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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 LKK

NOTICE OF MOTION, and
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT ULYSSES SIMPSON
GRANT EARLY, IV's MOTION TO
DISMISS – VINDICTIVE/SELECTIVE
PROSECUTION
[Fed Rule of Crim Pr 12]

Date: October 31, 2013

Time: 9:30 a.m.

Judge: Troy L. Nunley (TLN)

Courtroom: 2, 15th Floor

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19
20 Please take NOTICE that at the dates, times and places indicated herein, the
21 Defendant ULYSSES SIMPSON GRANT EARLY, IV will move this Court for an
22 order dismissing this case. This motion is based on the record in this matter,
23 judicially noticeable facts, the concurrently filed declaration of counsel and the
24 attached Memorandum of Points and Authorities.

25 Authority for this motion is found in the Federal Rules of Criminal
26 Procedure, relevant case law, federal and state statutory law and the Local Rules of
27 the Eastern District of California.
28

1 INTRODUCTION

2 Preliminary Facts

3 Defendant EARLY seeks dismissal from this case under Federal Rule of
4 Criminal Procedure 12(b) as the indictment fails to state an offense. Assuming
5 that the government will be heard to complain that these pretrial motions are not
6 being heard within 21 days of arraignment pursuant to Local Rule 430.1(c),
7 Defendant would seek an order from the Court that good cause exists to waive this
8 rule in this case for the following reasons:

- 9 a. There is no prejudice to the government as they were put on notice
10 that this motion would be filed. (See footnote 2 of EARLY's Motion to
11 Compel, Doc # 64.)
- 12 b. Defendant EARLY was diligent in filing pre-trial motions for
13 discovery. (Docket Entries #: 64, 65, 67, 79, 83, various dates)
- 14 c. The case was declared complex and the government was ordered to
15 produce additional discovery in this case as late as June 14, 2013.
16 (Docket Entry # 85, 05/23/2013)
- 17 d. Thus the defendant(s) in this case risked having the indictment merely
18 amended if they filed a Rule 12 motion without all of the government's
19 discovery being disclosed.
- 20 e. Defendant EARLY subsequently received additional discovery on April
21 19, 2013 and again on July 3, 2013.

22 Defendant EARLY has already filed notices – pursuant to Federal Rule of
23 Criminal Procedure 12.3 – that he reserves the right to make the following defenses
24 during pre-trial motions and trial itself (Docket Entry #66, 02/12/2013):

- 25 1. Entrapment by Estoppel.
- 26 2. Vindictive Prosecution.
- 27 3. Selective Prosecution.
- 28

STATEMENT OF FACTS

- 1
2 1. Since January 1, 2001, California statutory law and various administrative
3 regulations have created a roster of "Safe Handguns." See: California Penal
4 Code §§ 31900 - 32110 inclusive. California law makes it a crime for any
5 person to manufacture, import or offer for retail sale any firearm that is not
6 listed on the state's roster of "Safe Handguns."¹ There are exceptions to this
7 statutory scheme. Relevant to this case are:
 - 8 a. The sale, loan or transfer of any firearm pursuant to California Penal
9 Code § 28050. (Sales between private parties.) Penal Code § 32110(a).
 - 10 b. The sale or purchase of any firearm to any sworn members of any
11 police department or sheriff's office. California Penal Code §
12 32000(b)(4).
- 13 2. The Indictment (Doc #1) filed on May 31, 2012 references this mechanism for
14 non-law-enforcement persons to acquire off-roster firearms ¶ 4:

15 Pursuant to State law, certain firearms known as roster"
16 firearms are not on the approved list of firearms and may not be
17 offered for sale to the public as a new firearm by FFLs in
18 California, but may only be purchased new by sworn law
19 enforcement officers. Such firearms may later be lawfully sold
20 by a law enforcement officer to the public in a "private party"
21 transaction conducted through an FFL.
- 22 3. On February 24, 2012 California Assemblyman Dickinson introduced AB
23 2640 for the purpose of amending Penal Code § 32000(b)(4) so that any
24 firearm that is not on the roster of "Safe Handguns" that is purchased by a
25 sworn peace officer, could not subsequently be sold any person not also
26 exempted under § 32000(b)(4). (i.e., also a sworn peace officer) A copy of the
27 bill as amended in Assembly on April 9, 2012 is attached to the Declaration
28 of Counsel as **Exhibit A**.

