UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. HERNAN LOPEZ, Defendant.	CASE NO. 15-cr-252

DEFENDANT HERNAN LOPEZ'S NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF A GRAND JURY QUORUM

SPERTUS, LANDES & UMHOFER, LLP
Matthew Donald Umhofer
James W. Spertus
Samuel A. Josephs

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the attached Memorandum of Law and Declaration of Counsel, Mr. Lopez, by and through his attorneys, respectfully moves this Court at the United States Courthouse for the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, New York 11201, at the Courtroom of the Honorable Pamela K. Chen, on such date and at such time as the Court sets, for an Order dismissing the Superseding Indictment, or, in the alternative, requiring the disclosure of sufficient grand jury material to determine:

(i) the date on which the grand jury voted on the Superseding Indictment, S-3, ("Superseding Indictment") filed on the docket March 18, 2020;

(ii) whether the grand jury that returned the Superseding Indictment achieved a quorum during each day it received evidence pertaining to the charges in the Superseding Indictment and the day that it voted to return the Superseding Indictment; and

(iii) the number of grand jurors who concurred in the Superseding Indictment.

Mr. Lopez further respectfully requests an evidentiary hearing to address the above requested relief.

This motion is brought under Federal Rules of Criminal Procedure 6(a), 6(b)(2), 6(e), and 6(f), and is based on the attached Memorandum of Law, all files and records in this case, and such further information as may be provided to the Court regarding this motion.

Dated: May 13, 2020

Respectfully submitted,

/s/

Matthew D. Umhofer
James W. Spertus
Samuel A. Josephs
Attorneys for Hernan Lopez

MEMORANDUM OF LAW

I. INTRODUCTION

The Superseding Indictment charging Mr. Lopez appeared on the docket March 18, 2020. That was the same day Chief Judge Mauskopf declared that "no regular grand jury in this district has had a quorum since March 13, 2020" due to the COVID-19 crisis. (Suppl. Order Regarding Prelim. Hr'gs in Criminal Matters and Continuance of Jury Trials and Exclusion of Time under the Speedy Trial Act, Administrative Order No. 2020-11 at 1 (E.D.N.Y. Mar. 18, 2020) (the "Chief Judge's Administrative Order").) Curiously, the true bill attached to the Superseding Indictment is not dated, although the initial indictment in this case was. Since the Superseding Indictment issued, the government has asserted that the grand jury had a quorum at all relevant times and that the Superseding Indictment was "voted on/returned by the grand jury on March 18, 2020, the date reflected in the clerk's filing stamp." (Josephs Decl. Ex. C, at 2.) But, at the very least, there appears to be tension between a grand jury vote on March 18, 2020, at which a quorum had to have been present in order for the Superseding Indictment to have been properly returned, and the Chief Judge's Administrative Order.

If in fact there was not a quorum present when the grand jury voted on March 18, 2020, or during the sessions when the grand jury received evidence pertaining to the charges in the Superseding Indictment, as was stated by the Chief Judge's Order, this Court must dismiss the indictment under Rule 6(b)(2). In the alternative, and at a minimum, these unusual circumstances and the tension created by the Administrative Order and the Government's statements warrant further factfinding by the Court. The Superseding Indictment hit the docket with an undated true bill five days after the COVID-19 crisis deprived this District of a grand jury quorum. Accordingly, Mr. Lopez requests evidence that the grand jury achieved a quorum in any session in which it received evidence or voted.

The Court should order the disclosure of grand jury information sufficient to show the date of the true bill, whether the grand jury achieved a quorum on the days it received evidence, and whether 12 grand jurors concurred in the Superseding Indictment as required. Following

such disclosure, an evidentiary hearing is needed to resolve the Superseding Indictment's unexplained irregularities.

