

FIVE YEARS AGO TODAY, HUNTER BIDEN BOUGHT A GUN

Yesterday, Judge Maryanne Noreika dismissed the gun-related Information against Hunter Biden, signed by Baltimore AUSA Leo Wise, that was filed on June 20, an Information tied to a diversion agreement that Leo Wise also signed.

At the arraignment on Hunter's new charges – three charges replaced one – Magistrate Judge Christopher Burke reminded the Special Counsel's team (Derek Hines had the speaking role at the arraignment, not Leo Wise) about the Information still on the docket.

Mr. Hines, one question on my end. The Indictment now obviously has been filed on the docket and that still has the prior felony information that was filed with regard to the prior gun charge back at the point where it was thought that there might be a plea. Did the Government intend to dismiss that charge?

MR. HINES: Yes, consistent with local practice, we intend to file a written motion within the next day.

THE COURT: Okay. And that will go to Judge Noreika and she will review that.

It took Leo Wise two tries – he forgot to sign the first motion to dismiss – but Weiss' team did indeed move to dismiss the Information, and the docket identified the motion to dismiss that Noreika granted as the amended one, the one Leo Wise actually signed.

And so it was that on the last day off the fifth year after Hunter Biden purchased a gun, Judge Noreika dismissed one charge against him for doing so. Weiss' team moved to dismiss the Information without prejudice to refiling it.

But as of today, the statutes of limitation begin to expire on both that Information – charged under 18 USC 922(g)(3) and 18 USC 924(a)(2) – and the charges in the Indictment – which added charges under 18 USC 924(a)(1)(A) and 18 USC 922(a)(6) and 18 USC 924(a)(2), something Leo Wise noted at the failed plea hearing in July. Any charge tied to unlawful possession of that gun, as opposed to unlawful statements made during the purchase of the gun, will expire on October 23.

So, 9 days into the 30-day period during which Judge Burke gave Hunter's team to file motions, things may begin to get interesting,

Since the failed plea, the two sides have been involved in a dance regarding whether the diversion agreement – which, as noted, Leo Wise signed on July 26 – remains binding on the government. Over and over, the government, with its evolving titles, has claimed it does not remain binding. Over and over, Hunter's team preserves the record, insisting it does.

For example, when the government moved to vacate Judge Noreika's briefing order with an August 11 filing – a motion signed by Leo Wise – claiming that, "there is no longer a plea agreement or diversion agreement," Hunter's lawyers responded two days later countering, "the parties have a valid and binding bilateral Diversion Agreement." On August 15, DOJ filed a reply – signed by newly promoted Assistant Special Counsel Leo Wise – disputing Hunter's claims, focusing not on whether Wise signed the diversion, but whether Judge Noreika approved the plea or Probation signed the diversion.

On September 6, in response to an order from Judge Noreika, DOJ filed a status update – once again signed by Leo Wise – stating (among other things) that the diversion had not been executed because, while it had been signed by Leo Wise, it had not been signed by Probation. Lowell responded – again, protecting the record – that the court had been provided an executed copy of the diversion agreement, the one signed by Leo

Wise.

I don't know who will win this dispute. I know that DOJ – in filings signed by Leo Wise – keeps saying that where the diversion agreement says “approval” in ¶¶ 1 and 2, it means approval by Probation, not the parties mentioned in ¶¶1 and 2. But from the moment DOJ first opened this docket – with a letter signed by Leo Wise – they referred to executed agreements that were signed that day.

I also know that DOJ keeps speaking of a plea agreement as it existed on July 26, not the agreement that DOJ entered into on some unspecified date in June before that, between which time and July 26, Leo Wise took over from Lesley Wolf and the scope of the immunity agreement started shrinking, one of two things that led the plea to fail on July 26.

At the arraignment last week, Lowell warned that several things were going to happen by or before November 3, when motions are due.

MR. LOWELL: Yes, a couple of things, Judge. First, I understand that Judge Noreika did advise the Government of their **Brady obligations**. I would want to talk to the Government about the overall discovery issues, especially with the thirty-day motions schedule. **We would like to get discovery in the case obviously before we file the motions.** We will talk to them. I don't know that we'll have any problems that we will need to bring for the Court's attention, but we will see.

