IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	
v.	)	
	)	**CASE NO. 1:10-CR-225 (CKK)**
	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

DEFENDANT STEPHEN KIM'S MOTION TO DISMISS COUNT TWO OF THE INDICTMENT AND FOR AN EVIDENTIARY HEARING

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TABLE OF CONTENTS

Page

Pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure, defendant Stephen Kim, through undersigned counsel, respectfully moves this Court to dismiss Count Two of the indictment and for an evidentiary hearing.

INTRODUCTION

"It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government." United States Attorneys' Manual ¶ 9-42.160 (Sept. 1997). The fact that the Justice Department's own policy discourages Section 1001 prosecutions for a criminal suspect's mere denial of guilt reflects a fundamental understanding that "[t]he function of law enforcement is the prevention of crime and the apprehension of criminals" and, "[m]anifestly, that function does not include the manufacturing of crime." *Sherman v. United States*, 356 U.S. 369, 372 (1958).

In this case, however, the government has abandoned its own policy and indicted Mr. Kim for making a false statement under 18 U.S.C. § 1001(a)(2). The government's charge is particularly inappropriate in this case for two reasons. First, the allegedly false statement was made to a government agent in response to a question to which he likely already knew the answer. To punish a suspect for merely denying a fact that was already known to government agents amounts to little more than prosecutorial "piling on," especially where the false statement failed to have any influence on the government's investigation. Second, whatever the government claims Mr. Kim said that forms the basis of Count Two of its indictment, Mr. Kim provided the government with an accurate and complete answer before the government ever filed any charges in this case. Although Section 1001(a)(2) is not expressly limited to false statements that impede government functions, the application of the statute to a defendant who has corrected

a false statement prior to his indictment offends traditional notions of fundamental fairness under the Due Process Clause.

Mr. Kim submits that an evidentiary hearing is needed to further develop the facts, which are in dispute and determinative of this motion.

FACTUAL ALLEGATIONS

Mr. Kim met with law enforcement agents on at least two occasions, September 24, 2009, and March 29, 2010, in connection with the government's investigation into this matter. The indictment in this case alleges that during that first meeting, September 24, 2009, Mr. Kim made a materially false, fictitious, and fraudulent statement and representation to an agent of the Federal Bureau of Investigation ("FBI"). Specifically, the indictment alleges that Mr. Kim "den[ied] having had any contact with a named reporter for a national news organization since meeting the reporter in or about March 2009 when, in truth and fact, as the defendant well knew, he had repeated contact with said reporter in the months following that meeting." (Dkt. No. 3, Count Two.) According to the indictment, Mr. Kim's false, fictitious, and fraudulent statement violated 18 U.S.C. § 1001(a)(2). *Id.*[1]

Even if Mr. Kim denied having had any contact with the named reporter, as the indictment alleges, there is reason to believe that the government already knew the answer to its questions at the time it posed them. In addition, there is reason to believe that Mr. Kim provided government agents with accurate information either during that September 24, 2009, meeting or when he met with FBI agents for a second time, on March 29, 2010. For the reasons more fully

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[1] To date, Mr. Kim has not seen all of the FBI 302s associated with his interviews with the Federal Bureau of Investigation or the notes that served as the basis for those FBI 302s.

discussed below, the government cannot set a "perjury trap"—by asking questions to which it already knows the answer—without running afoul of the language of Section 1001 and the Constitution. It should not pursue a charge based on a target's obvious denial of his own wrongdoing. And it cannot and should not proceed with a case under Section 1001 when the defendant provided the government with a complete and truthful answer before it filed any charges.

ARGUMENT

I. The Government Cannot Set A Perjury Trap For A Suspect By Asking Questions To Which It Already Knows The Answers Merely To Generate A Prosecution Under 18 U.S.C. § 1001(a).

The false statement statute, 18 U.S.C. § 1001, criminalizes "any materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."[2] 18 U.S.C. § 1001(a)(2) (2010). Despite the broad sweep of its language, Section 1001 was not intended to confer authority on prosecutors to manufacture crimes.

