UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 17-CR-160

RONALD H. VAN DEN HEUVEL,

Defendant.

RESPONSE TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

The United States of America, by and through its undersigned attorneys, hereby responds to defendant Ronald H. Van Den Heuvel's Motion for Change of Venue (Doc. 75) and the accompanying Memorandum in Support (Doc. 76). Pursuant to Federal Rule of Criminal Procedure 18, which governs transfers from one division to another, the relevant factors are the convenience of the defendant, any victim, the witnesses, and the prompt administration of justice. The Court should deny the defendant's request for a change of venue because these factors do not favor moving the trial to Milwaukee. Defendant's motion invokes Rule 21(a), which governs transfers from one district to another, to argue that excessive pretrial publicity requires a change of venue. (Doc. 75; Doc. 76 at 1.) Although Rule 21(a) does not control, to the extent the Court considers the question of pretrial publicity, the motion should still be denied. Nothing in the defendant's motion demonstrates that Van Den Heuvel cannot receive a fair and impartial trial in Green Bay, with jurors drawn from the Green Bay Division jury pool. Accordingly, this matter should be tried in Green Bay.

LEGAL STANDARD

The proper venue in criminal cases is the district in which the offense was committed. *United States v. Morrison*, 946 F.2d 484, 490 (7th Cir. 1991). The United States Constitution guarantees a trial in the State and district where the crime was committed. U.S. Const. amend. VI. A defendant does not, however, have a constitutional right to be tried within a certain *division* of a particular district, so long as the trial takes place within the district in which the offense occurred. *See Humphrey v. United States*, 896 F.2d 1066, 1068 (7th Cir. 1990); *see also United States v. Lipscomb*, 299 F.3d 303, 337 (5th Cir. 2002) (since the 1966 amendment of Rule 18, there is no "divisional" venue in criminal cases). The Federal Rules of Criminal Procedure distinguish between inter-district and intra-district transfers. "Rule 21 governs transfers between districts, not divisions. Intra-district transfers are governed by Rule 18." *United States v. Bartelt*, 96-CR-50034, 1997 WL 436229, at *2 (N.D. Ill. July 7, 1997). "Only an interdistrict transfer implicates the Constitution." *Lipscomb*, 299 F.3d at 339. Therefore, there is no constitutional question presented by Van Den Heuvel's motion for an intra-district transfer, and Rule 18 provides the standard.

Rule 18 states:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Therefore, the key questions before the Court are the convenience of the defendant, victims, and witnesses, and the prompt administration of justice. A trial court "has broad discretion in deciding where to fix the location of the trial which will not be overridden on appeal as long as the court gives 'due consideration' to the factors listed in Rule 18." *United States v. Balistrieri*, 778 F.2d 1226, 1229 (7th Cir. 1985).

DISCUSSION

Van Den Heuvel's motion should be denied because the Rule 18 factors do not favor moving the trial to Milwaukee. For the reasons discussed below, neither the convenience of the defendant, victims, and witnesses, nor the prompt administration of justice, would be increased by transferring the trial. Furthermore, even if the Court does consider pretrial publicity as an additional factor under Rule 18, transfer is not warranted.

A. Convenience of the defendant, victims, and witnesses would not be improved by moving the trial to Milwaukee.

Van Den Heuvel's motion underestimates the inconvenience that moving the trial to Milwaukee would present to the many Green Bay-based witnesses who are expected to testify in this case. Although the parties have not exchanged witness lists, the United States currently expects that as many as 75 witnesses may testify. Of those witnesses, approximately 55% are located in the State of Wisconsin, and 45% are located outside of Wisconsin. With respect to the Wisconsin-based witnesses, approximately 70% live in the greater Green Bay area, meaning that a significant plurality (approximately 40%) of the total witnesses live in or near Green Bay. Several of the other Wisconsin-based witnesses live in the Madison area, meaning they will have to travel either to Green Bay or Milwaukee. The non-Wisconsin witnesses live in States ranging from Illinois to Florida and California, as well as foreign countries including Canada and China. For these witnesses, travel will also be required regardless.

Similarly, the convenience of the victims would not be enhanced by transferring the case. Two of the victims are based in Green Bay. None of the remaining victims are based in Milwaukee, so they will have to travel to participate in the trial. Although the defendant himself has requested a change of venue, the United States observes that Van Den Heuvel is from the Green Bay area and has extensive family and a support system in Green Bay. Van Den Heuvel's

motion also argues that Milwaukee will be a more convenient location for counsel, and may result in lower costs to taxpayers. (Doc. 76 at 13.) However, the convenience of counsel is not referenced in Rule 18, and at least one district court in the Seventh Circuit has rejected counsel's convenience as a reason for an intra-district transfer. *See Bartelt*, 1997 WL 436229, at *3 (denying a motion under Rule 18). Thus, the convenience of the witnesses, victims, and the defendant does not favor moving the case to Milwaukee.

