UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 14-20676
Hon. Mark A. Goldsmith

JERRY WAYMEN-TIMOTHY BIGHAM,

Defendant.

MOTION IN LIMINE
TO PROHIBIT USE OF "FELON" IN THE FELON IN POSSESSION CHARGE AND TO SUPPRESS PRIOR RECORD IF DEFENDANT BIGHAM ELECTS TO TESTIFY

Now comes Defendant, Jerry Bigham by and through his counsel, Mark H. Magidson, and in support of his motion, states unto this Honorable Court as follows:

1. Defendant, JERRY WAYMEN-TIMOTHY BIGHAM, is charged in a multiple count Indictment in Count I, for being in violation of 21 U.S.C. §841(a)(1), Possession with Intent to Distribute Marijuana, Count, II violation of 21 U.S.C. §841(a)(1), Possession with Intent to Distribute Marijuana, Count III, 18 U.S.C. §922(g)(1) felon in Possession of a Firearm; Count IV, 18 U.S.C §924(c)(1)(A), Possessing a Firearm in Furtherance of a drug Trafficking Crime.

2. Defendant's prior criminal record consists of the following convictions:

    A. 2/26/1993- Controlled Substance-Del/mfg Less than 50 grams, 22nd Circuit Court;

    B. 8/14/1998-Fleeing and Eluding, Fourth Degree, 22nd Circuit Court;

C. 10/14.2004-Fleeing and Eluding, Third Degree, 22nd Circuit Court;

D. 1/31/2011-Controlled Substance-Del/mfg Marijuana, 22nd Circuit Court, a misdemeanor, and,

E. 1/24/2013- Fleeing and Eluding, Third Degree, 22nd Circuit Court.

3. Ordinarily, if Defendant chose not to testify, there would be no way for the jury to be informed of his prior felony record.
4. However, once the "charge" of being a felon in possession of a firearm is read to the jury, the jury is informed that Defendant has a prior felony record.
5. Even if he did choose to testify, there is a chance that the court, in its discretion, would suppress the use of the prior criminal history as being more prejudicial that probative. For instance, Fed R. Evd. 609 allows the admission of evidence of a witness's prior conviction to impeach that witness if the crime was punishable by a sentence of greater than one year and if the probative value of the evidence outweighs its prejudicial effect. FRE 609(a)(1).
6. Where the crime "involved dishonesty or false statement, regardless of the punishment," Rule 609 admits evidence of the conviction without any balancing test. FRE 609(a)(2).
7. Here, Defendant has no felonies involving theft or dishonesty, therefore the Court would have discretion on whether to admit the prior convictions as impeachment. Because two of his prior convictions involved the delivery or manufacture of marijuana, similar to two counts in this matter, to admit the prior convictions if he chose to testify would be greatly prejudicial, specifically such evidence would be more prejudicial than probative.

8. However, even if the court granted Defendant's motion to suppress his prior record or if he chose not to testify, by merely reading the charge, "FELON" in possession of a firearm, the jury is now informed that Defendant is a convicted felon.
9. Once it is disclosed that the Defendant is a convicted felon, the jury will find it more difficult to believe him or trust him since societal views of convicted felons is negative.
10. The general public and the potential jurors are biased and prejudiced against former offenders, particularly those with a felony conviction. These feeling are manifested in numerous ways, particularly in the way society disenfranchises felons and as a society we continue to punish felons long after they have served their sentence.
10. For instance, in most states, including Michigan, persons with a felony record cannot vote, hold office, hold certain jobs, loose a job as in the case of an attorney and other professions, possess a firearm, live in federal housing and most importantly, sit on a jury.
11. Disclosure of a fact that a Defendant is a convicted felon creates substantial bias that cannot be cured by a special instruction; jurors view a person with a prior felony record as a "bad man" and this evidence will and is used as propensity against a defendant with jurors believing "if he did it once, he probably did it again."
12. In fact the statute does not mention "felon" in its title or body; instead the statute, 18 U.S.C. §922g, states that a person is "ineligible" to possess a firearm or ammunition if that person was convicted of a crime exceeding one year.
13. It is the position of the Defendant that to avoid unfair prejudice and to guarantee a fair trial, the jury should only be informed that he is being charged with being "ineligible" to possess a weapon, and it can be stipulated that he did not have a license to carry a

weapon and or that he was otherwise not eligible to carry a weapon. That way the only issue the jury would have had to consider was whether he "possessed" the firearm. Being a felon would not have been disclosed.