II. RELEVANT BACKGROUND

Mr. Lopez is charged only in the Superseding Indictment. (ECF Nos. 1319 and 1337.) The Superseding Indictment is stamped as received by the Clerk's Office on March 18, 2020 and appeared on PACER the same day. (Id. at 1.) The application for leave to file under seal attached to the Superseding Indictment is also dated March 18, 2020. (ECF No. 1337-1 at 1.) The true bill (Form DBD-34) attached to the Superseding Indictment is not dated, however. (ECF Nos. 1319 and 1337 at 70.)[1]

The same day the Clerk's Office received the Superseding Indictment, the Chief Judge issued Administrative Order 2020-11 to address the effects of the COVID-19 crisis on Speedy Trial Act deadlines. That Order recites that "no regular grand jury in this district has had a quorum since March 13, 2020." (Administrative Order No. 2020-11 at 1.) A later Administrative Order confirms that "none of the grand juries currently sitting in the District will be able to muster a quorum prior to May 15, 2020." (Further Continuance of Jury Trials and Exclusion of Time under the Speedy Trial Act, Administrative Order No. 2020-15 at 2 (E.D.N.Y. Apr. 21, 2020).)

In response to requests from Mr. Lopez's counsel, the government has stated that "[t]he indictment was voted on/returned by the grand jury on March 18, 2020, the date reflected in the clerk's filing stamp." (Josephs Decl. Ex. C, at 2.) The government has further stated that "(1) the grand jury achieved a quorum on each day that it received evidence and on the day it voted on the Superseding Indictment (see ECF Nos. 1319 and 1337); and (2) at least 12 grand jurors concurred in the Superseding Indictment." (Josephs Decl. Ex. C, at 1.)

[1] Counsel for Mr. Lopez has reviewed other publicly available indictments from this District, and it appears that recent grand juries have declined to date their true bills. It is not clear when this practice started. Notably, the initial indictment in this case (ECF No. 1 at 164) bears a dated true bill.

III. ARGUMENT

A. In the Absence of a Quorum, the Superseding Indictment Must Be Dismissed

1. Lack of Quorum is a Ground to Dismiss the Indictment

Under Federal Rule of Criminal Procedure 6(a)(1), "[a] grand jury must have 16 to 23 members." Fed. R. Crim. P. 6(a)(1); *see also* Handbook for Federal Grand Jurors, at 4 ("Sixteen of the 23 members of the grand jury constitute a quorum for the transaction of business."), *available at* https://img.nyed.uscourts.gov/files/local_rules/grandjuryhandbook.pdf. The "grand jury may indict only if at least 12 jurors concur." Fed. R. Crim. P. 6(f).

Accordingly, the lack of a grand jury comprised of at least 16 members present at each session, with at least 12 concurring in the indictment, is a sufficient basis to dismiss an indictment. See United States v. Barret, 824 F. Supp. 2d 419, 446 (E.D.N.Y. 2011) (entertaining motion to dismiss indictment based on lack of quorum); see also United States v. Leverage Funding Sys., Inc., 637 F.2d 645, 648 (9th Cir. 1980) ("A literal interpretation of Rules 6(a) and 6(f) indicates that an otherwise valid indictment will not be dismissed **if** . . . the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict.") (emphasis added).

2. There is Reason to Believe the Grand Jury Lacked a Quorum

The Superseding Indictment charging Mr. Lopez was filed with the clerk's office on March 18, 2020 (ECF Nos. 1319, 1337)—the very same day the Chief Judge observed that "no regular grand jury in this district has had a quorum since March 13, 2020," because of the persistent interference of the COVID-19 crisis. (Administrative Order No. 2020-11 at 1; see also Administrative Order No. 2020-15 at 2 ("In addition, after a canvass of individual grand jurors who currently sit in this District, none of the grand juries currently sitting in the District will be able to muster a quorum prior to May 15, 2020.").) Moreover, while Mr. Lopez has no reason to doubt the government's representation, it is impossible to tell from the face of the indictment whether the grand jury voted on March 18, 2020 or some other day. The true bill form attached to the indictment bears no date, as has evidently become the practice of grand juries in the

District. (Compare ECF Nos. 1318 & 1337 at 70 (not dated) with ECF No. 1 at 164 (dated).) In the face of these irregularities, the government asserts only the conclusion that the grand jury had a quorum at all relevant times and on March 18, 2020. (Josephs Decl. Exs. A-C.) But there is clearly some discrepancy between that assertion and the Chief Judge's observation that no such quorum existed on March 18, 2020 or at any time since March 13, 2020.[2]

B. In the Alternative, the Court Should Order the Government to Disclose Grand Jury Information Establishing that a Quorum Was Present

"The Second Circuit has explained that [the] discretion granted to a trial court deciding whether to make grand jury materials public is 'one of the broadest and most sensitive exercises of careful judgment that a trial judge can make.'" Anilao v. Spota, 918 F. Supp. 2d 157, 174 (E.D.N.Y. 2013) (quoting In re Petition of Craig, 131 F.3d 99, 104 (2d Cir. 1997)). Despite the "long-standing tradition of maintaining the secrecy of grand jury proceedings, it has been recognized that disclosure may be warranted in certain situations." Anilao, 918 F. Supp. 2d at 173.

