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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRIESHANAY QUENISE FORD, Defendant.	No. 2:22-CR-200-PA GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR VINDICTIVE PROSECUTION, VINDICTIVE ENFORCEMENT, SELECTIVE ENFORCEMENT, AND TO COMPEL DISCOVERY Hearing Date: Sept. 6, 2022 Hearing Time: 3:00 p.m. Location: Courtroom of the Hon. Percy Anderson

Plaintiff United States of America, by and through its counsel of record, the Acting United States Attorney for the Central District of California and Assistant United States Attorneys Alexander Su and David W. Williams, hereby files its Opposition to Defendant BRIESHANAY QUENISE FORD's Motion to Dismiss for Vindictive

Prosecution, Vindictive Enforcement, Selective Enforcement, and Motion to Compel Discovery (ECF No. 36).

This Opposition is based upon the attached memorandum of points and authorities, the declaration of Sarah J. Corcoran, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: August 29, 2022

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant BRIESHANAY QUENISE FORD ("defendant"), a repeat felon with a history of serious convictions and arrests, is charged with illegally possessing a firearm and ammunition. She now moves to dismiss the indictment for vindictive prosecution and selective enforcement, and in the alternative asks for expansive discovery unrelated to this federal prosecution (the "Motion"). In her Motion, defendant claims that (1) a local Los Angeles police detective violated her Fifth Amendment rights when interviewing her in connection with an unrelated murder investigation, and (2) this same detective referred her firearm case for federal prosecution as purported retribution for her Fifth Amendment invocation.

Defendant's motion seeks to transform a straightforward case about a repeat felon's illegal possession of a gun into a trial about an unrelated state murder investigation. The motion lacks merit and should be denied. This case was not charged by the local police detective or a state prosecutor; this federal case was brought by the United States Attorney's Office after it determined that the firearms charge merited federal prosecution. Defendant now makes the novel (and unsupported) claim that a local law enforcement officer's actions and motives are somehow imputed to the federal government -- a separate sovereign -- upon requesting federal assistance. Not so. There is simply no evidence that the prosecutors assigned to the case made the charging decision based on any punitive or vindictive motive, let alone knew about defendant's exercise of a constitutional right in the course of a local law enforcement interview regarding unrelated murder charges. In any case, given that the Ninth Circuit

has determined that a federal agent's "threat of 'serious federal time' falls short of evidence of vindictiveness," United States v. Lopez, 474 F.3d 1208, 1212 (9th Cir. 2007), overruled on other grounds by United States v. King, 687 F.3d 1189 (9th Cir. 2012), any such purported threat by a local officer (who is neither a member of the prosecution team nor has any involvement in the charging decision) cannot amount to vindictive prosecution. Defendant's motion to dismiss should be denied and, for similar reasons, so too should her motion to compel discovery.

II. STATEMENT OF FACTS

A. The Underlying Offense: Defendant, a Repeat Felon, Carries a Loaded Firearm in November 2021

Since 2010, defendant has been convicted of four felonies in California state court: (1) first degree burglary (Cal. Penal Code § 459); (2) grand theft by embezzlement (id. § 487(a); (3) first degree robbery (id. § 211); and (4) attempted burglary in May 2021. (ECF Nos. 17 at 2, 36-6 at 45.) In 2020, defendant was also charged with child cruelty and carrying a concealed firearm. (ECF No. 36-6 at 37.)[1]

The offense at issue in this federal case occurred on November 23, 2021. On that day, Los Angeles Police Department ("LAPD") officers stopped defendant in a car, because the vehicle she was driving did not have a license plate. Officers then learned that defendant had an active arrest warrant and that she was on probation with search conditions. They patted her down and found a pistol,

[1] The government is unaware whether that matter has resolved. The defense attorney from that case, Alan Fenster, provided a declaration in support of the pending motion. (ECF No. 36-5.)

loaded with 10 rounds of ammunition, in her pants. (See, e.g., ECF No. 1, Aff. ¶¶ 5, 7-8.)

The officers arrested defendant for being a felon in possession of a firearm, in violation of California Penal Code § 19800(a)(1). (ECF No. 36-6 at 37.)

B. Defendant Is Arrested and Interviewed as a Suspect in an Unrelated Homicide Investigation in December 2021

On December 14, 2021, defendant was arrested again, this time as a murder suspect. (ECF No. 36-6 at 37; see ECF No. 36-2 ("Ford Decl.") ¶¶ 1-4, 8-10.) She was interviewed by Detective David Vinton. (See Declaration of AUSA David Williams, Exhibit A ("Dec. 14 Interview Audio").)

Based on the allegations related to Detective Vinton in defendant's Motion, the government obtained an audio recording of defendant's December 14, 2021, interview. At the beginning of the interview, Detective Vinton provided a Miranda warning. (Id. at 7:47-8:10.) The interview and Detective Vinton's questioning -- all of which related to the murder investigation -- lasted approximately 10 minutes. During the interview, defendant requested a lawyer on three occasions, though questioning continued after each. (Id. at 8:32-9:02, 11:41-12:15, and 14:27-14:52.) Notably, nothing about defendant's illegal possession of a firearm on November 23 was discussed during the interview. (Id.)

