

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.,

Defendant.

UNITED STATES' RESPONSE TO DEFENDANT'S "PETITION FOR AN ORDER AND FINDINGS THAT DEFENDANT LAIN IS ENTITLED TO ATTORNEYS (SIC) FEES PAYABLE BY THE UNITED STATES DEPARTMENT OF JUSTICE AND/OR THE BUREAU OF ALCHOL (SIC), TOBBACO (SIC) AND FIREARMS WITH SUGGESTIONS IN SUPPORT" (DOC. 35)

OVERVIEW

On April 12, 2010, the jury returned a verdict finding Kenneth Lain, the defendant in *United States v. Lain*, not guilty of willfully transferring a firearm to another person who does not reside in the state in which the transferor resides, without utilizing a federal firearms licensee (FFL). On that same date, judgment of acquittal was entered on the docket. On May 21, 2010, Lain filed a timely "Petition for an Order and Findings That Defendant Lain Is Entitled to Attorneys (Sic) Fees Payable by the United States Department of Justice And/or the Bureau of Alchol (Sic), Tobbaco (Sic) and Firearms with Suggestions in Support (Doc. 35)." In that petition, Lain asks this court to find that the United States' must pay his reasonable attorney's fees under the Hyde Amendment, arguing that the prosecution against him was brought in bad faith because: (1) there was not sufficient evidence in support of the charge at trial; (2) the second count of the superseding indictment was obtained negligently; and (3) Lain was the victim of selective prosecution.

In this response, the United States demonstrates that its prosecution, albeit unsuccessful, was not brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous, and therefore Lain's petition for attorney's fees should be denied. Restated, because the evidence admitted at trial was more than ample for a reasonable factfinder to have found that Lain was guilty of the crime charged in Count One of the Superseding Indictment, Lain's petition for attorney's fees under the Hyde Amendment should be denied.

STATEMENT OF THE CASE

On February 25, 2010, a federal grand jury returned a one-count indictment charging Kenneth G. Lain with willfully transferring a firearm from Missouri to an individual in Kansas, where neither he nor the Kansas recipient, Carroll Hill, were FFLs, in violation of 18 U.S.C. §§ 922(a)(5), 924(a)(1)(D). Doc. 1.

On April 22, 2010, the United States filed a superseding indictment that charged the same original count and, in a new second count, charged Lain with transporting a firearm while under indictment in violation of 18 U.S.C. §§ 922(n), 924(a)(2). Doc. 13. On April 23, 2010, the United States promptly filed a motion to dismiss the superseding indictment's second count as it determined that the indictment underlying the crime charged in the second count had been dismissed in the Western District of Missouri. Doc. 14. This court granted the United States' motion to dismiss the second count on April 23, 2010, the same day that the United States filed its motion to dismiss. Doc. 15.

On April 23, 2010, the defendant filed a Motion to Dismiss the Superseding Indictment on Grounds of Prosecutorial Misconduct. Doc. 16. On May 4, 2010, this court denied defendant's motion to dismiss stating that "[t]here is no suggestion that the sole count of the

original indictment was obtained in an improper matter” and that “[t]he record in this case does not support a finding of prejudice.” Doc. 24.

On May 2, 2010, Lain filed a Motion in Limine (Doc. 21), to which the United States responded on May 4, 2010, (Doc. 25), and defendant replied the same day. Doc. 26. On May 10, 2010, this court granted in part and denied in part Lain’s motion. Doc. 27.

Trial was held from May 10, 2010, through May 12, 2010. Doc. 30. At the trial’s conclusion, this court took under advisement Lain’s motion for judgment of acquittal. R. at 201.¹ The jury found Lain not guilty on the remaining Count I. Doc. 30. Judgment was entered on May 12, 2010. Doc. 31.

On May 21, 2010, the defendant filed a motion for attorney’s fees under the Hyde Amendment, Pub. L. No. 205-119, title VII § 617, 111 State, 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A (Note)), seeking over nine thousand dollars in attorney’s fees associated with the defense of this case. Doc. 35.

The United States files this response in opposition to Lain’s motion, demonstrating that under the applicable law and relevant facts, an award of attorney’s fees under the Hyde Amendment is unwarranted in this case. In regard to the charge of willfully transferring a firearm to another person who does not reside in the state in which the transferor resides without utilizing an FFL, Lain did not dispute that he committed the acts charged—only that he did not do so in “willful” violation of the law. Because there is no evidence that the United States either

¹ All references to the trial transcript are designated as “R.” with a citation to the relevant page or pages of the transcript. Attached as Exhibit A are copies of the pages from the trial transcript which are cited in this response by the United States, as well as relevant background information pertaining to the witnesses.

misled or entrapped Lain into committing those acts, the issue of Lain's intent was clearly the province of the jury, *see United States v. Whitman*, 665 F.2d 313, 318 (10th Cir. 1981) ("The issue of intent is particularly within the province of the jury.") (citing *United States v. Goldstein*, 649 F.2d 799, 806 (10th Cir. 1981)), and under such circumstances Lain cannot possibly demonstrate that the United States' prosecution in this case was vexatious, frivolous, or in bad faith.

STATEMENT OF FACTS

I. Pre-Indictment Investigation

Authorities began investigating Lain after he was charged with violating several municipal ordinances in Shawnee, Kansas, on September 27, 2009. During a traffic stop, police were alerted to the fact that Lain was in possession of a firearm owned by Thomas Skiver. Due to his familiarity with Skiver from an unrelated investigation, ATF Special Agent Roger Stous was assigned to the investigation. Agent Stous found that Skiver loaned the firearm to Lain under the pretense that Lain was using it for shooting practice. In actuality, Lain used Skiver's firearm as collateral to obtain possession of a second firearm from Thomas Hart without Skiver's knowledge. Lain took the firearm obtained from Hart and unlawfully transferred it across state lines to Carroll Hill. Lain's transportation of the firearm from Missouri to Kansas was unlawful because neither he nor the recipient, Hill, were FFLs.

II. Indictment

On February 25, 2010, a federal grand jury indicted Lain on a one-count indictment for failure to utilize an FFL for interstate firearm transportation. Doc. 1.

III. Superseding Indictment

During its investigation and prosecution of Lain, the United States became aware that Lain had been the subject of a 2008 criminal investigation in the Western District of Missouri for possession of a stolen handgun taken from a gun shop in Missouri by Lain. The defendant was granted diversion for a period of 18 months from the date it was executed in October 2008 in the Western District of Missouri, Case No. 08-00172-01-CR-W-SOW. The United States also became aware that Lain falsely claimed that he was going to be deployed to Iraq in order to obtain diversion in the Western District of Missouri. A person is obviously considered “under indictment” if the indictment against that person has not been dismissed. Based on this information, the United States determined that it would be appropriate to add a second charge against Lain for possessing/acquiring a firearm while being under indictment. 18 U.S.C. §§ 922(n), 924(a)(2). The Assistant United States Attorney (AUSA) handling the Kansas case, Terra Morehead, conferred with the AUSA handling the Missouri case, David Barnes, and verified the viability of the new charge.

