

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 10-3201

UNITED STATES OF AMERICA,

Plaintiff/Appellee

v.

KENNETH G. LAIN, JR.

Defendant/Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
THE HONORABLE CARLOS MURGUIA
District Court Case No. 2:10-cr-20029-CM

BRIEF OF APPELLANT

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and Rule 4(b), Federal Rules of Appellate Procedure, because this is an appeal from a final order entered in a criminal case denying attorney fees following defendant's acquittal in a federal criminal prosecution (Aplt.App. at 130).¹

Mr. Lain was tried in The United States District Court for the District of Kansas before the Honorable Carlos Murguia and acquitted of the single count in the indictment by the jury on May 12, 2010 (Aplt.App. at 71). The district court had jurisdiction pursuant to Title 18, United States Code, Sections 922 and 924.

Following his acquittal, on May 21, 2010, Mr. Lain filed a timely motion seeking attorney fees pursuant to a Hyde Amendment claim and the Equal Access to Justice Act; 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 (Aplt.App. at 72).

¹ Appellant will cite to his Appendix as "Aplt.App." with a page number reference to the document or place in the document that is relevant.

On August 3, 2010, the district court entered the aforesaid final order denying defendant's motion for award of attorney fees. On August 9, Mr. Lain filed a timely notice of appeal within the time prescribed by Rule 4(b), supra (Aplt.App. at 137).

STATEMENT OF ISSUE

**WHETHER THE DISTRICT COURT ABUSED ITS
DISCRETION WHEN IT DENIED APPELLANT'S
TIMELY AND REASONABLE CLAIM FOR ATTORNEY
FEES FOLLOWING DEFENDANT'S ACQUITTAL**

United States v. Heavrin, 330 F.3d 723 (6th Cir. 2003)

United States v. Dashney, 117 F.3d 1197 (10th Cir. 1997)

United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999)

STATEMENT OF THE CASE

The appellant, Kenneth G. Lain, Jr., A Lee's Summit, Missouri resident, was indicted on February 25, 2010 in a one-count indictment charging him with delivering a firearm, that is a handgun, to Mr. Carroll Hill, a Kansas resident,

without using a licensed federal firearms dealer to affect the transfer of the handgun in violation of 18 U.S.C. 922(a)(5) and 924(a)(1)(D) (See Indictment; Aplt.App. at 12) . On the date of the offense, neither Mr. Lain nor Mr. Hill was a licensed gun dealer.

Mr. Lain entered a plea of not guilty to the charge and was tried before a jury and found not guilty on May 12, 2010 (Aplt.App. at 71). On May 21, 2010, defendant filed a motion seeking payment of attorney fees, relying on the Hyde Amendment provisions (Aplt.App. at 72). The motion was denied by the district court and this appeal followed (See Final Order; Aplt.App. at 130).

STATEMENT OF FACTS

Defendant Lain was indicted on February 25, 2010 in a one count indictment charging him as a Missouri resident with transporting a hand gun from Missouri to Kansas and delivering it to a Kansas resident when neither was a licensed firearms dealer (See Indictment; Aplt.App at 12). Undersigned counsel entered his appearance as retained counsel on March 2, 2010.

Defendant filed no pretrial Rule 12(b) motions requiring a hearing and on April 1, 2010, the district court canceled the tentatively scheduled motion hearing and noticed the parties that trial would commence on May 3, 2010 (See Docket

sheet entry # 8; Aplt.App. at 6).

On April 19, 20 and 21, defendant filed proposed voir dire, a witness list, an exhibit list, and proposed jury instructions. On April 22, 2010, the United States obtained a superseding indictment against Mr. Lain charging him with the same original count and a second count alleging that when Mr. Lain committed the offense alleged in Count One, he was under indictment in the Western District of Missouri for another felony offense (See superseding indictment; Aplt.App. at 15). On the evening of the return of the Superseding Indictment, AUSA Morehead informed undersigned counsel of the return of the superseding indictment and was immediately informed by counsel that no such indictment was pending and that the Missouri indictment had been dismissed for some time (See Government's Response in Opposition to Hyde Motion; Aplt.App. at 92).

The following day the government filed a motion to dismiss Count two of the superseding indictment stating as a reason that the government had determined that Mr. Lain was in fact not under indictment in the Western District of Missouri (See Motion to dismiss; Aplt.App. at 19). On the same day the district court granted the motion to dismiss (Aplt.App. at 21).

