IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	C.A. No. 0910012063
	)	
KAYLA J. HATCHER,	)	
	)	
Defendant.	)	

Submitted: December 13, 2010
Decided: December 20, 2010

MEMORANDUM OPINION AND ORDER

Michelle Whalen, Esquire, Deputy Attorney General, State of Delaware Department of Justice, Carvel State Office Building, 820 N. French Street, Wilmington, Delaware 19801. Attorney for the State of Delaware.

Louis B. Ferrara, Esquire, Ferrara & Haley, 1716 Wawaset Street, P.O. Box 188, Wilmington, Delaware, 19899-0188. Attorney for Defendant Kayla J. Hatcher.

DAVIS, J.

Defendant Kayla Hatcher was arrested on October 16, 2009 and charged with driving under the influence of alcohol ("DUI") in violation of Title 21, Section 4177 (a) (1) of the Delaware Code of 1974, as amended. A bench trial was held on October 18, 2010. At the conclusion of trial, the Court found Ms. Hatcher guilty of DUI. At the request of counsel, the Court delayed sentencing of Ms. Hatcher and ordered a pre-sentence investigation. The pre-sentence report revealed that the instant offense is to be considered a third offense for sentencing purposes.[1] Counsel for Ms. Hatcher notified the

[1] 21 *Del. C.* §4177(d)(3).

Court that it may lack subject matter jurisdiction over the instant offense. After an initial meeting with counsel, the Court requested that the parties brief the issue of whether the Court has subject matter jurisdiction. Upon due consideration of the briefs of the parties, a hearing and the Court's own review of the applicable law on the issues raised here, the Court has determined and holds that it lacks subject matter jurisdiction over an offense that must be sentenced as a third offense class G felony and thus will vacate the judgment of guilt in this case. In addition, the Court vacates its denial of Ms. Hatcher's motion to suppress.

I. BACKGROUND

a. Factual background

On the evening of October 16, 2010 and into the early morning hours of October 17, 2010, the Delaware Department of Highway Safety's Checkpoint Strikeforce program conducted a roadblock DUI checkpoint (the "Checkpoint") on Route 2 in Newark Delaware. Delaware State Police Corporal James Dempsey was assigned to work at the Checkpoint. Corporal Dempsey's duties included making contact with drivers passing through the Checkpoint and conducting DUI investigations. Ms. Hatcher, who was driving, was stopped at the Checkpoint and made contact with Corporal Dempsey.

In response to Corporal Dempsey's questions, Ms. Hatcher advised that she was driving home from Firewaters bar. Ms. Hatcher's eyes were blood-shot and glassy. There was a strong odor of alcoholic beverage emanating from Ms. Hatcher's breath. Ms. Hatcher admitted that she had been drinking that evening and that she was under 21 years old. Corporal Dempsey observed a case of beer in the back seat of the vehicle.

Corporal Dempsey ordered Ms. Hatcher to park her vehicle and get out for further investigation.

Corporal Dempsey escorted Ms. Hatcher to the mobile command center for administration of an intoxilyzer test. Ms. Hatcher submitted a breath sample and the intoxilyzer machine measured her breath alcohol concentration at .185 grams of alcohol per two hundred ten liters of breath. Ms. Hatcher was placed under arrest and charged with DUI. She was released from custody that evening and given notice to appear in court.

b. Initial procedural history

Ms. Hatcher appeared at Justice of the Peace Court 11 for an arraignment on October 31, 2009. At arraignment, Ms. Hatcher appeared *pro se*, entered a plea of not guilty, and requested a trial. The case was transferred to Justice of the Peace Court 15 and scheduled for trial on March 12, 2010.[2] On February 23, 2010, Louis B. Ferrara, Esquire, entered his appearance on behalf of Ms. Hatcher and requested that this case be transferred to the Court of Common Pleas. The case was transferred to the Court of Common Pleas and arraignment was scheduled for April 5, 2010. Ms. Hatcher filed a form pursuant to Court of Common Pleas Criminal Rule 10 (c) through which she waived the reading of the information, plead not guilty and waived trial by jury.

