Spring 2011

Secret Justice:

Access to Juror Questionnaires

39. Are you a fan of professional baseball? ( ) Yes ( ) No

40. Have you attended a professional baseball game in the past five years? ( ) Yes ( ) No

IF YES, how many games have you attended in the past five years? _____

41. Have you attended a San Francisco Giants' game in the past five years? ( ) Yes ( ) No

IF YES, how many games have you attended in the past five years? _____

42. Have you heard, read or seen anything about other cases concerning accusations of steroid use by athletes?

( ) Yes ( ) No

IF YES, please explain: _____

43. Are you familiar with recent investigation an
Co-Operative's (BALCO) involvement with st

( ) Yes ( ) No

IF YES, please describe what have you seen, r

By Rachel Costello; additional reporting by Derek D. Green

A criminal defendant's right to be tried by an "impartial jury" requires a process for choosing an impartial jury. The jury selection process has traditionally been open to the public. But the use of written juror questionnaires by courts raises questions about the public's continuing ability to monitor this important aspect of criminal proceedings.

continued on next page

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Secret Justice:
A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection.

Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of "the people" for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a "class" of persons similarly situated. The public, therefore, should be informed — well informed — about trials of public interest. The media, as the public's representative, need to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We examine trends toward court secrecy, and what can be done to challenge it.

For the complete series of "Secret Justice" publications, visit www.rcfp.org/readingroom.

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Research for this guide was conducted by Reporters Committee legal intern Rachel Costello and 2010-2011 McCormick Foundation Legal Fellow Derek D. Green. Publication was funded by a grant from the McCormick Foundation.

How the issue arises

A recent high-profile case in Washington, D.C., illustrates the concern over jury questionnaires. Jury selection for the trial of Ingmar Guandique, a Salvadoran man accused of killing U.S. government intern Chandra Levy, began on Oct. 18, 2010, in the District of Columbia Superior Court. As part of the juror selection process, known as *voir dire*, prospective jurors completed an 11-page, 55-question form.

The questionnaire asked potential jurors for standard demographic information as well as case-specific information, including knowledge about the case, familiarity with the crime area, and views on gangs and illegal immigration. Counsel for both parties used the completed questionnaires to examine the jury pool during the *voir dire* process.

After the trial began, *The Washington Post* requested access to the questionnaires that were completed by the 16 selected jurors and alternates for the case. The *Post*'s request was denied through a public affairs officer for the court.

As the trial continued, the *Post*, the Associated Press, Gannett Co. Inc. and The Reporters Committee for Freedom of the Press filed a joint motion asking the Superior Court to grant public access to the completed questionnaires. The organizations argued that the First Amendment and common law provide for the public's right of access to criminal proceedings and related court records.

The organizations further argued that access to the questionnaires would not have a negative effect on trial proceedings or participants, saying that there had been "no demonstration of any compelling and overriding interest that would warrant delaying or blocking access by the public and the press to at least the bulk of these materials."

During a break in the trial, Judge Gerald I. Fisher said that, without the secrecy of the questionnaires, the court would not be able to "get full candor from the jury, and that was the overriding concern." Fisher said he wanted to wait until the trial resumed before releasing anything because he had promised the jury their information would not be disclosed, and he wanted "to ask them about that."

After meeting privately with the jurors, the court released each juror's age, gender, education level and profession.

The media organizations filed a request for a formal, on-the-record finding explaining the reasoning for the court's denial of access to the remaining questionnaire information.

According to court papers, a full hearing on the media's motion was not held until after the jury returned a guilty verdict against Guandique and some members of the jury made themselves available to the press to discuss the case.

Fisher ruled that he would not publicly disclose the completed questionnaires, holding firmly to the justification that the jurors had expressed concerns about their privacy and that "people were going to try to talk to them and intrude upon their private or their working lives." Additionally, Fisher said public access to questionnaires would create a risk of "unfairness during the trial itself."

The *Post* has appealed this ruling, maintaining that "written juror questionnaires are an essential part of *voir dire* proceedings, and the public has a presumptive right of access to them under the First Amendment and the common law." The appeal is currently pending in the D.C. Court of Appeals.

