

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

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

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UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.)
)
ERIC ROBERT RUDOLPH,)
Defendant.)

CR-00-N-0422-S

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF PRIVACY
FOR JURORS BUT IN OPPOSITION TO AN "ANONYMOUS" JURY**

Comes now, Eric Robert Rudolph, through counsel, and files this memorandum in support of protecting the privacy interests of the jurors, but in opposition to an "anonymous" jury. The Court has proposed a several stage process for jury selection in this case, including: (1) a short statutory qualification questionnaire in the juror summons; (2) summoning approximately 500 prospective jurors to a facility rented by the Court to complete an extensive questionnaire; (3) permitting a round of challenges for cause based on the questionnaires; and (4) summoning jurors to court in manageable groups each day for individual, sequestered voir dire.¹ [See Transcript of Change of Venue Hearing at 30-31]. At the close of the venue hearing, this Court also raised the question of the use of an anonymous jury and allowing the jurors to come and go at the end of each day.

I. An Anonymous Jury Should Be Rejected

The undersigned did not understand this Court's comment as one supporting the impanelment of an anonymous jury. Nothing in this case suggests or justifies the need for an

¹ We concur with the process proposed by the Court and will seek leave at a later date to file specific recommendations regarding the instructions to be given the prospective jurors, the handling of hardship excuses, and procedures to use regarding challenges for cause.

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anonymous jury. Such an extreme procedure is inappropriate under the existing facts and circumstances present in this particular case. However, should counsel have misunderstood the Court's intent, we hereby set out our objections to the impanelment of an anonymous jury.

As discussed in greater detail below, an anonymous jury should be denied because the use of an anonymous jury would (a) deprive defendant of his right to a public trial as guaranteed by the Sixth Amendment to the United States Constitution; and (b) violate his right to the presumption of innocence as guaranteed by the Fifth Amendment, his right to a fair and impartial jury as guaranteed by the Sixth and Eighth Amendments, and his right to the disclosure of a list of names of veniremen as guaranteed by 18 U.S.C. § 3432. Further, the Government has not established that the extraordinary and highly prejudicial use of an anonymous jury is necessary and, thus, such a drastic measure should not be implemented unless the Government, at an evidentiary hearing, proves "by a preponderance of the evidence" that disclosure of the names and addresses of the venirepersons would place the lives or safety of the jurors in jeopardy.

A. The Use of an Anonymous Jury Would Violate Defendant's Right to a Public Trial.

The Sixth Amendment to the U.S. Constitution provides:

"In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence [sic]."

United States Constitution, Amend. VI.

A criminal defendant's right to a public trial is deeply rooted in the history of this country and English common law. See, Press-Enterprise Company v. Superior Court of California, 464 U.S. 501 (1984). Indeed, one early account of a criminal trial from 1565 reports that criminal

trials were held “[i]n the towne house, or in some open or common place.” Press-Enterprise, 464 U.S. at 506-507 (quoting, T. Smith, De Republica Anglorum 96 (Alston ed. 1906)).

Furthermore,

“[A]s the trial began, the judge and the accused were present. Before calling jurors, the judge “tellethe the cause of their coming, and [thereby] giveth a good lesson to the people.” Id. at 96-97. The indictment was then read; if the accused pleaded not guilty, the jurors were called forward, one by one, at which time the defendant was allowed to make his challenges. Id., at 98. Smith makes clear that the entire trial proceeded “openly, that not only the xii [12 jurors], but the Judges, the parties and as many [others] as be present may heare.” Id., at 79.”

Press-Enterprise, 464 U.S. at 507 (citations omitted).

The concept of a non-anonymous jury has similar deep roots in the history of this country.

In In re Baltimore Sun Company, 841 F.2d 74 (4th Cir. 1988), the Fourth Circuit Court of

Appeals explained:

“When the jury system grew up with juries of the vicinage, everybody knew everybody on the jury and we may take judicial notice that this is yet so in many rural communities throughout the country. So, everyone can see and know everyone who is stricken from a venire list or otherwise does not serve.”

Baltimore Sun, 841 F.2d at 75, citing Pope, The Jury, 39 Texas L. Rev. 426 (1961).

Although, the Fourth Circuit, was not dealing with a case involving threats of harm to the jury or jury corruption in the Baltimore Sun case, it explained that:

[t]he risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity. If the district court thinks that the attendant dangers of a highly publicized trial are too great, it may always [adopt other] ... method(s) of obviating pressure or prejudice.”

Baltimore Sun, 841 F.2d at 76.

