No. 12-1493

In The
Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

AMICI CURIAE BRIEF OF ROBERT SNELLINGS AND ULYSSES GRANT EARLY, IV IN SUPPORT OF REVERSAL

Donald E. J. Kilmer, Jr.*
Law Offices of Donald Kilmer
1645 Willow Street, Ste. 150
San Jose, CA 95125
Voice: (408) 264-8489
EM: don@dklawoffice.com

James Jeffries Goodwin
Goodwin Law Corp.
101 Parkshore Drive, #100
Folsom, CA 95630
Voice: (916) 932-2345
EM: jjg@goodwinlawcorp.com

* *Counsel of Record for Amici*

Counsel Press, LLC (800) 274-3321

QUESTIONS PRESENTED

When a person buys a gun intending to later sell it to someone else, the government often prosecutes the initial buyer for making a false statement about the identity of the buyer that is "material to the lawfulness of the sale." These prosecutions rely on the court-created "straw purchaser" doctrine, a legal fiction that treats the ultimate recipient of a firearm as the "actual buyer," and the immediate purchaser as a mere "straw man."

1. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6)?

2. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a piece of information "required . . . to be kept" by a federally licensed firearm dealer under 18 U.S.C. § 924(a)(1)(A)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes & Regulations

State Statutes

I. INTEREST OF AMICI[1]

Amici ROBERT SNELLINGS (represented by attorney J. Goodwin) and ULYSSES GRANT EARLY, IV (represented by attorney D. Kilmer) are co-defendants in a criminal case pending in the United States District Court for the Eastern District of California, *United States v. McGowan, et. al.,* Case No.: 2:12-CR-0207, the Honorable Troy L. Nunley presiding.

The *McGowan* case was set to begin a jury trial on or about December 2, 2013 when the petition for certiorari in this case was granted on October 15, 2013. Judge Nunley made a finding that the facts and law were similar enough in both cases, that the trial in *United States v. McGowan, et. al.,* was continued pending the publication of the opinion in *United States v. Abramski.*

This brief urges this Court to reverse the decision of the Circuit Court, by repudiating or modifying the

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation and submission of this brief. Amicus curiae received financial assistance in the preparation and filing of this brief from the Calguns Foundation, Inc., a non-profit organization that supports and defends Second Amendment rights in California. Calguns Foundation, Inc., is incorporated under the laws of that state with its principal place of business in San Carlos, California and is not publicly traded. Petitioner filed a blanket consent for amicus curiae. Respondent's consent is submitted herewith.

"straw-man" theory of criminal liability, unless the government has been objectively deprived of its recording-keeping information to insure lawful sales and provide crime trace data for solving crimes. This requirement of objectivity is essential when courts are interpreting criminal statutes that touch on fundamental rights.

II. ARGUMENT SUMMARY

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the SECOND AMENDMENT rejoined the Bill of Rights to act as a guarantee that government policy must comport with the Constitution when its rules effect individuals seeking to exercise their "right to keep and bear arms."

It should not be controversial that acquisition or commerce in arms, like their possession is, should be protected by the SECOND AMENDMENT.

In *Andrews v. State*, 50 Tenn. 165, 8 Am. Rep. 8 (1871) – cited favorably in *Heller*, *at* 608, 614, 629 – the High Court of Tennessee found much in common between that State's guarantee of the "right to keep and bear arms" and the SECOND AMENDMENT when it held:

> The right to keep and bear arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and purchase and provide ammunition suitable for such arms, and keep them in repair. [...]
>
> *Andrews*, 50 Tenn. *at* 178, 8 Am. Rep. *at* 13

The federal government has regulated and/or taxed commercial sales of some firearms since the National Firearms Act (NFA) of 1934[2] and extended that regulation to all commercial sales with passage of the Gun Control Act (GCA) of 1968.[3] The Bureau of Alcohol, Tobacco, Firearms and Explosives currently administers a licensing scheme for commercial firearm dealers. Those dealers "engaged in the business" of commercial firearms sales are required to insure compliance with federal laws at the point of sale (i.e., forbidding sales to prohibited persons) and to keep inventory logs and other necessary paperwork to enable the tracing of firearms recovered at crime scenes. See generally: 18 U.S.C. Chapter 44 *et seq.,* 26 U.S.C. Chapter 53 *et seq.,* and enabling regulations found at 27 CFR Part 478 *et seq.,* and 479 *et seq.,* and 28 CFR Part 25 *et seq*.

