UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA *
*
v. * Criminal Number 2007-64-B-W
*
ANDREW PORTER *

DEFENDANT'S MOTION FOR
DOWNWARD DEPARTURE AND
INCORPORATED MEMORANDUM

NOW COMES the Defendant, by and through counsel, and moves this Honorable Court to grant a downward departure from the otherwise applicable guideline range. This motion is premised upon two independent bases, U.S.S.G. § 2M5.2 and § 5K2.0. The Defendant urges for the following reasons that either basis independently supports this departure request, and, alternatively, that both bases considered together support this departure request.

Section 2M5.2 as applicable here provides for a base offense level of 26 in that more than 10 weapons were involved. See U.S.S.G. § 2M5.2(a)1. In 2001, the base offense level of § 2M5.2 was increased from 22 to 26. At 22, the offense level "assume[d] that the offense conduct [exportation of in excess of 10 "non-fully automatic small arms"] was harmful or had the potential to be harmful to a security or foreign policy interest of the United States." Guideline Amendment 337. The reason cited for the increase in base offense level, however, from 22 to 26, was to increase the penalties associated with "importation and exportation of nuclear, chemical and biological weapons, materials or technologies . . . ." Id. 633.

> [T]he amendment responds to . . . a sense of Congress that guideline penalties are inadequate for certain offenses involving the importation and exportation of nuclear, chemical, and biological weapons, materials or technologies by providing a four level increase for those offenses in subsection (a)(1) of . . . 2M5.2. This increase serves to make the penalty

1 But for the number of weapons involved, the guns otherwise qualify as "non-fully automatic small arms." Had fewer guns been involved the Defendant would have qualified for a base offense level 14. U.S.S.G. § 2M5.2(a)(2).

structure for those offenses proportional to other national security guidelines in Chapter Two, Part M.

Id.

The Sentencing Commission cited no empirical data or national experience justifying or rationalizing the increase in base offense level applicable to ten or more "non-fully automatic small arms." Hence, there appears to be no nexus between the base offense level increase and "empirical data and national experience" relating to ten or more "non-fully automatic small arms."

At the outset, the United States Sentencing Commission developed Guidelines offense values using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports. Kimbrough v. United States, 128 S.Ct. 558, __ (2007), see also USSG § 1A1.1, Introduction, Comment 3. Because the Guidelines after United States v. Booker, 543 U.S. 220 (2005) are now advisory, primary guidance for sentencing is now found in 18 U.S.C. § 3553(a). Kimbrough, 128 S.Ct. at __. Among the factors to be considered in § 3553(a) is "any pertinent policy statement" issued by the Sentencing Commission2 pursuant to its statutory authority. 18 U.S.C. § 3553(a)(5).

The sentencing court in Kimbrough felt that the 100:1 crack to powder ratio for guideline offense levels did not comport with the § 3553(a) sentencing objectives. The Kimbrough sentencing court disregarded the ratio embodied with the guideline offense levels. Kimbrough, 128 S.Ct. at __. In so far as the Sentencing Commission did not adopt the crack cocaine base offense levels by having taken into account "empirical data and national experience" it fell within the Court's discretion to conclude that the crack cocaine offense levels yielded sentences which were greater than necessary to achieve the 3553(a) objectives. Id.

Here, too, this case presents in a similar posture. The only guidance offered by the Sentencing Commission to understand the increase in base offense levels from 22 to 26 was reference to concern over "importation and exportation of nuclear, chemical and biological weapons, materials or technologies . . . ." In so far as the amendment to § 2M5.2 made the penalties proportional to other national security guidelines in Chapter Two, Part

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2 Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." Kimbrough, 128 S.Ct. at __ (quoting United States v. Pruitt, 502 F.3d 1154, 1171

M, those provisions all deal with recent issues of national experience. See §§ 2M5.3 (Supporting Foreign Terrorists), 2M6.1(Unlawful Activity involving Nuclear, Chemical and Biological Weapons), 2M6.2 (Atomic Energy Violations). In light of the national experience gained by the events of Sept. 11, 2001, it comes as no surprise that the Commission would specifically address nuclear, chemical, biological and other weapons of mass destruction through Guideline amendments. However, the Commission cited to no empirical data or other national experience to justify the base offense level increase from 22 to 26 as applicable to ten or more non-fully automatic small arms.

The Application Note to § 2M5.2 indicates that to determine the sentence within the applicable guideline range the court may consider several factors including degree to which the offense threatened a security or foreign policy interest of the Government, the volume of commerce involved, the extent of planning or sophistication and whether there were multiple occurrences. USSG § 2M5.2, Application Note 2. These factors, however, are referenced by the Commission as relevant to a determination of where within the applicable guideline range to sentence. The departure question presented here, however, is not where within the range to sentence but whether the range is properly supported by "empirical data or national experience" so that the established offense level is properly reflective of § 3553(a) concerns and not greater than necessary. See Kimbrough, 128 S.Ct. at __.