The right to attend jury selection

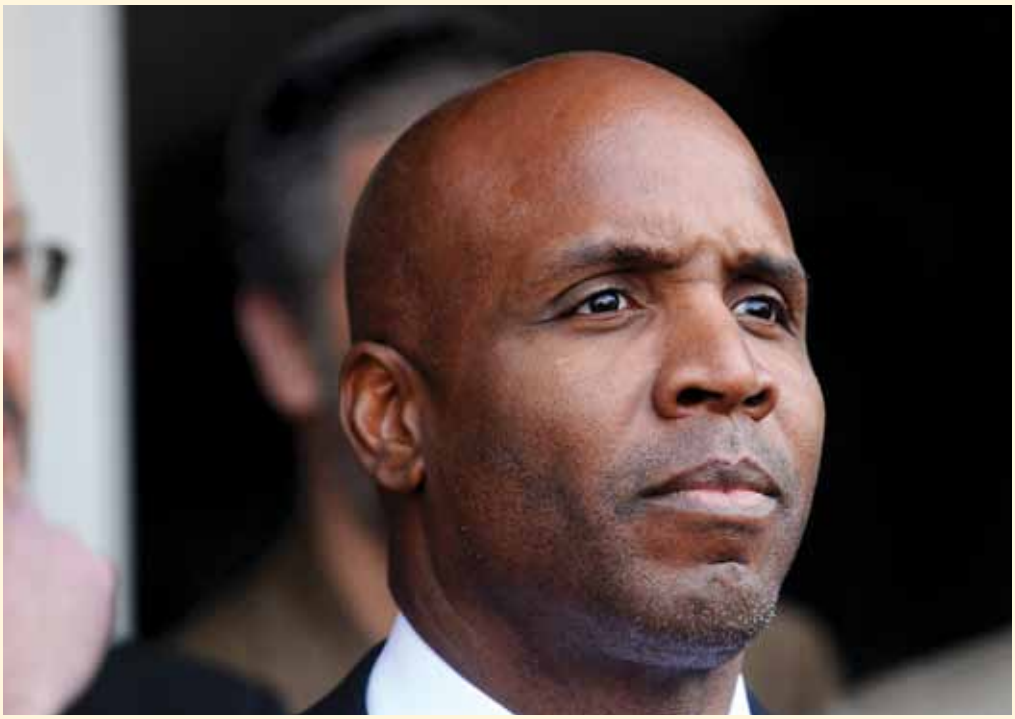
The Supreme Court affirmed the presumption of access to *voir dire* in the 1984 case *Press-Enterprise Co. v. Superior Court*. Commonly referred to as "*Press-Enterprise I*," the case involved a California court's decision to close all but three days of a six-week *voir dire* process in a high-profile murder prosecution. The judge also refused to release a transcript of the *voir dire* after the jury was selected. The defense and the government supported restricting access out of concern for juror privacy and the defendant's Sixth Amendment right to a fair trial.

The U.S. Supreme Court ruled the closure unconstitutional, noting that *voir dire* has traditionally been an open and public process since prior to the United States' independence from England. Explaining the benefit of such open proceedings, the Court said: "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed." The Court added: "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."

Although the Court clearly identified a First Amendment right of access to the *voir dire* proceeding, the Court cautioned that the right is not absolute. Rather, it created a presumption of openness, which "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." This interest must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Trial courts considering whether to close a proceeding must consider

all alternatives prior to closure and must make a record of the proceeding for possible appellate review, the Court said.

Anticipating concerns about juror privacy and embarrassment, the *Press-Enterprise I* Court also outlined steps for trial courts to reduce such concerns. The Court said a trial judge should notify prospective jurors that, if they feel public questioning is embarrassing, they can ask for an opportunity to discuss the problem outside of public view with the judge. Counsel and a court reporter must be present for these meetings.



Not all questionnaires are equal

The Supreme Court has not addressed how juror questionnaires affect the public's right of access to jury selection. But the answer may vary depending on how the juror questionnaires are used.

Some courts use questionnaires primarily for qualification purposes in order to help determine whether potential jurors are eligible and available to serve. Many courts send these "qualification questionnaires" out to potential jurors before issuing summons for jury duty. David A. Schulz, a media attorney at Levine Sullivan Koch & Schulz LLP in New York, described how "every district in the federal court is required to have a jury plan for selection of jurors. Some of that includes doing preliminary screenings, where you send something out to people by mail to see where they live."

