

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 15-49 (MJD/FLN)

United States of America,

Plaintiff,

v.

**DEFENDANTS' JOINT MOTION FOR
ACCESS TO JURY SELECTION
RECORDS AND MATERIALS**

Hamza Naj Ahmed (1),
Adnan Abdihamid Farah (3),
Abdurahman Yasin Daud (4),
Zacharia Yusuf Abdurahman (5),
Hanad Mustofe Musse (6),
Guled Ali Omar (7),

Defendants.

Defendants Hamza Naj Ahmed, Adnan Abdihamid Farah, Abdurahman Yasin Daud, Zacharia Yusuf Abdurahman, Hanad Mustofe Musse and Guled Ali Omar, by and through their undersigned counsel, hereby move the Court, pursuant to 28 U.S.C. §1867(f), for access to the jury selection records and materials requested herein.

Defendants are charged in the Superseding Indictment with (1) Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization (all Defendants); (2) Aiding and Abetting Attempting to Provide Material Support to a Designated Foreign Terrorist Organization (Ahmed, Daud, Abdurahman, Musse and Omar); (3) False Statement (Ahmed); and (4) Financial Aid Fraud (Ahmed and Musse), in violation of 18 U.S.C. §2339B(a)(1) and Section 2, 18 U.S.C. §1001, and 18 U.S.C. §1097(a). [ECF 65].

28 U.S.C. §1867 (a) and (d) provide that in criminal cases a defendant may move to dismiss an indictment and to stay any further proceedings against him, if there has been a "substantial failure to comply" with the provisions of the Jury Selection and Service Act of 1968 (the "Act"), 28 U.S.C. §1861 *et. seq.* in selecting the grand jury which indicted him or the petit jury to try his case, until such time as the failures have been corrected.

A defendant, however, would not typically know whether there has been a substantial failure to comply with the Act, such as the failure to create jury wheels that fairly represent the community, without first having the opportunity to review and inspect the relevant records maintained by the Clerk of the Court regarding the grand jury and petit jury selection procedures.

Therefore, 28 U.S.C. §1867(f) provides for the "unqualified right" of a defendant to inspect, and copy if necessary, "records or papers used by the jury commission or clerk in connection with the jury selection process" for the purpose of determining whether there exists the possibility of a meritorious challenge to the jury selection procedures in the district and, if so, to prepare and perfect a motion raising these issues consistent with the requirements of 28 U.S.C §1867(f). *See Test v. United States*, 420 U.S. 28, 30, 95 S.Ct 749, 750-751 (1975). ("Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an 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.'"); *United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996)("Because the right of access to jury selection records is 'unqualified', a district

court may not premise the grant or denial of a motion to inspect upon a showing of probable success on the merits of a challenge to the jury selection provisions. Although the burden is on the defendant to establish a prima facie case of unconstitutional exclusion, the right of access to the jury selection records is a precursor to this burden and is intended to provide the defendant with the evidence necessary to mount a proper showing. To avail himself of the right of access to jury selection records, a litigant need only allege that he is preparing a motion to challenge the jury selection process. The district court, therefore, erred in requiring Royal to make a showing of probable success on the merits of his jury selection challenge as a condition of granting access to the records.”)(citations omitted)(emphasis added).

Indeed, the Eighth Circuit has ruled:

“To avail himself (or herself) of (the) right of access to otherwise unpublic jury selection records, a litigant needs (sic) only allege that he (or she) is preparing a motion challenging the jury selection procedures.”... A defendant’s motion may not be denied because it is unsupported by a “sworn statement of facts which, if true, would constitute a substantial failure to comply ‘with the provisions of the Jury Selection Act.’”... Nor may a motion to inspect be denied because the defendant fails to allege facts which show a ‘probability of merit in the proposed jury challenge.’...Even if the defendant’s anticipated challenges to the jury selection process, as articulated at the time of his motion for inspection, are without merit, the defendant may still inspect the jury records. Grounds for challenges to the jury selection process may only become apparent after an examination of the records.

United States v. Alden, 776 F.2d 771, 773-775 (8th Cir. 1985)(citations omitted);

Government of Canal Zone v. Davis, 592 F.2d 887, 889 (5th Cir. 1979)(“Since the

Appellant’s right to inspection was unqualified, whether or not the accompanying

affidavit established a prima facie case of defective jury selection is of no import.”); United States v. Layton, 519 F.Supp. 946, 951 (N.D.Calif. 1981)(reversed in part on other grounds, 720 F.2d 548(9th Cir. 1983))(same); United States v. Carlock, 606 F.Supp. 491, 492-493 (W.D.La. 1985)(“Both the Test case and the controlling Fifth Circuit authority further establish that the trial court cannot deny access to the jury selection materials on the grounds that the motion for inspection is not accompanied by an affidavit establishing a prima facie case of defective jury selection.”); United States v. Penix, 516 F.Supp. 248, 251 fn. 2 (W.D.Okla.1981)(Defendant’s motion granted allowing the defendant “to inspect, reproduce and copy all records and papers used during the selection of the panel of prospective jurors of the petit jury to be used in this case.”); United States v. Gruberg, 493 F.Supp. 234, 251 (S.D.N.Y. 1979)(“1867(f) gives defendant an unconditional right to inspect the relevant documents,” being “the records and papers used by the jury clerk of the southern district in connection with the jury selection process.”).

Moreover, unless those issues are investigated now and timely raised, they are forever waived. 28 U.S.C. §1867(a); Davis v. United States, 411 U.S. 233, 238, 93 S.Ct. 1577, 1581 (1973)(“Rule 12(b)(2) precludes untimely challenges to grand jury arrays, even when such challenges are on constitutional grounds.”).

At this time and as a preliminary matter, Defendants request access only to surveys of the representativeness of the jury wheels required by the Administrative Office of United States Courts to be prepared by responsible jury selection officials in each district. 28 U.S.C. §1863(a) (“Each district shall submit a report on the jury selection

process within its jurisdiction to the Administrative Office of the United States Courts in such forms and at such times as the Judicial Conference of the United States may specify.”)

Counsel for the Defendants are aware that after the refilling of the Master and Qualified Wheels following each general election, the Administrative Office of Courts requires an analysis of the composition of the wheels to determine whether the Juror Selection Plan in effect in each district or division is successfully creating representative jury wheels. The document used for this analysis is called a Jury Selection Report and is completed on a form called a JS-12. This document is routinely provided to litigants in federal court investigating whether a particular juror selection system is successful. See, e.g., United States v. Aguero, 248 F.Supp.2d 1150, 1152, fn. 7 (S.D.Fla. 2003); United States v. Duran De Amesquita, 582 F.Supp. 1326, 1330 (S.D.Fla. 1984); United States v. Facchiano, 500 F.Supp. 896, 898, fn. 2 (S.D.Fla. 1980). This document includes no identification of any particular juror and counsel for Defendants can think of no reason why it should not be provided to Defendants in that it is the most readily available information maintained by the clerk’s office regarding demographic data concerning the jury wheels. These documents will give Defendants’ counsel an initial insight into the success of the jury selection system in complying with constitutional and statutory requirements. In short, it will tell Defendants, at least preliminarily, how well the system is representing various cognizable classes at the Master and Qualified Wheel levels. It may not be the end all and be all as to the representativeness of the jury selection system, and if these analyses indicate that further investigation is appropriate, Defendants may

request access to additional documents. But providing access to the relevant JS-12 analyses is an important and efficient first step.

Accordingly, Defendants respectfully request that the Court enter an order directing the Clerk to provide Defendants access to the above requested materials and the right to copy said materials as necessary.

Dated: August 6, 2015

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