

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 07-CR-00462-JLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CORY VOORHIS,

Defendant.

**RESPONSE OF THE UNITED STATES TO THE DEFENDANT'S MOTION TO
DISMISS BASED UPON SELECTIVE PROSECUTION AND FOR
SPECIFIC DISCOVERY BASED UPON SAID CLAIM**

COMES NOW, the United States, by and through its attorney, James C. Anderson, the assigned Special Prosecutor in this matter, and respectfully submits the following as the United States' response to the Defendant's Motion to Dismiss based upon Selective Prosecution, Motion for Discovery, and Motion for Evidentiary Hearing:

I. FACTS¹

A. Introduction

The United States alleges that on September 27-28, 2006, the Defendant in this matter, Cory Voorhis, while employed as a Special Agent for Immigration and Customs Enforcement (ICE),

¹The information contained within the Facts portion of this response are derived from investigative reports and other material gathered during the course of the investigation of this matter.

exceeded his authorized access to the National Crime Information Center (NCIC) database by requesting information on seven individuals. These queries were not in furtherance of any investigation being conducted by the Defendant. Rather, the queries were conducted as part of an affirmative effort by the Defendant to provide information to a candidate for political office, a clearly prohibited use of the NCIC system. Contrary to the assertions of the Defendant, he is not the victim of selective prosecution as the government is unaware of any other similarly situated individual in this matter. Moreover, the prosecution of the Defendant is certainly not motivated by any desire to retaliate against the Defendant for an exercise of rights guaranteed by the First Amendment.

Based upon the facts and circumstances resulting in the prosecution of the Defendant, as set forth below, and the applicable law, he cannot sustain his claim of selective prosecution nor is he entitled to any specific discovery associated with this claim.

B. NCIC Access

NCIC is a “national computerized data bank operated by the Federal Bureau of Investigation and designed to assist federal, state and local law enforcement agencies.” *Baker v. McCollan* 443 U.S. 137, 156 n. 17 (1979). The NCIC database collects and maintains various records relating to criminal histories of millions of people within the United States as well as persons, vehicles, and other property sought by law enforcement agencies nationwide. Access to the NCIC database is restricted to employees of law enforcement agencies who may access it for law enforcement purposes only. In addition to being employed by a law enforcement agency, NCIC operators must

be certified to access the system. The FBI has delegated to the states and territories responsibility for certifying NCIC operators. In Colorado, the Colorado Bureau of Investigation (CBI) is responsible for overseeing the training and certification of NCIC operators, regardless of whether the operator is employed by a local, state or federal law enforcement agency. To access NCIC within Colorado, an operator must enter the system through the Colorado Crime Information Center (CCIC).

In addition to obtaining their initial certification, operators of the CCIC/NCIC system in Colorado are required to undergo re-certification every two years. As part of his duties as a Special Agent with ICE, the Defendant was a certified operator of CCIC/NCIC, his most recent certification to use the system occurred on April 24, 2006. As part of that re-certification, the Defendant took an online exam that contained true/false and multiple choice questions including a question that asked: "Information in CCIC/NCIC can be given to?" The Defendant correctly chose the answer that stated, "Authorized criminal justice personnel only." The Defendant passed his re-certification exam with a 90% score. After successfully completing the re-certification exam, every operator is required to agree to the terms of a document entitled "Declaration of Understanding." This is again done online, and the Defendant executed this agreement on April 24, 2006. The agreement states:

I understand that at all levels of access, all information retrieved from the CCIC system can only be released to official criminal justice personnel and that no person outside the criminal justice system may receive such information, either verbally or in type written or hand written form, unless release is authorized or requested in the message

received or in a related message from the originating agency.
(emphasis added).

Every query made of the CCIC/NCIC is logged and maintained within the system. Thus, if a certified CCIC/NCIC operator were to query the name “Frank Sinatra” and give a date of birth of 12/12/15, at a later time, using a feature known as a “query-query search,” a CCIC/NCIC operator could query the same name and be able to see all of the operators of CCIC/NCIC who had queried that name and when the query occurred. This data is available within the CCIC system for two years.

