Ryan Bundy, *Pro Se*
Inmate: Swis#795070
Multnomah County Detention Center
11540 NE Inverness Drive
Portland, OR 97220
Telephone: (503) 988-3689
Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

United States of America, *Plaintiff*, v. Ryan Bundy, *Defendant*.	Case No. 3:16-cr-00051-BR DEFENDANT RYAN BUNDY'S MOTION (AND INCORPORATED MEMORANDUM OF LAW AND AUTHORITY) TO INSPECT GRAND JURY MINUTES, ROLLS, MASTER WHEEL, AND ALL RECORDS OF THE GRAND JURY SELECTION PROCESS Judge: Hon. Anna J. Brown

CERTIFICATE OF CONFERRAL: Prior to the filing of this motion standby counsel Lisa J. Ludwig, on behalf of *pro se* Defendant Ryan Bundy, conferred with AUSA Geoffrey Barrow. The government's position is that this motion relates to Discovery and is more appropriately considered in round two of the motions schedule.

MOTION

Defendant Ryan Bundy, *pro se*, respectfully moves the court (and where necessary directs this motion to the Chief Judge) for an order, pursuant to 28 U.S.C. § 1867(f) and 28 U.S.C. § 1868 and other authority cited herein below, allowing him or his authorized agent to inspect the grand jury minutes, rolls, master wheel, and all other

records of the grand jury selection process in this case. Whereas the local jury management plan appears to require requests to the Chief Judge, Mr. Bundy further moves the court to apprise the Chief Judge of this motion.

GROUNDS FOR REQUESTED RELIEF

The Jury Selection and Service Act, at 28 U.S.C. § 1867(f) and 28 U.S.C. § 1868, permits an inspection of records in the possession of the clerk. Pursuant thereto all parties in a case have an unqualified right to inspect the jury list at all reasonable times during the preparation of a challenge to jury selection procedures. *Test v. United States*, 420 U.S. 28 (1975); *United States v. Beaty*, 465 F.2d 1376, 1381-82 (9th Cir. 1972); 28 U.S.C. Section 1867(f). In *United States v. Beaty*, 465 F.2d 1376 (9th Circuit 1972), the Court of Appeals held that even a prison escapee who hijacked a car and led authorities on a high-speed interstate flight had a right to inspect jury selection records, even while representing himself *pro se*:

> The trial court was in error. The statutes clearly mean what they state. Appellant or his attorney or investigator, as the court might direct depending upon the circumstances, was entitled to inspect the old records from the master jury wheel under § 1868 and the "contents of records or papers used by the jury commission or clerk in connection with the jury selection process . . .", under § 1867(f).

Beaty at 1381.

The U.S. District of Oregon's approved Jury Plan provides, at Section 4.11, provides that disclosure of grand juror information will be provided upon motion directed to the Chief Judge, setting forth grounds as to "why disclosure should be allowed." This inspection is necessary for the preparation of a challenge to the indictment based upon failure to comply with the Jury Selection and Service Act and applicable federal law. Upon information and belief, an inspection of the grand jury selection records will reveal

that the grand jury in this case was disproportionately, or wholly drawn, from the Portland jury division of the District. This information is belief is buttressed by the court's recent statements.

> [T]he underlying events took place in Malheur County in January and February of this year…the Court notes the September 7, 2016, trial is set to take place in Portland, Oregon, which is geographically quite remote from the community in which the underlying event took place.

Dkt. No. 389, at p. 7.

This statement, constituting effective judicial notice by the court, is consistent with the concerns of Mr. Bundy in this matter. Common law, constitutional law, Framers' intent, and the intent of Congress as laid out in the Jury Selection and Service Act, all require that no indictment should issue from a grand jury that was not drawn from an area that includes the alleged location of the alleged offense. Thus, while the court's comments were regarding upcoming jury selection prior to trial, the observation that "Portland, Oregon is quite remote from the community in which the underlying event took place" is relevant and sufficient to call into question whether the grand jury was properly drawn.

Additionally, upon information and belief, an inspection will reveal that, over time, the government has increasingly consolidated its prosecutions in the Portland Courthouse among the largest urban center of the District, where the Government holds an advantage and where defendants accused of offenses in eastern Oregon face a distinct disadvantage. Defendants accused of federal offenses in eastern Oregon but indicted by a grand jury sitting in Portland are denied their constitutional rights under the Fifth Amendment and their statutory right under the JSSA to have their alleged offenses evaluated by grand jurors from the vicinage of the alleged offense. This improper empaneling of grand jurors violated (1) the Fifth Amendment Grand Jury Clause which

requires that all "infamous" (i.e., felony) crimes be referred by lawful grand jury, (2) the Fifth Amendment Due Process Clause, (3) the Fifth Amendment Equal Protection Clause, which requires that every citizen must have an equal chance of being summoned for grand jury service, and (4) the Jury Selection and Service Act.

