Bonds Juror Questionnaires to be Made Public During Voir Dire; Juror Names to be Withheld Until Trial End

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The United States District Court, Northern District of California (J., Illston) issued a 10-page ruling on March 14, 2011, granting the public and press access to completed juror questionnaires during the voir dire process in the upcoming perjury trial of former San Francisco Giants baseball player Barry Bonds.[1] The Court however ordered the names of jurors to be withheld until the end of trial. Citing to United States Supreme Court precedent, the Court stated:

'The process of juror selection is itself a matter of importance, not simply to adversaries but to the criminal justice system.' [Citation omitted.] Historically, an open selection process has given 'assurances to those not attending trials that others were able to observe the proceedings and enhanced public confidence.'[2]

Although noting that neither the United States Supreme Court nor the Ninth Circuit have addressed to what extent the public's presumptive right of access to the voir dire process extends to written questionnaires or juror names, the Court recognized that these access rights were grounded in federal constitutional law: "Just as it is important for the press and public to be able to 'attend, listen, and report on' voir dire generally … it is important for the press and public to be able to have access to, see, and report on the jury questionnaires that are actually part of the jury selection process." Applying the same presumptive right of access to the names of jurors, the Court found that the competing interests of juror privacy and defendant's right to a fair trial militated against access to juror names during trial, noting the high profile nature of the case, the potential for interaction between the public and jurors and the risk that the public could approach jurors in an attempt to influence their verdict. The Court rejected defense efforts to keep secret other indentifying information on the questionnaires such as the city of residence or employer information, and ruled that the names would be made public once a verdict in the matter is reached.

Details of the court's March 14 ruling

Vacating its Feb. 19, 2009 Pre-trial Order sealing the juror questionnaires, the Court's ruling addressed four specific issues raised by the Press Organizations' motion: "First, to what extent does the public right of access to the juror selection process extend to the content of written jury questionnaires filled out before oral voir dire begins? Second, to what extent does the public right of access to the jury selection process extend to the names or other identifiers of prospective and empaneled jurors? Third, are there any compelling governmental interests in restricting either of these rights? And finally, what narrow means might the Court use to serve those interests?"

In addressing the first issue, the Court recognized that the Supreme Court and Ninth Circuit have not had occasion to examine the public's right of access to written juror questionnaires. Nevertheless, the Court noted that California state courts have considered the issue and determined that the right of access to questionnaires filled out by venirepersons who are actually "called to the jury box for oral voir dire" is grounded in federal constitutional law.[3] Relying on those twenty-two year old appellate decisions, the Court noted that California courts have distinguished between venirepersons who are never called to the jury box, and thus whose questionnaires play no part in voir dire, from those who are called to the jury box during oral examination. The Court agreed that questionnaires by jurors who are never called to the jury box serve no function in the selection process and thus their disclosure is not compelled by the presumptive right of access to the voir dire process.

Applying this distinction, the Court ruled that the questionnaires of 50 prospective jurors who will be questioned on the morning of March 21 (the first day of trial) "will become part of the jury selection process." Should it become necessary to question more jurors, their questionnaires likewise will become part of the selection process, the Court stated.

Addressing how the right of access to the questionnaires will be facilitated during voir dire, the Court explained that any time a questionnaire is used by counsel, it will be displayed on a monitor in the courtroom and in the court's press room so that the press and public can follow along. Ten binders each with copies of the questionnaires filled out by those prospective jurors will be made available for public and press viewing in the press room on the morning of March 21, eight of the binders will be reserved for the press. The press and public can view, takes notes from and report on the questionnaires. Equating the use of written questionnaires to oral voir dire, however, the Court ruled that no member of the public or press will be allowed to copy, record or broadcast a facsimile of the complete questionnaires.

Addressing the second issue of the right of access to juror names, the Court stated that it "assumes that the presumption applies, just as it applies to other aspects of the jury selection process." Relying on the Seventh Circuit's decision in *U.S. v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010), the Court noted "[t]he right question is not *whether* names may be kept secret, or disclosure deferred, but *what justifies* such a decision."

Turning to the third issue of whether any compelling interests justify restricting the public's right of access, the Court stated that it was faced with two compelling interests: juror privacy and defendant's right to a fair trial.

In concluding that access to the names of jurors is to be deferred until the end of trial, the Court noted that "this is a very high profile case." It specifically referenced defendant's celebrity status and success as a baseball player for the Giants, the number (57) of news organizations applying for press credentials for the trial and congressional hearings held on the subject of steroid use in professional sports.

The Court also noted its concern "about the possibility that any member of the public, press or non-press, will interact with jurors during the trial in a way that might invade the privacy of the jurors and ultimately negatively impact the fairness of the proceedings." And the "risk that members of the public, press or non-press, could approach the jurors and attempt to influence the verdict in the case." While the Court stated that it would expect jurors to follow its admonitions not to engage with such persons, without citing to any evidence, it calculated that the risk of this occurring in this case "is higher and somewhat unique." The Court explained that the case not only is high profile but also involves various evidentiary rules precluding the admission of testimony and documents absent authenticating testimony from Anderson, who is expected to refuse to testify at trial. There is a risk, the Court stated, that "someone might approach a juror specifically to tell that juror about the inadmissible evidence…."

Turning to the last issue, what narrow means might the Court use to serve the stated interests, the Court rejected the broader restrictions requested by the parties, including sealing of the questionnaires until after a verdict is reached and redacting all identifying information from the questionnaires such as employer information and city of residence. The Court also noted that the access being provided to the questionnaires was broader than that upheld by the Second Circuit in the retrial of boxing promoter Don King, where the trial court restricted access to the questionnaires until the jury was actually empaneled.[4]

Public and press accommodations during trial

Though not part of the Press Organizations' access motion, the Court's order references several "unusual accommodations" being made to facilitate public viewing of the trial, including voir dire, that are also noteworthy. Five seats for the public and five seats for the press will be reserved during voir dire. The proceedings are to be broadcast live on a video and audio feed to the press room of the courthouse, which will include a monitor that has a camera shot of the witness stand, the bench and attorney's podium, from which the defendant will be visible, according to the Court. Another monitor will display any documents or photographs shown to the jury. If necessary, an overflow room also will be opened, with the same live video and audio feeds. Significantly, the Court will also permit quiet use of laptops in the courtroom or any overflow room, as well as use of personal devices for the transmission of email, "including the filing of reporter's stories." In this way, the Court notes, "[t]he press and the public will be able to 'attend, listen, and report on the proceedings.'"

FOOTNOTES

1 The Press Organizations seeking access were The Associated Press, ESPN, Hearst Corporation, The New York Times Company, KNTV Television, Inc., NBC Subsidiary (KNBC-TV), Inc., Los Angeles Times Communication, LLC, Sports Illustrated and MediaNews Group, and were represented by Davis Wright Tremaine LLP.

2 Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 507 (1984).

3 Citing Copley Press, Inc. v. Superior Court, 228 Cal. App. 3d 77, 80 (1991) (distinguishing Lesher Communications, Inc. v. Superior Court, 224 Cal. App. 3d 774 (1990)).

4 Citing U.S. v. King, 140 F.3d 76, (2d Cir. 1998).