

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

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DEFENDANT'S MOTION FOR A WRITTEN JURY QUESTIONNAIRE

The Defendant, Eric Sheppard, by and through his undersigned counsel, hereby moves this Honorable Court to grant the use of a proposed brief jury questionnaire (Exhibit A), unique to this case, for the following reasons:

The Government has charged the Defendant with Wire Fraud in obtaining loans through the SBA EIDL loan program and the Payment Protection Plan Act enacted by Congress in response to the pandemic. For a myriad of reasons, this topic has often been in the headlines and unfortunately is alleged to have been rampant particularly in South Florida. *See* Ryan Tracy, *Evidence of PPP Fraud Mounts, Officials Say*, THE WALL STREET JOURNAL (Nov. 8, 2020) (Exhibit B); Ken Dilanian and Laura Strickler, *'Biggest fraud in a generation': The looting of the Covid relief plan known as PPP*, NBC News (March 28, 2022) (Exhibit C). The headlines on PPP loan fraud have often shown those convicted of buying expensive cars and living lavishly with the PPP monies. *Id.* In fact, Mr. Sheppard has been the spotlight of several headlines. *See* Jay Weaver, *Prominent Florida developer got \$900,000 in pandemic loans. Feds charge him with fraud*, MIAMI HERALD (August 10, 2023) (Exhibit D); *South Florida U.S. Attorney's Office to Lead COVID-19 Fraud Strike Force Team Against Pandemic Relief Fraud*, UNITED STATES ATTORNEY'S OFFICE

SOUTHERN DISTRICT OF FLORIDA (September 15, 2022) (Exhibit E); Francisco Alvarado, *Feds slap Bal Harbour-based developer Eric Sheppard with PPP fraud indictment*, THE REAL DEAL (July 15, 2022) (Exhibit F).

This case, when it comes to trial, will fall under the wide umbrella the Government has opened regarding fraud and abuse of these loans—but, in this case, the allegations are not that the monies were misspent on such luxury. The pandemic created a chaotic crisis for our country on many levels. Unfortunately, many people consider the loans offered to be a political issue. These issues are better left outside of the courtroom, and candid responses about these loans can only be done, through the use of the brief jury questionnaire proposed, so that the potential juror feels free to candidly reply.

I. The Confluence of Pretrial Publicity and Heightened Risk of Prejudgment Necessitates a Written Jury Questionnaire

“The Constitution guarantees both criminal and civil litigants a right to an impartial jury” and “*voire dire* can be an essential means of protecting this right.” *Berthiaume v. Smith*, 875 F.3d 1354, 1358 (11th Cir. 2017) (citing *Warger v. Shauers*, 135 S. Ct. 521, 528-29 (2014)). “[J]ury selection falls ‘particularly within the province of the trial judge.’” *United States v. Tsarnaev*, 142 S.Ct. 1024, 1034 (2022) (quoting *Shilling v. United States*, 561 U.S. 358, 386 (2010)) “A trial court’s broad discretion in this area includes deciding what questions to ask prospective jurors.” *Id.* “[T]he district court’s duty is to conduct a thorough jury-selection process that allows the judge to evaluate whether each prospective juror is ‘to be believed when he says he has not formed an opinion about the case.’” *Id.* (quoting *Mu’Min*, 500 U.S. at 425). ***Voir dire* plays an important role in the jury selection process by allowing the Court and parties to uncover actual, implied, or inferred bias to ensure that juries are fair and impartial. It serves to protect the**

Constitutional right of a fair trial “by exposing possible biases, both known and unknown, on the part of potential jurors.” *McWhorter v. Comm'r, Alabama Dep't of Corr.*, 824 Fed. Appx. 773, 781 (11th Cir. 2020) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 849, 78 L.Ed.2d 663 (1984)) (emphasis added).

A case-specific juror questionnaire can help trial courts satisfy their duty to suss out juror partiality or bias created by media reporting. Most recently, in *Tsarnaev*, the Supreme Court approvingly recounted the trial judge's use of a questionnaire:

The questionnaire asked prospective jurors what media sources they followed, how much they consumed, whether they had ever commented on the bombings in letters, calls, or online posts, and, most pointedly, whether any of that information had caused the prospective juror to form an opinion about [the defendant's] guilt or punishment. The court then subjected those 256 prospective jurors to three weeks of individualized voir dire in which the court and both parties had the opportunity to ask additional questions and probe for bias. [Defense] attorneys asked several prospective jurors what they had heard, read, or seen about the case in the media. The District Court also provided emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.

Id. at 1035 (citations omitted). In *Skilling*, the Court similarly noted that the juror questionnaire “helped to identify prospective jurors excusable for cause and served as a springboard for further questions put to remaining members of the array.” 561 U.S. at 388.

