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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RYAN MCGOWAN, ET AL., Defendants.	CASE NO. 2:12-CR-207 TLN DATE: August 28, 2014 TIME: 9:30 a.m. COURT: Hon. Troy L. Nunley

Government's Opposition to
Defendants' Motions to Dismiss and for a Bill of Particulars
[Dkt. Nos. 108, 110, and 111]

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I. INTRODUCTION

Ulysses Simpson Grant Early, IV, has filed three motions: Motion to Dismiss for Failure to State a Criminal Offense (Dkt. 108); Motion to Dismiss or, in the Alternative, for a Bill of Particulars (Dkt. 110); and Motion to Dismiss for Vindictive or Selective Prosecution (Dkt. 111).

The motions focus on Count Six of the Indictment, which charges defendants Early and Snellings with conspiracy to make a false statement with respect to firearms records. Early is not charged in any other counts. Co-defendant McGowan has joined the motion to dismiss for failure to state a criminal offense, stating without elaboration that the charges in the counts against him are the same and therefore the same arguments apply. Dkt. 113. Co-defendant Snellings has joined the motion to dismiss for failure to state a claim and the motion for a bill of particulars. Dkt. 116. Snellings also purports to incorporate by reference the arguments in his previously filed motion to dismiss at Dkt. 95. Dkt. 116.

Each of these motions should be denied for the reasons set forth below.

II. STATEMENT OF FACTS

A. Charges

On May 31, 2012, a federal grand jury returned the indictment charging McGowan and Thomas Lu with engaging in the business of dealing in firearms and conspiracy to make a false statement with respect to firearms records. Dkt. 1. McGowan, Lu, Robert Snellings and Ulysses Simpson Grant Early, IV, were also charged in the same indictment with various counts of conspiracy to make a false statement with respect to firearms records. Dkt. 1.

B. Initial Appearances and Representation

McGowan and Early made their initial appearances on June 1, 2012, Snellings made his on June 22, 2012. Dkt. 18, 27. Early was represented by defense counsel Donald E.J. Kilmer. Lu made his initial appearance, was arraigned, and pleaded guilty on August 28, 2012. Dkt. 42.

At a status hearing on August 28, 2012, a status of counsel hearing for Early was scheduled for September 5, 2012. Dkt. 41. On September 4, 2012, Judge Karlton signed an order substituting Attorney Ralph D. Hughes for Donald Kilmer as Early's attorney. Dkt. 44. Attorney Hughes appeared with Early at the September 5, 2012 status conference. Dkt. 46. On November 16, 2012, attorney Donald Kilmer filed a notice of substitution of attorney on behalf of Early; this order was modified on November 26, 2012 and signed by Judge Karlton on November 27, 2012. Dkt. 53, 55, 56. Kilmer has represented Early without break since that time.

C. Motions and Other Proceedings

On February 12, 2013, Early filed a motion to compel, statement regarding discovery requests, and a declaration in support of his motion with attachments. Dkt. 64, 65, 67. This matter was referred to the magistrate and on April 9, 2013, Magistrate Judge Brennan denied the majority of the discovery requests. Dkt. 83. At a status conference on May 23, 2013, Judge Nunley ordered the government to make available the remaining 15 boxes of discovery to defense counsel by June 14, 2014. Dkt. 85. The government complied with this request, met with defense counsel, and permitted the inspection and copying of documents in the possession of ATF at a time convenient to defense counsel.

On October 10, 2013, Early filed a motion to dismiss for failure to state an offense, a motion to

dismiss for selective/vindictive prosecution, and a declaration. Dkt. 90-94. Snellings filed a motion to dismiss on October 12, 2013. Dkt. 95. McGowan joined the motions to dismiss on October 14, 2013.

At a status conference on October 31, 2013, Judge Nunley granted a defense motion to vacate the trial date and continue the trial until August 4, 2014 with a trial confirmation hearing on July 10, 2014. Dkt. 100. In December this trial date was moved by stipulation and order to the current trial date of September 18, 2014 with a Trial Confirmation Hearing on August 28, 2014. Dkt. 102.

Early filed a notice with the Court regarding the recent Supreme Court decision in *Abramski v. United States*, 134 S.Ct. 2259 (2014) on June 27, 2014. Dkt. 105.

On July 30, 2014, Early filed the motions at issue in this brief. Dkt. 108-111.

III. ANALYSIS AND ARGUMENT

A. Government's Combined Response to the Motions to Dismiss

This opposition is a combined response to the defendants' motions because the facts and issues are related and overlapping. The government has responded to every argument that appeared to be presented by the motions. If it becomes apparent from additional briefing or argument that Early has raised other issues in his statement of facts or other sections of his brief that are not clearly identified and to which the government has not responded, the government will seek leave of the Court to file supplemental or amended briefing on those issues.

B. The Defendants' Motions to Dismiss and Motions for a Bill of Particulars are Not Timely

The Court may exercise its discretion to deny motions that are untimely. *United States v. Matta-Ballesteros*, 71 F.3d 754, 766 (9th Cir. 1995) (affirming denial of late filed motion that was not filed as soon as possible).

