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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DANIEL EDWARD CHOVAN, Defendant.	Case No. 10CR1805-JAH **RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:** **(1) COMPEL SPECIFIC DISCOVERY** **(2) DISMISS COUNT 1 OF THE INDICTMENT AS VIOLATION OF DEFENDANT'S SECOND AMENDMENT RIGHTS** **(3) DISMISS COUNT 1 OF THE INDICTMENT BASED ON DEFENDANT'S CLAIMS THAT HIS CIVIL RIGHTS HAVE BEEN RESTORED** **(4) DISMISS COUNT 1 OF THE INDICTMENT AS A VIOLATION OF DEFENDANT'S EQUAL PROTECTION RIGHTS** **(5) GRANT LEAVE TO FILE FURTHER MOTIONS** Date: June 21, 2010 Time: 10:30 a.m. Court: The Hon. John A. Houston

COMES NOW the UNITED STATES OF AMERICA, by and through its counsel, Laura E. Duffy, United States Attorney, and Caroline P. Han, Assistant United States Attorney, and respectfully submits the following Response and Opposition to Defendant's Motions to Compel Specific Discovery, Dismiss Count One as Violation of Defendant's Second Amendment Rights, Dismiss Count One Based on Defendant's Claims that His Civil Rights Have Been Restored, Dismiss Count One as a Violation of Defendant's Equal Protection Rights, and for Leave to File Further Motions.

I

STATEMENT OF FACTS

On October 31, 2009, the defendant attempted to purchase a firearm at Wholesale Guns in Santee, California. As is the regular course with the purchase of a firearm, the defendant completed ATF Form 4473 (Firearms Transaction Record). Among other things, the form includes questions about an applicant's criminal history as relevant to federal restrictions on the possession of firearms by prohibited persons based on their criminal history. Question 11(I) of the form asks the applicant, "Have you ever been convicted in any court of a misdemeanor crime of domestic violence?" Based on an interview with an employee of Wholesale Guns, Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) learned that the defendant initially checked the "YES" box, but then ultimately checked the "NO" box and initialed the correction. The defendant also informed the employee that he no longer believed he was precluded from owning a firearm because it had been 10 years since his conviction. When Wholesale Guns submitted the defendant's information for a required background check, Wholesale Guns received a response indicating that the defendant was precluded from owning or purchasing a firearm based on his misdemeanor domestic violence conviction. More specifically, agents learned that the defendant was convicted of Inflicting Corporal Injury on a Spouse, a misdemeanor, in violation of California Penal Code 273.5(a), in San Diego County and that the victim of the offense was Cheryl Fix.

Subsequent to learning this information, agents learned from San Diego County Deputy Sheriff Mike Crews that he responded to a call of a domestic abuse incident on March 29, 2010 at the home of Daniel and Cheryl Chovan located at 18582 Bee Canyon Road Dulzura, CA. Deputy Crews and his fellow deputies interviewed Cheryl Chovan and learned that the defendant had struck her with a cell phone. She also stated that she feared leaving her husband because he had previously threatened to hunt her down and shoot her if she ever left him. She further stated that she believed his threats because he had weapons inside the house, including a shotgun.

Thereafter, based on the above described information as well as other information, on April 12, 2010, U.S. Magistrate Judge Cathy Ann Bencivengo signed a search warrant for the defendant's premises located at 18582 Bee Canyon Road Dulzura, CA to seek and obtain evidence of violations

of Title 18 U.S.C 922(g)(9), Prohibited Person in Possession of a Firearm.