In United States v. Sanchez, 74 F. 3d 562 (5th Cir. 1996), the Fifth Circuit held that the district court’s granting of an anonymous jury in a non-capital case was an abuse of discretion that warranted reversal of the defendant’s conviction. In so holding, the Court emphasized the

value of an open proceeding at which known jurors deliver their verdict to the defendant:

“[I]n United States v. Krout, 66 F.3d 1420, 1427 (5th Cir.1995) we recognized that ‘the decision to empanel an anonymous jury ... is a drastic measure, which should be undertaken only in limited and carefully delineated circumstances.’ ... Additionally, so that ‘the use of anonymous juries will remain a device of last resort, it is necessary that the district court base its decision on more than mere allegations or inferences of potential risk.’ Id. ... The government argues that even if the Krout criteria were lacking, it was harmless error to try the case before an anonymous jury because the court conducted extensive voir dire and enabled Sanchez to pick an unbiased jury, albeit Sanchez did not know the jurors’ names and addresses or their spouses’ or employers’ names. We disagree. The defendant has a right to a jury of known individuals not just because information such as was redacted here 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. Unless the type of circumstances listed in Krout exist, where the defendant has essentially compromised his right, he should receive a verdict, not from anonymous decisionmakers, but from people he can name as responsible for their actions.”

Sanchez, 74 F. 3d at 564-565.

Although the Eleventh Circuit has held that use of an anonymous jury is not unconstitutional in the context of a non-capital case, United States v. Ross, 33 F.3d 1507, 1519-1521 (11th Cir. 1994), the Eleventh Circuit’s constitutional analysis was limited to a defendant’s Sixth Amendment right to select an impartial jury and did not address a defendant’s Sixth Amendment right to a public trial. Furthermore, the Court expressly stated that “we do not mean to say that the practice of empaneling an anonymous jury is constitutional in all cases and ... we feel that courts should be highly circumspect in ordering the empanelment of anonymous juries.” Id. at 1521.

Use of an anonymous jury in this capital prosecution would violate defendant’s due process rights and his constitutional right to a public trial and a fair and impartial jury because such a procedure would turn the jury selection process into a secretive proceeding shrouded in mystery and would have an adverse impact on the public’s confidence in the administration of justice. As in Sanchez, Mr. Rudolph has “a right to a jury of known individuals” and he is

entitled to “receive a verdict, not from anonymous decisionmakers, but from people he can name as responsible for their actions.” This right needs to be even more scrupulously honored in the context of this case, where defendant’s life hangs in the balance. See, Gibson v. Zant, 705 F. 2d 1543,1546 (11 th Cir. 1983) (“The importance of ... jury composition is magnified in capital cases, where juries are required to consider ‘as a mitigating factor , any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis of a sentence less than death.”). Moreover, as discussed infra, for the last 100 years, Congress has required a non-anonymous jury in death penalty cases by dictating disclosure of the list of the venire people in capital cases. See, 18 U.S.C. § 3432. Accordingly, an anonymous jury should be denied.

B. An Anonymous Jury Is Prohibited in this Capital Case Because There Is No Threat to the Life or Safety of Any Juror.

The Eleventh Circuit has recognized that:

“Unquestionably, the empanelment of an anonymous jury is a drastic measure, one which should be undertaken only in limited and carefully delineated circumstances. An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant’s constitutional right to a presumption of innocence.”

United States v. Ross, 33 F.3d at 1519.

Ross expressly adopted the law of the Second Circuit on this issue and relied on United States v. Thomas, 757 F.2d 1359,1365 (2d Cir. 1984) in particular. In Thomas, the Court considered the impact on a defendant’s presumption of innocence of the practice of impaneling an anonymous jury:

“The elementary principle that a shield of innocence surrounds a defendant on trial reached back in history at least to early Roman law. See, Coffin v. United States, 156 U.S. 432, 453-54, 39 L.Ed. 481, 15 S.Ct. 394 (1895). Recognition of this principle and its enforcement are part of the foundation of our system of criminal justice. A particular practice – here the impaneling of an anonymous jury – and its impact on the presumption of innocence must therefore receive close

judicial scrutiny and be evaluated in the light of reason, principle and common sense.”

Thomas, 757 F.2d at 1363.

Both the Eleventh and the Second Circuits have also recognized that “[e]mpaneling an anonymous jury undoubtedly has serious implications for a defendant’s interests in effectively conducting a voir dire ...” United States v. Wong, 40 F.3d 1347, 1376 (2d Cir. 1994), cert. denied, 514 U.S. 1113 (1995) ; United States v. Ross, 33 F.3d at 1519 n. 22 (“In the usual case, the parties know the names, addresses, and occupations of potential jurors, as well as those of any spouses, and use this information during voir dire to formulate questions probing for potential biases, prejudices, or any other considerations that might prevent a juror from rendering a fair and impartial decision.”). See also, United States v. Mansoori, 304 F. 3d 635, 650 (7th Cir. 2002) (“ Juror anonymity also deprives the defendant of information that might help him to make appropriate challenges – in particular, peremptory challenges – during jury selection.”)

