

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

v.

JULIA BEATRICE KELEHER, et al.
Defendants.

CRIMINAL NO. 19-431 (PAD)

**RESPONSE IN PARTIAL OPPOSITION TO DEFENDANT JULIA BEATRICE
KELEHER AND DEFENDANT FERNANDO SCHERRER-CAILLET’S
MOTIONS TO INSPECT COURT RECORDS PURSUANT TO 28 U.S.C. § 1867
[Docket Nos. 421 and 423]**

Pursuant to the Jury Selection and Service Act (“JSSA”), 28 U.S.C. § 1861 *et seq.*, Defendants Julia Beatrice Keleher and Fernando Scherrer-Caillet request access to a broad array of records pertaining to the Court’s procedures for empaneling grand and petit juries, suggesting that the COVID-19 pandemic may have interfered with their right to have a grand jury selected from a broad cross-section of the community. The defendants are not entitled to much of the information they request because such information has no bearing on whether the grand jury panel that returned the superseding indictment was selected at random from a fair cross-section of the community. While the JSSA gives defendants an unqualified right to inspect a limited set of data to determine whether a motion to dismiss is warranted, it does not give them unfettered license to rummage through the Court’s records. For the reasons set forth below, defendants’ motions should be granted only to the extent that the information they request falls within the scope of the JSSA – that is, records and data pertinent to preparing a motion to challenge the process by which members of the grand jury were selected.

I. Applicable Law

In relevant part, the JSSA provides that a defendant “may move to dismiss the indictment

. . . against him on the ground of substantial failure to comply with the provisions” of the JSSA. 28 U.S.C. § 1867(a).¹ Section 1867 of Title 28 establishes the *exclusive* means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions of [the Title].” *United States v. Royal*, 100 F.3d 1019, 1024 (1st Cir. 1996) (internal citation and quotation marks omitted). In *Test v. United States*, the Supreme Court made clear that “a litigant has an unqualified right to inspect jury lists” under 28 U.S.C. 1867(f). This “unqualified right,” however, is not an unlimited one. *See, e.g., United States v. Rice*, 489 F. Supp. 2d 1312, 1316 (S.D. Ala. 2007) (noting that section 1867 “is not a license for litigants to rummage at will through all jury-related records maintained by the Clerk of the Court.”); *id.* (noting that “federal courts have uniformly declined to allow unfettered access to all jury-related documents and records.”); *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”).

Access to “jury-related records must be reasonably necessary for preparation of a motion under [28 U.S.C. § 1867].” *United States v. Merrick*, No. 20-09, 2020 U.S. Dist. LEXIS 149106, at *2 (D.N.H. Aug. 18, 2020); *see also United States v. Swan*, No. 03-36-01-B, 2003 U.S. Dist. LEXIS 13573 (D.N.H. July 22, 2003) (observing that section 1867(f) “expressly prohibits the disclosure of records and papers used in the jury selection process, unless they are shown to be

¹ The Fifth and Sixth Amendments guarantee a criminal defendant to right to a trial before a jury selected from a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *United States v. LaChance*, 788 F.2d 856 (2d Cir. 1986). The JSSA extends this requirement to federal grand juries. 28 U.S.C. § 1861 (“It is 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.”).

‘necessary’ in preparing a motion to challenge the process itself.”). Accordingly, “numerous courts have held that only the master jury list from which the grand jury was selected need be disclosed for a defendant to assess whether to challenge the grand jury selection process. *See, e.g., United States v. Shader*, 472 F. Supp. 3d 1, 5 (S.D.N.Y. 2020) (“The Master List is sufficient to comply with the Supreme Court’s decision in *Test* because it 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.”) (citations and internal quotation marks omitted); *United States v. Gotti*, No. (S4) 02-CR-743, 2004 WL 32858, at *10-11 (S.D.N.Y. Jan. 6, 2004) (citing *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”); *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 the indictment against them” was not error.).