For example, the website for the U.S. District Court covering Seattle (Western District of Washington) says: "[I]f you recently received a Juror Qualification Questionnaire from the U.S. District Court, you are being considered for jury service. However, this is NOT a summons for jury service, therefore, you are not being called to report at this time."

The website says the court uses these jury qualification questionnaires to obtain information about the potential juror so the court can objectively determine whether he or she is qualified to serve. The questions on such forms often seek to uncover whether the juror is a citizen of the U.S., of legal age and a resident of the county in state courts or resident of the district in federal courts. Depending on the jurisdiction, the questionnaires may also ask whether the juror can read and understand English or if there is any physical or mental impairment that may interfere with their ability to serve.

The information on juror qualification questionnaires is typically used by court clerks' offices to determine if a potential juror is qualified for jury duty. According to Schulz, these types of questionnaires are generally considered "administrative documents," and are typically not available to the press or the public. The lack of access to these documents has "never been a problem," Schulz noted.

Sometimes courts ask prospective jurors to fill out questionnaires as a substitute for asking questions in open court. Occasionally such questionnaires are sent along with jurors' summons for service, and are completed and returned by mail. Florida's criminal court rules provide that the court clerk must make the questionnaires available to the parties for use during *voir dire*, upon request. Alternatively, the mailed questionnaires can be created for a particular case and mailed prior to beginning the in-court juror selection process.

Questionnaires may also be administered while potential jurors assemble for a particular case, but prior to being placed on an actual trial venire, the panel from which a jury is selected. Colorado law requires that questionnaires be distributed to jurors "on or before the first day of the term of trial." Absent court order, the completed questionnaires are provided to the trial judges and counsel for use during the jury selection.

Alternatively, questionnaires can be distributed to potential jurors after the jury panel is created for a specific trial, but before in-court questioning begins. In each of these instances, copies of the completed questionnaires are typically distributed to the parties and the judge.

Schulz emphasized that these more detailed types of questionnaires are "absolutely" part of *voir dire* and thus presumptively open to the public. George Freeman, assistant general counsel of The New York Times Co. and co-chair of the American Bar Association Section of Litigation's First Amendment and Media Litigation Committee, said he agrees. "They really are no different than the former way of asking questions in open court of a particular juror where everyone can listen," and, therefore, should be open to the public, Freeman said.

Such questionnaires have traditionally been used primarily in high profile cases like the criminal prosecutions of Kobe Bryant, Michael Jackson and O.J. Simpson. Attorneys and judges face the high probability that potential jurors have already encountered information about these cases, and may have formulated biases and prejudices prior to setting foot into a courtroom.

In such cases, juror questionnaires can help expedite the selection process. As Schulz explained, "where you have to call a lot of jurors in and there is going to be a significant number who for one reason or another need to be dismissed for cause, a questionnaire is an effective way of screening the pool."

The use of juror questionnaires has expanded into less publicized cases as well. Jury selection can be a time-consuming enterprise for trial courts and litigants who are, therefore, under increasing pressure, due to calendar congestion, to speed up all aspects of the trial. In hopes of "trying to make jury selection more efficient and find ways to minimize the time and effort spent sitting around the court room," courts have begun using juror questionnaires, Schulz noted.

Montana's Uniform District Court Rules

reinforce this point, saying completed questionnaires "should be used so as to expedite the examination of jurors."

"There is no hidden agenda here," Freeman said, regarding the appeal of questionnaires to courts. "It is just a matter that you can get more information more quickly by having [potential jurors] fill out a form than by asking jurors individual questions. It's really more a matter of efficiency than anything else."

Although juror questionnaires are available for use, S. Douglas Dodd, a media and communications law attorney in Tulsa, Okla., said "ordinarily it does not supplant or replace standard *voir dire* questioning, it just shortens it."

Questionnaires may also be a more effective way of eliciting honest responses. Jack Daniels, a trial attorney in Los Angeles, said questionnaires eliminate "peer group pressure." Instead of feeling pressure to answer in conformity with one's neighbor, potential jurors will be "much more forthcoming when they can answer the questions in writing," he said.

Access to questionnaires varies

Jurisdictions vary on whether completed juror questionnaires are considered open records that are available for public inspection.

Oklahoma is one of several states that allows juror questionnaires to be used by parties during *voir dire*, while prohibiting public access. "Access to the questionnaires *by the parties* must be balanced against the juror's right to privacy and to the confidentiality of the information in the questionnaires," according to Oklahoma's court rules (emphasis added).

