IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY DOCKET

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 10-20029-CM-JPO |
| | ) | |
| KENNETH G. LAIN, JR., | ) | |
| | ) | |
| Defendant. | ) | |

**MOTION TO DISMISS THE SUPERSEDING INDICTMENT ON GROUNDS OF PROSECUTORIAL MISCONDUCT WITH SUGGESTIONS IN SUPPORT**

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## FACTS

Defendant Lain was indicted in this case on February 25, 2010 in a one count indictment in which he is accused of taking a hand gun from Missouri to Kansas where he gave it to his family minister. At the time of the transfer, neither he nor the benefactor of the gift, Carroll Hill, were licensed federal firearms dealers. It is unlawful for a person in one state to willfully make such a transfer without going through a federal firearms dealer. See Title 18 USC, Sections 922(a)(5) and 924(a)(1)(D).

At the initial appearance on the above indictment the prosecutor talked at

length about Mr. Lain's background and his various encounters with local law enforcement agencies which the government suggested often involved rather bizarre behavior and some questionable statements and conduct. Several of these encounters resulted in the issuance of local municipal citations.

In 2008 Mr. Lain was the subject of investigation by the local ATF and was accused of and ultimately indicted in the Western District of Missouri in a one count indictment for theft of a firearm from a gun shop in Missouri on June 25, 2008. See *United States v. Lain*, 4:08-cr-00172-SOW-1. That indictment was thereafter dismissed on November 11, 2008 after Mr. Lain agreed to be placed on pretrial diversion. Because of Mr. Lain's membership in the United States Army Reserve, he was specifically given permission have, possess and use firearms while on pretrial diversion. The indictment was docket entry #1 and the dismissal was docket entry #11, the final docket entry in the case.

The prosecutor has made no secret of the fact that she believes Mr. Lain is a person who in her judgment should not be legally able to possess firearms, as attested to by her representations to the Magistrate Judge during the bail proceedings. This statement was tempered with a representation to defense counsel that her objective was not the obtain lengthy incarceration for Mr. Lain, but merely to permanently disqualify him from possession of firearms and end his

military career.

Undersigned counsel informed the prosecutor that Mr. Lain was absolutely proceeding to trial and that it was the defense intent to go forward on the scheduled docket. The prosecutor thereafter informed counsel that she would be in Denver for oral argument on the first week of the docket but would be available for trial the following week. Defendant had no objection to this.

On April 19, 2010 defendant filed his exhibit list (doc. 9) and his proposed witness list (doc. 10). On April 20 defendant filed proposed voir dire (doc. 11) and on the 21st his request for a verdict director instruction, and instructions on good faith and willfulness (doc. 12).

Defense counsel has made no secret of the fact that his client will testify that he had no knowledge that it was unlawful for him to give the firearm to his family minister. The discovery fails to show an iota of deceptive or devious behavior on the part of Hill or defendant or that there was any willful attempt to hide the nature of the transaction, or engage in it for bad purpose, the lynchpin of the offense. Indeed, after the gift, Hill attempted to find out what he needed to do to make a record of the transaction for purposes of Kansas Law and discussed this with Mr. Lain. Defendant Lain had previously purchased a handgun in Missouri for another Missouri resident and was familiar with the “permit to purchase” law in Missouri.

In the latter transaction, Mr. Lain went to the Jackson County Sheriff's office and applied for the permit to ensure he was in compliance with local Missouri law.

Mr. Hill informed Mr. Lain that he called several local agencies and was finally directed to go to the "Bullet Hole", a local gun shop in Kansas, to find out what he needed to do. It was at this point he was informed that he and Mr. Lain should have unutilized a federal firearms dealer to carry out the transfer in accordance with federal law.

Mr. Hill was subsequently interviewed by an ATF agent and provided all the above information. Mr. Hill was told not to worry about it as he had not violated the law because he lacked the necessary intent. This is of course exactly the situation with Mr. Lain, although the government saw fit to indict him for the very same offense they were willing to ignore when it came to Hill's involvement.

On April 22, 2010 the United States obtained a superseding indictment in this case. That indictment charges the same original count and then adds a second count alleging a violation of 18 USC, Section 922(n) and 924(a)(2). The gist of the offense is that at the time the offense in Count One was committed, Mr. Lain was under indictment in Missouri and it was therefore a separate second offense for him to take the hand gun from Missouri to Kansas and give it to Mr. Hill in Kansas. See 18 USC, Section 922(n).

