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The Decision in United States v. Brown: The Fifth Circuit Interprets Justice Is Blind Literally.

Robert M. Anselmo

RECENT DEVELOPMENT

THE DECISION IN *UNITED STATES V. BROWN*: THE FIFTH CIRCUIT INTERPRETS "JUSTICE IS BLIND" LITERALLY

ROBERT M. ANSELMO

I. INTRODUCTION

Depending on the viewpoint, the Fifth Circuit's current stand on the use of anonymous juries is either a laudable source of necessary protection for jury members or an oppressive aura invoking images of a police state.[1] The basis for the current state of controversy stems from a Fifth

1. *See* Christopher Baughman, *Edwards Cites Unfairness of Polozola's Trial Tactics*, SATURDAY STATE TIMES/MORNING ADVOC., (Baton Rouge), Feb. 3, 2001, at 1B, 2001 WL 3850755 (referring to defendant Edward's comment that courtroom procedures in his trial allowed the trial to take on "an aura of Russian-type tactics").

Circuit decision handed down during the summer of 2001. In what could signal a trend, the court in *United States v. Brown*,[2] affirmed the use of an anonymous jury.[3]

The use of anonymous juries is relatively uncommon in the United States[4] and, until recently, unheard of in the Fifth Circuit.[5] However, within the short span of six years, the court traveled a very quick path from first impression through a variety of decisions leading to the *Brown* ruling. In *Brown*, the court of appeals addressed the power of a district court to order an anonymous jury in the face of First Amendment challenges. Previously in the Fifth Circuit, district courts' rationales justifying the use of anonymous juries could be divided roughly into two groups; the first in response to potential threats to the jury from either a defendant or the defendant's associates; and the second arising from the recognition of possible media influence upon the jurors that could jeopardize the parties' right to a fair trial. However, in *Brown*, the court blended these two distinct justifications to create a sum far greater than its separate parts. The expansive scope of the *Brown* opinion included elements of both justifications for anonymous juries, viewing them as interdependent, rather than independent components. By enhancing the likelihood of anonymous juries, the court inflicted a heavy blow to the media regarding its ability to present information about noteworthy trials.

This Article explores the controversy surrounding the Fifth Circuit's recent decision in *United States v. Brown* by first examining the rationalizations district courts commonly use to justify anonymous juries. The latter half of this Article considers the *Brown* decision in the context of notable Fifth Circuit cases addressing the anomaly of anonymous juries.

II. WHY USE AN ANONYMOUS JURY?

The empanelment of an anonymous jury raises the basic question: Why? First, why would a trial court decide to obscure jury members' identities from court records? Secondly, why would a trial court impose upon itself the burden of enacting and enforcing such an order? In addition, if such orders are needed, then why are anonymous juries only a recent trend in the history of jury trials? Lastly, if anonymous juries are

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2. 250 F.3d 907 (5th Cir. 2001).

3. *See* United States v. Brown, 250 F.3d 907, 922 (5th Cir. 2001) (affirming "post-verdict orders maintaining juror confidentiality").

4. *See* Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457, 457-58 (1999) (stating the first fully anonymous jury was *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979)). This action, seen as a judicial fluke at the time, was decided by the court *sua sponte*. *Id.*

5. *See* United States v. Krout, 66 F.3d 1420, 1426 (5th Cir. 1995) (identifying this matter as an issue of first impression in the Fifth Circuit).

needed, why would anyone dispute their use? The answers to these questions require an analysis of the justification given by trial courts that have made these decisions, as well as a detached analysis of the conditions surrounding trials that have used anonymous juries.

The typical knee-jerk response to the "why" questions is that jurors are in physical danger as a result of their in court decisions; therefore, the court has a duty to protect them. This assertion is, quite simply, not supported by history. In fact, no juror has ever been murdered as a result of his or her decision while on a jury panel.[6] This means that in over 200 years of jury trials of criminals, including the trials of the notorious crime figures such as Al Capone and "Lucky" Luciano, not a single person has been murdered because they served as a juror.[7] Nevertheless, jurors' perceived fears of reprisal from defendants are very real.[8] Many people express fear and reluctance to participate in any trial, even misdemeanor trials, for fear of retribution if a defendant is ultimately convicted.[9] In one survey, eighty-four percent of those questioned expressed that jurors in any criminal case should be granted anonymity as a means of protection.[10] Of course, surveys such as this and other anecdotal stories are of unknown accuracy; and, the actual occurrence of retribution is probably much less than feared.[11] Regardless of the actual percentage of jury threats, courts recognize that to ensure continued participation in the judicial system, jurors' fears must be considered and addressed.[12]

In addition to potential threats from a defendant, jurors are also concerned about the media's intrusion into their private lives due to the significant and pervasive presence the media has in today's judicial system.[13]

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6. Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457, 466 (1999).

7. *See id.* (noting that in many trials the names of the jurors were announced in open court).

8. *See* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 126 (1996) (pointing out that "juror apprehension about safety and privacy may be at an all-time high").

9. *See id.* (describing jury service as frightening, as expressed by the wife of a judge who served on a jury). In addition, judges are exposed to anecdotal stories of jurors expressing that they were fearful of defendant retribution. *Id.*

10. *See id.* at 127 (citing a 1995 survey conducted by a national magazine). The respondents expressed this feeling of fear despite less than one-fifth had ever served on a criminal jury. *Id.*

11. *See* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAN. L. REV. 123, 127 (1996) (emphasizing that surveys may not accurately predict the frequency of juror fear in criminal cases).

12. *See id.* at 124 (stating only by alleviating juror's fears through anonymity can courts ensure participation of citizens in the jury system).

13. *See* David Hudson, *Banning Post-Verdict Juror Interviews a Bad Policy*, freedomforum.org, *at* http://www.freedomforum.org (observing that it is a "recurring scene

It is true that some jurors, however, do not mind the attention given them by the media. In fact, a few jurors have actually profited from their jury duty by giving interviews, signing book deals, and appearing on television.[14] Nevertheless, some trial courts respond to stories of media harassment and invasion of juror privacy by ordering anonymous juries, regardless of whether the defendants pose any threat to the jurors.[15] These rationales, which are not based on fact but rather speculation, provided the foundation for the Fifth Circuit's broad stance on the use of anonymous juries.

III. THREATS TO THE JURY IN THE FIFTH CIRCUIT

Basic concerns over threats, intimidation, and attempts to use influence to secure a favorable verdict catalyzed the Fifth Circuit to provide a basis for anonymous juries. The promise of a jury of one's peers is a cornerstone of the United States's judicial system. Implicit in this guarantee is the assurance of an impartial jury. However, a jury that sits in fear may not fulfill this expectation of impartiality. Therefore, the security of a court imposed anonymity order could serve to solidify the constitutional tenet of the impartial jury trial.

