No. 16-30013

[NO. 2:15-CR-00109-JLR, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAYMOND LEE FRYBERG, JR,,
Defendant-Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable James L. Robart
United States District Judge

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1
BAIL STATUS 1
STATEMENT OF ISSUES PRESENTED FOR REVIEW 1
NINTH CIRCUIT RULE 28-2.7 3
Constitutional Provisions 3
A. Amendment V 3
B. Amendment VI 3
Statutes 3
A. 18 U.S.C. 922(g)(8) 3
Federal Rules of Criminal Procedure 4
A. Rule 21(a) 4
Federal Rules of Evidence 4
A. FRE 401 4
B. FRE 403 4
C. FRE 803(8) 4
Washington Rules of Professional Conduct 5
A. RPC 3.8(f) 5
STATEMENT OF THE CASE 6
SUMMARY OF ARGUMENT 13
ARGUMENT 15
1. Fryberg's conviction for unlawful possession of a firearm by a prohibited person, pursuant to 18 U.S.C. §922(g)(8), violated the Second Amendment as applied to Fryberg because the civil order of protection banned Fryberg from possession or ownership of a firearm for *the rest of his life.* 15
A. Standard of Review and Reviewability 15

B. Argument.....15

2. The District Court erred when it denied Fryberg's motion for a change of venue. 21

A. Standard of Review and Reviewability 21

B. Argument.....21

3. Fryberg was denied his right to a fair trial by the cumulative effect of the following evidence admitted over defense objection:.....24

(a) Nine (9) guns were admitted, in violation of FRE 403;.....24

(b) Photographs of ammunition were admitted, in violation of FRE 403; 24

(c) The photographs of the guns and ammunition that were admitted showed that the guns were unsecured and in a state of disarray in Fryberg's home, in violation of FRE 403, and the prosecutor stated in opening statement that the guns were unsecured;.....24

(d) The jury panel was aware the charges against Fryberg were related to the shooting at the school; and.....25

(e) The order of protection stated that Fryberg was restrained from coming within 100 yards of his one year old child, from interfering with his custody, and from removing him from the State, in violation of FRE 401 and 403.....25

A. Standard of Review and Reviewability 25

B. Argument.....25

4. The District Court's admission over defense objection of Exhibit 3, a return of service on the defendant of a notice of hearing concerning an order of protection on Mr. Fryberg—the only proof of a necessary element of the crime of Possession of a Firearm by a Prohibited Person, pursuant to U.S.C. § 922 (g)(8)—was not only inadmissible as an exception to the hearsay rule under FRE 803(8), but violated Mr. Fryberg's right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment.....29

A. Standard of Review and Reviewability 29

B. The District Court erred when it admitted the return of service on Fryberg because it was not admissible as a public record under FRE 803(8) and was thus inadmissible hearsay. 30

5. The District Court's decision to (a) allow cross-examination supporting the affirmative defense of entrapment by estoppel; (b) reject Fryberg's proposed entrapment by estoppel instruction; (c) give instruction no. 23, an additional knowledge instruction; and (d) reject Fryberg's proposed instruction on knowledge, all combined to confuse and/or mislead the jury. 39

A. Standard of Review and Reviewability 39

B. Argument.....39

6. The prosecutor's statement during closing argument that "Now, conveniently, the defendant, a month later, after Jesus Echevarria passes away, claims for the first time, to any court, that he did not receive notice of the hearing[,][h]ow convenient is that?" was prosecutorial misconduct, violated the due process clause of the Fifth Amendment by shifting the burden of proof to Fryberg, and violated Mr. Fryberg's Fifth Amendment right to not incriminate himself. The district court further erred by not granting Fryberg's motion for a mistrial.....43

A. Standard of Review and Reviewability 43

B. Argument.....44

CONCLUSION…...……48

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Supreme Court Cases

Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (2011).....35, 36
Chambers v. Florida, 309 U.S. 227, 236-37 (1940) 21
Citizens United v. FEC, 558 U.S. 310, 340 (2010).....18
Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).....34, 35, 36, 37
Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006) 35, 36
District of Columbia v. Heller, 554 U.S. 570, 595, 128 S.Ct. 2783 (2008).....16
In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970) 45
Melendez-Diaz v. Massachusetts, 557 U.S. 305, 328, 129 S.Ct. 2527 (2009).....37
Michigan v. Bryant, 562 U.S. 344, 131 S.Ct. 1143, 1156 (2011).....38
Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015).....36
See Irvin v. Dowd, 366 U.S. 717, 728 (1961) 22

Circuit Court Cases

Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir. 1998).....22
Hagmeyer v. United States Dept. of Treasury, 647 F.Supp. 1300, 1303 (D.D.C. 1986). 33
Oklahoma Radio Assoc. v. Federal Deposit Ins. Corp., 969 F.2d 940, 943 (10th Cir.1992) 33
Peruta v. Cnty. of San Diego, 742 F.3d 1144, (9th Cir. 2014).....17
Turner v. Calderon, 281 F.3d 851, 865 (9th Cir. 2002).....21
Tyler v. Hillsdale County Sheriff's Department, 775 F.3d 308, 326-331 (6th Cir. 2014) 18, 19
United States v. Batterjee, 361 F.3d 1210, 1217 (9th Cir. 2004) 40
United States v. Bena, 664 F.3d 1180, 1184 (8th Cir. 2011).....19
United States v. Chapman, 666 F.3d 220 (4th Cir. 2012).....18, 19, 20
United States v. Chovan, 735 F.3d 1127, 1133 (9th Cir. 2013.....16, 17, 19
United States v. Coutchavlis, 260 F.3d 1149, 1156-57 (9th Cir. 2001).....45
United States v. Curtin, 489 F.3d 935, 958 (9th Cir. 2007) 26
United States v. Easter, 66 F.3d 101, 10208 (9th Cir. 1995) 25

United States v. Figueroa - Gaona, 521 Fed.Appx. 587, 590 (9th Cir. 2013) 26
United States v. Garretson, Dkt. #2:13-cr-02 (D. Nevada).....20
United States v. Greeno, 679 F.3d 510 (6th Cir. 2012).....15
United States v. Guess, 745 F.2d 1286, 1288 (9th Cir.1984).....43
United States v. Hallock, 454 Fed. Appx. 545, 547 (9th Cir. 2011).....44
United States v. Jones, 542 F.2d 186 (4th Cir. 1976) 22
United States v. Layton, 767 F.2d 549, 553 (9th Cir. 1985).....25
United States v. Liu, 731 F.3d 982, 993-95 42
United States v. Mahin, 668 F.3d 119 (4th Cir. 2012) 18, 19, 20
United States v. Maldonado-Rivera, 922 F.2d 934, 967 (2nd Cir. 1990).....23
United States v. Mayans, 17 F.3d 1174, 1185 (9th Cir. 1994) 43, 46
United States v. Morales, 720 F.3d 1194, 1199 (9th Cir. 2013).....30
United States v. Nelson, 347 F.3d 701, 707 (8th Cir. 2003).....21
United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993) 15
United States v. Orozco, 590 F.2d 789, 794 (9th Cir. 1979) 31
United States v. Orozco-Acosta, 607 F.3d 1156, 1164 (9th Cir.2010.....38
United States v. Prantil, 764 F.2d 548, 555 (9th Cir.1985) 44
United States v. Randall, 162 F.3d 557 (9th Cir. 1998).....47
United States v. Rewald, 889 F.2d 836, 863 (9th Cir. 1989).....22
United States v. Rojas-Pedroza, 716 F.3d 1253, 1267-69 (9th Cir. 2013) .37, 38, 39
United States v. Segna, 555 F.2d 226 (9th Cir. 1977).....48
United States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996).....22
United States v. Stein, 37 F.3d 1407, 1410 (9th Cir.1994).....42
United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987).....40
United States v. Terry, 911 F.2d 272 (9th Cir. 1990).....39
United States v. Torralba-Mendia, 784 F.3d 652 (9th Cir. 2015) 30
United States v. Union Nacional de Trabajadores, 576 F.2d 388, 391 (1st Cir. 1978) 34
United States v. Valdez-Soto, 31 F.3d 1467, 1473 (9th Cir.1994).....47
United States v. Weiland, 420 F.3d 1062 (9th Cir. 2005) 31, 33
United States v. Wright, 625 F.3d 583, 609–10 (9th Cir. 2010).....44