**ARGUMENT**

The operative effect of the superseding indictment was to accomplish several things. First and most significantly, it was done with the intent to bolster the government's case at trial. By adding the second count naming the old indictment in Missouri the prosecutor would clearly be able to refer to that charge, the diversion agreement the defendant signed, and other factual matters concerning that case in Missouri. It would immediately cast defendant in a much worse light and paint him out to be a suspected thief who was involved with stolen firearms. Moreover, the superseding count alleges only "knowing" conduct as opposed to "willful" conduct, the higher standard of proof, and would give the prosecution a much better chance of obtaining a conviction in otherwise extremely weak case [1]

Secondly, the superseding indictment effectively continues the case and takes it off the current docket. Counsel became aware of the superseding indictment when the prosecutor called and informed counsel it had been obtained and inquired if the defendant was available for arraignment on Wednesday, April 28, 2010. During the call, undersigned counsel asked about the nature of the new charge or charges and was informed of the basis for Count Two.

[1] Defendant believes this count should in fact allege that the act was done willfully, per the statue; however, this is moot in light of the dismissal.

Counsel immediately informed the prosecutor that no such indictment was pending on the date of the alleged offense and that the charge was baseless. Apparently, after confirming this by checking with PACER, the prosecutor filed a motion to dismiss the newly included second count on April 22, 2010, exactly one day after it had been returned (See doc. 14). The motion was granted on the same day by the district court (See doc. 15).

Another troubling aspect of this entire episode and one that should be the subject of inquiry is what evidence was presented to the grand jury to obtain this spurious Count Two and where it came from. Defendant readily admits that there is evidence to support the charge in Count One and that the investigation did in fact clearly reveal that he committed the volitional act of taking the gun from Missouri to Kansas where he gifted it to Mr. Hill, the basis of the original Count One. Defendant of course denies any criminal intent and knowledge that such conduct was unlawful.

To obtain an indictment on the new count two it would appear that the focus of the investigation would simply have to involve a review of the prior presentation to the grand jury and review of the case file after which the ATF agent could present that evidence to the grand jury with some proof and basis that there was indeed an indictment pending in Missouri when the alleged unlawful conduct

occurred.

Undersigned counsel is himself a retired Assistant United States Attorney who is intimately familiar with the inter workings of the grand jury system and in fact served for a number of years as part of a three member indictment review board panel in the Western District of Missouri that was charged with reviewing every indictment which was required to be submitted to the panel with an accompanying prosecution memorandum. These were reviewed for both proper form and legal sufficiency to sustain any charged counts. ATF routinely provides the prosecutor's office with an actual case report which contains interviews and reports as well as a summary of the case and proposed violations. Unfortunately, it appears no such procedure was followed in this case in Kansas.

One would expect that prior to obtaining the indictment on count two that the ATF agent would have personally confirmed that the indictment was in fact pending. Indeed, Count two cites the proper case number for that indictment. A simple check of the court docket would have revealed that the indictment was not on file at the time of the alleged violation. This could have been accomplished very quickly by a review of the PACER system. Also, the Agent who is located in Kansas City could have simply driven to the courthouse and checked with the clerk and reviewed the status of the case with the United States Attorney for the Western

District of Missouri. Also, a simple computer check using defendant's name, social security number, date of birth and US Marshal's booking number would have revealed the status of the old Missouri indictment. In short, the Agent had a number of tools at his disposal to quickly confirm the status of the Missouri indictment.

This obviously did not occur. Apparently, he did nothing other than appear before the grand jury and take an oath to tell the truth, after which he informed the grand jury of inaccurate and false information relying on apparent rank hearsay or speculation. How extensive these false representations were remains to be seen because counsel does not have the transcript of the proceedings. Counsel is not prepared to call this perjury; however, it does suggest utter and callous disregard for the sanctity importance of the grand jury proceedings and certainly amounts to grossly negligent investigative technique, which was likely encouraged, promoted and sanctioned by the Assistant United States Attorney as part of an attempt to gain the prosecutorial upper hand and at the same time delay the proceedings.

