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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Criminal No. 03-217-E-BLW
	)	
AMY R. FLUCKINGER, aka	)	RESPONSE TO DEFENDANT'S
AMY BROWN	)	MOTION TO DISMISS
	)	
Defendant.	)	

NOW COMES, Michael J. Fica, Assistant United States Attorney for the District of Idaho and representing the United States herein, and hereby responds to defendant's motion to dismiss as follows:

As early as January of 2001, the defendant began providing uncorroborated information to authorities about drug trafficking in the Pocatello, Idaho area. Sometime later, in May of 2002, the defendant agreed to an interview where she indicated some involvement with Benjamin Quinonez, an individual who was, at that time, under federal indictment for drug trafficking. Quinonez subsequently plead guilty to charges arising from that indictment, and a sentencing hearing for Quinonez was conducted over three days in mid-May 2003.

The reason for this extended hearing for Quinonez was his dispute of several issues pertaining to sentencing, including quantities of drugs and his role in the offense. Anticipating evidentiary disputes regarding these issue, investigators were asked to identify various

individuals who could provided testimony at Quinonez' hearing regarding these issues. As a result of her interview a year prior, the defendant was identified as one such person, and given her custody status, a writ of habeas corpus ad testificandum was secured for her appearance at Quinonez' hearing.

The night before she was to be called as a witness in the Quinonez matter, authorities met with the defendant, and she confirmed much of the information she had relayed about Quinonez a year earlier. At that meeting, the defendant also expressed a desire to speak with her prior attorney, Ronald George. She was encouraged to contact Mr. George that evening, and authorities told her that they would also try to contact George that evening in her behalf. However, authorities were unsuccessful in their attempt to contact George that evening or the next morning.

Later that night, and again the next morning, the defendant indicated to authorities that she was unwilling to testify at Quinonez' hearing, and would invoke her Fifth Amendment right. In response to her apparent concern that she did not want to incriminate herself while testifying against Quinonez, the government furnished the defendant with a letter granting her immunity for her testimony. At the time the letter was delivered to her, the defendant was verbally told, and the letter itself stated, that the extent of the government's promise was to not use her testimony at the hearing against her. She was expressly told that no promises were being made that she would not be prosecuted for any of her conduct related to her testimony. Furthermore, at no time was the defendant ever told by authorities that she did not have the right to attorney. In fact although authorities told the defendant they did not have the ability to appoint an attorney to represent her, she was encouraged to consult with the attorney who had represented her in matters previously. Authorities even attempted to aid in that contact.

The defendant ultimately elected to invoke her Fifth Amendment right and refused to testify at the Quinonez hearing. The government proceeded with the Quinonez sentencing, rather than wait for her to consult with an attorney about whether or not she should testify.

During and subsequent to the Quinonez sentencing, authorities began to realize that the defendant may have had more culpability in the Quinonez case than was first thought. This conclusion was, in part, the result of an interview with Quinonez' co-defendant, Gloria Barajas, who was interviewed by authorities during the sentencing proceedings for Quinonez. Barajas provided corroborated information that the defendant was involved in distribution of drugs with Quinonez right up to the day of his arrest. As a result, authorities began to actively investigate the defendant's activities in relation to Quinonez. When it was determined several months later that independent evidence corroborated the defendant's prior statements about her involvement with Quinonez, an indictment was sought against the defendant.

### ARGUMENT

In this case, to establish a claim of vindictive prosecution, the defendant must initially show that charges were filed against her because she exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness. *See United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9<sup>th</sup> Cir. 1982); *United States v. Burt*, 619 F.2d 831, 836 (9<sup>th</sup> Cir. 1980). If there is a sufficient prima facie showing by the defendant, the burden shifts to the government to show that the charges did not rise from vindictive motive, or were justified by independent reasons or intervening circumstances that dispel the appearance of vindictiveness. *See Burt*, 619 F.2d at 836; *United States v. Griffin*, 617 F.2d 1342, 1347 (9<sup>th</sup> Cir. 1980). However, not all exercise of rights followed by charges give rise to a prima facie showing of vindictive prosecution. *See United States v. Goodwin*, 457 U.S. 368 (1982). In *Goodwin*, the Supreme Court held that the fact that a defendant refuses to plead guilty to lesser charges, and the

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS - Page 3**

government chooses to bring more serious charges is insufficient to warrant a presumption of vindictive prosecution. *See Goodwin*, 457 U.S. at 383-384.

It is not completely clear what exercise of statutory, procedural, or constitutional rights the defendant claims give rights to a prima facie case of selective prosecution in this case. The defendant seems to suggest in her motion that the government's prosecution of her arose because she did not want to testify at the Quinonez sentencing without consulting with counsel. However, the motion also seems to infer that her prosecution arose more generally because of her unwillingness to cooperate with authorities at the sentencing of Quinonez. While the government denies that either of these factors were a basis for the subsequent indictment of the defendant, regardless, neither factor would give rise to the establishment of a prima facie case of vindictive prosecution.

The defendant is certainly not the first person to invoke her Fifth Amendment right, and refuse to give a statement to authorities against herself or others, for fear that it may impute her in criminal activity. In fact it is quite common to have a suspect invoke their rights under the Fifth Amendment, and refuse to provide a statement to authorities. It is also quite common, that these individuals are charged with a crime even after refusing to give a statement. To suggest that a person charged with a crime subsequent to invoking their Fifth Amendment rights would give rise to vindictive prosecution, would create a presumption of vindictive prosecution in an overwhelming number of cases. It is a type of scenario that made the Supreme Court extremely reluctant to adopt inflexible presumptions of prosecutorial vindictiveness in pretrial settings. *See Goodwin*, 457 U.S. at 381.

