UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 08 CR 1010
v.	)	
	)	Chief Judge James F. Holderman
ROD BLAGOJEVICH and JOHN HARRIS	)	

Government's Response to Defendant Blagojevich's Motion for Various Forms of Pre-Indictment Relief

The UNITED STATES OF AMERICA, by its attorney, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, respectfully submits this Response to Defendant Blagojevich's Motion for Various Forms of Pre-Indictment Relief. In further support of this response, the government states as follows:

Statement

The criminal Complaint charges Blagojevich with two offenses: first, that he conspired to defraud the citizens of Illinois of their right to his honest services by obtaining and attempting to obtain personal benefits for Blagojevich and others in exchange for appointments to state boards and commissions, state employment, state contracts, access to state funds, and to the then-vacant Senate seat in Illinois. R. 1 ¶ 13(a), (c), ¶¶ 16-68, ¶¶ 86-116. The second count charges that the defendant corruptly solicited and demanded the firing of Chicago Tribune editorial board members who had been critical of Blagojevich, in exchange for the awarding of millions of dollars in financial assistance from the State of Illinois. *Id.* ¶ 13(b), ¶¶ 69-85.

In support of the Complaint, the government submitted an affidavit sworn by FBI Special Agent Daniel W. Cain. The Complaint Affidavit summarized facts to establish probable cause for the charged offenses, but did not contain all the facts known to the FBI concerning the investigation. R. 1 ¶ 12. Throughout the Complaint Affidavit, the government quoted and summarized court-authorized intercepted communications of the defendants and others (who were identified only by pseudonym). The order authorizing the interception of the communications of the defendants over various phones and at certain locations was issued under Title III, 18 U.S.C. § 2501 *et seq.*, in October and November 2008.

Contemporaneous with the issuance of the arrest warrants, the magistrate judge entered, upon the government's request, an order addressing sealing. Under the order, the arrest warrants, Complaint, and Complaint Affidavit were to "be sealed until the time of arrest of both defendants." R. 4. Thus, upon the defendants' arrests, the filings were unsealed by the terms of the order, and eventually the originals were placed in the public case file.

Summary of Argument

Defendant Blagojevich contends that the government's use of intercepted communications in the Complaint Affidavit and comments made by the United States Attorney and the Special Agent-in-Charge of the FBI's Chicago office at a press conference held on the day of the defendant's arrest were improper and, on this ground, argues that this Court should halt the ongoing investigation of his conduct, disqualify the sitting grand jury from hearing any further evidence, and disqualify the U.S.

Attorney for the Northern District of Illinois and every assistant assigned to this district from conducting any further investigation or prosecution of the defendant.[1] Def. Mot. at 1, 16. The Court should deny the motion, which seeks unprecedented relief that would grant Blagojevich a power to frustrate the investigation well beyond that which has ever been granted by a court to any other investigative target on publicity grounds. Contrary to the defendant's contentions, the government has not engaged in misconduct in this case, much less misconduct so grave as to warrant the extraordinary interference with the grand jury process that the defendant seeks.

As an initial matter, it was entirely proper to include references to court-authorized wiretap evidence in the Complaint Affidavit. The governing statutory text and controlling Seventh Circuit precedent *permit*, rather than prohibit, the use of intercepted communications by law enforcement officers in the proper performance of their official duties, and it is a core law enforcement duty to submit evidence in support of an arrest warrant. In this case, the Complaint Affidavit relied in substantial part on court-authorized intercepted communications to support the sweeping fraud and bribery-solicitation charges against the defendants. Not surprisingly, the Complaint Affidavit summarized, quoted, and paraphrased some of the intercepted

[1]Defendant also argues that this Court should not permit, as the government has asked in a separate motion, the disclosure of four wiretap recordings to the Illinois House of Representatives' Special Investigative Committee. Def. Mot. at 14-15. Because there is a separate briefing schedule on the propriety of the disclosure, the government does not discuss that issue here, and instead will address the issue in the response to the defendant's anticipated opening brief objecting to disclosure.

communications in order to establish probable cause for the defendant's arrest. This was legally proper.

