

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
)
) Criminal No. 18-292
)
v.)
)
ROBERT BOWERS)

**MOTION FOR RECONSIDERATION OF COURT’S ORDER ADOPTING
GOVERNMENT’S PROPOSED PROCEDURES FOR EXERCISING
PEREMPTORY CHALLENGES**

Robert Bowers, through counsel, files this motion seeking reconsideration of the Court’s Order adopting the government’s proposed procedure for arguing step three of any *Batson* challenge. ECF 1255. In its supplemental notice, filed this afternoon, the government mischaracterizes the *Batson* claim made in *United States v. Tsarnaev*, which the government purports support its position that no additional time is necessary to prepare and raise a step three *Batson* reply, and it misstates the facts regarding any inconvenience or inefficiency should the Court grant the defense request. ECF 1254. Because the defense did not have an opportunity to respond before the Court issued its Order this afternoon, it files this request for reconsideration.

The Third Circuit has recognized that “motions for reconsideration may be filed in criminal cases.” *United States v. Fiorelli*, 337 F.3d 282, 286 (3d Cir. 2003). A court “may grant a motion for reconsideration if the moving party shows: (1) an intervening change in the controlling law; (2) the availability of new evidence which was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice.” *United States v. Kubini*, 304 F.R.D. 208, 211 (W.D. Pa.

2015); see *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (noting “that there are circumstances when a motion to reconsider may perform a valuable function” and that “the motion is not uncommon in federal practice”). Here, a motion for reconsideration is appropriate to correct a clear error of fact and to prevent a manifest injustice. That Mr. Bowers will not have sufficient time to perform a comparative juror analysis, which the Third Circuit and the U.S. Supreme Court recognize as part and parcel of a step three reply to a purported race-neutral explanation for a peremptory strike, is a manifest injustice and raises the specter that Mr. Bowers will not be in a position to protect his Fifth and Sixth Amendment rights.

In its supplemental pleading, the government mischaracterizes the *Batson* claim in *United States v. Tsarnaev*, arguing that that the circumstances in *Tsarnaev* should dictate the Court’s response to the defense request in this case. In *Tsarnaev*, the government made a frivolous reverse *Batson* claim, and the defense responded with a race-neutral reason for striking the jurors, which even the government acknowledged as adequate. It baldly stated that it raised the *Batson* claim because the defense had challenged the racial diversity of the venire. Any defense strike on a minority juror, therefore, according to the government, somehow undermined the defense challenge to the venire’s racial diversity. The government’s *Batson* claim in *Tsarnaev* had no logical connection to the defense’s exercise of peremptory strikes, and therefore the government did not need time to perform a comparative juror analysis and prepare a proper step three reply. In *Tsarnaev*, it offered the following as its step three reply:

The government recognizes each of those as a plausible non-racially-based basis for striking; however, in the context of the litigation on the juror pool, it's clear that the defense has advanced a theory that the -- both the jury pool, the venire, as well as the -- those that were to be conducted by individual voir dire have not been racially diverse. And to the extent that the three visible minorities are on the panel have now been struck by the defense, I just wanted the record to reflect that despite the fact that there is a plausible non-racially based reason, there is still a strong inference that race played a role in that decision and we object to it.

United States v. Tsarnaev, No. 1:13-CR-10200 (D. Mass. Sept. 29, 2015) (attached as Exhibit A), at 26-8:5–16. Recognizing that the government's response had no relation to the *Batson* claim it made, the defense stated, "Well, I don't know that that requires us to respond," and the district court agreed, stating, "I don't think it does." *Id.* at 26-8:17–19. The Court then accepted the defense proffer of race-neutral reasons for the strikes. That the government in *Tsarnaev* raised a frivolous *Batson* claim and did not need time to perform a comparative juror analysis to prepare a step three reply has no bearing on the defense's well-supported request for a modest amount of time in this case.