On April 15, 2010, ATF and FBI Agents, served the above authorized search warrant seeking evidence of federal firearms violations. The following guns and ammunition were seized during the search: a Winchester 12 gauge shotgun model 37A bearing serial number C974628 with one (1) live round in the chamber; a Baldwin & Company limited 20 gauge shotgun; a Savage Arms Company .22 caliber Rifle; three (3) rounds of Ammo Independence 12 gauge shells; five hundred (500) rounds of 22 cc/Speer caliber ammunition; twenty-five (25) rounds of 12 gauge shotgun shells; and three (3) loose rounds of ammunition. Thereafter on April 21, 2010, Cheryl Ann Chovan, signed a separate FD-26, Department of Justice, Federal Bureau of Investigation, Consent to Search form, authorizing the removal of a High Standard MPG .22 caliber handgun bearing serial number 2254942 from the defendant's home. An analysis of the guns performed by ATF Agent Matthew Beals has revealed that the Winchester 12 gauge shotgun; the Savage Farms .22 caliber rifle; and the High Standard MPG .22 caliber handgun are all firearms within the meaning set forth in Title 18, United States Code section 921(a)(3) and all have an interstate nexus. Agents was arrested for a violation of Title 18 U.S.C 922(g)(9), Prohibited Person in Possession of a Firearm, on April 16, 2010.

In addition to the above stated events, videos depicting the defendant have been posted on http://www.YouTube.com. These videos have been viewed by agents investigating this case. Agents who have performed surveillance of the defendant and participated in the arrest of the defendant have viewed these videos. The videos depict the defendant and other individuals firing both shouldered weapons as well as handguns in front of the defendant's residence at 18582 Bee Canyon Road Dulzura, CA. In one of the videos, the defendant is shown firing a shouldered weapon approximately seven (7) times in the videos. One of these videos also shows the defendant acting as a firearms instructor to an unidentified female in that he is seen teaching her to shoot a rifle.

On May 12, 2010, a grand jury handed up a two count indictment charging the defendant with a violation of Title 18 U.S.C. 922(g)(9), Prohibited Person in Possession of a Firearm, and a violation of Title 18, U.S.C. 924(d), False Statement in Acquisition of a Firearm.

On May 13, 2010, the defendant was arraigned on the indictment and pled not guilty before

Hon. Nita L. Stormes.

II

MOTION TO COMPEL SPECIFIC DISCOVERY AND PRESERVE EVIDENCE

To date, the Government has provided the defendant with 160 pages of discovery to the defendant, including copies of reports of investigation, witness statements, and copies of documentation supporting his underlying conviction for a misdemeanor crime of domestic violence.

With respect to the defendant's discovery motions, the Constitution requires the Government to preserve evidence "that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479, 488 (1984). To require preservation by the Government, such evidence must (1) "possess an exculpatory value that was apparent before the evidence was destroyed," and (2) "be of such a nature that the Defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489; see also Cooper v. Calderon, 255 F.3d 1104, 1113-14 (9th Cir. 2001). The Government will make every effort to preserve evidence it deems to be relevant and material to this case. Any failure to gather and preserve evidence, however, would not violate due process absent bad faith by the Government that results in actual prejudice to the Defendant. See Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam); Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988); United States v. Rivera-Relle, 322 F.3d 670 (9th Cir. 2003); Downs v. Hoyt, 232 F.3d 1031, 1037-38 (9th Cir. 2000).

(1) Defendant's Statements – The Government recognizes its obligation, under Rules 16(a)(1)(A) and 16(a)(1)(B), to provide to the defendant the substance of the defendant's oral statements and defendant's written statements. (Unless otherwise noted, all references to "Rules" refers to the Federal Rules of Criminal Procedure.) The Government has produced all of the defendant's statements that are known to the undersigned Assistant U.S. Attorney as of this date. If the Government discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be promptly provided to Defendant.

(2) Arrest Reports, Notes, and Dispatch Tapes – The Government has provided the defendant with all known reports related to the defendant's arrest in this case. The Government is not aware of the existence of any dispatch tapes existing related to the arrest of the defendant. The

Government will continue to comply with its obligation to provide to the defendant all reports subject to Rule 16.