II. Response to the defendants’ specific requests

As the Court may already be aware, and as the defendants will now know, the grand jury that returned the superseding indictment was empaneled in 2018, well over a year before the COVID-19 pandemic began the unprecedented disruption of the operations of law enforcement

agencies, the courts, and life in general. Against this backdrop, the United States responds to the defendants' specific requests as follows:

- 1. The Jury Plan for the District of Puerto Rico currently in effect, if different from that available on the Court's website and a description of any changes made in the selection of prospective jurors due to the COVID-19 pandemic, including instructions given to, and responses from, the Jury Department under the Court's Frequently Asked Questions.**

As the defendants recognize, the information requested appears to exist in the public domain, and the United States does *not object* to anyone's access to publicly available information. To the extent any such COVID-19-related information may not exist in the public domain, however, the defendants *do not* have an "unqualified right" to inspect this information because the grand jury panel that returned the second superseding indictment was empaneled in 2018, well before most of the world even knew what COVID-19 was. Put simply, the COVID-19 pandemic played no role in the empanelment of the grand jury that returned the second superseding indictment. Be that as it may the United States does not object that the Court allow the parties to access and use all information that is public. Non-public information about any changes the Court has adopted in response to empaneling grand juries during the COVID-19 pandemic are irrelevant because no post-COVID-19-empaneled grand jury returned an indictment against any defendant.

- 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 this district; and (c) the Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation of any grand jury members added during the COVID-19 pandemic after a grand jury was originally empaneled in the District.**

The United States *objects* to this request inasmuch as the grand jury that returned the superseding indictment was empaneled in 2018, before the onset of the pandemic. This

information, therefore, cannot be helpful to evaluating the potential merits of a motion under 28 U.S.C. §§ 1861 *et seq.* The United States *does not, however, object* to the Court permitting the parties to inspect the following information to the extent it is available: the race, religion, sex, gender, ethnicity, year of birth, zip code, income, and occupation of the individuals in the Master Jury Wheel from which members of the grand jury that returned the superseding indictment were selected. None of the other information sought in this request is relevant to the preparation of a motion under 28 U.S.C. § 1867.

3. The Juror Qualification Form distributed to potential grand or petit jurors, as contemplated in Section 6 of the Court’s Plan, and any additional forms being distributed to potential grand or petit jurors during the COVID-19 pandemic;

The United States has *no objection* to the Court allowing the parties to inspect any AO-12 form or questionnaire which relates to the Master Jury Wheel used to summon the grand jurors who returned the superseding indictment in this case. *See United States v. Eldarir*, No. 20-CR-243 (LDH), 2020 U.S. Dist. LEXIS 208405, at *12 (E.D.N.Y. Nov. 6, 2020).

Any such information pertaining to grand juries empaneled after the onset of the COVID-19 pandemic, however, has no bearing on the extent to which the COVID-19 pandemic influenced the composition of the grand jury that returned the superseding indictment because that grand jury panel was active for well over a year before the onset of COVID-19. To the extent any juror qualification forms exist with respect to the summoning of a petit jury for this case, the request is premature inasmuch as no petit jury has yet been summoned in this case. Accordingly, the United States *objects* to the defendants’ request for any information pertaining to the empanelment of petit juries. *See United States v. Knight*, 2020 U.S. Dist. LEXIS 194138, at *9 (D. Nev. Oct. 20, 2020) (“[T]he [c]ourt finds [the defendant’s] specific requests regarding the summoning of a petit jury for this case premature because petit jury has not been summoned—and these records are therefore

unavailable.”); *see also United States v. Jones*, 2006 U.S. Dist. LEXIS 105628, at *41 (N.D.N.Y. Sept. 26, 2006) (“To the extent defendant seeks inspection of a jury list for the petit jury in this case, no such list yet exists. Therefore, the motion to inspect the jury lists from which the petit jury will be selected is denied as premature.”).

4. The District’s two most recently submitted AO-12 forms

The United States *does not object* to this request only to the extent that the information contained in these forms pertains to the Master Jury Wheel from which the grand jury that returned the superseding indictment was selected.

