

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA * CRIMINAL NO. 07-103

 v. * SECTION: "L"

JAMES PERDIGAO *
a/k/a Jamie Perdigao *

 * * *

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION
FOR DISCLOSURE OF NON PRIVILEGED JURY INFORMATION

NOW INTO COURT comes the United States of America through the undersigned Assistant United States Attorneys, who respectfully submits this response to the Defendant's Motion for Disclosure of Non Privileged Jury Information.

First, the government acknowledges that the defendant has a right to inspect the jury list regarding impanelment issues only. The defendant is entitled to an opportunity to inspect jury records subject to guidance and limitations an established by the Court pursuant to 28 U.S.C. § 1867. However, as to all other defendant's claims for disclosure of grand jury minutes regarding presentation of the indictment, the defendant's claims have no merit and must be denied.

I

The defendant's right to inspect jury lists is not an unfettered right. The Courts have the authority to supervise the defendant's right to the inspections of jury lists. The government believes the defendant may be trying to assert a Jury Service and Selection Act ("JSSA") challenge. If the defendant files a JSSA challenge then the defendant may file a motion to stay the proceedings before voir dire examination begins or within seven days after the defendant discovered, or, by the exercise of due diligence, could have discovered the grounds for such a motion. 28 U.S.C. § 1867(a).¹ Upon the filing of such a motion "containing a sworn statement of facts which, if true, would constitute a substantial failure to comply" with the JSSA provisions, a hearing shall be held at which the movant shall be allowed to present evidence in support of his motion. 28 U.S.C. § 1867(d). The JSSA "contemplates that the purpose of the hearing is to substantiate claims asserted in the motion and not to serve as a 'fishing expedition' by defendants to uncover possible grounds for additional claims." United States v. Bearden, 659 F.2d 590, 597 (5th Cir. 1981). The defendant is

¹The Fifth Circuit has concluded that Congress added a timeliness element to JSSA challenges "to prevent dilatoriness and to ensure the rapid disposition of claims, particularly those that are spurious." United States v. Bearden, 659 F.2d 590, 600 (5th Cir. 1981). Because of this, the time limit is to be strictly construed. 659 F.2d at 595. Sixth Amendment challenges are not governed by this rule. United States v. Williams, 264 F.3d 561, 568 n.3 (5th Cir. 2001).

entitled to an opportunity to inspect jury records and other papers during the preparation of the motion and is "given reasonable time to otherwise investigate possible violations." Id.; 28 U.S.C. § 1867(f). "Violations [of the JSSA] which are discovered or could have been discovered during this investigatory stage must be alleged in the motion and sworn statement, and failure to do so will preclude their assertion either at the evidentiary hearing or at any later point." Id. (citations omitted).

In order to gain relief, a defendant "must allege and prove a substantial failure to comply with the provisions of the Act." United States v. McKinney, 53 F.3d 664, 670 (5th Cir. 1995) (*citing* 28 U.S.C. § 1867(a)). A "substantial failure" to comply with the terms of the JSSA is "one that destroys 'the random nature or objectivity of the selection process.'" United States v. Hemmingson, 157 F.3d 347, 358 (5th Cir. 1998) (*quoting* United States v. Kennedy, 548 F.2d 608, 612 (5th Cir. 1977)). "Mere technical deviations from the Act or even a number of them are insufficient." Bearden, 659 F.2d at 601 (citations and internal quotations omitted).²

²See also United States v. Schmidt, 711 F.2d 595, 600 (5th Cir. 1983) ("Whether there has been a substantial violation of the Act is determined by weighing the alleged violation against the underlying principles of the Act. This court, citing to legislative history, has recognized that the two fundamental principles of the Act are: (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror qualifications, excuses, exemptions and exclusions on the basis of objective criteria only. Mere technical deviations from the Act constitute neither a substantial noncompliance nor frustration of the

Title 28, United States Code sections 1863 through 1866, set forth the JSSA's requirements for jury selection in order to effectuate the policy of random selection of jurors from a fair cross section of the community in the district or division where the court convenes. Section 1863 allows for selection of names of prospective jurors from the voter registration lists. In accordance with the JSSA, the Court's Plan³ utilizes the voter registration lists, as supplemented by the inclusion of subsequent registrants, as the source of prospective jurors and provides for both electronic and manual methods to randomly select names from the voter registration lists to be placed on the master jury wheel. The Court's Plan of selecting names from this list to be sent questionnaires to determine the individual juror's qualification to serve as a juror, and, subsequent selection for individual venire panels, is in complete compliance with the statute. Use of voter registration lists as the source for potential jurors has been upheld. Timmel v. Phillips, 799 F.2d 1083, 1087 (5th Cir. 1986); United States v. Lewis, 10 F.3d 1086, 1090 (4th Cir. 1993).

principles of the Act. Violation of a local plan is analyzed in the same manner as the Act; we look to see if any of the Act's policies were frustrated therefrom." (citations omitted)).

³ The Plan for the Random Selection of Grand and Petit Jurors Pursuant to the Jury Selection and Service Act of 1968 (the "Plan") was adopted by the Court on December 3, 1980, and has been amended on a number of occasions. The plan can be provided to the Court upon request. The JSSA requires each Federal District Court to "devise and place into operation a written plan for random selection of grand and petit juries." 28 U.S.C. § 1863(a).

