

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

Attorney for Defendant:
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

NOTICE OF MOTION, and
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT ULYSSES SIMPSON
GRANT EARLY, IV's MOTION TO
DISMISS – VINDICTIVE/SELECTIVE
PROSECUTION
[Fed Rule of Crim Pr 12]

Date: August 14, 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 for an order dismissing this case. This motion is based on the record in this matter, judicially noticeable facts, the concurrently filed declaration of counsel and the attached Memorandum of Points and Authorities.

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.

INTRODUCTION

Preliminary Facts

On or about December 5, 2014 this Court issued an order (Doc 102) modifying the trial dates from an earlier order that had continued the original trial dates set in this case because the U.S. Supreme Court had granted certiorari in a case that addressed similar facts and laws to the issues presented herein. On June 16, 2014 the U.S. Supreme Court issued its opinion in *United States v. Abramski*, 134 S. Ct. 2259; 189 L. Ed. 2d 262; 2014 U.S. LEXIS 4170 (2014). Notice of the publication of that opinion was filed by on June 27, 2014 by Defendant EARLY. Judgment in the *Abramski* case was issued on July 18, 2014.

During the time period from June 16, 2014 to the present, Defendant EARLY has sent several emails to the United States Attorney's Office for the Eastern District of California attempting to meet/confer on the significance of the *Abramski* opinion on the status of this case. The parties have reached an impasse in those discussions and now turn to this Court for interpretations that may have dispositive impact on a very different case now that the Supreme Court has issued its opinion.

Assuming that the government will be heard to complain that these pretrial motions are not being heard within 21 days of arraignment pursuant to Local Rule 430.1(c), Defendant would seek an order from the Court that good cause exists to waive this rule in this case for the following reasons:

- a. There is no prejudice to the government as they were put on notice that this motion would be filed and EARLY in fact had pre-trial motions filed in this matter when the. (See fn. 2 of EARLY's Motion to Compel, Doc # 64 and Motions to Dismiss, Doc # 90, 91, 92, 93 and 94)
- b. Defendant EARLY was diligent in filing pre-trial motions for discovery. (Docket Entries #: 64, 65, 67, 79, 83, various dates)
- c. The case was declared complex and the government was ordered to produce additional discovery in this case as late as June 14, 2013.

(Docket Entry # 85, 05/23/2013)

- d. Thus the defendant(s) in this case risked having the indictment merely amended if they filed a Rule 12 motion without all of the government's discovery being disclosed.
- e. Defendant EARLY subsequently received additional discovery on April 19, 2013 and July 3, 2013 prior to the Court's aforementioned stay.
- f. Defendant EARLY also received additional discovery while the stay was pending on March 20, 2014.
- g. And finally as noted above, this case was on hold by order of the Court due to the *Abramski* case pending in the Supreme Court, which only issued its final judgment and mandate on July 18, 2014.

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

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.

STATEMENT OF FACTS¹

1. Since January 1, 2001, California statutory law and various administrative regulations have created a roster of "Safe Handguns." See: California Penal Code §§ 31900 - 32110 inclusive. California law makes it a crime for any person to manufacture, import or offer for retail sale any firearm that is not listed on the state's roster of "Safe Handguns." There are exceptions to this

¹ References to any allegation or matter in this motion or accompanying memorandum in order to obtain the relief sought or the particulars of the alleged facts or matters do not constitute an admission.

1 statutory scheme.² Relevant to this case are:

- 2 a. The sale, loan or transfer of any firearm pursuant to California Penal
3 Code § 28050. (Sales between private parties.) Penal Code § 32110(a).
4 b. The sale or purchase of any firearm to any sworn members of any police
5 department or sheriff's office. California Penal Code § 32000(b)(4).

- 6 2. The Indictment (Doc #1) filed on May 31, 2012 references this mechanism for
7 non-law-enforcement persons to acquire off-roster firearms ¶ 4:

8 Pursuant to State law, certain firearms known as roster"
9 firearms are not on the approved list of firearms and may not be
10 offered for sale to the public as a new firearm by FFLs in
11 California, but may only be purchased new by sworn law
12 enforcement officers. Such firearms may later be lawfully sold by
a law enforcement officer to the public in a "private party"
transaction conducted through an FFL.

