

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA)
)
 v.)
)
ROLAND L. HUGUENIN)
)

CR. No. 89-046L

MEMORANDUM AND ORDER

Ronald R. Lagueur, United States District Judge.

Defendant Huguenin was found guilty of three counts of tax evasion after a jury trial in this Court on April 24, 1990. Defendant was sentenced and promptly appealed his convictions to the Court of Appeals for the First Circuit. After the appeal was fully briefed, the government informed the Court of Appeals of a previously undisclosed fact: the Secretary of the Treasury's response to the government's request for information under 26 U.S.C. § 6103(h)(5), which inquired whether any empaneled jurors had been audited or investigated by the Internal Revenue Service, covered only the period 1985 through 1990. The Court of Appeals believed that this Court was best positioned to determine the import of the government's disclosure in the first instance. Accordingly, it remanded the case with instructions by Order dated April 16, 1991. This Court now concludes that the Secretary's time-limited search did not comply with Section 6103(h)(5). It also determines that defendant suffered absolutely no prejudice from the Secretary's noncompliance with the statute.

I. Background

Section 6103(h)(5) allows any party to certain tax

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administration proceedings to inquire of the Secretary of the Treasury whether prospective jurors have been audited or investigated by the IRS.¹ In this case, the government requested the information under Section 6103(h)(5), but defendant was the party who desired the knowledge. Approximately six weeks before trial, defendant filed a motion for a court order directing the jury clerk to divulge the names on the jury panel. Defendant wanted the jury panel list so that he could make a request under Section 6103(h)(5). The government objected to defendant's motion for early disclosure of jury panel information on the grounds that such information is not normally available until one or two days before empanelment. At a hearing held on April 11, 1990, this Court denied defendant's motion, but stated that prospective jurors could be asked during voir dire whether they or any immediate family member had ever been audited or investigated by the IRS. This Court also ordered the prosecutor to submit the names of the chosen jurors to the Secretary of the Treasury immediately after

¹Section 6103(h)(5) states:

(5) Prospective jurors. - In connection with any judicial proceeding described in paragraph (4) to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

26 U.S.C. § 6103(h)(5).

jury selection to determine whether any of them or their spouses had been audited or investigated.²

Empanelment occurred on April 12, 1990. This Court followed its customary, and preferred, method of empanelment by allowing the lawyers to conduct their own voir dire. Defendant, who chose to represent himself and who was assisted by standby counsel, was afforded the opportunity to question prospective jurors to his heart's content. He chose to ask every prospective juror only one question: "Would you fear any retaliation from the Internal Revenue Service if you were to find me not guilty of these charges?" Defendant did not ask any other question, not even one concerning the prospective jurors' contacts with the IRS.

The prosecutor repeatedly asked prospective jurors on voir dire whether they or an immediate family member had ever been audited or investigated by the IRS. Two prospective jurors responded affirmatively. The first, John A. Gomes, indicated that he was audited about twelve or thirteen years before the date of empanelment. The second, Patricia O. Gilbert, responded that she and her husband had been audited fifteen years before. Neither juror was challenged for cause or peremptorily by the government or the defendant. Consequently, both jurors who admitted being the subject of IRS audits were members of the jury that eventually convicted the defendant.

²The language of Section 6103(h)(5) only requires the IRS to search the records of prospective jurors. This Court was not required to order a search of the records of any juror's spouse, but did so to ensure conformity with the purpose of the statute.

After the jury was selected, the prosecutor submitted the juror cards and a request under Section 6103(h)(5) to the District Director of the IRS. The IRS then conducted a search of its records of the names of the jurors and their spouses. The search indicated that none of the fourteen jurors or their spouses had been audited. These results were provided to the Court and to the defendant before trial started on April 23, 1990. Neither party brought to the Court's attention the discrepancy between the search results, which indicated no empaneled juror had been audited, and the oral responses of Mr. Gomes and Mrs. Gilbert, both of whom admitted being audited over ten years before the date of empanelment.