Following the dismissal, on April 23, 2010, the defendant filed a motion

to dismiss in this case alleging prosecutorial misconduct on the part of the government in obtaining the superseding indictment (Aplt.App. at 22). The district court denied the motion to dismiss by memorandum and order on May 4, 2010, stating that “. . . assuming some misconduct” defendant had failed to show prejudice in light of the subsequent dismissal (Aplt.App. at 53,55).

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 the close of the government’s case and subsequently ruled the motion moot after the jury returned its verdict after retiring at 10:15 a.m. and returning a verdict of “not guilty” in open court at 10:45 a.m. (See minute entry for docket #30 and Defendant’s motion for attorney fees; Aplt.App. at 9, 73,75). The court ruled that defendant’s pending reserved motion for judgment of acquittal was therefore moot (Id.).

On May 21, 2010, defendant filed a motion seeking attorney fees relying on the Hyde Amendment and the motion had attached to it an itemized bill for \$9,402.50 based on an hourly rate of \$125.00 per hour (See Affidavit & time sheet; Aplt.App. at 85). The government opposed the motion in a 34-page

pleading filed July 13, 2010 (Aplt.App. at 88-121). Mr. Lain filed a reply brief on July 13, 2010 (Aplt.App. at 122), which included an affidavit from Mr. Hill, the person to whom the defendant transferred the handgun (See Hill affidavit; Aplt.App at 129). On August 3, 2010, the district court entered its final order denying defendant's claim without reference to or discussion of the affidavit of Mr. Hill (See Final Order; Aplt.App at 130).

SUMMARY OF THE ARGUMENT

Mr. Lain was indicted not because the prosecutor believed he was guilty of the alleged illegal conduct charged in the indictment, but because of his unusual and bizarre behavior that brought him to the attention of the federal prosecutor. Ms. Morehead admitted to her chief witness, Mr. Carroll Hill, that she knew many people transferred hand guns across the state line without any knowledge that the transfer should be done through licensed firearms dealers.

She also told Mr. Hill her real motive was, in essence, to convict Mr. Lain so he could no longer have firearms and be in the Military because she had concerns that he might "go postal", yet she never sought to have him examined after she indicted him. Then, when faced with trial, she negligently allowed an ATF Agent to testify before the grand jury that there was another indictment pending in Missouri in order to add a second count, but failed to do minimal

due diligence to determine the accuracy of the information.

The district court ruled against Mr. Lain on his claim for attorney's fees but failed to consider a key affidavit submitted by Mr. Hill which squarely discredited the prosecutor and demonstrated ulterior impermissible motives for bringing the prosecution. Had the district court considered this it should have ruled differently; therefore, the failure to grant attorney's fees is an abuse of discretion and this court should reverse, remand, and order payment of reasonable attorney's fees.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S TIMELY AND REASONABLE CLAIM FOR ATTORNEY FEES FOLLOWING DEFENDANT'S ACQUITTAL

Standard of Review

The standard of review applied to determine if a claim for attorney fees was wrongly denied by the district court under a Hyde claim is "abuse of discretion." *United States v. Beeks*, 266 F.3d 880 (8th Cir. 2001); *United States v. Knott*, 256 F.3d 20, 35 (1st Cir. 2001); *United States v. True*, 250 F.3d 410,

422 (6th Cir. 2001); *United States v. Sherburne*, 249 F.3d 1121, 1125 (9th Cir. 2001); *United States v. Adkinson*, 247 F.3d 1289, 1293 (11th Cir. 2001); *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001).

ARGUMENT

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. 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).

The United States conceded in its answer to defendant’s motion filed in the district court “. . . 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” (Government’s answer

to defendant's petition at p.13, n.2; Aplt.App. at 100). And, of course, Lain was the prevailing party by virtue of the acquittal.

Defendant argued in his opening pleading that the motive for prosecution had little or nothing to do with acts demonstrating an intent to subvert federal firearms law, but was instead based on ulterior motives of a prosecutor who had taken it upon herself to punish Lain for other prior bad acts. Defendant argued to the district court:

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.

(See Petition for Award of Fees; Aplt.App. at 77).