Because of the importance of the interests that are burdened by the practice, the Eleventh Circuit has admonished that an anonymous jury is a “drastic remedy” and that “[i]n 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 1519-1520 (emphasis added). See also, United States v. Mansoori, 304 F. 3d 635 (7th Cir. 2002) (granting anonymous jury was an abuse of discretion absent the required showing); United States v. Sanchez, 74 F. 3d 562 (5th Cir. 1996) (granting anonymous jury was an abuse of discretion and reversible error absent the required showing “[s]o that ‘the use of anonymous juries will remain a device of last resort, it is necessary that the district court base its decision on more than mere allegations or inferences of potential risk.’”); United States v. Millan-Colon, 834 F.Supp. 78 (S.D.N.Y. 1993) (denying application for anonymous jury);

United States v. Melendez, 743 F.Supp. 134, 135 (E.D.N.Y. 1990) (denying "drastic remedy of an anonymous jury"); United States v. Coonan, 664 F.Supp. 861, 862 (S.D.N.Y. 1987) (denying anonymous jury in the absence of evidence that the defendants – notwithstanding the fact they were charged with "predicate acts including murder, attempted murder, kidnapping, loansharking, extortion, and narcotics trafficking as part of a racketeering enterprise known as the Westies" – were likely to interfere with the judicial process). Cf., United States v. Bellomo, 954 F.Supp. 630, 654-55 (S.D.N.Y. 1997) (granting application where government presented "substantial evidence that suggests a threat to the judicial process in this case," including the intimidation of witnesses, the murder of cooperating witnesses, and a defendant's instructions to another witness to provide false testimony before the grand jury).

As stated in Thomas, 21 F.3d 1251, 1264 (2d Cir. 1994), in considering a motion for an anonymous jury, a court "must balance the defendant's interest in conducting a meaningful voir dire and in maintaining the presumption of innocence against the jury's interest in remaining free from real or threatened violence and the public interest in having the jury render a fair and impartial verdict." Courts do not reach the balancing test, however, without a credible and convincing predicate showing from the Government that there is, in fact, "strong reason to believe the jury needs protection" which are defined as a finding that there is "a serious threat to jury safety" Thomas, supra, 757 F.2d at 1364-65, quoted with approval in Amuso, 21 F.3d at 1264.

Over 100 years ago, Congress, by enacting 18 U.S.C. § 3432, implicitly recognized that a defendant's rights to due process, a public trial and an impartial jury need even more protection in capital cases. Section 3432 provides that:

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for

proving the indictment, stating the place of abode of each veniremen and witness, *except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.*" (emphasis added).

Prior to the 1994 amendment that added the language emphasized above, it was clear that the government was under a mandatory obligation to provide the defense with the names of witnesses and venirepersons. Logan v. United States, 144 U.S. 263 (1892). In fact, in United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), where the Second Circuit first sanctioned the use of an anonymous jury in certain cases, it also recognized that capital cases were excluded from its holding because of the mandatory disclosure requirements contained in 18 U.S.C. § 3432. Barnes, 604 F.2d at 143 n.11; see also, United States v. Shakur, 623 F. Supp. 1, 2 (S.D.N.Y. 1983) (mandatory disclosure requirements of 18 U.S.C. 3432 need not be applied in a capital case where the death penalty is not being sought).

The 1994 amendment to 18 U.S.C. §3432 did not change the mandatory nature of the disclosure requirements. Rather, the 1994 amendment provides for a narrow exception to mandatory disclosure in death penalty cases, where the court finds "by a preponderance of the evidence that disclosure will jeopardize the life or safety of a juror." See 18 U.S.C. § 3432. By including a preponderance of the evidence standard in the language of the statute, Congress clearly contemplated that the mandatory disclosure requirements should not be disregarded unless the Government establishes at a full blown evidentiary hearing that the life or safety of a juror will be at risk. See, United States v. Heatley, 994 F. Supp. 483, 489 (S.D.N.Y. 1998) (Sotomayor, J.) (Reserving decision on whether to apply the exception to mandatory disclosure of witnesses pursuant to 18 U.S.C. § 3432 and directing a showing of "sufficient and particularized evidence to meet the preponderance standard").

18 U.S.C. § 3432 makes it clear that the only standard to be applied in deciding whether

to withhold disclosure of the names and addresses of jurors in a capital case, is whether the Government can establish by a preponderance of the evidence that **the life or safety of a juror may be jeopardized** by such disclosure. 18 U.S.C. § 3432. If the court makes such a finding, then, and only then, **may** the court decide to withhold the names and addresses.

