

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 2:13-cr-20772

Plaintiff,

HONORABLE GERSHWIN A. DRAIN

vs.

D-1 RASMIEH YOUSEF ODEH,

Defendant.

_____/

MOTION OF THE UNITED STATES TO EMPANEL AN ANONYMOUS
JURY AND TO TAKE OTHER MEASURES NECESSARY
TO ENSURE AN UNTAINTED JURY

NOW COMES the United States and for its Motion to Empanel an Anonymous Jury and to Take Other Measures Necessary to Ensure an Untainted Jury, states the following:

1. Defendant has been charged in an indictment with Unlawful Procurement of Naturalization, in violation of 18 U.S.C. § 1425(a).

2. Defendant is the Associate Director of the Arab American Action Network (AAAN), located in Chicago, Illinois. Hatem Abudayyeh is the Executive Director of the AAAN.

3. Since the date of defendant's arrest for naturalization fraud, Hatem Abudayyeh has orchestrated a concerted effort to influence the criminal

proceedings against defendant, which has resulted, at each proceeding, in a large group outside the Courthouse protesting and parading, carrying signs demanding dismissal of charges and “Justice for Rasma” and displaying the Palestinian flag. See Appendix to Brief in Support of Motion. Hatem Abudayyeh has publicly stated that a goal of filling the courtroom, rallying outside the courthouse, and chanting while holding posters is to influence the opinions of jurors. Mr. Abudayyeh also has told Deputy United States Marshals that he intends to be contentious with their efforts to maintain order and proper decorum.

4. Influencing the opinions of jurors and potential jurors through extra-judicial means is obviously improper and, as discussed in the accompanying brief, almost certainly criminal.

5. Given this concerted effort to sway the jury, the empaneling of an anonymous jury is necessary to protect the jury from improper influence. Such a procedure has been used in a number of cases in this Court, including most recently *United States v. Umar Farouk Abdulmutallab*, 2:10-cr-20005.

6. In addition, the United States requests what the United States Marshal Service refers to as a partial sequestration, in which instead of arriving at the Courthouse on their own each morning, the jurors will be directed to meet at an off-site location to be determined by the Marshal and driven to the Courthouse

garage, thereby not requiring jurors to cross through a protesting mob which is seeking to influence the proceedings. This procedure has been used in other trials in the Court, most recently that involving Kwame Kilpatrick.

7. Pursuant to Local Rule 7.1(a)(2)(A), on October 3, 2014, the undersigned sought concurrence of Michael Deutsch, James Fennerty and William Goodman, counsel for the defendant, who refused to concur in the relief sought, necessitating the filing of the instant motion and brief.

WHEREFORE, the government prays that the Court grant its motion and order the use of an anonymous jury, and that the Court order the United States Marshal Service to provide for off-site parking and transportation to and from the courthouse for each trial session.

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

Dated: October 3, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 2:13-cr-20772

Plaintiff,

HONORABLE GERSHWIN A. DRAIN

vs.

D-1 RASMIEH YOUSEF ODEH,

Defendant.

BRIEF OF THE UNITED STATES IN SUPPORT OF MOTION TO
EMPANEL AN ANONYMOUS JURY AND TO TAKE OTHER
MEASURES NECESSARY TO ENSURE AN UNTAINTED JURY

INTRODUCTION

Defendant is charged with having procured her United States citizenship illegally, in violation of 18 U.S.C. § 1425(a), which makes it a crime to “knowingly procure[] or attempt[] to procure, contrary to law, [his or her] naturalization....” Defendant is the Associate Director of the Arab American Action Network (AAAN), located in Chicago, Illinois. Hatem Abudayyeh is the Executive Director of the AAAN. “The Arab American Action Network (AAAN) strives to strengthen the Arab community in the Chicago area by building its capacity to be an active agent for positive social change.” *See* <http://www.aaan.org/?cat=11>.

Since defendant's indictment, Hatem Abudayyeh has engaged in a concerted effort to improperly influence the criminal proceedings before the Court. Specifically, through the aid of the AAAN (www.aaan.org), as well as the Committee to Stop FBI Repression (CSFR) (www.stopfbi.net) and the U.S. Palestine Community Network (USPCN) (www.USPCN.org), Hatem Abudayyeh has organized a campaign designed to improperly sway the jury that will be empaneled to hear this case.

On September 10, 2014, the media outlet "N Don't Stop" broadcast from the AAAN headquarters in Chicago, Illinois, an interview with Hatem Abudayyeh in which he specifically recruited individuals to demonstrate outside the courthouse for the purpose of swaying the jury in defendant's favor:

We need to fill that courtroom everyday.... Filling that courtroom every day and rallying outside that courtroom every day with our posters and our banners and our chants about, you know, justice for Rasma, 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, this woman is not isolated, this woman is not a criminal, this woman has massive, you know, massive community support, right. An acquittal on this case is more than just a case of this individual activist. . . . This is really, truly a case about Palestine as well. . . . You know, we believe that like you know putting that putting her on trial is putting Palestine on trial. Winning this thing on our end is another victory for the Palestinian people.

