

**UNITED STATES OF AMERICA
NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case Number: 10-CR-116-BDB
)	
v.)	
)	
ERNEST BRUCE BONHAM)	
)	
Defendant.)	

**DEFENDANT BONHAM’S RESPONSE TO GOVERNMENT’S MOTION TO
CONTACT JURORS**

Comes now the Defendant, Ernest Bruce Bonham, through his attorney, William D. Lunn, and responds to the Government’s motion contact jurors (#243).

The Court for the Northern District of Oklahoma has had a longstanding rule that prohibits contact by attorneys with jurors who have served in trials in the district. The rule is consistent with similar rules that appear in other districts throughout the country. Defense counsel tried his first criminal case in the Northern District more than 23 years ago and is aware of no time that the Court has ever permitted contact between jurors and attorneys. In 2006, defense counsel had a hung jury in the case of *United States v. Silva-Arzeta*, NDOK 06-CR-120-TCK. It would have been useful to contact jurors in the first trial about their deliberations relating to the case. However, because of Local Criminal Rule 1.2, no contact was allowed. Even after issues arose about possible impropriety committed by the evidence officer, Brandon McFadden, the district court still did not allow any contact with counsel and the jurors from the first trial.

In this case, the jurors reached what they believed was a final verdict. For some undisclosed reason, the Government now seeks to ask jurors who sat in the trial about

their deliberations. Even more puzzling, the Government seeks to have persons affiliated with the Internal Affairs Division of the Tulsa Police Department, whose department head, Luther Breshears, testified against Defendant Bonham, sit in on its discussions with the jurors. Breshears' testimony was inconsistent with prior statements made by Breshears himself during the police department's investigation of the Super 8 Motel and defense counsel challenged his testimony. His apparent bias against Defendant Bonham is a concern.

The Government, despite this longstanding rule, provides no justification whatsoever for any reason to disregard the rule in this case. Defense counsel believes there can be only two reasons for the Government's request. First, in an effort to avoid a possible second debacle in a subsequent police corruption trial scheduled for later this summer, the Government seeks to quiz the jurors about issues that caused them to render a verdict against the Government and thereby modify its trial strategy for the second trial. This is specifically the type of activity that the Court has found over the years to be unjustified as a basis for questioning jurors in cases where there have been hung juries. Second, the Government, and potentially Internal Affairs officers like Luther Breshears, seek somehow to undermine the jury's collective decision to absolve Defendants Bonham and DeBruin. Internal Affairs is evaluating whether Bonham and DeBruin should be allowed back to active duty on the police force. It is feared that counsel for Internal Affairs will seek to conduct a 'fishing expedition' to find a juror who might believe either officer had been involved in irregular, though not criminal, activity and this opinion could be used to justify keeping either officer off the police force.

Neither strategy can be justified. A Federal judge's power to prevent harassment of jurors and protect juror privacy does not cease when the case ends. *United States v. Brown*, 250 F.3d 907, 912 (5th Cir. 2001). The sanctity of jury deliberations is a basic tenet of our system of criminal justice. *United States v. Schwarz*, 253 F.3d 76, 97 (2nd Cir. 2002). The secrecy of deliberation is the cornerstone of the modern Anglo-American jury system. *United States v. Thomas*, 116 F.3d 606, 618 (2nd Cir. 1997). Post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting jury room deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts. *United States v. Ianniello*, 866 F.2d 540, 543 (2nd Cir. 1989). "Freedom of debate," as Justice Cardozo wrote, "might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark v. United States*, 289 U.S. 1, 13, 53 S. Ct. 465, 468-69, 77 L.Ed. 993 (1933). It is the historic duty of a trial judge to safeguard the secrecy of the deliberative process that lies at the heart of our system of justice. *United States v. Antar*, 38 F.3d 1348, 1364 (3rd Cir. 1994).

