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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 – FAILURE TO STATE AN  
OFFENSE [Fed Rule of Crim Pr 12]

Date: October 31, 2013

Time: 9:30 a.m.

Judge: Troy L. Nunley (TLN)

Courtroom: 2, 15<sup>th</sup> Floor

18  
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."<sup>1</sup> 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  
bill as amended in Assembly on April 9, 2012 is attached to the Declaration  
of Counsel as **Exhibit A**.

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27 <sup>1</sup> The roster itself is wholly arbitrary and is the subject of a civil action  
28 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.<sup>2</sup> 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.”

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27 <sup>2</sup> 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).<sup>3</sup>

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24  
25 <sup>3</sup> 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.

ARGUMENT

I. Count Six of the Indictment Fails to State an Offense

Where an indictment fails to allege an element, it fails to state an offense. *United States v. Wylie*, 919 F.2d 969, 972 (5<sup>th</sup> Cir. 1990); *United States v. Pupo*, 841 F.2d 1235, 1239 (4<sup>th</sup> Cir. 1988). An indictment also fails to state an offense when the facts alleged fall beyond the scope of the relevant criminal statute as a matter of statutory interpretation. *United States v. Hediathy*, 392 F.3d 580, 587 (3<sup>rd</sup> Cir. 2004). Under Ninth Circuit law, the omission of an element of the offense is grounds for automatic reversal. *United States v. Omer*, 395 F.3d 1087, 1088 (9<sup>th</sup> Cir. 2005).

Count Six of the indictment turns on the definition of “buyer/transferee.” The government’s theory is that “C.K.” intended all along to resell the firearm he purchased on April 29, 2010 to Defendant EARLY at a later date, and that in fact that sale occurred on May 27, 2010. And that because he had the intent to later resell the firearm, he cannot be a “buyer/transferee” and therefore made a false statement with respect to firearm records that are required under federal law. Both sales were conducted through a licensed a (by federal and state authorities) firearm dealer, Co-Defendant SNELLINGS.

In order to prove a conspiracy, the government must prove the requisite intent to commit the substantive crime. *United States v. Montgomery*, 384 F.3d 1050, 1062 (9<sup>th</sup> Cir. 2004) In a recent case dealing this violations of 18 U.S.C. § 924(a)(1)(A), the Ninth Circuit insisted that context is important. *United States v. Johnson*, 680 F.3d 1140, 1146. (9<sup>th</sup> Cir. 2012).

[T]he statute limits the types of falsehoods that are actionable to those that relate to information required under law to be kept by federally licensed firearms dealers. It makes sense that Congress would wish to ensure the accuracy of all the information that firearms dealers must keep as part of their permanent records, whether or not that information relates to the lawfulness of the ultimate sale. There is testimony that the accuracy of the information contained on Form 4473, including the name and address of the actual buyer, is of paramount importance to investigators when tracing weapons used in violent crimes.

1 In the present case, there is no allegation that “C.K.” immediately turned the  
2 gun over to EARLY (a true straw purchase, regardless of EARLY’s eligibility).  
3 Quite the contrary, the indictment alleges that a second transaction occurred a  
4 month later through the same licensed FFL that “C.K.” used for the first purchase.  
5 Which presumably means that all federal and state laws were obeyed relating to  
6 background checks, waiting periods and registration of the firearm.

7 Since there is no allegation in the indictment that the second 4473 contained  
8 false statements or that EARLY was otherwise prohibited from acquiring the  
9 firearm from “C.K.” during in the second transaction, there is no crime under 18  
10 U.S.C. § 924(a)(1)(4) because the government was never deprived of any of the data  
11 required by the federal record-keeping requirements. “C.K.”’s statements (address,  
12 status, eligibility, etc...) on the 4473 were accurate for the time period from when he  
13 bought the gun until he sold it to EARLY. And EARLY’s statements were/are  
14 accurate from the time he bought the gun from “C.K.” forward. It is only the  
15 government’s creative use of a vague and ambiguous definition of “buyer/transferee”  
16 that gets this case passed a grand jury.

17 First, as noted above, there is no statutory/regulatory definition of the term  
18 “buyer/transferee” that is sufficient to put any sane person on notice that their  
19 liberty is at stake if they apply this definition wrong.

20 Second, it is just as reasonable to assume that “buyer/transferee” includes  
21 “buyer for later resale” as it is to assume that “buyer/transferee” excludes “buyer for  
22 later resale” in the absence of a statutory/regulatory definition.

