UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, CRIMINAL NO. 13-20772

Plaintiff, HONORABLE GERSHWIN A. DRAIN

vs.

D-1 RASMIEH YOUSEF ODEH,

Defendant.
_____/

REPLY BRIEF IN SUPPORT OF MOTION FOR ANONYMOUS JURY AND OTHER MEASURES TO ENSURE UNTAINED JURY

Defendant's opposition to the government's request for an anonymous jury and a partial sequestration of jurors rests entirely on legal and factual errors and misstatements. The point of the motion, nothing more and nothing less, is to prevent individuals from circumventing instructions the Court will give to jurors, which include directions not to listen to or see things about the case except when present in court and to decide the case only on the evidence presented in court. Individuals plan to and have taken steps to force jurors to do otherwise, through the use of banners, chants, photographs and bullhorns, demanding a particular verdict. The present motion seeks to avoid the consequences of *that* conduct.

Defendant takes language from *United States v. Talley* and *United States v. Warman* that "the anonymity of the jury should be" preserved in certain cases to

mean that it should be preserved only in those cases and no others. *See* Defendant's Brief, at 2-3, Page ID 997-998; *Warman*, 578 F.3d at 343; *Talley*, 164 F.3d at 1001. However, as the Sixth Circuit noted, there are "guidelines to determine when circumstances of a case call for the use of an anonymous jury[,]" *Talley*, 164 F.3d at 1001, which require at a minimum "(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." *Id*. The language defendant cites means that it is likely an abuse of discretion *not* to order an anonymous jury in those instances, but it does not mean that no other circumstance can justify such measures. This is made apparent not only by the Court's language, but also by the statutory authority to order an anonymous jury "in *any* case in which the interests of justice so require." *See* 28 U.S.C. § 1863(b)(7); *Warman*, 578 F.3d at 343 (emphasis added).

Thus, in *Warman*, "anonymity was appropriate as a safety precaution and as a means to avoid *potential interference* with the jury's ability to function." *Warman*, 578 F.3d at 343 (emphasis added). That the *Warman-Talley* factors are not the entire universe of possible justifications for juror anonymity is demonstrated by the fact that in *Warman*, the Court relied in part on another factor, the lengthy sentences the defendants faced, "increasing the likelihood that they

would resort to extreme measures to influence the outcome of their trial." *Id.* at 344. Moreover, it is silly to suggest that *Talley's* statement that the jury's anonymity should be preserved where there is a history of attempted jury tampering and serious criminal records, 164 F.3d at 1001, means that a substantial showing of an intent to tamper with the jury, alone, is not a sufficient basis.

What is present in this case, remarkably enough, and apparently uniquely among all of the reported cases, is the videotaped and distributed statements of defendant's associate and the organizer of the protests, Hatem Abudayyeh, that "rallying outside that courtroom every day with our posters and our banners and our chants about, you know, justice for Rasmea, those are, those are really, really important things that happen in the courtroom because they, they sway, they could potentially, you know, umm, sway the opinions of the jurors[.]" *See* http://www.youtube.com/watch?v=nU-e3w1TMQI, at time 2:24 – 3:38. That statement demonstrates the requisite intent to influence jurors, particularly when coupled with the organized protests displaying defendant's name and photograph, demanding justice for her and seeking to convey information about the case. Such facts provide more than adequate, indeed overwhelming justification for the Court to grant the requested relief and thus to take steps to ensure the jury's integrity. Not doing so risks rendering the Court's instructions meaningless.

In her response to the motion, Defendant carefully avoids even mentioning § 1507, no doubt because of the clarity of the fact of its ongoing and intended future violation. Instead, defendant falsely claims that the protestors enjoy a First Amendment right to their activity. In that regard, defendant also avoids mentioning *Cox v. State of Louisiana*, 379 U.S. 559 (1965), in which all nine justices voted to uphold the Constitutionality of an identical version of § 1507 against a First Amendment challenge. It was the judicial conference of the United States, together with the American Bar Association, numerous state and local bar associations, and individual lawyers and judges which proposed a bill along the lines of § 1507. *Id*., 379 U.S. at 561 (citations omitted). The ABA stated, "While judges may be men of great fortitude and well able to brave the storm of public opinion, we cannot assume that jurors and witnesses will be of such stoic or Olympian nature." 33 J. Am. Jud. Soc. 53, 54 (1949-1950). It was the Supreme Court, not the prosecution, *see* Defendant's Brief at 2, Page ID 997, which used the term "mob" to describe the activities at issue. *See Cox*, 379 U.S. at 562 (Due process excludes "influence or domination by either a hostile or friendly mob... mob law is the very antithesis of due process."); *see also id.* at 567.[1]