¹ The roster itself is wholly arbitrary and is the subject of a civil action challenging the this statutory scheme here in the Eastern District. *Pena, et al., v. Lindley*, 2:09-CV-01185 KJM-CKD. Dispositive motions are set for Nov. 22, 2013.

- 1 4. As noted above the Indictment (Doc #1) was filed on May 31, 2012.
- 2 5. On September 28, 2012 Governor Brown vetoed AB 2640.
- 3 6. Therefore at all relevant times, as admitted in ¶ 4 of the Indictment, it is
4 perfectly legal for a sworn peace officer to purchase an “off-roster” firearm
5 and subsequently sell it to a someone who is not a sworn peace officer. It
6 goes without saying that any subsequent sale must comply with federal and
7 state law for private party firearms sales. (i.e., use of an FFL, background
8 check, waiting period, proof of safe-storage, etc...)
- 9 7. Defendant EARLY is charged with a single count (# 6) of Conspiracy to Make
10 a False Statement With Respect to a Firearm Record. [Doc #1, page 9]
- 11 8. The Indictment alleges that an unindicted con-conspirator (C.K.) who was a
12 Roseville Police Officer bought an “off-roster” firearm on April 29, 2010 and
13 that the transaction was conducted by a federally licensed firearm dealer.
14 This transaction is lawful under California Penal Code ¶ 32000(b)(4).
- 15 9. The Indictment further alleges that the Roseville Police Officer subsequently
16 sold the same firearm to Defendant EARLY on May 27, 2010 in a private
17 party transaction that is lawful under Penal Code §§ 28050 and 32110(a).
- 18 10. The gravamen of the conspiracy charge is that the Roseville (sworn) peace
19 officer (C.K.), the FFL (co-defendant SNELLINGS) and Defendant EARLY
20 entered into an agreement to commit the unlawful act of making a false
21 statement in connection with a firearm purchase in violation of 18 U.S.C. §
22 924(a)(1)(A), by having the sworn peace officer (C.K.) make a false statement
23 in response to Question 11.a., on ATF Form 4473 (5300.9). See **Exhibit B**
24 attached to declaration of counsel.
- 25 11. In addition to an ATF Form 4473, the State of California requires a
26 concurrent form for its records called a Dealer Record of Sale. (DROS) See
27 California Penal Code §§ 28100 - 28250.

28 ////

1 12. The government has now produced, the ATF Form 4473s from the April 29,
2 2010 and the May 27, 2010 transactions and both of the California DROS
3 from those transfers.

4 13. These documents are evidence that both transactions complied with federal
5 and state law. That the paperwork was complete and truthful and that all
6 background checks and waiting periods were complied with.

7 14. The snare used to manufacture the conspiracy charge against EARLY is
8 based on the theory that someone (C.K.) who intends to resell an object later,
9 is not a “transferee/buyer” at the time of initial acquisition.² In other words:

- 10 a. Even though California substantive law permits exactly the kind of
11 transaction described in Count Six of the Indictment,
- 12 b. Even though the California legislature sought to close this “loop-hole”
13 with legislation in the 2012 legislative session,
- 14 c. Even though the Governor of California vetoed that bill after this case
15 was filed, thus substantively ratifying this conduct in Count Six as
16 legal under California law,
- 17 d. Even though the U.S. Government admits in ¶ 4 of its Indictment that
18 this series of transactions is lawful,
- 19 e. Even though ATF Form 4473 offers a false choice to the
20 “transferee/buyer” in question 11.a., and
- 21 f. Even though these “co-conspirators” left a paper-trail that no self-
22 respecting swindler would ever contemplate,
- 23 g. That somehow it is appropriate to charge EARLY with a felony for
24 what amounts to – at best – a erroneous legal conclusion about the
25 definition of “transferee/buyer.”

27 ² The government has declined to charge C.K. with engaging in the Business
28 of Dealing in Firearms Without a License [18 U.S.C. § 922(a)(1)(A)]. Count One of
the Indictment makes that charge against Co-Defendant RYAN McGOWAN.

1 15. There are other infirmities with the government's theory of the case that are
2 set forth on the ATF Form 4473 itself:

3 a. At the top of the form is a warning that says:

4 **WARNING: You may not receive a firearm if prohibited by**
5 **Federal or State law. This information you provide**
6 **will be used to determine whether you are**
7 **prohibited under law from receiving a firearm.**
8 **Certain violations of the Gun Control Act, 18 U.S.C.**
9 **¶¶ 921 *et seq.*, are punishable by up to 10 years**
10 **imprisonment and/or up to a \$250,000 fine.**

11 But the transaction contemplated by Count Six is lawful under federal
12 and state law and the indictment admits exactly that.

