U.S. Department of Justice

United States Attorney
Eastern District of New York

MEG/JRS
F. #2018R01858

271 Cadman Plaza East
Brooklyn, New York 11201

July 13, 2020

By ECF

The Honorable Kiyo A. Matsumoto
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Tyshawn Corbett, et al.
Criminal Docket No. 20-213 (KAM)

Dear Judge Matsumoto:

The government respectfully submits this sur-reply to the reply letter (ECF Dkt. No. 62, filed on July 8, 2020 (the "Reply")) in support of the defendants' motion to access a wide range of information and materials related to the selection and service of the grand jury that returned the indictment in the above-captioned case (the "Grand Jury") (ECF Dkt. No. 10, filed on June 25, 2020 (the "Motion" or "Mot.")).[1] In the Reply, the defendants assert that they are entitled to the more than 20 categories of information and materials they requested in the Motion because they are purportedly "essential to aid the parties in litigating motions challenging the jury selection procedures" in this case pursuant to the Jury Selection and Service Act, 28 U.S.C. §§ 1861, et seq. ("JSSA"). Reply at 3-7. In addition, the defendants request that the Court schedule a telephone call with the Eastern District of New York ("EDNY") jury administrator and the parties in this case to "learn what information is available on the issues raised" in the Motion. Id. at 1-2.

As discussed below, the defendants have not demonstrated that they are entitled under the JSSA to the vast majority of the information and materials they seek. Rather, the four categories of data that the government identified in its response to the Motion — namely, the county of residence, zip code, and, to the extent available, the race and age of the individuals listed in the Master Jury Wheel from which the Grand Jury was

[1] The Motion was initially filed by defendant Qawon Allen and was subsequently joined by all other defendants. See ECF Dkt. Nos. 12, 29, 33, 34, 43, 46. This letter therefore treats the Motion and the Reply as filed on behalf of all defendants.

selected — are sufficient, when reviewed in the context of the EDNY Jury Plan, for the defendants to determine whether, in their view, a motion to dismiss the Indictment is warranted. Accordingly, the defendants' Motion should be denied with respect to all data they seek beyond these four categories.

I. The Defendants' Reply

The defendants argue that they are entitled to inspect the more than 20 categories of information and materials they requested in the Motion because they are purportedly "essential to aid the parties in litigating motions challenging the jury selection procedures" in this case. Reply at 3 (citing ECF No. 10-1 ("Declaration of Jeffrey Martin" and "Attachment 1")). The defendants assert that the four categories of data that the government identified for inspection in its response to the Motion — namely, the county of residence, zip code, and, to the extent available, the race and age of the individuals listed in the Master Jury Wheel from which the Grand Jury was selected — "elides the complexities of the grand jury selection process, as if grand jurors are selected directly and randomly — without any intermediary steps — from the Master Jury Wheel." Id. According to the defendants, even if the four categories of data the government has proposed for inspection "were to show that the Master Jury Wheel as constituted is representative of the community, that would only be the starting point of the inquiry." Id. The defendants maintain that "[i]n order to vindicate its guarantees of randomness and representativeness, the JSSA grants defendants the right to inspect records that reflect the grand juror selection process after the formation of the Master Wheel[,]" including information regarding the Qualified Jury Wheel, the selection of venires, the seating of grand jurors, and "particularly relevant here, the unprecedented mustering of a quorum after a hiatus of several months, 50 or more miles from those parts of the Eastern District disparately impacted by the pandemic and still operating under a stay-at-home order." Id. at 3-4.

The defendants argue that the more than 20 categories of information and materials they seek "is standard in grand jury challenges and courts have afforded discovery of the requested materials in similar cases." Id. at 4. In support of the argument that inspection of the extensive information they seek is "standard," the defendants cite only two cases: United States v. Saipov, 17-CR-722 (VSB) (S.D.N.Y. Feb. 26, 2020), and United States v. Simmons, 20-CR-294 (PKC) (S.D.N.Y. June 24, 2020).

In addition, the defendants request that the Court schedule a telephone call with the EDNY jury administrator and the parties in this case to "learn what information is available on the issues raised" in the Motion. Reply at 1-2 (citing United States v. Balde, 20-CR-281 (KPF) (S.D.N.Y. June 30, 2020)). The defendants propose that, following such a call, they would confer with the government about the specific records they are requesting and what, if any, objections the government has to those requests, and the parties would subsequently submit a joint status letter to narrow any disputes. Id. at 2.

