IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION FOR CHANGE OF VENUE

The defendant has moved, *pro se*, for a change of venue, suggesting that the trial in this case be moved to "a 'more neutral' location such as Denver, Colorado." The defendant's motion should be denied, as he has failed to meet his burden of showing that he cannot get a fair trial in this District. Prejudice in the jury pool in this District should not be presumed, has not been shown, and there is no reason to believe that empaneling a fair and impartial jury would be more difficult in this Court than in any other district in the United States. The Court should proceed to an in-depth voir dire in which the actual bias of any potential jurors can be tested.

1. Applicable Law

The Sixth Amendment affords the defendant the right to trial by an impartial jury. Rule 21(a), Fed. R. Crim. P., requires a change of venue "if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

A. Presumed Prejudice

Precedent is clear, however, that such prejudice should not be presumed, either from publicity or the composition of the jury pool. In this Circuit, change of venue motions based on claims of juror bias are examined under a two-step analysis:

> As a first step, a trial court must address whether the publicity is so inherently prejudicial that trial proceedings must be presumed to be tainted. In that case, a motion for a change of venue should be granted before jury selection begins. This court has cautioned, however, that "[o]nly in extreme circumstances may prejudice be presumed from the existence of pretrial publicity itself." Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987). Instead, a trial court customarily should take the second step of conducting a *voir dire* of prospective jurors to determine if actual prejudice exists. Wansley v. Slayton, 487 F.2d 90, 92-93 (4th Cir. 1973). Only where *voir dire* reveals that an impartial jury cannot be impaneled would a change of venue be justified.

United States v. Bakker, 925 F.2d 728, 732 (4th Cir. 1991); accord United States v. Bailey, 112 F.3d 758, 769 (4th cir. 1997) (affirming court's denial of change of venue motion where Bakker two-step analysis applied).

Instead of presuming prejudice, it is the defendant's burden to establish that pretrial publicity in a matter "is so inherently prejudicial that trial proceedings must be presumed to be tainted." Bakker, 925 F.2d at 732; Bailey, 112 F.3d at 769. "Sheer volume of publicity alone does not deny a defendant a fair trial." Bakker, 925 F.2d at 732 (citing Dobbert v. Florida, 432 U.S. 282, 303 (1977)). Indeed, the Supreme Court has held that even pervasive and adverse pretrial publicity "does not inevitably lead to an unfair trial." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976); see also United States v. Stevens, 83 F.3d 60, 66 (2d Cir. 1996) ("Substantial publicity alone is not enough to require a change of venue.").

As can be seen in the two-part Bakker analysis, venue changes before voir dire are disfavored. When a defendant moves for a change of venue before voir dire, the district court need only determine whether the trial setting is inherently prejudicial. United States v. Livoti, 8 F. Supp.2d 246, 249 (S.D.N.Y. 1998), aff'd, 196 F.3d 322 (2d Cir. 1999). Moreover, the district court can only be reversed on the issue of venue if an abuse of discretion is shown. Bakker, 925 F.2d at 735. United States v. Maldonado-Rivera, 922 F.2d 934, 966-967 (2d Cir. 1990); Livoti, 196 F.3d at 325.

Finally, "[b]efore a court may presume prejudice, it must determine whether a jury substantially less subject to the publicity can be impanelled [sic] in another location." Bakker, 925 F.2d at 733.

i. Government Employees as Jurors

It is well established that government employees will not be presumed to be biased as a matter of law and thus disqualified as jurors in a criminal case. United States v. Wood, 299 U.S. 123, 148-51 (1936); United States v. Frazier, 335 U.S. 497, 509-11 (1948) (in a criminal case involving a panel in which every juror was a government employee, government employees not disqualified as a matter of law; subject to challenge for actual bias) ; Dennis v. United States, 339 U.S. 162, 171-72 (1950) (Court refused to find implied bias in a criminal jury comprised primarily of government employees). Because bias cannot be implied based on a prospective juror's employment by the government, government employees are not disqualified from serving as jurors in criminal cases unless actual bias is shown.

