NO. 10-50856

In the United States Court of Appeals
For the Fifth Circuit

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOHN THOMAS SHIPLEY

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
El PASO DIVISION

BRIEF OF DEFENDANT-APPELLANT

LEON SCHYDLOWER
Attorney at Law
210 N. Campbell Street
El Paso, Texas 79901
(915) 532-3601
(915) 532-0904 (facsimile)
Texas Bar No. 00795639
Attorney for Defendant-Appellant

DECEMBER 2011

CERTIFICATE OF INTERESTED PERSONS

NO. 10-50856
United States v. John Thomas Shipley

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

(1) John Thomas Shipley, Defendant-Appellant;

(2) John E. Murphy, (then) United States Attorney for the Western District of Texas;

(3) Gregory Edward McDonald, Assistant United States Attorney who represented the United States in the District Court;

(4) Juanita Fielden, Assistant United States Attorney who represented the United States in the District Court;

(5) Robert J. Perez, defense counsel at the trial court level;

(6) Marjorie Wilcox Jobe, defense counsel at the trial court level;

(6) The Honorable David Briones, Senior United States District Judge.

/S/ LEON SCHYDLOWER
Leon Schydlower
Appellate Attorney of Record for Defendant-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant John Thomas Shipley requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 34.2 to the extent it would aid the Court in understanding the factual background of this case and clarify the legal issues presented.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

STATEMENT OF JURISDICTION

1. **Subject Matter Jurisdiction in the District Court.** This case arose from the prosecution of alleged offenses against the laws of the United States. The district court exercised jurisdiction pursuant to 18 U.S.C. § 3231.

2. **Jurisdiction in the Court of Appeals.** This is a direct appeal from a final decision of the United States District Court for the Western District of Texas. (USCA5 108-113) This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

Under Federal Rule of Appellate Procedure 4(b), a criminal defendant shall file a notice of appeal in the District Court "within ten (10) days after the later of (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal." FED. R. APP. P. 4(b). In this case, the amended judgment was entered on August 26, 2010 (Supp. #3 USCA 11), and Defendant-Appellant Shipley timely filed his Notice of Appeal on September 3, 2010. (USCA5 288-89).

STATEMENT OF THE ISSUES

I. WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S CONVICTION FOR DEALING FIREARMS WITHOUT A LICENSE WHERE SHIPLEY REINVESTED EVERY PENNY BACK INTO HIS GUN COLLECTION AND THE GOVERNMENT PRESENTED NOT A SCINTILLA OF EVIDENCE THAT SHIPLEY'S BUYING AND SELLING GUNS FOR HIS COLLECTION HAD THE PRINCIPAL OBJECTIVE OF LIVELIHOOD AND

PROFIT.

II. WHERE A GUN COLLECTOR CAN COMPLY WITH EVERY ASPECT OF THE STATUTE IN TERMS OF PURCHASING AND SELLING FIREARMS TO ENHANCE A GUN COLLECTION WITHOUT ANY SHOWING THAT EFFORTS IN THIS REGARD WERE FOR THE PRINCIPAL PURPOSES OF LIVELIHOOD AND PROFIT, AND STILL BE INDICTED AND CONVICTED FOR DEALING FIREARMS WITHOUT A LICENSE, SECTION 924(a)(1)(A) SHOULD BE DECLARED VOID FOR VAGUENESS

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S CONVICTIONS FOR CAUSING A FIREARMS DEALER TO MAINTAIN FALSE RECORDS WHERE SHIPLEY WAS A FIREARMS COLLECTOR WHO SOLD FIREARMS TO OTHER FIREARMS COLLECTORS ELIGIBLE TO PURCHASE THE FIREARMS IN THEIR OWN RIGHT AND WHO DID NOT SOLICIT OR PARTICIPATE IN THE TRANSACTIONS MANDATING THE COMPLETION OF THE ATF FORM 4473'S

IV. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S FALSE STATEMENT CONVICTION BECAUSE THE GOVERNMENT CHARGED SHIPLEY WITH MAKING A FALSE DOCUMENT OR WRITING, BUTATTEMPTED TO PROVE THE CHARGE THROUGH THE USE OF AN OSTENSIBLE *ORAL* STATEMENT

V. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S FALSE STATEMENT CONVICTION BECAUSE EVEN IF THIS COURT CHOOSES TO UTILIZE SHIPLEY'S *ORAL* STATEMENT THAT THE RECORDS HE PROVIDED ON MARCH 21ST WERE ALL OF HIS FIREARMS RECORDS, SUCH A STATEMENT WOULD BE DEVOID OF MATERIALITY BECAUSE IT WOULD HAVE NO BEARING ON WHETHER LUIS RODRIGUEZ WAS TRAFFICKING FIREARMS INTO MEXICO

VI. WHERE SHIPLEY IS REPRESENTED ON APPEAL BY AN ATTORNEY WHO DID NOT REPRESENT HIM AT TRIAL, AND WHERE THERE IS NO TRANSCRIPT OF SHIPLEY'S DIRECT AND CROSS EXAMINATIONS, THE JURY CHARGE CONFERENCE, AND THE PROFFER, OBJECTIONS, AND RULING ON A DEFENSE CHARACTER WITNESS, FIFTH CIRCUIT CASELAW MANDATES A REVERSAL FOR NEW TRIAL

VII. THE DISTRICT COURT ABUSED ITS DISCRETION IN EXCLUDING SHIPLEY'S SOLE REQUESTED CHARACTER WITNESS GIVEN THE GOVERNMENT'S VICIOUS ATTACKS ON SHIPLEY'S INTEGRITY AND GIVEN ITS CLOSING ARGUMENT REFERENCES TO SHIPLEY'S "LIES"

VIII. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY THAT EVIDENCE OF SHIPLEY'S HONESTY, INTEGRITY, AND CHARACTER AS A LAW-ABIDING CITIZEN CAN GIVE RISE TO REASONABLE DOUBT IN AND OF ITSELF

IX. THE ORDER OF FORFEITURE CONTAINED IN THE JUDGMENT SHOULD BE REVERSED BECAUSE THE COURT FAILED TO COMPLY WITH FED.R.CRIM.P. 32.2(b)(4)(B) IN FAILING TO ORALLY REFERENCE THE FORFEITURE AT SENTENCING, AND BECAUSE THERE WAS NO EVIDENCE SUPPORTING ANY NEXUS BETWEEN THE ITEMS FORFEITED AND THE COUNTS OF CONVICTION

X. WHERE THE PROSECUTORS FABRICATED A STORY THAT A FIREARM THAT SHIPLEY ONCE OWNED KILLED A MEXICAN ARMY CAPTAIN, AND SHOWED THE JURY PHOTOS OF WEAPONS AND ARMAMENT IN MEXICO THAT HAD NO CONNECTION TO THIS CASE WHATSOEVER, THEY IMPROPERLY SOUGHT TO INFLAME THE JURY WITH EMOTIONAL APPEAL, MANDATING A REVERSAL FOR A NEW TRIAL

STATEMENT OF THE CASE

A. Nature of the Case

A jury found Defendant-Appellant John Thomas Shipley ("Shipley") guilty of Dealing Firearms Without a License (one count), Causing a Firearms Dealer to Maintain False Records (four counts), and False Statement (one count). On August 24, 2010, the district court sentenced Shipley to six concurrent 24-month terms of imprisonment. This timely appeal follows, and challenges the conviction, the

sentence imposed, and order of forfeiture.

B. Course of Proceedings and Disposition in the Court Below

On June 24, 2009, Shipley was charged in a six-count indictment alleging Dealing Firearms Without a License in violation of 18 U.S.C. §922(a)(1)(A) – (Count 1); Causing a Firearms Dealer to Maintain False Records in violation of 18 U.S.C. §924(a)(1)(A) – (Counts 2-5); and False Statement in violation of 18 U.S.C. §1001(a)(3) – (Count 6). (USCA5 16-23) On April 14, 2010, a jury found Shipley guilty on all counts. (USCA5 164) On August 24, 2010, Shipley was sentenced to six concurrent 24-month terms of imprisonment. (Supp. #1 USCA5 1597) Shipley timely filed his notice of appeal on September 3, 2010. (USCA5 288-89). This court appointed the undersigned as CJA-appointed appellate counsel on December 8, 2010. This timely appeal follows.

C. Statement of the Facts

John Shipley was an FBI agent in good standing, former member of the FBI SWAT team, and former Army helicopter pilot when he was indicted. (Supp. #1 USCA 1267-70, 1274). The Government contended that Mr. Shipley was in violation of federal firearms laws because he did not possess a federal firearms license while buying and selling firearms to enhance his private gun collection.

