IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Criminal Case No. 05–cr–00545–EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

ORDER CONCERNING JUROR QUALIFICATION QUESTIONNAIRES AND SUPPLEMENTAL JUROR QUESTIONNAIRES

This matter comes before the court on the "Motion by Joseph P. Nacchio for Disclosure of Jury Questionnaires" (Doc. No. 411). The motion seeks disclosure of the 1,000 questionnaires which were sent with the summons for jury duty in this case on February 2, 2007. Defendant urges, inaccurately, that the court "has never explained" how this group of 1,000 persons was "winnowed down" to the number of persons who were actually directed to report for jury duty on the first day of trial and that the court's criteria for narrowing the jury pool were thus "unknown." Defendant also seems to suggest that the court's exclusion of "any member of the venire pool that had a prior employment, business, or financial relationship to Qwest or US West" was undertaken "over Mr. Nacchio's objection." If this is what he means, the argument attempts to rewrite history. Before ruling on Defendant's request for disclosure, then, the court will lay out (1) the

problems which this case presented with respect to jury selection and (2) the procedures chosen to address the problems.

Factual and Procedural Background

The case posed two unusual challenges for the jury selection process. The first was the unusual length of the trial, originally estimated to last from March 19 through May 17, 2007. This meant that it would be virtually impossible to select jurors from the court's regular jury panel for the month of March, since those jurors were told when summoned that they could expect to be on call and eligible for jury service during the month of March only. It also meant, based on experience, that the court could anticipate an unusually high number of jurors excusable for "undue hardship or extreme inconvenience" or for "economic hardship to an employer." *See* 18 U.S.C.A. § 1869(j) (West 2007).

Plentiful pre-trial publicity posed a second unusual challenge for jury selection. The publicity, mostly from Denver's two daily newspapers and mostly unfavorable to Defendant, was documented extensively in material supporting Defendant's motion to change venue (Doc. Nos. 113–122). Some of the publicity concerned Qwest's hostile takeover of U.S. West in 2000. It reported lingering resentment of U.S. West employees directed at Qwest and Defendant, continuing friction between the two companies, layoffs of employees after the takeover, and unfavorable remarks about U.S. West employees attributed to Defendant. Of greater concern to the court was publicity reporting Qwest's precipitous plunge toward bankruptcy and the concomitant decline in the value of its stock. This publicity included accounts of stockholders who were seriously affected by this decline and stories about employees and retirees who lost

savings when portfolios consisting of Qwest stock declined in value. Underlying much of this publicity was the suggestion that improper actions by Defendant and other Qwest managers contributed to Qwest's financial misfortunes.

During several hearings spanning the months of December 2006 through February 2007, the court, in consultation with the parties, developed and refined jury selection procedures designed to address the problems discussed above. Because of the problems inherent in selecting jurors from the court's regular March panel, the court decided to summon a special panel of 1,000 persons from which to select the jury for this case. Because much of the pre-trial publicity emanated from Denver, Defendant suggested that the court expand the selection pool beyond the Denver Jury Division. The court accepted this suggestion and expanded the jury pool to include the Pueblo Jury Division.

Initially, the court proposed to send two supplemental juror questionnaires in this case. The first would be sent to all summoned jurors and would accompany the standard Juror Qualification Questionnaire used in all cases by the court (attached). The supplemental questionnaire would be brief and consist of two types of questions. The first type would inform the jurors of the length of the trial and ask whether a trial of this length would impose an undue hardship or extreme inconvenience. The second type would relate to Qwest or U.S. West and inquire about the prospective juror's relationship with those companies — whether the juror or any family members or close personal friends had ever owned stock or been employed by either company, for example. The court made clear from the outset that it would use this initial questionnaire to determine whether jurors should be excused from further appearance without

