
NO. 10-3201

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KENNETH G. LAIN, JR.

Defendant - Appellant

**On Appeal from the United States District Court
for the District of Kansas**

**The Honorable Carlos Murguia, U.S. District Judge
D.C. No. 2:10-cr-20029-CM**

BRIEF OF APPELLEE

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PRIOR OR RELATED APPEALS

No prior or related appeals regarding this matter have been filed, docketed or heard.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1291, the Tenth Circuit Court of Appeals has jurisdiction to review the district court's August 3, 2010, Memorandum and Order denying Lain's motion for attorney's fees from the United States under the Hyde Amendment, 18 U.S.C. § 3006A. On August 9, 2010, Lain filed a timely notice of appeal challenging the district court's order denying his motion for attorney's fees.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Whether the district court abused its discretion when it denied the motion by the defendant/appellant, Kenneth Lain, for attorney's fees against the United States under the Hyde Amendment.

STATEMENT OF THE CASE

I. Nature of the Case.

On April 12, 2010, the jury returned a verdict finding Kenneth Lain, the defendant in *United States v. Lain*, Case No. 10-20029-CM, 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).¹ 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 Alcohol (Sic), Tobacco (Sic) and Firearms with Suggestions in Support (Doc. 35)." In that petition, Lain asked the district court to award him reasonable attorney's fees from the United States pursuant to the authority granted to it by the Hyde Amendment, arguing that the United States' prosecution against

¹ Unless otherwise stated, references herein to the record are through citation to the Appellant's Appendix (Aplt. App. at ___) or to Appellee's Supplemental Appendix (Aple. Supp. App. at ___).

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. The United States filed a response opposing that motion and Lain filed a reply.

On August 3, 2010, the district court entered an order denying Lain's motion for attorney's fees under the Hyde Amendment. (Aplt. App. at 130-136). On August 9, 2010, Lain filed a notice of appeal challenging the district court's order denying Lain's motion for attorney's fees. (Aplt. App. at 10). On August 10, 2010, the district court entered judgment of acquittal. (Aple. Supp. App. at 110).

II. The Course of Proceedings and the Disposition Below.

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). (Aplt. App. at 12-14).

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). (Aplt. App. at 13-18). 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. (Aplt. App. at 19-20). The district 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. (Aplt. App. at 21).

On April 23, 2010, the defendant filed a Motion to Dismiss the Superseding Indictment on Grounds of Prosecutorial Misconduct. (Aplt. App. at 22-23). On May 4, 2010, the district 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." (Aplt. App. at 55).

On May 2, 2010, Lain filed a Motion in Limine (Aplt. App. at 44-52), to which the United States responded on May 4, 2010 (Aplt. App. at 56-62), and defendant replied the same day. (Aplt. App. at 63-69). On May 10, 2010, this court granted in part and denied in part Lain's motion. (Aplt. App. at 70).

Trial was held from May 10, 2010, through May 12, 2010. (Aple. Supp. App. at 9). At the trial's conclusion, this court took under advisement Lain's motion for judgment of acquittal. (Aple. Supp. App. at 105). The jury found Lain not guilty on the remaining Count I. (Aple. Supp. App. at 10). The verdict was

entered on May 12, 2010. (Aplt. App. at 71).

On May 21, 2010, Lain 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. (Aplt. App. at 72-83). On July 13, 2010, the United States filed a 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. (Aplt. App. at 88-121; Aple. Supp. App. at 37-106).² 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 misled or entrapped Lain into committing those acts, the United States took the position that Lain's intent was clearly the province of the jury, *see United States v. Whitman*, 665 F.2d

² Although Lain included a copy of the United States' response to his motion for attorney's fees under the Hyde Amendment in his appellate appendix (District Court Doc. 40, Aplt. App. 88-121), he did not include the exhibits that were attached to the United States' response to that motion. Those exhibits, including the relevant excerpts from the trial transcript from *United States v. Lain*, are included in the United States' Supplemental Appendix.

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. On July 13, 2010, Lain filed a reply to the United States’ response. (Apt.App. at 122-129).

