UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, v. JULIA BEATRICE KELEHER, et al., Defendants.	CRIMINAL NO. 19-431 (PAD)

RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO TRANSFER VENUE

Defendants Julia Beatrice Keleher, Angela Avila-Marrero, Alberto Velazquez-Piñol, Fernando Scherrer-Caillet, Glenda Ponce-Mendoza, and Mayra Ponce-Mendoza have asked the Court to transfer this case's venue, claiming that negative pretrial publicity has made it impossible for them to receive a fair trial in Puerto Rico. *See generally* Docket Nos. 172, 177. They make such a sweeping claim before the Court has so much as questioned a single prospective juror, relying on a "venue study" they hired a jury-consulting firm to perform. The United States respectfully submits that this defense-commissioned venue study is no substitute for a voir dire process specifically tailored to ensure that the jury which is ultimately empaneled returns a verdict based ***only*** on the evidence presented within the four corners of the courtroom. Despite Defendants' arguments suggesting otherwise, there is no legal or factual basis to conclude that this Court is incapable of empaneling a fair and impartial jury. Nor is there, at this time, any legal or factual basis to conclude that a jury drawn from a pool of approximately three million U.S. citizens residing in Puerto Rico will be unable to follow the Court's instructions, and evaluate the evidence fairly and impartially. For the reasons more thoroughly discussed below, the Court should deny Defendants' joint motion requesting a change of venue, Docket No. 172, and Keleher's supplemental motion requesting the same relief, Docket No. 177.

DISCUSSION

The Constitution provides that "[t]he trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," Art. III, § 2, cl. 3, before a "jury of the State and district wherein the crime shall have been committed," Amdt. 6. It also secures to criminal defendants the right to trial by "an impartial jury," Amdt. 6, and to due process of law, Amdt. 5. Taken together, these provisions require a change of venue at a defendant's request if, but only if, "***extraordinary local prejudice*** will prevent a fair trial." *United States v. Skilling*, 561 U.S. 358, 378 (2010) (emphasis added).

The mechanism for seeking a change of venue based on pretrial prejudice is Federal Rule of Criminal Procedure 21(a), which states:

> Upon the defendant's motion, the court must transfer the proceedings against that defendant to another district if the court is satisfied that ***so great a prejudice*** against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

(emphasis added).

A Rule 21(a) motion "is addressed to the sound discretion of the trial court." *United States v. Drougas*, 748 F.2d 8, 29 (1st Cir. 1984). "A district court abuses its discretion [only] when it makes an error of law or if it bases its decision on a clearly erroneous assessment of the evidence." *See United States v. Wilcox*, 631 F.3d 740, 747 (5th Cir. 2011). "The burden of establishing prejudicial pretrial publicity is on him who asserts it." *Wansley v. Slayton*, 487 F.2d 90, 94 (4th Cir. 1973); *see also Stafford v. Saffle*, 34 F.3d 1557, 1566 (10th Cir. 1994) ("[Defendant] must establish that an irrepressibly hostile attitude pervaded the community. This is a difficult standard, even in cases in which there has been extensive media coverage . . . .") (internal quotation marks and citation omitted); *Coleman v. Kemp*, 778 F.2d 1487, 1537 (11th Cir. 1985) ("The presumptive prejudice standard . . . is ***only rarely applicable***, and is reserved for an extreme

situation. In short, the burden placed upon the petitioner to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an ***extremely heavy one***.") (emphasis added).

The Supreme Court developed the standard for presuming prejudice on the basis of negative community sentiment and pretrial publicity in three cases, all of which were decided over 50 years ago: *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The facts of those cases are instructive.

Rideau involved a defendant who was tried in a Louisiana parish of 150,000 people and convicted of robbery, kidnapping, and murder. *Rideau*, 373 U.S. at 724. Police interrogated the defendant in jail following his arrest and filmed his confession. *Id*. On three separate occasions shortly before trial, which took place less than two months after the arrest, a local television station broadcast the film to audiences ranging from 24,000 to 53,000 individuals. *Id.* In reversing the defendant's conviction, the Supreme Court observed:

> What the people saw on their television sets was [the defendant], in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder. . . . this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial -- at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

Id. at 726.

The trial in *Estes* was "conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment." *See Murphy v. Florida*, 421 U.S. 794, 799 (1975) (summarizing *Rideau*, *Estes*, and *Sheppard*). And in *Sheppard*, "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 [the defendant]." *Sheppard*, 384 U.S. at 355.[1]

Rideau, *Estes*, and *Sheppard* each involved a "conviction obtained in a trial atmosphere that was utterly corrupted by press coverage." *See Skilling*, 561 U.S. at 380-81. That is, in each of these cases, pretrial publicity "so permeated the community" that it "displaced the judicial process." *See United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998).

