

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA :

v. :

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MOTION TO DISMISS INDICTMENT

The Defendant, by and through undersigned counsel, hereby moves to dismiss the indictment against him on the ground that it fails to state an offense. Fed. R. Crim. P. 12(b)(3)(B).

The indictment charges the Defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Section 922(g)(1) provides that it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. Therefore, the Government must allege and prove that the Defendant has a prior conviction for which he could have received a term of imprisonment exceeding one year.

The indictment alleges the Defendant was convicted on May 31, 2006, in the Superior Court of Davidson County, North Carolina, of a crime punishable by more than one year, that is, possession with intent to sell and deliver marijuana. That offense is a violation of N.C.G.S. §§ 90-95(a)(1), (b)(2), and a Class I felony. However, under the North Carolina structured sentencing system, since his Prior Record Level did not exceed Level IV, the Defendant could not

have been imprisoned for more than one year on the basis of that conviction. N.C.G.S § 15A-1340.17. Accordingly, the indictment fails to allege a violation of 18 U.S.C. § 922(g)(1).

The Defendant is aware that the Fourth Circuit Court of Appeals previously held that the maximum sentence which a defendant could receive under the North Carolina structured sentencing system is the maximum sentence which any defendant could receive, not merely the maximum sentence which this particular Defendant could have received. United States v. Harp, 406 F.3d 242 (4th Cir. 2005). However, the United States Court of Appeals for the Sixth Circuit recently held to the contrary. United States v. Pruitt, 545 F.3d 416 (6th Cir. 2008). After examining Harp and the recent decision of the United States Supreme Court in United States v. Rodriguez, 128 S. Ct. 1783 (2008), the Sixth Circuit concluded that "in the context of North Carolina's structured sentencing scheme, an offense of conviction is 'punishable' for a term exceeding one year only if the state court could have sentenced a hypothetical defendant with the same prior record level as the defendant's prior record level to a term exceeding one year." Pruitt, 545 F.3d at 419.

The Defendant recognizes that Harp remains the controlling law in this circuit. However, pending final resolution of this circuit split by the United States Supreme Court, the Defendant wishes to preserve the issue for appeal. Rule 3.1, North Carolina Rules of Professional Conduct. Accordingly, the Defendant hereby moves to

dismiss the indictment for failure to state an offense.

Respectfully submitted this the 24<sup>th</sup> day of [REDACTED].

[REDACTED]  
Federal Public Defender

/s/ [REDACTED]  
[REDACTED]  
Assistant Federal Public Defender  
Arkansas State Bar No. [REDACTED]  
North Carolina State Bar No. [REDACTED] 1  
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CERTIFICATE OF SERVICE

I hereby certify that on [REDACTED], I electronically filed the foregoing Motion to Dismiss Indictment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: [REDACTED], Assistant United States Attorney, 101 South Edgeworth Street, Greensboro, NC 27401.

Respectfully submitted,

/s/ [REDACTED]  
[REDACTED]

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