Fed. R. Evid. 606(b) bars jurors from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions." While "extraneous prejudicial information improperly brought to a juror's attention or whether any outside influence improperly brought to bear upon any juror" may be examined under the Rule 606, courts have consistently required that a party allege misconduct and "make an adequate showing of extrinsic influence to overcome the presumption of jury impartiality" and thereby justify any inquiry. *United States v. Barshov*, 733 F.2d 842, 856 (11th Cir. 1984). *See also Dall*

v. Coffin, 970 F.2d 964 (1st Cir. 1992)(jury rule required ‘extraordinary situation’); *United States v. Walsh*, 75 F.3d 1 (1st Cir. 1996)(no ‘specific allegation of misconduct’, so no inquiry allowed). Courts are “always reluctant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct and extraneous influences.” *United States v. Moon*, 718 F.2d 1210, 1234 (2nd Cir. 1983). The Tenth Circuit appears to be the most recent circuit dealing with this situation. “District courts have wide discretion to restrict contact with jurors to protect jurors from ‘fishing expeditions’ by losing attorneys,” the court held in *United States v. Wright*, 506 F.3d 1243, 1303 (10th Cir. 2007). “This court has held that a trial judge is well within his discretion in denying leave to inquire of jurors where there was no claim of external influence with the process.” *Id.*, quoting *United States v. Miller*, 806 F.2d 223, 225 (10th Cir. 1986).

The request of the Government appears to be nothing but such a ‘fishing expedition’. The Government provides no justification whatsoever for why any juror need be questioned, and certainly not any justification based on impropriety in the jury process. The Court will recall that it was the Government that initially sought to create an anonymous jury to protect jurors against possible harassment. It is ironic that it is now the Government that seeks to make the contact. One of the questions on the jury questionnaire near the end addressed the possibility of a potential juror’s concern with retaliation. Not infrequently, prospective jurors indicated concern about such retaliation. The concern should be every bit as great for a juror who has decided against the Government as one who has found a defendant guilty. The Government needs to accept the finality of the jury’s determination and move on to its next case.

The inclusion of the Internal Affairs department in the questioning request is even more ominous. In light of the Internal Affairs' continuing investigation and possible litigation relating to the two acquitted officers, its requested participation with the Government in questioning jurors is even more suspect. Even though jurors are precluded under Rule 606 from testifying in any hearing involving the officers, it is not beyond the realm of possibility that an Internal Affairs agent, much like an FBI agent preparing a 302, might attempt to prepare some memorandum from his or her discussion with a juror that could be used against one of the Defendants in a subsequent administrative hearing where the rules of evidence may not apply. Given this situation, it is difficult to imagine why any Internal Affairs agent should be allowed to question a juror at all. If the Government otherwise intends to assist Internal Affairs by providing it a version of what a juror might have said, this is even more reason for not allowing the Government to interview jurors as well. Such a practice would undoubtedly subject the jurors to unnecessary harassment and work to undermine the finality of the jury process.

The Court should summarily deny the Government's application. If the Court considers the application at all, the Defendant requests a hearing.

Respectfully submitted,

 /s/ William D. Lunn
William D. Lunn, OBA #5566
320 South Boston, Suite 1130
Tulsa, Oklahoma 74103
(918) 582-9977
wlunn@peoplepc.com
Attorney for Defendant
Ernest Bruce Bonham

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on June 14, 2011, served a copy foregoing Motion for Scheduling Dates electronically through the court Clerk's electronic filing system at the United States Attorney's Office, United States Courthouse, Tulsa, Oklahoma on the following:

Ms. Jane Duke
Mr. Patrick Harris
Ms. Patricia Harris
Special Assistant United States Attorneys
P. O. Box 1229
Little Rock, Arkansas 72203

Paul Warren Gotcher and Warren Gotcher
Gotcher & Belote
P. O. Box 160
McAlester, OK 74502

Shannon M. McMurray
2642 E. 21st, Suite 190
Tulsa, OK 74114

/s/ William D. Lunn
William D. Lunn