It may be convenient to reference such factors as the volume of commerce involved, the extent of planning or sophistication and whether there were multiple occurrences to decide the departure issue. These same factors, however, were relevant to a determination of where to sentence within the range when the range was set by the prior offense level of 22. Put another way, since these factors assisted the Court in determining a sentence affected by a base offense level of 22 they should not be used by the Court to deny the departure from 26 to 22. This proves especially appropriate when there is no empirical data or national experience cited or referenced to support the guideline base offense level increase. Since an offense level of 22 "assume[d] that the offense conduct [involving ten or more "non-fully automatic small arms] was harmful or had the potential to be harmful to a security or foreign policy interest of the United States,3" the Court should

(10th Cir. 2007)(McConnell, J., concurring)).

3 USSG § 2M5.2, Application Note 1.

find that an offense level of 26 would yield a sentence greater than necessary to address § 3553(a) objectives.

As the sentencing court did in Kimbrough, 128 S.Ct. 558 (2007), so too can this Court reject the revised base offense level as not being the product of "empirical data and national experience" and thus not reflective of the § 3553(a) considerations. See id. at 575. This Court should conclude that the offense level of 26 for ten or more "non-fully automatic small arms" not involving nuclear, chemical and biological weapons, materials or technologies yields a sentence greater than necessary to accomplish § 3553 objectives.

USSG § 2M5.2, Application Note 1 further provides that:

> The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

The facts reveal here that a downward departure is appropriate. On several occasions the Defendant came into the US from New Brunswick, engaged another to purchase several handguns and then secreted the guns across the border to distribute them to one of a few individuals. The guns were sold to Canadian citizens for apparent non-militant use. The Defendant did not engage in any conduct which directly threatened the United States' security or foreign policy interests. While President Bush has declared this to be a time of war against terrorists and certain armed insurgents primarily operating out of Iraq and Afghanistan, there has never been any suggestion that our neighboring country Canada has any involvement with these factions.

A downward departure would be appropriate on the facts of this case. This presents one of the unusual cases where there is no direct evidence of any threat or compromise to the nation's security or foreign policy interests. It may be that the Government argues that gun control and amicable relations between the United States and Canada give rise to security and foreign policy concerns. It may further argue that those concerns were squarely implicated by this case. The Government must, however, do more. It must demonstrate that the offense harmed the United State's security or foreign policy interests or had the potential to do so.

There does not seem to be a factual predicate for an argument that the Defendant's

actions actually harmed the nation's security or foreign policy interests. If the Government argues that the offense had the potential to harm the nation's interests it must make a showing "with some teeth," and not make a case based upon speculation or attenuation. Moreover, to the extent that a level 22 assumed that an offense involving ten or more "non-fully automatic small arms" was harmful or had the potential to be harmful to a security or foreign policy interest of the United States, the Government should make some additional showing of harm to the nation's security or foreign policy interest to support a level 26 sentence.

As a further basis of departure, section 5K2.0(c), U.S.S.G., provides that: "The Court may depart from the applicable guideline range based upon a combination of two or more offender characteristics, none of which independently is sufficient to provide a basis for departure, only if (1) such offender characteristic or other circumstances, taken together, make the case an exceptional one, and (2) each such offender characteristic or other circumstance is (A) present to a substantial degree, and (B) identified in the guideline as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination whether a departure is warranted."

The Defendant offers that three discreet factors contributed to his situation here. First, he notes that his emotional condition during the period of his conduct was quite compromised as a result of having suffered three close family deaths, two immediately before he first commenced the criminal activity at issue. Second, the Defendant allowed his physical and emotional health to worsen by not having properly treated for his diabetes. Finally, the Defendant discontinued all criminal activity well before his apprehension.

In order to qualify under § 5K2.0(c) each of the asserted grounds must independently constitute a permissible ground for departure. Emotional condition is a permissible ground for departure under § 5K1.3. As noted in ¶ 27 of the PSR, the defendant's father died in 2001 of a heart attack. Indeed, it was the defendant that discovered his father's deceased body. The first person who the Defendant notified of his discovery was his grandfather. In the years following his father's death, the Defendant relied upon his grandfather more as he previously had relied upon his father for support. In September, 2005, the Defendant's grandfather suffered a fall which hospitalized him. Within a few days he had died of complications related to his injuries.

The Defendant had now lost the two men on whom he relied for emotional support and guidance. The Defendant's parents divorced when he was younger and the Defendant had up to then developed a mild relationship with his stepfather. It was the stepfather that the Defendant next turned to for guidance and support. Unfortunately, within about six weeks his stepfather, too, deceased. The Defendant lost all the men he used for guidance in his life.

Physical condition is a permissible departure ground under § 5K1.4. Immediately thereafter, the Defendant went into a depression and stopped treating his diabetes as is required. He stopped medicating and no longer addressed his increasing blood-sugar conditions. His blood-sugars had increased to the point that had he continued he was in jeopardy of serious medical complications, including the loss of his feet. His increased blood-sugars contributed to his inability to recognize his dire circumstances and the poor judgment he exercised. At the same time he disguised his emotional pain with his gambling pursuits. He used gambling as a mechanism to avoid the pains associated with the familial losses he suffered. Gambling was the defendant's attempt to control circumstances around him that were otherwise beyond his control. Unfortunately, the gambling, too, is uncontrollable.

