which an anonymous jury has been empaneled.

[2] The fact that Tim Balducci's testimony about purported bribes is "uncontradicted," Doc. 146, at 3, can hardly be held against Defendants, since they have not yet had the opportunity to put on their case. But, critically, even if the Court credits Balducci's testimony, he testified that neither he nor the Defendants set out to bribe Judge Lackey and that his criminal intent was not formed until Judge Lackey demanded $40,000 in exchange for ruling in Defendants' favor. *See* Ex. 15 at 53:2-6; 72:12-73:22. All Exhibits ("Ex.") cited herein are exhibits to the Declaration Of Warren Braunig In Support Of Defendants' Motion For Reconsideration Of Anonymous Jury Order, Or Alternatively For A Supplemental Jury Questionnaire; For Transfer Of Venue; And For Expanded Voir Dire Procedures. From this, it hardly can be inferred that Defendants or their agents would attempt to interfere with the jury pool in this case.

Second, while Defendants take very seriously the potential punishment they face, it does not compare to the extraordinary incarceration and monetary penalties that other courts have noted in relying upon this factor. *See, e.g., Edwards*, 119 F. Supp. 2d at 599 (primary defendant faced 350 years of imprisonment and a $7 million fine); *United States v. Krout*, 66 F.3d 1420, 1428 (5th Cir. 1995) (defendants faced life imprisonment); *United States v. Edmond*, 52 F.3d 1080, 1091 (D.C. Cir. 1995) (life imprisonment); *United States v. Ross*, 33 F.3d 1507, 1521 (same). The potential maximum penalties in this case are comparable to those in any federal multi-count indictment; they are not so unusual as to require an anonymous jury. See *Krout*, 66 F.3d at 1427 (anonymous jury intended to be a "device of last resort"). The Court's reliance on this factor was again clear error.

Third, the Court's reliance on the extensive publicity present here is plainly inconsistent with Fifth Circuit precedent.[3] Defendants agree that the publicity here is extraordinary but "[n]ot all celebrated trials merit an anonymous jury." *United States v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996). Missing here are the "deep passions" associated with the murder of FBI agents and the subsequent FBI raid on the Branch Davidian compound in *Branch*, *id.*, or the circus atmosphere that surrounded the trial of Louisiana's flamboyant and controversial four-term governor, Edwin Edwards, 119 F. Supp. 2d at 600-601. Most importantly though, beyond the naked allegations of the prosecution, there is absolutely no reason to believe that the publicity here risks the intimidation or harassment of jurors, as is required by *United States v. Krout*. 66 F.3d at 1427. The Court made no factual findings that intimidation or harassment is likely to occur, precisely because there are no facts in evidence that indicate it, only bare speculation.[4]

An anonymous jury prejudices the Defendants. Defendants have "a right to a jury of known individuals . . . because the verdict is both personalized and personified when rendered by

[3] The government has been trying to have it both ways, arguing that the same publicity that was insufficient to warrant a transfer of venue is now so severe as torequire the empaneling of an anonymous jury. The Court's rulings endorse this incongruous position.

[4] The government and the Court concede that the first two of the *Krout* factors—ties to organized crime or participation in a group with the capacity to harm jurors—are not present here. Doc. 146, at 2.

12 known fellow citizens. *Sanchez*, 74 F.3d at 565. Anonymity, on the other hand, "raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence." *Ross*, 33 F.3d at 1519. And that is why, "[i]n general, the court should not order the empaneling of an anonymous jury without [ ] concluding that there is a strong reason to believe the jury needs protection." *Id.* at 1519-20. As the Fifth Circuit has made clear, *see Edwards*, 303 F.3d at 613-14, in the absence of threats to juror safety or a concrete threat of jury tampering, an anonymous jury is inappropriate.[5] Therefore, the Court should reconsider its Order and deny the government's Motion.