C. The FBI Evaluated Defendant's Firearms Case for Federal Enforcement

On the date of defendant's murder arrest, Detective Vinton contacted Federal Bureau of Investigation Special Agent Sarah Corcoran to determine whether the FBI would pursue federal charges

against defendant. Specifically, Detective Vinton sent a text message to Agent Corcoran, asking whether she would "file federal gun charges on [defendant] if need be." (Corcoran Decl. ¶ 5; Corcoran Decl., Exhibit B ("Corcoran Texts") at 1.)

Agent Corcoran had no role in the LAPD's murder investigation. (Corcoran Decl. ¶ 4.) As a result, Agent Corcoran was not present during defendant's arrest on December 14, nor was she involved in the ensuing interview or interactions between Detective Vinton and defendant. (Id.) Rather, Agent Corcoran knew Detective Vinton because she sometimes assisted LAPD homicide detectives, and she had previously told them that the FBI could pursue federal firearms charges if the detectives presented her with an appropriate case. (Id. ¶¶ 2-4.) Additionally, because Agent Corcoran and Detective Vinton worked near one another, he had spoken to her previously about his investigations, including that he planned to arrest defendant for murder on December 14. (Id. ¶¶ 3-4.)

Based on those conversations, when Detective Vinton asked whether Agent Corcoran would adopt defendant's firearm case for federal prosecution, Agent Corcoran already knew that defendant was a suspect in a murder investigation and had recently been arrested by LAPD officers for being a felon in possession of a firearm. (Corcoran Decl. ¶ 3.) Thus, Agent Corcoran understood Detective Vinton's request to mean that he was asking whether the FBI would be interested in pursuing federal firearm charges if murder charges were not filed against defendant. (Id. ¶ 5.)

Agent Corcoran responded to Detective Vinton's initial request for assistance, indicating that she would pursue defendant's case if she could. (Corcoran Decl. ¶ 6; Corcoran Texts at 1.) She asked

whether defendant had admitted to using the November 23 firearm in the homicide, and was told no. (Corcoran Texts at 1.) She also specified that she could not pursue federal charges unless defendant had previously been sentenced to more than 12 months in prison, the state prosecutor agreed to drop the related state firearm charges, and the state case was still in its early stages. (Corcoran Decl. ¶ 6; Corcoran Texts at 1.)

Detective Vinton and Agent Corcoran did not discuss whether defendant had invoked her Fifth Amendment rights. (Corcoran Decl. ¶ 7.) Agent Corcoran also was unaware of the alleged threats referenced in the Motion until defense counsel raised the issue with the United States Attorney's Office following defendant's federal indictment. (Id. ¶ 7.)[2]

D. Referral to and Charging Decision by the United States Attorney's Office

Agent Corcoran presented the case to a federal prosecutor shortly thereafter. (See Corcoran Decl. ¶ 8; Corcoran Texts at 1.) That is, she collected evidence related to the November 23 firearms arrest and presented the case to the United States Attorney's Office. (Corcoran Decl. ¶ 8.) She told the prosecutor that defendant was a suspect in a murder investigation, but otherwise told the prosecutor nothing about Detective Vinton's involvement with defendant. (Id. ¶ 8.)

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[2] Defendant makes other serious allegations about her experiences on December 14, 2021. (See Ford Decl. ¶¶ 7-27.) The government does not have the information necessary to respond to those allegations and believes they are not relevant to the pending Motion. As described below, the allegations do not affect the outcome of this motion because the FBI and the United States Attorney's Office were unaware of their nature at the time of filing.

Over the next several months, Agent Corcoran obtained the November 2021 police report and associated video footage. (Corcoran Decl. ¶ 8-9.) She also kept Detective Vinton apprised of the progress of the federal review. (Id. ¶ 9; see, e.g., Corcoran Texts at 5-10.) However, Detective Vinton did not offer, and Agent Corcoran did not learn, any additional facts about the December 14 interactions with defendant. (Corcoran Decl. ¶ 7.)

The USAO evaluated defendant's case for federal prosecution and authorized the filing of a complaint on March 30, 2022. (See ECF No. 1.)

Defendant was arrested on April 21, 2022, when she arrived at the Los Angeles County Superior Court in Van Nuys for a hearing. (Corcoran Decl., Exhibit C.) The LAPD Van Nuys station was directly adjacent to the courthouse, and defendant was temporarily taken to that station, where FBI Special Agents inventoried defendant's property and arranged for its release to defendant's girlfriend. (Id.) Agent Corcoran had also alerted Detective Vinton when she arrested defendant, and he met defendant and the Special Agents at the station. (Corcoran Decl., Exhibit D; Corcoran Texts at 9-10.) While Detective Vinton attempted to speak with defendant about the still-ongoing murder investigation, she refused to speak with him. (Corcoran Decl., Exhibit D.)

