IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. KELLAND WRIGHT, Defendant.	)))))))))))	CASE NO.: 3:18CR162 JUDGE JAMES G. CARR UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3 (REGARDING ATF CLASSIFICATION LETTERS)

The Court should preclude Wright from introducing classification letters from the ATF, Firearms and Ammunition Technology Division (FATD) because they do not have a tendency to make any material fact more likely or less likely; introduction of the letters will only have the effect of confusing the jury. None of the classification letters relate to Wright's firearm, or his shouldering device. None of the classification letters was addressed to Wright. Wright saw them on the internet along with YouTube videos, chat rooms, and message boards, which he seeks to admit into evidence. These letters, like the videos and chat rooms, do not bear on Wright's knowledge about *his* firearm; they are only relevant to what Wright thought ATF might say about his firearm. In this respect, they are not admissible.

This is not a civil case in which Wright is appealing an administrative decision by ATF FATD that his firearm or proposed modifications of a firearm constitute a short-barreled rifle. Likewise, this is not a case where the defendant has asserted a claim that the statute outlawing the possession of unregistered short-barreled rifles is unconstitutionally vague. In such a case,

previous decisions by ATF and previous classification letters regarding certain design features on other firearms might be relevant. Here, however, such classification letters are not relevant.

The fact that Kelland Wright may have seen these letters is not relevant. Two issues will be in dispute at trial: (1) was the firearm designed to be fired from the shoulder; and (2) did Wright know it was designed to be fired from the shoulder. The fact that Wright may have read an ATF classification letter that was leaked on the internet may be relevant to what Wright thought the ATF might say about his firearm if he submitted it for classification. It is not relevant, however, to the question of whether or not Wright knew the firearm was designed to be fired from the shoulder. That question is a different inquiry that is not made more like or less likely by the introduction of letters related to other unrelated firearms.

These letters are not relevant to Wright's knowledge. The letters are not relevant to how Wright's firearm was designed. They do not support an entrapment by estoppel defense or a reliance defense. They are not relevant, and they will confuse the jury. For those reasons, they should be excluded.

A. The Relevant Inquiry

The Government is required to prove that Wright knew the characteristics of a firearm: that it had a barrel length of less than 16 inches and – in dispute in this case – that it was a rifle, which is to say that it is designed to be fired from the shoulder. (*See* Dkt. no. 49, Joint Proposed Jury Instructions, PageID 187, defining elements of the offense.) The Government is not required to prove that Wright *thought* that the ATF would classify his firearm as a rifle based on prior opinions. The Court must grasp this critical difference. Neither Wright, nor his proposed expert, require letters about other firearms and other designs to inform them of whether *this* firearm is now designed to be fired from the shoulder. The Government is only required to prove that the firearm

is designed to be fired from the shoulder and that Wright knew that. What Wright thought the ATF might say about the shouldering device that he attached to AR-platform firearm has nothing to do with this case.

Nonetheless, Wright claims the letters are relevant and admissible for two purposes: to introduce through his expert to somehow bolster his expert's opinion, and to introduce through Wright, to show that Wright saw the letters and relied on them. This is inappropriate under the Federal Rules of Evidence unless the letters are specifically offered as impeachment material where appropriate.

B. Introducing the ATF Classification Letters through Defense Expert Richard Vasquez

First, Wright expects to introduce the letters through his proposed expert, Richard Vasquez. This is inappropriate for two reasons: first, the letters do not address Wright's firearm, the shouldering device attached to his firearm, or a remotely similar device; second, Wright's expert should be able to testify about whether or not Wright's firearm is designed to be fired from the shoulder without consulting other letters. Wright claims that it is a narrow view to state that the letters are not precedential. But they are not. This is underlined by the fact that the ATF classification letters themselves do not cite previous letters as authority. They are not regulations, statutes, or statements of any of the parties. It remains unclear how or why these letters would come in under the rules of evidence.

In his response to the Government's Third Motion in Limine, Wright simultaneously claims that Vasquez will testify "to explain to the jury how to properly determine whether a firearm is intended to be fired from the shoulder" then states that as part of his presentation "Vasquez intends to discuss ATF opinion letters which relate to this determination." (Dkt. no. 53, Def's Resp. in Opp. to Govt. Mot. in Limine no. 3, p. 2.) In his response, Wright identifies two letters

that have nothing to do with the firearm at issue in this case. The letters were not addressed to Wright. The letters were not about Wright's firearm. The letters did not even address the brand of extension piece that Wright used to create the shouldering device on his AR-platform firearm. Instead, the two letters discuss firearms and modifications not at issue in this case: a design for a cheek weld attached to a buffer tube and an inquiry regarding attaching a cane tip to a buffer tube.

If this were driven to its logical extreme, during the expert testimony, the parties could offer the 1300 pages of letters that deal with arm braces, wrist braces, cheek pieces, cane tips and other issues that were requested and produced in discovery.[1] The jury could then sift through these materials to determine for themselves what should or should not be classified as a rifle based on prior ATF FATD decision letters that have nothing to do with this firearm. Such a process would be ridiculous. Instead, the experts can testify about the processes and factors related to the single firearm at issue and the jury can assess their credibility rather than offering a parade of out-of-court statements that have little or no bearing on whether or not Wright's firearm is designed to be fired from the shoulder.

C. Introducing the ATF Classification Letters through Wright

Second, Wright explains that he may testify that he saw the letters on the internet along with various YouTube videos, chat rooms, and Google inquiries, and relied on them in constructing the firearm at issue in this case. To be clear: Wright never contacted the ATF for a classification of his firearm. He also never had any communication with the government regarding his firearm. His firearm was never examined or classified prior to this case.