A. United States v. Krout

In 1995, the Fifth Circuit first examined the use of an anonymous jury to prevent potential jury harm in *United States v. Krout.*[16] The case ultimately set the tone for increasing the use of anonymous juries within the Fifth Circuit. In *Krout,* seven members of the "Mexican Mafia" prison gang appealed their convictions of murder, drug, and firearm offenses.[17] The appellants argued that the trial court abused its discretion by empanelling an anonymous jury based solely upon unsworn allegations. They further contested the trial court's failure to advise the jury of a neu-

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on the evening news" to see the media focusing on jurors after the decision in a high-profile case) (on file with the *St. Mary's Law Journal*).

14. *See id.* (illustrating that jurors in cases such as the O.J. Simpson and Menendez brothers criminal trials used their jury participation for personal profits). This indicates that a court's decision to use an anonymous jury to "protect" the jurors from the media is often clearly "out of line" with what is happening across the nation. *Id.*

15. *See* Jerry Markson, *Judges Pushing for More Privacy of Jurors' Names*, WALL ST. J., June 27, 2001, at B1, 2001 WL-WSJ 2867863 (commenting on the "small but growing number of judges around the country" choosing to keep the identities of jurors secret for their protection).

16. 66 F.3d 1420 (5th Cir. 1995).

17. *See* United States v. Krout, 66 F.3d 1420, 1424 (5th Cir. 1995) (stating that evidence introduced at trial established that the appellants were members and leaders of a Texas prison gang known as the "Mexican Mafia").

tral or non-prejudicial reason for the anonymity.[18] In addition, the appellants argued that the typical circumstances justifying an anonymous jury were not present in the case.[19]

The Fifth Circuit stated that it would use "the standards developed in other circuits" when deciding cases of first impression regarding the issue of anonymous juries.[20] The court emphasized that the decision to empanel an anonymous jury is a "drastic measure" and should be undertaken "only in limited and carefully delineated circumstances."[21] The court considered factors other courts used to determine when the circumstances of a trial warrant an anonymous jury.[22] The factors cited by the court included:

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.[23]

The court found that these factors were easily met in *Krout* because evidence presented during trial showed that the appellants were involved in an organization that dealt in drug trafficking, contract killing, weapons selling, and "everything imaginable."[24] In addition, the court observed that one of the organization's tenets was to interfere with potential opposing witnesses.[25] Considering the long periods of incarceration imposed upon the defendants[26] and the publicity the trial received,[27] the

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18. *Id.* at 1426.

19. *Id.* The appellants complained that the court: failed to conduct a hearing; failed to afford the defendants an "opportunity to refute the allegations in the government's motion for anonymous jury;" decided to select an anonymous jury "based solely on the unsworn allegations;" failed to "advise the jury of a neutral or nonprejudicial reason for" the anonymity; failed "to preserve the safeguards of a fair and impartial jury selection;" and that the court erroneously found "unusual circumstances that might justify" an anonymous jury were not present. *Id.*

20. *See id.* (stating the court adopts the standard of abuse of discretion and would "afford deference" to a district court's decision to empanel an anonymous jury).

21. *Krout*, 66 F.3d at 1427.

22. *Id.* at 1427.

23. *Id.*

24. *Id.* at 1427-28 (citing to the written constitution of the Texas Mexican Mafia).

25. *See id.* at 1428 (citing the group's involvement in "dozens of murders in San Antonio from 1990-92").

26. *See Krout*, 66 F.3d at 1428 (giving the range of incarceration as a minimum of 120 months to 420 months).

court found that all of the factors relied upon by other circuits were present.[28]

In its analysis, the Fifth Circuit recognized the impact that such a decision might have on the operation of a fair trial.[29] The court noted that other jurisdictions considered this type of jury protection constitutional.[30] However, the court also recognized that other jurisdictions limited their use of anonymous juries to situations when there was a need to ensure the safety of jurors against serious threats of harm and when the trial court was able to protect both the defendants' presumption of innocence and the party's right to conduct an effective voir dire.[31] The court of appeals concluded that using an anonymous jury still affords the defendant his constitutional rights only when the balance between threats to the jury and the fundamental rights of the accused was properly accomplished.[32]

Interestingly, the court of appeals noted that while the trial court decided that jury anonymity would dispel many of the juror's fears, the trial court nevertheless failed to implement jury anonymity; for example, the jurors were not aware of their anonymous status, they were not sequestered prior to deliberation, and they were allowed to transport themselves to and from the trial in their own vehicle on a daily basis.[33] Nevertheless, the court rendered an opinion in favor of an anonymous jury and thereby established a practice that would not only continue, but would soon expand.

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27. *See id.* (indicating both counsel and the district court observed that the trial was the subject of a high level of publicity, which would continue until the trial ended).

28. *Id.* at 1427-28. The court ultimately affirmed the district court's order requiring the anonymous jury. *Id.*

29. *See id.* at 1427 (opining an anonymous jury must remain a device of last resort).

30. *Krout*, 66 F.3d at 1427. As support, the court cited three opinions from the Second Circuit Court of Appeals: United States v. Wong, 40 F.3d 1347 (2d Cir. 1994); United States v. Amuso, 21 F.3d 1251 (2d Cir. 1994); United States v. Pacciona, 949 F.2d 1183 (2d Cir. 1991). *Id.*

31. *Id.*

32. *Id.*

33. *See id.* at 1427 n.5 (reciting the procedures the district court ordered to guard against perceived threats to the jurors and its failure to adhere to those orders). Because the district court did not explain the jurors' anonymous status, it can be concluded that the district court also failed to offer a neutral explanation for an anonymous jury. *Krout*, 66 F.3d at 1427 n.5.

B. United States v. Riggio

In *United States v. Riggio*,[34] the trial court empaneled an anonymous jury based on concerns of jury tampering by a defendant.[35] In *Riggio*, the defendant was convicted of arson and, as in *Krout*, was shown to have ties to organized crime.[36] Mindful of their prior decision in *Krout*, the court of appeals stated that an anonymous jury can only be used carefully and in a limited manner.[37] The court noted that the defendant in *Riggio* not only had connections to organized crime, but also was connected to prior instances of juror fraud.[38] In considering the nature of the crime, the court held the empanelment of an anonymous jury to be in the best interest of a fair trial.[39] In the court's opinion, an appropriate and neutral explanation existed for using anonymity that caused no unfair prejudice to the defendant.[40] Ironically, the court did not attempt to satisfy all the requirements for an anonymous jury it previously adopted in *Krout*.