Ironically, in the 35 page response filed by the government, much of what was offered as justification for the prosecution focused on Mr. Lain's prior bizarre behavior and fascination he and his friends had with guns (See Gov response; Aplt.App. at 88-121). In the statement of facts in its pleading the government stated:

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.

The above facts of course have absolutely nothing to do with the fundamental question of whether Mr. Lain knew when he took the firearm to Kansas he was doing so in violation of federal law. While his prior brushes with the law and his dealings with his friends and acquaintances may be some evidence of devious behavior, it entirely fails to establish or remotely prove in any way that Lain took the gun from Missouri to Kansas with the intent to subvert federal law. At best, such acts would serve only as impeachment if defendant were to testify – which he did not (assuming a Rule 404(b) objection was overruled and he did testify).

Indeed, the prosecutor no doubt recognized the difficulty of this hurdle which was one of the motives for the 11th hour superseding indictment.

Defendant had filed a motion in limine seeking to preclude the use of this very type of evidence and, in particular, evidence that defendant had been previously placed on pretrial diversion in Missouri (See Defendant's motion in limine; Aplt.App at 44). In her response to the Motion in Limine, Ms. Morehead stated in reference to Mr. Lain's 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 information was inaccurate; however it demonstrates the depth of Ms. Morehead's personal animus toward defendant, as further evidenced infra by the affidavit of the prosecutor's chief witness, Mr. Carroll Hill.

As a somewhat recurring theme, the government argued to the court that if the only issue in a prosecution resulting in acquittal was the defendant's intent, then, in essence, a defendant should never prevail when making a Hyde claim. Defendant took issue with this and filed a reply brief (Defendant's reply; Aplt.App. at 122). The reply brief included an affidavit prepared by Mr. Carroll Hill, the minister in Kansas who received the gun from Mr. Lain as a personal gift (Aplt.App at 129). Mr. Hill stated in his sworn affidavit in pertinent part:

I, Carroll Douglas Hill, reside at 12010 W. 68th Street, Shawnee, Kansas 66216. I am over the age of 21, am of sound mind, and competent to provide this affidavit. I testified in the case of United States v. Kenneth Lain, Jr., case number 2:10-cr-20029-CM.

Several days prior to appearing in court I met with the prosecutor, Terra Morehead, at the office of the United States Attorney, 500 State Avenue, Suite 360, Kansas City, Kansas 66101. In route to the meeting, I believed the purpose of the meeting was to go over my expected testimony and prepare me as a prosecution witness.

In addition to preparing me, during the meeting she told me she realized that "a lot of people transfer guns across State lines but that was not the real issue," She made it clear to me I had done nothing wrong and did not violate the law because I did not know what I was doing was illegal. She told me she was "concerned about Lain going all postal" and that was really her concern and "why she filed the case." She said she was more concerned "about the way Lain acted." She also did not seem to believe he acquired the .38 he gave me the way that Mr. Hart explained it happened. I surmised this had something to do with Lain's original problems in Missouri.

(Affidavit of Carroll Hill; Aplt.App. at 129).

The trial court denied Mr. Lain's claim for attorney fees on August 3, 2010 in a seven page order (Final Order; Aplt.App. 130-136). Defendant agrees that Sections I and II of the Order are factually accurate and a correct statement of the law. (Id. at 130). It is the application of this law to the facts and the reasons advanced in Section III that defendant takes issue with. In Section A the court discusses sufficiency of the evidence to support the charge. After a

brief summary of the facts constituting evidence of other crimes and/or uncharged misconduct, the court states that the only issue in the case was whether Mr. Lain acted willfully. Defendant also clearly saw this as the lynchpin issue in the case. Indeed, as noted by the government in its pleadings, Mr. Lain conceded that he committed the volitional act of transporting the gun from Missouri, where he lived, to Kansas where he gave it to his family minister, Mr. Carroll Hill, as a gift.

The district court judge correctly stated defendant's position when he wrote:

There was no evidence that defendant knew about the statute requiring the involvement of an FFL when giving a gun to someone in another state. It is on this basis that defendant asserts the prosecution was without a foundation in law or fact and was therefore frivolous. Defendant argued that, because he was unaware of the law, his conduct could not have been willful. That is, he did not intend to act in violation of the statute.

(Order; Aplt.App. at 133).