18 U.S.C. § 3432 also makes it clear that the allegation of a capital offense, standing alone, is insufficient to carry the Government's burden of establishing that the life or safety of a juror may be jeopardized. Indeed, the statute mandates disclosure of the names and addresses of jurors in a capital case as the general rule, not the exception. 18 U.S.C. § 3432 requires advance disclosure of juror names and addresses in all capital cases absent a specific and particularized *evidentiary showing* by the government. Likewise, the seriousness of the charges in non-capital cases, standing alone, is not a valid basis for use of an anonymous jury. United States v. Coonan, 664 F. Supp. 861 (S.D.N.Y. 1987); United States v. Millan-Colon, 834 F. Supp. 78, 83 (S.D.N.Y. 1983). See generally United States v. Ross, 33 F.3d 1507, 1521 n. 26 (11th Cir. 1994) (“[M]ere invocation of names of organized crime groups is insufficient basis to order anonymous jury.”); United States v. Vario, supra, 943 F.2d at 241 (2d Cir. 1991) (same); United States v. Mora, 1995 WL 519987, *2-3 (E.D.N.Y. 1995).

In Coonan, supra, Judge Knapp applied the standards articulated in Barnes, supra, and its progeny to a non-capital racketeering case involving the notorious and violent “Westies” gang. There, the racketeering conduct included, *inter alia*, murder, attempted murder, kidnapping, and loan sharking. Judge Knapp acknowledged that the defendants were alleged to have engaged in violent and unscrupulous conduct, but found that despite their prior involvement and familiarity with the criminal justice system, they were never alleged to have been involved in any type of *juror tampering*. Accordingly, the government's application for an anonymous jury was denied.

In so ruling, Judge Knapp explained that “it has been our observation over the years that there is a category of persons who, although prone to the most outlandish conduct, seem to draw the line at interfering with those who are engaged in the administration of the judicial process.” Coonan, supra at 863; see also, United States v. Millan-Colon, 834 F. Supp. 78, 83 (S.D.N.Y. 1993) (inclination towards threatening witnesses in absence of any evidence of jury tampering insufficient to warrant anonymous jury).

In this case, the available facts demonstrate that there is no reason to believe that juror safety will be compromised by disclosing their names and addresses. The Government makes no allegations of past or future efforts by Mr. Rudolph to obstruct the judicial process or to intimidate, threaten, kill, or solicit false testimony from witnesses. There is no allegation of a past history of jury- or witness-tampering. There is no allegation of future plans to engage in jury- or witness-tampering. Mr. Rudolph’s conduct in court and in jail has been exemplary. In short, nothing about this case suggests that the jury genuinely needs protection.

In sum, the Government has not and cannot set forth sufficient and particularized evidence to meet the “preponderance of evidence” standard set forth in 18 U.S.C. § 3432 demonstrating that disclosure would “jeopardize the life or safety of any person.” See United States v. Heatley, supra, 994 F. Supp. 483 (S.D.N.Y. 1998). Accordingly, at a minimum, this Court must conduct an evidentiary hearing where the government may attempt to demonstrate and the defense may attempt to rebut the notion that juror anonymity is required. After, such an evidentiary hearing, the Court may then make findings as to whether a preponderance of the evidence demonstrates that disclosure of the names and addresses of the venire will place their lives or safety in jeopardy. *Id.* at 489.

C. Even If this Court Utilizes the Standards Applicable to Non-capital Cases, an Anonymous Jury Is Not Warranted

As illustrated above, the defense maintains that the only test that may be employed in this capital prosecution in determining whether to use an anonymous jury is whether the life or safety of a juror would be jeopardized by disclosure of the names and addresses of the jurors. Even assuming, *arguendo*, that this Court utilized a test traditionally used in non-capital cases for guidance in determining whether the lives and safety of the jurors are in jeopardy, an anonymous jury should be denied.

The test traditionally used in non-capital cases is set forth by the Eleventh Circuit in United States v. Ross, 33 F. 3d at 1520, as follows:

“Sufficient reason for empaneling an anonymous jury has been found to exist upon a showing of some combination of several factors, including: (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.”

(1) The Defendant’s Involvement in Organized Crime

As indicated above, the Eleventh Circuit specifically cautioned in Ross, 33 F. 3d at 1521 n. 26, that the “‘mere invocation of names of organized crime groups is insufficient basis to order anonymous jury,’” quoting United States v. Vario, supra, 943 F.2d at 241 (2d Cir. 1991).

