

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

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

**DEFENDANT’S MOTION IN LIMINE TO PRECLUDE 1) ANY MENTION BY THE PROSECUTION OF DEFENDANT’S PREVIOUSLY DISMISSED INDICTMENT AND DIVERSION AGREEMENT IN THE WESTERN DISTRICT OF MISSOURI AND 2) ANY MENTION OF OR QUESTIONING ABOUT THE MISSOURI INVESTIGATION IN WHICH MR. LAIN WAS ACCUSED OF STEALING A HAND GUN FROM A LOCAL GUN STORE WITH SUGGESTIONS IN SUPPORT**

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In 2008 Mr. Lain was investigated by Agent Strous, the ATF case agent assigned to this present prosecution, and was accused of and ultimately indicted on June 25, 2008 in the Western District of Missouri in a one count indictment for theft of a firearm from a gun shop in Missouri. 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. As part of the plea and

disposition negotiations, Mr. Lain signed a written pretrial diversion agreement.

The government has endorsed as a witness the Assistant U.S. Attorney in Missouri who made the agreement with Mr. Lain as well as other parties involved in and having knowledge of the agreement and underlying investigation.

Rules 11 and 410, Federal Rules of Evidence, specifically prohibit the prosecution for attempting to elicit such evidence during the case in chief as well as during cross-examination of Mr. Lain after he has testified. These Rules may be waived if there is a knowing and voluntary waiver included in the agreement.

*United States v. Mezzanatto*, 513 U.S. 196 (1995). An executed copy of the diversion agreement is attached at Attachment “A.” The only waiver provision in that document is in the sixth unnumbered paragraph on page one and states:

Neither this Agreement nor any other document filed with the United States Attorney as a result of your participation in the Pretrial Diversion Program will be used against you except for impeachment purposes in connection any prosecution for the above-described offense.

Mr. Lain has not waived any other rights under Rules 11 and 410, Federal Rules of evidence. Therefore, no evidence of any nature even suggesting he was indicted and later entered into this diversion agreement can be mentioned by the prosecution during the case in chief or used as cross-examination or to assail character witnesses with “have you heard questions”, or as rebuttal evidence.

*United States v. Acosta-Ballardo*, 8 F.3d 1532 (10<sup>th</sup> cir. 1993); *United States v. Leavitt*, 599 f.2d 355 (10<sup>th</sup> Cir. 1979).

Federal Rule of Evidence 404(b) states:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The defendant has not heretofore made demand for notice of use of 404(b) evidence and the prosecution has not therefore provided defendant with any notice of intent to elicit such evidence against defendant.<sup>1</sup> The prosecutor has endorsed a number of witnesses who have underlying knowledge of the Missouri gun theft investigation and has endorsed police officers in Kansas who have had contact with defendant resulting in the issuance of municipal ordinance violations.

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<sup>1</sup> Absent a concession from the government that such 404(b) evidence will not be offered, defendant hereby takes the position that this motion in limine also constitutes a proper demand for the specific nature of such intended evidence in accordance with Rule 404(b), Federal Rules of Evidence.

While defendant has been provided full discovery, he is left to speculate as to exactly what it is the prosecutor thinks she will be able to elicit in the way of relevant and admissible testimony from many of these witnesses.

A review of the discovery and the government's witness list seems to clearly point to an anticipated tactic by the prosecution to attack the character of defendant by demonstrating that he is fascinated with guns, is a law enforcement "groupie", and that he is a practiced prevaricator.<sup>2</sup> None of this "bad character" evidence is even remotely relevant or probative of whether defendant was acting willfully with bad motive and purpose when he took the firearm from Missouri to Kansas and gave it to his family minister as a gift, the lynchpin of the alleged crime. Indeed the above board nature of the transaction suggests just the opposite. As noted in Rule 404(b), such evidence is admissible only to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident." Claiming to be a wounded war veteran, being arrested on municipal ordinance

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<sup>2</sup> It may be that some of the government witnesses are for rebuttal. Defendant will admit on cross-examination that he has made untruthful statements to others about his own military record and academic and professional credentials. Assuming such cross-examination is allowed, the government will have made its point and extrinsic evidence to prove such is inadmissible, even should defendant deny or quibble with the nature of such representations. Rule 608, Federal Rules of Evidence. *United States v. Fuentes*, 231 F.3d 700 (10<sup>th</sup> Cir. 2000).

violations for improper use of vehicle emergency equipment and otherwise misrepresenting your credentials or status in the military simply do not fit the Rule 404(b) criteria. See *Huddleston v. United States* 485 U.S. 681, 961-92 (1988); *United States v. Zamora*, 222 F.3d 756 (10<sup>th</sup> Cir. 2000).