Defendant was subsequently transported to the United States Marshals Service and made an initial appearance on April 21, 2022. (ECF No. 5; Corcoran Decl., Exhibit C.) On May 11, the grand jury returned an indictment for a violation of 18 U.S.C. § 922(g)(1). (ECF No. 17.)

III. ARGUMENT

Defendant's motion seeks to transform a straightforward case about a repeat felon's illegal possession of a gun into a trial about an unrelated state murder investigation. The motion should be denied for several reasons. First, defendant misconstrues the law by asserting that a presumption of vindictiveness can apply in this case; it does not, and thus defendant must establish that the United States Attorney's Office acted with a vindictive purpose. Second, there is no evidence -- none -- that the United States Attorney's Office or the FBI acted with an improper or vindictive purpose. Third, none of the authority defendant cites justifies imputing a state police officer's purported improper motive to federal law enforcement, nor the extreme remedy of dismissal. Defendant's alternative relief, seeking to compel the government to produce material not in its possession, fails for many of the same reasons.

A. Defendant Misconstrues the Law By Asserting that a Presumption of Vindictiveness Can Apply in the Case

"A prosecutor violates due process when he brings additional charges solely to punish the defendant for exercising a constitutional or statutory right." United States v. Noushfar, 78 F.3d 1442, 1446 (9th Cir. 1996) (citing Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). However, the Supreme Court and Ninth Circuit have been careful to distinguish improper retribution from permissible prosecutorial decision-making. "A charging decision does not levy an 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 societal interest in prosecution." United States v. Goodwin, 457 U.S. 368, 380 n.11

(1982) (emphasis added); see United States v. Kent, 649 F.3d 906, 912 (9th Cir. 2011) ("A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right." (quoting United States v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000)).

Under this framework, to establish vindictive prosecution, the defendant must (1) "produc[e] direct evidence of the prosecutor's punitive motivation," or (2) "show[] that the circumstances establish a reasonable likelihood of vindictiveness," which "giv[es] rise to a presumption that the Government must in turn rebut." Kent, 649 F.3d at 912-13 (citations omitted). A presumption of vindictiveness under the second prong ordinarily arises when the prosecutor brings additional charges during or after trial. See Goodwin, 457 U.S. at 376-77, 381; Blackledge v. Perry, 417 U.S. 21, 26-28 (1974). This is because "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." Goodwin, 457 U.S. at 381.

Contrary to defendant's claim, pre-indictment actions cannot establish vindictiveness, much less a presumption of vindictiveness. Under binding precedent, "[v]indictiveness claims are . . . evaluated differently when the additional charges are added during pretrial proceedings," Gamez-Orduno, 235 F.3d at 462 (citations omitted), or -- as here -- before any charges are brought at all. See United States v. Koh, 199 F.3d 632, 639-640 (2d Cir. 1999) (in a case involving a referral for federal prosecution by a former AUSA, the Court held that defendant must "demonstrate actual vindictiveness, which requires 'direct' evidence, such as a statement by the prosecutor evidencing vindictive motive" (citation omitted)); see

also id. at 639 (presumption of vindictiveness does not arise in "the shift from a state to a federal prosecution").

"For good reasons, the Supreme Court has urged deference to pretrial charging decisions." Kent, 649 F.3d at 913. "[B]efore trial many procedural rights are asserted quite routinely, as 'an integral part of the adversary process', [so] it would be 'unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter.'" United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982); accord Nunes v. Ramirez-Palmer, 485 F.3d 432, 442 (9th Cir. 2007); Koh, 199 F.3d at 639 ("[T]he presumption of prosecutorial vindictiveness generally does not arise in the pretrial setting."). And that deference extends to circumstances like here, where the federal government charged a defendant who had previously been charged by the state. See United States v. Selfa, 720 F. App'x 856, 857 (9th Cir. 2018) ("In cases involving separate sovereigns, we have expressed doubt whether one sovereign's prosecution can be vindictive when it is alleged to have punished a defendant for rights he asserted against a different sovereign" (citing United States v. Robison, 644 F.2d 1270, 1273 (9th Cir. 1981))).

Despite this binding authority, defendant asserts repeatedly that "the mere appearance of prosecutorial vindictiveness can give rise to a presumption of vindictiveness, even in the absence of direct threats." (Motion at 16; cf., Motion at 18, 19, 21, 27.) Defendant further claims that, "once a defendant raises a presumption of vindictiveness, the burden shifts to the government to furnish 'objective evidence justifying the prosecutor's action.'" (Motion at 17.)