In Vario, the Second Circuit stated that “(t)he invocation of words such as ‘organized crime,’ ‘mob,’ and ‘the Mafia,’ unless there is something more, does not warrant an anonymous jury.” Vario, 943 F.2d at 241. See also, United States v. Mansoori, 304 F. 3d 635, 650 (7th Cir. 2002) (“Although the case did involve elements of organized crime, ‘something more’ than the organized-crime label is required in order to justify juror anonymity.”). Allegations that a case is related to the specter of “terrorism” – even where the allegations are as attenuated as they are in

this case – belong also on that list of labels that do not terminate the analysis but, instead, require "something more." As stated in Vario, 943 F.2d at 241 :

“Before a district judge may rely on the organized crime connection of a defendant as a factor in the question of anonymous juries, he must make a determination that the connection has some direct relevance to the question of juror fears or safety in the trial at hand beyond the innuendo that this connection conjures up.”

Reviewing the cases on this factor, Ross indicates that an anonymous jury has been properly upheld where, in combination with several other factors, the prosecution had reliable reason to believe the defendants had strong ties to organized crime (United States v. Paccione, 949 F.2d 1183, 1191- 93 (2d Cir.1991), or where the government alleged a pattern of violence by members of the defendants' organization, including the murder of a witness (United States v. Crockett, 979 F.2d 1204, 1215-17 (7th Cir.1992), or where, as in Ross itself, the defendant was a leader of a large-scale criminal organization and was actively involved in organized crime. In this case, the government has studiously avoided any allegation that Mr. Rudolph is part of an organized group, conspiracy, or criminal enterprise. There is no evidence that he has strong ties to organized crime, that he is a member of a violent organization, or that he is the leader of a large-scale criminal organization.

(2) The Defendant's Participation in a Group With The Capacity to Harm Jurors

Since there is no allegation or evidence of any organization or group in this case, there is also no indication, as there was in Ross, that any organization “had the means to harm jurors and had in fact committed prior acts of violence.” 33 F. 3d at 1520. Moreover, even proof of participation in an illegal group is not enough to justify the impaneling of an anonymous jury. As stated in United States v. Mansoori, 304 F. 3d 635, 651 (7th Cir. 2002), where the Seventh

Circuit found an abuse of discretion in ordering such a jury:

“True, the defendants may have had the ability to intimidate jurors through associates who were not incarcerated, but that is true of many defendants. What demonstrates the need for jury protection is not simply the means of intimidation, but some evidence indicating that intimidation is likely. ... No such evidence is present here.”

(3) A Defendant's Past Attempts to Interfere With The Judicial Process

As stated in Vario, “An obstruction of justice charge, particularly one involving jury-tampering, has always been a crucial factor in our decisions regarding anonymous juries.” 943 F.2d at 240. See also, Ross, 33 F. 3d at 1520-1521 (“Appellant had previously attempted to interfere with the judicial process by ordering the death of Singer, a potential witness against Appellant. The government had also averred before trial that there had been three separate incidents of violence directed at the relatives of ... potential government witnesses. Appellant also offered bribes to [a] government witness ... and to the officer who arrested Appellant.”); United States v. Tutino, 883 F.2d 1125 at 1132-1133 (2d Cir. 1989) (history of actual jury tampering by defendant justified use of anonymous jury); Coonan, 664 F. Supp. at 862 (absent evidence of actual jury tampering, use of anonymous jury was unwarranted); Millan-Colon, 834 F. Supp. at 85 (same).

Here, the government cannot point to a single incident where it is alleged that Mr. Rudolph tried to improperly hurt, threaten or influence a juror or a witness. The absence of any specific or articulable effort by or on behalf of a defendant, to influence a juror or witness suggests an anonymous jury is unnecessary here. See, Coonan, 664 F. Supp. at 862; Melendez, 743 F. Supp. at 137; Millan-Colon, 834 F. Supp. at 83-85.

(4) The Seriousness of the Charge

It cannot be the case that simply saying the defendants face "serious charges" suffices. Nearly every defendant indicted in the federal court system faces "serious charges." Instead, as the cases require, "something more" must be proven, always involving proof of a credible threat that the defendants are likely to attempt to interfere with the judicial process.

As indicated above, the mere fact that the charges against a defendant are serious does not, standing alone, require an anonymous jury. Millan-Colon, 834 F. Supp. 78, 83 (heroin distribution conspiracy); United States v. Mora, 1995 WL 519987 (E.D.N.Y. 1995) (narcotics conspiracy); United States v. Melendez, 743 F. Supp. 134 (E.D.N.Y. 1990) (violent racketeering charges); United States v. Coonan, 664 F. Supp. 861 (S.D.N.Y. 1987) (violent racketeering charges). Moreover, the seriousness of the crime charged and a juror's theoretical fear of retaliation or retribution is not relevant in a capital case where the statute requires that the government prove that providing the jurors' names may place them in jeopardy.