(3) Brady Material – The Government has and will continue to perform its duty under Brady v. Maryland, 373 U.S. 83 (1963) to disclose material exculpatory information or evidence favorable to the defendant when such evidence is material to guilt or punishment. The Government recognizes that its obligation under Brady covers not only exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on behalf of the United States. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667, 676-77 (1985). This obligation also extends to evidence that was not requested by the defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107-10 (1976). "Evidence is material, and must be disclosed (pursuant to Brady), 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc). The final determination of materiality is based on the "suppressed evidence considered collectively, not item by item." Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

Brady does not, however, mandate that the Government open all of its files for discovery. See United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000) (per curiam). Under Brady, the United States is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the defendant from other sources (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the defendant already possesses (see United States v. Mikaelian, 168 F.3d 380-389-90 (9th Cir. 1999) amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the undersigned Assistant U.S. Attorney could not reasonably be imputed to have knowledge or control over. See United States v. Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001). Brady does not require the United States "to create exculpatory evidence that does not exist," United States v. Sukumolahan, 610 F.2d 685, 687 (9th Cir. 1980), but only requires that the Government "supply the defendant with exculpatory information of which it is aware." United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976).

The Government has no objection to the preservation of the agents' handwritten notes. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must preserve their original notes of interviews of an accused or prospective government witnesses). However, the Government objects to providing the defendant with a copy of the rough notes at this time. The Government is not required to produce the notes pursuant to the Jencks Act because the notes do not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The notes are not Brady material because, as discussed further, the notes do not present any material exculpatory information or any evidence favorable to the defendant that is material to guilt or punishment. If, during a future evidentiary hearing, certain rough notes become particularly relevant, the notes in question will be made available to the defendant.

(4) Defendant's Prior Record – The Government has provided the defendant with a copy of his known prior criminal record and, consequently, has fulfilled its duty of discovery under Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129 (9th Cir. 1990). In addition the Government has provided the defendant with documentation supporting the underlying misdemeanor crime of domestic violence conviction. To the extent that the Government determines that there are any additional documents reflecting the defendant's prior criminal record, the Government will provide those to the defendant.

(5) 404(b) Evidence – The Government will disclose in advance of trial the general nature of any "other bad acts" evidence that the United States intends to introduce at trial pursuant to Fed. R. Evid. 404(b). Evidence should not be treated as "other bad acts" evidence under Fed. R. Evid. 404(b) when the evidence concerning the other bad acts and the evidence concerning the crime charged are "inextricably intertwined." See United States v. Soliman, 812 F.2d 277, 279 (9th Cir. 1987).

(6) Evidence Seized – The Government has complied and will continue to comply with Rule 16(a)(1)(E) in allowing the defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all evidence seized that is within its possession, custody, or control, and that is

either material to the preparation of the defendant's defense, or is intended for use by the Government as evidence during its case-in-chief at trial, or was obtained from or belongs to the defendant. The defendant, through his counsel, need only provide notice to the undersigned and arrangements can be made for the inspection of the firearms and ammunition in this case.

(7) Tangible Objects – The Government has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of the defendant's defenses, or is intended for use by the Government as evidence during its case-in-chief at trial, or was obtained from or belongs to the defendant. The Government need not, however, produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

(8) Evidence of Bias or Motive to Lie – The Government recognizes its obligation under Brady and Giglio to provide evidence that could be used to impeach Government witnesses including material information regarding demonstrable bias or motive to lie.

(9) Impeachment Evidence – As previously discussed, the Government recognizes its obligation under Brady and Giglio to provide material evidence that could be used to impeach Government witnesses.

(10) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling – The Government recognizes its obligation under Brady and Giglio to provide material evidence that could be used to impeach Government witnesses including material information related to perception, recollection, ability to communicate, or truth telling. The Government strenuously objects to providing any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic because such information is not discoverable under Rule 16, Brady, Giglio, Henthorn, or any other Constitutional or statutory disclosure provision.

(11) Name of Witnesses Favorable to the Defendant – The Government is not aware of the names of any witnesses favorable to the defendant's case. If the Government discovers any witnesses favorable to the defendant, the names of such witnesses will be promptly provided.

