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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES**
12 **METROPOLITAN COURTHOUSE**

13 PEOPLE OF THE STATE OF CALIFORNIA,
14 Plaintiff,

15 v.

16 MIGUEL ANTONIO, CHANTELLE
17 HERSHBERGER,
18 Defendants.

Case No. 8MN04232

**PEOPLE'S RENEWAL OF FORMAL
REQUEST TO ENFORCE LOS
ANGELES COUNTY SUPERIOR
COURT LOCAL RULE 2.20;
REQUEST FOR INVESTIGATION
INTO JURY MISCONDUCT**

Date: June 27, 2019
Time: 10:00 am
Court: Dept. 62

19 TO THE HONORABLE MIGUEL T. ESPINOZA, JUDGE OF THE
20 SUPERIOR COURT, COUNTY OF LOS ANGELES, THE HONORABLE MA'AME
21 FRIMPONG, ACTING PRESIDING JUDGE OF THE METROPOLITAN COURT,
22 COUNTY OF LOS ANGELES, DAMON ALIMORI, COUNSEL FOR MIGUEL
23 ANTONIO, AND MICHAEL PLAUT, COUNSEL FOR CHANTELLE HERSHBERGER.

24 PLEASE TAKE NOTICE: The People formally ask the Court to immediately enforce
25 Los Angeles Superior Court Local Rule 2.20 and conduct an inquiry into jury irregularity.

26 **STATEMENT OF FACTS**

27 The Defendants in this action are self-admitted members of the group Refuse Fascism LA
28 (FLA). Numerous RFLA members, openly associated with both defendants, have descended
29 on the Metropolitan Courthouse and engaged in loud, subtle, and written protest clearly
30 ended to influence the jury. Throughout the course of this trial, the People have alerted the
31 ert to the conduct of RFLA members both inside the courtroom and in front of the courthouse.

1 Over the People's objection, Judge Espinoza allowed the defense, in direct examination of the
2 defendants and in their closing, to identify a number of political woes that motivated the
3 defendants' actions on the day they were arrested. These included such inflammatory, irrelevant,
4 and prejudicial topics associated with the current Presidential administration, including, but not
5 limited to, "ripping babies out of their parents' arms at the border", the threat of nuclear war, the
6 fascist takeover of the United States government, and the death of migrants coming over the
7 border. A central theme to the defense's closing urged the jury to "pick a side".

8 RFLA members, easily identifiable through their identical shirts, have used several
9 means to exercise influence upon the sitting jury. They distributed fliers depicting photographs
10 of the alleged crime as it was occurring and before it was shown to the jury. On June 18th,
11 during jury selection, leaflets were passed out by an unknown male wearing a black RFLA t-shirt
12 with Spanish writing, to people in the security line waiting to enter the courthouse. An employee
13 of the City Attorney's Office received one, as did the person in front of him and the person
14 behind him. See People's Exhibit 7. These leaflets directed readers to the group's website
15 (refusefascism.org, where additional facts about the case and case history not shown to the jury
16 is published) "to find out more about these cases including illegal police spying of Refuse
17 Fascism and members of the Revolution Club, and the use of LAPD spies, surveillance and
18 harassment." The issue of an LAPD informant was hotly contested and clearly excluded by a
19 402 ruling before trial. The defendants and their attorneys were instructed not to mention it
20 (which was violated by defendant Antonio). The fliers have been handed out to numerous
21 unknown members of the public directly in front of the courthouse entrance. They have also
22 been posted inside the few eating establishments nearby.

23 Each day during trial, RFLA members have gathered within thirty feet of the court
24 entrance during the lunch hour and when the court recessed for the day to hold rallies where the
25 case was discussed and their political viewpoints were shared in a loud manner. They have made
26 announcements on the courthouse property regarding issues pertaining specifically to the trial
27 (including evidence that was explicitly excluded by this court), while jurors from this trial were
28 present. They remain in front of the courthouse until after 5 pm in an apparent attempt to have
their worn messages seen by anyone with business in the courthouse.

On June 26th, 2019, RFLA members erected a large banner that spanned the face of the
Metropolitan courthouse.

1 Each day, RFLA members have been allowed into the courtroom wearing t-shirts (a black
2 version with Spanish writing advocating revolution and the group's website, and a white version
3 with various messages of the in the same font) in a clear attempt to communicate with the jury.

