

**IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____
_____ DIVISION**

| | | |
|---------------------------|---|------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | No. |
| v. |) | |
| |) | Hon. |
| DEFENDANT, |) | |
| |) | |
| Defendant. |) | |

**DEFENDANT’S MOTION FOR ACCESS TO
JURY SELECTION RECORDS AND MATERIALS**

Defendant respectfully moves this Court to grant access to grand and petit jury selection records and materials for Defendant’s upcoming jury trial pursuant to the Sixth Amendment to the U.S. Constitution and 28 U.S.C. §§ 1861-1869, and the Jury Selection and Service Act of 1968. The following is offered in support of this motion:

INTRODUCTION

Unlike most motions filed in our adversarial system, Defendant’s motion for access to jury selection records is intended to ensure a goal that is shared by all stakeholders in the criminal justice system: grand and petit juries that represent a fair cross-section of the community. Ensuring that grand and petit juries represent a fair cross-section of the community is not simply about avoiding a constitutional or even statutory violation. It is also essential to protecting the proper role of juries and ensuring that justice is fairly administered.¹ Defendant’s request is not only

¹ Social science research has demonstrated an important relationship between diverse juries and the quality of deliberations. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997, 1027-28 (2003). One empirical study revealed that, “[c]ompared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up

authorized by the Sixth Amendment and federal statutes, but also advances the interest all parties share in empaneling juries comprised of a fair cross-section of the community.

[INSERT CASE-SPECIFIC FACTS ABOUT CHARGES]

Since Defendant has been in custody, there has been a drastic change in circumstances as the novel COVID-19 coronavirus pandemic has taken hold globally, resulting in over 59.5 million confirmed cases, and over 1.4 million deaths. *See* Johns Hopkins University & Medicine, Johns Hopkins Coronavirus Resource Center, *available at*: <https://coronavirus.jhu.edu/map.html> (last visited Nov. 24, 2020). COVID-19 is an infectious disease that “has caused a worldwide pandemic of respiratory illness” that spreads from person to person. *See* Laura M. Sauer, *What Is Coronavirus?*, Johns Hopkins Medicine Conditions and Diseases, *available at*: <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> (last visited Nov. 24, 2020). Symptoms of COVID-19 include cough, fever or chills, shortness of breath or difficulty breathing, muscle or body aches, loss of taste or smell, headache, fatigue, nausea or vomiting, congestion or runny nose, and in some cases, death. *Id.* Often, a diagnosis may be difficult in cases where COVID-19 merely appears to be the flu or a bad cold. *Id.* COVID-19 spreads through “droplets released into the air when an infected person coughs or sneezes.” *Id.*

In addition to the short-term symptoms listed above, contracting the virus can also lead to serious long-term medical conditions, including cardiovascular diseases and a permanent reduction of pulmonary function. Tian-Yuan Xiong et al., *Coronaviruses and the Cardiovascular System: Acute and Long-Term Implications*, *European Heart Journal* at 1 (2020). COVID-19 causes the lungs to “become filled with inflammatory material” and impairs one’s ability “to get

more questions about what was missing from the trial (e.g. physical evidence that was not presented, witnesses who did not testify).” *Id.* at 1028.

enough oxygen to the bloodstream.” Graham Readfearn, *What Happens to People’s Lungs When They Get Coronavirus*, The Guardian, (Apr. 14, 2020), available at: <https://www.theguardian.com/world/2020/apr/15/what-happens-to-your-lungs-with-coronavirus-covid-19> (last visited Nov. 24, 2020). This can lead to acute respiratory distress syndrome, in which fluid displaces the air in the lungs, creating a sensation akin to drowning. Lizzie Presser, *A Medical Worker Describes Terrifying Lung Failure From COVID-19 — Even in His Young Patients*, PROPUBLICA, (Mar. 21, 2020), available at: <https://www.propublica.org/article/a-medical-worker-describes--terrifying-lung-failure-from-covid19-even-in-his-young-patients> (last visited Nov. 24, 2020).

[INSERT DISTRICT-SPECIFIC COVID DATA]

[SAMPLE DISCUSSION: In Illinois, as of January 7, 2021, there have been over 999,288 confirmed cases and 17,096 deaths. See Illinois Department of Health, Coronavirus Disease 2019 (COVID-19) available at: <https://www.dph.illinois.gov/covid19> (last visited Jan. 7, 2021). In Cook County alone – the largest and most densely populated county in Illinois, and where the Everett M. Dirksen Building is located – there have been over 406,000 confirmed cases and 8,574 deaths. See Johns Hopkins Coronavirus Resource Center, available at: <https://coronavirus.jhu.edu/map.html> (last visited Jan. 7, 2021).

