

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:07CR192

RICHARD F. SCRUGGS
DAVID ZACHARY SCRUGGS
SIDNEY A. BACKSTROM
TIMOTHY R. BALDUCCI
STEVEN A. PATTERSON

**GOVERNMENT'S RESPONSE AND MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR CHANGE OF VENUE**

Defendants join in a motion for change of venue, requesting an order of the court transferring the trial site to another federal judicial district. Their sole reason is that the Northern District of Mississippi has been inundated with publicity and that pervasive pretrial publicity that has occurred should require transfer of the case without any further inquiry. An analysis of the facts supporting their contention and the applicable case law demonstrates that there is no legal basis to sustain their motion to transfer at this juncture of the proceedings.

This case involves defendants RICHARD F. SCRUGGS, DAVID ZACHARY SCRUGGS and SIDNEY A. BACKSTROM, and a six-count indictment, charging conspiracy, wire fraud, and other violations involving a scheme to bribe a state judge. The indictment was returned November 28, 2007, and the trial date is scheduled for March 31, 2008, in Oxford, Mississippi. The defendants, in support of the allegation of pervasive pretrial publicity, attach copies of newspaper and media articles appearing in papers and publications with a circulation in the Northern District of Mississippi and elsewhere. The articles include coverage of guilty pleas

by two of the defendants, Timothy R. Balducci and Steven A. Patterson, and by Richard Scruggs' former counsel, Joey Langston. While pretrial publicity has been extensive, defendants have not demonstrated that it is so pervasive and highly prejudicial that they cannot obtain a fair and impartial trial in this district.

Standard of Review

Rule 21(a) of the Federal Rules of Criminal Procedure, states:

“The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant’s motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he can not obtain a fair and impartial trial at any place fixed by law for holding court in that district.”

Thus, the Rule presupposes that the district court be satisfied that there exists in the district prejudice so great against the defendant that he cannot obtain a fair and impartial trial at any place within the district. “This rule vests substantial discretion in the district court as to the granting or denying of such a motion; in order to disturb the court’s ruling on appeal, an abuse of discretion must be shown.” *United States v. Parker*, 877 F.2d 327, 330 (5th Cir.1989) citing *United States v. Noland*, 495 F.2d 529 (5th Cir.), *cert. denied*, 419 U.S. 966 (1974); *see also United States v. Harrelson*, 745 F.2d 1153, 1159 (5th Cir. 1985) (“As the words of the rule imply, that decision is one committed to the sound discretion of the trial court.”)

Defendants must demonstrate that it is virtually impossible to obtain an impartial jury

While pervasive, adverse pretrial publicity has the potential to taint the perspective of the community from which a jury panel is selected, “[e]xposure to pretrial publicity, however, does not necessarily destroy a juror’s impartiality. Consequently, a change of venue should not be granted on the mere showing of widespread publicity.” *United States v. Parker*, 877 F.2d 327,

330 (5th Cir. 1989) citing *Calley v. Callaway*, 519 F.2d 184, 205-06 (5th Cir. 1975) (*en banc*), *cert. denied, sub nom. Calley v. Hoffmann*, 425 U.C. 911 (1976).

The burden is on a defendant to “demonstrate that prejudicial, inflammatory publicity about his case so saturated the community from which his jury was drawn as to render it *virtually impossible* to obtain an impartial jury.” *United States v. Parker*, 877 F.2d 327, 330 (5th Cir. 1989) (emphasis added). Proof of such poisonous publicity raises a presumption that the defendant’s jury was prejudiced, relieving him of the obligation to establish actual prejudice by a juror in his case. *Id.* Here, the defendants have documented that this case has received extensive pretrial publicity. “However, they have not demonstrated that pervasive community prejudice resulted from this publicity.” *Parker*, 327 F.2d at 331.

The instant case does not involve a horrific crime, or the type of publicity that would attend such a crime. The wire fraud and bribery offenses are not inherently horrendous or of a nature likely to incite passions or to prompt a community call for revenge. For example, unlike the Enron/Skilling case, this case does not involve thousands of victims who suffered severe financial losses. Unlike the *Harrelson* case, it does not involve the sensational murder of a Federal judge by members of a notorious drug trafficking ring. *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985).

