IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs. **Case No. 10-20029-01-CM**

KENNETH G. LAIN, JR.,

Defendants.

GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS THE SUPERSEDING INDICTMENT

COMES NOW the United States of America, by and through Lanny D. Welch, United States Attorney for the District of Kansas, and Terra D. Morehead, Assistant United States Attorney for said District, and hereby responds to the defendant's motion to dismiss the superseding indictment on grounds of prosecutorial misconduct. (Doc. 16.) In opposition to the defendant's motion, the Government offers the following.

FACTS[1]

On February 25, 2010, the defendant was indicted by a federal grand jury in the District of Kansas for unlawfully and wilfully transferring a firearm from Missouri to Kansas, and when neither he nor the firearm recipient were licensed under federal law to engage in such activity, in violation of Title 18, United States Code, Sections 922(a)(5) and

[1]Government counsel does not intend to "answer" or defend the personal attacks that have been lodged not only against counsel herein, but the U.S. Attorney's Office for the District of Kansas, as well as the ATF case agent. Should the Court desire evidence concerning any matters not specifically addressed herein, Government counsel would be able to produce evidence by way of documentation and testimony that conclusively establishes that the allegations of misconduct are spurious.

924(a)(1)(D). The defendant appeared on March 2, 2010, with his retained counsel, John R. Osgood. The defendant was arraigned on the charge and then released on conditions of bond. (Docs. 3, 4.)

Throughout the month of March and into the early part of April, Government counsel and defense counsel communicated on several occasions about resolving the matter. On April 13, 2010, the Government received an e-mail correspondence from defense counsel indicating the matter would be proceeding to trial and acknowledging that any offers regarding a plea would be effectively withdrawn. With that acknowledgment, the Government began trial preparation which included a review of the current indictment. Because prosecutors don't always file all potential charges, it is the pattern and practice of prosecutors to determine if there are in fact additional charges that could be brought, once a case is proceeding to trial and presenting a Superseding Indictment.

Such a procedure certainly does not amount to an improper use of the grand jury with the primary purpose being to strengthen the Government's case--while the Government may derive some benefit from the adding of charges, this does not amount to impropriety. The defendant's reliance on *United States v. Jenkins*, 904 F.2d 549 (10th Cir. 1990) (and the other cases) regarding grand jury abuse is misplaced because it involved a situation in which the grand jury heard additional evidence from witnesses without additional charges being filed--arguably to utilize as a discovery tool; however, the court found no resulting prejudice or error. Regardless, such is not the case here.

Government counsel was aware that the defendant was on diversion in the Western District of Missouri on a firearm related charge. Within the discovery provided to defense counsel, the Government had in its possession a copy of the diversion agreement in case

number 08-00172-01-CR-W-SOW, wherein the defendant was granted diversion for a period of 18 months from the date it was executed.[2] The facts surrounding Count 1 of the present Indictment occurred between July and October 2009--well within 18 months of any diversion entered in the Western District of Missouri case.

Government counsel is intimately familiar with the procedure followed in a pretrial diversion case, having been a former Kansas state prosecutor for 16 years, where it was not uncommon for a case to be diverted, as well as under the context of being proudly employed as an Assistant United States Attorney. The process as known and followed in personal situations, as well as that mandated in the United States Attorney Manual, followed by all United States Attorney's Office's, including the Western District of Missouri, is that only **after** successfully completing the diversion program and fulfilling all terms and conditions of the Agreement, the charges are then dismissed.

Government counsel, being fully aware of the charge for receiving a firearm while under indictment, as provided for in under Title 18, United States Code, Sections 922(n), proceeded to conduct legal research to see the viability of whether one was "under indictment" while on diversion. The Government discovered *United States v. Valentine*, 401 F.3d 609 (5th Cir. 2005), which held that one is considered "under indictment" if under a deferred adjudication, i.e., formal diversion. The importance of *Valentine* was that it distinguished the facts of a Texas diversion (in which no formal guilty plea occurs, much like those done in the State of Kansas and in the federal court system) from a diversion

[2]The Agreement was signed by Lain and his attorney in late September 2008, by the probation officer on October 7, 2008 and by the prosecutor, David Barnes, on October 31, 2008.

entered in Missouri (in which an individual formally enters a guilty plea). *See United States v. Hill*, 210 F.3d 881 (8th Cir. 2000).

