

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

UNITED STATES OF AMERICA,

v.

JAYSON JEFFREY PENN, et al.,

Defendants.

Case No. 1:20-cr-00152-PAB

**MR. BLAKE'S MOTION FOR
DISCOVERY OF JURY SELECTION PROCEDURES**

Pursuant to 28 U.S.C. § 1867(f), Rickie Blake respectfully moves for discovery of this Court's jury selection plan and any related COVID-19 juror excuse policies. Mr. Blake has an unqualified statutory right to documents reflecting and related to the procedures by which his grand jury was selected and a future petit jury will be selected.

A grand jury returned the Superseding Indictment in this case on October 6, 2020, in the midst of the COVID-19 pandemic. *See* Superseding Indictment, ECF No. 101. Prospective grand jurors may have deferred or been excused from jury service by, for example, indicating 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. Even if the grand jury was empaneled prior to the commencement of the pandemic, grand jurors may have been excused from service in light of COVID-related concerns. Additionally, in the absence of any cure for COVID-19 on the immediate horizon, trial in this

matter may be held when the pandemic will be ongoing, and prospective jurors who receive a summons for jury service may seek to defer their service or be excused in light of concerns about contracting COVID-19.

The COVID-19 pandemic has affected distinctive groups differently. Accordingly, the process by which a grand jury or petit jury is ordinarily selected may not comply with the fair cross-section requirement during the unprecedented COVID-19 pandemic and any adjustments made to the ordinary jury selection process may not resolve, and can even exacerbate, these concerns. As such, Mr. Blake respectfully seeks discovery related to the jury selection plan during the COVID-19 pandemic to ensure that his Fifth and Sixth Amendment rights are not violated.¹

DOCUMENT REQUESTS

Mr. Blake requests the following documents be produced by the Clerk of the Court or, to the extent they are in the Government's possession, by the Government:²

¹ The phrase "during the COVID-19 pandemic," as used in this motion, refers to the time period from March 13, 2020 to present, during which the COVID-19 pandemic has affected operating procedures in this District. On March 13, 2020, Chief Judge Brimmer suspended "all civil, criminal petit, and grand jury selections and jury trials" in this District, effective immediately, through April 3, 2020. Gen. Order 2020-2 (D. Colo. Mar. 13, 2020), <https://tinyurl.com/y6ba9dg7>. All grand jury proceedings subsequently were suspended, such that "a grand jury within the District of Colorado [was] not available," from March 27 until May 29, 2020. See Gen. Order 2020-3 (D. Colo. Mar. 27, 2020), <https://tinyurl.com/yckzyefd> (grand jury proceedings suspended through May 1, 2020); Gen. Order 2020-6 (D. Colo. Apr. 21, 2020), <https://tinyurl.com/y6ph44fy> (grand jury proceedings suspended through May 29, 2020). Jury Division 3 stopped convening grand juries as of August 3, 2020 and has yet to resume doing so. Gen. Order 2020-11 (D. Colo. July 2, 2020), <https://tinyurl.com/y3pqua28>. And criminal jury trials have remained suspended since March 13, 2020, with limited exception.

² Throughout these requests, "documents" includes electronic data and, to the extent that documents and/or data are kept in accessible electronic form, Mr. Blake requests them in that form.