It was likewise proper to unseal the Complaint and make its allegations public. As a matter of law, the government is permitted to publicly disclose criminal charges, including charges containing evidence obtained from wiretapping. Moreover, given the defendant's gubernatorial power and responsibilities, the bringing of corruption charges against him necessarily had a widespread impact on the public. The bringing of charges against a sitting state governor is a serious step, more so than in other cases, and the public was entitled to know the specific grounds upon which it was determined that such a step was warranted. Once the Complaint became a part of the public record, it was entirely proper for the United States Attorney to publicly announce the allegations, which included the intercepted communications.

Although the U.S. Attorney did make comments at the press conference which characterized, rather than stated, the allegations of the complaint, in context, none of these comments came close to posing a "serious and imminent threat to the fairness of an adjudicative proceeding." Given the defendant's official position and the serious nature of the allegations, there was little likelihood that the comments would materially affect the public's perception or increase the publicity beyond that generated by the charges, allegations, and wiretap evidence themselves. It is apparent that the U.S. Attorney's descriptions of the wiretap conversations and strong statements concerning the seriousness of the allegations served the legitimate purposes of informing the public, communicating a strong message of deterrence, and encouraging

the public to do their part to end corruption by resisting similar conduct and coming forward with information. All of these factors, together with the fact that the defendant has yet to be indicted and thus any trial is at best many months away,[2] render negligible any potential impact of the U.S. Attorney's comments on the fairness of a future trial. And, contrary to the defendant's suggestion otherwise, grand jury proceedings are not adjudicative and in fact do not equate with trials for purposes of trial publicity rules. Fair treatment of investigative targets in the grand jury – which is an obligation of the government in every case – is ensured by giving and repeating the standard admonishment given to grand jurors upon their impanelment, namely, that the grand jurors must not consider anything they have heard outside the grand jury room. Accordingly, the defendant's motion should be denied.

Argument

I. The United States Followed the Governing Statute and Case Law in Using Wiretap Evidence in the Complaint Affidavit and Publicly Disclosing the Publicly-Filed Affidavit.

The defendant's pre-indictment publicity argument founders on its faulty premise: that the government could not use the contents of the court-authorized intercepted communications in the Complaint Affidavit submitted to establish probable cause for the Complaint. To the contrary, the statutory text and controlling Seventh Circuit precedent (plus the decisions of other federal courts) permit precisely what the

[2]The grand jury's investigation into the defendant's conduct is ongoing. On January 5, 2009, with the defendants' consent, this Court extended to April 7, 2009 the time in which the government must file an indictment in this case.

government did here: submit an affidavit with the most reliable evidence imaginable – the defendant's own recorded words – and then announce the publicly-filed charges. In his motion, the defendant does not attempt to analyze the governing statute's text or relevant case law.

Section 2517(2) governs a law enforcement officer's "use" of wiretap evidence:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire [or] oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(2). By its terms, § 2517(2) grants law enforcement officers the discretion ("may") to "use" the contents of intercepted communications as "appropriate to the proper performance of . . .official duties."[3] Not surprisingly, the defendant offers no argument based on the text, nor cases or any other authority, to believe that including the contents of wiretapped recordings in a complaint affidavit is somehow outside the scope of the proper performance of official duties. Indeed, submitting evidence to a federal judge in support of charges, and bringing charges, is at the core of law enforcement duties.

This common-sense reading of the text of Section 2517(2) was confirmed by the Seventh Circuit in *Apampa v. Layng*, 157 F.3d 1103, 1106 (7th Cir. 1998). In *Apampa*,

---

[3]Section 2510(7) defines "investigative or law enforcement officer" as "any officer of the United States . . . who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." In his motion, the defendant does not dispute that this definition covers the FBI agent and the AUSAs.

a heroin distributor, who had been charged in a federal criminal case, filed a civil lawsuit against two federal prosecutors and a DEA agent for, among other things, allegedly using wiretapped conversations at a press conference to defame him. *Id.* at 1105. In rejecting the claim, the Seventh Circuit held:

> we believe that Title III does not forbid the government to make public disclosure of criminal charges even if the charges include information obtained from wiretapping, . . . unless the criminal proceedings are themselves nonpublic, . . . and here, as is normally the case, they were public.