In United States v. Lussier, 929 F.2d 25, 30 (1st Cir. 1991), the First Circuit held that a procedure similar to the one employed by this Court satisfied the requirements of Section 6103(h)(5). In Lussier, the First Circuit stated that "winnowing the juror pool through questions on voir dire, directing the prosecutor to verify the empaneled jurors' answers by obtaining § 6103(h)(5) information about them from the IRS, and in fact obtaining such verification before the jury was sworn -- adequately enforced both the letter and the spirit of the statute." Id.

While this case was pending on appeal before the First Circuit, the government disclosed that the IRS's record search

covered only the period from 1985 to 1990.³ Lussier did not address the adequacy of such a time-limited search. Therefore, on April 16, 1991, the Court of Appeals remanded defendant's case to this Court with instructions to determine the sufficiency of a time-limited search and to analyze whether defendant was prejudiced. A copy of the Order of April 16, 1991 is appended hereto for ready reference.

This Court held a hearing on May 14, 1991 to address the First Circuit's concerns, and ordered the IRS to conduct a temporally-unlimited record search of the fourteen empaneled jurors and their spouses. This Court also directed the IRS to keep a record of the time necessary to conduct such a search.

The hearing was resumed on June 19, 1991. The IRS reported that its search results indicated that four jurors had been audited. Two of the four, Mrs. Gilbert and Mr. Gomes, revealed their audit history on voir dire. The two others, Louise R. Henry and Katherine W. McGowan, did not disclose the information on voir dire.

II. Discussion

A. Factual Findings

1. Administrative Burden on the IRS

Without question, the IRS bears a heavier administrative burden when it conducts a temporally-unlimited search. The five

³Obviously, the search results reported to the Court on April 23, 1990, did not refer to the audits of Mr. Gomes and Mrs. Gilbert in the 1970's because the search covered only the previous five years.

year record search of the fourteen jurors and their spouses that was conducted before the trial began took the IRS approximately three work days to complete. The temporally-unlimited search conducted per this Court's order took nineteen days. The time differential reflects the need to conduct a manual search beyond five years. This section details the procedures used by the IRS to conduct both types of searches.

The five year search conducted in this case was relatively simple for the IRS to perform. The prosecutor provided the juror cards to the disclosure officer at the Providence District Office on Thursday, April 12, 1990 at 3:30 p.m. The disclosure officer then initiated the search by entering into his computer each taxpayer's social security number, the type of tax return utilized, and the relevant tax years. He finished entering the information into the computer the following morning. This information was communicated via computer to the Andover Regional Service Center, the IRS's center which accepts and processes all federal tax returns from all of New England and Upstate New York, on April 13, 1990. Andover's computer facility then assimilated all such requests from the various district offices within its region and transmitted the requests to the IRS's national computer center in Martinsburg, West Virginia. The Andover Service Center transmits such requests daily, but only at 4:00 p.m. Thus, because the request from the Providence District Office reached Andover before 4:00 p.m. on Friday, April 13, 1990, it was transmitted to West Virginia that very day. The IRS's national computer facility in

West Virginia then analyzed the master files on record and transmitted the results of its search back to the Andover Service Center, which then re-transmitted the results to the Providence District Office on Monday, April 16, 1990.

After the search results were transmitted to the Providence District Office, the disclosure officer there downloaded the results onto a computer printout. The printout consisted of a series of documents known as "transcripts." A transcript is simply the record of a particular taxpayer's account for a particular tax year. The disclosure officer then analyzed each transcript by searching for a computer code that indicates whether the taxpayer was audited. After analyzing the transcripts, the disclosure officer turned the results over to the prosecutor on Tuesday, April 17, 1990.

The disclosure officer at the Andover Service Center testified that normally this type of search only yields results from the previous five years. Unless a taxpayer is being audited or investigated, which would cause a tax account for a particular year to remain open or "active," the West Virginia computer check apparently covers only a five year period.

