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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	
JASON PATRICK, DUANE LEO EHMER, DYLAN ANDERSON, SEAN ANDERSON, SANDRA LYNN ANDERSON, DARRYL WILLIAM THORN, and JAKE RYAN,	**GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS SUPERSEDING INDICTMENT (#1599)**
Defendants.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to defendants' Motion to Dismiss

Superseding Indictment: Prosecutorial Misconduct – Prejudicial Extrajudicial Statements (ECF No. 1599) and the Memorandum in Support thereof (ECF No. 1600), filed by defendant Jason Patrick on behalf of the February 14, 2017, trial defendants.

Defendants' Motion purports to be in response to public comments made by the United States Attorney for the District of Oregon, the Special Agent in Charge of the FBI Portland Division, and the United States Secretary of the Department of the Interior following the jury's verdicts in the first-round trial in the above case. Defendants seek dismissal of the Indictment on grounds that these comments were inappropriate and unfairly prejudicial. To the contrary, the comments were entirely appropriate and resulted in no unfair prejudice to defendants. Defendants have cited no authority to justify dismissing the Indictment under these circumstances. Accordingly, defendants' Motion should be summarily denied.

I. Government's Position

On January 2, 2016, defendant Patrick and several others led an armed takeover of the Malheur National Wildlife Refuge (MNWR). They quickly established a media operation and held almost daily press conferences. Defendant Patrick and his co-defendants gave multiple media interviews during the occupation. The occupation garnered significant national and local media attention.

On May 18, 2016, the Court divided the trial into two rounds. Trial for Ammon Bundy, Ryan Bundy, Shawna Cox, David Lee Fry, Jeff Wayne Banta, Kenneth Medenbach, and Neil Wampler began on September 7, 2016. On October 27, 2016, the jury returned verdicts of not guilty on all charges as to all defendants except as to Ryan Bundy on Count 5.

Following the verdicts, the United States Attorney for the District of Oregon, the Special Agent in Charge of the FBI Portland Division, and the United States Secretary of the Department of the Interior released statements. All three expressed respect for the process and disappointment in the verdicts. Based on these statements, the remaining defendants now seek an order from this Court dismissing the Indictment in this case on the assumption that these comments were, in fact, somehow inappropriate. They were not. Following the verdicts in the first round, it was entirely appropriate for these officials to address issues of public concern.

II. Legal Argument

Defendants claim that the United States Attorney's comments did not comply with restrictions placed on government lawyers by the Code of Federal Regulations and rules of professional conduct. (Defs.' Mem. 4-7.) Defendants' claims are wholly without merit.

Section 50.2 of Chapter 28 of the Code of Federal Regulations sets forth guidelines for Department of Justice personnel who speak to the news media about pending cases. The provisions of 28 C.F.R. § 50.2 are not binding or mandatory and, most importantly, are designed to accommodate the important public interest of explaining the actions of the Department of Justice and furthering the public understanding of law enforcement activities. As 28 C.F.R. § 50.2(a)(2) provides: "The task of striking a fair balance between the protection of individuals accused of crime . . . and public understandings of the problems of controlling crime and administering government depends largely on the exercise of sound judgment by those responsible for administering the law . . . ." In keeping with this broad purpose, 28 C.F.R. § 50.2(b)(9) sets forth circumstances under which information may be released to the media that

would not have a prejudicial effect: "If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so."

The United States Attorney's limited comments are entirely consistent with 28 C.F.R. § 50.2. It is clear that the remarks struck a proper balance between defendants' due process rights and the need to inform the public.

As defendants have noted, the Oregon Rules of Professional Conduct and the ABA Rules of Professional Conduct generally provide that a lawyer "shall not make an extrajudicial statement that the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Model Rules of Prof'l Conduct r. 3.6(a) (Am. Bar Ass'n 1983); *see* Or. Rules of Prof'l Conduct r. 3.6(a) (Or. State Bar 2012). Defendants have not explained how the limited comments at issue in this case have any likelihood of materially prejudicing their trial in this matter.

