IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

CASE NO: EP-07-CR-87-KC

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

LUIS POSADA CARRILES,

Defendant.

LUIS POSADA-CARRILES' MOTION REGARDING THE JURY SELECTION PROCEDURES

The selection of a fair and impartial jury is the first step in assuring that Mr. Posada-Carriles will be afforded a fair trial. The trial of this case will be lengthy and complex. It is a multi-count perjury, obstruction and false statements case involving the allegation of terrorism, which has and will continue to receive a large amount of publicity. To help facilitate the seating of a fair and impartial jury Luis Posada-Carriles by his undersigned counsel, request this Court to adopt the following procedures outlined below and in the memorandum of law which follows regarding the selection of the jury in his case.

Introductory Principles

The Sixth Amendment to the United States Constitution requires that all criminal verdicts be found by an impartial jury.[1] "The bias or prejudice of even a single juror is enough to violate that guarantee." *United States v. Gonzalez*, 209 F.3d 1109, 1111 (9th Cir. 2000). To protect the parties from juror prejudice attorneys for either side may challenge any juror "for cause", as can the judge sua sponte. See Fed. R. Crim. Pro. 24(a)(1) and (2) (West 2009). The following basic principles govern "for cause" challenges:

(A) **Trial judges have wide discretion over voir dire**. Trial judges are best suited to evaluate juror credibility, and therefore, reviewing courts afford them "ample" discretion in determining how best to conduct the voir dire." *Waldorf v. Shutta*, 3 F.3d 705, 710 (3d Cir. 1993); see also *United States v. Nash*, 910 F. 2d 749 (11th Cir. 1990).

(B) **But, trial judges may be reviewed for manifest error**. Although reviewing courts are highly deferential to trial judges because of their unique capability to personally evaluate the credibility and demeanor of the prospective jurors, the courts of appeals have not been a proverbial "rubber stamp" of trial court decisions. Rather, courts of appeals may overturn a

[1] Though acknowledging that case law from other federal jurisdictions is not binding on this Court, out of circuit case law is referenced because trials involving pervasive, national media coverage are a rare breed. Where appropriate, binding precedent from the Fifth Circuit has been cited, but is hoped that the court will turn to the analysis of other jurisdictions to help inform its answers to complex voir dire questions in the federal courts.

trial judge's jury determinations for manifest error. See *Patton v. Yount*, 467 U.S. 1025, 1031 (1984) (emphasis added).

(C) **Jurors must believably swear to their impartiality.** The relevant question for courts to ask of each juror is: "Did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed" Id. At 1036.

(D) **Trial judges must test juror's credibility**. Tests for a juror's impartiality are not formulaic. The Sixth Circuit, however, has laid forth a fairly comprehensive list of factors to help trial courts make accurate determinations during voir dire, such as:

> [1] [T]he nature of the information the juror knew, [2] how probative the information was as to a defendant's guilt; [3] when and how they learned of the information; [4] the juror's own estimation of the relevance of that knowledge; [5] any express indications of partiality by a juror; [6] whether the broader atmosphere in the community or courtroom was 'sufficiently inflammatory,'; [7] and the steps taken by the court in neutralizing this information.

Gall v. Parker, 231 F.3d 265, 308 (6th Cir. 2000), citing *Murphy v. Florida*, 421 U.S. 794, 800-02 (1975).

THE RISK OF PREJUDICE ON JURORS IN HIGH-PUBLICITY TRIALS

In the case of high-publicity trials, the trial court's conduct of voir dire must exhibit a higher degree of care to adequately protect the defendant's Sixth Amendment rights. One line of the Supreme Court's Sixth Amendment jurisprudence addresses the need for accurate determinations of juror bias in high-publicity trials. In *Irvin v. Dowd*, the court reviewed a case in which an extraordinary amount of publicity and media hype preceded the defendant's murder trial. The defense attorney had singled out several jurors for cause challenges because they demonstrated preconceived opinions about the defendant. 366 U.S. 717, 720 (1961). The presiding judge denied the challenge on the grounds that "each indicated that not withstanding his opinion he could render an impartial verdict." Id. At 724. although the court acknowledged that the judge had personally questioned the jurors, the court found that the jury panelists could not be impartial where the "build-up of the prejudice is clear and convincing." Id. at 725. The Court wrote,

> *No doubt each juror was sincere where he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellow is often its father. Where so many, so many times, admitted prejudice,* ***such a statement of impartiality can be given little weight****. As one of the jurors put it, 'You can't forget what you hear and see.'*

Id. at 728 (emphasis added). Reaffirming the reasoning of *Irvin* in *Patton v. Yount*, the Court recognized that "adverse pretrial publicity can create such a presumption of prejudice in a community that the juror's claims that they can be impartial should not be believed." 467 U.S. at 1031. The following factors may be relevant in evaluating when pre-trial publicity might prejudice the jury:

> (i) Extent of the publicity, *i.e*. the number of articles and circulation of those articles.
>
> (ii) Nature of the publicity: Editorial versus factual accounts.
>
> (iii) Timing between the "barrage of newspaper headlines" and the actual trial.