4 The messages on the t-shirts include:

- 5 • Children in Cages, Which side are YOU on?
- 6 • Would you have convicted Rosa Parks?
- 7 • Would you have convicted Harriet Tubman?
- 8 • Would you have convicted those who hid Anne Frank?
- 9 • Would you have convicted same sex couples?
- 0 • Family Separation! Which side are YOU on?
- 1 • Abortion Ban -- Which side are YOU on?
- 2 • Trump = Hitler
- 3 • Don't be a Good German
- 4 • Pence wants an American Gilead

5 One RFLA member, wearing a white t-shirt with the words "Abortion Ban" and white pants, was
6 allowed into the courthouse on June 26th despite having fake blood painted from her lower
7 abdomen and down the inside of her pant legs. She sat outside Dept. 62 while the jury was
8 inside so that she would be visible to anyone leaving Dept. 62.

9 On June 26th, when counsel for defendant Antonio finished his closing, the twenty to
0 thirty RFLA members who took up almost the entire right seating area of Department 62 erupted
1 in a loud applause. After allowing them to finish, Judge Espinoza asked the crowd to refrain
2 from applause. When the jury was sent to begin deliberations, the RFLA members stood up in
3 unison and held out the same photograph depicting a dead migrant and his child laying in a river.
4 Judge Espinoza saw this act and made a record which included the estimated number of RFLA
5 members present and a description of some of the t-shirts they were wearing. Judge Espinoza
6 later admonished the audience that the display of the photograph depicting the dead migrant and
7 child "was a bridge too far" and anyone holding up any sign would be asked to leave the
8 courtroom.

9 The People have requested several times that the court exercise its authority over the
0 courtroom to limit any members of the public from attempting to influence the jury. The People
1 have attempted to protect the jury from interference under numerous theories, including prohibited

communications and the local rules regarding jury interference. On June 26th, the People provided the court with a photograph of defendant Antonio wearing an RFLA t-shirt and standing with other members of RFLA and two poster boards depicting the aforementioned leaflets and migrant photo, along with evidence presented at trial. While obviously within the 50-yard boundary set forth in 2.20, Judge Espinoza ruled he could not be sure it was within 50 yards, and that he could not make out what was on the poster board. The photograph clearly showed defendant Antonio standing next to the raised concrete at the steps of the courthouse, and the migrant photo and photo of the crime scene is also apparent. Judge Espinoza denied the People's request for enforcement of 2.20 citing a lack of a declaration (though he acknowledged the prosecutor as an officer of the court), the lack of evidence showing it was within 50-yards, and a lack of the evidentiary standard needed for enforcement.

The People have asked for special admonishments and a voir dire of the jury after the events on June 26th, but Judge Espinoza has denied each request and has chosen to rely on the generic admonition regarding outside information and informing the court if a juror is approached with information. After each denial of the People's request, the group's actions have become bolder.

On June 26th, Judge Espinoza ruled the defense had standing to object to the People's request that the t-shirts be removed and that 2.20 be enforced.

**UNAUTHORIZED COMMUNICATIONS, WHICH HAVE BEEN MADE TO THE JURY
BY RFLA MEMBERS AND DEFENDANTS, ARE PRESUMED PREJUDICIAL**

"The presence of outside influences upon the jury establishes a presumption of prejudice..." (*United States v. Armstrong* (9th Cir. 1981) 654 F.2d 1328, 1332., citing *Remmer v. United States*, 347 U.S. 227, (1954); *Mattox v. United States*, 146 U.S. 140, (1892); *United States v. Goliday*, 468 F.2d 170, 171-72 (9th Cir. 1972), cert. denied, 410 U.S. 934.)

"Rebuttal requires a strong contrary showing." (*Rinker v. County of Napa* (9th Cir. 1983) 724 F.2d 1352, 1354.)

The actions by RFLA are clear communications made to the jury. The message being transmitted is meant to effectuate a particular outcome in the trial—namely, jury nullification. Their persistent presence in specific areas show that they are trying to get the jurors to see their message. Their pre-planned, and pre-supplied reveal of the dead migrant photo just as the jury

1 walked in front of them into the deliberation room shows they are coordinating their
2 communication.