C. United States v. Sanchez

The following year, in *United States v. Sanchez*,[41] the court of appeals offered further guidance for using an anonymous jury. In *Sanchez*, the defendant was a Galveston police officer alleged to have coerced suspected prostitutes to engage in sexual relations with him.[42] Unlike the defendants in *Krout* or *Riggio*, in *Sanchez* there were no allegations of involvement in organized crime, attempted jurors threats, or extensive

34. 70 F.3d 336 (5th Cir. 1995).

35. *See* United States v. Riggio, 70 F.3d 336, 338 (5th Cir. 1995) (identifying the district court's reasons for justifying the use of an anonymous jury).

36. *See id.* at 340 n.20 (indicating that the defendant "boasted" on several occasions of his mafia connections, and that at the time of this arrest, the defendant was carrying documents linking him to alleged mafia figures).

37. *Id.* at 339. The court slightly revised their prior decision in *Krout* by holding that a district court should "consider the defendant's involvement in organized crime, his past attempts at interfering with judicial proceedings, his previous history of violence, the extent of press coverage, and the likelihood of juror harassment or intimidation" in assessing whether an anonymous jury is justified. *Id.* at 339-40.

38. *Id.* at 340. The court noted that witnesses were threatened by Riggio. *Riggio*, 70 F.3d at 340 n.22.

39. *Id.* at 340.

40. *See id.* at 340 n.23 (describing the district court's explanation of the anonymity order as a "standard procedure in criminal cases"). The court of appeals opined that this sufficiently neutral explanation caused no unfair prejudice to the defendant. *Id.*

41. *See* United States v. Sanchez, 74 F.3d 562, 565 (5th Cir. 1996) (reiterating an anonymous jury is not justified unless the circumstances noted in *Krout* exist and explaining that although a harmless error analysis might be appropriate in some cases, it is not applicable in the present case).

42. *Id.* at 563.

publicity that would rise to the level of jury harassment or intimidation.[43] Instead, the trial court expressed two concerns: first, a delay of ten days between selection of jurors and the start of evidentiary proceedings would facilitate jury tampering,[44] and second, the jurors would be reluctant to decide a case involving the guilt or innocence of a "renegade" police officer if their identities were known.[45] As a result, the trial court ordered the removal of juror names, their spouses, addresses, and places of employment from jury lists.[46] However, the trial judge acknowledged that there was "neither allegations nor inferences of [jury] tampering."[47] Instead, this fear was only supported by the trial judge's speculation that he could not think of anything more frightening to the jury than "'having a rogue cop on their hands.'"[48]

On appeal, the court of appeals again reiterated that using an anonymous jury is, and should remain, a device of last resort, and a district court must base its decision on more than mere allegations or inferences of potential risks.[49] The court of appeals found in *Sanchez* that "virtually none of the factors listed in *Krout*" existed, and the defendant had a right to be tried before a panel of identified jurors.[50] The court asserted the defendant had a right to know the identity of persons on the jury, not only because such information could be valuable during jury selection, but also because any verdict rendered is "personalized and personified when rendered by twelve known fellow citizens."[51] In addition, the court held that the defendant in a jury trial has the right to receive the verdict "not from anonymous decisionmakers," but rather from people he can identify as being responsible for their actions.[52] In essence, the court held a defendant has a right to a jury of known citizens, unless the defendant has forfeited the right, as demonstrated by the circumstances in *Krout*.[53]

Within the short span of just a couple of years, the court of appeals solidified their stance on the use of anonymous juries. Evolving from a

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43. *See id.* at 565 (applying the factors set out in *Krout*).

44. *Id.* at 564. The delay was caused by a prior commitment of the trial judge to attend a week-long judicial conference. *Id.*

45. *Sanchez*, 73 F.3d at 565.

46. *Id.* at 564.

47. *Id.*

48. *Id.* at 564-65.

49. *Id.* at 564.

50. *Sanchez*, 73 F.3d at 565 (explaining that, in essence, there was no justification for an anonymous jury).

51. *Id.*

52. *Id.*

53. *See id.* (illustrating the importance of the right to a jury of known citizens is evidenced by a reversal of the defendant's conviction and remand for a new trial, presumably one without an anonymous jury).

case of first impression, the court appeared to establish the parameters justifying juror anonymity. However, there was another threat the court soon recognized. This threat came not from organized crime or retaliatory defendants, but instead from another source—the media.

IV. The Threat of Media Influences in the Fifth Circuit

In some high profile cases, district courts empanel anonymous juries to force the media's focus on the case and not on individual jurors.[54] The use of anonymity is seen as a way to keep the press "'off the backs'" of jurors in cases receiving intense media coverage.[55] Prior to *Krout*, the court addressed issues regarding media access to jurors in several cases, with mixed holdings regarding whether a jury deserves anonymity from the media.[56]

A. In re *Express-News Corp.*

In the case of *In re* Express-News Corp.,[57] a reporter for the San Antonio Express-News successfully challenged a district court's order prohibiting any person from interviewing a discharged juror regarding the deliberations or verdict.[58] The reporter sought to interview jurors who convicted two defendants of trafficking in illegal aliens.[59] The district court based its order on a local rule of the court prohibiting such conduct.[60]

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54. *See* Ernie Suggs, *IDs of Al-Amin Jurors to be Kept from Public*, Atlanta J. & Const., Aug. 30, 2001, at B1, 2001 WL 3688326 (identifying the attention of the press, including *Court TV*, as the reason for using an anonymous jury).

55. *See* Jerry Markson, *Judges Pushing for More Privacy of Jurors' Names*, Wall St. J., June 27, 2001, at B1, 2001 WL-WSJ 2867863 (referring to the empanelling of an anonymous jury for the trial of the Los Angeles police officers accused of beating Rodney King and quoting Mr. Munsterman of the National Center for State Courts).

56. *Compare* United States v. Edwards, 823 F.2d 111, 120 (5th Cir. 1987) (addressing the appeal of news organizations from an order closing proceedings, and finding only a qualified right of access to the records), *and* United States v. Harrelson, 713 F.2d 1114, 1117 (5th Cir. 1983) (finding that a judge's power to protect jurors does not end at the end of the trial), *with In re* Express-News Corp., 695 F.2d 807, 811 (5th Cir. 1982) (finding the court's denial of access to discharged jurors unconstitutional).

57. 695 F.2d 807 (5th Cir. 1982).

58. *See In re* Express-News Corp., 695 F.2d 807, 808 (5th Cir. 1982).

