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RYAN McGOWAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RYAN McGOWAN, ET AL.,

Defendant.

No. 2:12-CR-00207 TLN

DEFENDANT MCGOWAN'S PROPOSED
JURY INTSTRUCTION RE COUNT ONE;
POINTS AND AUTHORITIES

Courtroom: Hon. Troy L. Nunley

I. INTRODUCTION

As to Count One of the Indictment, Defendant Ryan McGowan respectfully requests that the jury be instructed with the proposed instruction attached hereto as "Exhibit A." This instruction accurately states the law, essentially verbatim, regarding the element of "engaged in the business of dealing in firearms." It includes the specific definition of "engaged in the business" pursuant to 18 U.S.C. §§ 921(a)(21)(C) and (a) (22). In particular, it states "engaged in the business" means doing so "with the principal objective of livelihood" and that the underlying intent "is predominantly one of obtaining a livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection." The government does not want the jury to know this law.

1 *Breier*, 813 F.2d at 213, 216 (“Courts have fashioned their own definitions of the term...Congress
 2 was well aware of the judicial interpretations of the term ‘engaged in the business.’ ” (footnote
 3 omitted)); *United States v. Schumann*, 861 F.2d 1234, 1237 n.2 (11th Cir. 1988) (“[T]he term
 4 ‘engaged in the business’ as it relate[s] to the sale of firearms [is] subject to judicial
 5 interpretation.” (citations omitted)); see also, e.g., *United States v. Wilmoth*, 636 F.2d 123, 125
 6 (5th Cir. 1981); *United States v. Swinton*, 521 F.2d 1255, 1258 (10th Cir. 1975) (“This Court has
 7 not heretofore considered the scope of the language ‘engaged in the business of dealing in
 8 firearms.’ ”); *Day*, 476 F.2d at 567 (defining the phrase based on case law).

9 Under the 1986 amendment, to be “engaged in the business of dealing in firearms” means
 10 to devote “time, attention, and labor to dealing in firearms as a regular course of trade or business
 11 with the principal objective of livelihood and profit through the repetitive purchase and resale of
 12 firearms.” 18 U.S.C. § 921(a)(21)(C). And “with the principal objective of livelihood and profit”
 13 means “that the intent underlying the sale or disposition of firearms is predominantly one of
 14 obtaining a livelihood and pecuniary gain, as opposed to other intents, such as improving or
 15 liquidating a personal firearms collection.” 18 U.S.C. § 921(a) (22).

16 The Ninth Circuit addressed the present issue in *United States v. Breier*, 813 F.2d 212,
 17 216 (9th Cir. 1987). There, Breier was charged with unlicensed dealing in firearms for renting
 18 tables at gun shows and trading, selling and purchasing firearms; he claimed he was a collector
 19 only. The jury received an instruction according to the law before the 1986 amendment (which
 20 did not include the “livelihood” language), and Breier was convicted. A few days later, the
 21 President signed the Firearms Owners’ Protection Act (which added the “livelihood” language).
 22 Breier appealed claiming the recently-enacted law should apply retroactively to his case and he
 23 deserved a new trial.

24 Although Breier lost his appeal because the Act was not retroactive, the court clearly
 25 articulated the new law (with the “livelihood” language), why it is important, why Congress
 26 enacted it, and why it should be applied to cases after the law went into effect. “Congress enacted
 27 new §§ 921(a)(21) and 921(a)(22) in order to limit the conduct deemed to be criminal.” *Breier*,
 28 at 216.

