

Professional Perspective

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Practical Tips on Challenges to Grand and Petit Juries

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As federal courts reel from the effects of the Covid-19 pandemic, federal criminal practitioners need to ensure that their clients' rights are protected as new procedures are put into place. The [Women's White Collar Defense Association](#) (WWCDA) recognizes that the pandemic presents novel issues, and it has engaged in activities to help guide the legal defense community and its clients through this time.

Here, WWCDA member Carolyn Kendall of Post & Schell interviewed WWCDA member Ann Flannery about her insights and recommendations for federal white collar practitioners concerning challenges to juries and grand juries during the pandemic.

Kendall: Analyzing the timeliness and propriety of a grand jury's indictment is always on the criminal defense lawyer's checklist. How does this analysis change with respect to indictments returned during the Covid-19 pandemic?

Flannery: This analysis takes on added urgency and importance in the time of Covid-19. Strange times lead to unusual developments. In the Eastern District of New York, for example, indictments arising from Black Lives Matter protests in Brooklyn were returned by a grand jury sitting in Islip, New York rather than Brooklyn, at a time when most of the Eastern District was under a stay-at-home order. See, e.g., *Mot. To Inspect Grand Jury Records*, ECF No. 11, *United States v. Samantha Shader*, No. 20-cr-202.

In the Eastern District of Pennsylvania, indictments in stale white-collar cases were abruptly returned by a "firearms" grand jury—reportedly the first to achieve a quorum after grand jury resumption was permitted by the court's general order.

In instances like these, where cases are abruptly switched to a different grand jury due to Covid-19 exigencies, it will be important to dig into the discovery and *Jencks* materials to see whether any shortcuts were taken that might undermine the indictment.

Things to consider are, for example, whether an agent summarized prior testimony inaccurately, giving rise to a challenge for intentional misstatement, or whether there was actually a quorum for the entirety of the session.

The most urgent questions, however, concern the grand jury's empanelment. The Jury Service and Selection Act, [28 U.S.C. §1861](#) (JSSA), gives defendants a statutory right to a grand jury drawn from a representative cross-section of the district in which the crime was committed. "[A]ll litigants in federal court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." [28 U.S.C. § 1861](#) (Declaration of Policy).

For a grand jury that was empaneled during the pandemic, practitioners should investigate whether it was drawn from a representative cross-section of the community. Covid-19 restrictions and concerns about public health and personal safety may so distort and contract the available pool of grand jurors that it is not a representative cross-section of the community.

Kendall: We have heard that in some jurisdictions, people who express concerns about serving on juries—both petit and grand—due to Covid-19 are excused. What concerns does this raise?

Flannery: Practitioners should consider whether the grand jury was inappropriately comprised of "volunteers." A defendant has a right to a grand jury randomly selected from the community. In other words, grand jurors cannot volunteer to serve. See, e.g., *United States v. Branscome*, [682 F.2d 484](#) (4th Cir. 1982). If potential grand jurors are openly excused from a grand jury pool based on concerns about Covid-19, the possibility arises that those remaining are essentially volunteers.

Whether considered “volunteer” or not, if persons with Covid-19 concerns or persons at higher risk for Covid-19 are routinely excused, a large swath of the community may be excluded from the pool—those over 60, those with underlying health conditions, minorities who have been impacted more severely by the illness, parents with school-aged children who must help with their schooling, etc. The pool would then not be a representative cross-section of the community.

Kendall: Are there other statutory rights at stake when juries and grand juries are selected during Covid-19?

Flannery: Criminal defense counsel should also determine whether the jury selection plan was followed. Under the JSSA, each federal judicial district must establish and approve its own plan for jury selection. [28 U.S.C. §1863\(a\)](#). A defendant has a statutory right to adherence to the jury selection plan. Specific procedures for modifications to the plan are set forth in Section 1863(a). The jury selection plan for each federal district can usually be found on the court's website. The plan typically telescopes from a master list, to a qualified list, to the issuance of summonses for a particular date or trial.

The possibility of Covid-19-related deviation from the plan, or Covid-19-related excusals, exists both at the stage in which potential jurors receive questionnaires to determine their qualification for jury service, and after potential jurors receive summonses. There may be formal or informal instructions being given to the jury clerk's office, or policies developed within the clerk's office, as to guidelines for excusal. These may or may not constitute changes to the plan.

Even before potential grand jurors arrive for the selection process, the representative nature of the pool could have been significantly compromised if informal excusal guidelines permit broad swaths of the population to be excused in advance. And, if certain demographic groups not listed in the published plan are excluded on request, a statutory violation has arguably occurred.