B. Prompt administration of justice does not favor transfer.

The Rule 18 factor concerning the prompt administration of justice is not at issue in this case, which is scheduled to be tried starting on November 13, 2018, regardless of location. Thus, this factor does not favor moving the trial to Milwaukee.

C. Even if the Court considers pretrial publicity as an additional Rule 18 factor, transfer is not warranted.

Because Van Den Heuvel's Motion for Change of Venue is premised on allegedly prejudicial publicity, the United States addresses publicity in this response. A district court "may consider other factors" when ruling on a Rule 18 motion. *Lipscomb*, 299 F.3d at 340-44 (taking into consideration court policy, logistics, and pretrial publicity); *see also United States v. Schock*, 16-CR-30061, 2016 WL 7156461, at *2 (C.D. Ill. Dec. 7, 2016) (pretrial publicity and court security may be considered). However, "[e]xtensive pretrial publicity does not, in itself, render a trial unfair and violate a defendant's right to due process." *Willard v. Pearson*, 823 F.3d 1141, 1146 (7th Cir. 1987). "Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling v. United States*, 561 U.S. 358, 381 (2010). When deciding a motion for change of venue, the "approved procedure in this circuit and other courts for most cases is to assess the impact of any pretrial publicity through voir dire of prospective jurors." *Bartelt*, 1997 WL 436229, at *2 (citing *United States v. Peters*,

791 F.2d 1270, 1295 (7th Cir. 1986) (superseded on other grounds, as stated in *United States v. Guerrero*, 894 F.2d 261, 267 (7th Cir. 1990) (citations omitted)). Abuse of discretion is the appropriate standard of review. *See United States v. Nettles*, 476 F.3d 508, 513 (7th Cir. 2007).

Defendant's motion should be denied because it fails to show that any actual prejudice in the jury pool could not be cured with appropriate *voir dire*, or the existence of presumed prejudice so great that juror bias is inevitable. Indeed, several recent Seventh Circuit cases have affirmed the denial of change of venue motions despite much greater potential for significant prejudice. In *Nettles*, for example, the Seventh Circuit upheld the district court's denial of a Rule 21(a) change of venue motion where the defendant had threatened to blow up the Dirksen Federal Building—the very courthouse where his trial occurred. 476 F.3d at 515 (approving the district court's "careful *voir dire* to prevent the presence of juror bias").[1] In *United States v. Philpot*, 733 F.3d 734, 740-41 (7th Cir. 2013), the Seventh Circuit affirmed the denial of a motion to transfer venue from the Northern District of Indiana to the Northern District of Illinois by a county official accused of taking improper payments from a federally-funded program. The magistrate judge had found that the pretrial publicity in *Philpot* was no more severe than in other public corruption cases tried in the Northern District of Indiana. *Id*. at 741. The Court's opinion noted that "Northwest Indiana may not be as populous as, say, Chicago, but neither is it a small town." *Id*. (observing that the jury pool in the relevant counties was approximately 600,000 people, and most of the news stories were factual in nature).

[1] Also instructive is *In re Dzhokhar Tsarnaev*, 780 F.3d 14 (1st Cir. 2015), which denied a petition for writ of mandamus filed by a defendant in the Boston Marathon bombing who objected to the district court's denial of his third motion for change of venue. The First Circuit found that the defendant had not met the "exacting burden" required to obtain a writ of mandamus in light of the trial court's findings that no presumption of prejudice had arisen and that there were jurors provisionally qualified to provide the defendant with a fair trial. *Id.* at 19-24 (noting the lack of a confession, primarily factual nature of the ongoing media coverage, and extensive *voir dire*).

1. Any actual prejudice could be addressed with careful *voir dire*.

Because jury selection has not yet commenced in this matter, the question of whether any members of the jury pool hold actual prejudice against Van Den Heuvel is inherently speculative. However, any such actual prejudice could be detected and remedied through targeted *voir dire*. *See Nettles*, 476 F.3d at 514-15. The *voir dire* would be designed to identify potential jurors' exposure to press reports and the parties' filings in this case, as well as prior knowledge of Van Den Heuvel, his companies, or his family. Most importantly, the *voir dire* would discern whether any prior familiarity with the defendant or the allegations would impact the jurors' ability to act in an unbiased manner. The "ultimate question is whether it is possible to select a fair and impartial jury, and in most situations the *voir dire* examination adequately supplies the facts on which to base that determination." *Nettles*, 476 F.3d at 513.