On August 3, 2010, the district court entered a Memorandum and Order denying Lain’s motion for attorney’s fees from the United States under the Hyde Amendment. (Aplt. App. at 130-136). Lain timely appeals the district court’s adverse decision to the Tenth Circuit Court of Appeals. (Aplt. App. at 10).

STATEMENT OF FACTS

Pre-Indictment Investigation by the United States

Authorities began investigating Lain after he was charged with violating several municipal ordinances in Shawnee, Kansas, on September 27, 2009. (Aplt. App. at 91). During a traffic stop, police were alerted to the fact that Lain was in possession of a firearm owned by Thomas Skiver. (Aple. Supp. App. at 52, 55-57). Due to his familiarity with Skiver from an unrelated investigation, ATF Special Agent Roger Stous was assigned to the investigation. (Aplt. App. at 91). Agent Stous found that Skiver loaned the firearm to Lain under the pretense that Lain was

using it for shooting practice. (Aple. Supp. App. at 50, 69). In actuality, Lain used Skiver's firearm as collateral to obtain possession of a second firearm from Thomas Hart without Skiver's knowledge. (Aple. Supp. App. at 73, 82, 83, 86). Lain took the firearm obtained from Hart and unlawfully transferred it across state lines to Carroll Hill. (Aple. Supp. App. at 89, 96-98). Lain's transportation of the firearm from Missouri to Kansas was unlawful because neither he nor the recipient, Hill, were FFLs. (Aplt. App. at 73).

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. (Aplt. App. at 12-14).

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. (Aplt. App. at 50-52, 75). 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. (Aplt. App. at 35, 36, 50-52). 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. (Aplt. App. at 58). 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. (Aplt. App. at 37).

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). (Aplt. App. at 15-18). 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. (Aplt. App. at 38). AUSA Morehead verified the dismissal of the underlying indictment the next day. (Aplt. App. at 38).

The Superseding Indictment was filed on April 22, 2010, at 9:15 a.m. (Aplt. App. at 15). AUSA Morehead filed a motion to dismiss Count II at 9:20 a.m. on

April 23rd, 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.” (Aplt. App. at 19-20). The district court promptly granted the United States’ motion at 11:27 a.m. (Aplt. App. at 21).

The District Court’s 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. (Aplt. App. at 31-32).

On May 4, 2010, the district 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, the district court found that “[e]ven assuming some misconduct, defendant does not show a significant infringement on the grand jury’s impartiality.” (Aplt. App. at 55). 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.*

Trial

On May 10, 2010, trial in *United States v. Lain* commenced. (Aple. Supp. App. at 9). As noted in the district court’s instructions to the jury, the elements that must be proven beyond a reasonable doubt in order for Lain 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.

(Aple. Supp. App. at 28).

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. (Aple. Supp. App. at 29).

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.” (Aplt. App. at 27). 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. (Aple. Supp. App. at 98-100, 102, 103); (2) Hill received the firearm as a gift from Lain and intended to keep it. (Aple. Supp. App. at 99); and (3) the exchange took place the second week of August 2009. (Aple. Supp. App. at 76). 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. (Aplt. App. at 103).

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. (Aple. Supp. App. at 89, 96-98). 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. (Aple. Supp. App. at 61, 67-70, 80, 81, 86-88).

On or about July 4, 2009, Skiver, Hart, Hill and Lain were all gathered at Lain’s house. (Aple. Supp. App. at 67, 79-80, 93-94). While together, they talked

about and showed each other various firearms. (Aple. Supp. App. at 52, 81). Hill commented that he liked Hart's .38 caliber revolver. (Aple. Supp. App. at 95-96).

In late July or early August, Lain borrowed Skiver's .40 caliber Glock under the pretense that he wanted to use it for shooting practice. (Aple. Supp. App. at 69-70).

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. (Aple. Supp. App. at 82). In exchange for the .38 caliber revolver, Lain gave Hart the .40 caliber Glock as collateral. (Aple. Supp. App. at 83-84). 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. (Aple. Supp. App. at 69-70). 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. (Aple. Supp. App. at 71-72).

