UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS	§	CRIMINAL NO. B-14-876-1
	§	
KEVIN LYNDEL MASSEY	§	

GOVERNMENT'S RESPONSE
TO DEFENDANT KEVIN LYNDEL MASSEY'S SECOND OPPOSED MOTION TO DISMISS INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the United States Attorney for the Southern District of Texas, by and through the undersigned Assistant United States Attorney, and files this Response to Defendant Kevin Lyndel Massey's Second Opposed Motion to Dismiss Indictment.

STATEMENT OF FACTS

On February 19, 2015, Defendant, by and through Defense Counsel, filed a motion to dismiss the indictment titled 'Defendant Kevin Lyndel Massey's Opposed Motion to Dismiss Indictment'. On the same date, Defendant, by and through Defense Counsel, filed a motion to suppress evidence titled 'Defendant Kevin Lyndel Massey's Opposed Motion to Suppress Illegally Seized Evidence and Illegally Obtained Statement.' On March 30, 2015, the Honorable Court was presented evidence pertaining to Defendant's motion to dismiss and motion to suppress. On April 10, 2015, the Government, by and through the undersigned Assistant United States Attorney, filed supplemental responses to Defendant's previously filed motions. On April 20, 2015, Defendant filed a supplement to Defendant's previously filed motions to dismiss and suppress.

On June 2, 2015, the Court denied Defendant's motions to dismiss and suppress. On June 5, 2015, the Court issued a Memorandum Opinion and Order in accordance with its prior rulings denying both Defendant's motion to suppress and Defendant's motion to dismiss. Thereafter, the case was set for a Bench Trial before the Honorable Court on August 24, 2015. Following a status hearing on August 24, 2015, the Bench Trial was set for September 30, 2015. Defendant, by and through Defense Counsel, now files a second motion to dismiss indictment titled 'Defendant Kevin Lyndel Massey's Second Opposed Motion to Dismiss Indictment.' The Government now responds to that motion and requests that the Honorable Court deny Defendant's second motion to dismiss.

ISSUES PRESENTED

Defendant's second motion to dismiss appears to be limited solely to the constitutionality, through the Tenth and Second Amendments, of 18 U.S.C. §922(g)(1) as applied to a defendant's "intrastate" possession of a firearm. Defendant's second motion to dismiss does not explicitly challenge the statutory language of §922(g)(1). Defendant's second motion to dismiss does not challenge the application of §922(g)(1) to a defendant observed in possession of a firearm on privately held land within the state of Texas. Defendant's second motion to dismiss does not make any claim relating to the legislative intent of §922(g)(1) and its application thereafter to the facts of this case. Defendant does not argue that §922(g)(1) is unconstitutionally vague. Defendant does not argue that §922(g)(1) as a whole is unconstitutional. Defendant's limited argument in Defendant's second motion to dismiss is that the Constitution of the United States precludes the Government of the United States from "prohibit[ing] a person's purely intrastate possession of firearms."

Defendant bases this argument on two claims. First, Defendant quotes the Tenth Amendment to the United States Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." Defendant asserts that the Tenth Amendment limits federal authority and that "the federal government may act only where the Constitution so authorizes" citing *New York v. United States*. 505 U.S. 444 (1992). Second, Defendant draws the Court's attention to the Second Amendment of the United States Constitution and argues that the Second Amendment "specifically prohibits the federal government from infringing the individual right to bear arms."

Defendant, therefore, claims that because the Tenth Amendment limits federal power to the enumerated powers contained within the Constitution, and because the Second Amendment specifically prohibits the federal government from infringing individual's right to bear arms, a defendant's "purely" intrastate possession of a firearm cannot be infringed by the federal government. Defendant's claims are not only misplaced, but are also insufficient for relief.

I. Summary

Defendant challenges the government's power to regulate or criminalize "purely" intrastate possession of a firearm by a felon. As a factual matter, evidence of an interstate nexus serving as the jurisdictional element are correctly preserved for a trial on the merits before a judge or jury and are not ripe for consideration. As a legal matter, Defendant does not have standing to challenge the issue of whether or not the Government has the power to regulate "purely" intrastate possession of a firearm. He has been charged under §922(g)(1), which was created pursuant to Congress's Commerce Clause power and requires an interstate nexus. Any

challenge to the existence of an interstate nexus is factual, jurisdictional or statutory, not constitutional. The law in the Fifth Circuit is clear and unequivocal. Firearms that have travelled in interstate commerce satisfy the interstate nexus requirement.