even coming to the courthouse. A juror who responded by revealing a queried relationship with Qwest /U.S. West or who said that jury service would pose an undue hardship or extreme inconvenience would be excused from service without further inquiry. The purpose of the first questionnaire, as the court explained, was to eliminate the time which would be consumed during voir dire in questioning jurors who had a present or past relationship to Qwest or who would claim undue hardship when informed in open court of the length of the trial. The court believed it highly probable that many such jurors would be excused for cause or would be subject to peremptory challenge by Defendant. The court also believed that the jurors with some present or past association with Qwest or U.S. West would be more likely than most jurors (1) to have heard about or experienced events which undermined their ability to afford Defendant the presumption of innocence or (2) to harbor subconscious prejudice against Defendant which might escape revelation during voir dire. In short, the use of this first questionnaire was intended to save time, select a jury more expeditiously, and provide an equitable counterbalance to pretrial publicity by not even calling to the courtroom jurors who would likely be unfavorable to Defendant.

The second questionnaire initially proposed by the court would be completed by jurors who were not excused because of their answers to the first questionnaire. Because the court and parties were focused on the first questionnaire and because the idea of a second questionnaire was later abandoned by the court, the contents of the second questionnaire were never developed in detail, although the parties and the court shared the view that it would be more extensive than the first questionnaire. It was Defendant's suggestion that this second questionnaire be completed by those jurors who survived the first questionnaire, *after* the survivors came to the courthouse. As

discussed below, this suggestion factored into the court's later decision to abandon the second questionnaire.

It is clear to the court that Defendant shared the court's concerns and assumptions about jurors who had some association with Qwest or U.S. West. It is even more clear that Defendant at all times endorsed the approach of excluding those jurors entirely before they appeared at the courthouse. In responding to the Government's position on the court's proposed first questionnaire, asserted during the first hearing where jury selection was discussed (December 8, 2006), counsel stated:

> I agree with [the Government] on the first point [that Qwest stockholders should be excused]. I think Qwest shareholders should not sit on the jury, and I think Your Honor's thought is very sensible, including a couple of other companies so you don't highlight it.
>
> I disagree [with the Government] on the latter [point, that Qwest employees, plus their close friends or relatives, should not be excused]. I think the Court's suggestion is a good one. I think if we do not automatically exclude anybody who has a relative or close personal friend who was an employee, we're going to be trapped into a rather extensive questioning of individuals about their relationships, who they are, what they did.
>
> The fact of the matter is, it's well-known in this community a lot of people were laid off, a lot of people were fired, and a lot of people lost a lot of money in pension funds. If the Court's desire is to get on with it and get a jury picked, I think your idea is the right way to proceed.

As the court ordered, the parties submitted a joint proposed initial questionnaire on January 3, 2007 (Doc. No. 204). The two-page questionnaire complied with the court's specifications concerning brevity. As discussed on December 8, the questionnaire revealed the

length of the trial and asked whether the prospective juror would "have a conflict" preventing continuous service during that time period. It also asked about stock ownership or employment in Qwest, U.S. West, and four other unrelated companies. The purpose of the inquiry concerning the four unrelated companies was to keep jurors from deducing that they were being summoned for Mr. Nacchio's trial and consciously or unconsciously answering questions in a way that would result in either avoiding or pushing for jury service based on that conclusion. Finally, the parties suggested at the end of the joint questionnaire that court release to them the responses "of those prospective *jurors who cleared the Court's review* of the first questionnaire at the same time the court releases the result of the second questionnaire." The purpose of the suggestion, as defense counsel later explained, was so that "we know what their history is, we know a little bit more about those jurors." There was no hint that either party wished to have the responses of *all jurors* to the first questionnaire for the purpose of reviewing, checking, or second guessing the court's application of the selection criteria or for the purpose of mounting a constitutional or statutory challenge to jury selection.