13 b. ¶ 2 of Count Six of the Indictment (Doc #1) falsely quotes the 4473.

14 i. From the Indictment: "Are you the actual buyer of this
15 firearm(s) listed on the form?"

16 ii. But ATF Form 4473 itself asks: "Are you the actual
17 transferee/buyer of the firearm(s) listed on this form?"
18 (Underlined for emphasis.)

19 This raises a reasonable question about whether the conjunctive term
20 "transferee" broadens the definition of buyer. And this is assuming
21 that the extraordinarily narrow definition of "buyer" implied by the
22 indictment is constitutionally, statutorily and administratively sound.

23 c. Perhaps the government can be forgiven their mis-statement in the
24 indictment because page 2 of 6 of the ATF Form 4473 makes the same
25 mistake substituting "buyer" for "transferee/buyer" in the verification
26 above signature block #16 which itself is titled: "Transferee's/Buyer's
27 Signature."

28 d. Furthermore on page 3 of 6 under the title: **Purpose of Form** the
government reiterates that the 4473 is to insure the lawfulness of the
transaction. In other words, its purpose is not to ensnare and

1 criminalize transactions by ordinary persons through the use of hyper-
2 technical legal definitions. Interestingly, paragraph three (3) under
3 this heading permits any person to make a correction, even after the
4 firearm has been transferred, to the Form 4473 when the inaccuracy is
5 discovered. No statute of limitations for corrections is contemplated by
6 the form. If the government conceded in their own indictment that the
7 transaction described in Count 6 is legal under federal and state law,
8 but that “technically” a term was misunderstood, wouldn’t the more
9 just remedy be to unwind the transaction and correct the form rather
10 than charge a felony?

11 e. Finally, there is on page 4 of 6 a wholly incomplete, misleading and
12 irrational definition of “Actual Transferee/Buyer.”

13 i. In the present case, each and every time the object firearm
14 changed hands we have a two-party transaction, and the federal
15 and state paperwork, background checks and waiting periods
16 were all complied with.

17 ii. Yet, in its explanation of what constitutes a permissible *three-*
18 *party transaction*, The United States Government contends
19 that it is permissible for Mr. Brown to buy a firearm from the
20 FFL with his own money and then make a gift of the firearm to
21 Mr. Black, and thus lawfully answer “YES” to this question,
22 provided Mr. Brown has no reason or cause to believe Mr. Black
23 is prohibited under 18 U.S.C. § 922(g), (n) or (x).³

24
25 ³ In other words, Mr. Brown must pass an F.B.I. background check to get the
26 gun from the FFL, but no background check is necessary for the third party (gift)
27 beneficiary Mr. Black so long as Mr. Brown “believes” that Mr. Black is not
28 prohibited. If the government’s interest in requiring these forms is to make sure
there is a record of the transaction and a means of insuring lawful possession (i.e.,
the recipient of the gun is not a felon, mentally ill, fugitive, etc.), then this informal
legal “advice” on the back of the 4473 form isn’t even rational.

1 16. The United States Government makes other statements to the gun-buying
2 public that are contrary to the theory of liability advanced by this indictment.
3 The United States Department of Justice, Bureau of Alcohol, Tabacco,
4 Firearms and Explosives, Office of Enforcement Programs and Services,
5 Firearms Program Division, puts out a publication: "FEDERAL FIREARMS
6 REGULATIONS REFERENCE GUIDE, ATF Publication 5300.4, Revised
7 September 2005." The shorthand title is: "The White Book."
8 [<http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf>] Among
9 other references to federal law, The White Book contains letter rulings and
10 FAQs relating to firearms laws and various permutations of firearm
11 transactions. Relevant to this case, from page 195 of that publication
12 (attached as **Exhibit C** to the Declaration of Counsel):

