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

UNITED STATES OF AMERICA	)	
v.	)	CR. NO. 2:10cr186 – MHT
MILTON E. MCGREGOR, THOMAS E. COKER, and JOSEPH R. CROSBY,	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTIONS FOR ADDITIONAL PEREMPTORY CHALLENGES

The United States, through undersigned counsel, submits this opposition to Defendant McGregor, Coker, and Crosby's Motions for Additional Peremptory Challenges. (Dkt. Nos. 1855, 1870, 1871.) The defendants argue that despite there being *less* defendants facing trial for *fewer* charges amidst media coverage of *acquittals*, they should receive more, instead of less, peremptory challenges. This time, they request an extraordinary 35 peremptory challenges – far more than the 20 challenges that are statutorily provided for the most serious of cases: a capital case. Yet, at the same time, the defendants argue that the government should not in fairness also receive an increased number of peremptory challenges.

The government opposes the extra challenges as unnecessary, given the extensive steps taken by the Court to ensure the parties have ample opportunity to excuse potentially biased jurors for cause. If the Court is inclined to increase the parties' peremptory challenges for the retrial, as it did for the first trial, then the government respectfully requests that the Court amend its earlier procedure by giving the 7 remaining defendants 5 additional joint peremptory

challenges for a total of 15; by giving the government 5 additional peremptory challenges for a total of 11; and by giving both sides any additional peremptory challenges that are statutorily provided for the selection of alternate jurors.

I. LAW

A defendant's right to peremptory challenges is statutory, not constitutional. Swain v. Alabama, 380 U.S. 202, 243-44 (1965) ("While peremptory challenges are commonly used in this country both by the prosecution and by the defense, we have long recognized that the right to challenge peremptorily is not a fundamental right, constitutionally guaranteed."). Rather, the constitutional guarantee underlying the use of peremptory challenges is a defendant's right to a fair and impartial jury. Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."); see Ross v. Oklahoma, 487 U.S. 81, 90, 108 (1988) (citing Stilson).

Federal Rule of Criminal Procedure 24(b) governs the availability of peremptory challenges in felony prosecutions. Under Rule 24(b)(2), in a non-capital felony case, the government is entitled to 6 peremptory challenges and the defendants are entitled to 10 peremptory challenges. Where 3 or 4 alternate jurors are impaneled, each side is entitled to 2 additional peremptory challenges. Fed. R. Crim. Pro. 24(c)(4)(B).

Rule 24(b)(2) provides for the same number of peremptory challenges in multi-defendant and single defendant cases, but notes that "[t]he court may allow additional peremptory challenges to multiple defendants." Fed. R. Crim. P. 24(b). The district court, however, is not *required* to give the defense any extra peremptory challenges in multiple defendant trials. Stilson, 250 U.S. at 586–87; see also United States v. Hueftle, 687 F.2d 1305, 1309 (10th Cir.

1982) (confirming that defendants in multi-defendant cases are not automatically entitled to additional peremptory challenges).

Granting additional challenges is within the district court's broad discretion. United States v. Maldonado-Rivera, 922 F.2d 934, 971 (2d Cir.1990). Whether the defendants must exercise the challenges jointly or separately is also within the district court's sound discretion. Fed. R. Crim. P. 24(b); see United States v. Aloi, 511 F.2d 585, 598 (2d Cir.1975) (holding that the district court did not abuse its discretion in requiring that peremptory challenges be exercised unanimously, despite differences in culpability and notoriety among the codefendants). Where district courts grant defendants additional peremptory challenges, it is common practice to grant the government additional challenges as well. See Fed. R. Crim. P. 24 advisory comm. nn. (West 2002) (noting that if the district court awards additional peremptory challenges to the defendants, then "the prosecution may request additional challenges . . . not to exceed the total number available to the defendants jointly").