A federal firearms licensee ("FFL") is a person who is licensed to purchase

and sell firearms for profit. (Supp. #1 USCA 73) When an FFL transfers a firearm to someone who is not an FFL, the recipient must complete an ATF Form 4473 that the FFL keeps in the FFL's records to memorialize the transaction. (Supp. #1 USCA 73) In Texas, a private seller (non-FFL) can transfer a firearm to another non-FFL within the state without the need for any such transfer paperwork. (Supp. #1 USCA 74). If someone who is not an FFL transfers a firearm to an individual in another state, the firearm must first be shipped to an FFL in the recipient's state, and an ATF Form 4473 is completed for the FFL's records before the recipient is allowed to take possession of the shipped firearm. (Supp. #1 USCA 86-87)

Count 1 – Dealing Firearms Without A License

Count 1 alleges that Shipley was dealing firearms without a license ("FFL"). The Government's case agent was ATF Agent Frank Henderson. (Supp. #1 USCA 47) Agent Henderson told the jury that the factors he looks to in gauging whether someone is selling firearms without a license are profit margin, how long a firearm is held, and whether there are repetitive purchases and sales. (Supp. #1 USCA 756-57) With respect to this particular case, Agent Henderson testified that when analyzing whether Shipley made a profit on his firearms sales, Henderson looked at "most of the transactions," but not all. (Supp. #1 USCA 755-56). The best Agent Henderson could provide with respect to any sort of financial analysis of Shipley's

private gun collection was, "I was looking at how much he made on each gun" and "I noticed that he was making a profit on ev- --almost every firearm." (Supp. #1 USCA 755). The Government offered no financial analysis beyond this testimony.

Shipley provided the jury an in-depth expert financial analysis. Defense witness Michael Wright was a former IRS special agent who conducted a forensic accounting analysis of the firearm and financial records in this case. (Supp. #1 USCA 1099-1100) Mr. Wright examined Shipley's firearm records, the ATF 4473 records, the documents that the Government provided in discovery, and Shipley's recollections about particular firearms. (Supp. #1 USCA 1100-1103) From these documents, Wright prepared spreadsheets and summaries of the information, and then re-verified the information to ensure that the spreadsheets and summaries were accurate. (Supp. #1 USCA 1105-06) Wright concluded that from 1996 to 2008, Shipley purchased 90 firearms, sold 68, and "in addition to the money he received from the sales, he still had to come up with $1,817.97 in order to make all the purchases for this time period." (Supp. #1 USCA 1143) In other words, after all purchases and sales during this time period, Shipley had to take $1817.97 out of his own pocket.

Shipley testified that he bought and sold guns in a constant effort to improve his gun collection, either in the number of guns or the value of the guns. (Supp. #1

USCA 1320) He testified that after he sold a gun from his collection, he would cash the buyer's check, place the cash into a safe, and use the money to reinvest into his collection. (Supp. #1 USCA 1323) Whenever he sold a gun for more than his own purchase price, he would take the excess money and invest it back into his collection. (Supp. #1 USCA 1333)

Defense witness John Hubert was a retired Border Patrol agent, a former FFL, a collector of firearms for 50 years, gun store employee, and recognized expert in firearms. (Supp. #1 USCA 967-68) Hubert testified that gun collectors will buy guns and make quick turnaround sales to buy better guns to enhance their gun collections. (Supp. #1 USCA 968) Mr. Hubert testified that this is how gun collectors upgrade their collections: "It's upgrading, and that's the object of most collectors." (Supp. #1 USCA 968-69) Hubert testified that there is no minimum period of time that someone must hold a gun before they sell it, no limit in Texas as to how many guns one can buy and sell in the same year, and no legal prohibition on selling a firearm on the same day is it received. (Supp. #1 USCA 982-84)

The Government offered the jury nothing to dispute any of this testimony. Indeed, ATF Agent Henderson testified that of the firearms sold during the indictment period of January 1, 2005 to May 8, 2008, some "were a part of his (Shipley’s) collection, and then some of them were a part of a -- just from what he

was selling." (Supp. #1 USCA 877) *The case agent himself could not make a determination about which "guns are a part of the alleged illegal activity"*: "That's what the jury will have to decide," according to ATF Agent Henderson (Supp. #1 USCA 878)

As the ATF case agent, Agent Henderson provided the jury zero guidance. He testified that the ATF regulations did not define what constituted "occasional" sales. (Supp. #1 USCA 763) He testified that one is entitled to sell a firearm that was already in one's collection and take the money to buy another firearm to enhance the collection, but conceded that there is no authority explaining how long one must hold a firearm before it becomes part of one's collection. (Supp. #1 USCA 770)

Testament to the confusion surrounding what constitutes dealing firearms without a license was Agent Henderson's explanation about Shipley's sales of several firearms from his collection in January of 2005. Shipley testified he sold some of his collection in January of 2005 to pay for expenses associated with medical fertility treatments and adoption expenses (Supp. #1 USCA 1338-1339) When questioned about the propriety of these sales, Agent Henderson testified that there was no problem with these sales because they were used to pay for expenses associated with adopting a child. (Supp. #1 USCA 827) Of course, the Government could provide no explanation why Shipley's firearm sales which were used to

enhance his gun collection were problematic.

Defendant's Exhibit 31 is a spreadsheet showing Shipley's firearm purchases and sales from the inception of the collection in June of 1996 to November of 2008. (Defendant's Exhibit 31, Record Excerpts). The spreadsheet reflect 90 purchases and 68 sales during that 149-month period (*Id*.), with the math working out to an average of .6 purchases/month and .45 sales/month. If the fourteen firearms sold in January 2005 are excluded because of Agent Henderson's testimony that those sales were perfectly legitimate, then the math for the 149-month period becomes .36 sales/month, or about one sale every three months. For the Indictment period (January 1, 2005 to May 8, 2008), there were 54 sales during that 39 month period, for an average of 1.38 sales/month (Defendant's Exhibit 31, Record Excerpts). Again, Agent Henderson could not identify for the jury what other sales he deemed legitimate or non-legitimate, leaving for the jury that determination, albeit without any guidance.

Again, Shipley testified that any money he made in selling firearms from his gun collection was reinvested to improve the collection. (Supp. #1 USCA 1320, 1323) The Government presented no evidence to refute Shipley's testimony that Shipley reinvested all gun sale money to improve his collection. Importantly, the Government did not show that Shipley used these monies for livelihood (bills,

mortgage, cars, college expenses), save for what Agent Henderson deemed the legitimate adoption expenses. Indeed, with respect to profit and livelihood, Mr. Shipley earned $115,000.00 per year as an FBI agent, and his wife earned $60,000.00 per year in the medical field. (Supp. #1 USCA 797) Importantly, there was no evidence that Shipley's collection activities generated any profit: Defense Exhibit 131 and Defense Financial Analyst Wright showed the jury that for the period 1996 to 2008, Shipley would still have needed to come up with $1,817.97 out of his own pocket in order to make all the purchases for the time period in question (Supp. #1 USCA 1143; Defense Exhibit 131, Record Excerpts)

Finally, during the ATF's search of Mr. Shipley's workplace, the ATF found records reflecting that Shipley had on multiple occasions called ATF agents for advice on how to legally transact sales. (Supp. #1 USCA 791-93)

Counts 2 – 5 Causing a Firearms Dealer to Maintain False Records

In Counts 2-5, the Government alleged that Shipley falsely represented in four ATF Form 4473's that he was the actual purchaser of the firearm shipped to Collector's Gun Exchange in El Paso when such was not the case.