Here, Defendants have correctly pointed out that this case has received extensive media coverage. This is to be expected in light of the fact that the indictment alleges criminal wrongdoing on the part of the former Secretary of Education of Puerto Rico and two of her associates, two prominent businessmen, and the former head of the Puerto Rico Health Insurance Administration. Media coverage portraying Defendants in a negative light, however, is not alone sufficient to compel the Court to presume that prejudice has contaminated the pool of potential jurors to such a degree that a trial in Puerto Rico would be nothing but a circus-like, hollow formality. *See Skilling*, 56 U.S. at 380-81 ("[O]ur 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. Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated does not require ignorance.") (internal quotation marks and citations omitted); *see also Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976) (holding that "pretrial publicity -- ***even pervasive, adverse publicity*** -- does not inevitably lead to an unfair trial.") (emphasis added); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 404 n.1 (1970) (Rehnquist, J., concurring) ("In fact, as both the Court and the dissent recognize, the instances in

[1] It bears emphasis that, "despite the proliferation of the news media and its technology, the Supreme Court has not found a single case of presumed prejudice in this country since the watershed case of *Sheppard*." *See McVeigh*, 153 F.3d at 1182.

which pretrial publicity alone, even pervasive and adverse publicity, actually deprives a defendant of the ability to obtain a fair trial will be quite rare.") (collecting cases).

In essence, Defendants request that the Court change the trial's venue because most people in Puerto Rico have heard about the case, and associate Defendants with former Governor Ricardo Rosselló, who resigned in the midst of mass protests following the publication of social media conversations in which he participated, and which many perceived to be unbecoming of a governor. In her supplemental motion, Keleher tacks on an additional argument—that she is "one of the most despised public figures in Puerto Rico's history," because she made controversial and unpopular decisions during her tenure as the Secretary of Education, and was paid significantly more than her predecessors. The Court should not allow such hyperbole to override a careful analysis of the facts and the law.

Under the law, the Court should consider the following factors in determining whether a presumption of prejudice warranting a change of venue has arisen as a result of pretrial publicity: "the size and characteristics of the community, the nature of the publicity, the time between the media attention and the trial, and whether the jury's decision indicated bias." *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 59 (D. Mass. 2016) (citing *Skilling*, 561 U.S. at 382-84). A consideration of the first three factors[2] should, at a minimum, compel the Court to deny Defendants' motion for a change of venue at this time, and allow voir dire to proceed in the District of Puerto Rico. *See United States v. Guillon*, 575 F.2d 26, 28 (1st Cir. 1978) ("We find that the trial judge did not abuse his discretion in denying the motion for a change of venue until he could consider the effect of any pretrial publicity at the time of conducting the voir dire of prospective jurors."); *see also Patton v. Yount*, 467 U.S. 1025, 1038 n.13 (1984) ("[V]oir dire has long been

[2] Only the first three factors are pertinent to the Court's analysis because the trial in this case has obviously not yet occurred.

recognized as an effective method of rooting out . . . [publicity-based] bias, especially when conducted in a careful and thoroughgoing manner.") (internal quotation marks and citation omitted); *Correia v. Fitzgerald*, 354 F.3d 47, 52 (1st Cir. 2003) ("The best way to ensure that jurors do not harbor biases for or against the parties is for the trial court to conduct a thorough voir dire examination. Assuming that venirepersons pass through this screen, the trial court thereafter may operate on the presumption that the chosen jurors will obey the judge's instructions to put extraneous matters aside and decide each case on its merits.") (citations omitted).

A. The Size and Characteristics of the Community in Which the Crime Occurred

Puerto Rico has a population of over three million people from which a fair and impartial jury may be empaneled. *See United States v. Casellas-Toro*, 807 F.3d 380, 386 (1st Cir. 2015). There is simply no basis to conclude that the Court will be unable to empanel 12 fair and impartial jurors from a population of over three million people. *See In Re Tsarnaev*, 780 F.3d 14, 24 (1st Cir. 2015) (rejecting the argument that pretrial publicity of Boston marathon bombing automatically disqualified population of three million people as potential jurors).

