

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

ST. LOUIS DIVISION

CASE NO. 06-CR-00337CEJ

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM HERNAN LENIS,

Defendant.

**MOTION TO DISMISS FOR SELECTIVE PROSECUTION
AND MOTION FOR DISCOVERY IN SUPPORT OF SAME**

COMES NOW the Defendant, WILLIAM HERNAN LENIS, joined by Defendants, WILLIAM LUIS LENIS, MONICA LENIS and MANNY LENIS, through undersigned counsel and moves this Honorable Court to dismiss the Indictment against the Defendant based upon the Government's impermissible, selective and discriminatory prosecution of the Defendant, a Hispanic. In addition, the Defendant moves this Court to order the Government to provide discovery to the Defendant in support of the Defendant's selective prosecution claim. In support of this application, the Defendant would show the Court the following:

1. William Hernan Lenis, together with his son, William Luis Lenis, his daughter, Monica Lenis and his nephew, Manny Gustavo Lenis, have been impermissibly selected for

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prosecution based upon their ethnicity as Hispanics.

2. William Lenis, together with numerous family members, some of which are co-Defendants in this case, and corporate entities identified with the Defendant have been in the direct mail advertising and promotional business in Miami, Florida for nearly 30 years. Neither Mr. Lenis nor any member of his family has ever been in the gambling business. To be sure, Mr. Lenis has **never** been involved in the conduct of any online gambling site. The companies for which the Lenis' have provided advertising and/or promotional services include a who's who of multi-national companies whose legitimate products are marketed worldwide. To be sure, William Lenis is **not** a bookmaker.

3. With regards to the business of Bet On Sports, the online gambling site charged in the instant case, at various times corporate entities associated with the Defendant have provided direct mail advertising and/or promotional services advertising the business of Bet On Sports. The Defendant's alleged participation in the Rico conspiracy and related charges is directly based on this advertising and promotional conduct on behalf of Bet On Sports.

4. Attached to the Defendant's previous "Request for Discovery in Support of Selective Prosecution Claim and Memorandum of Law in Support" was an Appendix of exhibits containing 26 direct mail advertising and/or promotional materials which, just as in the instant case, were prepared by Direct Mail and/or marketing companies on behalf of other online sports betting sites which are no different in any material respect¹ from the

¹ Recently, the Government provided a supplemental response to Mr. Lenis' "Request for Discovery in Support of Selective Prosecution Claim" objecting that, with one or two exceptions where dates were apparent, the materials are undated. The proof that will be presented at hearing show these materials have been sent in 2003, 2004, 2005 and currently the Government conceded that at least one of the direct mail materials was virtually identical to those alleged to have been mailed in this case, however, criticized the comparison of these brochures and

direct mail advertising and promotional materials which the Government alleges the Lenis family mailed on behalf of Bet On Sports and which are the basis of the wire and mail fraud count underpinning the Rico allegation in this case. The Defendant's previously filed "Request for Discovery in Support of Selective Prosecution Claim and Memorandum of Law In Support" together with the Appendix of exhibits is incorporated by this reference.

5. Upon information and belief, none of the direct mail advertisers who engaged in conduct identical to that allegedly engaged in by William Hernan Lenus are being prosecuted. Upon information and belief, none of the direct mail advertisers who sent any of the items contained in the Appendix to the previously filed Request for Discovery and which is incorporated by reference herein, are Hispanic. The only people being prosecuted for marketing online sports betting are William Hernan Lenis, William Luis Lenis, Monica Lenis and Manny Lenis, all of whom are Hispanic.

6. Prior to filing the instant motion, counsel informally requested by letter that the Government provide the names and case numbers of any individuals who are being prosecuted under circumstances similar or identical to those presented in the instant case. The Government did not provide the requested discovery resulting in the October 20, 2006 filing of the Defendant's Request for Discovery in Support of Selective Prosecution Claim. Very recently, the Government filed its Supplemental Response to the Request for Discovery

mailings in the Appendix as to whether any of the sites represented are commonly owned but differently branded. Although it may well turn out that several of the different sites are commonly owned, this is a distinction without a difference.

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pointing to Overt Act 16 of the Rico conspiracy for support for its claim that the Lenises are different from all the other direct mail advertisers because they facilitated the shipment of two Hummers from Florida to Costa Rica. One can only wonder how such conduct in any way facilitated or furthered any gambling activities or object of the alleged Enterprise. This would seem to be a non-material distinction.

7. In order to make a prime facie case of selective prosecution, a Defendant must show: (a) People similarly situated to him were not prosecuted; and (b) the decision to prosecute was motivated by a discriminatory purpose. *United State v. Hirsch*, 360 F.3d 860, 863 (8th Cir. 2004); *United States v. Perry*, 152 F.3d 900, 903 (8th Cir. 1998). The exhibits in the Appendix to the previously filed request for discovery which is referenced and incorporated herein above, make unmistakably clear that there are other people, similarly situated to the Defendant, in the direct mail advertising business who have/are mailing marketing materials which are in no significant way different than those involved in the instant case. The direct mail permits originate in New Milford, Connecticut; Fort Lauderdale, Florida; Phoenix, Arizona; Englewood, California; Hauppauge, New York; Utica, New York; Richmond, Virginia; Burlington, Wisconsin; Eastern Pennsylvania, Harrisberg Pennsylvania; Covington, Tennessee; Roswell, Georgia; Dayton, Ohio; Chicago, Illinois and Plattsburgh, New York. The Defendant does not know whether any of the individuals responsible for the mailings from these various locale have been or are being prosecuted. That is not to say that the Defendant has not tried to learn this information. In addition, counsel has attempted through the United States Postal Service, to identify the