C. Events Leading Up to the Unauthorized Access

The candidates in the 2006 Colorado gubernatorial race were Bob Beauprez, then serving as a United States Representative for Colorado’s Seventh Congressional District, and Bill Ritter, who had formerly served as the District Attorney for Denver County. In late August of 2006, Representative Beauprez criticized plea bargains entered into with illegal immigrants by the Denver District Attorney’s Office while Ritter served as district attorney. Ritter responded to this criticism and on August 23, 2006, an article appeared in the Rocky Mountain News which stated:

Democratic gubernatorial candidate Bill Ritter on Tuesday strongly defended his record as district attorney of prosecuting illegal immigrants, challenging criticism from Rep. Bob Beauprez, his GOP opponent, that he failed to aggressively pursue immigrants who broke the law.

Ritter said he made it a policy to always send illegal immigrants to jail so federal authorities would have the chance to detain them.

“I always instructed my lawyers to ask for jail time (for illegals) to ensure (Immigration and Customs Enforcement agents) would have the ability to come pick them up,” said Ritter, who served as Denver District Attorney until 2005.

(ROCKY MOUNTAIN NEWS, August 23, 2006).

Following the publication of this news article, as well as similar accounts in other Colorado media outlets, the Defendant, using a cell phone provided to him by Immigration and Customs Enforcement, contacted the Beauprez for Governor campaign headquarters. The Defendant spoke with John Marshall, Beauprez’s campaign manager. At the outset of the call, the Defendant identified himself as an ICE agent, and he told Marshall that he had information that contradicted Ritter’s account of the plea bargaining practices of the district attorney’s office during Ritter’s tenure as district attorney. During this conversation, Voorhis and Marshall agreed to meet face to face later that day at a coffee shop located in the same building as the Defendant’s office.

Shortly after their first telephone contact, and during working hours, the Defendant met with Marshall at the coffee shop in his building. Also attending the meeting with Marshall was Richard Beeson, a political consultant working with the Beauprez campaign organization. The Defendant explained to Marshall and Beeson that the Denver District Attorney’s Office allowed some illegal immigrants charged with crimes to plead guilty to the crime of Trespass Upon Agricultural Land. Using a stack of 3 x 5 index cards, the Defendant gave Marshall and Beeson specific examples of cases where the practice had been utilized by the Denver District Attorney’s Office under Ritter.

The Defendant also told Marshall and Beeson that they could find specific examples of this practice in state court files.

The day following the coffee shop meeting with Marshal and Beeson, and again during working hours, the Defendant went to the offices of an organization known as the Trailhead Group² and met with Marshall, Beeson, and Alan Philip, who was employed as the Director of the Trailhead group at the time. In addition to the Defendant, Marshall, Beeson, and Philip, William Winkler and John Wasilchick, individuals hired to perform research for Trailhead group, participated in the meeting by telephone. During the ensuing meeting the Defendant, this time with the use of what appeared to be computer generated papers, again outlined his allegations about the plea bargaining practices of Ritter's office. The Defendant also provided the other participants with the docket numbers of several state cases they should examine that he explained would highlight the use of the Trespass Upon Agricultural Lands statute in plea agreements entered into with illegal immigrants.

Sometime during the month of September 2006, the Defendant and Marshall again met for the purpose of discussing the possibility of the Defendant talking to members of the media about the plea bargaining practices of Ritter's office. The Defendant eventually agreed to meet with a reporter from the Denver Post on the condition he remain a confidential source. Marshall eventually arranged the meeting and the Defendant met with Karen Crummy to discuss his allegations regarding the practices of the District Attorney's Office under Ritter.

² Now defunct, the Trailhead Group, formed pursuant to 26 U.S.C. § 527, was created primarily for advancing and advocating certain political viewpoints within Colorado.

