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ULYSSES SIMPSON GRANT EARLY

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

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

DEFENDANT ULYSSES SIMPSON GRANT EARLY, IV's CONSOLIDATED REPLY BRIEF RE: MOTIONS TO DISMISS THE INDICTMENT OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS (Docs 108, 110, 111) [Fed Rule of Crim Pr 7 & 12]

Date: August 28, 2014
Time: 9:30 a.m.
Judge: Troy L. Nunley (TLN)
Courtroom: 2, 15th Floor

Please take NOTICE that at the dates, times and places indicated herein, the Defendant ULYSSES SIMPSON GRANT EARLY, IV will move this Court, pursuant to Rules 12(b) and 7(c)(1) of the Federal Rule of Criminal Procedure for an order dismissing the Indictment or in the alternative and pursuant to Rule 7(f) of the Federal Rules of Criminal for an order directing the Government to file a bill of particulars.

The motions to (1) dismiss the indictment or issue a bill of particulars (Doc 110); for (2) dismissal for failure to allege a crime (Doc 108) and for (3) dismissal based on vindictive prosecution (Doc 111) were all filed concurrently on July 30, 2014.

The Motions and this Reply are based on the record in this matter, judicially noticeable facts, the concurrently filed declaration of counsel and the Memorandum of Points and Authorities set forth below.

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

Date: August 25, 2014

/s/ Donald Kilmer
Attorney for Defendant EARLY

REPLY MEMORANDUM

Timeliness of Motion

The following facts bear repeating:

a. This case was declared complex at the request of the government, and the government was ordered to produce additional discovery in this case as late as June 14, 2013. (Docket Entry # 85, 05/23/2013)

b. Defendant EARLY subsequently received additional discovery on April 19, 2013 and July 3, 2013.

c. Defendant EARLY also received additional discovery while the *Abramski* stay was pending on or about March 20, 2014.

d. The government joined in the Defense motion to continue the trial based on the Supreme Court's certiorari grant in *U.S. v. Abramski*, 134 S. Ct. 2259; 189 L. Ed. 2d 262; 2014 U.S. LEXIS 4170 (2014). See Docs 99 - 103.

e. This necessarily means that the government itself had concluded that *Abramski* could have been dispostive of this case. The AUSA's comments that *Abramski* had little impact on this case is both: (1) a spectacular bit of *post-hoc* prognostication and (2) entirely beside the point. This case was on hold by order of the Court until the *Abramski* decision became final. The Supreme Court issued its final judgment and mandate on July 18, 2014. Early filed his motion on July 30, 2014, a mere 12 days later.

f. All of this defeats the government's contention that the motions should be denied based on some perceived tardiness. There was no way anyone could predict the result in the *Abramski* case. (Indeed, even though Abramski lost his appeal 5-4 at the Supreme Court, there are nuggets of value to EARLY in that decision.) But what was clear from the stipulation of the parties to continue the trial and the subsequent dribbling out of additional discovery as late as March of this year, is that *Abramski* had the practical effect of re-booting this case.

g. Therefore EARLY's attempt to negotiate with the government before filing his motions a mere 12 days after the *Abramski* decision became final is not an undue delay in seeking law/motions remedies in this matter.

h. Furthermore, even if the government plead and proved some form of prejudice (other than having the court consider EARLY's motion), the appropriate remedy would be to continue the trial when/if the AUSA makes a showing of prejudice.

i. In other words, Defendant EARLY has been diligent in his defense efforts.

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

1. Entrapment by Estoppel.
2. Vindictive Prosecution.
3. Selective Prosecution.

Substantive Reply Re: Dismissal

This Court should take into consideration all of the implications of the conspiracy theory relating Count #6 of the indictment, especially the proposition:

> That because "C.K." had formed the intent, at the time he signed the Form 4473, to later resell the firearm to EARLY; he somehow doesn't qualify as a "buyer/transferee" and thus made a false statement in connection with the purchase of a firearm.