Based on this information, the United States proceeded, in good faith, to obtain a Superseding Indictment charging the original count and adding a second count for possessing/acquiring a firearm while being under indictment in violation of 18 U.S.C. §§ 922(n), 924(a)(2). Doc. 13. The same evening the superseding indictment was returned, AUSA Morehead conferred with the defendant’s counsel, John Osgood, who notified her that the Missouri indictment had been dismissed. AUSA Morehead verified the dismissal of the underlying indictment the next day.

The Superseding Indictment was filed on April 23, 2010, at 9:15 a.m. AUSA Morehead filed a motion to dismiss Count II at 9:20 a.m. on that same date, noting as a basis for the dismissal that “[t]he United States determined that the defendant was not under indictment in the Western District of Missouri at the time he committed the offense in Count 1.” Doc. 14. This court promptly granted the United States’ motion at 11:27 a.m. Doc. 15.

IV. Denial of Defendant’s Motion to Dismiss the Superseding Indictment on Grounds of Prosecutorial Misconduct

On April 23, 2010, the defendant filed a Motion to Dismiss the Superseding Indictment on Grounds of Prosecutorial Misconduct on the basis that the superseding indictment served only to (1) bolster the prosecution’s case by adding an additional charge; (2) cast defendant in a negative light by putting evidence of prior bad acts before the jury; and (3) obtain a delay in the proceedings. Doc. 16 at 10-11.

On May 4, 2010, this court denied Lain’s motion to dismiss, calling it an extraordinary remedy to ensure proper standards of conduct by the prosecution. In its Memorandum and Order denying Lain’s motion to dismiss, this court found that “[e]ven assuming some misconduct, defendant does not show a significant infringement on the grand jury’s impartiality.” Doc. 24 at 3. It also noted that the second count was dismissed after the United States recognized its error in regard to the status of Lain’s 2008 indictment. Most importantly, this court found that “[t]here is no suggestion that the sole count of the original indictment was obtained in an improper manner. And there is no evidence of prejudice or infringement on the grand jury’s independent functioning as to that count in either the original or the superseding grand jury proceeding.” *Id.*

V. Trial

A. Elements of the Charge

As noted in this court's instructions to the jury, the elements that must be proven beyond a reasonable doubt in order for the defendant to be found guilty of willfully transferring a firearm to another person who does not reside in the state in which the transferor resides, without utilizing an FFL are as follows:

(1) the defendant resided in the State of Missouri on or about the date he gave or transferred the .38 caliber revolver to Carroll Hill;

(2) Carroll Hill received and took possession of the .38 caliber revolver with intent to keep it;

(3) Carroll Hill resided in the State of Kansas on or about the date of transfer or receipt of the .38 caliber revolver, and was not a federally licensed firearms dealer, manufacturer, or collector;

(4) that defendant did so willfully, that is, that the defendant transferred or gave the .38 caliber revolver to Carroll Hill with knowledge that his conduct was unlawful; and

(5) that this act occurred from, on or about the first day of July 2009 to on or about the first day of October 2009 in the District of Kansas.

Doc. 33 at 16.

In regard to the fourth element, the United States must prove that the defendant acted willfully. To do so, the United States must prove beyond a reasonable doubt that the defendant acted with knowledge that his conduct was unlawful, but not that the defendant knew the precise

legal duty which he was charged with violating. Doc. 33 at 17.

B. The United States' Case-in-Chief

The fourth element, whether or not the defendant acted “willfully,” was the only disputed element at trial; Lain conceded that he had committed the acts proving elements (1)-(3) and (5). Elements (1)-(3) and (5) deal with the act of the interstate transfer of a firearm. Defendant “readily admits that there is evidence to support the charge in Count One and the investigation did in fact clearly reveal that [Lain] committed the volitional act.” *See* Doc. 16 at 6. Moreover, the evidence introduced at trial, including the testimony of Hill, confirmed that (1) the firearm was transferred from one state to another without utilizing a federal firearms dealer. ®. at 176-178; 184-185); (2) Hill received the firearm as a gift from Lain and intended to keep it ®. at 177); and (3) the exchange took place the second week of August 2009 ®. at 176). At trial, this court admitted into evidence two certificates from the Bureau of Alcohol, Tobacco, Firearms and Explosives which verify neither Lain nor Hill are registered federal firearms dealers. Exhibits 3 and 4.

To prove the fourth element - that the defendant acted “willfully”—the United States presented a chain of circumstances from which a reasonable jury could conclude that Lain acted with knowledge that his conduct was unlawful without knowing the specific law he violated. This chain was formed through the testimony of six witnesses, including Travis Meats, Brent Griffin, Thomas Lynch, Thomas Skiver, Daniel Hart, and Carroll Hill. These witnesses described several exchanges of firearms, including the unlawful transfer of a firearm from Lain to Hill in August 2009. These events began in July 2009 when a group of friends were discussing firearms and ended in September 2009 when the defendant was involved in the traffic

stop that initiated this investigation.

On or about July 4, 2009, Skiver, Hart, Hill and Lain were all gathered at Lain's house. R. at 60, 116-117, 168-169. While together, they talked about and showed each other various firearms. R. at 63, 118. Hill commented that he liked Hart's .38 caliber revolver (Exhibit 1). R. at 170-171.

In late July or early August, Lain borrowed Skiver's .40 caliber Glock (Exhibit 2) under the pretense that he wanted to use it for shooting practice. R. at 65-66.

In the first or second week of August, Lain borrowed Hart's .38 caliber revolver, the same revolver that Hill had commented on during the gathering around July 4, 2009. R. at 119. In exchange for the .38 caliber revolver, Lain gave Hart the .40 caliber Glock as collateral. R. at 120-121. Lain did not own the .40 caliber Glock; this firearm was Skiver's and had been loaned to him for the sole purpose of shooting practice. R. at 65-66. Skiver did not give Lain any permission to use the gun as collateral and testified that he would have been concerned that it was no longer in Lain's possession. R. at 69, 91.

In the second week of August, Lain went to Hill's house and gave him the .38 caliber revolver owned by Hart. R. at 171. Hill recognized the gun and knew Lain had gotten it from Hart. R. at 175. When asked by Hill, Lain falsely assured Hill that he had lawfully acquired the gun and any paperwork would be taken care of by Hart. R. at 175-176. Hill said if he had known that the .38 caliber revolver "wasn't [Lain's] to give, [Hill] wouldn't take it." R. at 178.

