UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

v. CASE NO.: 3:19-cr-192-HES-JRK

FAN YANG,

Defendant.
_____/

DEFENDANT FAN YANG'S RESPONSE IN OPPOSITION TO UNITED STATES' MOTION *IN LIMINE* TO PRECLUDE EVIDENCE AND ARGUMENT REGARDING SELECTIVE PROSECUTION, (DOC. 446)

Defendant, FAN YANG ("Mr. Yang" or "defendant"), by and through his undersigned counsel, files this response in opposition to United States' motion in limine to preclude evidence and argument regarding selective prosecution, (Doc. 446), stating as follows:

In its motion in limine, the United States seeks an order

> to preclude defendant Fan Yang from eliciting testimony, presenting evidence, or suggesting to the jury through argument that individuals (apart from the defendant) have not been charged with violating federal firearms laws even though they allegedly engaged in conduct similar to the defendant's.

Doc. 446 at page 1. The United States argues that the defendant's only purpose for such evidence or argument would be to submit an impermissible claim of selective

prosecution with regard to counts one through three of the superseding indictment.[1] Doc. 446 at pages 1-5. The United States further argues that even if the evidence or arguments were deemed relevant, they should be excluded under Fed. R. Evid. 403. Doc. 446 at pages 5-6. The United States' arguments are wrong.

At the outset, the defendant recognizes that a claim of selective prosecution is not a defense on the merits to a criminal charge, see United States v. Armstrong, 517 U.S. 456, 463-64 (1996), and a selective prosecution claim must be raised before trial and resolved outside the presence of a jury, see United States v. Reid, 625 F.3d 977, 987 (6th Cir. 2010). The defendant disputes, however, that the evidence and arguments that the United States seeks to preclude are not relevant for any purpose, or should be excluded under Fed. R. Evid. 403, or are claims of selective prosecution.

Defendant's lack of mens rea defense to Count One

As for the mens rea defense, Count One charges defendant with *knowingly and willfully* conspiring to commit offenses against the United States, in particular, firearms offenses, in violation of 18 U.S.C. § 371. *See* Doc. 282 at 6 (emphasis

[1]Count one charges the defendant and others with *knowingly and wilfully* conspiring, in violation of 18 U.S.C. § 371, to violate federal firearms laws, Doc.282 at pages 1-10; Counts Two and Three charge the defendant alone with knowingly making false statements to a federally licensed firearms that the defendant was the actual transferee/buyer of firearms with regard to the sale and disposition of two different firearms. Doc.282 at pages 11-12.

added). Two of the three alleged objects of the conspiracy were as follows:

> (i) knowing possession of firearms, specifically a Sig Sauer pistol and a Glock pistol, in and affecting interstate and foreign commerce by a person who knew he was an alien who had been admitted to the United States under a nonimmigrant visa, under 18 U.S.C. § 922(g)(5); and
>
> (iii) knowing disposal of firearms, specifically a Sig sauer pistol and a Glock pistol, to a person whom the transferor knew, and had reasonable cause to believe was an alien who had been admitted to the United States under a nonimmigrant visa, under 18 U.S.C. § 922(d)(5).

Doc. 282 at 6-7.

By both tradition and constitutional mandate the jury is given the responsibility of determining guilt or innocence according to instructions of law delivered by the court. The Eleventh Circuit Pattern Jury Instructions for Criminal Cases on a conspiracy charge, under 18 U.S.C. § 371, reads, in part, as follows:

> The heart of a conspiracy is the making of the unlawful plan itself followed by the commission of any overt act. The Government does not have to prove that the conspirators succeeded in carrying out the plan.
>
> The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:
>
> (1) two or more persons in some way agreed to try to accomplish a shared and unlawful plan;
>
> (2) the Defendant knew the unlawful purpose of the plan and *willfully* joined in it;
>
> (3) during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the

indictment; and

(4) the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

Offense Instruction 13.1, Eleventh Circuit Pattern Jury Instructions for Criminal Cases (Emphasis added). The Eleventh Circuit Pattern Jury Instructions for Criminal Cases, at Basic Instruction 9.1A, provides the following definitions of the terms "knowingly" and "willfully," as follows:

> The words "knowingly" or "knew" means that the act was done voluntarily and intentionally and not because of mistake or accident. The word "willfully" means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something that the law forbids before you can find that the person acted "willfully," the person need not be aware of the specific law or rule that his or conduct may be violating.

