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.

MOTION BY JOSEPH P. NACCHIO FOR
DISCLOSURE OF JURY QUESTIONNAIRES

Introduction

On April 19, 2007, the Court ordered that Mr. Nacchio file any pre-sentencing motions in no later than 45 days. We intend to 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. Therefore, in order to prepare this motion, there is an immediate need for access to the responses to the 1,000 questionnaires which were sent by the Court to the venire pool. To the extent that potential juror's answers to the questionnaire did not demonstrate bias justifying automatic excusal, the

Court's unknown method for winnowing the venire from 1,000 to 78 may have constituted error warranting the grant of a new trial.

Procedural History And Argument

On July 31, 2006, Mr. Nacchio filed a Motion seeking a change of venue on grounds of overly prejudicial pretrial publicity. [Doc. No. 113] The Court denied that Motion on August 25, 2006. In so doing, however, the Court stated that, "[t]he classic and preferred way of dealing with this kind of prejudice is to question jurors in the voir dire process." Transcript of Proceedings, 71:10-12 (August 25, 2007). The Court contrasted this matter with the *McVeigh* case, where a change of venue was granted because the jury would be hearing inflammatory victim testimony, stating that:

> In this case, it appears unlikely that this court will be hearing victim testimony.... In other words, it might be during sentencing that the Court would consider that testimony; but certainly not during jury proceedings.

Id. 72:8-13.[1]

The Court also observed on August 25 that, "[s]ometimes that negative publicity dissipates, and there is every reason to believe that it will dissipate in this case. People will not have it in mind when it is finally time to choose the jury." *Id*., 75:10-13.[2] Even upon that assumption, the Court stated that, "this is going to be a case where we're going to work very hard on voir dire and voir dire procedures. ... But it will be a case where dealing with publicity that's occurred will require that we work on voir dire."

[1] The Court nevertheless allowed, then later struck "victim" testimony from Sally Anderson.

[2] As the Court itself acknowledged in the weeks prior to and during the trial, this proved not to be the case.

Id., 86:10-16. In furtherance of that effort, on August 25, 2007 the Court stated an inclination to begin the process by mailing questionnaires to the venire panel:

> I think you should start thinking at least before the next hearing about jury questionnaires. I don't think we're going to bring in a special panel on a separate day. I think we can send a jury questionnaire out when we summon the jurors.

Id., 86:19-22.

On December 8, 2006, the Court determined that two questionnaires would be mailed:

> Before the jury walks into the courthouse on March 19, the Court anticipates there will be two questionnaires, written questionnaires, that will be sent to the jurors. The first questionnaire will be sent during the week of January 22. It will contain the usual jury summons that the Court uses to summon jurors in any case, and the jurors will have an opportunity to respond to that by seeking an excuse or whatever other response the jurors want to make. There will also be with that communication a very short questionnaire. The questionnaire will ... have a few questions.... Among them would be a question as to whether this juror has ever owned stock in Qwest ... whether the juror has ever been an employee of Qwest, or whether close personal friends or family members of jurors have had those statuses, or stati, or whatever you call them. And frankly, what I intend to do with those is if a juror indicates that he or she has been an employee of Qwest or has owned stock in Qwest, my proposal to counsel, and I'll certainly solicit your views on this, is that that juror will be excluded without further inquiry.
>
> * * *

> On the initial questionnaire, I will not share the responses or the jury summons with the lawyers. I will make that determination on my own. But I will tell you what the criteria I'm going to use. I'll tell you I'm excluding everybody who has been associated with Qwest, if that's what I intend to do. I don't think there is any need to involve the lawyers at that point. On the supplemental questionnaire [which would be sent in February], I would anticipate the lawyers would be able to see the responses to that supplemental questionnaire.

Transcript of Proceedings, 3:2 - 4:11, 5:21 - 6:4.

Subsequently, the parties jointly submitted two proposed questionnaires to be mailed to the venire panel. Unlike the first questionnaire, which addressed any direct relationship between the jurors and Mr. Nacchio or Qwest, the second questionnaire was a more extensive inquiry designed to determine if the jurors harbored any prejudice against Mr. Nacchio or the government. As to the first questionnaire, which with slight modification ultimately ended up being the only questionnaire sent to the expanded venire pool, the Court stated: "we should have questions that the Court rules -- hopefully with agreement of the parties, but not necessarily -- that if the juror answers the question in a certain way, that juror will be excused, will not even be called to the courthouse." Transcript of Proceedings, 21:6-10 (January 12, 2007). The Court then stated:

> And I think the proposal -- and I'll just share it with you, as I don't see any reason not to -- is that we call 1,000 jurors on this initial -- sum of 1,000 jurors.
>
> * * *
>
> We'll pick 1,000 jurors, and we'll -- the initial questionnaire, as I say, will accompany the jury summons and act as a supplement to the jury summons. And I think you've all seen the standard jury summons. And

> the Court based on the response to the summons and the supplemental questionnaire will make a decision as to whether to excuse a certain number of jurors before they even come to the courthouse.

Id., 23:25 - 24:2, 26:5-11.

During the open portion of the January 26, 2007 Status Conference, however, the Court reversed itself and decided against sending out a second questionnaire:

> I know some judges and some courts send out extensive jury questionnaires, such as the ones that you have prepared. In my view, if a question is going to be propounded to the jurors in open court in the void dire process, which many of these questions are -- questions concerning prejudice, for example, will be explored in open court -- I don't propose to duplicate that effort by a jury questionnaire. I think that's, as I say, duplicative and pointless.

Transcript of Proceedings, 25:17-24 (January 26, 2007).

