

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
 :
v. : CASE NO. 21-cr-263 (TSC)
 :
RUSSELL DEAN ALFORD, :
 :
Defendant. :

GOVERNMENT’S OBJECTIONS TO PROPOSED JURY QUESTIONNAIRE

Pursuant to the Court’s order, the defendant filed a jury questionnaire, noting any unresolved objections and succinctly stating the parties’ respective positions. The government files this supplemental objection outlining its objections to the scope and substance of the defendant’s proposed jury questionnaire.

Many of the defendant’s proposed questions are irrelevant and not “reasonably calculated to discover an actual and likely source of prejudice.” *United States v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973). Additionally, many questions are inappropriately personal or seek the religious and political views or affiliations of the prospective jurors. The purpose of *voir dire* is not to enable the parties to sculpt a jury of their liking, but rather to ferret out prejudices in the venire that threaten the defendant’s Sixth Amendment right to a fair and impartial jury. The government does not object to questions seeking to determine if prospective jurors are biased based upon the amount of publicity surrounding the January 6, 2021 riots. But it objects to questions that are not reasonably calculated to discover prejudice or that are improperly intrusive.

I. Background

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S.

Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

At approximately 2:43 p.m. on January 6, 2021, the defendant unlawfully entered the U.S. Capitol Building through the Upper House Door on the east side of the building. The defendant then stood in the hallway outside the House Chamber taking videos of himself and other rioters. The defendant did not exit the U.S. Capitol Building until approximately 2:54 p.m., after a group of Metropolitan Police Department officers were dispatched to clear the hallway where he was standing.

Based on his actions on January 6, 2021, the defendant was charged with violations of 18 U.S.C. § 1752(a)(1) (Entering and Remaining in a Restricted Building); 18 U.S.C. § 1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building); 40 U.S.C. § 5104(e)(2)(D) (Violent Entry and Disorderly Conduct in a Capitol Building); and 40 U.S.C. § 5104(e)(2)(G) (Parading, Demonstrating, or Picketing in a Capitol Building). ECF No. 8.

On March 1, 2022, defendant moved this Court to transfer venue, or alternatively, to permit the defense to “prepare a questionnaire that, after review and approval by the Court, would be distributed to summoned prospective jurors to return before trial.” ECF No. 40, at 1. The basis for the request was that “in this District the prejudice against [the defendant’s] defense is so great that an impartial jury cannot be empaneled.” *Id.* The government opposed the motion for a change of venue but did not oppose the requests that the parties be present during any pre-screening

and be allowed to engage in individual questioning during *voir dire*. The government argued that a jury questionnaire was not necessary. ECF No. 44. On April 18, 2022, the Court denied the defense request for a change of venue, but granted the request for a jury questionnaire, explaining that “there has been extensive media coverage of the January 6 events” and that “[m]any District residents—and Americans throughout the country—including those who were not at the Capitol on January 6, may thus hold impressions and opinions about the day’s events.” ECF No. 46, at 14. The Court said that “[w]hether those impressions and opinions amount to disqualifying bias or whether prospective jurors can set aside any impressions and opinions and view the evidence against Defendant with an objective and open mind, is a question that deserves careful consideration.” *Id.* Thus, the Court found “good reason to expand examination of prospective jurors in each of the three ways [the defendant] requests.” *Id.* at 15.

The government does not dispute that the events of January 6, 2021 have received extensive local publicity. That publicity, however, has not been focused on this defendant. A brief Internet search reveals that little or no publicity concerning the defendant’s case has been published in the Washington D.C. area. Rather, the publicity concerning this defendant has been published in Alabama where the defendant resides. *See, e.g.*, Birmingham Real-Times News, “‘I wondered when y’all were going to show up’: 7th Alabamian arrested in U.S. Capitol riot,” (Mar. 29, 2021), *available at* <https://www.al.com/news/birmingham/2021/03/i-wondered-when-yall-were-going-to-show-up-7th-alabamian-arrested-in-us-capitol-riot.html> (last accessed May 31, 2022). *See also United States v. Chapin*, 515 F.2d 1274, 1288 (D.C. Cir. 1975) (jurors had very little knowledge of the defendant on trial, although they had strong opinions about other defendants involved in Watergate).