B. Should the Court, However, Continue with Its Plan to Empanel An Anonymous Jury, It Should Substantially Supplement the Jury Questionnaire

If the Court decides not to reconsider its order to empanel an anonymous jury then it should instead supplement the jury questionnaire that has already been distributed to venirepersons. Defendants proposed their jury questionnaire before the government moved for an anonymous jury, and the Court approved a questionnaire before it decided the government's

[5] Defendants agree with the Court that, if the Court empanels an anonymous jury, the jury should be specially instructed about the anonymity. Doc. 146, at 4. Defendants would request that their be no mention at all in the Court's instruction of the jurors' security or safety. Even informing them that anonymity is *not* related to protecting their safety may prejudice Defendants by indicating that there might be some relationship between the anonymity and Defendants' conduct. Defendants would urge the Court to use the following preliminary instruction, modeled on the one utilized in *Edwards*:

> You have been randomly selected to serve as a potential juror in the trial of Richard Scruggs, Zach Scruggs, and Sid Backstrom.
>
> This case has attracted a high degree of publicity. To protect your privacy during the jury selection process and trial, you have been assigned an individual juror number which will be used to identify you. You must use your juror number at all times. This procedure has been followed in other highly publicized cases in federal court and is designed to protect the privacy of jurors during the course of trial.
>
> With any potentially high profile case, we are all subject to receiving phone calls and letters about the case and even inquiries from members of the media or from friends, neighbors or relatives. I want to ensure that there not be any such contact with members of the jury during the course of this trial. The use of these procedures is to ensure that both sides will get a fair trial. It will also permit you, the jury, to perform your important duties without your privacy being invaded.

See Edwards, 119 F. Supp. 2d at 607.

anonymous jury motion, leaving the Defendants no opportunity to address the questionnaire in the new setting of an anonymous jury.

It is axiomatic, in the Fifth Circuit and beyond, that Defendants are entitled to a significantly more extensive jury questionnaire when they will face an anonymous jury. *See Edwards*, 303 F.3d at 612 ("twenty-eight page questionnaire consisting of 116 questions, some with subparts"); *United States v. Brown*, 303 F.3d 582, 602 (5th Cir. 2002) (noting with approval an "exhaustive 42-page juror questionnaire"); *Branch*, 91 F.3d at 724 (district court furnished Defendants with answers to "80 detailed questions"); *United States v. Jackson*, 863 F. Supp. 1449, 1459 (D. Kan. 1994) ("Courts resort to extensive jury questionnaires in such circumstances as where . . . an anonymous jury procedure is used."). This is because the provision of extensive questionnaires diminishes the prejudice to Defendants associated with an anonymous jury. *See Edwards*, 119 F. Supp. 2d at 605; *United States v. Gambin*o, 809 F. Supp. 1061, 1068 (S.D.N.Y. 1992). As the D.C. Circuit explained it, the twenty-three page questionnaire it approved in *United States v. Childress*, was "a substitute for revealing the prospective jurors' names, addresses, and places of employment or business." 58 F.3d 693, 702 (D.C. Cir. 1995). *See also United States v. Koubriti*, 252 F. Supp. 2d 418, 423 (E.D. Mich. 2003) (approving anonymous jury questionnaire with "103 detailed questions" on similar grounds).

Accordingly, if this Court does not reconsider its decision on an anonymous jury, Defendants request that the Court send out a Supplemental Juror Questionnaire (attached as Exhibit 1) to all venirepersons, or alternatively, to distribute and allow time for all venirepersons to answer this questionnaire on March 31, prior to jury selection. The limited 14-question jury questionnaire this Court has distributed with the jury summons, while reasonable in a normal case, is wholly insufficient in the context of an anonymous jury. The distributed questionnaire is dramatically shorter and less probing than any other questionnaire Defendants have been able to locate in an anonymous jury case. For example, in *Edwards*, one of the primary cases relied upon by this Court in its anonymous jury Order, the Court utilized an extensive, 116-question jury questionnaire (attached as Exhibit 2) that provided the parties with an "arsenal of

information" about potential jurors. 119 F. Supp. 2d at 605. The *Edwards* Court's questionnaire inquired extensively into demographic, employment, and political backgrounds, as well as jurors' attitudes. It included questions about:

- residential history (Questions 11-15);
- spouse's employment and educational background (Questions 35-43);
- political affiliations and predilections (Questions 48-53);
- religious preferences (Questions 54-56);
- opinions about the issue in that case, legalized gambling (Questions 57-71);
- connections with parties to the case (Questions 86-90);
- opinions about Governor Edwards (Question 92); and
- exposure to pretrial publicity (Questions 100-105)

See also Brown, 303 F.3d at 602 (42-page questionnaire); *Salvatore*, 110 F.3d at 1144 ("detailed questionnaire"); *Branch*, 91 F.3d at 724 ("80 detailed questions")

By contrast to these extensive and detailed questionnaires used in the Fifth Circuit's other anonymous jury cases, the Court's current questionnaire is sorely lacking in both scope and specificity. Indeed, prior to ordering an anonymous jury, the Court removed questions proposed by Defendants (relating to political leanings, exposure to pretrial publicity, opinions about trial lawyers, and others) that are nearly identical to those approved by the Fifth Circuit in *Edwards*. Instead of being provided with an "arsenal of information," *Edwards*, 119 F.2d at 605, Defendants here would be forced to make do with the crumbs of a questionnaire that is 83% shorter than the shortest questionnaire ever approved by the Fifth Circuit in an anonymous jury case.

