

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

No. C 07-00732 SI

Plaintiff,

**ORDER RE: ACCESS TO COMPLETED
JUROR QUESTIONNAIRES**

v.

BARRY LAMAR BONDS,

Defendant.

On March 8, 2011, the Court heard argument on the Non-Party Press Organizations’ Motion for Immediate and Concurrent Access to Completed Juror Questionnaires. Having considered the arguments of counsel and the papers submitted, the Court hereby rules as follows.

BACKGROUND

On February 19, 2009, the Court issued a Pretrial Order in this case. Doc. 136. In the Order, the Court explained that it would provide a questionnaire to be completed by a full panel of time-qualified jurors, which would in turn be distributed to the attorneys prior to oral voir dire in the case. The Court concluded by stating: “All completed questionnaires will be filed and retained under seal.” *Id.* at 2. The same day, the Court ruled on several motions in limine filed by defendant. Doc. 137. Among other things, the Court stated that certain evidence would not be admissible at trial if it were not authenticated by Greg Anderson, defendant’s former trainer who was and still is refusing to testify in this case.

On February 26, 2009, and in response to the Court’s Pretrial Order, The Associated Press, ESPN, Hearst Corporation, The New York Times Company, KNTV Television, Inc., NBC Subsidiary

1 (KNBC-TV), Inc., and Los Angeles Times Communications, LLC, filed an Ex Parte Application for
2 Order Shortening Time to Hear Motion to Vacate Order Sealing Completed Juror Questionnaires and
3 For Immediate Access to Completed Juror Questionnaires. Doc. 154. The next day, before either party
4 or the Court had responded to the Press Organizations' filing, the government filed an interlocutory
5 appeal of the Court's other February 19 Order. Doc. 155 (Notice of Appeal). The trial was postponed.

6 After the appeal was completed, trial was rescheduled for March 21, 2011. On February 10,
7 2011, the Press Organizations, joined now as well by Sports Illustrated and MediaNews Group, wrote
8 a letter to the Court. Press Letter Re: Docket 154 ("Press Letter"). The Press Organizations requested
9 "a hearing on the issue of their exclusion from the *voir dire* proceeding and sealing of completed juror
10 questionnaires." *Id.* at 1. At a February 18, 2011 status hearing, the Court asked the parties to brief the
11 Court with regard to the Press Organizations' motion. Doc. 252, TR 4:1-4:7. On March 1, after
12 receiving briefing from both parties, the Court scheduled a hearing for March 8, 2011 and provided the
13 parties and the Press Organizations one last opportunity to brief the Court by March 4. Doc. 257. The
14 parties provided supplemental briefing, although the Press Organizations did not.

15 16 LEGAL STANDARD

17 The Supreme Court has made clear that "[t]he process of juror selection is itself a matter of
18 importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise Co. v.*
19 *Superior Court*, 464 U.S. 501, 505 (1984) [*Press-Enterprise I*]. Historically, an open selection process
20 has given "assurance to those not attending trials that others were able to observe the proceedings and
21 enhanced public confidence." *Id.* at 507. There is a "presumption of openness" of the jury selection
22 process, just as there is a presumption of openness for a criminal trial generally. *See id.* at 510.

23 The closing of a criminal trial to the public, including the closing of the jury selection process,
24 is subject to strict scrutiny:

25 The circumstances under which the press and public can be barred from a criminal trial
26 are limited; the State's justification in denying access must be a weighty one. Where the
27 State attempts to deny the right of access in order to inhibit the disclosure of sensitive
information, it must be shown that the denial is necessitated by a compelling
governmental interest, and is narrowly tailored to serve that interest.

28 The presumption of openness may be overcome only by an overriding interest based on

1 findings that closure is essential to preserve higher values and is narrowly tailored to
2 serve that interest. The interest is to be articulated along with findings specific enough
that a reviewing court can determine whether the closure order was properly entered.

3 *Id.* at 509–10 (citations omitted).