Federal Statutes

18 U.S.C. § 3231..... 1
18 U.SC. § 922 40
U.S.C. §922(g)(4), ...18
18 U.S.C. §922(g)(8) .....passim
U.S.C. §922(g)(9) 17, 18, 19
18 U.S.C. 922(9).....16
28 U.S.C. § 1291..... 1

Federal Rules

FRE 401.....passim
FRE 403.....passim
FRE 803(8) .....passim
FRE 803(8)(B).....31, 33
Federal Rule of Criminal Procedure 21(a).....4, 21
Ninth Circuit Rule 28-2.7..... 3

State Rules

RPC 3.6 .....5, 24
RPC 3.8(f) 5, 24

Constitutional Provisions

Second Amendment.....passim
Fifth Amendment.....passim
Sixth Amendment .....passim

Other Authorities

4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*.....33

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231, and entered final judgment on January 11, 2016. 2ER 62. Defendant-Appellant Raymond Fryberg, Jr., timely filed a notice of appeal under FRAP 4(b) on January 21, 2016.[1] This Court has jurisdiction under 28 U.S.C. § 1291.

BAIL STATUS

Fryberg is currently serving a 24 month prison sentence at FCI Lompoc, in Lompoc, CA. His projected release date is November 11, 2017.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **Fryberg's conviction for unlawful possession of a firearm by a prohibited person, pursuant to 18 U.S.C. §922(g)(8), violated the Second Amendment as applied to Fryberg because the civil order of protection barred Fryberg from possessing a firearm for *the rest of his life*.**

2. **The District Court erred when it denied Fryberg's motion for a change of venue.**

3. **Fryberg was denied his right to a fair trial by the cumulative effect of the following evidence admitted over defense objection:**

   (a) Nine (9) guns were admitted, in violation of FRE 403;

   (b) Photographs of ammunition were admitted, in violation of FRE 403;

   (c) The photographs of the guns and ammunition that were admitted showed that the guns were unsecured and in a state of disarray in Fryberg's home, in violation of FRE 403, and the prosecutor stated in opening statement that the guns were unsecured;

[1] The excerpts of record are set out in 4 volumes and are abbreviated as 1ER, 2ER, 3ER, and 4ER, and are consecutively paginated.

(d) The jury panel was aware the charges against Fryberg were related to the shooting at the school; and

(e) The order of protection stated that Fryberg was restrained from coming within 100 yards of his one year old child, from interfering with his custody, and from removing him from the State, in violation of FRE 401 and 403.

4. **The District Court's admission over defense objection of Exhibit 3, a return of service on the defendant of a notice of hearing concerning an order of protection on Mr. Fryberg—the only proof of a necessary element of the crime of Possession of a Firearm by a Prohibited Person, pursuant to U.S.C. § 922 (g)(8)—was not only inadmissible hearsay under FRE 803(8), but violated Mr. Fryberg's right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment.**

5. **The District Court's decision to (a) allow cross-examination supporting the affirmative defense of entrapment by estoppel; (b) reject Fryberg's proposed entrapment by estoppel instruction; (c) give instruction no. 23, an additional knowledge instruction; and (d) reject Fryberg's proposed instruction on knowledge, all combined to confuse and/or mislead the jury.**

6. **The prosecutor's statement during closing argument that "Now, conveniently, the defendant, a month later, after Jesus Echevarria passes away, claims for the first time, to any court, that he did not receive notice of the hearing[,] [h]ow convenient is that?" was prosecutorial misconduct, violated the due process clause of the Fifth Amendment by shifting the burden of proof to Fryberg, and violated Mr. Fryberg's Fifth Amendment right to not incriminate himself. The District Court further erred by not granting Fryberg's motion for a mistrial.**

NINTH CIRCUIT RULE 28-2.7

Pursuant to Ninth Circuit Rule 28-2.7, set out verbatim below are the following pertinent constitutional provisions, statutes, and rules:

Constitutional Provisions

A. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

A. 18 U.S.C. 922(g)(8)

It shall be unlawful for any person . . . who is subject to a court order that-

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Federal Rules of Criminal Procedure

A. Rule 21(a)

Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Federal Rules of Evidence

A. FRE 401

Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

B. FRE 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

C. FRE 803(8)

The following [is] not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Washington Rules of Professional Conduct

A. RPC 3.8(f)

The prosecutor in a criminal case shall: (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

STATEMENT OF THE CASE

On October 24, 2014, a horrific tragedy occurred at Marysville-Pilchuck High School (MPHS): 15 year old Jaylen Fryberg (Jaylen), the freshman homecoming prince at the school, shot five people, four of whom died, and then killed himself. The tragedy, like so many other highly publicized school shootings since Columbine, traumatized the community. The case engendered intense and massive publicity in the Western District of this Court. *See* generally, 4ER.

On March 30, 2015, the U.S. Attorney's Office filed a one-count complaint alleging probable cause to believe Jaylen's father, the Appellant, Raymond Fryberg, Jr. (Fryberg), unlawfully possessed a firearm in violation of Title 18, United States Code, Section 922(g)(8), which prohibits a person from:

> (1) knowingly possessing a specified firearm; (2) that had been shipped or transported from one state to another or between a foreign nation and the United States; (3) and at the time the person possessed the specified firearm, the person was subject to a court order that,
>
> (a) was issued after a hearing of which the person received actual notice and at which the person had an opportunity to participate; and
>
> (b) the court order restrains the defendant from harassing, stalking, or threatening an intimate partner of the defendant or the child of the defendant of his intimate partner or engaging in other conduct that would place his intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (c) includes a finding that the defendant represents a credible threat to the physical safety of his intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against his intimate partner or child.

2ER 241. The complaint included specific details surrounding the onset of the FBI's Investigation; namely, that the subject firearm owned by Fryberg was used by Jaylen in the commission of the MPHS shooting, and was later recovered from the crime scene. *Id*.

The following day, March 31, 2015—and updated on April 1, 2015--the United States Attorney's Office issued the following press release:

> "**FATHER OF MARYSVILLE SCHOOL SHOOTER CHARGED WITH ILLEGAL FIREARMS POSSESSION:**
>
> *"Murder Weapon Illegally Purchased in Violation of Protection Order*.
>
> "The father of a teen who killed four students and himself last year at Marysville-Pilchuck High School was arrested today on charges that he illegally purchased the firearm used in the mass shooting, announced Acting United States Attorney Annette L. Hayes. . . .'Guns in the hands of people who have demonstrated they will use violence is a dangerous mix that is prohibited by law. This case is part of that effort [to prosecute those who illegally possess firearms] and a reminder that we are united in our commitment to get firearms out of the hands of those who pose the greatest risk to our communities.'"

4ER 309-10. This press release engendered intense and massive publicity against Fryberg in the Western District of Washington. 4ER 312-371.

Seven days later, on April 8, 2015, Mr. Fryberg was indicted for unlawful possession of a firearm by a prohibited person, in violation of 18 U.S.C. 922(g)(8). 2ER 239. The indictment was based on the fact that Jamie Gobin obtained a Tulalip Tribal Court order of protection against Fryberg almost 12 years earlier, on

September 10, 2002. This order was not limited in time, and specifically indicated that the order was permanent. 2ER 152-54; Ex. 4 (ECF 78). On July 15, 2015, the government filed a superseding indictment charging Fryberg with six counts of this offense, and named 9 specific firearms that he was alleged to have unlawfully possessed. 2 ER 235-38.

On September 16, 2015, the district court held a pretrial conference. The Court denied Fryberg's motion for a change of venue, and, over strenuous defense objection, indicated that it would advise the jury that Fryberg's son was involved in the shooting at the school, and would advise the jury that the issue was "not what we were here to talk about." 4ER 372-86; 1ER 1-11.