In the later part of September 2006, John Marshall placed a telephone call to the Defendant and told him that the research of the Denver court files had been completed and a list of approximately 52 names had been created. Marshall asked to meet with the Defendant and the Defendant agreed to meet at the coffee shop located in his building where they had previously met. During the subsequent meeting, Marshall told the Defendant he had a list of individuals having Hispanic surnames that had been arrested for various crimes but had subsequently pled guilty to a lesser offense. Marshall asked if the Defendant would check the immigration status of these individuals and he agreed. Marshall failed to bring the list with him and requested the Defendant to wait for his assistant, Katherine Holtgrewe, to bring him the list. Marshall then left and several minutes later Holtgrewe appeared and gave the Defendant a type written list containing 52 names of individuals with Hispanic surnames.

D. Unauthorized Access and Subsequent Disclosure of Information

CCIC/NCIC records indicate that on September 27, 2006, and again on September 28, 2006, the Defendant accessed the CCIC/NCIC database and made queries concerning eight individuals. Of these eight individuals, seven appeared on the list provided to him by Marshall. The eighth name the Defendant ran was an alias for one of the individuals appearing on the list supplied by Marshall. From records maintained by the CCIC/NCIC system, it appears that the Defendant logged on to the system on three separate occasions, twice on the 27th and once on the 28th. On each occasion he accessed CCIC/NCIC during these two days, the Defendant used a computer issued to him by ICE.

None of the names the Defendant queried were related to any ongoing investigation the Defendant was conducting at the time.

The following day, September 29, 2006, the Defendant met with John Marshall at the Beauprez campaign headquarters. The Defendant returned the list of Hispanic surnames to Marshall. Marshall noted the list contained handwriting and notations he had not put on the list. Importantly, the Defendant told Marshall to concentrate his efforts on one of the individuals on the list, Walter Noel Ramo. The Defendant said that this individual had been charged with a serious drug offense and subsequently pled guilty to a lesser offense. The Defendant went on to explain that after his court case in Denver, Walter Noel Ramo went to California where he committed a sex offense involving a 14 year old girl. The list the Defendant gave back to Marshall contained a hand written name "Carlos Estrada Medina" an alias for Ramo. Marshall was told by the Defendant that the arrest records for Walter Noel Ramo would be located in San Francisco, California. Finally, according to Marshall, the Defendant provided him with the FBI number assigned to Ramo aka "Carlos Estrada Medina."

E. Campaign Advertisement Featuring Carlos Estrada Medina

On October 10, 2006, less than two weeks after the Defendant returned the list of names to Marshall with the instruction to pay particular attention to Ramo, the Beauprez campaign ran a television advertisement which specifically referenced the Ramo case, using his alias, "Carlos Estrada Medina." The announcer for the advertisement read the following text while images of Ramo appeared on the screen:

Case File: Carlo Estrada Medina. Illegal Alien. Felon. Arrested in Denver for distribution of heroin. Prosecutor Bill Ritter plea-bargains down to agricultural trespassing. Estrada avoids deportation and walks away with probation. He's arrested again for sexual abuse of a minor. Bill Ritter's bad judgment allowed felons who should have been deported to plea bargain. That was Ritter's policy. How many more of these criminals walk the street now.

When he was arrested and convicted in Denver, Walter Noel Ramo did not use the alias Carlos Estrada Medina. That alias did not appear in any public document on file in the Denver state court system. Additionally, the name Harold Noel Ramo did not appear in any public document in the California court system where Ramo was arrested for the sex offense using the alias "Eugene Alfredo Estrada-Acosta." In fact, the only way to connect the names "Walter Noel Ramo," "Carlos Estrada Medina" and "Eugene Alfredo Estrada-Acosta" as aliases used by the same individual is through the NCIC database.

F. Investigation

On October 12, 2006, counsel for the Ritter campaign made a complaint to the Colorado Bureau of Investigation alleging the information contained in the television ad referenced above could not have been obtained without unlawfully accessing the NCIC database. CBI began investigating the matter shortly thereafter.

During the course of investigating this matter, agents with the Colorado Bureau of Investigation discovered that three operators of the CCIC/NCIC system had queried the name Walter Noel Ramo, aka Carlos Estrada Medina, during the months of September and October 2006. Specifically, CBI determined that the Defendant had queried the name on September 27, 2006, and

that on October 4, 2006, an individual using the login information assigned to an employee of the Harris County, Texas District Attorney's Office had also queried the name. The other query occurred on October 12, 2006, by an employee of the Denver County District Attorney's Office.