3 "The harm inherent in deliberate contact or communication can take the form of subtly
4 creating juror empathy with the party and reflecting poorly on the jury system." (*Rinker v.*
5 *County of Napa, surpa*, at 1354.) RFLA's use of messages such as "would you convict..." in the
6 courtroom and surrounding area is an attempt to speak directly to someone in the position to
7 convict—a juror! It aligns jurors who are contemplating voting guilty with people who have
8 committed grave injustices in history. On the other hand, it applauds jurors who would vote not
9 guilty by aligning them with historical figures who have taken a stand against injustices.

10 THE COURT MUST TAKE ACTION

11 1. The Court Should Take Measures to Prevent Further Unauthorized Communication: 12 with the Jury

13 The court has stated various times that there has been no indication that the jurors are
14 being at all influenced by all of the actions taken by RFLA members inside the courtroom, the
15 court halls, or the courtroom entrance. But there need not be an affirmative proof shown before
16 this court can exercise its duty to protect the due process rights of the parties..

17 "Due process means a jury capable and willing to decide the case solely on the evidence
18 before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the
19 effect of such occurrences." (*Smith v. Phillips*, 455 U.S. 209 at 217.) (emphasis added). Indeed,
20 the *Rinker* court goes on to state that a juror's affidavit stating she was not affected is *not*
21 dispositive of the influence exercised upon her by outside influence. *Id.* at 1354.

22 The court has several items of evidence before it that show multiple attempts for the
23 defendants and RFLA to influence the jury's deliberation process.

24 The People ask the court, yet again, to prohibit this group from interfering with the jury.
25 Los Angeles Superior Court Local Rule 2.20 states, in whole:

26 Except as may be authorized by a judge, no person may distribute or attempt to distribute
27 any written materials tending to influence, interfere, or impede the lawful discharge of
28 the duties of a trial juror, or communicate or attempt to communicate with any person
29 summoned, drawn, or serving as a trial juror for purposes of influencing, interfering, or

impeding the lawful discharge of the duties of a trial juror in, or within 50 yards of any public entrance to, the facilities within which the court conducts jury trials.

Here, the items and actions utilized by this group are advocating for the defendants and constitute an attempt to influence the jury to vote not guilty. Signs are posted where the jury congregates for lunch. The people wearing the clothing only enter the courtroom when the jury enters, and remain in the hallways when the jury is in the hallways. The placards held up while the jurors entered the deliberation room were held up to face the jury. There was clapping after the defense attorneys completed their closing arguments. There are rallies and announcements regarding the trials right outside the courthouse doors. The court inquired what the standard of proof was to enforce Rule 2.20. There is no standard. It is a court rule and the court has an obligation to enforce it at all times. The court must instruct the Sheriff to preserve the 50-yard boundary, and guard against any communication inside the courthouse, to prevent any further jury interference.

a. A Courthouse, and especially a courtroom, is not a public forum.

“A courthouse -- and, especially, a courtroom -- is a nonpublic forum.” (*Berner v. Delahanty* (1st Cir. 1997) 129 F.3d 20, 26.) See *United States v. Bader*, 698 F.2d 553, 556 (1st Cir. 1983); *Claudio v. United States*, 836 F. Supp. 1219, 1224-25 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994).

“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” (*Cornelius v. NAACP Legal Def. & Educ. Fund* (1985) 473 U.S. 788, 806 [105 S.Ct. 3439, 3451, 87 L.Ed.2d 567, 582].)

The People are requesting this court to prevent future attempts to influence the jury by ordering the removal of any sign, banner, clothing, leaflet, announcement (recorded or live), or any other form of communication that bears any message regarding issues raised in this trial, including, but not limited to, Donald Trump, immigration, fascism, social injustices, et cetera., all of which now directly comment on evidence introduced by the defense over the People's objection. So long as the court's order is viewpoint neutral and for the purpose of conducting its business (a fair trial for all parties), such an order would not run afoul of any First Amendment protections.

2. The Court Should Inquire of the Jurors Whether or Not All Jurors Are Basing their Deliberations Solely on the Laws as Given by the Court and the Evidence as Received in the Trial.

The People are requesting that the court inquire of the jurors the following:

"Are you basing your deliberations solely on the law as I have provided and the evidence you have received in this trial, and not on bias or any outside influence?"

