IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

REPLY BY JOSEPH P. NACCHIO TO RESPONSE ON MOTION FOR DISCLOSURE OF JURY QUESTIONNAIRES

Introduction

On April 26, 2007, Mr. Nacchio filed a Motion seeking disclosure of jury questionnaires. [Doc. No. 411] We now reply to the government's May 4, 2007 response. [Doc. No. 415] The government misconstrues our motion as one attacking the methodology for the initial selection of the 1,000 person venire pool. We do not. We do, however, question whether, following the return of questionnaires by the pool, the Court's method of reducing the pool from 1,000 to 78 violated the Jury Selection and Service Act of 1968 (the "Jury Selection Act") and Mr. Nacchio's Fifth and Sixth Amendment constitutional protections.

Because both the Supreme Court and the Tenth Circuit characterize a defendant's right to inspect jury lists as essentially unqualified when mulling a challenge to selection of the entire

pool, by analogy, when the issue is confined to the Court's use of questionnaires to select the pool of 78 jurors our pre-trial right to inspect the questionnaires is equally unqualified. Because we did, in fact, move prior to *voir dire* for the opportunity to inspect the questionnaires, our Jury Selection Act challenge remains timely. In any event, the government does not dispute the timeliness our Fifth and Sixth Amendment challenges and they, in and of themselves, justify the relief sought.

Finally, the government seeks to have only redacted questionnaires produced. This, however, would deprive us of the very information from which we could determine whether Mr. Nacchio's rights were violated by the manner in which the Court culled the pool from 1,000 to a jury pool of 78. We cannot imagine privacy concerns, since the prospective jurors surely realized that they were providing the information for use in the jury selection process. If there are any privacy concerns these can be addressed by restrictions accompanying the disclosure of the questionnaires.

Mr. Nacchio's Jury Selection Act Challenge Is Both Timely And Apposite

The government suggests that Mr. Nacchio's Jury Selection Act challenge should be disallowed because it was not filed prior to the commencement of *voir dire* and because Mr. Nacchio's rights extended only to inspection of the jury rolls and not the returns from the 1,000 questionnaires. Response at 2 and n.1. Both suggestions are incorrect.

In *Test v. United States*, 420 U.S. 28, 30 and n.4 (1975), a case emanating out of this very District, "[t]he Supreme Court characterizes a litigant's right to inspect jury lists as essentially unqualified." *United States v. Lawson*, 670 F.2d 923, 926 (10th Cir. 1982). The *Lawson* Court quoted *Test* as stating that "'(W)ithout inspection, a party almost invariably would be unable to

determine whether he has a potentially meritorious jury challenge.'" 670 F.2d at 926. The government asserts, however, that Mr. Nacchio's inspection right is limited to the jury lists and does not extend to the returned questionnaires. Response at 2, relying on *United States v. Davenport*, 824 F.2d 1511 (7th Cir. 1987). But, in *United States v. Dawes*, 1990 WL 171074 (D. Kan. 1990), *aff'd*, 951 F.2d 1189 (10th Cir. 1991), the District Court rejected the identical reliance by the government on *Davenport*, explaining:

> The *Davenport* decision has not been applied in the Tenth Circuit. Our circuit court has been reluctant to place conditions on requests for such records. "A district court should, as a matter of course, avoid confusion by issuing an order granting a proper § 1867(f) request." *United States v. Harrold*, 796 F.2d 1275, 1285 n. 11 (10th Cir.1986) (citing *See Government of the Canal Zone v. Davis*, 592 F.2d 887, 889 (5th Cir.1979), *cert. denied*, 479 U.S. 1037 (1987)). The Tenth Circuit has construed § 1867(f) as giving a defendant the unqualified right to inspect, reproduce, and copy records or papers used by the jury commission or clerk in connection with the jury selection process. *United States v. Lawson*, 670 F.2d 923, 926 (10th Cir.1982). Neither the statute nor the Tenth Circuit decisions expressly limit a defendant's inspection to the jury lists. The Supreme Court's sole reference to jury lists in the *Test* decision can be explained as the result of the defendant there moving for disclosure of only the jury lists. 420 U.S. at 29. This court finds some appeal and merit to an approach as in *Davenport* that makes a partial disclosure under § 1867(f), the jury lists, and then requires an additional showing of necessity before other jury selection records are produced. Until the Tenth Circuit gives some indication it would permit a *Davenport* approach, this court will abide by the broad language in *Harrold* and *Lawson* and give defendants access to those records and papers used by the clerk of the court in the jury selection process.

