ship's assets.[7] *See* Chapter XI § 311 of the Bankruptcy Act, 11 U.S.C. § 711,[8] Collier on Bankruptcy ¶ 3.02 at 156–63 (14th ed. 1978). It would be premature for us to determine the applicability of section 2(a)(21) of the Act since this, too, is an issue which the bankruptcy court is empowered to decide. *See In re Distillers Factors Corp.*, 187 F.2d 685, 687 (3d Cir. 1951); *Yoshinuma v. Oberdorfer Insurance Agency*, 136 F.2d 460, 461 (5th Cir. 1943). The district court order of September 14 did not affect any rights appellant may or may not have acquired in the fund marshalled by the equity receiver. It is the province of the bankruptcy court to determine whether appellants have acquired any legally recognizable interest in that fund.

It is too early to predict whether or not the Bankruptcy court will reject appellants' fraud claims under section 57(d), for the court may decide that they are capable of liquidation. Such a determination is vested in the discretion of the bankruptcy court and, as noted by the court in *In the Matter of Cartridge Television, Inc.*, 535 F.2d 1388, 1391 (2d Cir. 1976): "To reject an easily provable securities fraud claim, for instance, might well amount to an abuse of discretion."

[7] Finally we reject appellants' contention that Sterge was estopped from seeking the termination of the receivership because of the consent he entered into with the SEC. A reading of the judgment reveals that Sterge agreed only to the "temporary continuation of the receivership" and in no way bound himself unto eternity.

Affirmed.[9]

7. Ao-Car informs us in its brief that the appellants have raised this argument before the bankruptcy court.

8. Chapter XI § 311 of the Bankruptcy Act, 11 U.S.C. § 711 provides: "Where not inconsistent with the provisions of this chapter, the court in which their petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

9. Defendants-appellees' request for attorney's fees is denied, and their request for costs is allowed.

UNITED STATES of America, Appellee,

v.

Leroy BARNES, a/k/a "Nicky", Steven Baker, a/k/a "Jerry", Steven Monsanto, a/k/a "Fat Stevie", John Hatcher, a/k/a "Bo", Joseph Hayden, a/k/a "James Hayden", a/k/a "Freeman Hayden", a/k/a "Jazz", Wallace Fisher, Leon Johnson, a/k/a "J.J.", Waymin Hines, a/k/a "Wop", Leonard Rollock, a/k/a "Petey", James McCoy, Walter Centeno, a/k/a "Chico Bob", Defendants-Appellants.

Nos. 1045–1053, 1056, 1057; Dockets 78–1040, 1045, 1050, 1051, 1056, 1058–1061, 1063, 1067.

United States Court of Appeals, Second Circuit.

Argued June 22, 1978.

Decided April 23, 1979.

Rehearing and Rehearing En Banc Denied June 18, 1979.

Dissenting Opinion June 22, 1979.

Eleven defendants appealed from judgments entered in the United States District Court for the Southern District of New York, Henry F. Werker, J. Whereby defendants were convicted of conspiracy to violate federal narcotics laws and various substantive violations. In addition, one defendant was convicted of engaging in a continuing criminal conspiracy and another defendant was convicted of unlawful possession of a firearm during commission of a federal felony. The Court of Appeals, Moore, Circuit Judge, held that: (1) certain limitations on voir dire were not an abuse

of discretion; (2) under the circumstances, the district judge's decision to withhold the names and addresses of the jurors was appropriate; (3) the district court's refusal to inquire on voir dire into the ethnic backgrounds of the prospective jurors was not error; (4) the district court properly handled an incident involving alleged juror bias; (5) defendants were not entitled to obtain the information upon which the court issued an order permitting disclosure of tax returns; (6) the admission of the tax returns in evidence did not violate defendants' rights against self-incrimination; (7) the evidence established a single conspiracy; (8) there was no *Brady* violation; (9) any error in admitting certain cooperation agreements in evidence during the Government's direct examination was not sufficiently prejudicial to warrant reversal; (10) defendants were not entitled to suppression of evidence derived from electronic surveillance; (11) one defendant was properly convicted under the continuing criminal enterprise statute; (12) a postarrest statement was admissible; (13) denial of a motion for severance was proper; (14) the district court properly refused a request to charge on entrapment, and (15) evidence seized in an inventory search of an impounded automobile that was subject to forfeiture was admissible.

Ordered in accordance with opinion.

Meskill, Circuit Judge, dissented and filed opinion.

Oakes, Circuit Judge, dissented from the denial of petition for rehearing en banc and filed opinion in which Timbers, Circuit Judge, and Meskill, Circuit Judge, joined.

1. Jury ⇐131(2)

The trial judge's broad discretion in conducting the voir dire must be exercised consistently with the essential demands of fairness in the particular case.

2. Jury ⇐131(1)

The purpose of the voir dire is to ascertain disqualifications, not to afford individual analysis in depth to permit a party to choose a jury that fits into some mold thought to be appropriate for his case.

3. Jury ⇐131(6)

The defense must be given a full and fair opportunity during voir dire to expose bias or prejudice on the part of the veniremen; for example, if the case carries racial overtones or involves other matters concerning which the local community or the population at large is commonly known to harbor strong feelings, the possibility of prejudice is real and there is need for a searching voir dire.