**WHEREFORE**, defendant moves the Court to enter an Order granting the relief requested and such other relief as the court deems appropriate to preclude the admissibility of clearly prejudicial evidence and to further order the government to provide defendant with notice of intent to use 404(b) evidence as well as the detailed nature of such evidence.

Respectfully submitted,

/s/

John R. Osgood  
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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 Sunday, May 02, 2010.

*/s/*  
JOHN R. OSGOOD

DEPARTMENT OF JUSTICE  
UNITED STATES ATTORNEY  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

TO: KENNETH G. LAIN, JR.  
Criminal Case No. 08-00172-01-CR-W-SOW

AGREEMENT FOR PRETRIAL DIVERSION

It appearing that you have committed an offense against the United States in violation of Title 18, United States Code, Sections 922(j) and 924(a)(2) in that you knowingly possessed a stolen firearm, to wit, a Glock, Model 23, .40 caliber pistol, Serial Number DYU721US which had been transported in interstate commerce.

Upon accepting responsibility for your behavior, making full restitution of the retail value of the above referenced weapon and by your signature on this Agreement which constitutes an admission of the offense, it appearing, after an investigation of the offense, and your background, that the interest of the United States and your own interest and the interest of justice will be served by the following procedure given all of the above and your recent receipt of orders which will place your duty station in the country of Iraq and/or Kosovo, serving in the Missouri National Guard; therefore:

On the authority of the Attorney General of the United States, by John F. Wood, United States Attorney for the Western District of Missouri, prosecution in this District for this offense shall be deferred for a period of 18 months from this date, provided you abide by the following conditions and the requirements of the program set out below.

Should you violate the conditions of this supervision, the United States Attorney may revoke or modify any conditions of this Pretrial Diversion Program or change the period of supervision, which shall in no case exceed 24 months. The United States Attorney may release you from supervision at any time. The United States Attorney may at any time within the period of your supervision initiate prosecution for this offense should you violate the conditions of this Agreement. In any case, he will furnish you with notice specifying the conditions of the Agreement which you have violated.

After successfully completing your diversion program and fulfilling all the terms and conditions of this Agreement, no prosecution for the offense set out above will be instituted in this District.

Neither this Agreement nor any other document filed with the United States Attorney as a result of your participation in the Pretrial Diversion Program will be used against you, except for impeachment purposes, in connection with any prosecution for the above-described offense.

Conditions of Pretrial Diversion

**ATTACHMENT "A"**

05/02/10 11:22AM

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1. You shall not violate any law (federal, state or local). You shall immediately contact your pretrial diversion supervisor (hereinafter "supervisor") if arrested and/or questioned by any law enforcement officer.

2. You shall attend school or work regularly at a lawful occupation or otherwise comply with the terms of the special program described below. If you lose your job or are unable to attend school, you shall notify your pretrial supervisor at once. You shall consult him/her prior to job or school changes.

3. You shall report to your supervisor as directed and keep him/her informed of your whereabouts.

4. You shall follow the program and such special conditions as may be described below.

\* \* \* \* \*

I assert and certify that I am aware of the fact that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. I also am aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the court may dismiss the indictment, information, or complaint for unnecessary delay in presenting a charge to the grand jury, filing an information, or in bringing a defendant to trial.

I hereby request the United States Attorney for the Western District of Missouri to defer such prosecution. I agree and consent that any delay from the date of this Agreement to the date of initiation of prosecution, as provided for in the terms expressed herein, shall be deemed to be a necessary delay at my request, and I waive any defense to such prosecution on the ground that such delay operated to deny my rights under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States to a speedy trial or to bar the prosecution by reason of the running of the statute of limitations for a period of months equal to the period of this Agreement.