Defense counsel objected to a proposed juror questionnaire, requesting that neither the location nor the tribe be identified in the questionnaire because of the likelihood that jurors would recognize the relationship between Fryberg and the tragedy at the school. 2ER 164-67; 169-70. The objection was renewed during individual questioning of a juror who knew about the relationship of Fryberg to the shooting from the questionnaire. 2ER 177. The subject matter came up during many other individual discussions with potential jurors. *See* generally, 2ER 168-232. Juror #35, who was chosen to sit on the jury, specifically stated during *voir dire* that she did not "put two and two together" until she read the question in the questionnaire about whether anyone knew a Tulalip tribal member. 3ER 271-73.

Prior to trial, the defense moved *in limine* to redact the following information from the protective order, under FRE 401 and 403:

> Respondent is RESTRAINED from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking petitioner [and] the minor [A.G., Age 1].
>
> Respondent is RESTRAINED from interfering with petitioner's physical or legal custody of the minor [A.G., Age 1].
>
> The defendant is also restrained from having contact direct or indirect with Jamie Gobin and A.G., coming within 100 yards of their residence, place of employment or daycare or school, granted custody of A.G. to Jamie Gobin, and restrained the defendant from removing A.G. from the State.

2ER 152-54; *see* Ex.4 (ECF 78). The Court denied the motion. 1ER 12-13.

The defense also moved *in limine* to exclude the return of service on Fryberg that allegedly provided him notice of the September 10, 2002, hearing, because it was not admissible as a public record hearsay exception under FRE 803(8), *see* Ex. 3 (ECF 78); 2ER 155. The document contained information observed by a law enforcement officer under circumstances that were not trustworthy enough to justify admission under the rule because, *inter alia*, the officer was married to the petitioner's sister and the location that service on Fryberg was alleged to have occurred was in dispute, and there was a question whether this location even existed. 2ER 128-30; 151; 3ER 277-81; 285-288; 1ER 13-16. The defense also objected to the return of service on the ground that it violated Fryberg's right under the Confrontation Clause of the Sixth Amendment, as the officer who claimed to

have served Fryberg, Jesus Echevarria, was married to the sister of the complaining witness, had passed away, and was the only person who witnessed the alleged service on Fryberg. 2ER 128-30; 151; 3ER 277-81; 285-88; 1ER 13-16.

After the jury was selected, the defense renewed its motion for a change of venue. The Court denied the motion. 1ER 21-23.

During the government's opening statement, the prosecutor stated that a number of the firearms police found in Fryberg's home were "simply left out in the open, unsecured, at the foot of his bed." 2ER 158-64. The defense subsequently moved for a mistrial, which the Court denied. *Id*.

During the presentation of the government's case, the Court admitted, over defense objection under FRE 403, the nine firearms set out in the indictment, as well as photographs of the unsecured guns and the ammunition that were found in the home--despite the fact Fryberg was not charged with unlawfully possessing ammunition. 2ER 88-108; 121-26. The Court ruled that with regard to the pictures of the ammunition--after initially expressing skepticism over its admissibility—that the evidence was admissible because "the prejudice from the ammunition, that the guns are being displayed, is not so significant that it outweighs the probative value of the presence of the ammunition." 1ER 25-26; 3ER 270. The court did not explain its reasoning any further.

Fryberg's defense focused on the fact that the government could not prove beyond a reasonable doubt that Fryberg had been provided notice of the hearing and an opportunity to be heard on the order of protection, as 18 U.S.C § 922(g)(8) required. 1ER 37-39.

The defense proposed an entrapment by estoppel instruction, in that the evidence presented by the government showed that Fryberg had repeatedly been allowed to purchase firearms by a federal firearms licensee. 2ER 72. The Court refused to give the instruction on the ground that insufficient evidence existed to justify the instruction. 1ER 42-45.

The government proposed a supplemental knowledge instruction that stated the following:

> The "knowledge" requirement for the crime of possession of a firearm in violation of Section 922(g)(8) of Title 18, United States Code, applies only to the act of firearm possession.
>
> The third element requires proof that the defendant received actual notice of a hearing giving rise to an order for protection.
>
> The government need not establish the defendant's knowledge that the order was issued, or prove that the defendant knew his possession of a firearm was a violation of law.

2ER 68 (government's proposed instruction no. 27). The Court eliminated the second paragraph of this instruction and instructed the jury on the first and third paragraphs (Court's instruction No. 23), over defense objection. 2ER 69; 1ER 48-49. The Court's instruction to the jury thus stated:

> The "knowledge" requirement for the crime of possession of a firearm in violation of Section 922(g)(8) of Title 18, United States Code, applies only to the act of firearm possession.
>
> The government need not establish the defendant's knowledge that the order was issued, or prove that the defendant knew his possession of a firearm was a violation of law.

2ER 69. The Court also refused to instruct the jury on the defense's proposed instruction no. 3, which stated:

> The government must prove beyond a reasonable doubt that at the time the defendant possessed the specified firearm, the defendant was subject to a court order that was issued after a hearing of which the defendant received actual notice and at which the defendant had an opportunity to participate.
>
> If after a careful and impartial consideration of all the evidence, you have a reasonable doubt as to whether the Permanent Protection Order was issued after a hearing of which the Defendant received actual notice and at which he had an opportunity to participate, then it will be your duty to find the defendant not guilty.

2ER 72-73; 1RP 45-46.

During closing argument, the prosecutor stated, "Now, conveniently, the defendant, a month later, after Jesus Echevarria passes away, claims for the first time, to any court, and he's been in front of tribal court, that he did not receive notice of the hearing. How convenient is that?" 1ER 51.

The Court held a sidebar and then gave the jury a curative instruction, stating they should disregard that portion of the prosecutor's statement where she said that Fryberg "claims, for the first time, to any court," because there was no

evidence in the record to support it. 1ER 55. Defense counsel moved for a mistrial, and the Court denied the motion. 1ER 52-58.

Mr. Fryberg was convicted of all six counts of unlawfully possessing a firearm, and was sentenced to 24 months in prison. 2ER 62-67. This appeal timely followed.

SUMMARY OF ARGUMENT

Mr. Fryberg's Second Amendment right to bear arms was violated as applied to Mr. Fryberg because the order of protection that formed the basis for the charge that he unlawfully possessed a person was a civil order that prohibited him from possessing a firearm for the rest of his life.

The district court erred when it denied Fryberg's motion for a change of venue because the massive publicity concerning the shootings at MPHS high school and the subsequent arrest of Mr. Fryberg for unlawful possession of firearms, including the gun used by his son in the school shootings, meant that prejudice was presumed. The jury was aware of a connection between the MPHS shootings and Mr. Fryberg, and the prejudice was made more manifest when nine guns and photographs of ammunition were admitted into evidence, including photographs showing the guns were unsecured and in disarray in Mr. Fryberg's home. Fryberg was further prejudiced because the order of protection stated that he was restrained from coming within 100 yards of his one year old child, from

interfering with his custody, and from removing him from the State. The cumulative effect of all of this highly prejudicial evidence violated FRE 401 and 403, and deprived Fryberg of a fair trial.

The district court also erred when it admitted as a public record untrustworthy evidence of a return of service on Mr. Fryberg; the return of service was the only evidence that existed of the element—that the government had to prove beyond a reasonable doubt--that Fryberg had received actual notice of the hearing on the order of protection and an opportunity to be heard, and thus was inadmissible under the public records exception to the hearsay rule, pursuant to FRE 803(8). The admission of the return of service also violated the Confrontation Clause of the Sixth Amendment because under the facts of this case, the officer's claim that he served Fryberg was testimonial, the only witness to the alleged service of the order on Fryberg was the police officer who allegedly served the order, the officer was married to the complaining witness's sister, and the officer was unavailable to testify.

The district court's decision to give the jury an additional knowledge instruction, to reject Fryberg's proposed knowledge instruction, and to reject Fryberg's proposed entrapment by estoppel instruction, all combined to confuse and/or mislead the jury and requires reversal.