14. The mention of the word "felon" in possession creates unfair prejudice and bias, and therefore, Defendant would submit that in order to eliminate this prejudice and violation of due process, that the parties would stipulate to two of the elements of the charge, that being he had a prior felony (which would be outside the presence of the jury) and was not eligible to possess a gun. The jury would be informed that Defendant was not eligible to possess a weapon under federal law. The jury would then be instructed that or asked to decide whether the Defendant "possessed" a gun and if that was a case, and the jury found him guilty of that element, i.e., wrongful possession of a weapon, then Defendant would automatically stand convicted of 18 U.S.C. §922g.
15. In this way, the court can eliminate a significant bias without impacting or affecting the primary purpose if the jury's determination, that being whether Defendant actually or constructively possessed the firearms and ammunition at issue.
16. Further, if Defendant chose to testify he is requesting that his prior criminal history not be disclosed to the jury because the similarity in charges would make the admission of said evidence more prejudicial than probative.
17. Here, his prior convictions do not involve dishonesty or false statement and they do involve the possession and or use of guns to a large part.

18. In this case, if his prior record were introduced, because of the severity of the charges, the jury would be over influenced by such "evidence" and not use it for impeachment, but use it as propensity evidence.

WHEREFORE, Defendant Bigham prays that this Honorable Court:

a. Suppress the use of "felon" regarding Count III and not read the Indictment that refers to Mr. Bigham as being charged as a "felon" in possession of a firearm;
b. Suppress his prior record in the event he chooses to testify;
c. Grant such other relief that the Court deems reasonable and necessary to comply with Due Process.

Date: December 7, 2015

Respectfully submitted,

By: s/Mark Magidson
MARK H. MAGIDSON (P25581)
Attorney for the Defendant Nixon
615 Griswold, Suite 810
Detroit, MI 48226
313-963-4311
mmag100@aol.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 14-20676
Hon. Mark A. Goldsmith

JERRY WAYMEN-TIMOTHY BIGHAM,

Defendant.

BRIEF
IN SUPPORT OF MOTION IN LIMINE
TO PROHIBIT USE OF "FELON" IN THE FELON IN POSSESSION CHARGES
AND TO SUPPRESS PRIOR RECORD IF DEFENDANT NIXON ELECTS TO TESTIFY

FACTS

Defendant, JERRY WAYMEN-TIMOTHY BIGHAM, is charged in a multiple count Indictment in Count I, for being in violation of 21 U.S.C. §841(a)(1), Possession with Intent to Distribute Marijuana, Count, II violation of 21 U.S.C. §841(a)(1), Possession with Intent to Distribute Marijuana, Count III, 18 U.S.C. §922(g)(1) felon in Possession of a Firearm; Count IV, 18 U.S.C §924(c)(1)(A), Possessing a Firearm in Furtherance of a drug Trafficking Crime.

By reading these charges set forth in Count III, the jury will be informed that Defendant is a convicted felon. Since the decision of *Old Chief v. United States* [1] Defendants are permitted to stipulate to a prior felony conviction and not mention or describe the exact nature or details of

[1] 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

that conviction. However, the harm here is that before a defendant even testifies, the jury is informed that he has a prior felony record. Defendant Bigham submits that this fact in and of itself unfairly prejudices Defendant because of this society's negative conceptions of convicted felons. It is more than a perception; it is a state sponsored reality. In this society, in addition to not being able to possess a weapon, persons convicted of a felony cannot vote, cannot hold office, cannot live in federally subsidized housing, cannot hold certain jobs such as being in the medical field or an attorney or most importantly, cannot sit on jury. The fact is, that knowledge that a person is a convicted felon leads a juror to conclude that such a person, in this case, Defendant, is a "bad man," predisposed to commit additional crimes.

The solution to this problem is not to disclose to the jury that Defendant has a prior felony record. This can be done, by way of stipulation, outside the presence of the jury, that Defendant has a felony record. The charges could be described or read to the jury are that Defendant is "ineligible" to possess a firearm or ammunition, and that the function of the jury would be to simply determine whether he possessed the weapon. That way Defendant's criminal history is not disclosed to the jury in the beginning of the case. If he chooses to testify then this Court would have to engage in a balancing test as to whether to allow impeachment of his prior record, since none of his prior convictions consist of dishonesty or false statement. But that would be a decision by Defendant and not forced to be divulged by the Government's Indictment.