Contrary to initial hopes, the COVID-19 pandemic has not tapered off, nor has the United States effectively controlled the spread of the virus. After Illinois’ stay-at-home order was lifted and restrictions across Illinois loosened, Governor J.B. Pritzker recently returned the state back to Tier 3 coronavirus mitigation due to the rising COVID-19 cases. NBC Chicago, *All of Illinois to Enter Tier 3 Mitigations This Week, Gov. Pritzker Announces*, NBC 5 (Nov. 17, 2020) available

at: <https://www.nbcchicago.com/news/local/all-of-illinois-to-enter-tier-3-mitigations-this-week-gov-pritzker-announces/2373619/> (last visited Nov. 24, 2020).]

Globally, nationally, and locally, we are living through a rapidly evolving and exponentially deteriorating public health emergency. This public health emergency threatens the lives of Americans, especially those most at risk of contracting the virus or those unable to meet social distancing recommendations.

ARGUMENT

The Sixth Amendment provides a criminal defendant with the “right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. Amend. VI. The Supreme Court has long held the Sixth Amendment “secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community.” *Berghuis v. Smith*, 559 U.S. 314, 319 (2010). The fair cross-section requirement enhances the Sixth Amendment’s guarantee of an “impartial” jury because, as the Supreme Court has recognized, impartiality is more likely if the jury venire is broadly representative of all segments of a community. *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975). “When juries are not selected from a fair cross-section of the community and thus fail to fairly and reasonably represent distinctive groups in the community like African-Americans and Hispanics, the defendant’s Sixth Amendment right to an impartial jury is violated.” Nina W. Chernoff, *Wrong About The Right: How Courts Undermine The Fair Cross-Section Guarantee By Confusing It With Equal Protection*, 64 *Hastings L.J.* 141, 144 (2012).

The Jury Selection and Service Act (“JSSA”), codified in 28 U.S.C. § 1861, was enacted to “assure all litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified citizens will have the opportunity to be considered

for jury service.” *United States v. Miller*, 116 F.3d 641, 656 (2d Cir. 1997) (quoting H.R. Rep. No. 90-1076 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792.) The JSSA echoes the requirement that “grand and petit juries [be] 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.

In order to establish a *prima facie* violation of the Sixth Amendment’s fair cross-section requirement, a criminal defendant must show “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systemic exclusion of the group in the jury-selection process.” *Duren v. Missouri*, 439 U.S. 357, 364 (1979). “[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.” *Taylor*, 419 U.S. at 538. A showing of disparity over time can alone “manifestly indicate” that the disparity is “inherent” in the system and not the product of chance or fluke. *Duren*, 429 U.S. at 366. Critically, the right to inspect does not depend on a *prima facie* showing because “without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.” *Test v. United States*, 420 U.S. 28, 30 (1975). Here, Defendant has a right to inspect all jury selection records and materials—without any threshold showing—to determine whether Defendant has a meritorious jury challenge.

Additionally, given the unprecedented circumstances of this pandemic, Defendant requests any records of procedural changes or instructions due to COVID-19. Defendant is entitled to such review under common law. *See In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 780-81 (9th Cir. 1982); *United States v. Jack*, No. CR-07-266-FCD, 2009 WL 435124 (E.D. Cal.

Feb. 20, 2009)). Defendant is also entitled to such records under Federal Rule of Criminal Procedure 6(e).

I. Defendant is Entitled to Inspect All Records Used in Connection with The Jury Selection Process.

The “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.’” *Test* 420 U.S. at 30; 28 U.S.C. § 1861. To assess whether Defendant received an appropriately representative grand or petit jury, Defendant seeks to invoke his “unqualified right to inspect jury lists.” *Id.* at 30; citing 28 U.S.C. § 1867(f). Both the Sixth Amendment and 28 U.S.C. Section 1867(f) grant him the right to inspect, reproduce, and copy such records or papers that have been “used by the jury commissioner or clerk in connection with the jury selection process” as may be necessary to present a challenge to the composition of the jury pool. 28 U.S.C. § 1867(f); *See also United States v. Armstrong*, 621 F.2d 951, 955 (9th Cir. 1980).

