

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case Nos. 10-20029-01-CM
)	
KENNETH G. LAIN, JR.,)	
)	
Defendant.)	

**GOVERNMENT’S RESPONSE TO
DEFENDANT’S MOTION *IN LIMINE***

The United States of America, by and through Lanny D. Welch, United States Attorney for the District of Kansas, Terra D. Morehead, Assistant United States Attorney for said District, and hereby responds to the Defendant’s Motion *in Limine* to Preclude (sp) 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 (hereinafter referred to as *Motion in Limine*) (Doc. 21.) While the defendant only mentions seeking exclusion of the diversion agreement and the facts detailing Lain’s theft of the pistol in his motion heading, the body of his motion actually references much more that he is seeking to exclude. The Government **does not** intend to offer any evidence under the provisions of Rule 404(b). However, much of the evidence the defendant is attempting to extricate from the jury trial will be admissible as *res gestae* or possible impeachment or rebuttal evidence.

The defendant is “questioning” the Government’s witness list and is requesting that

the Court limit the Government's evidence based upon his presumptions about what the witnesses will be testifying about. Over the past several weeks defense counsel has filed numerous pleadings and made assertions based upon a theory that the case agent herein, ATF Special Agent Roger Stous,' was motivated in the instant case after investigating Lain in 2008 in the Western District of Missouri, in which Lain stole a firearm from a Federal Firearms Licensee, and that because Agent Stous was dissatisfied with the outcome (diversion), he engaged in a "vendetta" driven investigation and prosecution. The problem with this theory is that Agent Stous had nothing to do with the 2008 investigation and prosecution in the Western District of Missouri and did not even become aware of Lain until events unfolded in Kansas in August and September 2009. The Government has made defense counsel fully aware of this information and requested that he file documentation retracting these false and libelous assertions against Agent Stous and he has refused to do so, asserting that "these are matters to be resolved at trial." As such, the Government requests an order from the Court directing the defendant from questioning, eliciting, commenting or eluding to or making false assertions for which there is no good faith basis to rely upon. Additionally, defense counsel has repeatedly made statements in public pleadings that Agent Stous provided perjured testimony to the Grand Jury—likewise he has no good faith basis upon which to make such an assertion. "Perjury" or "lying under oath" is an act that occurs when someone deliberately makes a false statement under oath—such is not the case herein.

The Government is quite concerned by defense counsel's repeated efforts to try this case in pleadings, by providing the Court with only partial or incomplete information. For instance, the defendant has made no secret over the fact that he intends to testify and

indicates that he will admit “he has made untruthful statements to others about his own military record and academic and professional credentials.” The defendant asserts that because the defendant will admit to this fact that the Government “will have made its point” and all the extrinsic evidence should be precluded. However, the evidence about his untruthfulness concerning his record and credentials is highly relevant and probative with regards to several witnesses, pertaining to the wilfulness element as to Count 1 and in establishing Lain’s unlawful purpose in the transfer of a firearm from Missouri to an individual in Kansas. The Government believes it should be allowed to introduce evidence in its case in chief, as to certain falsities that he told close associates, because these falsities are probative to the current prosecution and the element of wilfulness.

Additionally, the Government believes it should be allowed to cross-examine the defendant about the subterfuge he has repeatedly engaged in, because by testifying, his credibility will be placed squarely at issue. For whatever reason the defendant has seen fit to file a copy of his diversion agreement from the case in the Western District of Missouri. While the Government does not intend to get into the specific allegations in that case (Lain’s theft of the firearm which was captured on videotape), it is highly relevant and probative that the defendant made false representations to the court and the U.S. Attorney’s Office in Missouri in order to acquire diversion. He received diversion **solely** because he represented that he had received military orders and was deploying to Iraq and/or Kosovo, with the Missouri National Guard (see reference contained in Defendant’s Attachment “A” at 1), which were documents the defendant included in his list of exhibits he intended to introduce. Lain’s representations about being deployed were completely false, as Lain **never** received orders to be deployed by any military unit.