(12) Jencks Act Material – Rule 26.2 incorporates the Jencks Act, 18 U.S.C. §3500, into the Federal Rules of Criminal Procedure. The Jencks Act requires that, after a Government witness has testified on direct examination, the Government must give the defendant any "statement" (as defined by the Jencks Act) in the Government's possession that was made by the witness relating to the subject matter to which the witness testified. 18 U.S.C. §3500(b). For purposes of the Jencks Act, a "statement" is (1) a written statement made by the witness and signed or otherwise adopted or approved by her, (2) a substantially verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. §3500(e). If notes are read back to a witness to see whether or not the government agent correctly understood what the witness was saying, that act constitutes "adoption by the witness" for purposes of the Jencks Act. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)).

(13) Giglio Information and Agreements Between the Government and Witnesses An agreement that the Government makes with a witness for testimony in exchange for money or in exchange for favorable treatment in the criminal justice system is generally subject to disclosure as impeachment evidence under Brady and Giglio. See United States v. Kojayan, 8 F.3d 1315, 1322-23 (9th Cir. 1993); Benn v. Lambert, 238 F.3d 1040, 1054-60 (9th Cir. 2002). As stated above, the Government will provide any Giglio information in connection with this case no later than two weeks prior to trial.

(14) Reports of Scientific Tests or Examinations – The United States will discover the results of any scientific tests or examinations as they become available to the United States.

(15) Henthorn Material – The Government will comply with United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and request that all federal agencies involved in the criminal investigation and prosecution review the personnel files of the federal law enforcement inspectors, officers, and special agents whom the Government intends to call at trial and disclose information favorable to the defense that meets the appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992). If the undersigned Assistant U.S. Attorney is uncertain whether certain incriminating

information in the personnel files is "material," the information will be submitted to the Court for an in camera inspection and review.

(16) Informants and Cooperating Witnesses – At this time, the Government has already disclosed the existence and identity of an informant involved in this case. The Government must generally disclose the identity of informants where (1) the informant is a material witness, or (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this case, the Court may, in some circumstances, be required to conduct an in-chambers inspection to determine whether disclosure of the informant's identity is required under Roviaro. See United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). Should the Government become aware of any additional informants or confidential sources being involved in this case, we will make it known to the defendant or seek counsel of the Court should the Government object to disclosure.

(17) Expert Witnesses – The Government will comply with Rule 16(a)(1)(G) and provide the defendant with a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(18) Residual Request – The Government has already complied with the defendant's residual request for prompt compliance with the defendant's discovery requests.

III.

COUNT ONE DOES NOT VIOLATE THE DEFENDANT'S SECOND AMENDMENT RIGHTS

The defendant has moved to dismiss Count One of the indictment, arguing that it violates his Second Amendment rights. In support of his motion, the defendant relies on District of Columbia v. Heller, 128 S. Ct. 2783 (2008). For the reasons set forth below, the defendant erroneously relies on Heller and his claim must fail.

In Heller, the Supreme Court held that the Second Amendment provides an individual with a right to possess and use a firearm for lawful purposes, such as self-defense within the home. Id. at 2791-2821. In so doing, the Court found that two District of Columbia statutes were unconstitutional to the extent that they totally banned handgun possession in the home and required all firearms within homes to be kept inoperable at all times, and thus unavailable for the lawful

purpose of self-defense. Id. at 2822. At the same time, however, Court clearly stated that "the right secured by the Second Amendment is not unlimited." Heller, 128 S. Ct. at 2816.

The defendant has invoked Heller's language and argues that he, a person who has been convicted of a misdemeanor crime of domestic violence, has the same protection under the Second Amendment as the plaintiff in Heller. However, the defendant is not at all similarly situated to that plaintiff. The plaintiff in Heller was a special police officer in the District of Columbia, who applied to register a handgun that he wished to keep in his home. Heller, 128 S. Ct. at 2788. In addition, although the Court found that the Second Amendment protects a "natural right of an individual to keep and bear arms in the home in defense of self, family, and property, it cautioned that the risk was not absolute." Heller v. District of Columbia, 2010 WL 1140875 (D.D.C. 2010, Urbina, J) ("Heller II" (citing Heller I at 2797-99)). Moreover, in ordering the District of Columbia to allow plaintiff in Heller I to register his handgun and issue him a license to carry the gun in his home, the Court specifically conditioned the order on the assumption that "Heller is not disqualified from the exercise of Second Amendment rights." Heller I, 128 S.Ct. at 2822. This is especially significant in the defendant's case because he argues that based on the decision in Heller I, his rights under the Second Amendment are violated.