II. Argument

Jury selection must be adequate to ensure the defendant receives a jury whose members are able to impartially follow the Court's instructions and evaluate the evidence. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). A trial court has "broad discretion" in "deciding what questions to ask prospective jurors." *United States v. Tsarnaev*, 142 S. Ct. 1024, 1034 (2022). The exact nature and scope of questioning is committed to the broad discretion of the court. *United States v. Tipton*, 90 F.3d 861, 877 (4th Cir. 1996) (citing *Rosales-Lopez*, 451 U.S. at 188 and *Ham v. South Carolina*, 409 U.S. 524, 527 (1973)); accord Fed. R. Crim. P. Rule 24(a). With limited exceptions, no particular questions are constitutionally required, unless a failure to ask them would "render the trial fundamentally unfair." See *Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991) (rejecting any requirement to ask questions about the content of pretrial publicity to which prospective jurors were exposed).

The Sixth Amendment guarantees "the accused" the right to a trial "by an impartial jury." U.S. Const. amend. VI. "The right to an 'impartial' jury 'does not require ignorance.'" *Tsarnaev*, 142 S. Ct. at 1034 (quoting *Skilling v. United States*, 561 U.S. 358, 381 (2010)) (emphasis omitted). "Notorious crimes are 'almost, as a matter of necessity, brought to the attention' of those informed citizens who are 'best fitted' for jury duty." *Id.* (quoting *Reynolds v. United States*, 98 U. S. 145, 155-56 (1879)). A trial court protects the defendant's Sixth Amendment right by ensuring that jurors have "no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors v. United States*, 158 U. S. 408, 413 (1895).

The Supreme Court has repeatedly said that jury selection falls "particularly within the

province of the trial judge.” *Tsarnaev*, 142 S. Ct. at 1034 (quoting *Skilling*, 561 U.S. at 386); *see also Mu’Min*, 500 U.S. at 424 (“[T]he trial court retains great latitude in deciding what questions should be asked on *voir dire*.”); *Connors*, 158 U.S. at 413 (“That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.”). That is so because a trial “judge’s appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record,” such as a “prospective juror’s inflection, sincerity, demeanor, candor, body language, and apprehension of duty.” *Skilling*, 561 U.S. at 386. A trial court’s broad discretion in this area includes deciding what questions to ask prospective jurors. *See Mu’Min*, 500 U.S. at 427 (“[O]ur own cases have stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity[.]”).

A criminal defendant is “not entitled to a jury of any particular composition.” *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). A defendant is no more entitled to a jury that holds a particular viewpoint than one that is all of one race or religion. The purpose of *voir dire* is not to enable the parties to sculpt a jury of their liking, but rather “to ferret out prejudices in the venire that threaten the defendant’s Sixth Amendment right to a fair and impartial jury.” *United States v. Howell*, 231 F.3d 615, 627 (9th Cir. 2000). The relevant question on *voir dire*—and when using a jury questionnaire—is not whether a juror harbors a particular belief or opinion, but rather whether that belief or opinion will “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *See Wainwright v. Witt*, 469 U.S. 412, 433 (1985) (internal quotation marks and citation omitted).

Although selecting a jury often requires inquiring into prospective jurors’ personal beliefs, courts have regularly refrained from probing into matters “too remote from the issues in the case

to warrant the intrusion into the potential jurors' private thoughts." *United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979). As the Second Circuit observed, it is not "the prospective jurors who are on trial," and "prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed." *Id.* Thus, courts of appeals have held that criminal defendants are not entitled to inquire into the ethnic backgrounds and religious beliefs of prospective jurors where those characteristics do not relate to an issue in the case. *See id.* at 140-42 (ethnic background and religion); *Yarborough v. United States*, 230 F.2d 56, 63 (4th Cir. 1956) (religious background and affiliation).

The D.C. Circuit has identified a few situations that call for specific *voir dire* questioning: (1) where "the case carries racial overtones"; (2) where the case "involves other matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact"; and (3) "other forms of bias" that "have come to be recognized as a proper subject for the *voir dire*," such as the "tend[ency] to attach disproportionate weight to the testimony of police officers." *United States v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973). Outside of these "recognized classes," however, a party must "lay a foundation for his question by showing that it is reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp." *Id.*

The government objects to many of the defendant's proposed questions because they ask about irrelevant or highly intrusive information or because they are not aimed at determining whether a prospective juror has "formed some impression or opinion as to the merits of the case" and whether, if so, the prospective juror can "lay aside his impression or opinion and render a

verdict based on the evidence presented in court.” *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). This Court should ask a more limited set of questions that focuses on the media coverage to which each prospective juror has been exposed and on whether the prospective juror can nevertheless be fair.

III. Specific Objections

The government specifically objects to the following questions for the stated reasons.