The Oklahoma rule contains no provision for balancing the public's interest; the rule expressly provides that the questionnaires shall not be made part of the public record, with all but the original questionnaires of the impaneled jurors destroyed at the conclusion of the juror's service. Even the originals of the impanelled jurors are to be destroyed after the completion of any appeal.

Likewise, Connecticut law requires counsel to return copies of completed juror questionnaires to the clerk upon completion of *voir dire*. The law also says the completed questionnaires, which include personal identifying information, demographic information and other "information usually raised in voir dire examinations," are not to be considered public records. Information written by jurors is to be held in confidence by the court, parties, counsel and their authorized agents, except for disclosures made during *voir dire* or under a court order.

Laws and rules in other states allow public disclosure of some information in a questionnaire, but require the requestor to explain the need for the information. New Mexico makes questionnaires "available for inspection and copying by a party to a pending proceeding or their attorney or to any person having good cause for access to the list and the questionnaires."

Similarly, Minnesota law provides that names and answers to questionnaires, with some exceptions, "must be made available to the public" upon request. However, the state requires that the request must be "supported by affidavit setting forth the reasons for the request." Minnesota courts can also decline to disclose or can place limits on the disclosure of the information based on safety and impartiality concerns, or in the "interest of justice."

Other states have no formal statute or written rule regarding whether juror questionnaires are publicly accessible. Utah is one such state. Jeffrey J. Hunt, a media lawyer in Salt Lake City, said Utah courts generally follow a presumption that, after juror questionnaire information is requested, the media and public are allowed access to it, with sensitive information such as social security numbers and addresses redacted.

"Generally speaking, both in state and federal court, jury questionnaires are released, but typically in redacted form," said Hunt, who focuses in commercial litigation, with an emphasis on First Amendment, media and intellectual property law. "[T]here is no rule that I'm aware of that governs it [in Utah], no case law. It is just what the practice has been," he said.

Hunt said that, in his experience, when the media wants access to juror questionnaires, they assert that the questionnaires are part of *voir dire*. Tying the questionnaires to *voir dire* is the "constitutional linchpin for arguing that there is a First Amendment right of access to them. The Supreme Court has made clear that in juror voir dire in a criminal case, there is a qualified first amendment right of access that attaches and this is part of that process."

Some published court opinions have taken this approach, including the Ohio Supreme Court in *Beacon Journal Publishing Co. v. Bond*, the New Mexico Supreme Court in *Stephens Media, LLC v. Eighth Judicial District Court*, and California appellate courts in *Bellas v. Superior Court* and *Lesher Communications, Inc. v. Superior Court*. But as the varying jurisdictional practices and rules reflect, there is no uniform agreement on the public's access rights when it comes to questionnaires.

The Bonds court's analysis

Because the Supreme Court has not resolved the tension between confidential juror questionnaires and open access to jury selection, lower courts are left to decide how to address the issue. A federal court's approach in the recent trial proceedings in the case of *United States v. Barry Bonds* provides one possible framework. The approach follows the example of earlier state court decisions in California.

Local and national press provided daily, and, in some instances, hourly and immediate, updates at the former Major League Baseball slugger's high-profile trial this spring on perjury and obstruction of justice charges. Among the information the press reported were details about the jurors who ultimately found the former San Francisco Giant and home run king guilty of one count of obstruction of justice.

As Bonds' anticipated trial began, the media provided the public with a close-up analysis of the jurors selected, and those not selected. For example, *The New York Times* reported that a man who "identified" with Bonds and supported the Giants was not selected for the jury, while a woman who said that she had heard that Bonds "might have lied to Congress or a judge about steroid use" was seated. A blog post for the *San Jose Mercury News* reported that a potential juror who said he was a "huge S.F. Giants Fan" and viewed the perjury case as "a waste of government time" was not seated.

One reason the public received expanded information about the jurors and potential jurors who heard Bonds' case was that the trial court judge agreed to release most of the information included on the juror questionnaires. Specifically, the court decided that the juror questionnaires would be made public at the time of juror selection, with the exception that the names of the jurors would be withheld until the end of the trial.