After having engaged in the offense conduct at issue the Defendant came upon the realization that neither his physical nor emotion conditions were improving. He had distanced himself from his family and came to appreciate that his gambling and gun smuggling was not helping him to move forward in a productive manner. By February, 2007, the Defendant completely discontinued both gambling and gun smuggling. He started treating his diabetic condition. He secured a new job and his relations with his family improved as he removed the emotion barriers he allowed to separate them.

A Defendant's post-offense rehabilitation is a permissible departure ground. <u>See</u> United States v. Monteiro, 417 F.3d 208, 214 (1st Cir. 2005), <u>United States v. Sklar</u>, 920 F.2d 107 (1st Cir. 1990), <u>United States v. Craven</u>, 358 F.3d 11, 15 (1st Cir. 2004). While presentence rehabilitation is not generally a permissible ground for departure because it is a factor relevant to acceptance-of-responsibility determinations a departure may be appropriate in extraordinary circumstances. <u>Sklar</u>, 920 F.2d at 107, <u>Craven</u>, 358 F.3d 11, 15 (1st Cir. 2004), <u>see</u> <u>also</u> U.S.S.G. § 3E1.1, Application Note 1(g). "[A] defendant's presentence rehabilitative efforts and progress can be so significant, and can so far exceed

ordinary expectations, that they dwarf the scope of presentence rehabilitation contemplated by the sentencing commissioners when formulating § 3E1.1 Sklar, 920 F.2d at 107.

Without appearing to diminish the gravity and seriousness of the offense conduct here, the offender characteristics referenced above are present to such a substantial degree as to make this case exceptional. It was the confluence of the above factors that conspired to contribute to the poor judgment of the Defendant between 2005 and 2007. Ironically, it was the defendant's good judgment that caused his to discontinue his scheme when he did. It is worth noting that the Defendant did not discontinue because he was apprehended or because his apprehension was imminent.

Taking the departure ground authorized under § 2M5.2 and coupling it with the departure grounds under 2K2.0 a departure to a level less of 22 or less is appropriate.

WHEREFORE, the Defendant respectfully requests that this Honorable Court grant him a departure under U.S.S.G. §§ 2M5.2, 5K2.0 for the reasons offered above.

DATED: April 23, 2008

/s/ Jeffrey M. Silverstein

Jeffrey Silverstein, Esq.
Counsel for Andrew Porter

CERTIFICATE OF SERVICE

I, Jeffrey M. Silverstein, Esq., hereby certify that foregoing Defendant's Motion For Downward Departure and Incorporated Memorandum has been electronically sent to Asst. U. S. Atty. Joel Casey for the Office of the United States Attorney on this 23rd day of April, 2008.

/s/ Jeffrey M. Silverstein
Jeffrey M. Silverstein, Esq.,
Counsel for the Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

U S. DISTRICT COURT
BANGOR, MAINE
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BY__________
DEPUTY CLERK

UNITED STATES OF AMERICA)
)
v.) **Magistrate No.07-54-M**
)
Andrew PORTER)
Defendant)

MOTION FOR DETENTION

The United States moves for pretrial detention of the defendant, pursuant to 18 U.S.C. § 3142.

1. **Eligibility of Case**. This case is eligible for a detention order because the case involves (check all that apply):

__ Conditions requiring a temporary detention order (18 U.S.C. § 3142(d);

__ Crime of violence (18 U.S.C. § 3156) or an offense listed in 18 U.S.C. 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

__ Maximum sentence life imprisonment or death;

__ 10+ year drug offense;

__ Any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as defined in 18 U.S.C. 921), or any other dangerous weapon, or involves a failure to register under 18 U.S.C.2250.

__ Felony, with two prior convictions in above categories;

_X_ Serious risk defendant will flee;

__ Serious risk obstruction of justice.

2. **Reasons for Detention**.

(i) Temporary Detention. ____.

(Specify conditions requiring a temporary detention order (18 U.S.C. § 3142(d)) and how long a temporary detention period (not to exceed 10 days the United States seeks).

(ii) Other Than Temporary Detention. The court should detain the defendant because there are no conditions of release which will reasonably assure (check one or both):

X__ Defendant's appearance as required;

__ Safety of any other person and the community.

3. **Rebuttable Presumption**. The United States will not invoke the rebuttable presumption against the defendant under section 3142(e)that no condition or combination of conditions will reasonably assure the safety of any other person and the community. The presumption applies because (check one or more if applicable):

__ the defendant has been convicted in the past of a Federal offense that is:

__ (A) a crime of violence;

__ (B) an offense for which the maximum sentence is life imprisonment or death;

__ (C) an offense for which the maximum term of imprisonment of 10 years or more is prescribed in 21 U.S.C.§ 801 et seq., § 951 et seq., or 46 U.S.C. § 1901 et seq.; **OR**

__ (D) any felony if defendant has been convicted of two or more offenses described above in subparagraphs (A) through (C) above, or two or more State or local offenses that would have been offenses described in those subparagraphs if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; the offense described above was committed while the defendant was on release pending trial for a Federal, State or local offense; **AND**

__ a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment for the offense described above, whichever is later.

4. **Rebuttable Presumption**. The United States will not invoke the rebuttable presumption against the defendant under section 3142(e)that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community. The presumption applies because:

___ Probable cause to believe that the defendant committed a 10+ year drug offense (21 U.S.C. § 801 et seq., §951 et seq. , 46 U.S.C. App. 1901 et seq.) or firearms offense (18 U.S.C. §§ 924(c), 956(a) or 2332b or an offense involving a minor victim under Title 18 Sections 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423 or 2425.