Finally, the prosecutor's statement during closing argument that "Now, conveniently, the defendant, a month later, after Jesus Echevarria passes away, claims for the first time, to any court, that he did not receive notice of the hearing[,] [h]ow convenient is that?" was prosecutorial misconduct, violated the due process clause of the Fifth Amendment by shifting the burden of proof to Fryberg, and violated Mr. Fryberg's Fifth Amendment right to not incriminate himself. The district court further erred by not granting Fryberg's motion for a mistrial.

ARGUMENT

1. Fryberg's conviction for unlawful possession of a firearm by a prohibited person, pursuant to 18 U.S.C. §922(g)(8), violated the Second Amendment as applied to Fryberg because the civil order of protection banned Fryberg from possession or ownership of a firearm for *the rest of his life.*

A. Standard of Review and Reviewability

Since this issue was not raised below, the standard of review is "plain error." *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012). Plain error is error that is plain and that affects substantial rights. *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993).

B. Argument

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear

Arms, shall not be infringed." In the landmark decision of *District of Columbia v. Heller*, the United States Supreme Court held that the Second Amendment protects "an individual right to keep and bear arms." *Heller*, 554 U.S. 570, 595, 128 S.Ct. 2783 (2008). While the *Heller* Court declined to "undertake an exhaustive historical analysis ... of the full scope of the Second Amendment," it did establish that the individual right guaranteed by the amendment is "not unlimited." *United States v. Chovan*, 735 F.3d 1127, 1133 (9th Cir. 2013, quoting *Heller*, 554 U.S. at 626-27). The *Heller* Court also stated that the core of the Second Amendment right is to allow "law-abiding, responsible citizens to use arms in defense of hearth and home." *Chovan*, 735 F.3d at 1133, quoting *Heller*, 554 U.S. at 635.

While the Ninth Circuit has held that a firearms ban for a conviction of a misdemeanor criminal charge of domestic violence, pursuant to 18 U.S.C. 922(9), does not violate the Second Amendment under an intermediate scrutiny test, *Chovan*, 735 F.3d at 1141, the issue of whether a civil order of protection banning an individual from ownership or possession of a firearm for life violates the Second Amendment, like the order at issue here under 18 U.S.C. 922(8(g), is an issue of first impression in this Court.

The Ninth Circuit has used various approaches in looking at Second Amendment as-applied challenges. In *Chovan, supra*, the Court held, with regard

to §922(g)(9), that by prohibiting domestic violence misdemeanants from possessing firearms, §922(g)(9) burdens rights protected by the Second Amendment. *Chovan*, 735 F.3d 1137. There is no distinction to be made between §922(g)(9), and the subsection of the statute here, §922(g)(8), with regard to this threshold issue, and thus §922(g)(8) clearly burdens rights protected by the Second Amendment.

Chovan then held that the intermediate scrutiny standard applies to a Second Amendment challenge. *Chovan*, 735 F.3d at 1138. Intermediate scrutiny requires that (1) the government's stated objective be significant, substantial, or important; and (2) that there be a reasonable fit between the challenged regulation and the asserted objective. *Id. at 1139.* However, a concurring opinion in *Chovan* argued that strict scrutiny was the more appropriate standard because using "intermediate scrutiny as the correct level at which to review a categorical, status-based disqualification from the core right of the Second Amendment . . . does not make sense." *Chovan*, 735 F.3d at 1145 (Bea, J., concurring).

Then, in *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, (9th Cir. 2014), the Court clarified that intermediate scrutiny applied only because the conduct fell within the scope of the Second Amendment but "outside [its] core," and that [i]ntermediate scrutiny is not appropriate for cases involving the destruction of a right at the core of the Second Amendment." *Peruta*, 742 F.3d at 1168 n.15.

The Fourth Circuit, using intermediate scrutiny analysis, has held that § 922(g)(8) survives a Second Amendment as applied challenge. *See United States v. Mahin,* 668 F.3d 119 (4th Cir. 2012); *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012). But other circuits have held that strict scrutiny analysis applies to other sections of 922(g). *See Tyler v. Hillsdale County Sheriff's Department,* 775 F.3d 308, 326-331 (6th Cir. 2014), *reh'g granted*, No. 13-1876 (6th Cir. Apr. 21, 2015) (strict scrutiny applies to §922(g)(4), which prohibits possession of firearms by a person "who has been committed to a mental institution"). A challenged law satisfies strict scrutiny if it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Tyler*, 775 F.3d at 330, citing *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

Given the facts of this case, however, Fryberg's Second Amendment rights were violated under either an intermediate or strict scrutiny analysis. In all of the Second Amendment as-applied cases that various circuits have considered with regard to § 922(g)(8), the order of protection placing the defendant in violation of §922(g)(8) was an order that was *limited in duration*. In Fryberg's case, the order was a *lifetime ban*. Ex. 4, 2ER at 154. Further, as will be shown below, the Ninth Circuit has held that in the context of § 922(g)(9)—concerning persons convicted of a misdemeanor domestic violence crime—that the scope and duration of the prohibition is critical.

In *Chovan, supra,* the Court noted that a provision limiting the applicability of §922(g)(9) was the fact that it "exempts those with expunged, pardoned, or set-aside convictions, or those who have had their civil rights restored." *Chovan*, 735 F.3d at 1138. Thus, for Mr. Chovan, there was at least some point that he could have the opportunity—despite a criminal domestic violence conviction—to reclaim his Second Amendment rights. Such was not the case here, for Mr. Fryberg, who had not even been convicted of a crime at the time the protection order was issued. *See Tyler*, *supra*, 775 F.3d at 339 ("Not so for Clifford Tyler, who cannot seek expungement or pardon [and] has never committed a crime . . .").

Three other circuits have denied Second Amendment challenges to §922(g)(8) by "presumptively violent, albeit law-abiding, individuals," but in all of that circuit's cases the order was only temporary. *See Tyler*, 775 F.3d at 340; *Chapman*, *supra*, 666 F.3d at 228; *Mahin*, *supra*, 668 F.3d at 120 (4th Cir. 2012); *See also United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011).

In *Chapman*, the Fourth Circuit found it to be of "critical importance" that § 922(g)(8)'s "exceedingly narrow prohibitory sweep" only affected "persons under a [domestic-restraining order] then currently in force." *Chapman*, 666 F.3d at 228-29 (emphasis added). The Court also stated that it was "significant" to its holding that the firearm ban was " temporally definite" and "limit[ed] the application to the exact duration of the [restraining order] at issue, which in [the defendant's] case

was only 180 days." *Id*. at 230. As the Court stated: "Congress tailored [the law] to cover *only* the time period during which it deemed the persons subject to it to be dangerous." *Id*. at 231 (emphasis added). *See Mahin*, 668 F.3d at 125-26 (law was not only "temporally limited and therefore exceedingly narrow," it did not *"impos[e] a lifelong prohibition*" but only a "temporary burden during a period when the subject of the order is adjudged to pose a particular risk of further abuse.") (emphasis added).

Here, the protective order against Fryberg was a garden variety civil order—not even an order based on a criminal conviction beyond a reasonable doubt--with nothing in the order suggesting that the factual basis for the order set it apart from any other order of its kind—and was for the rest of his life. Indeed, the order specifically stated that it was "permanent." Ex.4; 2RP at 154. *Compare*, e.g., *Chapman*, *supra (*six months); *Mahin*, *supra* (two years); *United States v. Garretson*, Dkt. #2:13-cr-02 (D. Nevada) (one year). For all of the foregoing reasons, a complete and total ban on Mr. Fryberg's Second Amendment right to possess and own firearms for the rest of his life, based upon the civil order of protection at issue here, violated the Second Amendment as applied to Fryberg.

2. The District Court erred when it denied Fryberg's motion for a change of venue.

A. Standard of Review and Reviewability

A denial of a motion for change of venue is reviewed for an abuse of discretion. *United States v. Nelson*, 347 F.3d 701, 707 (8th Cir. 2003). The district court denied Fryberg's motion both before the jury was empaneled, and afterwards. 1ER 7; 22.

B. Argument

The Sixth Amendment to the United States Constitution guarantees to the accused a public trial by an impartial jury. The Supreme Court has stated: "No person can be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, excitement, and tyrannical power." *Chambers v. Florida,* 309 U.S. 227, 236-37 (1940).