- 13 3. On February 24, 2012 California Assemblyman Dickinson introduced AB 2640
14 for the purpose of amending Penal Code § 32000(b)(4) so that any firearm that
15 is not on the roster of "Safe Handguns" that is purchased by a sworn peace
16 officer, could not subsequently be sold any person not also exempted under §
17 32000(b)(4). (i.e., also a sworn peace officer) A copy of the bill as amended in
18 Assembly on April 9, 2012 is attached to the Declaration of Counsel as
19 **Exhibit A**.

- 20 4. The Indictment (Doc #1) was filed on May 31, 2012.
21 5. On September 28, 2012 Governor Brown vetoed AB 2640.
22 6. Therefore at all relevant times, as admitted in ¶ 4 of the Indictment, it is
23 perfectly legal for a sworn peace officer to purchase an "off-roster" firearm and
24 subsequently sell it to a someone who is not a sworn peace officer. It goes
25 without saying that any subsequent sale must comply with federal and state
26 law for private party firearms sales. (i.e., use of an FFL, background check,

27
28 ² The roster itself is wholly arbitrary and is the subject of a civil action
challenging the this statutory scheme here in the Eastern District. *Pena, et al., v.*
Lindley, 2:09-CV-01185 KJM-CKD. Dispositive motions are pending.

1 waiting period, proof of safe-storage, etc...)

- 2 7. Defendant EARLY is charged with a single count (# 6) of Conspiracy to Make
3 a False Statement With Respect to a Firearm Record. [Doc #1, page 9]
- 4 8. The Indictment alleges that an unindicted con-conspirator (C.K.) who was a
5 Roseville Police Officer bought an “off-roster” firearm on April 29, 2010 and
6 that the transaction was conducted by a federally licensed firearm dealer.
7 This transaction is lawful under California Penal Code ¶ 32000(b)(4).
- 8 9. The Indictment further alleges that the Roseville Police Officer subsequently
9 sold the same firearm to Defendant EARLY on May 27, 2010 in a private
10 party transaction that is lawful under Penal Code §§ 28050 and 32110(a).
- 11 10. The gravamen of the conspiracy charge is that the Roseville (sworn) peace
12 officer (C.K.), the FFL (co-defendant SNELLINGS) and Defendant EARLY
13 entered into an agreement to commit the unlawful act of making a false
14 statement in connection with a firearm purchase in violation of 18 U.S.C. §
15 924(a)(1)(A), by having the sworn peace officer (C.K.) make a false statement
16 in response to Question 11.a., on ATF Form 4473 (5300.9). See **Exhibit B**
17 attached to declaration of counsel.
- 18 11. In addition to an ATF Form 4473, the State of California requires a
19 concurrent form for its records called a Dealer Record of Sale. (DROS) See
20 California Penal Code §§ 28100 - 28250.
- 21 12. The government has now produced, the ATF Form 4473s from the April 29,
22 2010 and the May 27, 2010 transactions and both of the California DROS from
23 those transfers.
- 24 13. These documents are evidence that both transactions complied with federal
25 and state law. That the paperwork was complete and truthful and that all
26 background checks and waiting periods were complied with.
- 27 14. The snare used to manufacture the conspiracy charge against EARLY is based
28 on the theory that someone (C.K.) who intends to resell an object later, is not

a “transferee/buyer” at the time of initial acquisition.³ In other words:

- a. Even though California substantive law permits exactly the kind of transaction described in Count Six of the Indictment,
- b. Even though the California legislature sought to close this “loop-hole” with legislation in the 2012 legislative session,
- c. Even though the Governor of California vetoed that bill after this case was filed, thus substantively ratifying this conduct in Count Six as legal under California law,
- d. Even though the U.S. Government admits in ¶ 4 of its Indictment that this series of transactions is lawful,
- e. Even though ATF Form 4473 offers a false choice to the “transferee/buyer” in question 11.a., and
- f. Even though these “co-conspirators” left a paper-trail that no self-respecting swindler would ever contemplate,
- g. That somehow it is appropriate to charge EARLY with a felony for what amounts to – at best – a erroneous legal conclusion about the definition of “transferee/buyer.”