Further, by way of this motion, Defendant is seeking to prohibit the introduction of his prior record if he elects to testify for the reason that by admitting the same would be more prejudicial than probative. His prior record is admittedly bad and if those facts were disclosed to

the jury, that bell would continue to ring long after this Court gave a cautionary and limiting instruction as to the purpose of such evidence.

I. PRECLUSION OF TERM "FELON" IN POSSESSION

A. BECAUSE OF THE IMPLICIT BIAS IMPLICATED IN THE WORD "FELON," THE REFERENCE TO BEING CHARGED WITH "FELON IN POSSESSION" CREATES UNNECESSARY BIAS AND PREJUDICE IN THE MINDS OF POTENTIAL JURORS, THEREBY DENYING DEFENDANT A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE

In this case, Defendant is charged with being a Felon in Possession of a Firearm. By reading the title of that charge, the jury, without knowing anything about the Defendant beforehand, will know before being shown in that he is a convicted felon. Even though jurors can be questioned on this point, and removed if they cannot be fair or given a cautionary instruction, that is insufficient to protect the fundamental right to have an impartial jury. Because of the pervasive negativity throughout society that cannot be avoided, people develop implicit biases as

it relates to persons with a felony record.[2] What researchers tell us about implicit bias is that it is sub-conscious which means people have a bias but do not know they do. That is why when asked the question could they be fair to a person with a felony record, many people will say they can, not knowing that they have implicit biases against persons convicted of felonies. This is why voir dire will be ineffective in rooting out this type of bias and curative instructions also will not have the intended effect. These biases and the effects they have on juries have been studied through the years.

1. SOCIAL SCIENTIFIC RESEARCH SUPPORTS THE CONCLUSION THAT ONCE A JURY IS INFORMED THAT THE DEFENDANT HAS A PRIOR FELONY CONVICTION, THEY WILL USE THAT INFORMATION TO CONVICT, DESPITE BEING GIVEN LIMITING AND CAUTIONARY INSTRUCTIONS.

---

[2] Defining Implicit Bias
Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.

A Few Key Characteristics of Implicit Biases

- Implicit biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Implicit and explicit biases are related but distinct mental constructs. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.
- Implicit biases are malleable. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.

kirwaninstitute.osu.edu/research/understanding

The impact of the jury discovering that a Defendant has a criminal history has been well documented. For instance, *The American Jury* by Kalven and Zeisel (Boston: Little, Brown & Co, 1966), involved a study of jury behavior and indicates that the introduction of a defendant's prior convictions substantially increases the conviction rate. At one point, the authors divided defendants into two groups. The first group was composed of those defendants who took the stand and either had no record or were able to keep it from the jury as well as those defendants who did not take the stand but of whom the jury learned that they had no record. The second group was comprised of all other defendants, i.e., those who the jury learned had a criminal record and those who did not take the stand and of whom the jury received no information as to their record. The acquittal rate of the first group was forty-two percent while that of the second group was twenty-five percent. In trial settings where the evidence suggested the highest probability of acquittal, the acquittal rate of the first group was sixty-five percent and that of the second group, thirty-eight percent. While the study did not determine what percentage of those choosing not to take the stand did so out of fear of impeachment by prior conviction, it did conclude that defendants without records testify in ninety-one percent of the cases, those with records testify in only seventy-four percent. Kalven & Zeisel, *supra* at 146. Where the case is clear for acquittal, only fifty-three percent of defendants with records testify, apparently not wishing to risk their high chance of acquittal on impeachment. *Id.* If it were true that impeachment went only to defendants' credibility, there would be little reason for defendants to shy away from testifying. At worst, their testimony would be disbelieved.

Another study addressed the question of whether jurors may have just found that a prior conviction made a Defendant more dishonest rather than a "bad man". That study found that "prior conviction evidence does not have its impact on verdicts by way of an intervening impact on perceptions of credibility" and that mock jurors "were willing to state that the prior conviction evidence increased the likelihood of the defendants' guilt and was the reason they found him guilty, even though they had been instructed not to use the information for that purpose." Wissler & Saks, *On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt,* 9 Law & Human Behavior 34, 44(1985). Thus, juries exposed to prior conviction evidence may decide on a defendant's guilt upon the basis of the inference that prior criminal activity indicates guilt of a charged crime. See *id.*

