

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-30053-WDS
)	
MICHAEL OWENS,)	
)	
Defendant.)	

DEFENDANT’S SENTENCING MEMORANDUM

I. Introduction

Mike Owens has lived the American dream. Raised in East St. Louis, Illinois, Mike worked his way through Washington University as a laborer at Granite City Steel, and ultimately wound up in an executive position with Madison County Transit.

Prior to being honorably discharged from the Army in 1976, Mike received a commendation letter which indicated that he “exhibited initiative and leadership in the performance of duties which were not routinely his responsibility.”

Prior to this offense, Mike worked at Madison County Transit. Paragraph 51 of the Presentence Investigation Report sums up Mike:

“The executive director advised that the defendant was a well respected and much missed member of the grants and procurement staff. His dependability and reliability is well documented throughout his more than eight years with ACT. The executive director went on to state that the defendant has the ability to work with a variety of people which was vital to his success in complying with the regulations associated with state and federally funded grants. Understanding the needs of the agency and working within the boundaries of numerous funding sources was one of his established skills. Losing his experience and knowledge of the grant and procurement guidelines, skill in working with people, and sense of commitment to his professional role was truly a loss to ACT. The defendant was terminated from his employment on August 25, 2005, after pleading guilty to multiple felony charges regarding the possession of a firearm and silencer.”

In short, Mike has made something of himself. He is an example that through hard work, discipline and honesty anything is possible. After pleading guilty—and knowing that he had lost his job—Mike spoke to students from an East St. Louis elementary school who had gone to federal court to observe the proceedings.

The students were all African-Americans. No doubt they looked at a middle aged, middle class white man and thought that they had nothing in common with him. When Mike told the students that he grew up in East St. Louis an automatic connection was made. Mike told the students that he didn't grow up "rich," and that anything he had was earned through hard work and sacrifice. Then, with his voice breaking, Mike told the students that everything he had worked so hard for was going to be taken away. "And for what" he asked? For one thoughtless act of stupidity. He told the students he was standing before them unemployed for the first time in his life, but that he'd be o.k. because he would keep working. Mike told the students that even "old guys like me make mistakes." By the time Mike finished speaking, the students were riveted to what was being said. He connected with them.

The facts of this case are simple. In October of 2004 Mike bought a machine gun and silencer from Mark Howard for \$350.00. On February 9, 2005 Mike turned the machine gun and silencer over to agents of the Alcohol Tobacco and Firearms. Mike *never* fired the firearm, and actually has not fired a firearm for nearly 20 years.

II. Downward Departures

A. Booker

Rather than doing away with Guideline sentences, *Booker* has allowed District Court judges more latitude than they previously enjoyed. *Booker* does *not* stand for the proposition that a defense attorney can ask for any sentence under the sun. All sentences begin with an analysis of the Guideline range and whether or not there is any latitude that can or should be given to a particular Defendant. *Booker* allows individuals like Mike to benefit from this latitude.

B. General Principles

18 U.S.C. § 3553(b) states in part that a District Court may impose a sentence outside of the applicable Guidelines range when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the sentencing court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Guidelines." In other words, a district court must determine whether the defendant's circumstances are sufficiently distinguished from the "heartland" of typical cases to which the Commission intended the Guidelines to apply. See *Koon v. United States*, 518 U.S. 81, 94, 116 S. Ct. 2035 (1996).

Here, both 5K2.0 and 5K2.20 take into consideration defendants like Mike, and in combination with *Booker* allow a sentencing court to give a "break" to a Defendant.

C. Aberrant Behavior

Section 5K2.20 stands for the proposition that inherently good people like Mike who for a short period in their otherwise law-abiding, stellar lives make mistakes are allowed a "break" so that the sentencing court can take into account the Defendant's entire life before rendering a sentence.

Common sense mandates that Mike's offense conduct be classified as aberrant behavior. Until October of 2004, Mike lived an exemplary life which was filled with hard work and doing good deeds for others. He has maintained gainful employment throughout his adult life, and has no prior convictions as evidenced by the PSR's assessment of zero criminal history points. This reflects the lowest likelihood of recidivism.