It should not escape the Court's attention that the government has failed to charge "C.K." with **any** crime. If this case were to mirror *Abramski*, "C.K." would be the defendant as he initiated the string of transactions described in Count #6 of the indictment. Furthermore, GRANT EARLY, doesn't even step into the shoes of Abramski's uncle because:

a. There is no allegation that "C.K." used funds provided by EARLY to make his initial purchase of the gun in question.

b. Nor was the FFL in this case deprived of the information that there was to a later reconveyance of the gun. That point was important to the *Abramski* Court. *Id.,* at 2268-69. Furthermore, the transfer to Abramski's uncle took place in another state! In this case the government has alleged that the same FFL was privy to the entire (intended) series of transactions all along.

All of this invites the question: Why is the government seeking to expand the definition of and make up new criminal law with regard to the doctrine of "straw-man" purchases by seeking criminal indictments? Why not have the regulatory agency that oversees federal gun law engage in some rule making? Or issue an industry memo? Or lobby Congress to change the law?

Another fact that this Court must be kept in mind when ruling on this motion, is that EARLY, SNELLINGS and "C.K." were engaged in commerce relating to the acquisition of arms to exercise their fundamental rights under the Second Amendment. EARLY (such a nefarious criminal) even registered this "crime gun" with the Sheriff of Sacramento County when he applied for and was granted a Concealed Weapons Carry Permit. He sought and obtained that permit for the purpose of exercising his "right of self-defense."

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. The Second Amendment right to keep and

bear arms is an individual right and a fundamental right. See *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3042 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *Nordvke v. King*, 681 F.3d 1041, 1043 (9th Cir. 2012) (en banc). The Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*, 130 S.Ct. at 3044; see also *Heller*, 554 U.S. at 630.

While the Second Amendment's protections are not unlimited, and longstanding regulatory measures such as "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," may be presumptively lawful [*McDonald*, 130 S.Ct. at 3047; *Heller*, 554 U.S. at 626-27; *United States v. Chovan*, 735 F.3d 1127, 1133 (9th Cir. 2013)] – that does not detract from the proposition that this court is duty bound to scrutinize the government's highly technical reading of a criminal statute that regulates a fundamental right by imposing prison sentences.

EARLY is not arguing that he has a Second Amendment right to defy federal law just because he is engaged in commerce relating to guns. He is arguing for a recognition that fundamental fairness requires Constitutionally significant notice of criminal liability when the government seeks to regulate a fundamental right. First Amendment jurisprudence is instructive for the present case.

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou v.Jacksonville*, 405 U. S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939)

(alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v.Williams*, 553 U. S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid*. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id*., at 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

These concerns are implicated here because, at the outset, the broadcasters claim they did not have, and do not have, sufficient notice of what is proscribed. And leaving aside any concerns about facial invalidity, they contend that the lengthy procedural history set forth above shows that the broadcasters did not have fair notice of what was forbidden. Under the 2001 Guidelines in force when the broadcasts occurred, a key consideration was " 'whether the material dwell[ed] on or repeat[ed] at length' " the offending description or depiction. 613 F.3d, at 322. In the 2004 *Golden Globes* Order, issued after the broadcasts, the Commission changed course and held that fleeting expletives could be a statutory violation. *Fox I*, 556 U. S., at 512, 129 S. Ct. 1800, 173 L. Ed. 2d 738. In the challenged orders now under review the Commission applied the new principle promulgated in the Golden Globes Order and determined fleeting expletives and a brief moment of indecency were actionably indecent. This regulatory history, however, makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation. The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of § 1464 as interpreted and enforced by the agency "fail[ed] to provide a person of ordinary intelligence fair notice of what is

> prohibited." *Williams*, supra, at 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650. This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon "sensitive areas of basic First Amendment freedoms," *Baggett v. Bullitt*, 377 U. S. 360, 372, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); see also *Reno v. ACLU*, 521 U. S. 844, 870-871, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect").
>
> *F.C.C. v. Fox Television Station, Inc.,*
> 132 S. Ct. 2307, 2317 (2012)

One of the helpful gems for EARLY that can be gleaned from the *Abramksi* decision is the breakdown on the votes. The Supreme Court Justices split a 5-4 decision regarding what constitutes materially false statement when buying a gun. If that fact alone does not establish, as a matter a law, the proposition that the "Straw-Man Doctrine" – at least with respect to the government's fantastical allegation of conspiracy against EARLY – is vague and ambiguous, it is difficult to imagine a circumstance where that conclusion could be made.