Similarly, when a defendant refuses to cooperate, further prosecution of the defendant based upon probable cause to believe the defendant committed a crime, does not present a

likelihood of vindictive prosecution. See *United States v. Gardner*, 611 F.2d 770, 772-773 (9<sup>th</sup> Cir 1980); *United States v. Blanchette*, 17 M.J. 512, 514 (1983). In *Gardner*, the government agreed to not seek more serious charges against the defendant if he cooperated in another investigation. See *Gardner*, 611 F.2d at 773. When the defendant refused and the government sought the more severe charges, the defendant alleged vindictive prosecution. *Id.* The court held that asking the defendant's cooperation in exchange for lesser charges was a reasonable position of the government, and did not infringe on *Gardner's* right to accept or reject the offer. *Id.* In the present case, the government asserts that the decision to prosecute the defendant was not based upon any right the defendant may have exercised including the right not to talk with or cooperate with authorities. However, even if prosecution of the defendant was based upon this, under *Goodwin* it would not give rise to a prima facie showing of vindictive prosecution.

Indeed, the decision to prosecute the defendant in this case was based upon a review of evidence obtained in preparation for the sentencing of Quinonez. Prior to finalizing the case against Quinonez at sentencing, the major evidence against the defendant was her own uncorroborated statement about her involvement with Quinonez. However, a statement received by another co-conspirator, Gloria Barajas, during Quinonez sentencing proceedings, began to corroborate the prior statement of the defendant. Even then, the government did not immediately seek indictment against the defendant, but instead began to actively investigate whether the defendant's prior inculpatory statements could be corroborated further. This took several months, but ultimately it was determined that a significant case could be made against the defendant, and the case was submitted to a grand jury.

Only when a presumption of vindictive prosecution has been established, does the burden shift to the government to show that, "independent reasons or intervening circumstances dispel

the appearance of vindictiveness and justify its decisions." *United States v. Montoya*, 45 F.3d 1286, 1299 (9<sup>th</sup> Cir. 1995), quoting *United States v. Hooton*, 662 F.2d 628, 634 (9<sup>th</sup> Cir. 1981). "When...charges are filed in the routine course of prosecutorial review or as a result of continuing investigation...there is no realistic likelihood of prosecutorial abuse, and therefore no appearance of vindictive prosecution arises merely because the prosecutor's action was taken after a defense right was exercised." *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9<sup>th</sup> Cir. 1982). "A charging decision does not levy improper "penalty" unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the case." *Goodwin*, 457 U.S. at 380, n.11.

In the present case, the decision to pursue an active investigation into the defendant's involvement with Quinonez was not made because the defendant refused to cooperate with authorities, or because she chose to invoke her Fifth Amendment rights, but because in preparing for the Quinonez sentencing authorities realized that inculpatory statements of the defendant could be corroborated and that the defendant involvement with Quinonez was much more extensive than first believed. This case presents exactly the scenario in which the Supreme Court held that a prosecutor should be free before trial to exercise broad discretion to reevaluate developing information in a case without being locked into initial charging decisions made prior to invocation of pretrial rights by a defendant. *See Goodwin*, 681 U.S. at 1168.

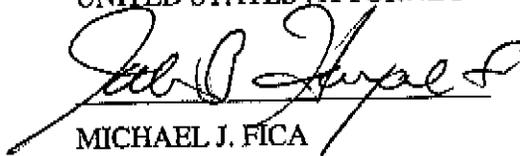
In sum, the government believes that the filing of charges subsequent to a defendant refusing to cooperate or exercising the Fifth Amendment rights, does not give rise to a prima facie showing of vindictive prosecution. Furthermore, any presumption of vindictive prosecution is obviated by intervening evidence obtained through continued investigation of the defendant. This is simply not the type of case where any government action, "is so grossly shocking and so

outrageous as to violate the universal sense of justice" and invoke the Due Process clause warranting a dismissal of the indictment. *See Montoya*, 45 F.3d at 1300.

Accordingly, the government respectfully requests that the defendant's motion to dismiss the superseding indictment be DENIED.

Respectfully submitted this 28<sup>th</sup> day of October, 2004.

THOMAS E. MOSS  
UNITED STATES ATTORNEY

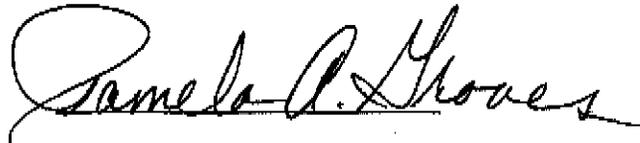
A handwritten signature in cursive script, appearing to read "Michael J. Fica", written over a horizontal line.

MICHAEL J. FICA  
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office for the District of Idaho, and that a copy of the foregoing Government's Response to Defendant's Motion to Dismiss was hand delivered, faxed, or mailed, postage paid, United States Mail Service, to all parties named below, this 25<sup>th</sup> day of October, 2004.

Kelly Kumm  
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A handwritten signature in cursive script that reads "Pamela A. Groves". The signature is written in black ink and is positioned to the right of the typed name.