In the second week of August, Lain went to Hill's house and gave him the .38 caliber revolver owned by Hart. (Aple. Supp. App. at 96). Hill recognized the gun and knew Lain had gotten it from Hart. (Aple. Supp. App. at 96). 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. (Aple. Supp. App. at 97). Hill said if

he had known that the .38 caliber revolver “wasn’t [Lain’s] to give, [Hill] wouldn’t take it.” (Aple. Supp. App. at 100).

In late August or early September, Lain asked Hart if he wanted to sell the .38 caliber revolver, Hart agreed, and arrangements were made. (Aple. Supp. App. at 85). At that time, Lain had already gifted the gun to Hill. (Aple. Supp. App. at 96).

In late September, Lain called Hart and asked him to return the .40 caliber Glock because it was owned by Skiver. (Aple. Supp. App. at 86). Hart met Lain on September 27, 2009, to return the .40 caliber Glock and socialize. (Aple. Supp. App. at 86-87). 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. (Aple. Supp. App. at 88).

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. (Aple. Supp. App. at 41-43, 59). 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. (Aple. Supp. App. at 41-44). 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. (Aple. Supp. App. at 41, 45-46). Lain also offered a second reason—that he was working on a federal gun case with the FBI and needed to deliver a warrant. (Aple. Supp. App. at 41, 47-48). Meats let Lain go on his word, but initiated a second stop when he learned additional information. (Aple. Supp. App. at 41, 48-49).

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. (Aple. Supp. App. at 53). Lain provided the business card of an FBI agent, but when the officers contacted the agent, the story was false. (Aple. Supp. App. at 54). Next, Lain said he was delivering a firearm for his army commander, which was not true. (Aple. Supp. App. at 55). However, this alerted police that Lain had a gun in his car and it was confiscated. (Aple. Supp. App. at 50-51, 55-56). The firearm, a .40 caliber Glock, belonged to Thomas Skiver and did not appear to be stolen. (Aple. Supp. App. at 57). 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. (Aple. Supp. App. at 60).

In early October, Hill was contacted by Agent Stous. (Aple. Supp. App. at 100). Afterward, Hill contacted several places to find out if any paperwork was needed for the .38 caliber revolver Lain had given him. (Aple. Supp. App. at 100-101). From those inquiries, Hill determined that the interstate transfer should have been handled through a federal firearms dealer. (Aple. Supp. App. at 100-101, 103).

Final Proceedings and Judgment

At the close of the United States' case, Lain made a motion for judgment of acquittal (Aple. Supp. App. at 104), which the district court took under advisement (Aple. Supp. App. at 105), and denied as moot after the jury returned its verdict of not guilty. (Aple. Supp. App. at 10; Aplt. App. at 71).

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." (Aple. Supp. App. at 29).

On May 12, 2010, the case was submitted to the jury, which returned a verdict of not guilty. (Aple. Supp. App. at 10). On August 10, 2010, judgment of

acquittal was entered on the docket. (Aple. Supp. App. at 110).

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).” (Aplt. App. at 72-87). On July 13, 2010, the United States filed a response to Lain’s petition for attorney’s fees under the Hyde Amendment (Aplt. App. at 88-121; Aple. Supp. App. at 37-109), and later that same day Lain filed a reply. (Aplt. App. at 122-129).

On August 3, 2010, the district court entered a seven page Memorandum and Order denying Lain’s motion for attorney’s fees. (Aplt. App. at 130-136). After setting forth a thorough discussion of the legal standards for evaluating claims under the Hyde Amendment, the district court considered and rejected Lain’s contentions that his prosecution by the United States was brought in bad faith.

On August 9, 2010, Lain filed a timely notice of appeal challenging the district court’s August 3, 2010, decision denying his motion for attorney’s fees. (Aplt. App. at 137).