This might be a different case if the AUSA had cast "C.K." in roll of defendant, his actions come closest to the conduct described in *Abramksi*. But it is a bridge too far to criminalize EARLY's agreement to buy a gun from "C.K." after "C.K." buys the gun with his own money, runs the first transaction through a (state and federal) licensed dealer, and then wait 30 days to run a second transaction through the same FFL.

How does all of this rise to the specter of a felony indictment with a man's liberty and other fundamental rights at stake? How, and in what manner was the government deprived of revenue? Information? An opportunity to stop the transaction based on felony or domestic violence convictions?

When police officers make technical mistakes about the law, even mistakes that result in the depravation of a citizen's constitutional rights, liability for that mistake, when there is no case law directly on point is shielded by the doctrine of

Qualified Immunity.

If that "notice" doctrine can be invoked to shield a government defendant from paying damages, why can't an analogous doctrine be invoked to shield a criminal defendant, who is arguably exercising a fundamental right, for the same reasons? Surely there is room in the Due Process Clause of the Fifth Amendment for such a doctrine in circumstances like this?

Analogizing that Fifth Amendment Due Process notice requirements to Qualified Immunity, we can look to the Supreme Court's two-part analysis for resolving government officials' immunity claims. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001), overruled in part on other grounds by *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). First, the court must consider whether the facts "[t]aken in the light most favorable to the party asserting the injury . . . show [that] the [defendant's] conduct violated a constitutional right[.]" *Saucier*, 533 U.S. at 201; see also *Scott v. Harris*, 550 U.S. 372, 377 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (per curiam); *Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006); *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002); *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002).

Second, the court must determine whether the right was clearly established at the time of the alleged violation. *Saucier*, 533 U.S. at 201; *Scott*, 550 U.S. at 377; *Brosseau*, 543 U.S. at 199-201; *Hope*, 536 U.S. at 739; *Garcia v. County of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011); *Rodis v. City & County of San Francisco*, 558 F.3d 964, 968 (9th Cir. 2009); *Inouye*, 504 F.3d at 712; *Kennedy*, 439 F.3d at 1060; *Estate of Ford*, 301 F.3d at 1050; *Sorrels*, 290 F.3d at 969.

Even if the violated right was clearly established at the time of the violation, it may be "difficult for [the defendant] to determine how the relevant legal doctrine . . . will apply to the factual situation the [defendant] confronts. . . . [Therefore, i]f the [defendant's] mistake as to

what the law requires is reasonable . . . the [defendant] is entitled to the immunity defense." (Emphasis added) *Saucier*, 533 U.S. at 205; *Kennedy*, 439 F.3d at 1061; *Estate of Ford*, 301 F.3d at 1050; cf. *Inouye*, 504 F.3d at 712 n.6 (explaining that the inquiry into the reasonableness of the defendant's mistake is not the "third" step in the *Saucier* analysis, but rather, is part of the second step of *Saucier's* two-step analysis). **"The reasonableness inquiry is objective, evaluating 'whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.'"** (emphasis added) *Huff v. City of Burbank*, 632 F.3d 539, 549 (9th Cir. 2011) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

Transplanting that analysis to the Conspiracy Charged in Count #6 against EARLY, and given the Supreme Court's split decision in *Abramski*, this Court should conclude that EARLY's innocent agreement to buy a gun from "C.K." – through a series of transactions that the government concedes is legal under state law (see ¶ 4 of the Indictment, Doc 1) is objectively reasonable without regard to intent or motivation. In other words, no trial is necessary.

Indeed, if Count #6 is tried to a jury, EARLY's primary defense (see his Fed. R. Crim. Pro. 12.3 Notices filed at Docket Entry #66, 02/12/2013) will be that he didn't intend to break the law. There is even less justification for submitting EARLY's liberty to a jury in a criminal trial, than there is in submitting a police officer's financial well-being to the same uncertainty in a civil case.

Again the Supreme Court's First Amendment jurisprudence is instructive on the point of due process, notice and fundamental fairness when laws impinge on fundamental rights:

> Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. American Civil Liberties Union*, 521 U.S. 844,

> 871-872, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). Vague laws force potential speakers to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), "government may regulate in the area" of First Amendment freedoms "only with narrow specificity," *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); see also *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).
>
> *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729; 2743 (2011)

Said another way? If the transactions described as a criminal conspiracy in Count #6 of the indictment had taken place after July 18, 2014 (the date the *Abramski* decision became final), this might – arguably – be a different case. With no controlling case law before that date, Count #6 must be dismissed.