Those situations include the "request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). Further, under the Supreme Court's applicable Douglas Oil test, the party seeking disclosure must "show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." Anilao, 918 F. Supp. 2d at 173 (citing Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 222 (1979)).

[2] If the government takes the position that this case involved a "special grand jury," rather than a regular one, that explanation would not end the inquiry—the inability to secure a quorum in regular grand juries for five days before the indictment in this case suggests that the government was unable to gather a quorum for a special grand jury, and the lack of a date on the true bill reinforces such skepticism about whether the government was in fact able to get 16 people in a room at a time when a pandemic was effectively shutting down the courthouse and the city.

Each of these conditions is satisfied here, where there is a colorable issue that the grand jury returned the Superseding Indictment charging Mr. Lopez at a time when no grand jury had a quorum as set forth in the Chief Judge's Administrative Order.

First, and as shown above, the lack of a grand jury comprised of at least 16 members present at each session, with at least 12 concurring in the indictment, is a sufficient basis to dismiss an indictment. See Barret, 824 F. Supp. 2d at 446; see also Leverage Funding, 637 F.2d at 648.

Second, Mr. Lopez has a particularized need for the grand jury material he seeks in order to avoid a possible injustice. "As a practical matter, many decisions treat the requirement of particularized need and the evaluation of a defendant's ability to show potential grounds for a motion to dismiss as essentially synonymous, although the opinions are not always explicit on this point." United States v. Wood, 775 F. Supp. 335, 337 (W.D. Ark. 1991); see also Anilao, 918 F. Supp. 2d at 173 n.4 (suggesting that a defendant's showing that "a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury" is sufficient grounds for revealing grand jury material) (citation omitted).

That is precisely the case here. In other words, the existence of grounds to dismiss the indictment is also the basis for Mr. Lopez's particularized need to access grand jury information. Indeed, proceeding on an invalid Superseding Indictment would invite an injustice precisely because the Superseding Indictment would be subject to dismissal if it issued without a quorum or without 12 jurors concurring. Mr. Lopez (and each defendant named in the Superseding Indictment) is entitled to a properly constituted grand jury that obtained a quorum each time it received evidence and when it voted. Because the lack of quorum requires dismissing the indictment, and to the extent the Court does not find a lack of quorum on the present record, it follows that Mr. Lopez has a particularized need for records to show that a quorum was indeed lacking. See Wood, 775 F. Supp. at 337.

Third, the need for disclosure outweighs the need for secrecy. The need for disclosure here is high. The Superseding Indictment issued on a day during which, according to the Chief

Judge's Administrative Order, no grand jury had a quorum for at least 5 days preceding, and it is impossible to tell from the face of the indictment whether the grand jury voted on March 18, 2020 or some other day.

At the same time, the need for secrecy is quite low. The Supreme Court has identified five reasons favoring grand jury secrecy, but none of them applies here.

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subordination of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Anilao, 918 F. Supp. 2d at 172 (citing United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954))).

The information sought here—just the date of the vote, whether a quorum was achieved on each relevant day, and the number who concurred in the vote—could not possibly undermine any of these goals. Because Mr. Lopez seeks neither transcripts nor witness and juror identities, nor the vote of any particular juror, there is no danger of chilling grand jury deliberations or the willingness of witnesses to testify. See Anilao, 918 F. Supp. 2d at 180 ("The Court also concludes that it is highly unlikely that any prospective grand jury witness who learns of this Court's decision to unseal plaintiffs' Grand Jury minutes will be less inclined to give full and frank testimony at a future grand jury proceeding."). Accordingly, the need for disclosure far outweighs the need for secrecy.