Here, the defendants' motions to dismiss are not timely because they were not filed within 21 days after arraignment and the Court did not set a different schedule. Local Rule 430.1(c). Early attempts to explain this delay with reference to the previously filed motions, but even those motions were filed over a year after indictment. Dkt. 91-95. Now, more than two years after indictment, this case is rapidly approaching trial. Early attempts to justify this delay by referring to the Supreme Court's June 16, 2014, opinion in *Abramski v. United States*, 134 S.Ct. 2259 (2014), and subsequent

unsuccessful efforts to convince the government to adopt the dissent's argument in the case. *Abramski*, however, has little impact on the actual issues raised in Early's motion to dismiss for failure to state a claim. It is not even cited substantively in his motion to dismiss for vindictive/selective prosecution, does not explain the 45 day delay in the face of a looming trial after the decision was issued, and cannot explain the more than one year delay in filing the initial motions.

Early's motion for a bill of particulars, which is joined by Snellings, is even more untimely. As with the other motions, it is in violation of Local Rule 430.1(c) since it was first filed on July 30, 2014. Dkt. 110. In addition, the Rules of Criminal Procedure anticipate that defendant's may move for a bill of particulars "before or within 14 days after arraignment." Fed. R. Crim. P., Rule 7(f). Although the rule allows the Court to permit a bill of particulars more than 14 days after arraignment, Rule 7(f) leaves it within the Court's discretion. Here, there is no reason to permit a bill of particulars at such a late date. Each of the defendants has had years to review the indictment. The indictment clearly states the charges, including names, dates, times, specific weapons where relevant and alleged overt acts. The government has given defense counsel large amounts of discovery and has arranged for defense counsel to examine the documents and evidence in ATF's possession. This has given the defendants adequate time and information to file a bill of particulars if one was truly necessary. Against this delay, Early attempts several explanations, but his explanations provide no reason relevant to the delay in filing of a motion for a bill of particulars. Instead, they are focused on the motions to dismiss and do not explain why the motion for a bill of particulars was not timely filed.

C. The Indictment is Valid and States a Criminal Offense [Response to Dkt. 108]

1. The Indictment States an Offense and Early's Challenge is an Invitation to the Court to Conduct an Improper Summary Trial of the Evidence.

In considering a motion to dismiss for failure to state an offense, "the court must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). That is because a "motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence ... The Court should not consider evidence not appearing on the face of the indictment." *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (quoting *United States v. Marra*, 481 F.2d 1196, 1199–1200 (6th Cir. 1973).

What Early characterizes in his motion to dismiss as a failure by the indictment to state an offense is actually a dispute with the government's proof—was the information put on the form 4473 regarding the buyer actually false? Did Early conspire with Snellings and C.K? Early challenges the facts underlying these allegations arguing that Early merely purchased the gun lawfully on the secondary market, but these are factual questions to be resolved by a jury at trial, not in a motion to dismiss. *Jensen*, 93 F.3d at 669. The proper consideration for a motion to dismiss is whether the indictment alleges a crime, regardless of the defendant's alternate explanation for his conduct.

Here, the indictment does allege a crime. The indictment alleges that the defendants conspired with each other to make a false statement (Dkt. 1 at 9:5-10), misrepresenting that "C.K. was the actual buyer of [the firearm] when he was not the actual buyer." Dkt. 1 at 9:11-14. Conspiring with others to commit an offense against the United States is a crime. 18 U.S.C. § 371. Likewise, making a false statement on a Form 4473 regarding the actual buyer of a weapon is a crime against the United States. *United States v. Johnson*, 680 F.3d 1140, 1146 (9th Cir. 2012); 18 U.S.C. § 924(a)(1)(A). Therefore, the indictment properly alleges an offense and Early's defense must wait for trial.

2. The Definition of Buyer/Transferee is Not Overbroad, Vague or Ambiguous Because it is Clearly Defined in the Context of the Case and the Supreme Court has Interpreted the Statutory Language Consistent with Its Use in the Indictment.

A statute is unconstitutionally vague if it (1) does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and (2) does not establish minimal guidelines to govern law enforcement. *United States v. Rodriguez*, 360 F.3d 949, 952 (9th Cir. 2004). "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

Here, the statute prohibits false statements on Form 4473's, including false statements about the identity of the actual buyer of the firearm. 18 U.S.C. § 924(a)(1)(A); *Abramski v. United States*, 134 S.Ct. 2259 (2014). In *Abramski*, a straw purchaser bought a gun on behalf of a relative who was legally entitled to buy the gun in order to get the relative a discount on the price. *Id.* at 2264-65. In doing so, the straw purchaser stated in response to question 11.a. that he was the actual buyer. *Id.* The Court, calling it a "relatively easy question," found that false statements regarding the true buyer violate §

924(a)(1)(A). *Id.* at 2266.

Even more specific to the context of this case, the definition on the Form 4473 is clearly written.[1] Question 11.a. on Form 4473 states in bold letters: "Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." *Id.* at 2266. The form goes on to give an example of a straw purchase similar to the one at issue in this case where another person pays for the gun and states that it is not permissible. *Id.* As such, the statute informed the conspirators that it was a criminal offense to put false information on the Form 4473 and the form itself defined the relevant terms and Early's motion should be denied.