Id.

Lack of willfulness is the defendant's primary defense to the conspiracy to violate federal firearms laws alleged in Count One in that the defendant reasonably believed in the legality of his actions in accommodating co-defendant Ge's possession and use of firearms at firing ranges. Co-defendant Ge is a foreign national from the Peoples Republic of China ("PRC") who was present in the United States pursuant to a nonimmigrant visa when he possessed and used

firearms with defendant Fan Yang and many other persons on numerous occasions only at firearms ranges. The United States is seeking to exclude relevant evidence that is critical to the defendant's valid mens rea defense to Count One which relates to the defendant's state of mind concerning the lawfulness of his actions. Further, defendant Fan Yang was not alone in his belief that he acted lawfully and not in violation of any federal firearms laws when accommodating Ge's possession and use of firearms at the firing ranges in the United States. Numerous other individuals, both named and unnamed co-conspirators, who accommodated Ge's possession and use of firearms at the firing ranges in the United States all believed that their actions in that regard were legal and not in violation of federal firearms laws, including Gabriel Lopez, Tim Grover, Jim Vann, Mel Asencio, and numerous other persons. The fact that the defendant was present when firing range officials on numerous occasions permitted co-defendant Ge to use the firearms at the ranges knowing that Ge was a foreign national is strong evidence corroborative of defendant's state of mind defense that he believed his actions were lawful, that is, without any intent to do something the law forbids; that is, without any bad purpose to disobey or disregard the law. The fact that none of the numerous persons who were involved with accommodating co-defendant Ge's possession and use of firearms at firing ranges were ever arrested is highly probative and relevant

to defendant's state of mind that the conduct was lawful, and, therefore, he lacked the mens rea to commit the offense.

The evidence at trial will show that Ge's possession use of firearms at firearms ranges with others was always out in the open. Co-defendant Ge did not conceal from firearms range personnel that Ge was a foreign national present in the United States on a nonimmigrant visa. None of the firearms range personnel advised anyone of any illegality in Ge's possession and use of the firearms at the firing ranges. None of the persons involved had any reason to believe their actions were unlawful. The fact that nobody was arrested for these actions that took place openly for years is a fact that in and of itself corroborates Defendant Fan Yang's reasonable belief that he was acting lawfully, that is, acting without any intent to do something the law forbids, that is, without bad purpose to disobey or disregard the law. The evidence is crucial to defendant's primary defense of lack of willfulness and not for any purpose of claiming selective prosecution.

Indeed, the evidence at trial will show that Defendant himself openly inquired, in writing, of a firearms dealer about having a business relationship based on Chinese tourists visiting the United States for the purpose of using firearms at firearms ranges because such activity is not permitted for Chinese citizens in the Peoples Republic of China. The firearms dealer considered the request and did not speak one word to defendant about the business activity of

"firearms tourism" being unlawful. Defendant reasonably understood and believed that the actions would be lawful in light of the silence of the firearms dealer about any illegality. Further, defendant was present for a few days when Tim Grover, a representative of a firearms range, hosted codefendant Ge at a firearms range for ten days while Grover had a film made of codefendant Ge using numerous firearms at Grover's firing range. There were numerous people present and no suggestion by anyone of any illegality in Ge's open use of the firearms at the firing range. (Indeed, it was so clear that nobody believed there was any illegality that Grover posted the film on his business Facebook page as a marketing tool for new business.)