In late August or early September, Lain asked Hart if he wanted to sell the .38 caliber revolver, Hart agreed, and arrangements were made. R. at 125. At that time, Lain had already gifted the gun to Hill. R. at 171.

In late September, Lain called Hart and asked him to return the .40 caliber Glock because it was owned by Skiver. R. at 130. Hart met Lain on September 27, 2009, to return the .40 caliber Glock and socialize. R. at 130-131. Hart was one of the passengers in Lain's car when he was stopped by police later that day with the .40 caliber Glock in the trunk. R. at 133.

On September 27, 2009, Lain was involved in several traffic stops by Officer Meats, Sergeant Griffin and Sergeant Lynch. Meats and Lynch were both on a shoplifting call in Overland Park, Kansas, when they saw an unmarked car running emergency lights and sirens. R. at 5-6, 40. Because this vehicle did not appear to be a police car and no report had been made over the radio regarding a call in that area, Meats located the vehicle and made a traffic stop. R. at 5-6, 13. Lain was driving the vehicle and told Meats that he was running the lights and sirens to show his two passengers how to use them. R. at 14-15. Lain also offered a second reason—that he was working on a federal gun case with the FBI and needed to deliver a warrant. R. at 16-17. Meats let Lain go on his word, but initiated a second stop when he learned additional information. R. at 17-18.

The second stop was made by Officer Mahoney and involved Meats, Lynch, and Griffin. During this stop, Lain said that he had run the lights and sirens because he was delivering reports as part of a joint investigation with the ATF, FBI, and Overland Park Police Department. R. at 32. Lain provided the business card of an FBI agent, but when the officers contacted the agent, the story was false. R. at 33. Next, Lain said he was delivering a firearm for his army commander, which was not true. R. at 34. However, this alerted police that Lain had a gun in his car and it was confiscated (Exhibit 2). R. at 21-22, 34-35. The firearm, a .40 caliber Glock, belonged to Thomas Skiver and did not appear to be stolen. R. at 37. During the stop, an

identification badge was also seized from Lain after contacting the city manager in Independence, Missouri, and confirming that Lain did not have any emergency management credentials. R. at 42.

In early October, Hill was contacted by Agent Stous. R. at 178. Afterward, Hill contacted several places to find out if any paperwork was needed for the .38 caliber revolver Lain had given him. R. at 178-179. From those inquiries, Hill determined that the interstate transfer should have been handled through a federal firearms dealer. R. at 178-179, 185.

C. Final Proceedings and Judgment

At the close of the United States' case, Lain made a motion for judgment of acquittal, R. at 194, which the court took under advisement R. at 201, and denied as moot after the jury returned its verdict of not guilty. Doc. 31.

Defense counsel requested that the court give a "knowledge" instruction asserting that Lain did not know he was violating the law. The court denied Lain's request for that jury instruction and instead instructed the jury that although the United States had to prove that Lain's conduct was "willful," there was no requirement that the United States prove that Lain "knew the precise legal duty which he was charged with violating." Doc. 33 at 17.

On May 12, 2010, the case was submitted to the jury, which returned a verdict of not guilty. Doc. 30. On that same day, judgment of acquittal was entered on the docket. Doc. 31.

D. Post-trial Proceedings

On May 21, 2010, Lain filed a timely "Petition for an Order and Findings That Defendant Lain Is Entitled to Attorneys (Sic) Fees Payable by the United States Department of Justice And/or the Bureau of Alcohol (Sic), Tobacco (Sic) and Firearms with Suggestions in Support

(Doc. 35).” The United States now files this timely response to Lain’s petition for attorney’s fees under the Hyde Amendment.

LEGAL STANDARDS FOR EVALUATING A HYDE AMENDMENT CLAIM

I. Language of the Hyde Amendment

The Hyde Amendment reads:

During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney’s fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act (EAJA), 28 U.S.C. §] 2412.

Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes).

II. Evolution of the Hyde Amendment

The principle of sovereign immunity precludes the award of attorney fees against the United States unless specifically authorized by Congress. *Ruckelshaus v. Sierra Club*, 473 U.S. 680, 685 (1983). Any such waiver of sovereign immunity must be “unequivocal,” *Department of Energy v. Ohio*, 503 U.S. 607, 615 (1992), and “must be construed strictly in favor of the sovereign,” *i.e.*, against the award of attorney fees, and “not enlarged beyond what the language requires,” *Ruckelshaus*, 473 U.S. at 685-686.

Absent explicit statutory authority granted by Congress, a federal court has no inherent power to award attorney fees for work done in a criminal case under any circumstances. *United*

States v. Horn, 29 F.3d 754 (1st Cir. 1994). The Hyde Amendment, 18 U.S.C. § 3006A (historical and statutory notes), authorizes the award of attorney fees against the United States by a federal district court in a criminal case if the defendant shows “that the United States’ position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.”

United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999). Moreover, the Hyde Amendment prescribes that “the procedures and limitations (but not the burden of proof),” *id.*, for the award of attorney’s fees is governed by the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which excludes a fee applicant who fails to meet certain requirements regarding filing time, defendant’s net worth, and attorney’s hourly rate.²

The genesis of the Hyde Amendment was a proposal to reimburse members of Congress and their staffs who successfully defended themselves against a federal criminal prosecution. *See Gilbert*, 198 F.3d at 1299. This suggestion was expanded by Representative Henry Hyde who proposed that attorney fees be available to all criminal defendants who prevailed unless the United States established that its position was “substantially justified,” which is the standard of the EAJA for the award of attorney fees in civil litigation. *See id.* at 1300. This broad proposal met with substantial opposition within Congress and from the Executive Branch. *See id.* at

² Section 2412(d)(1)(B) of the EAJA requires that a party seeking an award of fees and other expenses “shall” file an application “within thirty days of final judgment in the action.” Section 2412(d)(2)(D) disqualifies fee applicants whose net worth exceeded \$2,000,000 at the time the criminal prosecution was filed. Section 2412(d)(2)(A)(ii) provides that attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.” The United States acknowledges that Lain’s petition seeking an award of attorney’s fees is timely, counsel’s hourly fee has been reduced to fall within the EAJA limit, and that Lain’s net worth does not exceed \$2,000,000.