[1] In fact, on September 25, 2018, Wright identified 16 ATF decision letters as trial exhibits. (*See* Dkt. no. 66, Defendant's Amended Exhibit List.)

For this reason, Wright cannot introduce the letters as a part of an entrapment by estoppel defense. He also cannot introduce them as part of what appears to be a reliance defense. Entrapment by estoppel, requires the defendant to prove y a preponderance of the evidence four elements: (1) "that an agent of the United States government announced that the charged criminal act was legal"; (2) "that the defendant relied on that announcement"; (3) "that the defendant's reliance on the announcement was reasonable"; and (4) "that given the defendant's reliance, conviction would be unfair." *See* Sixth Circuit Pattern Jury Instruction 6.09. Because Wright never received communication from the United States government that the charged criminal act was legal, he cannot satisfy the first element, let alone that the reliance on the communication was reasonable. *Compare to United States v. Corso*, 19 DF.3d 521, 528 (2d Cir. 1994) (holding that the entrapment by estoppel defense was unavailable because, among other reasons, "there was no communication from an authorized government official to the defendant to the effect that his acquisition of the receivers was lawful."). Wright cannot show that he had a communication from ATF informing him that *his* firearm was not a short-barreled rifle or that his unregistered possession of it was lawful. He cannot even show that there was a communication between ATF and the manufacturer of his firearm stating that his firearm was not a short-barreled rifle.

If there were an ATF classification letter addressed to Wright or addressing the specific shouldering device that he possessed, then that letter would be admissible. No such letter exists. Introducing dozens of letters on unrelated modifications will not have a tendency to make any material fact more likely or less likely. It will not assist in a viable defense. The only purpose admission of these letters will serve is confusion of the issues and an attempt at nullification.

Because of the nature of the charge, Wright cannot rely on a good faith defense such as in fraud cases, or a reliance defense, such as in tax evasion cases. The good faith defense is available

to certain fraud defendants. *See* Sixth Circuit Pattern Jury Instruction 10.04 (Fraud – Good Faith Defense); *see also* Sixth Circuit Patter Jury Instruction 6.08, comment (cross referencing the Good Faith Instruction in Chapter 10; stating "Instruction 10.04 states a good faith defense to be used in conjunction with the elements instructions for mail, wire and bank fraud only; it does not articulate a general good faith defense."). It is less of an affirmative defense and part of the required burden of proof for the Government in establishing fraudulent intent. Likewise, a reliance defense is also unavailable, because this is not a tax fraud or bankruptcy fraud case. *See United States v. James*, 819 F.2d 674, 675 (6th Cir. 1987). There are two elements to a reliance defense: (1) full disclosure of all pertinent facts, and (2) good faith reliance on the accountant's [or professional's] advice. *See id.*; *see also United States v. Cox*, 348 F.2d 294, 296 (6th Cir. 1965). Such an instruction should not be given "if it lacks evidentiary support or is based upon mere suspicion or speculation." *James*, 819 F.2d at 675. This is not a tax case, where Wright relied on an accountant, or a bankruptcy fraud case, where Wright relied on a bankruptcy lawyer. Here, Wright relied on internet searches, YouTube videos, and chat rooms. He did not disclose the pertinent facts to ATF FATD or to anyone else. There is nothing that he could have reasonably relied upon.

Even if the Court constructed a hybrid defense based on these theories in fraud crimes, the ATF classification letters would not be relevant. Wright cannot establish that he reasonably relied on the results of leaked ATF classification letters that have nothing to do with his firearm. It would be different if Wright wrote to the ATF seeking guidance on issues related to his firearm or shouldering device. Likewise, it would be different if Wright had ATF classify his firearm and issue a classification letter to him. In those instances, Wright could reasonably rely on the ATF letter addressed to him in fashioning a form of a reliance defense.

Here, that is not the case. Because these defenses are not available in this sort of case, the Court must ask why introducing Wright's misplaced reliance on these unrelated classification letters is important. The answer is likely similar to Wright's justification for attempting to introduce YouTube videos, chat room conversations, and message boards he read about AR-platform firearms: *Wright read something on the internet and thought it was O.K.* This is the equivalent of making a medical diagnosis by reading articles on WebMD.com. That is not evidence. That is not reasonable reliance. That is confusion, and it walks very close to the line of attempted jury nullification.

In sum, Wright's review of ATF classification letters about other firearms has no bearing on whether Wright knew that his firearm was designed to be fired from the shoulder. Because the letters do not have a tendency to make a material fact more or less likely, they are not relevant. Because they are not relevant, they should be excluded.

E. CONCLUSION

For the above stated reasons, and the reasons stated in the Government's Motion in Limine no. 3, the Court should preclude Wright from introducing the ATF FATD classification letters.

Respectfully submitted,

JUSTIN E. HERDMAN
United States Attorney

By: /s/ Noah P. Hood
Noah P. Hood (Reg. No. MI P75564)
Assistant United States Attorney
Four Seagate, Suite 308
Toledo, OH 43604
Tel.: (419) 259-6376
Fax: (419) 259-6360
Noah.Hood@usdoj.gov

By: /s/ Jody L. King
Jody L. King (0094125)
Assistant United States Attorney
Four Seagate, Suite 308
Toledo, Ohio 43604
Phone: (419) 259-6376
Fax: (419) 259-6360
Email: Jody.King@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 2018 a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Noah P. Hood
Noah P. Hood
Assistant U.S. Attorney