Id. at 1106 (citations omitted). Not only did the Court state that it could find nothing in Title III that prohibited the government from summarizing the wiretap evidence in an indictment, but the Court also quoted and cited Section 2517(2) as the basis for including the wiretap evidence in publicly-filed charges. *Id.*

Apampa is thus relevant in two ways in refuting defendant Blagojevich's motion in this case. First, relying on Section 2517(2), the Seventh Circuit approved the use of wiretap evidence in a charging document as part of the proper performance of a law enforcement official's duties. Indeed, as *Apampa* pointed out, there are occasions where the absence of wiretap evidence from an indictment would result in "not adequately inform[ing] the defendant of the charge," and thus the government would be *required* to, much less barred from, include wiretap evidence in the charges. 157 F.3d at 1106. More fundamentally, it is simply nonsensical to prevent law enforcement from relying on wiretap evidence in bringing charges when the very purpose of a wiretap is to obtain evidence of criminal offenses.

Other federal courts agree with *Apampa*'s interpretation of Section 2517(2). In *United States v. VanMeter*, 278 F.3d 1156, 1164-65 (2002), the Tenth Circuit held that "[e]stablishing probable cause to arrest suspected criminals before a magistrate is at the core of law enforcement officers' official duties," and thus rejected the defendant's claim that agents illegally quoted a wiretapped call in the complaint affidavit charging defendant with bribery. The court of appeals there relied on *Apampa* and, like *Apampa*, relied on Section 2517(2). *Id.*[4] Similarly, in *United States v. O'Neill*, 52 F. Supp.2d 954, 972 (E.D. Wis. 1999), the district court held that Section 2517(2) gave law enforcement agents "every right" to include wiretap evidence in the affidavit submitted in applying for a search warrant. *Id.* at 972 ("The 'proper performance of his official duties' includes the use of the information for such uses as establishing probable cause to search.") (quoting Section 2517(2) and citing *United States v. Vento*, 533 F.2d 838, 854-55 (3rd Cir. 1976)). This Court, too, should hold here that Section 2517(2) authorized the inclusion of wiretap evidence in the Complaint Affidavit submitted to the magistrate judge against defendant Blagojevich.

The second way in which *Apampa* refutes the defendant's argument is that, once properly included in a publicly-filed charging document, it is permissible in turn to publicly announce what is in the public filing: "The charge was contained in a public

[4]It is true that *VanMeter* described the quotations in the affidavit there as "brief[]," but that case involved a single episode of bribery rather than the sweeping fraud scheme that Blagojevich is alleged to have committed, and in any case, the Tenth Circuit did not purport to draw a 'brevity' limit on wiretap evidence or to ground any limit on any statutory text. 276 F.3d at 1165.

indictment, and the government was entitled to announce the indictment publicly." 157 F.3d at 1106. The Seventh Circuit likened the public disclosure (including in "press releases") of wiretap evidence that has been disclosed in a public charging document to other types of otherwise privileged information, such as "confidential information in tax returns and grand jury proceedings," that has been properly disclosed in a public proceeding. *Id.* ("Once privileged information is properly disclosed in a public proceeding, the publicizing of the proceeding is not a violation of the privilege."). That principle should not be surprising: after all, if a document (whether it be a charging document or any other) is a matter of public record filed in the public case file, then further publication of the evidence in the document is nothing more than truthful repetition of that to which the public already has access.[5]

Finally, to the extent that the defendant contends that there must be some sort of judicial 'pre-approval' before the government either includes wiretap evidence in a complaint affidavit or publicizes wiretap evidence that is already in a publicly-filed affidavit, the defendant cites neither statute nor case nor any other authority for that novel proposition. Indeed, the defendant's only citation to a case is for an entirely different proposition. The motion quotes block-portions from *Gelbard v. United States*, 408 U.S. 41 (1972), Def. Mot. at 2-3, but those quotations say only that the government