6. **Date of Detention Hearing**. The United States requests the court to conduct the detention hearing,

__ At first appearance;

_X_ After continuance of _3_ days (not more than 3).

7. **Length of Detention Hearing**. The United States estimates that it will require _.5_ hour(s) on its case for detention.

8. **Other Matters**.

Title 18 United States Code, Section 3142(g) requires that the judicial officer, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, shall take into account the available information concerning:

(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled

substance, firearm, explosive, or destructive device. The instant offense involves aiding and abetting the fraudulent acquisition of eight firearms (handguns).

(2) The weight of the evidence against the person. In the instant case includes evidence provided by the person Defendant aided and abetting in the fraudulent purchases and a video of Defendant at the licensed firearms dealer and providing a large wad of cash to the person who signed the firearms application form.

(3) The history and characteristics of the person including:

- character
- family ties
- employment
- financial resources
- length of residence in the community
- community ties
- past conduct
- history relating to drug or alcohol abuse
- criminal history
- record concerning appearance at court proceedings
- whether at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of sentence for an offense;

The instant offense involves a defendant who is not a citizen of the United States, who is believed to be a citizen and resident of Canada and who is believed to be estranged from his wife.

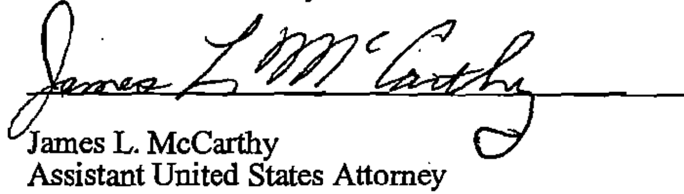
(4) The nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

In making that determination in the instant case, the seriousness and danger to the community is highlighted by the dissemination of eight dangerous handguns likely untraceable after leaving the hands of the named purchaser.

DATED in Bangor, Maine this 12th day of September, 2007.

Respectfully submitted,

PAULA D. SILSBY
United States Attorney

By: 

James L. McCarthy
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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BANGOR, MAINE
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UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 07-64-B-W**
	)	
ANDREW PORTER	)	

MOTION TO SEAL

NOW COMES the United States of America, by and through its attorneys, Paula D. Silsby, United States Attorney for the District of Maine, and Joel B. Casey, Assistant United States Attorney, and respectfully moves this Honorable Court to Seal the Agreement to Plead Guilty and Cooperate in this case, and this Motion, until the time of the defendant's sentencing hearing, so as to avoid disclosure of defendant's cooperation.

Dated at Bangor, Maine this 3rd day of January 2008.

Paula D. Silsby
United States Attorney

for JOEL B. CASEY
Assistant U.S. Attorney

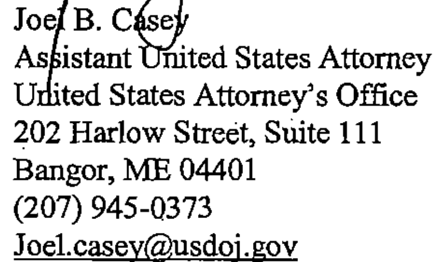
UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2008, I manually filled the original of the forgoing with the Court, and mailed by United States Postal Service, the Agreement to Plead Guilty and Cooperate and this Motion to Seal to the following:

Counsel for the Defendant
Jeff Silverstein, Esq.

Paula D. Silsby
United States Attorney



Joel B. Casey
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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

U.S. DISTRICT COURT
BANGOR, MAINE
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UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 07-64-B-W
	)	
ANDREW PORTER	)	

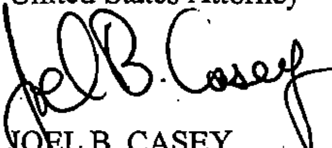
MOTION FOR DOWNWARD DEPARTURE AND TO SEAL

The United States moves pursuant to Title 18, United States Code, Section 3553 and United States Sentencing Commission Guideline Section 5K1.1 that the Court impose a sentence below that called for by the applicable statute and guideline in view of the substantial assistance which the defendant provided to the Government. In support of this motion, the United States submits a letter addressed to the Honorable John A. Woodcock describing the assistance provided by the defendant. The United States further requests that this motion, the letter addressed to the Court, and the corresponding docket entries be sealed until further order of this Court.

Dated at Bangor, Maine this 28th of April, 2008.

Respectfully submitted,

PAULA D. SILSBY
United States Attorney



JOEL B. CASEY
Assistant United States Attorney

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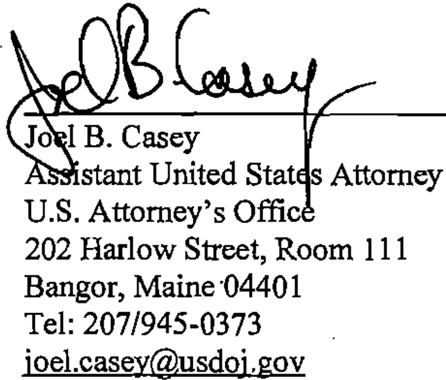
Names of Attachments, if any:

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2008, I filed the foregoing document with the Clerk of Court and mailed a copy of such filing(s) to:

Counsel for Andrew Porter
Jeff Silverstein, Esq.