1300-1301. The opposition engendered a “watered down” provision which placed the burden on the United States to show that the prosecution was not “without foundation, or was initiated vexatiously, frivolously, or in bad faith.” *Id.* at 1301-1302. Even this revised proposal met with opposition as “too easy to meet,” and was further modified to put the burden of proof on the defendant and to delete the “without foundation” criterion, so that even a prosecution that was “without foundation” would not permit the award of attorney fees unless the prosecution was initiated vexatiously, frivolously, or in bad faith - and even then the court could deny an attorney-fee award if “special circumstances make such an award unjust.” *Id.* at 1302-1303. The court concluded in *Gilbert*, “[t]he plain language] of the Hyde Amendment], reinforced by the legislative history of the provision, places a daunting obstacle before the defendants who seek to obtain attorney fees and costs from the United States following a successful defense of criminal charges.” *Id.*

III. Argument and Analysis

A. Firmly Rooted in Both Law and Fact, the United States’ Prosecution of Lain Was Not Frivolous, Vexatious or in Bad Faith.

The United States’ position as a whole was well-founded, supported by substantial evidence and had a reasonable likelihood of success as demonstrated in this brief and as this court observed as it presided over the trial; it was not brought for nefarious reasons or without any basis in law or fact. “From the plain meaning of the language that Congress used, it is obvious a lot more is required under the Hyde Amendment than a showing that the defendant prevailed at the pre-trial, trial, or appellate stages of the prosecution. A defendant must show that the United States’ position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in

law or fact as to be frivolous.” *Gilbert*, 198 F.3d at 1299. Because the United States’ position was justified and lacked any ill-intent, the United States should not be faulted for bringing this case. “In prosecuting crime, United States Attorneys are entitled to be zealous advocates of the law on behalf of their client, the people of the United States. While a prosecutor is not at liberty to strike foul blows, he may strike hard ones, and ‘he may prosecute with earnestness and vigor—indeed, he should do so.’” *Id.* at 1300 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

1. Lain’s Prosecution Was Not Frivolous Because the United States’ Position Was Not Foreclosed by Binding Precedent or Obviously Wrong.

“Frivolous” as used in the Hyde Amendment means “groundless [and] with little prospect of success; often brought to embarrass or annoy the defendant.” *United States v. Braunstein*, 281 F.3d 982, 994 (9th Cir. 2002) (citing *Gilbert*, 198 F.3d at 1299). Frivolous has only an objective component. *Braunstein*, 281 F.3d at 994. To show that a criminal prosecution was “frivolous,” a defendant must demonstrate that the United States’ position was “foreclosed by binding precedent or so obviously wrong as to be frivolous.” *Id.* at 995 (quoting *Gilbert*, 198 F.3d at 1304). *See also United States v. Schneider*, 395 F.3d 78, 86 n.3 (2d Cir. 2005) (noting Black’s Law Dictionary defines a “frivolous” claim as one for which a proponent “can present no rational argument based upon the evidence or law in support of that claim” and that Webster’s Third New International Dictionary defines “frivolous” as “of little weight or importance” and “having no basis in law or in fact”); *United States v. Bowman*, 380 F.3d 387, 390 (8th Cir. 2004) (“a position is frivolous for the purposes of the Hyde Amendment when the position is utterly without foundation in law or fact”).

a. *Count One of the Superseding Indictment*

To prove the defendant is guilty of the interstate transfer of a firearm without utilizing an FFL, the United States is required to prove (1) the defendant resided in one state and the recipient in another; (2) the recipient received the gun with intent to keep it; and (3) the defendant made the transfer willfully, that is, with knowledge that his conduct was unlawful. From the evidence presented at trial, a reasonable factfinder could have readily determined that Lain was guilty beyond a reasonable doubt of the willful transfer of a firearm from Missouri to Kansas without using an FFL.

The evidence the United States presented at trial included the testimony of six witnesses, two firearm exhibits, and verification that neither the transferor nor the recipient were FFLs, clearly demonstrating that Lain committed the act of transferring a firearm from Missouri to Kansas without utilizing an FFL. In fact, the defendant “readily admits that there is evidence to support the charge in Count One and the investigation did in fact clearly reveal that [Lain] committed the volitional act.” Doc. 16 at 6. While defendant concedes that he committed the acts for which he was charged, he denies that he *willfully* committed those acts.

Absent a confession by a defendant charged with “willfully” committing a federal crime, the United States would have to prove intent by circumstantial evidence. Through testimony of six witnesses, the United States presented sufficient evidence from which the jury could easily have concluded that the defendant committed the admitted acts with which he was charged “willfully.” A willful act is an unlawful act; it does not require the defendant to know the precise law he was violating. *See Bryan v. United States*, 524 U.S. 184 (1998) (holding that a conviction for “willfully” violating the statute only requires a showing that the defendant

generally knew his conduct was unlawful, not that he was aware of the precise licensing requirement).

Lain acted willfully because his acts surrounding the firearm transfer were done with knowledge that his conduct was unlawful. Lain acquired the .40 caliber Glock under the false pretense he was using it for shooting practice. R. at 65-66. Lain used this firearm—which he did not own—as collateral to acquire a second firearm, a .38 caliber revolver. R. at 119-121. Lain then gifted this .38 caliber revolver—which he did not own—to another person. R. at 171. Lain knew when he acquired that gun in Missouri and brought it to Kansas that he was acting unlawfully. This evidence established that Lain’s acts were willful; Lain did not need knowledge of the registration violation, only that his action was unlawful. These events establish a chain of circumstances demonstrating that Lain willfully committed the crime charged. The fact that the jury did not come to that same conclusion does not demonstrate that the United States’ prosecution of Lain was vexatious, frivolous or in bad faith.

Equally ill-founded is Lain’s suggestion that the relatively short duration of the jury’s deliberations—approximately 30 minutes—is relevant to this court’s determination of whether the United States’ prosecution was vexatious, frivolous or brought in bad faith. If Lain’s supposition is correct, then presumably a more severe sentence should be imposed against a defendant found guilty after a short period of jury deliberations, or a less severe sentence should be imposed against a defendant after lengthy jury deliberations. Obviously such is not the case. Because the jury’s deliberative process is not subject in the instance of judgment of acquittal to review or scrutiny for its efficacy, *i.e.*, to determine whether the jury did not understand the evidence admitted and/or the application of the law to those facts, that the jury was overly sympathetic to

the defendant, or that the jury simply gave the benefit of the doubt to the defendant in reaching a verdict of not guilty,³ the length of the jury's deliberations is essentially irrelevant to evaluating Lain's motion for attorney's fees under the Hyde Amendment. Under the applicable law, this court's inquiry is to determine whether the prosecution as a whole was frivolous or brought in bad faith. *Cf.*, *United States v. Robbins*, 179 F.3d 1268, 1269 (10th Cir. 1999) (dismissing defendant's appeal challenging the district court's denial of his request for fees and costs under the Hyde Amendment as untimely; district court denied defendant's request for fees and costs under the Hyde Amendment when the jury in the defendant's trial returned a verdict of not guilty after twenty-five minutes).