In regard to the Texas NCIC query of October 4, 2006, it appears from the investigation of this matter that the query was directly related to the information provided Marshall by the Defendant. William Winkler, a researcher hired by Trailhead Group in 2006, and who had participated by phone in the late August conference with the Defendant that took place at the offices of the Trailhead Group, hired a private investigator located in Texas to seek out information confirming the information given to Marshall by the Defendant. The Texas private investigator, in turn, asked a friend employed by the Harris County District Attorney's Office to query NCIC about Ramo. The friend confirmed the information about Ramo also being arrested in California, using yet another name "Eugene Estrada." The actions of Rodgers and the employee of the Harris County District Attorney's Office are currently under investigation by Texas law enforcement authorities.

On October 12, 2006, an employee of the Denver County District Attorney's Office also queried NCIC about Carlos Estrada Medina. This employee did so at the direction of a assistant district attorney after the office had become aware of the Beauprez campaign ad after it aired, and after the office had begun to receive press inquiries regarding the case. Based upon the investigation conducted in this matter, it appears this query was done to determine if there were outstanding legal concerns, such as a probation violation regarding this defendant, as he had been sentenced to probation as a result of the plea bargain he received from the charges documented in the political

advertisement, and also to verify the accuracy and source of the information contained in the advertisement.

II. DISCUSSION

A. Introduction

The Defendant complains he is the victim of selective prosecution. He claims he has been singled out for prosecution in contrast to similarly situated individuals. Further, he insists this prosecution is based upon a deliberate decision to punish him because he chose to exercise his constitutional and statutory right to petition a member of Congress. He also claims his acts are protected from prosecution because he is a “whistleblower.” Thus, according to the Defendant, he is entitled to discovery on this issue, thereafter a full hearing, and ultimately the dismissal of the charges pending against him. However, despite the gloss which the Defendant might attempt to place on the essential facts giving rise to this prosecution, he simply cannot establish there are other defendants who are similarly situated to him who have not been prosecuted, or that the decision to prosecute him was based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.

A selective prosecution claim asks the judiciary to exercise its power over a core executive branch function, and courts must therefore act with great restraint in invoking such authority. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Absent clear evidence to the contrary, federal prosecutorial decisions are “presumed to be motivated solely by proper considerations.” *United States v. Deering*, 179 F.3d 592, 595 (8th Cir. 1999). The Defendant’s inability to satisfy the

demanding standard necessary to overcome this presumption of regularity is fatal to his selective prosecution claim.

B. Standard for Reviewing Claims of Selective Prosecution

Over 120 years ago, the Supreme Court recognized that the Constitution prohibited prosecutions motivated by improper considerations. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), two San Francisco residents of Chinese descent raised challenges under the Fourteenth Amendment's Equal Protection Clause to their conviction for violating a San Francisco ordinance requiring operators of laundries in wooden buildings to obtain a permit from the city. About 200 Chinese owners of wooden laundries had been denied permits, whereas 80 non-Chinese owners had been granted permits to carry on their businesses under similar conditions. In reversing the two convictions, the Supreme Court stated:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is ... within the prohibition of the Constitution.

Id. at 373-74.

These considerations have led to what is known as the “selective prosecution” doctrine or defense. Under this doctrine, “the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.” *Wayte v. United States*, 470 U.S. 598, 608 (1985);

Oyler v. Boles, 368 U.S. 448, 456 (1962). The ban on discriminatory prosecution is not limited to the states but also applies to the United States under the Fifth Amendment's Due Process Clause. *Id.*, at 470 U.S. at 608 n. 9. The Tenth Circuit has held that in order to prevail on this defense, a defendant must prove that: 1) he has been singled out for prosecution while others similarly situated have not been proceeded against for the type of conduct forming the basis of the charge against him; and 2) the government's selection of him for prosecution was invidious or in bad faith and based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights. *United States v. Salazar*, 720 F.2d 1482, 1487 (10th Cir.1983). *See also United States v. Dukehart*, 687 F.2d 1301, 1303 (10th Cir.1982) ("Selective prosecution or enforcement is not unconstitutional if the selection is not based deliberately on an unjustifiable categorization such as race and religion.").