Re: Bill of Particulars

The same arguments made for dismissal, compel issuance of an order for a Bill of Particulars if the Defendant doesn't quite cross the finish line for an outright dismissal. Both the Motion to Dismiss and the Motion for a Bill of Particulars invoke due process and notice considerations. So even if the court harbors some "reasonable doubt" that a dismissal is improper at this juncture, for the reasons set forth above and in the moving papers filed on July 30, 2014, this Court should grant EARLY's motion for the Bill of Particulars to insure that he is not blind-sided by surprise witnesses and/or additional creative interpretations of the law.

The AUSA makes the predictable argument that a Bill of Particulars is not a substitute for discovery and that office even suggests that EARLY file a Motion to Compel Discovery. Perhaps the AUSA does not remember that EARLY filed such a motion and had most (but not all) of his requests denied by the magistrate. (Doc 64, 65, 66, 67.) One problem is that the AUSA has not complied with Judge Brennan's minute order to prepare the order after the April 9, 2013 hearing. (Doc 83), even

though the government did make the discovery that was won in that motion available to the Defendants pursuant to the Court Minute order of May 23, 2014. (Doc 85).

Buyer/Seller Rule or Wharton's Rule

In another example of the AUSA making up doctrine to suit the theory of their case, the United States contends that Defendant SNELLINGS could not have been their agent during a time period when he held a valid license at precisely the same time alleged in Count #6. Stop and think about this for a minute. The whole point of requiring licenses, and requiring that they be publicly displayed, is to put the public on notice that they are dealing with an agent of the United States Government. More importantly the government's assertion that SNELLINGS was not their agent during a time period that he held a valid license flies in the face of the *Abramski* opinion. *"As we noted in Huddleston, Congress chose to make the dealer the "principal agent of federal enforcement" in "restricting [criminals'] access to firearms." 415 U. S., at 824, 94 S. Ct. 1262, 39 L. Ed. 2d 782." Id.*, at 2271.

Assuming – arguendo – that SNELLINGS was engaged in nefarious schemes, the fact remains that EARLY himself was not a licensed dealer but a member of the gun-buying public entitled to rely on the valid – federally issued – license hanging in SNELLING's store. If the ATF failed to properly regulate SNELLING's activities and/or put the world on notice that he was no longer acting as their principal agent of federal enforcement by revoking his license, then the failure here is regulatory not criminal and the case against EARLY should be dismissed.

The point here is that the government's theory of the case is that EARLY was engaged in a straw purchase. Notwithstanding the phantom status of SNELLING's license, a purchase implies a buyer and a seller. *See: United States v. Donnell*, 596 F.3d 913, 924-25 (8th Cir. 2010)("Mere proof of a buyer-seller agreement without any prior or contemporaneous understanding does not support a conspiracy

conviction because there is no common illegal purpose: In such circumstances, the buyer's purpose is to buy; and the seller's purpose is to sell"); *United States v. Bacon*, 598 F.3d 772, 777 (11th Cir. 2010)("... the joint objective necessary for a conspiracy conviction is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs").

This Court can and should dismiss Count #6 under either the Wharton Rule or the Buyer/Seller Doctrine.

Vindictive/Selective Prosecution

The AUSA fundamentally misunderstands the nature of EARLY's motion for vindictive/selective prosecution. He conceded in his moving papers that he can only make out a prima facie (probable cause) allegation of bad faith prosecution. But that is because he was denied the opportunity to conduct discovery on this issue by the Magistrate's Order denying his motion to compel on April 5, 2013. (Doc 83).

Unless this Court is prepared to revisit that order and permit discovery and a hearing on this issue, EARLY is merely preserving his appellate rights against the order denying the discovery.

CONCLUSION

For the foregoing reasons, Defendant EARLY requests that the Court dismiss this criminal action (Count #6) against him or, in the alternative, to grant his motion for a bill of particulars.

Date: August 25, 2014

/s/ Donald Kilmer
Attorney for Defendant EARLY