15. There are other infirmities with the government’s theory of the case that are set forth on the ATF Form 4473 itself:

- a. At the top of the form is a warning that says:

**WARNING: You may not receive a firearm if prohibited by
Federal or State law. This information you provide**

³ The government has declined to charge C.K. with making a False Statement During the Acquisition of a Firearm [18 U.S.C. § 922(a)(6)], or with being engaging in the Business of Dealing in Firearms Without a License [18 U.S.C. § 922(a)(1)(A)]. Count One of the Indictment makes exactly that charge against Co-Defendant RYAN McGOWAN. Nor has the indictment charged Co-Defendant SNELLINGS in with the substantive crime under 18 U.S.C. § 924(a)(1)(A); though it would be hard to imagine how SNELLINGS could be engaged on conduct to defraud himself as he was the FFL who was acting as the U.S. Government’s agent (and interpreter of federal firearms laws) in all these transactions. *See generally, United States v. Abramski*, 134 S. Ct. 2259; 189 L. Ed. 2d 262; 2014 U.S. LEXIS 4170 (2014).

1 **will be used to determine whether you are**
2 **prohibited under law from receiving a firearm.**
3 **Certain violations of the Gun Control Act, 18 U.S.C.**
4 **¶¶ 921 *et seq.*, are punishable by up to 10 years**
5 **imprisonment and/or up to a \$250,000 fine.**

6 But the transaction contemplated by Count Six is lawful under federal
7 and state law and the indictment admits exactly that.

8 b. ¶ 2 of Count Six of the Indictment (Doc #1) falsely quotes the 4473.

9 i. From the Indictment: “Are you the actual buyer of this
10 firearm(s) listed on the form?”

11 ii. But ATF Form 4473 itself asks: “Are you the actual
12 transferee/buyer of the firearm(s) listed on this form?”
13 (Underlined for emphasis.)

14 This raises a reasonable question about whether the conjunctive term
15 “transferee” broadens the definition of buyer. And this is assuming that
16 the extraordinarily narrow definition of “buyer” implied by the
17 indictment is constitutionally, statutorily and administratively sound.

18 c. Perhaps the government can be forgiven their mis-statement in the
19 indictment because page 2 of 6 of the ATF Form 4473 makes the same
20 mistake substituting “buyer” for “transferee/buyer” in the verification
21 above signature block #16 which itself is titled: “Transferee’s/Buyer’s
22 Signature.”

23 d. Furthermore on page 3 of 6 under the title: **Purpose of Form** the
24 government reiterates that the 4473 is to insure the lawfulness of the
25 transaction. In other words, its purpose is not to ensnare and
26 criminalize transactions by ordinary persons through the use of hyper-
27 technical legal definitions. Interestingly, paragraph three (3) under
28 this heading permits any person to make a correction, even after the
 firearm has been transferred, to the Form 4473 when the inaccuracy is
 discovered. No statute of limitations for corrections is contemplated by

the form. If the government conceded in their own indictment that the transaction described in Count 6 is legal under federal and state law, but that “technically” a term was misunderstood, wouldn’t the more just remedy be to unwind the transaction and correct the form rather than charge a felony?

e. Finally, there is on page 4 of 6 a wholly incomplete, misleading and irrational definition of “Actual Transferee/Buyer.”

i. In the present case, each and every time the object firearm changed hands we have a two-party transaction, and the federal and state paperwork, background checks and waiting periods were all complied with.

ii. Yet, in its explanation of what constitutes a permissible *three-party transaction*, The United States Government contends that it is permissible for Mr. Brown to buy a firearm from the FFL with his own money and then make a gift of the firearm to Mr. Black, and thus lawfully answer “**YES**” to this question, provided Mr. Brown has no reason or cause to believe Mr. Black is prohibited under 18 U.S.C. § 922(g), (n) or (x).⁴

16. The United States Government makes other statements to the gun-buying public that are contrary to the theory of liability advanced by this indictment. The United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Enforcement Programs and Services, Firearms Program Division, puts out a publication: “FEDERAL FIREARMS

⁴ In other words, Mr. Brown must pass an F.B.I. background check to get the gun from the FFL, but no background check is necessary for the third party (gift) beneficiary Mr. Black so long as Mr. Brown “believes” that Mr. Black is not prohibited. If the government’s interest in requiring these forms is to make sure there is a record of the transaction and a means of insuring lawful possession (i.e., the recipient of the gun is not a felon, mentally ill, fugitive, etc.), then this informal legal “advice” on the back of the 4473 form isn’t even rational.