The government also complains about inconvenience and inefficiency. As to inconvenience to jurors, under the joint proposal, the 12 jurors and 6 alternates selected on Thursday would be notified that they have been preliminarily selected as jurors for this case, instructed to return to the courtroom for the start of trial, and dismissed for the day. ECF 1254 at ¶ 10. The remaining prospective jurors, according to the joint proposal, would be called into the courtroom, instructed that they are still under consideration, and dismissed for the day. ECF 1254 at ¶ 10. All of the prospective jurors, whether notified with their final status on Thursday or Friday, will have time to plan ahead. Should the Court grant a *Batson* challenge, it has authority to fashion a *Batson* remedy suitable to the circumstances of the

case, which includes seating the stricken juror and denying the party subject to the *Batson* challenge any additional peremptory challenges. *See United States v. Walker*, 490 F.3d 1282, 1294–95 (11th Cir. 2007). There would be no need to bring jurors back to the courthouse. Contrary to the government’s claim, no jurors would remain in limbo about their status after Friday, May 26, and there is no inefficiency in permitting the defense until the next morning to perform comparative juror analysis and prepare a step three reply.

Without permitting the defense sufficient time to review the voir dire transcript and compare the purported race- or gender-neutral reason for striking a particular juror with similarly situated jurors questioned over the course of 17 court days, this Court cannot ensure protection of Mr. Bowers’ rights under the Fifth and Sixth Amendments, as stated in *Batson v. Kentucky*, 476 U.S. 79 (1986).

Respectfully submitted,

/s/ Judy Clarke

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/s/ Ashwin Cattamanchi

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Assistant Federal Public Defender

1 MR. MELLIN: Thank you, your Honor.

2 (Long pause.)

3 THE COURT: May I see counsel briefly at sidebar,
4 please.

5 (Discussion at sidebar and out of the hearing of the
6 jury:)

7 THE COURT: Is this the official? All right. I
8 double-checked it against mine and I think it's fine. This is
9 what I understand we have. I'd like you to see if your records
00:32 10 reflect that.

11 MS. CLARKE: Yeah.

12 (Pause.)

13 MR. BRUCK: Yes.

14 THE COURT: All right?

15 MR. BRUCK: Yes.

16 THE COURT: All right?

17 MR. WEINREB: Yes.

18 THE COURT: You can check it in a minute. I just
19 wanted to -- you've got the list?

00:33 20 MR. CHAKRAVARTY: We do, yes. The government does
21 make a reverse *Batson* challenge with regards to the defense's
22 apparent systematic exclusion of Latino jurors. There were
23 two, I think, self-identified, I think a third whose name
24 convention suggests -- and appearance suggests she's also
25 Latino, and that results in effectively eliminating all visible

EXHIBIT A AT 2

1 minorities. The government thinks it is appropriate to
2 disallow the strikes.

3 THE COURT: Do you have the numbers?

4 MR. CHAKRAVARTY: Yes, your Honor. 308 --

5 THE COURT: All right.

6 MR. CHAKRAVARTY: -- 350 and 390.

7 MR. BRUCK: Just those two?

8 MR. CHAKRAVARTY: Three.

9 MR. BRUCK: What was the first one?

00:34 10 MR. CHAKRAVARTY: 308.

11 THE COURT: Do you want to address that?

12 MS. CLARKE: If we may just have a moment?

13 (Counsel confer off the record.)

14 MR. BRUCK: Our position is there has been no prima
15 facie showing of intentional ethnic or racial discrimination by
16 the government so the objection should be denied.

17 THE COURT: Why don't you make me a proffer as to each
18 of them.

19 MS. CLARKE: I didn't hear the question.

00:37 20 MR. BRUCK: The Court would like a proffer as to each
21 juror.

22 MS. CLARKE: We could do that with our notes.

23 MR. BRUCK: We would need to draw back. I don't
24 remember a lot of it, but...

25 THE COURT: All right.

EXHIBIT A AT 3

1 (Pause.)

2 MR. BRUCK: Your Honor, we would like a short recess
3 to make sure that we have -- I mean, I could do this off the
4 cuff and it probably would be satisfactory, but we want to be
5 sure we put every permissible basis and actual reasons for
6 these strikes on the record, which means going back to our
7 files and --

8 THE COURT: Which is where?

9 MR. BRUCK: Well, we have everything here on it.

00:38 10 THE COURT: Right.