3. The Buyer-Seller Doctrine Does Not Support Early's Motion to Dismiss Because that Challenge goes to the Sufficency of the Evidence, Not to the Sufficiency of the Indictment.

The buyer-seller doctrine states that "proof that a defendant sold drugs to other individuals does not prove the existence of a conspiracy." *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994). In other words, a sale standing alone is insufficient evidence of drug distribution conspiracy. *United States v. Montgomery*, 150 F.3d 983, 1002 (9th Cir. 1998) (stating that "the defendants must have reached an agreement or arrived at a plan" to further the manufacture or distribution of drugs).

The government is unaware of any controlling case authority that applies this rule to a conspiracy under 18 U.S.C. § 371 and Early has not cited any. Here, the indictment alleges a conspiracy to knowingly make a false statement. Notably, this differs from the cases where the buyer-seller rule is generally applied (drug cases where a conspiracy to distribute drugs is charged) because the underlying charge in this case is not one of distribution or sale. As a result, Early's argument regarding the buyer-seller rule is not applicable, since conspiracy charged in this case is one that does not create the danger of the government or the jury turning a simple buyer-seller transaction into a conspiracy. Instead, a properly instructed jury will have to find that an agreement existed to make the false statement.

In any event, even if applied to the charged conspiracy, the doctrine has to do with the sufficiency of the government's evidence, not whether the indictment states an offense. The Court,

[1] Congress may delegate authority to make regulations, including those regarding firearms, to federal agencies. *United States v. One Sentinel Arms*, 416 F.3d 977 (9th Cir. 2005).

when considering Early's motion to dismiss for failure to state a claim, must accept as true the allegations in the indictment and reject Early's invitation to hold a summary trial of the evidence. *Boren*, 278 F.3d at 914; *Jensen*, 93 F.3d 667, 669 (9th Cir. 1996). The indictment states that there was a conspiracy to make a false statement. The Court must accept that allegation as true when determining if the indictment states an offense. *Id.* Then, at trial, the government will have the burden to present sufficient evidence that a conspiracy existed. Likewise, at trial, Early can present his argument that he was merely a firearms buyer and not a member of a conspiracy to make a false statement in a firearms record.

4. Wharton's Rule Does Not Apply to Making a False Statement on a Firearms Record Because the Crime Can Be Accomplished By an Individual Acting Alone.

Wharton's Rule creates a presumption against prosecuting as a conspiracy, "an agreement between two people to commit a particular crime . . . where the crime necessarily requires the participation of two persons for its commission." *United States v. Rone*, 598 F.2d 564, 569 (9th Cir. 1979); *Iannelli v. United States*, 420 U.S. 770, 785 (1975). The "classic examples" of crimes that require two people to commit and therefore cannot be charged as conspiracies are "adultery, incest, bigamy and dueling." *Rone*, 598 F.2d at 569. "The applicability of Wharton's Rule depends not on the evidence offered at trial but rather on the statutory requirements of the substantive offense." *United States v. Ohlson*, 552 F.2d 1347, 1349-50 (9th Cir. 1977) citing *Iannelli*, 420 U.S. at 780 n.17. Moreover, the rule is merely a presumption that is used where statutory intent is unclear. *Id.*

In this case, the underlying crime is a violation of 18 U.S.C. § 924(a)(1)(A), which makes it a crime to "knowingly make[] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter." As a matter of common sense, this statute can be violated by one person making a false statement on a form. For example, a single individual could violate this statute by reporting another individual's name or an alias as the actual buyer on a Form 4473. However, case law also confirms that defendants have indeed been convicted of 924(a)(1)(A) while working alone. *See, e.g., United States v. Chovan*, 735 F.3d 1127, 1131 (9th Cir. 2013) (single defendant convicted of making a false statement to obtain a firearm).

Even if Wharton's Rule did apply, Early's challenge to the indictment would still fail under the

third-party exception to the Rule. The third-party exception limits the rule to cases where only the necessary parties are charged. *Gebardi v. United States*, 287 U.S. 112, 119 (1932); *United States v. Rueter*, 536 F.2d 296, 298 (9th Cir. 1976). Here, even under the Early's formulation, only two people were required to buy and sell the firearm, yet the indictment identifies three individuals in the conspiracy: Early, Snellings and C.K. Early attempts to remove Snellings from the conspiracy by stating that Snellings who held the federal firearms license cannot defraud himself, but this fails because Snellings is not the United States and it was the United States that was defrauded. Snellings is a Federal Firearms Licensee who conspired with C.K. and Early to make false statements on the Form 4473. As set forth in detail in *Abramski*, this form is not for the personal benefit of the FFL, it is for the benefit of the government's law enforcement efforts. *Abramski*, 134 S.Ct. 2266-2271. Therefore, Early's motion must be denied.

5. McGowan and Snellings Offer no Additional Facts or Argument that Would Compel a Different Result in Their Cases; Therefore, Their Motions Should Also Be Denied.

