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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEVEN W. CLYNE,

Defendant.

Docket No. 1:16-CR-00115-BLW

**DEFENDANT'S SECOND MOTION IN
LIMINE AND MEMORANDUM IN
SUPPORT**

Defendant Steven Clyne, through his attorney Robyn Fyffe, and pursuant to Rules of Evidence 103(c), 104(c), and 611, and *Luce v. United States*, 469 U.S. 38, 40, n.2 (1984), moves the Court for an Order in Limine concerning an evidentiary issue that is likely to arise during trial. Specifically, Mr. Clyne understands that the government will object to the evidence described herein and he offers the following background and argument to aid the Court in understanding its admissibility in advance of trial:

1. Evidence that after the ATF published guidance reflecting that an FFL was needed to sell firearms at gun shows in some circumstances, it fielded a variety of questions seeking further

clarification “about the extent to which persons who regularly buy and sell firearms at gun shows - but not from a fixed commercial location - are allowed and/or required to obtain a Federal firearms license”; and

2. Evidence the ATF responded to this confusion by amending the FFL application to strike the question advising applicants to not submit the application if they intend to sell only at gun shows.

MEMORANDUM IN SUPPORT

As Mr. Clyne sold more firearms at gun shows, he obtained an application for a federal firearm license (FFL) to investigate obtaining a license. Question 18a on that applications provides: “Do You Intend To Sell Firearms Only at Gun Shows? . . . ([i]f yes, do not submit application). Defense Exhibit 2001. Mr. Clyne reasonably interpreted this Question as indicating that he did not need (and could not obtain) a FFL to sell firearms only at gun shows. This interpretation was consistent with his understanding that federal law required an FFL to sell from business premises. *See also Abramski v. United States*, 134 S. Ct. 2259, 2263 (2014) (Section 922(c) brings the would-be purchaser onto the dealer's “business premises” by prohibiting, except in limited circumstances, the sale of a firearm “to a person who does not appear in person” at that location).

Mr. Clyne was not alone in his understanding. Shortly after the conduct at issue in this case, in January 2016, the ATF published a pamphlet entitled: “Do I need a License to Buy and Sell Firearms?” The pamphlet is available on the ATF’s official website — atf.gov — and the publication explains it contains “Guidance to help you understand when a Federal Firearms

License is required under federal law.” Defense Proposed Exhibit 2034. The publication includes examples of where an FFL is needed to sell firearms at gun shows, including:

Lynn regularly travels to gun shows around her state, rents space, and sells firearms under a banner stating “liquidating personal collection.” Most of the firearms Lynn offers for sale she purchased from a licensed dealer in the prior weeks. Lynn is retired and hopes to supplement her income with the money she makes on the sales, although she has yet to turn a profit. Lynn must get a license because she is repetitively buying and selling firearms with a primary objective of profit.

p. 7.

After “publication of the guidance, [the] ATF . . . fielded a variety of questions seeking further clarification, *especially about the extent to which persons who regularly buy and sell firearms at gun shows - but not from a fixed commercial location - are allowed and/or required to obtain a Federal firearms license.* Defense Exhibit 2039 (emphasis added). The National Associations of Arms Shows (“NAAS”) requested an advisory opinion as to whether an FFL required a physical premises and that the ATF had promised to amend “ATF E-Form 7, Application for Federal Firearms License, . . . by removing the hitherto confusing Question 18a: ‘Do You Intend to Sell Firearms Only at Gun Shows?’” Defense Exhibit 2040.

On February 17, 2017, Krissy Carlson, Chief, Firearms and Explosives Industry Division of the ATF EPS - Firearms Industry Programs Branch wrote a confirming that:

To avoid future confusion, ATF has recently been engaged in revising ATF form 7, Application for Federal Firearms License (ATF Form 5310.12) to amend language concerning when applicants who intend to sell firearms at gun shows are required to obtain a license. ATF anticipates that the revision process will be done soon, and that the revised form 7 will be available in the Spring of 2017. However, persons who intend to conduct their business primarily at gun shows, over the internet, or by mail order are free to submit the current form 7 in the interim, and it will be processed in accordance with the above-stated criteria.

Defense Exhibit 2039.