Dawes, 1990 WL 171074, *10.[1]

[1] Beyond the 10th Circuit's failure to adopt *Davenport*, the holding there was premised on the movant's failure to demonstrate a particularized need for information beyond the jury rolls. 824 F.2d at 1515. Here, the issue relates specifically to the Court's methodology for culling the *venire* from 1,000 to 78 following return of the questionnaires. Thus, the particularized need for the questionnaires exists even under the rubric of *Davenport*.

Thus, because our potential challenge is not based on the methodology for selection of the 1,000 person *venire* pool but on the possibility of error in the manner by which the Court used responses to the questionnaires to cull the pool from 1,000 to 78, we are entitled to review the entirety of responses to the questionnaires.

As to the government's assertion that our motion is untimely, it cannot be denied that we moved prior to *voir dire* for disclosure of the questionnaires. In our March 18, 2007 "Defendant's Motion Regarding Jury *Voir Dire*," we specifically requested that "all responses to the mailed questionnaire -- both of the selected 78 and the original 1,000 -- be provided to counsel and, if not, that they be sealed for any appellant review that may be necessary." [Doc. No. 299 at 11] Without ever addressing this issue, however, the Court's March 22, 2007 Minute Order dismissed the motion as moot in light of rulings made from the bench during jury selection. This is analogous to the situation in *Lawson*, where the 10th Circuit held it to be error for the District Court to deny pre-trial inspection of "jury selection materials" and remanded to allow defense counsel to have that inspection with the right to "then file an appropriate motion pursuant to 28 U.S.C. § 1876(a) and (d)." 670 F.2d at 926, *citing Test*.

Mr. Nacchio's Constitutional Challenges Are Also Timely

Our motion seeking disclosure of the jury questionnaires is not limited to potential challenges under the Jury Selection Act. We also noted the potential for violations of: Mr. Nacchio's Sixth Amendment right to a jury pool comprised of a fair cross-section of the community; his Fifth Amendment Equal Protection rights; his Sixth Amendment right to an impartial jury; and, whether the Court's winnowing of the pool undermined the statutorily mandated policies embodied in the District of Colorado's written jury selection plan. [Doc. No.

411 at 9] The government does not suggest that Mr. Nacchio is time barred from advancing 5th and 6th Amendment challenges in his post-trial motions.

Redaction Of The Questionnaires Would Defeat Mr. Nacchio's Rights

The government's final position is that, "[i]f the Court does decide to grant Defendant's request for the questionnaire responses, … personal identifying information [should] be redacted from those responses before they are released." Response at 3, *citing Davenport*. First, as has been shown, *Davenport* has been rejected by other District Courts in this Circuit as not in harmony with Tenth Circuit law. *See Dawes*, *supra*. More importantly, such redaction would deprive Mr. Nacchio of the very information he requires to determine whether his statutory and constitutional rights were violated. Without this information, it would be impossible to assess the Court's culling of the *venire* pool from 1,000 to 78 against statutory and constitutional requirements. *See Lawson*, 670 F.2d at 926 ("'(W)ithout inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.'" (quoting *Test*)). Any privacy concerns the government may now have can be adequately addressed by restrictions accompanying the disclosure of the questionnaires.[2] For example, the disclosure can be made with the *proviso* that counsel not disseminate the information without prior leave of Court, and that any subsequent motion should be sealed.

[2] The government apparently had no such privacy concerns when it requested the unredacted questionnaires on March 1, 2007. *See* Transcript of Chambers Proceedings, 27:6-8 (March 1, 2007).

Conclusion

For the foregoing reasons, we once more renew our request that all responses to the mailed questionnaire -- both of the selected 78 and the original 1,000 -- be immediately provided to counsel so that they can be analyzed as part of our motion seeking a new trial.

Respectfully submitted this 7th day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2007, a true and correct copy of the foregoing **REPLY BY JOSEPH P. NACCHIO TO RESPONSE ON MOTION FOR DISCLOSURE OF JURY QUESTIONNAIRES** was served on the following via the USDC CM/ECF system:

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