As to Count 2, on July 9, 2007 Shipley picked up a .50-caliber rifle at Collectors Gun Exchange that he bought from North Carolina resident David Sayers resident for $8200, plus $200 shipping. (Supp. #1 USCA 526). The record is

unclear, however, about who the Government alleged was the "actual buyer" of this firearm, if not Shipley. The prosecutor stated in response to Shipley's Rule 29 motion that Count 2 is associated with Luis Armando Rodriguez (Supp. #1 USCA 626). Rodriguez was a 10-year veteran of the El Paso County Sheriff's Department and Rodriguez frequently purchased firearms from Collector's Gun Exchange in El Paso. (Supp. #1 USCA 318-319). Every time that Rodriguez purchased a firearm from Shipley he was legally entitled to do so. (Supp. #1 USCA 556-57)

Shipley testified that Rodriguez found out about the July 9th firearm because it arrived at Collector's Gun Exchange in a huge box and Rodriguez began asking questions about it. (Supp. #1 USCA 1380-1381) Rodriguez continued to make inquiries about it, made an offer to Shipley, and Shipley sold him the firearm. (Supp. #1 USCA 1381)

As to Count 3, this is another transaction that the Government associated with Luis Rodriguez. The ATF Form 4473 indicates that Shipley received the firearm at Collector's Gun Exchange on August 13, 2007. (Supp. #1 USCA 548) Rodriguez could not recall when he actually received the gun from Shipley (Supp. #1 USCA 547), but Rodriguez was adamant that Shipley was not buying the gun for Rodriguez because Rodriguez knew nothing about how Shipley bought or came into the possession of the gun. (Supp. #1 USCA 549-50)

With respect to Count 4, Shipley testified that he purchased the firearm during an online auction on August 19, 2007 for his own personal collection. (Supp. #1 USCA 1456, 1467) On August 22, 2007, Mark Benedict gave Shipley a check for $8020 because Benedict wanted to buy the firearm for Benedict's use at a sniper school that Benedict wanted to attend with Shipley. (Supp. #1 USCA 452, 1457) Benedict wrote Shipley a check for the firearm, but Shipley did not use that money to pay for the firearm because he did not want to sell it to Benedict. (Supp. #1 USCA 1463) Instead, Shipley used his own money to obtain a money order and/or cashier's check and mailed it to the auction house to receive his rifle. (Supp. #1 USCA 1462-66)

The rifle arrived in El Paso on September 6, 2007 (Supp. #1 USCA 1469) That very day, Shipley told Benedict that he would not sell Benedict the rifle. (Supp. #1 USCA 1469) Shipley filled out an ATF Form 4473 on September 6, 2007 when he picked up the weapon at Collector's Gun Exchange at El Paso, and indicated on the form that he was the actual buyer of the firearm. (Supp. #1 USCA 380-81) Two days later, Shipley showed Benedict the rifle at a birthday party at Shipley's house, but again told Benedict he would not sell Benedict the rifle. (Supp. #1 USCA 1469-71) Two days after that, on September 10th, Shipley decided to sell the rifle to Benedict so that Benedict could attend the sniper school with Shipley. (Supp. #1

USCA 1472-73) When Shipley signed the ATF Form 4473 on September 6, 2007, however, Shipley had won the auction, used his own money to pay for the rifle, and intended to keep the rifle in his collection. (Supp. #1 USCA 1476) At the time Benedict was purchasing firearms, he was not a "prohibited person" and was legally entitled to do so. (Supp. #1 USCA 475)

Finally, with respect to Count 5, Shipley picked up a Nighthawk Vickers .45-caliber semiautomatic handgun on May 5, 2008 from Collector's Gun Exchange. (Supp. #1 USCA 336, 350). Shipley purchased the gun from John Cope in Montana and Cope shipped it to Collector's Gun Exchange so Shipley could fill out the ATF Form 4473. (Supp. #1 USCA 350). Shipley purchased the firearm for $2400. (Supp. #1 USCA 342) Mark Benedict testified he had discussed buying the gun from Shipley for $3500-$4500, but no sale was ever consummated. (Supp. #1 USCA 366-69)

Counts 6 – False Statement

ATF Special Agent Frank Henderson contacted Shipley because Agent Henderson was conducting an investigation of Luis Armando Rodriguez for firearms trafficking into Mexico. (Supp. #1 USCA 701). Shipley told Agent Henderson he would help Henderson's investigation, telling him Henderson, "(l)et me help. I'm on board." (Supp. #1 USCA 701) Shipley explained to Agent Henderson how he had

met Rodriguez, explained about how they would meet at Collector's Gun Exchange, and explained how he and Rodriguez had a mutual interest in firearms. (Supp. #1 USCA 701-702)

On March 17, 2008, Shipley called Agent Henderson and provided Henderson the make, model, serial number, and dates and price of each and every firearm Shipley sold to Rodriguez. (Supp. #1 USCA 702) Agent Henderson confirmed at trial that Shipley provided Henderson the information regarding every firearm Shipley sold to Rodriguez. (Supp. #1 USCA 703) Agent Henderson told Shipley, "(w)hen you get back in town please give me a call, because I would like to come by and look at those records." (Supp. #1 USCA 704) On March 21, 2008, when Shipley got back into town, Agent Henderson testified that he requested Shipley "bring all his records with him" to a meeting that evening. (Supp. #1 USCA 706) There is nothing in the record supporting any contention that Agent Henderson requested all of Shipley's firearms records, as opposed to all of his records regarding sales to Rodriguez. Agent Henderson testified that he asked Shipley, "(i)s this all your records?", and Shipley testified, "(y)es it is." (Supp. #1 USCA 709-710) Agent Henderson then noted that Rodriguez's driver's license appeared to be missing, but Shipley identified the license the records provided. (Supp. #1 USCA 710-711).

Shipley testified that on March 21, 2008, Agent Henderson called Shipley and

said, "Hey, I would like to look at that information on Armando Rodriguez…I'm conducting an investigation into a local trafficking group…I think Armando is involved in this." (Supp. #1 USCA 1422) Shipley testified that Agent Henderson was asking for Shipley's assistance in investigating Rodriguez. (Supp. #1 USCA 1422). Shipley testified that Agent Henderson did not say, "Bring all of your records because I want to see them all." (Supp. #1 USCA 1422) Shipley told his wife he was preparing the records for Agent Henderson because "Frank (Agent Henderson) needed the information on Armando Rodriguez." (Supp. #1 USCA 1252) Shipley had no photocopier in his home. (Supp. #1 USCA 788)

Shipley would not have been able to comply with any request to produce all of his firearm records because a computer that contained his firearms records had crashed, and Shipley had on hand only what he could recreate after the computer crashed. (Supp. #1 USCA 1422-23). Shipley testified that he wrote out the records he gave to Agent Henderson between 6:43 p.m. (when Henderson called), and 7:45 p.m. when he met Henderson to deliver the records concerning Rodriguez. (Supp. #1 USCA 1424-1425) Pressed for time, Shipley omitted from the records the information regarding his grandparents' guns, and other weapons that did not have anything to do with Armando Rodriguez or others to whom he sold locally. (Supp. #1 USCA 1428-29)

The March 21st conversation between Shipley and Agent Henderson was not recorded. (Supp. #1 USCA 129) During the subsequent execution of a search warrant of Shipley's home, the agents located a record book that had more entries than the record book Shipley gave to Agent Henderson on March 21, 2007. (Supp. #1 USCA 136)

There was no argument at trial and there is no support in the record for any contention that the records Shipley provided to Agent Henderson on March 21st omitted any information regarding Shipley's dealings with Rodriguez - which is the only information Agent Henderson sought. The records tendered included all of Shipley's records regarding his sales to Rodriguez. (Supp. #1 USCA 709-710) Agent Henderson testified that the records Shipley provided to him about Rodriguez were true and correct. (Supp. #1 USCA 750) Agent Henderson testified that he requested the records because "I was looking -- I mean the one I was really concerned with at that time was the Luis Armando Rodriguez firearms, because I was investigating Luis Armando Rodriguez." (Supp. #1 USCA 709) Henderson also conceded at trial that the "real book" of records seized from Shipley's home during the search warrant did not include all of Shipley's firearms transactions. (Supp. #1 USCA 842) Shipley kept some records on his computer which were not kept in the record book seized during the execution of the search warrant. (Supp. #1 USCA

843)

During this March 21st meeting, the ATF considered Shipley a "witness," not a target. (Supp. #1 USCA 170) Moreover, as Shipley was not an FFL, there was no requirement for him to keep any records at all. (Supp. #1 USCA 187, 749-50)

Inflammatory Prosecutorial Statements and Arguments

Twice during the trial the prosecutor represented to the jury that a firearm that Shipley sold to Luis Armando Rodriguez made its way into Mexico and was used to kill a Mexican military officer – knowing full well that this representation was false. She told the jury that a firearm that Shipley sold to Luis Armando Rodriguez "ended up in a drug shootout in Mexico where it killed somebody." (Supp. #1 USCA 1048) Then, on closing argument, the same prosecutor told the jury with respect to the same firearm, "(w)ell, we know where at least one of those .50-calibers ended up, in a shootout with Mexican traffickers, where a Mexican military officer was killed. That's who used those types of weapons." (Supp. #1 USCA 1492). The other prosecutor stated on closing argument that Shipley got a phone call during which the caller stated, "Your gun, the one you sold, was recovered at a murder in Mexico." (Supp. #1 USCA 1531) There was no evidence supporting these representations - they were fabricated.