See <http://www.youtube.com/watch?v=nU-e3w1TMQI>, at time 2:24 – 3:38. Abudayyeh also purports to speak on behalf of the other groups. See *id.* at time 1:42-2:08 (discussing activities including protests and picketing “we” do and referring people to StopFBI.net and USPCN.org for further information). Each of the websites to which Abudayyeh referred interested persons in fact contains details regarding planned protests regarding the *Odeh* case. Therefore, it seems clear that all of the activity is concerted and all of it centers on the *Odeh* case.

In fact, those groups have demonstrated in front of the Theodore Levine United States Courthouse in connection with previous proceedings in the case, *see, e.g.*, <https://www.youtube.com/watch?v=W66FD8OcPpk> (July 31, 2014, status conference); <http://www.youtube.com/watch?feature=youtu.be&v=NVEA0fyOGUM&app=desktop> (September 2, 2014, status conference). Attached in an appendix is a photograph taken outside the courthouse on September 2, 2014 in connection with a status conference in the case. In addition, on October 2, 2014, Mr. Abudayyeh told Deputy United States Marshals working to maintain order and proper decorum that he intended to be “contentious” with them. And finally, communication among the groups evidences an intent to disrupt the proceedings themselves. See <https://m.youtube.com/watch?v=phbaCLkAHR0> at time 01:14 - 01:26 (“We will be back here of course for the trial and we’ll fill that courtroom ...

and everybody here bring 5 people because ... if people can't get in that's great, that's great.")

Such conduct is without a doubt an improper influence on a jury, which, as the Court instructs, is to make its decision based only on evidence presented at trial and nothing else. In addition, such conduct is almost certainly criminal and is not constitutionally protected.¹

As will be illustrated below, the Court should use its discretion to empanel

¹ Title 18 U.S.C. § 1507 provides: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, [is guilty of a crime against the United States]." An identical statute was upheld against Constitutional challenge in *Cox v. State of Louisiana*, 379 U.S. 559, 562 (1965) (finding the "constitutional safeguards relating to the integrity of the criminal process" necessarily "exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process." *Id.*)

There is no First Amendment right to protest with an intent to influence judicial proceedings, and Abudayyeh's intent has been made manifest through his public statements. "The fact that by their lights appellant and the [protesters] were seeking justice and not its obstruction is as irrelevant as would be the motives of the mob condemned by Justice Holmes" in another case. *Id.* at 567. And in any event, even absent Abudayyeh's well-publicized public statements as to his intent, the Supreme Court has held that "At the very least, a group of demonstrators parading and picketing before a courthouse where a criminal charge is pending, in protest against the arrest of those charged, may be presumed to intend to influence judges, jurors, witnesses, or court officials." *Id.* The fact that Abudayyeh's protests and pickets have been timed to occur only on the dates of actual proceedings in the *Odeh* case simply reinforces his publicly-stated intent to influence those proceedings. 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.").

an anonymous jury and it should further direct the United States Marshal Service to use what it terms a partial sequestration, in which it picks up and drives jurors to the Courthouse so that jurors are not exposed to a large group or mob seeking to influence the jury's work. Such a practice has been used before in this District, most recently in the *Kilpatrick* trial.

ARGUMENT

A. AN ANONYMOUS JURY IS NECESSARY TO ENSURE IMPARTIALITY

The Sixth Amendment provides defendants with a right to a public trial by an impartial jury, but it does not guarantee a right to a public jury. *United States v. Lawson*, 535 F.3d 434, 440 (6th Cir. 2008). A district court may empanel an anonymous jury in any case in which the interest of justice so requires. Title 28, United States Code, § 1863(b)(7). The decision to grant an anonymous jury is within the sound discretion of the trial court. *Lawson, supra* at 439; *United States v. Talley*, 164 F.3d 989, 1001 (6th Cir. 1999).

The anonymity of a jury should be preserved where, among other things, there is a "history of attempted jury tampering." *Talley, supra* at 1001; *United States v. Warman*, 578 F.3d 320, 343 (6th Cir. 2009). Such a showing already has been made here. One of defendant's supporters, namely Hatem Abudayyeh and

the groups associated with him, already have unleashed a public campaign to tamper with and affect these proceedings.² It is irrelevant to the analysis whether Defendant is aware or not of such efforts, because a tainted jury must be prevented under any circumstance. However, Defendant has addressed and thanked the crowd of supporters after at least some of the protests. *See, e.g.*, https://www.youtube.com/watch?v=d0vcz_7tcVQ at 1:30-2:02.