[1] Defendant also complains about the prosecution's occasional use of the word terrorism. However, it only has been and only will be used as the term of art it is in the immigration laws applicable to this case. *See* 8 U.S.C. § 1182(a)(3)(B).

Defendant's statement that the relief sought would criminalize efforts of friends and family to "silently show the jury that [the defendant has] people who care about [her]", Defendant's Brief at 5, Page ID 1000, is similarly false, as there has been nothing remotely "silent" about the protests. The protestors have used and plan to continue to use bullhorns and chants outside the Courthouse while proceedings are under way, to demand a particular result in those proceedings, that is "Justice for Rasmea". While chanting, those individuals display photographs and banners of the defendant. *See* Appendix to Docket Entry 97, Page ID 974. And it is precisely that *lack* of silence and its intended and likely effects on the jury and on the proceedings which is the object of the motion.

It is important to note that the Court need not find that criminal conduct has taken place as a prerequisite to the use of an anonymous jury and partial sequestration. Nevertheless, such criminal activity already has occurred and more is planned. Section 1507 reaches not only picketing and protesting, but also using a sound truck or other similar device (such as a bullhorn) with intent to influence jurors or the administration of justice. More such protests are planned for the trial. *See* https://www.youtube.com/watch?v=nU-e3w1TMQI, at 2:39 (telling people from various states "All out for Detroit.")

Even without the recorded statements of intent to affect the trial proceedings, that intent is apparent in the circumstances and from the banners displaying defendant's name and photograph. *See United States v. Carter*, 717 F.2d 1216, 1220 (8th Cir. 1983) ("[T]he fact that the demonstration took place at the very time and place of the [] trial is grounds for an inference that the defendant intended to influence its outcome," and finding that a large sign held by members of the group across the street which said, among other things, "Free Gary Eklund," provides sufficient evidence of guilt "and that sentiment is most naturally understood as being addressed to judge and jury, not to the voting public.") And unlike in *Carter*, which involved a prosecution under § 1507, here it is not necessary to prove beyond a reasonable doubt that one or more individuals has violated § 1507 or will do so in the future. Rather, the question is whether it is within the Court's discretion to determine that the danger posed to a fair and impartial jury by such activities is so great as to call for action "as a means to avoid potential interference with the jury's ability to function." *Warman*, 578 F.3d at 344. The answer to that question is obvious.

There is no reasonable alternative to having the jurors assemble at an off-site location. Defendant's suggestion that the jurors be required to use the Fort Street entrance is unworkable. There is no guarantee where the protesters will be; as they

and Defendant imagine that they have a First Amendment right to what they are doing, they see themselves as free to protest on any of the four streets alongside the Courthouse. In addition, bullhorns being used on Lafayette Boulevard are audible from the Fort Street side, and the banners are visible from some of the intersections on Fort Street. Many jurors park in a lot on Lafayette Boulevard, directly across from the Courthouse entrance where the protests have taken place, which advertises itself as Courthouse parking, or use other nearby parking. In addition, jurors may leave the Courthouse during recesses and may well run into protesters then. Only partial sequestration will ensure no exposure to such protests.

CONCLUSION

For the reasons stated, the Court should order an anonymous jury and partial sequestration.

Respectfully submitted,

BARBARA L. MCQUADE
United States Attorney

s/Jonathan Tukel
JONATHAN TUKEL (P41642)
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9749
jonathan.tukel@usdoj.gov

s/Mark J. Jebson
MARK J. JEBSON (P53457)
Special Assistant U.S. Attorney
211 W. Fort, Suite 2001
Detroit, MI 48226
(313) 226-9698
mark.jebson@dhs.gov

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF filers.

s/Jonathan Tukel
JONATHAN TUKEL (P41642)
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9749
jonathan.tukel@usdoj.gov