

1 Donald E.J. Kilmer, Jr., (SBN: 179986)  
LAW OFFICES OF DONALD KILMER  
2 A Professional Corporation  
1645 Willow Street, Suite 150  
3 San Jose, California 95125  
Telephone: (408) 264-8489  
4 Facsimile: (408) 264-8487  
E-Mail: Don@DKLawOffice.com

5 Attorney for Defendant:  
6 ULYSSES SIMPSON GRANT EARLY

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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

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

17 Defendants.

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

DEFENDANT GRANT EARLY'S  
OPPOSITION / RESPONSE TO THE  
GOVERNMENT'S MOTION IN LIMINE

Trial Date: September 29, 2014

Before: Honorable Troy L. Nunley

18 To the United States Attorneys for the Eastern District of California and this  
19 Honorable Court:

20 Defendant ULYSSES SIMPSON GRANT EARLY, IV hereby opposes and/or  
21 otherwise responds to the Government's Motions in Limine (Doc #123) in the order  
22 raised in their moving papers:

23 A. The government moves the Court for an order precluding the Defendants from  
24 raising the Public-Authority Defense.

25 1. To the extent that they base this motion on lack of notice under  
26 Fed.R.Crim.Proc. 12.3, they are mistaken on three counts.

27 a. Early filed notice of his intent to assert this defense more than a  
28 year ago when he sought, and was denied discovery, on this issue.

1 See DEFENDANT ULYSSES SIMPSON GRANT EARLY, IV's  
2 NOTICE THAT HE RESERVES THE RIGHT TO ASSERT  
3 CERTAIN AFFIRMATIVE DEFENSES. (Doc #66, filed 2/12/2013)  
4 See also the moving papers filed with Defendant EARLY's motions  
5 to compel discovery wherein he specifically (through counsel)  
6 outlined his factual basis, and request for discovery, so that he  
7 could make a more effective entrapment by estoppel defense.  
8 (Docs #64, 65, 67 and 79).<sup>1</sup>

- 9 b. Defendant EARLY filed a supplemental notice of Affirmative  
10 Defenses on the day pretrial motions were due (September 8,  
11 2014) in compliance with Rule 12.3. See Docs # 121, 122.
- 12 c. The government's remedy for requesting clarification of an  
13 affirmative defense is more properly addressed through the  
14 procedures of Fed.R.Crim.Pro. 12.3(a)(3) and 12.3(a)(4) by making  
15 a request for their own "bill of particulars" after a Defendant has  
16 given notice of affirmative defenses. EARLY gave notice in  
17 Document #66 filed on **February 12, 2013** (and has been involved  
18 in informal discussions about this defense with the AUSA's office  
19 for more than two years), yet the AUSA's office has not sought  
20 further clarification or served a written response on EARLY as  
21 required by the rule. Incidentally, this is why the 1999 case of  
22 *United States v. Mack*, 164 F.3d 467 and the 1996 case of *United*  
23 *States v. Moreno*, 102 F.3d 994 and the 1991 case of *United States*  
24 *v. Brebner*, 951 F.2d 1017 are not persuasive. Rule 12.3 was  
25 extensively amended in 2002 and 2009.

26 2. To the extent that the Government claims that EARLY must testify or  
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28 <sup>1</sup> For a summary, yet incomplete list, see Defendant's Reply Memorandum  
Re: Motion to Compel (Doc #79), ¶¶ 14, 15, 16, 27, 34, 35, 36, 37, 38, 39, 46.

1 provide some statement under oath before asserting an affirmative  
2 defense, the Government is just plain wrong. The right to make a  
3 Motion for Judgment of Acquittal under Fed.R.Crim.Pro. 29 at the  
4 conclusion of the government's evidence is a substantive right afforded  
5 to all defendants. This issue is actually fleshed out more fully in  
6 Defendant EARLY's Motion in Limine #1 (Doc # 125). Furthermore the  
7 law is very clear in this circuit. Under *United States v. Tallmadge*, 829  
8 F.2d 767 (9<sup>th</sup> Cir. 1987) "[...T]he United States Government has made  
9 licensed firearms dealers federal agents in connection with the gathering  
10 and dispensing of information on the purchase of firearms." *Id.*, at 774.  
11 This proposition was upheld in the recent Supreme Court case of *U.S. v.*  
12 *Abramski*, 2014 U.S. Lexis 4170:

13 As we noted in *Huddleston*, Congress chose to  
14 make the dealer the "principal agent of federal  
15 enforcement" in "restricting [criminals'] access  
16 to firearms." 415 U. S., at 824, 94 S. Ct. 1262,  
39 L. Ed. 2d 782. And yes, that choice (like  
pretty much everything Congress does) was  
surely a result of compromise.