4. Jury ⇐131(6)

When the matter sought to be explored on voir dire does not relate to a situation carrying racial overtones or involving other matters concerning which the local community or the population is commonly known to harbor strong feelings, it is incumbent on the proponent of voir dire questions to lay a foundation for his questions by showing that the questions are reasonably calculated to discover an actual and likely source of prejudice; absent such showing, there is no prejudice to the rights of the accused from refusal of voir dire questions.

5. Criminal Law ⇐1134(5)

In reviewing trial judge's conduct of voir dire, an appellate court faced with a cold record should be satisfied that justice was done as long as there is some questioning as to identifiable issues connected in some way with persons, places or things likely to arise during the trial.

6. Criminal Law ⇐1158(3)

As long as a defendant's substantial rights are protected by a voir dire designed to uncover bias as to issues in the case and as to the defendant himself, reasonable limitations on voir dire questioning should not be disturbed on appeal.

7. Jury ⇐131(8)

In absence of anything to indicate that persons of one or another ethnic type are more favorably disposed than others toward trafficking in narcotics or toward using firearms and where defendants did not advance any reason to support disclosure of

use reasonable means to gain access for this purpose.

75. Criminal Law ⇐1169.6

Where guns that were seized in warrantless inventory of automobile were the subject of two counts on which defendant was acquitted, the admission of the guns was harmless even if they were improperly seized.

76. Criminal Law ⇐369.2(7)

In prosecution on charges including conspiracy to violate federal narcotics laws, district court properly admitted evidence of defendant's participation in a plan to import 300 pounds of heroin and to assemble some 50 guns, including sawed-off shotguns, machine guns and handguns where, in view of defendant's trafficking in the sale of heroin, the proof concerning the heroin importation scheme had unquestionable probative value in relation to the furtherance of the conspiracy and where the weapons could certainly have been indicative of "tools of the trade."

Robert B. Fiske, Jr., U. S. Atty., S. D. New York, New York City (Thomas H. Sear, Robert B. Mazur, T. Barry Kingham, Lawrence Pedowitz, Richard D. Weinberg, Robert J. Jossen, Asst. U. S. Attys., New York City, of counsel), for appellee.

Edward M. Chikofsky, New York City (David Breitbart, H. Richard Uviller, New York City, of counsel), for defendant-appellant Barnes.

Michael Young, New York City (Goldberger, Feldman & Dubin, New York City, of counsel), for defendant-appellant Baker.

Mel A. Sachs, New York City, for defendant-appellant Monsanto.

Helene M. Freeman, New York City (Robert Koppelman, New York City, of counsel), for defendant-appellant Hatcher.

Joel A. Brenner, East Northport, N. Y., for defendant-appellant Hayden.

Mark Lemle Amsterdam, New York City, for defendant-appellant Fisher.

Joseph T. Klempner, New York City, for defendant-appellant Johnson.

Mark S. Arisohn, New York City, for defendant-appellant Hines.

Melvyn Schlesser, New York City (Bobick, Deutsch & Schlesser, New York City, of counsel), for defendant-appellant Rollock.

J. Jeffrey Weisenfeld, New York City (Steven M. Jaeger, New York City, on the brief), for defendant-appellant McCoy.

Barry Bohrer, New York City (Bohrer & Ullman, New York City, of counsel), for defendant-appellant Centeno.

Before MOORE, VAN GRAAFEILAND and MESKILL, Circuit Judges.

MOORE, Circuit Judge:

Leroy ("Nicky") Barnes, Steven Baker, Steven Monsanto, John Hatcher, Waymin Hines, Leonard Rollock, James McCoy, Walter Centeno, Leon Johnson, Joseph Hayden, and Wallace Fisher appeal from judgments of conviction entered on January 19 and 23, 1978, in the United States District Court for the Southern District of New York after a ten-week trial before the Honorable Henry F. Werker, *District Judge*, and a jury. The defendants were convicted of conspiracy to violate the federal narcotics laws, in violation of 21 U.S.C. § 846, and of various substantive violations thereof (21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A)). In addition, defendant Barnes was convicted of engaging in a continuing criminal enterprise involving narcotics, in violation of 21 U.S.C. § 848, and defendant McCoy was convicted of unlawful possession of a firearm during the commission of a federal felony (18 U.S.C. § 924(c)(2)).

Those defendants who appeal have submitted a Joint Brief (J.Br.) of 94 pages and a reply brief of 71 pages covering common issues on appeal. In addition, separate briefs have been filed by individual appellants as to issues that apply more particularly to them. In view of the complexity of the issues raised on appeal, we set forth a summary of the charges in the indictment, insofar as it relates to appellants, followed

by a brief chronological sketch of the narcotics investigation which led to the instant prosecution, the facts of which were presented to the jury during the ten weeks of trial.

THE INDICTMENT

Count ONE charged a conspiracy by Barnes, Baker, Monsanto, Hatcher, Hayden, Wallace Fisher, Hines, Rollock, McCoy, and Centeno to violate the narcotics laws of the United States, 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A), 846. The object was the possession and distribution of heroin and cocaine. Thirty-three overt acts were alleged. Additional defendants named in this count included Guy Fisher, Gary Saunders, Wayne Sasso, and Brenda Sasso. The jury failed to reach a verdict as to Guy Fisher. Saunders and Wayne Sasso were acquitted. The charge against Brenda Sasso was dismissed by the court.