During the chambers portion of the January 26, 2007 Status Conference, the Court advised of its intention to excuse from the venire any "jurors who have owned any stock in Qwest…. We don't even need to call them to the courthouse, in my opinion." Transcript of Chambers Proceedings, 5:25 - 6:4 (January 26, 2007). When the government suggested that it should not be grounds for automatic excusal if a venire member answered the Court's proposed mail questionnaire by admitting having lost money in a stock option plan, the Court stated:

> That's the kind of question where I'm inclined to say, let's cut through the lengthy void dire process, shorten the void dire by not even having those people present at the courthouse, because the likelihood of getting a fair juror from that pool, that sub pool of people, is very low. That's what I think I want to do in the jury questionnaire, is just in a common sense way figure out what in this court's view, at least, is something where the brain damage, so to speak, that we go through by trying to get a fair and impartial juror with certain opinions and certain backgrounds is so small.

> You know, I remain convinced, Mr. Stern, that we're going to be able to get a fair and impartial jury in this case from 1,000 jurors in Colorado. And we can ask these sorts of questions and still come to the courthouse with a jury pool of about 2 or 300, if we need them. I don't propose to call 2 or 300 to the courthouse.

Id., 10:12 - 11:9. The Court did not explain on what basis it would winnow down the number of prospective jurors who were not automatically excluded by virtue of their answers to the questionnaire.

On February 7, 2007, the Court transmitted to the parties the abbreviated questionnaire which would be mailed to 1,000 prospective jurors. Letter from Hon. Edward W. Nottingham, U.S.D.J. to Messrs. Stricklin and Richilano (February 7, 2007). During the chambers portion of the February 8, 2007 Status Conference, the Court advised counsel that "yes" answers to certain questions would result in automatic disqualification from the prospective jury pool. One of those was Question No. 8, which asked whether the prospective juror, any family members or friends ever owned stock in Qwest Communications International, Inc. or U.S. West. Transcript of Chambers Proceedings, 3:24 (February 8, 2007). The Court advised counsel that this would be done automatically, "without the parties' input...." *Id.*, 10:17-20.

During the chambers portion of the March 1, 2007 Hearing, the Court advised counsel that, despite having sent questionnaires to 1,000 people, "I think I'm going to call probably about 80 jurors, which means between 70 and 75 will show up. I think we're gong to get a pretty clean jury in the sense that there -- these are people that don't have problems with the schedule and who don't have the disability of Qwest

associations." Transcript of Chambers Proceedings, 3:6-9 (March 1, 2007). No explanation was offered as to the manner or basis by which the Court intended to reduce the venire pool from 1,000 to "about 80."

When asked by the government whether counsel would have an opportunity "to see the return on the cover sheets and the questionnaires that you had sent out," the Court informed the parties that it had, *sua sponte*, changed the procedure it had previously announced with respect to automatic exclusion from the jury panel based on responses to the mailed questionnaire:

> Well, the questionnaires that I sent out are unremarkable. I mean, I should make one qualification, I said that anybody who had ever owned stock or had a relative or family member who owned stock in Qwest would be in the excluded pile, I think I said that. ... I think that's not a good decision. I've -- there are a few questionnaires that say, my cousin once removed owned stock in US West in the 1980s. I don't know how many we've gotten like that, but it seems to me those folks can probably serve.

Id., 27:6-19.

Subsequently, 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.

In sum, over Mr. Nacchio's objection, the Court sent out only a single, very limited, questionnaire to 1,000 potential jurors, with the stated intention of using the questionnaire to automatically exclude any member of the venire pool that had a prior employment, business, or financial relationship to Qwest or US West. The Court subsequently *sua sponte* narrowed its rules for automatic disqualification. Yet, although 1,000 questionnaires were sent out, only 78 jurors were chosen by the Court to report for *voir dire*. It is unlikely that only 78 of the questionnaires did not suffer from the defects of automatic disqualification. But without the responses by the 1,000, nor even by the 78, we have no way to ascertain the manner or method by which the former number became the latter.

To the extent that potential juror's answers to the questionnaire did not demonstrate potential bias justifying automatic excusal, the Court's pre-trial method for winnowing the venire from 1,000 to 78 may be error that warrants the grant of a new trial. Because the Court did this without observing the jurors' demeanor, the Court is not entitled to the dereference normally accorded jury selection determinations. *See United States v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000), *cert. denied*, 534 U.S. 992 (2001), where the Tenth Circuit refused to defer to the District Court's pre-trial excusal of venire members simply on the basis of a questionnaire, explaining that "the heightened deference we pay to these determinations is based almost exclusively on the trial judge's unique ability to observe demeanor and assess credibility." 230 F.3d at 1269, *citing Wainwright v. Witt*, 469 U.S. 412, 426 (1985).

It will not be until we have an opportunity to analyze the Court's pre-trial actions that we will be able to determine whether error was committed. Possible sources of error include violation of: the Jury Selection and Service Act of 1968, 28 U.S.C. § 1867, through the pre-trial excusal of jurors for reasons not countenanced by the statute;[3] 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.

We therefore 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.

[3] Mr. Nacchio's statutory obligation to provide a "sworn statement of facts 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...." 28 U.S.C. § 1867(a). That time will not begin to run until *after* the juror questionnaires have been disclosed to us.

Respectfully submitted this 26th day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2007, a true and correct copy of the foregoing **MOTION BY JOSEPH P. NACCHIO FOR DISCLOSURE OF JURY QUESTIONNAIRES** was served on the following via the USDC CM/ECF system:

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