The court's decision to release the questionnaires was a reversal of its earlier ruling. When the trial was previously set to begin in 2009, U.S. District Judge Susan Illston in San Francisco initially ordered all juror questionnaires to be sealed from the public. A media coalition asked the judge to reconsider that ruling. The court did not rule on that request because the trial was postponed for unrelated reasons.

When the trial was rescheduled for this spring, Illston revisited the juror questionnaire issue. Her analysis essentially turned on two key questions: First, should juror questionnaires be considered presumptively public documents? And second, if questionnaires are presumptively public, are there any overriding reasons for keeping them private in a particular case?

Presumptively public?

Juror questionnaires are presumptively public documents because the jury selection

process is itself presumptively public, Illston ruled. Her analysis began by recognizing the historical presumption of public access to criminal court proceedings, including jury selection. She then examined the extent to which juror questionnaires should be afforded the same presumption.

To the degree that the questionnaires are used to select jurors, the questionnaires are part of the jury selection process, Illston said. "Written jury questionnaires are meant to help facilitate the jury selection," she said. Explaining that the questionnaires serve as an extension of the *voir dire* process for all potential jurors who are seated for questioning, the court ruled that the questionnaires of any potential juror actually seated for questioning were presumptively open.

In contrast, Illston declined to release juror questionnaires of those individuals who were not questioned during *voir dire*. Using reasoning also used by some California courts, Illston said that potential jurors questioned in court stand in a different position than other potential jurors. "Although other individuals will have filled out questionnaires in preparation for possible participation in the *voir dire* process, they will not actually have participated in the criminal trial, and their questionnaires will have served 'no function in the selection of the jury,'" Illston said.

The key to Illston was that the questionnaires of those potential jurors actually seated for *voir dire* were a substitute for the oral *voir dire* process.

"The questionnaires are a proxy for an extended oral *voir dire*, and should be treated as such," Illston said. "Just as it is important for the press and the public to be able to 'attend, listen, and report on' *voir dire* generally, it is important for the press and public to be able to have access to, see, and report on the jury questionnaires that are actually part of the jury selection process."

Illston's opinion then set out specific procedures for allowing public access to copies of the questionnaires.

Concerns against public access?

Assuming a court decides that a presumption of access applies to the questionnaires, that court still must decide whether there are any overriding interests that weigh against disclosing the questionnaires. Illston's order in the *Bonds* case considered this issue as well, ultimately concluding that there was reason to withhold the names of the potential jurors until after the trial was complete.

Documenting the high publicity aspect of the case, the court found two "compelling government interests" supported the temporary withholding of the juror's names: juror privacy and the defendant's right to a fair trial. The court concluded that the jurors would have difficulty avoiding interactions with the public if their names were released. "As with any high profile case, there is a risk that jurors will themselves receive attention during the trial, which might distract them from the case," Illston said. In addition, disclosing the jurors' names during the trial also could lead some people to try to influence the jurors. Illston said that, although such concerns in a typical case may not warrant withholding the jurors' names, the specifics of the high-profile case and evidentiary matters made such a ruling warranted here.

"This restriction is intended to lessen the risk that jurors will be approached during the trial, either for the purpose of obtaining information from the jurors or for the purpose of influencing the verdict in the case," Illston said. "By releasing the names of the jurors only after they have been dismissed, any risk to the integrity of the process is considerably minimized."

Importantly, the court's order also identified and addressed the reasons why it concluded that there were no other less-restrictive means available to protect these compelling interests. The court stated that it had considered "more burdensome" measures, such as sequestering the jury, but found them to not be sufficiently tailored to the concerns she had.

Whether more courts will adopt the approach taken by the *Bonds* and California courts remains to be seen. But until the U.S. Supreme Court addresses the issue, courts are likely to continue to address access to juror questionnaires inconsistently.