However, as described above, courts apply a presumption of vindictiveness when prosecutors increase the charges after or during trial. See Goodwin, 457 U.S. at 376-77, 381. Here, in the pre-filing context, no such presumption exists. See Gamez-Orduno, 235 F.3d at 462; Koh, 199 F.3d 632, 639. In fact, the Supreme Court has expressly cautioned against such an approach for more than forty years. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." Goodwin, 457 U.S. at 382. Before trial, "a presumption of vindictiveness is not warranted." Id. at 381. Since the contested charges in this case were plainly filed pre-trial, defendant is not entitled to any presumption.

In order to prevail in her request for dismissal, then, defendant would have to show "direct evidence of the prosecutor's punitive motivation." See Kent, 549 F.3d at 912; United States v. Jenkins, 504 F.3d 694, 699 (9th Cir. 2007); Koh, 199 F.3d at 639.

B. Defendant's Motion Fails Because There Is No Evidence the United States Attorney's Office or the FBI Acted with an Improper or Vindictive Purpose

Defendant asks for dismissal on both vindictive prosecution and selective enforcement grounds. The former requires her to prove that the United States Attorney's Office acted with improper motives. The latter requires her to show that the FBI did. She cannot come close to making either showing.

1. The vindictive prosecution claim fails because the prosecutor did not act with an improper purpose

"In all but the most extreme cases, it is only the biases and motivations of the prosecutor that are relevant" to vindictive

prosecution claims. United States v. Gilbert, 266 F.3d 1180, 1187 (9th Cir. 2001) (citing United States v. Gomez-Lopez, 62 F.3d 304, 306 (9th Cir.1995)). "The purported motivation of another agency . . . is no indication that the prosecutor brought charges against [the defendant] to punish him for his action against the [other agency]." Gilbert, 266 F.3d at 1187.

Defendant's motion is devoid of any evidence or information that federal prosecutors acted with an improper purpose. That is because there is none. In the Motion, defendant only mentions prosecutors, as distinct from law enforcement officers like Agent Corcoran and Detective Vinton, a handful of times. She described how one prosecutor, after obtaining a warrant to search her phone, asked defense counsel to share the phone's password. (Motion at 8.) She also describes how another prosecutor asked if defendant would provide information to advance the murder investigation. (Motion at 8-9.) Neither request is unusual in the context of a criminal case, and both occurred well after the complaint and indictment were filed, and thus had no bearing on the decision to charge defendant with a federal crime.

Not only has defendant failed to attribute any vindictive conduct to a prosecutor, she has failed in her much higher burden of showing that the prosecutor then filed charges "solely to punish [defendant] for exercising a constitutional or statutory right." Kent, 649 F.3d at 912. That is, to prevail in her motion, she was required to show that the federal prosecutor knew about her Miranda invocation and Detective Vinton's alleged threats, was somehow aggrieved by her decision not to cooperate with a local homicide investigation, and then filed federal charges against her solely as

punishment for that invocation. She has not come close to making any of these showings.

First, defendant has not alleged that any member of the United States Attorney's Office knew anything about the content of defendant's December 14 interactions with Detective Vinton. Indeed, Agent Corcoran knew nothing about the alleged constitutional violation committed by Detective Vinton after he arrested her on murder charges -- so Agent Corcoran could not have conveyed that information to the United States Attorney's Office. (Corcoran Decl. ¶ 7.) This alone is fatal to defendant's motion. See Gilbert, 266 F.3d at 1187; Gamez-Orduno, 235 F.3d at 463 (no vindictive prosecution where "prosecutor had no knowledge" of relevant facts at a relevant time).

Second, defendant has offered no reason to believe federal prosecutors would care whether she invoked her Miranda rights during an LAPD interview concerning a local homicide. No federal agents were present with Detective Vinton on December 14, and for a simple reason: neither the FBI nor the United States Attorney's Office was investigating that homicide. Detective Vinton's homicide investigation was not a federal case, and it strains credulity to suggest that a purely local investigation could prompt such prosecutorial animus. Moreover, a defendant's invocation of her Fifth Amendment rights is "routinely made and is expected as part of the adversary process, so that it is unrealistic to assume the prosecutor's pretrial response would be vindictively motivated." See Gallegos-Curiel, 681 F.2d at 1170 (entry of not-guilty plea was "routinely made," and so did not support a vindictiveness finding).

Defendant, of course, points to Agent Corcoran's willingness to help Detective Vinton, and suggests an improper motive in the two federal prosecutors' requests that she "assist in the homicide investigation." (Motion at 8.) But "the entirely commendable practice of state and federal agents . . . cooperat[ing] with each other in the investigation and detection of criminal activity" is hardly a sign of animus. Elkins v. United States, 364 U.S. 206, 211 (1960). In fact, contrary to defendant's claim, there is nothing nefarious about a homicide detective referring a then-murder suspect with a significant criminal history who had recently been arrested for illegally possessing a firearm to the FBI for federal prosecution. Federal gun charges are frequently brought after state charges are initially filed. Nothing about the referral in this case suggests that Agent Corcoran knew what allegedly happened between defendant and Detective Vinton during the December 14 murder interview -- indeed, Agent Corcoran had no knowledge of the allegations defendant makes in her motion. (Corcoran Decl. ¶ 7.)