SUMMARY OF THE ARGUMENT

Although Lain correctly argues that he meets the standing requirements for seeking attorney's fees from the United States under the Hyde Amendment following his acquittal for 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), he cannot demonstrate that this district court abused its discretion when it found that the United States' prosecution, albeit unsuccessful, was not brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous. 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, the district court did not abuse its discretion when it denied Lain's petition for attorney's fees under the Hyde Amendment.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED LAIN'S MOTION FOR ATTORNEY'S FEES AGAINST THE UNITED STATES UNDER THE HYDE AMENDMENT.

A. Issue Raised and Ruled On

Following the jury's verdict of acquittal, Lain filed a motion seeking an award of attorney's fees from the United States under the Hyde Amendment. (Aplt. App. at 72-87). After assessing the evidence presented before, during and after trial, the district court found that the United States' prosecution of Lain was not vexatious, frivolous or pursued in bad faith. Based upon its factual and legal analysis, the district court, in the exercise of its discretion, denied Lain's motion for attorney's fees. (Aplt. App. at 130-136).

B. Standard of Review

Although the Tenth Circuit has apparently not addressed the appropriate standard of review in Hyde Amendment cases, as Lain acknowledges, the law is well-settled that "[a]n award of attorney fees pursuant to the Hyde Amendment is reviewed for an abuse of discretion." *United States v. Capener*, 608 F.3d 392, 400 (9th Cir. 2010) (quoting *United States v. Sherburne*, 506 F.3d 1187, 1189 (9th Cir. 2007); *United States v. Claro*, 579 F.3d 452, 456 (5th Cir. 2009) ("An award or

denial of attorney's fees and expenses under the Hyde Amendment is reviewed for abuse of discretion. *E.g.*, *United States v. Truesdale*, 211 F.3d 898, 905 (5th Cir. 2000). Legal determinations underlying the award are, of course, reviewed *de novo*. *Id.* at 906.”); *United States v. Isiah*, 434 F.3d 513, 519 (6th Cir. 2006); *United States v. Beeks*, 266 F.3d 880, 883 (8th Cir. 2001). In *United States v. Beeks*, 266 F.3d 880 (8th Cir. 2001), the Eighth Circuit stated:

Although our standard of review is not specified in the Hyde Amendment and we have not yet passed on the question, all other circuits to consider the issue have reviewed the district court's decision to award or to deny fees for abuse of discretion. *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); *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000); *United States v. Truesdale*, 211 F.3d 898, 906 (5th Cir. 2000). The language of the Hyde Amendment—that the court “may” award attorney's fees—and the district courts' unique familiarity with the litigation indicates we should apply “a deferential level of review in Hyde Amendment appeals.” *Truesdale*, 211 F.3d at 906; *see United States v. Lindberg*, 220 F.3d 1120, 1123-24 (9th Cir. 2000). We agree with our sister circuits that an abuse of discretion standard governs the review of Hyde Amendment claims.

Id. at 883.

“A district court abuses its discretion when it issues an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.” *Rocky Mountain Christian Church v. Board of County Com'rs*, 613 F.3d 1229, 1239 -1240 (10th Cir. 2010)

(quoting *John Allan Co. v. Craig Allen Co.*, 540 F.3d 1133, 1142 (10th Cir. 2008)

(internal quotations marks and citation omitted).

In applying the abuse-of-discretion standard, the question is not whether this court would have reached a different determination on the facts presented. See *United States v. Burgess*, 576 F.3d 1078, 1100 (10th Cir.), cert. denied, --- U.S. ----, 130 S.Ct. 1028, 175 L. Ed. 2d 629 (2009); *Eisenberg v. Univ. of N.M.*, 936 F.2d 1131, 1137 (10th Cir. 1991) (reviewing court does not second-guess district court's determination absent abuse of discretion). “Under the abuse of discretion standard[] a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.” *Id.* at 1504 (quotation omitted). “We will not challenge [the district court's] evaluation unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record.” *United States v. Robinson*, 39 F.3d 1115, 1116 (10th Cir. 1994).

In re: £Centrix Financial LLC, Case No. 10-1057, 2010 WL 3490245, 2 (10th Cir. Sept. 8, 2010).