The Tenth Circuit has instructed that this is a doctrine that should be applied very narrowly. According to the court, trial courts should view such claims with "caution." *United States v. DeBerry*, 430 F.3d 1294, 1299 (10th Cir. 2005). The *DeBerry* court went on to state:

The defendant is asking the judiciary to exercise power over a "special province" of the executive branch, a province in which, for good reason, the executive possesses broad discretion. *Armstrong*, 517 U.S. at 464 (internal quotation marks omitted). The decision to prosecute "is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.*; accord *Armstrong*, 517 U.S. at 465. Moreover, judicial review of

prosecutorial decisions can “chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.” *Armstrong*, 517 U.S. at 465. Accordingly, “the presumption of regularity supports ... prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.” *Id.* at 464. As the Supreme Court has noted, “the standard [for proving a selective-prosecution claim] is a demanding one.” *Id.* at 463, 116 S.Ct. 1480.

Id., at 1299 (emphasis added).

The *DeBerry* court also addressed the issue of when a defendant may obtain specific discovery associated with such a claim. Relying upon the teaching of the Supreme Court in *Armstrong*, the court stated that the standard for demonstrating a defendant is entitled to specific discovery is a “demanding” one. *Id.* In this regard the court went on to say:

[t]here is a “background presumption ... that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.” [citing *Armstrong*, at 463-64] (internal quotation marks and citation omitted). Responding to discovery on a claim of selective prosecution imposes many of the same costs that are associated with responding to a prima facie case of selective prosecution - diverting prosecutorial resources and disclosing prosecutorial strategies. *Id.* at 468, 116 S.Ct. 1480. Although defendants seeking discovery concerning selective prosecution need not make a prima facie case of selective enforcement, [citing *United States v. James*, 257 F.3d 1173, 1178 (10th Cir. 2001)], they must satisfy a “rigorous standard.” *Armstrong*, 517 U.S. at 468. Defendants must make “a credible showing” of both discriminatory effect and discriminatory intent. *Id.* at 470, 116 S.Ct. 1480; accord *United States v. Bass*, 536 U.S. 862, 863 (2002) (*per curiam*); *James*, 257 F.3d at 1178.

Id., at 1299-1300 (emphasis added).

The Defendant, citing this court's decision in *United States v. Haggerty*, 528 F.Supp. 1286 (D. Co. 1981), contends that simply because he has filed an assertion of selective prosecution, the burden of proof shifts to the government to refute the claim. *See Defendant's Motion* at 15. That is not the standard for evaluating these types of claims and *Haggerty* stands for no such proposition. According to the Supreme Court, "[b]ecause such claims invade a special province of the Executive-its prosecutorial discretion-we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 489 1999. And again, relying upon *Haggerty*, he states he is entitled to discovery because he has produced "some evidence" of selective prosecution. *Defendant's Motion* at 15. While this statement is correct insofar as it goes, it should be remembered that the evidence produced must be of such quality that it establishes a "credible showing" that both prongs of the selective prosecution doctrine have been satisfied; otherwise no specific discovery should be permitted. *United States v. DeBerry*, 430 F.3d 1299-1300.

Applying these standards to the facts presented here, this court must reject the Defendant's contention he has been improperly selected for prosecution and that he is entitled to specific discovery thereon.

1. The Defendant has not been singled out for prosecution as opposed to others “similarly situated.”

The Defendant claims he “has been isolated and singled out, in stark contrast to the Harris County Investigator and the Denver DA Employee, who both appear to have run the same query in the same databases, as well as others accused of NCIC abuse.” citing to *United States v. Haggerty*, 582 F.Supp. at 1291. He goes on to assert, “the Harris County Investigator, and the Denver DA employee engaged in *precisely* the same conduct by accessing NCIC/CCIC database files.” *Defendant’s Motion*, at 18 (emphasis in the original). On a very simplistic level he is, of course, correct: three separate individuals accessed Walter Noel Ramo’s CCIC/NCIC record in late September and early October 2006. However, that is where the comparison between the three ends, as there is simply nothing within the facts present in this case to establish that the Defendant has been singled out for prosecution as opposed to “similarly situated” individuals.