1 REGULATIONS REFERENCE GUIDE, ATF Publication 5300.4, Revised
 2 September 2005.” The shorthand title is: “The White Book.”
 3 [<http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf>] Among
 4 other references to federal law, The White Book contains letter rulings and
 5 FAQs relating to firearms laws and various permutations of firearm
 6 transactions. Relevant to this case, from page 195 of that publication
 7 (attached as **Exhibit C** to the Declaration of Counsel):

- 8 a. **(P60) An organization without a firearms license wishes to**
 9 **acquire a firearm from a licensee for the purpose of raffling the**
 10 **firearm at an event. How does the licensee comply with the**
 11 **Brady law?**
- 12 b. [Answer] The licensee must comply with the Brady law by conducting a
 13 NICS check on the transferee. If the licensee wishes to transfer the
 14 firearm to the organization, a representative of the organization must
 15 complete a Form 4473 and a NICS check must be conducted on that
 16 representative prior to the transfer of the firearm. Alternatively, if the
 17 licensee transfers the firearm directly to the winner of the raffle, the
 18 winner must complete a Form 4473 and a NICS check must be
 19 conducted on the raffle winner prior to the transfer. Please note, if the
 20 organization's practice of raffling firearms rises to the level of being
 21 engaged in the business of dealing in firearms, the organization must
 22 get its own Federal firearms license (and the examples below would not
 23 apply).
- 24 i. Example 1: A licensee transfers a firearm to the organization
 25 sponsoring the raffle. The licensee must comply with the Brady
 26 Law by requiring a representative of the organization to
 27 complete the Form 4473 and undergo a NICS check. As indicated
 28 in the instructions on the Form 4473, when the buyer of a
 firearm is a corporation, association, or other organization, an
 officer or other representative authorized to act on behalf of the
 organization must complete the form with his or her personal
 information and attach a written statement, executed under
 penalties of perjury, stating that the firearm is being acquired for
 the use of the organization and the name and address of the
 organization. Once the firearm had been transferred to the

organization, the organization can subsequently transfer the firearm to the raffle winner without a Form 4473 being completed or a NICS check being conducted. This is because the organization is not an FFL. However, the organization cannot transfer the firearm to a person who is not a resident of the State where the raffle occurs and cannot knowingly transfer the firearm to a prohibited person.

ii. Example 2: The licensee or his or her representative brings a firearm to the raffle so that the firearm can be displayed. After the raffle, the firearm is returned to the licensee's premises. The licensee must complete a Form 4473 for the transaction and must comply with the Brady Law prior to transferring the firearm to the winner of the raffle. If the firearm is a handgun, the winner of the raffle must be a resident of the State where the transfer takes place, or the firearm must be transferred through another FFL in the winner's State of residence. If the firearm is a rifle or shotgun, the FFL can lawfully transfer the firearm to the winner of the raffle as long as the transaction is over-the counter and complies with the laws applicable at the place of sale and the State where the transferee resides.

iii. Example 3: If the raffle meets the definition of an "event" at which the licensee is allowed to conduct business pursuant to 27 CFR 478.100, the licensee may attend the event and transfer the firearm at the event to the winner of the raffle. As in Example 2, the FFL must complete a Form 4473 and comply with the Brady law and the interstate controls in transferring the firearm.

iv. Please note, procedures used in Examples 2 and 3 ensure that the winner is not a prohibited person and that there is a record of the final recipient of the firearm in the raffle. [18 U.S.C. 922(t) and 922(a)(1)(A)]

In other words, the United State Government admits that its Form 4473 does not cover all possible permutations of how guns are marketed and sold, and therefore concedes that its definition of "buyer/transferee" is open (wide-open) to interpretation. The government's safety net for these circumstances is to insure that the final recipient of the firearms is "not a prohibited person" and "that there is a record of the final recipient of the firearm." That is exactly

1 what is alleged in this case. There is not an indictment's worth of difference
2 between the way the government alleges the transactions occurred in this
3 case and the way they can occur, with the government's blessings, in the
4 examples on the 4473 and in the White Book example at page 195.