A. The JSSA gives Defendant an “unqualified right” to jury selection records.

In the JSSA, Congress codified its commitment to ensuring “the right to grand and petit juries selected at random from a fair cross section of the community.” 28 U.S.C. § 1861. To enforce that right, the JSSA provides for expansive access to materials: “[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 a motion [challenging jury selection procedures under the JSSA].” 28 U.S.C. § 1867(f). When a party so moves, the JSSA empowers the parties to “inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion.” *Id.*

Congress’s decision to grant unqualified access, and to grant it at the preparation stage is the appropriate remedy. The discrepancies, inconsistencies, and flaws often found in the jury selection process can be invisible to the parties – even to the Court and jury administrators. Whether intentional or unintentional, any effect on the grand jury composition poses grave constitutional concerns. *See e.g. United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (“While the equal protection clause of the [F]ourteenth [A]mendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination, [t]he Sixth Amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of ... motive.”). Thus, under 28 U.S.C. § 1867(f), parties “*shall* be allowed to inspect” records of the jury selection process in order to prepare motions challenging jury selection. (emphasis added).

B. The global COVID-19 pandemic’s effect on racial and ethnic minorities warrants access to jury selection materials and records.

A Defendant may seek access to jury selection materials under the JSSA. *See Hirst v. Gertzen*, 676 F.2d 1252, 1259 (9th Cir. 1982) (noting that “returned questionnaires, which list not only the race of the prospective juror, but also any excuses from jury service requested by a prospective juror, and any excuses granted” were “available for appellants’ inspection upon appropriate motion” under Section 1867(f)). In this matter, Defendant intends to use the records produced in order to “determine whether [there is] a potentially meritorious jury challenge” under the JSSA. *Test*, 420 U.S. at 30.

As the COVID-19 global pandemic surges throughout the nation, many jurors fear potential exposure to the virus and ignore the court’s summonses, limiting the jury pool. A June survey conducted by the National Center for State Courts (“NCSC”) found that only “64% of Latino respondents and 58% of Black respondents said they’d report for jury duty, compared to 69% of whites.” Cara Bayles, *Can You Get A Fair Jury Trial During The Pandemic?*, Law 360

(August 30, 2020) available at: <https://www.law360.com/articles/1305161> (last visited Nov. 24, 2020). The poll found that Black and Latina women of all ages were least likely to report for jury duty. *Id.* Instead, their male counterparts – younger white men, conservative white men, and white men without a college degree – were most likely to show up for jury duty. *Id.* This is hardly surprising as COVID-19 disproportionately affects racial and ethnic minorities. Don Bambino Geno Tai, et al., *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, *Infectious Diseases Society of America* (Jun. 20, 2020). A recent Centers for Disease Control and Prevention (CDC) study reported that “21.8% of COVID-19 cases in the United States were African Americans and 33.8% were LatinX, despite the fact that these groups comprise only 13% and 18% of the US population, respectively.” *Id.* at 1. The CDC study shows that diabetes mellitus, hypertension, and obesity are pre-existing conditions that increase an individual’s risk of contracting COVID-19. *Id.* African Americans suffer from a disproportionately higher rate of diabetes, hypertension, and obesity, which contributes to the disproportionate deaths among African Americans with COVID-19. *Id.* “The disproportionate burden of chronic medical conditions is compounded by lower access to healthcare among some racial and ethnic minority groups” and lower-income areas where medical care is of poor quality. *Id.* at 1-2.

Most strikingly, however, is the finding that the “unequal burden borne by minority children [is] even greater” than adults when contracting COVID-19. Brita Belli, *Black, Hispanic children bear disproportionate burden of COVID-19*, *Yale News* (Dec. 2, 2020) available at: <https://news.yale.edu/2020/12/02/black-hispanic-children-bear-disproportionate-burden-covid-19> (last visited Dec. 5, 2020). Scientists from Yale and various pediatric centers found that three out of four children who were hospitalized because of COVID-19 were either Black or Hispanic (23.3% Black and 51% Hispanic). *Id.* “[N]early all of the sites reported that the majority of patients

diagnosed with the coronaviruses that cause COVID-19 were Hispanic and/or Black.” *Id.* This research study also found a different form of the virus among younger patients. *Id.* While the majority of young Hispanic patients with COVID-19 who presented severe respiratory issues also had underlying health issues, “nearly all of the youths presenting with multisystem inflammatory syndrome (MIS-C) – which appears two to four weeks after COVID-19 infection – were 7 to 9 years old and *had no preexisting conditions.*” *Id.* (emphasis added). “Black children and youth were more likely to present with MIS-C than respiratory COVID-19.” *Id.* Dr. Carlos Oliveira, assistant professor of pediatrics (infectious disease) and director of Congenital Infectious Diseases at Yale New Haven Children’s Hospital, stated this “was almost like two different diseases.” *Id.*

