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March 25, 2010

BY HAND

Mary Patrice Brown, Esquire
Acting Counsel
Office of Professional Responsibility
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 3266
Washington, DC 20530

**Re: *United States v. Johnson*
4:07-cr-54-1 (E.D.N.C.)**

Dear Ms. Brown:

We represent James E. Johnson, Jr., who was prosecuted by the United States Attorney for the Eastern District of North Carolina in 2008 for alleged violations of the Migratory Bird Treaty Act, 16 U.S.C. § 703, et. seq., 50 C.F.R. § 20.21i and 20.25, in violation of 18 U.S.C. § 371. We recently obtained proof that the Assistant United States Attorney who handled Mr. Johnson's case lied to the United States District Court about events material to the case and that a Fish and Wildlife Service Agent who knew the truth stood next to the AUSA in Court and, by his silence, knowingly abetted that lie. Please treat this letter as a formal Complaint made pursuant to 28 CFR § 0.39a(1).

FACTUAL BACKGROUND

Mr. Johnson owns (individually and through his corporation) several properties located within the Eastern District of North Carolina. On January 16, 2007, Mr. Johnson and two friends (Abel Brand and John Ragland) were hunting in a blind off Porpoise Creek in Pamlico County that was located on one of Mr. Johnson's properties. Troy Godwin and Ray Rhoden (employees of Mr. Johnson) assisted in retrieving the birds that were shot. Two federal game wardens, Agent Jack Baker and Agent Mike Canada, approached the blind and accused Mr. Johnson and his friends of shooting over bait. The alleged bait--corn--was located more than 600 yards from the blind. This was well outside the 300 yard distance specified in N.C. Gen. Stat. § 113-291.1. However, federal law does not provide a safe harbor distance as does North Carolina law. 16 U.S.C. § 704(b) instead creates an intent-based test requiring an opinion of the game warden, the prosecutor and the Court. Section 704(b)(1) makes it unlawful for any person to "take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area." Therefore, credible testimony by the

WAI-2933365v2

Mary Patrice Brown, Esquire
March 25, 2010
Page 2

game warden as a witness is needed to validate any charges. If the game warden is not truthful in any respect, his opinion on the charges may not be truthful.

Assistant United States Attorney Barbara Kocher, with Agent Baker's assistance, filed a Criminal Information charging Mr. Johnson and others with conspiracy to violate the Migratory Bird Treaty Act (Count I), hunting over bait (Count II) and killing migratory birds without retaining actual custody (Count III). A copy of the Criminal Information is attached as Exhibit 1. The case was assigned to the Honorable Terrence W. Boyle.

This was not the first time that Agent Baker and AUSA Kocher had pursued charges of shooting over bait. In January 2006, Agent Baker confronted members and guests of the Jones Island (Hunting) Club, Inc. and accused them of engaging in this activity. However, the United States Attorney did not prosecute the individual duck hunters caught that day. The United States instead agreed to a corporate plea as part of a disposition that involved a \$25,000 fine and **no** loss of hunting privileges. AUSA Kocher represented the government in this case, which also was assigned to Judge Boyle.

The corporate plea in the case of *United States v. Jones Island Club, Inc.*, Case No. 4:06-M-49 (E.D.N.C.) took place on October 16, 2006 and the transcript of this proceeding is attached as Exhibit 2. Agent Baker initially testified about his observations on the day of the incident. He stated:

The day we took it down there were 18 hunters. They were hunting the blinds, of course, the closest to the baited area. We took it down to four members, an assortment of guests, some juveniles.

(Exhibit 2 at p. 8). AUSA Kocher then announced the terms of the plea:

THE COURT: All right. Thank you.
What is the Government's position regarding this:

MS. KOCHER: Your Honor, the Government recommends a \$25,000 fine **with no attempt at restricting the hunting of this area**. It is something we have negotiated with the Defendant, and we both present it to you today.

(Exhibit 2 at p. 9) (emphasis added).

