

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 3:08CR014-M-A

**ROBERT L. MOULTRIE,
NIXON E. CAWOOD,
CHARLES K MOREHEAD,
FACILITY HOLDING CORP d/b/a FACILITY
MANAGEMENT GROUP, INC., FACILITY
CONSTRUCTION MANAGEMENT INC., and
FACILITY DESIGN GROUP, INC.**

MOTION FOR A JUROR QUESTIONNAIRE

Defendants Robert L. Moultrie, Nixon E. Cawood, Charles K. Morehead, Facility Holding Corp., d/b/a The Facility Group, Facility Management Group, Inc., Facility Construction Management, Inc. and Facility Design Group, Inc., through undersigned counsel, filed this their Motion for a Jury Questionnaire, and as grounds for this relief would show the following:

The extensive pretrial publicity in this case over a great number of years and from a wide variety of sources raises the question of the best way for this Court to examine potential jurors about the publicity and political bias that is inherent in this case. This motion proposes a relatively straightforward process that has been used repeatedly in cases involving extensive pretrial publicity and politics: The jurors are asked to fill out a questionnaire that is designed to identify areas where the jurors have prior information,

biases, or other characteristics that effect the parties' exercise of challenges (both peremptory and for cause), and where the potential jurors may be reluctant to state their views or biases in public. A questionnaire adapted to this case is attached to this motion as Exhibit A. **The defendant would welcome consultation with the Government about the form and content of this proposed questionnaire** and realize that the goal is produce a "Court's Questionnaire" that aids all parties in selecting a jury in this case.

This case is a matter of state-wide political interest for a number of reasons. First, the Mississippi Beef Plant was an extremely expensive project funded by the state legislature; the project failed, leading to years of investigations by state and federal officials. Those investigations resulted in civil and criminal cases in state and federal court in various parts of Mississippi. The publicity has been particularly intense because of the involvement in a variety of ways of candidates for state-wide public office. The Beef Plant was intended to be a large employer in this district, and its construction was itself a project that generated a lot of employment in the district. Because the identity of a state-wide public official not named in the indictment but allegedly involved in Count One of the indictment has been guessed by the press, this case has become an issue in a state-wide race for the United States Senate.

Aspects of the extensive publicity the Beef Plant project has involved are outlined in the Declaration of T.H. Freeland, IV, which is Exhibit B to this Motion. Exhibits 1 through 14 of Exhibit B represent newspaper coverage of various parts of the case. More to the point, Exhibit 15 outlines coverage on a statewide FM radio network, Super Talk Mississippi. Super Talk Mississippi is a radio network with rebroadcast transmitters throughout the state. It has rebroadcast transmitters in Oxford (WTNM 105.5 FM), Greenwood (WTCD 96.9 FM), Corinth (WXRZ 94.3 FM), and West Point (WKBB 100.9 FM). These stations

comprehensively cover the area from which this jury is to be chosen. Two shows on Super Talk provide state political “talk” coverage, with interviews of political figures such as Phil Bryant (former state auditor, including during the period of this investigation, and Lt. Governor, interviewed on April 28, 2008) about Mississippi politics. The tenor of the coverage is extremely partisan. The point of view of Super Talk is to use the Mississippi Beef Plant and the related investigations as a partisan issue, particularly about the identity and current campaign of the public official not named in the indictment. Coverage on Super Talk of the beef plant goes back years. The hosts use sound effects (mooring cows) and interviews with various public figures to “feature” the beef plant as a subject.

The coverage of Super Talk and its coverage of the Beef Plant is sufficiently pervasive and has gone on so long, and the Beef Plant is important enough in this district, that it will be difficult to sort out what jurors may or may not have heard about this case in a “normal” voir dire process. As outlined in the Declaration of T.H. Freeland, IV and attached exhibits, the extreme partisan nature of this coverage has been such that jurors of one particular political view or another are very likely to have a “side” in this case before it even commences. It is absolutely essential for both the Government and the defendants to have full information about the jurors in order to fairly select a jury.

An essential part of the Sixth Amendment right to an impartial jury is the right to an adequate selection process that identifies unqualified jurors. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that the right to a jury that is “impartial and indifferent” is secured by the examination of the jurors through voir dire).

