

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**CRIMINAL NO. 3:08-cr-00107**

**FRANK E. MELTON  
MICHAEL RECIO  
MARCUS WRIGHT**

**GOVERNMENT'S RESPONSE TO COURT'S INQUIRY REGARDING  
JURY SELECTION AND LOCATION OF TRIAL**

The United States, by its undersigned counsel, pursuant to Fed.R.Crim.P. 18, respectfully requests that this Court draw the venire from the Southern or Hattiesburg Division and hold the re-trial in the division from which the venire is taken. If the Court declines to move the location of the trial, the United States requests that the Court still draw the venire from the Southern or Hattiesburg Division. In support, the United States notes, as the Court noted several times during trial, this case has been the subject of “wall-to-wall” media coverage in Jackson before, during, and since the trial. Jackson’s three main television stations – WLBT, WAPT, and WJTV – maintained a constant presence inside and outside the courtroom before, during, and after the trial, running multiple reports throughout the day, evening, and night news broadcasts. The television stations routinely conducted and posted results of polls on topics such as viewers’ opinions about whether the defendants should plead guilty, whether the prosecution should have been pursued, and whether defendant Melton should resign. Similarly, the principal newspapers

in Jackson, *The Clarion-Ledger* and *The Jackson Free Press*, reported extensively on the case before trial began, and reporters from both publications were present in the courtroom throughout the trial. Each daily edition of *The Clarion-Ledger* had at least one article, and many editions had multiple articles, about the trial's progress.

In the months leading up to trial, the Court *sua sponte* took the extraordinary step of issuing a gag order based on repeated comments defendant Melton made to the press, which were designed to have, and likely would have had, an impact on the jury pool. As late as the week before trial, defendant Melton used the opportunity of speaking at a funeral to make public comments related to his trial decisions. During the course of the pre-trial proceedings, the Court admonished defendant Melton several times about his extra-judicial statements to the media.

In sum, the press coverage of the pre-trial, trial, and post-trial proceedings has been all-encompassing for the Jackson community. Thus, as noted by the Court, obtaining jurors for the re-trial who have not been tainted by coverage of the proceedings is a daunting task.

### **Recommendation**

The government requests that the venire be drawn from, and the re-trial be held in, the Southern Division because media coverage of the case has been less ubiquitous there than in any other division in the Southern District. This conclusion is strongly supported by data taken from the venire in the first trial, which reveal that the majority of the potential jurors who indicated that they had no knowledge about the case were from the Southern Division.

If the Court declines to move the trial to the Southern Division, the government request that the venire be drawn from, and the re-trial be held in, the Hattiesburg Division. After the Southern Division, the Hattiesburg Division was the division the most potential jurors reporting no knowledge about the case.

Although it may be impossible to find jurors who have never been exposed to any press coverage about the trial, such a restriction is not necessary. See Murphy v. Florida, 421 U.S. 794, 799-800 (1975), quoting Irvin v. Dowd, 366 U.S. 717 (1961)(holding that “it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.”). Instead, the aim of the Court, *on a re-trial*, should be to minimize the risks that potential jurors have been so immersed in details of the prior proceedings that they could not help be influenced, despite their best efforts to set aside pre-conceived ideas. See United States v. Weddell, 800 F.2d 1404, 1406 (5th Cir. 1986) (affirming trial court’s order of intra-division transfer in a public-official case after considering the extensive publicity surrounding the first trial and determining that a second trial in the same division as the first “would not be fair to the parties and thus, would not further the administration of justice.”).

The most logical place from which to draw jurors who have had the least amount of exposure to the media saturation is the Southern Division, which is the division that has been least affected by the Jackson media’s reach.<sup>1</sup> The combined range of reception for the three Jackson television stations encompasses nearly the entire Southern District *except* the Southern Division.<sup>2</sup> WLBT, which has the most coverage in the state, reaches the populations of every county in the District except for five of the six counties in the Southern Division and one county in the Hattiesburg Division. See WLBT media coverage map attached as Exhibit A. While WJTV and WAPT have less over-air coverage than WLBT, their designated marketing area, which includes cable and satellite carriers, fully encompasses the counties in the Jackson and

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<sup>1</sup> The Southern Division includes the counties of Peal River, Stone, George, Hancock, Harrison, and Jackson.

