

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	No. 20 CR 812
)	
MICHAEL McCLAIN, et al.)	Honorable Harry D. Leinenweber
)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ JOINT
MOTION FOR ACCESS TO GRAND JURY SELECTION MATERIALS**

In support of their Joint Motion for Access to Grand Jury Selection Materials, Defendants Michael McClain, Anne Pramaggiore, John Hooker, and Jay Doherty (collectively, Defendants) submit the following Memorandum of Law. Pursuant to 28 U.S.C. § 1867(f), Defendants respectfully request that the Court issue an order directing the Clerk of this Court, or the Government, to disclose certain information concerning the procedures by which members of grand juries are selected in this District during the COVID-19 pandemic, including both written policies and anonymized demographic data concerning the constitution of such grand juries. Defendants require such information to determine whether their constitutional and statutory right to a grand jury drawn from a fair cross section of the community has been violated. The Court should grant Defendants’ motion because they have an unqualified statutory right to these documents.

I. Defendants Have an Unqualified Right to Inspect Records Regarding Grand Jury Selection Process

The Sixth Amendment affords every criminal defendant the “constitutional right to a jury drawn from a fair cross section of the community” in which the defendant is tried. *Duren v. Missouri*, 439 U.S. 357, 368 (1979). The Jury Selection and Service Act of 1968 (JSSA or the

“Act”) protects Defendants’ Sixth Amendment right to a fair *grand* jury by providing that “all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.” 28 U.S.C. § 1861; *see also* United States District Court, Northern District of Illinois, *Plan for Random Selection of Jurors* (Approved by Jud. Council of the 7th Cir. Jan. 8, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_press/ILNDJuryPlan.pdf (same).

Under the JSSA, a defendant may move to dismiss an indictment or stay the proceedings on the grounds of substantial failure to comply with the provisions of the Act in selecting a grand jury. *See* 28 U.S.C. § 1867(a). Section 1867(f) of the JSSA allows a defendant to “inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of” a motion to dismiss under Section 1867(a). *See* 28 U.S.C. § 1867(f). Inspection of such materials is essential to a defendant’s ability to determine whether she has a potentially meritorious challenge. *Test v. United States*, 420 U.S. 28, 30 (1975) (“[W]ithout inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge”). This “*unqualified right to inspection* is required not only by the plain text of the statute, but also by the statute’s overall purpose of insuring ‘grand and petit juries selected at random from a fair cross section of the community.’” *Id.* (quoting 28 U.S.C. § 1861) (emphasis added); *see also United States v. Koliboski*, 732 F.2d 1328, 1331 (7th Cir. 1984) (“Criminal defendants have the unqualified right to inspect jury lists.”). A defendant need not prove that her claim under the Act will be successful, or show any likelihood of success, to gain access to the jury selection records. “To avail [herself] of this right of access to otherwise nonpublic jury selection records, a litigant need only allege that [she] is preparing a motion challenging the jury

selection procedures.” *United States v. Layton*, 519 F. Supp. 946, 958 (N.D. Cal. 1981); *see also United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996).

Here, Defendants are preparing a motion challenging the methods by which the grand jury that indicted them was selected. Each of their requests falls squarely within the discovery allowed by the Act because each seeks only “[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process.” 28 U.S.C. § 1867(f). Should the Court grant Defendants’ motion to inspect, the defense intends to review the records and, depending on their contents, determine whether grounds for a challenge under Section 1867(a) exist.

II. The Impact of the COVID-19 Pandemic

While Defendants do not doubt that this District’s normal grand jury selection procedures are fair, the emergence of the COVID-19 pandemic has necessarily affected Court operations in a manner that may have implicated their constitutional rights. On March 12, 2020, this District issued General Order 20-0012 in response to the COVID-19 pandemic, impacting operating procedures in this District. *See generally* General Order 20-0012 (Mar. 12, 2020). This District periodically amended this General Order and entered an additional General Order governing criminal procedures during the COVID-19 pandemic. *See generally, e.g.*, Second Am. General Order 20-0012 (Mar. 30, 2020); Third Am. General Order 20-0012 (Apr. 24, 2020); Fourth Am. General Order 20-0012 (May 26, 2020); Fifth Am. General Order 20-0012 (July 10, 2020); Am. General Order 20-0022 (Sept. 4, 2020); Second Am. General Order 20-0022 (Nov. 10, 2020). As reflected in the most recent General Order governing criminal procedures, grand juries continued to meet during the public health crisis, subject to “reasonable limits on grand jury sessions imposed by the Court in consultation with the U.S. Attorney’s Office.” Second Am. General Order 20-0022 (Nov. 10, 2020).