II. "PURELY" INTRASTATE ISSUE IS NOT RIPE FOR CONSIDERATION

Defendant's motion is not ripe for consideration as a factual matter. Defendant has presented merely a legal theory, namely that "purely" intrastate possession of a firearm cannot be infringed by the federal government of the United States. Defendant has not, however, presented any facts whatsoever let alone "sufficient facts which, if proven, would justify relief." *U.S. v. Harrelson*, 705 F.2d 733, at 737 (5th Cir. 1983); citing *U.S. v. Smith*, 546 F.2d 1275 (5th Cir. 1977); *U.S. v. Poe*, 462 F.2d 195 (5th Cir. 1972).

Pursuant to Criminal Local Rule 12, Southern District of Texas, a motion shall not only be supported by a statement of authority, but shall also be "supported by affidavit or declaration which sets forth with particularity the material facts at issue." The requirement that a motion presenting issues of fact be coupled with supporting affidavits or declarations is not a rule limited to the Southern District of Texas. According to the Fifth Circuit, "evidentiary hearings are not granted as a matter of course, but are held only when the defendant alleges sufficient facts which, if proven, would justify relief." *Harrelson*, 705 F.2d 733, at 737. "Factual allegations set forth in the defendant's motion, including accompanying affidavits, must be 'sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented.'" *Id*. citing *U.S. v. Poe*. "General or conclusionary assertions, founded upon mere suspicion or conjecture, will not suffice." *Id*.

Here, Defendant claims "pure" intrastate possession of a firearm cannot be regulated by the federal government of the United States due to constitutional limitations placed on the Government by the Second and Tenth Amendments. This has no relevance as the facts are currently presented. The Grand Jury found probable cause to believe that Defendant possessed weapons that previously traveled in interstate commerce, or in some other way were in or affected interstate commerce. Defendant was charged by that Grand Jury in a four count indictment with being a felon in possession of firearms that either travelled in interstate commerce, or were in and affecting interstate commerce. No evidence to the contrary has been presented to the Court in filings or in testimony. Defendant has asserted no facts either through affidavit or through Defendant's motion specifying: (i) where Defendant acquired said firearms, (ii) who sold Defendant said firearms or how Defendant acquired said firearms, or (iii) in what manner Defendant's possession of said firearms was "purely" intrastate. Indeed, Defendant does not even define what "purely intrastate possession" means.

Moreover, even if Defendant asserted facts supporting a claim that his possession of weapons was "purely" intrastate, as an element of the offense the Government bears the burden of proving this fact at trial. It is not ripe as a factual matter for judicial consideration at this time.

For the foregoing reasons and in accordance with both the Federal Rules of Criminal Procedure and the Local Rules the Government respectfully requests that Defendant's motion to dismiss indictment be denied.

III. Defendant Does Not Have Standing to Challenge "Pure" Intrastate Possession Regulation or Criminalization

On November 4, 2014, a Grand Jury found probable cause to believe that four firearms possessed by Defendant on both August 29, 2014, and on October 20, 2014, had travelled in interstate commerce before Defendant possessed said weapons. The Grand Jury thereafter charged Defendant with four counts of felon in possession of a firearm. Defendant now files a motion to dismiss the indictment based solely on a proposed legal theory that "purely" intrastate possession of a firearm by a felon (or presumably any other individual) cannot be regulated or criminalized by the federal government. At this juncture in the case, following an evidentiary hearing on both Defendant's motion to suppress and first motion to dismiss as well as following multiple motions filed by Defendant and the Government, at no time has it been disputed that the weapons in Defendant's possession on August 29, 2014, and on October 20, 2014, travelled through interstate commerce. Indeed, the evidence is to the contrary. Defendant's argument that "purely" intrastate possession cannot be regulated by the federal government, therefore, has no application in this case. Defendant does not have standing to challenge that issue.

"Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.' In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." *Already, LLC v. Nike, Inc*. 133 S.Ct. 721 at 726 (2013); citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). "A controversy is mooted when there are no longer adverse parties with sufficient legal interests to maintain the litigation." *U.S. v. Lares-Meraz,* 452 F.3d 352, 354-55 (5th Cir. 2006). "Accordingly, an actual, live controversy must remain at all stages of federal court proceedings, both at trial and appellate levels."[1] *Id.*

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1 Mootness is defined in Black's Law Dictionary as "having no practical significance;

At issue in this case is: (i) "that the defendant previously had been convicted of a felony;" (ii) "that he possessed a firearm;" and (iii) "that the firearm travelled in or affected interstate commerce." *U.S. v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001); citing *U.S. v. Gresham*, 118 F.3d 258, 265 (5th Cir. 1997). There is no alternative element of "purely" intrastate possession.

It is not the government's contention that there is not a case or controversy at issue in this prosecution. Indeed, at issue are the elements of the offense. It is the government's burden to prove the weapons in this case travelled in interstate commerce, or that Defendant possessed the weapons in and affecting interstate commerce by some other means. But this factual issue does not tangentially create a legal dispute on a matter not in controversy, namely an unrelated constitutional theory cloaked as a suppression issue. The sole issue as proposed by Defendant in Defendant's second motion to dismiss indictment is whether or not the federal government has the constitutional authority to regulate the "purely" intrastate possession of firearms by a defendant. This is not in controversy. Defendant has not challenged the Grand Jury's finding of probable cause to believe the weapons travelled in interstate commerce. Defendant has not presented any facts in support of an argument that Defendant's possession of firearms in this matter was "purely" intrastate. Even if Defendant did raise a challenge that the weapons did not travel in interstate commerce, as discussed below, the nature of that challenge would not be constitutional, it would be statutory and jurisdictional.

Whether or not Congress has the constitutional power to regulate or criminalize "purely" intrastate possession of a firearm is simply not a controversy in this case. As such, the Court should not "decide a legal dispute" or "expound on law" in the absence of any dispute on that

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hypothetical or academic." Black's Law Dictionary, Third Pocket Edition 2006.

issue. Defendant does not have standing to challenge this issue because the argument put forth by Defendant has "no practical significance," is "hypothetical or academic," and because Article III of the United States Constitution grants the Court authority to adjudicate 'cases' or 'controversies', not irrelevant and tangential legal theory. The question of whether or not the argument proposed by Defendant is ripe for adjudication is a procedural question; procedurally, the trial on the merits of the case is when the interstate nexus issue becomes ripe for consideration as an element of the offense. Likewise, as a substantive issue, Defendant does not have standing to challenge any supposed government regulation or criminalization of "purely" intrastate possession of a firearm.

Because Defendant's second motion to dismiss proposes an irrelevant and tangentially reached legal theory, and because Defendant does not have standing to challenge that issue, the government respectfully requests that the Court deny the motion to dismiss the indictment.

IV. Defendant's Legal Arguments Are Misplaced

Alternatively, if the Court does not deny Defendant's second motion to dismiss due to ripeness and standing issues, Defendant's second motion to dismiss still fails because it has no basis in law. Defendant argues the Tenth Amendment restrains the federal government from acting in spheres wherein powers were not specifically enumerated citing not only to the U.S. Constitution itself, but also *McCulloch v. Maryland*. This, according to Defendant, combined with the language of the Second Amendment, "prohibits the federal government from infringing the individual right to bear arms."

Defendant's reliance on *McCulloch v. Maryland* to bolster this point is an incorrect

understanding of that opinion. Were Congress to make the proper findings and act in the interest of the "general Welfare" of the people of the United States, it is theoretically possible Congress could, and theoretically possible Congress does, have the constitutional power to regulate and criminalize all possession of firearms by felons. Congress, however, has not chosen to act pursuant to alternative powers and has instead relied on the Commerce Clause. Because of this, an interstate nexus relating to possession of the firearms is an element of the crime and any challenge the Defendant is raising in regard to "purely" intrastate possession is a factual challenge, not a constitutional one. This is the Government's burden to prove at trial to establish a factual basis for federal jurisdiction. Because both legal theory and binding case law are contrary to Defendant's proposition, the Government respectfully requests that Defendant's second motion to dismiss be denied.