C. To the Extent the Court is Concerned About Publicity and the Reach of Defendants' "Agents," The Better Course Would be to Move the Trial out of Mississippi, Or Take Other Remedial Measures to Protect Defendants' Rights to A Fair Trial

1. Media coverage of this case continues to be pervasive and inflammatory

On February 11, 2008, Defendants filed a Motion asking the Court to transfer venue out of the state of Mississippi.[6] In denying that Motion ten days later, the Court noted that while there have been "dozens if not hundreds" of stories in the Mississippi press, Defendants had failed to present evidence of "how many people out there on the street" read the newspapers or "testimony by anyone who thinks that the defendants could not get a fair trial from jurors in this district."[7] Defendants hereby renew that Motion, and submit that, given the circumstances of this case, a transfer of venue is a more appropriate solution than use of an anonymous jury.

In answer to the Court's inquiry, Mississippians do read their newspapers, and they also read news on the Internet. Northern Mississippi's leading newspapers, along with their websites, reach a vast number of people in the jury pool.[8] 234,200 Mississippians read the Clarion-Ledger on at least a weekly basis, and 5,712,979 people visit its website each year.[9] The Northeast Mississippi Daily Journal, with a circulation of 36,000, is read by 90,000 Northeast Mississippians daily.[10] The Oxford Eagle has a daily circulation of 6,000[11]. The folo.us blog, which provides non-stop, 24-7 coverage of the Scruggs case, had 222,000 visitors in the last two weeks of February alone, 2/3 of them from Mississippi.[12]

In the month since Defendants filed their initial motion, the coverage of this story in the newspapers, radio and television of Northern Mississippi has proceeded at an extraordinary pace. Just in the last thirty days, the jury pool has faced a deluge of stories about Defendants, this trial,

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[6] Defendants incorporate by reference the arguments made and the articles cited in their Motion for Change of Venue and Combined Memorandum of Law. Doc. 96.
[7] Ex. 16 at 114-15.
[8] Defendants' original Motion did include such statistics for the Northeast Mississippi Daily Journal. *See* Doc. 96, at 6.
[9] *See* Ex. 3 at 10, 13.
[10] Ex. 4 at 2.
[11] Ex. 5 at 4.
[12] Ex. 17.

Richard Scruggs's relationship with Attorney General Jim Hood, and the uncharged allegations this Court is prepared to allow concerning Circuit Judge Bobby DeLaughter: At least thirty-three separate stories have run in the Clarion-Ledger;[13] twenty-five in the Daily Journal;[14] nine each in the Oxford Eagle[15] and the Greenwood Commonwealth[16]; and yet another twenty-five downstate in the (Biloxi) Sun-Herald.[17] Far from diminishing over time, the press attention to this case is only expanding from week to week, building toward the crescendo of coverage that likely will peak on the day the jury is empaneled. Given the Court's decision to try Defendants within four months of indictment, this continuity of coverage is not surprising; but the lack of any gap in the media coverage only heightens the prejudice that it will cause to Defendants at trial. *See Johnson v. Beto*, 337 F. Supp. 1371, 1377 (S.D. Tex. 1972).

Moreover, as Defendants noted before, across the Mississippi state line, the publicity temperature drops dramatically. Over the last month, only three stories about Scruggs have appeared in the New Orleans Times-Picayune[18] or the Memphis Commercial Appeal,[19] and only five AP stories in the Houston Chronicle.[20] This story may be noteworthy nationwide, but only in Mississippi is it a subject of regular and impassioned debate.

