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6 ULYSSES SIMPSON GRANT EARLY

7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
501 "I" STREET, SACRAMENTO, CA 95814

10 UNITED STATES OF AMERICA,

11
12 Plaintiff,

13 v.

14 RYAN McGOWAN, ROBERT
15 SNELLING, ULYSSES SIMPSON
GRANT EARLY IV, and THOMAS
16 LU,

17 Defendants.

CASE NO.: 2:12-CR-00207 TLN

NOTICE OF MOTION, DECLARATION
OF COUNSEL AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT ULYSSES
SIMPSON GRANT EARLY, IV's
MOTION TO VACATE TRIAL,
EXCLUDE TIME AND SET STATUS
CONFERENCE.

Date: October 31, 2013

Time: 9:30 a.m.

Judge: Troy L. Nunley (TLN)

Courtroom: 2, 15th Floor

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19 To this Honorable Court and the United States Attorney for the Eastern
20 District of California:

21 Please take NOTICE that at the dates, times and places indicated herein, the
22 Defendant ULYSSES SIMPSON GRANT EARLY, IV will move this Court for an
23 order vacating the currently set trial, excluding time and setting a status
24 conference in May of 2014. This motion is based on the record in this matter,
25 judicially noticeable facts, the declaration of counsel and the attached
26 Memorandum of Points and Authorities. Authority for this motion is found in the
27 Federal Rules of Criminal Procedure, relevant case law, federal and state statutory
28 law and the Local Rules of the Eastern District of California.

DECLARATION OF COUNSEL

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1. On October 15, 2013 the Supreme Court of the United States granted a petition for certiorari in *Abramski v. United States*, Case No.: 12-1493. A true and correct copy of the Supreme Court Docket for that case is attached as Exhibit A.
2. On that same day, I notified counsel for all co-defendants and AUSA William Wong representing the United States of this fact.
3. I provided them all with copies of the party and amici briefs filed in support of the petition for certiorari in the *Abramski* matter. If necessary, those briefs can be forwarded to this Court for review.
4. The questions presented for review in *Abramski* were framed by the Petitioner as:
 - a. When a person buys a gun intending to later sell it to someone else, the government often prosecutes the initial buyer under 18 U.S.C. § 922(a)(6) for making a false statement about the identity of the buyer that is “material to the lawfulness of the sale.” These prosecutions rely on the court-created “straw purchaser” doctrine, a legal fiction that treats the ultimate recipient of a firearm as the “actual buyer,” and the immediate purchaser as a mere “straw man.”
 - b. The lower courts uniformly agree that a buyer’s intent to resell a gun to someone who cannot lawfully buy it is a fact “material to the lawfulness of the sale.” But the Fourth, Sixth, and Eleventh Circuits have split with the Fifth and Ninth Circuits about whether the same is true when the ultimate recipient can lawfully buy a gun. The questions presented are:
 - i. Is a gun buyer’s intent to sell a firearm to another lawful buyer in the future a fact “material to the lawfulness of the sale” of the firearm under 18 U.S.C. § 922(a)(6)?

1 ii. Is a gun buyer's intent to sell a firearm to another lawful buyer
2 in the future a piece of information "required . . . to be kept" by a
3 federally licensed firearm dealer under § 924(a)(1)(A).

4 5. This nearly exact legal issue is currently pending in Defendant Early's
5 Motion to Dismiss currently set before this Court on the October 31, 2013,
6 9:30 a.m. Law and Motion Calendar (Criminal).

7 6. I have met and conferred with opposing counsel and counsel for all co-
8 defendants and there appears to be a consensus that the *Abramski* case and
9 this present case are similar enough that the Supreme Court's *Abramski*
10 opinion, when it is issued, will have a significant impact on evidentiary
11 issues and legal issues that will be before this Court during the trial in this
12 case.

13 7. This request for a continuance is not being sought for delay or in bad faith.
14 The Defendants and the government's attorneys have been working
15 diligently toward getting the case ready for trial. (E.g., several pre-trial
16 motions to dismiss have been filed with pending hearing dates and the due
17 dates for motions in limine and trial briefs are set for November 7, 2013.)

18 8. The case has already been declared complex by this Court. (Docket Entry #
19 85, 05/23/2013)

20 9. Defendant EARLY will not be prejudiced by any delay, in fact the prejudice
21 to enduring the stress and expense of a trial may be eliminated all together
22 by the outcome in the *Abramski* case.

23 10. I have met and conferred with counsel for the co-defendants and they have
24 indicated to me that they have no objection to delaying the trial.

25 11. I spoke to AUSA William Wong on October 24, 2013 and he has no objection
26 to the Court considering this motion on October 31, 2013.

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1 I declare under penalty of perjury that the foregoing is true and correct and
2 this declaration was executed in San Jose, CA on October 25, 2013.

3 /s/ Donald Kilmer

4 Attorney for Defendant EARLY

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6 **STATEMENT OF THE LAW**

7 This Court (unlike California State Courts) does not operate on “waiver”
8 principles when it comes to trial delay. The Court is required to make specific
9 findings with respect to the exclusion of time between indictments and trials.
10 However, there is authority for the Court to delay this trial based on statutory
11 language found in the Speedy Trial Act.