The government would note that based upon the investigation of this matter to date, it is certainly possible that the employee of the Harris County District Attorney may have violated either federal law or the applicable Texas state statute, or both, relating to wrongfully obtaining a criminal history in an unauthorized manner.³ The Defendant goes on to state that the only apparent difference between him and the Texas investigator is the fact that the Defendant’s purpose in accessing the CCIC/NCICthe database was legitimate. That claim is unsustainable.

³ TEXAS GOVERNMENT CODE § 411.085 prohibits an individual knowingly or intentionally obtaining a criminal history record in an unauthorized fashion.

Simply because the Defendant and the individual in Texas may have wrongfully accessed the CCIC/NCIC in relation to Walter Noel Ramo does not mean that they are “similarly situated” for purposes of a selective prosecution claim. First, and importantly, the Defendant’s actions were committed within the District of Colorado, not the Southern District of Texas. The undersigned has absolutely no authority to prosecute an individual in the Southern District of Texas for conduct that occurred in that district. The government is aware of an on-going investigation related to this matter being conducted by law enforcement authorities in the State of Texas. Suffice it to say, what happened in Texas is the concern of law enforcement officials in Texas, not Colorado.

Secondly, the individual in Texas is not a federal law enforcement official, sworn to uphold federal law, who used a federal computer while seated in a federal office, to access a federal database for an unauthorized purpose. Within the limited number of individuals who the Defendant contends are similarly situated, only the Defendant is a sworn federal agent who has taken an oath to evenhandedly enforce the law. The United States has a strong institutional interest in prosecuting any federal law enforcement agent who might wrongfully access a sensitive and confidential federal database for the specific purposes of providing the results of that access to one side or the other in a partisan political campaign. The citizens of this country have a right to expect and demand that the awesome powers of federal law enforcement agencies not be used to further partisan political agendas. When a federal agent uses the powers granted him by virtue of his office to aid a partisan political campaign in an improper manner, he puts at substantial risk the legitimacy and integrity of federal law enforcement, never mind compromising the public’s reasonable expectation that partisan

politics play no role in the manner in which its law enforcement employees carry out their official duties. In such cases, the United States has a duty to fully investigate and initiate a prosecution if warranted by the evidence and law. That is exactly what happened in the instant case, and it plainly does not render this prosecution improper under the selective prosecution doctrine. *See United States v. Swanson*, 509 F.2d 1205, 1208-09 (8th Cir. 1975)(federal program to target certain professionals such as CPA's for tax fraud held not to constitute selective prosecution); *United States v. Peskin*, 527 F.2d 71, 86 (7th Cir. 1975)("Assuming that the decision to indict Peskin and press for trial was based in part on consideration of his political prominence, this is not an impermissible basis for selection. It makes good sense to prosecute those who will receive the media's attention. Publication of the proceedings may enhance the deterrent effect of the prosecution and maintain public faith in the precept that public officials are not above the law.").

Further, there is simply nothing to suggest that the nature and character of the actions of the Denver County District Attorney's Office employee who accessed Ramo's CCIC/NCIC are remotely similar to the actions of the Defendant. On October 10, 2006, a television ad began to air throughout Colorado which accused the Denver District Attorney's Office of an improper or too lenient plea agreement for an individual by the name of "Carlo Estrada Medina." The office began to receive numerous media inquiries about the case, and so a manager within the office asked an employee to run the name for informational purposes. The Denver District Attorney's Office has posted a document on its web site entitled "Setting the Record Straight" (attached hereto and marked "Exhibit A"). It details the reasons and time frame when the office accessed the Ramo CCIC/NCIC record,

an explanation which corresponds to the results of the investigation conducted by CBI. The facts and circumstances surrounding the access of the CCIC/NCIC by the Denver District Attorney's Office are certainly far different than those surrounding the Defendant's, or for that matter, those of the investigator in Texas.