Applying Rule 24 to this case, in which it is expected the Court will seat 4 alternates at the retrial, the government is entitled to 6 peremptory challenges (plus 2 for the selection of alternate jurors), and the defendants are entitled to 10 peremptory challenges (plus 2 for the selection of alternate jurors).[1]

II. FACTUAL BACKGROUND

At the first trial, several defendants moved for 8 additional peremptory challenges. (See Dkt. Nos. 361, 433, 440, 447, 452, 458, 482.) As grounds for his motion, defendant McGregor argued that "this is a very high-profile case that has received a truly enormous amount of

[1] If the Court were to impanel 5 or 6 alternates instead, Rule 24 would entitle both sides to 1 additional peremptory challenge to be used in the selection of alternate jurors. See Fed. R. Crim. P. 24(c)(4)(C).

publicity and public attention," and cited two cases where courts, in upholding district courts' denial of a change of venue, relied in part on several steps taken by the district court to protect the defendants' right to an impartial jury during the jury selection process, including for example the granting of additional peremptory challenges to the parties. (See Dkt. No. 361, at 1-2 (citing cases).)

The government opposed the high number of additional peremptory challenges sought by the defendants and instead advocated for the Court to grant 2 additional peremptory challenges to each side, resulting in a total of 12 for the defendants and 8 for the government, plus any peremptory challenges afforded under Rule 24(c) for the selection of alternate jurors. (Dkt. No. 632.) In support, the government cited United States v. Siegelman, Cr. No. 2:05cr119-MEF, a high-profile public corruption case involving four defendants where the district court granted each side 2 additional peremptory challenges. (Dkt. No. 632, at 2-3.) There, the government argued, the provision of two additional peremptory challenges "proved sufficient to select a fair and impartial jury" for both sides. (Id. at 3.)

Over the government's objection, the Court granted the defendants' request in full, increasing the defendants' peremptory challenges from 10 to 18, and the Court sua sponte increased the number of peremptory challenges to be used for the defendants' selection of alternate jurors from 2 to 9. (Dkt. No. 1100, at 2.) The Court increased the government's peremptory challenges from 6 to 10 and also increased its peremptory challenges to be used for the selection of alternate jurors from 2 to 5. (Id.) When the Court later increased the number of alternates from 4 to 5, the Court again increased the number of peremptory challenges for selecting alternate jurors, giving the defendants 10 and the government 6. In total, the

defendants were given 28 peremptory challenges to exercise jointly or individually, and the government was given 16.

At the first trial, the Court granted all but one of the defendants' 10 challenges for cause. The defendants also struck 28 jurors with peremptory challenges. The defendants exercised all 28 of their peremptory challenges jointly, although the Court did not require them to do so. The Court did not grant any of the government's challenges for cause. The government exercised all but one of its peremptory challenges at trial.[2]

ARGUMENT

The defendants' motions claim they should receive more, instead of less, peremptory challenges, despite there being less defendants facing trial for fewer charges on the heels of widespread coverage of the acquittals rendered in the first trial. This time, the defendants request an excessive 35 peremptory challenges (far more than is provided under the law for capital cases), while at the same time arguing that the government should not in fairness also receive additional peremptory challenges. The defendants' unreasonable request should be denied.

In the government's view, granting the defendants a total of 15 or less peremptory challenges is reasonable. Only seven defendants will be tried in the retrial, and it is unlikely there will be any conflicts among the defendants over how to exercise their peremptory challenges. At the first trial, the defendants agreed on the joint exercise of all 28 peremptory challenges, and defendant McGregor's motion confirms that the defendants once again expect to

[2] The government makes this representation upon information and belief. However, the government is unable to confirm this fact because the transcript for the relevant day of jury selection has not yet been prepared.

agree on all peremptory challenges and to jointly exercise those challenges at the retrial. (See Dkt. No. 1855, at 3-4.)[3]