<sup>2</sup> The Southern District of Mississippi has five divisions: Western, Jackson, Eastern, Hattiesburg, and Southern.

Western Divisions, with the exception of Wilkinson County in the Western Division and Amite County in the Jackson Division. The designated marketing areas for WJTV and WAPT do not include the counties in the Eastern Division and only include three of the ten counties in the Hattiesburg Division. See WJTV and WAPT media coverage maps attached as Exhibits B and C, respectively.

As noted above, *The Clarion-Ledger* carried pre-trial and post-trial news of the proceedings and daily coverage of the trial itself, frequently including multiple articles and opinion pieces. Circulation records for *The Clarion-Ledger* also support the government's request to move the case to the Southern Division; those figures demonstrate that the dominant print media outlet has a fraction of the presence in the Southern Division that it does in any other division within the District. See *Clarion-Ledger* circulation statistics, attached as Exhibit D. The total gross distribution of *The Clarion-Ledger* (excluding Sunday distribution) in the counties encompassed within the Southern Division is 644.<sup>3</sup> By comparison, the Western Division has a total gross distribution of 3,317; the Hattiesburg Division has a total gross distribution of 3,701; and the Eastern Division has a total gross distribution of 3,072.<sup>4</sup> Like the coverage from the Jackson television stations, the print coverage of the trial was drastically less in the Southern Division than in other regions.

Empirical evidence also supports the conclusion that the Southern Division received the least media coverage of the case. The majority of the venire members who indicated that they had not heard anything about the case were from the Southern Division. The division with the

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<sup>3</sup> The daily distribution is cited because government counsel suspects that it more clearly captures the volume of regular readers who would be most likely influenced by coverage of the prosecution.

<sup>4</sup> By comparison, the total gross distribution for daily editions of the newspaper in the Jackson Division is 68,438.

next largest group of venire members who reported that they had no knowledge of the case was the Hattiesburg Division.

Prior to jury selection, the Court received approximately 126 jury questionnaires that were used to aid the parties in jury selection. Question #17 asked the recipients:

With regard to this case, have you seen or heard any of the following: (check all that apply):

Television coverage of this case \_\_\_\_\_

Newspaper coverage of this case \_\_\_\_\_

Radio coverage of this case \_\_\_\_\_

Comments about Frank Melton, Michael Recio, or Marcus Wright, including lifestyle, career, temperament, personality, etc. \_\_\_\_\_

If you have checked any of the above spaces, please state what you have seen or have heard as to each such defendant and the source.

Of the 126 questionnaires, 22 included explicit responses that that member of the venire had heard nothing about the case or the defendants. Thirteen of the 22 “no knowledge” responses came from the Southern Division. Five of the “no knowledge” responses came from the Hattiesburg Division. The four remaining responses were scattered around the District.<sup>5</sup>

In sum, the division that appears to have been least affected by the saturation coverage of the Jackson media is the Southern Division. Based on the prior questionnaire responses, the Hattiesburg Division seems to have been less impacted than the Western, Eastern, or certainly, the Jackson Divisions.<sup>6</sup> However, even Hattiesburg is not nearly as insulated as the Southern Division. While there may well be District-wide knowledge of the proceedings, the Southern

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<sup>5</sup> As the Court considers the advisability of moving the case to the Western Division, it is noteworthy that only one “no knowledge” response came from the Western Division and that response came from a venire member from Wilkinson County, which is not within the WJTV or WAPT coverage and only part of which is in WLBT coverage.

<sup>6</sup> While speculative, possible reasons include: two of the three Jackson TV stations have limited coverage in the Hattiesburg region; Hattiesburg has its own television station, which tends to focus on local, as opposed to Jackson, news; and Melton was previously involved in a high-profile defamation lawsuit in Meridian (in the Eastern Division).

Division, and to a lesser extent, the Hattiesburg Division, present realistic, data-based options to minimize the possible “taint” to the venire.

Defense counsel has cited three principal considerations in support of not moving the trial: 1) medical reasons; 2) financial reasons; and 3) witness convenience. None of these reasons provide a compelling justification to forego the search for a jury that is as untainted by pre-trial publicity as possible. The Fifth Circuit has explicitly held that the risks to a fair trial posed by the kind of saturation coverage this case has garnered justifies moving the trial away from the coverage. See United States v. Gonzales, 163 F.3d 255, 259 (5th Cir. 1998) (on re-trial, the Court *sua sponte* moved the trial due to the considerable publicity that arose after the first jury resulted in a hung jury and a second mistrial due to outside contact to the jurors). Each of the defendants’ proffered reasons for the re-trial to take place in the Jackson Division are unpersuasive.