In characterizing the media coverage, attempt to cast the charges against the defendants as lightning rods for tort reform and partisan politics, but the tort reform battles in this state are old news, have already been waged and pretty much settled. Moreover, tort reform debates are not confined to this district or this state, but, like the weather, may be the grist of occasional coffeehouse talk around the country. Aside from trial lawyers and the insurance industry, tort

reform is not a burning issue in most households, and questions about juror prejudice as to tort reform and the defendants are appropriate for voir dire, rather than a change of venue.

Once a presumption of prejudice is raised from pretrial publicity, the focus is on a correctly conducted voir dire examination during jury selection to ensure a fair and impartial jury

“[E]ven if the community was saturated with inflammatory pretrial publicity sufficient to raise a presumption of prejudice, that presumption may be rebutted.” *United States v. Parker*, 877 F.2d 327, 331 (5th Cir. 1989); accord *United States v. Harrelson*, 754 F.2d 1153, 1159 (5th Cir. 1985) The government may demonstrate from the *voir dire* that an impartial jury was actually empaneled, and the conviction will stand despite defendants’ showing of adverse pretrial publicity. *United States v. Parker*, 877 F.2d at 331; *United States v. Harrelson*, 754 F.2d at 1159 (5th Cir. 1985); *United States v. Chagra*, 699 F.2d 241, 250 (5th Cir.), cert. denied, 459 U.S. 846 (1982); *United States v. O’Keefe*, 722 F.2d 1175 (5th Cir. 1983).

Once pervasive pretrial publicity is sufficiently demonstrated to raise a presumption of prejudice, the proper focus is on *voir dire*. There, the “focus must rest upon a juror’s willingness and ability to put aside any preconceived notions of guilt or innocence and return a verdict based strictly on admissible evidence.” *United States v. Dozier*, 672 F.2d 531, 546 (5th Cir. 1982). In *Dozier*, the Fifth Circuit concluded that the District Court did not err in rejecting defendant’s motion for a change of venue even though three-fourths of those questioned, including 21 of the 28 empaneled prior to peremptory strikes, had read or heard of the allegations against the defendant. *Id.*

The answers of the remaining venire men convinced the trial court, and have convinced us, that these prospective jurors were both willing and able to put publicity and preconceived opinions behind them once they entered the jury box. We are satisfied, therefore, that the District Court’s patient and comprehensive questioning resulted in the requisite ‘fair and disinterested panel of jurors.’”

Id. citing *United States v. Capo*, 595 F.2d 1086, 1092 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980). “A careful voir dire is invaluable in gauging whether community prejudice is so great that a defendant cannot receive a fair trial in a given locale,” (Citations Omitted) *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (1977).

Thus, it is clear in the Fifth Circuit that the preferable procedure to determine if any such prejudice exists is a properly conducted *voir dire* examination during the jury selection process. *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992). *United States v. Malmay*, 671 F.2d 869, 875-76 (5th Cir. 1982). Malmay was a federal prosecution in Louisiana dealing with voting fraud violations. The pretrial publicity had been extensive with the FBI’s large scale investigation into vote buying schemes being hailed as the “story of the year” by the Shreveport Times. In addition, an expert conducted four polls of two hundred registered voters in the area where the district court was sitting, and forty eight percent of those polled believed charges of vote buying they had read, seen, or hear about were true, while only seven percent believed them to be false. There was very little awareness among the polls of the specific defendants individually, with only fourteen percent claiming to have heard of the defendant. On opinions of guilt or innocence, one percent polled said he was innocent and five percent said he was guilty, with ninety two percent saying they did not know and two percent refusing to answer. In the area of Shreveport, where the trial took place, forty percent of those polled believed there was buying of votes on a regular basis. The district court denied the motion to transfer and the court of appeals affirmed, holding as follows:

“The district court was not, however required to move the trial absent a strong showing of prejudice. Courts have generally felt that voir dire examination is the appropriate mechanism for screening jurors to avoid bias. According to the due process standards established in *Irvin v. Dowd*, 366 U.S. 717, 81 St. Ct. 1639,

6 L. Ed. 2d 751 (1961), the constitution does not entitle a criminal defendant to a trial by a body of jurors ignorant of all facts surrounding a case, but only an impartial jury that will render a verdict based exclusively on the evidence presented in the court.”

The defendant in *Malmay*, continued to argue on appeal that the polls indicated almost one-half of those surveyed felt that the vote buying charges were true and that the difficulty in determining the extent of bias in a venire, potentially tainted by as much as fifty percent, required reversal. The Fifth Circuit rejected this argument and held that the allegation of impossibility of ferreting out such latent bias in half of the population is not a strong argument, especially in view of the fact that the voir dire examination revealed no such bias in the jurors interrogated, *United States v. Malmay, supra*, at page 876.