Ms. Hatcher's first appearance in the Court of Common Pleas was on May 12, 2010 for a DUI Case Review Calendar. At this time, the State, represented by a deputy attorney general, and Mr. Ferrera had an opportunity to review the case, discuss a plea, establish deadlines for motions and discovery, and set a trial date. The docket indicates

[2] The original notice from Justice of the Peace Court 15 indicates that trial was scheduled for Sunday, February 28, 2010. However, subsequent notice indicates that trial was scheduled for Friday, March 12, 2010.

that Ms. Hatcher rejected a plea offer at DUI Case Review. The Court ordered that the State produce discovery prior to August 18, 2010 and either party file motions before September 18, 2010. Ms. Hatcher's counsel filed a motion to suppress (the "Motion") on June 30, 2010. The Motion was scheduled to be heard on the day of trial. Trial was scheduled on October 18, 2010.

c. Motion hearing and trial

On October 18, 2010, the Court heard the Motion. The Motion, which raised a number of arguments relating to the arrest and intoxilyzer testing, did not seek to have the case dismissed for lack of subject matter jurisdiction. After an evidentiary hearing and argument, the Court denied the Motion. The State then moved all non-hearsay evidence into the trial record and proceeded to present its case-in-chief. At the conclusion of trial, the Court found Ms. Hatcher guilty of DUI.

d. Sentencing

Immediately after trial, the Court addressed sentencing. The State notified the Court that, based on Ms. Hatcher's driving record, this offense was a second offense for sentencing purposes.[3] Mr. Ferrara agreed that Ms. Hatcher's record indicated this was a second offense and that the Court would be required to impose a minimum mandatory sentence of 60 days at Level 5. Ms. Hatcher requested that the sentencing hearing be delayed because she has a child and needs to make appropriate child care arrangements before serving a Level 5 sentence. The State requested a full pre-sentence investigation because of a concern about possible convictions from the State of Maryland which may

[3] Ms. Hatcher's driving record indicates defendant elected to enter the DUI First Offenders program to resolve a DUI arrest which occurred on December 11, 2008. The driving record does not list any other DUI arrests or convictions.

not be included on Ms. Hatcher's driving record. Based on these requests, the Court ordered a pre-sentence investigation and scheduled sentencing for December 3, 2010.

The pre-sentence investigation office's report was completed and sent to the Court and the parties for review on November 30, 2010. The pre-sentence investigator discovered that this offense was actually Ms. Hatcher's third offense for sentencing purposes. This information was relayed to counsel for the parties. At this point, for the first time, Ms. Hatcher's counsel contacted the Court and raised the concern that the Court may not have subject matter jurisdiction over this case.[4]

The parties met for an office conference with the Court on December 1, 2010 to address the issue of subject matter jurisdiction. At that conference, the Court determined that sentencing would be continued to a later date and the parties would have an opportunity to submit written arguments on the issue of subject matter jurisdiction. The Court scheduled sentencing for Tuesday, December 14, 2010 and asked counsel to submit written arguments by Monday, December 13, 2010.[5]

At the hearing, the State and Ms. Hatcher's counsel both argued that the Court had jurisdiction and that the Court should proceed with sentencing Ms. Hatcher as a second offender. After hearing argument, the Court made a preliminary ruling, holding

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[4] Ms. Hatcher's criminal history shows a conviction for Reckless Driving Alcohol Related, reduced from a DUI charge, in addition to the previously mentioned First Offender's Election.

[5] The Court informed counsel that it would like the following issues addressed:

1. Jurisdiction.
    a. Under the facts and circumstances present here, does the Court of Common Pleas have subject matter jurisdiction to sentence Kayla Hatcher?
    b. Assuming the Court of Common Pleas does not have jurisdiction to sentence Kayla Hatcher, what is the appropriate course of action with respect to addressing the unsentenced conviction of Kayla Hatcher?
    c. Assuming the Court of Common Pleas has subject matter jurisdiction to sentence Kayla Hatcher, what is your position on sentencing and the basis for that position (e.g., minimum level 5 time and fines because…., or 6 months and $1000 fine because….)?
2. Can the State elect, either expressly or through conduct, to pursue an offense that is sentenced under section 4177(d)(3) instead as an offense sentenced under section 4177(d)(2)?

that the Court of Common Pleas does not have subject matter jurisdiction over an offense which the legislature has determined must be sentenced as a felony and, therefore, the Court must vacate the judgment of guilt with respect to Ms. Hatcher. The Court advised counsel that it would prepare a written opinion to supplement its preliminary ruling on the record at the hearing. This is the Court's memorandum opinion and order following the sentencing hearing. The Court also incorporates, by reference, into this memorandum opinion and order the Court's findings and holdings set forth at the hearing held on December 14, 2010.