Id. at 1032-33. The Supreme Court has divided its analysis of juror impartiality into cases of "actual bias" and "presumed" or "implied" bias. See *Murphy v. Florida*, 421, U.S. at 798.

> (1) **"Actual bias"** has been defined as "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Nelson*, 277 F. 3d 164, 202 (2d Cir. 2002). "Actual bias" has been described as "bias in fact." *United States v. Gonzalez*, 214 F.3d at 1111. typically, where the court suspects a juror's "actual bias." The juror has admitted to some factor or "state of mind" giving rise to that suspicion. Id. at 1112.
>
> (2) **"Presumed bias"** involves an inquiry "whether an average person in the position of the juror in controversy would be prejudiced." [P]rejudice is to be presumed "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." Id. (internal citations omitted). "presumed bias" presents a mixed question of law and fact." Id. cases of "presumed bias" tend to be rare, and "[o]nly in

> extreme circumstances may prejudice to a defendant's right to a fair trial be presumed from the existence of the pretrial publicity itself." *Wells v. Murray*, 831 F. 2d 468, 472 (4th Cir. 1987) Still, "[i]n other, less extreme situations, when external events such as pretrial publicity raise strong possibility of jury bias, the court has a duty to determine whether the accused may have a fair trial. Inquiry into jury bias typically entails an evaluation of 'the pre-trial publicity complained of and its impact, if any, on the jury, as developed through adequate voir dire examination of the jurors." "Id., quoting *Wansley v. Slayton*, 487 F. 2d 90, 92-93 (4th Cir. 1973). "Because the implied bias standard is essentially an objective one, a court will, where the objective facts require a determination of such bias, hold that juror must be recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial." *Gonzalez* at 1113.

Voir dire in pre-trial publicity cases may involve both "actual" and "presumed" bias, and the presiding judge should explore the extent to which either type of bias might be present. See *Pruett v. Norris* 153 F.3d 579, 584-87 (8th Cir. 1998).

THE FIFTH CIRCUIT'S APPROACH TO HIGH-PUBLICITY TRIALS

To comply with the Sixth Amendment's guarantee of an impartial jury, the Fifth Circuit has required a three-part inquiry of individual jurors on voir-dire:

> [1] "The trial court first should determine whether the publicity raised serious questions of possible prejudice."
>
> [2] "if it does, the court should begin inquiry, and '…..should be confined at first to the issue whether any jurors have actually been exposed to the damaging material."
>
> [3] "If any have, they should be further questioned to determine the extent of that exposure and its effects on their ability to render an impartial verdict."'

United States v. Herring, 568 F.2d 1099, 1104-05 (5th Cir. 1978), *Jordan v. Lippman*, 763 F.2d 1265,1280, n. 17 (11th Cir. 1985; see also id. ("The case law

requires, at the least, that where there exist a significant possibility of prejudice the jurors must in the first instance be questioned as to whether they were exposed. Further inquiry as to the nature of the exposure is then undertaken, if necessary.") Where pre-trial publicity has pervaded the media, a juror's "conclusory protestation of impartiality" should be deemed "improbable." Id., citing *Irvin v. Dowd*, 366 U.S. at 724-25 and 728-28, n. 4.[2]

Furthermore, **"[t]he preferred approach"** in cases involving pre-trial publicity "is to conduct **individual examination of the jurors."** *Cummings v. Dugger*, 862 F.2d 1504, 1508 (11th Cir. 1989) (emphasis added)' see also id., citing *Jordan* 763 F.2d at 1281 ("[I]n situations of potential prejudice, the jurors must be questioned individually about whether they have been exposed to pretrial publicity and to what degree it has affected their decision making ability.").

In *Jordan*, the court of appeals found an abuse of discretion where the trial judge neglected to engage in probing voir dire about the protest and media coverage that occurred the weekend before, and was related to, the defendant's trial. 763 F.2d at 1279. In Defendant Posada's case, as this court well knows, coverage of the defendant and his various legal proceedings has been prominent in both local and national media. No doubt *Jordan* applies to voir dire in the

[2] See, *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978), in which the court held, "A juror's impartiality is not necessarily destroyed when he is exposed to pretrial publicity. 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Irvin v. Dowd*, 366 U.S. at 723…. But when a juror is exposed to potentially prejudicial pretrial publicity, it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. The juror is poorly placed to make a determination as to this own impartiality. Instead, the trial court should make this determination." 583 F.2d at 197.

defendant's case. The trial judge should, therefore, follow *Jordan's* standards for careful and accurate questioning of each individual juror. See also: *United States v. Arzola-Amaya*, 867 F. 2d 1504 (5th Cir. 1989) (under the circumstances, court's initial inquiry regarding publicity was sufficient); *United States v. Manzella*, 782 F. 2d 533 (5th Cir. 1998) (court's failure to conduct inquire regarding potential juror contamination regarding reference to defendant's prior conviction insufficient to overturn jury verdict).