- 13 a. **(P60) An organization without a firearms license wishes to**
14 **acquire a firearm from a licensee for the purpose of raffling**
15 **the firearm at an event. How does the licensee comply with the**
16 **Brady law?**
- 17 b. [Answer] The licensee must comply with the Brady law by conducting
18 a NICS check on the transferee. If the licensee wishes to transfer the
19 firearm to the organization, a representative of the organization must
20 complete a Form 4473 and a NICS check must be conducted on that
21 representative prior to the transfer of the firearm. Alternatively, if the
22 licensee transfers the firearm directly to the winner of the raffle, the
23 winner must complete a Form 4473 and a NICS check must be
24 conducted on the raffle winner prior to the transfer. Please note, if the
25 organization's practice of raffling firearms rises to the level of being
26 engaged in the business of dealing in firearms, the organization must
27 get its own Federal firearms license (and the examples below would
28 not apply).
- i. Example 1: A licensee transfers a firearm to the organization
sponsoring the raffle. The licensee must comply with the Brady
Law by requiring a representative of the organization to
complete the Form 4473 and undergo a NICS check. As
indicated in the instructions on the Form 4473, when the buyer

1 of a firearm is a corporation, association, or other organization,
2 an officer or other representative authorized to act on behalf of
3 the organization must complete the form with his or her
4 personal information and attach a written statement, executed
5 under penalties of perjury, stating that the firearm is being
6 acquired for the use of the organization and the name and
7 address of the organization. Once the firearm had been
8 transferred to the organization, the organization can
9 subsequently transfer the firearm to the raffle winner without a
10 Form 4473 being completed or a NICS check being conducted.
11 This is because the organization is not an FFL. However, the
12 organization cannot transfer the firearm to a person who is not a
13 resident of the State where the raffle occurs and cannot
14 knowingly transfer the firearm to a prohibited person.

15 ii. Example 2: The licensee or his or her representative brings a
16 firearm to the raffle so that the firearm can be displayed. After
17 the raffle, the firearm is returned to the licensee's premises.
18 The licensee must complete a Form 4473 for the transaction and
19 must comply with the Brady Law prior to transferring the
20 firearm to the winner of the raffle. If the firearm is a handgun,
21 the winner of the raffle must be a resident of the State where
22 the transfer takes place, or the firearm must be transferred
23 through another FFL in the winner's State of residence. If the
24 firearm is a rifle or shotgun, the FFL can lawfully transfer the
25 firearm to the winner of the raffle as long as the transaction is
26 over-the counter and complies with the laws applicable at the
27 place of sale and the State where the transferee resides.

28 iii. Example 3: If the raffle meets the definition of an "event" at
which the licensee is allowed to conduct business pursuant to 27
CFR 478.100, the licensee may attend the event and transfer the
firearm at the event to the winner of the raffle. As in Example 2,
the FFL must complete a Form 4473 and comply with the Brady
law and the interstate controls in transferring the firearm.

iv. Please note, procedures used in Examples 2 and 3 ensure that
the winner is not a prohibited person and that there is a record
of the final recipient of the firearm in the raffle. [18 U.S.C.
922(t) and 922(a)(1)(A)]

1 In other words, the United State Government admits that its Form 4473 does
2 not cover all possible permutations of how guns are marketed and sold, and
3 therefore concedes that its definition of “buyer/transferee” is open (wide-open)
4 to interpretation. The government’s safety net for these circumstances is to
5 insure that the final recipient of the firearms is “not a prohibited person” and
6 “that there is a record of the final recipient of the firearm.” That is exactly
7 what is alleged in this case. There is not an indictment’s worth of difference
8 between the way the government alleges the transactions occurred in this
9 case and the way they can occur, with the government’s blessings, in the
10 examples on the 4473 and in the White Book example at page 195.

11 17. Nor is this the only somewhat misleading information that the United States
12 Government puts out that conflicts with the government’s theory of the
13 indictment. (i.e., that private party sales are somehow tainted with
14 conspiracies.) Attached as **Exhibit D** to the Declaration of Counsel is an
15 “Open Letter To All Federal Firearms Licensees” dated January 16, 2013. In
16 this letter the U.S. Department of Justice, Bureau of Alcohol, Tobacco,
17 Firearms and Explosives, encourages FFLs to facilitate private party
18 transfers between private sellers as long as the transactions comply with
19 federal and state law.

20 18. Finally, consider some additional implications of the government’s theory of
21 Count #6 of the indictment:

22 That because “C.K.” had formed the intent, at the time he
23 signed the Form 4473, to later resell the firearm to
24 EARLY; he somehow doesn’t qualify as a
25 “buyer/transferee” and thus made a false statement in
26 connection with the purchase of a firearm.

27 a. 18 U.S.C. § 921 *et seq.*, sets forth the statutory definitions to be used in
28 connection with Chapter 44 of Title 18. Nowhere in those definitions is
the term “buyer/transferee” defined. For that matter, neither are the
terms “buyer” or “transferee” defined as separate terms.

