UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	
CHARLES WESLEY GILMORE AND WALTER LEFIGHT CHURCH,	)	
	)	
Defendants.	)	Case No. 1:00CR00104
	)	Case No. 1:03CR00014
	)	
	)	**OPINION AND ORDER**
UNITED STATES OF AMERICA,	)	
	)	By: James P. Jones
v.	)	United States District Judge
	)	
SHERI LYNN HOWELL NICHOLS,	)	
	)	
Defendant.	)	
	)	

Anthony P. Giorno and Rick A. Mountcastle, Assistant United States Attorneys, Abingdon and Roanoke, Virginia, for United States of America; Anthony F. Anderson, Roanoke, Virginia, and Stephen J. Kalista, Big Stone Gap, Virginia, for Defendant Charles Wesley Gilmore; James C. Turk, Jr., Stone, Harrison & Turk, P.C., Radford, Virginia, and Beverly M. Davis, Davis, Davis & Davis, Radford, Virginia, for Defendant Walter Lefight Church; Timothy W. McAfee, Norton, Virginia, for Defendant Sheri Lynn Howell Nichols.

The defendants Charles Wesley Gilmore and Walter Lefight Church have filed motions requesting a transfer of their upcoming consolidated murder trial to another

division in the district due to ostensibly prejudicial pretrial publicity in the Abingdon division of this court stemming from media coverage of the crime, of earlier related trials, and of defendant Sheri Lynn Howell Nichols' indictment for perjury earlier this year. Church filed a similar motion to transfer prior to his first trial. I denied that motion, and I hereby incorporate the opinion I issued at that time and find for the reasons stated therein that there presently exists no presumption of prejudice due to pretrial publicity. *See United States v. Church*, 217 F. Supp. 2d 696, 697-99 (W.D. Va. 2002). Therefore, both Church's and Gilmore's motions for a transfer are also denied at this time. I will proceed with a voir dire examination of potential jurors, and, if it appears from such an examination that actual prejudice exists and a fair and impartial jury cannot be empaneled, then I will reconsider this decision at that time.

I

The defendants Charles Wesley Gilmore and Walter Lefight Church are charged with various federal crimes arising out of the murders of Robert Davis, Una Davis, and Robert Hopewell, Jr., on April 16, 1989, in Pocahontas, Virginia.[1] The

[1] Specifically, the defendants are charged with conspiracy to murder Robert Davis in furtherance of a continuing criminal enterprise (Count One) (21 U.S.C.A. § 848(e)(1)(A) (West 1999)) and with killing Mr. and Mrs. Davis and Robert Hopewell in furtherance of a continuing criminal enterprise (Counts Two, Three and Four). Both defendants are also charged with killing Robert Davis with the intent to prevent him from communicating with federal authorities (Count Five) (18 U.S.C.A. § 1512(a)(1)(C) (West 2000 & Supp. 2003)) and Church is charged with killing

original indictment, returned December 13, 2000, charged Church and Samuel Stephen Ealy with the killings. Ealy was tried first and convicted and has been sentenced to life imprisonment. Church was thereafter tried, but the jury was unable to reach a unanimous verdict, and a mistrial was declared. Before Church's second trial was to begin, the government obtained a Sixth Superceding Indictment, adding Gilmore as a defendant.[2] Defendant Sheri Lynn Howell Nichols was indicted separately by the government for allegedly providing perjurious testimony at Church's first trial. I consolidated the cases for trial, which is now set to begin on February 2, 2004.

Both Gilmore and Church have filed motions to transfer venue based on pretrial publicity. They argue that media coverage of and community focus on the brutal details of the crime, the previous trials related to this case, the defense strategies, and Nichols' recent indictment have all created a prejudicial environment in the geographical areas from which the prospective jurors would be summoned. As a result, both defendants maintain that a fair and impartial jury cannot be selected in the Abingdon division.

Una Davis and Robert Hopewell to prevent their communication with federal authorities (Counts Six and Seven). The government is seeking the death penalty for Church and Gilmore under Counts One, Two, Three, and Four.

[2] The government has since obtained a Seventh Superceding Indictment to correct certain errors in the previous indictment.