2. Pretrial publicity has not inevitably prejudiced the Green Bay jury pool.

Van Den Heuvel's motion appears to rely primarily on the idea that the pretrial publicity in this case has been so pervasive that jury bias is inevitable. (Doc. 76 at 11.) Courts in the Seventh Circuit consider a number of factors when determining whether pretrial publicity and media coverage "has so infected a jurisdiction's jury pool that a change of venue is warranted." *United States v. Bills*, 93 F. Supp. 3d 899, 902-03 (N.D. Ill. 2015) (denying motion for change of venue by city official accused of accepting bribes in connection with widely unpopular red light traffic camera program). Those factors include "the size and characteristics of the community where the crime occurred, the nature of the news stories, and the time that elapsed between heavy news coverage and the trial." *Id.* at 903.

As stated in Van Den Heuvel's motion, the combined population of Green Bay and Appleton is estimated at almost 890,000, and residents have a host of media outlets available to

them. (Doc. 76 at 6.) The Green Bay Metropolitan Statistical Area ("MSA") includes Brown, Kewaunee, and Oconto Counties and is the third-largest MSA in the State of Wisconsin, with an estimated population of approximately 300,000, according to public sources. In addition to those three counties, the Green Bay Division of the Eastern District of Wisconsin includes Florence, Forest, Marinette, Langlade, Menominee, Shawano, Door, Waupaca, Outagamie, Waushara, Winnebago, Calumet, and Manitowoc Counties. As a result, the Green Bay Division includes not only the largest city in the region, but also smaller cities and municipalities as well as suburban and rural communities. Van Den Heuvel's proposed venue, the Milwaukee MSA, is the largest in Wisconsin, with an estimated population of about 1.6 million. That population is less than twice as large as the Green Bay/Appleton area. While Green Bay may not be as populous as Milwaukee, neither is it just a small town. *See Philpot*, 733 F.3d at 741. It seems implausible that an impartial jury could not be selected from the Green Bay Division's diverse pool of jurors.

Much of the press coverage identified by Van Den Heuvel is standard journalism—a recitation of the "Five Ws": who, what, where, when, and why. These articles simply present the facts concerning the legal developments in Van Den Heuvel's various cases. Some of the articles include facts to which the defendant himself has allocuted. (Doc. 76, Ex. F.) Many of them are careful to use terms such as "allege[dly]," "claims," and "[p]rosecutors say" when referring to the information in the pending indictment, and note that Van Den Heuvel pleaded not guilty. (Doc. 76, Exs. D, E, F, G, H.)

Defendant's memorandum devotes several pages to the Oneida Eye. In contrast to the largely dispassionate coverage by local television stations and newspapers, the Oneida Eye's coverage of defendant has in fact been "highly uncomplimentary," as the defendant describes it.

(Doc. 76 at 3.) However, it is worth noting that the Oneida Eye's coverage of defendant is convoluted and not clearly organized, and likely would be difficult for an uninformed reader to follow. (*See* Doc. 76, Exs. A, I.) More importantly, it appears that the influence of the Oneida Eye is relatively small. While the materials submitted by the defendant do not disclose the readership of the Oneida Eye blog, it appears that the Oneida Eye Twitter account has only 74 followers.[2] (Doc. 76, Ex. I.) Accordingly, *voir dire* will be sufficient to establish whether a prospective juror is aware of the Oneida Eye blog or Twitter account, has ever read the blog or followed the Twitter feed—either generally or with respect to its coverage of Van Den Heuvel, and whether any exposure to the Oneida Eye's coverage of defendant would make it impossible for a prospective juror to treat Van Den Heuvel fairly. Furthermore, given that the Oneida Eye's reporting about defendant is available to anyone with an Internet connection, it would be prudent to ask these questions of any prospective juror, whether located in Green Bay or elsewhere.

The exhibits provided by Van Den Heuvel indicate that much of his press coverage has been driven by major events in the prior and current criminal case, such as his guilty plea (Doc. 76, Exs. D, F, G), sentencing (Ex. B), revocation of conditions of release (Ex. H), and the unsealing of the current indictment and filing of parallel civil charges (Exs. C, E). Media reports about such events are not uncommon. While it is true that some of this coverage is recent, such as articles reporting on the revocation of Van Den Heuvel's conditions of release, there is no indication that the mainstream press coverage will reach a crescendo as this case nears trial. The best way to address potential juror's exposure to pretrial publicity is during *voir dire*.