A. § 922(g)(9) is a "presumptively lawful measure" that was exempted by Heller from being an unlawful infringement on Second Amendment rights

In addition to acknowledging that a person's rights under the Second Amendment are not absolute, the Court further declared that "[N]othing in [its] opinion should be taken to cast doubt on longstanding 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 . . . ." Id. at 2816-17. Moreover, it specifically stated that ""we identify these presumptively lawful regulatory measures only as examples," not as an exhaustive list. Id. at 2817 n.26. Thus, like other constitutional rights, the individual right protected by the Second Amendment is not absolute, but is subject to appropriate restrictions.

The defendant has sought to dismiss the significance of this language by calling it dicta, but

the Ninth Circuit has definitively rejected this argument finding that the language is indeed, binding. United States v. Vongxay, 594 F.3d 1111, 1116 (9th Cir. 2010). In so doing, the Ninth Circuit explained that the language served as a limitation on the Court's ruling in Heller I, and "Courts often limit the scope of their holdings, and such limitations are integral to those holdings." Id. As such, the defendant cannot simply dismiss the limitations on the ruling set forth by the Court in Heller I. Even still, admittedly, the Heller I court did not specifically cite the limitation placed on people like the defendant who have been previously convicted of misdemeanor crimes of domestic violence. Regardless, if the restrictions set forth on felons in possession of firearms under 18 U.S.C. 922(g)(1) can be said to be longstanding as they were declared to be by the Court in Heller I, so can the restrictions set forth under 18 U.S.C. § 922(g)(9).

18 U.S.C. § 922(g)(1) was passed in 1968, whereas 18 U.S.C. § 922(g)(9) was passed in 1996. While 28 years exist in between the passage of the two statutes, the difference is not great at all. The difference might be significant if § 922(g)(1) dated back to the Bill of Rights or even to the first half of to the 20th Century, but such is not the case. As such, to the extent that the Court in Heller I found § 922(g)(1) to be longstanding having been passed in the 1960s, the less than three decade difference in the passage is in fact insignificant. In addition, the background to the 922(g)(9)'s passage demonstrates that § 922(g)(9) was passed, in part, as an extension of the prohibitions set forth in § 922(g)(1). For example, in adopting § 922(g)(9), Congress found that "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies," but "are, at most, convicted of a misdemeanor." 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg). As such, the passage of the statute sough to "close this dangerous loophole and keep guns from violent individuals who threaten their own families." Id. at 22,986. Given that the statutes were passed relatively close in time within the second half of the 20th century and § 922(g)(9) served as an extension of § 922(g)(1), this court can and should find that § 922(g)(9) is also "longstanding" and a "presumptively lawful regulatory measure," as § 922(g)(1) was described by Heller I. § 922(g)(9) was thus within the category of regulatory measures that the Supreme Court found to be excepted from being unlawful restrictions on citizens' Second Amendment rights. 128 S.Ct. at 2817. Should the court make that finding, the court would

not be alone in that several courts have agreed. See, e.g., United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010); United States v. Walker, 2010 WL 1640340 (E.D.Va. 2010, Hudson, J.).

