

**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' RESPONSE TO GOVERNMENT'S MOTION FOR ANONYMOUS  
JURY, OR IN THE ALTERNATIVE, A DISTRICT-WIDE AND SEQUESTERED JURY**

Defendants Richard F. Scruggs, David Zachary Scruggs, and Sidney A. Backstrom hereby request that the Court deny the Government's motion for anonymous jury. Defendants express no opinion as to whether the jury should be drawn district-wide or whether it should be sequestered and will leave those decisions to the discretion of the Court.

**Background**

Despite arguing only days ago that the publicity attending Defendants' upcoming trial was neither remarkable nor prejudicial to Defendants, and proffering before this Court that the media attention would not interfere with the Court's ability to empanel an impartial jury, the Government now takes a 180-degree turn and asks this Court to take the drastic step of empaneling an anonymous jury. Were the Government genuinely concerned with publicity and fairness, it could have supported Defendants' call for a change of venue, a less severe measure available to this Court that would not in any manner interfere with the Defendants' jury trial rights. Instead, having succeeded in holding onto Northern Mississippi as the venue, the Government seeks to obtain yet another edge by keeping juror information secret.

While the Government emphasizes that the test for use of an anonymous jury is a "totality of the circumstances" analysis, the Government's only support for its Motion is its speculative and baseless allegation that compromising of the jury process "cannot be

discounted,” Doc. 119, at 4, and the existence of “considerable pretrial publicity as is reflected by the [Defendants’ venue motion].” *Id.* at 1. But “mere allegations” cannot support the use of an anonymous jury, and the Government has failed to show that the publicity here poses any threat to the security or safety of the jury. Under these circumstances, there is no reason whatsoever to utilize an anonymous jury in this case.

### **Use of Anonymous Juries**

The Fifth Circuit considers the empaneling of an anonymous jury a “device of last resort,” a “serious” and “drastic measure, which should be undertaken only in limited and carefully delineated circumstances.” *United States v. Krout*, 66 F.3d 1420, 1427 (5<sup>th</sup> Cir. 1995). “The defendant has a right to a jury of known individuals not just because information such as [names, addresses, and employers’ names] yields valuable clues for purposes of jury selection, but also because the verdict is both personalized and personified when rendered by 12 known fellow citizens.” *United States v. Sanchez*, 74 F.3d 562, 565 (5<sup>th</sup> Cir. 1996). While the decision to empanel an anonymous jury is left to the district court’s discretion, the Fifth Circuit instructs that a district court look primarily to five factors:

- 1) the defendants’ involvement in organized crime;
- 2) the defendants’ participation in a group with the capacity to harm jurors;
- 3) the defendants’ past attempts to interfere with the judicial process or witnesses;
- 4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and
- 5) extensive publicity that could enhance the possibility that jurors’ names would become public and expose them to intimidation and harassment.

*Krout*, 66 F.3d at 1427.

The case at bar does not present the type of “last resort” situation warranting an anonymous jury. The Government agrees that Defendants have no connection to organized crime, nor are they involved with groups that possess the capacity to harm jurors. The Government speculates, without any substance, that Defendants might “compromise” the jury

process, Doc. 119, at 4, but the Fifth Circuit has rejected use of an anonymous jury based on “mere allegations or inferences of potential risk.” *Krout*, 66 F.3d at 1427 (emphasis added).<sup>1</sup> The incarceration and monetary penalties Defendants would face are not so out-of-the-norm as to justify the “drastic” remedy of an anonymous jury; and while there has been extensive publicity of this case in Northern Mississippi, there is no reason to believe that, as a result of that publicity, jurors in this case would be exposed to “intimidation and harassment.” *Id.*