A. *McCulloch v. Maryland*: A Precedent of Implied Powers

It is both prophetic and ironic that Defendant cites to *McCulloch v. Maryland* in defense of the notion that the federal government is "one of enumerated, limited powers" and that, implicitly, because the document itself nowhere expressly grants the federal government the authority to regulate the possession of firearms "purely" intrastate, the federal government is therefore prohibited from regulating or criminalizing the "purely" intrastate possession of a firearm by a felon. At issue in *McCulloch v. Maryland* was whether or not Congress had the power to incorporate a bank. As Chief Justice Marshall observed, the Supreme Court could not find "[a]mong the enumerated powers…that of establishing a bank or creating a corporation." 17

U.S. 316, at 405 (1819). Nevertheless, like here, it was not enough then to simply rest upon what was specifically enumerated in the document:

> "The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, **establish justice, insure domestic tranquility**, and secure the blessings of liberty to themselves and their posterity.'" *Id.* at 403-404. (Emphasis added)

> "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is universally admitted." *Id.* at 405.

> "**But**, there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. **Even the Tenth Amendment, which was framed for the purpose of quieting excessive jealousies which had been excited, omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or the people;' thus leaving the question, whether the particular power which may become subject of contest, has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument."** *Id.* at 406. (Emphasis added)

> "So with respect to the whole penal code of the United States; whence arises the power to punish, in cases not prescribed by the constitution?[2] All admit, that the government may, legitimately punish any violation of its laws; and yet, this is not among the enumerated powers of congress." *Id.* at 416.

A mere twenty-eight years following the ratification of the Tenth Amendment the Supreme Court saw fit to express an understanding of both the whole Constitution and the Tenth Amendment which recognized the implied or incidental powers 'delegated' to the United States

2 Congress was and is granted through the enumerated powers the power to 'to provide for the punishment of counterfeiting the securities and current coin of the United States' and 'to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.' *McCulloch* at 416-417.

government even if those powers were not enumerated. It should come as no surprise then that the Supreme Court ruled in *McCulloch v. Maryland* that Congress had the power to incorporate a bank despite having no specifically enumerated power to do so. The precedent set nearly two hundred years ago in *McCulloch v. Maryland* works against Defendant, not for him.

B. LEGAL THEORY, THE CONSTITUTION, AND THAT WHICH IS NECESSARY AND PROPER

It is a misstatement to say that Congress (the People) is feeble in their ability to make law, to prescribe enforcement of that law, and to rule over the whole of the United States. Article I, Section 8, of the United States Constitution *expressly* grants Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other* Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (Emphasis added). One of the "foregoing Powers" Article 1, Section 8, is referring to is the power to 'provide for the Common Defence and general Welfare of the United States.' Another, is to "provide for organizing, *arming*, and *disciplining*, the Militia" (Emphasis added).[3] As observed above, however, the Necessary and Proper Clause does not limit Congress solely to those enumerated powers, but to "all other Powers vested by this Constitution in the Government," including the Executive Power vested in the President of

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3 In reference to the Second Amendment constitutional scholar Akhil Reed Amar states the following: "The amendment's syntax has perplexed modern readers precisely because these readers persistently misconstrue the words 'Militia' and 'people' by imposing twentieth and twenty-first century definitions on an eighteenth century text. In 1789, the key subject-nouns were simply slightly different ways of saying roughly the same thing. As a general matter, the Founders' militia were the people and the people were the militia. Indeed, an early draft of the amendment linked the two clauses with linchpin language speaking of a 'well regulated militia, composed of the body of the people." Amar, Akhil Reed; America's Constitution: A Biography, pg. 323, Random House 2006.

the United States.

The laws ordained by Congress (the People), far from being impotent, act as the "supreme Law of the Land." Article VI of the United States Constitution makes clear that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."

Congress (the People) therefore not only have the power to make all laws "necessary and proper for carrying into Execution" the powers vested to the federal government by the Constitution both *implicitly* and explicitly, but those laws also become the "supreme Law of the Land." When reviewing the Tenth Amendment it is apparent that the Framers were deliberate in their use of the words "delegated to the United States" rather than "enumerated herein."

Likewise, the Framers saw fit in the Second Amendment to ordain "the right of the *people* to keep and bear Arms, shall not be infringed" (Emphasis added). The Framers did not, however, say "the right of *persons* to keep and bear arms." The people, then as now, maintain their right to bear arms to the potential exclusion of certain groups Congress (the People) may determine who shall not possess arms because that possession would be harmful to the "general Welfare" of the United States. The statute at issue here, §922(g)(1), which criminalizes the possession of a firearm by a felon through the Commerce Clause, could alternatively and theoretically be considered "necessary and proper" in maintaining the "general Welfare" of the United States, "insuring domestic tranquility," "establishing justice," and would stand as the "supreme Law of the Land." For our purposes here, however, it is not a question of whether Congress has the constitutional authority to criminalize all possession, interstate and intrastate,

pursuant to the Necessary and Proper Clause. The issue is whether Congress has acted to criminalize some forms of firearms possession through another power granted to Congress through the Constitution – the Commerce Clause.