Count TWO charged Barnes with operating a "continuing criminal enterprise" to violate 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) in concert with five or more other persons with respect to whom he occupied a position of organizer, supervisor, or manager, and from which enterprise he obtained "substantial income or resources". 21 U.S.C. § 848.

The Substantive Narcotics Violation Counts 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A), and 18 U.S.C. § 2

1. *The Heroin Charges*

Count THREE charged Barnes, Baker, Monsanto, McCoy, and Fisher with possessing and distributing approximately 445 grams of heroin on or about December 29, 1976.

Count FOUR charged Barnes, Hatcher, and Fisher with possession and distribution of approximately 457 grams of heroin on or about March 11, 1977.

Count FIVE made the same charge against Barnes, Hines, and Centeno, the date being on or about March 14, 1977, and the amount being 892.7 grams.

Count SEVEN charged Baker and McCoy with possession and distribution of some 191 grams of heroin on or about March 1, 1977.

Count ELEVEN charged Barnes, Rollock, and Fisher with possession and distribution, on or about November 29, 1976, of 107.6 grams of heroin.

2. *The Cocaine Charges*

Count TWELVE charged Johnson with possession and distribution, on or about December 4, 1976, of some 24.1 grams of cocaine.

Count THIRTEEN charged Johnson with possession and distribution of 99.5 grams of cocaine on or about December 14, 1976.

The Firearms Violations

Count EIGHT charged McCoy with carrying a firearm, on or about March 15, 1977, during the commission of a federal felony, in violation of 18 U.S.C. § 924(c)(2).

In addition, McCoy and Centeno were charged with separate firearms violations. Count SIX, in which Centeno was charged, was dismissed at the close of the Government's case. The jury acquitted McCoy under Counts NINE and TEN.

THE INVESTIGATION

Apparently as a result of a New York State narcotics investigation, Inez Smart, a narcotics "activist", was arrested in March 1977. She agreed to cooperate and testified at trial. Her testimony, in substance, was that, in October 1974, she had met the defendant Barnes through a Richard Smith; that Barnes had desired to purchase quinine (a narcotics cutting material) in large quantities ($150,000 worth a month) at $25 an ounce; and that, upon delivery of 1000 ounces, Smith and Barnes had paid her $25,000. Further quinine transactions took place during 1975.

In December 1974 police officers stopped a Mercedes Benz leased by Barnes from Hoby Darling Leasing Corporation and driven by Barnes. Richard Smith and one Robert Monroe were passengers. In the trunk of the car the police found over $132,000 in cash, mostly small bills.

In November 1976 the Drug Enforcement Administration (DEA), in an effort to uncover sources of drug traffic in Harlem and the South Bronx, enlisted, for a financial consideration and witness protection, the services of Robert Geronimo. He had grown up in the South Bronx and was friendly with many of the defendants. Geronimo also was familiar with the Kingdom Auto Leasing Corporation in the Bronx, owned by Guy Fisher and apparently used by the Barnes organization narcotics dealers to avoid car forfeiture if narcotics were found therein.

In November 1976, Geronimo, in an effort to infiltrate what was believed to be the Barnes organization, called upon Wallace Fisher, a younger brother of reputed Barnes confederate Guy Fisher, in an endeavor to enlist his services. At about this same time, undercover agent Louis Diaz of the DEA appeared with money to make substantial purchases. Geronimo represented Diaz to Wallace Fisher [1] as his Italian cousin with money to make narcotics purchases.

On November 29, 1976, for the sum of $8,300 ($8,000 for the narcotics and $300 for Fisher), one-eighth of a kilogram of heroin was sold by Rollock to Geronimo and Diaz. This transaction formed the basis for Count ELEVEN of the indictment. Rollock and Fisher were convicted on this charge; Barnes was acquitted.

"Money-washing" is apparently an important step in the narcotics business. It involves the conversion of many small bills into larger denominations. In mid-December 1976, at the Hubba Hubba Social Club in Harlem, Barnes asked Fisher whether he and Geronimo could handle a "wash". This was accomplished at a downtown bank by Diaz and Wayne Sasso (who was acquitted of the conspiracy charge arising from this transaction). Defendant Hayden, when told of the success of the "wash", expressed his satisfaction with the operation.

Shortly thereafter, on an occasion when Barnes met Fisher at Bubba Jean's Emporium, Barnes asked Fisher why he (Fisher) and Geronimo had gone to Rollock; Barnes directed that, for any further deals, Fisher and Geronimo should see defendant Monsanto ("Fat Stevie"). A deal was consummated subsequently at the Harlem River Motors Garage, whereat Geronimo gave $21,000 to Monsanto, who in turn gave Geronimo one-half kilogram of heroin which, according to the conspirators, had come from defendant Baker. McCoy and Monsanto proceeded to count the money as Geronimo left the premises. Barnes, Baker, Monsanto, McCoy and Fisher were convicted for this transaction, which was Count THREE.