Finally, the Defendant cites another instance, apparently gleaned from press accounts, involving an improper access of the CCIC/NCIC by the University of Colorado Police Department. Again, the United States would simply point out that the facts and circumstances surrounding the Defendant's use of the CCIC/NCIC database of September 28 and 29, 2006, appear to be far different than the alleged improper access by the university police.

There is simply no credible evidence that the Defendant has been improperly singled out for prosecution. In fact, there is no credible evidence that there are even others similarly situated to the Defendant. On this basis alone the Defendant's claim should be rejected.

2. This prosecution is not invidious or brought in bad faith and based on a desire to punish the exercise of a constitutional or statutory right by the Defendant.

In his motion to dismiss, the Defendant contends that "since" he has been unfairly singled out for prosecution, "[t]his supports the deduction that the United States is prosecuting [the Defendant] because he exercised First Amendment rights, and derivative and related statutory rights." *Defendant's Motion*, at 16. In this regard, he asserts that he "has been charged due to his exercise of his First Amendment right to petition a U.S. Congressman and his right to speak out about issues of public concern." *Id.*, at 17. This argument is remarkable for several reasons,

including the bold leap of logic it necessarily requires. The Defendant's contention also glosses over the fact that no credible evidence exists to support his claim that this prosecution is motivated by a desire to punish constitutionally protected activity as the Defendant was not engaged in constitutionally protected activity when he utilized the CCIC/NCIC database for a non-law enforcement purpose, the specific offense charged in the Information. Rather, he was engaged in a violation of federal law not protected by the First Amendment.

It is a cornerstone of our Constitution that a citizen has a right to speak out concerning the political issues of the day, and to petition a member of Congress with his or her grievances. U.S. Constitution, Amendment I. However, constitutional rights are not absolute. *United Public Workers v. Mitchell*, 330 U.S. 75, 97-99 (1947). In the context of employment, a governmental employer may impose restraints upon job-related speech and activity that would be plainly unconstitutional if applied to the public at large. *United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995). "For over a century, courts have upheld regulations, such as the Hatch Act, curtailing the rights of public employees to engage in certain kinds of political speech." *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998). One of the primary purposes of such restraints is to ensure "impartiality, and the public perception of impartiality, in government services." *Id.*, at 1272, citing *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973)(stating that public employees "are expected to enforce the law . . . without bias or favoritism," and that "[a] major thesis of the Hatch Act is that to serve this great end of government-the impartial execution of the laws-it is essential that federal employees" not

become involved in politics). This certainly pertains to a federal law enforcement officer subject to the strictures of the Hatch Act, which prohibits government employees from engaging in political activity while on duty or from using their official authority or influence for the purpose of interfering with or affecting the result of an election. *See* 5 U.S.C. § 7324(a)(1) and § 7323(a)(1).⁴ Thus, the right to petition a member of Congress does not bestow upon a federal law enforcement agent an unfettered right to improperly access a sensitive federal database for the purpose of providing information to a partisan political election campaign being waged by a member of Congress.

To cloak the Defendant's activities as the exercise of his constitutional right to petition a member of Congress is merely an attempt to obfuscate the plain facts of this case. The Defendant contacted a political campaign organization, not a Congressman's office. He met with and informed a campaign manager, not a Congressional office staffer, about the questioned plea bargains. The Defendant's second meeting about the plea agreements was with campaign personnel and

⁴ a) 5 U.S.C. § 7324(a)(1) provides, "An employee may not engage in political activity-- (1) while the employee is on duty . . ." 5 U.S.C. 7323(a)(1) provides that a federal employee may not "use his official authority or influence for the purpose of interfering with or affecting the result of an election." Further, 5 U.S.C. § 7226 provides, "[a]n employee or individual who violates section 7323 or 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the (cont.) employee or individual. However, if the Merit System Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board."

individuals associated with a partisan political committee, not members of a congressman's staff. The request to obtain information regarding the list of Hispanic names came from a campaign manager, not a congressional staffer. When the Defendant turned over the results of his database queries he did so at a campaign headquarters, not a congressman's office. Finally, Bill Ritter was no longer District Attorney and Mr. Beauprez, as a member of Congress was hardly in any position to affect any plea bargaining practice of the Denver District Attorney's Office. Clearly, the actions of the Defendant were not those of someone petitioning congress "for a redress of grievances" but rather those of an individual providing potentially negative information about an opponent to a political campaign.