5. *Please list any social, community, or professional organizations or groups with which you have been involved during the last 10 years. Additionally, please briefly describe your role in the organization.*

The government objects that the proffered question calls for personal information that is not relevant to a prospective juror’s fitness to serve on a jury and is not “reasonably calculated to discover an actual and likely source of prejudice.” *Robinson*, 475 F.2d at 381. Moreover, D.C. residents have a constitutionally protected right to association, and they should not be forced to disclose all of their associations where those associations have no bearing on their ability to serve as jurors in this case.

7. *Have you ever had a sticker on your vehicle or a sign or flag on your property? If so, please describe the words and/or images on it.*

The government objects to this question, which seeks unnecessary personal information about prospective jurors’ religious, political, and personal opinions that are not relevant to their fitness for service. *See Connors*, 158 U.S. at 414 (“The law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute.”). Many prospective jurors may be unable to recall all the bumper stickers or political yard signs they have displayed

through the years, and they may be embarrassed by some of their previous associations and viewpoints. This Court should reject such a highly intrusive and irrelevant question.

10. *Outside of news sources, what web sites do you visit most often? Please be specific.*

Although the government does not object to inquiry into prospective jurors' sources of news, it objects to inquiry into the other websites that they visit. This inquiry calls for highly personal and potentially embarrassing information that is not "reasonably calculated to discover an actual and likely source of prejudice." *Robinson*, 475 F.2d at 381.

11. *What are the most frequently used apps on your smart phone? Please do not include preinstalled apps, such as the calculator or web browser.*

As with the previous question, this question calls for highly personal and potentially embarrassing information that is not "reasonably calculated to discover an actual and likely source of prejudice." *Robinson*, 475 F.2d at 381. As the Supreme Court has observed in a different context, mobile telephone apps reveal a "broad array of private information": "There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life." *Riley v. California*, 573 U.S. 373, 396-97 (2014). Where there is no other relevance to the case, prospective jurors should not be required to disclose this highly sensitive personal information.

12. *What magazines and periodicals do you read?*

The government objects that the proffered question calls for personal information that is not relevant to a prospective juror's fitness to serve on a jury and is not "reasonably calculated to discover an actual and likely source of prejudice." *Robinson*, 475 F.2d at 381. Moreover, to

the government's knowledge, there has been no reporting about the defendant's specific case in any magazine or periodical.

16. *What are your general impressions of the people who gathered in Washington, D.C. on Jan. 6 in support of then-President Trump?*

The government objects to this question because it is unlikely to produce helpful information. The criminal charges in this case are not based on simply "gather[ing]" in support of the former President. And the question is inherently speculative, calling for "general impressions" about a group of thousands of people.

17. *What are your general impressions of the people at the Capitol on Jan. 6 in support of then-President Trump?*

Do you believe that all of them shared similar intentions? YES NO

The government objects to this question, which calls for subjective "general impressions" of the people at the Capitol on January 6, 2021. It could be appropriate to ask, for example, whether prospective jurors had any strongly held opinions about those present at the Capitol on January 6 that would prevent them from being impartial jurors in a case involving charges arising from that event. But asking for "general impressions" about a group of more than 2,000 different people engaged in a wide variety of conduct is unlikely to yield answers that would be helpful in identifying disqualifying bias. *See, e.g.,* Exhibit 4 at 97:2-97:16 (excerpt from transcript of *voir dire* in *United States v. Thomas Webster*, 21-CR-208-APM) (court admonishing defense counsel for asking questions that "elicit[] a general sentiment . . . of what the personal generally thinks about the events of that day and, arguable, even the people that participated in that day," because this type of question "doesn't sort of hone in on what the legal principles are and what the presumptions are with respect to" the defendant and his rights). As the Supreme Court has observed, educated jurors often will have "formed some impression or opinion as to

the merits of [a] case” that is publicly reported, yet such impressions are not disqualifying so long as the juror “can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Irvin*, 366 U.S. at 722-23.

18. *Do you believe that all people present at the Capitol on January 6 in support of then-President Trump should have been charged with criminal offenses?* YES NO

The government objects to this question, which improperly asks prospective jurors to second-guess the government’s charging decisions and would require them to speculate about whether “all people present at the Capitol on January 6” were there in violation of any law.

19. *What is your general impression of those charged with offenses stemming from or relating to the January 6 events at the Capitol?*

The government objects to this question, which unhelpfully asks about “general impressions” of a group of more than 800 people who have been charged with a wide array of offenses. This question is unlikely to be helpful in identifying disqualifying bias. *See, e.g.*, Exhibit 4 at 97:2-97:16 (court admonishing defense counsel for asking questions that “elicit[] a general sentiment . . . of what the personal generally thinks about . . . the people that participated in that day” because such questions do not help identify disqualifying biases).