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McCormick Legal Fellow Derek D. Green is on a leave of absence for the duration of his fellowship from Davis Wright Tremaine, the firm that represented the media coalition in the Bonds *case.*

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Mont. Uniform D. Court R. 9

N.M. Stat. Ann. § 38-5-11

Okla. Ct. Crim. App. R. 1.3

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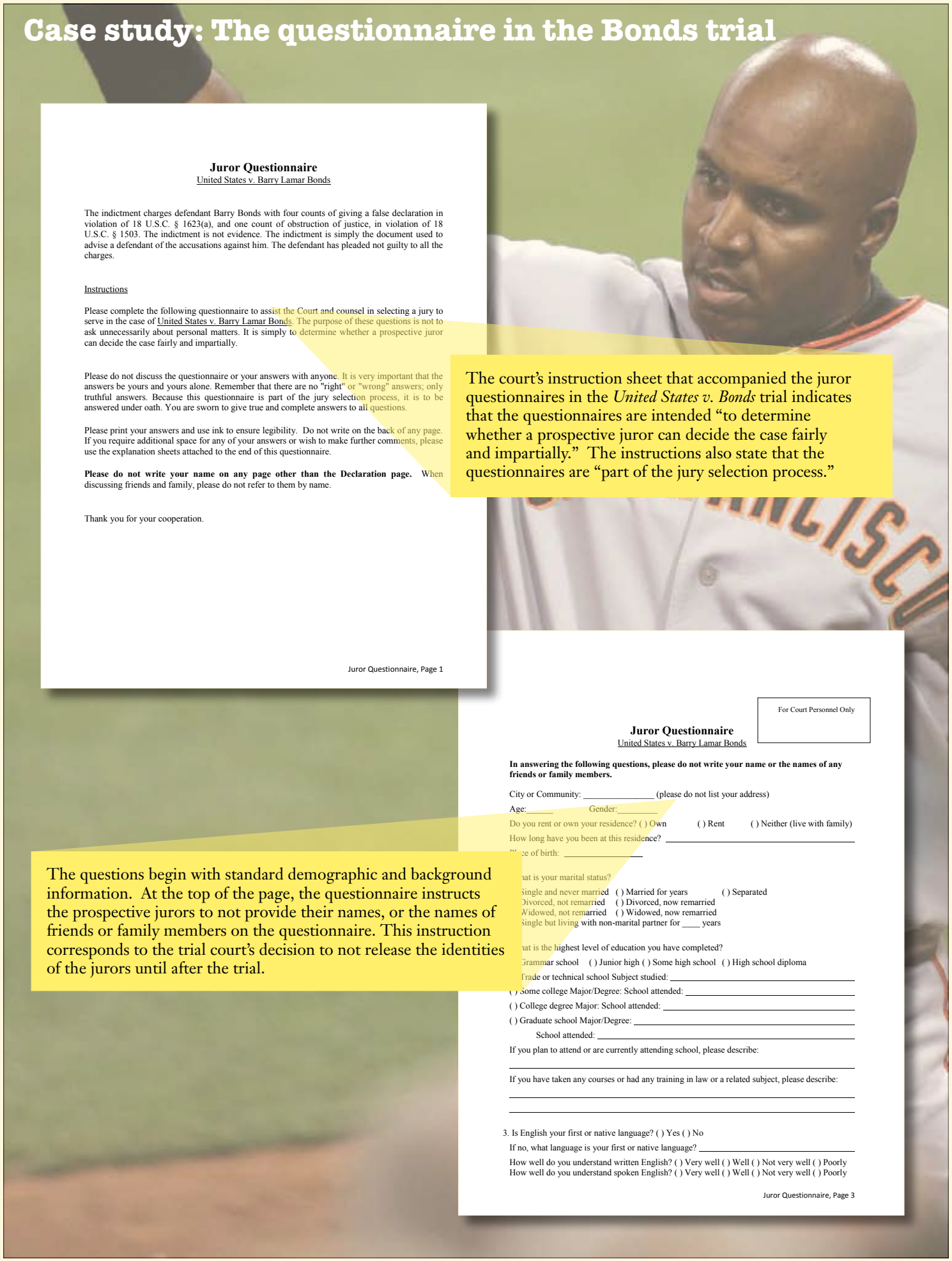
Case study: The questionnaire in the Bonds trial



Juror Questionnaire
United States v. Barry Lamar Bonds

The indictment charges defendant Barry Bonds with four counts of giving a false declaration in violation of 18 U.S.C. § 1623(a), and one count of obstruction of justice, in violation of 18 U.S.C. § 1503. The indictment is not evidence. The indictment is simply the document used to advise a defendant of the accusations against him. The defendant has pleaded not guilty to all the charges.

Instructions

Please complete the following questionnaire to assist the Court and counsel in selecting a jury to serve in the case of United States v. Barry Lamar Bonds. The purpose of these questions is not to ask unnecessarily about personal matters. It is simply to determine whether a prospective juror can decide the case fairly and impartially.