United States v. Capo, 595 F.2d 1086 (5th Cir. 1979) involved a widely publicized conspiracy to import marijuana and the grizzly murders of two innocent people who stumbled upon the marijuana conspiracy being placed into effect. These crimes were termed the Sinkhole murders” in Florida. The defendants moved for a change of venue pursuant to Rule 21(a), Federal Rules of Criminal Procedure, which was denied by the district court. The voir dire examination of the prospective jurors revealed that as result of media coverage of the case, approximately ninety percent possessed at least minimal knowledge of the murders associated with the marijuana allegedly committed by the defendants. Additionally, in three months preceding the trial approximately twenty-one news stories concerning the offenses were published in the city’s largest newspaper, and since the occurrence of the offenses a local television station had run one hundred twenty different new reports linking the murders and the drug offenses. During these newscasts, the word “murder” surrounded by a red patch, symbolizing blood, was flashed on the screen. It was estimated that each newscast reached over

two hundred thousand people. In affirming the district court's denial of a motion to transfer the Fifth Circuit quoted from the Supreme Court's opinion in *Irvin v. Dowd*, 366 U.S. 717, 722-23:

“It is not required, however, that jurors be totally ignorant of the facts and issues involved. In these days of swift, wide-spread 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 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 of opinion and render a verdict based on the evidence presented in court.” *United States v. Capo*, *supra* at 1090.

See also Calley v. Callaway, 519 F.2d 184, 210 (5th Cir. 1975) (If, in this age of instant, mass communication, we were to automatically disqualify persons who have heard about an alleged crime from serving as a juror, the inevitable result would be that truly heinous or notorious acts will go unpunished.)

Thus, under the law of this circuit, the district court need not ensure that the jury panel be made up of individuals who have no preconceived opinions about a defendant, but individuals who have such opinions must be able to “lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *United States v. Lipscomb*, 299 F.3d 303, 344 (5th Cir. 2002) quoting *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975); *United States v. Fastow*, 292 F. Supp. 914, 917 (S.D. Tex.2003).

The Fifth Circuit cases cited above clearly show that defendants have not demonstrated that a change of venue is required. *See also, United States v. Williams*, 523 F.2d 1203 (5th Cir. 1975), rehearing denied 531 F.2d 791 (5th Cir. 1976) (reversed on other grounds); *United States v. Thaggard*, 477 F.2d 626 (5th Cir. 1973), rehearing denied 478 F.2d 140 (5th Cir. 1973), *cert. denied*, 414 U.S. 1064 (1973); *United States v. Nix*, 465 F.2d 90 (5th Cir. 1972), *cert. denied*, 409

U.S. 1013(1972).

The government agrees with the broad principals enunciated in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Irvin v. Dowd*, 366 U.S. 717 (1961) and other cases cited by the defendants herein. The general rule is that the defendant's burden of proof requires a showing that community prejudice actually invaded the jury box affecting the opinions of the prospective jurors, *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975). However, if the defendant proffers evidence of pervasive community prejudice in the form of highly inflammatory publicity or intensive media coverage, prejudice may be presumed and there is no further duty to establish actual bias, *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975). The cases cited by the defendants where this "presumptive prejudice" has been found are distinguishable here for the same reasons that the Fifth Circuit found them distinguishable in *United States v. Capo*, 595 F.2d 1086, 1090-91 (5th Cir. 1979):

"The cases in which such presumptive prejudice has been found are those where prejudicial publicity so poisoned the proceedings that it was impossible for the accused to receive a fair trial by an impartial jury. The clearest paradigms of such pervasive publicity were the trials of *Estes* and *Sheppard*, wherein the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the courtroom transforming the trial into an event akin to a three-ring circus.

"Having reviewed the record and exhibits, we do not believe that appellants were subjected to prejudicial publicity of such a magnitude that it dominated the proceedings and reduced the trial to a mockery of justice."

It must also be noted that the Supreme Court cases enunciating these principals and finding presumptive prejudice are state cases, usually involving sensational crimes such as murder with intense and overwhelming media coverage. Unlike a state case in which the jury is selected from restrictive locale such a county in which the crime was committed, federal juries are drawn from a broad area consisting of many counties.