- (1) The Jury Plan for the District of Colorado currently in effect, if different from that available on the Court's website (*Revised Jury Plan for Random Jury Selection*, U.S. D. CT. D. COLO., Mar. 1, 2017, <https://tinyurl.com/y3ekg9td> ("D. Colo. Jury Selection Plan")), and a description of any changes that have been made in the selection of prospective jurors due to the COVID-19 pandemic, to the extent not otherwise stated in the Court's Jury Trial Protocols (*Jury Trial Protocols*, U.S. D. CT. D. COLO., June 30, 2020, <https://tinyurl.com/y6aspn84>);
- (2) Documents sufficient to show: (a) the Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation of all grand juries empaneled in the District during the COVID-19 pandemic; (b) the Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation of all grand jury members excused or deferred from participating in a grand jury after it was empaneled in the District; and (c) the Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation of any grand jury members added after a grand jury was originally empaneled in the District;
- (3) The Juror Qualification Questionnaire distributed to potential grand or petit jurors, as contemplated in Section 14 of the Court's Plan, and any additional forms being distributed during the COVID-19 pandemic;
- (4) The District's two most recently submitted AO-12 forms;
- (5) Documents sufficient to show: Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation for those individuals on the Master Jury Wheel in this District;
- (6) Documents sufficient to show: Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation for those individuals eligible for jury service in this District;
- (7) Documents sufficient to show: Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation for those individuals (a) to whom summonses and jury questionnaires were sent, as contemplated by Sections 11, 12, and 15 of the Court's Plan, and (b) those deemed qualified for jury service, as contemplated by Section 16 of the Court's Plan;
- (8) Documents identifying all excuses received from potential jurors and, separately, all excuses accepted from potential jurors, for the District, as contemplated by Sections 17 and 18 of the Court's Plan, during the COVID-19 pandemic;
- (9) Documents reflecting any policies or practices established by the Court or Clerk's Office for excusing grand or petit jurors during the COVID-19 pandemic;

- (10) Documents sufficient to show: Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation for all prospective jurors for the District who have been excused from or granted a deferral of their jury service based on the COVID-19 pandemic; and
- (11) Once criminal trials in this District resume and a trial schedule in this matter is set, any additional documents or data responsive to Request Nos. 2–3 and 5–10 for the period between March 13, 2020 and 30 days before voir dire in this matter.

ARGUMENT

The Fifth and Sixth Amendments to the United States Constitution guarantee a criminal defendant the right to an impartial grand and petit jury. U.S. CONST. amends. V, VI. The Supreme Court has held that “the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment’s guarantee of an impartial jury trial in criminal prosecutions.” *Taylor v. Louisiana*, 419 U.S. 522, 526, 530–31 (1975); accord *United States v. Orange*, 447 F.3d 792, 797 (10th Cir. 2006) (“The Sixth Amendment guarantees a defendant the right to a jury pool consisting of a fair cross section of the community.”). Further, the Court has explained that “[t]he Fifth Amendment requires the Federal Government to use a grand jury to initiate a prosecution” and, because the grand jury “controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, . . . [t]he integrity of these decisions depends on the integrity of the process used to select the grand jurors.” *Campbell v. Louisiana*, 523 U.S. 392, 398–99 (1998); see *Peters v. Kiff*, 407 U.S. 493, 501, 504 (1972) (plurality op.) (“[W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.”); see also *United*

States v. Serubo, 604 F.2d 807, 816 (3d Cir. 1979) (“In federal criminal proceedings, the right to indictment by an unbiased grand jury is guaranteed by the fifth amendment.”).

To protect these rights, Congress passed the Jury Selection and Service Act of 1968 (“JSSA”), which made it “the policy of the United States 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. For the reasons set forth below, Mr. Blake has a statutory right under the JSSA to discovery of materials relating to jury selection. His Document Requests, listed above (*supra* at 2–4), should be granted because they are necessary for him to evaluate whether the unprecedented COVID-19 pandemic and the jury selection process and policies in place during the pandemic result in the impermissible exclusion of distinctive groups. *See* 28 U.S.C. § 1867(f).

I. MR. BLAKE HAS AN UNQUALIFIED STATUTORY RIGHT TO DISCOVERY OF THE JURY SELECTION MATERIALS HE REQUESTS.

The JSSA provides that a defendant “may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions” of the statute in selecting the grand jury or petit jury. 28 U.S.C. § 1867(a). A violation is “substantial” if it frustrates any of three principles on which the JSSA is based: “(1) the random selection of jurors, (2) culling of the jury from a fair cross-section of the community, and (3) the determination of disqualifications, exemptions, and exclusions based on objective criteria.” *United States v. Kamahale*, 748 F.3d 984, 1022 (10th Cir. 2014). “The 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

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