A link to this February 17, 2017 correspondence is available on a recently posted on atf.gov in the Licensing section of the Firearms Q & A page. Defense Exhibits 2034-2040. Specifically, the link appears with a response dated February 23, 2017 to the following question: “The February 17, 2017 correspondence indicates a license can be issued for persons whose intent is to sell firearms primarily at gun shows, the internet, or by mail. To qualify for a license, must applicants also sell firearms from their premises?” Defense Exhibit 2038.

Counsel discovered the February 17, 2017 correspondence on atf.gov the afternoon of Thursday, March 9, 2017 and disclosed it to the government as a potential exhibit. Counsel and the government discussed the evidence the following day and counsel understands that the government would object to the evidence as irrelevant and hearsay

1. Relevance

The ATF’s aforementioned statements establish that issues surrounding Question 18a to the FFL application and the statutory “premises” requirement created sufficient confusion to warrant publishing information on the ATF’s official website. The public’s reaction to the ATF’s guidance indicating an FFL is necessary for gun show vending makes it more probable that Mr. Clyne held that same understanding and did not willfully deal without a license.

Mr. Clyne also claims that he is not guilty due to entrapment by estoppel, which requires he establish that he reasonably relied on Question 18a’s indication that he did not need an FFL. Evidence that many others shared the same understanding — including counsel for the National Association of Arms Sales — makes it more probable that Mr. Clyne’s understanding was reasonable.

Undersigned counsel understands the government considers the evidence irrelevant because the pamphlet, correspondence and Q & A posting all occurred after the conduct at issue. However, the pamphlet that triggered the “variety of questions” was published two months after the ATF concluded their controlled operations. Thus, the reaction to the pamphlet reflected the public’s understanding during the precise time period relevant here.

The ATF’s admission that Question 18a and the statutory premises requirement created confusion makes it more probable that Mr. Clyne shared the understanding of those who contacted the ATF and that his reliance on Question 18a was reasonable. The evidence is therefore relevant.

2. The Evidence in Non Hearsay

The pamphlet, Q & A and February 17, 2017 are all published on atf.gov to aid the public in understanding ATF policies and firearm laws. The ATF, part of the Department of Justice, is of course the same entity who investigated Mr. Clyne. Much of the government’s case will rely on the testimony of ATF special agents.

The ATF is a party-opponent in this case. The “Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases.” *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988), *citing United States v. Morgan*, 581 F.2d 933, 937 n. 10 (D.C.Cir.1978). “Whether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases the Justice Department certainly should be considered such.” *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988) (internal citations omitted).

To qualify as an admission of a party opponent under Federal Rule of Evidence 801(d) (2), the statement must be “made by the party in an individual or representative capacity”; “one the party manifested that it adopted or believed to be true”; (3) “made by a person whom the party authorized to make a statement on the subject”; and “made by the party's agent or employee on a matter within the scope of that relationship and while it existed.

Here, the government cannot dispute that atf.gov is the ATF's official website where it posts forms, publications and Q & A's specifically to inform the public viewing the site. Nor can it question that the Q & A and correspondence posted to the atf.gov on or around February 24, 2017, were made by a person the ATF authorized within the scope of their authority.

Counsel discovered the February 24, 2017 posting on March 9, 2017. She therefore has not had an opportunity to identify and subpoena the persons responsible for drafting the content on the atf.gov website or its publications. Nor should such witnesses be necessary to lay sufficient foundation for the evidence's admissibility. The ATF publishes the evidence on its website for the viewing public. Thus, a person who has visited atf.gov and downloaded the information should be able establish that the statements were authorized by the ATF.

The ATF fielded a variety of questions seeking further clarification from people who, just like Mr. Clyne, had interpreted Question 18a and the statutory premises requirement to signify that “persons who regularly buy and sell firearms at gun shows - but not from a fixed commercial location - are [not] allowed and/or required to obtain a Federal firearms license.” The ATF responded to this confusion by amending the application form to omit the question. The ATF is a party-opponent in this case and its official admissions, which are material to Mr. Clyne's defense, are not hearsay.

DATED this 12th day of March, 2017.

/s/ Robyn Fyffe
ROBYN FYFFE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12, 2017, I filed the foregoing document electronically through the CM/ECF system, which caused the following parties to be served by electronic means:

Christopher Atwood
Assistant United States Attorney
District of Idaho
christopher.atwood@usdoj.gov

/s/ Robyn Fyffe
ROBYN FYFFE