The federal district court cases cited by defendants herein are likewise inapposite due to the nature of the crimes and the attendant pretrial publicity in those cases. For example, citing *United States v. McVeigh*, 918 F. Supp. 1467 (W.D. Okla.1996), the defendants contend that the crimes charged against them are “sensational.” That case is widely regarded as the shot heard around the world, second in sensationalism only to the 911 World Trade Center attack. In terms of sensationalism, this case is hardly analogous to the Oklahoma City Bombing, which involved the mass murder of 168 men, women and small children.

The defendants cite *Sheppard, Irvin* and *Engleman* for cases in which the media reported prejudicial material that would not be admissible at trial. In *Sheppard*, the defendant murdered his pregnant wife, and then called the mayor to be the first on the scene. Sheppard told his “story” in front of media, he was searched in full view of spectators by the police, and newspapers reported many false stories about the case. The trial was attended not only by mass media, but also by a “carnival atmosphere.” In *United States v. Englemen*, 489 F. Supp. 48 (E.D. Mo. 1980), involved federal charges in the defendants’ complicity in the deaths of two people, and the use of an explosive. State capital murder charges were filed and change of venue had already been granted in the state cases against both defendants. The state prosecutor told the media that it was one of the most notorious cases in recent years and he had no objection to a change of venue. Headlines about the case included: “Murdered Man’s Wife Gives Data On Role in Plots”, “Dentist Is Suspect in Other Killings,” “Widow Tells of Plot to Kill Halm,” “Peach Says He’ll Seek Death Penalty Against Engleman In Bombing.” In addition, the newspaper secretly taped and publicized conversations with a key witness in the case. *Irvin*, a death penalty case, is also easily distinguishable from the instant case. Six

murders that occurred within four months were heavily publicized in the local media, and the Police Department issued several press releases stating that the defendant confessed to the six murders. The media also reported that the defendant would plead if given a 99-year sentence.

Defendants cite *Johnson v. Beto*, 337 F. Supp. 1371 (S.D. Tex.1972) and *Tokars* as cases involving massive and pervasive new coverage. *Beto*, however, involved facts far different from the instant case. In 1968, racial feeling was strong in the community when the defendant, a well-known black militant, was convicted in state court of giving one marijuana cigarette to an undercover agent, and was sentenced to 30 years imprisonment. The trial was conducted during a racially charged period; the defendant was regarded as one of the most vocal and demanding black militants in the community; he had engaged in racially oriented speeches, confrontations with public officials and participation in demonstrations; the media reported that a certain organization was the cause of a university race riot in which a police officer was killed and reported in effect that the defendant was a hard-core militant member of the organization. The district court noted that it was unlikely that the state trial court ever recognized the degree of hostility toward the defendant which apparently permeated the community by trial. The district court pointed out that the unduly severe sentence of 30 years for the gift of one marijuana cigarette, which was assessed by the jury, also indicated that outside influences played a role in the minds of the jury. The district court remanded the case to the state court for a new trial, but did not require a change of venue. *Tokars*, which is described further herein, is likewise distinguishable.

Raising the danger of prejudice from media reports attending the guilty pleas of Timothy Balducci, Steven Patterson and Joey Langston, defendants cite cases that are easily

distinguishable. *Rideau v. Louisiana*, 373 U.S. 723 (1963) involved the defendant's own recorded confession being broadcast in the media. The defendant confessed to robbing a bank, kidnaping three of the bank's employees, and killing one of them. His 20-minute videotaped confession was broadcast three times by a local television station. Three jurors who decided the case, which resulted in the death penalty, had seen the televised confession. *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985) involved the brutal mass murders of six members of a family, including the rape of one of the victims. The crimes occurred in a rural county with a population of only about 7,000. The media reported that the defendant and his co-defendants were prison escapees, their fingerprints were found at the murder scene, and the defendant had also confessed to the killing of a youth in another state. Media articles also noted that the defendants were accused of other crimes along their escape route through several states, including the murder of the youth and at least two armed robberies. Co-defendants were tried first, and the media widely reported the details that came out in those trials, including the trial testimony of a co-defendant who became a witness for the state.