Contrary to what Keleher argues, that some residents of Puerto Rico may not be able to serve on a federal jury because they lack the necessary fluency in the English language is no reason to conclude that a consideration of the size and characteristics of the community weighs in favor of a change of venue at this time. ***All*** adult U.S. citizens residing in Puerto Rico are eligible for ***consideration*** as potential jurors. *See, e.g.*, *United States v. Ramos-Colon*, 415 F. Supp. 459, 462-63 (D.P.R. 1976) ("In looking at the declaration of policy contained in 28 U.S.C. § 1861 we find that it requires that grand and petit juries be selected at random from a fair cross section of the community and that all citizens . . . have the opportunity to be considered for service. This does not mean that precise proportional representation of any particular group is required on the grand or petit panel, but rather that the group from which they are selected be taken by chance (i.e., at

random), from the community.") (internal quotation marks and citations omitted). That many may not qualify to serve on a federal jury because of a lack of English-language proficiency neither makes the size of the population eligible for ***consideration*** as potential jurors in Puerto Rico any smaller, nor does it make it more likely that a jury empaneled in Puerto Rico will be unconstitutionally biased toward a criminal defendant. *See, e.g.*, *id.* at 463 ("The statement of policy to the effect that all citizens be granted an opportunity to ***be considered*** for jury duty we understand to mean that individuals will be considered but can only serve if they also meet the qualification requirements for jury service contained in 28 U.S.C. § 1865."); *see also Castro-Poupart v. United States*, No. 91-1877, 1992 U.S. App. LEXIS 24109, at * 10 (1st Cir. Sept. 30, 1992) (rejecting Sixth Amendment challenge to requirement that jurors be proficient in English because "even assuming that declining English proficiency in Puerto Rico resulted in a smaller pool of eligible jurors and a systematic exclusion in the jury selection process, the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language.").

B. The Nature of the Publicity Surrounding the Case

According to Defendants, pretrial media coverage has created a strong impression of guilt among the population of Puerto Rico. To support this claim, they point out that the venue study they commissioned revealed that 85% of the jury pool in Puerto Rico is familiar with the case, and 77% presume Defendants to be guilty.

As an initial matter, it is worth emphasizing that these numbers are based on a survey of 302 individuals out of a population of approximately three million. *See* Docket Nos. 172 at 12, 172-1 at 7. The Court should be skeptical of Defendants' claim that any effort to empanel a fair

and impartial jury would be an exercise in futility based on a survey of roughly .01% of the population of Puerto Rico.

More importantly, as previously discussed, a potential juror need not be ignorant about a case to be fair and impartial. Nor must a potential juror have refrained from forming an opinion about a particular defendant's guilt to be eligible to serve. As the Supreme Court first observed in 1879, and as it has repeated many times since, "every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits." *Reynolds v. United States*, 98 U.S. 145, 155–56 (1879); *accord Irvin v. Dowd*, 366 U.S. 717 (1961); *Skilling*, 561 U.S. at 381.

The United States does not dispute that media outlets in Puerto Rico have extensively reported on this case, and that much of the reporting has portrayed Defendants in a negative light. But that does not mean that jurors will fail to set aside their beliefs and apply the presumption of innocence. On the contrary, "it is a premise of [our] system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented." *Skilling*, 561 U.S. at 398 n.34; *see also Irvin*, 366 U.S. at 723 ("To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."); *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987) ("[Jurors] are presumed to be impartial . . . [and the] existence of a juror's preconceived notion as to the guilt of the accused will not by itself destroy the presumption of impartiality.").

Overlooking the precedents cited above, Defendants assert that "[t]his case is comparable to two other recent Puerto Rico cases, *Casellas-Toro* and *Moreno-Morales*," each of which should

compel the Court to transfer venue. Docket No. 172 at 13. The United States respectfully disagrees.

Casellas-Toro involved the son of a federal judge accused locally of murdering his wife, and federally with making false statements to a federal agent in connection with the murder. 807 F.3d at 383-84. After being convicted in local court, the defendant was tried in federal court on the false statement charges, and convicted. The First Circuit vacated the conviction, holding that pretrial publicity prejudiced the defendant's ability to be judged by a fair and impartial jury. Specifically, the First Circuit emphasized that "the media extensively and sensationally covered [the defendant's] Commonwealth trial, conviction, and sentencing in a just-concluded case intertwined with" the federal case, and noted that the jury could have "difficulty disbelieving or forgetting the opinion of another jury, twelve fellow citizens, that a defendant is guilty in an intertwined just-concluded case." *Id.* at 387.

Defendants' reliance on *Casellas-Toro* is misplaced for three reasons. First, Defendants have not been defendants, much less convicted defendants, in a separate trial intertwined with the facts of this case. Second, in *Casellas-Toro*, voir dire "occurred two months after [the defendant's] televised sentencing in the [state] murder case." *Id.* at 388. Here, there is no temporal proximity between an extensively media-covered criminal proceeding, and the trial that is scheduled to begin in May 2020. Finally, in *Casellas-Toro*, "voir dire revealed the depth of community knowledge of, and hostility to, [the defendant]." *Id.* at 389. Voir dire has yet to occur in this case; accordingly, Defendants' motion to change venue is, at the very least, premature.