In this case, the seriousness of the crime charged does not warrant the use of an anonymous jury. Congress would not have enacted a requirement that the names and addresses of the venire be disclosed to capital defendants three days before trial if the seriousness of the charges or the fact that defendant faces the death penalty in and of itself justified the withholding of the names and addresses of the jurors. See, 18 U.S.C. § 3432.

Further, there is nothing about the charges in this case, excluding the death penalty count, that distinguishes them from the multitude of other violent crimes which are routinely tried without anonymous juries. See, Coonan, 664 F. Supp. 861 (S.D.N.Y. 1987); United States v. Mora, 1995 WL 519987 (E.D.N.Y.) (case involving violent narcotics conspiracy did not justify

completely anonymous jury); United States v. Melendez, 743 F. Supp. 134 (E.D.N.Y. 1990) (same); United States v. Millan-Colon, 834 F. Supp. 78, 83 (S.D.N.Y. 1993) (narcotics conspiracy where witness intimidation alleged). The rules governing jury selection do not contain an automatic exception for cases involving acts of violence or the possible imposition of the death penalty nor should they. Defendants charged with committing violent crimes and facing lengthy prison sentences or the death penalty are entitled to at least the same rights as defendants in “white collar” cases. Accordingly, it is respectfully submitted that neither the violent nature of the crimes charged nor the potential sentence, standing alone, provide an adequate basis for use of an anonymous jury in this case.

(e) Publicity

Admittedly, there has been a great deal of publicity in this case, and there will likely be a great deal of publicity throughout the trial. However, as the Eleventh Circuit cautioned in Ross, “the degree of pretrial publicity is not dispositive as to whether to empanel an anonymous jury.” 33 F. 3d at 1521 n. 26. Under Ross, the relevant inquiry is not the existence of extensive publicity itself, but whether there is “extensive publicity that could enhance the possibility that jurors' names would become public *and expose them to intimidation or harassment.*” 33 F. 3d at 1520. There is no indication here that anyone connected with the defense will expose any juror to intimidation or harassment. See also, United States v. Mansoori, 304 F. 3d 635, 651 (7th Cir. 2002) (“In short, that the defendants had the ability and incentive to threaten jurors, without additional evidence indicating that they were likely to act on that ability and incentive, was not enough to justify the unusual step of juror anonymity.”)

In sum, it is respectfully submitted that there is nothing about the nature of the charges or

penalties faced by Mr. Rudolph and nothing about his conduct in this case or in the past that would warrant the use of an anonymous jury. It is further respectfully submitted that the media coverage in this case, although extensive, does not give rise to a credible threat of jury tampering by the defense, and that any perceived threat of tampering by the media itself can be addressed without taking the “drastic measure” of impaneling an anonymous jury. Finally, in the event that the Court is not inclined to summarily deny any request for an anonymous jury, the Court should hold an evidentiary hearing to determine whether a preponderance of the evidence supports any assertions that the lives and safety of the prospective jurors will be in jeopardy if their identities are disclosed. *See* 18 U.S.C. § 3432.

II. Alternatives

Defendant has made strenuous objection to an anonymous jury out of an abundance of precaution. Should this Court see the need additional measures in this high-profile case, Mr. Rudolph makes the following recommendations regarding juror privacy:

- A. Members of the media and public should not be present at the time that the prospective jurors complete the juror questionnaires;
 - B. This Court Should Enter an Order Prohibiting the Press from Interviewing and Photographing Prospect Jurors.
 - C. The Identity of the Jurors Selected to Serve on this Jury And Their Juror Questionnaires Should Remain Sealed.
 - D. The Juror Questionnaires of Those Prospective Jurors Who Do Not Serve on the Jury in this Case Should Be Sealed
- A. Members of the Press and Public Should Not Be Present When the Prospective Jurors Fill out the Questionnaires.**

Assembling prospective jurors who have reported to jury duty in the jury room and instructing them as to the procedures that they will follow with regard to their jury service is not

a proceeding that is usually open to the public and the press. Likewise, assembling prospective jurors to complete a written questionnaire as a preliminary step to participating in voir dire is not an event to which the public and press should have access. A finding that the assembling of prospective jurors to complete written questionnaires is not a proceeding that should be open to the press and public comports with the Supreme Court's analysis regarding the public nature of criminal trials.

In Press-Enterprise Company v. Superior Court, 464 U.S. 501 (1984), the Supreme Court, after reviewing the history of the criminal trial under the common law, held that the traditional guarantees of openness to a criminal trial extend to voir dire examinations. 464 U.S. at 505-10. Nothing in the Court's opinion supports a view that the media and public traditionally have had access to the jury assembly room or that the media or public have any right to view prospective jurors silently completing questionnaires.