- 1 b. The closest we get to a hint of the statutory definition of transferee is
2 at 18 U.S.C. § 922(t)(1)(C) which requires the transferor to verify the
3 identity of the transferee with a photo ID.
- 4 c. Title 27 CFR Chapter II, Part 478 contains the administrative rules for
5 interpreting the congressional statute. Subpart B sets forth the
6 definitions at § 478.11. (This is set forth in the White Book starting on
7 page 35.) Nowhere in that list of definitions is the term
8 “buyer/transferee” defined. Nor for that matter, are the terms “buyer”
9 or “transferee” defined as separate terms.
- 10 d. The closest the statutes and regulations come to identifying what
11 constitutes a “transferee” is under Title 27 CFR Chapter II, Part 479 –
12 Machine Guns, Destructive Devices, and Certain Other Firearms. But
13 these are the regulations for interpreting Title 26 U.S.C. Chapter 53 of
14 the Internal Revenue Code otherwise known as the National Firearms
15 Act, which regulates – among other things – machine guns, saw-off
16 shotguns and silencers. The relevant part of that identification and/or
17 definition states that: “[A] certifying official has no information
18 indicating that the receipt or possession of the firearm would place the
19 transferee in violation of State or local law or that the transferee will
20 use the firearm for other than lawful purposes.” 27 CFR § 479.85.

21 With the government’s theory of the case against Defendant EARLY (not to
22 mention his liberty) riding on a definition of “buyer/transferee” – one would
23 think that the government could produce a statutory/regulatory definition of
24 the term that would give constitutionally significant notice of what is and is
25 not included in that definition. Because with all the actions taken by the
26 parties (proper forms filled out, background checks performed, waiting
27 periods observed, etc...) being legal by the government’s own admission, then
28 this case becomes a “thought crime” case.

- 1 19. See Counsel's Declaration in Support of Motion to Compel for a sworn
2 statement and exhibits. Briefly:
- 3 a. Detective Tom Koontz (#76) is employed by the Sacramento County
4 Sheriff's Department.
- 5 b. He questioned Defendant EARLY on or about November 3, 2011.
- 6 c. He left a business card identifying himself as a special investigator
7 with the Sacramento County Sheriff's Office. See **Exhibit E**.
- 8 d. On or about November 8, 2011, Assistant U.S. Attorney William S.
9 Wong caused a Subpoena to Testify Before the Grand Jury to be issued
10 to Mr. EARLY. The subpoena date and time was set for December 15,
11 2011 at 9:00 a.m. at 501 "I" Street in Sacramento. **Exhibit F**.
- 12 e. Mr. EARLY arrived at the date and time on the Subpoena with
13 Counsel. (Donald Kilmer)
- 14 f. Prior to that meeting EARLY's counsel contacted Assistant U.S.
15 Attorney William S. Wong and inquired about state and federal use
16 immunities.
- 17 g. The inquiry about state use immunity was prompted by the fact that
18 Defendant EARLY was interviewed early by a Sacramento Sheriff's
19 Deputy. Additionally, the United States Attorney's Office for the
20 Eastern District of California purports to participate in a program that
21 targets gun crime called: "Project Safe Neighborhood" which "promotes
22 partnerships among local, state and federal law enforcement agencies
23 and prosecutor's offices to target gun crime." See **Exhibit G**.
- 24 h. EARLY's counsel documented the substance of that contact in a
25 December 15, 2011 letter that was hand delivered to the AUSA on the
26 morning of December 15, 2011. **Exhibit H**.
- 27 i. Even after capitulating on state use immunity, and offering to testify
28 before the Grand Jury with only federal use immunity, Assistant

1 United States Attorney William S. Wong informed Mr. EARLY and his
2 lawyer at the December 15, 2011 meeting that Mr. EARLY was now a
3 target of a criminal investigation.

4 j. Mr. EARLY's home was subsequently searched and state criminal
5 charges were filed against him, in addition to the federal charges
6 herein. *People v. Early*, Case No.: 12 F 06812 charged EARLY with
7 one count of possession of an unregistered "Assault Weapon." The
8 charge has nothing to do with Count Six of the federal indictment.
9 There was quite a bit of overlap on the investigating officers who have
10 executed (so far) two search warrants at Mr. EARLY's home. This
11 state case was dismissed after the Defense prevailed on a Motion to
12 Suppress under Penal Code § 1538.5.