With respect to *United States v. Moreno-Morales*, 815 F.2d 725 (1st Cir. 1985), the United States is at a loss as to why Defendants believe this case helps their cause. *Moreno-Morales* involved the police shooting of two advocates of Puerto Rican independence, "the media event of the years 1983-1984." 815 F.2d at 730. The district judge conducted an extensive voir dire

resulting in the empanelment of 12 jurors who "testified repeatedly . . . that they would base their deliberations solely on the evidence adduced at trial, and that they could impartially reach a verdict." *Id.* at 733-34. Consequently, the First Circuit held that there was no "manifest error in the district court's determination to seat the jurors as impartial." *Id.* at 734. The First Circuit also held that there was "no convincing evidence" that the "effect of the [pretrial] publicity, widespread as it undoubtedly was, was such as to foreclose [the defendants'] right to a fair trial." *Id*. Far from supporting the notion that the Court should dispense with voir dire and transfer venue, *Moreno-Morales* stands for the proposition that it is entirely possible to empanel a fair and impartial jury in Puerto Rico notwithstanding the media's coverage of this case.

Indeed, the U.S. citizens residing in Puerto Rico have a demonstrable record of deciding high-profile public corruption cases fairly and impartially. One need look no further than *United States v. Acevedo-Vila*, Criminal No. 08-36 (D.P.R. 2008), a public corruption case brought in 2008 against the then-sitting governor of Puerto Rico, Anibal Acevedo-Vilá. In spite of the widespread media attention the case garnered, Acevedo-Vilá was acquitted following a 29-day trial in the District of Puerto Rico.

C. Time Between Media Attention and Trial

Defendants argue that holding the trial in this case as scheduled, ten months after the grand jury returned the indictment, will not allow for sufficient time for the decibel level of media attention to diminish. *See* Docket No. 172 at 10-13. They also complain that they will be subject to renewed media scrutiny as the trial approaches because the trial date overlaps with election season. Defendants' gripes with the scheduling of the trial have nothing to do with the propriety of the District of Puerto Rico as a trial venue, and everything to do with the Court's scheduling order, which the Court, of course, has ample discretion to modify.

Be that as it may, the United States has no reason to doubt that, whether the trial takes place as presently scheduled or on a later date, the Court will adopt every necessary measure to ensure that the jury that is ultimately empaneled will decide the case based only on a fair and impartial evaluation of the evidence.

D. The Interest of Justice Does Not Warrant a Change of Venue

It is no doubt true that moving trials to distant districts will nearly always reduce the number of potential jurors with knowledge of, or a personal connection to, the underlying events. But the Framers of our Constitution considered it more important to keep trials local. "The Colonists believed in the concept that the community which had suffered injury should be allowed to judge those charged with the injury. . . . To this day, the interest of a community in trying those who violate its laws remains a central tenet of our judicial system." *United States v. Dubon-Otero*, 76 F. Supp. 2d 161, 164 (D.P.R. 1999) (internal quotation marks and citations omitted). It is, therefore, not surprising that courts have denied motions to transfer venue in extraordinarily high-profile cases with broad impact on the local population. *See, e.g.*, *Skilling*, 561 U.S. at 358 (former CEO of Enron Corporation which crashed into bankruptcy as a result of fraud); *United States v. Salameh*, No. S5 93 CR 0180 (KTD), 1993 U.S. Dist. LEXIS 12770 (S.D.N.Y. Sept. 15, 1993) (first World Trade Center Bombing); *United States v. Tsarnaev*, 157 F. Supp. 3d 57 (D. Mass. 2016) (Boston Marathon bombing); *People v. Charles Manson*, 71 Cal. App. 3d 1 (Cal. App. 2d Dep't 1977) (leader of murderous cult); *New York v. David Berkowitz*, 93 Misc. 2d 873 (1978) ("Son of Sam" serial killer).

The facts of this case do not warrant a finding of presumed prejudice any more than the facts of the above-cited high-profile cases so warranted. At a minimum, the Court should decline Defendants' invitation to conclude that empaneling a fair and impartial jury in the District of Puerto Rico is impossible unless and until the voir dire process demonstrates otherwise.

CONCLUSION

For the reasons set forth above, Defendants' motion to transfer venue should be denied, as should Keleher's supplemental motion to transfer venue.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 13th day of January, 2020 in San Juan, Puerto Rico

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy of such filing will be emailed to defense counsel of record.

/s/ Alexander L. Alum
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