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August 31, 2010

Hon. James Ware, United States District Judge
Northern District of California
280 South First Street
San Jose, California 95113

Re: United States v. Jamie Harmon, CR 08-00938 JW

Dear Judge Ware,

Defendant, in her August 27, 2010, letter to this Court, incorrectly states that the United States "request[ed] further inquiry into this issue." This is incorrect. The government's August 26, 2010, letter makes no such request, and the government opposes the defendant's latest request. As discussed below, due to the sensitivity of examining juror information, the Court's August 24, 2010, order, and the findings from the transcript of jury voir dire, the government does not intend to conduct a "further inquiry" by attempting to examine Mr. Porter's 25 year old conviction unless further directed by the Court.

The defendant, through her letter to the Court, now seeks discovery relating to another juror who made no alleged misrepresentations. The government does not believe further juror discovery is warranted, nor called for in the Court's order of August 24, 2010. Defendant, in arguing her motion at the August 24, 2010, hearing, asserted that she believed that one of the jurors, specifically the foreperson, stated that he had been convicted of a felony and asserted that his rights had been restored. Defendant argued that she should be able to, post trial, test the truth of that juror's assertion that his rights had been restored. In response to defendant's argument, the Court, in its August 24, 2010, order, found "that Defendant has shown good cause for discovery of information on impaneled jurors who represented that they had been convicted of a crime but that their civil rights has been subsequently restored, allowing them to serve as jurors." (Emphasis added). There was only one such person who stated he had been convicted of a crime and his civil rights restored–a Mr. Santos.

As discussed in the government's August 26, 2010, letter to the Court, Mr. Santos, after not being stricken by either party, ultimately was removed by the Court for cause due to his need to care for his elderly mother. The foreperson, a person believed to be Mark Porter, while stating he had been convicted of welfare fraud 25 years ago, never made any statements regarding his

conviction being a felony or about his rights being restored. Nor did defendant's counsel[1] ask him any questions related to his conviction, seek to have him stricken for cause, or strike him. Mr. Porter could not have made any of the types of misrepresentations that concerned defendant at the August 24, 2010, hearing. With no alleged misrepresentation asserted, there is simply no basis to proceed with digging into this juror's past. What defense now seeks is discovery solely on the hope that defendant's conviction was a felony, thus permitting her to argue that his participation on the jury requires a new trial. Yet this argument has been tried before, and failed. First, section 28 U.S.C. § 1865(b)(5) is a statutory bar as applied to the prospective juror, not a constitutional one rendering a juror biased. Second, a "felon who slips through juror selection is not automatically disqualified in the absence of a showing of bias or prejudice." U.S. v. Thuan Huy Ha, 2010 WL 2994021 * 1 (9th Cir. 2010 (slip opinion)) (finding district court did not err in failing to strike juror who stated he was a felon during voir dire) (citing Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1059 (9th Cir. 1997) (holding that the participation of a felon-juror is not an automatic basis for a new trial, defendant must show actual bias or prejudice). And of course, this juror did not slip through–he disclosed the nature of his crime during voir dire, and defendant choose to not ask him any other questions and to seat him on the jury. U.S. v. Mitchell, 568 F.3d 1147, 1151, 1154 (9th Cir. 2009) (holding that when a defendant fails to inquire more or strike the juror, that defendant must show that "[t]he evidence of partiality before the district court was so indicative of impermissible juror bias that the court was obligated to strike [the juror] from the jury); see Thuan Huy Ha, 2010 WL 2994021 at *1 (finding this burden was not met simply because the juror had previously been convicted of a crime-defendant had refrained from challenging juror for cause, did not strike him, and struck others). Surely defendant is not taking the position that every juror who states during voir dire that he/she was convicted of a crime (and defendant seated him on the jury with that knowledge) must, post trial, have their criminal history examined, and that every felon is deemed by the courts to be per se biased against a defendant–nor could she. See Mitchell, 568 F.3d at 1151 ("We have cautioned, however, that bias should be presumed only in 'extreme' or 'extraordinary' cases) (citations omitted); Coughlin, 112 F.3d at 1062 (finding that a juror with a felony fit none of the general categories set forth by the Ninth Circuit where bias or prejudice may be presumed or implied, rejecting defendant's claim of implied bias due to juror's status as a felon).

[1] It should be noted that defendant is no ordinary defendant, but rather an experienced former prosecutor and criminal defense lawyer.

For the foregoing reasons, the government believes that there is no further action to be taken by the government in response to the Court's August 24, 2010, Order, and that the Court's September 3, 2010, deadline is thus moot. Therefore, it does not intend to try to track down Mark Porter's 25 year old conviction records unless otherwise directed by the Court to do so.

Very truly yours,

MELINDA HAAG
United States Attorney

/s/
RICHARD C. CHENG
Assistant United States Attorney

/s/
GRANT P. FONDO
Assistant United States Attorney

cc: J. Tony Serra, Esq.