The court next summarized the government's position as:

The government argued that defendant need not have been aware of the specific law that his conduct was violating, but must have acted with the intent to do something unlawful, *i.e.*, not innocent. The government's position, with which the jury apparently did not agree, was that defendant's conduct in deceiving his friends out of their guns and gifting the

.38 caliber gun to Hill, when the gun was not his to give, evidenced his unlawful intent. Such a position is not contrary to law.

(Id.).

The court here makes the same mistake the government made in its arguments in its pleadings in opposition to the claim. The question of intent legally turned on whether Mr. Lain intended to subvert federal law in some manner with “bad purpose” even though he may not have known what that law was. It is the act of willfully transporting and disposing of the firearm with bad purpose and ill will which is the federal crime.

The inclusion of the word willfully appears in only one other section of the gun control act besides the section charged in this case. Congress clearly intended therefore to make this a specific intent statute as opposed to a general intent statute e.g., felon in possession of a firearm. In the latter situation the felon need not act willfully – he only needs to have possession of the firearm with knowledge that it is a firearm.

In years past, the court defined willfully in specific intent crimes as: “An act is done ‘willfully’ if done voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.” *United States v. Dashney*, 117 F.3d 1197 (10th

Cir. 1997). Also See *United States v. Hall*, 805 F.2d 1410 (10th Cir. 1986) (willfully defined in the context of a specific intent crime); Also see *U.S. v. Markopoulos*, 848 F.2d 1036 (10th Cir. 1988).

Willfully here means the act was committed voluntarily and purposely with specific intent to do something the federal law forbids -- not something that is a municipal ordinance violation, or a Missouri state criminal code violation, or even a civil fraud or conversion.

By the court's own admission, there was no evidence to show Mr. Lain intended to subvert the federal gun control act. If that was his intent, one would anticipate that he would do things such as file off serial numbers; or take other nefarious acts to disguise the nature of the transaction; or purposely and knowingly put the gun illegally in the stream of commerce outside ATF scrutiny and detection; all of which is typical in "gun running cases" where guns are transported across state lines.

Finally, when the court says there was a legal and factual basis for the charge, it supports the statement with the sentence "[t]he court does not find that it was frivolous, or brought in bad faith (Order, Section III; Appt.App. at 133). This appears to be completely contrary to the reasons Ms. Morehead provided to Mr. Hill during his pretrial interview and which he has memorialized in his

affidavit. For some inexplicable reason, the court choose not to even mention Mr. Hill's affidavit in its order.

The court seems to ignore Ms. Morehead's statements such as: "a lot of people transfer guns across State Lines but that was not the real issue"; or "[Hill] had done nothing wrong and did not violate the law because [he] did not know what [he]was doing was illegal"; or ". . .she was concerned about Lain going all postal and that was really her concern and why she filed the case"; or "she was more concerned about the way Lain acted."

These considerations demonstrate less than a pure motive in bringing the original and superseding indictment. And with respect to the superseding indictment, the court found that there was no evidence to support a finding that it was obtained with intent to harass, irritate, or annoy the defendant, noting it was immediately dismissed after the government discovered its error – an error, as noted supra, brought to the attention of Ms. Morehead by defense counsel. The totality of the events surrounding the seeking of the superseding indictment, when viewed together and in context with the Hill affidavit (something again not discussed by the district court in its order), suggests the district court was also wrong on this point. Indeed, prior to the revelations in the Hill affidavit, the court had already arguably found in its order denying Mr.

Lain's motion to dismiss that this was misconduct, when it held: "Even assuming some misconduct, defendant does not show a significant infringement on the grand jury's impartiality" (Order denying motion to dismiss because of misconduct by the government; Aplt.App. 53 at 55).

To the extent that the court has tried to compartmentalize fault in this case, appellant submits that what the court has done is contrary to *United States v. Heavrin*, 330 F.3d 723 (6th Cir. 2003). In *Heavrin*, the Sixth Circuit held that it is improper to 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.

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. 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).²

The courts have uniformly held that 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). Appellant knows he has a difficult burden in convincing this court that the district court abused its discretion in ruling against

² Defendant argued bellow and still 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.

him. Having said this, defendant submits that the totality of the circumstances surrounding this unusual and bizarre prosecution and revelations in the Hill affidavit, which generated no discussion and was presumably not considered by the court for some reason, warrants an award of attorney fees in the amount claimed because, contrary to the district court findings, the prosecution was frivolous, vexatious, and brought in bad faith and the district court abused its discretion by denying the claim.