Section 1001 has its origins in the Act of March 2, 1863, Stat. 696, which was a prohibition against the filing of fraudulent claims with the government. When initially enacted, the progenitor to Section 1001 was limited to statements relating to fraudulent filings under the Act. In 1918, Congress revised the statute to cover other false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." Act of Oct. 23, 1918, ch. 194, § 35, 40 Stat. 1015–1016. Despite the broadened

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[2] Section 1001(a)(2) is similar to the penal statutes criminalizing perjury, except it addresses false statements made outside the context of a sworn proceeding.

language, the Supreme Court continued to interpret the statute as being limited to statements intended to "cheat[] the Government out of property or money." *United States v. Cohn*, 270 U.S. 339, 346 (1926).

"The restricted scope of the 1918 Act became a serious problem with the advent of the New Deal programs in the 1930's." *United States v. Yermian*, 468 U.S. 63, 80 (1984) (Rehnquist, J., dissenting). When the Secretary of the Interior determined that regulated entities could subvert New Deal programs by filing false reports without actually cheating the government out of property or money, Congress amended the statute in 1934 to prohibit "any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States or any corporation in which the United States of America is a stockholder." Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996. The pertinent part of the statute appears in essentially the same form today.

The legislative history makes clear that the intended purpose of Section 1001 was to "protect the Government from the affirmative, aggressive and voluntary actions of persons who take the initiative; and to protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions." *Paternostro v. United States*, 311 F.2d 298, 302 (5th Cir. 1962). Congress did not enact the statute to criminalize suspects' false denials of wrongdoing in the course of informal interviews initiated by government agents.

Because of the enormous breadth of Section 1001's prohibitions, there is a well-founded fear that overzealous prosecutors will use the statute as a means of compounding offenses and, in some cases, punish the denial of wrongdoing more severely than the underlying wrong. In this respect, Section 1001 provides prosecutors with an extraordinary ability to manufacture crimes.

Rather than simply prosecuting those who break the law, government agents have been empowered to generate felonies. As noted in the scholarly literature:

> Since agents may often expect a suspect to respond falsely to their questions, the statute is a powerful instrument with which to trap a potential defendant. Investigators need only informally approach the suspect and elicit a false reply and they are assured of a conviction with a harsh penalty even if they are unable to prove the underlying substantive crime.

See Note, Fairness in Criminal Investigations Under the Federal False Statement Statute, 77 Colum. L. Rev. 316, 325–326 (1977).

Even the Justice Department has shown reluctance to use Section 1001 to prosecute suspects who make simple false denials to investigators. In *Nunley*, for example, the Solicitor General suggested that the Court vacate a conviction under Section 1001 and remand with instructions to dismiss the indictment because prosecutions of cases like Nunley's, in which the false statements at issue "essentially constituted mere denials of guilt," were "normally refused." *Nunley v. United States*, 434 U.S. 962 (1977). As discussed, the Justice Department's general policy against such prosecutions, which guided the *Nunley* dismissal, is formally announced in the United States Attorneys' Manual ¶ 9-42.160.

The *Nunley* case and Department of Justice Policy 9-42.160 reflect an understanding that prosecutions for denials of guilt are of dubious propriety. As part of the criminal investigative process, government agents frequently interview suspects without informing them that they are targets of a criminal investigation, that they have the right to retain counsel, that they have the right to remain silent or invoke their Fifth Amendment right against self-incrimination, or that their false statements could give rise to criminal prosecution. Given that a criminal suspect is provided no warning of the potential perils of misrepresentations, prosecuting that suspect for a mere denial of wrongdoing is inimical to the notion of fundamental fairness. Such a prosecution is particularly unfair because the denial arises in a context in which there is no real expectation

of honesty. As the Supreme Court has acknowledged, "[i]t probably is the normal instinct to deny and conceal any shameful or guilty act." *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting). This fact certainly is not lost on government agents. Prosecution for a mere denial is especially unfair where the denial pertains to a known fact and it was recanted prior to any indictment of the defendant.

But that is precisely what the government seeks to do in this case. The government has indicted Mr. Kim for his alleged denial that he "had any contact with a named reporter for a national news organization since meeting the reporter in or about March 2009[.]" (Dkt. No. 3, Count Two.) Prosecution for such an alleged statement is inappropriate for several reasons.

