

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA

V.

Case No. B-14-876-1

KEVIN LYNDEL MASSEY,

DEFENDANT

**DEFENDANT KEVIN LYNDEL MASSEY'S FIRST SUPPLEMENT TO OPPOSED  
MOTION TO DISMISS INDICTMENT**

Defendant Kevin Lyndel Massey, through his undersigned counsel, files this supplement to the motion to dismiss the instant indictment and in support thereof, avers as follows:

**FACTUAL BACKGROUND**

1. Defendant asks the Court to consider the facts that were covered in the motion to dismiss, Document number 62 in this matter. The Criminal Complaint was based upon what is referred to as "possession of a Firearm by an individual having been convicted of a felony". In fact, the Affidavit cites 18 U.S.C. § 922 (g)(1), with the pertinent phrase being, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce". The word "has", as opposed to the word "had" was used in the statute. "Has" is the third person singular, present indicative, verb meaning active in the action just completed, where "had" is past tense and participle of the verb have, meaning in a previous situation. So, if one were the direct recipient, then the word "has" would be appropriate. However, if it were expansive, intended to include any firearm shipped in interstate commerce, then "had" would be the proper verb. The use of "had" would have meant to include any and all that "had" been so transported any time prior.

## INDICTMENT FAILS TO MEET STATUTE

2. The only charges against Defendant Massey, according to the Criminal Indictment, are a violation of 18 USC §922(g)(1). The pertinent part is as follows: (g) It shall be unlawful for any person - (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; 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.

3. First, "It shall be unlawful", Defendant Massey has no problem with that portion of the statute. Next, if that person "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Defendant assumes, for the sake of discussion, that the criterion has been met. So, now we move on to the third portion of the Statute.

4. It is unlawful "to ship or transport in interstate or foreign commerce". Defendant Massey did not ship or transport and he is not charged with shipping or transporting.

5. The next phrase is rather interesting. It is unlawful to "possess in or affecting commerce". "Possess" means "to occupy in person; to have in one's actual and physical control". So this must mean that you have in your control the firearm when you affect the commerce. The possession must be done while participating in or affecting that commerce.

6. It is important to note, that the governments' references to cases cited do not address Defendant Massey's claim. The Fifth Circuit stated Mitchell Daugherty appeals his conviction of violating 18 U.S.C. § 922(g)(1) (2001), which prohibits convicted felons from possessing firearms "in and affecting" interstate commerce. We affirm. *U.S. v. Daugherty*, 264 F.3d 513, 514 (C.A.5 (Tex.),2001). Nowhere does 18 U.S.C. § 922(g)(1), prohibit convicted felons from possessing firearms "in and affecting" interstate commerce. The statute says

possesses “in or affecting commerce.”

Johnny Darrington challenges the constitutionality of the felon in possession statute, 18 U.S.C. § 922(g)(1). *U.S. v. Darrington*, 351 F.3d 632, 633 (C.A.5 (Tex.),2003). Again, the statute in Defendant Massey’s case says possesses “in or affecting commerce.” The Courts have read the statute to make it a possession in violation of an “interstate” commerce statute.

Records on *United States v. Joseph Leland Everist*, 368 F.3d 517, are sealed at the District Court and Appeal Court levels so Defendant Massey can only guess on his conclusions for the decision.

7. Finally in 18 U.S.C. § 922(g)(1), it is unlawful "to receive any firearm or ammunition which has been shipped or transported in interstate commerce." Well, that last one surely must be the direct recipient, the addressee in order to "receive", as opposed to "possess". For if that were the case, the statute would read, "to possess any firearm or ammunition which had been shipped or transported in interstate commerce."

8. The indictment facing Defendant Massey states “did knowingly possess in and affecting interstate commerce a firearm”. Then the indictment goes on to state “said firearm “having” been shipped in interstate commerce”. “Having” means that which is had or possessed.

9. The indictment does not match the language of the statute. “Did knowingly possess in and affecting interstate commerce a firearm” should not be read with “said firearm having been shipped in interstate commerce” because the latter refers to “receiving” a firearm not “possessing” a firearm. 18 USC §922(g)(1) states “possess in or affecting commerce”.

10. 18 USC §921 states that "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the

United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. United States Code Chapter 44: Firearms - does not define “commerce.”

### UNCONSTITUTIONALITY

11. 18 USC §927 states that “no provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.”

12. 18 USC §922(g) states it is unlawful "to possess in or affecting commerce". The statute makes it clear that the possession has to be "in or affecting commerce". One would have to be involved in commerce, or doing something that affected commerce, to satisfy this provision. The relationship would have to be direct. In *U.S. v. Lopez* the Supreme Court addresses commerce as being a commercial activity. *U.S. v. Lopez* 115 S.Ct. 1624 at 1625. Simply because the firearm was transported, in commerce, at some prior or subsequent date, does not affect the person that possesses a firearm totally unrelated to the commercial aspect of its transportation.

13. As applied to Defendant Massey, the statute would be unconstitutional because Congress could not impose such a restriction on commerce as it is applied specifically to Massey.

### EQUAL PROTECTION CLAUSE

14. If we consider the implications of the law 922(g), if you live in a state that manufactures a firearm, then you can possess it, as it has not been involved in interstate

commerce. However, if you have ammunition that was manufactured in another state, then you are guilty because of the ammunition. If you live in a state that manufactures both weapons and ammunition, you can possess those "firearms" and ammunition. However, if you live in a state that manufactures one, the other, or neither, then you may have but one, or none. That seems to give preference to one state over another.

15. Further, this absolutely defies the concept of equal justice; it would defy the concept of Article IV, § 2, which states, "The Citizens of each State shall be entitled to all of the Privileges and Immunities of the Citizens of the several States." It would mean that if one moved to another state, with what was legal, from the federal standpoint, in the state from which he began, he would be a criminal in the other state.

**WHEREFORE**, Massey is charged with possessing a firearm which he kept for self-defense and for no other purpose, nefarious or otherwise. 18 U.S.C. § 922(g), a statute bearing only a tenuous relationship with the interstate commerce power upon which it rests, purports to take away from Massey his right to bear arms in self-defense – a fundamental right guaranteed by the Second Amendment – in violation of that amendment, the Fifth Amendment's Due Process clause, and the Due Process clause's Equal Protection component. Since 18 U.S.C. § 922(g) is therefore unconstitutional, Massey asks that this Court dismiss the instant indictment.

Signed: April 19, 2015

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Louis S. Sorola  
Texas State Bar Number: 00794990  
Fed. I.D. 19533  
1999 W. Jefferson  
Brownsville, Texas 78520  
Telephone: (956) 504-2911  
Fax: (956) 544-7766

Attorney for the Defendant,  
Kevin Lyndel Massey

**CERTIFICATE OF SERVICE**

I certify that a true and exact copy of the Defendant Kevin Lyndel Massey's Supplement to Motion to Dismiss Indictment was electronically sent to William Hagan, Assistant United States Attorney on the 19th day of April, 2015.

\_\_\_\_\_/s/\_\_\_\_\_  
Louis S. Sorola

**CERTIFICATE OF CONFERENCE**

I certify that I conferred with Mr. William Hagan, Assistant United States Attorney on the 2<sup>nd</sup> day of February, 2015 and he is opposed to the Motion to Dismiss.

\_\_\_\_\_/s/\_\_\_\_\_  
Louis S. Sorola