And second of all on those motions, I appreciate the date, I think we can conform to that based on the discovery perhaps, but I think there will be a number of motions which won't be a surprise to Your Honor or to Judge Noreika, including **motions to dismiss which we discussed during the last proceeding which would focus on our view**

that there was an agreement in effect which would prevent this charge from being filed as well as questioning the constitutionality of the statutes that have been cited and others depending on what happens. So that thirty days seems right, but we'll talk to the Government.

[snip]

MR. LOWELL: The only other thing that would maybe not change the schedule but would add to the schedule, is that at least one of those motions, I think given what we all know about this case, we will be making a request for an evidentiary hearing. [my emphasis]

Lowell said he:

1. Wanted Brady and other discovery before he filed motions
2. Would make a request for an evidentiary hearing
3. Would file motions (plural) to dismiss, arguing:
 - The diversion agreement prohibits these charges
 - The gun charges are unconstitutional
 - "others depending on what happens"

As a threshold matter, Lowell seems to believe he had not, by last Tuesday, received all the Brady discovery, even though Chris Clark agreed he had received it back in July. That is, Lowell believes the government has evidence that either exculpates Hunter (which is unlikely) or impeaches the investigation or prosecution that DOJ has not yet turned over.

It's not a mystery what some of this is. In an August 13 appearance on CBS, Lowell described that if Weiss decided to file charges other than what got filed in June, something must have "infected" the process.

LOWELL: But you asked me whether or not that has been part of the investigation and after five years and what we know happened in the grand jury, of course that had to be part of what the prosecutor has already looked at, as well as every other false allegation made by the right wing media and others, whether it's corruption or FARA, or money laundering. That was part of what this prosecutor's office had to have been looking over for five years. I can assure you that five years concluded that the only two charges that made sense were two misdemeanors for failing to file like millions of Americans do, and a diverted gun charge for the 11 days that Hunter possessed a gun. Everything else had been thoroughly looked at. So is that possible that they're going to revisit it? Let me answer it one way. If the now Special Counsel decides not to go by the deal, then it will mean that he or they decided that something other than the facts and the law are coming into play.

[snip]

LOWELL: -Because I know we were a little rushed. So to answer your question squarely. People should keep in mind that while Mr. Weiss' title changed last week, he's the same person he's been for the last five years. He's a Republican U.S. attorney appointed by a Republican president and attorney general, who had career prosecutors working this case for five years, looking at every transaction that Hunter was involved in. So whether it was tax or the gun, or possible any

other charge, if anything changes from his conclusion, which was two tax misdemeanors, and a diverted gun charge. The question should be asked: what infected the process that was not the facts and the law?

MARGARET BRENNAN: Or new evidence? I mean, are you confident your client won't face new criminal charges?

LOWELL: I'm confident that if this prosecutor does what has been done for the last five years, look at the facts, the evidence and the law, then the only conclusion can be what the conclusion was on July 26. It's new evidence, there's no new evidence to be found. Some of these transactions are years old. They've had people in the Grand Jury, they've had data that was provided to them. I don't know the possibility exists after this kind of painstaking investigation for them to be "oh, my gosh, there's a new piece of evidence which changes." The only thing that will change is the scrutiny on some of the charges, for example, the gun charge.

More spectacularly, in a September 14 appearance on CNN, *after* the gun charges were filed, Lowell casually mentioned that prosecutors, "don't share their emails with me, at least as of yet."

LOWELL: And that the only thing that changed, Erin, was not the facts and not the law, which has only gotten worse for law enforcement but the application of politics. If it turns out that they continue to escalate the charges, then that is an issue that should be explored.

BURNETT: Okay. So but you are saying that they would be doing that because they are under political pressure from Republicans, MAGA Republicans as you

referred to them, in Congress.

LOWELL: Well, they don't talk to me about their motives.

BURNETT: Yeah.

