

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,)
)
PLAINTIFF,)
)
V.) CR00-S-422-S
)
ERIC ROBERT RUDOLPH,)
)
DEFENDANT.)

**MOTION FOR OPPORTUNITY TO CONDUCT ADDITIONAL POLLING
PRIOR TO FILING FORMAL MOTION FOR CHANGE OF VENUE**

COMES NOW the Defendant, Eric Robert Rudolph, by and through his undersigned counsel of record and hereby moves this Honorable Court, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Rule 21(a) of the Federal Rules of Criminal Procedure, all files and records in this case, and any further evidence and/or argument presented in support of the forthcoming Motion For Change of Venue, for an Order permitting the Defendant to file his formal Change of Venue Motion after additional polling has been completed. As grounds for said Motion the Defendant states as follows:

1) "A fair trial in a fair forum is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955). In Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1624 (1961), the Supreme Court wrote:

In the ultimate analysis only the jury can strip a man of his liberty or his life. [...] [A] juror must be as indifferent as he

stands unsworn. His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. [...] The theory of the law is that a juror who has formed an opinion cannot be impartial. Dowd at 1624.

In Sheppard v. Maxwell, 384 U.S. 333, 349, 86 S. Ct. 1507, 1517 (1966) the United States Supreme Court wrote:

[T]he Court has ... pointed out that legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. And the Court has insisted that no one be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. (internal quotations and citations omitted).

Rule 21(a) of the Federal Rules of Criminal Procedure also safeguards the right of criminal defendants to a fair trial in a fair forum. The rule provides in relevant part:

[The court, upon motion of the defendant shall transfer the proceeding as to that defendant to another district [...] if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.] Fed.R.Crim.P. 21(a).

See also, Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171 (1959) (per curiam)(holding that the standard in federal criminal cases is more protective of defendants than the constitutional due process test.); United States v. Gullion, 575 F.2d 26, 30 (5th Cir.1978); United States v. Tokars, 839 F. Supp. 1578, 1582 (N.D.Ga.1993); United States v. Moody, 762 F. Supp. 1485 (N.D.Ga.1991), aff'd, 977 F.2d 1425 (11th Cir.1992), and cert. denied, 113 S. Ct.1948 (1993); Delaney v. United States, 199 F.2d 107, 113 (1st Cir.1952); United States v. Engleman, 489 F.

Supp. 48, 49 (D.Mo.1980) (trial judge has a nondelegable responsibility under Rule 21 to ensure that a defendant receives a fair trial).

In Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031 (1975), the Court made clear that Marshall articulated a standard more protective than due process. The Court denied relief in Murphy, finding no due process violation and expressly declining to apply Marshall outside the realm of a federal criminal case.

Concurring in the judgment, Chief Justice Burger wrote that "I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case." Murphy, 421 U.S. at 804, 95 S. Ct. 2038 (Burger, C.J., concurring).

Interpreting Sheppard along with other Supreme Court cases on presumed prejudice, the Fifth Circuit restated the test for presumed prejudice in broader terms to encompass the influence of any factor, including pretrial publicity. See Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir.1966), cited with approval in Groppi v. Wisconsin, 400 U.S. 505, 508 n. 6, 91 S. Ct. 490, 492 n. 6 (1971). Writing for the panel in Mason, Judge Wisdom wrote:

The test is no longer whether prejudice found its way into the jury box at trial.... [T]he test is: 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 change of venue, to assure a fair and impartial trial. Mason, 364 F.2d at 5.

2. Polling has been conducted in the Southern Division and the Eastern Division of the Northern District of Alabama as well as the Middle and Eastern Districts of Tennessee. A review of the polling data demonstrates an extraordinarily high propensity towards a guilty verdict and a death sentence in both of the Alabama surveys. For example, polling of the Southern Division of Alabama showed 42% of

all polled mentioned this case when asked to name *any* case where the allegation was homicide occurring during the last six years. After minor prompting, 97% of all respondents were familiar with this case. When asked about their opinion of the case, 65% of Southern Division respondents stated that Mr. Rudolph was “definitely” or “probably” guilty. Among those who believe the death penalty is an appropriate punishment in an intentional murder case, 78% felt that the death penalty was a more appropriate punishment for Mr. Rudolph than life without the possibility of parole. These numbers demonstrate an intolerable bias against Mr. Rudolph which is inconsistent with any possibility of striking a fair and impartial jury.

In each of the Tennessee Districts surveyed the respondents were somewhat less predisposed to guilt and a death sentence, the Middle District of Tennessee, Nashville, being the less predisposed of the two. However, it is clear that there is, even in Tennessee, a marked predisposition against Mr. Rudolph, in both the innocence and penalty phase which may hinder Mr. Rudolph’s right to a fair and impartial trial. It is not known whether or not Nashville, TN is consistent with a general and national predisposition against Mr. Rudolph or whether there are locales in other parts of the country which may be substantially less predisposed to having fixed and prejudicial opinions in this case. Therefore, Mr. Rudolph, through his attorneys, finds it critically necessary to conduct additional scientific polling in additional jurisdictions in order to determine whether the potential venire in other areas of the country, due to lower media intensity or interest, are substantially less predisposed to having a fixed opinion on guilt and punishment.

3. The polling results from all four jurisdictions surveyed are similar or substantially worse than the polling results from other cases where change of venue motions have been granted. (See, Addendum, filed under seal.)

WHEREFORE PREMISES CONSIDERED, the Defendant hereby requests this Honorable Court for an Order permitting the Defendant to file his formal Change of Venue Motion after additional polling has been completed.

RESPECTFULLY SUBMITTED:

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BY:



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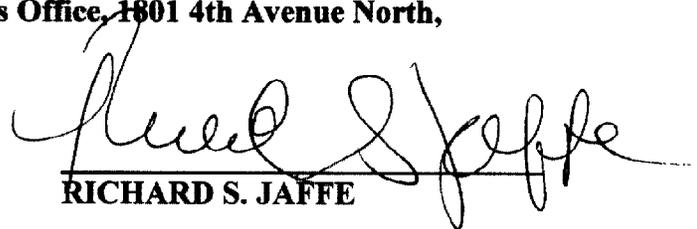
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 28 day of June, 2004, served a copy of the foregoing by United States mail, postage prepaid and properly addressed, and/or by hand-delivery, to AUSA Michael Whisonant, United States Attorney's Office, 1801 4th Avenue North, Birmingham, AL 35203.


RICHARD S. JAFFE