CONCLUSION

Based on the arguments and authorities contained herein, Mr. Lain asks this Court to find that his request for an award of attorney's fees is justified and remand the case back to the district court with instructions to determine a just and reasonable fee and Order the United States to pay Mr. Lain such amounts forthwith.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Due to the significance of the issue presented, counsel requests oral argument.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 5,681 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point New Times New Roman Font and converted to native PDF using Acrobat version 8.0.

/s/ John R. Osgood

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2010, the foregoing brief was served via electronic submission and Federal Express to the Court and by the U.S. mail to:

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ATTACHMENTS

**District Court Final Order Denying
Hyde Claim for Attorney Fees**

A superseding indictment was filed on April 22, 2010, which charged the same original count and, in a new second count, charged defendant with transporting a firearm while under indictment. 18 U.S.C. §§ 922(n), 924(a)(2). However, the government filed a motion to dismiss the second count immediately after the superseding indictment was filed, noting that defendant was not, in fact, under indictment in the Western District of Missouri at the time he allegedly committed the offense in Count I. The court granted the motion.

The case went to trial on May 10, 2010, on the original count. After a two-day trial, at which defendant presented no evidence other than through cross-examination, the jury returned a verdict of not guilty after deliberations lasting approximately thirty (30) minutes.

Defendant now asks this court to order the United States to pay his reasonable attorney's fees under the Hyde Amendment, 18 U.S.C. § 3006A, (Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2440, 2519 (1997)), arguing that the prosecution against him was frivolous, vexatious, and in bad faith because: (1) there was insufficient evidence to support the charge; (2) the second count of the superseding indictment was obtained negligently; and (3) defendant was the victim of selective prosecution.

II. Standards

The Hyde Amendment permits the court, “. . . in any criminal case . . . [to] award 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. . . .” *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1167 (10th Cir. 2006) (quoting *United States v. Robbins*, 179 F.3d 1268, 1270 (10th Cir. 1999), Pub. L. No. 105-119, 111 Stat. at 2519)). The Hyde Amendment provides redress for active and knowing prosecutorial misconduct; where the charges are brought solely to annoy or embarrass,

or were advanced in bad faith; or where the government's position is "foreclosed by binding precedent or so obviously wrong as to be frivolous." See *United States v. Yuajar*, No. 05-10118-JTM, 2006 WL 133439, at *2 (D. Kan. Jan. 13, 2006) (citing *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999); *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002)). Because it involves a waiver of sovereign immunity, the Hyde Amendment must be strictly construed. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–86 (1983); *United States v. Knott*, 256 F.3d 20, 27 (1st Cir. 2001). The defendant bears the burden to establish that the government's prosecution was vexatious, frivolous, or pursued in bad faith. See *United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1182 (9th Cir. 2003). Moreover, a "presumption of regularity supports . . . prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quotation omitted). With these standards in mind, and after reviewing the briefs, the record, and relevant law, the court finds that defendant is not entitled to attorney's fees.

III. Discussion

A. Sufficiency of the Evidence Supporting the Charge

At trial, the government presented evidence that authorities began investigating defendant after he was charged with violating several municipal ordinances in Shawnee, Kansas, in September 2009. During a traffic stop, police learned that defendant was in possession of a .40 caliber Glock owned by Thomas Skiver. ATF Special Agent Roger Stous was assigned to the investigation, and learned that Skiver had loaned the firearm to defendant under the pretense that defendant was using it for shooting practice. In actuality, defendant used this firearm—which he did not own—as collateral to acquire a second firearm, a .38 caliber revolver, from Thomas Hart. When Hart let defendant borrow the .38, he believed that the .40 caliber Glock belonged to defendant. Defendant

then purported to give this .38 caliber revolver—which he did not own—to Carroll Hill, as a gift. The transfer to Hill crossed state lines and failed to involve a federal firearms licensee (“FFL”).

Defendant did not dispute that he committed the acts charged—only that he did not do so in “willful” violation of the law. The issue of defendant’s intent was clearly the question before 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”) (citations omitted). To support a guilty verdict, the government had to prove beyond a reasonable doubt that defendant acted willfully, that is, with knowledge that his conduct was unlawful.