LOWELL: **They don't share their emails with me, at least as of yet.** All I can do, as you as a good reporter does, is make connections. So, if they thought after five years this was appropriate and then the political pressure came and now they think this is appropriate and if it's no change in the facts and no change in the law, then let me ask you as a journalist would ask, what changed? And I'm telling you, the only thing that's changed is the politics.

That is, Lowell insinuated that he would demand emails *from the prosecution team* to understand what led them to (to use the phrase used in the first Hunter filing signed by Lowell) renege on a plea deal.

I have said repeatedly when covering this case and I'll repeat again, defense attorneys make the kinds of claims that Lowell is making – raising selective prosecution claims and insisting they haven't gotten Brady discovery, for example – all the time. Such claims usually don't work. Mind you, you would *always* need to take those claims more seriously when dealing with someone like Lowell; he's a formidable lawyer. But even still, selective prosecution claims almost *never* reach the bar required to get an evidentiary hearing and DOJ has a great deal of flexibility in how they fulfill their discovery obligations. Lowell is making incredibly aggressive claims here, *especially* the casual suggestion he might get prosecutors' emails.

The Hunter Biden case is different though. It's different because Gary Shapley and Joseph Ziegler have spent months making easily debunked claims about politicization in favor of Hunter

Biden, even while disclosing the existence of evidence showing the opposite, improper political influence to investigate Hunter. And it's different because James Comer and Jim Jordan and Jason Smith and the chief investigative counsel they all keep swapping between committees like a cheap date, Steve Castor, keep forcing one after another investigative witness to go on the record about this investigation.

Take just one example: the emails that Gary Shapley belatedly claimed he was a whistleblower to try to explain away because David Weiss' team demanded them in discovery. Michael Batdorf – the Director of IRS-CI Field Operations who described that Shapley uniquely escalated things to him because he has, “a tendency to go to level like grade 7 five-alarm fire on everything,” also described that Shapley wasn't a mere supervisor on this team, he was playing an investigative role.

He was taking investigative steps with the special agents. I mean, he was one of the team.

So it wasn't just an agent involvement. It was the supervisor involvement. He was, again, taking those actions as if he was a working case agent. (97)

Batdorf provided this description to explain why it was reasonable to remove the entire IRS investigative team (which Batdorf also repeatedly said was not retaliation, undercutting yet more of Shapley's claims). But it would also serve to explain why it was totally reasonable for Weiss to demand Shapley's emails in discovery, first in March 2022 and then, after Shapley refused to turn them over, again in October 2022. Batdorf also revealed that Weiss had to and did go over his head to get Shapley's emails. If it was reasonable to obtain Shapley's emails for discovery – and Batdorf has explained why it was – then it would be reasonable for Hunter Biden to expect to get

them.

Republicans' frenzied dick pic sniffing has also provided clear evidence, both in the form of testimony about whether Shapley's notes accurately reflect what happened on October 7, which multiple witnesses say they do not, and in notes that clearly conflict with what he typed up and sent in emails, to demand Shapley's handwritten notes, in addition to his more formal memorializations.

Normally, evidence that Shapley has been biased or dishonest would only matter for any tax case Weiss attempts to charge down the road. Weiss has time yet under the statute of limitations for tax charges, allowing him to see how this gun charge will go down, and possibly allowing him to delay responding to precisely this kind of discovery request until after the gun charges are resolved.

Except that thanks to frothy Republicans, there is already evidence showing that Shapley's media tour "infected" Weiss' prosecutorial team before they made the decision to "renege" on a plea agreement and add additional felony gun charges against Hunter.

When asked by Steve Castor in an interview on September 7 how Shapley's media tour was affecting the ongoing investigation (which Thomas Sobocinski continues to oversee), the FBI Special Agent in Charge of the Baltimore office described that the media tour, "is affecting my employees," so much so that the children of retired FBI agents "are being followed."

Castor later asked a question I'm sure Abbe Lowell would love to know the answer to: Why Lesley Wolf was taken off court filings. Sobocinski balked at answering, even questioning whether Castor's premise was "factually correct." But Democratic staffers followed up to ask whether Wolf has faced threats. Sobocinski responded that "my office and the FBI have done things and initiated things to ensure that she remains safe."