“An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings.” *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998). “A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling.” *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002) (citation omitted).

“A factual finding is clearly erroneous if ‘it is without factual support in the record or, after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made.’” *United States v. Fox*, 600 F.3d 1253, 1260 (10th Cir. 2010) (quoting *United States v. Barnhardt*, 93 F.3d 706, 710 (10th Cir. 1996)). See also *United States v. Cardenas-Alatorre*, 485 F.3d 1111, 1119 (10th Cir. 2007) (holding that, for a finding to be clearly erroneous, the “finding must be more than possible or even probably wrong; the error must be pellucid to any objective observer”) (further quotation omitted).

C. Discussion

Because the district court’s factual finding that the United States’ prosecution of Lain was not vexatious, frivolous or in bad faith is not clearly erroneous or contrary to law, the district court did not abuse its discretion in denying Lain’s motion for attorney’s fees under the Hyde Amendment.

1. 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*, 463 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). In pertinent part, the Hyde Amendment provides:

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). 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.³

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

³ 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.

broad proposal met with substantial opposition within Congress and from the Executive Branch. *See id.* at 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.*

In sum, Lain bears the burden of proof of establishing that he is qualified to receive an award under the Hyde Amendment. *See United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002).

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

Contrary to Lain's suggestion, the United States' position as a whole was well-founded, supported by substantial evidence and had a reasonable likelihood of success; 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, as the district court found, 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)).

a. 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”).

1. 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. (Aple. Supp. App. at 28). 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.

In his opening appellate brief, Lain repeatedly suggests that although he committed the acts giving rise to the charge in Count I he did not do so “willfully” and acted without the requisite intent to be convicted. Lain’s Appellate Brief at 14-19. And while Lain ascribes nothing suspicious to the facts introduced at trial regarding his actions, a reasonable factfinder could easily have concluded that he acted “willfully.” 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.” (Aplt. App. at 27). 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. (Aple. Supp. App. at 69-70). Lain used this firearm—which he did not own—as collateral to acquire a second firearm, a .38 caliber revolver. (Aple. Supp. App. at 82-84). Lain

then gifted this .38 caliber revolver—which he did not own—to another person. (Aple. Supp. App. at 96). 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,⁴ 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, the district 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. *See United States v. Erwin*, Case No. CR-08-33-FHS, 2010 WL 1816349, 1 (E.D. Okla. May 3, 2010) (despite district court's substantial doubts about the overall wisdom of the United States' prosecution, the

⁴ *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.").

district court denies the defendant's motion for attorney's fees under the Hyde Amendment). 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. (Aplt. App. at 92). In support of the first belief, the United States had evidence in support of count one and defendant's own admissions. (Aplt. App. at 92). 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. (Aplt. App. at 35-37, 92). 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. (Aplt. App. at 35-37, 92). 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. (Aplt. App. at 50-52, 92). 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.

(Aplt. App. at 19-20, 53-54, 92-93).

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. (Aplt. App. at 19-20, 53-54, 92-93). 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 district court's finding in its 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.

c. 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”).

In the district court, Lain alleged that the charge was “obtained with intent to harass defendant and delay the prosecution and force a guilty plea.” (Aplt. App. at 78; *see* Lain’s Appellant Brief at 23, n. 2). That argument rests on baseless allegations and is supported by no evidence other than the fact that the superseding indictment was filed and the arraignment for the superseding indictment was rescheduled without his knowledge. (Aplt. App. at 77-79). 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.

d. 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”).