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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 07-64-B-W**
	)	
ANDREW PORTER	)	

GOVERNMENT'S OBJECTION TO THE DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE

NOW COMES the United States of America, by and through Paula D. Silsby, United States Attorney for the District of Maine, and Joel B. Casey, Assistant United States Attorney, and objects to the defendant's motion for a downward departure under U.S.S.G. § 2M5.2 and U.S.S.G. § 5K2.0.

Background

As reflected in the Government's version of the offense, the defendant stands convicted of six serious felony offenses based upon a course of conduct from 2005 to 2007 during which he illegally obtained firearms in the United States, smuggled them into Canada, and sold them to individuals in that country.

The acquisition, possession and use of firearms is tightly controlled and closely monitored in Canada, as evidenced by the attached correspondence from Royal Canadian Mounted Police Superintendent Richard T. Noble. See Exhibit 1. The tight regulation of firearms in Canada has created a growing black market in that country. Id. Porter supplied that black market. A few of the handguns he smuggled into Canada have been recovered.

A Hi-Point .40 caliber pistol purchased by Kurt Porter at Johnson's True Value Hardware on December 16, 2006, was recovered 374 days later in Toronto, Ontario. The pistol was purchased as part of a multiple sale by Porter. The pistol was brandished during an altercation

outside a Toronto nightclub. It was seized by an RCMP member who responded to the scene. According to the RCMP, the individual from whom the gun was seized is a gang member who is considered a person of interest in a homicide investigation. See Exhibit 2.

Another Hi-Point .40 caliber pistol purchased by Carter at Johnson's True Value Hardware July 9, 2006 was recovered in St. John, New Brunswick on December 15, 2006. The pistol was purchased as part of a multiple sale. The pistol, together with one purchased by Laurence Sears, was seized in connection with a drug trafficking investigation. RCMP members also seized a pound of cocaine, a large amount of marihuana, $120,000 in Canadian currency, and several rifles. See Exhibit 3.

A Hi-Point .40 caliber pistol purchased by Lawrence Sears as part of an eight gun purchase at Maine Military Supply in Brewer, Maine on June 16, 2006 was used in a drug related double homicide in Ottawa, Ontario on June 21, 2007 and recovered a few days later. See Exhibit 4.

These are the types of people that were getting their hands on Porter's smuggled handguns.

Argument

A. The base offense level increase from 22 to 26 under U.S.S.G. §2M5.2 is explainable and should be applied in this case.

The defendant argues that the sentencing commission provided no justification for increasing the base offense level of U.S.S.G. §2M5.2 from 22 to 26 when it amended the provision in 2001. As such, he contends that the Court should apply base offense level 22, not base offense level 26. For the following reasons, the Court should reject the argument.

Prior to November 1, 1997, U.S.S.G. § 2M5.2(a) provided for a base offense level of 22 "if sophisticated weaponry was involved" and 14 otherwise. In promulgating Amendment 337, the Sentencing Commission removed the quoted phrase, and called for application of base offense level 22 generally, except "if the offense involved only non-fully automatic small arms, and the number of weapons did not exceed ten." Amendment 337. The amendment revised U.S.S.G. § 2M5.2 "to better distinguish the more and less serious forms of offense conduct covered." Id. In deleting the phrase "if sophisticated weaponry was involved" and providing for a lower base offense level "if the offense involved only non-fully automatic small arms, and the number of weapons did not exceed ten" in order to distinguish the more and less serious forms of offense conduct, the Commission implicitly rejected the position now pressed by the defendant. Specifically, the Commission rejected the notion that a higher base offense level should apply only if sophisticated weaponry such as chemical, biological or nuclear weapons are involved in the offense. Indeed, Amendment 337 recognizes that a "more serious form of offense conduct" can be committed where it involves more than 10 non-fully automatic small arms, as is the case here.

In promulgating Amendment 633 on November 1, 2001, the Sentencing Commission was largely concerned with reflecting the sense of Congress that offenses involving nuclear, chemical and biological weapons was not being adequately punished, however, it did not take the opportunity to second guess the conclusion that it had reached four years earlier, namely, the recognition that a "more serious form of offense conduct" can be committed where it involves more than 10 non-fully automatic small arms, as is the case here. See Amendment 337. The Sentencing Commission's decision to increase the base offense level of U.S.S.G. § 2M5.2(a) to

account for the seriousness associated with offenses involving nuclear, chemical and biological weapons, was also done with concern to keep those offenses proportional to other serious national security offenses, such as those involving more than ten semi-automatic handguns. See Amendment 633.

