

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

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

12-cr-43-wmc

v.

RALPH LANG,

Defendant.

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Defendant Ralph Lang moves this court “to modify its normal jury selection process by (1) allowing the parties to submit a detailed written questionnaire to be completed by all potential jurors prior to the beginning of trial and (2) permitting individual, lawyer-conducted voir dire.” In its response, the government joins in the use of a pretrial juror questionnaire on “the politically and morally charged subject of abortion and reproductive health care services,” but opposes any other modification to the court’s normal jury selection process. The court agrees that the issue of abortion is one of a few, uniquely divisive issues that may justify a departure from the court’s normal jury selection process. Before deciding whether to submit a questionnaire to the potential jury panel, or adopt any of the other modifications proposed by the defendant, however, the court will await receipt of an agreed-upon questionnaire, with any additional questions or instructions not agreed upon, on February 15.

By way of guidance to the parties, the court offers the following observations with respect to defendant's proposals.

### **1. Use of Pre-Trial Questionnaire**

As the defendant rightly points out, the United States Supreme Court has recognized the "critical function" voir dire plays "in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Morgan v. Illinois*, 504 U.S. 719 (1992). As both parties also note, a trial court has broad discretion in conducting voir dire. See FED. R. CRIM. P. 24; *United States v. Banks*, 687 F.2d 967, 974 (7th Cir. 1982). See also *United States v. Montenegro*, 231 F.3d 389, 393-94 (7th Cir. 2000) (observing that "[t]he conduct of voir dire is left to the trial court's sound discretion" and that "litigants do not have a right to have a particular question asked") (quoting *Gardner v. Barnett*, 199 F.3d 915, 920-21 (7th Cir. 1999) (en banc) (citation omitted)).

Although the Seventh Circuit has not addressed it directly, there would appear to be a general consensus that this discretion extends to the use of written questionnaires to screen jurors in a case involving highly charged issues and substantial pre-trial publicity, among other factors. See, e.g., *Skilling v. United States*, — U.S.—, 130 S. Ct. 2896, 2910-11 (2010) (use of a "comprehensive" pretrial questionnaire to dismiss potential jurors in a high-profile case where the responses indicated bias or other disqualifying characteristics); *United States v. Taylor*, 509 F.3d 839, 842 (7th Cir. 2007) (use of pretrial questionnaires in a death penalty case); *United States v. Contreras*, 108 F.3d 1255, 1269-70

(10th Cir. 1997)(use of jury questionnaires in anticipation of an exceptionally lengthy, complex trial on drug trafficking, conspiracy and money laundering charges); *United States v. Blagojevich*, 743 F. Supp. 2d 794, 796 (N.D. Ill. 2010) (use of a pretrial questionnaire to screen jurors in a highly publicized corruption case).

Here, the parties and this court share a concern over the impact on at least some jurors upon learning that the defendant is charged with traveling to Madison with the intention to murder a doctor employed by the Planned Parenthood Clinic. There is no disputing that abortion is an emotionally charged topic for many that features polarizing moral, philosophical, theological and political points of view among members of the public, from which the jury will be selected.<sup>1</sup>

Neither side has provided the court with surveys or studies indicating what percentage of the population is likely to be so strongly vested on either side of the abortion debate that they would be unable to decide fairly and impartially whether the defendant was innocent or guilty of the specific crime charged. Even so, the court takes judicial notice of the fact that passions run sufficiently high on the subject of abortion for bias to be a significant issue in obtaining a fair and impartial jury in this matter.<sup>2</sup> Similarly, while the court suspects that the level of exposure of the jury panel to pre-trial

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<sup>1</sup> Of course, this is true, to some extent, in all criminal cases. *See, e.g., United States v. Vuitch*, 402 U.S. 62, 72 n.7 (1971) (acknowledging that abortion is a volatile issue, but there are “well-established methods” that litigants may use to protect themselves against potential jury prejudice, including voir dire).

<sup>2</sup> Even pervasive adverse pretrial publicity, without more, is an insufficient basis from which to presume the existence of bias in the community or to deem the process of voir dire futile. *See, e.g., Skilling*, 130 S. Ct. at 2918-25.

publicity will be substantially less prevalent than defense counsel fears -- a consequence of increasingly fragmented audiences brought about by the same internet that poses other challenges to our justice system. Even so, there may well be some who have read media or internet reports regarding defendant's alleged conduct and who may be particularly affected because they are already predisposed to bias.

This does not necessarily mean, however, that the submission of a written, pre-trial questionnaire to the potential jury pool will ferret out such bias, nor substantially streamline the need for in-court voir dire, nor even reduce the number of panel members that will need to be called to seat an impartial jury. For example, to the extent that there are true extremists on either end of the spectrum who would allow their personal views to color their view of this case, an advance questionnaire might give them sufficient time and opportunity to disguise or obscure their bias, while others who could be objective may decline out of needless concern over the amount of controversy this case may engender. In either instance, the result could be a jury panel more likely to bias. To the extent that there is substantial pre-trial publicity in this matter, the advent of the internet gives most jury panel members unfettered access to information and misinformation on this subject generally (and to Mr. Lang in particular) with very little, if any, control by the court -- something that may be remedied if they are first asked about the subject on the day of trial and strongly admonished face-to-face by the judge on the consequences of any outside research. Finally, social science experts in jury selection have refined this art to the point that even a few, well-crafted questions -- much less a detailed questionnaire --

can be used to identify effectively those with strong biases, both known and latent, some of which may well be counter-intuitive to those not involved in product or political advertising.

These observations are not intended to discourage the parties' ongoing efforts to agree on a written questionnaire that might be used in this case. Rather, they are intended to identify the areas of concern for this court in the hopes that any jointly-submitted pre-trial jury questionnaire -- as well as any additional questions or instructions submitted separately by either party -- avoids to the extent possible heightening, rather than reducing, the risk of a jury comprised of those unable to decide this matter fairly and impartially on the facts, argument and law presented at trial.

## **II. Lawyer-Conducted Voir Dire of Individual Panel Members**

This court is less disposed to allow lawyer-conducted voir dire. As an initial matter, the court intends to be thorough in both the subjects to be asked about and in follow-up questions for any juror exhibiting concern or misgivings about their ability to be fair or impartial. The court will also make ample use of sidebars for those jurors who may be uncomfortable discussing these subjects in open court and will encourage them to use this option. The court is sympathetic to defense counsel's desire to plumb the depths of any actual or perceived bias face-to-face -- whether in open court, at sidebar or in a conference room -- but each involves the risk that voir dire will turn into a preview of closing arguments and trial themes.

Again, this is not to say that the court is unwilling to take extra steps to insure an impartial jury here, including more extensive questioning based on the suggestions of the parties, follow-up questioning requested by counsel, extensive use of sidebar and (under limited, appropriate circumstances) allowing attorney questioning at sidebar.<sup>3</sup>

ORDER

IT IS ORDERED that defendant Ralph Lang's motion for pretrial juror questionnaire and individual lawyer-conducted voir dire (dkt. # 89) is RESERVED pending receipt of an agreed-upon questionnaire and other proposed questions.

Entered this 11th day of February, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge

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<sup>3</sup> While defendant has a right to be present at sidebar, the court is concerned that his presence may prove counter-productive to a potential juror's candor and that the cumbersomeness of moving him back and forth for multiple sidebars may even be prejudicial to him. Accordingly, the court would appreciate some guidance as to whether the defendant is willing to waive that right.