This view is supported by the purpose underlying open voir dire proceedings which is to guarantee that jurors are "fairly and openly selected." Id. at 509. That purpose is not advanced by public or media access to the prospective jurors while they are completing the questionnaires because no jury selection process is occurring at that time. The purpose of having prospective jurors assemble to complete the questionnaires is to guarantee the integrity of the questionnaire process and to protect the privacy interests of the prospective jurors. In the context of juror questionnaires, the authority of the Court assures the integrity of the process. The presence of the media or the public during the completion of the questionnaires advances no judicial or constitutional interest. Clearly, the media and public have no right of access to the jury room or to jury deliberations and for like reason should have no access to prospective jurors while they

complete written questionnaires.

Moreover, the denial of access to the proceedings ensures that the prospective jurors' privacy rights are respected. If the prospective jurors received the juror questionnaires with their summons and completed them in the privacy of their homes, the media and public would have no right of access to the jurors while they completed the questionnaires. See United States v. McVeigh, 955 F. Supp. 1281, 1282 (D. Colo. 1997) (questionnaires were mailed with the jury summons).

B. This Court Should Enter an Order Prohibiting the Press from Interviewing and Photographing Prospect Jurors.

As discussed above, the assembling of the prospective jurors in this case is the functional equivalent of assembling the prospective jurors in the jury room. The media would not have access to photograph or interview jurors assembled in the jury room and should not have access to them in this case. Moreover, this Court clearly has the authority to limit the ability of the media to photograph or sketch artists to draw jurors during the course of a trial. Cf. Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1304, 1397 (1983) (discussing the trial court's order, directing that "[n]o person shall draw sketches, photographs, televise or videotape any juror or jurors during their service in these proceedings"). In addition, even though 47 state courts permit cameras in the courtroom, every state recognizes the importance of the jurors' privacy interests by limiting or prohibiting the photographing of the jury during the proceedings. See Ruth Ann Strickland & Richter H. Moore, Jr., Cameras In State Courts: A Historical Perspective, 78 *Judicature* 128, 135 (1994) ("televised coverage of voir dire and of jurors is usually restricted or prohibited"). Accordingly, this Court should exercise its authority in this instance.

C. The Identity of the Jurors Selected to Serve on this Jury And Their Juror Questionnaires Should Remain Sealed.

Concerns about the effect of media coverage on the prospective jurors, can be addressed by keeping the jurors' names secret from the media and the general public while disclosing the names to the parties. In the recently concluded highly publicized prosecution of Martha Stewart, the trial judge, in an effort to protect potential jurors' privacy, closed the voir dire to the media. In reversing that ruling, the Second Circuit disapproved the exclusion of the media from voir dire proceedings and noted that the concerns for juror privacy could have been accomplished by "simply concealing the identities of the prospective jurors from the media: "[W]e do not see why simply concealing the identities of the prospective jurors would not have been sufficient to ensure juror candor." ABC, Inc. v. Stewart, 360 F.3d 90, 105 (2d Cir. 2004) (The Court also noted that the trial judge in that case had entered an order "prohibiting the media from communicating with jurors or prospective jurors or with their family members until such time as that juror's or potential juror's service was completed." Id. at 94).

Mr. Rudolph does not object to a similar order being entered in this case. Such an order should be expanded to include a prohibition from any person having contact with jurors. Nor does Mr. Rudolph object to the jury being informed of such a court order with instructions from the Court to report any violation of that order. Similar procedures have been adopted in several federal capital cases.²

Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1304, 1397 (1983) involved a local

² These cases include United States v. Timothy McVeigh and Terry Nichols, (Cr. No. M-95-98-H, W.D. OK) on change of venue to (D. Co. CR. 96 Cr. 68-M); United States v. Jason Dela Torre, et al., (D. N.M., Cr. No. 95-538-MV); United States v. Dean Beckford, et al., (E.D. Va. Cr. No. 3:95 Cr. 00087); United States v. Chevy Kehoe and Dan Louis Lee, (E.D. Ar. Cr. No. LR-CR-97-243).

homicide case that attracted “a great deal of public interest” in Pennsylvania. After jury selection but before sequestration, the trial court, *sua sponte* and without any hearing or record, entered an order prohibiting the publication of the names or addresses of the jurors. 463 U.S. at 1303-05. This order was entered despite the fact that the had been selected in open court with the media and public present and their names had been disclosed. *Id.* at 1305. Consequently, the court lacked sufficient justification for a “categorical, permanent prohibition against publishing information already in the public record”. *Id.* at 1306.