5 17. Nor is this the only somewhat misleading information that the United States
6 Government puts out that conflicts with the government's theory of the
7 indictment. (i.e., that private party sales are somehow tainted with
8 conspiracies.) Attached as **Exhibit K** to the Declaration of Counsel is an
9 "Open Letter To All Federal Firearms Licensees" dated January 16, 2013. In
10 this letter the U.S. Department of Justice, Bureau of Alcohol, Tobacco,
11 Firearms and Explosives, encourages FFLs to facilitate private party
12 transfers between private sellers as long as the transactions comply with
13 federal and state law.

14 18. Finally, consider some additional implications of the government's theory of
15 Count #6 of the indictment:

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

- 19 a. 18 U.S.C. § 921 *et seq.*, sets forth the statutory definitions to be used in
20 connection with Chapter 44 of Title 18. Nowhere in those definitions is
21 the term "buyer/transferee" defined. For that matter, neither are the
22 terms "buyer" or "transferee" defined as separate terms.
- 23 b. The closest we get to a hint of the statutory definition of transferee is at
24 18 U.S.C. § 922(t)(1)(C) which requires the transferor to verify the
25 identity of the transferee with a photo ID.
- 26 c. Title 27 CFR Chapter II, Part 478 contains the administrative rules for
27 interpreting the congressional statute. Subpart B sets forth the
28 definitions at § 478.11. (This is set forth in the White Book starting on

1 page 35.) Nowhere in that list of definitions is the term
2 “buyer/transferee” defined. Nor for that matter, are the terms “buyer”
3 or “transferee” defined as separate terms.

- 4 d. The closest the statutes and regulations come to identifying what
5 constitutes a “transferee” is under Title 27 CFR Chapter II, Part 479 –
6 Machine Guns, Destructive Devices, and Certain Other Firearms. But
7 these are the regulations for interpreting Title 26 U.S.C. Chapter 53 of
8 the Internal Revenue Code otherwise known as the National Firearms
9 Act, which regulates – among other things – machine guns, saw-off
10 shotguns and silencers. The relevant part of that identification and/or
11 definition states that: “[A] certifying official has no information
12 indicating that the receipt or possession of the firearm would place the
13 transferee in violation of State or local law or that the transferee will
14 use the firearm for other than lawful purposes.” 27 CFR § 479.85.

15 With the government’s theory of the case against Defendant EARLY (not to
16 mention his liberty) riding on a definition of “buyer/transferee” – one would
17 think that the government could produce a statutory/regulatory definition of
18 the term that would give constitutionally significant notice of what is and is
19 not included in that definition. Because with all the actions taken by the
20 parties (proper forms filled out, background checks performed, waiting
21 periods observed, etc...) being legal by the government’s own admission, then
22 this case becomes a “thought crime” case.

- 23 19. See Counsel’s Declaration in Support of Motion to Compel for a sworn
24 statement and exhibits. Briefly:

- 25 a. Detective Tom Koontz (#76) is employed by the Sacramento County
26 Sheriff’s Department.
27 b. He questioned Defendant EARLY on or about November 3, 2011.
28 c. He left a business card identifying himself as a special investigator with

the Sacramento County Sheriff's Office. See **Exhibit D**.

- d. On or about November 8, 2011, Assistant U.S. Attorney William S. Wong caused a Subpoena to Testify Before the Grand Jury to be issued to Mr. EARLY. The subpoena date and time was set for December 15, 2011 at 9:00 a.m. at 501 "T" Street in Sacramento. **Exhibit E**.
- e. Mr. EARLY arrived at the date and time on the Subpoena with Counsel. (Donald Kilmer)
- f. Prior to that meeting EARLY's counsel (Kilmer) contacted Assistant U.S. Attorney William S. Wong and inquired about state and federal use immunities.
- g. The inquiry about state use immunity was prompted by the fact that Defendant EARLY was interviewed by a **Sacramento Sheriff's Deputy**. Additionally, the United States Attorney's Office for the Eastern District of California purports to participate in a program that targets gun crime called: "Project Safe Neighborhood" which "promotes partnerships among local, state and federal law enforcement agencies and prosecutor's offices to target gun crime." See **Exhibit F**.
- h. EARLY's counsel documented the substance of that contact in a December 15, 2011 letter that was hand delivered to the AUSA on the morning of December 15, 2011. **Exhibit G**.
- i. Even after capitulating on state use immunity, and offering to testify before the Grand Jury with only federal use immunity, Assistant United States Attorney William S. Wong informed Mr. EARLY and his lawyer at the December 15, 2011 meeting that Mr. EARLY was now a target of a criminal investigation. Presumably this was because EARLY was the only off-roster buyer who asserted any constitutional rights or had the temerity to hire counsel after receiving a Grand Jury Subpoena.