In spite of the likelihood of prejudice, it can be argued, that a limiting instruction will suffice regarding how a defendant's criminal history can be used. However, as the United States Supreme Court stated in *Bruton v. United States,* 391 U.S. 123, 135, 88S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968), when over- turning the holding in *Delli Paoli v. United States,* 352 U.S. 232, 242, 77 S.Ct. 294, 300, 1 L.Ed.2d 278 (1957):

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt v Utah,* [120 U.S. 430, 438, 7 S.Ct. 614, 617, 30 L.Ed. 708 (1887)]; *Throckmorton v Holt,* 180 US 552, 567[, 21 S.Ct. 474, 480, 45 L.Ed. 663 (1901)]; *Mora v United States,* 190 F2d 749 [CA 5, 1951]; *Holt v United States,* 94 F2d 90 [CA 10, 1937]."

The notion that a limiting instruction can prevent misuse of prior conviction evidence is simply mistaken, as it asks the jury to do what it cannot. This view is supported by a number of empirical studies.

A Canadian study concluded that "present research leaves little doubt that knowledge of a previous conviction biases a case against the defendant". The likelihood that a jury will convict the defendant is significantly higher if the defendant's record is made known to the jury. *The fact that the defendant has a record permeates the entire discussion of the case,* and appears to affect the juror's perception and interpretation of the evidence in the case."... *These effects are present in spite of the fact that jurors were given specific instructions to ignore the fact of record while assessing the defendant's guilt.* "Hans & Doob, *Section 12 of the Canada Evidence Act and the deliberations of simulated juries,* 18 Crim LQ 235, 251(1976) (emphasis added).Perhaps most disturbing was the study's conclusion that "jurors used [prior conviction evidence] only minimally in considering the issue of credibility." *Id.* at 247. Thus, the intended use of the evidence was of little actual importance.

The Columbia Journal of Law and Social Problems conducted a random national survey of trial judges and criminal defense attorneys. When asked whether they believed jurors were able to follow limiting instructions concerning the use of prior conviction evidence, ninety-eight percent of the responding attorneys answered negatively, and, even more disturbingly, forty-three percent of the responding judges agreed. Note, *To take the stand or not to take the stand: The dilemma of the defendant with a criminal record,* 4 Colum J of Law & Social Problems 215, 218 (1968).

A similar study of this problem concluded that mock jurors used prior conviction evidence to "help them judge the likelihood that the defendant committed the crime charged" in spite of limiting instructions. Wissler & Saks, *On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt,* 9 Law & Human Behavior 37, 44 (1985).

Most telling was the fact that a higher conviction rate was found where, all else being the same, the impeaching crime was murder than where the impeaching crime was perjury. *Id.* at 43. The only explanation for this last result is that the prior conviction evidence was not used exclusively to evaluate credibility. This is emphasized by the fact that the researchers found that there was no significant difference between the mock jurors' ratings of defendant's credibility when a prior conviction was introduced and when one was not. *Id.* at 41. They concluded that “[t]he credibility ratings of defendant did not vary as a function of prior conviction,” while “[c]onviction rates [did vary] as a function of prior conviction....” *Id.*

The Supreme Court has also confirmed what the social scientists have established. The Court noted that in light of the overwhelming tendency for jurors, and even trial and appellate judges to misuse prior conviction evidence, it was the Court’s view that there was an “overwhelming probability” that most prior conviction evidence introduced for the purpose of impeachment will be considered as if it had been introduced to show that the defendant acted in conformity with his criminal past. See *Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct.1702, 95 L.Ed.2d 176 (1987).

2. PRIOR DECISIONS ARE CONSISTENT WITH THE RELIEF SOUGHT BY DEFENDANT IN THIS MOTION.

A similar issue was raised in *Old Chief v. United States,* 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). There, in 1993, petitioner, Old Chief, was arrested after an altercation involving at least one gunshot. Following his arrest, federal charges included not only assault with a dangerous weapon and using a firearm in relation to a crime of violence but violation of

18 U.S.C. § 922(g)(1). This statute makes it unlawful for anyone —who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to possess in or affecting commerce, any firearm. There, as here, the Defendant did not want his specific prior record disclosed to the jury, particularly the felon in possession prior conviction that is the same crime he is charged with now.