A trial court must grant a defendant's motion for a change of venue when the court is unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. *Turner v. Calderon*, 281 F.3d 851, 865 (9th Cir. 2002. Federal Rule of Criminal Procedure 21(a) provides:

> "Upon the defendant's motion, the court must transfer the proceedings against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."

Under the rule, a defendant must establish either presumed prejudice or actual prejudice to warrant a change in venue. *United States v. Rewald*, 889 F.2d 836, 863 (9th Cir. 1989).

In cases involving presumed prejudice, a motion for change of venue should be granted before jury selection begins. See *United States v. Jones*, 542 F.2d 186 (4th Cir. 1976). Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime. *United States v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996). Presumed prejudice necessarily assumes skepticism concerning juror claims of open-mindedness. *See Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

Ninth Circuit courts consider several factors when assessing the existence of presumed prejudice, including: (1) whether there was a 'barrage of inflammatory publicity immediately prior to trial, amounting to a huge…wave of public passion'; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial. *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998). One other very important factor that a court must consider, however, is the extent to which the

government is responsible for generating the publicity in the case. *See United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2nd Cir. 1990).

Here, virtually every single news article and media broadcast about this case made direct reference to the MPHS shooting. In fact, nearly all news articles and media broadcasts identified the defendant in this case as "Raymond Lee Fryberg, the father of the MPHS shooter," and most of this inflammatory information was not admissible at Fryberg's trial, because he was only charged with unlawful possession of a firearm. *See*, generally, 4ER. Further, the September 1, 2015 public release by Snohomish County of its formal investigative report on the MPHS shooting recast Fryberg into the public eye on the eve of trial which began less than then three weeks later. 4ER 350-51.

Finally, the torrent of prejudicial publicity in Fryberg's case was specifically prompted by the government's press release of March 31, 2015, and that was updated the following day. That press release encouraged community support in labeling Mr. Fryberg as a person who "posed the greatest risk to our communities." By the press release's very terms, it assumed that Fryberg had demonstrated a history of gun-related violence, which was completely false. And it expressly stated that the firearm Mr. Fryberg was charged with unlawfully possessing was the "murder weapon" which was "used in the mass shooting." 3ER 22-23.

This press release undermined Fryberg's constitutional right to a fair trial, i.e. one in which his case would be decided on the facts of the case presented in the courtroom and not on government or public opinion. Indeed, in the absence of this press release, it is entirely likely that this case would have received no publicity whatsoever, rather than the firestorm ignited by the Government's press release.

The press release also violated RPC 3.8(f), which states:

> The prosecutor in a criminal case shall: (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's *action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused* and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(emphasis added). For all of the foregoing reasons, it is evident the U.S. Attorneys' Office press release violated RPC 8.3(b), and prompted the torrent of publicity directly involved with the prosecution of Mr. Fryberg.

3. Fryberg was denied his right to a fair trial by the cumulative effect of the following evidence admitted over defense objection:

(a) Nine (9) guns were admitted, in violation of FRE 403;

(b) Photographs of ammunition were admitted, in violation of FRE 403;

(c) The photographs of the guns and ammunition that were admitted showed that the guns were unsecured and in a state of disarray in Fryberg's home, in violation of FRE 403, and the prosecutor stated in opening statement that the guns were unsecured;

(d) The jury panel was aware the charges against Fryberg were related to the shooting at the school; and

(e) The order of protection stated that Fryberg was restrained from coming within 100 yards of his one year old child, from interfering with his custody, and from removing him from the State, in violation of FRE 401 and 403.

A. Standard of Review and Reviewability

Evidence admitted over objection under FRE 401 and 403 is reviewed for an abuse of discretion. *United States v. Easter*, 66 F.3d 101, 10208 (9th Cir. 1995); *United States v. Layton*, 767 F.2d 549, 553 (9th Cir. 1985). The district court admitted this evidence over defense objection. 2ER 88-108; 121-26; 1ER 25-26; 4ER 367.

B. Argument

FRE 401 states that evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. FRE 403 states the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The Court ruled the ammunition and the photographs of the ammunition in Fryberg's home were relevant because it tended to prove the element of possession of the firearms, and that under FRE 403, the probative value of the ammunition

outweighed its prejudicial effect. 3ER 270. But Fryberg was only charged with unlawful possession of firearms; not unlawful possession of ammunition. The government's case was replete with evidence showing that Fryberg possessed the firearms, and the defense did not contest this fact.[2] As such, the prejudicial effect of admitting the ammunition with the guns outweighed its probative value.

The Court abused its discretion when it admitted the ammunition and the photographs without properly balancing the factors that it was required to balance under FRE 403. Indeed, the Court, after initially expressing skepticism over its admission, admitted the evidence with a mere conclusory statement that it found "that the prejudice from the ammunition, that the guns are being displayed, is not so significant that it outweighs the probative value of the presence of the ammunition." 3ER 270. This conclusory statement hardly comports with the balancing test that is necessary under FRE 403. *See United States v. Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) ("we hold as a matter of law that a court does not properly exercise its balancing discretion under Rule 403 when it fails to place on the scales and personally examine and evaluate *all* that it must weigh") (emphasis in original); *United States v. Figueroa - Gaona*, 521 Fed.Appx. 587, 590 (9th Cir. 2013) (Kennelly, J., dissenting) ("I do not believe that it was sufficient for the

[2] The defense was willing to stipulate to the fact that Fryberg possessed the guns, but the parties were unable to agree on an appropriate stipulation. 1ER 113-14.

court simply to adopt the government's argument given the entirely conclusory nature of that argument)".

The prejudice from the admission of this evidence was made more manifest by the fact the photographs of the guns and ammunition showed the guns were unsecured, and scattered in disarray around Fryberg's bedroom, *see* Ex.'s 29, 45--indeed, the prosecutor, during opening statement, made a point of this, to which defense counsel objected, 2ER 158--and the jury was likely aware from the juror questionnaire and *voir dire* that the charges against Fryberg had a connection to the Marysville-Pilchuck school shooting. 2ER 168-232; 3ER 271-73.[3]

Finally, the irrelevant and prejudicial evidence contained in Exhibit 4, the protection order itself, added to the cumulative effect of the rest of the prejudicial evidence admitted over defense objection. The order of protection stated that Fryberg was restrained from coming within 100 yards of his one year old child, from interfering with his custody, and from removing him from the State. *See* Ex. 4, at 3; 2ER 154. But this information was simply irrelevant to the charge of unlawful possession of a firearm, and could have been easily redacted from the order of protection, without eliminating the relevant portion of the order that the

[3] The record reflects the Hobson's choice facing the defense in *voir dire*: protect Fryberg by refraining from any mention whatsoever that the case had a relationship to the MPHS shooting; or risk not knowing if prospective jurors had heard of publicity concerning the case and whether what they heard would frustrate their ability to be fair and impartial, or otherwise adversely affect their duty to deliberate based on actual evidence presented at trial. The fact is, the only way to avoid this Hobson's choice was to move the trial to a venue outside the state, or at least outside the Western District of Washington. *See supra.*

government claimed was necessary in order to prove their case under 18 U.S.C. 922(g)(8), i.e. that the order contained a prohibition restraining the defendant from "harassing, stalking, or threatening an intimate partner or child, or engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to his or her child; [and] contained a finding that the defendant represented a credible threat to the physical safety of the intimate partner or child, or explicitly prohibited the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury."

It is clear from the Court's ruling *in limine* that it simply did not consider the language in the order that Fryberg objects to above, i.e. that he was restrained from coming within 100 yards of his one year old child, from interfering with his custody, and from removing him from the State; the Court only considered the language the government argued was necessary to prove its case. 1ER at 12-13. The former language was irrelevant under FRE 401, and even if relevant, was more prejudicial than probative, because it cast Fryberg as someone who could not be trusted around children, and suggested to the jury that he not only possessed unsecured firearms that he left lying around his house, but that he was also a threat to scoop up his one year old child and spirit him out of the state. The District Court's failure to even consider this language when it made this ruling was an abuse of discretion under FRE 403.