It was not until after the jury had rendered its verdict and one incarnation of

the PSR generated that the fabrication was uncovered: "there was no evidence that revealed that the Barret Model 82A1, .50 recovered in Mexico, was the actual weapon used to kill the Mexican Army Captain or the other suspected cartel hit men." (PSR Addendum, at 11)

Not only did the United States fabricate a story that a former Shipley firearm was used to kill a Mexican Army officer, the United States knew Shipley had no idea that one of his former firearms ended up in Mexico. Shipley sold the firearm at issue to Luis Armando Rodriguez, who himself had no idea that the firearm ended up in Mexico. (Supp. #1 USCA 552) Rodriguez took the firearm, consigned at Collector's Gun Exchange, had the gun store sell the firearm for him while he was out of town, and had no idea who took the gun into Mexico. (Supp. #1 USCA 553, 563-565) Indeed, ATF case agent Frank Henderson testified Shipley had no idea what Rodriguez did with the firearm after Shipley sold it to him. (Supp. #1 USCA 821)

Even though the there were at least three parties after Shipley who owned/controlled the firearm that went into Mexico (Rodriguez, Collector's Gun Exchange, and Jonathan Lopez - who bought it on consignment from the gun store), the Government presented photographic evidence of .50 caliber ammunition, hand grenades, magazines for various firearms, military style rifles of different calibers,

ballistic vests, ammunition pouches, and military helmets - all recovered by the ATF in Mexico and having absolutely nothing to do with the case against John Shipley. (Supp. #1 USCA 75)

Missing Transcript

Shipley was in the middle of his direct examination on April 12, 2010 when the Court recessed the proceedings for the day. (Supp. #1 USCA 1478) The Record on Appeal's next page, Supp. #1 USCA 1479, is the trial transcript for April 14th. (Supp. #1 USCA 1479). April 13th was skipped.

On April 13, 2010, a substitute court reporter attempted to record the day's proceedings. Upon receipt of the undersigned's request for a transcript of that day's testimony for purposes of processing this appeal, the Court Reporter (Anne M. Clark) notified the undersigned that there exists no record of the proceedings from that day. (Supp. #2 USCA 23-25). The testimony lost was the second half of Shipley's direct examination, his entire cross examination, any redirect examination, and any and all objections attendant to same. There was also proffered testimony about Mr. Shipley's character witness (attorney Enrique Moreno) that was not recorded, along with legal arguments, objections, and a Court ruling regarding same. (Supp. #2 USCA 36). The courtroom deputy's minutes for April 13th indicate that "TRIAL HELD," "EVIDENCE PRESENTED ON BEHALF OF GOV'T/DEFT,"

and "DEFENDANT REST." (USCA 136) It also indicates that court was in session from 9:10 a.m - 12:15 p.m., and 1:50-2:10 p.m. (USCA 136). Accordingly, there are 3 hours and 25 minutes of trial transcript missing, within which was Shipley's direct and cross examination to the jury.

On April 12, 2010, the parties and the Court held an informal conference regarding the jury charge. (Supp. #1 USCA 1404-12) The District Court then advised the parties that they would be given a chance to make more formal objections and that the Court and the parties would "go over the rest of it later." (Supp. #1 USCA 1412) There was no further discussion regarding the jury charge on April 12th. On April 14th, the District Court advised, "Counsel, I informed you yesterday that I would give you a final opportunity to make any additional objections to the Court's instructions. Your previous objections are on the record, and you're not waiving any of them at this time, if you failed to bring them up." (Supp. #1 USCA 1480) From this passage, it is clear that the formal jury charge conference was conducted on April 13th, and that the parties' requests for instructions, objections, and the Court's rulings were lost.

The transcript for April 14th also indicates that Shipley's counsel made a live proffer of defense character witness Enrique Moreno on April 13th (Supp. #1 USCA 1486), and that the Court explained its reasons for excluding Mr. Moreno. (Supp. #1

USCA 1486)

After this Court remanded the case to the District Court to determine whether the missing transcript could be recovered, the United States reported to the District Court notwithstanding all available forensic recovery efforts, the April 13th record is gone. (Supp. #3 USCA 212).

SUMMARY OF THE ARGUMENT

John Shipley's conviction on Count 1 for Dealing Firearms Without a License should be reversed, remanded, and rendered for a Judgment of Acquittal because the Government produced not a scintilla of evidence that Shipley's efforts with respect to his gun collection had the "principal objective of livelihood and profit." Indeed, the statute at issue should be declared void for vagueness given that Shipley reinvested every penny back into his gun collection and otherwise complied with all federal firearms laws, but was still indicted and convicted.

Shipley's convictions on Counts 2-5 should also be reversed, remanded, and rendered for Judgments of Acquittal because Shipley's sales of firearms to other bona fide collectors were absolutely legal. As a matter of law, logic, and common-sense, Shipley was the only one who could sign as the "actual purchaser" on the ATF Form 4473's. His False Statement conviction fails because Shipley was charged with making a false written statement, but the Government sought to prove only a false oral statement – which as it turns out was not false at all. Moreover, the Government failed to identify, establish, or prove the "materiality" element.

If any of the counts of conviction survive, this matter must be remanded for a new trial because an important piece of the record of trial was lost due to court reporter error, to include Shipley's direct and cross examinations on April 13, 2010. Moreover, a new trial is mandated because of evidentiary and jury instruction errors associated with Shipley's character evidence, and because of improper and inflammatory prosecutor arguments and comments. Finally, Shipley argues that the forfeiture order in the Judgment is procedurally and substantively unsound.

ARGUMENT AND AUTHORITIES

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S

CONVICTION FOR DEALING FIREARMS WITHOUT A LICENSE WHERE SHIPLEY REINVESTED EVERY PENNY BACK INTO HIS GUN COLLECTION AND THE GOVERNMENT PRESENTED NOT A SCINTILLA OF EVIDENCE THAT SHIPLEY'S BUYING AND SELLING GUNS FOR HIS COLLECTION HAD THE PRINCIPAL OBJECTIVE OF LIVELIHOOD AND PROFIT.

A. Standard of Review

With respect to challenges to the sufficiency of evidence, the Fifth Circuit reviews the evidence presented and all reasonable inferences therefrom in the light most favorable to the prosecution to determine whether a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 27811, 61 L.Ed.2d 560 (1979); *United States v. Brugman*, 364 F.3d 613. 615 (5th Cir. 2004).

B. Argument

The statute underlying Count 1, Dealing Firearms Without a License, provides that, "It shall be unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce…" 18 U.S.C. §922(a)(1)(A). To gauge whether Shipley was dealing in firearms without a license, the evidence adduced must be measured against the following statutory definitions.

The term "engaged in the business" means…as applied to a dealer in

> firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business *with the principal objective of livelihood and profit* through the repetitive purchase and resale of firearms, *but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby*, or who sells all or part of his personal collection of firearms. 18 U.S.C. §921(a)(21)(C)(emphasis added)
>
> The term "with the principal objective of livelihood and profit" means that *the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain*, as opposed to other intents, such as improving or liquidating a personal firearms collection…18 U.S.C. §921(a)(22)

The first question, then, is whether there was any evidence establishing that Shipley's firearm sales were conducted "with the principal (and 'predominant') objective of livelihood and profit." The best the Government could adduce at trial was that the ATF case agent looked at "most of" Shipley's firearms transaction to see how much Shipley was earning on each sale. That, according to the Government, was enough, but the governing statutes and definitions demand much more.

The defense was the only side to conduct and present a comprehensive financial analysis of Shipley's firearms sales. The evidence presented in this regard established that depending on the time period utilized, Shipley sold between .36 and 1.38 firearms per month, and was *actually short $1817.97* when his purchases and sales from 1996-2008 were analyzed. Again, the Government neither conducted nor presented any financial analysis of Shipley's firearms sales - relying only on the ATF

agent's almost elementary efforts in "looking at how much he (Shipley) made on each gun" - without any statistical or formulaic analysis. (Supp. #1 USCA 755)

The Government's witnesses could not even identify what firearms in Shipley's collection were problematic - testifying straight-faced that they were leaving that job for the jury to decide - with zero guidance or explanation. The Government's biggest problem, however, is that the statute actually contemplates that collectors such as Shipley will sell firearms to improve a collection. As defense expert witness Hubert testified, gun collectors will buy guns and make quick turnaround sales to buy better guns to enhance a gun collection. (Supp. #1 USCA 968) According to Hubert, this is how gun collectors upgrade their collections: "It's upgrading, and that's the object of most collectors." (Supp. #1 USCA 968-69) The Government offered no evidence, expert or otherwise, to refute this testimony.