- j. Mr. EARLY's home was subsequently searched and state criminal charges, in addition to the federal charges herein, were pending against Mr. EARLY. *People v. Early*, Case No.: 12 F 06812 one count of possession of an unregistered "Assault Weapon." The charge has nothing to do with Count Six of the federal indictment. There is quite a bit of overlap on the investigating officers who have executed (so far) two search warrants at Mr. EARLY's home. This state case was dismissed after the Defense prevailed on a Motion to Suppress under Penal Code § 1538.5.
- k. As it turns out, Mr. EARLY's inquiry about state and federal use immunity was not paranoid.
- l. A follow-up letter was sent to Assistant U.S. Attorney William Wong on February 28, 2012 recapitulating the status of the case. **Exhibit H**.
- m. On or about June 1, 2012 the United States Attorney for the Eastern District of California issued a Press Release (See **Exhibit J**) in which that office acknowledges the following facts about this case:
- i. Sacramento County Sheriff's Deputies Ryan McGowan, and Thomas Lu, both of Elk Grove, were each charged with engaging in the business of dealing in firearms without a license. Federal Firearms Licensee Robert Snellings, of Rancho Murieta, was charged with five counts of conspiracy to make false statements in federal firearms records.
 - ii. McGowan and EARLY of Sacramento, were also charged with conspiracy to make a false statement in federal firearms records.
 - iii. The press release goes on say that peace officers who own off-roster firearms may sell them in a private sale, as long as it is brokered by a Federal Firearms Licensee. They may not, however, use these private sales to conduct a business whose

principal objective is to make a profit through the repetitive purchase and resale of firearms.

- iv. The press release accuses Snellings, a licensed firearms dealer, of facilitating straw purchases with McGowan, Lu, and other unindicted persons, who used their status as law enforcement officers to purchase off-roster firearms that were not available to the general public. Those weapons were then resold to private citizens in private transactions through Snellings' firearms business. EARLY was the only private citizen purchaser charged.
- v. McGowan and Lu are each charged with engaging in a firearms business without a license. Documents unsealed today indicate that each of them purchased dozens of off-roster firearms and resold many of them for profit.
- vi. Indeed, the Press Release states that according to the Automated Firearms System (AFS) kept by the State of California, since 2008, McGowan purchased 41 handguns and sold 25 of them as a private party transfer. Five were private party transferred within four weeks of the initial purchase and 15 within one year.
- vii. According to AFS, Lu obtained 27 off-roster firearms since 2008. He private party transferred 23 firearms. Eighteen were transferred within one year of the initial purchase.
- viii. As noted above, EARLY was not being paranoid when his made his inquiries about federal and state immunity. U.S. Attorney Wagner specifically thanked the Sacramento Sheriff's Office, the Sacramento Police Department, the Sacramento County District Attorney's Office, and other regional law enforcement agencies for their partnership in the course of this investigation.
- ix. Not only that, but it turns out that EARLY's request that AUSA

1 Wong contact the Sacramento District Attorney about immunity
2 from state charges was also prescient; as it turns out that
3 Assistant District Attorney Jan Scully was part of the
4 coordinated effort between the U.S. Attorney's Office and local
5 law enforcement agencies all along.

6 x. By the Government's own admission in this press release they
7 point to of almost fifty (50) off-roster firearms that were allegedly
8 sold illegally, through private party transfers from peace officers
9 to private individuals, yet only EARLY was indicted as a private
10 individual who ended up with one of these off-roster firearms.

11 20. These facts make out a prima facie case of Vindictive and/or Selective
12 Prosecution in retaliation for EARLY exercising a constitutional right. (i.e.,
13 Requesting immunity from state and federal charges before testifying to the
14 Grand Jury.)