The defendant's argument concerning the increase of the base offense level under U.S.S.G. § 2M5.2(a) from 22 to 26 rests upon a non-existent conclusion by the Sentencing Commission that offenses involving nuclear, chemical and biological weapons are more serious than those involving the types and numbers of weapons he was exporting. The argument is undermined by Amendment 337 and its recognition that a "more serious form of offense conduct" can be committed where it involves more than 10 non-fully automatic small arms, as is the case here, and Amendment 633's expressed concern that U.S.S.G. § 2M5.2 provides for proportional punishment for an entire range of serious national security offenses. The defendant's argument also suggests that the seriousness of national security offenses turns upon the number of people that can potentially be harmed by a particular type of weaponry. In this regard, the defendant's position ignores a whole host of national security and foreign policy concerns that can potentially be generated by offense conduct such as his, as discussed below.

Accordingly, the Court should reject the defendant's arguments and apply base offense level 26.

B. A departure under U.S.S.G. § 2M5.2 application note 1 is not appropriate.

The defendant next argues that his presents "the unusual case where there is no direct evidence of any threat or compromise to the nations security or foreign policy interests" and, therefore, a departure is warranted under U.S.S.G. § 2M5.2, Application Note 1. See

Defendant's Motion for a Downward Departure at 4. In an attempt to place his burden for establishing a basis for a downward departure on the Government, he argues that "there does not seem to be a factual predicate for an argument that the defendant's actions actually harmed the nations security or foreign policy interests and little showing that it had the potential to do so. Id. at 4-5.

U.S.S.G. § 2M5.2 is entitled Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License, and it provides for a base offense level of 26, unless the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten. In this case, because the offense involved more than ten firearms, the base offense level is 26.

The application notes to U.S.S.G. § 2M5.2 provide, in relevant part:

> 1. ***
>
> The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. See Chapter Five, Part K (Departures).
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> 2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.

Thus, the guideline assumes that conduct involving the illegal exportation of more than ten semi-automatic firearms outside the United States is harmful, or has the *potential* to be harmful to the security or foreign policy interest of the United States. See U.S.S.G. § 2M5.2,

Application Note 1. It is only in the unusual case, where the conduct poses no such risk, that a downward departure is warranted. Id. Given the express assumption of the guideline and its Application Notes, it is the defendant's burden to prove by a preponderance of the evidence that his conduct did not harm or have the potential to harm the national security or foreign policy interests of the United States. See e.g., United States v. Derbes, 369 F.3d 579, 582 (1st Cir. 2004) ("Although the burden of justifying a downward departure is on the defendant, the government obviously has superior knowledge of what BOP permits."); United States v. Craven, 358 F.3d 11, 15 (1st Cir. 2004) ("The defendant bears the burden of proving that he is eligible for a downward departure."); United States v. Anders, 956 F.2d 907, 911 (9th Cir. 1992) ("The defendant bears the burden of proving the appropriateness of a downward departure."); United States v. Rutana, 932 F.2d 1155, 1159 (6th Cir.) ("[T]he burden of persuading the sentencing court that a downward departure is warranted rests with the defendant."), cert. denied, 502 U.S. 907(1991). The defendant's arguments, however, obfuscates this analysis in an attempt to shift the burden to the Government to prove that which U.S.S.G. §2M5.2 assumes. The Court should not require this of the Government, and let the burden rest with the defendant to prove by a preponderance of the evidence, that his is the unusual case warranting a downward departure.

Although it is the defendant's burden to prove, by a preponderance of the evidence, that he is the unusual case in which his violation of the Arms Export Control Act did not harm, or have the potential to harm, the national security or foreign policy interests of the United States, he offers not a shred of evidence. While the Government does not bear the burden of proving that which is assumed by U.S.S.G. § 2M5.2, it presents the Court with evidence that supports the assumption that the defendant has not overcome.

The Government's evidence in this regard is discussed below, however, the Court should first closely consider the faulty premise upon which the defendant bases his entire argument. The defendant suggests that a general impact on national security or foreign policy interests is insufficient to warrant application of base offense level 26. See Defendant's Motion for Downward Departure at 4-5. This is simply wrong. In United States v. Sero, 520 F.3d 187 (2nd Cir. 2008), in affirming the district court's refusal to downwardly depart on the basis of U.S.S.G. § 2M5.2, Application Note 1, the court endorsed the "consistent theme throughout the district court's comments that Sero's conduct posed a *general risk* to United States foreign policy." Id. at 192. The court rejected the defendant's argument that he was "entitled to a downward departure pursuant to the application note because his conduct was beneficial in that he was selling weapons to anti-terrorist groups in the Philippines and not to insurgents." Id. at 191-92. Thus, the unregulated exportation of firearms to friendly parties - whether it be Filipino antiterrorist groups or Canadian citizens - has the potential to harm U.S. foreign policy interests. An argument to the contrary ignores matters of comity between friendly nations and, here in particular, the respect that the U.S. owes for Canadian laws.

Therefore, in considering the defendant's motion, the Court should be mindful of matters of comity and the realities of the foreign policy and national security interests of the United States. In the absence of any evidence by the defendant, the evidence submitted by the Government demonstrates the particular realities of U.S. relations with Canada.