Defendants suggest that pretrial publicity reflects a public desire for revenge against defendants as "greedy trial lawyers." The *Moody* and *Coleman* cases cited by defendants are inapposite. *United States v. Moody*, 762 F. Supp. 485 (N.D. Ga. 1991) involved the mail bomb murder of an 11th Circuit Court of Appeals Judge. The media focused on the defendant for two to three years prior to trial, and reported heavily on a previous trial. The articles included comments by law officers and officials, and media reports listed the evidence against the defendant. The *Coleman* case, already discussed herein concerned the brutal mass murders of a family in a small community by a group of prison escapees. While being considered a "greedy

trial lawyer” may be unflattering, it is unlikely to generate visceral passions for revenge akin to those incited by mail bombings and mass murder.

In support of their contention that voir dire alone cannot protect Scruggs from prejudice the defendants rely on cases that are distinguishable. *Rideau v. Louisiana*, 373 U.S. 723 (1963) involved the defendant’s own recorded confession being broadcast in the media. The defendant confessed to robbing a bank, kidnaping three of the bank’s employees, and killing one of them. His 20-minute videotaped confession was broadcast three times by a local television station. Three jurors who decided the case, which resulted in the death penalty, had seen the televised confession.

United States v. Marcello, 280 F. Supp. 510 (E.D. La.1968) involved the prosecution of the notorious mafia leader, Carlos Marcello, in his home city of New Orleans where he had been the focus of many years of negative coverage as head of the mafia. The district court pointed out the substantial and constant publicity Marcello received over the years as a high-ranking member of the infamous Cosa Nostra, “an underworld leader,” “the leader of the Cosa Nostra or Mafia in Louisiana,” and the publicity surrounding his arrest with other high-ranking members of Cosa Nostra at the “Little Apalachin” meeting in New York, the bomb scare when he was to appear before a grand jury, a series Life magazine cover stories exposing organized crime in the United States which identified Marcello as one of the mafia leaders of an organization engaged in narcotics, prostitution, gambling, bombings and brutal murders, and which declared that Marcello was “King Thug of Louisiana.”¹

¹ The district court granted the defendant’s motion for a change of venue, with the location to be determined later. But in an odd twist, “[n]ot more than ten minutes after the conclusion of the hearing, defense counsel entered the Court’s chambers and, to the complete surprise of the Court, made an oral exparte request for the Court to withdraw its order granting the change of venue which had just been

In *United States v. Tokars*, 839 F. Supp. 1578 (N.D. Ga. 1993), massive pretrial publicity necessitated transfer of racketeering charges where one defendant was a former state district attorney and noted tax and criminal defense attorney who was also facing state charges of having arranged for the murder of his wife, another defendant was alleged to have tortured and tried to kill an alleged member of a drug ring, the district had been saturated with publicity which increasingly focused on whether the one defendant had been guilty of arranging for his wife's murder, 66% of the population polled had an opinion as to defendant's guilt relating to the murder charges, and 97 % of those who had an opinion believed defendant was guilty.

In *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952), much of the media coverage of the defendant involved publicity and disclosures surrounding the work of the New York State Crime Commission which was investigating conditions of the New York waterfront, which was a matter of great local interest. The media depicted the defendant as a "mobster" and "leader of a notorious organization known as the 'Ed Florio gang.'" 13 F.R.D. at 297. The media frequently mentioned that defendant was an ex-convict and repeatedly associated him with other crimes. The court was particularly concerned that "this avalanche of publicity, with bold headlines concerning 'dock racketeering' and Florio himself, reached the public on the very morning when the jury was to be empaneled." 13 F.R.D. at 297-98. The court observed that the intensity and timing of the publicity, as well as the local nature of the incidents, presented a unique situation. Under these circumstances, the government gave only token opposition to the

entered. It was somewhat astonishing to the Court, to say the least, for the defendant to move for a change of venue, to argue the motion, and after the motion was granted to urge the Court to withdraw its order granting the defendant's motion." *Marcello* 280 F. Supp. at 512. The district court later held another hearing and denied the defendant's motion to reconsider.

motion for change of venue and later agreed with it.

Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963) involved three nighttime murders of lone attendants at small business establishments in Suffolk County, New York. The Second Circuit observed that the communities in the county “had been thoroughly alarmed at the murders and the presence of a ‘mad killer’ in their midst.” 313 F.2d at 366. “The press gave front page space and scare headlines to the killings, the search for the killer, and the fears of the people. The press received and widely published news of Bloeth’s confession from the District Attorney’s office, from the police, from [defendant’s attorney]....” The District Attorney was quoted as stating that the stickup was “characteristic of the sadistic nature of Bloeth.” The press reported that the defendant flunked lie detector tests, and that prison records described him as “hostile, sadistic, with a deep hatred of discipline and an admitted narcotic user.” Headlines and articles included: “‘Mad Killer’ Confesses,” “Bloeth: From Bad Boy to ‘Mad Killer,’” “Bloeth Must Go To Chair: DA,” “.... to police, he is a violent, sadistic ex-con....,” “Francis Henry Bloeth, who murdered three humans with as little emotion as other persons feel while swatting mosquitos,” could be freed soon because of NY’s archaic sanity laws and “would be free to kill again.” 313 F.2d at 366-67 and n.1. Of the 16 jurors seated as regular and alternate jurors, only one had not read of the case, and eight stated that they had formed an opinion of guilt, but indicated they would be able to change the opinion or to render an impartial verdict. Of 80 other jurors, 31 had formed an opinion of guilt or innocence and in every case when asked to specify, the opinion was toward guilt. Defense counsel failed to exhaust his challenges of the original twelve chosen, and stated that each was acceptable. The Second Circuit observed that the publicity was “high inflammatory, its volume great, and

accessibility universal. It reached and entered the consciousness of the overwhelming majority of available talesmen.” It noted that the “publicity, partly sponsored by the prosecution, created opinions of guilt long before trial...and included inadmissible material emanating from the prosecution denigrating the insanity defense and so predisposing the prospective jurors to reject it.” 313 F.2d at 373. The opinions formed “were based not solely on accounts of the crime at issue, but on accounts of admissions of many other crimes not on trial,” on statements by the DA about the defendant’s sanity, and an editorial attack that an insanity defense “would free the mad killer to strike again.” *Id.*

Publicity concerning the wire fraud and bribery charges against Defendant Richard Scruggs, a well-known lawyer, is hardly comparable to publicity surrounding the cases of mafia leaders, a “Mad Killer,” mobsters, and confessed murderers. The defendants cannot seriously argue that the unique situations in *Bloeth, Rideau, Tokars, Florio and Marcello* are present in this case.

Perhaps more analogous is the Fifth Circuit case of *United States v. Muncy*, 526 F.2d 1261 (5th Cir. 1976), where in defendant was a president of a grocery store chain that filed a bankruptcy action in the division where the criminal charges against him were pending. There had been substantial publicity about the bankruptcy proceedings and many employees and creditors of defendant’s company in the district lost money because of the bankruptcy action taken by defendant. Defendant contended he couldn’t receive a fair trial in the district because of the pervasive pretrial publicity. The district court denied defendant’s motion to transfer and the court of appeals affirmed, stating that in “. . . an attack on the verdict based on pretrial publicity, it is necessary that the defendant show that community prejudice actually invaded the

jury box.” *United States v. Muncy*, *supra* at 1263. *See also United States v. Dreitzler*, 577 F.2d 539, 553 (9th Cir. 1978); *cert. denied*, 440 U.S. 921. (Bank Fraud Case) *United States v. O’Keefe*, 722 F.2d 1175 (5th Cir. 1983).

Issues regarding the media coverage and possible community prejudice can be dealt with during jury selection. Moreover, the region that comprises the Northern District of Mississippi provides a sizeable jury pool and encompasses 37 diverse counties, spread from the endless cotton fields of the Mississippi Delta and the rolling hills of northeast Mississippi to the northern-most counties that are part of the rapidly growing Memphis metropolitan area. Given this wide pool of potential jurors and appropriate jury selection safeguards, it is reasonable to conclude that a fair and impartial jury can be impaneled within this District.

CONCLUSION

For the foregoing reasons and authorities it is abundantly clear that there is no factual or legal basis at this juncture of the proceedings to transfer this case to another district. The defendants have not shown that pretrial publicity has so poisoned the proceedings so as to make it impossible for the defendants to receive a fair trial. Additionally, the geographical area from which the venire and ultimately the trial jury will be selected, is in an extensive area defusing the impact of pervasive pretrial publicity. The preferable procedure, is not automatic transfer from one district to another when the motion is made by the defendant, but appropriate voir dire examination at trial in all but the most unusual of cases. The defendants have not demonstrated that the District Court would be incapable of conducting a comprehensive voir dire that will result in a fair and impartial jury. The motion to transfer should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas W. Dawson, First Assistant United States Attorney, certify that I electronically filed the foregoing **GOVERNMENT'S RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 19th day of February, 2008.

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THOMAS W. DAWSON
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