Moreover, COVID-19 is highly correlated with low socioeconomic backgrounds and has disproportionately affected the above-mentioned racial and ethnic communities. A recent Pew Research Center article found that “61% of Hispanic Americans and 44% of Black Americans said in April [2020] that they or someone in their household had experienced a job or wage loss due to the coronavirus outbreak, compared with 38% of white adults.” Mark Hugo Lopez, Lee Rainie, and Abby Budiman, *Financial and health impacts of COVID-19 vary widely by race and ethnicity*, Pew Research Center (May 5, 2020) available at: <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/> (last visited Nov. 24, 2020). Furthermore, “nearly three-quarters of black (73%) and Hispanic (70%) adults said that they did not have emergency funds to cover three months of expenses; [while only] half of white adults (47%) said the same.” *Id.*

In addition to race, age is another factor when evaluating whether a fair cross-section of the community can be obtained. The NCSC found that senior citizens are also less likely to respond to jury summons. Cara Bayles, *Can You Get A Fair Jury Trial During The Pandemic?*, Law 360

(August 30, 2020) available at: <https://www.law360.com/articles/1305161> (last visited Nov. 24, 2020). The NCSC concluded that 74% of individuals under the age of 50 indicated they would report for jury duty while only 53% of individuals over the age of 65 said they would report. *Id.*

The magnitude and breadth of social and economic change in the wake of the resurgent virus is vast. Predictions about the exact ways the virus will skew summons response rates are therefore dangerous. However, the group of people who answer summonses will not resemble that produced by this Court's pre-COVID-19 jury selection plan, which was carefully calibrated to produce a fair cross-section of the community.² As noted above, the anticipated jury duty summons rates are likely to be significantly lower among Latino and Black communities and the elderly, thereby limiting the diversity within a jury venire. Furthermore, jurors from lower socioeconomic backgrounds are inevitably placed into positions of undue hardship and risk major financial burdens if required to sit on a jury for a few days or even weeks. When a finding is made and a juror is excused for undue hardship or extreme inconvenience, the jury venire once again dwindles down into a narrow group of individuals slated to determine Defendant's fate.

For the reasons above, Defendant reasonably fears that his jury will not be representative during this unprecedented time. In order to determine whether these fears are borne out or whether the disproportionate turnout rates affect jury venires in [INSERT DISTRICT], only jury selection records and materials will provide the Court and Defendant adequate assurance of a fair cross-section of the community. Access to jury selection materials and records will provide Defendant

² [Although beyond the scope of this motion, counsel should consider a challenge to the district's jury selection plan if the venire is drawn from a single source. Exclusive use of one source, such as voter registration lists, presents grave concerns that the venire will not represent a fair cross section. See American Bar Ass'n, *Principles for Juries and Jury Trials*, Principle 10(A)(1) ("The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction.").]

the opportunity to analyze the demographic and systemic factors in the jury system, and to complete a full demographic analysis of the jury system and potential venires, ensuring Defendant's venire is comprised of a fair cross-section of the community.

II. Defendant Requests All Jury Selection Records and Materials.

Defendant seeks to review the applicable jury selection plans and orders. The Jury Selection Plan for the [INSERT DISTRICT] is the current framework for the policies and procedures when selecting jurors. However, in order to adequately assure Defendant's jury pool results do not exclude a distinctive group from the jury pool, Defendant requests the following court policies:

1. The Jury Selection Plan for the [INSERT DISTRICT] in effect and at the time jurors were summoned in this case, or confirmation that the plan has at all such times been codified in its entirety.
2. Any temporary Jury Selection Plan or Order utilized to accommodate the ongoing COVID-19 pandemic.

Defendant also requests the Master and Qualified Jury Wheels. Such materials will allow Defendant to uncover the disproportionate numbers among distinctive groups in the community and in the jury pool. The requested material provides Defendant an opportunity to evaluate the data, finding any inaccuracies or discrepancies. This information should include, but is not limited to, the date the juror was summoned, juror name, juror number, race, gender, ethnicity, date of birth, address, county, and jury division. Within this request, Defendant seeks the following productions in accessible electronic form:

3. Any Divisional or District forms created relating to the Master Jury Wheel and the Qualified Jury Wheel that were used to summon grand or trial jurors in the case.
4. Any other statistical or demographic analyses produced to ensure the quality of the Master Jury Wheel and Qualified Jury Wheel used to summon grand jurors or jury venires in this case, and to ensure those Wheels complied with applicable law and the Constitution.

