

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

UNITED STATES OF AMERICA :  
 :  
 v. : [REDACTED]  
 :  
 [REDACTED] :

**DEFENDANT'S POSITION CONCERNING SENTENCING FACTORS**

[REDACTED], by and through counsel, submits this statement of his position with respect to sentencing factors in this case.

**FACTUAL BACKGROUND**

The Defendant was indicted for possessing a Springfield 9 mm semi-automatic pistol, model XD-9, serial number [REDACTED], and a DPMS Panther Arms .223 caliber semi-automatic rifle, model A15, serial number [REDACTED], in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On April 13, 2008, the Defendant, an employee of [REDACTED] Grading Service, Inc. was driving a company truck eastbound on Highway 49 in Cabarrus Co., NC. A Cabarrus Co. sheriff's deputy estimated the Defendant's speed at 66 MPH in a 45 MPH zone and initiated a traffic stop. The deputy smelled alcohol coming from the Defendant. The Defendant admitted that he had consumed a 32 oz beer earlier in the day. The deputy administered a roadside alcohol screening test that registered a blood alcohol concentration of .082.

When the officer attempted to put the Defendant into his patrol vehicle, the Defendant ran from the location. A brief foot chase ensued. The Defendant stopped when the deputy told him to stop or be tasered.

A search of the 1995 GMC pick-up truck driven by the Defendant revealed the semi-automatic pistol mentioned above in a nylon holster, along with a loaded spare magazine behind one of the truck's bench seats. The Panther Arms .223 caliber semi-automatic rifle was recovered from the tool box in the back of the pick-up truck.

Police were later contacted by the son of the owner of [REDACTED] Grading Service, who stated that a .223 caliber rifle cartridge and a black leather holster were found under the front seat of the truck. The magazine was capable of accepting 15 or more rounds of ammunition.

While seated in the back of the patrol car, the Defendant was read his Miranda rights. He waived his rights and told police that he ran because he was a convicted felon and he knew the handgun was in the truck. He stated that he was simply taking the pistol to an unknown person on the I-485 bridge after receiving it from another individual near Beatties Ford Rd.

#### **GUIDELINE COMPUTATION**

The Defendant was assigned a base offense level of 22 in his

presentence report (Paragraph 13, Page 5). Although technically correct, the Defendant contends that the Court should grant him a 2-level variance to base offense level 20, which is where his guideline calculation would ordinarily begin without the "semi-automatic assault weapon" enhancement under USSG § 2K2.1(a)(3)(A)(I).

### **DISCUSSION**

The Defendant's position is rooted in the legislative history of the Violent Crime Control and Law Enforcement Act of 1994 (the "Violent Crime Control Act" or the "Act"). On September 13, 1994, Congress passed the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994), in order to amend and expand various existing statutory and regulatory provisions found in 18 U.S.C. §§ 921 through 930. See, National Rifle Association of America v. Magaw, 132 F.3d 272, 277 (6<sup>th</sup> Cir. 1997); Nate Navegar, Inc. v. United States, 103 F.3d 994, 997 (DC Cir. 1997). Among other things, the Act banned the manufacture, transfer or possession of semi-automatic assault weapons and large capacity magazines. Violent Crime Control and Law Enforcement Act, §§ 110102, 110103, codified at 18 U.S.C. §§ 922(v)(1) and 922(w)(1). The portion of the Act that banned assault weapons and large capacity magazines was vigorously debated, with the majority of the House Judiciary

Committee reporting, "The threat posed by criminals and mentally deranged individuals armed with semi-automatic assault weapons has been tragically widespread. Since then, the use of semi-automatic assault weapons by criminal gangs, drug traffickers and mentally deranged persons continues to grow." H. R. Rep. No. 103-489, § 7 (1994). Dissenting House members cited to Justice Dept. statistics to refute the majority's assertion that assault weapon use was widespread at all, much less widespread among gang members, drug traffickers and mental incompetents.

[T]he problem of these guns has been greatly exaggerated. Although semi-automatic weapons are used in the most high-profile killings that make it on the nightly news, in fact, more than 99% of killers eschew assault rifles and use more prosaic devices. According to statistics from the Justice Dept. and reports from local law enforcement, five times as many people are beaten to death than are killed with assault rifles.

H. R. Rep. No. 103-489 (1994) (dissenting views of House members F. James Sensenbrenner, Jr., George W. Gekas, Lamar Smith, Bill McCollum, Howard Coble, Steve Schiff and Bob Goodlatte)

In an effort to achieve sufficient support to pass the measure, Congress exempted any firearm or magazine meeting the weapon definition of § 921(a)(30) that was lawfully possessed prior to the enactment of the Act (18 U.S.C. § 922(v)(2)) and additionally included a sunset provision automatically repealing the legislation ten years after its enactment (Violent Crime

Control and Law Enforcement Act, Sec. 110105(2)). The Violent Crime Control and Law Enforcement Act became law on September 13, 1994, and its provisions outlawing certain assault weapons and magazines were later repealed by operation of law on September 13, 2004.

Effective November 1, 1995, the Sentencing Commission amended the firearms guidelines in response Congress' passage of the Violent Crime Control and Law Enforcement Act. Amendment 522 boosted the penalties for those persons convicted of possession of assault weapons or large capacity magazines. "[T]he amendment revises § 2K2.1 ... to provide increased offense levels currently provided for possession of machine guns and other firearms described in 26 U.S.C. § 5845(a)." USSG App. C, amendment 522. Despite the repeal of 18 U.S.C. §§ 922(v)(1) and 922(w)(1), the guideline enhancements brought about by those provisions remain in effect today.

In this case, the Defendant constructively possessed the rifle. It was not actively deployed nor was it otherwise used in furtherance of an independent criminal objective. The weapon was unloaded at the time it was seized and no ammunition was located in the vehicle. Unlike the 9 mm pistol, the rifle had not been reported stolen. Finally, the Defendant is neither a gang member, drug trafficker nor a mental incompetent.

Given the circumstances surrounding the Defendant's constructive possession of the rifle, as well as the legislative history of the assault weapon ban and repeal, sentencing him as if he actually possessed a machine gun would expressly contradict the Congressional mandate set forth in 18 U.S.C. § 3553(a) to impose a sentence that is "sufficient, but not greater than necessary ..." to further the interests set forth in the statute.

The Defendant requests that the Court reduce his total offense level of 21 to 19 and impose a sentence within the resulting guideline range of 33-41 months.

Respectfully submitted, this the 28th day of April, 2010.

[Redacted]

Defender

A

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system which will send notification of such filing to the following:

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Respectfully submitted, this the 28th day of April, 2010.

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