B. Actual Prejudice

The second step in the Bakker analysis is to determine whether there is actual prejudice to the defendant. Bailey, 112 F.3d 758, 769. This, of course, is done during voir dire. A searching and vigorous voir dire must be conducted to insure a fair-minded jury. In conducting such a voir dire, the Court need not find twelve jurors who have never heard of Moussaoui or September 11 for "[i]t is not required . . . that the jurors be totally ignorant of the facts and issues involved." Irvin v. Dowd, 366 U.S. 717, 722 (1961). As the Supreme Court has noted:

> 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.

Id. at 722-723 (citations omitted). Accord Bakker, 925 F.2d at 734 (["I]t is not required ... that jurors be totally ignorant of the facts and issues involved . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.")(citation omitted)

2. Argument

The defendant sets forth two reasons for his request for a different venue: (1) "to ensure a greater feeling of personal safety for the jury and therefore reduce slightly the level of hostility and increase the ability to make rational decisions for the jury;" and (2) "to have a jury pool without over representation of loyal government employees." Def. Mot. at 1. Neither of these

reasons is sufficient to support a change of venue.[1] Whether the defendant seeks a change in venue based on pretrial publicity or because the jury panel will include government employees, the law is clear that he is not entitled to a presumption that the prospective jurors are biased; he must prove actual bias, which he cannot do before voir dire.

A. Jurors in this District Should Not be Presumed to be Prejudiced

Neither the publicity generated by this case nor defendant's assertion that this District contains an "over-representation" of government employees supports a finding that the jury pool here is biased.

i. Publicity

As noted in the Bakker decision, prejudice should not be presumed just because a case has generated pretrial publicity. Even though this case has generated significant publicity, it is not so extraordinary to require as a matter of law that the case be moved. Further, there is no indication that any other district would be less affected by the publicity that has been generated by the terrorist attacks of September 11. Moreover, the factual dispute in this case is not whether the events of September 11 happened, but, instead, whether defendant was a participant in the conspiracy that committed the terrorist acts. Thus, a prospective juror could be properly seated after saying that she has read or seen substantial amounts of press coverage regarding the

[1] The defendant cites press reporting of the U.S. "crusade" against Muslims (Def. Mot. at 3) and he cites (but does not produce) a "Northern Virginia Survey" as indicating that 60 % of potential Northern Virginia jurors believe him definitely or probably guilty. Def. Mot. at 12. Accordingly, we presume that the defendant's motion rests in part on a claim that jurors in this District are unfairly prejudiced against him due to pretrial publicity.

September 11 events as long as she also indicates that she could judge whether defendant participated in these events solely on the evidence.

As noted above, voluminous, extensive, and adverse publicity does not necessarily deny defendant a fair trial or support a change of venue. Nebraska Press Ass'n v. Stuart, 427 U.S. at 554; Bakker, 925 F.2d at 732; Stevens, 83 F.3d at 66.

Cases in which the Supreme Court has found that publicity has prevented a fair trial are extremely rare. Each of those cases involved disproportionate and inflammatory publicity that was confined to a small community. For example, in Irvin v. Dowd, 366 U.S. 717 (1961), the Supreme Court vacated a conviction and death sentence and remanded to allow a new trial where the prosecutor and police in a small Indiana community had issued highly publicized press releases stating that the defendant had confessed to the six murders for which he was being held. The Court noted that the murder of the six members of one family had become a "cause celebre" and found that the constant barrage of inflammatory, adverse publicity up to the day of the trial created a "pattern of deep and bitter prejudice" in the small Indiana community. In addition, eight out of the twelve jurors selected thought the defendant was guilty in advance of trial. Under these circumstances, the Court held that the defendant could not have been tried fairly in an atmosphere with "so huge a wave of public passion." Id. at 728.

In Rideau v. Louisiana, 373 U.S. 723 (1963), a 20-minute film of the police interrogation during which the defendant admitted to the bank robbery, kidnapping, and murder was broadcast three times to the small community in Louisiana where the crime and the trial took place. The Supreme Court reversed the conviction without examining the voir dire transcripts for actual

prejudice because "the spectacle" of the confession had rendered the trial "but a hollow formality." Id. at 726.