I. Longstanding Legal Precedent Requires That Jurors Be Drawn From The Area Of The Alleged Crime.

Fundamental standards of fairness underlying the legal foundation of jury selection require that indictments may be issued only by grand jurors drawn from the vicinage of the alleged offense. *See* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U.L. Rev. 1658. Engel, at pages 1677 through 1680, which ably recites the fundamental authorities on the question. "The legal commentators with whom the American Founders were most familiar - writers such as Coke, Hale, and Blackstone - recognized that the vicinage presumption inhered in the very nature of the jury." *Id*. at 1679. "Because trial by jury was defined as trial by a body drawn from the community that had suffered the crime," according to Engel, "the early legal commentators recognized the vicinage as an essential requirement for jurors." *Id.* At 1677. Edward Coke wrote that, by law, a juror had to have three qualities, the first of which was that "he ought to be dwelling most neere to the place where the question is moved." *Id.* In the early eighteenth century, Matthew Hale likewise wrote that the jury must "be of the Neighbourhood of the Fact to be inquired, or at least of the County or Bailiwick."

Indeed, Lord Coke wrote that it would cause a mistrial for trial jurors to pronounce a verdict on matters outside of their community. 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* 125 ("For if there be a mistryall, (that is) if

the jury commeth out of a wrong place... and give a verdict, judgement ought not to be given upon such a verdict."). *See also* F.W. Maitland, *The Constitutional History of England: A Course of Lectures Delivered* 122 (1926) (stating that "the germ of trial by jury" was for English judges to summon neighbors from area of crime).

II. THE CONSTITUTION REQUIRES THAT INDICTMENTS MAY BE ISSUED ONLY BY GRAND JURIES DRAWN FROM AN AREA THAT INCLUDES THE LOCATION OF THE ALLEGED CRIME.

Scholars of constitutional history universally document that the Framers of the Constitution intended that grand and petit juries must be drawn from an area that includes the location of an alleged offense. *See* Engel, *supra*, as well as Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. 197, 205; Drew Kershen, *Vicinage* (pts. 1 & 2), 29 Okla. L. Rev. 803 (1976), 30 Okla. L. Rev. 1 (1977); Akhil Reed Amar, *The Bill of Rights* 105-07 (1999); Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 123-24 (1997); Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 13-34 (1951) (describing origins of jury right in colonial America); William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 63-66 (1944).

Moreover, the Supreme Court has often recognized that the jury provisions of the Constitution must be construed in accordance with the English common law which the Framers were all familiar with. See *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980).

Congress repeatedly expressed its intent, over a period of a hundred years, that trials shall be held in the divisions in which crimes are committed.[1] But in the mid-1960s, high-flying defense lawyers such as F. Lee Bailey perfected motions for removal of cases to distant locations on grounds of pre-trial publicity. The ancient constitutional and common law foundations for juries and grand juries drawn from the vicinages of alleged offenses were loosened. In 1966, Congress amended the statutes and replaced the statutory vicinage requirement with Rule 18 of the Federal Rules of Criminal Procedure, leaving it to the discretion of the court to fix the place of trial within the District according to a balancing of interests of the parties.

THE FEDERAL CASE LAW

Despite the clarity of common law, constitutional history and legal scholarship, there is disagreement among some Circuit courts regarding whether a grand jury in one division of a district may indict people in another division for alleged offenses allegedly arising in that other division. The case law on the issue is slender,[2] but at least two

---

[1] "And all prosecutions in either of said districts for offenses against the laws of the United States shall be tried in that division of the district to which process for the county in which said offenses are committed is by said section required to be returned." Act of June 14, 1880, c. 213, 21 Stat. 198. See also Act of August 13, 1888, c. 869, 25 Stat. 438. The Judicial Code of 1911 provided: "All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed. . . ." Act of March 3, 1911, c. 231, § 53, 36 Stat. 1087.14 See Rosencrans v. United States, 165 U.S. 257, 17 S. Ct. 302, 41 L. Ed. 708 (1897); Post v. United States, 161 U.S. 583, 16 S. Ct. 611, 40 L. Ed. 816 (1896); *Dupoint v. United States*, 388 F.2d 39 (5th Cir. 1967).