The Government also offered no evidence to refute Hubert's testimony that there is no minimum period of time that someone must hold a gun before selling it, no limit in Texas as to how many guns one can buy and sell in the same year, and no legal prohibition on selling a firearm on the same day is it received. (Supp. #1 USCA 982-84)

Finally, the Government offered no evidence whatsoever that the "intent underlying the sale or disposition of (Shipley's) firearms (was) *predominantly one of*

obtaining livelihood and pecuniary gain." Indeed the Government offered *no evidence* that Shipley's firearms sales produced anything other than an enhanced gun collection. There was no evidence adduced whatsoever that Shipley used the proceeds from firearm transactions to pay for his mortgage, cars, college savings, groceries, or any other such livelihood expenditures. Shipley testified that every penny derived from his firearms transaction went back into enhancing and improving his gun collection. This testimony went uncontradicted, and according to 18 U.S.C. §922(a)(1)(22), negates any finding of a "principal objective of livelihood and profit." Shipley's conviction on Count 1 should be reversed and rendered for a Judgment of Acquittal for want of factual and legal sufficiency.

II. WHERE A GUN COLLECTOR CAN COMPLY WITH EVERY ASPECT OF THE STATUTE IN TERMS OF PURCHASING AND SELLING FIREARMS TO ENHANCE A GUN COLLECTION WITHOUT ANY SHOWING THAT EFFORTS IN THIS REGARD WERE FOR THE PRINCIPAL PURPOSES OF LIVELIHOOD AND PROFIT, AND STILL BE INDICTED AND CONVICTED FOR DEALING FIREARMS WITHOUT A LICENSE, SECTION 924(a)(1)(A) SHOULD BE DECLARED VOID FOR VAGUENESS

A. Standard of Review

The Fifth Circuit reviews whether a statute is void for vagueness *de novo*. *See United States v. Nevers,* 7 F.3d 59, 61 (5th Cir. 1993).

B. Argument

The "void for vagueness" doctrine requires that a penal statute define a

criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983).

As explained it the section immediately *supra*, Shipley was indicted and convicted under 18 U.S.C. §922(a)(1)(A) even though there was no evidence that his firearm purchases and sales were for anything other than improving and enhancing his personal gun collection - efforts which Congress explicitly contemplated and blessed when defining "engaged in the business (of dealing firearms)" and "with the principal objective of livelihood and profit" in 18 U.S.C. §§922(a)(21)(C) and (22), respectively.

Shipley was indicted and convicted even though the defense was able to show that he took a loss of $1817.97 in assembling his firearms collection over the years and had a combined household annual income of $175,000.00 - notwithstanding that the statutes mandate proof that firearm purchases and sales are "predominantly (for) obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."

Given the evidence presented at trial, given that the ATF case agent could not or would not himself identify the problematic Shipley firearm sales - leaving that

decision to the jury, and given that there was evidence presented at trial that Shipley on multiple occasions called the ATF for assistance and guidance on various firearm transactions notwithstanding that he was a federal law enforcement agent himself, the statutes at issue cannot and do not define "Dealing Firearms Without a License" with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983).

Sections 924(a)(1)(A), 922(a)(21)(C), and 922(a)(22) are unconstitutionally vague and should be declared void. Shipley's conviction on Count 1 should be reversed and rendered for a Judgment of Acquittal.

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S CONVICTIONS FOR CAUSING A FIREARMS DEALER TO MAINTAIN FALSE RECORDS WHERE SHIPLEY WAS A FIREARMS COLLECTOR WHO SOLD FIREARMS TO OTHER FIREARMS COLLECTORS ELIGIBLE TO PURCHASE THE FIREARMS IN THEIR OWN RIGHT AND WHO DID NOT SOLICIT OR PARTICIPATE IN THE TRANSACTIONS MANDATING THE COMPLETION OF THE ATF FORM 4473'S

A. Standard of Review

With respect to challenges to the sufficiency of evidence, the Fifth Circuit reviews the evidence presented and all reasonable inferences therefrom in the light most favorable to the prosecution to determine whether a rational jury could have

found the essential elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 27811, 61 L.Ed.2d 560 (1979); *United States v. Brugman*, 364 F.3d 613. 615 (5th Cir. 2004).

B. Argument

The Fifth Circuit has only one published case involving 18 U.S.C. §924(a)(1)(A), the statute underlying Counts 2-5 of Shipley's indictment. In *United States v. Rivera-Juarez*, 626 F.3d 246 (5th Cir. 2010), the defendant was convicted because she was paid cash to purchase firearms for a smuggler. The smuggler selected the firearms and gave the defendant the money for the purchases - the classic "straw purchase" that *every* Section 924(a)(1)(A) involves. It should be noted that the prosecutor in Shipley's case took pains to advise the Court that the Government was not alleging Shipley participated in "straw purchase(s)." (Supp. #1 USCA 1404-12) Although never clearly articulated, the Government's theory for Counts 2-5 appears to be that Shipley purchased the firearms in question with the intent to re-sell them, rendering his representations on each ATF Form 4473 that he was the actual purchaser ostensibly false.

There is not one single case, either in the Fifth Circuit or in any other circuit, supporting this tortured application of Section 924(a)(1)(A). The statute makes it unlawful for "…whoever knowingly make any false statement or representation with

respect to the information required by this chapter to be kept in the records of a person licensed under this chapter…" 18 U.S.C. §924(a)(1)(A). Counts 2&3 and Counts 4&5 refer to Shipley's sales of firearms to fellow collectors Luis Armando Rodriguez and Mark Benedict, respectively. During the relevant time periods, Rodriguez and Benedict, as collectors, could lawfully purchases firearms directly and in their own right.

Section 922(a)(6) of Title 18 provides that it shall be unlawful

> for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed…dealer…knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such…dealer…with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provision of this chapter. 18 U.S.C. §922(a)(6)

Both Section 924(a)(1)(A)(the statute underlying Counts 2-5 in this case) and Section 922(a)(6) prohibit the making of false statements or representations to firearms dealers and are similar such that the analysis of one carries to the other. *See United States v. Nelson*, 221 F.3d 1206, 1210 n.6 (11th Cir. 2000). In analyzing Section 922(a)(6), the Fifth Circuit has held that where there is a question as to whom is the bona fide firearm purchaser for ATF Form 4473 purposes, if the person who the Government alleges is "true purchaser" can lawfully purchase a firearm directly and in his own right, § 922(a)(6) liability cannot attach. *United States v.*

Polk, 118 F.3d 286, 295 (5th Cir. 1997), *citing Barrett v. United States*, 423 U.S. 212, 220, 96 S. Ct. 498, 503, 46 L. Ed. 2d 450 (1976) (holding that purpose of § 922(a)(6) was "'to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency'" (quoting S.Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968) U.S. Code Cong. & Admin. News 1968 p. 4410)); *United States v. White*, 451 F.2d 696, 699 (5th Cir. 1971) ("One goal sought by Congress [through § 922(a)(6)] was control over the ease with which criminals may acquire firearms."), cert. denied, 405 U.S. 998, 92 S. Ct. 1268, 31 L. Ed. 2d 468 (1972).

In other words, even assuming that the Government could have proven that Rodriguez and Benedict were the "true purchasers" for ATF Form 4473 purposes, their respective abilities to purchase the firearms at issue in their own right would have insulated Shipley from liability. As the cases cited *supra* reflect, the purpose of Section 922(a)(6), and Section 924(a)(1)(A) by extension, is to "keep firearms out of the hands of those not entitled to possess them." These statutes are not intended to impose criminal liability on a collector such as Shipley who purchases a firearm for his collection and then (in quick fashion or otherwise) sells to another collector for purposes of generating income for yet further improvement of his own collection. Any tortured reading of these statutes to the contrary is devoid of support in the Fifth

Circuit or any circuit, and the adoption of a dangerous reading in this regard in the Fifth Circuit would create new law and impose a chilling effect on gun collectors nationwide - in contravention of Congress' intent and in contravention of the Second Amendment.