In sum, the cumulative effect of the admission of all of these pieces of prejudicial evidence violated Fryberg's right to a fair trial. The jury saw nine guns, many of which were lying around the house unsecured, photographs of ammunition, was aware from jury selection that there was a relationship between Fryberg and the shootings at Marysville-Pilchuck High School, and was presented with irrelevant and extremely prejudicial evidence from the order of protection that showed Fryberg was restrained from coming within 100 yards of his one year old child, from interfering with his custody, and from removing him from the State of Washington. Given the fact Fryberg was only charged with the crime of unlawful possession of a firearm, the cumulative effect of all of this evidence, even if a portion of it was technically relevant under FRE 401, clearly violated FRE 403 and denied Fryberg a fair trial.

4. The District Court's admission over defense objection of Exhibit 3, a return of service on the defendant of a notice of hearing concerning an order of protection on Mr. Fryberg—the only proof of a necessary element of the crime of Possession of a Firearm by a Prohibited Person, pursuant to U.S.C. § 922 (g)(8)—was not only inadmissible as an exception to the hearsay rule under FRE 803(8), but violated Mr. Fryberg's right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment.

A. Standard of Review and Reviewability

A district court's decision to admit evidence under a hearsay exception is reviewed for an abuse of discretion*;* a district court's ruling on the Confrontation Clause and its construction of the hearsay rules are reviewed *de novo*. *United*

States v. Torralba-Mendia, 784 F.3d 652 (9th Cir. 2015); *United States v. Morales*, 720 F.3d 1194, 1199 (9th Cir. 2013). The trial court admitted this evidence over defense objection. 1ER 13-16.

B. The District Court erred when it admitted the return of service on Fryberg because it was not admissible as a public record under FRE 803(8) and was thus inadmissible hearsay.

FRE 803(8) states that a public record is admissible as an exception to the hearsay rule, regardless of whether the declarant is available as a witness, if

> (A) the record sets out:
>
> (i) the [public] office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter *observed* by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
>
> (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

FRE 803(8) (emphasis added).

Here, this was a criminal case and Ex. 3, the return of service, did not involve a matter "*observed*" while under a legal duty to report; rather, it was a document that the government sought to use to prove a critical element in their case; namely, their claim that Jesus Echevarria, a Tulalip tribal police officer, had personally served Mr. Fryberg with notice of a hearing and a temporary order of protection concerning Jamie Gobin. 2ER at 155. Under FRE 803(8), a matter "*observed*" by "law enforcement personnel" in a criminal case cannot qualify as

an admissible public record under FRE 803(8). Indeed, as will be shown below, the word "observe*"* in the rule distinguishes it from case law in the Ninth Circuit that holds that routine, ministerial, and objective acts allow for admission under the rule, and shows that the return of service in this instance is not a routine or ministerial act that would allow for such admission.

While there does not appear to be any Ninth Circuit opinion that specifically deals with the admission of a return of service as a public record exception to the hearsay rule under FRE 803(8), the Court in *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2005), stated that a "penitentiary packet" containing Weiland's fingerprints and photograph was admissible as a public record under the rule because they were public records of routine and *non-adversarial matters* that did not contain information akin to police officers' reports of their contemporaneous observations of crime that might be biased by the adversarial nature of the report. *Weiland*, 420 F.3d 1074, *citing United States v. Orozco*, 590 F.2d 789, 794 (9th Cir. 1979) [internal citation omitted]. The *Weiland* Court went on to state that "fingerprinting and photographing a suspect, and cataloguing a judgment and sentence are the types of routine and unambiguous matters to which the public records hearsay exception in Rule 803(8)(B) is designed to apply. " *Id.* at 1075.[4]

[4] The *Weiland* Court ultimately ruled that the judgment and sentences were independently admissible under FRE 803(22).

Here, there is a critical difference between Officer Echevarria's "observations" with regard to the return of service and the obviously ministerial acts involved with fingerprinting and photographing a suspect. Officer Echevarria's actions were not merely ministerial, and were not merely "observations"; his action was an *assertion* that he had in fact served Mr. Fryberg with the necessary notice required to give him the opportunity to contest the petition for an order of protection. Without this notice, the adversarial hearing on the order of protection could not go forward, and if Mr. Fryberg did not appear, there could only be a default if there was *proof* that Fryberg had been served. Thus, Echevarria's service was an assertion that Fryberg's rights—indeed his due process rights—had been provided for by virtue of his having been provided the notice and the opportunity to be heard, and consequently such an assertion cannot be viewed as a mere ministerial act that suffices for admission as a public record.

Furthermore, the fact that Officer Echevarria was a police officer charged with serving Mr. Fryberg places the return of service squarely within the exception pertaining to law enforcement officers under the rule. Officer Echevarria didn't just "observe" Mr. Fryberg being served; he claimed he actually *served* him. Given the critical due process concerns outlined above, one cannot view service in this case as merely a ministerial act. As the Tenth Circuit has stated:

> The service of process has two expressive, communicative functions: "notifying a defendant of the commencement of an action against him and providing a ritual that marks the court's assertion of jurisdiction over the lawsuit."

Oklahoma Radio Assoc. v. Federal Deposit Ins. Corp., 969 F.2d 940, 943 (10th Cir.1992) (citing *Hagmeyer v. United States Dept. of Treasury*, 647 F.Supp. 1300, 1303 (D.D.C.1986) and 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1063) (emphasis added). Service of process is thus not a ministerial act.

Finally, the specifics of this case clearly show a lack of trustworthiness that precluded admission of this document under FRE 803(8)(B). Not only was the location of service, and the very existence of the claimed location of service, in dispute, but the relationship between the petitioner, Jamie Gobin, and Officer Echevarria clearly called into question the trustworthiness of the document. Officer Echevarria was married to Jamie Gobin's *sister*. 2RP 129-30; 137. Testimony during the trial indicated there had been conversations between the two about the need to serve Mr. Fryberg. 2ER 134-38. Under these circumstances, one cannot say, as noted by the Court in *Weiland,* that the public record here was *non-adversarial;* the opposite was in fact true. The relationship between Officer Echevarria and Jamie Gobin, coupled with the disputed location as to where Fryberg was served--and whether that location even existed--called into clear question the trustworthiness of the document; that is, whether Officer Echevarria

had truly served Mr. Fryberg with the protection order and provided him with notice of the hearing. As such, the source of the information—Officer Echevarria --the relationship between Echevarria and the petitioner, the dispute over the supposed location of service and whether such a location even existed, and the very fact that Echevarria's act of serving Mr. Fryberg was not merely ministerial, shows that the District Court erred when it admitted this document. *Compare United States v. Union Nacional de Trabajadores*, 576 F.2d 388, 391 (1st Cir. 1978) ("A sheriff or marshal reporting the service of process is not reporting in the capacity of a police observer at the scene of a crime, nor is he *ordinarily connected with the case in a law enforcement capacity*. The "adversarial" circumstances which might render a law enforcement officer's observations unreliable are unlikely, therefore, to be present.") (emphasis added). Here, unlike in *Union Nacional de Trabajadores* , Officer Echevarria was most assuredly connected with the case because he was married to the complaining witness's sister, and had a vested interest in the case.

C. The District Court erred when it admitted the return of service on Fryberg because it violated his rights under the Confrontation Clause of the Sixth Amendment.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). the United States Supreme Court held that where testimonial evidence is at issue, the Sixth Amendment demands that a witness be unavailable and that the defendant have

had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. Although the Court in *Crawford* declined to set out the specific parameters of what constituted a testimonial statement, the Court clearly defined "testimony" as "a solemn declaration or affirmation for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51.

Here, Officer Echevarria's claim in his return of service that he had personally served notice of the hearing on Mr. Fryberg was testimonial because it was an *assertion* that *he had personally served notice* of the hearing on Mr. Fryberg, and was thereby an affirmative statement that he had undertaken a specific act that would provide the process for which Mr. Fryberg was due; in short, Officer Echevarria's claim was no mere ministerial act. One must only look no further than the definition of "testimonial" in *Crawford* to see that this is the case: "testimony" is "a solemn declaration or affirmation for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51. Under the facts of this case, it is difficult to see how Officer Echevarria's claim that he served Fryberg could be viewed otherwise.