On about March 11, 1977, a sale of a half-kilo, at the price of $35,000 (as agreed between Hatcher and Geronimo), was made by defendant Hatcher, through Fisher, to Geronimo and Agent Diaz, delivery taking place at the Harlem River Motors Garage. The package containing the heroin had the name "Bo" (which was Hatcher's nickname) written on it. This transaction, the subject of Count FOUR, resulted in the conviction of Hatcher and Fisher; Barnes was acquitted, despite evidence to the effect that Barnes had been in the office area watching Diaz's comings and goings.

While Diaz and Geronimo were continuing their "infiltration" efforts, the DEA was attempting to find other means to obtain evidence. Hence, during late summer and early fall of 1976, the DEA enlisted the services of two additional informers, Promise Bruce and Robert Wooden. Bruce was in jail at the time he was approached, but was reputed to know Barnes, Johnson, Hines and Guy Fisher and to have discussed obtaining heroin with Barnes and Guy Fisher during 1974. After his release from prison, Bruce purchased cocaine from Johnson on about December 3 and 13, 1976. For these two sales Johnson was convicted under Counts TWELVE and THIRTEEN.

1. Hereinafter, "Fisher" will refer only to defendant Wallace Fisher. Any reference to Guy Fisher will include his full name.

Later in December, Bruce proposed exchanging "cut" for heroin. On two occasions Bruce delivered samples of quinine and mannite (a cutting narcotic) to Johnson, to be taken by him to Barnes for his approval. Apparently the quinine was the wrong kind and the price was out of line. Further negotiations ensued, and in early February 1977 Bruce discussed such an "exchange" transaction directly with Barnes. When Hayden joined them, Barnes inquired as to the quantity of cut that Bruce had on hand. After hearing his reply and after asking Hayden about his (Hayden's) stock of "cut", Barnes told Bruce that they did not need any "cut" at that time.

Bruce continued to push his exchange program and, after unfruitful discussions with Monsanto, made a deal for the exchange of "cut" and cash for one-quarter kilo of heroin. The deal was consummated on or about March 1, 1977 by the delivery to defendants Baker and McCoy of some 44 kilograms of mannite and $2,000 for the one-quarter kilo. Baker and McCoy were both convicted on this count (Count SEVEN).

Bruce continued in his efforts to purchase heroin. In early March 1977, he met the defendant Waymin Hines, who agreed to sell 250 "quarters" [2] of heroin for $10,000 and to provide samples so that the weight and quality might be checked. Bruce then waited at Julia's Bar with DEA Agent Mary Buckley for delivery of the samples. Shortly thereafter defendant Walter Centeno arrived and gave Bruce two "quarters". The four—Bruce, Buckley, Centeno and Hines—left the bar and reassembled at an agreed-upon location, at which time $10,000 was given to Hines. Hines, in turn, designated the time and place of delivery of the 250 "quarters", which were delivered to Agent Buckley by Centeno, who gave his name as "Chico Bob". Hines and Centeno were convicted on this count (Count FIVE); Barnes was acquitted.

Wooden's testimony as an informer related to Monsanto and Baker. Wooden, posing as a customs agent in 1974, had met Monsanto. During the course of their friendship, Monsanto told Wooden that he (Monsanto) sold heroin. He asked whether it would be possible for him (Wooden), as a customs agent, to permit the importation of 300 pounds of heroin into the country. It was after this event that Wooden began to cooperate with the DEA. Wooden and Monsanto conducted business both in "cut" and heroin, Wooden delivering a case of "bonita" (a cutting material) to Monsanto for $700 and buying an ounce of heroin for $1500, the cash being paid to Monsanto at the Harlem River Motors Garage. Baker was present when the money was given to Monsanto, and was introduced to Wooden as Monsanto's partner. No charge was brought relating specifically to this transaction.

Other evidence included testimony of numerous conversations in which "Nicky" was referred to by Fisher and others, and general conversations regarding negotiations, unconsummated deals, and identifications of persons who arrived at various subject locations just before or just after a transaction was completed.

The jury began to hear evidence on September 29, 1977, before the Honorable Henry F. Werker. On December 2, after deliberations lasting three days, eleven defendants were convicted.

THE ISSUES ON APPEAL

I.

Appellants' opening and much stressed argument deals with the manner in which the court conducted the *voir dire* examination of the potential jurors and its insistence on their anonymity. More specifically they claim that:

> "The district court's refusal to disclose petit jurors' identities, residence locales or ethnic backgrounds and the court's restrictive voir dire denied defendants due process." (J.Br. 5).

2. A "quarter", or "street quarter", refers to a quantity of approximately 4 grams of 1.5 percent pure heroin—a package of ten sold to users of the drug. *See* Gov't Br. 5 n.*.