This Court need not even weigh in on such a statutory analysis because the Government did not adduce evidence that Rodriguez and Benedict were the "actual purchasers" in Counts 2&3 and 4&5, respectively. In each count, Shipley either won an auction or bought directly from a third-party with whom neither Rodriguez nor Benedict had any contact. Moreover, Shipley arranged for the shipment from the seller/auctioneer to Collectors Gun Exchange (the FFL) because of the interstate nature of the transfer. Shipley used his own money for each and every one of the purchases, and there was no evidence whatsoever that either Rodriguez or Benedict solicited Shipley to make the purchases on their behalf.

Another way to look at the issue is that the interstate nature of each of the transactions mandated the completion of an ATF Form 4473 when each firearm arrived in El Paso. The Government alleged that Shipley should not have represented that he was the “actual purchaser,” so it follows that the Government's position is that either Rodriguez or Benedict should have listed themselves as the “actual purchasers” of the firearms. However, not having been parties to the auction

or sale; having had no contact with either the auction or out-of-state buyers; not having used their own money to effect the interstate purchase of the firearm; and not having arranged for the respective firearm's shipment to the FFL in El Paso, a representation by either Rodriguez or Benedict that they were the "actual purchasers" of the firearms per the Government's theory would have guaranteed Section 924(a)(1)(A) indictments against them. In other words, Shipley was the *only one* who lawfully could have, and did, complete the ATF Form 4473 as the "actual purchaser." An assertion or affirmation by this Court otherwise would disregard logic, would defy common sense, would create chilling new caselaw, and would be an affront to Congressional intent. The convictions on Counts 2-5 should be reversed and rendered for Judgments of Acquittal for factual, legal, logical, and common-sensical insufficiency.

IV. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S FALSE STATEMENT CONVICTION BECAUSE THE GOVERNMENT CHARGED SHIPLEY WITH MAKING A FALSE DOCUMENT OR WRITING, BUTATTEMPTED TO PROVE THE CHARGE THROUGH THE USE OF AN OSTENSIBLE *ORAL* STATEMENT

A. Standard of Review

With respect to challenges to the sufficiency of evidence, the Fifth Circuit reviews the evidence presented and all reasonable inferences therefrom in the light most favorable to the prosecution to determine whether a rational jury could have

found the essential elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 27811, 61 L.Ed.2d 560 (1979); *United States v. Brugman*, 364 F.3d 613. 615 (5th Cir. 2004).

B. Argument

Count 6 of the indictment charged that Shipley on March 21, 2008,

> did knowingly and willfully make and use a material false writing and document by presenting to the Bureau of Alcohol, Tobacco, Firearms, and Explosives Special Agents a Dealers' Firearms Record Book, which the Defendant represented to be his only original document recording his purchases and sales of firearms, and the Defendant told the agents said document was a complete and accurate list of the firearms he bought and sold, knowingly the statements and records to be false; that is in truth and fact, Defendant had another Dealers' Firearms Record Book which contained a more extensive and descriptive list of his firearms purchases and sales, in violation of Title 18, United States Code, Section 1001. (USCA 21)

The Indictment explicitly lists 18 U.S.C. §1001(a)(3) as the statute underlying Count 6. (USCA 212) Section 1001(a)(3) provides that "…whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully…makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement of entry…shall be fined under this title, imprisoned not more than 5 years…" 18 U.S.C. §1001(a)(3). The statute is clear - a conviction requires a "false writing or document" that the defendant knows to contain a "false, fictitious,

or fraudulent statement of entry."

There was no evidence presented at trial that the records that Shipley provided to Agent Henderson on March 21, 2008 were false. In fact, Agent Henderson testified that the records Shipley provided regarding Rodriguez and Benedict were true and correct. (Supp. #1 USCA 750) The only falsity that the Government tried to prove was an alleged *oral* statement from Shipley that the records tendered were Shipley's complete firearm records. False *oral* statements are proscribed in 18 U.S.C. §1001(a)(2)(proscribing the making of any "materially false, fictitious, or fraudulent statement or representation")(full statute in Record Excerpts), an entirely different statute.

Shipley was charged under 18 U.S.C. §1001(a)(3) which requires a false writing or document that contains a materially false, fictitious, or fraudulent statement or entry in the writing itself. As there is was no evidence presented in this regard, Count 6 should be reversed and rendered for a Judgment of Acquittal.

V. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SHIPLEY'S FALSE STATEMENT CONVICTION BECAUSE EVEN IF THIS COURT CHOOSES TO UTILIZE SHIPLEY'S *ORAL* STATEMENT THAT THE RECORDS HE PROVIDED ON MARCH 21ST WERE ALL OF HIS FIREARMS RECORDS, SUCH A STATEMENT WOULD BE DEVOID OF MATERIALITY BECAUSE IT WOULD HAVE NO BEARING ON WHETHER LUIS RODRIGUEZ WAS TRAFFICKING FIREARMS INTO MEXICO

A. Standard of Review

With respect to challenges to the sufficiency of evidence, the Fifth Circuit reviews the evidence presented and all reasonable inferences therefrom in the light most favorable to the prosecution to determine whether a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 27811, 61 L.Ed.2d 560 (1979); *United States v. Brugman*, 364 F.3d 613. 615 (5th Cir. 2004).

B. Argument

As explained in the section immediately *supra*, to obtain a conviction for making a false statement in violation of Section 1001 the government must establish that the erstwhile false statement was "material." In *Kungys v. United States*, 485 U.S. 759, 770, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988), the Supreme Court held that to be "material," the statement at issue must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." Thereafter, in *United States v. Gaudin*, 515 U.S. 506, 509, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995), the Court not only reaffirmed this definition, but provided the following guidance for its application:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material

> to the decision," requires applying the legal standard of materiality . . . to these historical facts. *Id*., at 512.

Again, as explained in the section immediately *supra*, Shipley was charged with a false writing or document, but there is no evidence that the records Shipley provided to Agent Henderson on March 21, 2008 were false. Accordingly, the first element of the "materiality" inquiry cannot even be addressed because there is no false "statement (that) was made."

If this Court adopts the Government's theory that Shipley's ostensible (and disputed) *oral* statement that the records tendered on March 21st were his complete firearms records, and that such statement was false, the inquiry would then move to the second inquiry about what decision was the agency trying to make. As Agent Henderson testified that he wanted Shipley's records to investigate Luis Armando Rodriguez, the relevant "decision the agency was trying to make" was whether Luis Armando Rodriguez was trafficking firearms into Mexico. As Agent Henderson testified that the records Shipley provided *regarding Armando Rodriguez were true and complete*, any ostensible false statement that the records were the entirety of Shipley's firearms records would have had no bearing on ATF's decision about whether Rodriguez was trafficking firearms into Mexico. Accordingly, the record is devoid of any evidence supporting the "materiality" element of Count 6, and Count 6 should be reversed and rendered for a Judgment of Acquittal.

VI. WHERE SHIPLEY IS REPRESENTED ON APPEAL BY AN ATTORNEY WHO DID NOT REPRESENT HIM AT TRIAL, AND WHERE THERE IS NO TRANSCRIPT OF SHIPLEY'S DIRECT AND CROSS EXAMINATIONS, THE JURY CHARGE CONFERENCE, AND THE PROFFER, OBJECTIONS, AND RULING ON A DEFENSE CHARACTER WITNESS, FIFTH CIRCUIT CASELAW MANDATES A REVERSAL FOR NEW TRIAL

A. Standard of Review

The Fifth Circuit's law relating to incomplete records on appeal is set forth in *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977). Under *Selva*, an appellant must generally show prejudice from omissions or errors in the record before such lapses require reversal. *Id.*, at 1305. If the appellant, however, is represented on appeal by an attorney other than the one who represented him at trial, no showing of prejudice is required. *Id.* All that is required is that the appellant demonstrate that the missing record portions are "significant and substantial." *Id.*, at 1306.

B. Argument

There exists a grave problem with respect to Mr. Shipley's Due Process and Sixth Amendment rights to pursue the instant appeal: there exists no record of his testimony to the jury on April 13, 2010, no record of the jury charge conference, no record of the proffer regarding excluded defense character witness Enrique Moreno, and no record of the other evidence, objections, legal arguments, and Court rulings that occurred that day.

In *Hardy v. United States*, 375 U.S. 277, 84 S. Ct. 424, 11 L. Ed. 2d 331

(1964), the Supreme Court held that where new counsel represents an indigent defendant on appeal, counsel must be furnished with a complete transcript of the trial. *Hardy*, 375 U.S. at 282. The Court stressed that the duty of representation of an appellate lawyer included the duty to search out plain error, and that nothing less than a complete transcript suffices to meet this duty. *Id.*, at 279-80. With respect to the parts of the transcript that the Supreme Court deemed the most significant and substantial, the Court held: "We conclude that this counsel's duty cannot be discharged unless he has *a transcript of the testimony and evidence presented by the defendant* and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." *Id.*, at 282 (emphasis added).