Please do not discuss the questionnaire or your answers with anyone. It is very important that the answers be yours and yours alone. Remember that there are no "right" or "wrong" answers; only truthful answers. Because this questionnaire is part of the jury selection process, it is to be answered under oath. You are sworn to give true and complete answers to all questions.

Please print your answers and use ink to ensure legibility. Do not write on the back of any page. If you require additional space for any of your answers or wish to make further comments, please use the explanation sheets attached to the end of this questionnaire.

Please do not write your name on any page other than the Declaration page. When discussing friends and family, please do not refer to them by name.

Thank you for your cooperation.

Juror Questionnaire, Page 1

The court's instruction sheet that accompanied the juror questionnaires in the *United States v. Bonds* trial indicates that the questionnaires are intended "to determine whether a prospective juror can decide the case fairly and impartially." The instructions also state that the questionnaires are "part of the jury selection process."

For Court Personnel Only

Juror Questionnaire
United States v. Barry Lamar Bonds

In answering the following questions, please do not write your name or the names of any friends or family members.

City or Community: _____ (please do not list your address)

Age:_____ Gender:_____

Do you rent or own your residence? ( ) Own ( ) Rent ( ) Neither (live with family)

How long have you been at this residence? _____

Place of birth: _____

What is your marital status?

( ) Single and never married ( ) Married for years ( ) Separated
( ) Divorced, not remarried ( ) Divorced, now remarried
( ) Widowed, not remarried ( ) Widowed, now remarried
( ) Single but living with non-marital partner for ____ years

What is the highest level of education you have completed?

( ) Grammar school ( ) Junior high ( ) Some high school ( ) High school diploma
( ) Trade or technical school Subject studied: _____
( ) Some college Major/Degree: School attended: _____
( ) College degree Major: School attended: _____
( ) Graduate school Major/Degree: _____
School attended: _____

If you plan to attend or are currently attending school, please describe:

_____

If you have taken any courses or had any training in law or a related subject, please describe:

_____

_____

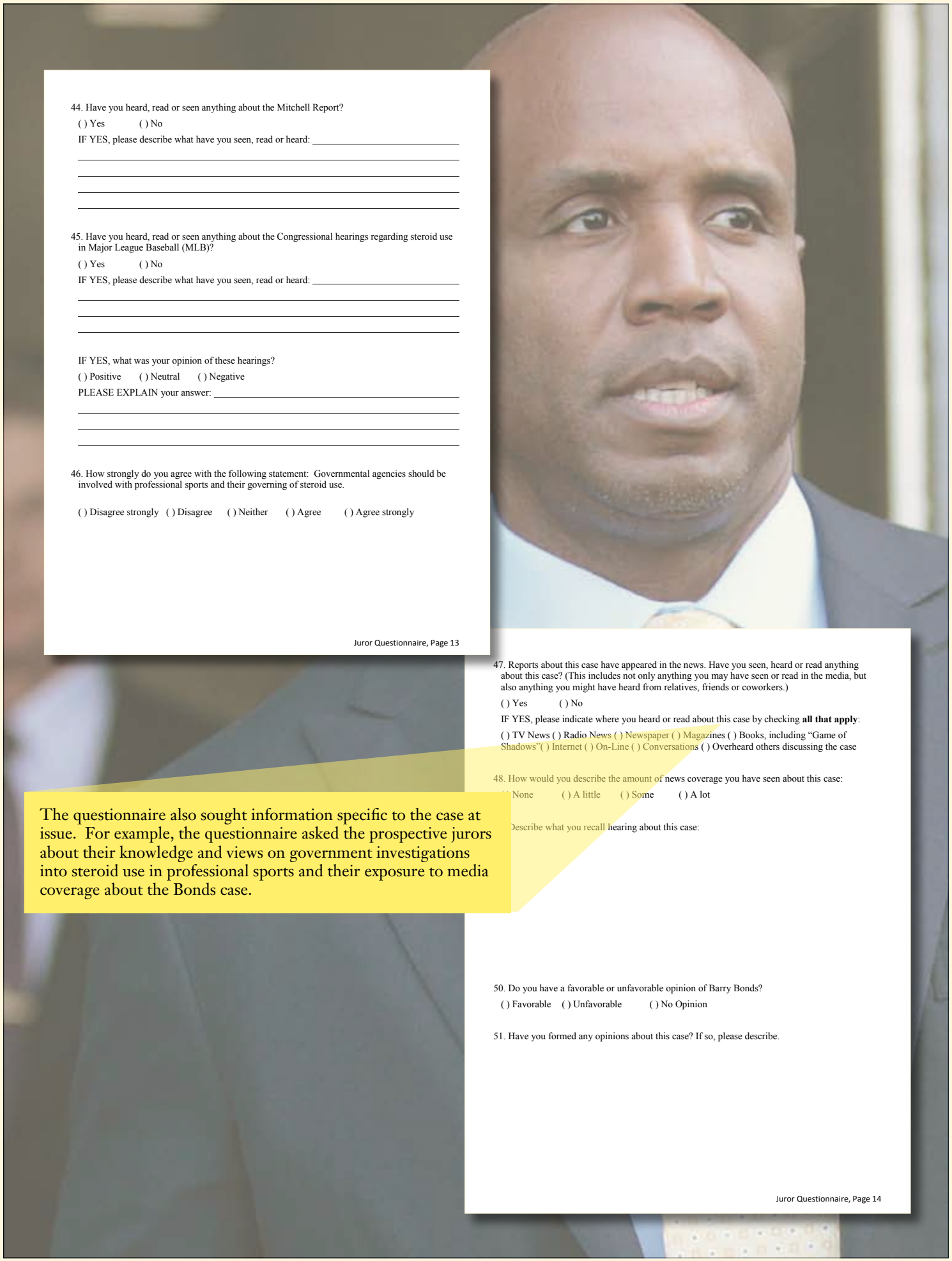
3. Is English your first or native language? ( ) Yes ( ) No