It is important to note that none of the foregoing laws and principles even touched upon the Commerce Clause and the power of Congress to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Art. 1, Sec. 8., Cl. 3. As a purely hypothetical matter, the Constitution may grant Congress the power to criminalize all possession of firearms by felons without the use of its Commerce Clause power. That hypothetical discussion, however, is not justiciable in this matter. What is at issue is Congress's use of the Commerce Clause and the power granted therein. Because Congress has chosen to act pursuant to that clause, Defendant's challenge is not constitutional in nature, but rather factual and statutory.

C. The Commerce Clause and "Purely" Intrastate Possession – Why It Is A Statutory, Jurisdictional, and Factual Issue; Not A Constitutional One

In 1971, the Supreme Court of the United States considered whether or not Congress, acting pursuant to the Commerce Clause, had the authority to criminalize all possession of firearms by felons – both intrastate and interstate. In *U.S. v. Bass*, the Supreme Court considered this issue following the conviction of a defendant for felon in possession of a firearm (under a sister statute to §922(g)(1), 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act). In *Bass*, the government did not prove an interstate nexus at trial under the mistaken belief that the statute did not require an interstate nexus when showing possession only. 404 U.S. 336 (1971).

The conviction was overturned because the statutory language required the government to prove an interstate nexus, as the modern version of that statute still requires. *Id*. This holding was not constitutional in nature, but rather an analysis of statutory construction and language bearing upon the prosecution's burden of proof as it relates to jurisdiction. The statute requires an interstate nexus because Congress is explicitly enacting law through the Commerce Clause.

Even then, the Supreme Court briefly considered in dicta the extent of that power before clarifying that they did "not reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession of firearms'" by a convicted felon through the use of the Commerce Clause. *Id*. at FN 4. The Court thereafter refused to adopt a broad reading, which would criminalize all possession of firearms by felons, without explicit findings or a "clearer direction from Congress." *Id*. at 339. Nevertheless, the Court did conclude that legislative history provided "significant support" for the proposition that Congress may have intended to criminalize all possession. *Id*. at 343. This analysis included the observation of a speech by Senator Long, the proponent of the law, on the Senate Floor wherein Senator Long discussed "the evils that prompted his statute," which "included assassinations of public figures and threats to the operation of businesses significant enough in the aggregate to affect commerce." *Id*. at 345. "Such evils," the Supreme Court noted in *Bass*, "would be most thoroughly mitigated by forbidding every possession of any firearm by specified classes of especially risky people, regardless of whether the gun was possessed, received, or transported 'in commerce or affecting commerce.'" *Id*. By implication then, had Congress been more specific in its intent, all possession of firearms by a felon, both intrastate and interstate, very well could be criminalized under the Commerce Clause powers possessed by Congress.

But then, as now, Congress has not made those findings and has not pursued that goal. The statute requires the Government to prove as a jurisdictional element of the offense an interstate nexus. Then, as now, the Court should not "not reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession of firearms'" by a convicted felon. *Id.* at FN4. Simply stated, the statute itself demands that the Government establish an interstate nexus in the prosecution of a defendant under §922(g)(1).

For Defendant to now argue that Congress doesn't have the constitutional authority to regulate or criminalize "purely" intrastate possession of a firearm amounts to nothing more than a straw man argument. The Government is required to prove that the fact in question does not exist as a matter of statutory law and to establish jurisdiction. It is a matter of mere legal theory as to whether Congress could go beyond this, or whether Congress has been implicitly granted the power to act beyond this. But, Congress has not attempted to act pursuant to another power outside the Commerce Clause as it relates to §922(g)(1). Likewise, Congress has not attempted through the Commerce Clause to criminalize all possession of firearms by felons based on an aggregate effect on commerce. The statute requires an interstate nexus. Defendant's challenge, if reviewed by the Court, is factual, jurisdictional, and statutory in nature. It is not a constitutional challenge.