---

[5]Of course, as *Apampa* recognized, if "the criminal proceedings are themselves nonpublic," then further disclosure could be prohibited. 157 F.3d at 1106 (citing *United States v. Dorfman*, 690 F.2d 1230 (7th Cir. 1982)). Here, as in almost every criminal case, after the arrests were executed, the Complaint Affidavit became a public document pursuant to the pre-arrest sealing order entered by the magistrate judge. R. 4 (ordering that complaint and affidavit be unsealed upon arrest of defendants).

must obtain court pre-authorization to *intercept* – which the government did here – and say nothing about the *use* of the wiretap evidence once intercepted with court-authorization. "Use" is addressed by Section 2517(2), and there is no hint of judicial pre-approval in the statutory text. Indeed, as we discussed above, the Seventh Circuit approves the inclusion of wiretap evidence in public charging documents and does not bar subsequent republication of properly-public filings. *Apampa*, 157 F.3d at 1106; *see also VanMeter*, 278 F.3d at 1164 (Section 2517(2) "use" is not governed by sealing requirements) (citing *United States v. Carson*, 52 F.3d 1173, 1186 (2d Cir. 1995)). Furthermore, the defendant offers no way of implementing what could only be termed a 'pre-emptive strike' against the use of wiretap evidence at the stage of filing a complaint – is the government to give notice to the defendant that the government is about to seek a complaint and arrest him, and transform even the filing of a complaint into suppression litigation? Neither Title III's statutory provisions nor the Federal Rules of Criminal Procedure contemplate that extraordinary concept. As we explain below, the proper time to file comprehensive motions to suppress or to change venue due to pre-trial publicity is *after* indictment, rather than at the complaint stage, and this Court should reject defendant Blagojevich's attempt to fashion an unprecedented, extraordinary procedure for his benefit.

II. Supreme Court Precedent Forecloses Blagojevich's Challenge to the Use of the Wiretap Evidence Before the Grand Jury.

Another form of relief that the defendant requests is to prohibit the use of the wiretap recordings before the grand jury unless there is a judicial determination of the

wiretap's legality. Def. Mot. at 17. Presumably, the defendant again relies on *Gelbard v. United States* in support of this extraordinary relief (there is no other pertinent case cited in the motion). Def.'s Mot. at 2-3. But *Gelbard* offers no support, and indeed forecloses the defendant's claim for relief.

In *Gelbard*, various individuals were subpoenaed to appear before various grand juries (the cases were consolidated in the Supreme Court). 408 U.S. at 44-45. The putative witnesses objected to answering any questions, in the grand jury, that were based on wiretapped conversations, which the witnesses claimed were illegal. *Id.* The respective district courts held the witnesses in contempt and ordered them to answer the questions. *Id.* The witnesses claimed that they should be permitted to defend against the contempt citation by litigating the legality of the wiretap. *Id.* The claim was based on Section 3504, which provides in pertinent part:

> (a) In any . . . proceeding . . . before any . . . grand jury . . . of the United States–
>
> > (1) upon a claim by a *party* aggrieved that evidence is inadmissible because it is the primary product of an unlawful act [under Title III] or because it was obtained by the exploitation of an unlawful act [under Title III], the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act . . . .

18 U.S.C. § 3504(a)(1), (b) (emphasis added).

In providing the contemnors with a narrow defense against the contempt citation, the Supreme Court explicitly emphasized that *only* a contemnor-witness could test the legality of the wiretap in the grand jury setting:

> In the application of § 3504 to 'any . . . proceeding in or before any . . . grand jury,' *'a party aggrieved' can only be a witness, for there is no other 'party' to a grand jury proceeding*.