If no, what language is your first or native language? _____

How well do you understand written English? ( ) Very well ( ) Well ( ) Not very well ( ) Poorly
How well do you understand spoken English? ( ) Very well ( ) Well ( ) Not very well ( ) Poorly

Juror Questionnaire, Page 3

The questions begin with standard demographic and background information. At the top of the page, the questionnaire instructs the prospective jurors to not provide their names, or the names of friends or family members on the questionnaire. This instruction corresponds to the trial court's decision to not release the identities of the jurors until after the trial.



44. Have you heard, read or seen anything about the Mitchell Report?

( ) Yes ( ) No

IF YES, please describe what have you seen, read or heard: _____

45. Have you heard, read or seen anything about the Congressional hearings regarding steroid use in Major League Baseball (MLB)?

( ) Yes ( ) No

IF YES, please describe what have you seen, read or heard: _____

IF YES, what was your opinion of these hearings?

( ) Positive ( ) Neutral ( ) Negative

PLEASE EXPLAIN your answer: _____

46. How strongly do you agree with the following statement: Governmental agencies should be involved with professional sports and their governing of steroid use.

( ) Disagree strongly ( ) Disagree ( ) Neither ( ) Agree ( ) Agree strongly

Juror Questionnaire, Page 13

47. Reports about this case have appeared in the news. Have you seen, heard or read anything about this case? (This includes not only anything you may have seen or read in the media, but also anything you might have heard from relatives, friends or coworkers.)

( ) Yes ( ) No

IF YES, please indicate where you heard or read about this case by checking **all that apply**:

( ) TV News ( ) Radio News ( ) Newspaper ( ) Magazines ( ) Books, including "Game of Shadows"( ) Internet ( ) On-Line ( ) Conversations ( ) Overheard others discussing the case

48. How would you describe the amount of news coverage you have seen about this case:

( ) None ( ) A little ( ) Some ( ) A lot

Describe what you recall hearing about this case:

50. Do you have a favorable or unfavorable opinion of Barry Bonds?

( ) Favorable ( ) Unfavorable ( ) No Opinion

51. Have you formed any opinions about this case? If so, please describe.

Juror Questionnaire, Page 14

The questionnaire also sought information specific to the case at issue. For example, the questionnaire asked the prospective jurors about their knowledge and views on government investigations into steroid use in professional sports and their exposure to media coverage about the Bonds case.

The Reporters Committee for Freedom of the Press is committed to helping journalists understand the laws that affect newsgathering. And we have a wide array of publications that can help.

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