As the first questionnaire was being submitted and considered, the court began to doubt whether sending a second questionnaire was a good idea. It expressed those doubts during a hearing on January 12, 2007. It reiterated that the sole purpose of a juror questionnaire, in its view, would be to pose questions which, if answered in a certain way, would result in the juror's being excused without the inconvenience and expense of appearing at the courthouse for voir dire. That purpose could be fully accomplished by the initial supplemental questionnaire, to be sent with the jury summons. A second, more extensive questionnaire to be mailed out and

completed by jurors who survived the screening of the first questionnaire would be needlessly expensive, cumbersome and time-consuming, especially if the second questionnaire were completed and reviewed *after* the prospective jurors appeared at the courthouse — as suggested by Defendant. If the jurors appeared at the courthouse, the court reasoned, all of the questions in a second questionnaire could be posed in open court during voir dire, avoiding the expense of mailing the questionnaire and the inconvenience to jurors in taking the time to answer it. Moreover, the court emphasized (1) that it was pointless to put questions in a second questionnaire and then repeat the same questions in court and (2) that asking the questions in open court would give the court and the parties an invaluable opportunity to observe jurors' manner and demeanor in answering the questions. Because the parties initial questionnaire had been prepared on the assumption that there would be a second questionnaire, the court gave them more to time to re-submit the initial questionnaire, this time making the assumption that there would *not* be a second questionnaire.

The parties second cut at the proposed supplemental questionnaire (Doc. No. 211) crystalized the court's preference for a single, brief supplemental questionnaire which would be used to decide which jurors should report to the courthouse, followed not by a second questionnaire but by extensive oral voir dire of those jurors who reported. The court discussed this preference and reiterated the reasons for it. The court also pointed out that the parties' submission suffered from a number of problems. First, at fifty-eight questions, it was too long, too repetitive of questions in the standard juror qualification questionnaire, and too likely to engender juror annoyance and frustration. Second, by asking only about Qwest and U.S. West

and by posing questions focusing on Mr. Nacchio and pretrial publicity, it telegraphed to the recipient exactly what proceeding was involved, thus increasing the likelihood of juror self-selection which would have been minimized by posing masking questions about four other major companies as well. Finally, many of the questions were ones which undoubtedly would be asked, and followed-up, in open court during voir dire, where everyone would have the chance to observe jurors' manner and demeanor. During the discussion, the court repeated that it did not "propose to show the parties these questionnaires, any more than [it] would propose to show the parties the juror [qualification questionnaire sent with the] summons. There was no suggestion by either party that anyone wanted to review the responses to *all* questionnaire, for any purpose. The only issue arose when the Government argued that loss of money on the stock market or a pension plan should not be a question used to automatically excuse a juror. The defense responded:

> If you are going to an abbreviated questionnaire for the purpose of winnowing out . . . from a large venire, I think your approach is correct. . . . I do think that people who have lost money in the stock market or their pension plan are presumptively not good jurors for a case like this, which I why I don't want them, and I guess why [the Government] might.

Working from the parties' proposed questionnaire, the court developed its own thirteen-question questionnaire (Doc. No. 278). During a conference on February 8, 2007, the court specified the answers which would result in a juror's being excused before appearing at the courthouse. The first eleven questions, taken directly from the parties' proposal, inquired about the relationships of jurors with Qwest and U.S. West. The court proposed that, if the prospective

juror answered that the juror, a family member, or friend had ever (1) worked for either company, (2) unsuccessfully applied for work in either company, (3) "done business" with either company, (4) owned stock in either company, or (5) lost money in an investment plan, IRA, 401K, or other retirement plan in either company, that juror would be excused. The court further proposed that, if any juror stated that service in a trial of this length would "cause such an undue hardship or extreme inconvenience that it would prevent you from being a juror or affect you ability to be a fair and impartial juror" (question 13), that person would be excused. As to question 12, asking whether the prospective juror wanted to serve on the jury, the court acquiesced in the parties' proposal but stated that, without further input from the parties, no juror would be excused solely because of his/her answers to the question. In response to the Government's reservation about excluding a juror because of stock ownership, Defendant responded:

> We think the question is appropriate. We think it should be an issue for cause. And I know you're interested in saving time. If anybody answered the question that they had stock in those companies, it would lead to a lot of additional questions. I don't know why we need jurors who are shareholders in those two companies.

No other objection was made to the court's proposed exclusions.

