UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

Case No. 12-20459
HON. THOMAS L. LUDINGTON

ANTHONY BENNETT,

Defendant.
_____/

REPLY BRIEF IN SUPPORT OF MOTION FOR CHANGE OF VENUE

In its Response Brief, the Government overstates the proper standard for determining whether presumptive prejudice exists to warrant a change of venue, and understates the extent to which Defendant has met the *Skilling* factors which would require his motion to be granted, *Skilling v. United States*, 130 S. Ct. 2896, 2915-2916 (2010). Defendant addresses these defects below.

1. What is "presumptive prejudice."

The Government argues that presumptive prejudice should be found only where a "circus-like atmosphere pervades both the courthouse and the surrounding community," citing *Campbell v. Bradshaw*, 674 F.3d 578, 592 (6th Cir. 2012). That is not the standard set by the United States Supreme Court. As noted in Defendant's principal Brief, the proper standard was set forth in *Sheppard v. Maxwell*, 86 S.Ct. 1507, 1522 (1966):

> [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another [venue] not so permeated with publicity.

The fact that the Court in *Sheppard* noted a "carnival-like" atmosphere in that case, on appeal post-conviction, to bolster its ruling that the above-described "reasonable likelihood" existed cannot be read to require such an atmosphere as a condition of finding presumptive prejudice. (Nor, of course, is that even possible when a trial judge assesses the merits of this kind of motion pretrial.) This Court should apply the "reasonable likelihood" standard, in light of the *Skilling* factors discussed in Defendant's principal Brief and more below, in deciding the issue.

2. The *Skilling* factors.

In *Skilling*, *supra* at 2915-2916, the Supreme Court identified three factors for trial courts to consider in high publicity cases: (1) the size and characteristics of the community from which the jury will be drawn, (2) whether there has been dissemination of prejudicial information that a juror could not "reasonably be expected to shut from sight," and (3) whether the taint of publicity will be dissipated by the lapse of time between the case arising and trial.

Here, the Government appears to concede that there has been pervasive publicity surrounding this case. However, it argues that there is sufficient population in the

Northern Division to find impartial jurors notwithstanding the widespread coverage, that negative coverage cannot be presumed prejudicial, and that the 18 months in anticipated elapsed time between the events at issue and trial will dissipate any taint in the venire. The defense disagrees.

a. Size/characteristics of the community.

The Government accepts the defense's citation to U.S. Census Bureau numbers estimating the Northern Division's population to be 866,459. Then it cites to a study noted in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991) (plurality opinion), for the proposition that there is a "reduced" likelihood of prejudice in a venire drawn from a population of over 600,000 people. The Government also minimizes the notion that news of this case has reached the venire population by asserting that it has not made the *Cheboygan News*.

Certainly, the fact that there is a sizeable population from which a jury will be drawn is an important factor in determining if prejudice in the venire should be presumed. However, the *Gentile* case was not setting a standard for determining the issue. In fact, venue was not an issue in the discussion at all. And most important, even in this plurality opinion, the justices noted that damaging information disseminated to this size population nonetheless could give rise to the likelihood of prejudice. *Id.*

As for the suggestion that absence of news in the Cheboygan media outlet means that population is not affected by publicity of this case, the suggestion is entirely unsupported. In fact, there are any number of alternate news outlets that reach Cheboygan, including many cited by Defendant in his principal brief. Further, to the undersigned's knowledge there is no suggestion in the jurisprudence that every news outlet must carry the relevant events for presumptive prejudice to be found.

b. Nature of prejudicial information.

The Government is correct that, even where publicity is pervasive, negative publicity by itself may not suffice to raise presumptive prejudice. Rather, as stated above, the inquiry is into whether the negative information was the kind that one might not "reasonably be expected to shut from sight * * * ." *Skilling, supra*. In *Skilling*, the Court used publicity of a defendant's confession as an example, but the example was not intended to be exhaustive, and other information that similarly can poison a community's heart and mind against a defendant raises the same specter of prejudice.

As cited by Defendant in his principal Brief, in the instant case there has been publicized a great deal of information that is highly damaging, damning even. This includes information that might be considered evidentiary, such as that that Defendant was Carnel Chamberlain's

caretaker and the last to see him alive. However, it also includes assertions that generally are inadmissible, like those characterizing Mr. Bennett as the prime suspect, as a person with a prior history of physically abusing Carnel, and as one who refused to cooperate with police or (of enormous concern) to take a polygraph while others took them. In addition, many articles publicized details of Mr. Bennett's life that bring him into disrepute and that are irrelevant to this case, including his time in juvenile facilities, his lengthy criminal history, his drug use, his sparse employment history, and his anti-social behavior towards the authorities. This information largely is like that relied on in *Irvin v. Dowd*, 366 U.S. 717, 722-24 (1961) where prejudice was presumed (publicity included details of defendant's criminal background, that he had been identified as a prime suspect, that he had been placed at the scene of the crime, that he had was offered a polygraph test, that he refused to cooperate, and ultimately a confession).

Of additional great importance, as noted in Defendant's principal Brief, the publicity has supported a community discussion about child abuse and the need to eradicate it. In this publicity, Mr. Bennett's assumed guilt of Mr. Bennett is the starting point of the discussion.

This information appears to be precisely of that nature noted by the Supreme Court support a change of venue, because collectively and qualitatively it is the kind that

a person cannot reasonably be expected to forget or disregard. *Irvin v. Dowd; Skilling, supra*. It leaves a stain. The widespread, ugly nature of the comments to news items and blogsites spawned by the allegations, which Defendant described in his principal Brief, confirms the stain. While ordinarily one might agree with the Government and hesitate to ascribe the sentiments expressed in those comments and blogsites to the general population, the virulence expressed in this case, and the utter absence of any countervailing point of view, ought overcome that hesitation.

c. Elapsed time between events and trial.

The Government contends that 18 months between the allegations and trial will dissipate whatever taint the pervasive publicity has had on the population. This seems unlikely given the nature of the charges and the highly inflammatory information that has been disseminated, not to mention the "call to action" sentiments the case has raised (including calls for Defendant's death). The defense acknowledged in its principal Brief that media attention is not as intense now as it was last year, but there still are pulses of media attention whenever this case comes to a substantive turn, which only relives and recreates the effects of the prior publicity that effectively has hung Defendant.

In this regard, the *DeLisle* case relied upon by the Government is inapposite, *DeLisle v Rivers*, 161 F.3d 370 (6th Cir. 1998). In that case, the defendant's case may have come to trial sooner, but he did not suffer the intensely personal attacks suffered by Defendant here. Indeed, the Sixth Circuit specifically noted that the publicity was not "virulent," and the defendant there "did not complain that the press * * * portrayed him as an inhuman monster, or beat the drum for conviction." The instant case is the polar opposite.

CONCLUSION

Justice Sotomayor, in her separate opinion in *Skilling*, raised the controlling question:

> Do we have confidence that the jury's verdict was "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"?

Skilling, supra, 130 S.Ct. at 2948 (citations omitted). In response, here there is more than a reasonable likelihood that a fair trial will not be possible absent a change of venue, and voir dire procedures will not be trustworthy enough to reveal underlying prejudices. Defendant's motion should be granted.

Dated: August 5, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 5, 2013, he filed a copy of Defendant's *Reply Brief in Support of Motion for Change of Venue*. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Dated: August 5, 2013

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