Kendall: How do you determine whether the procedures have been correctly followed, and whether the pool that turns up in the courtroom for grand jury selection has been drawn from a representative cross-section of the community?

Flannery: First and foremost, the defense must get the jury selection records. The JSSA provides that if a defendant is preparing a motion to dismiss the indictment—as in a grand jury challenge—or stay the proceedings—as in a petit jury challenge—the defendant is entitled to view the jury selection records used by the jury commissioner or clerk. [18 U.S.C. §1867\(f\)](#).

The U.S. Supreme Court has held that this right is unqualified, reasoning that “[w]ithout inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.” *Test v. United States*, [420 U.S. 28](#), 30 (1975). In other words, the defendant need not show a likelihood of success on the merits to obtain the records.

Remember that time is of the essence. Section 1867(a) of the JSSA provides that in criminal cases, a motion to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the act in selecting the grand or petit jury must be made “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.”

If a defendant has Covid-19-related concerns about the indicting grand jury, but must obtain records to evaluate whether a valid challenge exists, a potential issue is what constitutes “discovery” of the issue. To further complicate matters, Section 1867(f) does not articulate a deadline for a record disclosure request. Nonetheless, some courts have held that a motion for grand jury selection records must be made within seven days of indictment. See, e.g., *United States v. Saipov*, No. S1 17-CR-722 (VSB), [2020 BL 70898](#) (S.D.N.Y. Feb. 26, 2020) (collecting cases).

The most prudent course is to make the motion for disclosure of records within seven days of indictment along with (or as part of) a pro forma motion to dismiss the indictment, requesting leave to supplement the motion to dismiss when the records have been received and evaluated.

Kendall: What records does one request in such a disclosure motion?

Flannery: Top of the list should be what jury selection plan was followed, including any formal or informal amendments to the published plan, and any formal or informal instructions used by the jury commissioner or clerk in excusing individuals prior to their appearance in a jury pool. Even if the defense does not have the financial resources for a jury selection expert or statistician, this type of information can be analyzed by the defense team.

In some of the early cases, such as *United States v. Samantha Shader*, Mot. To Inspect Grand Jury Records, ECF 11, No. 20-cr-202 (E.D.N.Y. June 18, 2020), and the Elizabeth Holmes case, *United States v. Holmes*, Mot. To Access Grand Jury Selection Materials, ECF 461, No. CR-18-00258 (N.D. Cal. July 21, 2020), jury selection experts were used in support of the applications.

The dockets of these cases are useful sources of sample requests which, with some reflection, can be inspiration for requests in one's particular case. If a serious challenge is to be made to the demographic composition of the pool from which the grand jury was drawn, however, the services of a statistician or other expert may be required.

It is important to recognize that a defendant is not entitled to a grand jury panel that is a representative cross-section of the community. Rather, the defendant is entitled to a grand jury randomly drawn from a representative cross-section of the community. Any potential challenge should be framed this light. Simply looking at the indicting grand jury, or the petit jury pool or panel, and arguing that it has no members of a particular demographic will likely be insufficient to sustain a successful challenge.

This distinction explains the differing results in recent Covid-19-related motions for grand jury selection records. In *Shader*, the government advised the court that the indicting grand jury had been empaneled in 2019—pre-Covid-19. Therefore, the court granted access to the master list in effect at the time the grand jury was chosen, but did not give the defense access to jury selection records that were more recent, or Covid-19-related. See, Mem. & Order, ECF 16, *Shader*.

In contrast, the grand jury that returned the superseding indictment in *Holmes* was empaneled during Covid-19. Therefore, the court granted access to records not only regarding the master list, but also Covid-19 questionnaires (blank forms) and excusal records. See, Order, ECF 506, *Holmes*; see also Order Granting Defendant's Mot. to Access Grand Jury Selection Materials, ECF 25, *United States v. Sullivan*, No. 20-cr-337 (N.D. Cal. Oct. 7, 2020). Practitioners should note that specific personal identifying information is not typically requested or granted.

Kendall: What can a practitioner hope to achieve by challenging a grand jury or jury empaneled during the Covid-19 pandemic?

Flannery: The stakes are high in a challenge to the grand jury—an improperly constituted grand jury can lead to dismissal of the indictment. A pretrial challenge to the representative nature of the pool from which a petit jury is to be drawn, on the other hand, leads to a continuance of the proceedings.

Strategically, raising a challenge to the petit jury pool ahead of trial and getting the records as to excusals may help inform trial counsel as to whether to emphasize Speedy Trial rights and proceed to trial, or whether seeking a continuance would be more prudent, emphasizing the defendant's right to a jury drawn from a representative cross-section of the community as well as other rights and practical concerns that may be compromised in the time of Covid-19.