The Government disagrees that the diversion agreement involves the provisions of F.R.C.P. 11 or F.R.E. 410. Lain did not enter a formal plea when he entered into the agreement. Regardless, the waiver of Lain's diversion only mentions prohibiting the use of the Agreement or any other documents—the Government does not intend to introduce any documents. The Government would only intend to cross examine Lain about the subterfuge he engaged in to receive diversion. Lain has used deception on numerous occasions in order to get out of serious legal trouble.

The defendant is claiming that he did not act wilfully when he transferred the firearm from Missouri to Kansas. The Government's evidence will establish otherwise. The defendant is attempting to get the Court to tie the Government's hands by not allowing the jury to hear relevant evidence. It is clear from the defense counsel's motion that he is not familiar with all of the facts and circumstances surrounding a number of the endorsed witnesses and the importance of their testimony particularly as it relates to the wilfulness element of the crime charged.

The Government does not intend to delve into the fact that Lain was charged with several "municipal ordinance(s)" in Shawnee on September 27, 2009; however, the details involving that situation are relevant as "res gestae." Those events were how authorities began investigating the offense for which Lain is proceeding to trial, which also clearly negates the defendant's "vendetta theory." Evidence of other crimes should not be suppressed when those facts come in as res gestae – "as part and parcel of the proof of the offense charged in the indictment." *United States v. Gand*, 560 F.2d 990, 993- 93 (10th Cir. 1977); see also *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980) (stating evidence is admissible when it provides the context for the crime, "is necessary to a 'full

presentation' of the case," or is "appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the "res gestae" ' "). Evidence admissible for one of the purposes specified in F.R.E. 404(b) and res gestae evidence are not always separated by a bright line. See *United States v. Cook*, 745 F.2d 1311, 1318 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220, 105 S. Ct. 1205, 84 L.Ed.2d 347 (1985).

The *Masters* case noted as follows:

“One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . ' (and is thus) part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "(t)here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae." As the Court said in *United States v. Roberts*, (6th Cir. 1977) 548 F.2d 665, 667, *cert. denied*, 431 U.S. 920, 97 S. Ct. 2188, 53 L.Ed.2d 232 "(t)he jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge." 622 F.2d at 86.

The events of September 27, 2009, clearly establish that they are part and parcel of the evidence of the crime charged in Count 1 and it is necessary to provide the jury with a full presentation of the case. It is also highly relevant with regards to the wilfulness of the events which involved Lain obtaining a firearm from a Missouri resident under false pretenses and transferring it to a Kansas resident, all which was done in an unlawful manner, which is what the Government is require to prove to satisfy the criminal elements.

In *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939, 1948-9, 141 L.Ed.2d 197

(1998), the court held that the Government was not required to prove a defendant knew about the federal licensing requirement in order to satisfy the willfulness component of section 924(a)(1)(D), but only that he knew he was acting in an unlawful manner. The facts will clearly establish that Lain knowingly acted in an unlawful manner utilizing a series of lies and subterfuge to acquire the firearm from the State of Missouri to transfer it to an individual in Kansas. The Court can certainly limit any potential prejudicial effect by following the introduction of any of the evidence with a limiting instruction. Moreover, whatever prejudice may result from admitting defendant's other connected bad acts, it is not of a nature to "substantially outweigh" its probative value, especially considering its relevance to what is an essential element of the Government's case: the willfulness element which the defendant disputes, or for impeachment or rebuttal purposes.

CONCLUSION

The Government asserts that some of the evidence that will be introduced is first and foremost admissible as res gestae and other offered evidence is relevant on the issue of willfulness. The evidence the defendant seeks to exclude will be admissible as res gestae, impeachment and/or rebuttal evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2010, I electronically filed the foregoing response with the clerk of the court by using the CM/ECF system which will send a notice of electronic to counsel of record.

s/ Terra D. Morehead
Terra D. Morehead
Assistant United States Attorney