11 MR. BRUCK: The record of the voir dire, the
12 questionnaires, our notes.

13 THE COURT: Well, I'd rather not break up the session
14 here.

15 MR. BRUCK: Well, I can --

16 THE COURT: I'll give you the time here while we --

17 MR. BRUCK: Right. I mean, I can make a proffer of
18 some of the reasons they are not going to be --

19 MS. CLARKE: Let's just look at our stuff and then you
00:38 20 can come up?

21 MR. BRUCK: Yeah, let's do that.

22 (Pause.)

23 MR. BRUCK: So we'll take these in order. Juror 308
24 was a dispatcher at Northeastern University and was actively
25 involved in police work on the night of April 18th to 19th. In

EXHIBIT A AT 4

1 addition -- that was certainly enough for us not to think she
2 should be on the jury. In addition to that, she clearly had
3 ambition to be a law enforcement officer, and that was the
4 direction of her career trajectory. And we felt that given the
5 fact that this was the -- the case involved the murder of a
6 police officer, she would -- even though she said otherwise on
7 voir dire, that it was likely that she was going to feel
8 pressured to go with the perceived interests or desires of law
9 enforcement as a juror in this case and not be the person that
00:42 10 spared the Boston Marathon bomber from receiving the death
11 penalty.

12 As to Number 350, he had extremely strong pro death
13 penalty views. He was the juror who felt based on his
14 experiences in Puerto Rico that the death penalty sometimes was
15 necessary to, quote, send a message. And he, more than any
16 other juror in this entire process, talked about the value of
17 using the death penalty for deterrence, which is something that
18 goes against the whole idea of considering mitigation. So we
19 thought he was an exceptionally dangerous juror from the point
00:42 20 of view of imposing the death penalty on our client. We note
21 that we made a motion to strike Juror 350 that the Court
22 overruled on the grounds of his pro death penalty views.

23 Juror 390 was a 10 on her form. We also moved to
24 disqualify Juror 390 on the basis of her pro death penalty
25 views and rated her as an extremely adverse juror for her

EXHIBIT A AT 5

1 punishment views.

2 For those three reasons, we exercised our peremptories
3 to exclude them using exactly the same criteria that we did for
4 all the other jurors.

5 MR. CHAKRAVARTY: The government recognizes each of
6 those as a plausible non-racially-based basis for striking;
7 however, in the context of the litigation on the juror pool,
8 it's clear that the defense has advanced a theory that
9 the -- both the jury pool, the venire, as well as the -- those
00:44 10 that were to be conducted by individual voir dire have not been
11 racially diverse. And to the extent that the three visible
12 minorities are on the panel have now been struck by the
13 defense, I just wanted the record to reflect that despite the
14 fact that there is a plausible non-racially based reason, there
15 is still a strong inference that race played a role in that
16 decision and we object to it.

17 MR. BRUCK: Well, I don't know that that requires us
18 to respond.

19 THE COURT: I don't think it does.

00:44 20 MR. BRUCK: Thank you.

21 THE COURT: The record is there for whatever it means
22 for the statistical argument, and it's certainly clear that to
23 the extent there are no minorities, Hispanic minorities in this
24 petit jury, it's clear that it was at the choice -- not for
25 that reason, but at the choice of peremptories that the defense

EXHIBIT A AT 6

1 made to shape the jury that way, for whatever that means. I
2 accept the proffer as to the non-ethnic or racial-based reasons
3 for the strikes.

4 Okay. So we will begin as we planned with 530.

5 MR. CHAKRAVARTY: And go one at a time?

6 MR. BRUCK: I think it is two and one.

7 THE COURT: I was going to do two and one, but I could
8 do one, one, one.

9 MR. CHAKRAVARTY: We prefer to do one, one, one.

00:45 10 THE COURT: All right. One, one, one is fine.

11 MR. CHAKRAVARTY: Thank you.

12 (In open court:)

13 (Long pause.)

14 THE COURT: Let me again see counsel, please, at the
15 side.

16 (Discussion at sidebar and out of the hearing of the
17 jury:)

18 THE COURT: Everybody agree?

19 MS. CLARKE: Yes.

00:54 20 THE COURT: I'm going to now call each of these in
21 sequence, all 18, in the box. After that, we'll have a few
22 remarks, excuse the others, and take them in the back, okay?

23 MR. CHAKRAVARTY: Thank you.

24 MS. CLARKE: Thank you, your Honor.

25 (In open court:)