The Fifth Circuit's law relating to incomplete records on appeal is set forth in *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977). Under *Selva,* an appellant must generally show prejudice from omissions or errors in the record before such lapses require reversal. *Id.*, at 1305. If the appellant, however, is represented on appeal by an attorney other than the one who represented him at trial, no showing of prejudice is required. *Id.* All that is required is that the appellant demonstrate that the missing record portions are "significant and substantial." *Id.*, at 1306.

This Court has expanded the required list of recorded trial segments beyond what the Supreme Court in *Hardy* deemed critical for a non-reversible and complete

Record on Appeal: ("*testimony and evidence presented by the defendant* and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution"). In *Selva*, this Court deemed missing jury argument transcripts "substantial and significant" and reversed and remanded for a new trial without any showing of prejudice because appellate counsel did not represent the appellant at trial. *Id.*, at 1306. Similarly, in *United States v. Gregory*, 472 F.2d 484, 485 (5th 1973), this Court reversed and remanded for a new trial because of missing voir dire and opening and closing transcripts where appellate counsel was not the trial counsel. In *Gregory*, this Court made clear is it was reversing because it could not tell whether objections were made during the portions of the trial not recorded, and could not tell whether plain error occurred during those portions in the absence of any objections. *Id.*, at 486.

The undersigned is Mr. Shipley's lone appellate counsel, having filed the Notice of Appeal alone. The undersigned is Mr. Shipley's only listed counsel in the Fifth Circuit docket. Mr. Shipley's trial counsel, Robert Perez and Marjorie Wilcox Jobe, did not file any notice of appeal on Mr. Shipley's behalf and have not and will not enter appearances in the Fifth Circuit Court of Appeals on his behalf.

The undersigned did not represent Mr. Shipley at trial, and did not witness one single minute of the trial. The undersigned joined the case after the convictions to

represent Mr. Shipley as sentencing counsel, but participation as Shipley's sentencing counsel has no bearing on the standard to be employed in this case. *United States v. Pace*, 10 F.3d 1106, 1125 (5th Cir. 1993)(in another missing transcript case where appellate attorney participated in pretrial matters and appeared for appellant at sentencing but did not represent appellant at trial, the Fifth Circuit held that "on appeal appellant is being represented by counsel other than his attorney at trial").

There can be no more important piece of evidence than a criminal defendant's testimony to a jury in his own defense at trial. Indeed, as explained *supra*, the Supreme Court in *Hardy* focused only on the "*transcript of the testimony and evidence presented by the defendant* and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution" when it reversed because transcripts were missing. *Hardy v. United States*, 375 U.S. 277, 84 S. Ct. 424, 11 L. Ed. 2d 331 (1964)(emphasis added). The Fifth Circuit later expanded the definition of "significant and substantial" to include jury arguments, *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977), and voir dire, *United States v. Gregory*, 472 F.2d 484 (5th Cir. 1973). Should this Court not reverse and remand for judgments of acquittal, Shipley prays that his convictions and sentences be vacated and the case remanded for a new trial.

VII. THE DISTRICT COURT ABUSED ITS DISCRETION IN EXCLUDING SHIPLEY'S SOLE REQUESTED CHARACTER WITNESS GIVEN THE GOVERNMENT'S VICIOUS ATTACKS ON SHIPLEY'S INTEGRITY AND GIVEN ITS CLOSING ARGUMENT REFERENCES TO SHIPLEY'S "LIES"

A. Standard of Review

This Court reviews a district court's decision to exclude character evidence for an abuse of discretion. *United States v. Marrero*, 904 F.2d 251, 260 (5th Cir. 1990)

B. Argument

A defendant may introduce character testimony to show that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. *United States v. John*, 309 F.3d 298, 303-04 (5th Cir. 2002), *citing Michelson v. United States*, 335 U.S. 469, 476, 93 L. Ed. 168, 69 S. Ct. 213 (1948). Unlike an affirmative defense, character evidence is never legally sufficient to render a defendant not guilty. Standing alone, however, character evidence may create a reasonable doubt regarding guilt. *John*, 309 F.3d at 304, *citing Edgington v. United States*, 164 U.S. 361, 366, 41 L. Ed. 467, 17 S. Ct. 72 (1896). "In some circumstances, evidence of good character may of itself create a reasonable doubt as to guilt, and the jury must be appropriately instructed." *John*, 309 F.3d at 304, *citing United States v. Hewitt*, 634 F.2d 277, 278 (5th Cir. Unit A Jan. 1981).

On April 14, 2010, minutes before closing arguments, Shipley's counsel

sought to complete a proffer from the day before (April 13th - the day for which there is no transcript). (Supp. #1 USCA 1485) Shipley's counsel argued that the character evidence was necessary because Shipley's character for truthfulness was put at issue throughout the trial. (Supp. #1 USCA 1485) Indeed, just minutes later, the prosecutor called Shipley a liar ("He'll lie about…") five times during her closing argument (Supp. #1 USCA 1495), and offered the jury this jewel: "I want to remind you that the motto of the FBI is 'Fidelity, bravery, and integrity.' Where is the integrity that this agent has shown? Where is that? Where is the credibility?" (Supp. #1 USCA 1493)

The record reflects that Shipley's counsel had proffered character witness Enrique Moreno's testimony on voir dire to establish the very questions that the 1948 *Michelson* Supreme Court case sanctioned. (Supp. #1 USCA 1455) This proffered testimony is not available for appellate review because the transcript of it is missing.

Given this Court's recognition that character evidence can in and of itself generate a reasonable doubt, and given the weight that this Court accords character evidence as reflected in the cases cited *supra*, Shipley prays that this Court reverse and remand for a new trial because the Court abused its discretion in excluding Shipley's sole requested character witness.

Should this Court deem an abuse of discretion analysis impossible because of

the missing transcript with its proffered testimony, arguments, and district court rationale for the exclusion of Moreno as a character witness, then Shipley would pray for a new trial as 5th Circuit caselaw mandates for lost transcripts.

VIII. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY THAT EVIDENCE OF SHIPLEY'S HONESTY, INTEGRITY, AND CHARACTER AS A LAW-ABIDING CITIZEN CAN GIVE RISE TO REASONABLE DOUBT IN AND OF ITSELF

A. Standard of Review

This Court reviews for abuse of discretion the refusal to give a defense-tendered instruction. *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993). A court commits reversible error where (1) the requested instruction is substantially correct; (2) the requested issue is not substantially covered in the charge; and (3) the instruction "concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir. Unit A May 1981).

B. Argument

Fifth Circuit Pattern Jury Instruction 1.09 ("Character Evidence") provides as follows:

> Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you should consider such evidence along with all the other evidence in

> the case.
>
> Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.
>
> You will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. (5th Cir. Pattern Jury Instruction 1.09, Record Excerpts)

In response to the constant barrage of attacks on his integrity, Shipley took the stand and explained at great length his character as a law abiding citizen. He described his service to his country as an Army helicopter pilot, his career as an FBI agent, his participation on the FBI swat team, and described his communications with the ATF to ensure that his firearm collection was managed within bounds of federal firearms law.

The jury charge does not contain 5th Circuit Pattern Jury Instruction 1.09. The transcript of the formal jury charging conference is missing because that conference occurred on April 13th. Shipley argues herein that the Court should have given the instruction *sua sponte* and its failure to do so was reversible error. Alternatively, given that the requests, objections, arguments, and rulings by the Court during the jury charging conference are omitted from the Record on Appeal, Shipley prays for a new trial as 5th Circuit caselaw mandates for lost transcripts.

IX. THE ORDER OF FORFEITURE CONTAINED IN THE JUDGMENT SHOULD BE REVERSED BECAUSE THE COURT FAILED TO COMPLY WITH FED.R.CRIM.P. 32.2(b)(4)(B) IN FAILING TO ORALLY REFERENCE THE FORFEITURE AT SENTENCING, AND BECAUSE THERE WAS NO EVIDENCE SUPPORTING ANY NEXUS BETWEEN THE ITEMS FORFEITED AND THE COUNTS OF CONVICTION

A. Standard of Review

With regard to forfeiture, the district court's factual findings are reviewed for clear error, but whether those facts are sufficient to constitute a proper criminal forfeiture is reviewed *de novo. United States v. Marmolejo,* 89 F.3d 1185, 1197 (5th Cir. 1996).

