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Attorney for Defendant

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UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. AMY R. FLUCKIGER, a.k.a AMY BROWN, Defendant.	CR- 03-217-E-BLW **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SUPERSEDING INDICTMENT**

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

The defendant, Amy Fluckiger (hereinafter referred to as "Amy"), is currently serving a sentence on a state charge of manufacturing methamphetamine between the time period of January 1, 2001 and December 31, 2001. She pled guilty to the charge and was sentenced on or about February 18, 2003. She was sentenced to a fixed sentence of four (4) years plus an indeterminate term of six (6) years. After beginning that sentence, Amy was subpoenaed by the

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United States government on or about May 15, 2003 to testify against Benjamin Quinonez before this same court in the matter of the United States vs. Quinonez, Case No. 02-CR-00027-005. Others indicted and prosecuted jointly with Quinonez were Gloria Barajas, his spouse, Jeremy Cooper and Ramon Gutierrez. All of the defendants in that matter were convicted and sentenced.

Amy was presumably subpoenaed to testify against Benjamin Quinonez about her knowledge of Quinonez's drug involvement. When she was transported to the Federal courthouse in Pocatello, Amy was not aware of the reason for her transportation. Upon arrival at the courthouse, Amy met with Assistant United States Attorney Mike Fica, as well as agents involved in the prosecution of Quinonez. Upon meeting with Fica and others on May 14 and 15, 2003, she was advised that she was expected to testify against Quinonez. Moments before her appearance, she was provided a letter granting her use immunity. A copy of that letter, dated May 15, 2003 is attached to this memorandum and incorporated herein by reference as though fully set forth as Appendix "A". Amy balked and asked to speak with an attorney. Fica advised Amy she did not have the right to counsel.

Upon being called to testify, Amy advised the court that she was uncertain as to her rights and sought to have the advice of counsel. She invoked her 5th Amendment right to not testify. When this request for counsel was made apparent to the court, the court ordered the matter to be continued until Amy had the opportunity to consult with counsel. The government went ahead with the sentencing hearing against Quinonez without Amy's testimony.

Over the next several months, an investigation into Amy's participation in drug trafficking with Quinonez and the others was pursued. Police reports show that numerous witnesses were contacted with the specific intent of revealing the scope of Amy's involvement.

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B. NATURE OF THE PROCEEDINGS.

Approximately four (4) months after Amy's aborted court appearance, on or about September 23, 2003, A.U.S.A. Fica instituted Grand Jury proceedings which resulted in an indictment against Amy. The first count of the Indictment alleges conspiracy to possess and distribute a controlled substance. The second count alleges drug possession/distribution in violation of federal law. The indictment specifically references overt acts with alleged coconspirators Quinonez and Barajas. On or about August 24, 2004, a Superseding Indictment was filed, alleging essentially the same charges. None of the sparse discovery provided by the government to date explains the rationale in delaying the indictment against Amy until after the sentencing of all the co-defendants. This matter is set for trial on November 8, 2004.

II. ARGUMENT

The mere filing of an indictment can support a charge of vindictive prosecution. United States vs. Hooton, 662 F.2d 628 (9th Cir. 1981). The concept of vindictive prosecution stems substantially from North Carolina vs. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed. 2.d 656 (1975) and its progeny. In Pearce, the Supreme Court found a violation of the Due Process Clause of the 14th Amendment of the United States Constitution where a criminal defendant was subjected to a greater punishment after a successful appeal and reconviction than that imposed at his first trial. In Pearce, the court focused on the sentencing judge's appearance of vindictiveness because the defendant successfully appealed an earlier conviction, thereby consuming a great deal of the court's time and resources.

In subsequent cases of Colten vs. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L.Ed 2.d 584 and Chaffin vs. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L.Ed 2.d 714, the court held that because a different court or a jury was sentencing the defendant after a second trial, there

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was no reasonable likelihood of vindictiveness on the part of the original sentencing judge and the prophylactic rule of Pearce seemed unnecessary.

In Blackledge vs. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed 2.d 628 (1974), the Court focused on the actions of a prosecutor who instituted felony charges after a defendant appealed a misdemeanor conviction. The question presented to the Perry court was whether the opportunities for vindictiveness, such as arose in the Pearce case, are such as to compel the conclusion that due process of law requires a rule analogous to that of Pearce that applies to the actions of a prosecutor. The Perry court concluded that the prosecutors, when bringing felony charges against a defendant under these circumstances, also demonstrate a reasonable likelihood of vindictiveness. *Id.* at 28. The case at bar is analogous.

All of the information presented to the Grand Jury to support the indictment against Amy revolved around her dealings with Benjamin Quinonez and his codefendants. All of those defendants had previously been indicted and convicted prior to Amy's indictment. The government did not seek Amy's indictment until after she balked at testifying at the sentencing hearing for Benjamin Quinonez.