In summary, although Lain may think his prosecution was ill-premised, he plainly cannot demonstrate that he is entitled to attorney's fees under the Hyde Amendment. That Lain, or even this court, would not have brought this prosecution, is not the standard. The following excerpt from a recent opinion in *United States v. Erwin*, Case No. CR-08-33-FHS, 2010 WL 1816349, 1 (E.D. Okla. May 3, 2010) makes clear that an award of attorney's fees is inappropriate in this case:

On May 1, 2008, the Grand Jury returned a seven-count indictment against Defendant, a former state legislator, on charges of conspiracy (Count I), Honest Services Mail Fraud (Counts II-IV), and Money Laundering (Counts V-VII). Trial on these charges began on October 6, 2008, before the Honorable Ronald White. Following a five-day trial, Judge White declared a mistrial on all counts as a result of the jury's inability to return unanimous verdicts. Defendant was represented during the first trial by Mark Green. On December 19, 2008, current counsel, Clark Brewster, entered an appearance on behalf of Defendant and Mark Green was allowed to withdraw as counsel for Defendant. On January 16, 2009,

³ See *United States v. Aguilar*, 121 F.3d 717, 1997 WL 469642, at *7 (9th Cir. 1997) ("Absent allegation that extraneous prejudicial information was brought to the jury's attention, the district court may not review the jury's deliberative process.").

this case was transferred to the undersigned. On April 9, 2009, Brewster sent a letter to government counsel requesting that they dismiss the indictment against Defendant because the Government's case against Defendant rested entirely upon the testimony of Steve Phipps, a confessed liar who, under oath, admitted to committing hundreds of felonies. The government declined Defendant's request for a dismissal and a second trial commenced on April 20, 2009, and Defendant was acquitted on all charges on April 24, 2009, after the jury deliberated for approximately four hours.^{FN1} On May 22, 2009, Defendant filed his motion for attorney fees and expenses under the Hyde Amendment.

FN1. Brewster renewed his request for the Government to dismiss the charges against Defendant during trial when, in his opinion, it became apparent that the Government's prosecution of Defendant was baseless.

DISCUSSION

The Hyde Amendment authorizes courts to award attorney's fees and costs to individuals who have been subjected to vexatious, frivolous, or bad faith prosecution. The intent of Congress in enacting the Hyde Amendment in 1997 was to "penalize government for prosecutorial abuses and to deter such inappropriate conduct." *United States v. Schneider*, 395 F.3d 78, 86 (2nd Cir.), *cert. denied*, 544 U.S. 1062, 125 S.Ct. 2532, 161 L.Ed.2d 1112 (2005). The Defendant has the burden of proof in connection with a Hyde Amendment application, and he must do more than show that he "prevailed at the pre-trial, trial or appellate stages of the prosecution." *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999). The Defendant must prove by the preponderance of the evidence:

1. that the case was pending on or after November 26, 1997, the date of the enactment of the Hyde Amendment;
2. that the case was a criminal case;
3. that he was not represented by assigned counsel paid for by the public;
4. that he was the prevailing party;
5. that the prosecution was vexatious, frivolous, or in bad faith;
6. that the attorney's fees were reasonable; and
7. that there are no special circumstances that would make such an award unjust.

United States v. Bunn, 215 F.3d 430, 436 (4th Cir. 2000) (citing *United States v. Pritt*, 77 F.Supp.2d 743, 747 (S.D.Va.1999)). As the first four elements above are not in dispute, Defendant's ability to recover attorney's fees and costs centers on the issue of whether the government's prosecution was vexatious, frivolous, or in

bad faith.^{FN2}

FN2. Elements six and seven need not be addressed given the Court's finding that this case was not vexatious, frivolous, or in bad faith.

As the Hyde Amendment does not provide definitions for the words “vexatious, frivolous, or in bad faith,” courts have turned to the common dictionary definitions of those words:

[V]exatious means “ ‘without reasonable or probable cause or excuse.’ ” *Gilbert*, 198 F.3d at 1298-99 (quoting Black's Law Dictionary 1559 (7th ed. 1999)). A frivolous action is “ ‘groundless ... with little prospect of success; often brought to embarrass or annoy the defendant.’ ” *Id.* (quoting Black's Law Dictionary 668 (6th Ed.1990)). And, bad faith “ ‘is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will.’ ” *Id.* (quoting Black's Law Dictionary 139 (6th ed.1990)).

Bunn, 215 F.3d at 436; *see also Schneider*, 395 F.3d at 86 n. 3. As these definitions suggest, the “vexatious” and “frivolous” components of the Hyde Amendment standard contemplate a prosecution which is groundless and has no reasonable prospect of securing a conviction. Such a finding, however, would run contrary to the Court's denial of Defendant's Rule 29 Motion presented at both the close of the government's case-in-chief and at the end of the presentation of all the evidence. In denying Defendant's Rule 29 Motions, the Court determined that in considering the evidence in the light most favorable to the government, there was substantial evidence, evidence beyond a mere scintilla, from which the jury might reasonably find the Defendant guilty of the crimes charged beyond a reasonable doubt. That the second jury determined the evidence did not support a conviction on any count against Defendant does not negate or nullify the Court's determination.^{FN3} The Court's findings in the context of the Rule 29 Motions that there were “sufficient grounds to present the case to the jury,” *United States v. Gugnani*, 178 F.Supp.2d 538, 543 (D. Maryland 2002), essentially precludes a finding under the Hyde Amendment that the prosecution of Defendant was “vexatious” or “frivolous.” *See Pritt*, 77 F.Supp.2d at 747 (“[i]f a court denies a defendant's motion for acquittal at trial as to all counts, the prosecution cannot have been frivolous as a matter of law.”)(citing *United States v. Troisi*, 13 F.Supp.2d 595, 597 (N.D.W.Va.1998)).

FN3. As noted above, a mistrial was declared after the jury in the first trial of this matter was unable to reach a unanimous verdict as to any

count.