Third, defendant has not shown that a federal case was brought against her "solely" for vindictive motives. In fact, if the charges were filed even in part to impose harsher penalties than the ones available in state court, the filing would be permissible. See United States v. Nance, 962 F.2d 860, 865 (9th Cir. 1992) (pursuing harsher federal penalties constitute a legitimate reason for bringing federal charges); Lopez, 474 F.3d at 1212 ("threat of 'serious federal time' falls short of evidence of vindictiveness").

2. The selective enforcement claim fails because the FBI did not act with an improper purpose

A selective enforcement claim requires a similar showing. To prove selective enforcement, defendant "must demonstrate that [1] enforcement had a discriminatory effect and [2] the police were motivated by a discriminatory purpose." Lacey v. Maricopa Cnty., 693 F.3d 896, 920 (9th Cir. 2012) (citing Rosenbaum v. City & Cnty. of S.F., 484 F.3d 1142, 1152 (9th Cir.2007)). "Enforcement may be shown through a variety of actual or threatened arrests, searches and temporary seizures, citations, and other coercive conduct by the police." Id. To prove a discriminatory effect, "the claimant must show that similarly situated individuals . . . were not prosecuted." Id. (quoting United States v. Armstrong, 517 U.S. 456, 465 (1996)).

Defendant attempts to satisfy the discriminatory purpose prong by pointing to Detective Vinton's "explicit threats." (Motion at 25.) But this argument has a significant flaw: regardless of what he said to her, Detective Vinton did not, has not, and will not enforce federal firearm laws against defendant. Rather, the enforcing officers are (1) Agent Corcoran, who presented the matter to federal prosecutors, and (2) the LAPD officers who arrested defendant on November 23, 2021, for illegally possessing a firearm. See Velasquez v. City of New York Dep't of Buildings, 19-cv-9687 (PKC), 2020 WL 2614826, at *3 (S.D.N.Y. May 22, 2020) ("Discipline imposed by an unrelated governmental entity . . . cannot serve as a basis for comparison to determine if defendants . . . were selectively enforcing [Special Inspector Agency] regulations."); Papas v. Leonard, No. 3:10-CV-00550-BR, 2012 WL 1445853, at *11 (D. Or. Apr. 25, 2012), aff'd, 544 F. App'x 764 (9th Cir. 2013) (no showing of

selective enforcement where plaintiff challenge to "the [Oregon Liquor Control Commission's] actions," and the commission was "a state agency unrelated to Defendants"). As explained above, Agent Corcoran had no discriminatory purpose, and neither did the arresting officers.

Moreover, defendant cannot show that similarly situated individuals were not prosecuted. Similarly situated individuals -- i.e., repeat felons, caught with a firearm, while on probation with an open warrant -- are exactly the type of criminals frequently prosecuted under 18 U.S.C. § 922(g)(1). See, e.g., United States v. Bautista, 989 F.3d 698, 701 (9th Cir. 2021) (federal charges brought after state arrested defendant on an outstanding warrant for a probation violation and found a firearm when he was booked in county jail); United States v. Hinton, 222 F.3d 664, 667-68 (9th Cir. 2000) (federal charges brought after marshal and police officer arrested defendant on an outstanding warrant for a probation violation, searched his house, and found several firearms); United States v. Torres, 853 F. App'x 151, 153 (9th Cir. 2021) (federal charges brought after state found a firearm during defendant's arrest, where defendant had two prior felonies, was on felony probation, and was wanted for another recent domestic violence offense).

Moreover, while Agent Corcoran did not know about the alleged constitutional violation by Detective Vinton, defendant's Motion should still fail even if she did. When the evidence of a particular case is strong (like this one) and the suspect has a substantial criminal history (like defendant), charges are still frequently filed where a defendant's Fifth Amendment rights may have been violated. See, e.g., Torres, 853 F. App'x at 154 (McKeown, J. dissenting);

United States v. Chong, 720 F. App'x 329, 333 (9th Cir. 2017); United States v. Padilla, 387 F.3d 1087, 1093 (9th Cir. 2004); United States v. Polanco, 93 F.3d 555, 559 (9th Cir. 1996).[3]

C. Defendant's Motion Fails Because Any Purported Improper Purpose by Detective Vinton Should Not Be Imputed to the Federal Government

Because she cannot show any improper conduct by the prosecutors or the FBI, defendant relies heavily on the argument that Detective Vinton's motives should be imputed in some way to them. In addition to the reasons set forth above, the attempt fails for several reasons. First, improper motive cannot be imputed from one sovereign to another. Second, Detective Vinton had no influence or control over the charging decision, so the government did not act as Detective Vinton's "stalking horse." And third, this is not a case of "outrageous" misconduct; if anything, it presents something akin to a Miranda violation, for which the proper remedy is suppression rather than dismissal.