II

A change of venue in federal criminal trials is authorized only if the locality where the case is pending harbors "so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial." Fed. R. Crim. P. 21(c). Under this inquiry, the court must examine prior to trial the publicity relating to the case as a whole and determine whether it is so biased and detrimental to the defendant as to create a presumption that a local trial of the defendant would not be inherently impartial. *See Wansley v. Slayton*, 487 F.2d 90, 92 (4th Cir. 1973). The prejudicial impact of the publicity is to be assessed in light of factors such as its volume, its objectivity, its relevance to the defendant's case, its timing, its source, and whether a change of venue would reduce the risk of juror bias. *Id*. at 93-94. A change of venue due to pretrial publicity is proper only in "extreme cases" where the publicity and the resulting bias has been overwhelming. *United States v. Bakker*, 925 F.2d 728, 732 (4th Cir. 1991). Where the pretrial publicity does not rise to the level of provoking presumed prejudice against the defendant during trial, the court is to proceed to a voir dire examination of potential jurors to assess the existence of actual prejudice. *See United States v. Jones*, 542 F.2d 186, 193 (4th Cir. 1976).

As I reasoned and stated in my previous opinion in this case on this issue, media coverage of the defendants, whether focusing on details of the crime, on the

legal strategies of the co-defendants, or on legal developments in each of the defendants' cases, has not created a presumption of prejudice against the defendants. The reports have primarily been factual in nature, have not been inflammatory, and have consisted substantially of information that will become known to jurors in the first few minutes of trial when preliminary instructions are given and opening arguments are made. *See Church*, 217 F. Supp. 2d at 698; *see also United States v. Sawyers*, 423 F.2d 1335, 1343 (4th Cir. 1970). Viewing the pretrial media coverage as a whole, I cannot say that it is so overwhelming or so one-sided as to create an environment of presumptive prejudice against the defendants.

In support of their motions to transfer, Church and Gilmore present two arguments in addition to those previously advanced by Church before his first trial. First, they submit additional affidavits of residents residing in the various localities from which the jury pool will be summoned. These citizens attest to their awareness of the pretrial publicity related to the case and to their expectation that a fair and impartial jury cannot be empaneled if the trial remains in the Abingdon division and if the jury pool is summoned as planned. In offering these additional affidavits, the defendants are attempting to provide the perspective of citizens from all jurisdictions from which the jury pool will be summoned for the upcoming trial, in an effort to

remedy my previous skepticism towards similar affidavits as representing only selected jurisdictions.

Although I appreciate the defendants' diligence, the affidavits, a total of forty-eight, are still insufficient to show that pretrial publicity related to the case has resulted in a presumption of prejudice against the defendants. They are statistically insignificant given the population of the geographical area as a whole from which the jury pool will be summoned. The affidavits have also been screened for their substance, and there is no evidence accompanying them to reflect the number of people who may be willing to assert that they are not sufficiently familiar with the case as to expound on the existence of presumptive prejudice. In addition, the determination of whether pretrial publicity has arisen to such a level as to prevent the defendant from receiving a fair and impartial trial is a legal determination. The citizens who have submitted affidavits are qualified to express their knowledge of the pretrial publicity and their personal perspectives as to whether they as individuals would be able to set aside what they have heard through media coverage if they were to be selected as jurors. However, they are not qualified to infer whether other potential jurors would be capable of evaluating the case based only on information presented at trial or to assess whether the defendants will receive a fair and impartial jury and trial. Finally, in so far as these citizens' affidavits represent the viewpoint

of potential jurors and their inability to set aside preconceived notions as to the defendants' guilt, that is precisely the danger against which voir dire examination is designed to protect.

Church and Gilmore also contend that the pretrial publicity in this case has unavoidably prejudiced potential jurors because even though jurors may claim they can set aside their prior knowledge of the case and base the verdict only on the evidence presented to them at trial, they are inherently unable to do so due to the very nature of knowledge. As evidence of this, the defendants refer to the post-trial conduct of some jurors empaneled for Church's first trial. At the end of the trial proceedings, some of those jurors allegedly became emotional and approached the victim's family in sympathy, apologizing for failing to reach a unanimous verdict. Church and Gilmore point to these emotions expressed by the jurors as evidence that these jurors harbored prejudgments against the defendants and wanted to convict them regardless of the evidence presented at trial. I am unpersuaded. The jurors' reactions to the suffering of the victims' family and to the mistrial was post-trial and was clearly shaped by the information that was presented to them during the trial, information that they were obligated to evaluate and from which they were permitted to draw conclusions. Because the cause of the juror's reaction was therefore the trial and not pretrial publicity, it is irrelevant to the present motion and does not reflect

upon potential jurors' ability to set aside preconceived notions of the defendants' guilt or innocence.

Again, I will proceed to appropriate voir dire examination of the potential jurors, including individual sequestered questioning of any juror who has prior knowledge of this case. If such examination reveals the existence of actual prejudice such that a fair and impartial jury cannot be empaneled, this determination will be reevaluated.

III

For the foregoing reasons, it is **ORDERED** that the defendants' motions requesting the case be transferred to another division in the district (Doc. Nos. 708, 818) are denied without prejudice.

ENTER: December 18, 2003

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United States District Judge