Though the *Heller* opinion did not purport to disturb any "longstanding" laws imposing conditions and qualifications on the commercial sale of arms (*Id., at* 626), this Court did strike down a federal enclave's criminalization of conduct that clearly fell within the scope of the SECOND AMENDMENT.

The petitioner in *Abramski* and the defendants in *U.S. v. McGowan*, were similarly engaged in conduct

---

[2] 72nd Congress, Sess. 2, Ch. 757, 48 Stat. 1236, enacted on June 26, 1934, currently codified as amended as I.R.C. Ch. 53

[3] Pub.L. 90–618, 82 Stat. 1213-2, enacted October 22, 1968.

that clearly falls within the scope of that amendment. They bought and sold firearms. They used a federally licensed dealer to facilitate all transactions. All parties to the transactions passed all background checks, completed all paperwork, adhered to all waiting periods and complied with all state laws in their local jurisdictions. No firearm was transferred in any transactions to any person for whom the federal government was not given written notice (through the licensed dealer) of all legally required information.

The subjective intent of a gun buyer who becomes a seller at a subsequent time cannot be criminalized when the subsequent transaction is also conducted through a licensed dealer. With such a holding, this Court can right the wrong against the *Abramski* petitioner and perhaps prevent an unnecessary trial on an erroneous legal theory in *U.S. v. McGowan*.

III. FACTS OF *U.S. v. McGOWAN*

Defendants EARLY and SNELLINGS are charged with Conspiracy to Make a False Statement With Respect to a Firearm Record. The indictment alleges that an unindicted co-conspirator, who was a police officer, bought a firearm on April 29, 2010 and that the transaction was conducted by SNELLINGS, a federally licensed firearm (FFL) dealer. This transaction was lawful under California Penal Code § 32000(b)(4).

The *McGowan* indictment further alleges that the police officer subsequently sold the same firearm to Defendant EARLY on May 27, 2010 in a private party transaction that is lawful under California Penal Code §§ 28050 and 32110(a).

The gravamen of the conspiracy charge is that the police officer, the FFL (SNELLINGS) and the civilian (EARLY) entered into an agreement to commit the unlawful act of making a false statement in connection with a firearm purchase in violation of 18 U.S.C. § 924(a)(1)(A), by having the police officer indicate that he was the actual buyer/transferee in response to Question 11.a., on ATF Form 4473 (5300.9).

In addition to an ATF Form 4473, the State of California requires a concurrent form for its records called a Dealer Record of Sale (DROS). See California Penal Code §§ 28100 - 28250. The government has produced, both of the ATF Form 4473s from the April 29, 2010 and the May 27, 2010 transactions and both of the California DROS from those transfers as part of pretrial discovery. These documents are evidence that both transactions complied with federal and state law. That the paperwork was complete and truthful and that all background checks and waiting periods were complied with.

The snare used to manufacture the conspiracy charge against EARLY and SNELLINGS is based on the theory that someone who intends to resell an object at some later time, is not a "transferee/buyer" at the time of initial acquisition.

IV. ARGUMENT

A. The Regulations Are Ambiguous

There are problems with the "strawman" theory of criminal liability that are set forth on the ATF From 4473 itself. At the top of the form is a notice:

> WARNING: You may not receive a firearm if prohibited by Federal or State law. This information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. ¶¶ 921 *et seq*., are punishable by up to 10 years imprisonment and/or up to a $250,000 fine.

However the ATF Form 4473 then offers a false choice to the gun buyer in question 11.a. when it asks: "Are you the actual transferee/buyer of the firearm(s) listed on this form?"

