

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA)	
)	
V.)	Crim. No. 99-10371-DJC
)	
JAMES J. BULGER)	
_____)	

**DEFENDANT’S OPPOSITION TO GOVERNMENT’S MOTION TO CONDUCT
CRIMINAL BACKGROUND CHECKS OF POTENTIAL JURORS**

The government has filed a motion for the Court to direct the Clerk’s Office to obtain and provide to the parties the criminal histories of the potential jurors in this case. The defendant, James J. Bulger, moves in opposition to that motion.

There is no applicable federal statute mandating verification of information provided by a juror regarding their criminal history. The relevant statute provides only that those with felony convictions or pending felony charges are not qualified to sit on the jury. 28 U.S.C.A. § 1865(b)(5) (2000). Had Congress intended for courts to corroborate a juror’s disclosure about their criminal history, a provision would have been written into the statute that grants the authority to do so.

Additionally, there is no precedent in the First Circuit that permits courts to conduct criminal background checks on

potential jurors. In its motion, the government cites United States v. McIntosh as support for the contention that criminal background checks on jurors are appropriate. ECF Dkt. 920 at 1. The case does in fact state that there was no impropriety in the AUSA's actions in checking a juror's criminal record. United States v. McIntosh, 380 F.3d 548, 557 (1st Cir. 2004). This ruling, however, is not responsive to the government's motion. The AUSA in McIntosh conducted a background check of Juror No. 1 during jury deliberations and after the court had received multiple notes that the jury was deadlocked. Id. at 552. Additionally, other members of the jury had brought Juror No. 1 to the attention of the court; he had been interrupting deliberations, using his cell phone, and had refused to deviate from any of his positions. Id. at 551-52.

In its holding, the court in McIntosh referenced Massachusetts Disciplinary Rule 7-109(E) which prohibits lawyers from undertaking a "harassing investigation of . . . a juror," and noted that the background check could not have harassed the juror because the background check was invisible to him. Id. at 557. Here, the government is requesting background checks of potential jurors that have not posed any prior issues or indicated any deceitful behavior. Furthermore, these criminal background checks would be conducted with the knowledge of

potential jurors who may experience this intrusion as a harassing investigation.

In this case, there is no compelling reason as to why the Court should verify criminal background information provided by the juror. One's criminal record is no more relevant to the juror's fitness to serve on the jury than any of the other inquiries into the juror's background. The possibility of a juror providing a false answer exists for every question posed to the juror. If the Court mandates that the juror's answer as to their criminal background be verified, then should the Court not also verify the juror's answers to the many other inquiries posed during the voir dire process? This type of intensive investigation would be both inefficient and unnecessary. A juror answers a questionnaire and responds to the questions of counsel while under oath. The information provided by potential jurors is provided under the pains and penalty of perjury, an assurance of honesty that is deemed sufficient for trial testimony and other courtroom proceedings. Surely, this assurance is also sufficient for the voir dire of potential jurors in this case.

The government also cites Sampson v. United States, currently on appeal to the First Circuit, as an example of the harmful and irreversible effects of a juror's dishonest answer. ECF Dkt. 920 at 2. The district court in Sampson reversed a conviction after a finding of "inferable bias" resulting from

the false answers provided by one juror during voir dire. Sampson v. United States, No. 12-1643, Government's Opening Brief and Petition, at 21-22. The juror at issue in Sampson, Juror C, provided a deliberately false answer in response to an inquiry as to whether she had been a victim of domestic abuse (among other false answers). Id. at 20. While the court found that an honest answer regarding the abuse by her former husband would have resulted in her dismissal as a juror, the government's request for criminal background checks is not responsive to the issue in Sampson. Id. at 23. Conducting a criminal background check on Juror C would not have yielded the information that led the district court to reverse the conviction.

For the foregoing reasons, the defendant respectfully requests that the Court deny the government's motion to provide criminal records of potential jurors to parties.

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Dated: May 17, 2013

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on or before the above date.

J. W. Carney, Jr.

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AFFIDAVIT SUPPORTING
DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION TO CONDUCT
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I, J. W. Carney, Jr., state that the facts contained in the attached motion are true to the best of my information and belief.

Signed under the penalties of perjury.

J. W. Carney, Jr.
J. W. Carney, Jr.

Dated: May 17, 2013