In addition, this court can find that §922(g)(9) is historical and longstanding based upon the history of the right of the government to regulate gun possession. At the time that the United States was founded, domestic violence was not a concept within the political consciousness of the citizens of our nation. Much in the same way, based upon a lack of need or public demand for government regulation on the matter, possession of a firearm by a felon was also not regulated. In fact, many felonies were punishable by death or exile, thus doing away with any need for a specific regulation proscribing felons from possessing guns. See United States v. Brown, 2010 WL 2105157 at *8 (E.D. Va. 2010, Payne, J.) Moreover, "At that time, 'every man was supposed to keep a gun, [and] every man wanted to keep one and feared to be without one.' " Id. (citing Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* 240 (1st ed. 1975). But despite the fact that the era demanded men to be armed, there is support for the notion that the government could regulate a person's right to bear arms. Id. (internal citation omitted) (acknowledging that the British Parliament "granted citizens the right to bear arms only "as suitable to their conditions and as allowed by law" in the 1689 Declaration of Rights. Moreover, Virginia disarmed people who refused to swear to an oath of loyalty as early as 1756. Id. Thus, although persons convicted of domestic violence misdemeanors were not precluded from possessing firearms when this country was founded, the government did in fact regulate the possession of firearms and thus the right to bear arms was not absolute even then. As such, based upon the longstanding ability of the government to restrict the possession of firearms, this court can find that the prohibition of possession of a firearm by a domestic violence misdemeanant does not run afoul of the core Second Amendment right recognized in Heller.

B. Strict scrutiny does not apply to § 922(g)(9)

The defendant has urged this court to apply strict scrutiny review to § 922(g)(9), despite the fact that the Supreme Court declined to declare the standard of review that would apply to statutes to determine if they were an unlawful infringement on an individual's Second Amendment rights and

no indication exists of what the Court's view of what level of scrutiny should apply. Even still, the defendant argues that "given that the Court held that the Second Amendment sets out a fundamental individual right, there can be little doubt strict scrutiny applies" without citing to any authority. Def. Mtn. 9. In fact, the opposite is true in the defendant's case.

First, it is important to again emphasize that the plaintiff in Heller I was a law-abiding person who wanted to possess a gun in his home for purposes of self defense. Despite that, even in addressing his case, the Supreme Court acknowledged that he would still have to be in a position where he had not been "disqualified" from exercising his Second Amendment rights. Heller I, 128 S.Ct. at 2822. Second, the Court further specifically cited certain statutes, although not exhaustive, which were exempt from its holding, including § 922(g)(1), a statute that is akin to § 922(g)(9).

In addition to acknowledging the longstanding regulatory measures exempted from the holding in Heller I as discussed above, the Heller I court specifically discussed the interaction of its decision with its prior holding in United States v. Miller, 307 U.S. 174 (1939). Heller I, 128 S.Ct. at 2814-2815. In Miller, the Court had addressed an amendment that banned certain types of weapons and the Heller I court found that the two decisions could be reconciled. Specifically, the Heller I Court found that Miller stood for the "proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." Id. at 2814. As such, the Court in Heller I noted that in addition to the limitations on its holding as discussed above, Miller was yet another limitation on its holding to the extent that the core Second Amendment right could in fact be limited by a regulation that restricted the kinds of weapons that a person wanted to possess. Based on all of this, it is clear that the core Second Amendment right is not absolute and thus inherently, cannot be subject to strict scrutiny review.

The defendant further argues that as applied to him, the statute must be struck down under strict scrutiny review. However, as discussed above, the Supreme Court cited several lawful restrictions on the core right conferred under the Second Amendment even for law abiding people who wanted to possess a gun in their homes for the sake of self defense. The situation is wholly different for the defendant because although he seeks to minimize his conviction in his motion, he still has a criminal record. Moreover, he has not stated his purpose in possessing a firearm. As

such, it is impossible to assess the level of scrutiny that applies to the defendant's case. His reason for possessing a firearm is important as at least one court has found that a defendant, with a criminal record who argued that § 922(g)(9) violated his Second Amendment rights and who wanted to possess his firearms for hunting purposes, would have his claim evaluated under intermediate scrutiny review. United States v. Skoien, 587 F.3d 803, 812-816 (7th Cir. 2009), *rehearing en banc granted, opinion vacated by* 2010 WL 1267262 (7th Cir. 2010).