As it reviewed the responses to the questionnaires, the court became concerned that stringent application of the announced criteria for being excused would result in an insufficient number of "clean" jurors who would be instructed to come to the courthouse. It therefore modified the criteria for exclusion in two ways, one of which was discussed with the parties and the other of which the court (evidently mistakenly) thought it had discussed with the parties. The

first modification concerned responses to question eight (concerning stock ownership), where the prospective juror indicated that he/she, or a family member, or friend, had owned U.S. West stock at a time remote from the merger. The court proposed not to automatically excuse such a person and announced its proposal during a conference on March 1, 2007. The Government concurred, and so, it appeared to the court, did Defendant, noting that "[if] its on the fringe, it could be solved with a question [during voir dire]."

The second modification, evidently not discussed with the parties, occurred because a substantial number of jurors were answering questions six and seven (inquiring whether the prospective juror had "ever done business" with Qwest or U.S. West) by disclosing that they had telephone service or internet service from the companies. The court, apprehending that (1) such a common connection was neither intended to be covered by the question nor a basis for being excused and that (2) many other jurors who had such connections probably did not think the question covered the connection, excused no juror solely because he/she disclosed such a connection. As defense counsel observed with respect to the first modification, the second modification could not have prejudiced either party, since the court's decision would result in the prospective juror's appearance at the courthouse, where the question could be pursued in open court.

The final event of significance to the present motion occurred on Sunday, March 18, 2007, the day before jurors were appear for the first day of trial. Defendant filed a motion (Doc. No. 299) decrying perceived continued publicity and asking the court to conduct *individual* voir dire concerning pre-trial publicity. Unbeknownst to Defendant, the court had already decided to ask

those questions individually, at the bench, although it had at one time indicated that it would like to conduct group voir dire. Having conducted the individual voir dire which it thought Defendant had requested, the court denied Defendant's motion as moot.

As part of reciting the procedural history which Defendant thought pertinent to his motion for individual voir dire, Defendant asked, for the first time, "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 [sic] review that may be necessary." As the basis for the request, Defendant stated:

> Although 1,000 questionnaires were sent out, we have been informed that only78 jurors have been notified to report for voir dire. Yet we do not have the responses by the 1,000, nor even by the 78, and we have no way to ascertain the manner in which the former number became the latter. *To be sure, we are not suggesting any impropriety in the manner in which the venire pool has been culled down from 1,000 to 78* — we simply do not know how it was achieved, even as the press accounts have multiplied in both number and degree while this process was in motion.

(Emphasis added.) Given the context of the motion, the court interpreted this language as a modified version of Defendant's earlier-stated request for as much information about prospective jurors as he could get his hands on, not as a suggestion that the material was needed to mount a statutory or constitutional challenge to the court's process for excusing jurors.

Using the criteria discussed herein, the clerk instructed eighty-one jurors (not seventy-eight, as Defendant states) to appear at the courthouse for voir dire. Two did not appear at all, and two appeared late, after jury selection commenced, meaning that seventy-seven were present for jury selection. Of the remaining summonses, 367 were returned as undeliverable, and fifty-

four persons did not respond . The clerk disqualified or exempted, or the court reviewed and excused, a total of 472 jurors. The court applied the criteria discussed herein.

The 107 remaining jurors carried on the clerk's record as "qualified" are divided into two categories. The first category consists of the eighty-one who were "clean" — *i.e.*, they cleared the court's selection process without ambiguity or question. The second category consists of twenty-four jurors who could have been excused by application of the court's selection criteria but whose answers suggested that they might nonetheless pass muster if follow-up questions were propounded in open court. The court directed the clerk not to place these jurors in the excused group but to hold them in reserve. The court had previously determined that approximately eighty jurors needed to be brought to the courthouse, and it was not always apparent during the six-week review process that it could get eighty completely "clean" jurors. Hence, the court created this borderline category of persons who, although they did meet the specified criteria for exclusion, might be called to create a pool of eighty jurors or who could be held in reserve for follow-up questions if the pool of "clean" jurors were exhausted. The jury management system carries these persons in the "qualified" category. The system also carries as "qualified" two jurors who did not return the questionnaire until after commencement of trial (bringing the total of "qualified" jurors to 107). Ultimately, the court did have a group of eighty-one "clean" persons from whom the jury was chosen and did not need to further consider those twenty-four jurors who were subject to being excused by application of the selection criteria.