Not only is this case covered extensively; the coverage continues to be damning and inflammatory. The Clarion-Ledger has suggested that the Scruggs case is "fostering a false image of this state operating like a bad Dukes of Hazzard episode."[21] The Democrat, out of Tate County, Mississippi, declared: "We could not agree more with Dickie Scruggs' defense team's declaration that Scruggs has been made 'poster-child for greed, attorney malfeasance and tort reform.'. . . [T]his case strikes at the very foundation of the justice system of law upon which

[13] Ex. 6.
[14] Ex. 7.
[15] Ex. 8.
[16] Ex. 9.
[17] Ex. 10.
[18] Exh. 18.
[19] Exh. 19.
[20] Exh. 20.
[21] Exh. 21.

everything in this nation is founded."[22] If the goal of these editorials, and the constant drumbeat of articles repeating the allegations, is to stir the passions of average Mississippians, it appears to be working. Local readers commenting on the Clarion-Ledger's website have had the following to say about Defendants:

- "These scum have no morals, integrity or shame. God set's his sites on guys like them and one day he pulls the trigger and BAM!! Dead Dogs."[23]
- "TRIAL LAWYERS = THE ROOT OF ALL MISSISSIPPI EVIL ----- WATCH UR BACKS GREEDY PEEPS OF MS, IT'S SHAKEDOWN TIME!"[24]
- "May Dickie Scruggs be mounted by a rabid dog!!!!"[25]
- "I say we waterboard 'em and get to the bottom of this."[26]
- "[T]he good 'ole boy system has completely ruined this state. We will never elevate out of 50th place until we round up all these good 'ole boys and run them clear out of the state."[27]

Perhaps most striking about all of this coverage, and the venom spewed at Defendants, is its sheer volume and the manner in which it has electrified the state. One Clarion-Ledger cartoonist captured the zeitgeist of the moment, portraying the Scruggs trial as the soap opera that people run home to follow on the Internet[28]:

[22] Ex. 11
[23] Ex. 13 at 28.
[24] *Id.* at 4.
[25] Ex. 12 at 3.
[26] *Id.*
[27] *Id.* at 7.
[28] See Clarion-Ledger, "Scruggs Soap Opera", Michael Ramsey, dated Feb. 22, 2008.

For all these reasons, the Court should transfer venue out of Mississippi. "Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." *Pamplin v. Mason*, 364 F.2d 1, 5 (5th Cir. 1966); *see also United States v. Tokars*, 839 F. Supp. 1578, 1582 (N.D. Ga. 1993) (inferring widespread bias from "extraordinary volume of coverage (virtually all of which is highly negative to the Defendants) with the emotional nature of the coverage").[29]

2. Where local publicity might justify an anonymous jury, the less prejudicial course is to transfer venue

This extraordinary publicity was cited, and indeed relied upon, by the Court in its Order granting the use of an anonymous jury. Doc. 146, at 3. But the risks associated with pretrial publicity could better be alleviated by moving the trial outside Mississippi. Confronted with a very similar situation, the district court in *United States v. Saya* determined that changing the venue of the trial would obviate the need for an anonymous jury. 980 F. Supp. 1157 (D. Hawaii 1997). In *Saya*, the district court recognized "[e]xtensive publicity concerning the Defendants, coupled with the sensitive issues of an anonymous jury, aggravates the concern whether Defendants will receive a fair trial." *Id.* at 1158. Noting the "recent, widespread and highly damaging publicity" and "the heightened publicity this case would receive" because of the use of an anonymous jury, the court concluded that the publicity would be far less intense, and indeed

[29] Insofar as the Court believes that Defendants need to provide testimony that they will not be able to receive a fair trial in Mississippi, Defendants would welcome the opportunity to put on such testimony. But live testimony is not necessary. Defendants previously proffered the language of Northern Mississippi editorials suggesting precisely that. Doc. 96 at 11-12.

the risk of jury tampering significantly diminished, if the trial were moved from Honolulu to Spokane, Washington. *Id.* at 1159.[30] As such, the Court concluded that an anonymous jury, and the concomitant "serious threat" to the Defendants' fair trial rights it entails, *id.*, would be unnecessary in Spokane.

The same remedy is appropriate here. There is no evidence that Defendants will interfere with the jury process in Mississippi. But to the extent the Court is worried that "agents" of the Defendants or the news media would harass jurors, those concerns would be diminished if the trial were held in Louisiana, Texas, or anywhere else. As noted previously, coverage of this case is practically nonexistent outside Mississippi, and it is "highly improbable" that those hypothetical agents the Court fears might engage in jury intimidation would travel hundreds of miles and outside the state to harass jurors. *Id.* Transferring venue pursuant to Federal Rule of Criminal Procedure 21 is a fairer and more reasonable approach than utilizing an anonymous jury.

