PARALLEL POISONS: DEREK HINES' (MIS)REPRESENTATIONS ABOUT HIS POST-INDICTMENT INVESTIGATION

As I noted in this post, I confirmed that a warrant that AUSA Derek Hines says he relied on to search Hunter Biden's iCloud content for evidence of firearms violations was not obtained until December 4, 2023, 81 days after Hines obtained an indictment charging Hunter for those violations.

As I also explained, there's no reason to doubt that that warrant is lawful. I imagine the affidavit for it simply quotes a bunch of Hunter Biden's public comments about his addiction to establish probable cause. While it is dickish for a prosecutor to seek evidence that has been readily available for years between charging and trial, so long as he's not relying on the grand jury that was exclusively focused on investigating *that crime*, it would be within the bounds of normal dickish prosecutorial behavior.

Where it starts to be a problem is in the way it undermines the argument at hand. In the same filing where he revealed that warrant, for example, Hines leant heavily on representations Chris Clark made, in a letter sent in October 2022, about a call he had in March 2022 (Hines only includes three pages of a 27-page letter; Politico describes the rest to be an extensive description of the political pressure to charge the gun charges), to claim that prosecutors were always going to charge Hunter for gun crimes, even before Jim Jordan demanded those charges.

> During the course of discussions between counsel for the defendant and counsel for the government, in a letter dated

> October 31, 2022, from Mr. Biden's prior counsel to government counsel, the defense wrote:
>
> > Since December 2020, nearly all of our meetings, phone calls, and correspondence with your Office have related to the Government's investigation of Mr. Biden for possible tax offenses. It was not until a phone call in March 2022—over a year into our cooperative dialogue—that your Office disclosed a potential investigation of Mr. Biden for possible firearms offenses (the "Firearm Investigation"). (footnote)
>
> Exhibit 1 (redacted and includes only relevant pages).
>
> The footnote in the letter stated, "Your Office informed us that the implic ated Title 18 provisions are Sections 922(g)(3), 922(a)(6), and 924(a)(1)(A)." Id. (emphasis added). The defense later released their letter to selected media outlets, 7 but the defendant did not include it in his materials filed with the Court in support of his motion to enforce the diversion agreement. The letter the defense sent in October 2022 shows that the defense was aware that the government was considering all of the charges later returned in the indictment, see Section I.G., as of March 2022. This directly refutes that the charges returned by the grand jury were the product of various statements by out-of-office politicians in 2023, as the defendant claims. [emphasis original]

In October 2022, prosecutors could still and likely were relying on content available on the laptop (including, per Daily Mail, a voice mail

from Joe Biden on October 15, 2018 telling Hunter to get help). But in November 2022, John Paul Mac Isaac published a book claiming, among other things, that the FBI was attempting to access the laptop on December 9, 2019, four days *before* the warrant David Weiss is relying on here, meaning any reliance on the laptop would pose significant problems at trial (even before you consider some forensic problems I'm still trying to nail down).

Here's the passage from JPMI's book — it becomes important below:

> Agent Wilson eventually shook my hand, saying, "Let us know if anyone comes looking for it. Call us immediately."
> "What should I tell them?" I asked, hoping the conversation would never arise.
>
> "Tell them you keep abandoned equipment offsite, like a warehouse location," Agent DeMeo answered, taking over. "Tell them it will take a day for you to check and they should call back the next day. Then immediately text me at my cell number. From now on, only communicate through my cell number. Not Agent Wilson, just me. We need to avoid communicating through, ah, normal channels. I'm sure you can understand. Text me and we will get the equipment back to you and deal with the situation."
>
> [snip]
>
> I went home and called my father. I was relaying the facts when an incoming call notification showed up: Agent DeMeo.
>
> "I'll have to call you back. I have one of the agents calling in," I told my father before switching calls.
>
> "Hello, this is John Paul," I said.
>
> "Hi, my name is Matt," said a voice I

didn’t recognize. “I work with Agent DeMeo and Agent Wilson. Do you have a second? I have some questions about accessing the laptop.”

Confused, I responded, “Sure, what’s going on?”

“Did the laptop come with any cables or a charger? How can I connect the drive to a PC? When I plug it in, it wants to format the drive,” Matt said.

“PCs can’t natively read Mac-formatted disks. You will only be able to access the drive from another Mac.”

This is fairly common knowledge among most computer users, and I was surprised that any kind of tech person wouldn’t know it.

“Sadly, Hunter never left the charger or any other cables,” I went on. “I have a charger and everything you need back at the shop. You guys are welcome to it.”

I was feeling really uncomfortable. This Matt guy definitely didn’t seem to have the training or resources to be performing a forensic evaluation of the laptop. Hadn’t the whole reason for taking the laptop been to get it to a lab for proper evaluation and dissemination?

“Tell him we’re OK and we won’t need to go back to his shop,” Agent DeMeo said in the background. “We’ll call you back if we need to,” Matt said before hanging up.

[snip]

“Hi, it’s Matt again. So, we have a power supply and a USB-C cable, but when we boot up, I can’t get the mouse or keyboard to work.”