Contrary to defendant Melton’s assertion, there is no evidence that Melton’s health would be jeopardized in any way by moving the trial to either Gulfport or Hattiesburg. According to an interview Melton gave to the *Jackson Free Press*, reported on March 4, 2009, his health is “remarkably much better.” See “2009 JFP Interview with Frank Melton, Part I: Health,” attached as Exhibit E. According to the article, defendant Melton indicated that he has been taking his medication and attending his cardiac rehabilitation twice a week as instructed by the Court and his physicians. There is no indication that he could not take his medication and participate in cardiac rehabilitation if the trial were moved. Both Gulfport and Hattiesburg have several cardiac rehabilitation facilities; there is no evidence that Melton’s primary care physician

needs to be present during the rehabilitation sessions; and the defendant can certainly take his medication outside of Jackson.<sup>7</sup>

The claim of financial hardship is similarly unpersuasive. Defendant Melton is the mayor of Jackson. According to public records, he earns a salary of \$120,000.00 per year. He is not destitute. There are costs associated with mounting a criminal defense such as fees for attorneys, investigators, jury consultants, and experts. Occasionally, there are additional costs associated with trying a case away from the local courthouse. While convenience of the parties is a factor to be taken into account in any transfer decision, See United States v. Lipinsky, 299 F.3d 303, 343 (5th Cir. 2002), in appropriate circumstances the corrupting influence of pre-trial publicity can be sufficient on its own to move the case. Id., (analyzing pretrial publicity as the “only factor” that might counterbalance convenience to the parties). In addition, the costs associated with a change of venue might be met through the use of federal Criminal Justice Act funds. The defendants have made no assertions about the unavailability of those funds in this case.

Finally, the defendants cannot credibly avail themselves of the argument that a transfer would inconvenience their witnesses. In the trial that ended on February 24, 2009, the defendants jointly called only four witnesses; two of whom were in state or federal custody and were transported at the expense of the government. Each witness testified for less than 15 minutes. Coordinating the logistics of four very brief witnesses will not involve extensive expense or inconvenience to the parties or the witnesses themselves. Depending on the progress

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<sup>7</sup> In the Gulfport area, there are at least two cardiac rehabilitation facilities: one is located at Memorial Hospital, 4500 13th Street, Gulfport, MS (located about four blocks from the United States District Court); and the other is at the Hancock Medical Center, 4550 Shepherd Square, Bay Saint Louis, MS (approximately 25 miles from downtown Gulfport). In the Hattiesburg area, there are at least two cardiac rehabilitation facilities: one facility is located at Forrest General Hospital, 6051 U.S. Highway 49, P.O. Box 16389, Hattiesburg, MS; and one located at Wesley Medical Center, 5001 Hardy Street, Hattiesburg, MS. See Exhibit F.

of the re-trial, all four witnesses, if called again and permitted to testify by the Court, could be called in a single afternoon, which would permit them to drive to and from the Southern or Hattiesburg Division in a single day (if they are not otherwise transported by law enforcement officials).

In conclusion, the trial court has “broad discretion in determining whether transfer [within a judicial district] is warranted.” Weddell, 800 F.2d at 1406, citing United States v. Alvarado, 647 F.2d 537, 539 (5th Cir. 1981). Here, the impact of the extraordinary pre-trial coverage was documented through the responses of the original venire to the court-issued questionnaire and during the voir dire process itself. Thereafter, the press coverage during trial increased the public exposure to the proceedings exponentially. Whereas here, like in Weddell, the media coverage is combined with the attendant public attention to the trial of a sitting, high-ranking public official, an intra-district transfer is necessary to serve the “prompt administration of justice” See Fed.R.Crim.P. 18 on a re-trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned counsel for the United States, hereby certify that on the 9th day of March, 2009, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

John Reeves, Attorney for Frank E. Melton

John M. Colette and Matt Baldrige, Attorneys for Defendant Marcus Wright; and

Cynthia Stewart, Attorney for Michael Recio.

/s/ Mark Blumberg