In his joinder, McGowan offers no facts or legal argument. Dkt. 113. The arguments and analysis regarding Early's arguments above apply with equal force to McGowan in the nearly identically worded Count Two. Likewise, Snellings in his filings relies on the same faulty reasoning as Early. Dkt. 95, 116. Snellings argues that the government cannot prove his intent or participation in the conspiracy because he was a licensed firearms dealer who was just doing what he was licensed to do. A federal firearms licensee can conspire to make a false statement just like anyone else. As with Early and McGowan, questions of proof and sufficiency of the evidence should be left to the jury and not decided in a motion to dismiss.

D. <u>Early and Snellings are Not Entitled to a Bill of Particulars Because the Indictment and the Discovery in this Case are Sufficient to Inform Them of the Charges, Minimize Surprise and Allow Them to Plead Double Jeopardy. [Response to Dkt. 110]</u>

It is within the court's discretion whether or not to direct the government to file a bill of particulars. Fed. R. of Crim. P., Rule 7(f); *Cook v. United States*, 354 F.2d 529, 531 (9th Cir. 1965) ("The granting or refusing to grant a bill of particulars is a matter within the sound discretion of the trial court"). A bill of particulars has three functions: (1) to inform the defendant of the charge with enough

precision to enable trial preparation; (2) to avoid or minimize surprise; and (3) to enable the defendant to plead double jeopardy in any subsequent prosecution. *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979).

Notably, many of Early's requests for a bill of particulars, which were joined by Snellings, are for items that are contained within the discovery, ask the government to give a detailed explanation of how it will try the case, or are interrogatories or discovery requests in disguise. A bill of particulars, however, is not intended to substitute for a discovery motion. *See, e.g., Giese*, 597 F.2d at 1181 ("request for the 'when, where, and how' of every act in furtherance of the conspiracy was equivalent to a request for complete discovery of the government's evidence, which is not a purpose of the bill of particulars"). In addition, a substantial portion of Early's motion for a bill of particulars is devoted to arguing the clarity of the Form 4473 and the applicability of the charged statute to straw-buyer transactions. This appears to have no relevance to any legitimate purpose for the motion. As such, the government asks the Court to exercise its discretion and deny Early's motion in total.

Early's individual requests are also flawed. In his motion, Early asks for C.K.'s identity. Government counsel has spoken with defense counsel and defense counsel has correctly and independently determined C.K.'s identity.[2] Therefore, this request should be denied as moot.

The motion also asks for detailed information regarding the government's case before trial such as the identification of others known and unknown listed in the indictment and the identification of custodians of records. Requests for identities of individuals known and unknown to the grand jury are frequently denied where, as here, they are not necessary to prepare a defense. *United States v. Ojeikere*, 299 F. Supp. 2d 254, 261 (S.D.N.Y. 2004) (listing cases). Moreover, if that information is not already in the discovery and the defendants believe they are entitled to it, the defendants should have made a discovery motion.

Early's request for information that is already in the actual indictment should also be denied. This includes his request for the identity of the involved FFL—it is his codefendant, Snellings, as stated near the end of count six. Likewise, the Court should deny Early's request for information that has no

[2] It is also revealed in a search warrant affidavit that was unsealed by Judge Brennan on August 7, 2012. See Exhibit A (Search Warrant Affidavit).

readily discernable relationship to the indictment or the case: the "identification of any type or kind of record, other than a Form 4473, that an FFL is required to keep in accordance with federal law." In his motion, Early does not explain the reason for this request and it appears to be a minimally relevant or irrelevant legal question that counsel could research on his own.

Moreover, Early's request regarding the *mens rea* elements of the offense should also be denied. Knowingly and willfully are mental states. Mental states are generally proven through statements of a defendant (which are in the discovery) and through circumstantial evidence. Prior to trial, "a defendant is not entitled to know all the evidence the government intends to produce, but only the theory of the government's case." *Cook*, 354 F.2d at 531. Furthermore, "the government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case." *Nye & Nissen v. United States*, 168 F.2d 846, 851 (9th Cir. 1948) aff'd, 336 U.S. 613 (1949). The theory of the case is set forth in the indictment and in the discovery; Early does not, however, get to know each detail of how the government intends to show knowledge and willfulness. *See Id.* at 851 (government need not show circumstances the government will use to show a conspiracy). Absent further explanation from the defendant, this request appears to be an improper attempt to get the government to reveal its trial strategy and arguments. *Id.*; *United States v. Conesa*, 899 F. Supp. 172, 176 (S.D.N.Y. 1995) ("The bill of particulars is not a discovery technique available to a defendant to ascertain the details of the Government's proof"). As such, the government asks that the Court deny this request.

Finally, Early demands the government identify all sums of money gave to C.K. and all overt acts taken by all of the conspirators. The government has provided extensive discovery in the case. It has alleged three overt acts in the indictment. The defendant is not entitled to more as "there is no requirement in conspiracy cases that the government disclose even all the overt acts in furtherance of the conspiracy." *Giese*, 597 F.2d at 1180.