4 5 DISCUSSION

6 The Court finds it appropriate to begin by discussing the extent to which the trial in general —
7 including oral voir dire — will be open to the public. The Court has agreed to reserve six seats for
8 defendant throughout the trial. Doc. 258. During the trial, the courtroom will be open to members of
9 the public, including members of the press. Additionally, although the Court expects that the courtroom
10 will be nearly filled with prospective jurors during voir dire, the Court will reserve five seats for the
11 public in general and an additional five seats for members of the press with special press passes. The
12 proceedings will be broadcast live on a video and audio feed to the press room on the first floor of the
13 courthouse.¹ If necessary, another overflow room will be opened, also with live video and audio feed.
14 In accordance with Federal Rule of Criminal Procedure 53, the audio and video feed from the courtroom
15 to overflow rooms will not be recorded, and no one will be permitted to record to the audio or video
16 feed. *See United States v. Hastings*, 695 F.2d 1278, 1279 (11th Cir. 1983) (upholding Rule 53 as
17 constitutional). Transcripts of the trial, including the oral portion of voir dire, will be available as they
18 are in any criminal trial, and in accordance with General Order No. 59 (Electronic Availability of
19 Transcripts of Court Proceedings). Additionally, the Court will permit quiet use of laptops in the
20 courtroom and any overflow courtroom, as well as the use of BlackBerry or other similar personal
21 devices for electronic transmission of email, including the filing of reporter’s stories. Thus, the criminal
22 trial, including oral voir dire, will be conducted in public to the extent that all criminal trials are
23 conducted in public in the Northern District of California, with certain unusual accommodations made
24 for the large expected attendance. The press and the public will be able to “attend, listen, and report on

25 _____
26 ¹ The Court intends that the video feed will display the following throughout the
27 proceedings. One monitor will show a simulcast from one camera focused on the witness stand, one
28 camera focused on the bench, and one camera focused on the attorney’s podium. It is expected that
defendant will be visible on the attorney’s podium camera. A second monitor will display any document
or photograph that is being published to the jury. There will also be an audio feed from the microphones
in the courtroom.

1 the proceedings.” *Hastings*, 695 F.2d at 1280.

2 The Press Organizations’ motion, then, raises four narrow questions. First, to what extent does
3 the public right of access to the jury selection process extend to the content of written jury
4 questionnaires filled out before oral voir dire begins? Second, to what extent does the public right of
5 access to the jury selection process extend to the names or other identifiers of prospective and
6 empaneled jurors? Third, are there any compelling governmental interests in restricting either of these
7 rights of access? And finally, what narrow means might the Court use to serve those interests?

8 Neither the Supreme Court nor the Ninth Circuit has examined whether, and to what extent, jury
9 questionnaires are part of the “jury selection process.”² The California state courts have considered the
10 question in more detail, concluding that the public right of access to the jury selection process extends
11 only to the jury questionnaires filled out by venirepersons who actually are “called to the jury box for
12 oral voir dire.” *See Copley Press, Inc. v. Superior Court*, 228 Cal. App. 3d 77, 80 (1991) (distinguishing
13 *Leshar Communications, Inc. v. Superior Court*, 224 Cal. App. 3d 774 (1990)).

14 The California courts have based their conclusion on federal constitutional law and the following
15 persuasive rationale:

16 [V]enirepersons who are never called to the jury box do not play any part in the voir dire
17 or the trial. They fill out the questionnaire only as a prelude to their participation in voir
18 dire. The questionnaire serves no function in the selection of the jury unless the person
19 filling it out is actually called to be orally questioned.

20 *Leshar*, 224 Cal. App. 3d at 779. Based on this reasoning, the California courts “see no legitimate
21 public interest in disclosure of these questionnaires.” *Id.*

22 The Court agrees. Written jury questionnaires are meant to help facilitate the jury selection
23 process by assisting the attorneys and the Court during oral voir dire and the actual selection of the jury.
24 Written jury questionnaires are only part of the jury selection process to the extent that they are used
25 to select jurors. In this case, it is the Court’s intention to begin oral voir dire on the morning of March
26 21 with the questioning of 50 individuals. At that time, the written questionnaires of those individuals

26 ² In *United States v. King*, 140 F.3d 76 (2d Cir. 1998), the Second Circuit appears to have
27 assumed, though it never stated so explicitly, that jury questionnaires are part of the jury selection
28 process. In reviewing and ultimately permitting a variety of restrictions on public access to voir dire,
including delayed access to completed juror questionnaires, the Court did not address the delayed access
question specifically. *See id.* at 80, 84.