First, the government likely already knew the answer to this question at the time that it asked it. It appears from the disclosure the government has made before and after indictment that they had electronic and other evidence that demonstrated exactly when and how Mr. Kim communicated with the media. Under the plain language of Section 1001, a false statement must be material to a matter within government jurisdiction to create criminal liability. 18 U.S.C. § 1001(a)(2); *Gaudin v. United States*, 515 U.S. 506, 509 (1995). Although Section 1001 does not define what constitutes a "materially false" statement, the Supreme Court has held that a statement is materially false if it has "a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988). This is not meant to suggest that Section 1001 implicitly requires a showing of actual influence or reliance. *See Brogan v. United States*, 522 U.S. 398, 402 (1998) ("making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange."). Rather, the point is that when a federal investigator asks a question to which he already knows the

truthful answer, a suspect's false statement in response to that question is incapable of influencing the investigation. Accordingly, a false statement in these circumstances is functionally equivalent to an assertion of the Fifth Amendment right against self-incrimination.

Second, in such circumstances, the government's conduct is akin to a perjury trap—conduct that is inappropriate under either Section 1001 or the Constitution. Courts have defined a "perjury trap" as "the deliberate use of a judicial proceeding to secure perjured testimony." *United States v. Simone*, 627 F. Supp. 1264, 1268 (D.N.J. 1986). The perjury trap doctrine, which is related to the statutory defense of entrapment, reflects an understanding that prosecutors' opportunistic use of judicial proceedings to generate crime is contrary to the principle of due process. Moreover, the doctrine is premised on the notion that "fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous.'" *United States v. Twigg*, 588 F.2d 373, 379 (3d Cir. 1978). In this context, "the question is not whether the government implanted the disposition to speak falsely in the witness, but whether there was a premeditated design on the part of the government to trap the witness into perjury in such an *unfair* way that a due process test may provide a viable defense." *Simone*, 627 F. Supp. at 1269. Where the government asks a suspect a question about a known fact and then prosecutes that suspect for mere denial of the fact—in contravention of the Justice Department's own policy—it creates a presumption that there was such a "premeditated design" to entrap the suspect in a lie. Such conduct is contrary to a system of criminal justice that is "an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). Accordingly,

the Due Process Clause of the Fifth Amendment should protect criminal suspects from this form of prosecutorial overreaching.

Preservation of a suspect's due process rights in this context does not require, however, that federal investigators refrain from asking suspects baseline questions concerning known facts. Investigators routinely rely on such questions to evaluate a suspect's credibility and assess his willingness to cooperate in the government's investigation. Such questioning no doubt could be raised to show consciousness of guilt or perhaps to refute a defendant's testimony on the stand. But although such questions may serve a useful purpose from an investigative standpoint, a false statement made in response to such a question is *not* material under Section 1001, because it is already known to be false. Accordingly, punishing a suspect for a false statement in that context—as the government appears to have done to Mr. Kim—is contrary to the notion of fundamental fairness and violates due process.

II. This Court Should Impute A Recantation Defense Into Section 1001 And Dismiss Count Two Of The Indictment.

Although Section 1001 does not contain an express recantation defense, this Court can and should impute one into the statute to avoid the absurd results of the statute's sweeping language.

Under the federal perjury statutes, such as 18 U.S.C. § 1623, recantation is a bar to a perjury prosecution when three conditions are met. First, the recantation must be made "in the same continuous court or grand jury proceeding" in which the original false declaration was made. *United States v. Moore*, 613 F.2d 1029, 1038–1039 (D.C. Cir. 1979). Second, the recantation must unambiguously admit that the prior statement was false. *Id.* Finally, the recantation must be made before the false declaration has "substantially affected the proceeding" and before it has "become manifest that such falsity has been or will be exposed." *Id.* By

allowing a recantation defense, the perjury statutes properly recognize that the law should not punish a declarant for a false statement when he corrects that statement before it has had any substantial impact.

The same principles that underlie the recantation bar in a perjury case are present in the false statements context as well. In cases such as this one, the alleged false statement may not have had any impact on the government's investigation or its proceedings before the grand jury. Indeed, Mr. Kim's subsequent correction of the alleged false statement may have cured any harm created by the earlier statement, and Mr. Kim corrected his statement many, many months before the government returned the indictment now at issue.