3. Other remedial measures could alleviate the Court's concerns while protecting Defendants' rights

In lieu of using an anonymous jury, the Court has other measures it could take to minimize the risks of trial publicity or juror intimidation. As noted, and, indeed, requested by the government, the Court could sequester the jury. Doc. 119, at 4; *United States v. Greer*, 806 F.2d 556, 557 (5th Cir. 1986). Sequestration would minimize the risk of both exposure to mid-trial publicity and outside parties seeking to interfere with the jury's deliberation. The Court alternatively could release the names, addresses, and employment of the venirepersons only to the Defendants or their counsel, while keeping their identities secret from the media, a procedure occasionally used in cases of this nature.

[30] As is the case here, the prosecution in *Saya* never suggested that trying the case outside the home district would be "highly inconvenient." 980 F. Supp. at 1159.

D. Regardless of Whether the Jury Is Anonymous Or Not, Expanded Voir Dire is Necessary in this Case

1. The Fifth Circuit demands an extended voir dire in situations of extensive pre-trial publicity or an anonymous jury

The trial court has broad discretion to determine the scope and method of voir dire in criminal cases. *See* Fed. R. Crim. P. 24(a); *United States v. Shannon*, 21 F.3d 77, 82 (5th Cir. 1993). But in all cases, the Court's discretion must be exercised with due regard for Defendants' right to trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717 (1961). The "right to an impartial jury includes the right to an adequate voir dire to identify unqualified jurors." *United States v. Beckner*, 69 F.3d 1290, 1291 (5th Cir. 1995) (citing *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992)).

The Fifth Circuit has specifically recognized that pretrial publicity may give rise to "a significant possibility of prejudice" and that, when that risk is present, the district court's voir dire must "provide a reasonable assurance that prejudice would be discovered if present." *Beckner*, 69 F.3d at 1292; *see also United States v. Hawkins*, 658 F.2d 279, 283 (5th Cir. 1981); *United States v. Davis*, 583 F.2d 190, 196-97 (5th Cir. 1978). Defendants establish the requisite risk of prejudice from pretrial publicity by submitting into the record evidence of pervasive and prejudicial local media coverage. *See Beckner*, 69 F.3d at 1293. In *Beckner*, the defendant provided the Court with forty-eight local newspaper articles and eight television broadcasts, including ones that connected the defendant to the guilty plea of a co-conspirator, mentioned that the jury in his first trial had hung 11-1 in favor of conviction, and played up the defendant's Democratic Party connections. *Id.*; *see also Hawkins*, 658 F.2d at 284 (noting large number of media stories "relating to the arrests, indictments, and pre-trial activities surrounding this case," regular invocation of the defendants' names, emphasis on the drug-related charges and "continuous flow" of articles about the pleas of other defendants).

Here, Defendants have more than met their burden, submitting to the Court well over a hundred separate stories published in Mississippi newspapers, or broadcast on Mississippi radio or television. In addition to the inflammatory articles suggesting that Defendants are "greedy,"

have stained the reputation of Mississippi, and have committed conduct on par with child molestation, the cited stories implicate many of the same factors noted in *Beckner* and *Hawkins*. The news stories and features have emphasized Defendants' connections to the Democratic Party and Attorney General Jim Hood; and numerous articles have mentioned Defendants in connection with the guilty pleas of Defendants' alleged co-conspirators Tim Balducci and Steve Patterson. As the Fifth Circuit has noted, frequent reporting about the pleas of purported co-conspirators poses a particularly serious risk of prejudice. *Hawkins*, 658 F.2d at 284-85.

Moreover, "[t]here is a consensus among all circuits that … once the decision to empanel an anonymous jury is made, the trial court must take appropriate action to ensure the parties are given adequate voir dire to allow the parties to have sufficient information to meaningfully exercise their challenges." *Edwards*, 119 F. Supp. 2d at 604. This is because "[j]uror anonymity also deprives the defendant of information that might help him to make appropriate challenges—in particular, peremptory challenges—during jury selection." *United States v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002); *see also Sanchez*, 74 F.3d at 564 (juror anonymity is appropriate only "if the courts also protect the defendants' interest in conducting effective voir dire") (internal citations omitted) Therefore, if the Court employs an anonymous jury, it becomes even more necessary to expand the voir dire procedures.