In ***United States v. Gibbons***, 607 F.2d 1320 (10th Cir. 1979) the court opined:

> We must agree, of course, that it is improper to use the grand jury for the primary purpose of strengthening the Government's case on a pending indictment or as a substitute for discovery, although this may be an incidental benefit. See, e. g., ***United States v. Beasley***, 550 F.2d 261, 266 (5th Cir.), ***cert. denied***, 434 U.S. 863, 98 S.Ct. 195, 54 L.Ed.2d 138; ***United States v. Woods***, 544 F.2d 242, 250 (6th Cir.); ***In re Santiago***, 533 F.2d 727, 730 (1st Cir.); ***United States v. Fisher***, 455 F.2d 1101, 1104-05 (2d Cir.); ***United States v. George***, 444 F.2d 310, 314 (6th Cir.); ***United States v. Dardi***, 330 F.2d 316, 336 (2d Cir.), ***cert. denied***, 379 U.S. 845, 85 S.Ct. 50, 13 L.Ed.2d 50; ***In re National Window Glass Workers***, 287 F. 219, 223, 227 (N.D.Ohio). However, where there is another legitimate purpose behind the grand jury investigation, the proceeding would not be improper merely because the Government may derive an incidental benefit. ***Application of Iaconi,*** 120 F. Supp. 589, 590-91 (D.Mass.).

The viability of this ruling was reaffirmed in ***United States v. Jenkins***, 904 F.2d 549 (10th Cir. 1990) ("We said in ***Gibbons*** that the grand jury process is abused when the prosecutor uses it "for the primary purpose of strengthening the Government's case on a pending indictment or as a substitute for discovery, although this may be an incidental benefit.")

In ***United States v. Wadlington***, 233 F.3d 1067 (8th Cir. 2000) the court, citing ***Gibbons***, held:

> It is well-settled that it is improper to summon a witness before the grand jury "for the sole or dominant purpose of preparing a pending indictment for trial." ***Puckett***, 147 F.3d at 770 (quoting ***United States v. Gibbons***, 607 F.2d 1320, 1328 (10th Cir. 1979)). However, "where the purpose of the grand jury proceeding is directed to other offenses, its scope cannot be narrowly circumscribed and any collateral fruits from bona fide inquiries may be utilized by the government." United ***States v. Sellaro***, 514 F.2d 114, 122 (8th Cir. 1973).

Discovery indicates that the ATF completed its investigation in this case in October of 2009 and submitted a written investigative report to the United States Attorney around that time. That report summarized Mr. Lain's alleged criminal activity and contained the text of Title 18 USC, Section 922 (a) (5) at the beginning of the report. The ATF Agent was well aware of the prior Missouri investigation as he had been the agent involved in that matter.

The only logical explanation for these unfortunate events seems to point to a desire by the prosecutor to 1) bolster her case by adding an additional charge; 2) cast the defendant in a worse light before the jury by putting evidence of bad acts

before the jury e.g. the old indictment and surrounding facts; and 3) obtain a delay in the proceedings. The superseding indictment, with respect to Court Two, was obtained without even minimal due diligence and has now subjected the defendant to additional time, expense, embarrassment and emotional trauma.

The court's supervisory authority to dismiss an indictment because of improper conduct before the grand jury is admittedly limited. ***Bank of Nova Scotia v. Untied States***, 487 U.S. 250 (1998). In ***Nova Scotia*** the Supreme Court held as a general matter that a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendant. The government will likely argue there is no prejudice here because the faulty Count Two has been dismissed. While the remaining Count One is identical to the original Count One, the fact remains that it was obtained after presentation of this case as part of a package of evidence that was tainted by false information and substantial evidence of uncharged misconduct related to the old Missouri case. How and to what extent this influenced the grand jury's decision to return an indictment on Court one is at best speculative.[2] These proceedings were

[2] Counsel obviously does not know whether it was the same panel or two different grand jury panels that heard these presentations. There is obviously room for greater prejudice if the superseding indictment was presented to a newly constituted or different panel.

fundamentally unfair and prejudice running to the remaining Count One should be presumed. See ***Vasquez v. Hillery***, 474 U.S. 254 (1986).

WHEREFORE, defendant moves the Court to dismiss the remaining Count One of the Superseding Indictment.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney Terra Morehead for the District of Kansas and other ECF listed counsel through use of the Electronic Court Document Filing System on April 23, 2010.

/s/
JOHN R. OSGOOD