

Ellsberg Judge Won't Pick New Jury

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Daniel Ellsberg and Anthony Russo will be tried by the same jury of eight women and four men that was sworn in more than four months ago, U.S. District Court Judge W. Matt Byrne Jr. ruled yesterday in Los Angeles.

But attorneys for Ellsberg and Russo, who are charged with espionage, conspiracy and theft in connection with disclosure of the top-secret Pentagon papers, said they would file an emergency appeal of that decision this weekend.

With their legal papers already prepared, the defense attorneys said they would ask the Ninth U.S. Circuit Court of Appeals to hold an expedited hearing on their claim that the jurors were "infected" by publicity about the controversial case.

Byrne, meanwhile, set a new date of Dec. 12 for the much-delayed trial to begin with opening statements from prosecution and defense.

Another dispute arose yesterday, however, which could postpone the trial even further.

That dispute involved the decision of the government prosecutors to use photographic transparencies of portions of the Pentagon papers in the presentation of their case against Ellsberg and Russo.

The defense claimed yesterday that 390 of the 610 pages the government says it plans to show the jury were never listed in a previous "bill of particulars" setting forth the government case.

"Two-thirds of the preparation we have done may be totally wasted," complained

Charles R. Nesson, a Harvard Law School professor helping defend Ellsberg.

(Byrne ruled last spring that the prosecution had to specify in advance exactly what portions of the Pentagon papers it was going to rely on in order to show that Ellsberg and Russo harmed "national security" by releasing them.)

The judge's decision on the defense challenge to the jury — which was sworn into service on July 21 — came after he asked the jurors and their six alternates whether they had read or heard anything about the case while free in the community.

At least nine of them said they had been exposed to some information about the trial, but all insisted they could still be "completely fair and impartial" in judging the case.

One woman juror insisted that she felt "quite nervous" about the prospect of sitting on the case.

Byrne gave the defense the opportunity to challenge three specific jurors and have them replaced with alternates, but the attorneys said they preferred to make their challenge a general one which rejected the entire panel's qualifications to serve.

Among other matters, chief defense counsel Leonard B.

Boudin argued that some jurors might harbor secret resentments against Ellsberg and Russo for causing the long delay of the trial with their appeals on legal issues.

Pending further developments, such as an appellate reversal of Byrne's decision about the jury, the judge ordered the jury to return to his courtroom on Dec. 12.