

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 JB

UNITED STATES OF AMERICA :
 :
-v- : CR 00-S-0422-S
 : UNDER SEAL
ERIC ROBERT RUDOLPH, :
Defendant :

GOVERNMENT'S BRIEF IN SUPPORT OF EMPANELING
ANONYMOUS JURY

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney and Robert Joe McLean and William R. Chambers, Jr., Assistant United States Attorneys, and respectfully files this Brief regarding and in support of the empaneling an anonymous jury in the above-styled and numbered case and submits the following:

While the process of selecting persons to serve as potential jurors in any case has always been accompanied by a certain level of anonymity, the empaneling of an "anonymous" jury implies much more. As defined by prevailing case law on the issue, empaneling an anonymous jury typically involves withholding the names, addresses and other identifying biographical information of potential jurors and their families, not only from the public, but from the parties themselves. *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996); *United States v.*

Krout, 66 F.3d 1420 (5th Cir. 1995), *cert. denied*, 516 U.S. 1136, 116 S.Ct. 963 (1996); *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994); and *United States v. Wong*, 40 F.3d 1347 (2d Cir. 1994).

In *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132, 115 S.Ct. 2558 (1995), the Eleventh Circuit first addressed this issue. In *Ross* the district court empaneled an anonymous jury, withholding names, addresses, places of employment and spouses' names and places of employment from the parties, over defense objections that the use of an anonymous jury violated his right to the presumption of innocence under the Fifth Amendment and his right to trial by an impartial jury under the Sixth Amendment.¹ Rejecting the defendant's claims on appeal, the Eleventh Circuit adopted the standard of the Second Circuit holding: "In general, the court should not order the empaneling of an anonymous jury without (a) concluding that there is strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." *Ross*, 33 F.3d at 1520, *quoting*, *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir.1991), *cert. denied*, 505 U.S. 1220, 112 S.Ct. 3029, 120

¹ The defendant also objected on grounds that the district court's cautionary instruction failed to remedy the unconstitutional effect created by the use of an anonymous jury.

L.Ed.2d 900 (1992).² This same line of reasoning was subsequently adopted by the Fifth Circuit in *United States v. Krout*, 66 F.3d 1420 (5th Cir. 1995), *cert. denied sub nom, Campos Alvarez v. United States*, 516 U.S. 1136, 116 S.Ct. 936 (1996). Following the reasoning of other courts upholding the use of anonymous juries in limited circumstances, the court in *Ross* outlined common or typical concerns that may exist in a particular case that would support empaneling an anonymous jury. These include:

- (1) the defendant's involvement in organized crime;
- (2) the defendant's participation in a group with the capacity to harm jurors;
- (3) the defendant's past attempts to interfere with the judicial process;
- (4) the potential that, if convicted, the defendant 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 or harassment.

Ross, 33 F.3d at 1520. *See also United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994), *cert. denied sub nom, Ngo v. United States*, 514 U.S. 1113, 115 S.Ct.

² The Court in *Ross* noted that every court to have addressed the issue of empaneling anonymous juries has held that, when needed and when properly used, anonymous juries do not infringe on a defendant's constitutional rights. *See United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 474 U.S. 819, 106 S.Ct. 66; *United States v. Crockett*, 979 F.2d 1204, 1215-17 (7th Cir.1992), *cert. denied*, 507 U.S. 998, 113 S.Ct. 1617 (1993); *United States v. Scarfo*, 850 F.2d 1015, 1021-26 (3d Cir.), *cert. denied*, 488 U.S. 910, 109 S.Ct. 263 (1988); *United States v. Varella*, 692 F.2d 1352, 1355 (11th Cir.1982), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3542.

1968 (1995) and *United States v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996), *cert. denied*, 520 U.S. 1185, 117 S.Ct. 1467 (1997). While these are considered common factors often present in cases where there is a need for juror anonymity, courts have not presented this as an exhaustive list nor required that a certain number or aggregate be present to justify the use of an anonymous jury. Rather, as the Court in *Ross* noted, “in determining whether or not to empanel an anonymous jury, courts should look to the totality of the circumstances.” *Ross*, 33 F.3d at 1521 fn. 26. For example, the level and impact of media coverage and publicity surrounding the cases weighed heavily in the district courts’ decisions to empanel anonymous juries in both *Wong* and *Branch*.

Branch involved the firefight that erupted in Mount Carmel, Texas between agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) and members of the Branch Davidian sect in 1993. The district court reasoned that an anonymous jury was appropriate due to the large amount of “world-wide” media coverage and publicity generated by and surrounding the case. Echoing the district court’s concerns over the media attention, the Fifth Circuit added that the case has “aroused deep passions” which, as legitimately feared by the district court, could have had potentially disruptive effects on jurors. *Branch*, 91 F.3d at 724. The Second Circuit in *Wong* similarly noted that the “prospect of publicity militates in

favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment.” *Wong*, 40 F.3d at 1377.

