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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 25, 1998

Lt. S. E. Buffkin
Darlington Police Department
400 Pearl Street
Darlington, South Carolina 29532

Re: Informal Opinion

Dear Lt. Buffkin:

You are seeking an opinion "on the legality of a solicitor or city prosecutor running a criminal background check on all potential jurors."

Law / Analysis

I am unaware of any South Carolina court decision or opinion of this Office which addresses the question of the legality of criminal background checks on potential jurors. However, a number of cases in other jurisdictions have concluded that such background checks are legal. In Saylor v. State of Indiana, 686 N.E.2d 80 (Ind. 1997), for example, the Supreme Court of Indiana faced the question. In Saylor, the Court analyzed the issue as follows:

Saylor contends he is entitled to a new trial because the State conducted criminal background checks on potential jurors. When Saylor became aware that the State may have been using this information in questioning potential jurors, Saylor asked the court to discharge all jurors previously selected or to declare a mistrial. The trial court denied Saylor's motion but stated that it would entertain a discovery request by Saylor for the information. The record does not disclose any such discovery request.

Request Letter

Saylor's contention fails for two reasons. First, he does not cite authority from any jurisdiction to support his argument. ... Second, and more importantly, he fails to explain how the State's use of the criminal background checks prejudiced his interests. The State noted that no juror had been challenged due to his record checks. Rather, it had relied upon information provided on the juror questionnaires and gained during voir dire to challenge the jurors. Furthermore, Saylor's assertion that he was denied due process because the State had access to information not available to him is similarly unpersuasive. The trial court stated that it was willing to entertain a discovery request for the information, thereby alleviating any prosecutorial advantage. In light of the above factors, we find no error here.

In Tagala v. State, 812 P.2d 604 (Alaska 1991), the Court also concluded that the running of criminal records checks on prospective jurors was valid. The Court recognized that this practice had been approved by courts in a number of jurisdictions throughout the country. Observed the Court,

[a]pparently it is a common practice, in Alaska and other states, for the prosecutor to run criminal record checks on prospective jurors. Professor LaFave notes that such record checks, even when coupled with police investigation of the prospective jurors, are frequently challenged but rarely successful. LaFave, 2 Criminal Procedure § 21.3(b) at 725 (1984). This seems to be the first time the issue has been raised in this state.

Tagala relies on State v. Bessenecker, 404 N.W.2d 134 (Iowa 1987), in support of his argument. In that case, the Iowa Supreme Court held that the state must seek a court order before obtaining computerized criminal justice information on prospective jurors. Id. at 139.

However, in most cases, courts have upheld the practice. See, United States v. Falange, 426 F.2d 930 (2d Cir. 1970); People v. Murtishaw, 29 Cal.3d 733, 175 Cal. Repr. 738, 631 P.2d 446 (1981); People v. Aldridge, 47 Mich. App. 639, 209 N.W.2d 796 (1973); Losavio v. Mayber, 178 Colo.

184, 496 P.2d 1032 (1972); Commonwealth v. Smith, 350 Mass. 600, 215 N.E.2d 897 (1966).

812 P.2d at 611. And in Sears v. State, 262 Ga. 805, 426 S.E.2d 553 (1993) the Georgia Supreme Court stated that "[w]e see no reason to prohibit the state from running criminal background checks on prospective jurors." 426 S.E.2d at 556.

SLED Regulation 73-24 has been adopted pursuant to S.C. Code Ann. § 23-3-130. Such Regulation provides for dissemination of nonconviction data in the following circumstances:

- A. Criminal justice agencies for purposes of the administration of criminal justice and criminal justice agency employment.
- B. Individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate state or local officials or agencies.
- C. Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes for which given, ensure the security and confidentiality of the data consistent with these regulations, and provide sanctions for violation thereof.
- D. Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency. The agreement shall specifically authorize access to data, limit the use of data to research, evaluative, or statistical purposes, ensure the confidentiality and security of the data consistent with these regulations and section 524(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and any regulations implementing section 524(a) and provide sanctions for the violation thereof.

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The Court in Tagala concluded that the State's use of the law enforcement computer system to run criminal background checks on prospective jurors did not violate a similar provision whereby criminal justice information could be used only for law enforcement purposes or for any other lawful purpose necessary for administration "[s]ince the criminal record of a prospective juror is relevant for the use of challenges for cause"

Based upon the foregoing, therefore, I see no prohibition in the use of criminal background checks on prospective jurors. Such use insures the integrity of the jury system and further guards against the use of jurors with criminal convictions.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an