Courts have rarely granted the high number of peremptory challenges sought by the defendants, even for similarly high-profile prosecutions. As previously noted, the district court granted each side only 2 additional peremptory challenges in United States v. Siegelman, Cr. No. 2:05cr119-MEF, a public corruption case that involved four defendants. The court in United States v. Haldeman, 559 F.2d 31, 79 (D.C. Cir. 1976), found no error in the trial court's granting of only one additional peremptory challenge to each of the five defendants, even in light of the extensive publicity on Watergate. In United States v. Hill, 643 F.3d 807, 831 (11th Cir. 2011), a complex fraud case involving a 187-count indictment, more than 300 transactions, and upwards of 100 witnesses, the Eleventh Circuit upheld the district court's provision of 16 peremptory challenges to the 12 codefendants and 10 challenges to the government.

The defendants' purported need for a high number of peremptory challenges is undercut by the extensive steps the Court has taken to ensure both sides will have a fair and impartial jury. The Court has required prospective jurors to complete a lengthy and meticulous questionnaire, consisting of more than 130 questions, and at the defendants' request the Court expanded the amount of time for the parties to review and analyze the completed questionnaires from 7 days to

[3] Even if the remaining defendants disagree over some challenges, it is well settled that multiple defendants have no right to more peremptory challenges than given them by Rule 24, even when they disagree on how to exercise them, as long as they are given a trial by an impartial jury. Stilson, 250 U.S. at 583; see United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011) (finding no abuse of discretion where court required four disagreeing codefendants in capital case to jointly exercise 20 peremptory challenges and also gave the government 20 challenges); United States v. McClendon, 782 F.2d 785, 788 (9th Cir. 1986) ("Disagreement between codefendants on the exercise of joint peremptory challenges does not mandate a grant of additional challenges unless defendants demonstrate that the jury ultimately selected is not impartial or representative of the community."); United States v. Williams, 463 F.2d 393, 395 (10th Cir. 1972) (finding no abuse of discretion where the district court limited two disagreeing codefendants to ten joint peremptory challenges).

14 days. At the first trial, the Court permitted counsel for all defendants to conduct individual voir dire on a wide variety of subjects. Once the jury was seated, the Court gave the jurors clear instructions to avoid all media coverage of the case, and, at the defendants' request, the Court sequestered the jurors during deliberations so as to limit their exposure to the public. These procedures are more than adequate to ensure a fair and unbiased jury.

Without acknowledging any of these safeguards, the defendants' motions argue that 35 peremptory challenges are necessary to ensure they receive an impartial jury because of the press attention that the case has received and is likely to receive in the future.[4] But additional peremptory challenges, change of venue, and other similar steps are not justified merely because the allegations and the defendants have been subjects of media coverage of which the potential jurors may be aware.

Indeed, a district court in the Middle District of Alabama, in denying a defendant's motion for a change of venue based on media attention, explained, "[i]t is not required that the jurors be totally ignorant of the facts and issues involved." Davis v. Jones, 441 F. Supp. 2d 1138, 1166 (M.D. Ala. 2006) (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961)). As the Supreme Court has recognized,

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

[4] The defendants' request for additional peremptory challenges is a narrow one. They do not argue that the nature of the charges or evidence support their claim for additional peremptory challenges. Instead, they base their request entirely on the amount of press attention given to the case.

Irvin, 366 U.S. at 722–23; see Cummings v. Dugger, 862 F.2d 1504, 1510 (11th Cir. 1989) (finding no actual prejudice even though 11 of 12 jurors had been exposed to some degree of pretrial publicity)[5]; see also United States v. Lamb, 575 F.2d 1310, 1315 (10th Cir. 1978) ("[S]imply because a prospective juror admits having read newspaper accounts relative to [the criminal charges of kidnapping and robbery at issue] is not in itself sufficient grounds for excusing a juror.").[6]