The fact that nobody was arrested in connection with these activities (helping Ge possess and use firearms at firearms ranges) is a fact that corroborates defendant's state of mind defense that he believed the conduct was lawful; it is not a improper claim of selective prosecution by the defendant. In this regard, in United States v. Todd, 108 F.3d 1329, 1332-34 & fn.4 (11th Cir. 1997), the Eleventh Circuit reversed a district court judgment for exclusion of evidence that was legally irrelevant for one purpose, but relevant and critical to defendant's theory of defense and to rebut the government's theory of defendant's criminal intent. Further, in United States v. Lankford, 955 F.2d 1545, 1550 (11th Cir. 1992), the Eleventh Circuit reversed another district court judgment for exclusion of

relevant evidence that was critical to a defendant's defense stating; "where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent." Id. quoting United States v. Garber, 607 F.2d 92, 99 (5th Cir.1979) (en banc). The Eleventh Circuit, in Lankford had a second ground for reversal for improper limitation of cross-examination of witness by a district court's exclusion of evidence of a possible motive for a witness's cooperation with the prosecution. Id. at 1548-49. The Court held that the defendant's Sixth Amendment right to cross-examine for possible motive or bias because the district court excluded evidence of the fact that the witness's sons had been arrested by state authorities for the sale of twenty pounds of marijuana and had entered guilty pleas to the state charges, and they were on probation at the time of the defendant's trial. Id. The evidence was not relevant to a defense of the criminal charge, but was relevant for proper impeachment of the witness consistent with the Sixth Amendment. Likewise, in the instant case, should the government call as witnesses any of the multitude of persons who engaged in conduct similar to the defendant's conduct, but were never arrested or charged for any violation of law, an inquiry on cross-examination to flesh out any reason for the government's leniency and potential motive or bias would be highly relevant and critical to compliance with the Sixth Amendment. The undersigned cross-examined codefendant Zheng Yan, who testified in a

deposition pursuant to a plea agreement, asking her whether she had been charged with a firearms violation and she responded that she had not been charged for firearms violations. *Zheng Yan deposition, Doc. 399-1 at page 97.* The United States cannot seriously dispute that the question was valid cross-examination under the Sixth Amendment, yet its motion in limine would seek exclusion of the question as a claim of selective prosecution.

In United States v. Sheffield, 992 F.2d 1164 (11th Cir.1993), the Eleventh Circuit reversed on the grounds of an abuse of discretion for the district court's exclusion of evidence to explain defendant's acts which supported a legitimate defense theory. The Sheffield Court held that the evidence should have been admitted to put the charges in context, "to complete the story of the crime on trial." Id. quoting United States v. Mills, 704 F.2d 1553, 1559 (11th Cir. 1983). In the instant case, like in Sheffield, the United States is seeking exclusion of evidence involving inferences that are highly significant to a material element of the case. In the instant case, the evidence is that defendant observed numerous persons over several years openly providing firearms to Ge for use at firearms ranges, that all believed their actions were legal, and nobody was arrested at firearms offenses. This evidence clearly corroborates defendant's reasonable belief that he was not violating the law when engaging in the same conduct with the others. The evidence is relevant and admissible for defendant's lack of willfulness defense.

Conclusion

In conclusion, in its motion in limine, the United States refuses to acknowledge for any purpose the relevance of the evidence and argument its seeks to exclude for any purpose, Doc. 446 at pages 5-6, which necessarily includes the defendant's valid and critical mens rea defense, or cross-examination of witnesses for motive or bias. The court should deny the United States' motion in limine.

Respectfully submitted on October 25, 2021.

/s/ Charles L. Truncale
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25, 2021, I filed the foregoing response in opposition to United States' motion in limine to preclude evidence and argument regarding selective prosecution, (Doc. 446), through the Court's CM/ECF system which will send a notice of electronic filing to all counsel of record, including:

Michael Coolican, Assistant United States Attorney,
Kirwinn Mike, Assistant United States Attorney,
Laura Cofer Taylor, Assistant United States Attorney,
Mai Tran, Assistant United States Attorney, and
Heather M. Schmidt, Senior Trial Attorney, National Security Division, United States Department of Justice.

/s/ Charles L. Truncale
CHARLES L. TRUNCALE