The earlier crime charged in the indictment against Old Chief was assault causing serious bodily injury. Before trial, he moved for an order requiring the Government to refrain from mentioning by reading the Indictment, during jury selection, in opening statement, or closing argument, and to refrain from offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the defendant, *except* to state that the defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year.
There, the defendant argued that by revealing the name and nature of his prior assault conviction would unfairly tax the jury's capacity to hold the Government to its burden of proof beyond a reasonable doubt on current charges of assault, possession, and violence with a firearm. Old Chief's attorney offered to solve the problem by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) yea[r]. He argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that un-fair prejudice from that evidence would substantially outweigh its probative value.

The Government refused to participate in any stipulation. The trial court relied on the principle supported by case law that there is a right on the part of the Government to refuse an

offered stipulation and proceed with its own evidence of the prior offense. *United States v. Tavares,* 21 F.3d 1, 3–5 (C.A.1 1994) (en banc); *United States v. Poore,* 594 F.2d 39, 40–43 (C.A.4 1979); *United States v. Wacker,* 72 F.3d 1453, 1472–1473 (C.A.10 1995). On appeal, the authority relied upon be the Government was *Parr v. United States,* 255 F.2d 86 (CA5), cert. denied, 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958), in which the Fifth Circuit explained that the reason for the rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. 255 F.2d, at 88.

The Court rejected this argument and held that the trial court abused its discretion in not allowing a stipulation that would not describe the particulars of the felony. The Court in *Old Chief* noted that the term unfair prejudice, as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of ―unfair prejudice under Rule 403). So, the Committee Notes to Rule 403 explain, unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860. *Old Chief, supra,* 519 U.S. 180.

The *Old Chief* Court noted that such improper grounds certainly include the one that the Defendant was raising to the Court: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then Judge

Breyer put it, "although ... propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance *United States v. Moccia,* 681 F.2d 61, 63 (1st Cir. 1982). Justice Jackson described how the law has handled this risk:

> —Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States,* 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.* The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. *Michelson v. United States,* 335 U.S. 469, 475–476, 69 S.Ct. 213, 218–219, 93 L.Ed. 168 (1948). (emphasis added)

There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity. Nevertheless, in our system of jurisprudence, courts try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendants' prior acts in reaching its verdict. See *United States v. Mitchell,* 2 U.S. (2 Dall.) 348, 357, 1 L.Ed. 410 (1795).

In a recent opinion dated September 23, 2015, the Sixth Circuit Court of Appeals ruled on this very same issue. *United States v Ray*, 803 F3d 244, 252 (6th Cir. 2015). In *Ray*, the Sixth Circuit stated the following:

> While it appears that this Circuit has not explicitly addressed the unfair prejudice that may arise solely as a result of the repeated use of the word "felon" in reference to a defendant, courts in this Circuit have recognized the potential unfair prejudice that may arise as a result of trying a charge under § 922(g) with other charges arising from the same underlying conduct. Further, we recognize the proven impact of implicit biases on individuals' behavior and decision-making. Social scientists have examined extensively the theory of implicit bias in recent decades, especially as it relates to racial bias. See, e.g., Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL'Y REV. 149, 152 (2010); Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. REV. 465, 465 (2010); Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 DUKE L.J. 345, 345 (2007).
>
> **In light of such concerns, and because the word "felon" is not used in the statute, there is no reason a court could not use alternative language — such as the language of the statute — instead of labeling the defendant a "felon" or referring to a charge under § 922(g) as "felon in possession." Indeed, if a court conducted a Rule 403 analysis and concluded that the use of the term "felon" or "felon in possession" was unfairly prejudicial, we see no reason such a ruling should not be upheld**.
> [emphasis added]
>
> *United States v Ray*, 803 F3d 244, 259-60 (6th Cir. 2015).

Just a few weeks after the Sixth Circuit's decision in Ray, US District Court Judge Gershwin Drain relied on the Ray decision to rule on this same issue in a case still pending in the Eastern District. (See attached Order - *US v. Nixon*, 10/14/15, RE 54, Case No. 15-20020, Page ID 355-358). Judge Drain granted the defendant's motion to suppress the use of the word "Felon" in a case involving the same charges, and where the defendant agreed to stipulate that he had been previously convicted by a crime punishable by imprisonment for a term exceeding one year. *Id.* The relevant portion of Judge Drain's opinion is reproduced here:

> [ ] In *United States v. Ray*, the court held that the district court did not abuse its discretion in allowing the use of the word "felon" at trial where a violation of Section 922(g)(1) was alleged. The *Ray* court noted in dicta, however, that: (a) the Sixth Circuit "has not explicitly addressed the unfair prejudice that may arise solely as a result of the repeated

use of the word 'felon' in reference to a defendant," but (b) "courts in [the Sixth] Circuit have recognized the potential unfair prejudice that may arise as a result of trying a charge under § 922(g) with other charges arising from the same underlying conduct." [internal citations omitted]

The Sixth Circuit further recognized "the proven impact of implicit biases on individuals' behavior and decision-making" and noted that "[s]ocial scientists have examined extensively the theory of implicit bias in recent decades, especially as it relates to racial bias." The Sixth Circuit then stated that, "because the word 'felon' is not used in the statute, there is no reason a court could not use alternative language—such as the language of the statute—instead of labeling the defendant a 'felon' or referring to a charge under § 922(g) as 'felon in possession.'" The Sixth Circuit further stated, "if a court conducted a Rule 403 analysis and concluded that the use of the term 'felon' or 'felon in possession' was unfairly prejudicial, we see no reason such a ruling should not be upheld." [internal citations omitted]

In fact, this Court previously granted a similar motion when a defendant agreed to stipulate to the fact that he had a previous conviction for a crime punishable by imprisonment for a term exceeding one year. In that case, this Court agreed to exclude the name and nature of his prior felony conviction throughout trial. See *United States v. Tutt*, No. 13-CR-20396, 2013 WL 6062035, at *4 (E.D. Mich. Nov. 15, 2013)(citing *Old Chief v. United States*, 519 U.S. 172, 185, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)(to note that Old Chief "highlighted the particular danger to Defendant because his prior weapons offense conviction creates a risk that he will be convicted on a propensity inference alone."). Significantly, at the October 8, 2015, hearing, the Government stated that, in light of Ray, it would not object to precluding the use of the term "felon" with respect to the "felon in possession" charge against Defendant and instead using the language of § 922(g)(1)(i.e., a "person–who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"). Defendant also stated that he would like the statutory language used rather than the term "felon." In light of the parties' positions at the hearing, the Sixth Circuit's ruling in Ray, as well as this Court's finding that the term "felon" could be unfairly prejudicial to a defendant, the Court holds that the term "felon" shall not be used in the course of any trial proceedings in this case, including, without limitation, during jury selection, in the jury instructions, and during opening statements, questioning of witnesses, and closing arguments.

The Court is not persuaded, however, that it should grant Defendant's request that the jury be told simply that Defendant is "ineligible" to possess a firearm (rather than that he is a felon or has been convicted of a crime punishable by imprisonment of more than a year). As the Government has argued, simply telling the jury that Defendant is "ineligible" to possess a firearm would eliminate from the jury's consideration one of the elements of the crime (i.e. , Defendant is a "person–who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year").

> In *United States v. Underwood*, No. 95-5441, 95-5442, 1996 WL 536796 (6th Cir. Sept. 20, 1996) (unpublished), a case that is similar to this case, the Sixth Circuit affirmed the district court's rejection of a defendant's request that the issue of possession be submitted to the jury with no mention of his status as a felon. Id. at *6 (citing *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993) (agreeing with the district court denial of defendant's bifurcation motion because granting the request "would require omitting an element of the charged offense from the jury instructions" and adopting the rule in *Barker* that a "district court may not eliminate an element of the crime charged."). Likewise, as the Sixth Circuit stated in the *Ray* decision, "it is still the Government's burden to prove each element of the offense and, likewise, generally the jury must make a finding as to each element, even where there is a stipulation to the elemental facts." *Ray*, 2015 WL 5573749, at *8 (citing *United States v. Jones*, 108 F.3d 668, 674–76 (6th Cir. 1997)).
>
> For the reasons set forth above, the Court denies Defendant's request to inform the jury that he is "ineligible" to possess a firearm, or words to that effect, rather than using the statutory language that he had a prior conviction for a crime punishable by imprisonment for a term exceeding one year.
>
> *US v. Nixon*, Order 10/14/15, RE 54, Case No. 15-20020, Page ID 355-358 (attached).

Here, Defendant submits that the injection into these proceedings of the fact that the Defendant is a "felon" will necessarily create undo prejudice in the minds of the jurors. The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. *See* Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). To remedy this problem, Defendant proposes that he will stipulate that he is "ineligible to possess a firearm," and is requesting that this Court and the parties not state to the jury that Defendant is charged as a "felon" in possession of firearms or ammunition, but rather he is "ineligible" to possess such items.