The sentencing in *United States v. Jones Island Club, Inc.* took place on March 12, 2007 and the transcript of that proceeding is attached as Exhibit 3. After hearing argument, Judge Boyle announced the sentence as follows:

THE COURT: I know what I'm going to do. I'm going to put them on probation, **but I'm not going to embargo them from hunting, and I'm going to**

Mary Patrice Brown, Esquire
March 25, 2010
Page 3

allow them to continue to operate as they are intended for the next two years with the qualification that any violations or unlawful conduct would be a violation of that probation. And because they'll be on probation, I'll go along with the fine and impose the \$25,000 fine.

* * *

THE COURT: And so, the club will be on probation for a period of two years on condition that it comply with all wildlife regulations and hunting and game regulations and dedicate a hundred hours of community service each year to the wildlife resource and pay a fine of \$25,000 and a special assessment.

(Exhibit 3 at pp. 7 & 8) (emphasis added). Despite having handled *United States v. Jones Island Club, Inc.* the year before, both Agent Baker and AUSA Kocher denied during plea negotiations in *United States v. Johnson* that the Jones Island case had been resolved without any loss of hunting privileges.

Mr. Johnson had to decide whether to take the case against him to trial. As noted above, Section 704(b)(1) requires that the defendant knowingly shoot over bait. Further, cases such as *United States v. Lee*, 217 F.3d 284 (5th Cir. 2000) require proof that the bait was capable of luring birds into the shooting zone. Agent Baker's credibility would be particularly important in such a trial because Baker would testify as to the location of the corn, time of day, weather, flight patterns of ducks, etc. and whether the convergence of those factors constituted "luring the birds" as required under the statute. Mr. Johnson did not know at the time of making his decision that Agent Baker was a tainted witness whose testimony at trial would not be credible.

Not knowing of AUSA Kocher's willingness to lie to the Court and of Agent Baker's willingness to allow a lie to the Court, Mr. Johnson elected to plead guilty to Counts II and III of the Information. His plea was taken at a hearing held before Judge Boyle on March 11, 2008. The transcript of this hearing is attached as Exhibit 4. Agent Baker testified about the events of January 16, 2007 and Judge Boyle relied on this testimony in accepting Mr. Johnson's plea. (Exhibit 4 at pp. 25 & 26). During the sentencing phase of the hearing, the Court, Mr. Johnson's defense counsel (Joe Cheshire) and AUSA Kocher (with Agent Baker standing by her side) engaged in the following colloquy:

MR. CHESHIRE: But I don't think -- you know, we have talked about this case; and he has asked me about this case a million times, the Jones Island case where they were hunting over bait, and there were lots of people that were members of that particular club.

THE COURT: Was that a case here?

Mary Patrice Brown, Esquire
March 25, 2010
Page 4

MR. CHESHIRE: Yes, sir. It was chosen - -

THE COURT: **I don't remember. What was that about?**

MR. CHESHIRE: It's a hunting club, and it was a hunting over bait case, and it was chosen to proceed against the hunting club. And none of the members were to be punished individually. No one lost their license and yet Mr. Johnson, who I think it would be hard to say does not keep this property conserved better than almost anyone in North Carolina, should be punished with the loss of his license for two years when other people that have done the same thing but not put the resources, the limitation of hunting and the resources into really building a beautiful preserve there, not just a place to hunt.

THE COURT: Didn't the club get closed down for a period of time?

MR. CHESHIRE: No sir, I don't believe it did. It paid a large fine and --

THE COURT: Well, didn't it get closed down? Sure it did.

MS. KOCHER: **It did, Your Honor. There is no hunting on the club for a two year period.**

(Exhibit 4 at p. 34) (emphasis added). Judge Boyle thereafter sentenced Mr. Johnson to a \$7500 fine, one year probation and the loss of his hunting privileges for one year.

As established above, AUSA Kocher's representation to Judge Boyle about the Jones Island Club losing hunting privileges for two years was false. Agent Baker was standing right beside AUSA Kocher when the lie was made, but did nothing to correct it. In addition, the falsehood was material as it gave Judge Boyle the misimpression that taking away Mr. Johnson's hunting privileges was necessary in order to avoid sentencing disparity. *See* 18 U.S.C. § 3553(a)(6). It also calls into question the truthfulness of Agent Baker's entire testimony which served as the factual basis of the baiting charges.