20. *Do you believe that those charged with offenses stemming from or relating to the January 6 events at the Capitol are likely guilty of the charges against them, or likely not guilty of the charges against them? Check all that apply, and please add what leads you to that conclusion.*

The government objects to this question. The question asks prospective jurors to speculate about the strength or weakness of a wide variety of criminal charges against more than 800 defendants charged in connection with January 6. A prospective juror’s speculation on that point is not relevant to his or her fitness to serve as an impartial juror. Moreover, many prospective jurors (in any jurisdiction) would answer “likely guilty,” based on the common-sense intuition that

people charged with crimes are likely to be guilty of them. But holding the view that people charged in connection with January 6 are “likely guilty” is not disqualifying so long as a prospective juror can set aside any preconceived ideas, apply the presumption of innocence, and judge the case based solely on the facts and the law.

21. *Would you use any of the following words to describe the actions of people who entered the Capitol on January 6 protest? Please check all that apply.*

Defending Freedom

Insurrection

Patriotism

Protest that went too far

Trying to overthrow the US government

Trying to overturn the election and keep Donald Trump in power

Invited to the Capitol by then-President Trump

Misled by then-President Trump

The government objects to this question. This question improperly asks prospective jurors to characterize those who entered the Capitol on January 6 using descriptions that are irrelevant both to the charges against the defendant and to determining bias. The defendant has not been charged with “[i]nsurrection” or with participating in a “[p]rotest that went too far,” for example. And whether he was motivated, for example, by “[p]atriotism” or by a desire to “overthrow the government” is irrelevant to his guilt on the trespass-related charges in this case. Nor would a prospective juror be disqualified to serve based simply on a belief that some “people who entered the Capitol on January 6” were trying to overturn the election or were misled by the former President. In short, this question is not designed to identify jurors who cannot be fair and impartial.

22. *Do you have a general impression of law enforcement, such as Metropolitan Police Department or the U.S. Capitol Police? YES NO*

If so, please describe your impression, and where you get that impression from.

The government objects to this question’s wording, which focuses on “general

impression[s]” of law enforcement agencies, rather than asking whether prospective jurors have negative impressions of those agencies which would make it difficult for them to be impartial jurors in a case involving testimony from those officers.

23. *Have you, or someone close to you, ever had a strong interaction, either positive or negative, with law enforcement?* YES NO
If so, please describe.

The government objects to this question’s wording because it fails to probe the critical issue of whether these positive or negative interactions would make it hard for the potential juror to be impartial. The government would propose adding the following clause to the end of the question: “which would make it difficult for you to be fair and impartial to either party in this case?”

24. *Do you have a general impression of how the prosecutors have been handling cases arising from the January 6 protest?* YES NO
If so, please describe your impression, and where you get that impression from.

The government objects to this question’s wording because it fails to probe the critical issue of whether these impressions would make it hard for the potential juror to be impartial. The government would instead recommend asking jurors: “Do you have any impressions or feelings, positive or negative, about how the Department of Justice has been handling the cases arising from the January 6 protest that would make it hard for you to be impartial?”

25. *Do you have a general impression of lawyers defending the people charged with crimes arising from the January 6 events at the Capitol?* YES NO
If so, please describe your impression, and where you get that impression from.

The government objects to this question’s wording because it fails to probe the critical issue of whether these impressions would make it hard for the potential juror to be impartial. The

government would instead recommend asking jurors: “Do you have any impressions or feelings, positive or negative, toward lawyers defending the people charged with crimes arising from the January 6 events at the Capitol that would make it hard for you to be impartial?”

31. *Do you believe that individuals involved with the Jan. 6 incident at the Capitol have been treated differently than individuals involved with other events, such as Black Lives Matter protests in 2020?*

YES NO

Why, or why not?

The government objects to the proffered question, which improperly asks prospective jurors to speculate about the government’s charging decisions and improperly suggests the possibility of selective prosecution. Furthermore, the question lacks relevant context, such as the fact that few Black Lives Matter protests involved intrusion onto federal lands or buildings like the events of January 6. This question is not “reasonably calculated to discover an actual and likely source of prejudice.” *Robinson*, 475 F.2d at 381.

37. *In the past 10 years, have you followed any court cases with interest? If so, what cases were they, and what interested you about those cases?*

The government objects to this question, which unnecessarily probes prospective jurors’ personal interests and news consumption without being “reasonably calculated to discover an actual and likely source of prejudice.” *Robinson*, 475 F.2d at 381.

WHEREFORE, the government files these objections to the defendant’s proposed jury questionnaire.

Respectfully submitted,

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
DC BAR NO. 481052

