

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

Frank M. Alvarez,

Appellant,

}
} case no: ^{4:}10-00320-16-CR-W-DGK
}
}

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**U.S. COURT OF APPEALS
EIGHTH CIRCUIT**

MOTION TO APPEAL DISTRICT COURTS RULING

Comes now defendant, Frank M. Alvarez, pro se, pursuant to Federal Rules of Appellate Procedure, Rule 4, hereby moving this court to grant this motion of appeal.

As appellate argument, the defendant offers: District Judge Greg Kays in plain error denied defendant Frank M. Alvarez motion of appeal (Doc.349)

ASSERTABLE ARGUMENT

1) It is Alvarez's assertion that district judge Greg Kays in plain error denied his motion of appeal to inspect jury records and to quash jury panel.

As statutorily provisioned by § 1867(a) of title 28 U.S.C. of chapter 121, and the sixth Amendment of the U.S. Constitution, Alvarez has the right(s) to challenge the grand jury array and individual jurors prior to the seating of the grand jury: In criminal cases, before voir dire begins, or with seven days after the defendant is discovered... the grounds therefor, whichever is earlier... the defendant may move to dismiss the indictment... on substantial failure to comply with the selection provisions of this title in selection provisions of this title in selecting the grand jury.

(1)

This right was deprived the defendant before the jury was impaneled. HE now seeks to exercise this right. His allegation(s) is that members of identifiable class may have been excluded from jury service and those members being Mexican Americans.

On the date of October 5th, 2011 defendant Alvarez received an order from the the honorable Chief magistrate Judge Robert E. Larson denying and striking from record a pervious motion filed by the defendant to inspect and quash jury impanelment, filed September of 2011. Defendant Alvarez then appealed Judge Robert E. larsons order to the district court, which was also denied by Honorable judge Greg Kays.

These oreders are in direct violation of Alvarez' right(s) to do process and equal protection of the laws pursuant to Title 42 U.S.C § 1983, as Federal Rules of Criminal Procedures, Rules 6(b), and Title 28 U.S.C. §§1867(a)et seq., which affords for a defendant in a criminal case the opprotunity to challenge by motion the methods by which a grand jury and/or petit jury was selected. See Text v.U.S., 420 U.S. 28, 95 S.ct. 749 ststing that ... an unquaified right to inspection of jury lists in connection with preparation and presentation of a motion challenging jury selection procedures was required not only by the plain text of the Jury Selection and Service Act but also by the statute's overall purpose of insuring "grand and petit juriesslected at random from a fair cross section of the community." 28 U.S.C. §§ 1861 et seq., 1867(f).

The Chief Magistrate's decision to deprive defendent Alvarez of this statutory and constitutional right based on his presumption that defendant's time for filing pretrial motions has expired,

arbitrarily negates the statutes of the Jury Selection and Service Act, and the Fifth Amendments's requirements of due process.

In the plain language of § 1867(f), Mr. Alvarez has an unqualified right to (2) two things: (1) an unqualified right to the inspection of the jury list and, (2) an unqualified right to challenge by motion the methods by which the jury impaneled.

This Circuit Court in U.S. V. Alden, 776 f. 2d 771 (C.A.8(mo.)1985) followed the precedent set by the text court finding that "To avail himself of right of access to otherwise unpublic records, criminal defendant need only allege that he is preparing motion challenging jury selection procedurs; defendant's motion may not be deined because it is unsupported by sworn statement of facts which, if true, would constitute substantial failure to comply with provisions of Jury Selection Act, nor may motion to inspect be denied because defendant failed to allege facts which show probability of merit proposed jury challenge.' 28 U.S.C §§1861 et seq., 1867 (f).

This cort is not free to establish additional requirements that defendants must meet in order to gian access to jury selection records. The Supreme Court has unequivically stated that the right to inspect these records is "essentially unqualified" and is conditioned only in the manner set forth in the statute. Test V. United States, 420 U.S. at 30, 95 S.Ct.at 750.

Title 28U.S.C. § 2072(b) specifically prohibits this District Court from abridging or enlargeing rights provided to the defendant.

The ruling made by Chief Magistrate Larson and District judge Greg Kays is designed to do just that. As this is so, and all supporting statute and ruling case law piont toward support of defendant Alvarez'

contention that the Order issued denying him access to grand jury lists is illegal in violation of the Fifth and Fourteenth Amendments, this Court must issue Order overruling Magistrate Larson's and Judge Greg Kay's decision denying defendant's motion to inspect and quash the grand jury impanelment.

In further support of his appellate claims, Alvarez list that: the Jury Selection and Service Act provides him an undeniable access to the grand jury records he seeking, and that Magistrate Larsen or Greg Kays has no legal authority to deprive defendant of his constitutional and statutory rights to challenge the methods by which the jury was selected. If given access to these lists, he will prove that there has been an illegal and systematic exclusion of Mexican-Americans, and African-Americans from the grand jury service. Therefore, pursuant to 28 U.S.C. §§ 636 (b)(1)(A), and Civil Procedures Rule 70, this Court must overrule the Recommendation and orders of Magistrate Larsen and District judge Greg Kays, and grant defendant Alvarez' appeal in this matter.

CERTIFICATE OF SERVICE

It is hereby certified that one copy of this motion has been filed and mailed to United States Assistant Attorney Bruce Rhoades, pursuant to F.R.Crim.P., Rules 49(a),(b).and (d), and F.R.Civ.P., Rules 5(b), at 400 East Ninth Street, Kansas city, Missouri, 64106 this 9th, date of November, 2011.

Respectfully submitted,
Frank M. Alvarez, pro se
100 Highway Terrace, (CCA)
Leavenworth, Kansas 66048

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Frank Alvarez