59. *Id.* Both the newspaper and reporter filed a motion to vacate the restrictions, but the motion was denied. *Id.*

60. *Id.* District Court Local Rule 500-2 for the Western District of Texas said in part "no person shall 'interview . . . any juror, relative, friend or associate thereof . . . with respect to the deliberations or verdict of the jury in any action.'" *Id.*

The court of appeals, upon review of both the rule and order of the district court, found the rule imposed an unconstitutional restriction.[61] In addition, the court held that the order was an attempt at government-imposed secrecy which would deny "the free flow of information and ideas not only to the press but also to the public."[62] The court noted that freedom of speech "is of little value if there is nothing to say," and the publication of information received from juror interviews would serve the public's interest, and facilitate public discussion of governmental affairs.[63] The court explained the "judiciary, like the legislative and judicial branches, is an agency of democratic government" and the public has the same right of access and scrutiny of the judiciary as it does to the other branches of government.[64]

The court of appeals based its opinion, in part, on a similar holding from the Ninth Circuit that ruled it unconstitutional for a district court to bar "any person, including the news media, from contacting jurors after the return of their verdict."[65] The Fifth Circuit recognized that the media's First Amendment rights were not absolute in nature, and the right does not guarantee access to information not generally available to the public.[66] The court added this right does not allow the actions of the press to operate in a manner that would function to deny a defendant his Sixth Amendment right to a fair trial, to affect "the fairness of a pending trial," to disturb the decorum of the court, or to harass or invade the privacy of the jurors as private citizens.[67]

Despite these stipulations, the court's objections to the lower court's order and the local rule were that these orders were unlimited in time and scope, applied equally to jurors who were willing to be interviewed and those who were not, and attempted to forbid "both courteous as well as uncivil communications."[68] The court also found the right to gather news, as provided by the First Amendment, was enough "good cause" and thus, if the government sought to restrict access to jurors post-verdict, the burden was on the government to demonstrate the need for curtailing this right.[69] In addition, the court noted that jurors have two

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61. *In re* Express-News, 695 F.2d at 811.

62. *See id.* at 809 (arguing the public has a First Amendment right to receive information).

63. *Id.* at 808.

64. *Id.* at 809.

65. *Id.* (citing *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978)).

66. *In re* Express-News, 695 F.2d at 809.

67. *Id.* at 809-10.

68. *Id.* at 810.

69. *Id.* (citing *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978)). The United States Attorney filed an amicus curiae brief expressing support for the local rule on the

concurrent rights: the right of freedom of speech and the freedom not to speak.[70] The court opined that the trial judge may advise the jurors of the right not to speak to avoid any juror misunderstanding that service on a jury panel would place the juror under public scrutiny or obligate them to grant interviews.[71]

B. United States v. Harrelson

The same local rule imposed by the district court in *Express-News* was the center of another Fifth Circuit decision. In *United States v. Harrelson*,[72] the district court prohibited any contact with the dismissed jurors without leave of the court.[73] The press filed a motion to vacate based upon the previous *Express-News* decision.[74] However, the district court chose not to follow the recent precedent on the grounds that the ruling in *Express-News* was not yet final and the mandate was not issued as of the date of its own decision.[75]

The court of appeals offered slightly more deference to its prior decision than the district court, reiterating the salient points of the decision, including the finding that broader language than that used in the local rule was "unimaginable."[76] In contrast to its earlier holding, the court in *Harrelson* was concerned not with government-imposed secrecy, but with the possibility of the press harassing or otherwise infringing on the privacy of the jurors.[77] However, there was nothing in the court's decision indicating any evidence that a member of the press actually performed or even contemplated such harassment.[78]

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grounds that "if jurors were made to feel 'that their arguments and ballots were to be freely published,'" it would stifle the "freedom of debate and independence of thought" necessary for deliberations. *Id.*

70. *In re* Express-News, 695 F.2d at 809.

71. *Id.*

72. 713 F.2d 1114 (5th Cir. 1983).

73. United States v. Harrelson, 713 F.2d 1114, 1114 (5th Cir. 1983). The court based its opinion on District Court Local Rules 500-2. *Id.*

74. *Id.*

75. *See id.* at 1115-16 (indicating that Local Rule 500-2 was not a prior restraint on the press, but rather an acceptable restraint on access). The *Express-News* decision was issued December 30, 1982, while the decision of the district court on the motion to vacate Local Rule 500-2 was issued January 5, 1983. *Id.* at 1116.

76. *See Harrelson*, 713 F.2d at 1117.

77. *See id.* at 1116 (asserting that the press' First Amendment rights are not absolute and do not grant journalists "special privileges denied other citizens").

78. *See id.* at 1117-18 (discussing that the trial court concluded that even one request to interview a juror was one request too many, but failing to offer that this request was ever made).

In *Harrelson*, the court of appeals declared that "a federal judge is not the mere moderator of a jury trial," but is also responsible for the proper conduct of the tribunal.[79] In this position, a judge may issue orders at the judge's discretion and "need neither hold hearings to justify nor make fact-findings to support his orders in such matters."[80] Additionally, this unchecked ability to issue orders regarding access to juries, under the guise of maintaining court order, was not given a time limitation.[81] As the court wrote, "[n]or does [the judge's] power to prevent harassment of jurors end with the case."[82] The court of appeals chose to adopt precisely the same language used by the United States Attorney in *Express-News* to support press restrictions due to the "stifling" of the freedom of debate.[83]

C. United States v. Branch

The defendants in *United States v. Branch*[84] were members of the Branch Davidians, a religious group involved in a well publicized gun battle with Federal agents in 1993.[85] The defendants committed none of the acts specified by the court in *Krout* that would result in the forfeiture of their right to a jury of known citizens.[86] Nonetheless, the district court ordered an anonymous jury and based its reasoning on the "enormous amount" of publicity the trial received.[87]

The court of appeals affirmed, and noted that while not all celebrated trials necessarily justify an anonymous jury, this trial in particular "aroused deep passions."[88] In addition, the court decided the public at-

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79. *Id.* at 1117.

80. *Id.* The court noted that federal judges are given broad discretion over many phases of a jury trial based on "the law and on his own and common experience." *Harrelson*, 713 F.2d at 1170.

81. *Id.*

82. *Id.*

83. *Id.* at 1118 (referencing the Supreme Court decision in *Clark v. United States*, 289 U.S. 1, 13 (1933)). The part of the decision used as the basis for the United States Attorney's amicus curiae brief in *Express-News* and by the court of appeals was "[f]reedom of debate might be stifled and independence of though checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.*

84. 91 F.3d 699 (5th Cir. 1996).

85. United States v. Branch, 91 F.3d 699, 709 (5th Cir. 1996) (explaining that four agents of the Bureau of Alcohol, Tobacco, and Firearms were killed during a gun battle while attempting to execute a search and arrest warrant at a location housing members of a religious cult in Waco, Texas).

86. *See id.* at 724 (discussing the reasoning of the district court when ordering an anonymous jury).

87. *See id.* (noting that the district court *sua sponte* ordered the use of an anonymous jury).