23 Third, without a statutory/regulatory definition of “buyer/transferee” the  
24 government should be bound by the common-law or state definition of such a term.  
25 California Civil Code § 3445(c) defines “Transferee” as “the person to whom  
26 property was transferred or an obligation was incurred, or the successors or assigns  
27 of the person.” California’s Uniform Commercial Code § 2103(1)(a) defines “buyer”  
28 as “a person who buys or contracts to buy goods.”

1 Similar California definitions of buyer and/or transferee can be found  
2 throughout California's statutory and case law. None of them preclude a buyer  
3 from being a reseller at a later time. "C.K."s subjective intent at the time of the  
4 first purchase is irrelevant as long as the information he conveyed was accurate at  
5 the time of the initial sale and for the duration of the record-keeping requirements  
6 for that gun. Only by giving the gun to EARLY without the second round of record-  
7 keeping could "C.K."s conduct be charged as a crime, let alone a conspiracy.

8 By failing to allege that the second transaction was conducted without the  
9 government's record-keeping requirements can this indictment withstand judicial  
10 scrutiny under the relevant case law and rules. Count Six must be dismissed.

11  
12 II. The Definition of "Buyer/Transferee" is Overbroad, Vague and Ambiguous

13 As noted above, there is no statutory/regulatory definition of the term  
14 "buyer/transferee." Furthermore, whatever hints exist in various government  
15 publications actually support Defendant's equally reasonable definition.

16 Take for example the scenario described on the 4473 itself relating to Mr.  
17 Brown buying Mr. Black a gun as a gift. In that transaction, the government is  
18 deprived of the data it needs as part of the federal record-keeping requirements.  
19 After all Mr. Brown needs, is to be ignorant of Mr. Black's criminal status for him to  
20 hand the gun over to Mr. Black. Furthermore the tracing data available to any  
21 future law enforcement investigation stops with Mr. Brown's 4473 information.  
22 The government is actually in worse position relating to that transaction on their  
23 own form, then they are in this present case.

24 Take for (another) example the situations described for auctions or raffle  
25 drawings in the White Book at page 195. The government blesses the first  
26 transaction that includes statements on the 4473 by that "buyer/transferee" who is  
27 running the auction/raffle, even though that person knows that they will not  
28 ultimately end up with the gun. What makes that set of transactions copacetic is

1 the second set of records that are created. The second 4473 insures that the second  
2 transferee is eligible and creates the trace data necessary for law enforcement.

3 These transactions, sanctioned by the government's own publications, are  
4 indistinguishable from what "C.K." and EARLY did as described in the indictment.

5 The government's interpretation of "buyer/transferee" as it relates to 18  
6 U.S.C. § 924(a)(1)(A) is overbroad because it criminalizes conduct associated with a  
7 constitutionally protected right. The right to acquire (keep and bear) arms.

8 SECOND AMENDMENT. See generally: *Broadrich v. Oklahoma*, 413 U.S. 601 (1973).  
9 Furthermore this prosecution is likely to have a chilling effect on private party sales  
10 if gun buying public begins to believe that a misinterpretation of some fine-print,  
11 boiler-plate language on a government form could land them in federal prison.

12 The government's interpretation of this undefined term is vague because it  
13 "leaves the public uncertain as to the conduct it prohibits or leaves judges and  
14 jurors free to decide, without any legally fixed standards, what is prohibited and  
15 what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

16 A law or definition may also be invalid because "[I]t fails to give a person of  
17 ordinary intelligence fair notice that his contemplated conduct is forbidden by the  
18 statute." *Colautti v. Franklin*, 439 U.S. 379 (1979) (quoting *United States v.*  
19 *Harriss*, 347 U.S. 612 (1954)).

20 The rationales of the vagueness doctrine as it relates to fundamental rights  
21 are set forth in *Grayned v. City of Rockford*, (1972) 408 U.S. 104 at 108-09:

22 Vague laws offend several important values. First,  
23 because we assume that man is free to steer between lawful  
24 and unlawful conduct, we insist that laws give the person of  
25 ordinary intelligence a reasonable opportunity to know  
26 what is prohibited, so that he may act accordingly. Vague  
27 laws may trap the innocent by not providing fair warning.  
28 Second, if arbitrary and discriminatory enforcement is to be  
prevented, laws must provide explicit standards for those  
who apply them. A vague law impermissibly delegates basic

1 policy matters to policemen, judges, and juries for resolution  
2 on an ad hoc and subjective basis, with the attendant  
3 dangers of arbitrary and discriminatory application. Third,  
4 but related, where a vague statute "abut[s] upon sensitive  
5 areas of basic First Amendment freedoms," it "operates to  
6 inhibit the exercise of [those] freedoms." Uncertain  
7 meanings inevitably lead citizens to "'steer far wider of the  
unlawful zone' . . . than if the boundaries of the forbidden  
areas were clearly marked."