II. DISCUSSION

a. Subject matter jurisdiction in DUI cases.

A subject matter jurisdictional defect cannot be forfeited or waived.[6] Subject matter jurisdiction refers to a courts statutory or constitutional power to adjudicate a case.[7] Lack of subject matter jurisdiction may be raised at any time by the parties or by the Court on its own initiative. If a court lacks subject matter jurisdiction, it does not have the authority to resolve the charges and must dismiss the case.[8]

The subject matter jurisdiction of the Court of Common Pleas is defined by statute.[9] The Court's subject matter jurisdiction over criminal matters is expressly limited to misdemeanors and violations in which jurisdiction is not vested exclusively in another court.[10] First and second offense DUI charges are a violation of Delaware's motor vehicle code.[11] Jurisdiction for first and second offense DUI charges are criminal

[6] *State v. Stoesser*, 183 A.2d 824, 825 (Del. Super. 1962).
[7] *United State v. Cotton*, 535 U.S. 625, 630 (2002).
[8] *See Shearin v. State*, 2000 WL 710089 (Del. Super. 2000).
[9] 11 *Del. C.* § 2701(b).
[10] *Id*.
[11] 11 *Del. C.* § 4177(d)(1), (2).

charges not otherwise exclusively vested in another court. Therefore, the Court of Common Pleas has subject matter jurisdiction over first and second offense DUI charges.[12]

The Court of Common Pleas does not have subject matter jurisdiction over third and subsequent offense DUI charges.[13] Section 4177(d)(12) specifically states that "[t]he Court of Common pleas…*shall not* have jurisdiction over offenses which *must* be sentenced pursuant to (d)(3), (4) or (9)" – convictions which must be sentenced as a felony.[14]

Although the DUI statute specifically states that the Court of Common Pleas does not have jurisdiction over (d)(3) and (d)(4) – third and fourth offenses; the statute is silent on the matter of jurisdiction over fifth, sixth, seventh and subsequent offenses. This is clearly a drafting error. The current DUI statute was amended on July 13, 2009. Prior to its revision, 21 *Del. C.* § 4177(d)(3) controlled sentencing for third offense DUI and (d)(4) controlled sentencing for fourth and subsequent offense DUI convictions. The amended statute created separate statutory paragraphs and sentencing schemes for third, fourth, fifth, sixth, and seventh and subsequent offense convictions – (d)(3) – (d)(7) respectively. However, provisions of the DUI statute which referred to (d)(3) and (d)(4) clearly were not updated to reflect the amended statute.

The Court recognizes that third and subsequent offenses *must* be sentenced as a felony and, therefore, the Court of Common Pleas does not have jurisdiction over such DUI offenses. Importantly, the Court recognizes the legislature's specific intent that the

[12] *See also* 11 *Del. C.* § 4177(d)(12) (limiting the jurisdiction of the Court of Common Pleas to section 4177(d)(1) and (2) offenses).
[13] *State v. Zickgraf* 2005 WL 4858668 (Del. Super. 2005), *aff'd*, 897 A.2d 768 (Del. 2006).
[14] 21 *Del. C.* § 4177(d)(12) (*emphasis added*).

Court of Common Pleas *shall* not have jurisdiction over any DUI offense which *must* be sentenced as a felony.

b. The State does not have to prove prior DUI convictions as elements of the DUI offense at trial.

The DUI statute does not require that the State prove prior offenses as an element of a subsequent offense.[15] The Delaware General Assembly did not codify separate offenses of misdemeanor and felony DUI. In either case, the substantive elements prescribed by the DUI statute are the same.[16]

It is the statute itself that allows a judge to increase the sentence based on the convicted defendant's prior convictions.[17] In addition to sections 4177(d)(1)-(7), section 4177(d)(11) provides:

> [a] person who has been convicted of prior or previous offenses of this section, as defined in § 4177B(e) of this title, need not be charged as a subsequent offender in the complaint, information or indictment against the person in order to render the person liable for the punishment imposed by this section on a person with prior or previous offense under this section. However, if at any time after conviction and before sentence, it shall appear to the Attorney General or to the sentencing court that by reason of such conviction and prior or previous convictions, a person should be subjected to paragraph (d)(3) or (4) of this section, the Attorney General *shall* file a motion to have the defendant sentenced pursuant to those provisions. If it shall appear to the satisfaction of the court at a hearing on the motion that the defendant falls within paragraph (d)(3) or (4) of this section, the court *shall* enter an order declaring the offense for which the defendant is being sentenced to be a felony and *shall* impose a sentence accordingly.[18]

This section allows the Attorney General to move, after conviction, to have a subsequent offender sentenced under (d)(3) or (d)(4). However, this section does not

[15] *Talley v. State*, 841 A.2d 308 (Del. 2003) (published at 2003 WL 23104202); *Stewart v. State*, 829 A.2d 936 (Del. 2003).
[16] *Talley*, 2003 WL 23104202, at *2
[17] *Id.*; 21 *Del. C.* § 4177(d)(1)-(7).
[18] 21 *Del. C.* § 4177(d)(11).

contain a provision addressing the problem arising in the instant case – the Attorney General proceeding with a DUI prosecution in the Court of Common Pleas and, after conviction but before sentencing, determining that the charge must be sentenced as a third or subsequent felony offense. Section 4177(d)(11) cannot apply here. As stated above, the statute and the clear legislative intent is that third and subsequent offenses *must* be sentenced as a felony and that the Court of Common Pleas does not have jurisdiction over such DUI offenses. While it could be drafted more clearly, the reference to "the sentencing court" in section 4177(d)(11) must therefore refer only to the Superior Court.

c. Prosecutorial Discretion.

The decision whether or not to prosecute and what charge to file or bring rests entirely in the prosecutor's discretion.[19] As recently noted, Delaware courts have long recognized prosecutorial discretion when pursuing criminal charges.[20] Absent a colorable due process or equal protection claim, the prosecutor's charging decisions are not subject to judicial oversight, "even if the Attorney General handles similar cases differently."[21] Additionally, it has long been the law of this State that the Attorney General has the sole power to choose the forum for prosecution.[22]

The General Assembly has limited the prosecutorial discretion of the Attorney General with respect to DUI offenses.[23] The General Assembly has expressly stated the amount of discretion able to be exercised by the Attorney General in deciding when and

[19] *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *State v. Anderson*, 2010 WL 4513029, at *5 (Del. Super. Nov. 1, 2010).
[20] *Anderson*, 2010 WL 4513029, at *5.
[21] *Id.*; *see also Sandra V. Anderson v. State*, 2010 WL 3103400, at *1 (Del. Super. June 3, 2010).
[22] *State v. Fischer*, 285 A.2d 417, 420 (Del. 1971).
[23] 21 *Del. C.* § 4177(d)(9).

to what extent a subsequent offense DUI can be prosecuted as a lesser offense DUI. Section 4177(d)(9) specifically provides: "[the mandatory sentencing provisions] of this title notwithstanding, the Attorney General may move the sentencing court to apply the provisions of paragraph (d)(3) of this section to any person who would otherwise be subject to a conviction and sentencing pursuant to paragraph (d)(4) of this section."[24] This is the only section of the DUI code that allows the Attorney General to charge a lesser offense as a matter of prosecutorial discretion – *i.e.*, a fourth offense DUI as a third offense DUI. There is no similar statutory grant of discretion for charging and prosecuting a felony DUI as a misdemeanor DUI.

Importantly, prior to this case, the Attorney General has recognized that his normally broad prosecutorial jurisdiction is limited in DUI offenses. In *State v. Zickgraf*, both in the Superior Court and before the Supreme Court, the Attorney General briefed and argued the legal position that there is very limited discretion granted to the Attorney General in charging and prosecuting fourth offense DUI offenders as either first or second offense DUI offenders.[25]

d. This Court lacks subject matter jurisdiction here.