To remedy any adverse effects of empaneling an anonymous jury or any negative inferences that may arise therefrom, Courts have consistently relied on extensive voir dire and instructions that provide plausible and nonprejudicial reasons for hiding the identities of jurors. *See Ross, Krout, and Branch.*

Of the five common factors typically existing in cases where anonymous juries have been used and their use upheld, the media coverage and publicity this case has garnered and will certainly receive during trial will be an issue to the jury that will be empaneled. As has been demonstrated during the litigation of previous motions, the media coverage of this case, to this point, has been extensive on both regional and national levels. One can only expect that coverage will increase and intensify once trial commences. Of concern to the United States is both the impact of that coverage and publicity will have on the jury selection process, the venire and the actual jury and the media’s efforts to learn as much as possible about the jurors serving on this high profile case.³

³ Sequestration would seem to offer a rather easy solution to the problem of media coverage and publicity and any impact or adverse effect it may have on a particular jury, but also creates even larger problems, especially in a trial such as this, that is expected to last for several months. The United States submits that sequestering a jury for this trial would place an undue burden on members of the

While the United States submits that the trial of this case warrants an increased level of anonymity surrounding juror selection as well as increased efforts aimed at safeguarding the identities of potential jurors and those actually called to serve on the jury from the public and the media, an anonymous jury, as defined in case law, may not be appropriate. Given the fact that this case is a capital case, both the prosecution and defense will need to learn as much as possible about potential jurors in assessing their ability to consider evidence in the guilt phase of the trial and determining their suitability to sit on a jury where capital punishment could be imposed. Empaneling a quasi or semi anonymous jury allows both the prosecution and defense to engage in a complete and meaningful jury selection process while at the same time protecting potential members of the jury from potential harassment and/or intimidation by the public or media. In virtually all of the cases discussed above, where anonymous juries were empaneled, the district courts took additional steps to safeguard the identities of the jurors. Some of these same measures that are available to this court include:

1. sequestration and securing of the jurors in and away from the courthouse during trial days;
2. jurors meeting with security personnel at confidential pre-arranged locations for transportation to and from the

jury as well as both counsel for the United States and the defendant.

courthouse; and

3. secured and confidential lodging for those jurors requiring overnight accommodations during trial days;

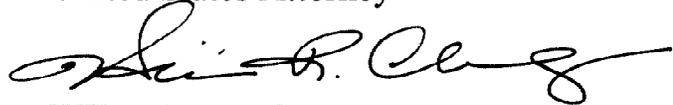
The court could also devise a protective order to restrict access and release of identifying information outside of the trial teams.

Premised on prevailing case law, it is well within this Court's discretion to empanel an anonymous jury. Given the nature of the crime charged, the severity of the sentence the defendant faces, and the publicity surrounding the case, this Court has ample reason to conclude that the jury empaneled in this case, and the entire process for selecting the jury for that matter, must be afforded greater protection. The United States submits, however, that while increasing the level of anonymity surrounding the process of jury selection and safeguarding release of information identifying jurors to the public is warranted in this case, due to the nature of this case, withholding such information from the parties would be counter-productive. Empaneling a semi-anonymous jury, however, where the identities of jurors is safeguarded from the public through a variety of means, achieves the goal of protecting the jury from harassment or intimidation while at the same time guaranteeing a more complete selection process, mindful of the defendant's constitutional rights. Providing identifying information to the parties

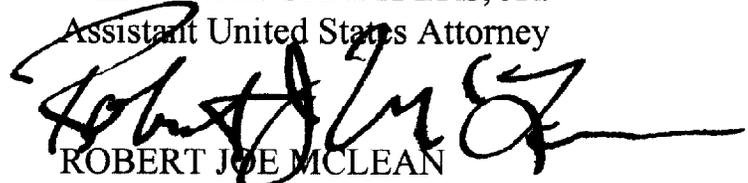
but withholding release of such information to the public has the added benefit of virtually eliminating the possibility that jurors would draw inferences prejudicial to the defendant.

Respectfully submitted this the 13th day of August, 2004.

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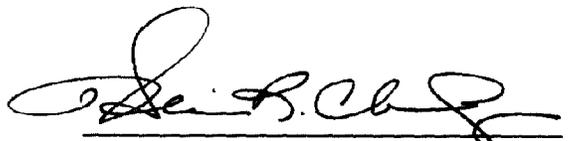
CERTIFICATE OF SERVICE

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

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