The illegal trafficking of firearms from the United States to Canada is a significant law enforcement problem. See Exhibit 1. The strict controls imposed by the Canadian Parliament upon the acquisition, possession and use of firearms, particularly handguns, has created a

growing black market for firearms in Canada. Id. Firearms that pass through this black market are recovered in connection with the investigation of drug offenses and violent crimes. Id. [1] Indeed, three of the firearms smuggled by the defendant into Canada were recovered under such circumstances. See Exhibits 2 - 4. Notwithstanding the close working relationship between U.S. and Canadian law enforcement, difficulties associated with stemming the tide of illegal firearms into Canada from the United States remains a problem between the two countries. See Exhibit 1.

Addressing the problem of illegal firearms trafficking has produced international agreements between Canada and the United States. On November 16, 2006, Former Attorney General Alberto Gonzalez and Stockwell Day, Canadian Minister of Public Safety and Emergency Preparedness, signed the "Memorandum of Understanding Between the Bureau of Alcohol, Tobacco, Firearms and Explosives of the United States of America and the Royal Canadian Mounted Police Regarding Accessing Forensic Firearms Data." See Exhibit 5. The agreement contains a recognition by the RCMP and the ATF "that mutual cooperation is an essential element in assisting criminal investigations in illicit cross border firearms trafficking and further related criminal investigations in both countries." Id. at 1. The ATF has also entered into a Memorandum of Understanding with the Ontario Provincial Police, Provincial Weapons Unit, ("OPP") that allows for OPP access to ATF firearm tracing services. See Exhibit 6. This MOU contains a recognition that the ATF

> is a law enforcement agency within the United States Department of Justice, dedicated to preventing terrorism, reducing violent crime and protecting the

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[1] The Court is well-familiar with the illegal drug smuggling that takes place between Canada and the United States. It also is apparent that firearms are "tools of the trade" for drug traffickers. Thus, illegally exported firearms that end up in the hands of Canadian drug dealers may be used in connection with drug smuggling activities that touch upon the United States.

> nation. In its efforts to enhance homeland security in the U.S., ATF works collaboratively and in partnership with international governments and law enforcement agencies in order to assist friendly nations and allies in the fight against international criminal organizations whose criminal enterprise pose a threat to the citizenry and global peace.

See Exhibit 6 at 1. A similar agreement was entered into with the RCMP. See Exhibit 7. Allowing RCMP access to ATF tracing services is a means by which the two countries to investigate firearms offenses and firearms trafficking offenses. Id. Canada is one of only nine countries in the world that have access to ATF firearms tracing capabilities. Id.

The U.S. State Department recognizes that arms trafficking from the United States to Canada is a significant law enforcement and foreign policy issue between the two countries. See Exhibit 8 at ¶5. The United States cooperates with Canada on a wide range of issues in the realm of border management and law enforcement and depends on this close cooperation and the support of the Canadian people and Canadian officials to keep the border safe. Id. The State Department recognizes that safe street and urban violence in Canada has prompted Canadian officials, such as the Ontario Premier and the Mayor of the City of Toronto, to publicly complain about the influx of guns from the United States into Canada. Id. at ¶6. The State Department also recognizes the concerns expressed by Superintendent Noble in his letter to the Court.[2] Actions by the United States to mitigate the flow of weapons into Canada is seen as a key signal of good faith on the part of the United States in cross border security. Id. at ¶7. Treating Canadian concerns seriously and taking action to stem the flow of weapons into Canada is important in leveraging support from Canada in the areas where the United States needs

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[2] The danger of further public embarrassment of the United States on the international stage is also relevant when considering whether the defendant's conduct had the potential of harming our foreign policy interests.

assistance. Id. at ¶8. As such, the State Department recognizes that arms trafficking into Canada from the United States has the potential to be harmful to the foreign policy interests of the United States. Id. at ¶9.

The views expressed by the U.S. Department of State concerning the foreign policy implications of illegal arms trafficking from the United States into Canada, while not controlling here, are particularly relevant. "Matters relating 'to the conduct of foreign relations. . .are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Regan v. Wald, 468 U.S. 222, 242 (1984) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)). See also United States v. Baez, 349 F.3d 90, 93 (2nd Cir. 2003) (judicial deference in context of sentencing assurances made by the Executive to a foreign nation prior to extradition); Consarc Corp. v. Iraqi Ministry, 27 F.3d 695, 701-02 (D.C.Cir. 1994) (judicial deference in the context of reviewing the decision of the Office of Foreign Asset Control ("OFAC") of the United States Department of Treasury to designate a particular entity a specially designated global terrorist and blocking all of its assets pursuant to the International Emergency Economic Powers Act); Holy Land Foundation for Relief and Development v. Ashcroft, 219 F. Supp. 2d 57, 67 (D.D.C. 2002) (same); Palestine Information Office v. Shultz, 853 F.2d 932, 934 (D.C. Cir. 1988) (judicial deference in context of State Department's recognition of foreign mission); American Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756, 773 n. 9 (E.D. Cal. 1989) (judicial deference in context of decision to grant temporary status to foreign nationals). Cf. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424

(2003) (citing letters from State Department explaining harm to foreign policy caused by state law). [3]

U.S.S.G. § 2M5.2, clearly calls upon the Court to examine whether the defendant's conduct presents the "unusual case" of illegal arms exportation that does not effect the foreign policy interests of the United States. The Government respectfully suggests, however, that the views expressed by the State Department - - and echoed by the Premier of Ontario, the Mayor of the City of Toronto, and RCMP Superintendent Noble - - should be given considerable weight by the Court in considering whether the "unusual case" is presented here.