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E. Early is not a Victim of Selective or Vindictive Prosecution, but Rather of His Own Decisions[3] [Response to Dkt. 111]

1. Vindictive Prosecution

The government was not vindictive in seeking an indictment against Early after he rejected the government's immunity offer because the filing or threat of filing more serious charges as a consequence of failed plea negotiations does not in itself offend due process. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

In the "'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *United States v. Segal*, 495 F.3d 826, 833 (7th Cir. 2007) ("a pretrial claim of vindictive prosecution is extraordinarily difficult to prove"). Instead, a claim of vindictive prosecution only arises when a prosecutor uses criminal charges to punish a defendant for exercising a statutory, procedural or due process right. *United States v. Goodwin*, 434 U.S. 357 (1978). The "link of vindictiveness cannot be inferred simply because the prosecutor's actions followed the exercise of a right, or because they would not have been taken but for exercise of a defense right." *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168-69 (9th Cir. 1982). In fact, nearly every Circuit, including the Ninth, has refused to find vindictiveness under circumstances similar to those in the present case. *See, e.g., United States v. Sanders*, 211 F.3d 711, 719 (2d Cir. 2000) (no vindictiveness when threat to prosecute carried out after defendant refused to identify contact in return for immunity); *United States v. Oliver*, 787 F.2d 124, 126 (3d Cir. 1986) (no vindictiveness though indictment followed only after defendant refused to cooperate with authorities because defendant informed of choices and consequences); *United States v. Williams*, 47 F.3d 658, 662-63 (4th Cir. 1995) (no vindictiveness though prosecutor fulfilled threat to bring more severe charges in federal court after defendant refused to cooperate with police while pleading guilty; although "plea" took form of threat, defendant gained opportunity that would not have been available if prosecutor originally referred case to federal

[3] Early states that this motion is "essentially a place-holder motion" to preserve his appeal of Magistrate Judge Brennan's denial of his discovery motions. The government notes that this motion is not a sufficient vehicle to preserve his discovery claims, and responds to the substantive motions. The government has reordered some of Early's arguments to permit better organization of its response.

authorities without first making offer); *United States v. Wells*, 262 F.3d 455, 466-67 (5th Cir. 2001) (no presumption of vindictiveness because reasonable-minded defendant would know that failing to cooperate in breach of plea agreement would motivate prosecution to abandon decision to bring lesser charge); *United States v. Yarbough*, 55 F.3d 280, 283 (7th Cir. 1995) (no vindictiveness when prosecutor added six counts to superseding indictment after defendant successfully withdrew guilty plea); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1172 (9th Cir. 2002) (no vindictiveness when prosecutor added charges after defendant rejected plea agreement); *United States v. Vallo*, 238 F.3d 1242, 1249 (10th Cir. 2001) (no realistic likelihood of vindictiveness merely because charge severity increased after defendant rejected plea agreement).

Here, assuming arguendo that Early's recitation of the facts is correct, the government offered Early use immunity in exchange for his testimony. During the negotiations related to this immunity, Early rejected this offer and "insist[ed]" on "federal and state immunity." (Kilmer Letter Dkt. 109-7 p.2). The government, which was not prepared to offer federal transactional immunity, and which cannot offer state transactional immunity, investigated and eventually indicted Early. This was a decision that the government was permitted to make when the parties were unable to reach mutually agreeable resolution. If the law was otherwise, whenever a potential witness was offered immunity in exchange for testimony, he or she could simply reject the offer, refuse to testify, and also be immune to prosecution by claiming vindictiveness, just as Early has attempted to do here. Early rejected the government's offer as was his right, but the government acted appropriately when it later charged him with a crime.

2. Selective Prosecution

Early does not have a valid selective prosecution claim because he has failed to meet the three elements of a selective prosecution claim: (1) there were other similarly situated individuals who were not prosecuted, (2) he was deliberately singled out, and (3) his selection as a defendant was based on an unlawful consideration. *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). In support of his claim, Early appears to argue that his selection was based on an unlawful consideration based on one or more of three constitutional rights. As explained below, none of these considerations is supported by the record or legally sufficient to support his claim.

First, Early indicates his prosecution will have a chilling effect on the general public's right to keep and bear arms. Early does not explain further and he completely fails to demonstrate how this relates to his selection as a criminal defendant in this case, or how he was deliberately singled out from among other similarly situated individuals. Therefore, Early fails to establish critical elements of his claim and cannot establish selective prosecution on this ground.

Second, Early raises a claim of selective prosecution based on the Fifth Amendment. This claim appears to be based on the same series of events as those set forth in support of his vindictive prosecution claim. As described above in the response to that claim, the government is permitted to charge criminally culpable individuals who reject offers of immunity. *See, e.g.*, *Sanders*, 211 F.3d at 719 (no vindictiveness when threat to prosecute carried out after defendant refused to identify contact in return for immunity); *Gastelum-Almeida*, 298 F.3d at 1172 (no vindictiveness when prosecutor added charges after defendant rejected plea agreement). Moreover, Early has failed to show that there were other similarly situated individuals who were not prosecuted. Through agreement of the parties, Early has now had access to the discovery in this case for several years, including to the records relating to transactions involving other individuals.[4] What Early does not allege is telling—he does not allege that there was another buyer who, like him, encouraged a police officer to engage in a straw purchase transaction as opposed to being solicited by the police officer. See Exhibit A (Search Warrant Affidavit) at 2-5. He also does not allege that another individual who demonstrated knowledge of the unlawfulness of engaging in a straw purchase in a written message about the transaction: "I don't like writing stuff like this down. He knows, and I have not paid him. I'll pay you when we do the xfer. I'll be sure to cover all your expenses." Exhibit A at 5. In any event, even if such a similarly situated individual existed, it would still be proper for the government to make charging decisions based in part on cooperation or non-cooperation in an ongoing investigation. As a result, Early's indictment was not the result of being punished based on the exercise of a protected right, but rather a natural result of his own decision when faced with two divergent options.

