

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) Criminal Number 07-41-P-S
)
 DARIO GIAMBRO.)

MOTION IN LIMINE RE: EVIDENCE OF DISCLOSURE OF INFORMATION
DURING COMPLIANCE ATTEMPT (26 U.S.C. 5848)

BACKGROUND

On February 10, 2006, the Auburn Police Department seized from Mr. Giambro approximately 204 firearms during the investigation of a shooting that allegedly took place at Mr. Giambro's residence. Subsequently, all but two of the firearms were returned to Mr. Giambro. The two firearms that were retained were a Winchester pistol and the Marbles Game Getter that is the subject of this prosecution. The two firearms were seized by the ATF on the grounds that they were contraband, as they were unregistered NFA firearms.¹

Mr. Giambro's counsel, David VanDyke, contacted ATF Agent Durkin to inquire about the reason for the confiscation of the Game Getter. During the conversation between counsel and Agent Durkin, counsel acknowledged that the Game Getter was not registered and inquired about how Mr. Giambro could register the firearm so as to bring it into compliance with the registration requirement.

¹ The ATF later conceded that classification of the Winchester as contraband was a mistake and returned that firearm.

One of the elements that the government must prove in order to convict Mr. Giambro of Possession of an Unregistered Firearm is that Mr. Giambro knew that the firearm was of a type that was required to be registered.² The government has indicated that it intends to introduce testimony regarding the above-described conversation between counsel and Agent Durkin to prove that Mr. Giambro knew that the firearm was required to be registered and that it was not registered.

ARGUMENT: THE CONVERSATION IS NOT ADMISSIBLE PURSUANT TO THE IMMUNITY CREATED BY 26 U.S.C. 5848

Pursuant to 26 U.S.C. 5848, information disclosed during transfer or registration of a firearm shall not be used in any criminal proceeding. Here, the conversation between counsel and Agent Durkin was in the context of an attempt to comply with the registration requirement. Therefore, the government may not use this conversation during the trial of this matter.

The history and purpose of the statute lends credence to the defense position. In 1968, the Supreme Court in *Haynes v. U.S.*, 390 U.S. 85 (1968) held that 26 U.S.C. 5861 presented 5th amendment self-incrimination problems because a person who attempted to comply with the registration requirement would necessarily incriminate himself during attempts at compliance. Congress quickly³ corrected the problem by creating an immunity provision regarding information disclosed during compliance.⁴

² *Staples v. United States*, 511 U.S. 600(1994)

³ *Haynes* was decided in January, 1968. 26 U.S.C. 5848, in its present form, was enacted in October, 1968.

⁴ 26 U.S.C. 5848 is reproduced as follows:

- (a) General rule.**--No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal

In this case, the conversation between counsel and Agent Durkin fits squarely within the type of information that Congress intended to exclude from use in a criminal proceeding. Counsel sought to accomplish nothing other than bringing his client into compliance with the registration requirement. Therefore, any evidence concerning the conversation must be excluded from evidence during the trial of this matter.

Dated at Portland, Maine this 24th day of July, 2007.

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proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

(b) Furnishing false information.--Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

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I hereby certify that on July 24, 2007 Motion in Limine RE: Evidence of Disclosure of Information During Compliance Attempt using the CM/ECF system which will send notification of such filing to Assistant United States Attorney Darcie McElwee, and I hereby certify that on July 24, 2007, I mailed by United States Postal Service, the document to the following non-registered participant: Mr. Dario Giambro.

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