IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

UNITED STATES' RESPONSE TO MOTION BY JOSEPH P. NACCHIO FOR DISCLOSURE OF JURY QUESTIONNAIRES

The United States respectfully responds to the "Motion by Joseph P. Nacchio for Disclosure of Jury Questionnaires" (Docket No. 411).

Defendant explains that the basis for his motion is that he may "seek a new trial, among other reasons, on the grounds that error may have been committed in the manner in which the expanded jury venire pool of 1,000 was winnowed down to 78 persons, for the Court has never explained how this occurred." Docket No. 411 at 1. Defendant thus requests "the responses to the 1,000 questionnaires which were sent by the Court to the venire pool." *Id.* The United States does not oppose release of the questionnaire responses, subject to the limitations noted below.

The United States notes that this request for questionnaire responses is *not* governed by the Jury Selection and Service Act of 1968, which is referenced in Defendant's motion. *See* 28 U.S.C. § 1861 et *seq.* That Act does provide a procedure for seeking "[t]he content of records or papers used by the jury commission or clerk in connection with the jury selection process." 28

U.S.C. § 1867(f); *see Test v. United States*, 420 U.S. 28, 30 & n.4 (1975) (observing that under § 1867, a litigant has a "right to inspect jury lists," and noting that such inspection is limited to "reasonable times"). The Act thus provides a right of access to materials used by the court's "commission or clerk," not a right of access to completed juror questionnaires used by the trial judge. *See United States v. Davenport*, 824 F.2d 1514-15 (7th Cir. 1987) (explaining that "*Test* does not hold that completed juror questionnaires must be made available to defendants in addition to jury lists"); *id.* at 1515 (denying the defendant's motion for access to jury questionnaires, and observing that "[t]o give the defendant an absolute right of routine access to all materials would be an amendment of the Act"); *United States v. Diaz*, 236 F.R.D. 470, 482-83 (N.D. Cal. 2006) (observing that "[w]hile the Supreme Court required disclosure of jury lists in *Test*, it did not require the disclosure of jury questionnaires," and denying a motion seeking jury questionnaire responses).[1]

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[1] Defendant is incorrect in suggesting that he can raise a claim under this Act in his forthcoming post-trial motion. Defendant states:

> Mr. Nacchio's statutory obligation to provide a "sworn statement which, if true, would constitute a substantial failure to comply with" the Act is only implicated "within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefore [sic] ...." 28 U.S.C. § 1867(a). That time will not begin to run until *after* the juror questionnaires have been disclosed to us.

Docket No. 411 at 9 n.3 (emphasis in original). Contrary to Defendant's representation, the deadline to file a motion pursuant to the Act is long past. The provision applicable to criminal trials — section 1867(a) — provides that "[i]n criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to

Accordingly, the United States believes that Defendant has no statutory right to the questionnaire responses, and that provision of the response is a matter within the Court's discretion. Obviously, the Court is familiar with the questionnaire responses, and thus is in the best position to determine whether there are concerns that support not releasing the responses.

If the Court does decide to grant Defendant's request for the questionnaire responses, the United States requests that personal identifying information be redacted from those responses before they are released. As the court in *Davenport* observed, "[i]f these completed judicial jury forms were released to defendants generally there would exist the possibility of substantial abuse of the information these forms contain, which could have serious consequences for individual jurors and the system." 824 F.2d at 1515.[2]

To protect the privacy of the numerous citizens who filled out the questionnaires, the United States proposes that the Court should (1) redact the personal identifying information that would identify either the prospective juror (such as names, signatures, and addresses) or any other individuals whom the prospective juror may have identified in the questionnaire responses,

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comply with the provisions of this title in selecting the grand or petit jury." 28 U.S.C. § 1867(a). In short, the defendant must file a motion to stay or to dismiss the indictment, at the latest, "before the voir dire examination begins." *Id.* Here, Defendant did not file any such motion before voir dire began. On the contrary, Defendant's "Motion Regarding Jury Voir Dire" stated that Defendant was "not suggesting any impropriety in the manner in which the venire pool has been culled down ...." *See* Docket No. 299 at 11.

[2] This privacy interest is also implicitly recognized in 28 U.S.C. 1867(f), which provides, with respect to jury lists, that "[a]ny person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1000 or imprisoned not more than one year, or both."

(2) number the questionnaire responses, to facilitate ease of reference if the parties later must refer to the responses in any pleadings, and (3) indicate which of the responses were among the persons selected to appear for voir dire. This approach will protect the privacy of the prospective jurors, while also allowing Defendant to assess whether "error may have been committed in the manner in which the expanded jury venire pool of 1,000 was winnowed down to 78 persons." Docket No. 411 at 1.

CONCLUSION

For the reasons stated, the United States believes that Defendant has no statutory right to the questionnaire responses, and that whether to provide the responses is a matter within the Court's discretion. If the Court decides to grant Defendant's request for the completed questionnaires, the United States respectfully requests that the Court (1) redact information that would clearly identify either the prospective juror (such as names, signatures, and addresses) or other individuals whom the prospective juror may have identified in the questionnaire responses, (2) number the questionnaire responses, and (3) indicate which of the responses were among the persons selected to appear for voir dire.

Respectfully submitted this 4th day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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