STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JESSE T. BROOKS

09-S-319, 08-S-579, 07-S-2885

ROCKINGHAM SUPERIOR COURT 2009 JUN 15 P 3:

DEFENDANT'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

Defendant Jesse T. Brooks, by and through counsel, hereby moves for an order allowing him at least twenty (20) peremptory challenges during jury empanelment in this case. Mr. Brooks submits that such an allowance is necessary to ensure a fair trial in this matter.

In support of this Motion, Mr. Brooks states as follows:

1. Mr. Brooks is charged with one count of conspiracy to commit murder in connection with the death of Jack Reid, Sr. in Deerfield on June 27, 2005. He is one of five co-defendants, including John A. "Jay" Brooks (Jesse Brooks' father) and Robin Knight, who has been charged in relation to this alleged conspiracy.

2. Counsel for Mr. Brooks filed a Motion for Change of Venue on April 9, 2009. Counsel argued in that motion that because of the unprecedented circumstances of this case, including the trial of Mr. Brooks' father last fall in the first capital murder case to go to a jury in New Hampshire in nearly fifty years, Mr. Brooks "has been subject to uniquely intense and prejudicial pretrial publicity throughout the more than two years since his arraignment." See Def.'s Motion at 1. Counsel for Mr. Brooks also cited, and included in an appendix to the motion, a sampling of the extensive newspaper coverage over the last four years regarding the investigation and prosecutions regarding Mr. Reid's death. See id. App. A to Venue Motion.

3. On May 15, 2009, the Court issued an order denying Mr. Brooks' Motion for Change of Venue. The Court concluded that "the pretrial publicity surrounding the defendant's and his co-defendants' trials is not so inherently prejudicial to justify a change of venue without reference to the jury *voir dire*." See Order on Defendant's Motion for Change of Venue (May 15, 2009) ("Venue Order"), at 6. Notably, however, the Court also found that "the defendant has shown that the community from which his jury will be drawn has been exposed to a significant amount of pretrial publicity that may result in familiarity with the case." Order on Defendant's Motion for Change of Venue (May 15, 2009) ("Venue Order"), at 5.

4. As counsel for Mr. Brooks set forth in the venue motion, the risk to a fair trial in this case from exposure "to a significant amount of pretrial publicity" is not merely a risk of patent prejudice, which would be subject to a challenge for cause during jury empanelment. The venire is at risk, as well, of latent or inherent prejudice that may never manifest itself during *voir dire*. Indeed, as counsel for Mr. Brooks argued in the Motion for Change of Venue, courts have held that in assessing inherent prejudice after *voir dire* has occurred, a court must disregard the results of the voir dire. See State v. Nordstrom, 25 P.3d 717, 727 (Ariz. 2001); see also Robert Hardaway & Douglas B. Tumminello, "Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong," 46 Am. U. L. Rev. 39, 64 (1996) (citing study results that "[j]urors who may believe themselves to be unaffected by pretrial publicity may be mistaken").

5. Allowing additional peremptory challenges has been widely recognized as a means to address potential bias that may result from extensive pretrial publicity. Indeed, even where courts are prepared to address such prejudice through "liberally excus[ing] prospective jurors for cause," those courts have also allowed defendants additional peremptory challenges.

See Robert M. Takasugi, "Jury Selection in a High-Profile Case: *United States v. DeLorean*," 40 Am. U. L. Rev. 837, 839 (1991) (commentary by trial judge in United States v. DeLorean, CR 82-910-RMT (C.D. Cal. 1983) noting that defense was allowed additional peremptory challenges in the jury empanelment, while the court "liberally excused prospective jurors for cause," "[o]ut of concern for jury contamination resulting from pretrial publicity").