88. *Id.*

tention focused on the trial and, particularly on the jurors themselves, would have a disruptive effect on the trial.[89] The defendants argued, based on precedent, for some evidence that the defendants or their associates posed some threat to the jurors justifying the empanelment of an anonymous jury.[90] The defendants claimed there was no such evidence.

The court of appeals chose to distinguish this case from *Krout* and its successors in two manners: first, the court delineated whether the jury empanelled could properly be termed anonymous, and second, it held that district courts should look at the "totality of the circumstances."[91] The court first questioned whether the jury was properly considered "anonymous" or whether the term was "misleading."[92] While noting the district court's order concealed both the names and addresses of the jurors, the court stated it did not wish to paint with too broad a brush, as the meaning of "anonymous juries" had changed in recent years.[93] The court reasoned that "anonymity has long been an important element of our jury system."[94] The court supported this assertion with the practice of random selection of jurors from the community, that jurors are selected to decide the case presented to them, and that after the decision the jurors will "inconspicuously fade back into the community."[95] In light of this definition of anonymity, the court of appeals found that the jury in *Branch* could not be considered "anonymous" except "in the most literal sense."[96] The court noted that other juries termed "anonymous" had more information concealed than the jury in *Branch*.[97]

The court of appeals expanded the list of factors that might result in an anonymous jury to include the influence upon the trial of a non-party, namely the publicity surrounding the case.[98] The court stated the factors

89. *See id.* (asserting that several jury members received mail regarding the case during the trial).

90. *See Branch*, 91 F.3d at 723 (arguing there was no evidence to justify an anonymous jury). In addition, the defendants argued on appeal that an anonymous jury "led jurors to believe that defendants posed some threat of harm to them, thereby undermining the presumption of innocence." *Id.*

91. *See id.* at 723-24 (explaining there are circumstances besides those given in previous decisions which warrant the use of anonymous juries).

92. *See id.* at 723 (discussing the reasoning behind the jury selection process).

93. *Id.*

94. *See Branch*, 91 F.3d at 723 (emphasizing the history of the function of juries).

95. *See id.* (citing United States v. Scarfo, 859 F.2d 1015, 1023 (3d Cir. 1988)) (expressing the random process of choosing potential jurors and the limits of a juror's duty).

96. *See id.* (asserting the defendants received "a wealth of information" about the potential jurors).

97. *See id.* (referencing the jury in *United States v. Ross*, 33 F.3d 1507 (11th Cir 1994), in which the names, spouses names, addresses, places of employment, and spouse's places of employment were concealed).

98. *Id.* at 724.

delineated in *Krout* were those commonly present in trials when anonymous juries were upheld, but other factors also justify their use.[99] The court instructed district courts to look at the entire circumstances surrounding the trial, and concluded the mere prospect that publicity might expose jurors to intimidation would militate in favor of the use of anonymous juries.[100] Specifically, the court found justification for using anonymity since at approximately the same time and in the same courthouse another unrelated trial was taking place and that "persons bent on mischief" might mistakenly target jurors selected for the *Branch* trial.[101] The reasoning of the court, based on the assertion that the extensive publicity surrounding the Davidian trial was sufficient justification for an anonymous jury, would appear to contradict this assertion.

D. United States v. Salvatore

The Fifth Circuit soon expanded a trial court's ability to empanel an anonymous jury in *United States v. Salvatore*.[102] In *Salvatore*, the defendants were convicted of participating in fraudulent companies with connections to organized crime.[103] The court noted that some of the defendants in *Salvatore* and *Riggio* were the same and that using an anonymous jury was previously affirmed in *Riggio*.[104] In affirming the trial court's use of an anonymous jury, the court cited their previous decisions in *Krout* and *Branch*.[105]

The combination of the court's prior decisions enabled subsequent courts to select from a variety of reasons when deciding whether to use an anonymous jury. Essentially, a trial court could choose to justify its decision by the *Krout* factors or the totality of the circumstances used in

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99. *See Branch*, 91 F.3d at 724 (arguing that a history, or intent to tamper with juries in the future, is not the only circumstance which justifies the use of an anonymous jury).

100. *See id.* (citing United States v. Wong, 40 F.3d 1347, 1377 (2d Cir. 1994)) (justifying a district court's decision to use an anonymous jury).

101. *See id.* (expressing concern that a high-profile trial involving organized crime figures was in session at the same time and in the same court house as the trial involving the Branch Davidians).

102. United States v. Salvatore, 110 F.3d 1131, 1143 (5th Cir. 1997) (opining that a district court may consider other factors besides those set out in *Krout* when deciding to empanel an anonymous jury).

103. *See id.* at 1134-35 (noting the defendants were convicted of mail fraud in connection with a plan to operate organized-crime related companies which circumvented the requirements set out by Louisiana's Video Draw Poker Devices Control Law).

104. *Id.* at 1143.

105. *Id.*

Branch.[106] Both of these justifications depend on an affirmative showing of either an outside influence or threat. The court of appeals added that using an anonymous jury would be affirmed absent a showing that its use would result in either prejudice to the defendant's ability to chose an impartial jury or negate the presumption of innocence.[107] Prior to setting forth these broad justifications, the court reaffirmed that an anonymous jury is "a 'drastic measure' to be utilized only in limited circumstances" and must be based on more than a district court judge's "'mere allegations or inferences of potential risk.'"[108] In addition, the court stated it would affirm the use of an anonymous jury when there was evidence presented at trial supporting the necessity of an anonymous jury.[109]

Mindful to avoid jury prejudice, the court of appeals found the explanation of the district judge in *Salvatore*, regarding the use of anonymity, was both plausible and nonprejudicial in nature.[110] The district court's explanation was not based on any potential threats, but instead upon the high profile nature of the case.[111] Specifically, the district court informed the jury that anonyminity was to protect them from unwanted phone calls while participating in a highly publicized case.[112] The explanation presented neither side as the source of such conduct, but instead stated:

> Now with any potentially high profile case, we're all subject to quack phone calls and anonymous letters and that sort of thing. I want to protect the defendants as well as the government from any belief on any part of the jury that any such communications are coming from one side or the other. In other words, I don't want the defendants to be characterized as anyone who would be sending anonymous communications to the jury; I don't want the government to be characterized as someone who is trying to influence the jury improperly.
>
> The use of an anonymous jury is to ensure that both sides will get a fair trial. *It's not being done because of any apprehension on the part*

106. *Id.* In *United States v. Branch*, the court of appeals opined that a district court could consider "the totality of the circumstances" in determining whether an anonymous jury is justified. United States v. Branch, 91 F.3d 699, 723 (5th Cir. 1996).

107. *Salvatore,* 110 F.3d at 1143.