408 U.S. at 54 (emphasis added). Thus, although the Court did permit the contemnor-witnesses to defend against the contempt citation by litigating the legality of the wiretap order, the Court strictly limited the remedy to grand jury witnesses who had been held in contempt.

Of course, defendant Blagojevich does not fall within that limited class of individuals. The defendant only quotes, Def. Mot. at 2-3, those portions of *Gelbard* that say nothing more than the non-controversial proposition that the government must obtain court-authorization in order to wiretap conversations – and that the government did here. No grounds exist for the defendant to prevent the submission of the wiretap evidence to the grand jury.

III. The Press Conference Comments Provide No Basis For the Unprecedented Relief Sought by the Defendant.

Background

Shortly after the defendant's arrest, a press conference was held to announce the unsealing of the Complaint and the arrest of the defendant.[6] Patrick J. Fitzgerald, the United States Attorney, described the charges against defendants Blagojevich and John Harris, Blagojevich's (now-former) Chief of Staff, and indicated (as did the Complaint Affidavit) that evidence leading to the charges had been obtained through

[6]A transcript of the press conference is attached hereto as Exhibit 1.

court-authorized interceptions of conversations in the defendant's campaign office and on his home telephone.

The U.S. Attorney limited his description of the Complaint Affidavit's allegations to specific examples, highlighting (1) three official acts which the defendant allegedly attempted to trade in exchange for campaign contributions (a $1.8 billion tollway project; reimbursement funding for Children's Memorial Hospital; and signature of a bill concerning gambling revenue); (2) the alleged attempts to trade the appointment to the vacant Senate seat for personal gain; and (3) the alleged attempt to condition state financial assistance to the Tribune Company on the firing of editorial board members who had been critical of the defendant. With respect to each of these matters, Fitzgerald quoted the complaint's descriptions of intercepted communications. Fitzgerald made clear that his descriptions of conduct were "according to the complaint" unsealed that day, and repeatedly declined to provide information not contained in the filings.

During the press conference, the U.S. Attorney made several comments that emphasized the seriousness of the conduct with which the defendants were charged. Specifically, Fitzgerald referred to the alleged conduct as "appalling" and a "political corruption crime spree" and, in the middle of his remarks, commented that the alleged conduct related to the Senate seat "would make Lincoln roll over in his grave." Immediately after concluding his description of the conduct alleged in the complaint, the U.S. Attorney stressed that both defendants were presumed innocent. He echoed

this point twice more during the question-and-answer period that followed his prepared remarks.

At the conclusion of his remarks, Fitzgerald advised that the investigation was continuing, and made a request for cooperation from the citizenry. He urged those citizens "who heard or saw things or were approached in ways that felt uncomfortable . . . [to] come forward and give us that information," and stressed that such information was "very, very important" in order to "get to the bottom of what has happened here." He emphasized these points throughout the question and answer period, commenting that ". . . the real effort to clean up corruption's going to start with the citizenry, people who are going to speak up and say something when it's wrong."

Legal Analysis

Contrary to the defendant's contention, the U.S. Attorney's comments during the press conference do not justify the requested extraordinary interference with the grand jury investigation, and did not violate Title III or the applicable rules of professional responsibility. As discussed above, *see* Argument § I, the government properly referred to court-authorized intercepted conversations described in the publicly-available Complaint Affidavit. There were legitimate grounds for discussing the specific allegations in the Complaint Affidavit, including the allegations related to the intercepted conversations. Indeed, given the defendant's position of public authority and responsibilities as governor, the bringing of charges against him necessarily had widespread public impact and was of great public interest.

Moreover, none of the U.S. Attorney's comments (nor any of the comments of FBI Special-Agent-in-Charge Rob Grant) came close to posing a "serious and imminent threat to the fairness of an adjudicative proceeding." NDIL Local Rule ("LR") 83.53.6(a). This court's Local Rule 83.53.6, entitled "Trial Publicity," strikes a balance between protecting a defendant's right to a fair trial and fulfilling the public's legitimate interest in being informed about the administration of law. *See* LR 83.53.6, Committee Comment.[7] The rule provides that an attorney participating in an investigation or litigation of a matter may not make an extra-judicial statement that is likely to be disseminated by means of public communication and that, if so disseminated, "*would pose a serious and imminent threat to the fairness of an adjudicative proceeding*." LR 84.53.6(a) (emphasis added).