Because (1) the Heller I court noted the lawful regulatory measures that did not infringe upon the core Second Amendment right that it recognized in its decision and (2) the defendant, with his criminal record and unknown need to possess a firearm, would not receive strict scrutiny review in any event, the defendant's arguments that this court should review § 922(g)(9) under strict scrutiny review fail. Moreover, because § 922(g)(9) is a presumptively lawful measure akin to those recognized by the Court in Heller I and strict scrutiny does not apply to his challenge as applied to the defendant, the defendant's motion should be denied.

IV.

DEFENDANT HAS NOT HAD HIS CIVIL RIGHTS RESTORED WITHIN THE MEANING OF § 921(a)(33)(B)(ii) AND THUS THE STATUTE IS PROPERLY APPLIED TO HIS CASE

The defendant has argued that he is disqualified from being charged with a violation of 18 U.S.C. § 922(g)(9) because his civil rights have been restored within the meaning of § 921(a)(33)(B)(ii). For the reasons set forth below, he is in error and his motion should be denied.

In Logan v. United States, the Supreme Court addressed the meaning of a defendant having his or her "civil rights restored" as described in 18 U.S.C. § 921(a)(20), a provision that tracks § 921(a)(33)(B)(ii) as to the issue of restoration of rights. 552 U.S. 23, 36 (2007). The Supreme Court noted that in § 921(a)(33)(B)(ii), "the words 'civil rights restored' do not a cover a person whose civil rights were never taken away." Id.

The Ninth Circuit has noted that "no civil right could be more relevant to a felon's future dangerousness than the right to possess firearms." United States v. Valerio, 441 F.3d 837, 843. In Valerio, the court addressed a conviction for felon in possession in light of the provision in 18 U.S.C. § 921(a)(20). In that case, the issue was whether the defendant had been convicted of a felony for purposes of a conviction under 18 U.S.C. § 922(g)(1) where the defendant had initially

received a deferred imposition of sentence and subsequent discharge under New Mexico state law. Id. at 839. The Valerio court found that even though the defendant's civil rights, including the right to vote and to possess firearms, had been restored by the state of New Mexico, that the restoration of those civil rights were not sufficient to place him within the category of individuals who were precluded from prosecution by § 921(a)(20). Id. at 843-44. In support of its holding, the court cited the Supreme Court's words in Caron that "existing state law 'provide less than positive assurance that the person in question no longer poses an unreasonable risk of dangerousness' " and further opined that "Congress meant to keep guns away from all offenders who, the Federal Government feared, might cause harm, even if those persons were not deemed dangerous by the state." Id. at 843 (internal citation omitted).

In the defendant's case, he was convicted of a misdemeanor violation of California Penal Code § 273.5. See Ex. 1. As a consequence of this conviction, the defendant lost his ability to possess firearms under state law for a 10 year period. Cal. Pen. Code § 12021(c)(1). Specifically, the statute precludes a defendant who has been convicted of misdemeanor violations of § 273.5 of owning, purchasing, receiving, or possessing a firearm for a 10 year period after the conviction, and the violation of the statute is a misdemeanor violation punishable by a year in jail. Id. Other than the restriction set forth in § 12021, the defendant has not cited to any other restrictions that were placed on him in relation to his conviction for a misdemeanor crime of domestic violence. That is because indeed, there are no others. As the defendant states in his motion, despite his conviction, he retained his right to vote, hold public office, and be a juror. Cal. Const. art II, § 4; Cal. Const. art VII, § 8; Cal. Pen. Code § 893(a)(3). In addition, when he regained his ability to possess a firearm under California state law, it was done by operation of law.[1/] That is, as discussed in § 12021, the restriction on his possession was in effect for a 10 year period which ceased at the end of the 10 year period. See Cal. Pen. Code § 12021(c)(1). Based on the Supreme Court's reasoning in Logan, the