Likewise, there is simply no merit to the claim that this prosecution is somehow a violation of a statutory right granted the Defendant by the Whistleblower Protection Act. *Defendant's Motion*, at 16. The Whistleblower Protection Act (WPA) only covers specified disclosures made by federal employees, including those which the employee reasonably believes evidences- "(I) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8).

Disclosures of wrongdoing by a non-federal government entity by a federal employee may constitute a protected disclosure under the WPA when the government's interests and good name are implicated in the alleged wrongdoing, and the federal employee shows that he reasonably believed that the information he disclosed evidenced that wrongdoing. *Arauz v. Department of Justice*, 89

M.S.P.R. 529, ¶ 7 (2001). However, the plea bargaining practices of the Denver District Attorney's Office simply did not constitute a violation of any law, rule, or regulation or qualify as gross mismanagement, a gross waste of funds, an abuse of authority, or present a "substantial and specific" danger.

Finally, it must be remembered that the Defendant is not being prosecuted for an unlawful disclosure of information but rather for exceeding his authorized access to federal database. His subsequent disclosure of the information he gleaned from that unauthorized access is not the gravamen of his offense but merely evidence of the charged offense. The Defendant's actions in exceeding his authorized access to a federal database did not constitute "whistle blowing" activity as contemplated by 18 U.S.C. § 2302(b)(1).

The Government has not selected the Defendant for prosecution simply out of retaliation because he chose to engage in constitutionally or statutorily protected activity as his actions do not constitute such. Rather, the Defendant is being prosecuted because while acting as a federal law enforcement agent he violated federal law.

3. Defendant is not entitled to specific discovery.

As set forth above, the Defendant has not and cannot establish a claim of selective prosecution as there is simply no credible evidence to support such a claim. While the Defendant points to some factors he believes indicates he has been the victim of a selective prosecution, his claim simply does not withstand close scrutiny. Because the Defendant cannot satisfy either prong

of the selective prosecution analysis, let alone both, he is not entitled to specific discovery in this matter.

III. CONCLUSION

The Defendant's claim of selective prosecution is without merit and should be denied. He was not singled out from similarly situated individuals, as the facts and circumstances surrounding his offense are unique to him. While there is one individual connected with this case who may have committed an offense similar to the Defendant's, he is in another jurisdiction where an investigation is ongoing. Secondly, the Defendant was not chosen for prosecution in retaliation for his exercise of a constitutional right. When the Defendant, in his capacity as a federal law enforcement agent, accessed the CCIC/NCIC database for non-law enforcement purposes, it was not protected constitutional activity but simply a violation of federal law.

While at first reading the Defendant's claim appears tenable, it simply cannot withstand close scrutiny as there is no credible evidence to support his claims. Given the failure of the Defendant to demonstrate he has been singled out for prosecution over other similarly situated individuals or that this prosecution is motivated by a desire to punish the Defendant for the exercise of a constitutional or statutory right, his motion for discovery and dismissal should be denied.

DATED this 17th day of December, 2007.

TROY A. EID
United States Attorney

By: s/ James C. Anderson
JAMES C. ANDERSON
Special Assistant United States Attorney
P.O. Box 668
Cheyenne, Wyoming 82001
Telephone: (307) 772-2124
Facsimile: (307) 772-2123
E-mail: james.anderson@usdoj.gov
Attorney for Government

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2007, I have caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following via email:

William Taylor
Danielle R. Voorhees
Holland and Hart, LLP
555 17th St., Suite 3200
P.O. Box 8749
Denver, CO 80201-8749
Phone: (303) 295-8000
Fax: (303) 295-8261
wtaylor@hollandhart.com
dvoorhees@hollandhart.com

Patrick Ridley
Ridley, McGreevy, & Weisz, P.C.
303 16th St., Suite 200
Denver, CO 80202
Phone: (303) 629-9700
Fax: (303) 629-9702
ridley@rmwpc.com

/s/ Vicki Powell
For the United States Attorney's Office

ATTACHMENTS