They also assert as reversible error the court's failure to inquire into the religion of each prospective juror. Using as their authority Clarence Darrow, who believed that a juror's "nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads . . . [even to his] method of speech, the kind of clothes he wears, the style of haircut . .", were important subjects for questioning, they contended that the court's inquiry was unduly (to the point of reversal) restrictive. (J.Br. 5, *quoting* Darrow, *Attorney for the Defense*, Esquire Magazine, May 1936). Substantially before Darrow, even Blackstone, also quoted by appellants, said: "The peremptory challenges of the prisoner must however have some reasonable boundary." 4 Blackstone 347 (1769). Appellants themselves recognize this limitation, saying: "[I]t is not asserted that defendants ordinarily are entitled, in each and every case, to *voir dire* prospective jurors on their ethnic or religious backgrounds"; but they claim "at the very least, their 'neighborhood' or township within the County" should have been disclosed, and that, if names and addresses were properly withheld, then the court should at least have inquired about prospective jurors' ethnic background in order to facilitate the intelligent exercise of peremptory challenges. (J.Br. 12 n.*).

In view of the challenge to the jury selection procedure adopted by the district court, a review of the some 524 pages of the transcript covering the *voir dire* must be made. There were 15 defendants. All but one, a Hispanic, were black. The charges were serious—the distribution of massive quantities of narcotics on the streets of Harlem and the South Bronx from which enormous profits were realized—an operation which had continued over a period of years. There had been much pre-trial publicity, particularly centering around the activities of the alleged ringleader, the defendant Barnes. Further, the "sordid history" of multi-defendant narcotics cases tried in the Southern District[3] was sufficient to put the trial court on notice that all safety

3. As the Government points out,

> "The trial court was well aware, as is this Court, of the sordid history of attempts at influencing witnesses and jurors in cases such as these. See, *e. g., United States v. Pacelli*, 521 F.2d 135 (2d Cir. 1975) [*cert. denied*, 424 U.S. 911, (96 S.Ct. 1106, 47 L.Ed.2d 314) (1976) (Pacelli, indicted for narcotics violations on the grand jury testimony of witness Parks, convicted of conspiracy to cause Parks' death)]; *cf. United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1275 (2d Cir. 1975) [*cert. denied* 423 U.S. 937, (96 S.Ct. 296, 46 L.Ed.2d 269) (1975) (noting the peril surrounding the lines of narcotics agents; no error to close courtroom during agents' testimony)]."

Gov't Br. 66. *See also United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir. 1978) (in multi-defendant narcotics prosecution, no error to hold *in camera* hearings, without all defendants present, under circumstances of case, which included death threats made to cooperating witnesses).

Furthermore, prior to trial, the Government, in its sequestration papers (11th Supp. Record on Appeal, Document No. 221, Envelope ordered sealed by district court), directed Judge Werker's attention to three recent Southern District cases in which there had been attempts to influence jurors: (1) *United States v. Alvarez* (Moten) was a 22-defendant narcotics case tried before Judge Owen. About six weeks into the trial, a defense attorney informed Judge Owen that a co-defendant had suggested the possibility of bribing a juror; later, the juror had approached a defendant's sister. The juror was replaced, and defendant Moten subsequently won the opportunity to interview other jurors in the hopes of obtaining a new trial. *United States v. Moten*, 582 F.2d 654 (2d Cir. 1978); *United States v. Moten*, 564 F.2d 620 (2d Cir.), *cert. denied*, 434 U.S. 942, 959, 974, 98 S.Ct. 438, 489, 531, 54 L.Ed.2d 304, 318, 466 (1977); *In re Grand Jury Subpoena served upon Doe*, 551 F.2d 899 (2d Cir. 1977). (2) *United States v. Stanzione*, 391 F.Supp. 1201, (S.D.N.Y.1975), tried before Hon. Thomas P. Griesa, Jr., involved a juror who, during the course of deliberations in the second trial of the matter, suddenly suffered "chest pains", resulting in a mistrial. Judge Griesa thought the circumstances suspicious, and stated on the record that the juror might have been "reached"; (3) *United States v. Tutino et al.*, 419 F.Supp. 246, (S.D.N.Y.1976), was a narcotics case before Judge Cooper. All of the defendants were acquitted, but the Government received information concerning contacts with jurors on behalf of certain of the defendants. The grand jury investigation that ensued was publicized as a result of articles in New York newspapers based on disclosures by witnesses who had testified before the grand jury.

measures possible should be taken for the protection of prospective jurors, including complete anonymity, namely, no disclosure of name or address. In addition, their rights of privacy had to be respected except insofar as their views might relate to the specific charges to be submitted to them.

The court called 150 potential jurors. To each was assigned a number. Individual examination followed to winnow out for cause. The court had received in advance from both Government and defendants alike lengthy lists of questions which they requested the court to ask the prospective jurors. The Government submitted 45 questions; respective counsel for Barnes, Hayden, and Fisher, 108, which included questions relating to their general attitude towards black people and their feelings towards them.

The substance of these many requests, with the exception of ethnic background and religion, were embodied in the court's questions. None of the crimes charged related to any specific ethnic background, nor to any religion. Rather, they concerned simply allegations of narcotics trafficking committed by blacks. Potential prejudices in these fields were fully covered by the court.

The court first addressed a number of questions to the entire panel. These questions included the usual questions pertaining to whether the prospective jurors knew any of the alleged participants or attorneys involved in the case; whether they could accept and apply the law as instructed by the court; whether they had any feelings about undercover agents, paid informants, or electronic surveillance which would prevent their fair judgment of the case; whether they, or close friends or relatives, had had any prior experiences with narcotics or with firearms which would prevent fair consideration of the case; whether they had seen or read anything that would influence their judgment; and whether they would be able to sit during a rather lengthy trial. The entire panel was also asked to make known to the court whether they had ever had any contact with any individuals or businesses which would be referred to during the trial, including the Harlem River Motors Garage, various social clubs, and various persons, including even the doorman at the Hubba Club. The list was quite lengthy, but only two responded that they, or their friends or relatives, had knowledge of the named persons or places.