Finally, in Sheppard v. Maxwell, 384 U.S. 333 (1966), the trial judge allowed the press to dominate the courtroom proceedings and had a press table placed inside the bar. The Supreme Court noted that reporters caused such a commotion inside and outside the courtroom and that "bedlam reigned at the courthouse." Sheppard, 384 U.S. at 355. The judge took no steps to insulate the jurors or witnesses from reporters, photographers, or prejudicial material. Moreover, the coverage was massive and adverse both before and during the trial. Given these facts, the Court reversed the denial of the habeas petition, finding that the trial judge "did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." 384 U.S. at 363.

Conversely, district court judges have routinely rejected change of venue motions in terrorism cases and other high-profile trials, including the two trials arising from the 1993 World Trade Center bombing, even where the pretrial publicity had been extensive and adverse to the defendants. United States v. Salameh, 1993 WL 364486 (S.D.N.Y. September 15, 1993) (denying change of venue from New York City in 1993 bombing of World Trade Center); United States v. Yousef, 1997 WL 411596, at *3 (S.D.N.Y. 1997) (denying change of venue for Ramzi Yousef, accused of masterminding 1993 WTC bombing); United States v. Salim, 151 F. Supp. 2d 281, 284-285 (S.D.N.Y. 2001) (denying change of venue to an alleged al Qaeda terrorist charged with stabbing a correctional officer in the eye). In those cases, the trial judges found that the diverse population of the New York area and careful jury selection provide adequate safeguards against potential prejudice to the defendant.

Here, too, we have the same two safeguards: a diverse population and a careful voir dire. We endorse, request, and fully expect an extensive and probing voir dire to find a fair and impartial jury.

ii. Publicity Relating to this Case is no Greater in this District than in Any Other U.S. Judicial District

As noted above, "[b]efore a court may presume prejudice, it must determine whether a jury substantially less subject to the publicity can be impanelled [sic] in another location." Bakker, 925 F.2d at 733. The publicity related to the September 11 terrorists attacks and this defendant was not confined to or concentrated on Northern Virginia. Instead, it was national -- pervasive in every part of the United States. September 11 was a national tragedy, with national media coverage, and not a localized event. Even with the Pentagon here, Northern Virginia was no more affected by publicity than potential jurors in any other part of the country. There is no reason to assume that Virginia is any different from anywhere else in the U.S.

Publicity greater than or equal to pretrial publicity in the district in question has been cited by the Fourth Circuit in affirming the denial of a change in venue based on pretrial publicity. In Bakker, a criminal case against a nationally known televangelist, the Fourth Circuit noted that the publicity surrounding that case was nationwide. Bakker, 925 F.2d at 733. But, the Bakker court observed that there the inflammatory publicity about the defendant received comparatively wider dissemination outside the district where the trial was to be held. Id.

Indeed, defendant's reasons for requesting a change of venue to Denver only elliptically suggest that the jury pool in Denver would be more fair to him. The defendant gives the following reasons for suggesting Denver: (1) It is a secure location (near the federal maximum

security penitentiary), thus increasing the "feeling of personal safety;" (2) "the high altitude and the fresh air will bring back some sense of security;" (3) Denver is not "the scene of a recent government or American attack (New York, Oklahoma, etc.);" and (4) "A judge in Colorado might feel less afraid, and more confident and less pressure than a judge in the Rocket Docket."[2] Def. Motion 13, 15. None of these reasons merits a change in venue.

Further, defendant presumably selected Denver at least in part because it was the site of the trial of the defendants in the Oklahoma City bombing case. That case, however, was patently different from this one. When the Murrah Federal Office Building in Oklahoma City was bombed, that District was uniquely and extraordinarily affected by the defendants' conduct, which led the judge in that case to note that it was perceived as an Oklahoma tragedy and to find "that there is so great a prejudice against these two defendants in the State of Oklahoma that they cannot obtain a fair and impartial trial at any place fixed by law for holding court in that state."[3]

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[2] To the extent the defendant's fourth reason suggests recusal of the Court, that motion has already been denied. To the extent defendant suggests that a change of venue will lessen purported pressure on the Court, defendant fails to carry his burden of showing that a change of venue is required to avoid prejudice from the bench.