17 *Abramski at page 8 of the Slip Opinion*

18 The fact that Defendant SNELLINGS is named as a co-conspirator is beside  
19 the point. He was licensed by the federal government to insure the lawfulness  
20 of all gun transactions in his store for all relevant time periods. The whole  
21 point of licensing schemes is so that the public may rely on the government's  
22 oversight of the licensee (SNELLINGS) to insure compliance with applicable  
23 laws. That fact doesn't change whether the licensed activity is gun sales, hair  
24 salons, or practicing law. Furthermore the government agency (BATFE)  
25 responsible for overseeing gun sales is equally as culpable as a source of  
26 confusion about how to fill out an ATF-4473.

27 a. As already noted in Defendant EARLY's motions to dismiss,  
28 there is no definition of buyer, transferee, or

1 buyer/transferee in any published statute, regulation, letter  
2 ruling or industry memo by the BATFE.

3 b. Additionally, the ATF's wholly inadequate reference to these  
4 terms on the 4473 itself is not legal authority, even though  
5 it is apparently relied upon by unsuspecting FFL's and gun  
6 buyers. From *Abramski*:

7 [...C]riminal laws are for courts, not for  
8 the Government, to construe. See, e.g.,  
9 *United States v. Apel*, 571 U. S. \_\_\_, 134 S.  
10 Ct. 1144, 188 L. Ed. 2d 75, 83 (2014) ("[W]e  
11 have never held that the Government's  
12 reading of a criminal statute is entitled to  
13 any deference"). We think ATF's old  
14 position no more relevant than its current  
15 one – which is to say, not relevant at all.  
16 Whether the Government interprets a  
17 criminal statute too broadly (as it  
18 sometimes does) or too narrowly (as the  
19 ATF used to in construing §922(a)(6)), a  
20 court has an obligation to correct its error.

21 *U.S. v. Abramski*, 2014 U.S. Lexis 4170, 4180

22 The government relies upon the case of *United States v. Dole*, 705 F.3d 1134  
23 (9<sup>th</sup> Cir. 2013) for the proposition that EARLY cannot assert an affirmative  
24 defense during the government's case-in-chief. They are wrong. That case  
25 (and *Dixon v. United States*, 548 U.S. 1 (2006)) dealt with whether an  
26 affirmative defense negates an element of the crime as the threshold issue as  
27 to when and how an affirmative defense is to be made. Jury Instructions are  
28 not yet due as of the date of this Response, but both of Ninth Circuit Model  
Instructions (unmodified) for: Conspiracy to Defraud the United States (18  
U.S.C. § 371 "Defraud Clause") [Model Instruction # 8.21] and False  
Statement or Identification in Acquisition or Attempted Acquisition of a  
Firearm (18 U.S.C. § 922(a)(6))<sup>2</sup> [Model Instruction # 8.58]; require the

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<sup>2</sup> There is no model instruction for violation of 18 USC § 924(a)(1)(4) as  
alleged in the indictment Count #6. That section does not describe a crime, it sets  
forth the penalty for making a false statement. EARLY already brought a motion

1 government to prove a *mens rea* of specific intent beyond a reasonable doubt.  
2 EARLY entrapment by estoppel defense is a *mens rea* defense to a charged  
3 crime that depends for conviction upon the government proving a culpable  
4 state of mind. While it is possible that EARLY might not prevail on negating  
5 that element based on the presentation of any/all evidence during the  
6 government's case, he is absolutely entitled to try to make a Rule 29 motion at  
7 the conclusion of the government's case. Furthermore, there is no authority  
8 for the government's assertion that EARLY himself cannot present that  
9 evidence if/when the Defense must put on its own case relating to Count #6.  
10 The government's motion should be denied.