1 will become part of the jury selection process. If it thereafter becomes necessary to question more
2 individuals, more written questionnaires will become part of the jury selection process. Although other
3 individuals will have filled out questionnaires in preparation for possible participation in the voir dire
4 process, they will not actually have participated in the criminal trial, and their questionnaires will have
5 served “no function in the selection of the jury.” *Leshner*, 224 Cal. App. 3d at 779.

6 The question then becomes what it means for these jury questionnaires to be open to the public.
7 The questionnaires are a proxy for an extended oral voir dire, and should be treated as such. Just as it
8 is important for the press and the public to be able to “attend, listen, and report on” voir dire generally,
9 *Hastings*, 695 F.2d at 1280, it is important for the press and public to be able to have access to, see, and
10 report on the jury questionnaires that are actually part of the jury selection process. With the exception
11 of the names of jurors, which the Court discusses separately below, the Court finds it appropriate to do
12 the following with regard to the questionnaire. First, the most recent draft of the blank questionnaires
13 is currently posted to the public docket in this case, and a finished copy will be as soon as the content
14 is finalized. Second, the Court will ask prospective jurors general demographic questions aloud during
15 oral voir dire, as per the Court’s normal voir dire process. Third, to the extent that, during oral voir dire,
16 the Court or the attorneys refer to specific answers written on questionnaires, the Court will display
17 those written answers on a video monitor in the courtroom, the media room, and any additional overflow
18 viewing area. In this way, members of the public and press who are watching oral voir dire will be able
19 to follow the proceedings as easily as they would had the Court not utilized written questionnaires.

20 Finally, copies of the jury questionnaires filled out by individuals who actually are “called to
21 the jury box for oral voir dire,” *Copley Press*, 228 Cal. App. 3d at 80, will be made available for public
22 and press review during oral voir dire, and they will be part of the record open to the public after the
23 conclusion of the trial. Ten binders of numbered, completed questionnaires for the first 50 prospective
24 jurors will be made available in the media room on the first floor of the courthouse at approximately
25 8:30 am on Monday, March 21, 2011. Eight of the binders will be reserved for any press organization
26 with court issued media credentials for the case, and two of the binders will be available to all members
27 of the public. Members of the public and members of the press may view, take notes from, and report
28 on the written questionnaires; however, as with voir dire in general, they may not photograph, record,

1 or broadcast a facsimile of the completed questionnaires. *See* Fed. R. Crim. Pro. 53. Nor will they be
2 permitted to remove any questionnaire or any part of any questionnaire from the binders. If it becomes
3 necessary for additional prospective jurors to be “called to the jury box,” the Court will make their
4 completed questionnaires available at that time, in the same manner.

5 In this way, the public and the media will have open and meaningful access to the completed
6 questionnaires of prospective jurors, just as they would have had access to the questions and answers
7 if the Court had conducted an extended oral voir dire instead of allowing the attorneys to use written
8 questionnaires to facilitate jury selection.

9 The next question for the Court is to what extent the public right of access to the jury selection
10 process extends to the names or other identifiers of prospective and empaneled jurors. Neither the
11 Supreme Court nor the Ninth Circuit has examined whether, and to what extent, the presumption of
12 public access applies to the names of jurors. The Court assumes that the presumption applies, just as
13 it applies to other aspects of the jury selection process. As the Seventh Circuit has recently explained,
14 “The right question is not *whether* names may be kept secret, or disclosure deferred, but *what justifies*
15 such a decision.” *United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010) (emphasis in original).
16 “[A] judge must find some unusual risk to justify keeping jurors’ names confidential; it is not enough
17 to point to possibilities that are present in every criminal prosecution.” *Id.* at 565.

18 This approach is in accord not only with the general presumption of openness in
19 *Press-Enterprise I*, but also with the rules of the Northern District of California. In the Northern District
20 of California, General Order 6 provides that

21 The names drawn from the qualified jury wheel shall be disclosed to the parties and to
22 the public upon request of any party or member of the public; provided, however, that
23 the chief judge or any judge before whom a case is pending in which any of the
prospective jurors concerned are expected to serve, may *by special order* require that the
clerk keep these names confidential *where the interest of justice so requires*.