8 This irrational definition of "buyer/transferee" along with the publicity that this  
9 case has already generated, will have a chilling effect on the gun-buying public's  
10 Second Amendment rights. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

11  
12 III. A Mere Buyer/Seller Relationship Cannot Support a Conspiracy Charge.

13 Some federal appellate courts have acknowledged that evidence of a mere  
14 buyer-seller relationship is insufficient to support a drug trafficking conspiracy  
15 charge. Since drugs are illegal to even possess, let alone offer for sale, this rationale  
16 should be doubly strong with the commercial items is a constitutionally protected  
17 artifacts – a firearm.

18 Some of the Court enter he rationale that there is no singularity of purpose,  
19 no necessary agreement, in such cases: "the buyer's purpose is to buy; the seller's  
20 purpose is to sell." *United States v. Donnell*, 596 F.3d 913, 924-25 (8th Cir.  
21 2010)("Mere proof of a buyer-seller agreement without any prior or  
22 contemporaneous understanding does not support a conspiracy conviction because  
23 there is no common illegal purpose: In such circumstances, the buyer's purpose is to  
24 buy; and the seller's purpose is to sell"); *United States v. Bacon*, 598 F.3d 772, 777  
25 (11th Cir. 2010)("... the joint objective necessary for a conspiracy conviction is  
26 missing where the conspiracy is based simply on an agreement between a buyer and  
27 a seller for the sale of drugs").

28 Other Courts do so to avoid sweeping mere customers into a large-scale



1 trafficking operation. *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir.  
 2 2010)(“When the alleged coconspirators are in a buyer-seller relationship, however,  
 3 we have cautioned against conflating the underlying buy-sell agreement with the  
 4 drug distribution agreement that is alleged to form the basis of the charge  
 5 conspiracy. To support a conspiracy conviction there must be sufficient evidence of  
 6 an agreement to commit a crime other than the crime that consists of the sale  
 7 itself”); *United States v. Deitz*, 577 F.3d 672, 680 (6th Cir. 2009)(“Generally, a  
 8 buyer-seller relationship alone is insufficient to tie a buyer to a [larger] conspiracy  
 9 because mere sales do not prove the existence of the agreement that must exist for  
 10 there to be a conspiracy”).

11       See also: *U.S. v. Mincoff*, 574 F.3d 1186 (9<sup>th</sup> Cir. 2009); *U.S. v. Linnick*, 18  
 12 F.3d 814 (9<sup>th</sup> Cir. 1994); and *U.S. v. Ramirez*, 714 F.3d 1134 (9<sup>th</sup> Cir. 2013).  
 13 Although most of these cases invoking the “buyer/seller” rule with regard to  
 14 criminal conspiracies relate to drug sales, the gist of the rule is that something  
 15 more than a mere buyer/seller relationship must established by the agreement. In  
 16 the present case (as noted already) the government was no deprived of its crime  
 17 prevention (background check) interest because both transactions were fully vetted  
 18 under federal and state law by the FFL. Nor was the government deprived of its  
 19 record-keeping function because during both transactions the relevant paperwork  
 20 was completed for tracing the firearms should they become involved in a crime.  
 21 Therefore, all we have a buyer/seller relationship between two guys who like to  
 22 collect, trade and shoot guns. As long as the paperwork is accurate, the subjective  
 23 intent of either the buyer or seller is irrelevant.

24       Count Six must be dismissed.

## 26       CONCLUSION

27       WHEREFORE, Defendant respectfully requests that this Court grant his  
 28 request for a dismissal of Count Six under any of the alternative theories set forth

1 herein. This is not a case of felons trying to circumvent background checks or make  
2 it more difficult for the government to trace their transactions. They fully complied  
3 with all federal and state laws during both transactions. There mistake, if indeed it  
4 is a mistake, is that they failed to comprehend the definition and/or the significance  
5 of the term "buyer/transferee." A term is not statutorily defined and therefore  
6 cannot be the linch pin of a criminal conviction.

7 Respectfully Submitted on October 10, 2013,

8           /s/ Donald Kilmer          

9 Donald Kilmer, Attorney for EARLY

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