II. The Defendants Have Not Demonstrated that They Are Entitled Under the JSSA to the Vast Majority of the Information and Materials They Seek

Contrary to the defendants' assertion, the four categories of data that the government has identified for inspection — namely, the county of residence, zip code, and, to the extent available, the race and age of the individuals listed in the Master Jury Wheel from which the Grand Jury was selected — are sufficient, when reviewed in the context of the EDNY Jury Plan, to comply with the JSSA because nothing more is needed for the defendants to determine whether, in their view, a motion to dismiss the Indictment is warranted.[2]

The JSSA provides that "all litigants in Federal courts entitled to trial by jury shall have the right to grand . . . juries selected at random from a fair cross section of the community in the district . . . wherein the court convenes." 28 U.S.C. § 1861. Sections 1862 through 1866 of the JSSA set forth requirements for the jury selection process. Section 1867(a) provides that a defendant "may move to dismiss the indictment . . . against him on the ground of substantial failure to comply with" these requirements. Section 1867(f) addresses what records a defendant contemplating such a motion may inspect. It provides: "[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation" of such a motion. Id. § 1867(f) (emphasis added). As the plain language of Section 1867(f) makes clear, the "records and papers" related to the jury selection process "shall not be disclosed" except to the extent "necessary" for a defendant to "prepar[e] or present[]" a motion to dismiss the Indictment. In other words, the JSSA expressly recognizes that inspection of only a limited set of jury selection records may be necessary for a defendant to determine whether to file a motion to dismiss.

Consistent with the JSSA's plain language, the Supreme Court, the Second Circuit and several other circuits have interpreted Section 1867(f) to require only limited data related to the Master Jury Wheel — not the Qualified Jury Wheel, the venire or the ultimate grand jury — to be disclosed for purposes of a defendant's motion to dismiss. See Test v. United States, 420 U.S. 28, 30 (1975) (holding that 1867(f) "makes clear that a litigant has essentially an unqualified right to inspect jury lists") (emphasis added); United States v. Brown, 116 F.3d 466, 466 (2d Cir. 1997) (noting defendant's "right to obtain relevant grand

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[2] In United States v. Cruz, 20-CR-206 (WFK) — a case in which the defendant sought the identical grand jury selection materials as the defendants in this case — Judge William F. Kuntz, II, ordered the government on July 1, 2020 to provide to the defendant these four categories of data: namely, the county of residence, zip code, and, to the extent available, the race and age of the individuals listed in the Master Jury Wheel from which the Grand Jury was selected. See ECF Order, dated July 1, 2020. The government received this data from the EDNY jury administrator on July 10, 2020 and provided it to defense counsel the same day. See ECF Dkt. No. 13. Upon issuance of an order from the Court, the government will promptly provide the same data to the defendants in this case.

jury lists containing information regarding the ethnicity of the members of his grand jury pool"); United States v. Gotti, No. (S4) 02-CR-743, 2004 WL 32858, at *11 (S.D.N.Y. Jan. 6, 2004) (holding that defendants "do not have an absolute right of access to all materials relating to the grand jury selection" and granting defendants access to the master jury list); United States v. Davis, No. 06-CR-911, 2009 WL 637164, at *15-16 (S.D.N.Y. Mar. 11, 2009) (observing that "there is no absolute right of access to all materials relating to grand jury selection" and disclosing only "the District's Master Plan for jury selection").[3]

These courts' holdings are also consistent with protecting the specific right that the U.S. Constitution and the JSSA affords defendants. The JSSA protects a defendant's right to grand juries "selected at random from a fair cross section of the community." 28 U.S.C. § 1861. In other words, the JSSA protects against structural problems in the way the jury pool is defined or composed that would "systematically exclude distinctive groups in the community." Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (holding defendant entitled to jury selected from pool that did not categorically exclude women). The JSSA does not, however, protect against the happenstance of a randomly selected venire or grand jury having more or less representation from one race or other protected group, which may happen from time to time. See id.; see also Gotti, 2004 WL 32858, at *11 (the master jury list is "sufficient to comply with" the Supreme Court's decision in Test because "[i]t is not the actual selection of the grand jury which would constitute the violation but whether the jury was selected 'at random from a fair cross section of the community.'"). Accordingly, disclosing to the parties data related to the county of residence, zip code, race and age of individuals in the Master Jury Wheel from which the Grand Jury was selected — in conjunction with the EDNY Jury Plan — is sufficient for the defendants to assess whether, in

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[3] See also United States v. Davenport, 824 F.2d 1511, 1515 (7th Cir. 1987) (holding that the defendant had "not demonstrated why other records besides those available jury lists might be required" to establish "an alleged deficiency" in the jury selection process); United States v. Harvey, 756 F.2d 636, 642-43 (8th Cir. 1985) (master grand jury list with names and addresses redacted provided the defendant with "the ability to determine whether the master grand jury list represented a racial and economic cross-section of the community"); and United States v. McLernon, 746 F.2d 1098, 1123 (6th Cir. 1984) (holding that the defendants' "unqualified right to inspection was satisfied by disclosure of the Master Lists and the relevant demographic data about the general pool from which the specific grand jurors were selected" and that "refusing to provide [defendants] with the names, addresses, and demographics of the specific grand jurors who returned indictment against them" was not error).