The applicable Local Rule identifies the types of statements that ordinarily are likely to pose a serious and imminent threat to fairness:

> (1) the prior criminal record (including arrests, indictments or other charges of crime), the character or reputation of the accused, or any opinion as to the accused's guilt or innocence, as to the merits of the case, or as to the evidence in the case;

---

[7]There is no substantive difference between the Illinois Rule of Professional Conduct governing trial publicity, Rule 3.6, and the Northern District's rule. The government notes for the record that the defendant's motion cited the Illinois Rules of Professional Conduct, whereas the U.S. Attorney is licensed in the State of New York. Thus, the Illinois state rules do not apply. Ill. RPC 8.5(a) (limiting scope of disciplinary authority to "[a] lawyer admitted to practice in this jurisdiction"). In any event, the government also notes that there is no substantive difference between the New York rule and Illinois's and this district's rules, *see* NY DR 7-107(a), (b) (identifying same categories of prohibited statements as Illinois rule and Northern District's rule).

> (2) the existence or contents of a statement given by the accused, or the refusal or failure of the accused to make a statement;
>
> (3) the performance of an examination or test of the accused or the accused's refusal or failure to submit to an examination or test;
>
> (4) the identity, testimony, or credibility of prospective witnesses;
>
> (5) the possibility of a plea of guilty to or other disposition of the offense charged; or
>
> (6) information that the lawyer knows or reasonably should know would be inadmissible as evidence in a trial.

LR 83.53.6(b)(1)-(6). The U.S. Attorney's comments at the press conference do not fall within any of those six categories, and the comments do not otherwise pose a "serious and imminent threat" to the fairness of proceedings.

The defendant relies on *Sheppard v. Maxwell*, 384 U.S. 333, 360-61 (1966), but that case only proves the point that the U.S. Attorney's comments here were not covered by the forbidden categories. In that case, the Supreme Court found that trial publicity had compromised the defendant's right to a fair trial where, *during the course of trial*, the prosecutor among other things repeatedly released to the press evidence that was not admitted at trial, some of which was clearly inadmissible, including evidence that defendant's wife had said defendant had a Jeckyll-Hyde personality, and that defendant had declined to take a lie detector test. Obviously, here the U.S. Attorney's pre-indictment characterizations of the charged conduct pale by comparison to the comments in *Sheppard*.

To the extent that some comments characterized the allegations of the Complaint Affidavit rather than quoted them, the comments nevertheless focused on

the egregiousness of the alleged conduct, rather than on the character of the defendant or prejudicial evidence such as a past confession, or any of the other prohibited categories.[8] The public does have a legitimate interest in judicial proceedings, *see* LR 83.53.6, Committee Comment, and making public statements about the seriousness of alleged crimes is consistent with societal interests in public criminal proceedings.

The U.S. Attorney's references to the intercepted conversations, as well as his statements concerning the seriousness of the allegations, served to inform the public and to achieve other legitimate law enforcement goals. Taken as a whole, the U.S. Attorney's comments communicated a warning to others engaged in, or considering becoming engaged in, similar or related conduct. And they served as a means of energizing and mobilizing the community to take action to thwart and deter public corruption – by resisting corrupt conduct, and by coming forward with information. The U.S. Attorney repeatedly stressed that the investigation was ongoing and that law enforcement needed the help of citizens to "get to the bottom" of the conduct charged in the Complaint, and more generally, to stamp out corruption. Characterizations of the alleged conduct as egregious emphasized the need for assistance and motivated witnesses to come forward. At the same time, any potentially adverse impact of the

---

[8] *Cf. United States v. Stanford*, 589 F.2d 285, 299 (7th Cir. 1978) (holding that *even assuming* references to confessions and statement that crime was "most serious" of prosecutor's career violated ethical rules, comments did not justify dismissal of indictment); *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995) (noting "tension" between ethical rules and prosecutor's calling defendant a murderer and boasting that this time the government's case, which included extensive wiretap evidence, was much stronger than in the prior trials).

statements on the defendant was tempered by the U.S. Attorney's specific admonishment during the conference that the defendant was presumed innocent, and by the U.S. Attorney's repetition of that admonishment twice during the question-and-answer period that followed the opening remarks.