Although defendants cite the Oregon Rules of Professional Conduct, they do not cite any ethics opinions. Formal Opinion 2007-179 contains an extensive discussion of trial publicity and Rule 3.6. Or. State Bar Ass'n, Formal Op. 2007-179, 2007 WL 7261223 (Sept. 2007). The examples cited in the opinion illustrate the fact that the limited comments here do not violate the ethics rules. No reasonable lawyer would construe disappointment with one verdict as a comment on a co-defendant's upcoming trial. Moreover, the comments at issue are not substantially likely to have a prejudicial impact on the impending trial.

Finally, defendants claim that these comments violate their right to a fair trial. (Defs.' Mem. 2.) Juror (or potential juror) exposure to news accounts of the crime does not presumptively deny a defendant of due process. *Skilling v. United States*, 561 U.S. 358, 380 (2010). Indeed, "[p]rominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*." *Id*. at 381 (citation omitted). As the Ninth Circuit has stated, "We rarely find presumed prejudice because 'saturation' is 'reserved for an extreme situation.'" *Casey v. Moore*, 386 F.3d 896, 906 (9th Cir. 2004) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988)). While a defendant's right to a fair trial is without question, the government also is entitled to a fair trial in a criminal case, *United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979); *see Levine v. U. S. Dist. Court for the Cent. Dist. of Cal.*, 764 F.2d 590, 596-97 (9th Cir. 1985) ("We must consider the fundamental interest of the government and the public in insuring the integrity of the judicial process.").

Defendants' reliance on *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (Defs.' Mem. 4, 7), is misplaced. In *Sheppard*, which has been limited by more recent Supreme Court cases such as *Skilling* and *Murphy v. Florida*, 421 U.S. 794 (1975) (*see Crater v. Galaza*, 491 F.3d 1119, 1134-35 (9th Cir. 2007)), the Supreme Court held that the defendant did not receive a fair trial due to "massive, pervasive and prejudicial publicity that attended his prosecution." *Sheppard*, 384 U.S. at 335. The *Sheppard* decision was based not only on prejudicial publicity but also on disruptive influences in the courtroom, including a press table erected inside the bar within a few feet of the jury box and counsel table. *Id*. at 354-55, 363. Indeed, the Court found that

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"bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." *Id*. at 355.

The facts in *Sheppard* illustrate the innocuous nature of the comments at issue in this case. Limited expressions of respect for the process and disappointment in the result of the first trial do not impair defendants' right to a fair trial. The comments were appropriate and did not violate the defendants' due process rights. Defendants are free to voir dire potential jurors to determine if they even heard any of the remarks in question. Moreover, defendants have cited no precedent for the type of order they seek. The case they appear to rely on, *United States v. Owen*, 580 F.2d 365 (9th Cir. 1978), did not involve pretrial publicity and did not result in dismissal of the indictment. In fact, the case notes that dismissal of the indictment based on alleged government misconduct is an extreme sanction that should be infrequently utilized. *Id.* at 367.

Defendants purport to complain about the pretrial publicity, but this publicity is mainly the result of the crime with which they have been charged and the extensive comments defendant Patrick, his co-defendants, and their attorneys have made to the media.[1] *See Crater*, 491 F.3d at

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[1] Defendant Patrick has spoken to the media after the verdicts in the first-round trial. *See* Gillian Flaccus, *Acquittal Of 7 Oregon Occupiers Poses Questions On Fate Of 7 More*, Oregon Public Broadcasting, Nov. 8, 2016, available at http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/oregon-standoff-occupiers-aquital-new-trial/. His attorney-advisor has also been quoted in the media after the verdicts. *See* Maxine Bernstein, *Drop Charges Against Oregon Refuge Occupiers Awaiting Trial, Defense Lawyers Say*, The Oregonian, Oct. 31, 2016, available at http://www.oregonlive.com/oregon-standoff/2016/10/drop_charges_against_oregon_re.html.

1134 ("The state court aptly remarked that the coverage of Crater's case 'was [no] more sensational than the very nature of the crime itself would require.'").

III. Conclusion

For the reasons set forth above, the government respectfully requests that defendants' Motion be denied.

Dated this 12th day of December 2016.

Respectfully submitted,

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s/ Geoffrey A. Barrow
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