This case presents the unique situation where the State prosecuted through judgment a third offense felony DUI as a second offense misdemeanor DUI. Does the Court have subject matter jurisdiction to adjudicate Ms. Hatcher's third offense DUI as a misdemeanor DUI based on waiver, prosecutorial discretion or some other theory? Here, the State asks the Court to find that it has subject matter jurisdiction based upon

[24] *Id*.
[25] 2006 WL 936653, at *15-17 (Del. February 21, 2006) (Appellate Brief) (arguing that the Attorney General is not empowered to forego the mandatory provisions of the DUI law and try fourth offenses as first or second offense DUIs).

prosecutorial discretion and the Attorney General's overall conduct in prosecuting this matter in the Court of Common Pleas and uphold the judgment of guilt. Ms. Hatcher also wants the Court to treat her DUI as a second offense. As set forth herein, the Court disagrees with the reasoning of the parties.

The State argues that it is a matter of prosecutorial discretion as to whether the Attorney General can pursue Ms. Hatcher's offense as a second offense DUI or a third offense DUI. Basically, the State contends in this Court that the Attorney General may waive prosecuting a DUI as a felony that would otherwise be eligible for sentencing as a third or subsequent offense by prosecuting the matter in the Court of Common Pleas instead of the Superior Court.

The State compares the scheme used to determine whether a DUI is a felony or misdemeanor to the scheme used to determine whether a theft charge is classified as a misdemeanor or felony.[26] A theft is to be classified as a felony if the value of the property received is more than $1500.00.[27]

This Court agrees that, absent an abuse of discretion, it is within the Attorney General's authority to waive an element of the offense of theft and prosecute the crime as a misdemeanor. However, as is discussed above, DUIs differ from other criminal offenses. The DUI statute does not require that the State prove prior offenses as an element of a subsequent offense. Whether a DUI is a felony or a misdemeanor depends upon a consideration of prior offenses.[28] In the overall analysis here, that is critical

[26] 11 *Del. C.* § 841.
[27] *Id*.
[28] *Talley v. State*, 841 A.2d 308 (Del. 2003) (published at 2003 WL 23104202); *Stewart v. State*, 829 A.2d 936 (Del. 2003).

because section 4177 -- as presently drafted and interpreted by the courts and the State -- limits the prosecutorial discretion of the Attorney General.

The Court recognizes that this case is not the first time that the Attorney General has filed charges in the Court of Common Pleas and later realized that the case is a third or subsequent felony offense. It is, however, the first instance the Court is aware of where the Attorney General obtained a conviction in the Court of Common Pleas and later determined that the offense is subject to sentencing as a third or subsequent offense felony DUI. In cases where the jurisdictional defect is discovered prior to trial, the Attorney General has a practice of entering a *nolle prosequi* in the lower court -- the Court of Common Pleas or the Justice of the Peace Court -- and bringing an indictment in Superior Court.[29]

Prior to reaching its decision, this Court considered prior cases, although factually distinguishable, where the State entered a *nolle prosequi* in the Court of Common Pleas and sought an indictment in Superior Court. Upon review of the case law, the case most similar to this one, and the one that provides the Court guidance here, is *State v. Zickgraf*.[30]

In *Zickgraf*, the Attorney General originally filed a DUI charge in JP Court. Zickgraf elected to have the case removed to the Court of Common Pleas. While the case

[29] *See State v. Pruitt*, 805 A.2d 177, 178 (Del. 2002) (State filed charges in the JP Court, entered a *nolle prosequi*, and then filed an indictment in Superior Court); *State v. Strzalkowski*, 2010 WL 2961519 (Del. Super. 2010) (the Attorney General filed a DUI charge against defendant in the Court of Common Pleas, entered a *nolle prosequi*, and subsequently brought a felony indictment in Superior Court); *Baker v. State*, No. 0803038600 (Del. Super. December 16, 2009) (State filed DUI charges against Baker in JP Court, Baker had the charges transferred to the Court of Common Pleas, the State entered a *nolle prosequi* on the charge, and the State filed a felony indictment in Superior Court); *State v. Zickgraf*, 2005 WL 4858668 (Del. Super. 2005), *aff'd*, 897 A.2d 768 (Del. 2006) (the Attorney General originally filed the charge in JP Court, Zickgraf had the case removed to the Court of Common Pleas, the Attorney General noticed the prior convictions and entered a *nolle prosequi*, and subsequently filed an indictment in Superior Court).