In any event, regardless of the propriety of the U.S. Attorney's remarks themselves, the current procedural posture also demonstrates that the defendant's motion should be denied. Although the defendant suggests that professional conduct rules related to *trial* publicity apply equally in the context of *grand jury* proceedings, he cites, and research reveals, no case that so holds. Instead, Local Rule 83.53.6(a) addresses extra-judicial statements in "an adjudicative proceeding," which a grand jury proceeding is not. *See United States v. Williams*, 504 U.S. 36, 51 (1992) (noting that grand juries do not serve adjudicative function of determining guilt or innocence); *United States v. Navarro-Vargas*, 367 F.3d 896, 902 (9th Cir. 2004) (distinguishing petit trial juries from grand juries, and noting that only trial juries have adjudicative function).[9]

Indeed, the defendant provides no legal support for his claim that pre-indictment publicity, whether or not generated by statements of the prosecutor, and whether or not in violation of rules of professional conduct, provides grounds for disqualification of the grand jury or the prosecutor or other pre-indictment relief. To the contrary, the

[9]In attempting to apply trial rules to the grand jury setting, the defendant cites *Rose v. Mitchell*, 443 U.S. 545, 551-59 (1979), Def. Mot. at 12, but *Rose* concerned a unique type of structural error – racial discrimination in the selection of the grand jury – which has no application here.

few cases that have addressed this issue hold that pre-indictment publicity does not warrant pre-indictment relief.[10] In any event, ensuring fairness in the grand jury – without interfering with the grand jury's proper functions – may be achieved by admonishing the grand jury not to consider anything heard or seen outside the grand jury room, which the government has done and represents that it will continue to do so throughout the current and ongoing grand jury proceedings.

Finally, it bears noting that the anticipated time lag between the press conference and the indictment greatly diminishes the seriousness and imminence of any alleged threat to fairness because the defendant need not be indicted until April 7, 2009, nearly four months after the press conference. Even more so with any trial: the trial, if there is one, in all likelihood would occur, at the earliest, several more months after April 2009. In the event that an indictment is returned and the defendant proceeds to trial, thorough screening and admonishment will ensure that the trial jurors who hear his case are fair and impartial.

---

[10] *See Schwartz v. United States Department of Justice*, 494 F. Supp. 1268, 1272-73 (E.D. Pa. 1980) (denying relief on civil complaint seeking to enjoin grand jury from returning indictment due to publicity); *In re Grand Jury*, 508 F. Supp. 1210, 1213 (S.D. Ala. 1980) (denying motion to stay grand jury proceedings based on publicity); *In re Balistrieri*, 503 F.Supp. 1112, 1115 (E.D. Wis. 1980) (finding claim for grand jury bias "premature"); *see generally* Paul S. Diamond, Federal Grand Jury Practice and Procedure § 4.01 (4th ed. 2005) (finding no reported decision in which a court enjoined an ongoing federal grand jury investigation).

Conclusion

For all the foregoing reasons, the United States respectfully asks this Court to deny the defendant's motion.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/Edmond E. Chang

EDMOND E. CHANG
DEBRA RIGGS BONAMICI
Assistant United States Attorneys
219 South Dearborn Street
Fifth Floor
Chicago, Illinois 60604
(312) 886-1000

Date: January 15, 2009

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

> Government's Response to Defendant Blagojevich's Motion for Various Forms of Pre-Indictment Relief,

was served on January 15, 2009, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

/s/ Edmond E. Chang
EDMOND E. CHANG
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-1000