The policy statement at § 5K2.20 sets forth the parameters of conduct and criminal history which the Sentencing Commission believes appropriately may warrant a downward departure on the basis of "aberrant behavior."¹ It provides:

¹U.S.S.G., Amendment 603, Appendix C (November 1, 2000).

A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if 1) the offense involved serious bodily injury or death; 2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; 3) the instant offense of conviction is a serious drug trafficking offense; 4) the defendant has more than one criminal history point...; or 5) the defendant has a prior federal, or state, felony conviction...

An example of pre-Amendment 603 decisions comes from the Eighth Circuit which had previously allowed departure for aberrant behavior only where the offense involved a single act that was spontaneous and seemingly thoughtless. The Court, in *United States v. Garlich*, 951 F.2d 161 (8th Circ. 1991), interpreting existing guideline language, held that a fraud spanning one year and several transactions was not a "single act of aberrant behavior."²

Prior to Amendment 603, the argument against a downward departure for aberrant behavior would have been "Mike's behavior can't be considered aberrant because by having the firearm from October of 2004 until February of 2005 it occurred over a period of several months." However, in adopting § 5K2.20 the Commission resolved a circuit split regarding whether a "single act of aberrant behavior" includes multiple acts that occurred over a period of time. The Commission concluded that the former language in Chapter One was "overly restrictive and may preclude departures for aberrant behavior in circumstances in which such a departure might be warranted."³

The only real "hurdle" regarding whether Mike is eligible for a downward departure based on aberrant behavior is the fact that this offense involves a firearm, because Section 5K2.20(2) precludes an aberrant behavior departure if "the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon." The undersigned would state that this subsection is not applicable because Mike never discharged the firearm he possessed and

²The prior, original language was contained in the Introduction to the Guidelines Manual as follows, "The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." U.S.S.G. Chap. One, Part A, Subpart 4(d) (1987).

³Amendment 603, Reason for Amendment, at 1218-1219.

similarly did not “use” the firearm pursuant to advisory Guideline Section 1B1.1(I) which defines “*otherwise used*” as:

“Otherwise used” with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.”

Because Mike did not possess a dangerous weapon or discharge a firearm he does not fall within the policy statement’s restriction precluding departure. See comment., (n.1).

Application note 1 defines “aberrant behavior” as a single criminal occurrence or single criminal transaction that A) was committed without significant planning; B) was of limited duration; and C) represents a marked deviation by the defendant from an otherwise law-abiding life.

Discussing each of these requirements seriatim, there is no doubt that the offense was a single criminal transaction, that it was committed without significant planning or that it represents a marked deviation by Mike from an otherwise law-abiding life.

The sole issue for purposes of whether or not Mike meets the requirements of aberrant behavior is whether or not this Honorable Court determines that the offense was of limited duration. The offense began and ended when Mike purchased the firearm. The duration of the offense was perhaps one minute or less. Limited duration does *not* mean the time from when he purchased the firearm until the time Mike turned it over to the ATF.

A case which is on point, and decided on January 26, 2005, *U.S.A. v. Myers*, 353 F. Supp. 1026 (S.D. Iowa) involved a Defendant who pleaded guilty to unlawful possession of an illegal firearm. The Defendant in *Myers* had shortened the length of a shotgun and retained possession for at least a decade. Here, Mike purchased the firearm in October of 2004 took it home and voluntarily gave it to the ATF in February of 2005.

Mike committed one act. In *U.S.A. v. Locke* (2003 U.S. Dist. LEXIS 17510), the Seventh Circuit concluded that even though Defendant held stolen money for a week, his conduct constituted aberrant behavior under 5K2.20 because Defendant only committed one

criminal act. The Court did not preclude the application of 5K2.20 based on the length of time the Defendant “held” the stolen money. Also see *U.S.A. v. Maese* (2005 U.S. App. LEXIS 17832, 10th Cir.)

A Defendant would not meet the *limited duration* prong of 5K2.20 if multiple acts were committed over a period of time. The crime of embezzlement is a good example. If a bank teller embezzles one time and is not discovered for six months, his conduct would be of limited duration since it was one act. However, if a bank teller embezzles 50 times from October, 2004 until February of 2005 this would *not* be of limited duration because the embezzlement was committed on multiple occasions.