I couldn’t believe it—they were trying

> to boot the machine!
>
> "The keyboard and trackpad were disconnected due to liquid damage. If you have a USB-C–to–USB-A adaptor, you should be able to use any USB keyboard or mouse," I said. He related this to Agent DeMeo and quickly hung up.
>
> Matt called yet again about an hour later.
>
> "So this thing won't stay on when it's unplugged. Does the battery work?"
>
> I explained that he needed to plug in the laptop and that once it turned on, the battery would start charging. I could sense his stress and his embarrassment at having to call repeatedly for help. [my emphasis]

So this warrant was likely just parallel construction, an effort to make evidence already in hand admissible at trial. That's also considered perfectly legal, just another of the dickish prosecutorial tactics considered normal.

But Derek Hines can't very well tell Judge Maryellen Noreika that the guy who gave the FBI the laptop would testify, if called as a witness, that the FBI was, "trying to boot the machine!" before obtaining a warrant for it. Or at least before obtaining *this warrant*, the December 13, 2019 warrant that Hines claims to be relying on.

So instead, Hines told her that they first obtained a warrant to search for content on December 4, 2023, 81 days after obtaining an indictment.

The process of parallel constructing that content, if that's what happened, now helps Abbe Lowell make the case that prosecutors weren't *really* considering charging the gun crimes until Jim Jordan demanded they do so, because Hines has implied to Judge Noreika that they didn't obtain a warrant to search for

evidence of that crime until … after they indicted.

Things get worse from there. According to an unrebutted claim Lowell made in his December 11 motion for discovery, ten days *before* Lowell filed that motion, Hines responded to Lowell's inquiry about whether he should expect, "any additional productions in the near-term," by stating he would, "let the discovery stand for itself."

> During a meet and confer phone call on December 1, 2023, Mr. Biden's counsel even asked Messrs. Wise and Hines for a status update of the prosecution's discovery, and specifically whether the government intended to make any additional productions in the near-term or respond to our various discovery request letters, to which Mr. Hines responded that the government would "let the discovery stand for itself."

Hines told Lowell, ten days before Lowell's motions were due, that the discovery spoke for itself.

And then, three days later, he went and got a *new* warrant for content he wants to use at trial against Hunter Biden.

Note that, in the passage that discloses these warrants, Hines *doesn't* say that he provided Lowell the warrant before his motions deadline? He only claims to have given Lowell *the content*, "in advance of the deadline to file motions."

> In August 2019, IRS and FBI investigators obtained a search warrant for tax violations for the defendant's Apple iCloud account. 2 In response to that warrant, in September 2019, Apple produced backups of data from various of the defendant's electronic devices that he had backed up to his iCloud account. 3 Investigators also later came into possession of the defendant's Apple

> MacBook Pro, which he had left at a computer store. A search warrant was also obtained for his laptop and the results of the search were largely duplicative of information investigators had already obtained from Apple. 4 Law enforcement also later obtained a search warrant to search the defendant's electronic evidence for evidence of federal firearms violations and to seize such data. 5
>
> 2 District of Delaware Case No. 19-234M and a follow up search warrant, District of Delaware Case Number 20-165M.
>
> 3 The electronic evidence referenced in this section was produced to the defendant in discovery in advance of the deadline to file motions.
>
> 4 District of Delaware Case No. 19-309M
>
> 5 District of Delaware Case No. 23-507M. [my emphasis]

You need to cross-reference this passage with Hines' response to Lowell's discovery request to discover that Hines doesn't claim to have given Lowell *anything* after obtaining the December iCloud warrant until January 9, almost a month after the motions deadline.

> On October 8, 2023, the defendant made a request for discovery under Federal Rules of Criminal Procedure 16.
>
> On October 12, 2023, the government provided to the defendant a production of materials consisting of over 350 pages of documents as well as additional electronic evidence from the defendant's Apple iCloud account and a copy of data from the defendant's laptop. This production included search warrants related to evidence the government may use in its case-in-chief in the gun case, statements of the defendant

> including his admissions that he was addicted to crack cocaine and possessed a firearm in 2018, and law enforcement reports related to the gun investigation.
>
> On November 1, 2023, the government provided a production of materials to the defendant that was over 700,000 pages and largely consisted of documents obtained during an investigation into whether the defendant timely filed and paid his taxes and committed tax evasion. These documents included information of the defendant's income and payments to drug and alcohol rehabilitation programs in 2018, the same year in which the defendant possessed the firearm while addicted to controlled substances.
>
> On December 7, 2023, a grand jury in the Central District of California returned an indictment (hereafter the "tax indictment") charging the defendant with the following tax offenses:
>
> [snip]
>
> In advance of his initial appearance on the tax indictment, the government made a production of materials to the defendant on January 9, 2024, which included over 500,000 pages of documents and consisted of additional information related to the tax investigation. [my emphasis]

That is, in his selective and vindictive response, Hines has suggested to Judge Noreika that Lowell had the opportunity to suppress content. But in his discovery response, Hines *seems* to suggest that he didn't provide Lowell the warrant that he would need to suppress until after the motions deadline passed, in language that implies the January 9 discovery pertained exclusively to the tax case,

and not the gun case.