This raises a reasonable question about whether the conjunctive term including "transferee" broadens the definition of buyer. And this is assuming that the extraordinarily narrow definition of "buyer" implied by the "strawman" doctrine is constitutionally, statutorily and administratively sound.

Then page 2 of 6 of the ATF Form 4473 makes the mistake of substituting "buyer" for "transferee/buyer" in the verification above signature block #16 which itself is titled: "Transferee's/Buyer's Signature."

Furthermore on page 3 of 6 of the government's form under the title: Purpose of Form, the government reiterates that the 4473 is to insure the lawfulness of the transaction. In other words, its purpose is not to ensnare and criminalize transactions by ordinary persons through the use of hyper-technical legal definitions.

Finally, there is on page 4 of 6 of the 4473 a wholly incomplete, misleading and irrational definition of "Actual Transferee/Buyer."

In the present cases, each and every time the firearm changed hands there was a two-party transaction, and the federal and state paperwork, background check and waiting periods were all observed. Yet in its explanation of what constitutes a permissible three-party transaction, The United States Government contends that it is permissible for a Mr. Brown to buy a firearm from the FFL with his own money and then make a gift of the firearm to a Mr. Black, and thus lawfully answer "YES" to Question 11.a., provided Mr. Brown has no reason or cause to believe Mr. Black is prohibited under 18 U.S.C. § 922(g), (n) or (x).

The United States Government makes other statements to the gun-buying public that are contrary to their "strawman" theory of criminal liability.

The Bureau of Alcohol, Tabacco, Firearms and Explosives, puts out a publication: "FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE, ATF Publication 5300.4, Revised September 2005." It is available on the ATF website at: http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf.

Among other references to federal law, this Reference Guide contains letter rulings and FAQs relating to firearms laws and various permutations of firearm transactions. Relevant to this case, from page 196 (the pdf copy may be different) of the bound version of that publication, is the following FAQ:

(P60) An organization without a firearms license wishes to acquire a firearm from a licensee for the purpose of raffling the firearm at an event. How does the licensee comply with the Brady law?

[Answer] The licensee must comply with the Brady law by conducting a NICS check on the transferee. If the licensee wishes to transfer the firearm to the organization, a representative of the organization must complete a Form 4473 and a NICS check must be conducted on that representative prior to the transfer of the firearm. Alternatively, if the licensee transfers the firearm directly to the winner of the raffle, the winner must complete a Form 4473 and a NICS check must be conducted on the raffle winner prior to the transfer. Please note, if the organization's practice of raffling firearms rises to the level of being engaged in the business of dealing in firearms, the organization must get its own Federal firearms license (and the examples below would not apply).

Example 1: A licensee transfers a firearm to the organization sponsoring the raffle. The licensee must comply with the Brady Law by requiring a representative of the organization to complete the Form 4473 and undergo a NICS check. As indicated 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.

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.
>
> 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.
>
> 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 wide open to interpretation.

The purpose of the 4473 in commercial firearm sales should be to insure that the final recipient of a firearm is "not a prohibited person" and "that there is a record of the final recipient of the firearm" to assist in tracing crime guns. [Amici are not challenging the prosecution of persons who act as an intermediary or “strawman” for a prohibited person who cannot pass a background check or lawfully own guns.]

That is exactly what happened in the *Abramski* and *McGowan* cases. There is not an indictment's worth of difference between the way the government alleges the transactions occurred in these case and the way they can occur, with the government's blessings in the "gift" example printed on the Form 4473 and in the Reference Guide's "raffle" example.

B. The Regulations Do Not Provide Adequate Notice

Another implication of the "strawman" theory of liability based on such a narrow definition of buyer is that it does not provide adequate notice of criminal conduct, especially when a fundamental right is at stake.

The "strawman" theory says that if a buyer had formed the intent, at the time he signed the Form 4473, to later resell the firearm, he doesn't qualify as a "buyer/transferee" and thus makes a false statement in connection with the purchase of a firearm if he answers "Yes" to Question 11.a. This is not supported by the current state of the law.