Even assuming the Court is not precluded from reversing course from its previous findings, the Court has undertaken a thorough and comprehensive review of the transcript of the second trial of this action and concludes the prosecution, while certainly subject to criticism based on prosecutorial judgment, evaluation, and discretion, was neither frivolous nor vexatious. As he did at trial, counsel for Defendant, in his brief, forcefully and adeptly points out the many inconsistencies and contradictions prevalent throughout the government's prosecution. While these arguments and the related evidence in connection with those arguments proved to be extremely successful in countering the government's theory of the case, they do not transform this prosecution into one which can be labeled either frivolous or vexatious. Essentially, Defendant argues the government's entire case was built upon the testimony of its primary witness, Stephen Phipps, a pathological liar, con man, and felon, who was motivated to implicate Defendant, and other high profile public figures, in order to curry favor with the government with respect to his own criminal activity. Defendant's counsel vigorously and skillfully exposed the weaknesses and inconsistencies in the government's case, in particular, its reliance on Mr. Phipps and the validity and soundness of the government's corroborating evidence. While Defendant and counsel are fervent in their belief that the government, by relying on Mr. Phipps's testimony, failed to fulfill its obligation to see justice done in this prosecution, the Court cannot agree with such a conclusion-even while the Court does question the government's evaluation of the soundness of this prosecution.^{FN4}

FN4. If nothing else, the government is consistent in its endorsement of Phipps. The government's belief in the veracity of Phipps as a witness is further evidenced when it moved for a downward departure of the sentencing guidelines based on Phipps's substantial assistance in the government's investigation into public corruption in the State of Oklahoma. Phipps pled guilty to a charge of conspiracy in violation of 18 U.S.C. § 371 in Case No. CR-07-43-RAW and was sentenced by Judge White on May 27, 2009, to a term of imprisonment of twelve months and one day. In connection with Phipps's sentence, Judge White granted the government's motion for downward departure.

At the heart of this prosecution is the government's theory that Defendant steered money from the legislature to Mr. Phipps through entities in which Mr. Phipps was associated. It was the government's position that in consideration for his efforts, Defendant received kickbacks through one of Mr. Phipp's entities, Indian Nations Entertainment (“INE”). The evidence, although certainly disputed and subject to varying interpretations, established a plausible case for Defendant's ability to steer or influence the direction of monies from the legislature and his receipt of money (via cash payments and a refusal to be paid by check) from INE,

not for services rendered on behalf of INE or a return on investment, but as part of a kickback for his efforts on behalf of Phipps. The crux of the charges against Defendant in this prosecution was outlined in the following excerpt from the Court's instructions:

Public officials and public employees inherently owe a duty to the public to act in the public's best interest. If, instead, the official acts or makes his decision based on the official's own personal interests-such as accepting a bribe, taking a kickback or receiving personal benefit from an undisclosed conflict or interest-the official has defrauded the public of the official's honest services even though the public agency involved may not suffer any monetary loss on the transaction.

The Court concludes the evidence of payments to Defendant combined with the evidence of his influence, if not outright steering, of funds to Phipps' enterprises is sufficient to present a plausible case of honest services mail fraud and the related charges outlined in the indictment-notwithstanding the fact that the government's primary witness is an admitted liar, con man, and felon. While those attributes certainly would give a prosecutor reason to pause and question the probability of success at trial, they merely go to the weight and credibility of the government's case. It is certainly true that prosecutorial judgment and discretion might have been exercised differently in other hands, but that factor alone does not equate with a finding of frivolous or vexatious conduct sufficient to entitle Defendant to fees under the Hyde Amendment.

Finally, the Court concludes no basis exists for a finding of bad faith. Defendant argues the government exhibited bad faith with respect to its sponsorship of Phipps as a witness, its changing of theories in its closing argument, its attempted bootstrapping of unrelated guilty pleas and convictions of other crimes and people, and its misrepresentation of the evidence regarding money being sent directly to INE. During his closing argument, counsel for Defendant offered similar arguments concerning the government's prosecution of his client, *i.e.*, that the "government makes it up as they go along," that the government "lacked the fortitude" to objectively assess its case, that "there's not an ounce of honesty in anything that's done with this charge or any of these charges," and that he doesn't know how the government lawyers and agents can "sleep at night" after bringing these charges. Defendant's argument suggests that the government not only taught Phipps to sing, but to compose. Given the outcome of this case, these arguments may certainly have been influential with respect to the jury's return of not guilty verdicts approximately four hours after retiring to deliberate. The Court finds, however, that while these arguments address a prosecution which is riddled with poor judgment and evaluation, they

are not linked to conduct on the part of the government which can be classified as “the conscious doing of a wrong because of dishonest purpose or moral obliquity.” *Bunn*, 215 F.3d at 436; *see Gugnani*, 178 F. Supp. 2d at 545-46 (in denying a claim of bad faith on an allegation of knowingly using false information to obtain an indictment, the court concluded the government did not misguide the grand jury and noted that the defendant had not shown that the government either (1) withheld information from grand jury which would have prevented the return of the indictment or (2) presented false information or returned an indictment containing legal standards that were contrary to established law).

CONCLUSION

Based on the foregoing reasons, the Court finds Defendant has failed to satisfy his burden under the Hyde Amendment. Defendant's Motion for Attorney Fees and Expenses (Docket No. 133) is denied.

2010 WL 1816349 at *1-4 (footnote 5 omitted).

Because a reasonable factfinder could have readily determined from the evidence presented as applied to the elements set forth in the jury instructions that Lain was guilty of the crime charged, an award of attorney's fees under the Hyde Amendment is not appropriate.

b. Count Two of the Superseding Indictment

The United States' failure to verify the status of defendant's Missouri indictment constitutes at most an honest mistake, not frivolousness as the term is used in the Hyde Amendment. “On any plausible interpretation of the Hyde Amendment standard, mere ‘faulty judgment’ is not vexatious, frivolous, or in bad faith.” *United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1180 (9th Cir. 2001). *See Braunstein*, 281 F.3d at 995 (Hyde Amendment targets “prosecutorial misconduct, not prosecutorial mistake”); *United States v. Truesdale*, 211 F.3d 898, 909 (5th Cir. 2000) (“confusion and sloppiness do not amount to vexatiousness or frivolousness). The question under the Hyde Amendment is not what the United States should

have or could have known, but what it did know when it brought the prosecution. *See United States v. Sherburne*, 249 F.3d 1121, 1127 (9th Cir. 2001) (“the test for awarding fees under the Hyde Amendment should not be an exercise in 20/20 hindsight based solely on reasonableness”).

Objectively, the first count against the defendant had merit and, at the time the superseding indictment was filed, there was no reason to believe the second count lacked merit. The United States filed the superseding indictment adding a second count based on two beliefs: (1) Lain had transported a firearm; and (2) Lain was currently under indictment. In support of the first belief, the United States had evidence in support of count one and defendant’s own admissions. The second belief was based on the AUSA’s knowledge that the defendant was the subject of a 2008 criminal investigation and currently on diversion for 18 months from the date it was executed in October 2008. Before presenting the indictment’s second count to the grand jury, AUSA Morehead researched whether diversion qualified as “under indictment” under 18 U.S.C. §§ 922(n), 924(a)(2) and conferred with the Missouri AUSA to confirm that the charge was both appropriate and substantiated. Based upon that information, the United States sought the superseding indictment. Lain had been the subject of a criminal investigation and was on diversion, but at the time the superseding indictment was sought, the underlying charge had been dismissed. Upon learning that the defendant was no longer under indictment for possession of a stolen firearm, the United States immediately filed a motion to dismiss the second count.