[3] In United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996), the Government conceded that the trial should not be held in Oklahoma City and, instead, argued that it should be moved to Tulsa. The district court rejected that argument and enumerated a number of factors that supported a change of venue from Oklahoma to Denver, including the following: (1) over time, "differences developed in both the volume and focus of the media coverage in Oklahoma compared with local coverage outside of Oklahoma and with national news coverage"; (2) "[t]he Oklahoma coverage was more personal, providing individual stories of grief and recovery"; and (3) "the 'Oklahoma family' has been a common theme in the Oklahoma media coverage" and the political leadership of the state proclaimed "to the nation and the world that the survival and recovery from this tragedy is 'Oklahoma's story.'"p. 1471 Under those facts, the Court concluded that the pretrial publicity created such a strong emotional and community response that Oklahoma jurors would feel a personal stake in the outcome. McVeigh, 918 F. Supp. at

United States v. McVeigh, 918 F.Supp. 1467, 1474 (W.D.Oklahoma 1996). Although the court granted a change of venue in the Oklahoma City bombing case, the main factors supporting that decision are absent, or at the very least substantially weakened, when applied to the differing circumstances surrounding this case and the September 11th attacks.

The unprecedented nature of the September 11th attacks and the unrelenting national media coverage that has followed show the distinction between the Oklahoma City bombing and this case. First, unlike the Oklahoma City bombing, which the Oklahoma media portrayed as primarily an Oklahoma tragedy (according to the McVeigh trial judge), the September 11th attacks are viewed as a national tragedy affecting the entire nation. The September 11th attacks involved hijackings of planes originating from three different states (Massachusetts, Virginia, and New Jersey) that resulted in deaths and injuries in three different states (New York, Pennsylvania, and Virginia). Because of the nature of the attacks, there were victims from numerous U.S. cities, as well as from different countries around the world. Moreover, every community in the United States has been directly affected by the security measures instituted since the attacks. Government buildings in major cities across the nation were evacuated on September 11, 2001, and flights were grounded for several days. In addition, increased security measures have been implemented nationwide in airports, other transportation centers, and major buildings. Also, members of the armed forces from communities across the United States were mobilized and are overseas fighting a war. Therefore, although Oklahoma City was a horrific

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1473 (trust in jurors' ability to be fair "diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome").

event that received extensive national attention, it did not involve a multifaceted attack by an international terrorist network that forced the United States government to take drastic and unprecedented measures to secure its cities, transportation centers, and other assets, as well as to mobilize its citizenry (and the international community) for war. Nor was the attack in Oklahoma City part of a declared war against the United States, as is alleged in this case.

Second, with respect to the media coverage, the September 11th attacks have received national press coverage that is commensurate with the local coverage in this area. The media coverage clearly reflects the national scope and impact of this crime. For example, the national networks provided uninterrupted, 24-hour coverage for several days after the September 11th attacks. Similarly, in the weeks following the attacks, the extensive media coverage has continued in newspapers and on television stations in every city across the United States. Although the coverage in Northern Virginia has included reporting on the impact of the attack at the Pentagon on the families and friends of the victims, similar stories have also permeated the national media for months. Similarly, local reporting has also concentrated on the victims in New York and Pennsylvania. Government officials and the press consistently refer to September 11th as an "Attack on America" and an act of war against America. Under these circumstances, it would be erroneous to characterize this as primarily a Virginia event.

Accordingly, the key factors that were relied upon to change venue in the McVeigh case -- the disproportionate media coverage in Oklahoma and the perception by the community that the bombing was an "Oklahoma tragedy" -- are far less compelling when the same analysis is applied to Northern Virginia in connection with the September 11th attacks. Any potential prejudice to the defendant is unlikely to be avoided elsewhere in the U.S. Although many

victims of the tragedy lived (and still live) in the Northern Virginia area, citizens of all districts across the United States have been victimized in various ways. Moreover, citizens nationwide have been saturated with media coverage, have viewed the events of September 11th emotionally as an attack against all of America, and have been affected by security measures implemented in the aftermath of the attacks. Under such circumstances, a change of venue to reduce potential prejudice would be futile.

iii. Government Employees Are Not Presumably Biased Jurors

The defendant also seeks a change of venue to reduce the number of government employees in the jury pool.[4] This basis for a change of venue is without merit.