D. INTERSTATE NEXUS, THE SECOND AMENDMENT, AND THE TENTH AMENDMENT – SETTLED LAW IN THE FIFTH CIRCUIT

Here, the Grand Jury found probable cause to believe the four weapons possessed by Defendant on both August 29, 2014, and October 20, 2014, travelled through interstate

commerce before being possessed by Defendant. It is well settled law that this fact, if proven at trial, satisfies the requirement of establishing an interstate nexus; that requirement being present as an element in the statute because Congress has *chosen* to act pursuant to the Commerce Clause. The Fifth Circuit has been unequivocal on this issue.

In 2001, the Fifth Circuit considered facts nearly identical to those presented here. In *U.S. v. Daugherty*, the defendant Mitchell Ray Daugherty was convicted of possessing a firearm "in and affecting" interstate commerce after the weapon had travelled in interstate commerce. 264 F.3d 513, 514 (5th Cir. 2001). On appeal, among other challenges, Daugherty claimed that his case was "a classic example of a purely local offense." *Id.* at 518. The Court disagreed. The Court stated unequivocally that they "repeatedly have said that evidence similar to that presented in Daugherty's case suffices to maintain a §922(g)(1) conviction." *Id.*[4]

In *U.S. v. Darrington*, the Fifth Circuit once again held that where a weapon travels in interstate or foreign commerce, it satisfies the interstate nexus requirement. 351 F.3d 632 (5th Cir. 2003). Johnny Darrington was convicted pursuant to a conditional plea wherein he preserved his right to challenge the Constitutionality of §922(g)(1) based on a number of claims including: (i) a challenge that the Second Amendment precluded government regulation or criminalization of felons possessing a firearm; (ii) the failure to meet the interstate commerce requirement where the government's evidence was solely that the weapon travelled in interstate commerce; and (iii) that the statute violated the Tenth Amendment. *Id*. These challenges are similar to those made by

4 The Court cited to *U.S. v. Kuban*, 94 F.3d 971 (5th Cir. 1996) wherein a defendant's conviction for felon in possession of a firearm was affirmed "where the weapon was manufactured in Belgium and possessed in Texas; and to *U.S. v. Rawls*, 85 F.3d 240 (5th Cir. 1996) wherein a defendant's conviction for felon in possession of a firearm was affirmed where the weapons was manufactured in Massachusetts and possessed in Texas.

Defendant in this case.[5]

The Fifth Circuit was clear once more on the interstate nexus claim, and equally as pointed in their holdings on the other issues. First, the Fifth Circuit addressed the Second Amendment claim. "[I]t is clear that felons, infants, and those of unsound mind may be prohibited from possessing firearms." *Id.* at 634. "Section 922(g)(1) does not violate the Second Amendment." *Id.*

Second, the Fifth Circuit echoed the holding in *Daugherty* stating: "[a]s in the pending case, the interstate requirement was met in *Daugherty* because the gun travelled in interstate commerce." *Id.* citing *Daugherty* at 518.

Finally, the Fifth Circuit addressed the issue of the Tenth Amendment and was unequivocal about that issue as well. The statute, §922(g)(1), "is a valid exercise of the congressional authority to regulate interstate commerce," and further recognized "that 'The Tenth Amendment's reservation to the states of power not conferred on the federal government in no way inhibits the activities of the federal government in situations in which a power has been so conferred." *Id.* citing *Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998).

These issues raised by Defendant are settled law. The Fifth Circuit has made clear that §922(g)(1) does not violate the Second Amendment, does not violate the Tenth Amendment, and that the interstate nexus is satisfied when the weapon has travelled in interstate or foreign commerce.

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5 The challenges aren't identical because Defendant Kevin Massey, unlike *Darrington*, doesn't challenge the statute as written, but rather some hypothetical situation wherein the Government was attempting to regulate or criminalize "purely" intrastate possession without establishing in interstate nexus.

V. THE FACTS IN THIS CASE SUPPORT DENYING DEFENDANT'S SECOND MOTION TO DISMISS

The Grand Jury has found probable cause to believe, and the Government intends to prove at trial, that the weapons in Defendant Kevin Lyndell Massey's possession on August 29, 2014, and on October 20, 2014, travelled in interstate commerce before being possessed by Defendant. Pursuant to Fifth Circuit precedent this satisfies the interstate nexus requirement. Indeed, the Fifth Circuit has gone as far to say that testimony that the firearm was manufactured in a state other than Texas and thereafter possessed in Texas without more is sufficient to uphold a jury's finding of an interstate nexus. See generally *U.S. v. Privett*, 68 F.3d 101 (5th Cir. 1995).