their view, their rights to a grand jury "selected at random from a fair cross section of the community" has been violated.[4]

Two Supreme Court decisions the defendants cite in their Reply — Duren v. Missouri, 439 U.S. 357, 364 (1979), and Taylor v. Louisiana, 419 U.S. 522 (1975) (see Reply at 4, n.3) — stand for the same proposition. In those cases, the Supreme Court held that compliance with the U.S. Constitution and the JSSA does not require any particular composition of the jury, but only that the sources from which the jury is drawn reflect a fair cross-section of the community with no distinctive groups systematically excluded. Specifically, the Supreme Court held that although "juries must be drawn from a source fairly representative of the community" (emphasis added), there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." Taylor, 419 U.S. at 538 (reversing conviction where Louisiana law excluded every woman from jury service except those who had previously filed written declaration of desire to be subject to jury service); Duren, 439 U.S. at 364 n.20 (reversing conviction where Missouri law allowed women to claim exemption to jury service before the jury wheel was filled). The defendants are correct that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups," Reply at 4, n.3 (emphasis added), but it does not follow that every particular jury, randomly drawn from a fair pool of names, must reflect any particular composition. That is, the fair-cross section requirement is a requirement relating to the source from which the jury is drawn, and not the particularities of the body that results. See Duren, 439 U.S. at 364 n.20 (fair cross-section

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[4] Just as they did in the Motion, see Mot. at 1, the defendants again make the baseless argument that they are entitled to inspect their wide-ranging list of grand jury selection materials because of the government's "unprecedented mustering of a quorum after a hiatus of several months, 50 or more miles from those parts of the Eastern District disparately impacted by the pandemic and still operating under a stay-at-home order." Reply at 4. As the government explained in its response to the Motion, the COVID-19 pandemic has had no bearing on whether the Grand Jury was randomly selected from a fair cross section of the community. The Grand Jury at issue was empaneled in the Central Islip courthouse in October 2019 — many months before the start of the pandemic — and has remained empaneled since then. And, like all grand juries sitting in Brooklyn and Central Islip, the Grand Jury was selected from a list of residents drawn from all five counties of the Eastern District of New York. Which members of the Grand Jury have made up the quorum since the Grand Jury began sitting again on June 11, 2020 is not at issue under the JSSA.

requirement "does not mean that petit juries actually chosen must mirror the community" (internal quotation marks omitted)).[5]

For the reasons detailed above, the defendants have not demonstrated that they are entitled under the JSSA to any information and materials beyond the four categories of data that the government has identified for inspection — namely, the county of residence, zip code, and, to the extent available, the race and age of the individuals listed in the Master Jury Wheel from which the Grand Jury was selected pursuant to the EDNY Jury Plan.

III. A Telephone Call with the EDNY Jury Administrator Is Not Necessary to Resolve the Defendants' Motion

The defendants' final request — that the Court schedule a telephone call with the EDNY jury administrator and the parties in this case to "learn what information is available on the issues raised" in the Motion (see Reply at 1-2) — is unnecessary and irrelevant to resolving the defendants' Motion. The Court already has access to the information held by its own jury administrator. Furthermore, the Court can determine what data is "necessary" to the defendants' preparation of a motion under the JSSA, regardless of what records the EDNY courthouse possesses or how it organizes those records, and the defendants should be permitted to inspect only the limited data to which they are entitled under the JSSA.[6]

IV. Conclusion

For the foregoing reasons, the defendants' motion to access data related to the grand jury selection process should be denied with the exception of certain limited data — the county of residence, zip code, and, to the extent available, the race and age of the individuals listed in Master Jury Wheel from which the Grand Jury was selected — that is

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[5] The two recent SDNY decisions on which the defendants rely in the Reply — Saipov, 17-CR-722 (VSB), and Simmons, 20-CR-294 (PKC) — do not undermine the long line of decisions by courts within the Second Circuit and other circuits. Neither Saipov nor Simmons ruled on, let alone mentioned, the scope of information to which defendants are entitled under 28 U.S.C. § 1867(f).

[6] For the same reason, the defendants' request that the parties meet and confer about the defendants' requests and submit a joint status letter regarding the government's objections to the defendants' requests is unnecessary.

sufficient, in conjunction with the EDNY Jury Plan, for the defendants to determine whether, in their view, a motion to dismiss the indictment is warranted.

Respectfully submitted,

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