The Eighth Circuit has correctly embraced the recantation defense in the false statement context. *See United States v. Cowden*, 677 F.2d 417 (8th Cir. 1982). The *Cowden* court reversed a conviction under Section 1001 because the defendant corrected a false statement on a customs declaration with a "true oral statement." 677 F.2d at 420–421. In *Cowden*, the defendant completed and signed a customs form and handed it to a customs inspector at Twin Cities International Airport. *Id.* at 417. On the form, the defendant checked "no" in response to the form's question as to whether he was carrying over $5,000.00 in monetary instruments. *Id.* at 418. After receiving the declaration, the customs inspector began a routine customs examination. *Id.* In the course of that examination, the customs inspector searched the defendant's briefcase and discovered what he believed to be undeclared currency. *Id.* The customs inspector concealed his discovery from the defendant and before the fact of the discovery was made known, the defendant informed the customs inspector that he was in fact carrying over $5,000 in monetary instruments and requested an opportunity to revise his customs

form—a request that the customs inspector denied. *Id.* The defendant was subsequently convicted of making a false customs declaration in violation of 18 U.S.C. § 1001.

In overturning the conviction, the *Cowden* court first reasoned that the "Customs inspection should be conducted so that the probable result is compliance with the law, not the eliciting of a violation of the law." *Id.* at 420. The court further noted that 19 C.F.R. § 148.16 "permits amendment of a customs declaration up to the time an undeclared article is found." *Id.* The court then concluded that, because the currency was not discovered prior to the defendant's attempted amendment of the customs form, it was "manifestly unfair that a customs officer should make every effort to conceal his discovery of an item and then, once a passenger has requested to amend his declaration, to forbid amendment." *Id.* at 421.

This case presents compelling reasons for this Court to follow *Cowden*, adopt a recantation defense, and dismiss the Section 1001 charge against Mr. Kim. The government agents in this case questioned Mr. Kim about facts that they likely already knew. Mr. Kim's alleged denial of a known fact could not have influenced the government's investigation. Indeed, if a suspect provides a false answer in response to a question that the prosecutor already knows the answer to, the investigator is deprived only of the suspect's admission of that fact. This same result arises if the suspect simply asserts his rights under the Fifth Amendment and refuses to answer the question. But, in this case, Mr. Kim may have done even more to ensure that his statement had no effect on the government's investigation. Indeed, even if Mr. Kim initially provided a false answer to a question from the investigators, either during that same interview or during his second meeting with agents on March 29, 2010, Mr. Kim corrected his previous denial. This was many months before the government ever brought the charge at issue. It is manifestly unfair for the government to prosecute a suspect for violation of Section 1001

under these circumstances, because the suspect's recantation effectively cures the only feasible ill associated with the false statement, which is the denial of an admission of fact.

CONCLUSION

There is no doubt that the government is expected to zealously pursue and investigate those suspected of violating the law. It is contrary to the notion of fundamental fairness and, therefore, the Due Process Clause for prosecutors to use the investigative process to generate crimes under the false statements statute, particularly where the false statement consisted of a mere denial of a fact already known to the government that was subsequently recanted and corrected. For these reasons, and the ones set forth above, Mr. Kim respectfully requests that this Court conduct an evidentiary hearing to determine whether it should dismiss Count Two of the indictment.

Respectfully submitted,

Dated: January 31, 2011

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Defendant.	)	

[PROPOSED] ORDER

This matter came before the Court on Defendant Stephen Kim's Motion to Dismiss Count Two of the indictment. Upon due consideration of the pleadings and the entire record herein, the Court finds that an evidentiary hearing is necessary to develop further facts, which are in dispute and determinative of Defendant's motion. It is hereby **ORDERED** that:

An evidentiary hearing will be held on _____, 2011 at _____.

SO ORDERED.

_____
COLLEEN KOLLAR-KOTELLY
United States District Judge

Date: _____, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2011, I caused a true and correct copy of the foregoing to be served via the Court's ECF filing system to all counsel of record in this matter.

/s/ Abbe D. Lowell