Legal Analysis

Based on the procedural history recited above, it is this court's view that Defendant has no right to disclosure of all 1,000 questionnaires at this juncture because the stated purpose of disclosure, pursuit of a challenge to the selection process under the Jury Selection and Service Act of 1968, 28 U.S.C.A. § 1861–1878 (West 2007) would be untimely. The pertinent provision of the Act provides:

> In 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 comply with the provisions of this title in selecting the grand or petit jury.

28 U.S.C.A. § 1867(a) (emphasis supplied). This language has been interpreted to mean what it ambiguously says:

> A party challenging the jury selection process under the Jury Selection Act must make his challenge "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.*" 28 U.S.C. § 1867(a) (emphasis added). The timeliness requirement "is to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act." *United States v. Bearden,* 659 F.2d 590, 595 (5th Cir. Unit B 1981), *cert. denied,* 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982). Therefore, once voir dire begins, Jury Selection Act challenges are barred, even where the grounds for the challenge are discovered only later.

United States v. Paradies, 98 F.3d 1266, 1277–78 (11th Cir. 1996). A pre-trial motion is critical, because one alternative available to the court is to stay the case until there is compliance with the Act and thus to avoid needless resources consumed in jury selection and trial.

Here, Defendant at all times declared agreement with the court's criteria for excusing jurors before they entered the courthouse. Although he initially joined the Government in asking for disclosure of the questionnaires *of those jurors who survived after the supplemental questionnaire*, he never suggested that he wanted to challenge compliance with the Act or to obtain *all* questionnaires. The request for all questionnaires was made on the day before trial and, even then, disavowed any challenge to the selection process. Defendant has shown no diligence in pursuing the claim, and it is difficult for this court to regard his present motion as anything other than post-verdict grasping at straws.

The court is aware that Defendant has alluded to a possible constitutional, as well as statutory, challenge. While this claim is not burdened by the weight of an unambiguous statute making it untimely, this court believes that even the constitutional claim can be, and has been, waived by failure to assert it at an earlier point in the proceeding. Defendant's failure to ever give the court a timely indication that he wished to check the court's application of the selection criteria or preserve a constitutional challenge has prevented the court from timely considering and evaluating it on the merits, before voir dire commenced.

Although the court is convinced that no proper purpose would be served by disclosure of responses to the questionnaires because any use of the questionnaires would be untimely, an appellate court may disagree concerning the timeliness of the request for the 1,000 questionnaires.

The court also agrees with the Government that disclosure would be within the court's discretion. The court therefore chooses to exercise that discretion by ordering disclosure, for two reasons. First, as long as private and identifying about prospective jurors is protected, neither the jurors nor the parties would be prejudiced by disclosure. Second, and more important, the court believes that disclosure at this point might well facilitate and expedite appellate review and avoid possible piecemeal appeals. Were the appellate court to reject this court's view that Defendant's statutory and constitutional challenges were untimely, one result might well be a stay and delay of proceedings and remand to this court for the purpose of allowing the disclosure. *See, e.g., United States v. Lawson*, 670 F.2d 923, 926 (10th Cir. 1982) (remanding for disclosure and further proceedings). This would probably be followed by further appellate procedures. The court therefore believes that disclosure now might allow completion of all proceedings in this court followed by orderly completion of proceedings in the appellate court.

Upon the foregoing findings and conclusions, it is

ORDERED as follows:

1. Defendant's motion (411) is GRANTED. The clerk will allow the parties to inspect the records concerning the 1,000 jurors summoned for jury duty in this case.

2. In order to preserve the privacy of prospective jurors, the parties shall treat the information in the questionnaires as confidential. If reference to a specific juror is necessary in court filings, the juror's number shall be used.

Dated this 22nd day of May, 2007.

BY THE COURT:

s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
United States District Judge