On November 18, 2020, in the midst of the ongoing COVID-19 pandemic, the Special January 2019 Grand Jury returned an indictment charging Defendants with violations of 18 U.S.C. §§ 371, 666(a)(2), and 2 and 15 U.S.C. §§ 78m(b)(5) and 78ff(a). *See* Indictment, ECF No. 1. The Special January 2019 Grand Jury was empaneled in January 2019, prior to the start of the pandemic. However, individuals were likely added to the grand jury during the pandemic, and prospective grand jurors may have deferred or been excused from jury service for reasons related (and perhaps unrelated) to the pandemic. For example, prospective grand jurors may have indicated that they had an underlying medical condition that put them at a higher risk of developing serious health complications from COVID-19 or that they live with, or provide direct care for, someone with such a condition.

Although the District's General Orders indicate that grand juries have continued to meet during the pandemic "with reasonable limits on grand jury sessions imposed by the Court in consultation with the U.S. Attorney's Office," it is unclear whether changes to grand jury procedures affected the representativeness of the grand jury that returned the indictment against Defendants. Second Am. General Order 20-0022 (Nov. 10, 2020). This is not a speculative concern because the pandemic has had a disparate impact on different groups. For example, recent studies suggest that African American prospective jurors are less likely to appear in the jury pool during the pandemic as a result of the disproportionate impact that the epidemic is having on them. *See* Cara Bayles, *Can You Get a Fair Jury Trial During the Pandemic?*, LAW360 (Aug. 30, 2020), <https://www.law360.com/access-to-justice/articles/1305161/can-you-get-a-fair-jury-trial-during-the-pandemic>. COVID-19 has also impacted age groups differently, with particularly severe impacts on persons above 65 years of age. *See COVID-19 Hospitalization and Death by Age*, CTRS. FOR DISEASE CONTROL & PREVENTION,

<https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html> (last updated Aug. 18, 2020). And commentators have recognized that the pandemic, and the closure of schools and day care facilities, has imposed a childcare burden that has been disproportionately borne by women. *See, e.g.*, Anu Madgavkar, et al., *COVID-19 and gender equality: Countering the regressive effects*, MCKINSEY & COMPANY (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects>. Each of these dynamics may reduce the representativeness of the grand jury pool by selecting one that is whiter, younger, and more male than the community in which this Court is located.

These differential effects raise concerns as to whether the grand jurors that were likely added to the Special January 2019 Grand Jury that returned the indictment were representative of the community in the district and division in which this Court convenes.¹ Accordingly, Defendants respectfully seek discovery related to the jury selection plan during the pandemic to ensure that their constitutional and statutory rights have not been violated. Indeed, a number of courts have recently recognized the possibility of such disparate impacts in granting requests similar to those that Defendants make here. *See, e.g.*, *United States v. Holmes*, No. 18-cr-00258-EJD-1, 2020 WL 5408163 (N.D. Cal. Sept. 9, 2020) (granting in part Section 1867(f) motion where superseding indictments were returned during the COVID-19 pandemic); *United States v. Sullivan*, No. 20-cr-00337-WHO-1, 2020 WL 5944433 (N.D. Cal. Oct. 7, 2020) (granting Section 1867(f) motion where indictment was returned during the pandemic).

¹ Press reports have indicated that this District has experienced difficulties related to grand juries in light of the ongoing pandemic. *See, e.g.*, Jon Seidel, *Feds having trouble convening grand juries amid coronavirus outbreak, prosecutors say*, CHICAGO SUN-TIMES (Mar. 24, 2020), <https://chicago.suntimes.com/2020/3/24/21193124/federal-grand-juries-quorum-issues-amid-coronavirus-outbreak>.

CONCLUSION

In light of the foregoing, Defendants respectfully request that the Court order the Clerk of the Court or, to the extent they are in the Government's possession, the Government to produce the grand jury selection materials identified in Defendants' motion.

DATED: December 11, 2020

Respectfully submitted,

/s/ Patrick J. Cotter

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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