As a result of the research conducted, on April 20, 2010, Government counsel contacted the Assistant United States Attorney handling the Missouri case, David Barnes, to discuss the viability of the § 922(n) charge. Mr. Barnes confirmed that Lain had not entered a guilty plea in the Missouri case (similar to the facts in *Valentine*) and concurred that the § 922(n) charge would be an appropriate charge. Government counsel was wholly unaware and was not informed by Mr. Barnes that, in fact, the United States Attorney's Office in the Western District of Missouri had filed a motion to dismiss the Indictment on October 29, 2008, which was granted on November 4, 2008, contrary to the procedure outlined in the United States Attorney Manual.[3]

On April 21, 2010,[4] the same grand jury that returned the initial Indictment on February 25, 2010 convened, and on that date the Government presented the additional charge (Count 2) to them for their consideration. Government counsel was acting in good faith that the § 922(n) charge was proper, especially in light of the facts known during the course of the investigation and based upon the conversation with Mr. Barnes. On the evening of April 21, 2010, Government counsel contacted defense counsel to see his availability for a first appearance on the Superseding Indictment for the following week.[5]

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[3]The Government would be prepared to present testimony from numerous long time practicing attorneys about diversion and more specifically the protocol dictated in the United States Attorney Manual.

[4]Because of the volume of cases, returns were not had until April 22, 2010.

[5]This conversation occurred after the matter was presented to the Grand Jury.

When advised of the new charge, defense counsel informed Government counsel that the Indictment had been dismissed in the Missouri case. Government counsel mentioned to defense counsel that David Barnes had been consulted and had not informed Government counsel of the dismissal.

On April 22, 2010, Government counsel was able to confirm with Mr. Barnes that the Indictment in the firearm case in Missouri against Lain had been dismissed in November 2010. When questioned about the fact that he had failed to so inform Government counsel, his response was--"Obviously I failed to recall that when we spoke. I apologize."

The Superseding Indictment was filed on April 23, 2010, at 9:15 a.m. Government counsel filed a motion to dismiss Count 2 at 9:20 a.m. on that same date, noting as a basis for the dismissal that "[t]he Government determined that the defendant was not under indictment in the Western District of Missouri at the time he committed the offense in Count 1." As a result of the Government's motion, the Court granted the motion at 11:27 a.m. on April 23, 2010.

ARGUMENTS AND AUTHORITIES

The defendant has no basis in fact or law to support his claim of prosecutorial misconduct or that he is entitled to dismissal of Count 1. The erroneously filed charge was dismissed at the first opportunity and in record time--5 minutes. The cases relied upon by the defendant are distinguishable and have no factual similarity. None of the cases support the defendant's proposition that the defendant is entitled to a remedy of dismissal as to Count 1. Defense counsel has made a number of statements about what he has speculatively concluded occurred before the Grand Jury and wants the Court to engage in the same sort of speculation to reach a result (dismissal of Count 1) that there is no legal

support or authority to do.

An indictment may be dismissed for prosecutorial misconduct only upon a showing of "flagrant error" that significantly infringes on the ability of the grand jury to exercise independent judgment and actually prejudices the defendant. *United States v. Larrazolo,* 869 F.2d 1354, 1357 (9th Cir.1988); *Bank of Nova Scotia v. United States,* 487 U.S. 250, 255-60, 108 S. Ct. 2369, 2373-76, 101 L.Ed.2d 228 (1988). Federal courts draw their power to dismiss indictments from two sources, namely constitutional error and their inherent supervisory powers. *United States v. Isgro,* 974 F.2d 1091, 1094-99 (9th Cir. 1992), *cert. denied,* 507 U.S. 985, 113 S. Ct. 1581, 123 L.Ed.2d 148 (1993); *United States v. De Rosa,* 783 F.2d 1401, 1404 (9th Cir.), *cert. denied,* 477 U.S. 908, 106 S. Ct. 3282, 91 L.Ed.2d 571 (1986).

"[A] court may dismiss an indictment if it perceives constitutional error that interferes with the grand jury's independence and the integrity of the grand jury proceeding." *Isgro,* 974 F.2d at 1094. To warrant a dismissal on this ground, the prosecutorial misconduct "must significantly infringe upon the grand jury's ability to render an independent judgment." *Larrazolo,* 869 F.2d at 1357 (*citing De Rosa,* 783 F.2d at 1404). The relevant inquiry thus focuses on the impact of the alleged misconduct on the grand jury's impartiality, not on prosecutorial culpability. *United States v. Sears, Roebuck & Co., Inc.,* 719 F.2d 1386, 1392 (9th Cir. 1983), *cert. denied,* 465 U.S. 1079, 104 S. Ct. 1441, 79 L.Ed.2d 762 (1984); *De Rosa,* 783 F.2d at 1405. Constitutional error is found "where the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice" to the defendant. *Bank of Nova Scotia,* 487 U.S. at 257, 108 S. Ct. at 2374-75 (*citing Rose v. Clark,* 478 U.S. 570, 577-78, 106 S. Ct.