The IRS follows a completely different procedure to obtain search results beyond five years. Tax returns for those individual years are kept in a "retention register." This register is located on a microfilm cassette at the service center where the return was originally filed. These records can not be accessed by computer; a manual request must be made to the microfilm area at the service

center where the return was filed. This request can only be made after the national computer system is consulted for a determination of the year when the tax return was put onto microfilm. Then, a separate manual search must be performed by the microfilm area at the appropriate service center for each tax return. Furthermore, the Andover Service Center only has complete tax records starting with 1967. Before that date, it is not possible to obtain a complete transcript from the records at Andover capable of definitively showing whether or not a person has been audited or investigated.

Pursuant to this Court's order to conduct a temporally-unlimited search, the IRS spent nineteen workdays to compile search results for the information requested under Section 6103(h)(5) for the fourteen jurors and their spouses back to and including 1967. To conduct this search, the IRS did not have to consult the microfilm areas of other service centers. If such consultations had been needed, the search would have taken even more time.

2. Impact on this Court's Trial Procedure.

The five-year search of the empaneled jurors and their spouses had no adverse impact on the normal procedure followed by this Court for empaneling jurors and commencing a trial. This Court customarily calls the trial calendar at the very beginning of each month. The Court then devotes the following day to empaneling all cases that are ready for trial. Each empaneled case is then tried seriatim. The five year search of the empaneled jurors and spouses that occurred in this case did not interrupt this system because

it took only approximately three days after empanelment to complete.

Furthermore, this Court's procedures would not be seriously impacted by waiting for the IRS to conduct a complete search of its records. This Court could do one of two things to accommodate such searches. First, it could hear other trials while waiting for the search results. Alternatively, it could bring in a special juror panel for the express purpose of empaneling a Section 6103(h)(5) case a few weeks before the anticipated trial date. In short, this Court's procedures are not impacted by Section 6103(h)(5). Procedures are in place now or could easily be developed to accommodate either a five year search or a "complete" search.

3. Discrepancy Between Oral Responses on Voir Dire and Complete Search Results

The complete search results indicated that four jurors had been audited. Two jurors disclosed this information on voir dire; two others, Mrs. Henry and Mrs. McGowan, did not. The inconsistency between the silence of the two jurors and the search results is inconsequential.

Mrs. Henry was audited in 1978, and Mrs. McGowan had been audited in 1975. Both jurors had filed joint returns with their spouses for the tax years in question. As a result of the audits, Mr. and Mrs. McGowan paid an additional \$36.24 in tax and Mr. and Mrs. Henry paid an additional \$132.00. Both amounts were paid prior to the formal assessment of the additional tax by the IRS.

Although no record indicates precisely the type of audit each

juror received, it is probable that both were the subject of a correspondence audit. A correspondence audit occurs when the IRS sends out a letter to a taxpayer stating that a certain amount of additional tax may be owed. The letter states that if the taxpayer agrees, he or she should sign the letter and enclose a check for the amount. At the time of these two audits, the signature of only one of the two joint filers could bind both to the proposed liability, if that liability did not exceed five hundred dollars.

The failure of two jurors to provide accurate information about their past history with the IRS on voir dire is easily explained. There are three equally probable reasons why these jurors did not disclose their income tax audit history. First of all, it may well be that both jurors simply forgot about their audits. Both audits occurred well over ten years before empanelment and involved fairly minimal amounts of money. Secondly, it is also likely that neither juror considered one mundane letter from the IRS to be an "audit" or an "investigation." Thirdly, it is probable that neither juror disclosed the audit information because neither had knowledge of it. The spouse of each could have settled the matter quickly and quietly by signing and returning the letter with payment. At that time, a correspondence audit could be handled in such a fashion. In short, there is no reason to believe that these jurors lied about their audit history.

B. Conclusions of Law

The unwieldiness of Section 6103(h)(5) is well known. See,

e.g., United States v. Hashimoto, 878 F.2d 1126, 1145 (9th Cir. 1989) (Wiggins, J., dissenting). The statute employs broad language and offers no procedural guidelines on how its substantive rights are to be conferred. Furthermore, no administrative regulations exist which clarify the fuzziness of Section 6103(h)(5). The judiciary has been left the task of setting forth parameters on the statute so that compliance with it can be judged.