[3] In addition to vindictive prosecution and selective enforcement, defendant ostensibly seeks dismissal for "vindictive enforcement." However, she only mentions the phrase twice, both times in seriatim. (Motion at 2, 18 (alleging "vindictive prosecution, vindictive enforcement, and outrageous government conduct," and a theoretical prohibition on "vindictive prosecution, but also vindictive enforcement").) She cites no authority suggesting a separate, freestanding basis for dismissal on the grounds of "vindictive enforcement," and does not separately analyze the theory. To the extent it exists, though, it appears to be a species of selective enforcement -- not a sort of vindictive prosecution. See, e.g., Heaton v. City of Princeton, 47 F. Supp. 2d 841, 844 (W.D. Ky. 1997), aff'd, 178 F.3d 1294 (6th Cir. 1999) ("'Vindictive enforcement' is selective enforcement intended to discourage or punish the exercise of a constitutional right"). To the extent this claim has been properly presented to the Court, it fails for the same reason the selective enforcement claim fails.

1. Improper motive cannot be imputed from one sovereign to another

"[T]he involvement of separate sovereigns tends to negate a vindictive prosecution claim." United States v. Robison, 644 F.2d 1270, 1273 (9th Cir. 1981). Selfa, cited above, reiterated the Ninth Circuit's "doubt whether one sovereign's prosecution can be vindictive when it is alleged to have punished a defendant for rights he asserted against a different sovereign." Selfa, 720 F. App'x at 857 (citing Robison, 644 F.2d 1273). In other words, the complained-of conduct relates to the powers and prerogatives of a separate sovereign, tending to disprove a claim of punitive motivation. See Kent, 549 F.3d at 912; see United States v. Ng, 699 F.2d 63, 68 (2d Cir. 1983) ("the fact that the prosecutions of the defendants are by two different sovereigns, each acting independently under its own laws and in its own interest without any control of or by the other, renders inapplicable the concept of prosecutorial vindictiveness"). The federal government has its own sovereign interests in pursuing defendant, wholly separate and distinct from the state's interest, as expressed through Detective Vinton and his homicide investigation. For that reason alone, the attempt to impute vindictiveness should be denied.

2. The government is not Detective Vinton's "stalking horse"

Defendant suggests that animus can still be imputed to the federal government, though, because Detective Vinton somehow transformed the United States Attorney's Office into the state's "stalking horse." (Motion at 17 (citing Koh, 199 F.3d at 640 and United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000)).) That

is, she claims the federal prosecutor was "prevailed upon to bring the charges by another with animus." Koh, 199 F.3d at 640. In addition to being confined to a handful of out-of-circuit authorities, the "stalking horse" theory is inapplicable to the facts of this case.

Neither Koh, nor Sanders, nor the district court case that apparently gave rise to the term "stalking horse," actually found vindictive prosecution. Koh, 199 F.3d at 640; Sanders, 211 F.3d at 719; see United States v. Aviv, 923 F. Supp. 35, 38 (S.D.N.Y. 1996). In Koh, the federal prosecutor only filed charges after a former prosecutor from the same office "made a big noise" about the case. 199 F.3d at 640. Even though, as the district court observed, the former prosecutor "was a big man," apparently with significant clout in the prosecutor's office, the Second Circuit found "no evidence that the decision to prosecute was the result of his allegedly improper motives." Id. "The decision to prosecute Koh was based . . . on an independent investigation by the U.S. Attorney's Office." Id. at 641. Sanders is not even about the "stalking horse" theory. 211 F.3d at 716-19. And in Aviv, the defendant alleged that he was prosecuted as "retaliation for his public statements that the United States government was responsible in part for" the Lockerbie bombing. 923 F. Supp. at 37. The FBI agent in charge of the case had been involved in a grand jury investigation and civil suit for that same incident and had allegedly interfered with the defendant's work on behalf of the FDIC for the same reason. Id. Even so, there was "no

objective showing that the prosecution would not have been brought even in the absence of vindictiveness." Id. at 38.[4]

In other words, the "stalking horse" theory cannot save defendant's motion. But even if it could apply where the United States Attorney's Office and FBI had no knowledge of the purported animus in other circuits, it would not apply in the Ninth Circuit without running afoul of Robison. 644 F.2d at 1273 (the "involvement of separate sovereigns tends to negate a vindictive prosecution claim").