The two Fifth Circuit cases that have affirmed anonymous juries in situations of extraordinary pretrial publicity, *United States v. Edwards*, 303 F.3d 606 (5<sup>th</sup> Cir. 2002), and *United States v. Branch*, 91 F.3d 699 (5<sup>th</sup> Cir. 1996), found other factors present as well. In *Branch*, the Texas trial of Branch Davidians involved in the killing of four ATF agents in Waco, the district court noted that the trial (not surprisingly) “aroused deep passions” in the community, and the court also was concerned that the Davidian jurors might be confused with jurors in a high-profile trial involving organized crime figures that was taking place in the same courthouse at the same time. 91 F.3d at 724. Likewise, in *Edwards*, the criminal trial of four-term Louisiana Governor Edwin Edwards, “the district court did not base its decision on publicity alone.” 303 F.3d at 614. Edwards faced a maximum of 375 years in prison and a \$7.5 million fine; the government filed an affidavit stating that Edwards had used a state trooper to run records searches on participants in his previous criminal trials; and “Edwards had numerous close political operatives and allies who also might have attempted to influence the jurors.” *Id.*

Here, by contrast, the Government previously has denied that Defendants’ case stirs the sort of “deep passions” inspired by the Branch Davidian murder of ATF agents. See Doc. 110, at 12 (“While being considered a ‘greedy trial lawyer’ is unflattering, it is unlikely to generate visceral passions for revenge akin to those incited by mail bombings and mass murder.”). Nor

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<sup>1</sup> Were it correct that being indicted for bribing a public official created a *per se* threat of jury tampering, that would transform “a device of last resort” into the default rule for anonymous juries in bribery cases, a result that would be inconsistent with Fifth Circuit precedent. In fact, most cases relying on this third factor have involved the prior use of violence and intimidation against witnesses or jurors. See, e.g., *United States v. Crockett*, 979 F.2d 1204, 1216 (7<sup>th</sup> Cir. 1992); *United States v. Paccione*, 949 F.2d 1183, 1192-93 (2d Cir. 1991); *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988).

has the Government demonstrated, beyond its own speculation, that identification of the jurors poses any threat of juror tampering or intimidation, as was the case in *Edwards*. Indeed, the Government's main justification for empaneling an anonymous jury appears to be that this Court's discretion won't be disturbed on appeal if it does so. Doc. 119, at 5. Especially given that Defendants' fair trial rights are at stake, the Government should not be allowed to have it both ways, arguing one day that the publicity of this case is not serious at all (in order to defeat Defendants' venue motion), and then arguing the next day that the publicity is so severe as to require an anonymous jury.

In the absence of any reason to believe that juror safety or misconduct will occur, the publicity surrounding this case in Northern Mississippi does not warrant the use of an anonymous jury. As the Fifth Circuit has clearly articulated: "Not all celebrated trials merit an anonymous jury." *Branch*, 91 F.3d at 724. *See also United States v. Ross*, 33 F.3d 1507, 1520 (11<sup>th</sup> Cir. 1994) (following Second Circuit and adopting general principle that "the court should not order the empaneling of an anonymous jury without [ ] concluding that there is strong reason to believe the jury needs protection"). Therefore, the Government's request for an anonymous jury should be denied.

### **District-Wide and Sequestered Jury**

The Government correctly notes that the use of sequestration and a district-wide venire fall within the sound discretion of the Court and may serve as a protective measure against pretrial publicity. Defendants neither support nor oppose the use of a district-wide venire. Likewise, while sequestration is a rather extraordinary step, and one that imposes substantial burdens on jurors, Defendants will submit to the Court's wise discretion on the matter.

### **Conclusion**

If the Court is genuinely concerned about the local media attention invoked by the Government in its motion, Defendants request that the Court reconsider its decision on their motion for a change of venue. Because, as discussed before, this case does not attract elsewhere the level of intense scrutiny it does in Mississippi, changing the trial venue would both alleviate

the Government's concern about publicity of juror information and protect the Defendants' rights to a jury of known individuals. The Court need not choose between the Defendants' rights and the Government's interests. Both can be solved by moving this trial out of Mississippi.

In the absence of the Court's reconsideration, however, Defendants respectfully request that the Court deny the Government's hasty and unnecessary request for an anonymous jury.

Dated: February 25, 2008

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**CERTIFICATE OF SERVICE**

I, Warren A. Braunig, do hereby certify that I have electronically filed the foregoing **Defendants' Response to Government's Motion for Anonymous Jury, or in the Alternative, a District-Wide and Sequestered Jury** 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 25<sup>th</sup> day of February, 2008.

/s/ Warren A. Braunig