Based on what the prosecutor in the District of Kansas knew at the time she sought the superseding indictment, count two had a good faith basis in fact and law. When it learned that the underlying charge for count two had been dismissed, the United States took immediate action to dismiss that count. With the benefit of perfect hindsight, the United States’ failure to further

verify the information through another source, such as PACER, may have been a mistake, but its actions in bringing that charge was not frivolous under the definition of the Hyde Amendment. The finding in this court's May 4, 2010, Memorandum and Order denying Defendant's Motion to Dismiss the Superseding Indictment on Grounds of Prosecutorial Misconduct essentially precludes such a finding.

2. Lain's Prosecution Was Not Vexatious Because Nothing in the Record Demonstrates that the United States Acted Maliciously or with an Intent to Harass.

There is nothing in the record to support a finding that the United States acted maliciously or with an intent to harass the defendant. While similar to the term "frivolous," "the term vexatious embraces the distinct concept of being brought for the purpose of irritating, annoying, or tormenting the other party." *United States v. Heavrin*, 330 F.3d 723, 729 (6th Cir. 2003). *See United States v. Knott*, 256 F.3d 20, 29 (1st Cir. 2001) (noting that "vexatious" "includes an element of maliciousness, or an intent to harass").

Lain alleges that the charge was "obtained with intent to harass defendant and delay the prosecution and force a guilty plea." Doc. 35 at 7. Lain's argument rests on baseless allegations and offers no evidence other than the fact that the superseding indictment was filed and the arraignment for the superseding indictment was rescheduled without his knowledge. While filing a charge may have the effect of causing the defendant to feel "irritated, annoyed, or tormented," the mistaken filing of the charge does not establish that the United States was motivated to file the additional charge solely to cause such feelings in the defendant.

3. The Prosecution Was Not in Bad Faith Because the United States Did Not Act with Furtive Design or Ill Will.

The United States' prosecution of Lain was brought in good faith, absent of any furtive design or ill will. "Bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity...it contemplates a mind affirmatively operating with furtive design or ill will." *Gilbert*, 198 F.3d at 1299. *See In re 1997 Grand Jury*, 215 F.3d 430, 437 (4th Cir. 2000) (affirming denial of Hyde Amendment application where United States "could have, and perhaps should have, done more to investigate before bringing charges" but there was no evidence that the United States' "alleged omissions were the product of ill-intent...rather than simple negligence or lack of judgment").

The charges against Lain were a good faith response to a pattern of events strongly suggesting criminal intent. The prosecution was brought because the defendant unlawfully transported a firearm across state lines without utilizing an FFL. As a result of the defendant's volitional and unlawful act, the United States brought an appropriate charge based upon a thorough investigation and evidence supportive of the charge. The facts giving rise to the second count of the superseding indictment were not fabricated or invented; the defendant had been the subject of a criminal prosecution and placed on diversion. When the United States was notified that the underlying charge had been dismissed, it quickly remedied its error by making a motion to dismiss the second count of the superseding indictment, which the court promptly granted.

The mistake regarding the status of the Missouri indictment was not a product of furtive design or ill will. It cannot be shown that the testimony regarding the status of the Missouri indictment was a lie rather than merely incorrect, or that the United States intended to procure

false testimony or to deprive Lain of any constitutional right as he alleges. There is no evidence that the United States actually participated with or encouraged a presentation of erroneous testimony. At most, this was a situation in which the prosecutor lacked knowledge she “could have, and perhaps should have” had before bringing the charge; however, this “simple negligence or lack of judgment” is not indicative of a “bad faith” prosecution.

B. Because the United States’ Position as a Whole Was Justified, a Fee Award Should Be Denied Even If Count I of the Superseding Indictment Was Frivolous, Vexatious or in Bad Faith.

Taking into account the merits of the entire case, the prosecution’s position as a whole was justified. A Hyde Amendment award is only appropriate where the United States’ “position” was vexatious, frivolous, or in bad faith, and “position” refers to the “case as an inclusive whole.” *Heavrin*, 330 F.3d at 730.⁴ Thus, “a determination that part of the United States’ case is frivolous does not automatically entitle the movant to a Hyde Amendment award if the court finds that the United States’ ‘position’ as a whole was not vexatious, frivolous, or in bad faith.” *Id.* See also *United States v. Isaiah*, 434 F.3d 513, 519 (6th Cir. 2006) (“In deciding a defendant’s motion, the district court must analyze the case as a whole, not count by count”). In *United States v. Heavrin*, the court denied a fee award even though some charges brought against

⁴ The court applied the Supreme Court’s interpretation of “position” in the Equal Access to Justice Act (“EAJA”): “The fact that the [word] ‘position’ is again denominated in the singular...buttresses the conclusion that only one threshold determination for the entire civil action is to be made.” *Comm’r, INS v. Jean*, 496 U.S. 154, 159 (1990). The Supreme Court in *Jean* held that “[w]hile the parties’ postures on individual matters may be more or less justified, the EAJA - like other fee-shifting statutes - favors treating a case as an inclusive whole, rather than as atomized line-items.” *Id.* At 161-162. The Sixth Circuit concluded that “[b]ecause the Hyde Amendment is subject to the procedures and limitations of the EAJA, the term ‘position’ should be accorded the same meaning under the Hyde Amendment as it is in the EAJA.” *Heavrin*, 330 F.3d at 730.

the defendant were “little more than prosecutorial mudslinging,” because “the United States had strong reasons to believe the case against [the defendant] on a substantial part of the indictment.” 305 F. Supp. 2d 719, 720, 722-23 (W.D. Ky. 2004).

The prosecution in this case rested squarely on count one of the superseding indictment - the only charge in original indictment and only charge that the defendant faced at trial. Count two was a separate charge and when it was dismissed, it did not affect the foundation upon which the prosecution was built. In regard to the viability of count one, this court stated, “[t]here is no suggestion that the sole count of the original indictment, which is now the only count remaining against defendant, was obtained in an improper [manner].” Doc. 24 at 3. Even if count two of the superseding indictment was frivolous, the United States promptly corrected its error in seeking that additional charge by seeking dismissal of count two. Consequently, Lain cannot demonstrate that the United States’ overall position was not justified and that it did not have a reasonable chance of success.

C. Defendant’s Claim of Selective Prosecution Is Unfounded; No Evidence Supports His Claim That Lain’s Prosecution Was Motivated by a Discriminatory Purpose and Hill Is Not Similarly Situated to Lain.