3101, 3105-06, 92 L.Ed.2d 460 (1986)). A constitutional violation may also be found if the defendant can show a history of prosecutorial misconduct that is so systematic and pervasive and that it affects the fundamental fairness of the proceeding or if the independence of the grand jury is substantially infringed. *Bank of Nova Scotia,* 487 U.S. at 259, 108 S. Ct. at 2375-76; *Isgro,* 974 F.2d at 1094.

A court may also dismiss an indictment under its own supervisory powers "because of misconduct before the grand jury, at least where [the] misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by [the Supreme] Court and by Congress to ensure the integrity of the grand jury's functions.' " *United States v. Williams,* 504 U.S. 36, 46, 112 S. Ct. 1735, 1741-42, 118 L.Ed.2d 352 (1992) (*quoting United States v. Mechanik,* 475 U.S. 66, 74, 106 S. Ct. 938, 943-44, 89 L.Ed.2d 50 (1986) (O'Connor, J. concurring in judgment)). Courts, however, have repeatedly cautioned that such power is limited and must be used sparingly. *See United States v. Santana,* 6 F.3d 1, 10 (1st Cir. 1993) (referring to such power as a "potent elixir that should not be casually dispensed"). The Supreme Court has emphasized the limitations of such power in several decisions. *See Williams,* 504 U.S. at 50, 112 S. Ct. at 1743-44 ("any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings"); *Bank of Nova Scotia,* 487 U.S. at 254, 108 S. Ct. at 2373 (federal court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudice the defendant and may not invoke its supervisory power to circumvent the harmless-error inquiry prescribed by Fed.R.Crim.P. 52(a)); *United States v. Hasting,* 461 U.S. 499, 103 S. Ct. 1974, 76 L.Ed.2d 96 (1983) (a court may not invoke

its supervisory power to reverse a conviction in order to castigate the prosecution for misconduct that did not prejudice the defendant); *United States v. Payner,* 447 U.S. 727, 100 S. Ct. 2439, 65 L.Ed.2d 468 (1980) ("the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court"); *see also, Santana,* 6 F.3d at 9-11. Before dismissing an indictment pursuant to its supervisory power, a court must first find that the defendant was actually prejudiced by the misconduct alleged. Absent such prejudice-that is, absent proof that the "misconduct 'substantially influenced the grand jury's decision to indict' " or proof that "there is 'grave doubt' that the decision to indict was free from the substantial influence of [the misconduct]"-a dismissal is not warranted. *Bank of Nova Scotia,* 487 U.S. at 256, 108 S. Ct. at 2374. Even if the requisite showing of misconduct and prejudice has been made, nonetheless, a court must "tailor[ ] relief appropriate [to] the circumstances." *United States v. Morrison,* 449 U.S. 361, 365, 101 S. Ct. 665, 668, 66 L.Ed.2d 564 (1981). As the court observed in *Bank of Nova Scotia:*

> Errors of the kind alleged in these cases can be remedied by means other than dismissal. For example, a knowing violation of [Fed.R.Crim.P. 6] may be punished as contempt of court. In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar of the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

487 U.S. at 263, 108 S. Ct. at 2378 (citation omitted). The same grand jury was impaneled as to the original Indictment (Count 1) and in the Superseding Indictment (Counts 1 & 2), as such there is no question that the grand jury was not adversely impacted by the adding of Count 2, when it originally returned a true bill as to Count 1 in February 2010.

In the event the Court could even find that the Government engaged in some sort of misconduct, the defendant is unable to establish any actual prejudice, given the sequence of events. The defendant makes a general assertion that he has now been subjected to "additional time, expense, embarrassment and emotional trauma." The Government assumes the defendant is indicating with regards to the claim of "additional time and expense" based upon the work engaged by defense counsel regarding preparation of the motion to dismiss, which as the Government has asserted is frivolous. As such, the defendant should not be able to claim prejudice based upon time and expense expended on a frivolously filed motion. As for a claim of embarrassment and emotional trauma, the Government is uncertain how the filing of an additional count would have that result. If the defendant asserts that it is because the Superseding Indictment is available for public review, so is the Court's order indicating that the charge was dismissed and the Government's motion indicating the basis for the request that the charge be dismissed.

The defendant has failed to provide any authority upon which this Court could dismiss the remaining count of the Indictment. The Government is confident, based upon the evidence, that a jury could find the defendant guilty as charged, including and particularly with regards to the willfulness of his conduct. As such the Government requests that the defendant's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2010, the foregoing was electronically filed with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

John R. Osgood
Attorney for Kenneth G. Lain, Jr.

s/ Terra D. Morehead
TERRA D. MOREHEAD, # 12759
Assistant United States Attorney