

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.)	

**PETITION
FOR AN ORDER AND FINDINGS THAT
DEFENDANT LAIN IS ENTITLED TO
ATTORNEYS FEES PAYABLE BY THE UNITED
STATES DEPARTMENT OF JUSTICE AND/OR
THE BUREAU OF ALCHOL, TOBBACO AND
FIREARMS WITH SUGGESTIONS IN SUPPORT**

JURISDICTION

Defendant Lain meets the standing requirements of the Equal Access to Justice Act and the requirements of the Hyde Amendment as applied in the criminal context. See Equal Access to Justice Act of 1948, 28 U.S.C. § 2412 and 18 U.S.C. 3006A. Public Law 105-119.7 Section 617 which amended 18 U.S.C. § 3006A (Adequate Representation of Defendants), These laws allow a court to award a “prevailing” defendant “a reasonable attorney’s fee and other litigation

expenses” when the federal prosecution was “vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust.”

Section 617 is popularly known as the “Hyde Amendment,” named after its sponsor, Representative Henry Hyde (R-IL).

Defendant Lain was indicted in this case on February 25, 2010, in a one count indictment in which he was 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 to a person residing in another state without going through a federal firearms dealer. See Title 18 USC, Sections 922(a)(5) and 924(a)(1)(D).

Defendant Kenneth Lain’s net worth is less than \$ 2,000,000.00 and the defendant is therefore eligible to receive said award of attorney fees (See affidavit of net worth attached as Exhibit “A”.) This petition has been filed within 30 days of final judgment in the criminal case and is therefore timely filed under the EAJA and Title 18 USC provisions. The criminal case was filed after the effective date of the act, November 26, 1997, in this district and tried before this court.

Undersigned counsel, a sole practitioner engaged 90% of the time in federal criminal defense practice, with over 30 years experience, was retained and has

submitted as an attachment hereto an affidavit and itemized bill for attorney fees and expenses billed at the CJA rate of \$125.00 per hour which amount is “reasonable” under the Act (See Affidavit of attorney’s fees attached as Exhibit “B”).¹

Defendant Kenneth Lain was the prevailing party within the meaning of the Act and submits that the prosecution was vexatious, frivolous and in bad faith both on the part of Bureau of Alcohol, Tobacco Firearms and Explosives, a Bureau and agency under control of the Department of Homeland Security and the United States Department of Justice, both being Departments of the United States of America, plaintiff herein. There are no “special circumstances” that make this award unjust.

ARGUMENT

Trial commenced on May 10, 2010, and concluded on May 12, 2010.

Defendant offered no evidence other than through cross-examination of government witnesses and rested at the close of the government’s case in chief.

The court took Defendant’s motion for judgment of acquittal under advisement at

¹ Exhibit “B” shows a balance due by Lain of \$7,402.50 on a total bill of \$9,402.50. Counsel seeks an award of \$9,402.50 from respondent payable to counsel so counsel may deposit said funds in his trust account and thereafter return \$2,000 to the client.

the close of the government's case and subsequently ruled the motion moot after the jury returned its verdict. A verdict of not guilty was rendered by the jury after deliberations of less than 30 minutes.

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. At least one of these encounters resulted in the issuance of local municipal citations in Kansas.

In 2008 Mr. Lain was the subject of a criminal investigation in Missouri and was accused of and ultimately indicted in the Western District of Missouri in a one count indictment on June 25, 2008, for possession of a stolen handgun allegedly taken from a gun shop in Missouri by defendant. 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.

During discussions with the prosecutor, counsel informed the prosecutor that Mr. Lain was absolutely proceeding to trial and that there was simply no evidence to support the charge and that it was the defense position that it was a frivolous indictment. Defense counsel informed the prosecutor that defendant had no

knowledge that it was unlawful for him to give the firearm to his family minister and that the discovery produced by the government failed to show an iota of deceptive or devious behavior on the part of Mr. Hill or defendant Lain 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.

Counsel pointed out that following the gift, Mr. Hill attempted to find out what he needed to do to make a record of the transaction for purposes of Kansas Law and did not learn about how it should have been done until after the fact. 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 utilized a federal firearms dealer to carry out the transfer in accordance with federal law which totally surprised both individuals.

Mr. Hill was subsequently interviewed by an ATF agent and provided all the above information to the agent, Roger Stous. Mr. Hill was told by Stous not to worry about it as he had not violated the law because he lacked the necessary intent, which was again confirmed for Hill during his pre-trial witness preparation interview with the prosecutor. Hill was told by ATF and the prosecutor that “Mr. Lain was not who Hill thought he was” or words to that affect, which of course had

nothing at all to do with whether the two engaged in the transfer for illicit purposes in violation of federal law. On the other hand, it does evidence an impermissible motive for the prosecution.