II

As to the defendant's other requests for grand jury disclosures regarding the following:

- (1) What proper instructions were given to the grand jury;
- (2) Whether or not hearsay evidence was used;
- (3) Whether or not any unauthorized persons were present in the grand jury room during the presentation of the indictment;
- (4) Whether or not circumstances in which the indictment was presented to the grand jury was proper;
- (5) A request for disclosure orders for the grand jury.

These requests for disclosure must fail because the defendant failed to allege a particularized need for this material. Further from the defendant's very request it is obvious that he wants to go on a fishing expedition which of course is not a basis for disclosure of secret grand jury testimony or proceedings.

Grand jury proceedings are afforded a strong presumption of regularity and a defendant's unsupported view that abuses may have occurred in the grand jury system is insufficient to overcome the presumption of regularity of the grand jury proceeding. *Hamling v. United States*, 418 U.S. 87, 139 (1974);

United States v. R. Enterprises, Inc., 492 U.S. 292, 301 (1991);
United States v. Ruppel, 666 F.2d 261, 268 (5th Cir. 1982);
United States v. Wilson, 567 F.Supp 1416, 1436 (S.D.N.Y 1983). A
criminal defendant has a burden of demonstrating an abuse of the
grand jury process. *United States v. Breitkreutz*, 977 F.2d 214,
217 (6th Cir. 1992). The mere contention that a party seeking
transcript has a "right" to the transcripts without showing a
proper showing of need will not suffice to justify disclosure.
Pittsburgh Plate Glass Company v. United States, 360 U.S. 395,
399 - 401, 79 S.Ct. 1237, 1241(1959). See also *United States v.*
Miramontez, 995 F.2d 56, 59-60 (5th Cir. 1993).

A defendant seeking to obtain a record of his grand jury
proceedings must "show that a particularized need exists for the
materials[.]" *United States v. Miramontez*, 995 F.2d 56, 59 (5th
Cir. 1993). To meet this burden of demonstrating particularized
need, petitioner must show that

(1) the material he seeks is needed to avoid a possible
injustice in other judicial proceedings,

(2) the need for disclosure is greater than the need for
continuing secrecy, and

(3) his request is structured to cover only material so
needed *United States v. Miramontez*, 995 F.2d at 59 (5th Cir.
1993) citing *Douglas Oil Company v. Petrol Stops, N.W.*, 441 U.S.
211, 221 - 22 (1979).

Defendant's bare and vague assertions contained in his motion do not constitute a particularized need under any of the three elements as set forth in *Douglas Oil*. Defendant's speculation and conjecture do not give rise to an *in camera* inspection of the material presented to the grand jury and therefore in light of the Supreme Court and 5th Circuit precedence, the defendant's argument should be dismissed.⁴

It is clear from the defendant's motion that he is purely on a fishing expedition to determine whether or not any misconduct occurred. The defendant has not given any allegations or support for his request for disclosure of grand jury minutes much less any showing of "particularized need". An example of how outrageous defendant's request is, the government notes the defendant has requested disclosure to determine whether or not hearsay evidence was presented to this grand jury. While the government is not disclosing what evidence was used by the grand jury to return indictments in this case, the law allows an indictment to be based entirely on hearsay⁵. *Costello v. United States*, 350 U.S. 359, 363 (1956); see also *United States v. R. Enterprises, Inc., et al.*, 498 U.S. 292, 298 (1991) (rule against hearsay does not apply to grand jury proceedings). Finally addressing the defendant's question as to whether or not there

⁴ While not necessary, the government submits that its presentation of evidence to the grand jury for the superseding indictment comports with all existing 5th Circuit jurisprudence.

⁵ See Federal Rules of Evidence, Rule 1101.

were any unauthorized persons in the grand jury, the government advises, that mere speculation, unsubstantiated in any way, that unauthorized parties were present at grand jury proceedings does not suffice to require the disclosure of secret grand jury transcripts. *United States v. Howard*, 433 F.2d 1, 3 (5th Cir 1970).

WHEREFORE, for the foregoing reasons, the Defendant's Motion for Disclosure of Non Privileged Jury Information except for the defendant's right to inspect jury lists under Court supervision must be denied.

RESPECTFULLY SUBMITTED,

JIM LETTEN
UNITED STATES ATTORNEY

/s/ James R. Mann
JAMES R. MANN (20513)
Assistant U.S. Attorney
james.mann@usdoj.gov

SALVADOR PERRICONE (10515)
Assistant United States Attorney

BRIAN KLEBBA
Assistant United States Attorney
500 Poydras Street, B210
New Orleans, Louisiana 70130
Telephone: (504) 680-3000

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2008, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to William F. Wessel, Attorney at Law. I further certify that I mailed the foregoing document and the Notice of Electronic filing by First Class Mail, postage prepaid and properly addressed to Charles F. Griffin, Attorney at Law, 802 S. Carrollton, New Orleans, Louisiana, 70118.

/s/ James R. Mann

JAMES R. MANN

Assistant U. S. Attorney