The fact that jurors selected in the retrial may have been exposed to some pretrial publicity concerning the case is a weak justification for the defense's extraordinary request for 35 peremptory challenges. Both sides may challenge for cause any jurors who are unable to set aside preconceived notions about the case resulting from exposure to pretrial publicity, and the defendants do not point to any wrongful denials of challenges for cause at the first trial that might have frustrated their ability to secure a fair and impartial jury if they had not relied on peremptory challenges. Nor do they direct the Court to any specific portions of the record – such as the lengthy voir dire examination of the jurors – as a basis for any arguments that there exists

[5] In Cummings, the Court found no prejudice despite the fact that one juror admitted that she was not sure she could completely clear her mind of the media coverage she had been exposed to, while stating that she had formed no opinion as to the defendant's guilt, and despite the fact that another juror admitted that he had already formed an opinion that the defendant was guilty but stated he could put this opinion out of his mind and decide the defendant's guilt or innocence based on the evidence presented without being influenced by the pretrial publicity to which he had been exposed. 862 F.2d at 1510-11.

[6] Compare Patton v. Yount, 467 U.S. 1025, 1029, 1035 (1984) (holding that the trial court did not err in finding that the jury was impartial, even though "77% [of the venire] admitted they would carry an opinion in to the jury box," because the "relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially"), and Murphy, 421 U.S. at 803 (holding that excusing 20 out of 78 prospective jurors [or, 26%] "by no means suggests a community with sentiment so poisoned against [the defendant] as to impeach the indifference of jurors who displayed no animus of their own"), with Irvin, 366 U.S. at 727 (reversing the defendant's conviction because 268 of the 430 venirepersons, or 62%, had fixed opinions regarding the defendant's guilt).

pervasive prejudice against their clients that cannot be overcome without the safeguard of additional peremptory challenges.

Instead, as the questionnaire and voir dire responses from the first trial reflected, the vast majority of prospective jurors had not formed any negative opinions about the defendants or formed any opinions as to the defendants' guilt, despite the fact many had been exposed to pretrial publicity. For the few prospective jurors who had formed such opinions, nearly all reported that their preconceived opinions were not so strong that they would be unable to put them aside and render a verdict based on the evidence presented in court. See Davis v. Jones, 441 F.Supp. 2d at 1166-67 (quoting Irvin, 366 U.S. at 723) ("Impartiality exists where a potential juror indicates that he or she can put aside any preconceived notions regarding the outcome of the case and return 'a verdict based on the evidence presented in court.'"). At the conclusion of the voir dire at the first trial, the defendants expressed satisfaction with the selected jurors in terms of their ability to serve fairly and impartially and made no motions for a change of venue, reconsideration of denied challenges of cause, or pleas for additional peremptory challenges.[7]

Yet, the defendants now claim they should receive additional peremptory challenges based on the large amount of media coverage on the case. (Def. McGregor's Mot., Dkt. No. 1855, at 2 (citing the "enormous amount" of publicity).) But the quantum of publicity cannot, standing alone, create a presumption that a defendant was denied a fair trial by an impartial jury. Dobbert v. Florida, 432 U.S. 282, 303 (1977) (rejecting petitioner's argument that "extensive coverage by media denied him a fair trial" because the argument "rest[ed] almost entirely upon the quantum of publicity which the events received," without any evidence of "constitutional unfairness"). Rather, "[t]he nature of the publicity and whether it is the sort that could be laid

[7] Defendant Walker, who is not party to the instant motions before the Court, did move for severance.

aside by jurors, rather than its volume, is the crucial factor to be considered." Brofford v. Marshall, 751 F.2d 845, 851 (6th Cir. 1985) (citing Murphy v. Florida, 421 U.S. 794, 800 (1975)).

The defendants do not argue that the pretrial publicity was not so intense and so negative in nature that a change of venue is appropriate, nor is there a basis for such an argument.[8] Here, the publicity has been essentially factual and largely balanced. The media reports relating to this case have been very different in nature from the type of inflammatory publicity that courts have found troubling in other cases. Contra Sheppard v. Maxwell, 384 U.S. 333, 353-57 (1966) (citing "months of virulent publicity" relating to charges the defendant bludgeoned his pregnant wife to death)[9]; Irvin, 366 U.S. at 728 (citing "inflammatory" publicity in capital case that reported on the defendant's prior convictions, his confession to 24 burglaries and 6 murders including the one for which he was being tried, and his unaccepted offer to plead guilty to avoid the death penalty).

