



obtain a fair and impartial trial there.” *Fed. R. Crim. P. 21(a)*. The defendant bears the burden of proving that venue should be changed. *See United States v. Smith*, 918 F.2d 1551, 1557 (11th Cir. 1990); *see also United States v. Livotti*, 196 F.3d 322, 326 (2d Cir. 1999). Whether a motion to transfer should be granted is left to the discretion of the trial court and a decision to deny a change of venue request will be reversed only for abuse of discretion. *Smith*, 918 F.2d at 1556; *See also United States v. Williams*, 531 F.2d 791, 792 (5th Cir. 1976); *Greenhill v. United States*, 298 F.2d 405, 411 (5th Cir. 1962). A pre-trial order denying transfer of venue is not subject to interlocutory review. *United States v. Novellas*, 108 F.3d 1370, 1997 WL 138692, \*1 (2d Cir. 1997).

There are two considerations for a district court under Rule 21(a). First, there is the constitutional analysis of *Murphy v. Florida*, 421 U.S. 794, 800 (1975). Second, there is an analysis of whether the supervisory authority posited in *Marshall v. United States*, 360 U.S. 310, 313 (1959), requires a transfer. *United States v. Tokars*, 839 F. Supp 1578, 1581 (1993).

Although different courts have followed different formulations and considered a variety of factors, the constitutional standard centers on whether a defendant has made a showing of “a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial.” *United States v. Moody*, 762 F. Supp 1485,

1490 (N.D. Ga. 1991). It is well established that a motion to transfer should not be granted merely upon a showing of widespread or even adverse publicity. *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961); *Devier v. Zant*, 3 F.3d 1445, 1462 (11th Cir. 1993). Transfer is only warranted where a defendant can demonstrate that prejudicial inflammatory publicity saturated the jury pool in the district he seeks transfer away from in a manner that renders it virtually impossible to obtain an impartial jury. *Devier v. Zant*, 3 F.3d at 1446; *United States v. Smith-Bowman*, 76 F.3d 634 (5th Cir. 1996); *United States v. McVeigh*, 918 F.Supp 1467, 1470 (W.D. Okla. 1996); *United States v. Tokars*, 839 F. Supp 1578, 1581 (N.D. Ga. 1993). It is essential to note that the issue is whether a fair and impartial jury can be selected. There is no requirement that jurors be totally ignorant of the facts and issues presented in the case. *Murphy*, 421 at 800. It is sufficient if jurors can set aside any exposure they may previously have had and render a fair and impartial verdict based upon the evidence presented in court. *Irvin*, 366 U.S. at 723.

In order to prevail on a motion under Rule 21(a), the defendant must show "a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). The factors the court should consider in assessing whether defendant meets his burden of proof can include (1) whether the publicity is recent, widespread and highly damaging to a

defendant, (2) the extent to which the government is responsible for the publicity, (3) the inconvenience to the government and the administration of justice of a change of venue or continuance, and (4) whether a substantially better panel can be sworn at another time or place. *See generally* 2 C. Wright, Federal Practice and Procedure, Criminal 2d, § 342 (2000); *United States v. Maldonado-Rivera*, 922 F.2d 934, 966-67(2d Cir. 1990).

The type of pervasive influence on the jury pool that warrants transfer is epitomized by the language used by Judge Matsch in *McVeigh*, “The effects of the explosion [the Oklahoma City Bombing] on that community are so profound and pervasive that no detailed discussion of the evidence is necessary.” *McVeigh*, 918 F.Supp at 1470. *McVeigh* involved months of coverage of hundreds of victims, including children, their families, and photo footage of a destroyed federal building and intensive rescue efforts. The local coverage went far beyond, in scope, subject matter, and length of time, the national coverage of the bombing in Oklahoma City. *Id. at 1471*. Nor is this a case like *United States v. Moody*, in which the court’s decision to transfer the case for trial detailed, in page after page of its opinion, the conclusory public statements of law enforcement regarding the

defendant's certain guilt<sup>1</sup> and the precise layout of the prosecution's evidentiary case against the defendant. *Id.* at 1488-1490. This is not a case like *Moody*, where recusal orders by all district and appellate court judges in the district of indictment furthered the case for transfer. *Id.* at 1488.