Without an adequate *voir dire* the trial judge’s responsibility to remove prospective jurors who will not be able to impartially follow the court’s instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of

adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as in the federal courts.

Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981). For a *voir dire* to be constitutionally adequate, a defendant must be able to detect the potential prejudices of members of the jury pool. *Cummings v. Dugger*, 862 F.2d 1504, 1507 (11th Cir. 1989). While the conduct of *voir dire* is a matter entrusted in a trial court's broad discretion, that discretion "must be bounded by protection of the defendant's constitutional rights, especially in a situation of extensive pretrial publicity." *Cummings*, 862 F.2d at 1507 (citing *United States v. Gerald*, 625 F.2d 1291, 1295 (5th Cir. 1980)). The Fifth Circuit has held it reversible error in a case of extensive pretrial publicity to limit *voir dire* about publicity to simply asking venire members whether their knowledge would impair their ability to render an impartial decision. *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978). This did not adequately protect the defendant's Sixth Amendment rights. *Id.*

Both case law and the American Bar Association have recommended individual examination of the jurors as the solution to this problem. *Davis*, 583 F.2d at 196-98 (citing ABA Standards Relating to Fair Trial and Free Press); see *Cummings*, 865 F.2d at 1508 (to same effect). A full-blown individual *voir dire* would of course be an unwieldy and slow process in this or any case. It is easy to question the inefficiency of individual *voir dire* of an entire panel. For that reasons, courts have adopted the use of questionnaires to facilitate beginning the examination of panelists. *United States v. Quinones*, 511 F.3d 289, 297-98 (2nd Cir. 2007). As will be shown, there are reasons to believe that oral questioning alone—either individually or en masse—would not suffice to identify jurors holding biases.

One value of a jury questionnaire is that it would allow the court to first winnow out jurors who have information related to publicity and allow them to be questioned

individually about those narrow areas in a context that did not taint the entire panel without at the same time occupying the court's time with questioning jurors one-by-one.

Another value has to do with problems of oral voir dire in indentifying juror biases. Oral voir dire alone has been criticized for the fact that jurors often do not in an oral examination disclose relevant biases or prejudices. D.W. Broeder conducted a seminal study, examining over two hundred jurors in federal court cases after they had completed jury duty. He concluded that "voir dire was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as likely to prove 'unfavorable.'" D.W. Broders, "Voir dire examinations: An Emprical Study," 38 Southern California Law Review 503, 505 (1965); *see* R. Hastie, "Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries," 40 American University Law Review 703, 721-22, (1991) (attorney-conducted questioning is not adequate to identify juror prejudices), H. Zeisel and S. Diamond, "The Effect of Peremptory Challenges on the Jury and Verdict," 30 Stanford Law Review 491, 528 (1978) ("voir dire... did not provide sufficient information for attorneys to identify prejudiced jurors").

A study by Judge Gregory Mize noted the number of jurors who complete voir dire without saying anything, and that these jurors often have strong opinions and biases. He stated that as many as 28% of jurors remain silent during voir dire, and, in each case he that studied, between one and four silent jurors, questioned later, revealed biases that would have been the basis for a challenge for cause. G.E. Mize, "On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room," Court Review 10-15 (Spring 1999). He used the term "UFO jurors" to identify those jurors whose biases remained unidentified after voir dire.

Courts have used the procedure of having the jurors come to court and fill out a questionnaire, particularly where extensive coverage was involved. *See United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998) (jurors were summonsed and asked to fill out the questionnaire, with the court beginning the process by informing the jurors that news coverage was often inaccurate); *United States v. Wilson*, 493 F.Supp. 537, 544 (E.D. N.Y. 2007) (jurors filled out questionnaires in the courtroom after being summonsed). In a high-publicity case, a two-step process of a questionnaire followed by oral questions has been used. *United States v. Stewart*, 433 F.3d 273, 304 (2nd Cir. 2006).

The purpose of this motion is entirely utilitarian: to propose an orderly, efficient jury selection process in which all parties and the Court will have a complete opportunity to examine juror biases and in which the defendants' Sixth Amendment right to a fair and impartial jury is assured. The process of asking the jurors to complete a questionnaire on the day of or a day before jury selection, followed by conventional oral voir dire examination, best assures that.

This the 23rd day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused a copy of the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following CM/ECF participant attorneys of record:

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