In *Carey v. Mustadin* (2006) 549 U.S. 70, Justice Souter's concurring opinion described the standard for jury tampering and stated:

"We have a number of decisions dealing with threats to the fundamental fairness of a criminal trial posed by conditions in (or originating in) the courtroom, see, e.g., *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986); *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), and the two most recent ones agree on a general formulation harking back to *Estes, id.*, at 542-546, 85 S. Ct. 1628, 14 L. Ed. 2d 543: the question is whether the practice or condition presents "an unacceptable risk . . . of impermissible factors coming into play" in the jury's consideration of the case. *Flynn, supra*, at 570, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (quoting *Williams, supra*, at 505, 96 S. Ct. 1691, 48 L. Ed. 2d 126). The Court's intent to adopt a standard at this general and comprehensive level could not be much clearer.

As for the applicability of this standard, there is no serious question that it reaches the behavior of spectators. The focus of the later cases is on appearances within the courtroom open to the jurors' observation. There is no suggestion in the opinions, and no reason to think now, that it should matter whether the State or an individual may be to blame for some objectionable sight; either way, the trial judge has an affirmative obligation to control the courtroom and keep it free of improper influence. *Sheppard, supra*, at 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600. And since the *Williams-Flynn* standard is a guide for trial judges, not for laypersons without schooling in threats to the fairness of trials, its general formulation is enough to tell trial judges that it applies to the behavior of courtroom visitors.

Nor is there any reasonable doubt about the pertinence of the standard to the practice in question; one could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim's photo can raise a risk of improper considerations. The display is no part of the evidence going to guilt or innocence, and the buttons are at once an appeal for sympathy for the victim (and perhaps for those who wear the buttons) and a call for some response from those who see them. On the jurors' part, that expected response could well seem to be a verdict of guilty, and a sympathetic urge to assuage the grief or rage of survivors with a conviction would be the paradigm of improper consideration.

The only debatable question is whether the risk in a given case reaches the "unacceptable" level. While there is a fair argument that any level of risk from wearing buttons in a courtroom is unacceptable, two considerations keep me from concluding that the state court acted unreasonably in failing to see the issue this way and reverse the conviction."
(*Id.* at 82-83.)

This court has a duty to determine the level to which RFLA's actions have influenced jury deliberations in order to safeguard the fairness of this trial and maintain the due process rights of the People. There is no question that jurors have been exposed to unauthorized communications, which are presumed to be improper. The court cannot ignore the deep risk that these communications have now tainted the jurors. The People are requesting that the court inquire of the jurors in order to ascertain whether or not the jurors are able to deliberate after having seen and heard such inflammatory remarks and photos from RFLA members. The court can then decide whether to re-instruct the jury on how to deal with the communications, substitute in alternate jurors, or otherwise take action necessary to preserve the People's right to a fair trial.

CONCLUSION

For the reasons stated, the People request that the court take action to avoid depriving the People their due process right to a fair trial.

Dated this 27th Day of June 2019

Respectfully Submitted,
MICHAEL N. FEUER
City Attorney

By: _____
ANDREW D SOLIMAN
Deputy City Attorney


DECLARATION OF BENJAMIN KARABIAN

I, Benjamin Karabian, declare as follows:

1. I am the Supervising Attorney of the City Attorney's Metropolitan Branch.
2. On June 26th, 2019, I observed a Caucasian woman with dark hair wearing a white t-shirt with the words "abortion ban" in the same font as other RFLA members' shirts. She had white jeans on as well and a large amount of fake blood on her lower abdomen, groin, and trailing down the inside of each leg. She remained seated on the bench in front of department 62 and directly opposite the courtroom door.
3. On June 26th, I accessed the City of Los Angeles zoning database ZIMAS and used the distance tool to draw a line from within the Metropolitan courthouse and extended across the front sidewalk and into the street. The measured distance was 47.882 feet.
4. It is my opinion that the photograph depicting defendant Antonio standing near poster boards taken on June 26th places him at a distance of less than 30 feet from the entrance to the courthouse.
5. The poster board in front of where defendant Antonio was standing when photographed contains an image of the November incident and an image of the dead migrant and child.
6. Throughout the trial, I have observed numerous RFLA members in court wearing political messages on t-shirts that were referenced by defendant Hershberger and used in closing arguments. Some t-shirts had the words "Would you convict Harriet Tubman?" and "the person who housed Ann Frank?" while the jury was seated.
7. On June 25th, at approximately 12:15 pm, I heard RFLA members talking about the trial and evidence excluded from the jury (specifically "spies") at such volume that I could hear it from the 5th floor of the Metropolitan courthouse.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 27, 2019 at Los Angeles, California.


Benjamin Karabian