18 U.S.C. § 921 *et seq*., sets forth the statutory definitions to be used in connection with Chapter 44 of Title 18. Nowhere in those definitions is the term "buyer/transferee" defined. For that matter, neither are the terms "buyer" or "transferee" defined as separate terms.

The closest we get to a hint of the statutory definition of transferee is at 18 U.S.C. § 922(t)(1)(C) which requires the transferor to verify the identity of the transferee with a photo ID.

Title 27 CFR Chapter II, Part 478 contains the administrative rules for interpreting the congressional statute. Subpart B sets forth the definitions at § 478.11. (This is set forth in the Reference Guide starting on page 33.) Nowhere in that list of definitions is the term "buyer/transferee" defined. Nor for that matter, are the terms "buyer" or "transferee" defined as separate terms.

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

With the “strawman” theory riding on a definition of "buyer/transferee" – one would think that the government could produce a statutory/regulatory definition of the term that would give constitutionally significant notice of what is and is not included in that definition. Because with all the objective actions taken by the parties (proper forms filled out, background checks performed, waiting periods observed, etc...) this “strawman” doctrine is really just a "thought crime" that should be impermissible under our Constitution.

C. Sales to the Law-Abiding, Conducted Through an FFL Cannot Be a Crime

Where an indictment fails to allege an element, it fails to state an offense. *United States v. Wylie*, 919 F.2d 969, 972 (5th Cir. 1990); *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988). An indictment also fails to state an offense when the facts alleged fall beyond the scope of the relevant criminal statute as a matter of statutory interpretation. *United States v. Hediathy*, 392 F.3d 580, 587 (3rd Cir. 2004). Under Ninth Circuit law, the omission of an element of the offense is grounds for automatic reversal. *United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005).

The government's "strawman" theory is that any gun buyer with the intent to later resell that firearm, cannot be a "buyer/transferee" at the time of his initial acquisition and therefore makes a false statement with respect to a firearm record if he answers "Yes" to Question 11.a. – even if the subsequent sale was conducted through an FFL. (Presumably with all background checks, record keeping requirements and waiting periods.)

In a recent case, the Ninth Circuit insists that context is important.

> [T]he statute limits the types of falsehoods that are actionable to those that relate to information required under law to be kept by federally licensed firearms dealers. It makes sense that Congress would wish to ensure the accuracy of all the information that firearms dealers must keep as part of

> their permanent records, whether or not that information relates to the lawfulness of the ultimate sale. There is testimony that the accuracy of the information contained on Form 4473, including the name and address of the actual buyer, is of paramount importance to investigators when tracing weapons used in violent crimes.
>
> *United States v. Johnson*, 680 F.3d 1140 (9th Cir. 2012).

With the exception of the government's obtuse reading of Question 11.a., there are no allegations in *Abramski* (or the *McGowan* indictment), that the 4473s contained false statements or that any person who was prohibited acquired a firearm during the first or second transactions. There can be no crime under 18 U.S.C. § 924(a)(1)(4) because the government was never deprived of any of the data required by the federal record-keeping requirements. In other words, if the statements (address, legal status, eligibility, etc...) on the 4473 were accurate each time the gun was bought and sold, it is only the government's creative interpretation of the term "buyer/transferee" that even gets this case to a grand jury.

As noted above, there is no statutory/regulatory definition of the term "buyer/transferee" that is sufficient to put any sane person on notice that their liberty is at stake if they apply this definition wrong.

Second, it is just as reasonable to assume that "buyer/transferee" includes "buyer for later resale" as it is to assume that "buyer/transferee" excludes "buyer

for later resale" in the absence of a statutory and/or regulatory definition.

Third, without a statutory/regulatory definition of "buyer/transferee" the government should be bound by the common-law or state definition of such a term. For example, California Civil Code § 3445(c) defines "Transferee" as "the person to whom property was transferred or an obligation was incurred, or the successors or assigns of the person." California's Uniform Commercial Code § 2103(1)(a) defines "buyer" as "a person who buys or contracts to buy goods."