12 18 U.S.C. § 3161(h)(7) *et seq.*, provides:

13 (7) (A) Any period of delay resulting from a continuance
14 granted by any judge on his own motion or at the request
15 of the defendant or his counsel or at the request of the
16 attorney for the Government, if the judge granted such
17 continuance on the basis of his findings that the ends of
18 justice served by taking such action outweigh the best
19 interest of the public and the defendant in a speedy trial.
20 No such period of delay resulting from a continuance
21 granted by the court in accordance with this paragraph
22 shall be excludable under this subsection unless the court
23 sets forth, in the record of the case, either orally or in
24 writing, its reasons for finding that the ends of justice
25 served by the granting of such continuance outweigh the
26 best interests of the public and the defendant in a speedy
27 trial.

24 (B) The factors, among others, which a judge shall
25 consider in determining whether to grant a continuance
26 under subparagraph (A) of this paragraph in any case are
27 as follows:

28 (i) Whether the failure to grant such a continuance
in the proceeding would be likely to make a continuation

1 of such proceeding impossible, or result in a miscarriage
2 of justice.

3 (ii) Whether the case is so unusual or so complex,
4 due to the number of defendants, the nature of the
5 prosecution, or the existence of novel questions of fact or
6 law, that it is unreasonable to expect adequate
7 preparation for pretrial proceedings or for the trial itself
8 within the time limits established by this section.

9 (iii) Whether, in a case in which arrest precedes indictment,
10 delay in the filing of the indictment is caused because the arrest occurs
11 at a time such that it is unreasonable to expect return and filing of the
12 indictment within the period specified in section 3161(b) [18 USCS §
13 3161(b)] or because the facts upon which the grand jury must base its
14 determination are unusual or complex.

15 (iv) Whether the failure to grant such a continuance in a case
16 which, taken as a whole, is not so unusual or so complex as to fall
17 within clause (ii), would deny the defendant reasonable time to obtain
18 counsel, would unreasonably deny the defendant or the Government
19 continuity of counsel, or would deny counsel for the defendant or the
20 attorney for the Government the reasonable time necessary for
21 effective preparation, taking into account the exercise of due diligence.

22 (C) No continuance under subparagraph (A) of this paragraph shall
23 be granted because of general congestion of the court's calendar, or
24 lack of diligent preparation or failure to obtain available witnesses on
25 the part of the attorney for the Government.

26 ARGUMENT

27 There would certainly be a miscarriage of justice to put the Defendants, the
28 government, this Court and a Jury through a trial, regardless of the outcome, if the
29 United States Supreme Court were to issue an opinion in the *Abramski* case that
30 would be dispositive of evidentiary and/or legal issues in this case.

31 This case has already been declared complex by the Court in a prior order.
32 The fact that the United States Supreme Court has granted certiorari in *Abramski*
33 is itself a finding that the High Court considers the *Abramski* facts and/or legal

1 issues "novel." The similarities of the facts and legal issues of the *Abramski* case to
2 this case would support the same finding by this Court.

3 This continuance is not being sought on the basis of Court congestion. This
4 matter is already set for trial on December 2, 2013. Nor has there been any lack of
5 diligence by the government or the defendants. The parties are continuing to
6 exchange discovery. Defendants have pretrial motions pending and are on track to
7 file Motions in Limine and Trial Briefs in accordance with the previous scheduling
8 order.

9
10 **CONCLUSION**

11 This Court should make the appropriate findings under the Speedy Trial Act
12 to vacate the currently set trial date, set a status conference for some time during
13 the Spring of 2014 and exclude time between now and then based on the facts and
14 law presented in this motion.

15 Respectfully Submitted on October 25, 2013 by:

16 /s/ Donald Kilmer

17 Attorney for Defendant EARLY
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SUPREME COURT
OF THE UNITED STATES

No. 12-1493

Title: Bruce James Abramski, Jr., Petitioner
v.
United States

Docketed: June 25, 2013

Linked with 12A955

Lower Ct: United States Court of Appeals for the Fourth Circuit

Case Nos.: (11-4992)

Decision Date: January 23, 2013

Questions Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

- Apr 2 2013 Application (12A955) to extend the time to file a petition for a writ of certiorari from April 23, 2013 to June 22, 2013, submitted to The Chief Justice.
- Apr 4 2013 Application (12A955) granted by The Chief Justice extending the time to file until June 21, 2013.
- Jun 21 2013 Petition for a writ of certiorari filed. (Response due July 25, 2013)
- Jul 19 2013 Order extending time to file response to petition to and including August 26, 2013.
- Jul 25 2013 Brief amici curiae of Steve Stockman, et al. filed.
- Jul 25 2013 Brief amicus curiae of NRA Civil Rights Defense Fund filed.
- Aug 26 2013 Brief of respondent United States in opposition filed.
- Sep 9 2013 Reply of petitioner Bruce James Abramski, Jr. filed.
- Sep 11 2013 DISTRIBUTED for Conference of September 30, 2013.
- Oct 7 2013 DISTRIBUTED for Conference of October 11, 2013.
- Oct 15 2013 Petition GRANTED.

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| ~~Name~~                                    | ~~~~Address~~~~                                                                     | ~~Phone~~      |
|---------------------------------------------|-------------------------------------------------------------------------------------|----------------|
| Attorneys for Petitioner:                   |                                                                                     |                |
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| Party name: Bruce James Abramski, Jr.       |                                                                                     |                |
| Attorneys for Respondent:                   |                                                                                     |                |
| Donald B. Verrilli Jr.<br>Counsel of Record | Solicitor General<br>United States Department of Justice                            | (202) 514-2217 |

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Party name: Steve Stockman, et al.