24 N.D. Cal. Gen’l Order 6, at XIII (emphasis added); *see also* 28 U.S.C. § 1863 (requiring each district
25 court to “devise and place into operation a written plan for random selection of . . . petit jurors,” which
26 includes fixing “the time when the names drawn from the qualified jury wheel shall be disclosed to
27 parties and to the public”).

28 This does not end the Court’s inquiry. Here, the Court is faced with two compelling

1 governmental interests that militate in favor of non-disclosure of the names of empaneled jurors: juror
2 privacy and defendant's right to a fair trial. Unlike in *United States v. Presley*, 130 S. Ct. 721 (2010),
3 defendant here has requested that public access to the voir dire be limited to a certain extent.

4 Specifically, defendant requests the following:

5 that the Court defer disclosure of the names of jurors and alternates until after the jury has
6 been discharged. Defendant also requests that, at a minimum, all identifying information
7 for jurors and alternates (e.g., names, addresses, place of birth, name of employer, names
8 of relatives, etc.) be redacted from any juror questionnaires should any portion thereof be
9 made public prior to the jury's discharge, with such redaction to remain in effect until the
10 time of the discharge.

11 Def. Suppl. Statement Re: Confidentiality of Juror Questionnaires, Doc 272. As defendant clarified
12 during the hearing on this matter, this would amount to deferred disclosure and thus would differ from
13 an "anonymous jury" case where the names of the jurors are never disclosed.

14 The Court notes first that this is a very high profile case. Defendant is a local celebrity who
15 played for the San Francisco Giants from 1993 until 2007, during which time he was very successful
16 on the field. Fifty-seven news organizations, domestic and international, have requested press
17 credentials for the trial.³ The question of steroid use in professional sports is of such interest that
18 Congress has held multiple hearings on the subject, and former Senate Majority Leader George Mitchell
19 released a report on steroids and Major League Baseball. See George J. Mitchell, *Report to the*
20 *Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other*
21 *Performance Enhancing Substances by Players in Major League Baseball* (Dec. 13, 2007). Defendants'
22 name is in the subtitle of a book entitled *Game of Shadows: Barry Bonds, BALCO, and the Steroids*
23 *Scandal that Rocked Professional Sports*, written by two local journalists who have written extensively
24 about the BALCO case and these proceedings.

25 The parties and the Court are concerned about the possibility that any members of the public,
26 press or non-press, will interact with jurors during the trial in ways that might invade the privacy of the
27 jurors and ultimately negatively impact the fairness of the proceedings. As with any high profile case,
28 there is a risk that jurors will themselves receive attention during the trial, which might distract them

³ These are all requests that were either made or renewed after the trial was rescheduled for March 2011.

1 from the case. The jurors could be approached or even harassed or offered money to provide
2 information about themselves or the case. The jurors could see their names or photographs in print.
3 Even if they are completely successful in sequestering themselves from media coverage, people they
4 know may inform them about it. The jurors will be instructed that they may not read or watch press
5 coverage of the case, which will already be a difficult task. Disclosing their names before the trial is
6 concluded will make that task more difficult still.

7 Additionally, there is a risk that members of the public, press or non-press, could approach the
8 jurors and attempt to influence the verdict in the case. In a more typical case, that might involve
9 approaching a juror to express one's thoughts about a criminal defendant's guilt or innocence. This is
10 undesirable, but the Court would expect that a juror would and could follow the Court's admonitions,
11 refuse to engage with that person, and put the person's comments aside when deliberating. However,
12 the specific risk in this case is higher and somewhat unique. Not only does the case have a high news
13 profile, but the Court has excluded various documents and areas of testimony, absent authenticating
14 testimony by Greg Anderson, who is expected to refuse to testify at trial. *See* Order Re: Defendant's
15 Motions in Limine (Doc. 137). This ruling in particular has been subject to a large amount of publicity.
16 The risk here is that someone might approach a juror specifically to tell that juror about the inadmissible
17 evidence, either in person or by, for example, posting a short message on the juror's Facebook page.
18 There is a risk that information about inadmissible evidence could be communicated before the juror
19 would be able to disengage. It would be more difficult for a juror to ignore specific information about
20 excluded evidence than it is to ignore general opinions.