A key factor in the Court's determination of whether it must transfer this case is whether there was something in the nature of what occurred in *McVeigh*, where despite the national interest in the case, the local coverage was of a more extensive and prejudicial nature. *McVeigh*, 918 F. Supp at 1471. The media coverage in the Rudolph case was nationwide in scope. The coverage was in print and electronic media and presented similar facts across the country through internet and nationally syndicated news outlets. Rudolph is more closely akin to the consideration of a Rule 21(a) transfer motion in the *Williams* case than it is to *McVeigh*. In *Williams*, the former Fifth Circuit held:

First, this is not a case where the trial judge abused his discretion by denying a motion for transfer of venue under Rule 21(a) of the Federal Rules of Criminal Procedure. The record reveals that the publicity given to this case was truly nation-wide in scope. National television networks, widely circulated news magazines, and the major wire services brought the particulars of the kidnaping and its aftermath to the attention of the public in every part of the country. In exhaustive jury selection procedures, which the

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<sup>1</sup> The opinion is replete with statements by agents and other spokespersons such as, "this is a coffin that has a thousand nails in it," *Moody*, 762 F. Supp. at 1488.

panel opinion describes as 'meticulous in every respect', the trial judge chose a jury which was virtually untouched by the massive media publicity and which had formed no opinion concerning appellant's guilt or sanity. A Rule 21 motion is addressed to the sound discretion of the trial court, *see United States v. Nix*, 465 F.2d 90, 96 (5th Cir.), *cert. denied*, 409 U.S. 1013, 93 S.Ct. 455, 34 L.Ed.2d 307 (1972). On this record, and especially in view of the intense nationwide publicity, it would be sheer speculation for an appellate court to conclude that a trial elsewhere would have taken place before a jury less influenced by pretrial media coverage. There is even less reason to hold that the trial judge abused his discretion in finding the likelihood of prejudice too small to necessitate a change of venue.

*Williams*, 531 F.2d at 792.

In *United States v. Salim*, Southern District of New York Judge Batts declined to transfer a case for trial under Rule 21(a), where the defendant, a man of Arab ethnicity, claimed he could not get a fair trial in New York City in the wake of September 11, 2001, and because there might be some evidence intimating he was connected with terrorism. *United States v. Salim*, 189 F.Supp2d 93, 94 (S.D.N.Y 2002). The Court noted that some of the factors to use in assessing whether prejudice was so great that the defendant could not obtain an impartial trial included the extent to which the government was responsible for generating the publicity and whether the publicity focused on the crime or on the individual accused of it, along with other factors reflecting on the ability of potential jurors to hear the evidence impartially. *Id.* at 95. The *Salim* Court concluded that more traditional measures, such as careful voir dire and an

expanded jury pool, could be effective. *Id.* at 96, 97. A careful review of the demographic data revealed that there was less than the pervasive level of prejudice the defense sought to demonstrate with it. *Id.* The Court concluded that *Salim* failed to present “the rare circumstance of so great a prejudice” that the Court would be unable to trust the jurors to be truthful in answering questions regarding their ability to be impartial.

The six-year delay between the publicity that occurred following the bombing of the New Woman All Women Clinic and the time of Rudolph’s trial strongly mitigates the effects of the pre-trial publicity in this case and suggests that a transfer is not warranted. A review of the reporting reflects that it is factual in nature and not of an inflammatory nature that is unduly damaging to a defendant. The government has not sought publicity in this case.<sup>2</sup> Other factors to be considered, *i.e.*, inconvenience to the government and to the administration of justice may also be considered by the court. At trial, approximately 50% of all

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<sup>2</sup>The bulk of the publicity surrounding the crime occurred six years ago. Although there was publicity at the time of Rudolph’s arrest, the government has avoided provoking publicity and the record reflects that at least some of the post-arrest coverage has been triggered by events such as press conferences by defense counsel. Ironically, counsel for defendant has on several occasions appeared in print and electronic media to discuss his client’s inability to receive a fair trial due to media coverage during the pendency of defendant’s Motion for Change of Venue.

witnesses will come from the Birmingham area. Such a number is considerable and from the point of view of the United States, is a significant factor for the Court to consider in its decision on venue. In light of the uniform media coverage, it is unlikely that a substantially better panel can be sworn at another time or place. The Northern District of Alabama is of a sufficient size to field a venire that, through the use of careful and detailed voir dire, can field a population of jurors who are able to impartially decide the case. There is no indication of special prejudice or emotion at work in this case that indicates the court cannot rely upon jurors to be truthful in assessing whether any prior exposure they may have had to the facts of the case renders them unable to decide the case solely on the evidence at trial.