11 B. The government has moved for an order excluding Defendant's experts on  
12 legal matters. The court's ruling on this motion should be deferred until the  
13 issue is presented in context. Defendant EARLY is a gun rights activist. He  
14 studies the law and has tried to comply with it. He reads Supreme Court  
15 opinions all the time in his attempt to understand the law. Whether his  
16 interpretation (which partially overlaps the opinions of no less than four (4)  
17 Supreme Court justices) is reasonable and therefore whether that  
18 reasonableness is valid goes to his state of mind. EARLY's state of mind is  
19 therefore relevant not only to his defense but to the proof required during the  
20 government's case. Whether that state of mind is reasonable is a fact that  
21 would be helpful to the trier of fact. That is all that is necessary for the court  
22 to permit expert testimony. FRE 702 *et seq.* The reasonableness of EARLY's  
23 interpretation of legal matters that may be relevant in this trial will cover not  
24 only the issues covered by *Abramski*, but also the purely mundane  
25 understanding of who is a buyer, who is a transferee or who is a  
26 buyer/transferee in ordinary commercial transaction for goods. (i.e., the

27 \_\_\_\_\_  
28 that was denied making the argument that the government has improperly charged  
this case.

1 Uniform Commercial Code) EARLY tried to make exactly this point during  
2 his Motion to Dismiss which was denied because (paraphrasing) the Court  
3 thought the issue turns on facts. EARLY wants to be prepared to present  
4 “facts” that it is not unreasonable for him to conclude that the “C.K.”  
5 identified in Count #6 of the Indictment was “in fact” the buyer/transferee of  
6 the firearm in question (regardless of “C.K.’s” subjective intent).

- 7 1. For example: California Commercial Code section 2103(1)(a) defines  
8 "Buyer" as a person who buys or contracts to buy goods.
- 9 2. For example: UCC 1-201(B)(9) – Subject to definitions contained in  
10 other articles of the Uniform Commercial Code that apply to particular  
11 articles or parts thereof: "Buyer in ordinary course of business" means a  
12 person that buys goods in good faith, without knowledge that the sale  
13 violates the rights of another person in the goods, and in the ordinary  
14 course from a person, other than a pawnbroker, in the business of  
15 selling goods of that kind. A person buys goods in the ordinary course if  
16 the sale to the person comports with the usual or customary practices in  
17 the kind of business in which the seller is engaged or with the seller's  
18 own usual or customary practices. [...] A buyer in ordinary course of  
19 business may buy for cash, by exchange of other property, or on secured  
20 or unsecured credit, and may acquire goods or documents of title under  
21 a preexisting contract for sale. Only a buyer that takes possession of the  
22 goods or has a right to recover the goods from the seller under Article 2  
23 may be a buyer in ordinary course of business. [...]. The government's  
24 Motion should be denied.

25 C. Defendant EARLY has no comments on this Motion in Limine regarding  
26 McGowan's expert, but joins in McGowan's opposition to the Government's  
27 motion. The government's Motion should be denied.

28 D. Defendant EARLY own statements, to the extent they are elicited though the

1 government's witnesses during their case-in-chief are absolutely admissible if  
2 they are relevant to an element (*mens rea*) of the crime. See above. The  
3 government's Motion should be denied.

4 E. Defendant EARLY hereby objects to having his statements characterized as a  
5 "confession." This motion by the government is premature and should be  
6 denied without prejudice and ruled upon in the context of facts as they  
7 develop at trial. The government's Motion should be denied.

8 F. Defendant EARLY takes no position on McGowan's prior convictions, but  
9 would join in his opposition if he makes one.

10 G. Defendant EARLY's only comments on Government's request to offer public  
11 and business records is that complete records be offered and redaction be  
12 limited to protecting the financial and personal privacy of third parties.

13 H. Defendant EARLY is not planing on making a jury nullification argument, so  
14 he has no objection to this motion by the government. However, the Court  
15 will have to grapple (in the Jury Instructions) with the fact that vague and  
16 ambiguous laws are subject to particularly exacting scrutiny when they  
17 trench on fundamental rights. This issue is more properly addressed in the  
18 Jury Instruction contest that is forthcoming. However, on the issue of  
19 "character evidence" raised in the government's motion in sub-part H; EARLY  
20 has many prior transactions of firearms (buying and selling) that are relevant  
21 to show a habit and pattern of lawful conduct in conformance with his  
22 assertion of innocense as to Count #6. This character for lawfully buying and  
23 selling firearms in the past is relevant under FRE 404, 405 and 406. To that  
24 extent the government's motions should be granted in part and denied in part.

25 Respectfully submitted, September 15, 2014

26 /s/ Donald Kilmer

27 Attorney for Defendant EARLY  
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