Defendant Lain's licensed private investigator, Mark Reeder, took lengthy recorded statements from both Mr. Hart and Mr. Hill and provided audio and transcribed copies of the statements to the government. Neither witness said anything to even remotely indicate that any of the three individuals, Hart, Lain or Hill, were aware of the law, intended to subvert it, or even had knowledge of it. This defense discovery failed to alter the prosecutor's personal pursuit of an unjust conviction in this case and preconceived notion that Mr. Lain was basically a "bad person" with bizarre behavior.

Apparently recognizing the frivolous nature of the basic charge and convinced of defendant's intent to go to trial, on April 22, 2010, the United States obtained a superseding indictment in this case. That indictment charged the same original count and then added a second count alleging a violation of 18 USC, Section 922(n) and 924(a)(2). The gist of the new offense was 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).²

Counsel immediately informed the prosecutor that no such indictment was pending on the date of the alleged offense and that the charge was baseless and frivolous, and, in counsel's view, was obtained with intent to harass defendant and delay the prosecution and force a guilty plea. Apparently, after confirming the status-of-the-indictment error 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).

The superseding indictment was obtained after ATF Agent Strous testified before the same panel and swore under oath that a Missouri indictment was pending. In a subsequent electronic mail message from Strous's supervisor, counsel was informed that this was "negligence" and not done willfully. Apparently Strous relied exclusively on information provided to him by the prosecutor prior to giving his sworn testimony. Counsel subsequently filed a motion to dismiss relying on the aforesaid tactic, which motion was denied.

¹ This count alleged only "knowing" conduct, a lesser standard of proof, and would have allowed the prosecutor to circumvent many of the evidentiary issues covered by defendant's motion in limine.

An arraignment date was set for the superseding indictment. Counsel informed this Court's courtroom deputy that he wished to proceed to trial on the originally scheduled date. On the date of the scheduled arraignment on the superseding indictment, counsel and his client appeared at court and found the Magistrate's courtroom locked. Counsel subsequently learned from the Magistrate's secretary that the prosecutor had informed someone the hearing should be canceled. Neither defendant nor his counsel were notified of this maneuver and consequently made an unnecessary 50 mile round trip from Lee's Summit to Kansas City, Kansas for court.

Because of the discretionary language of the Hyde Amendment and the district court's unique familiarity with trial court litigation, a district court is vested with discretion in ruling on a defendant's motion under § 3006A. *United States v. Bowman*, 380 F.3d 387, 390 (8th Cir. 2004)(per curiam). As used in §3006A, the term "frivolous", according to *Bowman*, is restricted to those cases where the Government's position "is utterly without foundation in law or fact." *Bowman*, 380 F.3d at 390 (citing *United States v. Beeks*, 266 F.3d 880, 883-84 (8th Cir.2001)). In *United States v. Heavrin*, 330 F.3d 723 (6th Cir. 2003), the court rejected this more restrictive definition that had been applied by a lower court and defined frivolous under the Hyde criteria as: "A frivolous position is one lacking a

reasonable expectation of attaining sufficient material evidence by the time of trial.” Id.

A prosecution is “vexatious” for purposes of the Hyde Amendment if the defendant can show that the criminal case “was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the Government’s conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy.” *United States v. Knott*, 256 F.3d 20, 29 (1st Cir. 2001). In *Heavrin, supra*, the court said vexatious was similar to frivolous but is distinguished by embracing “the distinct concept of being brought for the purpose of irritating, annoying, or tormenting the opposing party.”

A prosecution is brought in “bad faith” if it stems, not simply from bad judgment or negligence, but rather involves the conscious doing of a wrong based upon dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will. *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999) (internal citations omitted).

In order to prevail on a motion for attorneys fees and costs under the Hyde Amendment, a defendant must demonstrate more than that he prevailed at the pre-trial, trial or appellate stages of the prosecution; rather, he must show that the Government’s position underlying the prosecution amounted to prosecutorial

misconduct – a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.

In short, in order to grant a Hyde Amendment claim, a court must find that the government's conduct was wrong and outside the norm as defined by the above case law. *Also see United States v. Stephens*, 177 F. Supp.2d 1108, 1112-1115 (D. Mont. 2001), *affirmed at United States v. Manchester Farming Partnership*, 315 F.3d 1176 (9th Cir. 2003), *rehearing denied* at 326 F.3d 1028 (9th Cir. 2003). To make a prima facie case of selective or vindictive prosecution, defendant must show: (1) that someone similarly situated to him e.g. Carroll Hill, was not prosecuted; and (2) the decision to prosecute was based on an impermissible ground. *See United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978).³

One of the more egregious tactics in this case was the grossly negligent conduct of obtaining a superseding indictment without engaging in minimum due diligence. In the *Heavrin case, supra*, the Sixth Circuit held that it is improper to

³ Defendant submits that the prosecutor's motive for seeking indictment on Count One was not based on an objective belief in Lain's guilt of the charge but rather with intent to deprive him of Second Amendment rights because of his non-charge related conduct and alleged bizarre behavior and perceived fascination with firearms. The superseding indictment was then obtained to further harass him because of his desire to exercise his Sixth Amendment right to trial by jury.

determine the merits of a claim by assigned percentages of fault where some counts are frivolous and in bad faith and others are arguably meritorious. The *Heavrin* court concluded that the case must be examined in the total context of the prosecution and it is possible to recover in cases where some counts were justified and others were not and this is best decided by the district court. Defendant submits that the totality of the circumstances surrounding this unusual and bizarre prosecution warrants an award of attorney fees in the amount claimed.