108. *Id.* (quoting *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995)).

109. *Id.*

110. *Id.* at 1144.

111. *Id.* The court stated that "the publicity surrounding the trial was quite extensive, thus enhancing the possibility that the juror's name would have become public." *Salvatore*, 110 F.3d at 1144.

112. *Id.*

of this court that you would be in danger or subject to improper pressures if your name had been disclosed.[113]

V. *UNITED STATES V. BROWN*—THE BLENDING OF JUSTIFICATIONS

If there was ever a case that would bring the media to the steps of a Louisiana courthouse, it was the trial of "Jim" Brown. In *United States v. Brown*,[114] the lead defendant, James Harvey "Jim" Brown, was the Insurance Commissioner of Louisiana and a co-defendant, Edwin Edwards, was the former Governor of Louisiana.[115] The charges levied against several defendants centered on a complex insurance fraud scheme in which the defendants participated in the liquidation of an insurance company.[116] To make the case even more attractive to the media, Edwards was recently convicted in another trial, a case subject to both a gag order and an anonymous jury.[117] In fact, Edwards, in addition to being elected an unprecedented four times to governor, was the subject of multiple criminal investigations reportedly comprising the most expensive wiretaps in FBI history.[118] Even for a state not noted for purity in politics, these cases attracted plenty of attention.[119] While the issues presented in *Brown* were a matter of first impression for the court of appeals, the actual parties in the trial were no strangers to the court, and a prior court decision regarding many of the same parties exerted quite a bit of influence on the *Brown* holding.[120] Due to the influence of this prior case, a

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113. *Id.* (emphasis added).

114. 250 F.3d 907 (5th Cir. 2001).

115. United States v. Brown, 250 F.3d 907, 910 (5th Cir. 2001).

116. *See id.* (detailing the illegal settlement scam involving a failed automobile insurance carrier). The charges included several counts of conspiracy, mail and wire fraud, insurance fraud, false statements, and witness tampering. *Id.*

117. *See* United States v. Edwards, 823 F.2d 111, 111 (5th Cir. 1987) (discussing the appeal of the second trial of former Governor Edwards for racketeering and bribery). The trial court imposed a ban on public comment concerning the trial and sealed portions of the record. *Id.* The court also precluded any media access to the record. *Id.*

118. *See* S.L. Alexander, *Trials of the Century* U.S. v. Edwin Edwards *2000*, 48 LA. BAR. J. 290, 290-94 (2000) (stating that the wiretaps cost $1.5 million and involved recording 26,000 conversations resulting in 30,000 pages of transcripts).

119. *See id.* at 294 (referencing comments made by a professor at Loyola University's Institute of Politics). Politics in Louisiana has not been not noted for its purity; "[n]o one ever claimed Louisiana politics was like Ivory Soap, 99 and 44/100% pure." *Id.* Apparently, the criminal charges and trials did not dim the political aspirations of Edwards, who proclaimed that the extensive publicity he received from the charges might encourage him to seek another term in office. Christopher Baughman, *Edwards Cites Unfairness of Polozola's Trial Tactics*, SATURDAY STATE TIMES/MORNING ADVOC., (Baton Rouge), Feb. 3, 2001, at 1B, 2001 WL 3850755.

120. *See generally* United States v. Brown, 250 F.3d 907, 916 (5th Cir. 2001) (opining that "this court has already upheld a gag order on the trial participants in the second Ed-

brief look at *United States v. Edwards*[121] is necessary to appreciate the situation presented to the court of appeals in *Brown*.

A. *The Basis for* Brown—United States v. Edwards

The appellants in *United States v. Edwards* were three news organizations seeking to overturn a district court order sealing portions of the court record, including the jury member names.[122] The trial at the focus of this appeal was actually the second trial of Edwards on allegations of racketeering and bribery.[123] The first trial lasted two and a half months and resulted in a mistrial when the jury, amidst rumors of jury bribery, was unable to reach a unanimous decision.[124] In response to the rumors, and to avoid another mistrial, the district judge in the second trial ordered the jury sequestered to protect the jury from both "'bias from outside influences'" and the expected publicity resulting from the first trial.[125] Whether these orders had the desired results is questionable because the second jury returned a verdict of not guilty as to all defendants.[126]

The court of appeals affirmed the district court's orders denying the appellants media access to the sealed records and juror information.[127] The court found the acts of the trial judge as "reasonable limitations on

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wards trial, while emphasizing the determined efforts of defendants and all counsel to circumvent it").

121. 823 F.2d 111 (5th Cir. 1987).

122. United States v. Edwards, 823 F.2d 111, 114 (5th Cir. 1987). The complete list of first amendment challenges brought by one of the appellant news organizations was:

> 1) the closure of the proceedings, 2) the midtrial orders sealing the record and imposing a ban on public comment about the proceedings during the trial, 3) the lack of a hearing for the press before closure and before the court issued its mid-trial orders, and 4) the post-trial order that permanently seals portions of the record, notably jurors names.

Id.

123. *Id.* at 113. In the present trial, Edwards faced a possible fine of millions of dollars and a sentence of hundreds of years in prison. S.L. Alexander, *Trials of the Century* U.S. v. Edwin Edwards *2000*, 48 LA. BAR. J. 290, 290 (2000).

124. *See Edwards,* 823 F.3d. at 113 (noting that the jury in the first trial was not sequestered). During the first trial, counsel become aware of a report suggesting that a vote for an acquittal was "'going for $25,000.'" *Id.* at 113 n.1. The FBI also received a letter claiming that two jurors in the first trial were "compromised." *Id.*

125. *Id.* at 113.

126. *See id.* at 113-14 (discussing the allegations of one juror remarking that the previous jury was paid for an acquittal). At another point in the trial, a juror reported that another juror "confided" that one of the defendants "smiled and brought an envelope [to the juror's] attention" every time the jury was dismissed. *Edwards*, 823 F.3d at 113.

127. *See id.* at 120 (affirming the trial court's decision precluding media access to the record and to the information provided by jurors on their questionnaires).

access to a trial" that were designed to further the court's interests in the fair administration of justice.[128] In regard to the district court's order redacting the jurors' names from the transcripts, the court of appeals found no error and stated the "usefulness of releasing jurors' names" was "highly questionable," and the redacted transcripts were adequate to reveal both the "substance and significance" of the issues.[129] The court of appeals found the jurors, in addition to being entitled to the court's protection from influence leading to bias during their service, were also deserving of the court's protection from the media's invasion of their privacy and harassment.[130] This protection was deemed necessary despite the failure the court of appeals to note any intention of the media to invade the privacy of the jurors, or harass any of the jurors.[131]

B. *The District Court's Orders in* Brown

Based on the experience in *Edwards*, the court of appeals was reasonably prepared when the parties presented themselves in the matter of *United States v. Brown*.[132] In *Brown,* the issue was a challenge of the district court's order to empanel an anonymous jury and its refusal to allow media access to the jury members after the verdict.[133] The trial giving rise to the appeal was actually the second of three federal prosecutions involving the former Governor Edwards, with Edwards acquitted of all charges in this trial, and Brown convicted of seven of nine counts of making false statements to a FBI agent.[134]

In *Brown*, the district court granted the government's motion requesting an anonymous jury.[135] The district court stated that anonymity had "long been an important element of the jury system," and by issuing the anonymity order, the court was merely increasing the level of jury ano-

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128. *See id.* at 116 (holding that a trial judge has discretion to restrict the amount of information the media receives).