Before I get into where Hines may *really* have created a problem for himself, let's consider how it is possible that Hines could have provided Lowell with "the electronic evidence referenced in this section" before he had obtained a warrant to find it.

See the language I've turned red? On October 12, Hines gave Lowell,

- Additional electronic evidence from the defendant's Apple iCloud account
- A copy of data from the defendant's laptop

The texts he quotes in the filing may well be in both of those, the iCloud account and the laptop. They *definitely* were on the laptop; that's where the Daily Mail got them.

It's the iCloud content where things get interesting (but not yet to where Hines *really* created a problem for himself — not yet). When the FBI gets a warrant, they get everything, and then can search for the stuff that fits within their scope. So in either 2019 or — more likely — 2020, they got everything in Hunter's iCloud from 2018. Often, prosecutors will give defendants both a complete and a scoped version of evidence, basically, "here's everything Apple had on you, and here's the stuff that complied with our warrant." So it could just be that Hines provided Lowell with Hunter's iCloud and that's the basis for saying that Lowell had everything before the motions deadline.

But Hines implies that the iCloud content he turned over on October 12 was scoped, pertinent to the gun crime.

If that's right, it means Hines had a *different* warrant than the December 4, 2023 one authorizing the search of content for gun

crimes. It's possibly the one, 20-165M, he describes in a footnote but doesn't explain in the text, the one that would have come after relying on the laptop for seven months without doing much due diligence on it. If so, we'll learn that when the warrant actually gets unsealed on Monday; something to look forward to! Or, it's possible there's one from 2021 or 2022 that Hines doesn't want to talk about, not to us and not to Judge Noreika.

It's like that it's not so much that prosecutors hadn't already gotten the evidence to charge Hunter with gun crimes, it's that they had to get a new warrant to make it admissible at trial without giving Lowell cause to subpoena JPMI to describe how the FBI told him they were booting up Hunter Biden's laptop on December 9, 2019, before they got a warrant.

Or at least before they got this warrant.

If Judge Noreika were to ask about the confusion, Hines might just explain that they got a warrant relying on the laptop obtained in good faith, but have since gotten a new warrant to ensure it's all kosher. Mind you, along the way, he might have to explain that something Abbe Lowell said on that phone call on December 1 — possibly following up on the discovery request he made on October 8 for any record of communications with John Paul Mac Isaac — led him to run out and get a *new* warrant that didn't rely on the laptop.

> Any documents and/or information reflecting communications (whether oral or in writing) between anyone in your Office or any member of the investigative team or their supervisors (including FBI and IRS agents) with John Paul Mac Isaac or any member of his family.

Who knows: Maybe Hines discovered, for the first time, that there were three calls made from Agent DeMeo's phone to JPMI on December 9, 2019,

a phone used, according to JPMI's description of what DeMeo told him because, "We need to avoid communicating through, ah, normal channels." Maybe Hines discovered corroboration for JPMI's claim that the FBI was booting up Hunter Biden's laptop four days before obtaining a warrant. Or at least before obtaining the warrant dated December 13, 2019.

Believe it or not, if they had a warrant — say, one obtained by Bill Barr's office in advance of the time his Chief of Staff sent him a text on December 14 saying, "Laptop on way to you" — all this still might fly. There is a great deal of dickishness that prosecutors routinely get away with.

Where prosecutors get in trouble is *not* collecting evidence after indicting and *not* in parallel constructing evidence and *not* in relying on dodgy warrants so long as they were obtained in good faith — prosecutors get away with that kind of dickishness all the time!

Where prosecutors get in trouble is in misleading judges. And I have to believe that Judge Noreika might not look too kindly on Hines' claim, in his discovery filing, that suggested he turned over the warrants "related to evidence the government may use in its case-in-chief in the gun case" on October 12, as if he turned over all the warrants relating to the gun case.

> This production included search warrants related to evidence the government may use in its case-in-chief in the gun case,

He obviously couldn't have turned over all the warrants relating to the gun case on October 12, because he hadn't obtained the one he claims he is relying on, not for another 53 days yet!

Derek Hines might get away with obtaining evidence after the indictment and parallel construction and good faith reliance on a warrant that relied on the laptop. That's all

normal prosecutorial dickishness. But if Judge Noreika feels like he implied he turned over all the warrants in one filing even while, in another, he was hiding the fact that he didn't turn over the warrant he is actually relying on until well after the motions deadline, *then* Hines might get into hot water.

You can get away with a great deal of prosecutorial dickishness, but you can't mislead a judge.

Mind you, it may not matter. *Whatever* is going on, by obtaining a warrant 81 days after indicting Hunter Biden, Hines has created *the appearance* that he didn't obtain his best evidence until after rushing an indictment that Jim Jordan demanded, making it more likely that this would be that almost unheard of example where a judge rules there's reason to question the prosecutors' decisions.

At the very least, Judge Noreika might just grant Abbe Lowell discovery to try to figure out why Derek Hines got a warrant 81 days after the indictment.

Update: Corrected Judge Noreika's first name.