Finally, Early raises a selective prosecution claim relying on the Sixth Amendment. This claim

[4] In fact, Early's counsel has spent many hours reviewing evidence at the ATF offices.

is based on a series of communications Early initiated with a police officer acquaintance who was not involved in this investigation, but who then communicated with a police officer/designated Federal Task Force Officer who was assigned to the case.[5] These communications back and forth contained statements regarding the efficacy of defense counsel which now form the basis of Early's selective prosecution claim. This claim must be addressed in two parts. First, as a selective prosecution claim it fails because the alleged communication post-dates indictment and therefore cannot meet any of the required elements. Second, as an interference with the right to counsel claim it fails because there is no showing of substantial prejudice. Interference is a Sixth Amendment violation only if it "substantially prejudices the criminal defendant." *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004) citing *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985), *Weatherford v. Bursey*, 429 U.S. 545, 557-58 (1977); *United States v. Fernandez*, 388 F.3d 1199, 1240 (9th Cir. 2004).

Here, there is not even an allegation of substantial prejudice, nor could there be, since Early rehired the same attorney who is the subject of the communications. Moreover, even if Early had alleged and shown substantial prejudice, the remedy for a Sixth Amendment violation is rarely dismissal. *United States v. Morrison*, 449 U.S. 361 (1981). Instead, "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* at 364.

In *Morrison*, the Supreme Court addressed a similar but more egregious set of facts than those alleged in the present case. There, Drug Enforcement Administration agents met with the defendant without her attorney's knowledge. *Id.* at 362. The DEA agents disparaged defendant's counsel in an attempt to gain the defendant's cooperation in another case. *Id.* The defendant, however, refused to cooperate, incriminate herself, or provide any information; instead, she informed her attorney. *Id.* While the Court did not condone the agents' behavior, it found that dismissal was not an appropriate remedy because there was no prejudice that needed to be purged to ensure the defendant was "effectively represented and not unfairly convicted." *Id.* at 366-67. It reasoned that absent impact on criminal proceedings "there is no basis for imposing a remedy" where a case could go forward with the

[5] This officer is no longer a Federal Task Force Officer and is no longer a case agent for this case.

"full recognition of the defendant's right to counsel and to a fair trial." *Id.* at 366.

Likewise, the Ninth Circuit has declined to use dismissal as a remedy for disparagement of counsel. *United States v. Amlani*, 111 F.3d 705, 710-12 (9th Cir. 1997). In *Amlani*, the defendant alleged that the prosecutor disparaged defense counsel in front of him. *Id.* at 710. As a result, the defendant stated he proceeded to trial with a different, less competent attorney. *Id.* at 710. In applying *Morrison*, the Ninth Circuit found that dismissal was not appropriate, but that the proper remedy was to vacate the conviction so the defendant could be retried with the counsel of his choice. *Id.* at 711-12.

Like the Supreme Court in *Morrison*, the government does not condone the communications at issue in the present case. The communications were not directed or encouraged by the U.S. Attorney's Office. Government counsel learned of the communications after the fact and counsel categorically state that they are inconsistent with the principles and standards of the U.S. Attorney's Office and the law enforcement agencies it works with. This incident is taken seriously and the U.S. Attorney's Office has advised the employing law enforcement agency of this issue. Nevertheless, as in *Morrison*, where no prejudice was alleged, Early has not shown prejudice from the communications he initiated with law enforcement that would entitle him to the windfall remedy of dismissal. Moreover, the remedy indicated in *Amlani*—ensuring Early's choice of counsel at trial—was already put into effect by Early almost two years ago when he rehired his original attorney. Therefore, Early's motion should be denied.

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court deny Early's motions to dismiss at Dkt. No. 108, 110 and 111 as to him and his codefendants.

Dated: August 21, 2014

BENJAMIN B. WAGNER
United States Attorney

By: /s/ Michael D. Anderson
WILLIAM S. WONG
MICHAEL D. ANDERSON
Assistant United States Attorney

EXHIBIT A

Affidavit in Support of a Search Warrant

I, Special Agent Sara M. Lewis, Bureau of Alcohol, Tobacco, Firearms and Explosives, United States Department of Justice, being duly sworn on oath, depose and say:

1. I am a Special Agent employed by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), United States Department of Justice. I have been so employed since July 2002. I have a Bachelors degree in Criminal Justice from California State University, Fresno, and a Masters degree in Criminal Justice from California State University, Fresno. I am a graduate of the Federal Law Enforcement Training Center's Criminal Investigator Program and the Bureau of Alcohol, Tobacco, Firearms and Explosives, New Professional Training (NPT), Special Agent Academy.