129. *Id.* at 120.

130. *See id.* (detailing that the duty of the law is to protect the privacy of jurors and keep them from being harassed after their duties are completed).

131. *See generally Edwards,* 823 F.3d at 111 (noting the court of appeals did not discuss the media's objectives of invasion of juror privacy or harassment).

132. *See generally* United States v. Brown, 250 F.3d 907, 910 (5th Cir. 2001) (stating that because of the relatively recent litigation, the court of appeals was quite familiar with the issues in the case).

133. *Id.* at 910 n.1. The list of media involved included Time-Picayune Publishing Corporation, the Associated Press, Capital City Press, Gannett River States Publishing, Inc., Hearst-Argyle Television, Inc. (WDSU-TV), WGNO Inc., WWL-TV Inc., Emmis Television Broadcasting L.P. (WVUE-TV), and the Louisiana Press Association. *Id.*

134. *See id.* at 910 (stating that Edwards was convicted of bribery in an earlier trial).

135. *Id.*

nymity, and was not breaking new ground.[136] The district court noted that three of the five non-exclusive factors set forth in *Krout* were present in the *Brown* case.[137] Specifically, the district court found allegations of attempts to interfere with the judicial process, including attempts to bribe a judge, attempts to illegally terminate a federal investigation, and attempts to influence a court appointed special master.[138] In addition, two of the defendants pleaded guilty to witness tampering, and Edwards was convicted of interfering with judicial and administrative processes.[139] Thus, the *Krout* factor of "past attempts to interfere with the judicial process" was clearly present.[140]

Finally, the case received extensive publicity, potentially another factor under *Krout*, if the publicity "could enhance the possibility that jurors' names would become public."[141] The district court concluded that the media's interest in gaining access to the jurors' information "strongly counseled" the district court that anonymity was necessary to protect the jury from "foreseeable harassment by the media and others."[142] Therefore, to protect the integrity of the trial and the jurors themselves, the district court issued protective orders including a gag order on all trial participants, an anonymous, but not sequestered jury, closure of the jury selection process, and post-verdict orders that continued juror anonymity and shrouded jury deliberations.[143]

In anticipation of the press to either ignore or thwart these orders, the district court also issued statements that admonished against any attempt to circumvent or interfere with the anonymous jury order.[144] The district court addressed both of these statements to "the media and others," raising concerns that the court was categorically grouping the media with

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136. *Brown*, 250 F.3d at 910.

137. *See id.* at 911 (stating the factors in the case indicated the need for an anonymous jury).

138. *Id.* at 911; *see also* S.L. Alexander, *Trials of the Century* U.S. v. Edwin Edwards *2000*, 48 LA. BAR. J. 290, 293 (2000) (noting that support for the assumption was the surprise move of the appointed judge, who presided over the prior Edwards trial, to recuse himself, followed by three other judges in the Middle District of Louisiana).

139. *Brown*, 250 F.3d at 911.

140. *Id.* at 911 n.1; *see also Krout*, 66 F.3d at 144 (listing past attempts of interference with the judicial process or witnesses as one of five elements justifying jury anonymity).

141. *Brown*, 250 F.3d at 911.

142. *Id.*

143. *Id.* at 912.

144. *See id.* at 911 (referencing the district court statement stating "'[a]ny attempts by the media or others to interfere with this [the anonymous jury order] will not be tolerated'") (quoting the district court's August 9, 2000 Order). The district court also stated that "'[i]n the meantime, the media is ordered not to attempt to circumvent this Court's ruling preserving the jury's anonymity.'" *Id.* (quoting the district court's August 9, 2000 Order).

individuals that might seek to influence the trial's outcome for their own purposes.[145] After the verdict was announced, the district court informed the jurors that their identities would not be released unless they approached the court and requested otherwise.[146] In addition, the district court informed the jury that absent a court order, they could not be interviewed by any member of the media.[147]

C. *The Court of Appeals Decision in* Brown

Prior to beginning its discussion on the district court's orders, the court of appeals expressed that the district court had gone to "extraordinary lengths to preserve the integrity of the jury system" and to ensure "a fair trial in the face of relentless publicity."[148] The court observed that the publicity was at least partially generated by the parties themselves.[149] In addition, the court noted that the media "entertained" the citizens of Louisiana and beyond with continuous coverage of the defendants' prosecutions.[150] The court of appeals opined that the district court's orders had not "noticeably interfered" with press coverage, but merely limited access to the background and makeup of the jury.[151] The court found an "area of agreement" between the media and the district court's order based on the fact there was no challenge to the order empanelling the anonymous jury.[152] The court further opined that by failing to appeal this

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145. *See* Douglas Lee, *Ruling Affirming Anonymous Jury Flouts Principles of Open Trials*, May 29, 2001, *at* http://www.freedomforum.org (opining that the court's ruling failed to distinguish between the criminals' intimidation of jurors and the journalist's attempts to cover the news) (on file with the *St. Mary's Law Journal*).

146. *Brown*, 250 F.3d at 912.

147. *See id.* (reviewing the juror's instructions given by the district court regarding their anonymity and its extent). The court of appeals noted that the district court asked if any of the jurors wished to waive their anonymity, which none of the jurors choose to do. *Id.*

148. *Id.*

149. *Id.*; *see also* S.L. Alexander, *A Reality Check on Court/Media Relations*, THE MISSOURI BAR, BRIEFLY, Feb. 2001, *at* www.mobar.org/press/bfly0201.htm (stating that in violation of the court's gag order, Edwards discussed exculpatory evidence with reporters outside the courtroom). This violation of the court's order resulted in Edwards being fined $1700, or $100 per word, and was threatened with a future fine of $1,000 per word for any further violations of the order. *Id.*

150. *Brown*, 250 F.3d at 912; *see also* S.L. Alexander, *Trials of the Century* U.S. v. Edwin Edwards *2000*, 48 LA. BAR. J. 290, 291 (2000) (analogizing the events surrounding the trials with a college football game).