1 The new definition has effectively raised the evidentiary bar for the government by
2 restricting the definition of what constitutes a firearms dealer and “engaged in the business”. See
3 *Martin v. United States*, 989 F.2d 271, 274 n.4 (8th Cir. 1993) (noting that the 1986 amendment
4 has “narrow[ed] the class of persons for whom certain conduct is prohibited” (emphasis
5 supplied)); *Schumann*, 861 F.2d at 1237 (noting that the 1986 amendment “substituted, inter alia,
6 a narrower definition of ‘dealer’ by further defining the term ‘engaged in the business’ ”

7 Plainly, Mr. McGowan’s proposed jury instruction effectuates Congressional intent by
8 including the required statutory language. Without the instruction, the law is ignored,
9 Congressional intent is cast aside, and Mr. McGowan gets thrown into a broad web of criminal
10 conduct that is not fair, legal or foreseeable. It is well established that criminal statutes must give
11 adequate notice of a particular crime. Here, §§ 921(a)(21)(C) and 921(a)(22) give some notice,
12 but to hide it from the jury and remove the “livelihood” language would remove any hint of
13 proper notice.

14 The government may attempt to rely on *United States v. King*, 735 F.3d 1098, 1106 (9th
15 Cir. 2013) to support a contrary instruction because it is cited in the Comment to the Ninth Circuit
16 Model Instruction 8.53 (2010). However, a reading of the *King* case does not support a jury
17 instruction as suggested. *King* addressed the issue of whether the district court erred in refusing a
18 proposed jury instruction about King acting as an authorized agent of a federal firearms licensee.
19 That is not an issue in this case. King also claimed the evidence was insufficient to prove he was
20 “engaged in the business” of dealing in firearms.

21 In addressing the sufficiency claim, the *King* court cites the new law (18 U.S.C. §
22 921(a)(21)(C) - which includes the “livelihood” language) but it misquotes the statute and
23 inexplicably leaves out the “livelihood” language. The *King* court also cites the *Breier* case,
24 discussed at length above, but the *Breier* decision directs courts to use the new law with the
25 “livelihood” language. It should be noted that the “use of a model jury instruction does not
26 preclude a finding of error.” *United States v. Warren*, 984 F.2d 325, 328 (9th Cir. 1993).

27 In any event, the *King* court offers an example of what the government must show to
28 prove a defendant is “engaged in the business,” but it does not squarely address the element and

1 what the statute requires. It appears the *King* court was focused on the sufficiency of the evidence
2 claim, not the proper instructing of a jury.

3 In contrast, Mr. McGowan is asking for a jury instruction that specifically addresses the
4 theory of his case. A criminal defendant has a constitutional right to have the jury instructed
5 according to his theory of the case, provided that the requested instruction is supported by law
6 and has some foundation in the evidence.” *King*, at 1104, citing *United States v. Marguet-Pillado*,
7 648 F.3d 1001, 1006 (9th Cir. 2011) (citations and internal quotation marks omitted).

8 Moreover, in deciding whether this jury instruction is appropriate, the court must start
9 with the statute. As the *King* court stated: “We begin, as always, with the statutory text. *See*
10 *United States v. O’Donnell*, 608 F.3d 546, 549 (9th Cir. 2010); *see also United States v. Johnson*,
11 680 F.3d 1140, 1144 (9th Cir. 2012) (‘If the plain meaning of the statute is unambiguous, that
12 meaning is controlling [.]’) (citations omitted).”

13 The government simply cannot argue, at least with any credence, that the proposed jury
14 instruction is not supported by the law, that it lacks foundation in the evidence, or that the
15 underlying statute is not clear. Hence, the proposed instruction is well supported, legally and
16 factually.

17 Finally, the court should feel quite comfortable giving this instruction as it is essentially the
18 same instruction found in the Fifth Circuit: Fifth Circuit Pattern Criminal Jury Instruction 2.44;
19 and the Eleventh Circuit: Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction
20 34.1.

21 **III. Conclusion**

22 For the several good reasons discussed above, and because no reasonable argument
23 supports leaving the jury in the dark as to the true, statutory meaning of “engaged in the business
24 of dealing in firearms,” Mr. McGowan respectfully requests that the court instruct the jury, as to
25 Count One, with the proposed instruction attached hereto as “Exhibit A.”

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1 DATED: October 9, 2014

Respectfully submitted,

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3
4 /s/ Chris Cosca

CHRIS COSCA

Attorney for Defendant

RYAN MCGOWAN