2. I have investigated no less than 100 cases involving federal firearms violations including straw purchase violations. I have spoken to several straw purchasers about how and why they committed the act of straw purchasing. I have received training regarding straw purchase investigations. I have spoken to more experienced investigators about how people commit straw purchases and other federal firearm violations.

Federal Firearms Laws and Definitions

3. I am familiar with federal laws and know it is a violation of 18 U.S.C. § 922(a)(6), for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious or misrepresented identification, intended or likely to deceive such importer manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearms or ammunition.

4. Title 18 U.S.C. § 921(a)(3), defines a firearm as any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon.

5. The information set forth in this Affidavit is based, in part, upon my own personal knowledge, but it is also based upon information provided to me by other law enforcement officers and reports generated by other law enforcement personnel. Because this Affidavit is presented for the limited purpose of setting forth probable cause for the requested search warrant, I have not necessarily included every fact known to me through this investigation. I have set forth only those facts necessary to establish probable cause to believe that contraband, fruits of the crimes, and other items illegally possessed, property designed for use, intended for use, or used in committing the offenses outlined in this

Affidavit will be found at **3848 Bilsted Way in Sacramento, California**, more fully described, and incorporated here by reference, in Attachment A to this Affidavit.

Scope of Requested Search Warrant

6. This Affidavit requests authority to search the person, vehicles, and residence of **Ulysses Simpson Grant EARLY, IV** (hereinafter "EARLY"), **3848 Bilsted Way, Sacramento, California,** which is described in **Attachment A,** and is incorporated by reference as though fully set forth herein, and seize the items listed in **Attachment B,** which is incorporated by reference as though fully set forth herein, to this Affidavit.

7. It is my belief that those items listed on **Attachment B** may be found at the premises to be searched. I base this belief on the information set forth in this Affidavit, my training and experience, and the experience of the law enforcement officers with whom I have consulted.

Overview of Investigation

8. On November 3, 2011, seven Federal search warrants were served at various locations in the Eastern District of California. The residence of Christopher Tait KJELLBERG (hereinafter "KJELLBERG" or "Tait") was one of the locations. See **Attachment C,** which is incorporated by reference as though fully set forth herein, for further information regarding the search warrant.

9. Subsequent to the search warrant, ATF Task Force Officer (TFO) Greg Halstead and I spoke with KJELLBERG. KJELLBERG stated that in April of 2010, he had straw purchased an "off roster" Sturm & Ruger, model LCP, .380 caliber pistol, serial number 37300127, for EARLY.

10. KJELLBERG stated that he purchased the firearm from Robert Snellings of Snellings' Firearms and private party transferred it to EARLY a few weeks later. KJELLBERG stated that he met EARLY on an internet website named "CalGuns" a few years ago. KJELLBERG stated that his screen name is "Ravenslair" and that EARLY went by the screen name "Toolbox X". KJELLBERG said that he and EARLY have met on several occasions over the past few years in person.

11. On November 3, 2011, ATF TFO Koontz and Sacramento County Sheriff's Department (SSD) interviewed EARLY regarding the purchase and/or private party transfer of a Sturm, Ruger and Co., Model LCP, .380 caliber pistol, serial number 37300127. EARLY stated that he purchased the firearm from KJELLBERG. EARLY stated that approximately two weeks before the purchase, KJELLBERG told him he should get the firearm for his Carry Concealed Weapon (CCW) permit. EARLY stated that he did not tell KJELLBERG to purchase the firearm for him.

Investigation of the Sturm & Ruger, model LCP, .380 caliber, serial number 37300127

12. I have reviewed the California Dealer Record of Sale (DROS) paperwork related to the purchase of the Sturm & Ruger, model LCP, .380 caliber, serial number 37300127.

13. On 04-29-2010, Roseville Police Officer Christopher KJELLBERG started the DROS process for Sturm & Ruger, model LCP, .380 caliber handgun, serial number 37300127. This transaction was completed by Robert Snellings of Snellings' Firearms.

14. On 05-27-2010, approximately 28 days later, Christopher KJELLBERG private party transferred the Sturm & Ruger, model LCP, .380 caliber handgun, serial number 37300127, to a Ulysses EARLY. The private party transfer was completed through Snellings' Firearms.

CalGuns Emails Between KJELLBERG and EARLY

15. On November 17, 2011, TFO Halstead and I received all electronic communications from CalGuns for the account "Ravenslair" and "Toolbox X", including the private messages.

16. The following is a summary of the private messages between "Ravenslair" and "Toolbox X" regarding the Sturm & Ruger, model LCP, .380 caliber handgun, serial number 37300127.

From : Toolbox X
To : Ravenslair
Date : 2010-04-12 13:16
Title : Re: AK rivet tool?

Hey Tait,
I hope you get this quickly. I can't tell which phone number in my call log is yours. Give me a call when you get this and well setup a time to meet up.

Grant
[redacted]

From : Ravenslair
To : Toolbox X
Date : 2010-04-13 02:29
Title : Re: AK rivet tool?