13 k. As it turns out, Mr. EARLY's inquiry about state and federal use
14 immunity was not paranoid.

15 l. A follow-up letter was sent to Assistant U.S. Attorney William Wong
16 on February 28, 2012 recapitulating the status of the case. **Exhibit I**.

17 m. These facts make out a prima facie case of Vindictive Prosecution in
18 retaliation for EARLY exercising a constitutional right.

19 20. After EARLY was indicted in the federal action, he was contacted by a friend
20 of his named George Singewald who is a sworn peace officer in a local law-
21 enforcement agency. Mr. Singewald is apparently friendly with Greg
22 Halstead who is an investigating officer in this federal case who works for the
23 Sacramento Police Department and is designated as ATF TFO in the reports
24 and memoranda in this case. Halstead is also an investigating office in the
25 State case: *People v. Early*. **Exhibit J**, sets out a series of text messages
26 between EARLY and Mr. Singewald from before this case broke, with dates
27 up through and including September 24, 2012.

28 a. On August 20, 2012 at 9:11 p.m. there is a text message mentioning

1 "Greg." This is ATF TFO Greg Halstead.

2 b. ATF TFO Greg Halstead is mentioned again on September 5, 2012 at
3 12:45 p.m. and again at 4:25 p.m.

4 c. ATF TFO Greg Halstead is mentioned again on September 14, 2012 at
5 5:41 p.m.

6 d. ATF TFO Greg Halstead is mentioned again on September 24, 2012 at
7 10:45 a.m.

8 The entire series of text messages indicate, or at least imply, that
9 government agents prosecuting this case may have been improperly
10 interfering in the Attorney/Client relationship EARLY had with Mr. Kilmer
11 by encouraging EARLY to change counsel in order to get a better deal with
12 Mr. Wong of the U.S. Attorney's office. [Note: No allegation is made (at this
13 time) that Mr. Wong was aware of this liaison.]

14 21. The discovery already produced in this matter indicated that dozens, if not
15 scores of firearms were purchased by sworn peace officers and then sold in
16 private party transfers to non-peace officers. Yet only Mr. EARLY has been
17 singled out for selective prosecution.

18
19 **ARGUMENT**

20 22. This is essentially a place-holder motion to preserve EARLY's appellate
21 rights on the denial of discovery on these issues in an order by the Magistrate
22 Judge Edmund Brennan. The magistrate declined to order the government
23 to turn over material requested by the defense to make an adequate showing
24 for this motion. The government was directed to submit an order of the those
25 proceedings, but has thus far failed to do so. (Docket Entry 83, April 9, 2013)

26 23. Nevertheless, with only the prima facie evidence he can produce through his
27 own resources, EARLY hereby requests an order dismissing this case under
28 the alternative theories of vindictive or selective prosecution.

1 24. For Selective Prosecution, see generally: *United States v. Armstrong*, 517 U.S.
2 456 (1996); *United States v. Darif*, 446 F.3d 701 (7th Cir. 2006). Of all the
3 grand jury witnesses who were subpoenaed, who also bought guns from law
4 enforcement officers, only EARLY has been indicted. The fundamental right
5 being impacted is EARLY's Second Amendment right to keep and bear arms
6 and the chilling effect this prosecution will have on the general public.

7 25. The Due Process Clause protects defendants from vindictive treatment based
8 on the exercise of a constitutional or statutory right. "Vindictiveness in this
9 context means the desire to punish a person for exercising his fundamental
10 rights." *United States v. Barner*, 441 F.3d 1310 (11th Cir. 2006) The
11 constitutional right that EARLY sought to invoke that instigated this
12 prosecution was his Fifth Amendment right to avoid giving sworn testimony
13 against himself in the grand jury proceedings that could be used against him
14 in state court proceedings. And his Sixth Amendment right the Counsel of
15 his choice. Only after EARLY made inquiries about, and then did not even
16 insist on, immunity from state charges did the AUSA inform Mr. EARLY that
17 he went (in a lightening flash) from being a witness to being a target.

18 26. Given the weakness of the case against EARLY (See concurrently filed
19 Motion to Dismiss.), the AUSA's actions can only be described as vindictive.
20

21 **CONCLUSION**

22 WHEREFORE, Defendant respectfully requests that this Court grant his
23 request for a dismissal of this criminal action against him.

24 Respectfully Submitted on October 10, 2013,

25 /s/ Donald Kilmer

26 Donald Kilmer, Attorney for EARLY
27
28