REMEDY

Needless to say, making false representations of fact on the record in the course of a judicial proceeding violates the law, 18 U.S.C. § 1001, as well as the standards of conduct expected of Assistant United States Attorneys and government agents involved in criminal prosecutions, 28 U.S.C. § 530B. Federal prosecutors have a special duty to not impede the

Mary Patrice Brown, Esquire
March 25, 2010
Page 5

truth. "It is as much [the federal prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88-89 (1935). The United States Department of Justice's mission statement describes this duty as one "to ensure fair and impartial administration of justice for all Americans." United States Department of Justice, About DOJ, <http://www.usdoj.gov/02organizations/>. Such a high standard is necessary because a "prosecutor's opinion carries with it imprimatur of the Government and may induce the jury [or a judge] to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985) (citing *Berger*, 295 U.S. at 88-89).

The facts outlined above require that the Department of Justice discipline and punish AUSA Kocher and Agent Baker, and we request that such action be taken. We ask the DOJ to consider that James Johnson was placed on supervised federal probation. His travel was restricted. His financial affairs were restricted. He was subjected to drug testing. He was subjected to unannounced visits at his home by the probation officer. He lost his hunting privileges. In summary, his personal liberty was taken away by the United States government. All of these sentencing consequences followed a lie told to the Court by AUSA Kocher and abetted by Agent Baker in knowing silence.

In addition to disciplining and punishing the prosecuting AUSA and the Fish and Wildlife Service Agent, we request that the United States move to vacate Mr. Johnson's conviction, as well as the convictions of Messrs. Brand, Ragland, Godwin and Rhoden. Convictions and sentences procured through falsehoods, whether made in open court or in plea negotiations, cannot be allowed to stand. *See, e.g., U.S. v. Reyes*, No. 577 F.3d 1069 (9th Cir. 2009) (reversible error for prosecutor to make knowingly false statements regarding material facts during closing argument); *U.S. v. Azubike*, 504 F.3d 30 (1st Cir. 2007) (reversible error for prosecutor to misquote defendant as having referred to conspiracy's leader during conversation with confidential informant); *U.S. v. Carter*, 236 F.3d 777 (6th Cir. 2001) (reversible error for prosecutor to misstate testimony of key identification witness); *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000) (reversible error for prosecutor to misrepresent that complainant's "story has not changed"); *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999) (reversible error for prosecutor to "mendaciously" misrepresent to jury that it was unknown why defendant's case was dismissed when prosecutor knew that his objections prevented defendant from showing that he passed polygraph test); *U.S. v. Mastrangelo*, 172 F.3d 288 (3d Cir. 1999) (reversible error for prosecutor to mischaracterize scope of stipulation); *U.S. v. Watson*, 171 F.3d 695 (D.C. Cir. 1999) (reversible error for prosecutor to misstate defense witness testimony on critical point); *U.S. v. Donato*, 99 F.3d 426 (D.C. Cir. 1996), as amended, (Jan. 17, 1997) (reversible error for prosecutor to misrepresent value of property stolen by defendant); *U.S. v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993) (reversible error for prosecutor to falsely advise jury that absent witness could have refused to testify).

Mary Patrice Brown, Esquire
March 25, 2010
Page 6

Events like the one described above require public corrective action that inspires confidence in the Department of Justice and in the court rulings the United States Attorney and DOJ procure.

Please call me if you would like to discuss this matter further. Pursuant to 28 CFR § 0.39a(2)(5), we ask that you advise us of how this matter is resolved.

Very truly yours,

A handwritten signature in black ink that reads "Walter Kelley". The signature is written in a cursive style with a large, sweeping initial "W".

Walter D. Kelley, Jr.

cc: George Holding, Esquire
United States Attorney for the
Eastern District of North Carolina