Finally, Mr. Lopez seeks only the material needed to support dismissal. "[T]he Second Circuit has stated that if a court determines that grand jury materials should be disclosed, its 'disclosure order must be structured to cover only the material required in the interests of justice.'" Anilao, 918 F. Supp. 2d at 181 (quoting United States v. Sobotka, 623 F.2d 764, 768

(2d Cir. 1980)). Here, Mr. Lopez seeks only that which is needed to determine when he was indicted, whether a quorum was present that date and other dates the grand jury received evidence pertaining to the Superseding Indictment, and how many grand jurors concurred in returning the Superseding Indictment. Again, disclosure of this information does not require release of full grand jury transcripts, nor does it require the disclosure of any testimony whatsoever. The requested disclosure is no broader than necessary to answer the question plainly raised by the Chief Judge's Administrative Orders—*i.e.*, whether the Superseding Indictment could possibly satisfy Rules 6(a) and 6(f).

In sum, Mr. Lopez's request to examine grand jury materials should be permitted because those materials will explain the discrepancy between the Chief Judge's Administrative Order and the government's statements. See United States v. Lee, 667 F. Supp. 1404, 1420 (D. Colo. 1987), rev'd in part sub nom. on other grounds by United States v. Gaudreau, 860 F.2d 357 (10th Cir. 1988) ("The defendants seek dismissal of the indictment for noncompliance with the grand jury quorum and attendance requirements. It is apparent that some records must be examined for the full consideration of this motion, and it is, therefore, reserved until the defendants have an opportunity to inspect records in accordance with this court's order . . . .").

C. In Any Event, The Court Should Conduct an Evidentiary Hearing

At the very least, the lack of quorum identified in the Chief Judge's COVID-related Administrative Orders raises a disputed question of fact as to the government's assertions about the Superseding Indictment. Upon disclosure of the requested grand jury information, the Court should order an evidentiary hearing to examine the date on which the grand jury voted, whether there was a quorum, and whether at least 12 grand jurors concurred in the indictment. See, e.g., United States v. Awadallah, 202 F. Supp. 2d 17, 44 & n.29 (S.D.N.Y. 2002) (ordering evidentiary hearing to resolve disputed facts relevant to motion to dismiss indictment).[3]

[3] In the alternative, Mr. Lopez respectfully requests that the Court review the grand jury material sought *in camera* to determine whether the Government properly obtained the Superseding Indictment.

IV. CONCLUSION

For the reasons stated above, Mr. Lopez respectfully requests the release of grand jury information sufficient to show:

(i) the date on which the grand jury voted on the Superseding Indictment filed on the docket March 18, 2020;

(ii) whether the grand jury that returned the Superseding Indictment achieved a quorum during each day it received evidence related to the charges in the Superseding Indictment and the day that it voted to return the Superseding Indictment; and

(iii) the number of grand jurors who concurred in the Superseding Indictment.

Mr. Lopez respectfully requests an evidentiary hearing to address whether the grand jury achieved a quorum on all days it received evidence and on the day it voted.

Dated: May 13, 2020

Respectfully submitted,

/s/
Matthew D. Umhofer
James W. Spertus
Samuel A. Josephs
Attorneys for Hernan Lopez

DECLARATION OF COUNSEL

I, Samuel A. Josephs, declare and state:

1. I am a partner at Spertus, Landes & Umhofer, LLP, counsel of record for Hernan Lopez in this matter. I am licensed to practice in the State of California, and admitted to practice before this Court.

2. Attached as **Exhibit A** hereto is a true and correct copy of a letter from the undersigned to Samuel Nitze, Assistant United States Attorney for the Eastern District of New York, dated May 6, 2020.

3. Attached as **Exhibit B** hereto is a true and correct copy of a letter from the undersigned to Samuel Nitze, Assistant United States Attorney for the Eastern District of New York, dated May 7, 2020.

4. Attached as **Exhibit C** hereto is a true and correct copy of the email chain containing Mr. Nitze's responses to the letters attached as Exhibits A and B.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing facts are true and correct.

Executed this 13th day of May, 2020, at Los Angeles, California.

/s/ Samuel A. Josephs
Samuel A. Josephs