After many prospective jurors were excused for cause, the court addressed the following types of questions to the individual prospective jurors. All jurors were asked the county of their residence, and the length of time they had resided in that county. Family history was elicited: each prospective juror was asked about marital status and whether he/she had any children. Furthermore, each was asked about his or her own occupation and, if he or she had a family, about the occupations of spouse and/or children.

All prospective jurors were also asked about their educational backgrounds, and about membership in any organized group, club, or fraternal organization.

Each was also asked whether he/she or close friends or relatives had ever had dealings with agents or officers of the DEA, the New York Drug Enforcement Task Force, the New York City police, or any agency of Government dealing with narcotics; if there was an affirmative response, the prospective juror was asked whether the previous contact had created any opinion. All prospective jurors were also asked about any family member's or friend's employment with the Federal Government or with any federal or state investigating agency, etc., which could support a tendency to favor the Government. Furthermore, each was asked whether he/she had any opinion about the courts, defense attorneys, prosecutors, and/or law enforcement officers, that would prevent fair judgment of the case, and whether he/she had been involved in any suit with the United States; whether he/she or a friend or family member had ever previously been a juror or had ever been charged with a crime or been under subpoena, or had ever been a complainant.

gious faith was not directly in issue, still the defendant's religion would be brought to light in the case.

[6] There are numerous cases in which a trial court's decision to limit *voir dire* has been sustained because the matter sought to be probed by the defendant was too remote from the issues in the case to warrant the intrusion into the potential jurors' private thoughts. *See, e. g., United States v. Taylor*, 562 F.2d 1345, 1355 (2d Cir.), *cert. denied*, 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083; 434 U.S. 853, 98 S.Ct. 170, 54 L.Ed.2d 124 (1977) (no error to deny inquiry into prospective jurors' educational backgrounds and into question whether they had children since questioning was fair to permit intelligent challenges); *United States v. Hamling*, 481 F.2d 307, 314 (9th Cir. 1973), *aff'd*, 418 U.S. 87, 138–40, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (refusal to ask about views toward sex and obscenity was proper in obscenity prosecution); *United States v. Workman*, 454 F.2d 1124, 1128 (9th Cir.), *cert. denied*, 409 U.S. 857, 93 S.Ct. 138, 34 L.Ed.2d 102 (1972) (upholding refusal to ask about attitudes toward drug use, political activists, and antiwar demonstrators in prosecution of antiwar demonstrator for assault on policeman and destruction of government property); *Maguire v. United States*, 358 F.2d 442, 444–45 (10th Cir.), *cert. dismissed*, 385 U.S. 801, 87 S.Ct. 9, 17 L.Ed.2d 48 *cert. denied*, 385 U.S. 870, 87 S.Ct. 138, 17 L.Ed.2d 97 (1966) (upholding refusal to inquire about bias against homosexuals when the defense to charge of auto theft was that car owner had given car to defendants after they had threatened to divulge his homosexuality); *Wagner v. United States*, 264 F.2d 524, 527 (9th Cir.), *cert. denied*, 360 U.S. 936, 79 S.Ct. 1459, 3 L.Ed.2d 1548 (1959) (rejecting argument that specific addresses of jurors were necessary to determine "whether there is any proximity to any possible witnesses or information"; "approximate community" was sufficient). Certainly, in all these cases, the information sought would have been helpful to the defense in the sense that Clarence Darrow envisioned that every bit of information might be helpful. However, because no issue was raised requiring inquiry into the matters as to which requests had been made, the courts made the determinations that inquiry must be reasonably limited. It is not, after all, the prospective jurors who are on trial in the cases that come before the courts. It can be imagined that, as counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed. *See Yarborough v. United States, supra*, 230 F.2d at 63 (religion is "private matter"; no reason to inquire); *cf. United States v. Arroyo-Angulo*, 580 F.2d 1137, 1142 (2d Cir. 1978) (jury provided with special entrance to courtroom "to secure their privacy and protection"). As long as a defendant's substantial rights are protected by a *voir dire* designed to uncover bias as to issues in the cases and as to the defendant himself, then reasonable limitations on the questioning should not be disturbed on appeal.

[7] Appellants have not advanced any reason that would support the disclosure of the ethnic backgrounds of their trial jurors. There is nothing to indicate that persons of one ethnic type or another are more favorably disposed toward narcotic trafficking or to using firearms. Whatever prejudice may be shared by members of any ethnic group as to black persons would have been uncovered by the questioning about attitudes toward blacks. Thus, it can hardly be said that defendants' right to a fair trial was violated by the limitation on the *voir dire* imposed by the trial judge in this case.