In his opening appellate brief, citing to the affidavit of Hill submitted by Lain as an Exhibit to his reply brief in district court, Lain argues that he “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.” Lain’s Appellate Brief at 10. Lain suggests that firearms are unlawfully transported illegally across state lines without a licensed firearms dealer, but that he was unfairly singled out for prosecution. Lain’s Appellate Brief at 10. Lain goes on to argue the prosecutor’s true motive in seeking to obtain a conviction of Lain was so that “he could not 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.” Lain’s Appellate Brief at 10. Contrary to his suggestion, 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 United States notes that Lain did not present the affidavit of Hill until he filed his reply brief and that the specific arguments presented in regard to that affidavit were raised for the first time in his July 13, 2010, reply in support of his motion for attorney's fees. (Aplt. App. at 125-127). In his appellate brief, Lain contends that the district court's decision is faulty because (1) its August 3, 2010, decision did not expressly discuss Hill's affidavit and/or (2) because it did not discuss Hill's affidavit, it did not consider that affidavit in finding that the United States' prosecution was not vexacious, frivolous or brought in bad faith. Lain Appellate Brief at 10-11, 16-20, 23-24. In his appellate brief, Lain argues that because the district court did not expressly discuss Hill's affidavit the district court's decision denying his motion for attorney's fees should be reversed. Lain Appellate Brief at 23-24. Lain's analysis should be rejected.

First, contrary to Lain's suggestion, there is no requirement that the district court, or for that matter, any court, expressly discuss all of the evidence introduced and/or all of the arguments advanced by a party. *Cf., Plant Genetic Sys., N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1343 (Fed. Cir. 2003) ("The fact that the

district court did not in its opinion recite every piece of evidence does not mean that the evidence was not considered.”); *Conopco, Inc. v. May Dept. Stores Co.*, 46 F.3d 1556, 1573 (Fed. Cir. 1994) (“That the court failed to discuss every possible piece of evidence in its opinion does not render its decision defective or permit the inference that it ignored relevant evidence. *See Medtronic, Inc. v. Daig Corp.*, 789 F.2d 903, 906, 229 USPQ 664, 667 (Fed. Cir. 1986) (“We presume that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise.”)). Second, Lain raised this argument and information for the first time in his reply brief and therefore what weight, if any, the district court chose to give to that information was committed to its sound discretion. *See Minshall v. McGraw Broadcasting Co.*, 323 F.3d 1273, 1288 (10th Cir. 2003) (stating that an argument raised for the first time in a reply brief is waived); *The SCO Group, Inc. v. Novell Inc.*, 578 F.3d 1201, 1222 (10th Cir. 2009) (“An issue or argument insufficiently raised in a party's opening brief is deemed waived. *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277-78 (10th Cir. 1994). Although SCO addresses this issue in its reply brief, the general rule in this circuit is that a party waives issues and arguments raised there for the first time. *See M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753 (10th Cir. 2009).”). Finally, Hill’s affidavit does not prove that Lain’s prosecution was brought for an improper purpose by the

United States. As long as the United States does not choose to prosecute a person for some unlawful or discriminatory reason, it does not abuse its prosecutorial discretion in choosing to prosecute the persons it perceives to pose the greatest danger to the citizens of the United States. Moreover, that the United States does not prosecute every person suspected of committing a federal firearms violation is not a basis for proving that Lain's prosecution was in bad faith.

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.

D. 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 730.⁵ 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,

⁵ 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.

not count by count”). In *United States v. Heavrin*, the court denied a fee award even though some charges brought against 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, the district 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].” (Aplt. App. at 55). 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, the district court did not abuse its discretion in finding that the United States’ overall position was justified and that it was not vexacious, frivolous or brought in bad faith.

E. 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)).

Lain contends that Hill was a similarly situated individual but still fails to even identify a discriminatory basis, much less provide evidence of one. (Aplt. App. at 81). There is absolutely no indication that his 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. (Aple. Supp. App. at 98). 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.

CONCLUSION

As demonstrated above, the district court did not abuse its discretion when it denied Lain's petition for an award of attorney's fees against the United States under the Hyde Amendment. The district court correctly denied Lain's motion for attorney's fees based upon its reasonable findings of fact and conclusions of law. Because 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, and because the

United States presented evidence demonstrating that Lain committed the act with knowledge that his conduct was unlawful and 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, the district court did not commit error when it found that the United States' position as a whole throughout its prosecution of Lain was reasonable and warranted. For the foregoing reasons, this Court should affirm the district court’s decision denying Lain's petition for attorney’s fees under the Hyde Amendment.

Respectfully submitted,

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