As noted earlier, the First Circuit has already performed this function in Lussier by holding that a defendant has no absolute right to have a Section 6103(h)(5) search performed on the members of a venire well in advance of trial. 929 F.2d at 30. The question here concerns not the scope of the jury group that must be searched, but whether a search limited to five years complies with the statute.⁴

Section 6103(h)(5) does not state how far back the IRS must search its records. It also does not address the complexities of the IRS's information storage and retrieval systems. Quite plainly, a five year search enables the IRS to rely primarily on its computers to respond quickly to a Section 6103(h)(5) request. A complete search forces the IRS to supplement the computer search

⁴During the course of these proceedings on remand, information about the administrative burden of requiring a search of an entire sixty person venire and spouses did surface. The disclosure officer at the Andover Service Center estimated that a five-year search of sixty people would take approximately nine to ten work days, and that a five-year search of one hundred and twenty people would take between fifteen and twenty work days. He also indicated that a "complete" search (i.e., back to 1967) of sixty people would take approximately twenty to twenty-one workdays, and that a search of one hundred and twenty people would take thirty to thirty-six workdays to complete.

with a manual search of tax records by personnel at its microfilm areas. That process not only diverts scarce resources from other projects, it takes longer -- sixteen days longer in this case.

Two courts have held that Section 6103(h)(5) only required the IRS to conduct a computer search of its records, not a manual search. United States v. Pottorf, -- F. Supp. -- , 1991 WL 119997 (D. Kan. June 26, 1991); United States v. Johnson, 762 F. Supp. 275 (C.D. Cal. 1991). However, the Pottorf court believed that a computer search covered a period of twenty-seven years, -- F. Supp. at --, 1991 WL 119997, at *11, and the Johnson court believed that a computer search could be conducted for the past twelve years. 762 F. Supp. at 277 n.1. Here, the facts clearly establish that a computer search can trace only the past five years.

Such a limited search does not comply with Section 6103(h)(5). United States v. Sinigaglio, 925 F.2d 339, 341 (9th Cir. 1991), amended opinion, -- F.2d --, --, 1991 WL 156899, at *3 (9th Cir. Aug. 20, 1991). The statute's silence on the matter indicates that Congress intended to authorize a complete and thorough search of any records in existence. Condoning a five-year search would be a sheer exercise of legislative redrafting by the judiciary. It also would sanction the arbitrary distinction between computer searches and manual searches. If Congress did not intend for the IRS to respond to a Section 6103(h)(5) request by searching all of its records, it should make appropriate amendments to the statute. For now, this Court must interpret the law as it is presently written.

Even though the Secretary's time-limited response violated the statute, it is abundantly clear that defendant was not prejudiced in the least in this case. Every court that has addressed the issue has concluded that thorough voir dire questioning may be sufficient to negate any prejudice to the defendant resulting from noncompliance with the statute. See United States v. Hardy, -- F.2d --, --, 1991 WL 146985, at *4 (9th Cir. August 7, 1991); Lussier, 929 F.2d at 30; United States v. Masat, 896 F.2d 88, 95 (5th Cir. 1990). Here, defendant was afforded the opportunity to ask prospective jurors any questions he wished on voir dire. Defendant can not claim prejudice from his own failure to conduct a meaningful voir dire. In addition, the prosecutor thoroughly probed the prospective jurors on voir dire on the issue of their dealings with the IRS. This Court paid particular attention to the prosecutor's questions, and reminded him to ask "the questions about an Internal Revenue audit" the one time he failed to inquire of a juror on the subject.

Moreover, the results of the complete search that the IRS performed per this Court's order basically verify the oral responses of the jurors to the prosecutor's questions. As discussed earlier, it is extremely likely that both jurors who failed to disclose the fact of their audits on voir dire simply did not know they had been audited. Because neither juror knew their tax history, it would be impossible for them to have been biased because of it.

Indeed, it is clear that if an audited juror with knowledge

of his audit has any bias at all, such bias would favor the defendant, not prejudice him. Johnson, 762 F. Supp. at 277. This conclusion is buttressed by the defendant's own action with respect to the two other jurors who accurately disclosed on voir dire that they had been audited. If defendant feared prejudice from those two jurors, he most certainly would have challenged both of them. Defendant did not do that. Instead, he left both jurors on the jury. This fact emphatically demonstrates that defendant was not prejudiced by the presence of previously-audited jurors on the jury. Therefore, the failure of two jurors to know or to acknowledge that they had been audited is of no consequence in this case.

III. Conclusion

The Secretary of the Treasury's time-limited response to the government's request for information under 26 U.S.C. § 6103(h)(5) failed to comply with the statute. Defendant, however, was not prejudiced by the noncompliance with the statute. These findings shall be certified expeditiously to the Clerk of the Court of Appeals.

It is so ordered.


Ronald R. Lagueux
United States District Judge

Date 9/4/91

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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CLERK
U.S. DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Appellee,

v.

ROLAND LEON HUGUENIN,
Defendant, Appellant.

Before

Campbell, Selya and Cyr,
Circuit Judges.

ORDER OF COURT

Entered April 16, 1991

After this case was fully briefed and submitted for decision, the government called to our attention a fact not indicated in the record: that the Secretary's response to the government's request under 26 U.S.C. § 6103(h)(5) -- that is, its request for an answer to the question whether any of the empaneled jurors had been audited or investigated by the Internal Revenue Service -- "covered only the period from 1985 through 1990."

In a recent opinion, United States v. Lussier, No. 90-1389, slip op. at 8-12 (1st Cir., March 29, 1991), we ruled that the basic procedure employed by the district court here was sufficient to satisfy the requirements of § 6103(h)(5): by "winnowing the juror pool through questions on voir dire, directing the prosecutor to verify the empaneled jurors' answers by obtaining § 6103(h)(5) information about them from the IRS, and in fact obtaining such verification before the jury was sworn," the court in Lussier "adequately enforced both the letter and spirit of the statute." Id. at 12. Lussier, however, did not raise the issue at hand; it was never suggested to us there that the scope of the Secretary's response was limited to a particular span of years.

The limited nature of the Secretary's response here raises a basic question about the requirements of § 6103(h)(5): does the statute require the government to make a temporally-unlimited search of the prospective jurors' tax records, despite whatever administrative burdens and interruption of normal trial procedures such a search might cause, or is a time-limited search, as was conducted here, sufficient when coupled with a thorough oral examination of the jurors on voir dire? See United States v. Masat, 896 F.2d 84, 94-95 (5th Cir. 1990). We think that the district court is best positioned to decide that question in the first instance, since it is capable of making potentially-dispositive factual inquiries (for example, about the exact burden that a more lengthy search of jurors' tax records might impose). Accordingly, we remand this matter to the district court with the following instructions:

1. The district court should conduct whatever preliminary proceedings it deems necessary to determine whether the Secretary's time-limited response complied with the requirements of 26 U.S.C. § 6103(h)(5), then make such a determination and record it in a written finding together with subsidiary findings reflecting, among other things, the extent of the burden upon the Secretary, the likely time and expense involved, etc.;

2. If the district court determines that the Secretary's response did not comply with the statute, the district court should order the Secretary to make what the court deems to be a complete response concerning all jurors in this case on a priority basis;

3. Once the district court receives such a complete response, it should determine whether the Internal Revenue Service's records verify or contradict the jurors' answers on voir dire to the question whether they had ever been audited or investigated by the Internal Revenue Service;

4. If the district court finds that any discrepancies exist between a juror's oral response and the Internal Revenue Service's records, the district court should determine whether the juror's participation in the trial and verdict was in any way harmful or prejudicial to the appellant, and indicate its determination by a written finding.

The district court's findings as to the above shall be certified expeditiously to the clerk of this court. We retain appellate jurisdiction to dispose of this issue, together with the other issues raised by the briefs, after we receive the district court's response.

So ordered.

True Copy:

Attest:

By the Court:

Clerk.

[Clerk] cc: U.S.D.C. of Rhode Island, cc: Messrs. Huguenin, Holden and Ms. Curran]