The United States’ decision to prosecute Lain was based on Lain’s independent, volitional acts, as admitted by Lain and supported by the evidence, not by a discriminatory purpose. United States Attorneys have broad discretion in bringing criminal charges, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). As a result, “the presumption of regularity supports” their prosecutorial decisions and, “in the absence of clear evidence to the contrary, courts presume

that they have properly discharged their official duties." *Id.* (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). However, an exercise of prosecutorial discretion that violates constitutionally protected rights is selective prosecution. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 511 (1999).

To establish selective discrimination, a defendant must demonstrate: (1) the defendant has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct; and (2) the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race or religion, or the desire to prevent the exercise of constitutional rights. *See Schwartz v. New Mexico Corrections Dept. Probation and Parole*, No.09-2302, 2010 WL 2531456 at *3-4 (10th Cir. June 24, 2010) (citing *United States v. Davis*, 339 F.3d 1223, 1228 n. 3 (10th Cir. 2003)).

The defendant haphazardly labels Hill as a similarly situated individual and fails to even identify a discriminatory basis, much less provide evidence of one. *See* Doc. 35 at 10. There is absolutely no indication that the prosecution had a discriminatory effect or that it was motivated by discriminatory purpose. Moreover, Hill is not similarly situated to the defendant. Hill was the unwitting recipient of the .38 caliber revolver given to him by Lain, which Lain falsely represented as a firearm under his lawful possession. R. at 176. As the recipient, there is no evidence that indicates Hill had any unlawful purpose. This is unlike Lain who unlawfully gave Hill a firearm he did not own and had obtained through deceptive means.

D. Attorney General Eric Holder’s May 2010 Memorandum Was Released after the April 2010 Superseding Indictment Was Obtained And, Therefore, Is Not Controlling.

On May 19, 2010, Attorney General Eric Holder released a memorandum to all federal prosecutors on the department policy on charging and sentencing. See Exhibit B. The United States addresses the relevance of this memorandum in response to defendant’s counsel’s notification to counsel for the United States that he plans to include a discussion of that memorandum in his reply. In his reply, Lain apparently intends to raise the new argument that the prosecution in this case violated the Attorney General’s May 19, 2010, memorandum, which establishes an internal, discretionary process for obtaining an indictment. The superseding indictment in this case was obtained on April 22, 2010. Because the May 19, 2010, memorandum had not been issued at the time the superseding indictment was obtained, and because time is linear, it is not relevant to evaluating the United States’ act of seeking a superseding indictment prior to that time.

Moreover, the internal policies of the Department of Justice do not create any substantive rights and therefore the underlying premise of Lain’s ostensible argument pertaining to the May 19, 2010, memorandum is specious at its inception. See *In re Grand Jury Subpoena (Judith Miller)*, 438 F.3d 1141, 1152-53 (D.C. Cir. 2006) (upholding reservation in U.S. Attorney’s Manual guidelines which “expressly state[s] that they do ‘not create or recognize any legally enforceable right in any person’ ”) (quoting 28 C.F.R. § 50.10(n)); *United States v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983) (concluding that a “policy [that] is merely an internal guideline for exercise of prosecutorial discretion [is] not subject to judicial review,” and emphasizing that the policy “is not a statute or regulation; nor is it constitutionally mandated”); see also *United States v.*

Craveiro, 907 F.2d 260, 264 (1st Cir. 1990) (“[T]he internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party.”); *cf.*, *United States v. Larsen*, 427 F.3d 1091, 1094 (8th Cir. 2005) (“The *Petite* policy, an internal policy of the Department of Justice, states that a federal prosecution should not be based on substantially the same acts as were the basis for a prior state prosecution unless there is a compelling federal interest. *Thompson v. United States*, 444 U.S. 248, 248-49 n. 1, 100 S.Ct. 512, 62 L.Ed.2d 457 (1980) (per curiam) (citing *Petite v. United States*, 361 U.S. 529, 531, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960) (per curiam)). The policy, however, confers no substantive rights on a criminal defendant, *see United States v. Leathers*, 354 F.3d 955, 962 & 962 n. 5 (8th Cir.2004), *cert. denied*, 125 S.Ct. 285 (2004), and thus Mr. Larsen could obtain no relief based on it even if the government had acted contrary to it here.”). The United States simply notes that before the superseding indictment in this case was presented to the grand jury for consideration, it was reviewed in accordance with this USAO’s internal practices.

Finally, as demonstrated above, the United States’ prosecution as a whole was fundamentally sound, being well based in fact and law, and was not one that Lain can possibly carry his burden of proving that the United States’ prosecution was vexatious, frivolous, or brought in bad faith. *See United States v. Anderson*, 74 Fed. Appx. 768, 769, 2003 WL 22039794, 1 (9th Cir. 2003) (“A defendant bears the burden of proof of establishing that he is qualified to receive an award under the Hyde Amendment.”).

FEE AWARD

Although the United States vehemently challenges the defendant's entitlement to an award of attorney's fees under the Hyde Amendment, should this court find that such an award is appropriate, the United States does not challenge the reasonableness of the amount Lain requests for attorney's fees. The reasonableness of such an award is therefore committed to the discretion of this court. However, should this court grant Lain's petition for attorney's fees, consistent with the Hyde Amendment, the United States requests that the award be directed to payment by the United States Department of Justice so that it can determine the allocation of the payment of that award between Department of Justice components under the supervision of the Deputy Attorney General.

CONCLUSION

As demonstrated above, Lain's petition for an award of attorney's fees should be denied in this case. To award attorney's fees under the Hyde Amendment, Lain must prove and this court must find that the United States' position as a whole in the prosecution of Lain was vexatious, frivolous, or in bad faith. In this response, the United States demonstrates that a fee award should be denied because (1) Lain concedes he committed the voluntary acts that are the basis of count one and therefore only his intent was a question for the jury; (2) the United States presented evidence demonstrating that Lain committed the act with knowledge that his conduct was unlawful; (3) from that evidence, a reasonable jury could easily have found Lain guilty of the "willful" transfer of a firearm from Missouri to Kansas without utilizing an FFL; and (4) the United States' position as a whole throughout its prosecution of Lain was reasonable and warranted. For the foregoing reasons, Lain's petition for attorney's fees under the Hyde Amendment should be denied by this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 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
jrosgood@earthlink.net

Attorney for Defendant/Petitioner

I further certify that on this date, I caused a copy of the notice of electronic filing, along with a copy of the foregoing to be placed in the United States mail, postage prepaid, addresses to the following non-CM/ECF participants:

None.

s/ Christopher Allman
CHRISTOPHER ALLMAN
Assistant United States Attorney