The Government is not suggesting that the Court should accept the broad proposition that the actions of Andrew Porter resulted in eroding relations between the United States and Canada. On the other hand, determining whether his actions were harmful or had the *potential* to be harmful to a security or foreign policy interest of the United States requires the Court to consider the realities of U.S. relations with Canada and how the type of conduct engaged in by the defendant adversely affected or had the potential to adversely affect those relations. The defendant has failed to meet his burden of proving by a preponderance of the evidence that his is the unusual case where his conduct did not harm, nor have the potential to harm the foreign policy or national security interests of the United States.

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[3] While the facts of these cases are distinguishable from the case now before the Court, they all stand for the general proposition that, when it comes to matters of foreign policy, the Court should consider the views expressed by those in the Executive branch charged with carrying out our foreign relations.

B. U.S.S.G. §5K2.0(c)

The defendant argues that he should receive a downward departure under U.S.S.G. §5K2.0(c) based upon three factors: (1) his emotional condition at the time of the offense, see U.S.S.G. § 5H1.3, (2) his physical condition at the time of the offense, see 5H1.4, and (3) his post-offense rehabilitative efforts. The Court should reject the defendant's argument.

Both 5H1.3 and 5H1.4 are discouraged factors under the guidelines and should not be considered, unless that are presented to an extraordinary degree. See United States v. Jimenez-Beltre, 440 F.3d 514, 527 (1st Cir. 2006). Here, the defendant claims that emotions resulting from the deaths of two loved ones (the first when the defendant was 31 and the second when the defendant was 35) and his affliction with diabetes present emotional and physical considerations to an extraordinary degree. Notably, the claimed contribution of these factors to the defendant's "situation here", see Defendant's Motion for Downward Departure at 5, were not of sufficient significance for the defendant to report them to the U.S. Probation Office for inclusion in the pre-sentence report. See PSR at ¶¶27-31. In any event, other courts have rejected motions for downward departure based upon far more troubling facts.

For example, in United States v. McComb, 519 F.3d 1049, 1051 (10th Cir. 2007), the court affirmed the district court's denial of the defendant's motion for a downward departure based upon sections 5H1.3 and 5H1.4 where the defendant

> called four family members to testify on his behalf. Each witness discussed the stroke's effects on Mr. McComb, testifying that he was unable to think coherently; he had memory problems; his speech was slurred; the motor skills of the right side of his body were severely impaired; he had trouble performing simple tasks, such as shaving, dressing, or feeding himself; and, for purposes of Social Security, he had been deemed completely disabled. The witnesses also related that, by the time of sentencing, Mr. McComb had been drug-free for some time. Mr. McComb argued that the sum of these circumstances-suggesting his

vulnerability in a prison setting, his near-constant need for care, and the fact that he presented little risk of recidivism-augured in favor of a below-Guidelines' sentence.

See also United States v. Millet, 510 F.3d 668, 680 (7th Cir. 2007) (affirming denial of downward departure based on impairments caused by the defendant's Interferon treatments for Hepatitis C, familial circumstances, and depression). Here, during his adulthood, the defendant lost two family members who he was particularly close with, a circumstance that is far from extraordinary. Moreover, he lives with diabetes. While unfortunate, it is not extraordinary.

Finally, the defendant argues that his decision to stop gambling and gun smuggling before he was arrested represents so far exceeds ordinary expectations as to constitute extraordinary rehabilitative efforts. Downward departures based upon such efforts are likely to "be few and far between." United States v. Sklar, 920 F.2d 107, 116 (1st Cir. 1990). In United States v. Rushby, 936 F.2d 41, 42-43 (1991), the court concluded that a defendant was not entitled to a downward departure for presentence rehabilitation based on proof that he had enrolled in a substance abuse treatment program, was attending to his family responsibilities, and was holding gainful employment. In Sklar,supra, the court set aside a downward departure grounded on presentence rehabilitation where the defendant entered a halfway house, remained substance-free, and found employment. Here, the defendant claims he stopped gambling and smuggling guns by February 2007.[4] There is no indication that he received counseling for his gambling habit prior to or since his arrest. The timing of his claimed decision to stop gambling and gun running in February 2007 is curious, however. This would have been after co-conspirator Larry Sears was questioned in June 2006 by ATF and after co-conspirator Kurt Carter was questioned by ATF and ICE in February 2007. The defendant bears the burden of

[4] As reflected in the prosecution version, Porter participated in a gun smuggling event on February 9, 2007.

establishing a basis for the departure he seeks. The facts presented do not, however, support a departure based upon extraordinary rehabilitative efforts, emotional condition, or physical condition.

CONCLUSION

Based on the foregoing, the Court should deny the defendant's motion for a downward departure.

Respectfully submitted,

PAULA D. SILSBY
United States Attorney

BY: /s/ Joel B. Casey

JOEL B. CASEY
Assistant United States Attorney

Date: April 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following

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