2. <u>The Court must conduct an independent examination of each juror exposed to pre-trial publicity</u>

All three of the leading Fifth Circuit cases addressing voir dire in situations of unusual pre-trial publicity have found inadequate the use of general questions to the venire about whether they can fairly decide the case in spite of their exposure to publicity. *Beckner*, 69 F.3d 1293 n.4; *Hawkins*, 658 F.2d at 282; *Davis*, 583 F.2d at 196 n.5. Therefore, this Court must "make an *independent* determination of the impartiality of each juror." *Beckner*, 69 F.3d at 1294; *see also Davis*, 583 F.2d at 196 ("The district court erred in not undertaking a more thorough examination of those panel members exposed to publicity."). Individual examination is essential because "[j]urors are in a poor position to make determinations as to their own impartiality." *Beckner*, 69

F.3d at 1293; *cf. Irvin*, 366 U.S. at 727-28 (jurors' statements that they can decide the case impartially, when they have been subject to extensive negative publicity about defendants, is entitled to "little weight").

The Fifth Circuit has articulated the appropriate method of voir dire when jurors have been exposed to potentially prejudicial pretrial publicity. *See Davis*, 583 F.2d at 197. The *Davis* court held that the trial judge should: (1) ask what information the prospective jurors have received, (2) inquire into the prejudicial effect of the information, and (3) make an independent determination whether the information tainted the person's impartiality. *Id.* As discussed more fully below, the preferred method for implementing this process is to address each juror individually, out of the presence of the other members of the venire. *Id.* at 196-97.[31]

The approach adopted by the court in *Davis* is necessary and appropriate here because of the extensive and prejudicial media coverage of this case in Northern Mississippi. In this environment, the only way to safeguard Defendants' right to a fair trial is for the Court to allow a thorough and robust voir dire examination.

3. The individual voir dire should be conducted *in camera* or at the bench, in order to avoid tainting the remaining venire.

While Defendants have no doubt that the Court will be diligent in explaining that this case must be decided on its own facts, there remains a risk that a discussion of biases in front of the entire venire will poison other jurors. Furthermore, given the extraordinary publicity surrounding this trial in Northern Mississippi, the Defendants' standing in the community, and the inflammatory rhetoric about the impact of this case on the reputation of the entire state of Mississippi, it is quite likely that some prospective jurors may express views and biases specific to the facts of this case.

Recognizing that the purpose of voir dire is to remove partial jurors, the Fifth Circuit has approved a hybrid approach whereby potential jurors are questioned generally as a group, but are

[31] The government acknowledged the need for this sort of expanded voir dire in opposing the Defendants' initial motion for change of venue. *See* Doc. 110, at 5 ("[I[t is clear in the Fifth Circuit that the preferable procedure to determine if any such prejudice exists is a properly conducted *voir dire* examination during the jury selection process.").

called into chambers or to side bar for any individual questioning that has the potential to taint the rest of the jury pool. *See Davis*, 583 F.2d at 196-97 (describing separate examination as "preferable"); *see also Edwards*, 119 F. Supp. 2d at 606 (noting that "individual voir dire was conducted on each juror outside the presence of the other jurors"). "Individual voir dire allows the trial court to probe the effect of any adverse publicity on the juror and insulates the jurors from one another's prejudicial comments." *Cummings v. Dugger*, 862 F.2d 1504, 1508 (11th Cir. 1989); *see also Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) ("Because of the voluminous publicity antedating appellant's trial . . . [t]he court should . . . [make] a careful, individual examination of each of the jurors involved, *out of the presence of the remaining jurors*, as to the possible effect of the articles.") (emphasis added).

Defendants respectfully submit that, in order to safeguard their right to an impartial jury, the Court should employ the hybrid method of voir dire recommended by the Fifth Circuit. Given the extraordinary and prejudicial press coverage of this case, and the likelihood that many members of Defendants' jury pool will personally know the Defendants, the prosecutors or key government witnesses,[32] jurors are likely to express strong opinions about the Defendants. If repeated in open court, the allegations and innuendo that have crept into the press coverage (including allegations that are without foundation and inadmissible) could taint the rest of the venire. *See Hawkins*, 658 F.2d at 284-85. It is therefore preferable that such potential views or biases be explored *in camera*, or at a minimum, at the bench, and away from the remaining jurors.