THE QUALITY OF JUROR'S ASSURANCES OF IMPARTIALITY

(A) The need for unequivocal answers. When questioned about their impartiality prospective jurors must swear unequivocally that they "can lay aside any opinion [they] might hold and render a judgment solely on the evidence present in court." *United States v. Rhodes*, 177 F.3d 963, 965 (11th Cir. 1999); see also *Thompson v. Altheimer & Gray*, 248 F. 3d 621, 627 (7th Cir. 2001) (citation omitted) ("Missing are those 'unwavering affirmations of impartiality' that permitted the district judge to find the challenged juror unbiased.").

(B) Trial Courts should not rely on juror's self-assessment of impartiality. Where substantial pretrial publicity runs the risk of prejudicing the jury, the district court should hesitate before taking a panelists' claims of impartiality at face value. The Supreme Court has held that "[t]he juror's assurance that he is equal to the test can not be dispositive of the accused rights,

and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Murphy v. Florida*, 421 U.S. at 800 (citations omitted); see *Wells v. Murray*, 831 F. 2d 468, 471, n.2 (4th Cir. 1987) (finding in pretrial publicity cases that juror "affirmations [of impartiality] are not universal guarantees of prospective jurors impartiality."); id. ("The veniremen's avowals of impartiality, however, are most suspect where the jury is comprised of individuals from a community deeply hostile to the accused."); *Kirk v. Raymark Indus*, 61 F. 3d 147, 153 (3d Cir. 1995) ("[T]he district court should not rely simply on the jurors subjective assessments of their own impartiality."). As the Eleventh circuit stated in *Jordan*, "The reason the court cannot rely on conclusory statements by jurors of their impartiality is apparent. In situations where the community is inflamed, [t]he juror is poorly placed to make a determination as to his own impartiality." 763 F.2d at 1281,n. 18.

(C) The need for "searching" inquiry. Where media pervades a particular trial and risks prejudicing a jury, the court's have endorsed "searching questioning of prospective jurors…. to screen out those with fixed opinions as to guilt or innocence" at voir dire. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976) (noting that chief Justice Marshall set the example for thorough, "searching" voir dire at the highly publicized trial of Aaron Burr, even by 1807

standards). The concurrence in *Neb. Press Ass'n* sets forth the method for such searching inquiry:

> In particular, the trial judge should employ the voir dire to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective juror had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt. Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause.

Id. at 601-02 (Brennan, J. concurring) (citations omitted).

(D) The statement "I'll try to be impartial" is insufficient. Even where the juror has made a good faith promise that he will "try to be impartial," despite admitting to preconceived opinions or prejudice in the case, courts have found that such assurances fall short of Sixth Amendment impartiality. See *Thompson,* 248 F.2d at 626 (7th Cir. 2001) (determining that the trial judge did not "push hard enough to determine whether [the prospective juror] could relinquish her prior beliefs" where the juror merely stated "I can try to be as fair as I can, as I do every day."); *Wolfe v. Brigano*, 232 F. 3d 499, 503 (6th Cir. 2000) ("[I]t appears that the trial judge based the findings of impartiality exclusively upon each juror's tentative statements that they would try to decide this case on the evidence presented at trial.

Such statements, without more, are insufficient,"); United States v. Gonzalez, 214 F. 3d 1109, 1114 (9th Cir. 2000) (finding that where the juror promised to try to be impartial, but did not give an "unqualified affirmative" statement of impartiality, the court should "have not confidence that the juror will 'lay aside' her biases or her prejudicial personal experience.").

(E) Doubts about impartiality must be resolved against the juror.

Courts have required that "'[d]oubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not palled."; *United States v. Nells,* 526 F.2d 1223, 1230 (5th Cir. 1976); *Bailey v. Bd. Of Cty. Comm'rs***,** 956 F.2d 1112, 1128 (11th Cir. 1992), *Accord United States v. Nelson*, 277 F. 3d 164, 202 (2d Cir. 2002); *Burton v. Johnson*, 948 F. 2d 1150, 1158 (10th Cir. 1991) ("Doubts regarding bias must be resolved against the juror.").