permit holders who mailed the 26 items contained in the Appendix to the request for discovery. Counsel is advised by the postal service, however, that they will not reveal that information. As noted, counsel wrote to the Government and subsequently filed a formal request for discovery asking only that the Government tell the Defendant that they have prosecuted some other similarly situated individuals. The Government's response has been that the Defendant is not entitled to the Information. Based on counsel's efforts in searching the internet and the use of the United States Courts' Pacer system, counsel has been unable to locate or identify any individual in like circumstance being prosecuted. In the government's recent supplemental response, the Government refers to prior internet gambling based prosecutions in the S.D. of Missouri, the W.D. of Wisconsin and the S.C. of New York. None of those prosecutions, however, deal with the advertising and marketing services alleged to be unlawful by the Government. The Government also points to arrests and State of Florida prosecutions. Noteworthy is the fact the State of Florida dismissed Rico claim for payment of \$188.00 in Court costs as a best-interests misdemeanor, nolo plea (the Lenis' dispute any claims that they were involved in gambling). The Lenis are not materially different than any of the direct mail marketers responsible for the 26 exhibits contained in the Appendix.

To carry his burden, in this motion, the Defendant is required to prove a negative. Given the number of federal prosecutions in this country is an insurmountable task. The Government, on the other hand, can provide the information necessary to support the Defendant's good faith claim of selective prosecution. The discovery requested places

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almost no burden nor imposition upon the Government. It is a simple question put to the Government: Has the United States prosecuted anyone for marketing internet gambling sites?

MEMORANDUM OF LAW

The seminal authority for obtaining discovery in support of a selective prosecution claim is *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed 2d 687 (1996). In *Armstrong*, the Supreme Court addressed the constitutional restraint on prosecutorial discretion imposed by the equal protection component of the due process clause of the Fifth Amendment. There, the Court concluded, based on long standing authority, that the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion or other arbitrary classification. *Oyler v. Bowles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed 2d 446 (1962). The court specifically addressed the issue presented by the instant request; discovery in support of a selective prosecution claim. The Court stated that a Defendant must show “some evidence tending to show the existence of the essential elements of the selective prosecution claim” to be entitled to discovery. (At 116 S.Ct. 1489). The Court concluded that:

We think the required threshold—a credible showing of different treatment of similarly situated persons, adequately balances the Government’s interest in vigorous prosecution, and the Defendant’s interest in avoiding selective prosecution. (116 S.Ct. 1489).

Other courts, following the mandate of *Armstrong*, have addressed entitlement to discovery in support of a selective prosecution claim. The Ninth Circuit, in *United States v. Arenas-Ortiz*, 339 F.3d 1066 (9th Cir. 2003) addressed the circumstance where the Defendant, a hispanic male, claimed that he was being discriminated against in his prosecution because he was hispanic. There, the Court

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stated that to make a claim of discriminatory selective prosecution, the Defendant must show that similarly situated individuals of a different ethnic origin were not prosecuted. The Court described the standard necessary to obtain discovery in this circumstance:

The showing necessary to obtain discovery is somewhat less: the defendant must produce “some evidence that similarly situated defendants of other races could have been prosecuted, but were not.” (At 769 - quoting with approval *Armstrong*, 116 S.Ct. 1480).

Several district courts have also addressed the issue subsequent to *Armstrong*. *United States v. Tuitt*, 68 F.Supp. 2d 4 (D. Massachusetts 1999) interpreted *Armstrong* to require that a Defendant claiming selective prosecution must make a “credible showing of different treatment of similarly situated persons” before discovery can be ordered with respect to that claim. Similarly, Senior District Court Judge Wiseman in the Middle District of Tennessee concluded that:

In order for a Defendant to obtain discovery in a selective prosecution case, there must be “some evidence tending to show the existence of the essential elements of the defense.” *United States v. Holloway*, 29 F.Supp.2d 435, 439 (M.D. Tennessee, 1998).

The Government should be required to reveal whether or not they have prosecuted other individuals in this circumstance and as to each of those individuals their ethnicity, if known to the Government. The Defendant has shown “some evidence tending to show the existence of the essential elements of the defense” by alleging that which its best efforts have revealed: Other individuals engaging in the identical conduct are not being prosecuted whereas this Defendant and his family, all of whom are Hispanic, are. A prima facie case of selective prosecution has certainly been sufficiently alleged. Whether, ultimately, it will be proven by the discovery requested is not known.

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CONCLUSION

The distinctions the Government seeks to draw, both with regard to the date and content of the proffered marketing materials for other online sports betting sites and with regard to the conduct of the Lenises are not material.

Having alleged the essential elements of a prima facie case of selective prosecution, the Defendant has satisfied the some "evidence" standard necessary to require the Government to provide the very limited and easily obtainable discovery requested. Whereupon, the Defendant's Motion to Dismiss for Selective Prosecution should be granted.

WHEREFORE counsel for Defendant, WILLIAM HERNAN LENIS, requests this Court enter an order directing the Government to provide the requested discovery in support of the Defendant's selective prosecution claim and thereupon, dismiss the Indictment herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all counsel/parties of record listed on the attached Attorney Service List on this 18th day of December, 2006.

**ROBBINS, TUNKEY, ROSS, AMSEL,
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/s/ Alan S. Ross

BY: _____
ALAN S. ROSS

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