[8, 9] As to the court's decision to withhold names and addresses of the jurors, appellants take the position that "jurors must publicly disclose their identities and publicly take responsibility for the decisions they are to make . . . ." (J.Br. 25). This, however, is not the law—and should not be. If a juror feels that he and his family may be subjected to violence or

death at the hands of a defendant or his friends, how can his judgment be as free and impartial as the Constitution requires? If "the anonymous juror feels less pressure" as the result of anonymity (J.Br. 28), this is as it should be—a factor contributing to his impartiality. The court's decision as to anonymity and sequestration comported with its obligation to protect the jury, to assure its privacy, and to avoid all possible mental blocks against impartiality.

As noted above, *see* note 3, *supra*, the history of violence in this district is well known. There was much pretrial publicity playing up the alleged acts of violence on the part of the actors in the case. It would be nothing short of irresponsible were a trial judge sitting in New York City to close his eyes to these circumstances.

In fact, some fifteen years ago, this court anticipated the problem now before us in another case involving a narcotics conspiracy. In a decision written by Judge Friendly, in which Judge Smith and now-Justice Marshall concurred, the court stated that the events in that case, involving threats to jurors in the form of unsigned letters,

> "demonstrat[ed] the need for precautions assuring that the addresses, and perhaps even the names, of jurors in cases such as this will be held in confidence; courts must protect the integrity of criminal trials against this kind of disruption, whether it emanated from defendants' enemies, from their friends, or from neither."

United States v. Borelli, 336 F.2d 376, 392 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano v. United States*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). It seems that the time has come to approve the precautions suggested in *Borelli*. It will not do to say that, because there were no actual threats received in the case at bar, Judge Werker's action was inappropriate, for the circumstances were such that the suggestion of disruption was manifest. That is not to say that the courts should sanction the approach taken by this trial judge in every case. However, in a case that generated as much pretrial publicity as this one did and in which allegations of dangerous and unscrupulous conduct abounded, precaution was best taken so that fears would not become realities.

If the giving of names and addresses had been required so that investigation could have been made in the neighborhood or from their families as to their characteristics, any semblance of an impartial jury would have been destroyed. Fear of retaliation against themselves or members of their families would inevitably have been uppermost in their minds during their deliberations. Sequestration would have been no protection in the event of a guilty verdict. And since communication with their families during sequestration would have been permitted, a mere threat to the family of one juror would have permeated the entire jury.

[10, 11] As to religion, our jury selections system was not designed to subject prospective jurors to a catechism of their tenets of faith, whether it be Catholic, Jewish, Protestant, or Mohammedan, or to force them to publicly declare themselves to be atheists. Indeed, many a juror might have a real doubt as to the particular religious category into which they could properly place themselves. The same can be said of ethnic background.

The courts have recognized the increasing peril in other contexts. For example, in *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (1975), a case dealing with the propriety of closing the courtroom to spectators while two undercover narcotics agents testified, Judge Lumbard, concurring, took note of the increasing perils associated with narcotics investigations and prosecutions. He said:

> "Any judge of a court which is concerned with the prosecution of offenses against the narcotics laws knows all too well the great dangers and difficulties which face law enforcement officers . . . . In no area of law enforcement have murder, mayhem and terror been more frequently used against disclosure and testimony. Against this background

of judicial knowledge and notice, the undisputed assertion of the district attorney [relating to the dangers posed to the two agents] was sufficient reason for the county judge's action in closing the court to spectators during their testimony." 520 F.2d at 1275.

Unfortunately, the situation which prompted the trial judge's actions in *Lloyd*, was not uncommon. The courts must recognize the danger, and permit the trial judge appropriate leeway to assure that the trial he is to conduct will be conducted fairly and impartially, with a minimum of intrusion into the lives of the prospective jurors.

[12, 13] Appellants' characterization of the procedure followed in this case as a "blind-man's bluff"—as constituting a deprivation of their right to meaningfully probe the jurors' potential biases—is overstated. A criminal defendant is entitled, under the law, to a fair and impartial jury. To be sure, there must be sufficient information elicited on *voir dire* to permit a defendant to intelligently exercise not only his challenges for cause, but also his peremptory challenges, the right to which has been specifically acknowledged by the Supreme Court despite the lack of a constitutional statutory source. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). To say, however, that the limitations imposed in this case constituted a denial of the right to an intelligent exercise of the challenge is to underestimate the ability of counsel to gain the same, or substantially the same, insights into the prospective juror's thoughts by observing his demeanor, generally, and by listening to the answers to questions concerning family, education, and other matters (which were covered rather extensively in this case), as one might gain by being informed of a person's residence address or ethnic background. One's style of clothes, for example, and one's manner of speaking, certainly reveal much about a person's character. Indeed, it is unlikely that the disclosure of any bit of information will contribute to an impression of the person that differs materially from the impression gained by appearances and answers to questions bearing on the case, such as the questions concerning attitudes toward blacks that were asked here.