Similar California definitions of buyer and/or transferee can be found in California's statutory and case law. None of them preclude a buyer from being a reseller at a later time. A gun buyer's subjective intent at the time of the first purchase should be irrelevant as long as the information he conveyed was accurate at the time of the initial sale for that gun.

Take for example the scenario described on the 4473 itself relating to Mr. Brown buying Mr. Black a gun as a gift. In that transaction, the government is deprived of the data it needs as part of the federal record-keeping requirements.

All Mr. Brown needs, is to be ignorant of Mr. Black's criminal status for him to hand the gun over to Mr. Black as a gift. Furthermore the tracing data available to any future law enforcement investigation stops with Mr. Brown's 4473 information. The government is actually in a worse position relating to that transaction described on their own form as perfectly lawful, than they are in the *Abramski* and *McGowan* cases.

Take for (another) example the situations described for auctions or raffle drawings in the Reference Guide at page 196. The government blesses the first transaction that includes statements on the 4473 by that "buyer/transferee" who is running the auction/raffle, even though that person knows that they will not ultimately end up with the gun. What makes that set of transactions copacetic is the second set of records that are created. The second 4473 insures that the second transferee is eligible and creates the trace data necessary for law enforcement.

These transactions, sanctioned by the government's own publications, are indistinguishable from what is described as a crime in the *Abramski* and *McGowan* cases.

D. The Vague/Ambiguous "Strawman" Doctrine Violates a Fundamental Right

The government's interpretation of "buyer/transferee" as it relates to 18 U.S.C. § 924(a)(1)(A) is overbroad because it criminalizes conduct associated with a constitutionally protected right. That right is to acquire (keep and bear) arms. SECOND AMENDMENT. See generally: *Broadrich v. Oklahoma*, 413 U.S. 601 (1973).

Furthermore prosecutions under this theory are likely to have a chilling effect on private party sales if the gun buying public begins to believe that a misinterpretation of some fine-print, boiler-plate language on a government form could land them in federal prison. This chilling effect may also have the

unintended consequence of driving the private gun sales market underground and away from licensed dealers.

The government's interpretation of "buyer/transferee" is vague because it – "[...] leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

A law or definition may also be invalid because "[I]t fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Colautti v. Franklin*, 439 U.S. 379 (1979) (quoting *United States v. Harriss*, 347 U.S. 612 (1954)).

The rationales of the vagueness doctrine as it relates to fundamental rights are set forth in *Grayned v. City of Rockford*, (1972) 408 U.S. 104 at 108-09:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy

> matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

The government's irrational and contradictory definition of "buyer/transferee" promulgated by the "strawman" doctrine in these cases will have a chilling effect on the gun-buying public's SECOND AMENDMENT rights.

V. CONCLUSION

This Court should apply some form of heightened scrutiny to criminal law statutes that impact fundamental rights.

But even if the "strawman" doctrine did not threaten the "right to keep and bear arms" it is still irrational and constitutionally suspect when applied to circumstances where the government is charging a crime and it has not objectively been deprived of a gun buyer's prohibited party status and/or any record-keeping information to facilitate law enforcement's ability to trace firearms used in crimes.

The *Abramski* conviction should be reversed and this Court must further define or repudiate the "strawman" doctrine.

Respectfully Submitted on December 3, 2013,

Donald E. J. Kilmer, Jr.* for Amici EARLY
Law Offices of Donald Kilmer
1645 Willow Street, Ste. 150
San Jose, CA 95125
Voice: (408) 264-8489
EM: don@dklawoffice.com

* *Counsel of Record for Amici*

James Jeffries Goodwin for Amici SNELLINGS
Goodwin Law Corp.
101 Parkshore Drive, #100
Folsom, CA 95630
Voice: (916) 932-2345
EM: jjg@goodwinlawcorp.com