In the Supreme Court's later decisions in *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006), and *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705 (2011), the Court began to narrow the holding of *Crawford*, stating that in order for a statement to be testimonial, the statement must have a "primary

purpose" of "establish[ing] or prov[ing] past events *potentially* relevant to later criminal prosecution." *Bullcoming*, 131 S.Ct. at 2714 n.6, *quoting Davis*, 547 U.S. at 822 (emphasis added). But as the late Justice Scalia, the author of the majority opinion in *Crawford*, stated succinctly in his concurring opinion in *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015), "*Crawford* remains the law."[5]

Here, the government introduced the return of service for the sole purpose of proving a past event--service of a notice of hearing—in order to prove an essential element of the crime that the government alleged Mr. Fryberg committed. Indeed, the very purpose of a return of service is the anticipation of litigation and to thus prove a past event. As in *Bullcoming*, the statement that the government introduced was a report containing a testimonial certification, made in order to prove a fact at a criminal trial. "[I]f an out-of court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming*, 127 S.Ct. at 2713. Officer Echevarria was unavailable as a witness and Mr. Fryberg never had an opportunity to confront him. The sole purpose for admitting the return of service was to prove the truth of the matter asserted—that Mr. Fryberg received notice of the September 10 hearing—and thus

[5] And as Justice Scalia went on to say in his concurring opinion in *Clark*, "I write separately, however, to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford* v. *Washington*."135 S.Ct. at 2184.

since his very receipt of that notice was itself an element of the crime charged, it was vital to the government's case, and the admission of the return of service violated the Confrontation Clause.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328, 129 S.Ct. 2527 (2009), the Supreme Court held that the Confrontation Clause does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and thus the admission of an affidavit attesting that a forensic analyst determined that drugs seized from the defendant was cocaine violated the defendant's confrontation rights under *Crawford* because the analyst was not subject to cross-examination. Under the specific facts of the instant case, there is little functional difference with *Melendez-Diaz.* There, the forensic analyst's affidavit proved a necessary element of the prosecution's case, i.e. that the substance seized was cocaine. Here, the declaration of Officer Echevarria under penalty of perjury also proved a necessary element of the prosecution's case, i.e. that the government had met its burden of proof with regard to the fact that Fryberg was subject to a court order issued after a hearing of which he had received actual notice and at which he had an opportunity to participate.

In light of the specific facts of this case and the Supreme Court's opinion in *Melendez-Diaz*, the Ninth Circuit's opinion in *United States v. Rojas-Pedroza,* 716 F.3d 1253, 1267-69 (9th Cir. 2013), does not justify the admission of the return of

service under the Confrontation Clause. In *Rojas-Pedroza,* the Court stated that "the 'mere possibility' that a record 'could be used in a later criminal prosecution' does not render it testimonial," citing *United States v. Orozco-Acosta,* 607 F.3d 1156, 1164 (9th Cir.2010. The Court went on to state that "there must be some additional showing that the primary purpose of the document is for use in litigation," and that the relevant inquiry is an objective one; that is, "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Rojas-Pedroza,* F.3d at 1267, *quoting Michigan v. Bryant,* 562 U.S. 344, 131 S.Ct. 1143, 1156 (2011).

Here, it is impossible to ascertain the purpose that reasonable participants would have had from the alleged service of Mr. Fryberg by Officer Echevarria--the brother in law of the petitioner who apparently had had prior conversations with his wife about her sister's request for a protection order before allegedly serving Mr. Fryberg--because there is no record of what occurred at the time of the service, and Officer Echevarria was unavailable to testify. However, there is no question that proper service of an order of protection is a necessary element of the criminal charge of *violation* of an order of protection. Indeed, the whole purpose of petitioning a court for an order of protection is to make clear to a respondent that if he violates that order, he will be criminally prosecuted. As such, a return of

service with regard to a hearing on a petition for an order of protection provides the "'additional showing' that the primary purpose of the document is for use in litigation," in accordance with *Rojas-Pedroza*.

5. The District Court's decision to (a) allow cross-examination supporting the affirmative defense of entrapment by estoppel; (b) reject Fryberg's proposed entrapment by estoppel instruction; (c) give instruction no. 23, an additional knowledge instruction; and (d) reject Fryberg's proposed instruction on knowledge, all combined to confuse and/or mislead the jury.

A. Standard of Review and Reviewability

When a party objects to a jury instruction, a reviewing court conducts *de novo* review of the question of whether the instruction is misleading or states the law incorrectly to the prejudice of the objecting party. *United States v. Terry*, 911 F.2d 272 (9th Cir. 1990). The district court refused to give Fryberg's requested estoppel by entrapment instruction, the defense objected to the court's decision to give an additional knowledge instruction, as set forth in Court's instruction no. 23, and the court refused to give the defense's proposed instruction on knowledge, defense proposed instruction no. 3. 1ER 42-49.

B. Argument

The trial court must give an entrapment by estoppel instruction when there is evidence that (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was

permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable." *United States v. Batterjee*, 361 F.3d 1210, 1217 (9th Cir. 2004). The United States Government has made licensed firearms dealers federal agents in connection with the gathering and dispensing of information on the purchase of firearms. *Batterjee*, 361 F.3d at 1216-1217; *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987).

Fryberg's affirmative defense of entrapment by estoppel and their argument that the government could not prove beyond a reasonable doubt one element of the crime--namely, that Fryberg had received actual notice of the hearing on the order of protection—were not mutually exclusive. Based on the evidence presented through the government's witnesses, a reasonable jury could have believed that Fryberg had honestly answered question 11(h) of ATF Form 4473 in the negative because of the language set out in this form, which states, in pertinent part:

> Under 18 U.SC. § 922, firearms may not be sold to or received by persons subject to a court order that: (A) was issued after a hearing *which the person received actual notice of* and had an opportunity to participate in . . .

See Ex.'s 11-15, *et.* seq., (ECF 78). This language in question 11(h) of ATF form 4473 thus defined a restraining order in such a way that Mr. Fryberg could have reasonably believed that the honest answer to that question was "no," and Fryberg's success in repeatedly purchasing a firearm therefore satisfied the defense of entrapment by estoppel.

But even if there was insufficient evidence to justify an entrapment by estoppel instruction, the District Court's decision to give Instruction No. 23—*which it based on the defense's reasonable decision to elicit testimony from the government's witnesses supporting an entrapment by estoppel defense*--at best confused, or at worst misled the jury with regard to what the government was required to prove beyond a reasonable doubt in order to obtain a conviction; in fact, the Court's decision to give Instruction No. 23 contradicted the Court's previously stated concern--with regard to the defense's rejected instruction that clearly stated the government had to prove beyond a reasonable doubt the order of protection was issued after a hearing for which Fryberg received actual notice and at which he had an opportunity to participate--that the jury not be presented with an instruction that unduly emphasized a particular aspect of the case.

Here, the Court's Instruction no. 23 caused the jury to unduly emphasize the fact the government did *not* need to prove that Fryberg knew an order of protection had been issued, and thus confused this issue with defense counsel's argument that the government had to prove beyond a reasonable doubt that Fryberg had received actual notice of the hearing on that very order of protection. 2ER 69-73; 1ER 35-41. If the Court felt it important to provide to the jury Instruction no. 23, then it also should have provided to the jury the defense's proposed instruction No. 3, which clearly stated that if the government did not prove Mr. Fryberg had actual

notice of the hearing on the order of protection beyond a reasonable doubt, the jury had a duty to acquit.

Furthermore, the jury could have been confused by these instructions because the basis for Fryberg's argument that the government had not proven beyond a reasonable doubt that he was given actual notice of the hearing on the permanent protective order was based on the fact that Fryberg did not know that there was a *temporary* order of protection, because that temporary order, set out in Exhibit 3, also contained the notice of hearing that the government had to prove that Fryberg received. *See* Ex. 2, 3; 2ER 155-57. Thus, the definition of the word knowingly in Instruction no. 21--"an act is done knowingly if the defendant is aware of the fact and does not act through ignorance, mistake, or accident [and the] government is not required to prove that the defendant knew that his acts or omissions were unlawful . . ."—could have created confusion with regard to Instruction no. 23, which stated that the "government need not establish the defendant's knowledge that *an* order of protection was issued, or prove that the defendant knew his possession of a firearm was a violation of the law," because the government did have to prove that Fryberg had knowledge of the *temporary* order (emphasis added). 2ER 69, 71. *See United States v. Liu*, 731 F.3d 982, 993-95; *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir.1994) (general definition of

knowingly conflicted with specific instruction of knowledge with regard to the crime of money laundering).

