

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| |) | |
| v. |) | No. 02-20484 |
| |) | |
| TORRICK LYLES, |) | |
| |) | |
| Defendant. |) | |

**ORDER ADOPTING THE MAGISTRATE JUDGE’S REPORT AND
RECOMMENDATION AND DENYING DEFENDANT’S MOTION TO DISMISS
SUPERCEDING INDICTMENT ON GROUNDS OF VINDICTIVE PROSECUTION**

Before the Court is the Magistrate Judge’s Report and Recommendation on Defendant Torrick Lyles’ (“Defendant”) motion to dismiss the superceding indictment as vindictive prosecution. Based on the analysis therein, the Court adopts the Magistrate Judge’s Report and Recommendation and denies Defendant’s motion to dismiss.

Defendant was indicted in this cause on December 10, 2002. He was charged with possession with intent to distribute a controlled substance. At that time, two unrelated indictments of Defendant were also pending. The government and Defendant entered into plea negotiations concerning all three indictments. In the course of those negotiations, the government made clear to Defendant that, if he did not agree to plead guilty, the government would seek a superceding indictment with an additional count of a violation of 18 U.S.C. § 924(c), use or possession of a

firearm in relation to a drug crime. The parties did not reach a plea agreement, and a superceding indictment accordingly issued with the § 924(c) count.

On May 19, 2003, Defendant filed this motion to dismiss, arguing that issuance of the superceding indictment with the additional count was the result of vindictive prosecution that violated his rights to due process of law. The Court referred the matter to the Magistrate Judge on May 20, 2003, pursuant to 28 U.S.C. § 636(b)(1)(B). On June 25, 2003, the Magistrate Judge entered a Report and Recommendation submitting that Defendant had not shown that his due process rights were violated and that Defendant's motion to dismiss should be denied.

Vindictive prosecution violates a defendant's Fourteenth Amendment right to due process of law. In the Sixth Circuit, to establish vindictive prosecution, a defendant must show: "(1) exercise of a protected right; (2) the prosecutor's 'stake' in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the plaintiff for the exercise of the protected right.'" Nat'l Eng'g & Contracting Co. v. Herman, 181 F.3d 715, 723 (6th Cir. 1999) (quoting Futernick v. Sumpter Township, 78 F.3d 1051, 1056 n.7 (6th Cir. 1996)); see also U.S. v. Dupree, 323 F.3d 480 (6th Cir. 2003) (same).

The Supreme Court has clearly held that, when a prosecutor threatens to add charges in a superceding indictment as a result of a defendant's refusal to plead guilty to an original indictment, due process is not offended so long as the accused was properly chargeable with the additional count and was "free to accept or reject the prosecution's offer" during plea negotiations. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Presenting the defendant "with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution" does not violate due process. Id. at 365. See also U.S. v. Suarez, 263 F.3d 468, 479 (6th Cir. 2001) ("[I]f the [additional]

charges are brought simply as the result of failure of the plea bargaining process, they are not vindictive.”).

Bordenkircher clearly controls here. Defendant’s argument in this case is based solely on the prosecutor’s addition of the § 924(c) charge in response to Defendant’s refusal to reach a plea agreement. As in Bordenkircher, it is undisputed that the additional charge was fully justified by the evidence, the prosecutor was in possession of this evidence at the time of the original indictment, and Defendant’s refusal to plead guilty was what led to the superceding indictment. When the prosecutor made clear to Defendant that failure to come to an agreement could lead to the institution of a § 924(c) count, Defendant was free to accept or reject the prosecutor’s offer. Defendant has not established a case of vindictive prosecution that would violate his due process rights.

Accordingly, the Court adopts the Report and Recommendation of the Magistrate Judge as to the disposition of Defendant’s motion to dismiss. Defendant’s motion to dismiss is **DENIED**.

IT IS SO ORDERED this ____ day of _____, 2003

BERNICE BOUIE DONALD
UNITED STATE DISTRICT JUDGE