15 21. Additional facts indicate a motive. After EARLY was indicted in the federal
16 action, he was contacted by a friend of his named George Singewald who is a
17 sworn peace officer in a local law-enforcement agency. Mr. Singewald is
18 apparently friendly with Greg Halstead who is an investigating officer in this
19 federal case who works for the Sacramento Police Department and is
20 designated as ATF TFO in the reports and memoranda in this case. Halstead
21 is also an investigating office in the State case: *People v. Early*. **Exhibit I**,
22 sets out a series of text messages between EARLY and Mr. Singewald from
23 before this case broke, with dates up through and including September 24,
24 2012.

25 a. On August 20, 2012 at 9:11 p.m. there is a text message mentioning
26 "Greg." This is ATF TFO Greg Halstead.

27 b. ATF TFO Greg Halstead is mentioned again on September 5, 2012 at
28 12:45 p.m. and again at 4:25 p.m.

1 c. ATF TFO Greg Halstead is mentioned again on September 14, 2012 at
2 5:41 p.m.

3 d. ATF TFO Greg Halstead is mentioned again on September 24, 2012 at
4 10:45 a.m.

5 The entire series of text messages indicate, or at least imply, that government
6 agents prosecuting this case may have been improperly interfering in the
7 Attorney/Client relationship EARLY had with Mr. Kilmer by encouraging
8 EARLY to change counsel in order to get a better deal with Mr. Wong of the
9 U.S. Attorney's office. [Note: No allegation is made (at this time) that Mr.
10 Wong was aware of this liaison.]

11 22. As noted above, the discovery already produced in this matter indicated that
12 dozens, if not scores of firearms were purchased by sworn peace officers and
13 then sold in private party transfers to non-peace officers. Yet only Mr.
14 EARLY has been singled out for selective/vindictive prosecution.

15
16 **ARGUMENT**

17 23. This is essentially a place-holder motion to preserve EARLY's appellate rights
18 on the denial of discovery on these issues in an order by the Magistrate Judge
19 Edmund Brennan. The magistrate declined to order the government to turn
20 over material requested by the defense because Judge Brennan found that
21 EARLY had failed to make an adequate showing for this motion. The
22 government was directed to submit an order from those discovery
23 proceedings, but has thus far failed to do so. (Dkt Entry 83, April 9, 2013)

24 24. Nevertheless, with only the prima facie evidence he can produce through his
25 own resources, EARLY hereby requests an order dismissing this case under
26 the alternative theories of vindictive or selective prosecution.

27 25. For Selective Prosecution, see generally: *United States v. Armstrong*, 517 U.S.
28 456 (1996); *United States v. Darif*, 446 F.3d 701 (7th Cir. 2006). Of all the

1 grand jury witnesses who were subpoenaed, who also bought guns from law
2 enforcement officers, only EARLY has been indicted. The fundamental rights
3 being impacted by EARLY's Indictment include, but are not limited to:

- 4 a. Second Amendment right to keep and bear arms and the chilling effect
5 this prosecution will have on the general public.
- 6 b. EARLY's Sixth Amendment right to counsel when investigating officers
7 were urging him to fire his lawyer.
- 8 c. EARLY's Fifth Amendment right to remain silent if/when he is the
9 target of a criminal investigation and/or petition his government for
10 immunity in consideration of that testimony.

11 26. For Vindictive Prosecution, the Court must look to the Due Process Clause
12 which protects defendants from vindictive treatment based on the exercise of
13 a constitutional or statutory right. "Vindictiveness in this context means the
14 desire to punish a person for exercising his fundamental rights." *United*
15 *States v. Barner*, 441 F.3d 1310 (11th Cir. 2006) The constitutional right that
16 EARLY sought to invoke that instigated this prosecution was his Fifth
17 Amendment right to avoid giving sworn testimony against himself in the
18 grand jury proceedings that could be used against him in state court
19 proceedings. Only after EARLY made inquiries about, and then did not even
20 insist on, immunity from state charges did the AUSA inform Mr. EARLY that
21 he went (in a lightening flash) from being a witness to being a target and
22 indeed a criminal defendant.

23 CONCLUSION

24 WHEREFORE, Defendant respectfully requests that this Court grant his
25 request for a dismissal of this criminal action against him. Respectfully Submitted
26 on July 30, 2014.

27 /s/ Donald Kilmer

28 Donald Kilmer, Attorney for EARLY