There was no evidence that defendant knew about the statute requiring the involvement of an FFL when giving a gun to someone in another state. It is on this basis that defendant asserts the prosecution was without a foundation in law or fact and was therefore frivolous. Defendant argued that, because he was unaware of the law, his conduct could not have been willful. That is, he did not intend to act in violation of the statute.

The government argued that defendant need not have been aware of the specific law that his conduct was violating, but must have acted with the intent to do something unlawful, *i.e.*, not innocent. The government’s position, with which the jury apparently did not agree, was that defendant’s conduct in deceiving his friends out of their guns and gifting the .38 caliber gun to Hill, when the gun was not his to give, evidenced his unlawful intent. Such a position is not contrary to law. *See Bryan v. United States*, 524 U.S. 184 at 190, 199, 201 (1998); *United States v. Wenger*, 427 F.3d 840, 851–52 (10th Cir. 2005). Although the prosecution was unsuccessful, there was both a legal and factual basis for the charge. The court does not find that it was frivolous, or brought in bad faith.

B. The Superseding Indictment

Defendant alleged that the Assistant United States Attorney, as well as the ATF agent who testified before the grand jury, committed misconduct by informing the grand jury of false and inaccurate information, and that the government was negligent in pursuing the superseding indictment.² He argues that this evidences the government's vexatious intent. The court previously found that, despite the mistake, there was no significant infringement on the grand jury's impartiality; the sole count of the original indictment, which was the count on which defendant was tried, was obtained in a proper manner; and misconduct, if any, caused no prejudice. Defendant now suggests that the superseding indictment was obtained only to harass him for exercising his Sixth Amendment right to trial. The court finds the argument unconvincing. Nothing in the record suggests that the government sought the superseding indictment for the purpose of harassing, irritating, or annoying defendant. Nor is there evidence, aside from defendant's conclusory accusations, that the prosecution was motivated by ill will or malice. The count allegedly obtained by misconduct was dismissed at the request of the government immediately after it discovered its error, and the case proceeded to trial on the original charge and according to the same schedule as previously set.

C. Selective or Vindictive Prosecution

The government has broad discretion as to whom it prosecutes and on what charges, *see Wayte v. United States*, 470 U.S. 598, 607–08 (1985), and a presumption of regularity supports prosecutorial decisions. *United States v. Deberry*, 430 F.3d 1294, 1299–1300 (10th Cir. 2005) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). Courts treat selective-prosecution claims with caution, and the standard defendant must reach is a demanding one. *Armstrong*, 517

² This argument was previously raised in a pretrial Motion to Dismiss the Superseding Indictment on Grounds of Prosecutorial Misconduct (Doc. 16), which this court denied.

U.S. at 464; *Deberry*, 430 F.3d at 1299. In the absence of clear evidence to the contrary, courts addressing selective-prosecution claims presume that prosecutors have properly discharged their official duties. 430 F.3d at 1299. Defendant argues that he was a victim of selective and/or vindictive prosecution because Hill, who was similarly situated, was not prosecuted. Defendant offers nothing other than this conclusory assertion in support of his argument. He falls far short of providing “clear evidence” that the prosecution violated equal protection. *Armstrong*, 517 U.S. at 464–65; *Deberry*, 430 F.3d at 1299.

In any case, the court finds that Hill was not similarly situated, because the circumstances surrounding Hill’s receipt of the gun were not suspicious or otherwise indicative of criminal intent. Hill testified that he believed the .38 caliber was being given to him as a gift, for him to keep, and that he had no reason to believe that it was not defendant’s to give. Defendant, on the other hand, had engaged in a chain of deceptive acts in order to accomplish the transfer.

The Hyde Amendment’s “plain language, reinforced by its legislative history . . . , places a daunting obstacle before defendants who seek to obtain attorney fees and costs from the government following a successful defense of criminal charges.” *Gilbert*, 198 F.3d at 1302–03. Defendant’s efforts in this petition fall short of clearing that obstacle. The government was unsuccessful in its prosecution, and defendant was acquitted. But the court does not find that the prosecution was frivolous, vexatious, or brought in bad faith. Accordingly, defendant’s petition is denied.

IT IS THEREFORE ORDERED that defendant’s 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 Alcohol, Tobacco and Firearms with Suggestions in Support (sic.) (Doc. 35) is denied.

Dated this 3rd day of August, 2010, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge