

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 CHANGE OF VENUE
EVIDENTIARY HEARING REQUESTED

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 this Motion, for an Order changing the venue of the above-styled case. A change of venue is necessary to preserve Mr. Rudolph's' right to a fair trial because there exists a prejudice so great that a fair trial cannot be had anywhere in the Northern District of Alabama. In order to provide the Court with expert analysis and testimony with regard to the polling data and the impact of the media, we move this Court for an evidentiary hearing and oral argument. As grounds for said Motion, the Defendant states as follows:

INTRODUCTION

The defense has undertaken the task of conducting polling in the Southern Division and the Eastern Division of the Northern District of Alabama.¹ The results of the polling data demonstrate an intolerable bias by potential venires in the Northern District of Alabama against the Defendant with respect to the presumption of innocence as well as in punishment alternatives. A review of said data indicates that there is an unacceptable percentage of the potential venire who have already concluded that Mr. Rudolph is guilty as charged and that he should be sentenced to death.

LEGAL STANDARD AND ARGUMENT

"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).

¹ The results of each of the four surveys conducted by the defense have been filed under seal contemporaneously with the present motion.

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.

FACTS

Since January 29, 1998, there has been an overwhelming amount of both print and media coverage of the bombing of The New Woman/ All Women Clinic. The polling data reflects that this media coverage, which has been both sensationalistic and based, in part, on inaccurate information from law enforcement, has served to prejudice the Defendant and substantially hampered his ability to receive a fair trial before an impartial jury in the Northern District of Alabama.

As stated, polling has been conducted in the Southern Division and the Eastern Division of the Northern District of Alabama. A review of the polling data in both of the Alabama surveys demonstrates an extraordinarily high propensity towards a guilty verdict and a death sentence. In the Southern Division of the Northern District poll, after minor prompting with respect to knowledge of the “women’s health care clinic bombing in 1998”, 97% of all respondents were familiar

with the case. After some additional prompting, 100% 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. This figure represents 81% of all respondents who had an opinion. Among those who believed the death penalty was 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.

In the Eastern Division of the Northern District of Alabama polling demonstrated that, after minor prompting, 92% of all respondents were familiar with this case. After additional prompting, less than 2% of all respondents stated that they were unfamiliar with this case. In addition, 62% of Eastern Division respondents, and 75% of those surveyed who had an opinion, stated that the Defendant was “definitely” or “probably” guilty. Among those who believe the death penalty is an appropriate punishment in an intentional murder case, 76% 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 within the Northern District of Alabama.

3. The defense anticipates supplementing this motion with expert analysis of the polling conducted to date as well as expert analysis of print and TV media.

**WHEREFORE PREMISES CONSIDERED, the Defendant hereby moves
this Honorable Court for an evidentiary hearing on this Motion and for a change of
venue.**

RESPECTFULLY SUBMITTED:

**RICHARD S. JAFFE,
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BY:



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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 30 day of Jan, 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