As is evident from Mr. Abudayyeh's own statements, it is his goal, and that of his supporters, to tamper with the prospective and seated jurors in order to sway the jury in defendant's favor. Further, defendant and her supporters have previously attempted to flood Department of Justice telephone lines in an attempt to influence these proceedings. *See* <http://www.stopfbi.net/2014/9/4/all-out-detroit-defend-rasmea-odeh>; <https://m.youtubeyoutube.com/watch?v=phbaCLkAHr0>, at time .00:17 - 00:44. There is every reason to think they will do so with regards to jurors if the jurors' names are made public; at a minimum, given the publicly stated goal of swaying the jury by other means, it is the prudent course to

² Section 1507 is directed not only to instances involving an intention to influence a jury, but also to an erroneous public perception that any other court personnel is subject to being influenced by such efforts. "A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Cox v. State of Louisiana*, 379 U.S at 565. *See also* Note 1, *supra*.

make any such attempt impossible.

Simply put, Mr. Abudayyeh and his hoard of supporters have created a public, emotional and political atmosphere aimed at improperly influencing the jury. The Sixth Circuit in *United States v. Dakota*, 197 F.3d 821 827 (6th Cir. 1999), found that such an atmosphere justified an anonymous jury:

The district court decided to empanel a partially anonymous jury in order to minimize the prejudicial effects of pretrial publicity and an emotional, political atmosphere that created a risk of jury intimidation and improper influence. The court created a solution to remedy the concern about potential juror intimidation which avoided possible juror bias, and it did not abuse its discretion in doing so.

Moreover, the Court can take reasonable precautions to minimize any potential prejudicial effects to defendant from the use of an anonymous jury, to ensure that her trial rights are protected. For instance, the Court can provide the jury with a neutral explanation for using an anonymous jury so as to not prejudice defendant. As explained by the Sixth Circuit in *United States v. Deitz*, 577 F.3d 672, 685 (6th Cir. 2009): “Both this Court and several other circuits have held that the need to protect the jury from unwanted publicity is an appropriate explanation.” Further, defendant’s ability to challenge potential jurors for bias or prejudice during the voir dire process would remain unabridged because only their names would remain confidential.

In refusing to concur in the government's request for the relief sought in the present motion, Defendant's counsel wrote: "We find it quite contradictory that you so vehemently opposed a jury questionnaire, claiming that there was nothing special about this case that required special care in selecting a jury and then turn around a request an anonymous jury. Such a motion is only intended to play the 'terrorism' card and is unacceptable."

In fact, nothing could be further from the truth. A questionnaire is not justified in this case because there has been little or no pretrial publicity surrounding it, and thus there is no reason to think any prospective juror has heard of it. However, such untainted jurors quickly will become tainted if they are exposed to extrajudicial efforts seeking to sway them, which is what the instant motion is aimed at stopping.

B. ORDERING THE UNITED STATES MARSHAL SERVICE TO PROVIDE A PARTIAL SEQUESTRATION CONSISTING OF OFF-SITE PARKING AND TRANSPORTATION FOR JURORS IS AN APPROPRIATE PRECAUTION TO AVOID INTERFERENCE WITH THE JURY'S ABILITY TO FUNCTION IMPARTIALLY

Given the use of public demonstrations by defendant's supporters, the United States asks the Court to order the United States Marshal Service to provide off-site parking and transportation for the jurors, which the Marshal Service refers to as a partial sequestration. When such a procedure is used, the Marshal Service

meets the jurors at an offsite parking location, then drives the jurors into the basement of the Courthouse in vans which have the windows covered, so that the jurors are not exposed to whatever is taking place outside the Courthouse. Although protestors do not have a right to seek to influence jurors hearing a case, *see* Note 1, *supra.*, the partial sequestration would make it unnecessary to remove such protestors in order to ensure an untainted jury. Such a procedure has been used before in this Court, in cases such as *United States v. Umar Farouk Abdulmutallab*, 2:10-cr-20005, and *United States v. Kwame Kilpatrick*, 2:10-cr-20403. Such a procedure would enable the jury to come and go from their homes to the courthouse without being subject to attempted intimidation or suasion by the protesters. Without this remedy, the jurors will have no ability to avoid the expressed plans of jury intimidation. And the same instruction to jurors telling them the partial sequestration is being used to guard against unwanted publicity would ensure no prejudice to Defendant. *See Deitz*, 577 F.3d at 685.

CONCLUSION

For the reasons stated, the Court should empanel an anonymous jury and should order the United States Marshal Service to implement a partial sequestration providing jurors transportation to and from the Courthouse from an offsite location.

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

Dated: October 3, 2014

APPENDIX

September 2, 2014



CERTIFICATE OF SERVICE

I hereby certify that on October 3, 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