5. The date when the Master Jury Wheel used to summon grand jurors or jury venires in this case was refilled.
6. The “general notice for public review...explaining the process by which names are periodically and randomly drawn.” 28 U.S.C. § 1864(a).
7. The date when grand jurors or jury venires were summoned and/or empaneled in this case.
8. The number of persons summoned from the Qualified Jury Wheel to be considered as jury members in this case.
9. The District and Divisional Master Wheel and the District and Divisional Qualified Jury Wheel.
10. Status Codes for potential jurors who were selected from the Master Jury Wheel for qualification but either had their qualification form returned by the postal service, did not respond, or were disqualified or exempted from jury service. For each juror, the data should include whether the form returned was Undeliverable, whether the form was Not Returned, and Reason for Disqualification.
11. All persons and their juror status for persons whose juror summons and qualification form were not returned or returned as undeliverable.
12. All persons summoned to appear in the Clerk’s Office for the [INSERT DISTRICT].
13. All persons selected as potential grand jurors and petit jurors in this case.
14. The juror qualification and/or summons forms for persons summoned to potentially become grand or trial jurors in this case.
15. Any temporary or alternative juror qualification and/or summons forms utilized to accommodate the ongoing COVID-19 pandemic.
16. The disposition of each summoned grand or trial juror in this case as to excusal, deferment, disqualification, or selection.

Lastly, Defendant requests the following data to determine whether COVID-19 has caused deviations in this district’s Jury Selection Plan. The request below should include, but is not limited

to, juror name, juror number, race, gender, ethnicity, date of birth, address, county, and jury division.³ Within this request, Defendant seeks the following in accessible electronic form:

17. The attendance record and reason for absence by date for each grand juror or jury pool member.
18. All persons who were selected to sit on the grand jury or petit jury but were subsequently replaced, and all persons selected to replace them. The data should include who replaced whom, and whether the replacement juror was selected as an alternate under Federal Rule of Criminal Procedure 6(a)(2).
19. Any communications made outside the jury room related to the COVID-19 pandemic.

In summation, due to the disproportionate percentages of racial and ethnic minorities and the pervasive fear of contracting COVID-19, Defendant potentially faces a disproportionate impact on his jury venire, compromising his Sixth Amendment right to a fair cross-section. Defendant is therefore entitled to all jury selection records and materials to ensure Defendant has a fair cross-section of the community in Defendant's upcoming trial.

III. Defendant is Entitled to Access Records Concerning the Impact of COVID-19 on Grand Jury Procedure.

As noted previously, the JSSA itself entitles Defendant to the information requested above. But he is also entitled to that information under the common law right of access to the courts. Indeed, Defendant has a common law right to the access grand jury materials provided those materials do not (1) implicate matters occurring "before the grand jury" within the meaning of Rule 6(e), or (2) impinge on the five policies behind grand jury secrecy. *See In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 780-81 (9th Cir. 1982). Here, the materials requested

³ Defendant seeks this data to determine whether grand jury practices in Defendant's case are consistent with the Jury Selection Plan and Federal Rule of Criminal Procedure 6(a). The JSSA permits Defendant to move to dismiss the indictment or stay the proceedings against him if he can demonstrate substantial failure to comply with the Juror Selection Plan. *See* 18 U.S.C. § 1867(a); Fed. R. Crim. P. 6(a).

do not concern what happened before the grand jury. Indeed, the requested disclosure will have no effect on grand jury secrecy. Nor will the records impinge on any of the traditional rationales for ensuring grand jury secrecy.

In addition to records of the jury selection process requested above, Defendant requests access to records concerning how the pandemic has affected grand jury procedure. To be clear, this request does not seek access to any substantive aspect of the grand jury proceedings. Defendant does not seek the identity of any witness or juror, the contents of any testimony, or any other substantive information regarding the proceedings themselves. And Defendant does not object to this Court's *in camera* review of the requested materials to identify and redact substantive information. *See United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991). Defendant seeks only information concerning any procedural changes because of the COVID-19 pandemic.