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[8] Indeed, prejudice of jurors is presumed only in the extreme case where negative pretrial publicity so saturates the community so as to render virtually impossible a fair trial by an impartial jury drawn in that community. See Murphy, 421 U.S. at 798–99; see also Mills v. Singletary, 63 F.3d 999, 1010 (11th Cir.1995) ("[T]he principle of presumed prejudice 'is rarely applicable and reserved for extreme situations.'"). In making that determination, courts look to "whether: (1) the pretrial publicity was sufficiently prejudicial and inflammatory; and (2) the publicity saturated the community in which the trial was held." Mills, 63 F.3d at 1010. Publicity which is factual and objective in nature is not likely to be deemed "inflammatory." Murphy, 421 U.S. at 801 n. 4 (noting distinction between "largely factual publicity" and publicity "which is invidious or inflammatory"); Mills, 63 F.3d at 1012 ("We are satisfied that the media coverage of this case 'was essentially factual and was not directed at arousing or inciting the passion of the community.'").

[9] In Sheppard, the court noted that "[m]uch of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; that he was 'a bare-faced liar' because of his testimony as to police treatment; and finally, that a woman convict claimed Sheppard to be the father of her illegitimate child." 384 U.S. at 356-57. .

In truth, a good amount of the media attention on this case has put the defendants in a favorable light – such as, for example, coverage of the acquittals resulting from the first trial;[10] self-serving statements made by the defendants and their attorneys;[11] public statements issued by a juror from the first trial criticizing the merits of the government's case;[12] and numerous articles on the government's witnesses' racially insensitive remarks, political biases, and motives to lie.[13] With the exception of a brief press conference to announce the indictment, held more than one year ago, the government has uniformly declined to comment publicly on the case. Contra Sheppard, 384 U.S. at 360-61 (noting the prosecutors "repeatedly made evidence available to the news media which was never offered in the trial," including the defendant's refusal to take a lie

[10] See, e.g., Phillip Rawls, *Ala. Gambling jury favors acquittals*, Bloomberg Business Week (Aug. 16, 2011) (reporting that the defendants were acquitted of 91 charges and stating that the majority of the jury wanted to acquit the defendants of all charges because of scant evidence and a dim view of a prosecution witnesses); see also Lance Griffin, *Bingo Corruption Trial: Judge dismisses some counts of indictment*, Dothan Eagle (Aug. 1, 2011).

[11] See, e.g., *Espy: The tapes failed to prove prosecution case*, http://www.youtube.com/watch?v=cNfwh8E5hi4 (video interview of McGregor's attorney referring to government witnesses as "the three amigos" and "the two crooks," calling the government's audio evidence a "mole hill" not a "mountain," and stating that the "government failed in its proof"); Sebastian Kitchen, *One Year Later: 3 pleaded, 2 exonerated, 7 still on trial in corruption case*, Montgomery Adviser, (Oct. 9, 2011) (reporting that an innocent defendant's legal fees totaled more than $1.25 million and speculating that those legal bills will continue to climb as the government " use[s] its resources 'to beat down' [the] defendants") (quoting defendant Smith's attorney).

[12] See, e.g., *Juror #9 issues statement after corruption trial*, WSFA, http://www.wsfa.com/story/15238001/juror-9-issues-statement-in-corruption-trial (Aug. 16, 2011) (quoting juror's statement that key government witnesses "had no credibility in my eyes").