B. Argument

Federal Rule of Criminal Procedure 32.2(b)(4)(A) provides, "(a)t sentencing -- or at any time before sentencing if the defendant consents--the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2.(c)". Fed.R.Crim.P. 32.2(b)(4)(A)

Procedurally, "(t)he Court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36." Fed.R.Crim.P. 32.2(b)(4)(B).

Although mandated to do so under Fed.R.Crim.P. 32.2(b)(4)(A), the District Court never mentioned the forfeiture during Shipley's sentencing, nor otherwise ensured that he knew about the forfeiture at sentencing. (Supp. #1 USCA 1556-1599) Indeed, the original Judgment did not even contain any forfeiture order. (USCA 275-280).

Shipley's second argument is that the criminal forfeiture commenced too late. Shipley's firearms, ammunition and cash were seized during the execution of the search warrant on May 6, 2008 (Supp. #1 USCA 132, 158-159) The instant criminal forfeiture action did not commence until Shipley's Indictment on July 24, 2009. "Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure." 18 U.S.C. §922(d)(1). Accordingly, the criminal forfeiture order derived from forfeiture proceedings that were untimely, rendering the judgment of forfeiture void.

Finally, there was insufficient evidence to establish that the firearms, ammunition, money, and other property contained in the forfeiture order had any nexus to the crimes of conviction. As explained *supra*, the ATF case agent could not even identify what firearms he deemed problematic - leaving that decision for the jury to decide. The jury never made any such "decision," and the District Court never made any factual findings regarding any ostensible nexus between the items

and money seized, and the counts of conviction - because there was no evidence supporting any such nexus. Accordingly, there are no factual findings for this Court to review. The judgment of forfeiture must be reversed.

X. WHERE THE PROSECUTORS FABRICATED A STORY THAT A FIREARM THAT SHIPLEY ONCE OWNED KILLED A MEXICAN ARMY CAPTAIN, AND SHOWED THE JURY PHOTOS OF WEAPONS AND ARMAMENT IN MEXICO THAT HAD NO CONNECTION TO THIS CASE WHATSOEVER, THEY IMPROPERLY SOUGHT TO INFLAME THE JURY WITH EMOTIONAL APPEAL, MANDATING A REVERSAL FOR A NEW TRIAL

A. Standard of Review

As Shipley did not object to the prosecutors' comments and evidence at trial, this Court reviews for plain error. *United States v. Gracia*, 522 F.3d 597, 599-600 (5th Cir. 2008). To demonstrate reversible plain error, Shipley must show that (1) there was error, i.e., the prosecutor's remarks and evidence were improper, (2) the error was plain and obvious, and (3) the error affected his substantial rights. *Id.*, at 600.

B. Argument

Twice during the trial the prosecutor represented to the jury that a firearm that Shipley sold to Luis Armando Rodriguez made its way into Mexico and was used to kill a Mexican military officer – which was a completely fabricated story. After the jury verdict and before sentencing, the United States conceded that these

representations were fabricated.

Not only did the United States fabricate the story that a former Shipley firearm was used to kill a Mexican Army officer, the United States knew Shipley had no idea that one of his former firearms ended up in Mexico. Shipley sold the firearm at issue to Luis Armando Rodriguez, who himself had no idea that the firearm ended up in Mexico. (Supp. #1 USCA 552) Rodriguez took the firearm, consigned it at Collector's Gun Exchange, had the gun store sell the firearm for him while he was out of town, and had no idea who took the gun into Mexico. (Supp. #1 USCA 553, 563-565) In fact, ATF case agent Frank Henderson testified Shipley had no idea what Rodriguez did with the firearm after Shipley sold it to him. (Supp. #1 USCA 821)

Even though there were at least three parties after Shipley who owned/controlled the firearm went into Mexico (Rodriguez, Collector's Gun Exchange, and Jonathan Lopez - who bought it on consignment from the gun store), the Government presented photographic evidence of .50 caliber ammunition, hand grenades, magazines for various firearms, military style rifles of different calibers, ballistic vests, ammunition pouches, and military helmets - all recovered by the ATF in Mexico and having absolutely nothing to do with the case against John Shipley. (Supp. #1 USCA 75) The fabricated story and the photos of the weapons and

armament in Mexico were intended as emotional and inflammatory appeals to the jury.

Not content with the foregoing, the prosecutor decided closing argument presented the best opportunity to personally bolster his own credibility and that of his case agent:

> You think Special Agent Henderson is happy to be here today? Do you think he's overjoyed that his investigative efforts led to the downfall of one of his federal law enforcement colleagues here in El Paso? He's not. He's not.
>
> Do you think I am? Do you think I'm happy to be here presenting evidence of wrongdoings to you? I'm not.
>
> Do you think I like looking at Colonel Shipley and thinking, you know, I'm presenting the evidence against him, his son. *My father was a colonel as well. I know what he's going through. I'm a father of a child*
>
> …
>
> *But you know what? The United States of America depends on people like me, Special Agent Henderson, and on times like today, you, to step forward and do the right thing.*
>
> The evidence led where it led. Unfortunately, it led to an FBI agent. Unfortunately, *it caused a tarnish on the reputation of an otherwise fine law enforcement agency. Unfortunately, it's going to strain the future ability of agencies to work together. Because you know, one cop should be able to trust another cop. But when you find a bad apple you can't just leave it in the barrel.*
>
> …
>
> But now he wants you to look over there and feel sorry for him and

> sorry for those children. Well, you'd better feel sorry for those children. *But you also better feel sorry for the other children, you know, the ones that are downrange from those firearms.* (Supp. #1 USCA 1546-48)(emphasis added)

Accordingly, in a matter of a just a few seconds, the prosecutor referred to the following matters, none of which have anything to do with the evidence in this case and were purely emotional and inflammatory appeals: the prosecutor's and agent's sadness and remorse at having had to prosecute this case; the prosecutor's father's profession; the prosecutor's status as a father; *and the need for people like him (the prosecutor), the case agent, and jury "to step forward and do the right thing*." Most disturbingly, however, the prosecutor appealed to the jury to "do the right thing" because Shipley's conduct somehow tarnished the reputation of the FBI and strained the ability of the ATF and FBI to work together. Again, these inflammatory arguments were completely unsupported by any evidence.

Shipley's credibility versus that of Agent Henderson was a critical component of the trial. For example, with respect to Count 6, their respective testimonies regarding the conversation in the parking lot were 180 degrees divergent. The prosecutors' fabricated stories and inflammatory appeals to the jury's emotion were egregiously improper. The Fifth Circuit has repeatedly cautioned prosecutors about such conduct. "The government has been cautioned repeatedly by this court against making such arguments, yet we continue to face them on appeal." *United States v.*

Raney, 633 F.3d 385, 395 (5th Cir. 2011) (per curiam).

A prosecutor is "not permitted to make an appeal to passion or prejudice calculated to inflame the jury." *United States v. Crooks*, 83 F.3d 103, 107 n.15 (5th Cir. 1996). During closing arguments, "[a] prosecutor is confined in closing argument to discussing properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence." *United States v. Vargas*, 580 F.3d 274, 278 (5th Cir. 2009).

As the foregoing sections of this brief establish, this is a case for which every single count should be reversed, remanded, and rendered for Judgments of Acquittal. In the absence of sufficient evidence, the only reason that Shipley was convicted was because of the emotional and inflammatory arguments and comments by the prosecutors in this case. Accordingly, the prosecutors' errors described in this section were plain, clear, and affected Shipley's substantial rights because but for the errors and resultant convictions, Shipley would not be sitting in a federal prison today.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Shipley respectfully requests that his convictions be vacated, reversed, and rendered for Judgments of Acquittal. Alternatively, he requests that his convictions and sentences be reversed and the case

remanded for a new trial.

Respectfully submitted,

/S/ LEON SCHYDLOWER
LEON SCHYDLOWER
Attorney at Law
210 N. Campbell Street
El Paso, Texas 79901
(915) 532-3601
(915) 532-0904 (facsimile)
Texas Bar No. 00795639
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Brief of Defendant-Appellant John Thomas Shipley, in both paper and electronic form, on Mr. Joseph H. Gay, Jr., Assistant United States Attorney, 601 N.W. Loop 410, Ste. 600, San Antonio, Texas 78216, and to John Thomas Shipley, by tendering same to the United States Post Office in El Paso, Texas, with correct, prepaid first-class postage, on this 29th day of December, 2011.

S/ LEON SCHYDLOWER
LEON SCHYDLOWER
Attorney for Defendant-Appellant