In other words, Shapley made himself relevant to not just the tax charges but also to *all* charges from David Weiss' office by setting off a media frenzy that led to credible threats that – Hunter's attorneys can and undoubtedly will argue – may have led prosecutors to ratchet up the charges against Hunter.

It turns out, though, that it wasn't just the threats Shapley elicited that affected Lesley Wolf's involvement in the case. Just five days after Sobocinski's interview, Batdorf was willing to answer that question.

Q And looking at the individuals who were working on the case outside of IRS, so looking at the AUSA, for instance, to your knowledge, was there any change in the personnel of the AUSA from when it started in 2018 to now? Has there been a change, or has it been generally the same career people working the case the entire time?

A It's my understanding that there had been a change in the AUSA, the prosecution team.

Q And when was the change made? Do you know?

A I believe that it was made in roughly – I think it was May or June of this year when we decided to move forward with the investigation. (99)

According to Politico, Wolf remained involved in the plea negotiations at least as late as June 7. According to Batdorf, Weiss did ultimately remove her.

The process by which Weiss removed his own AUSAs from the prosecution team appears to have taken two steps. First, between June 7 and June 20, Leo Wise started signing things, including things that Lesley Wolf negotiated. While Wolf was never on the Hunter Biden docket, Delaware AUSA Benjamin Wallace was on early filings (and

has not withdrawn from it). According to reports from the day, a number of Weiss' prosecutors attended the scotched plea deal as well.

But since Weiss was named Special Counsel, just Wise and Hines have appeared on filings, using their new title, Assistant Special Counsel. In other words, it seems that Weiss may have belatedly – very, very belatedly – tried to create a prosecutorial clean team that might sustain charges against the President's son.

Along the way, Wise made preposterous claims – such as that he was not aware of any leaked grand jury information – that suggest that on top of removing Wolf from the process, Weiss is serially attempting to sheep-dip the prosecution, to create a team unaffected by the bullshit that has gone on for five years, so as to create the illusion of apolitical, neutral prosecutorial decisions.

On a July 31, 2023, call, Assistant United States Attorney Wise stated he was “not aware” of any leak of grand jury information by the Government during the course of the Government's investigation of our client. Such a statement was surprising given that Mr. Biden's counsel have discussed such leaks with the Government on multiple occasions over the past two years and addressed these leaks in at least four prior letters and countless telephone calls with your Office.¹ We incorporate by reference counsels' prior correspondence on these issues, enclosed herewith as Exhibits A – D.

Not only does that ignore the press blitz Republicans have created, to which both Wise and jurors would have been exposed.

But at least in June, Leo Wise signed things negotiated by Lesley Wolf. You can't claim that Wise represents a team isolated from the original investigative team if he was signing

documents negotiated by Wolf.

That transition, from Wolf to Wise, is a central factual issue that would determine whether DOJ reneged on the terms of the plea agreement, as Hunter's team insists DOJ did. That transition, from Wolf to Wise, will significantly determine whether that diversion agreement really does remain binding – meaning the indictment already charged would need to be dismissed, with statutes of limitation expired even for an Information to backstop any diversion agreement that remained in place.

Again, normally defendants would *never* get access to such details. Normally defendants would *never* contemplate, as Lowell did publicly, getting prosecutors' emails.

But Jim Jordan and James Comer and Steve Castor have been jumping through hoops providing Lowell cause to do just that.

And so, on the fifth anniversary of the day when Hunter Biden purchased a gun, things may start to get interesting.

Update: Hunter's attorneys have filed a consent motion to extend deadlines, with Hunter's initial motions deadline extended to December 11 (provided Judge Noreika approves).

The parties in the above-captioned case have conferred, and respectfully submit the following proposed modified briefing schedule for all pretrial motions: (a) the defendant's pretrial motions to be filed by December 11, 2023; (b) the government's oppositions/responses to be filed by January 16, 2024; and (c) the defendant's replies to be filed by January 30, 2024. The parties will be prepared to argue the motions, if the Court so directs, following completion of all briefing. This proposed schedule excludes deadlines for motions regarding jury selection, discovery, and motions in limine (which can be scheduled at a later time once a trial date is

1 determined).