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[1/] This is significant in that in the case of a defendant who had received a piece of paper referred to as a "discharge order" which purported to restore his civil rights, the Ninth Circuit found that a prosecution under § 922(g)(1) was precluded by § 921(a)(20) because the defendant had been affirmatively informed that all of his civil rights had been restored and thus "a reservation in a corner of the state's penal code can not be the basis of a federal prosecution." United States v. Laskie, 511 F.3d 894, 900-901 (9th Cir. 2001).

defendant is erroneous in arguing that his "restoration of his civil rights is complete" and that he falls within the group of people whose civil rights were restored within the meaning of § 921(a)(33)(B)(ii). In fact, the only civil right of his that was restored was the ability to possess a firearm lawfully under California state law alone. In addition, based on the Ninth Circuit's decision in Valerio, the restoration of this right alone by operation of law is insufficient to protect the defendant from prosecution for a violation of § 922(g)(9).

V.

§ 922(g)(9) DOES NOT VIOLATE DEFENDANT'S EQUAL PROTECTION RIGHTS

The defendant argues that his equal protection rights have been violated because he is treated "dramatically different" from people who are similarly situated. Again, he urges this court to apply the strict scrutiny standard. For the reasons discussed above, this court should not apply the strict scrutiny standard. While if the right to bear arms is a fundamental right, rational basis analysis may no longer be applicable for all Second Amendment challenges, the Supreme Court in Heller I "purposefully differentiated the right to bear arms from the more limited rights of those who are restricted" by longstanding regulatory measures, including felons and domestic violence misdemeanants. See Vongxay, 594 F.3d at 1118.

As such, as discussed above, the Heller I court specifically excluded some people, including persons convicted of a domestic violence misdemeanor, from its holding by analogy given that felons and those with mental illness were also excluded. This view was adopted by the Ninth Circuit in Vongxay in addressing a defendant's similar claim with regards to § 922(g)(1) and the court applied its pre-Heller I precedent to the issue and rejected the claim. In the defendant's case, the Ninth's Circuit's precedent in United States v. Hancock is applicable, 231 F.3d 557 (9th Cir. 2000). In that case, the court agreed with the Eight Circuit's conclusions that "the discrepancy in treatment of which the defendant complained was the inevitable result of Congress' reference to state law" and the statute did not violate equal protection rights because domestic violence misdemeanants could regain their right to possess a firearm based upon means set forth in § 921(a)(33)(B)(ii). Id. at 567 (citing United States v. Smith, 171 F.3d 617, 626 (8th Circuit 1999).

Based on this prior Ninth Circuit precedent which has not been overruled, the defendant's claim must fail. See Vongxay, 594 F.3d at 1119 (citing State Oil Co. V. Khan, 52 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

VI.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

The Government does not object to the granting of leave to file further motions as long as the further motions are based on newly discovered evidence or discovery provided by the Government subsequent to the instant motion at issue.

VII.

CONCLUSION

For the foregoing reasons, the Government requests that the Court deny the defendant's motions, except where unopposed, and grant the Government's motion for reciprocal discovery.

DATED: June 14, 2010

Respectfully submitted,

LAURA E. DUFFY
United States Attorney

/s/ *Caroline P. Han*
CAROLINE P. HAN
Assistant United States Attorney
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United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DANIEL EDWARD CHOVAN, Defendant.	Criminal Case No. 10CR1805-JAH CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Caroline P. Han, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **RESPONSE AND OPPOSITION TO THE DEFENDANT'S MOTIONS TO COMPEL SPECIFIC DISCOVERY, DISMISS COUNT ONE AS VIOLATION OF DEFENDANT'S SECOND AMENDMENT RIGHTS, DISMISS COUNT ONE BASED ON DEFENDANT'S CLAIMS THAT HIS CIVIL RIGHTS HAVE BEEN RESTORED, DISMISS COUNT ONE AS A VIOLATION OF DEFENDANT'S EQUAL PROTECTION RIGHTS, and for LEAVE TO FILE FURTHER MOTIONS** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Joshua J. Jones
Attorney for the defendant

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2010

/s/ *Caroline P. Han*

CAROLINE P. HAN