[14] What we are confronted with, then, is a *voir dire* procedure under which *both* the prosecutor and defense were equally in the dark as to names and addresses of the prospective panelists, and where neither side was told the exact ethnic background or religion of those persons. Both sides, however, had an arsenal of information about each person that was based on his responses to questions concerning his own life, as well as his attitudes about the issues that would arise in the case. This can hardly be deemed "inadequate". The law as to jury selection [10] is not so unbending

10. The literature (*i. e.*, the articles) in this field has been amply cited by the appellants to support their theory that *any* limitation on the *voir dire* is improper. *E.g.*, ABA Standards Relating to Trial by Jury § 2.2 (Approved Draft 1968); Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan.L.Rev. 545 (1975); Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 Brooklyn L.Rev. 290 (1972); Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan.L.Rev. 491 (1978); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stan.L. Rev. 1493 (1975); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715 (1977). A review of these articles—and many, many more—leaves the impression that the resolution of the issue before us depends not on any interpretation of law, but rather requires a judgment as to the proper accommodation between the need to protect jurors, the goal of promoting efficiency in the conduct of criminal trials without doing damage to the right of a criminal defendant to an unbiased and impartial jury, and the desire of the defendant to know as much as possible about those who sit in judgment on him. The literature does little to resolve the question; rather, depending on the slant of the author, each article offers a point of view on the best methods of conducting *voir dire*. The slant of the articles cited by appellants, of course, is that the attorney should be able to ask what he will and to take full control of the jury selection process. Be that as it may, there are also many articles relating the abuses of attorney-controlled *voir dire*, which suggest that a reasonable inquiry into the essentials raised in the particular case should be sufficient, and that the trial judge should retain the

that it cannot, or should not, be accommodated to the realities of modern day trials in large narcotics cases which have created such problems for the courts in large cities. Clarence Darrow's ideal has already yielded to what has been thought to be the greater necessity, *i. e.*, the need to streamline the *voir dire* process by resting the control of it in the district judge, *see* Fed.R.Crim.P. 24(a), subject to the demand that the essentials of the case should be the subject of inquiry. If that demand is satisfied, then so will have been the rights of the parties.

[15, 16] In sum, the trial transcript here reveals that the trial court followed the *voir dire* precepts held by the decisions to be essential. The suggestions made by appellants as to fields into which they would roam would, if we were blindly to accept them, lead to *ad absurdum* ends. If Darrowesque questioning of prospective jurors were allowed, namely "religion, politics, social standing, family ties, friends, habits of life and thought", any semblance of juror privacy would have to be sacrificed. There is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict.[11] Nor has any case been brought to our attention that casts any doubt on the procedure followed by the trial judge in this case. Since the court gave counsel full opportunity for an intelligent exercise of challenges by inquiring into the essentials of the case at hand, appellants were not deprived of any trial right which would require a new trial.[12]

II.

Appellants place great stress on an incident which occurred after some six weeks of trial and at the end of a court day. Four defense lawyers were walking along a public sidewalk on a street adjacent to the courthouse when they passed the bus in which the jurors were sitting. Counsel for the defendant Guy Fisher claimed that one of the jurors directing his eyes at him, raised his middle finger in a sign generally recognized to be the antithesis of approval and indicated by an expression on his face "distaste for me [the counsel]". (J.Br. 32). At the time, three other defense lawyers were with Fisher's counsel. The incident was brought to the court's attention that evening. Counsel for Fisher requested that the particular juror be dismissed and that an alternate juror be substituted. The following morning, the court declined to dismiss the juror or to conduct a *voir dire* on

discretion to apply limits. *E.g.*, Braswell, *Voir Dire—Use and Abuse*, 7 Wake Forest L.Rev. 49 (1970); Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S.Cal.L. Rev. 916 (1971) (federal method, *i. e.*, questioning controlled by judge, produces time savings without excessive abuse, and is preferred to other methods); Note, *Judge Conducted* Voir Dire *As A Time-Saving Trial Technique*, 2 Rutgers-Camden L.J. 161 (1970); Martin, *Lawyers Speak The Truth About Counsel-Conducted Voir Dire* (American Judicature Soc'y, 1970); Okun, *Investigation of Jurors by Counsel: Its Impact On The Decisional Process*, 56 Geo.L.J. 839 (1968) (background investigation of jurors may intimidate jury decision-making). *See also* Title, *Voir Dire Examination of Jurors in Criminal Cases*, 43 Calif. State Bar. J. 70 (1968) (describing California system, which limits voir dire to subjects about which there could be challenge for cause); Kallen, *Peremptory Challenges Based On A Juror's Background: A Rational Use?*, 13 Trial Lawyer's Guide 143 (1965) (little agreement between experienced trial lawyers about characteristics making jurors desirable); Plutchik & Schwartz, *Jury Selection: Folklore Or Science?*, 1 Crim.L.Bull. 3 (May 1965) (psychologists think that lawyers' "rules" for picking juries do not yield scientific results).

11. In capital cases, there is a statute that requires the disclosure of names and addresses of prospective jurors three days prior to trial. 18 U.S.C. § 3432. The statute is inapplicable to non-capital cases.

12. Indeed, it might even be pointed out that the jury was selective in its decisions, acquitting two of the defendants entirely, acquitting defendant Barnes on three of the substantive counts, and failing to reach a verdict as to defendant Guy Fisher, while voting to convict as to the remaining charges and defendants. This is perhaps some indication that impartial debate was undertaken, the jury deciding the case on the evidence as it was shown to do. *Accord, United States v. Haldeman*, 181 U.S. App.D.C. 254, 283 n. 28, 559 F.2d 31, 60 n. 28 (1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).