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Judges Dismiss Nine Felony Cases, Including Murder, Over Darin Smith Misconduct

Wyoming's federal judges on Friday dismissed nine felony-level criminal cases, including one first-degree murder case, due to prosecutorial misconduct through "inflammatory and inappropriate" comments interim U.S. Attorney nominee Darin Smith made to a grand jury.



Clair McFarland

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U.S. Attorney Darin Smith (Matt Idler for Cowboy State Daily)

Wyoming's federal judges on Friday dismissed nine felony-level criminal cases, including one first-degree murder case, due to prosecutorial misconduct brought on by "inflammatory and inappropriate" comments U.S. Attorney nominee Darin Smith made to a grand jury.

But the judges are pausing their dismissal order until Wednesday at 5 p.m. to give the federal government the chance to appeal if it wishes. If the government doesn't want to appeal, the order will go into effect immediately, it says.

The order also dismisses the cases "without prejudice," meaning the government can try to have the defendants charged once again.

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Defense attorneys in late April and early May filed at least 10 motions to dismiss various indictments in felony cases ranging from unlawful firearm possession to child pornography charges to murder, saying Smith had spoiled the grand jury proceedings with inappropriate comments.

Wyoming-based U.S. District Court Chief Judge Kelly Rankin, and Judges Alan B. Johnson and Scott Skavdahl agreed with the defense attorneys in a Friday order.

Smith's statements "cannot be downplayed as 'perhaps overly informal and friendly' conversation," says the judges' order. "They were inflammatory and inappropriate... And, until proven guilty, they are incorrect."

Smith had, according to court documents, referred to the defendants as "murderers" and "bad people," had called the cases "slam dunks." He had also spoken with grand jurors and had handed out his business card to jurors before the judge entered the room.

The U.S. Attorney's Office on May 8 had argued that Smith's comments were "ill-advised" but didn't rise to the level of prejudicing the defendants.



The judges disagreed.

By providing "the business card of a high-ranking government official" and inviting the grand jurors to reach out to him, Smith "appears to curry favor with the grand jurors," says the order. The prosecutor shouldn't be seeking to speak with grand jurors outside of court anyway, it adds.

Prosecutors can't add a "false aura" to the government's case – such as calling all the defendants murderers, wrote the judges.

Only one of the defendants, Jose Ocon, was facing a murder charge.

Grand juries are gatekeepers tasked with deciding whether the government has probable cause to prosecute a crime. They're not an arm of the federal government, but an independent entity.

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“This is not a case where a few off-hand statements were improperly sprinkled throughout the presentation of evidence in one defendant’s case,” says the order. “This misconduct began with some of the first words spoken to the grand jurors by the U.S. Attorney.”

Citing rules of conduct like a mandate for “candor” in court, Smith’s office had, while arguing on his behalf, felt it necessary to disclose some of Smith’s interactions with grand jurors that the defense attorneys had not raised.

“The misconduct continued to permeate the proceedings in the off-record conversations, occurring on the breaks between indictments,” the judges wrote. “This is deeply concerning.”

Smith did not immediately return a voicemail request for comment. The U.S. Attorney’s Office spokeswoman Lori Hogan declined comment Friday.

Why Not Permanently?

Shortly after the three judges’ order, defense attorneys filed motions for reconsideration, saying the cases should have been dismissed “with prejudice,” meaning permanently so they couldn’t be brought again – or the whole office should be disqualified from representing the second round of these cases’ prosecution if they’re brought again; and Smith should be disciplined.

The motions lament that the defense attorneys did not get the chance to reply to the government’s points before the judges filed their order.

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“Consequently, the Court’s Order did not address the government’s institutional suppression of misconduct, nor did it address the necessary secondary sanctions required if the government is permitted to re-present this case,” reads a defense filing.

By letting the government start over with a new grand jury in all the cases, the outcome “inadvertently rewards the United States Attorney’s Office for an institutional cover-up,” says the filing.

Dismissing the cases altogether is a drastic remedy, the filing concedes. But, the defense wrote, it’s “required here because the misconduct was not an isolated lapse in judgment by a single attorney; it metastasized into systemic, institutional failure by the United States Attorney’s Office.”

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'I Would Have Been Fired Instantly'

Because the order is stayed, the defendants who are in jail aren't getting out of jail Friday.

But the defendants wouldn't go free necessarily anyway, since the government could draw up a quick criminal complaint and get a warrant to hold them for a new case, former Wyoming Attorney General Pat Crank told Cowboy State Daily in a Friday phone interview.