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[32] *See, e.g.*, Ex. 14. (John O'Brien, *Blogosphere becomes authority, issue in Scruggs case*, LegalNewsline.com, Feb. 14, 2008). This article quotes Alan Lange, editor of Mississippi political website Y'all Politics, as saying:

> "Mississippi is so small that *just about everyone in the state has had some personal interaction with at least one of the players in this tragedy*, so it's compelling on an individual level. It also involves a fall from grace of people who were well-known and larger than life. Dickie Scruggs, Jim Hood, Joey Langston, (former Attorney General) Mike Moore and Steve Patterson *are all household names in Mississippi . . . .*"

(emphasis added).

4. Defendants should be allowed to submit questions to the Court and follow up with individual voir dire by counsel

The Fifth Circuit has repeatedly specified that voir dire should be extensive when the court empanels an anonymous jury, and has favorably approved voir dire in which defendants are allowed to submit questions or individually question jurors. For example, in *United States v. Edwards*, the district court conducted a voir dire comprising approximately 2,000 pages of transcript, permitted both parties to suggest questions, conducted individual voir dire *in camera* and allowed the parties to ask follow up questions to each juror. 119 F. Supp. 2d at 592. *See also Branch*, 91 F.3d at 725 ("[A]t voir dire, the court asked the defendants' proposed questions and elicited additional information regarding potential juror bias."); *Salvatore*, 110 F.3d at 1144 ("The court also allowed the [Defendants] extensive voir dire.").

Given the unusually high pre-trial publicity in this case, the prominence of the Defendants and the witnesses who will testify, and the prospect of an anonymous jury, Defendants request that each of them, and the government, be allowed to submit 10 questions to the Court for inclusion in the Court's voir dire. In addition, Defendants request that the government and the defense each be allowed 45 minutes of individual voir dire conducted by counsel (the defense time to be allocated among the three Defendants). The combination of submitted questions and voir dire by counsel will allow Defendants to explore adequately issues of bias, exposure to pre-trial publicity, and opinions about Defendants' alleged conduct that might interfere with the Defendants' right to a fair trial in this far-from-ordinary case.

5. The Court should increase the number of peremptory challenges

Again, in light of the extraordinary publicity in this case and the prominence of the parties, as well as the fact that there are multiple Defendants being tried together, Defendants request that the Court exercise its discretion to increase the number of peremptory challenges. In a non-capital felony case for crimes punishable by more than one year imprisonment, the Federal Rules specify that the government will have 6 peremptories and the Defendant will have 10. Fed R. Crim. P. 24(b)(2). But "[t]he court may allow additional peremptory challenges to multiple

defendants and may allow the defendants to exercise those challenges separately or jointly." *Id.* Rule 24(b).

Defendants request that they be allowed seven peremptory challenges each (a total of 21) and that the government be allowed twelve. This expanded number of peremptories would accommodate the potentially different concerns of co-Defendants and the attendant publicity this trial has garnered, while maintaining the 6:10 ratio of Rule 24(b) and a reasonable, judicially-efficient process.

III. CONCLUSION

For all these reasons, Defendants request that the Court 1) reconsider its decision to empanel an anonymous jury, or alternatively, supplement the jury questionnaire; 2) transfer venue to a location outside the state of Mississippi; and 3) employ expanded voir dire procedures that will protect Defendants' jury trial rights in light of this case's extraordinary pre-trial publicity.

Respectfully submitted this 12th day of March, 2008.

Dated: March 12, 2008

By: /s/ John W. Keker

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CERTIFICATE OF SERVICE

I, Warren Braunig, do hereby certify that I have electronically filed the foregoing **DEFENDANTS' MOTION FOR RECONSIDERATION OF ANONYMOUS JURY ORDER, OR ALTERNATIVELY FOR A SUPPLEMENTAL JURY QUESTIONNAIRE; FOR TRANSFER OF VENUE; AND FOR EXPANDED VOIR DIRE PROCEDURES, WITH COMBINED MEMORANDUM OF LAW** with the Clerk of the Court using the ECF system, which sent notification for such filing to Thomas W. Dawson, Assistant United States Attorney, Robert H. Norman, Assistant United States Attorney, David Anthony Sanders, Assistant United States Attorney, Frank W. Trapp, J. Rhea Tannehill, Jr., Nathan F. Garrett, and Todd P. Graves.

This, the 12th day of March, 2008.

/s/ Warren Braunig
WARREN BRAUNIG