Prior to seeking indictments against Quinonez and his co-defendants, the U.S. Attorney's Office had every capability to indict Amy for the same crimes which she now faces. While Amy can have no insight into the policy decision which caused the U.S. Attorney's Office not to indict Amy along with Quinonez and co-defendants, educated speculation would lead one to assume the U.S. Attorney's Office either conducted an informal Petite review of Amy's case and, in doing that review, concluded no substantial federal interest existed or sought to obtain Amy's cooperation in testifying against Quinonez and other co-defendants. Amy denies making, or

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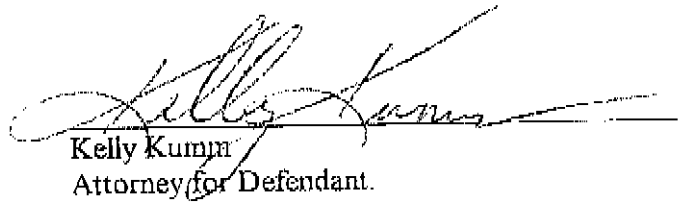
even discussing, any agreement with the government to cooperate in its prosecution of Quinonez, *et.al.*

One thing is certain, Amy was indicted only after her hesitancy at testifying against Quinonez without the advice and benefit of her own counsel, a hesitation which an objective observer would deem to be prudent and appropriate. Indeed, Amy was asserting a valid and legal right. United States vs. Goodwin, 457 U.S. 368, 102 S. Ct. 2485, 73 L.Ed 2.d 74 (1982). Instead, the government now seeks to charge and have Amy held in federal prison for a substantial period of incarceration following completion of her term of imprisonment on state charges. Coincidentally, the state charges are for drug activity involving methamphetamine during the same time period, in the same location, as the charges contained in the indictment against Amy. Because of the similar nature of the charges, Amy has recently sought a Petite review of the U.S. Attorney's decision to indict Amy, a request to which there has been no formal response.

III. CONCLUSION

The decision to indict Amy Fluckiger has the "reasonable likelihood of vindictiveness." A *prima facie* case for vindictive prosecution has been made. See United States vs. Montoya, 45 F.3d 1286, 1299 (9th Cir. 1995).

RESPECTFULLY SUBMITTED this 13th day of October, 2004.



Kelly Kumm
Attorney for Defendant.

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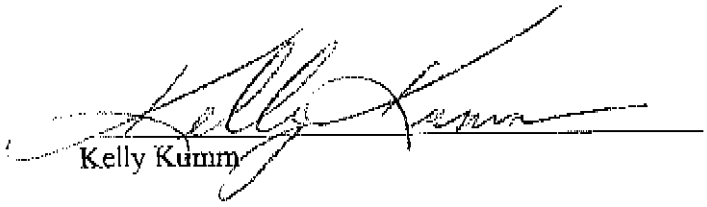
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October, 2004, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SUPERSEDING INDICTMENT** to be delivered to the party named below, as follows:

Michael Joseph Fica
Assistant United States Attorney
801 East Sherman Avenue
Pocatello, Idaho 83201
Fax No. 334-9018

☐ By U.S. Mail
☐ By Hand Delivery
☒ By Facsimile ✔



Kelly Kumm

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U.S. Department of Justice

United States Attorney
District of Idaho

Mailing Address:	*Street Address:*	*Comm: 208/334-1211*
	First Interstate Center	*Main Fax: 208/334-9375*
P. O. Box 32	*877 W. Main, Ste 201*	*Cv Div Fax: 208/334-1414*
Boise, ID 83707	*Boise, ID 83702*	*Cr Div Fax: 208/334-1415*
		DTF Div Fax: 208/334-9018

May 15, 2003

Dear Ms. Amy Fluckiger:

You have been subpoenaed to testify in the Case of United States v. Quinonez, CR-02-027-BLW.. This letter sets forth the ground rules covering immunity being given to you from prosecution in this case by this office.

1. Truth: This promise of immunity will apply so long as you testimony is completely truthful with no material misstatements or omissions of fact.

2. No Promises: Your expressly understands that the government is making no promise of any consideration at this time.

3. Immunity: The government agrees that statements or information contained in your sworn testimony in this case may not be used in the government's case-in-chief against you should a trial be held.

4. Impeachment: If you should testify materially false, or otherwise present in a legal proceeding a position materially inconsistent the testimony may be used against your client as impeachment or rebuttal evidence, or as the basis for a prosecution for perjury or false statement.

Sincerely,

THOMAS E. MOSS
United States Attorney
by

MICHAEL J. FICA.
Assistant United States Attorney

AO 89 (Rev. 7/95) Subpoena in a Criminal Case

United States District Court

JUDICIAL DISTRICT OF IDAHO

UNITED STATES OF AMERICA
V.

BENJAMIN QUINONEZ, etal.

SUBPOENA IN A CRIMINAL CASE

CASE NUMBER: CR 02-027-E-BLW

TO:

AMY RENEE FLUCKIGER

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
U.S. Courthouse/Federal Building 801 East Sherman, #192 Pocatello, Idaho 83201	B. LYNN WINMILL Chief U.S. District Judge
	DATE AND TIME May 15, 2003 1:30 p.m.

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
Cameron S. Burke	May 15, 2003
(BY) DEPUTY CLERK Renee A. Hutchinson	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER

Michael J. Fica, Assistant U.S. Attorney
801 E. Sherman, #192, Pocatello, Idaho 83201 Phone: (208) 478-4166