Crank also worked as a federal prosecutor under three different U.S. Attorneys from 1990-2002, including Dave Freudenthal and Matt Mead, who would later become governors of Wyoming.

Crank voiced shock at the nature of the claims against Smith.

"In my tenure, everything we said to the grand jury was recorded by the court reporter, and that was all to protect the sanctity of that process," said Crank. If he happened to see a grand juror in the entryway to the courthouse, he'd say something like "Good morning," but that was it, he added.

"But to hand out business cards and tell them we're going to bring murderers," said Crank, "If I did that I would have been fired instantly."

Crank said that conduct is "outlandish."

He said he cannot recall an indictment being dismissed from that office for prosecutorial misconduct, either in his 12 years or from keeping loose tabs on it since that tenure.

Crank said at least two of the office's most senior attorneys – "guys that had 15, 20 years in the U.S. Attorney's Office – supervised the conduct of all of the assistants in front of a grand jury."

He said they were "exceedingly careful to be ethical and do it right."

Crank served as Wyoming AG from 2003 to the autumn of 2007.

The Cases

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and are for:

- Brian Johnson, who was accused of possessing a pistol despite being a felon, and whom court documents say pointed a pistol at a Riverton Police Department officer in February while police responded to a report of a male assaulting two females.
- Dennison Antelope, who was accused of possessing a gun despite being a felon.
- Wolf Elkins Duran, who was accused of keeping child pornography of prepubescent children and bestiality on his phone.
- Matthew Miller Jr, who was accused of possessing and intending to distribute drugs.
- Cheyenne Swett, who was accused of possessing guns despite being a felon, which police say they discovered after Swett shot himself in the abdomen.
- Michael Hopper, who was accused of possessing pistols despite being a felon.
- Mathew Jacoby, who was accused of possessing and intending to distribute a “burrito” like package of meth.
- Richard Allen, who was accused of possessing a short-barreled rifle that was not registered to him, and despite being a convicted felon.

Pending Confirmation

At least as of Monday, Wyoming’s two U.S. Sens. John Barrasso and Cynthia Lummis were planning to vote in favor of Smith’s confirmation.

The Northern Arapaho Business Council, which is the executive branch of the Northern Arapaho Tribe, voiced its opposition to his confirmation in a Thursday statement.

“The Tribe finds these actions deeply troubling and inconsistent with the solemn responsibility entrusted to the United States Attorney’s Office,” the statement says. “Federal prosecutors are expected to uphold the integrity of the justice system, not undermine it through reckless comments, improper familiarity with grand jurors, or conduct that creates the appearance of bias and prejudice.”

“The stakes on the Wind River Reservation are far too high for carelessness,” the statement adds.

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While counties throughout Wyoming elect their prosecutors locally, tribal members implicated in felony crimes on the reservation are prosecuted, generally, by the Wyoming-based U.S. Attorney.

That means the president, not the people, chooses the top prosecutor of tribal members implicated in felonies on the reservation.

“If defendants are later found to have been denied fair treatment in the grand jury process, victims and their families will once again bear the consequences of a failed federal system,” says the statement. “The people of the Wind River Reservation deserve better.”

The tribe concluded by calling on the U.S. Department of Justice to emphasizes professionalism, impartiality and respect for constitutional rights.

The tribal government expects Wyoming’s senators to confirm him, however, the statement adds.

“The Northern Arapaho Tribe calls upon the United States Department of Justice to ensure that all prosecutions involving crimes committed on the Wind River Reservation are conducted with professionalism, impartiality, and respect for the constitutional rights of all parties involved. Justice for Native victims and families cannot be achieved through shortcuts, arrogance, or conduct that undermines public confidence in the federal judicial system.

“The federal government has a trust responsibility to Tribal Nations and Indian people. That responsibility includes the fair, competent, and ethical prosecution of violent crimes occurring within Indian Country. The Northern Arapaho Tribe expects that responsibility to be honored.

“Although Mr. Smith likely has secured Wyoming Federal delegate support for his confirmation as Wyoming’s U.S. Attorney. Nonetheless, the Northern Arapaho Business Council knows there are better candidates to serve Wyoming and does not support Mr. Smith’s nomination or confirmation as Wyoming’s next U.S. Attorney.”

Update: This story has been updated to include a later filing by the defense attorneys, responding to the judges' order.

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