It is well settled that prospective jurors who are employed by the government are not presumed to be biased in federal criminal cases. Wood, 299 U.S. at 148-51. In Wood, the Court rejected defendant's argument that the presence of government employees on the jury denied him his Sixth Amendment right to an impartial jury, stating: "To impute bias as a matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary."[5] 299 U.S. at 149-50. The Court held that

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[4] The defendant has offered no evidence that the potential jury pool in this District contains a higher percentage of government employees than the potential jury pool in the District of Colorado or elsewhere in the U.S.

[5] In Wood, the Court noted:

> Why should it be assumed that a juror merely because of employment by the government, would be biased against the accused? In criminal prosecutions the government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good

government employees are not disqualified as a matter of law from serving on criminal juries. 299 U.S. at 148-51; accord Frazier, 335 U.S. at 509-11; Dennis, 339 U.S. at 171-72.

Accordingly, that the defendant presumes this District to contain a disproportionately high number of government employees is not a valid basis for a change of venue.[6]

B. Actual Prejudice

The defendant has failed to meet his burden of showing any prejudice that would support a change of venue. Although defendant cites to and offers excerpts from a "Northern Virginia Survey" that apparently was commissioned by his former (now standby) counsel, he does not attach the Survey. Without the Survey, of course, it is impossible to discern: who was surveyed;

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citizen is or should be.

299 U.S. at 149. Defendant here asks the Court to make the assumption rejected in Wood.

[6] Nor is defendant entitled to a jury comprised of "12 Talibans from Cuba" (Def. Mot. at 4) or any other particular cross-section of the community. In Frazier, the Court reaffirmed that:

> The well-settled rule is that, given a lawfully selected panel, free from any taint of invalid exclusions or procedures in selection and from which all disqualified for cause have been excused, no cause for complaint arises merely from the fact that the jury finally chosen happens itself not to be representative of the panel or indeed of the community. *There is, under such circumstances, no right to any particular composition or group representation on the jury.*

335 U.S. at 507-08 (emphasis added). See also United States v. Bin Laden, 91 F. Supp.2d. 600, 625 (S.D.N.Y. 2000)("El Hage asks the Court to find that, as a matter of law, all United States citizens should be presumed to be biased against the defendants. We believe, however, 'that the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristics such as race, gender, or ethnic background undeniably gives rise to an 'appearance of unfairness,' which offends both the Sixth Amendment and the Equal Protection Clause.")(quoting Lockhart v. McCree, 476 U.S. 162, 175 (1986)).

the size of the survey; the methods used; where, how, and by whom the survey was conducted; or even all the questions that were asked. Thus, the Survey cannot be relied upon.

Indeed, even the defendant's apparently incomplete recitation of certain questions and answers from the Survey do not support his thesis that he cannot receive a fair trial in Northern Virginia. For example, to the question of whether respondents could be fair and impartial as jurors in this Moussaoui case, 72% responded that they could be fair and impartial as jurors. Def. Mot. 24. That response indicates that a large majority of the prospective Northern Virginia jurors can be impartial to the defendant.

Moreover, the defendant has made no showing that potential jurors this District are any more biased against him than in any other district. There is no indication from the portions of the Survey that he reveals that the Survey even mentioned another district, including the District of Colorado.

3. Conclusion

The defendant's motion for a change of venue should be denied. There is no reason why the prospective jurors in this District should be presumed to be biased, and the defendant has made no showing of actual bias. The Court should, of course, conduct a thorough voir dire to ensure a fair and impartial jury.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 24, 2002, a copy of the attached Government's Opposition to Defendant's Motion for Change of Venue was sent by hand delivery, via the United States Marshal's Service to:

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I further certify that on June 24, 2002, a copy of the attached Government's Opposition to Defendant's Motion for Change of Venue was sent by facsimile and regular mail to:

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