A jury questionnaire is appropriate in this case to ensure that Mr. Sheppard's defense will seat jurors without learning and or exposing their bias' and prejudice. His case sits at the confluence of several forces that jeopardize his right to a fair trial: pretrial publicity, guilt-by-imagined-association within the political arena that Congress enacted the CARES Act, and therefore, there is a heightened risk of animus and prejudgment in the era of political division. Any one of these alone would likely warrant the enhanced procedural protections requested herein; the

presence of all three makes it necessary. As the Eleventh Circuit explained: “[w]ritten questionnaires are now a common complement to oral examination when selecting an effective and impartial jury. As the Second Circuit observed not too long ago, courts ‘routinely employ questionnaires to facilitate voir dire in a number of circumstances.’” *United States v. Isaacson*, 752 F.3d 1291, 1301 (11th Cir. 2014) (citing *United States v. Quinones*, 511 F.3d 289, 299 (2d Cir.2007) (italics omitted) (finding that written questionnaires can be used as part of the voir dire process noting “District courts routinely employ questionnaires to facilitate *voir dire* in a number of circumstances,” including “where there has been extensive pre-trial publicity.”).

For instance, in the high-profile securities fraud trial of Enron executive Jeffrey Skilling, the district court issued a 14-page questionnaire that included 77 questions asking prospective jurors about “their sources of news and exposure to Enron-related publicity, beliefs concerning Enron and what caused its collapse, opinions regarding the defendants and their possible guilt or innocence, and relationships to the company and to anyone affected by its demise.” *Skilling v. United States*, 561 U.S. 358, 371 (2010). The Supreme Court determined on appeal that the extensive screening questionnaire and follow-up *voir dire* overcame a presumption of juror prejudice based on pretrial publicity or widespread community impact of the company’s bankruptcy. *See id.* at 384. *Skilling* also instructed lower courts on the proper procedure in the event a questionnaire response necessitates further inquiry. Such follow-up *voir dire* should be individualized and outside the presence of the other jurors, “thus preventing the spread of any prejudicial information to other venire members.” 561 U.S. at 389.

The protocol endorsed in *Skilling* and requested by Mr. Sheppard, a written jury questionnaire, is essential in this case. It will decrease the likelihood of seating a juror who has been tainted by the highly prejudicial portrayals of people who have been granted these loans.

Further, these procedural protections are warranted when, as here, the case touches on issues likely to unfairly incite animus and prejudgment against a party.

In addition to guarding against prejudice, a written jury questionnaire will decrease the Court time necessary to complete the jury selection process and will facilitate the gathering of important, candid, and relevant information necessary to afford the parties a fair trial. Using a written questionnaire is more efficient than oral examination alone in highly-publicized cases. *United States v. Isaacson*, 752 F.3d 1291, 1301 (11th Cir. 2014) (noting that courts routinely employ questionnaires to facilitate voir dire in a number of circumstances). That is because administering a questionnaire decreases the time necessary to complete the jury selection process because it can be completed without the supervision of the court, and the parties can use the responses to pinpoint areas requiring follow-up inquiry. *See* Barbra Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power”*, 27 STAN. L. REV. 545, 563-64 & n. 70 (1975) (“A sworn questionnaire . . . might gather from jurors answers to basic questions about themselves with face-to-face inquiry reduced to certain key issues on which the reactions of the individual and observation of her or his manner are important . . . An unintrusive yet thorough questionnaire would be more revealing and would concomitantly reduce the need for extended questioning . . . Face-to-face questioning would then be reserved for the issues on which probing is necessary, such as prejudice against the litigant or bias arising from the facts of the particular case.”); *see also* Hon. Barbara M.G. Lynn (N.D. Tex.), *From the Bench: A Case for Jury Questionnaires*, 33 LITIGATION MAGAZINE No. 4 (Summer 2007) ([q]uestionnaires provided “more information in a faster and more organized way than could be gathered in a reasonable amount of time by questioning in court.)

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant this Motion for a Written Jury Questionnaire, specifically, for the Jury Questionnaire attached to this Motion as Exhibit A.

Moreover, it is respectfully requested that the jurors be brought to the courthouse early Tuesday morning, September 26, to fill out the questionnaires. Counsel for the defense requests to be able to pick them up at the courthouse by midday¹ so that they can be reviewed in a meaningful way and be ready to commence with Voir Dire on Wednesday, September 27.

MEET AND CONFER CERTIFICATION

The defense conferred with the Government who oppose the questionnaire but not the proposed questions.

Dated: September 15, 2023

Respectfully submitted,

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¹ Undersigned counsel intends to ask the court to begin trial on September 27 as September 25 is a Holy day for the defense team, and involves a 24 hour fast. It will be a hardship to begin trial the very next morning without having a day, physically and mentally to reset -- especially to begin trial with a person's liberty at stake.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2023 the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ Jayne C. Weintraub
Jayne C. Weintraub