[2] By way of comparison, as of August 21, 2018, the Green Bay Press-Gazette Twitter account has approximately 29,100 followers.

3. The pretrial publicity in this matter falls far short of the "bedlam" and "carnival atmosphere" that would mandate a change of venue.

Any actual or potential prejudice that may exist in this case pales in comparison to the extreme prejudice facing the defendants in the three Supreme Court cases cited by Van Den Heuvel. (Doc. 76 at 1.) In *Rideau v. Louisiana*, 373 U.S. 723, 724 (1963), local police interrogated Rideau about a small-town bank robbery in which three bank employees were kidnapped and one was killed. The interrogation happened in jail without counsel present and resulted in Rideau's confession. *Id.* Without informing Rideau or seeking his consent, the police filmed the interrogation. *Id.* A local television station broadcast the twenty-minute "confession" three separate times shortly before the trial to audiences ranging from 24,000 to 53,000 viewers, in a parish with a population of approximately 150,000 people. *Id.* "What the people [in the parish] saw on their television sets was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." *Id.* at 725. Given the "kangaroo court" nature of the proceedings, the Supreme Court held that Rideau's motion for a change of venue should have been granted. *Id.* at 726-27.

The other two cases cited by Van Den Heuvel likewise involved media coverage that "manifestly tainted a criminal prosecution." *Skilling*, 561 U.S. at 379. In *Estes v. Texas*, 381 U.S. 532, 536 (1965), extensive pretrial publicity, including live television and radio broadcasts of the initial hearings, translated into excessive exposure. During preliminary court proceedings in *Estes*, reporters and television crews overran the courtroom and "bombard[ed] . . . the community with the sights and sounds of the pretrial hearing." 381 U.S. at 536-38 (holding that overzealous reporting "led to considerable disruption" and denied the "judicial serenity and calm" to which the defendant was entitled). Similarly, in *Sheppard v. Maxwell*, 384 U.S. 333, 353-55 (1966), reporters feverishly covered the story of a doctor accused of bludgeoning his

pregnant wife to death, resulting in "bedlam" at the courthouse. Even in *Sheppard*, however, it was not the months of "virulent publicity" alone that denied due process. *Id.* at 354-55. Rather, the error was the trial court's failure to control the press and rein in the "carnival atmosphere" that pervaded the proceedings. *Id*. at 358.

As the Supreme Court itself has noted, these decisions "cannot be made to stand for the proposition that juror exposure to news accounts of the crime alone presumptively deprives the defendant of due process." *Skilling*, 561 U.S. at 380 (citing *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975)). Rather, "vivid, unforgettable information" is what makes a fair trial impossible. *Id.* at 384. This case does not involve a recorded confession or a brutal murder. The pretrial publicity in this wire fraud and money laundering case has been largely factual, and reporters are not running amok in the courtroom. Van Den Heuvel's motion does not cite any authority for the proposition that federal and state court pleadings being publicly available, whether for free (Doc. 76 at 7, 10) or via CCAP or PACER (*Id.* at 11), is inherently prejudicial. Nor does it provide authority for the idea that media reports including a photograph or depicting the defendant in handcuffs (*Id*. at 9) is fundamentally prejudicial. Nothing in the Department of Justice's press release (*Id.*, Ex. B) or SEC litigation release (*Id.*, Ex. C) is so prejudicial that a change of venue is warranted. Indeed, if standard government press releases prompted changes of venue, every defendant who has a prior conviction or other pending cases would be entitled to one—which is not what the law requires.

CONCLUSION

The United States respectfully submits that the Court should deny the defendant's motion for a change of venue. Defendant's motion does not demonstrate that the Rule 18 factors favor an intra-district transfer to the Milwaukee Division. To the extent the Court considers pretrial

publicity as an additional factor, the media coverage of this case does not present the type of "carnival atmosphere" arising from such pervasive and inflammatory pretrial publicity that juror bias is inevitable. Any indication of actual prejudice can be addressed during *voir dire*. Nothing in Van Den Heuvel's motion establishes that he will be unable to receive a fair trial in the Green Bay Division. Accordingly, Van Den Heuvel's Motion for Change of Venue should be denied.

Dated at Milwaukee, Wisconsin, this 24th day of August, 2018.

Respectfully Submitted,

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