II. THIS COURT SHOULD SUPPRESS AND PROHIBIT DEFENDANT'S PRIOR RECORD IN THE EVENT HE ELECTS TO TESTIFY FOR THE REASON THAT THE ADMISSION OF SUCH CRIMES WOULD BE MORE PREJUDICIAL THAT PROBATIVE

Defendant is requesting that in the event he elects to testify in this matter, that his prior record not be used for impeachment purposes. His prior record does not involve dishonesty or false statement. His record involves a prior drug offense and prior fleeing and eluding offenses.

Fed R. Evd. 609 allows the admission of evidence of a witness's prior conviction to impeach that witness if the crime was punishable by a sentence of greater than one year and if the probative value of the evidence outweighs its prejudicial effect. FRE 609(a)(1). Where the crime "involved dishonesty or false statement, regardless of the punishment," Rule 609 admits evidence of the conviction without any balancing test. FRE 609(a) (2).

Defendant submits that if Defendant's record were introduced as impeachment, the jury will treat that as propensity evidence and will convict him because he would be considered a "bad man." For the reasons stated above, cautionary instructions and voir dire will be ineffective regarding this issue. Once a criminal history is disclosed, jurors will use that information, not for credibility issues, but will use it to convict as propensity evidence.

Further, Defendant's prior convictions were more than 10 years ago. Specifically, the drug conviction is over 20 years old and the Fourth Degree Fleeing case is 17 years old and the third degree fleeing case in over 11 years old.

Under FRE 609(b), evidence of those convictions is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." FRE 609(b)(1).

This is generally regarded as a high bar. See *United States v. Huff*, No. 97–6020, 1998 U.S.App. LEXIS 14988, at *6, 1998 WL 385555, 2-3 (6th Cir. 1998) ("[E]vidence of convictions more than ten years old should be admitted very rarely and only in exceptional circumstances.") (citing *United States v. Sims*, 588 F.2d 1145, 1147 (6th Cir. 1978)); See also *United States v. Pettiford*, 238 F.R.D. 33, 39 (D.D.C. 2006) (same).

In *United States v. Sims*, 588 F.2d 1145 (6th Cir.1978), the 6th Circuit identified some of the factors to be considered by a district court in ruling on the admissibility of older convictions: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id*. at 1149, citing *Gordon v. United States*, 383 F.2d 936, 940 (D.C.Cir.1967).

Here, there are no exceptional circumstances, and there is no probative value in admitting those two convictions because they are unrelated to the charges in this case. They only show that Defendant is a "bad guy." Defendant's testimony is necessary for his defense.

WHEREFORE, Defendant Bigham prays that this Honorable Court:

a. Suppress the use of "felon" regarding Counts I III and not read the Indictment that refers to Mr. Bigham as being charged as a felon in possession of a firearm or ammunition;

b. Suppress his prior record in the event he chooses to testify;

c. Grant such other relief that the Court deems reasonable and necessary to comply with Due Process.

Date: December 7, 2015 Respectfully submitted,

By: s/Mark Magidson
MARK H. MAGIDSON (P25581)
Attorney for the Defendant Bigham
615 Griswold, Suite 810
Detroit, MI 48226
313-963-4311
mmag100@aol.com

STATEMENT OF COMPLIANCE WITH LR 7.1(a)(2)

I hereby certify and affirm that pursuant to LR 7.1(a)(2)(B), despite reasonable efforts to reach the Assistant US Attorney on December 7 2015, and after leaving a voice message stating the nature of the motion, Defense Counsel was unable to conduct a conference.

Dated: December 7, 2015

By: s/Mark H. Magidson
MARK H. MAGIDSON (P25581)
Attorney for Defendant
615 Griswold, Ste. 810
Detroit, MI 48226

(313) 963-4311

CERTIFICATE OF SERVICE

I herby certify that on December 7, 2015 I electronically filed the *MOTION IN LIMINE TO PROHIBIT USE OF "FELON" IN THE FELON IN POSSESSION CHARGES AND TO SUPPRESS PRIOR RECORD IF DEFENDANT BIGHAM ELECTS TO TESTIFY* and *Exhibit A* with the Clerk of the Court using the ECF system, which will send notification of such filing to the parties of record.

By: s/Mark H. Magidson
MARK H. MAGIDSON (P25581)
Attorney for Defendant
615 Griswold, Ste. 810
Detroit, MI 48226
(313) 963-4311