If the trial court had not eliminated the second sentence from the government's proposed instruction with regard to knowledge—"the third element requires proof that the defendant received actual notice of a hearing giving rise to an order of protection"--the same concern would not have been present. *See* 1ER at 48-49; 2ER at 68-69. The Court's decision to eliminate the second sentence thus created the confusion in the two instructions, and conflict with the general knowledge instruction, and requires reversal.

6. The prosecutor's statement during closing argument that "Now, conveniently, the defendant, a month later, after Jesus Echevarria passes away, claims for the first time, to any court, that he did not receive notice of the hearing[,][h]ow convenient is that?" was prosecutorial misconduct, violated the due process clause of the Fifth Amendment by shifting the burden of proof to Fryberg, and violated Mr. Fryberg's Fifth Amendment right to not incriminate himself. The district court further erred by not granting Fryberg's motion for a mistrial.

A. Standard of Review and Reviewability

Generally, claims of prosecutorial misconduct and denials of motions for mistrial during closing argument are reviewed for an abuse of discretion. *United States v. Guess*, 745 F.2d 1286, 1288 (9th Cir.1984). Statements that impact a defendant's Fifth Amendment right to not incriminate himself and/or shift the burden of proof to the defendant are reviewed *de novo*. *United States v. Mayans*,

17 F.3d 1174, 1185 (9th Cir. 1994). Defense counsel moved for a mistrial, based upon the prosecutor's improper statement. 1ER 53-58.

B. Argument

During closing argument, prosecutors are allowed to strike "hard" blows, using fair inferences from the evidence, but cannot strike "foul" blows. *United States v. Prantil*, 764 F.2d 548, 555 (9th Cir.1985). "To obtain a reversal based on prosecutorial misconduct, [a defendant] must establish both misconduct and prejudice." *United States v. Wright*, 625 F.3d 583, 609–10 (9th Cir. 2010).

Here, the prosecutor's statement during closing argument that "Now, conveniently, the defendant, a month later, after Jesus Echevarria passes away, claims for the first time, to any court, that he was not aware of the hearing on the order of protection," was clearly prosecutorial misconduct because there had been no evidence presented of the prosecutor's claim, and the District Court treated it as misconduct, admonishing the prosecutor and giving the jury a curative instruction. *Compare United States v. Hallock*, 454 Fed. Appx. 545, 547 (9th Cir. 2011) ("Hallock has failed to establish misconduct. The district court neither struck Agent Hodgdon's disputed testimony from the record nor admonished the Government concerning its use").

The prosecutor's statement was also clearly prejudicial, because it accused the defense of making up this defense solely because Officer Echevarria had

passed away and that therefore the government could provide no direct testimony from Officer Echevarria that he had in fact served Mr. Fryberg. This argument had the highly prejudicial effect of improperly undermining the credibility of both Fryberg and defense counsel, and was wholly improper.

Further, the prosecutor's prejudicial comments improperly shifted the burden of proof to the defendant, in violation of the due process clause of the Fifth Amendment . *See United States v. Coutchavlis,* 260 F.3d 1149, 1156-57 (9th Cir. 2001). It is well-settled that due process requires the government to prove each and every essential element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970).

Here, the government was required to prove, beyond a reasonable doubt, the element that at the time Fryberg possessed each of the firearms, he was subject to a court order that was issued after a hearing of which the defendant received actual notice and at which he had an opportunity to participate. The only evidence the government had of this element was contained in Exhibit 3, the alleged return of service on Fryberg that was signed by Officer Echevarria. The prosecutor's improper statement during closing argument highlighted the fact that the *defendant* had presented no evidence that Fryberg had not been served, and thus unconstitutionally shifted the burden of proof to Fryberg.

Finally, the prosecutor's improper statement violated Fryberg's Fifth Amendment right to not incriminate himself. Fryberg did not testify at the trial, and the prosecutor's statement highlighted a false scenario that Fryberg previously had the opportunity to come into court—"any court"—and claim that he had not been properly served, and, more importantly--if he truly wanted to hold the government to their burden of proving beyond a reasonable doubt that at the time Fryberg possessed each of the firearms, he was subject to a court order that was issued after a hearing of which the defendant received actual notice and at which he had an opportunity to participate--he could have testified at the trial that he had not been properly served. Indeed, it is important to note that the prosecutor did not say the "*defense* claims for the first time . . .," but said the *"defendant claims for the first time* . . .." As such, the prosecutor's statement was a comment on Fryberg's right to remain silent, and his failure to testify. *See United States v. Mayans*, 17 F.3d 1174, 1185 (9th Cir. 1994).

The Fifth Amendment violation was made even more manifest by the fact that after the jury was empaneled, the trial judge told them--while explaining why he did not want the jurors to talk to one another about the case--that he didn't want the jury to be convinced of Mr. Fryberg's guilt after the government had presented their witnesses because "you've not heard from Mr. Fryberg yet." 2ER 234. This statement from the Court had the effect, right from the start of the trial, of creating

an expectation that Mr. Fryberg would testify. When coupled with the prosecutor's objectionable statement during closing argument, as outlined above, it is even more clear that this statement violated Mr. Fryberg's right against self-incrimination.

A district court's denial of a motion for mistrial is reviewed for an abuse of discretion. *United States v. Randall*, 162 F.3d 557 (9th Cir. 1998). Declaring a mistrial is appropriate only where a cautionary instruction is unlikely to cure the prejudicial effect of an error. *Id.*, *citing United States v. Valdez-Soto*, 31 F.3d 1467, 1473 (9th Cir.1994). Here, however, given the multiple bases of prejudice outlined above, both constitutional and non-constitutional, the trial court's instruction to the jury to ignore the prosecutor's statement did not cure the prejudice to Mr. Fryberg, and the Court should have granted Fryberg's motion for a mistrial. Indeed, the Court's actual instruction to the jury only dealt with one very small basis for prejudice: the fact that "Mr. Fryberg [never claimed] – 'this is the first time, in any court." 1ER 55. Not only was this a very confusing and incomplete statement by the Court as to what the jury was to ignore, the Court said nothing about the real point of the prosecutor's improper statement: the fact that Mr. Fryberg, and defense counsel, had supposedly made up the story of Fryberg never being properly served, only because the man who allegedly served him, Jesus Echevarria, had died a month before, and was therefore unavailable to testify.

Fryberg's defense in this trial was almost entirely based on the contention the government had not proven beyond a reasonable doubt that at the time Fryberg possessed each of the firearms, he was subject to a court order that was issued after a hearing of which the defendant received actual notice and at which he had an opportunity to participate. Consequently, the prosecutor's improper statement concerning the return of service—the only evidence available to the government to prove this element--made it highly probable that the prosecutor's argument materially affected the verdict, and thereby prejudiced Mr. Fryberg. *See United States v. Segna*, 555 F.2d 226 (9th Cir. 1977). As such, the district court erred when it denied Fryberg's motion for a mistrial.

CONCLUSION

For all of the foregoing reasons, the appellant, Raymond Fryberg, Jr., respectfully requests that this Court reverse his convictions, and that it dismiss the superseding indictment. Alternatively, Fryberg requests that this Court reverse his convictions and remand for a new trial.

DATED This 7th day of June, 2016.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Counsel for Appellant Raymond Fryberg, Jr., is unaware of any related cases pending in the Ninth Circuit.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a New Times Roman typeface of 14 points, and contains 11,897 words.

Dated this 7th day of June, 2016.

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CERTIFICATE OF SERVICE

On June 7, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service of the brief will be accomplished by the appellate CM/ECF system.

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