[13] See, e.g., Samual King, *Gambling trial judge criticizes Beason, Lewis*, WSFA, http://www.cbs42.com/content/localnews/story/Judge-Beason-had-racist-intent/kVit6gOMA0eqX2as3V68tA.cspx (Oct. 20, 2011) (quoting judicial opinion which found that two of the government's witnesses had "ulterior motives rooted in naked political ambition and pure racial bias"); *Smith calls for Beason's resignation*, WSFA, http://www.wsfa.com/story/14918242/smith-calls-for-beasons-resignation (June 15, 2011) (reporting that government witness, Scott Beason, referred to the Black clients of a Greentrack casino as "aborigines" and expressed concerns over the increase in Black voters at the polls if an electronic bingo referendum were placed on the ballot); Brendan Kirby, *Alabama bingo trial lawyer confronts Sen. Scott Beason on stand with disparaging remarks about blacks*, Press-Register (June 15, 2011).

detector test). In contrast, the defense attorneys and certain defendants regularly engaged in video interviews in front of the courthouse before and after trial proceedings.[14] In light of this, the defendants' argument that they deserve 35 peremptory challenges because of the media coverage while the government should not receive any additional challenges for the same reason smacks of unfair gamesmanship.

This Court should reject the defendants' proposal and continue its standard practice of granting the government additional peremptory challenges if it awards additional challenges to the defendants. See Fed. R. Crim. P. 24 advisory comm. nn. (West 2002) (noting that if the trial court awards additional peremptory challenges to the defendants, then "the prosecution may request additional challenges . . . not to exceed the total number available to the defendants jointly"). To do otherwise would be unfair.

The government requests that the Court provide the government a number of peremptory challenges that is comparable to the number given to the defense and that reflects the inherent challenges faced by the government in multi-defendant trials where the government's case easily can be overshadowed due to the sheer number of defendants. By way of example, in the first trial, the government's 50 minute opening statement was followed immediately by 330 minutes

[14] See, e.g., *Atty. Joe Espy Speaks About Sen. Scott Beason*, http://www.youtube.com/watch?v=vdUUSJGbfMs (criticizing the government for introducing only "7 tapes out of 120" and asking "does that make common sense to any of y'all?"); *Joe Espy: Prosecutors "led the jury down a path that they shouldn't,"* http://www.youtube.com/watch?v=Isk8E1U5vTI (remarking that a juror's question about entrapment is "significan[t]" because it shows the jury "is paying attention" and stating that it was "a great day for the defense" while also opining that a government witness "was a politically ambitious politician who would do anything to get to the top"); *Espy responds to Gilley testimony*, http://www.youtube.com/watch?v=F2cdHWVEoOs (claiming he overheard someone in the courthouse, when asked "how can you tell [Gilley] is testifying falsely?," respond, "his lips are moving, ain't they?" and remarking that Gilley, who "did not get much credit with the jury," is "stretching the truth . . . And, there's a reason for that. If he's gonna to not spend 20 years in a penitentiary, he's got to make the prosecution happy. And there's not but one way to make the prosecution happy. And that's to put it on Mr. McGregor and the other defendants as hard and as strong as he can.").

of opening statements by 9 different defense lawyers; the government's direct examination of one of its key witnesses was followed by 6 days of cross and re-cross examination by 9 different defense lawyers; and together the defense attorneys objected more than 20 times during the government's rebuttal closing argument. These examples demonstrate the challenges faced by the government in multi-defendant cases.

While the defendants certainly have a constitutional right to present robust defenses, the fact remains that when multiple defendants are tried together, and where their interests are aligned so that they combine forces to undermine the government's case and to jointly exercise their peremptory challenges, the Court should avoid furthering the unfair imbalance between the parties by granting an uneven distribution of peremptory challenges.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court grant the defendants' motions for additional peremptory challenges beyond that which are provided by statute, but the government asks that a far more reasonable number of 5 additional peremptory challenges be afforded to both sides.

Date: October 24, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on October 24, 2011, I provided lead counsel of record with the foregoing filing via the electronic case filing system.

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