Materially, the Ninth Circuit appears not to have adopted the "stalking horse" theory at all. However, it has considered similar imputation arguments and rejected them. In one case, "the only alleged animus was that of [ATF] Agent Campbell, who had no charging authority," so the defendant "failed to show even an appearance of vindictiveness on the part of those members of the United States Attorney's office who made the prosecutive decision." United States v. Hooton, 662 F.2d 628, 634 (9th Cir. 1981). In another case, an FBI agent threatened a defendant, warning that "he 'could be looking

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[4] Additional "stalking horse" case law also supports, rather than undermines, the government's position. For instance, in United States v. Dean, where a state prosecutor referred the matter for federal prosecution, the district court applied the stalking horse test. 119 F. Supp. 2d 81, 82-83 (D. Conn. 2000). But it observed that "even if Dean had proffered sufficient evidence that the state prosecutor harbored genuine animus against him, there is no suggestion that the state prosecutor . . . influence[d] United States Attorney's independent decision . . . ." Id. at 84 (citing United States v. Monsoor, 77 F.3d 1031, 1035 (7th Cir. 1996)) ("the animus of a referring agency is not, without more, imputed to federal prosecutors"). In other words, a referral is not enough; if the vindictive individual has no influence in the decision to prosecute, the federal prosecutor cannot become a "stalking horse." Monsoor, 77 F.3d at 1035; see also Koh, 199 F.3d at 640 (notifying United States Attorney of illegal activities does not constitute "prevailing upon" such that the United States Attorney acted as state's "stalking horse").

at serious federal time' unless he cooperated" in pre-filing interview. Lopez, 474 F.3d at 1210. The Circuit held this threat insufficient to find vindictive prosecution. Id. at 1211; see id. at 1212 ("A prosecutor, and presumably field officers too, may threaten a defendant with prosecution during an interview . . . .").[5]

Here, Detective Vinton was wholly uninvolved in the decision to prosecute. See Monsoor, 77 F.3d at 1035. He certainly had no charging authority. See Hooton, 662 F.2d at 634. As evidenced by Agent Corcoran's text messages, he often learned of the prosecutor's decisions well after the fact, because his federal contact was Agent Corcoran, not the prosecutor. He was therefore out of the loop once the case was sent to the prosecutor, and he was never able to "influence" the decision to prosecute.

[5] The principal contrary case cited by defendant is United States v. Hollywood Motor Car Co., 646 F.2d 384, 386 (9th Cir. 1981), cert. granted, judgment vacated, 458 U.S. 263 (1982), which was vacated and is not an opinion at all. (Motion at 15-16.) While she acknowledges that it was reversed on other grounds, she still relies on it, failing to note that the opinion was altogether undone: the Supreme Court "reversed . . . for lack of jurisdiction and ordered that the appeal be dismissed without reaching the merits of the vindictive-prosecution claim." United States v. Hollywood Motor Car Co., 682 F.2d 1352, 1352 (9th Cir. 1982). The 1981 opinion is therefore neither binding nor persuasive authority.

However, even if it were, it would not support defendant's argument. That case simply stood for the proposition that, when one federal prosecutor expressly evinces animus, and a second federal prosecutor goes along with the first prosecutor's charging threats, the court will find vindictive prosecution. Hollywood Motor Car Co., 646 F.2d at 387; see United States v. DeMarco, 550 F.2d 1224, 1226 (9th Cir. 1977) (same). As described elsewhere, threats by a non-prosecutor, and by a state officer to boot, are different. See Robison, 644 F.2d at 1273; United States v. Gilbert, 266 F.3d 1180, 1187 (9th Cir. 2001).

3. This is not "the most extreme case," nor is it "outrageous"

Finally, defendant attempts to circumvent the ordinary rules of vindictive prosecution motions by claiming that the conduct was so outrageous as to require dismissal. As noted above, "[i]n all but the most extreme cases," only the prosecutor's biases are relevant. Gilbert, 266 F.3d at 1187.

Defendant claims this case falls into that extreme or outrageous category, because "Detective Vinton's threats were egregious and continued over the course of four months." (Motion at 22.) However, while the government does not condone the alleged conduct, defendant's description approximates to a Fifth Amendment or Miranda violation -- not the sort of extreme or "outrageous" conduct that would justify the extreme remedy of dismissal. See, e.g., Rochin v. California, 342 U.S. 165, 166 (1952) (police officers broke into the defendant's bedroom, attempted to pull drug capsules from his throat, and forcibly pumped his stomach to retrieve the capsules, violating due process and warranting dismissal); United States v. Franco, 136 F.3d 622, 629 (9th Cir. 1998) (outrageous government conduct warranting dismissal includes completely fabricating the crime solely to secure conviction); United States v. McClelland, 72 F.3d 717, 721 (9th Cir. 1995) (same). Here, by contrast, defendant's allegations of misconduct do not even relate to the evidence of the charged offense -- for which the independent evidence is overwhelming.

The proper remedy for Miranda-type violations is not dismissal. It is suppression of any affected statement. See United States v. Walker, 742 F. App'x 284, 285 (9th Cir. 2018) (where defendant "had not eaten since the previous evening, had already endured questioning

for more than an hour and a half, and responded with mumbles and complaints, while the interrogator in forceful and threatening tones urged him to answer by inter alia, invoking the will of God," district court properly suppressed statements under Miranda).

Since the government does not intend to use any statements made by defendant during her interactions with Detective Vinton, no further remedy is required.