[30] 2005 WL 4858668 (Del. Super. 2005), *aff'd*, 897 A.2d 768 (Del. 2006).

was pending in the Court of Common Pleas, the Attorney General noticed the prior convictions, entered a *nolle prosequi* on the charges, and subsequently brought a felony indictment in Superior Court. Zickgraf then moved to dismiss the indictment because the State had previously filed the charges in the Court of Common Pleas.

The Superior Court denied the motion to dismiss and specifically stated that the Court of Common Pleas did not have jurisdiction over the offense because defendant's alleged crime, if proven, fell under section 4177 (d)(3). The Superior Court stated: "[i]t is clear …that the Attorney General's Office erred in filing this indictment *in a court that lacked jurisdiction*."[31] The Supreme Court, upon consideration of the briefs of the parties, affirmed the Superior Court's judgment.[32]

While not in the decision of the Superior Court or the Supreme Court, the Attorney General and defendant in *Zickgraf* briefed and argued the issue arising in the instant case – whether the Court of Common Pleas can adjudicate an offense which falls under section 4177 (d)(3) – (7).[33] In *Zickgraf*, the State, arguing the exact opposite of what is argued in this case, asserted that the "clear language of the DUI statute" requires an interpretation that the Court of Common Pleas can not try and sentence a felony DUI offender.[34] The State contended that "[t]here is very limited discretion granted to the Attorney General and the courts dealing with [felony] DUI offenders – the classification of the crime as a felony and accompanying punishment is set by the legislature."[35] The State also identified, as this Court did above, that the legislature specifically inserted a provision granting discretion to the Attorney General to reduce a section 4177(d)(4)

[31] *Zickgraf*, 2005 WL 4858668, at *1 (*emphasis added*).
[32] 897 A.2d 768 (Del. 2006) (published at 2006 WL 941969)
[33] 2006 WL 936653, at *15-17 (Del. February 21, 2006) (Appellate Brief).
[34] *Id.* at *15.
[35] *Id*. at *16.

offense to a (d)(3) offense for sentencing purposes. The State concluded its argument in *Zickgraf* by proffering that a third or subsequent offense DUI must be tried in the Superior Court and that "[n]o other court has jurisdiction."

Absent more specific authority, the decisions in *Zickgraf* control. Although *Zickgraf* involves a fourth offense DUI initially brought in the Court of Common Pleas and dismissed prior to trial instead of a third offense DUI brought in the Court of Common Pleas and tried by the Attorney General through judgment, those distinctions do not make a difference here. The Superior Court – after briefing and argument by the parties on the issues of prosecutorial discretion, waiver and the framework of section 4177 – explicitly holds that the Court of Common Pleas does not have subject matter jurisdiction over felony DUIs.

As stated above, lack of subject matter jurisdiction may be raised at any time by the parties or by the Court on its own initiative. If a court lacks subject matter jurisdiction, it does not have the authority to resolve the charges and must dismiss the case.[36] The Court of Common Pleas does not have jurisdiction over offenses which must be sentenced as a third or subsequent offense.[37] The offense in this case is a third offense and, as such, must be sentenced by the Superior Court. The Court of Common Pleas is empowered to vacate a void judgment.[38] The Court is required to vacate its prior entry of judgment of guilt and its decision to deny the Motion.

[36] *See Shearin v. State*, 2000 WL 710089 (Del. Super. 2000).
[37] *State v. Zickgraf*, 2005 WL 4858688 (Del. Super. 2005).
[38] *State v. Mayne*, 1991 WL 236992, at *2 (Del. Super. October 18, 1991); see also *Stroesser*, 183 A.2d at 826.

III. CONCLUSION

For the above stated reasons, the Court of Common Pleas lacks subject matter jurisdiction over an offense which must be sentenced as a third offense pursuant to section 4177(d)(3). As the offense in this case is required to be sentenced as a third offense, the Court of Common Pleas is not a court of competent jurisdiction. The Court's denial of the Motion is a nullity and hereby **VACATED**. Moreover, the Court's finding of **GUILT** on October 18, 2010 is a nullity and hereby **VACATED**.

The Court will not dismiss this action at this time. Given the facts and circumstances present here and in the interests of justice, the Court will grant the State's request that it be given an opportunity to present the matter to the grand jury, which is scheduled for Monday, December 20, 2010. If no action is taken by January 3, 2010, the Court will dismiss the case at that time.

IT IS SO ORDERED.

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Eric M. Davis
Judge