In this case, however, the facts go far beyond that which is sufficient to prove an interstate nexus; the sufficiency being met by a showing of interstate travel by the firearms. While the Government does not need to prove anything beyond the fact that the weapons in Defendant's possession were manufactured somewhere other than the state of Texas, it is worth noting where and in what activity Defendant possessed those weapons.

The Court has heard at the prior evidentiary hearing on Defendant's first motion to dismiss and Defendant's motion to suppress that Defendant was on or near the international border between the United States and Mexico. This border is formed by the Rio Grande River. The weapons in Defendant's possession were being used to deter immigrants from illegally entering this country across the Rio Grande River into the United States. Interstate commerce includes "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or *persons* or things in interstate commerce, even though the threat may only come from intrastate activity," and "those activities having a substantial relation to interstate

commerce." *U.S. v. Morrison*, 529 U.S. 598, 609 (2000); (Emphasis added). Defendant was directly affecting persons in interstate commerce and the use of channels of interstate commerce. While this commerce may be illegal, it is commerce nonetheless.

Moreover, Defendant had a separate firearm in his possession in a hotel he was residing in.[6] Unless Defendant Massey owned the hotel in which he was residing, he was quite literally possessing a firearm in commerce as he was presumably paying the hotel to stay there.

Defendant has made no factual allegations to support the assertion that his possession of firearms was "purely" intrastate. To the contrary, probable cause has been found by the Grand Jury that the firearms in Defendant's possession travelled in interstate commerce. Moreover, the manner in which Defendant possessed those firearms creates a separate and distinct, though quite unnecessary, factual basis to support the argument that Defendant possessed the firearms in and affecting interstate commerce outside of his possession of firearms that had travelled in interstate or foreign commerce. For the foregoing reasons, Defendant's motion to dismiss should be denied.

VI. Other Issues Not Addressed in Defendant's Motion – Border Patrol's Authority

On August 24, 2015, the Court held a status hearing on this case in which there was mixed discussion relating to jurisdiction. Defendant was not clear about the issues he was challenging. Defendant has not elaborated, or for that matter even touched upon, those issues in

6 At the status hearing on August 24, 2015, there was a brief discussion relating to where the Defendant lived while he was in Brownsville. The Court, as observed in its Memorandum Opinion and Order on Defendant's Motion to Suppress, has already heard evidence that Defendant Massey resided at a local hotel. He did not reside on the border or at Sabal Palms.

Defendant's second motion to dismiss. It is the Government's contention that Defendant has not pursued those issues at this time since they were not included in Defendant's motion to dismiss and those issues should therefore not be considered by the Court.

Nevertheless, it might be helpful to briefly touch on any issues Defendant may have failed to raise. The evidence presented to the Court thus far outlines the basic facts of the offense committed in this case and the facts surrounding the offense. On August 29, 2014, Defendant Massey and two companions, Varner and Foerster, were patrolling the international border between the United States and Mexico. They were in possession of firearms. Defendant Massey was observed by federal agents in possession of long rifle prior to any detention. A firearm was discharged by a Border Patrol agent after coming in contact with Foerster, who was armed. Following the discharge of this weapon, all individuals in the area were asked to remain and were disarmed. Defendant Kevin Massey voluntarily surrendered a pistol he also had in his possession. These facts have already been heard and ruled on in an evidentiary hearing on Defendant's motion to suppress.

At the August 24, 2015, status hearing Defendant Massey alluded to the power of Border Patrol to make arrests or detain individuals. This issue has not been pursued by Defendant in Defendant's motion to dismiss indictment, presumably because of the clarity of the law. Title 8 U.S.C. §1357 contains the "powers of immigration officers and employees." Pursuant to §1357(a), Border Patrol agents have the power to (1) "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;" (2) "to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of law…;" (3) "to board or search alien vessels;" (4) "to make arrests for felonies which have been

committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens;" **and (5) "to make arrests" - -**

> **(a) "For any offense against the United States, if the offense is committed in the officer's or employee's presence, or"**
>
> **(b) "For any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,"**

"if the officer or employee is performing duties relating to enforcement of the immigration laws at the time of the arrest and if there is likelihood of the person escaping before a warrant can be obtained for his arrest."