A case such as the one at bar presents the kind of situation in which maintaining the confidentiality of the identity of the jurors is appropriate. The media attention this case has already received is extraordinary. Undoubtedly, that coverage will only increase as this case goes to trial. Our system of jury service contemplates not only that jurors will be able to serve as jurors without interference by the media and public but also that the “jurors will inconspicuously fade back into the community once their tenure is completed.” Application of Daily News, 787 F. Supp. 319, 323 (E.D.N.Y. 1992) (quoting United States v. Gotti, 777 F. Supp. 224, 226 (E.D.N.Y. 1991). See United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977), cert. denied, 435 U.S. 968 (9178) (denying press request for release of jurors names, addresses and other personal information in highly publicized case); cf. United States v. Beckham, 789 F.2d 401, 406-415 (6th Cir. 1986) (denying the media the right to copy audio and videotapes, tape transcripts and exhibits in a highly publicized political case).

D. The Juror Questionnaires of Those Prospective Jurors Who Do Not Serve on the Jury in this Case Should Be Sealed

The prospective jurors who do not ultimately serve on the jury should remained sealed as the press and public would never have any right of access to the information contained in the

questionnaires unless, and until, the prospective jurors actually participate in the voir dire examination. See Copley Press, 228 Cal.App.3d at 87, 278 Cal. Rptr. at 450 (relying on Leshner Communications, Inc. v. Superior Court, 224 Cal.App.3d 774, 779, 274 Cal. Rptr. 154, 156 (1990) (“Press-Enterprise does not require that disclosure be made of questionnaires submitted by venirepersons never called to the jury box for voir dire”).

In holding that the questionnaires of venirepersons not chosen to serve on the jury should not be disclosed, the Copley court adopted the reasoning of the Leshner court:

“[W]e assume that these questionnaires play no role whatsoever until a prospective juror is actually called to the jury box. The Press-Enterprise court rested its decision that voir dire must be open to the public on the interest of the public in open criminal trials. A review of the history and tradition of open criminal proceedings in English and American courts led to the conclusion that an open trial included an open voir dire. However, venirepersons who are never called to the jury box do not play any part in the voir dire or the trial. They fill out the questionnaire only as a prelude to their participation in voir dire. The questionnaire serves no function in the selection of the jury unless the person filling it out is actually called to be orally questioned. We see no legitimate public interest in disclosure of these questionnaires.”

228 Cal. App.3d at 87 n.8, 278 Cal. Rptr. at 450 n.8. In adopting the holding of the Leshner court, the Copley court reasoned that the prospective jurors’ privacy interests outweighed any countervailing rationale for disclosure. Id.

Furthermore, nondisclosure comports with the procedure normally followed in the jury selection process. Prospective jurors fill out a juror questionnaire that accompanies the jury summons. This information, however, does not become a matter of public record until the prospective jurors are asked the same or similar questions in open court and they give their answers on the record. Where records, such as these, are not entered into evidence or filed in

court, they are not matters of public record to which the public and press have a constitutional or common law right of access. See In the Matter of Newsday, Inc., 71 N.Y.2d 146, 518 N.E. 2d 930 (N.Y. App. 1987), cert. denied, 486 U.S. 1056 (1988); cf. Beckham, 789 F.2d at 406-415 (upholding on constitutional and common law grounds the district court's denial of the media's requests to copy audio and videotapes, transcripts of tapes and trial exhibits); United States v. Board of Education, 747 F.2d 111, 114 (2d Cir. 1984) (upholding the district court's denial of media's request to tape record the proceedings in a civil trial).

CONCLUSION

For the foregoing reasons and based on the authorities cited herein, it is respectfully submitted that the Court not impanel an anonymous jury.

Respectfully submitted,
Judy Clarke
Bill Bowen
Michael Burt

Counsel for Eric Robert Rudolph

Dated: August 13, 2004

BY: Michael Burt
MICHAEL BURT

Judy Clarke
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 544-2720
Facsimile: (619) 374-2908

Michael Burt
LAW OFFICE OF MICHAEL BURT
600 Townsend St., Suite 329-E
San Francisco, California 94103
Telephone: (415) 522-1508
Facsimile: (415) 522-1506

William M. Bowen, Jr. (BOW012)
WHITE, ARNOLD, ANDREWS & DOWD P.C.
2902 21st Street North, Suite 600
Birmingham, Alabama 35203
Telephone: (205) 323-1888
Facsimile: (205) 323-8907

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for the government the defendant's **DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO AN ANONYMOUS JURY** by U.S. Mail, first class postage prepaid and addressed to:

Michael W. Whisonant
Robert J. McLean
Will Chambers
Assistants United States Attorney
U. S. Department of Justice
Office of United States Attorney
Northern District of Alabama
1801 Fourth Avenue North
Birmingham, Alabama 35203-2101

This the 13th day of August, 2004.



Bill Bowen