This request includes, but is not limited to:

- (a) the charges, instructions, and directions grand jurors have received regarding their ability to request witnesses or evidence;
- (b) the charges, instructions, and directions grand jurors have received regarding whether there are any limitations on which witnesses or evidence the grand jury may request, e.g., whether they are permitted to call non-government witnesses;
- (c) the charges, instructions, or directions grand jurors received for the process by which they may call non-government witnesses during the pandemic;
- (d) the transcript of the instructions in Defendant's case;
- (e) whether witnesses testified in person, over video or teleconference, or both;
- (f) whether video teleconferencing or teleconferencing is utilized in any other way for grand jury proceedings;

(g) what precautions are taken to protect live witnesses before the grand jury from spreading or contracting the virus.

Defendant is entitled to access this information under both the common law right of access and Rule 6(e).

A. Defendant Has a Common Law Right of Access to Grand Jury Materials Reflecting Procedural Changes Caused by COVID-19.

Under common law and the First Amendment, members of the public enjoy a “general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978); *see also United States v. Bus. Of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011); *United States v. Jack*, No. CR-07-266-FCD, 2009 WL 435124 (E.D.C.A. Cal. Feb 20, 2009) (discussing this right and relevant case law in detail).

To be sure, the right to access court records is “not absolute.” *Nixon*. 435 U.S. at 598. Indeed, Rule 6(e) prohibits disclosure of “a matter occurring before the grand jury.” Fed. R. Crim. P. 6(e)(2)(B). And matters that do not occur before the grand jury but still implicate one of the policies underlying the grand jury secrecy doctrine are also guarded from disclosure. *See In re Special Grand Jury*, 674 F.2d at 781-82. Outside of those limitations, however, all members of the public, including criminal defendants, have “a right, subject to the rule of grand jury secrecy, of access to the ministerial records in the files of the district court having jurisdiction of the grand jury.” *In re Special Grand Jury (for Anchorage, Alaska)*, 647 F.2d at 780. “Absent specific and substantial reasons for a refusal, such access should not be denied.” *Id.* at 781.

Here, none of Defendant’s requests implicate any “matter occurring before the grand jury.” Fed. R. Crim. P. 6(e). “The touchstone for determining whether the disclosure of a particular item would reveal ‘a matter occurring before the grand jury’ is whether the disclosure of the item would

reveal something of substance about the grand jury’s investigation.” Sarah Sun Beale et al., *Grand Jury Law and Practice* § 5:6 (2d ed.). As explained above, Defendant does not seek access to any substantive matter—he seeks information only about procedure. As such, the limitation imposed by Rule 6(e) does not apply.

Nor does Defendant’s request run afoul of the grand jury secrecy doctrine as it does not impinge on the interests underlying the doctrine. See *In re Special Grand Jury*, 674 F.2d at 781-82 (enumerating policy reasons behind grand jury secrecy doctrine). Where, as here, “the grand jury investigation is already terminated and an indictment has been issued, only ‘institutional’ concerns are implicated by ... disclosure.” *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9th Cir. 1993). Specifically, because “the grand jury investigation has been terminated,” “the importance of the first three factors” underlying the grand jury secrecy doctrine—preventing escape, ensuring freedom of deliberations, and preventing witness tampering—“is insignificant.” *In re Grand Jury Proceedings*, 62 F.3d 1175, 1180 n.2 (9th Cir. 1995). The fifth factor is also not implicated as the grand jury did not exonerate Defendant and he will go to trial. *Id.* The only meaningful factor implicated is the institutional concern in “encourage[ing] free and untrammelled disclosures by persons who have information with respect to the commission of crimes.” *Id.*

Defendant’s request will have no effect of witnesses’ willingness to come forward. Defendant does not seek the identities of witnesses or the contents of their testimony. Further, there is no realistic possibility that witnesses will hesitate to come forward because Defendant learns about COVID-related procedural changes.

Finally, the records requested are “ministerial.” *In re Special Grand Jury*, 674 F.2d at 781. Ministerial records “generally relate to the procedural aspects of the empaneling and operation of the ... Grand Jury, as opposed to records which relate to the substance of the ... Grand Jury’s

investigation.” *Id.* at 779 n.1. As noted above, Defendant’s request does not seek access to any substantive matters. *See, e.g., Jack*, 2009 WL 435124 at *3-4 (granting request for ministerial records and collecting cases for the proposition that “defendants are entitled to the transcript of the instructions and charges to the grand jury.”).

Thus, Defendant’s request is not barred by Rule 6(e) or the grand jury secrecy doctrine, and he has a common law right to the requested information.

CONCLUSION

Defendant requests that this Court grant Defendant’s request to access jury selection records and enter an order directing the Clerk of Court to disclose the materials requested.

Respectfully submitted,

/s/ _____