5. Documents sufficient to show: Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation of those individuals on the Master Jury Wheel in this District

The United States *does not object* to this request only to the extent that this information pertains to the Master Jury Wheel from which the grand jury that returned the superseding indictment was selected. The United States *objects*, however, to the request to the extent it pertains to grand juries empaneled during the COVID-19 pandemic. Inasmuch as the information requested pertains to petit juries to be empaneled in the future, the request is premature. *See, e.g., Knight*, 2020 U.S. Dist. LEXIS 194138, at *9

6. Documents sufficient to show: Race, Religion, Sex, Gender, Ethnicity, Year of Birth, Zip Code, Income, and Occupation of those individuals eligible for jury service in this District.

The United States *does not object* to this request to the extent the information is available, and pertains to the Master Jury Wheel from which the grand jury that returned that returned the superseding indictment was selected. To the extent the request pertains to petit juries to be empaneled in the future, the request is premature. *See, e.g., Knight*, 2020 U.S. Dist. LEXIS 194138, at *9.

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 4, 6, 11, and 13 of the Court’s Plan, and (b) those deemed qualified for jury service, as contemplated by Sections 4, 6, 11, and 13 of the Court’s Plan

The United States *does not object* to subpart (a) of this request, but *objects* to subpart (b) of this request because “it 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.”) *See, e.g., United States v. Shader*, 472 F. Supp. 3d at 5.

8. 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

The United States *objects* to this request because the COVID-19 pandemic played no role in the empanelment of the grand jury that returned the superseding indictment. To the extent the defendants request information pertaining to the impact of COVID-19 to the summoning of potential petit jurors, the request is premature. *See Knight*, 2020 U.S. Dist. LEXIS 194138, at *9. What is more, the information requested is irrelevant because it is not the actual makeup of a jury that matters for purposes of complying with the JSSA, but that the jury be selected from a fair cross-section of the community. *See, e.g., United States v. Ramos-Colon*, 415 F. Supp. 459, 462-63 (D.P.R. 1976) (“In looking at the declaration of policy contained in 28 U.S.C. § 1861 we find that it requires that grand and petit juries be selected at random from a fair cross section of the community and that all citizens . . . have the opportunity to be considered for service. This does not mean that precise proportional representation of any particular group is required on the grand or petit panel, but rather that the group from which they are selected be taken by chance (i.e., at random), from the community.”) (internal quotation marks and citations omitted).

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

The United States *objects* to this request because the grand jury that returned the superseding indictment was not empaneled during the COVID-19 pandemic. *See also* Response to Request 8.

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 petit or grand jury service for a reason related to the COVID-19 pandemic

The United States *objects* to this request because the COVID-19 pandemic played no role in the empanelment of the grand jury that returned the superseding indictment. To the extent the defendants request information pertaining to the impact of COVID-19 to the summoning of potential petit jurors, the request is premature, and such information is irrelevant. *See Knight*, 2020 U.S. Dist. LEXIS 194138, at *9; *see also* Response to Request 8.

11. Once criminal trials in this District resume, any additional documents or data responsive to Request Nos. 2–3 and 5–10 for the period between March 13, 2020 and 30 days prior to the scheduled commence of voir dire in this matter

At the appropriate time, the United States will have *no objection* that the Court allow the parties to inspect: (1) the records containing the demographic information described in Request 2 as it relates to the Master Jury Wheel from which the petit jurors will be summoned for this case; (2) the records described in Request 3 only as they relate to the process for summoning petit jurors to serve in this case; (3) the records described in Request 5 only as they relate to the process for summoning petit jurors to serve in this case; (4) the records described in Request 6 only as they relate to the process for summoning petit jurors to serve in this case; and (5) the records described in Request 7(a) only as they relate to the process for summoning petit jurors to serve in this case. For the reasons previously given, the United States *objects* to the parties' request to access to the

records described in Request 7(b), Request 8, Request 9, and Request 10.

III. CONCLUSION

For the reasons set forth above, the Court should grant in part, and deny in part the defendants' request in the manner consistent with the United States' proposals.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico, March 26, 2021

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s/ Alexander L. Alum
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s/ Jose Ruiz Santiago
Jose Ruiz Santiago
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will provide electronic notice to all counsel of record.

s/ Alexander L. Alum
Alexander L. Alum
Assistant U.S. Attorney