After the shots were fired the situation was dynamic. Border Patrol Agent Cantu was keeping the area safe, keeping the individuals safe, and investigating a potential felony committed in his presence. He did not know who fired the shots, why they fired the shots, or if a felony had been committed. At or near the time of the incident Agent Cantu and the other Border Patrol agents were in pursuit of suspected illegal alien activity in the area. They were performing duties related to the enforcement of immigration. Finally, local law enforcement and FBI agents were immediately contacted to respond to the area while it was being secured. None of the actions taken by Border Patrol exceeded their authority under federal law. It should be noted once more that Defendant Kevin Massey was observed in possession of a long rifle prior to any investigation relating to either the shooting or the fact that he is a felon who was in possession of a firearm.

Finally, the Court has already ruled on this issue in the Court's Memorandum Opinion

and Order pertaining to Defendant's First Motion to Dismiss. Defendant was not arrested at that time, as the Court held in its Memorandum Opinion and Order dated June 5, 2015. Defendant was detained pending an investigation. The factual issues surrounding Defendant's arrest and detention have already been ruled on by the Court.

VII. THE COURT'S PRIOR RULINGS ADDRESS ANY OTHER ISSUE RAISED IN DEFENDANT'S SECOND MOTION TO DISMISS

The Court, in its Memorandum Opinion and Order on Defendant's first motion to dismiss indictment, and in its Memorandum Opinion and Order on Defendant's motion to suppress, has already ruled on any other issues potentially raised by Defendant in his second motion to dismiss. Included in those opinions and orders were rulings on the constitutionality of §922(g)(1) under the Second Amendment, the constitutionality of §922(g)(1) under the Equal Protection Clause, the constitutionality of §922(g)(1) under the Commerce Clause, and the facts surrounding the detention and arrest of Defendant.

VIII. CONCLUSION

Defendant challenges the government's power under the Second and Tenth Amendments of the United States Constitution to regulate or criminalize "purely" intrastate possession of a firearm by a felon. This issue is not ripe for consideration because Defendant has provided no facts sufficient to support the conclusion that his possession of the firearms was "purely" intrastate as required by the Local Rules and Fifth Circuit precedent. Similarly, though not identically, Defendant does not have standing to challenge Congress's authority to criminalize or

regulate "pure" intrastate possession because "purely" intrastate possession of a firearm and the federal government's powers therein are not at issue in this case. That matter is not in controversy. The legal theory postulated by Defendant is just that, a legal theory. Other legal theory supports the proposition that the federal government through an act of Congress may indeed have the authority to criminalize "purely" intrastate possession of a firearm by a felon should Congress make the requisite findings that it is necessary and proper to criminalize possession of a firearm by a felon to promote the general welfare of the American people, insure domestic tranquility, and establish justice. Nevertheless, Congress has not chosen to pursue that route. Instead, Congress has utilized the Commerce Clause power and has criminalized the possession of firearms that have travelled in interstate commerce by a felon. The Supreme Court in *Bass* recognized the possibility for Congress to regulate all possession, intrastate and interstate, but Congress has not yet gone that far and has limited federal government action to cases where the firearms travelled in interstate commerce or otherwise are in or affecting interstate commerce.

Because of this, the statutory structure of §922(g)(1) requires as a jurisdictional element of the offense that the Government prove an interstate nexus. Any challenge claiming Defendant possessed the firearms at issue "purely" intrastate is a statutory or jurisdictional fact based challenge to the Government's burden of proof; it is not a constitutional argument. The Grand Jury has found probable cause to believe, and the Government intends to prove at trial, that the firearms in Defendant's possession travelled in interstate commerce. Under well-established law, this is sufficient to establish an interstate nexus.

Defendant's motion to dismiss should be denied because the argument presented by

Defendant is not ripe for consideration, Defendant does not have standing to make the challenge he is making, and Defendant's claims are unsupported by the facts and law. The government respectfully requests the Court deny Defendant's second motion to dismiss indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of September, 2015, the notice of **Government's Response To Defendant Kevin Lyndel Massey's Second Opposed Motion to Dismiss Indictment** was served by Notification of Electronic Filing to Louis Sorola, counsel for Defendant Kevin Lyndel Massey.

/s/ Jason Corley
Jason Corley
Assistant United States Attorney