21 Defendant has a compelling interest in being tried by an impartial jury based on the evidence
22 and testimony presented at trial. "Actions which have a significant potential of intimidating jurors or
23 disturbing their tranquility to the point that they lose the ability to rationally consider the evidence or
24 follow instructions are . . . to be discouraged." *United States v. Blagojevich*, --- F. Supp. 2d ----, 2010
25 WL 2934476 (N.D. Ill. July 26, 2010). Additionally, "jurors summoned from the community to serve
26 as participants in our democratic system of justice are entitled to safety, privacy and protection against
27 harassment." *In re Globe Newspaper*, 920 F.2d 88, 95 (1st Cir. 1990); *see also id.* ("As the Supreme
28 Court has recognized, protecting jurors' privacy interests also implicates the integrity and reputation of

1 the judicial process” (citing *Press-Enterprise I*, 464 U.S. at 515 (Blackmun, J., concurring))). The
2 potential transformation of “jurors’ personal lives into public news . . . could unnecessarily interfere
3 with the jurors’ ability or willingness to perform their sworn duties.” *United States v. Black*, 483 F.
4 Supp. 2d 618, 630 (N.D. Ill. 2007).

5 The Court finds it necessary and appropriate to withhold from the public the names of jurors
6 during the trial.⁴ This restriction is intended to lessen the risk that jurors will be approached during the
7 trial, either for the purpose of obtaining information from the jurors or for the purpose of influencing
8 the verdict in the case. By releasing the names of the jurors only after they have been dismissed, any
9 risk to the integrity of the process is considerably minimized.

10 The Court has considered more burdensome alternatives: sequestering the jury; having an
11 anonymous jury; closing voir dire access in general; and restricting access to the jury questionnaires.
12 The Court does not find these to be narrowly tailored to the facts of this case. The Court also notes that
13 the single restriction of deferred disclosure is narrower than the restrictions upheld in *United States v.*
14 *King*, 140 F.3d 76 (2d Cir. 1998), and significantly narrower than those overruled in *Presley* and
15 *Stephens Media LLC v. Eighth Judicial District of Nevada*, 221 P.3d 1240 (Nev. 2009).

16 Defendant has argued for deferred disclosure not only of jurors’ names, but also of “addresses,
17 place[s] of birth, name[s] of employer, [and] names of relatives.” The risk of improper contact with
18 jurors is considerably lessened by the simple restriction on the publication of jurors’ names, and the
19 Court does not find it necessary to defer disclosure of anything other than the actual names of the jurors.
20 (The Court notes that the home address of jurors is never disclosed. Rather, the jurors are asked for the
21 name of the city or community in which they live.)

22 The Court does find it necessary to edit one question on the draft questionnaire. As written,
23 question 14 requests specific names of any “relatives or close personal friends who are judges or
24 attorneys or court personnel,” as well as the prospective juror’s relationship to the person or persons.
25 See Proposed Juror Questionnaire (Doc. 125). The Court will ask instead for the prospective juror to

26
27 ⁴ No one has suggested deferring release of the names of the jurors to the parties
28 themselves. This is a remedy reserved for situations where there is some concern about that one party
or another might attempt wrongfully to influence the jury verdict. This is not such a case.

1 “identify the type of judge or attorney or court personnel, and the their relationship to you.”

2 To the extent the parties remain concerned about any questions on the questionnaire, they may
3 propose further edits before submitting a final copy to the Court.

4 The Court also notes that deferring disclosure of the identity of the jurors will necessitate that
5 the voir dire process be conducted by number. Thus the questionnaires shown to the public during voir
6 dire will be numbered and will not include the name of the individuals who filled them out.

7 The Court’s 2009 Order sealing the jury questionnaire is rescinded.

8

9 **IT IS SO ORDERED.**

10

11 Dated: March 14, 2011



12 SUSAN ILLSTON
13 United States District Judge

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28