WHEREFORE, defendant moves the Court to award Mr. Lain reasonable attorney fees.

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 Friday, May 21, 2010.

/s/
JOHN R. OSGOOD

Defendant:

Case NO

Voucher #

Client:	LAIN, Kenneth							
Agency:	ATF	Roger Stous						
Case Agent:								
Asst Prosecutor:	AUSA Terra Morehead, District of Kansas							
Terms of Employment:								
Initial Retainer:	Client shall deposit an initial retainer in the amount of : \$500.00				CLIENT agrees to make monthly payments a minimum of \$500.00 due on the 5th of each month			
which shall be billed against at the hourly rate specified below.								
HOURLY RATE:	125.00							
TIME: In court and out of court								
Date	Service	Inter Confer	Obtain & review records	Legal Research writing	Court time	Investigate and other	Travel Time	
2/26/2010	initial conference with client	1.00						
3/2/2010	attempted vst with client at LS PD	0.25						
3/2/2010	meet with PI Reeder brief him	0.50						
3/2/2010	arraignment / bail/ hearing / meet client BF hearing	0.25			0.50		0.75	
3/4/2010	review Hill interview audio / discuss with Reeder		2.00					
3/4/2010	letter to client w/ copy of CD			0.25				
3/9/10	received and reviewed ATF pros report		0.75					
3/10/10	phon con client/review skiver files		0.50					
3/12/10	phon cons/send Reeder reports / track down hartl /						0.50	
3/15/10	phon cons client and PI / prosecutor / meet client / brief Connie at lunch						2.00	
3/15/10	Letter to Katz demanding time sheets and prior case information						No charge	
3/24/10	email and phon con with prosecutor / email client / talk to PI / review Hartl audio						1.50	
3/27/10	letter to client with Hartl audio enclosed / burn CD			0.25				
3/27/10	letter to Katz and to client regarding fees on old case:						No charge	
MARCH STATEMENT MAILED TO CLIENT								
4/14/10	meeting with client / witness prep / review documents						3.00	
4/19/10	review exhibits and file exhibit list with court						1.00	
4/20/10	work on case / file various pleadings including voir dire / research law						3.50	
4/21/10	meeting with client / witness prep / research, write, file instructions request /email prosecutor						5.00	
4/21/10	phon con re superseding indictment and validity of count						0.25	
4/22/10	review new indictment / phone cons and emails						0.50	
4/23/10	research and write motion to dismiss / complaint letter to ATF / phon cc			5.50				
4/26/10	Review government witness list and discovery / update client on new charge						1.00	
4/28/10	Attend court hearing on superseding indictment (was canceled without notice)							0.75
4/29/10	review and post government answer to motion to dismiss	0.25						
4/30/10	email and call Missouri prosecutor re case status						0.25	
5/3/10	research and write motion in limine to keep diversion agreement out			3.00				
APRIL STATEMENT MAILED TO CLIENT								
5/4/10	review answer from government and write a reply brief			1.50				
5/8/10	trial preparation						2.50	
5/9/10	trial preparation						4.50	
5/10/10	DAY ONE - trial				5.50			0.75
5/10/10	study Hill transcript / prepare opening statement / trial prep						2.50	
5/11/10	DAY TWO - trial				7.50			0.75
5/11/10	review notes and instructions / stufy file and prepare for argument						1.50	

Defendant:

Case NO

Voucher #

5/12/10	DAY THREE - trial final arguments / verdict returned Not guilty					2.00		0.75	
5/13/10	letter to unit commander / email frm client / call Hart re more allegations by gov						0.50		
5/19/10	research Hyde claim and work on petition					2.50			
5/20/10	continue research on Hyde claim and work on petition / get affidavits					1.75			
5/21/10	finalize Hyde claim and file petition					3.00			
Date	Service			Inter Confer	Obtain& review records	Legal Research writing	Court time	Investigate and other	Travel Time
Total time by category				2.00	3.50	17.75	15.50	30.00	3.75
Time running hour bal:								72.50	
Due for services								9062.50	
Non-fee expenses related to case:									
Private Investigation (Reeder)		300.00	Audio statements from Hill and Hart					ck#1040	
color scan & dupe docs for prosecutu		40.00							
Total non-fee related expenses:		340.00							
Gross Billing:		9402.50	Payment history:		500.00	3/4/2010	ck#6439	from parents	
less payments:		2000.00			200.00	3/10/10	ck#6444	from parents	
					300.00	3/15/10	ck#6447	from parents	
					500.00	4/15/10	ck#6466	from parents	
					500.00	5/10/10	ck#6490	from parents	
			Total Payments:		2000.00				
Unpaid balance as of									
05/21/2010 :		7402.50							