D. The Court Should Deny Defendant's Motion to Compel

Defendant also asks for a multitude of mostly non-discoverable items. (ECF No. 36-1.) She wants to pry into the status of an ongoing and unrelated homicide investigation being conducted by the LAPD, asking (among other things) for communications between Detective Vinton and the Los Angeles County District Attorney's Office, plus all written communications between Detective Vinton and his fellow state law enforcement officers about the homicide investigation. (Id. ¶¶ 1, 6.) In short, she asks for everything created in connection with an open murder investigation.

"In limited circumstances, individuals have the right to pursue discovery against the government to support claims of vindictive prosecution." United States v. One 1985 Mercedes, 917 F.2d 415, 421 (9th Cir. 1990). However, the Supreme Court has "adopted a 'rigorous standard,' whereby a defendant must show that 'the Government has failed to prosecute others who are similarly situated to the defendant' as evidence of discriminatory effect." United States v. Sellers, 906 F.3d 848, 852 (9th Cir. 2018) (citing United States v. Armstrong, 517 U.S. 456, 468-69 (1996)). This "standard for discovery for a selective prosecution claim should be nearly as rigorous as that for proving the claim itself." Id.; see Sanders,

211 F.3d at 717 (defendant's burden is the same in seeking discovery for vindictive and selective prosecution claims); cf. One 1985 Mercedes, 917 F.2d at 421 (to receive discovery, defendant must first make a "showing of a likelihood of vindictiveness by some evidence tending to show the essential elements of the defense"). As described above, defendant has not alleged any form of animus or vindictiveness by the prosecution, nor has she shown a failure to prosecute similarly situated individuals. She therefore has not come close to making the necessary showing.

But defendant also suggests that she is entitled to discovery in support of her selective enforcement claim. (Motion at 26.) She claims the threshold here is lower, and a defendant must only show "something more than mere speculation." (Motion at 26) (citing Sellers, 906 F.3d at 855.) In fact, even where Sellers applies (to reverse stash-house stings, where the nature of the operation implies that all targets will be charged, see Sellers, 906 F.3d at 853) it imposes a higher bar than defendant suggests. "The district court should use its discretion -- as it does for all discovery matters -- to allow limited or broad discovery based on the reliability and strength of the defendant's showing." Sellers, 906 F.3d at 855. While not a high requirement, then, the showing should be proportionate to the discovery request.

In cases like this one, though, where "evidence of similarly situated individuals who were not targeted exists" (i.e., suspects with probation search terms were stopped for traffic infractions), the standard described in Armstrong should apply. See Sellers, 906 F.3d at 853. Since defendant did not come close to making the necessary showing above, she has not made it here. And for similar

reason, even under Sellers' reduced requirements, defendant has not made the necessary showing: the only vindictiveness she attempts to describe is Detective Vinton's -- and as discussed above, he is not enforcing the federal firearms laws here. In short, no matter how low the bar, defendant has not done more than speculate about whether federal law enforcement and the LAPD officers who arrested her on November 23, 2021, acted with animus. Sellers, 906 F.3d at 855.

Finally, to the extent the Court disagrees, and finds that some limited showing has been made, any discovery order should be limited. See Sellers, 906 F.3d at 855.

Defendant's showing is not strong, yet she asks for an incredible trove of information. Virtually all documents related to an ongoing murder investigation. (ECF No. 36-1 ¶ 1.) Communications between LAPD and a different prosecuting agency. (ECF No. 36-1 ¶ 6.) A list of all persons arrested by LAPD who could have been charged with violating 18 U.S.C. § 922(g), with no temporal boundaries. (ECF No. 36-1 ¶¶ 14-15.) These sorts of requests are simply not proportionate to the speculation she has offered. She asks for significant documentation outside the control of the prosecution team: the government does not have access to the internal LAPD homicide documents listed in paragraphs 3, 4, 5, 6, 7, 8, 12, 13, 14, 15, 16, and 17. (ECF No. 36-1.) Again, then, the request far exceeds the realm of proportionality.

Of the remaining items, the government has produced, or will soon produce (1) communications in the government's possession between Agent Corcoran and Detective Vinton (ECF No. 36-1 ¶ 1), and (2) the only audio recording of the December 14 interrogation known to the government (ECF No. 36-1 ¶ 2). Additionally, the government

has already informed defense counsel that arresting officers on April 21, 2022, were not wearing body cameras. (ECF No. 36-1 ¶ 9.) The other items pertain to the internal policies and deliberations of the United States Attorney's Office -- and are therefore available only under a selective prosecution theory of discovery. That theory is undeniably governed by Armstrong, and therefore cannot possibly support the requested discovery. See also United States v. Camacho, 499 F. App'x 709, 710 (9th Cir. 2012) (defendant's "request for further discovery focused on the government's internal prosecution memorandum, which is protected attorney work product and thus not discoverable").

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny defendant's Motion to Dismiss and Motion to Compel Discovery.