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 REPLY TO THE GOVERNMENT'S ANSWER TO DEFENDANT'S PENDING MOTION IN LIMINE WITH SUGGESTIONS IN SUPPORT

The government seems confused as to what are relevant issues as part of motion practice as opposed to what is a legally admissible defense at trial (See Gov answer at 1-2). Contrary to the Government's suggestions, the defense will not attempt to solicit any testimony from any witness, whether defense or government, having anything to do with a claim of "vendetta", as such matters are clearly not relevant as to the simple issue of whether defendant willfully violated

federal law when he gave the gun to his friend and family minister. The latter will be the sole focus of the defense and testimony will be confined to that issue.[1]

After defendant's indictment in Missouri he was reassigned to the 326th Area Support Group in Kansas City, Kansas, a US Army Reserve Command, as reflected in defendant's exhibit #21, a unit then designated for activation by DOD orders. This unit was on deployment orders and did in fact deploy to Iraq in October 2008 for a period of approximately one year. The unit was placed on deployment orders on May 14, 2008 by the Department of Defense as reflected in defendant's exhibit #22. When it came time to deploy in October, 2008, defendant's Chain of Command thereafter made a decision that 1LT Lain should remain behind as part of the rear detachment. At the time his deployment status was discussed with the US Attorney, he in fact expected to be deployed based on

[1] Defendant has not accused Stous of willful perjury. We have only pointed out that no other conclusion can be arrived at other than false information was presented to the grand jury, a matter already conceded to defense counsel and the government by one of Agent Stous's superiors in email in which he described the event as a "negligent" act. Defendant has been advised by the government that Stous was not the case agent in the Missouri matter and will accept that. This court has made its ruling on the misconduct motion and defendant believes these issues are behind us.

his reassignment to the 326th. Again, discussion about his anticipated deployment were Rule 11 and Rule 410 discussions that are inadmissible and defendant has marked the aforementioned exhibits only on the off chance that they should be needed at some point. He does not intend to offer these into evidence in his defense.

At page 4 of the government's answer the prosecutor argues that Rules 11 and 410 do not apply to the diversion agreement but cites no authority for such a proposition or tries to distinguish the clear authority cited by defendant in his motion in limine. These rules would indeed be hollow and meaningless in this case if the prosecution were allowed to tell the jury he negotiated with the government about a gun theft charge and was thereafter not charged because he was being deployed. All the discussions with the prosecutor in the Western District of Missouri took place over the course of several weeks and reflect clear negotiations to achieve a mutually acceptable disposition to the charged indictment. The indictment, the diversion agreement, and the discussions that brought about the agreement and the dismissal are part and parcel of the Rules 11

and 410 discussions and ultimate disposition.[2]

Defendant in his motion in limine makes it clear that he expects to be cross-examined on prior statements he has made that ultimately turned out not to be true. This is a legitimate area of inquiry, assuming it does not intrude into the area of the diversion agreement and those discussions. Specifically, defendant will admit on cross-examination that he has made untruthful statements to others about his own military record and academic and professional credentials. The government does not seem to understand or at least agree with the clear language in Rule 608, Federal Rules of Evidence. Once the impeachment question is asked of Mr. Lain, his answer is on the record and extrinsic evidence to prove up the prior inconsistent statement is inadmissible and this is true even should defendant deny or quibble with the nature of such prior representations where the prior representations are clearly extrinsic to the issue at trial. See Rule 608, Federal Rules of Evidence. ***United States v. Fuentez***, 231 F.3d 700 (10th Cir. 2000).

For the benefit of the government so they might better understand defendant's legal position, defendant offers the often cited law school example of the drunk driver case. This involves the drunk driver who is asked on the stand

[2] Contrary to the prosecutor's suggestion at page 3 of her answer, the video in question from the gun store was inconclusive and there were other suspects all of

where he had breakfast and he replies "Denny's." He is then asked if he in fact had Breakfast at the Waffle House. He answers "no, Denny's." Where he had breakfast is otherwise irrelevant to the DWI charge and Courts will not allow a mini-trial to determine where he ate breakfast whether his answer is true or false. On the other hand, if he is asked in good faith by the prosecutor whether he told the waitress at the Waffle House he just got off work from the night shift at a local manufacturing plant and needed more than a few stiff drinks and was going to Joe's Bar to get them and he is then arrested later in the morning on the way home for drunk driving, the evidence is not extrinsic and the government could clearly put on the evidence in its case in chief as an admission against interest or call the waitress as a rebuttal witness. This is the clear teaching of ***Huddleston v. United States***, 485 U.S. 681 (1988). For a variation and exception on the rule, see ***United States v. Abel***, 469 U.S. 45 (1984) (extrinsic evidence may be admissible to prove strong bias of a prosecution witness).

Defendant acquired the .38 caliber firearm involved in this case from a Mr. Hart, another friend and acquaintance. Mr. Hill admired the gun and liked it. Defendant Lain later made a decision to give it to Mr. Hill because he felt Mr. Hill was a close friend and it would be a nice gesture. There will be no evidence that

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which no doubt influenced the Missouri prosecutor's decision to defer prosecution.

either Hart, defendant or Hill discussed some nefarious plan to get the gun to Hill in another state to avoid the consequences of entering it into federal firearms records by use of a federal firearms dealer to do the transaction. There is not a shred of evidence to be offered by a single witness to establish that there were any sinister discussions among any of these government witness to support a claim that defendant or Hart or Hill were trying to subvert federal law. Again, the government simply wants to unload on defendant to attack his character through testimony of unrelated irrelevant incidents that cast him in a bad light, none of which deal with the issue of whether he and Hill and Hart were aware that one or all were violating federal law.

WHEREFORE, defendant prays that the Court grant him the relief sought in his motion in limine presently on file.

Respectfully submitted,

/s/

John R. Osgood
Attorney at Law, KS#70340

Bank of the West Bank Building - Suite 305
740 NW Blue Parkway
Lee's Summit, MO 64086

Office Phone: (816) 525-8200

Fax: 525-7580

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 Tuesday, May 04, 2010.

/s/
JOHN R. OSGOOD