[2] Courts have repeatedly held that there is no constitutional right to a jury drawn from an entire judicial district. Ruthenberg v. United States, 245 U.S. 480, 482 (1918) (a petit jury may be drawn constitutionally from only one division rather than the whole district); Zicarelli v. Dietz, 633 F.2d 312, 316-18 (3d. Cir. 1980) (no constitutional right to a jury chosen from the entire district despite demographic differences between divisions). United States v. Young, 618 F.2d 1281, 1287-88 (8th Cir. 1980) (no constitutional right to a jury drawn from an entire district despite differences in the ratio of urban to rural jurors in the district's divisions).

circuits have upheld such indictments, see *United States v. Joyner*, 494 F.2d 501 (5th Cir. 1974), *cert den*, 419 U.S. 995 (1974) (finding that the JSSA does not require that grand juries be selected from the same community from which petit juries are drawn); *United States v. Cates*, 485 F.2d 26 (1st Cir. 1974) (finding no requirement that grand jurors must come from the same division where offense was committed).

The Fifth Circuit, in *United States v. Grayson*, 416 F.2d 1073 1076 (5th Cir. 1969), defied constitutional law and history by proclaiming that Grayson's argument that indictments must be issued by grand jurors drawn from the vicinage of the crime "does not find support in the decided cases, in view of the widely differing functions of grand and petit juries. The right to be tried before a jury from the vicinage is not impinged upon in the slightest by a finding of probable cause by an otherwise duly and legally constituted grand jury in another division of the same judicial district."

The Ninth Circuit has weighed into the question only tangentially. In *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983), Native American defendants sought to be tried in a division of the U.S. District of Arizona with a higher percentage of native Americans (but where neither the defendants, the attorneys nor the witnesses lived and where the offense did not occur). The *Herbert* Court upheld the venue and vicinage of trial where the offense occurred. *Id*., cert den (1983) 464 US 821 (1983).

In *United States v Edwards*, 465 F2d 943 (9th Cir. 1972), the Ninth Circuit was confronted with a situation where citizens of Oakland and Eureka were being systematically deprived of jury service as the District's prosecutions all commenced in San Francisco. But the Circuit dismissed Edwards' challenge by arguing that the result was unintentional. "If the district court had known in advance that the interaction of the

[Jury] Plan and pertinent Local Rules . . . would result in no trials being held in the Oakland or Eureka divisions, perhaps reversal would be appropriate."[3] Most significantly, however, defendant Edwards did not request a trial in either the Eureka or Oakland divisions; the offense occurred in San Francisco where he was tried.

By contrast, Defendants in the instant case were taken hundreds of miles from the location of the alleged offense and (upon information and belief) indicted by a grand jury drawn from a hostile division that did not include jurors drawn from an area that includes the scene of the alleged offense.

Moreover, the difference in jury pools between eastern Oregon and Portland are much starker than any differences between jury pools among San Francisco, Eureka and Oakland. Eastern Oregonians are culturally, ethnically, politically, and racially different from the population of the Portland jury division.

Eastern Oregon, where the alleged events of this case allegedly occurred, is overwhelmingly politically conservative, suspicious of expansive government and supportive of the right to keep and bear arms. Western Oregon, from where the grand jury in this case was apparently mostly or wholly drawn, is overwhelmingly politically liberal, grateful for federal management of public lands, and somewhat contemptuous of the right to keep and bear arms. *See Oregon Politics and Government: Progressives Versus Conservative Populists* edited by Richard A. Clucas, Mark Henkels, Brent Steel 61 (2005) ("Democratic candidates usually dominate Portland . . . . Republicans win

[3] The Edwards Court deliberately declined to address the vicinage question: "Any such intentional deprivation of the opportunity of citizens in the Oakland and Eureka divisions to be considered for jury service might deny equal protection to those citizens. However, we need not decide that question here."

most elections in southern or eastern Oregon"); Ralph Friedman, *The Other Side of Oregon* (1993) (detailing numerous cultural differences between western Oregonians and eastern Oregonians); Sandra Bao *Washington, Oregon and the Pacific Northwest* 43 (2010) ("In rural parts of eastern Oregon and Washington, the personality of the Old West is still very much alive. The region is "full of hunters" who value gun ownership).

ACCORDINGLY, Defendant asks for access and permission to view, photocopy and record all records of the grand jury selection process in this case.

Respectfully submitted this 27h day of April, 2016.

/s/ Ryan Bundy*
Pro Se Defendant

**Filed on behalf of Mr. Bundy by standby counsel Lisa J. Ludwig, OSB #953387*