Hey Grant,
Just got this. I will give you a call tomorrow. BTW, my number is [redacted]

From : Toolbox X
To : Ravenslair
Date : 2010-04-13 18:30
Title : Re: AK rivet tool?

Hey Tait,
Bob says he has a LCP for $300 plus DROS. Score!

Grant

From : Ravenslair
To : Toolbox X
Date : 2010-04-13 21:17
Title : Re: AK rivet tool?

Grant,
Sounds like I need to make a trip down to his place on Thursday?

From : Ravenslair
To : Toolbox X
Date : 2010-04-13 21:17
Title : Re: AK rivet tool?

BTW, that is a great price. I found mine for about $285 before DROS... and I had to wait 6 weeks. I should have checked with Bob first.

From : Toolbox X
To : Ravenslair
Date : 2010-04-16 13:06
Title : Re: AK rivet tool?

How did your trip to Bob's go? Did he charge you sales tax?

From : Ravenslair
To : Toolbox X
Date : 2010-04-16 15:48
Title : Re: AK rivet tool?

I did not hear back, so was not sure if I was supposed to go. Sorry about that. I will go down there next Thursday. I assume you already gave him the heads up?

From : Ravenslair
To : Toolbox X
Date : 2010-04-16 22:05
Title : Re: AK rivet tool?

Did you already pay him for the gun?

From : Toolbox X
To : Ravenslair
Date : 2010-04-16 23:07
Title : Re: AK rivet tool?

Sorry, I should have responded. I don't like writing stuff like this down. He knows, and I have not paid him. I'll pay you when we do the xfer. I'll be sure to cover all of your expenses.

ATF FORM 4473

17. During the purchase of this firearm, KJELLBERG filled out ATF Form 4473. Question 12a of the Form 4473, asks: "Are you the actual buyer of this firearm(s) listed on the form?" On the form, KJELLBERG answered: "yes" to question 12a.

18. Question 12a also explains, **"you are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you."**

Information about EARLY and 3848 Bilsted Way, Sacramento, California

19. On December 29, 2011, a query of the Sacramento Municipal Utility District (SMUD) reported that EARLY has an active account at 3848 Bilsted Way in Sacramento, California.

20. On December 28, 2011, I queried the Department of Motor Vehicles (DMV) information system and learned that Ulysses EARLY currently lists 3848 Bilsted Way in Sacramento California.

21. On December 28, 2011, a query of the Accurint database lists 3848 Bilsted Way in Sacramento California as his current address.

22. On November 3, 2011, Sacramento County Sheriff's Department Detectives Koontz (badge #76) and Sanchez (badge #923) interviewed EARLY at 3848 Bilsted Way in Sacramento, California. EARLY informed SSD Detective Koontz that he lived at the residence.

Information Regarding Items to be Seized

23. Sturm, Ruger and Co, .380 caliber pistol, serial number 37300127.

24. All firearms paperwork related to the purchase and/or transfer of a Sturm, Ruger and Co, .380 caliber pistol, serial number 37300127.

25. Based upon my training and experience, persons who reside at a certain location maintain items indicating ownership or residency at such locations, and these items include, rent or mortgage receipts and payment books, utility and telephone bills and statements, keys for the premises, photographs taken at and within the residence, and other items of indicia and that these items are kept at the person's residence.

26. Based on my training and experience, I know that gun owners often store their firearms in safes and/or locked containers.

Conclusion

27. I believe, based on KJELLBERG'S statement, the CalGun emails and the purchase and subsequent transfer of the firearm is evidence that EARLY conspired with KJELLBERG to commit a straw purchase of a Sturm, Ruger and Co, .380 caliber pistol, serial number 37300127.

28. Based on the foregoing, I respectfully submit that probable cause exists to search the person, vehicles, and residence described more particularly in Attachment A , for the items described in Attachments B, which is, evidence, fruits, and instrumentalities of the violation of Title 18 U.S.C. Section 922(a)(6).

29. Therefore, this Affidavit requests authority to search the locations set forth in **Attachment A** and seize the items described in **Attachment B.**

REQUEST FOR SEALING ORDER

30. This criminal investigation is continuing. We contemplate a number of additional interviews, subpoenas, and possibly grand jury testimony of witnesses in the near future. Disclosure of the contents of this affidavit at this time could seriously impede the continuing investigation and prosecution by prematurely disclosing the details of the government's investigation. This could potentially cause subjects of the investigation to flee, destroy evidence, or intimidate and attempt to corruptly influence potential witnesses in the case. If the affidavit was made public, potential subpoena recipients may attempt to destroy evidence. Also, potential interviewees would be able to identify specific subjects of the investigation and could fabricate responses in order to avoid possible criminal liability.

I swear under penalty of perjury that the foregoing information is true and correct to the best of my knowledge, information and belief.

Sara M. Lewis, Special Agent
Bureau of Alcohol, Tobacco, Firearms, and Explosives

Sworn to and subscribed before
me this 24th day of January 2012.

Hon. Edmund F. Brennan
United States Magistrate Judge

Approved as to form:

William S. Wong 1-13-12
William S. Wong
Assistant U.S. Attorney