151. *Brown*, 250 F.3d at 912.

152. *See id.* at 914 (enumerating available options to the trial court and noting the media's agreement with its eventual decision).

order, the media "conceded" that the jury's anonymity was both "fully supported in the record and fully enforceable against parties."[153]

Furthermore, the court of appeals found there was "abundant" evidence supporting the district court's "fears of an imminent and serious threat" to the jury members from both the defendants and the press.[154] In addition, the court noted the media's attempt to "zealously" seek information that the court had denied public access.[155] The court of appeals found that the district court "could well conclude" the integrity of the trial was at risk and a "clear and present danger" existed if jury anonymity was compromised.[156]

The court of appeals found an anonymous jury was a reasonable method to combat the "direct intimidation by the press or the defendants" and was a viable way for the court to protect the jurors, venire persons, and the jurors' families from outside influences.[157] Further, the district court's orders were needed to prevent jury members from becoming "unwilling pawns in the frenzied media battle" surrounding the case.[158] The court of appeals was quick to point out the media's attempts to use a "self-justifying" argument in challenging the non-circumvention orders.[159] However, the court then presented its own self-justifying argument in its affirmation of the district court's restrictions.[160] The court stated the right to gather news was not absolute[161] and the media was entitled to report on "public proceedings involved in a trial" and thus, the restrictions on non-public information were appropriate.[162] The self-justifying basis was that the court orders placed information usually within the public domain into the private area and operated to curtail the newsgathering ability of the press.[163]

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153. *Id.*

154. *See id.* at 916 (observing Edwards's prior conviction of interference with the judicial process, the prior guilty pleas to witness tampering by two defendants, and the media's prior pursuit of jurors despite the anonymity order).

155. *Id.*

156. *Brown*, 250 F.3d at 916.

157. *See id.* (asserting that the other available alternative to jury anonymity, sequestration, was less appropriate considering the circumstances).

158. *See id.* at 921 (expressing approval of the district court's measures as a means of preventing undue juror influence by the media).

159. *See id.* at 914 (recognizing the media's argument that the district court's non-circumvention orders hinders independent news gathering as a legitimate, though self-justifying, argument).

160. *See id.* (stating that while the media had the right to report on public proceedings, the First Amendment did not guarantee journalists access to information generally not available to the public).

161. *Brown*, 250 F.3d at 914.

162. *Id.*

163. *Id.*

As the court noted in prior cases, the power of the judge to prevent juror harassment does not end with the trial[164] and judge issued orders regarding contact and anonymity are permissible, despite their limitless duration.[165] The court noted the district court's orders in *Brown* "[did] not mandate anonymity" and jurors were free to signal their willingness to submit to media contact.[166] Regardless of the justifications given by the court, one observer noted the court seemingly "went out of its way" to justify the use of an anonymous jury.[167]

VI. CONCLUSION

Some critics have said the ruling in *Brown* places "ominous clouds" on the horizon for the media to inform the public about the justice system.[168] Incidentally, the critics' predictions of the Fifth Circuit's stand on anonymous juries have been reinforced by subsequent rulings. As recently as September of last year, the court of appeals upheld a district court order forbidding media access to jury members without prior court approval.[169]

As the lead lawyer for the media organizations in both the *Edwards* and *Brown* case pointed out, the court's rulings are a "disturbing trend."[170] Seemingly, the court decided to follow a trend that jury duty in

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164. *See* United States v. Harrelson, 713 F.2d 1114, 1117 (5th Cir. 1983) (granting federal judges wide discretion in determining treatment of jurors); *see also* United States v. Edwards, 823 F.2d 111, 120 (5th Cir. 1987) (recognizing that "although post-trial restrictions on news gathering must be narrowly tailored, the jurors are entitled to privacy and protection from harassment").

165. *See Brown*, 250 F.3d at 918-19 (holding that the judge's power to protect a juror's privacy does not end when the case ends).

166. *See id.* at 920 n.20 (asserting that the district court's order regarding jury anonymity did not make anonymity mandatory but permissive and thus, did not violate the media's right of access).

167. *See* John Council, *5th Circuit: Juror Info. May Be Kept Secret Post-Verdict*, 224 LEGAL INTELLIGENCER No. 90, May 9, 2001, at 4 (expressing some of the same concerns the media had regarding the *Brown* decision).

168. *See* Douglas Lee, *Ruling Affirming Anonymous Jury Flouts Principles of Open Trials*, May 29, 2001, *at* http://www.freedomforum.org (discussing the court's comparison between the media and criminal intimidation) (on file with the *St. Mary's Law Journal*).

169. *See* Bob Van Voris, *5th Circuit OKs Shielding Jurors*, NAT'L L.J., Oct. 15, 2001, A4 (reporting that the jurors were involved in the "first case to be tired against [Firestone] since a massive tire recall in 2000"). During jury deliberations, the parties settled. *Id.* However, prior to dismissal, the judge advised the jury members about not talking to the press because of an "possible effect on the hundreds of Ford and Firestone cases pending across the country." *Id.*

170. *See* S.L. Alexander, *A Reality Check on Court/Media Relations*, THE MISSOURI BAR, BRIEFLY, Feb. 2001, *at* http://www.mobar.org/press/bfly0201.htm (quoting attorney Mary Ellen Roy's comments on the use of anonymous juries). Another attorney expressed dismay with anonymous juries by noting that the public no longer has full knowledge of how the court system treats defendants. *Id.*

a high-profile case is no longer a challenge or inconvenience that the individual is expected to meet.[171] Through its holding in *Brown*, the Fifth Circuit has reduced jurors to helpless pawns, suffering at the hands of the media.[172]

With the court affirming the vast majority of anonymous jury orders, the ability of a district court to empanel an anonymous jury, for whatever reason, are expanding in the Fifth Circuit. Whether this increased use of anonymous juries will lead to judges hauling in defendants to stand trial before twelve anonymous citizens "who could end up 'protected' behind a screen, or wearing black hoods" remains to be seen.[173] However, this potential scenario results in the defendant wondering if the panel that is judging his fate is an impartial one, or merely a panel of a dozen prosecutors, "sworn in advance to railroad" the defendant to the gallows and without any effective review of who the panel members are.[174]

171. *Id.*

172. *See* Douglas Lee, *Ruling Affirming Anonymous Jury Flouts Principles of Open Trials*, May 29, 2001, *at* http://www.freedomforum.org (expressing the additional concern that the focus of the courts has become the behavior of the media, and not the guilt of the defendants) (on file with the *St. Mary's Law Journal*).

173. Editorial, *Anonymous Juries Gain Ground*, LAS VEGAS REVIEW J., July 2, 2001, 6B, *at* 2001 WL 9536851.

174. *Id.*