The supervisory powers delineated by the Supreme Court as part of its obligation to establish and maintain civilized standards of procedure and evidence, *McNabb v. United States*, 318 U.S. 332, 340 (1943), do not dictate otherwise. As the *McNabb* Court noted:

Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force.

*Id.* However those powers, which the Court has noted extend to cases involving potential jury prejudice through the press, *Marshall*, 360 U.S. at 312, do not

compel the Court to transfer a case in a situation such as this one, where the evidence suggests neither an undue taint in the jury pool nor an indication that a superior jury is available elsewhere. As Judge Evans noted in *Tokars*, the contours of *Marshall* are unclear and district courts must evaluate both the Constitutional and supervisory powers concerns on a Rule 21(a) motion, *Tokars*, 839 F. Supp at 1581. But unlike *Tokars*, there is none of the uniquely local, pervasive publicity which targeted the defendant in an inflammatory manner. *See Id.* at 1582. Although *Marshall* dealt with publicity during the course of the trial,<sup>3</sup> Judge Evans in *Tokars* adopted the supervisory standard outlined in *Marshall* as an appropriate consideration in analyzing Rule 21(a). *Marshall* stands for the proposition that the trial judge has large discretion in evaluating the prejudicial effect of media coverage and may exercise this discretion through its inherent supervisory powers to formulate and apply proper standards and remedial measures to address any prejudice.

Based on the foregoing, it would not be an abuse of discretion for the Court to decline to transfer this case to another district for trial. As the Eleventh Circuit concluded in *Devier*:

Mere publicity about a case, however, is insufficient to void a conviction.

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<sup>3</sup> *United States v. Blom*, 242 F.3d 799 (8th Cir. 2001)

[FN52] Indeed, in a free society with the capability for "swift, widespread, and diverse methods of communication," it should not be surprising that informed citizens will have learned of a noteworthy case in the community and even formed some impression as to the merits. [FN53] The publicity surrounding the disappearance and murder of a young child is bound to be fanned by widespread media coverage. We agree with the district court's conclusion that although the publicity surrounding Devier's trial was widespread, the vast majority of the media coverage was simply factual reporting and was neither "invidious [n]or inflammatory." A review of the media reports of the trial presented to the district court indicates that Devier failed to establish that "the populace from which his jury was drawn was widely infected by a prejudice apart from mere familiarity with the case."

*Devier*, 3 F.3d at 1462.

The United States has not addressed in this response anything contained in the polling data provided by the defendant nor the merits or substance of their claim contained in their Motion for Change of Venue. On February 11, 2004, the United States received a disc represented to contain raw polling data compiled by defense experts in preparation for their Motion for Change of Venue. The United States is in the process of evaluating this polling data and will reply to defendant's Motion for Change of Venue in a timely manner once this data has been evaluated by the expert for the United States.

The United States has attempted to respond to the Court's request for a discussion of the legal standards governing transfers under Federal Rule of Criminal Procedure 21(a) in this document. Should the Court require discussion

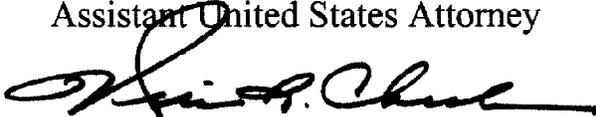
of any additional aspect of the law, the United States will provide an additional response. This response in no way attempts to address the merits of the transfer motion or alternatives which the Court could consider. Instead, it is limited to a discussion of the legal standards underlying Rule 21(a), as directed by the Court.

Respectfully submitted this the 13<sup>th</sup> day of February, 2004.

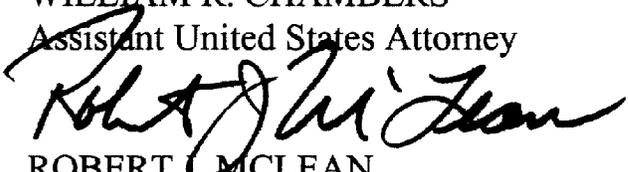
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date, February 13, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

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