6. Moreover, the denial of a "motion for a change of venue only indicates a heightened sense of ... responsibility to ensure the trial will be conducted in the fairest possible manner ...." United States v. Kouri-Perez, 985 F. Supp. 25, 29 (D.P.R. 1997). Hence, courts that have denied a motion for change of venue that was based on alleged adverse pretrial publicity have regularly allowed the defendant to use additional peremptory challenges "to assure the selection of an unbiased jury." United States v. Blom, 242 F.3d 799, 804 (8th Cir. 2001) (although district court denied motion for change of venue, court "took many precautions designed to assure the selection of an unbiased jury," including "increasing the number of peremptory strikes for each side"); see also Mills v. Singletary, 63 F.3d 999, 1008 & n.12 (11th Cir. 1995) (noting, in context of federal habeas case, that district court had denied change of venue motion but had also "increased the number of ... [defendant's] peremptory challenges from ten to sixteen"); United States v. Rodriguez, Crim. No. 2:04-cr-55, 2007 WL 466752, at *31 (D.N.D. Feb. 12, 2007) (denying motion for new trial where court had denied motion for change of venue but had also "increased the number of peremptory strikes for the defendant"); accord United States v. Hassoun, No. 04-60001-CR, 2007 WL 4180847, at *3 n.12 (S.D. Fla. Nov. 20, 2007) (denying motion for new trial, where defendant asserted that trial publicity biased jury, in part because court had "provided the defense with 36 peremptory challenges, almost four times the amount allotted" under the federal rules); United States v. Felton, 239 F. Supp. 2d 122, 125

(D. Mass. 2003) (court "allowed additional defense peremptory challenges" in light of "extensiveness of the publicity and the inflammatory nature of the accusations").

7. Mr. Brooks submits that allowing him at least twenty peremptory challenges is necessary to ensure the Court's stated goal of excluding "prospective jurors infected with prejudice." See Venue Order at 6 (quoting Groppi v. Wisconsin, 400 U.S. 505, 510 (1971)). As counsel for Mr. Brooks has argued previously, the pretrial publicity in this case has been substantial, extensive, and unique. Because Mr. Brooks' trial is to follow the trials of both his father and Mr. Knight, he has been subject to more pretrial publicity regarding the investigation and prosecutions concerning the death of Mr. Reid than either of those two co-defendants. In addition, Mr. Brooks faces a unique source of prejudice that Mr. Knight did not face: Mr. Brooks, unlike Mr. Knight, is the son of, and shares the same last name as, his father—the first defendant convicted of capital murder by a New Hampshire jury in decades—who was also convicted of participation in the same conspiracy with which Jesse Brooks is charged. Hence, even though the Court has concluded that the pretrial publicity in this case to date has not warranted a change of venue, the Court should ensure that trial in this matter proceeds "in the fairest possible manner" by allowing Mr. Brooks twenty peremptory challenges.

8. Mr. Brooks expressly reserves the right to renew his Motion for Change of Venue at a later date. The Court, in denying that motion, explicitly "invite[d] the defendant ... to renew his motion after *voir dire* if at that time he believes an impartial jury has not been seated." Venue Order at 6. Mr. Brooks also reserves the right to move for additional peremptory challenges based on responses to the juror questionnaire, as well as in the conduct of the *voir dire*, if such challenges appear necessary "to assure the selection of an unbiased jury." See Blom, 242 F.3d at 804.

9. Counsel for Mr. Brooks contacted counsel for the State prior to the filing of this motion. Counsel for the State has advised that he will take no position until he has had the opportunity to review this motion.

WHEREFORE, Defendant Jesse T. Brooks respectfully requests that this Honorable Court:

A. Allow this Motion for Additional Peremptory Challenges;

B. Issue an order allowing Defendant to make at least twenty (20) peremptory challenges during jury empanelment in this case; and

C. Grant such other relief as is just and appropriate.

Respectfully submitted,
JESSE T. BROOKS,
By his attorneys,

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Dated: June 15, 2009

Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, June 15, 2009, to all counsel of record by electronic mail and U.S. mail.

Peter D. Anderson