THE NEED FOR "CONTENT QUESTIONING"

In cases involving substantial pretrial publicity, trial courts routinely ask jurors whether they have been exposed to any pretrial media about the case, and if so, whether such exposure would influence their impartiality. Nonetheless, Supreme Court and Fifth Circuit case law concededly places few constitutional demands on district judges discretion on what questions to ask prospective panelists. Although, as addressed in Part II (above), this court should follow the

standard set forth in *United States v. Herring*, 568 F. 2d 1099 (5th Cir. 1978), the defendant also urges the court, pursuant to its discretionary powers, to engage in the type of "content questioning" addressed by the Supreme Court in *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

"Content questioning" is a searching inquiry about the content of jurors' exposure to news media or other prejudicial information that might bias their opinions about the case. See generally Id. at 424-27. It requires the trial court to go beyond general information about exposure to news and into "precisely what [jurors] had read, seen or heard." Id. at 438. As a result, "content questioning" promotes accuracy in the trial court's determination of "for cause" challenges. Id. at 443-44 (*Marshall, J*. dissenting).

Although the court in *Mu'Min v. Virginia* held that neither the Sixth nor Fourteenth Amendment compelled trial courts to engage individualized "content questioning" of prospective jurors, it recognized the ability of federal courts to require "content questioning" pursuant to their supervisory authority. Id.. at 426-427. In fact, several United States courts of appeals have long implemented "content questioning" under their supervisory powers, including the Third, Fifth, and Ninth Circuits. See *United States v. Silverthorne*, 400 F. 2d 627, 639 (9th Cir. 1968); *United States v. Davis*, 583, F. 2d 190, 196(5th Cir. 1978); *United States v. Addonizion*, 451, F. 2d 49, 67 (3d Cir. 1971)

In his dissenting opinion in *Mu'Min*, Justice Marshall set forth three sound reasons why "content questioning" constitutes good trial practice.

> (1) "[C]ontent questioning is necessary to determine whether the type and and extent of the publicity to which a prospective juror has been exposed would disqualify the jurors as a matter of law." 500 U.S. at 441 (Marshall, J. dissenting). By probing into the types of media viewed and the effects it might have had, the trial judge can establish whether a juror has an "actual bias" or whether the judge should "presume" bias.
>
> (2) Content questioning allows the Court to evaluate jurors' "self assessment" of their impartiality. Id. at 443. Gauging self assessment is essential for at least two fundamental reasons: (i) jurors may be unaware of their own biases; (ii) juror's concept of impartiality may not be "the same impartiality that the Sixth amendment demands." Id. In other words, a juror's conclusory, "yes I can be impartial" tells the court nothing about what he may really think about the case."
>
> (3) Content questioning facilitates accurate trial court fact finding and less-speculative appellate review. Id. at 443-44. The more information the trial court has, the more accurate its credibility determinations about individual jurors will be. If the trial court denies a "for cause" challenge and that decision is subject to appellate review, appeals courts will be more likely to give that finding deference where the trial court has developed a factual record for its findings.

The court should not hesitate to put this pragmatic reasoning into practice to ensure an accurate voir dire that protects the defendant's Sixth Amendment rights. "Whether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case? Id. at 425 (*Rehnquist, C.J.*, majority). Though not required, "content questioning" can best facilitate this trial court's decision making.

When analyzing this type of prejudice and what it can do to an individual juror, how their deliberative process is thwarted, it is instructive to look to the case wherein right wing domestic terrorist were convicted for the bombing of Oklahoma City. In an Order, which granted a Change of Venue Motion in the Oklahoma City bombing case, February 20, 1996, Judge Richard Matsch wrote eloquently:

> *The existence of such prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair-trial is not limited to bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.*
>
> *The possible prejudicial impact of this type of publicity is not something measurable by any objective standards… There is not laboratory experiment that can come close to duplicating the trial of criminal charges. There are so many variables involved that not two trials can be compared regardless of apparent similarities. That is the very genius of the American jury trial.*
>
> *Trust in the ability of jurors to exercise discipline to disregard prior prejudicial awareness 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. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.*

Judge Richard Matsch, *United States v. McVeigh and Nichols*, Feb. 20, 1996 (emphasis added.) Order on Change of Venue.

Luis Posada-Carriles respectfully request in light of the above, that this Court allow the following:

1. Allow for the submission of a juror questionnaire (such as the questionnaire being filed contemporaneously with this motion);
2. Allow for individualized interview of jurors by the Court and counsels for defense and prosecution regarding juror hardship, pre-trial publicity and all other issues present in this case;
3. After all jurors have been interviewed, those who were not excused for cause will be summoned back to Court for the exercise of peremptory challenges;
4. Allow the defendant 20 peremptory challenges and the government 12 (same ratio 6:10 in F.R.C.P. Rule 24).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.

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