There is no evidence that Mike engaged in any planning, let alone significant planning, prior to committing the offense. Mr. Howard offered the firearm to Mike and it was purchased that same day. This conduct was the first serious criminal act in which Mike has engaged. He is a responsible person and well thought of by his co-workers, family and friends. His conduct clearly meets the characteristics the Commission has identified as aberrant and as such Mike’s sentence should be reduced.

As was stated above, Section 5K2.20 stands for the proposition that inherently good people like Mike who for a short period in their otherwise law-abiding, stellar lives make mistakes are allowed a “break” so that the sentencing court can take into account the Defendant’s entire life before rendering a sentence.

D. Heartland Departure

Requests under §5K2.0 have always been the “catch-all” for downward departures. Mike’s case is no exception. If this Honorable Court decides to depart downward to a Zone C or Zone D sentence based on aberrant behavior, 5K2.0 can be employed for this Honorable Court to depart downward even further.

In his Motion for Downward Departure Pursuant to §5K2.0 Mike mentions several reasons why this Honorable Court should determine that his case falls outside of the heartland type of cases and should depart downward.

1. Collection Exception

If the firearm Mike purchased had been used for sporting or collection, Guideline Section 2K2.1(b)(2) would apply and his base offense level would have been a 6 as opposed to an 18. He would be eligible for probation.

However, because of the type of firearm Mike possessed §2K2.1(b)(2) is not applicable, and he would not be eligible to receive the benefit of the “collection exception.” It is the undersigned’s position that for purposes of heartland type cases and *Booker*, some consideration should be given to Mike because he otherwise would meet all of the provisions of Application Note 7 which states:

“Under subsection “(b)(2), “lawful sporting purposes or collection” as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant’s criminal history . . . Note that where the base offense level is determined under subsections (a)(1)-(a)(5), subsection (b)(2) is not applicable.”

Mike possessed *one* firearm which was loaded with *normal* ammunition. The firearm was located in a *safe* area locked in a case. The firearm was *never* used and Mike has *no* criminal history. However, because his base offense level is determined under subsection (a)(5) Mike is unable to reap *any* benefit from this section.

Defendant is not trying to argue that his base offense level should be 6. Rather, his argument goes to the issue of whether or not he should receive some benefit for his actions, because it appears that the Sentencing Commission did not envision someone like Mike when drafting Note 7.

Mike’s request for a downward departure for this collection exception is based on “fairness.” The issue of fairness where the offense level substantially overstates the seriousness of the offense is not unheard of. Application Note 19(C) to §2B1.1 allows a sentencing court to make that determination. Why can’t that logic be applied to Mike’s case? Surely, Congress and the Sentencing Commission did not envision this type of case,

and the best way to deal with this situation is to apply the same logic that the Commission used in drafting Application Note 19(C) to §2B1.1.

2. *Family Circumstances*

Sentencing *always* involves hardships on loved ones. That's part of punishment. Family circumstances arguments are always made at sentencing in one way or another. Mike has an elderly Mom who was recently diagnosed with Alzheimers.

A "benefit" of Mike losing his job because of his conviction herein is that he has been able to help his Mom a lot more than he otherwise would have. Mike's concern is that if he is incarcerated his other family members won't be able to help his Mom, and as such the only alternative would be for his Mom to go into a nursing home. This is something Mike desperately wants to avoid and hopefully, this Honorable Court can depart downward for this as well.

III. *Statutory Analysis*

Mike is requesting a departure from a total offense level of 15 to any sentence this Honorable Court deems is appropriate. The undersigned is not recommending any specific offense level because he believes that *Booker* allows this Honorable Court to fashion whatever sentence is appropriate. The undersigned is **NOT** requesting straight probation, because a crime has been committed and some sort of punishment is warranted. The undersigned is recommending a sentence somewhere between probation and incarceration, with a provision that Mike perform community service. Sections 5K2.20 and 5K2.0 as well as *Booker allow* this Honorable Court to sentence Mike as it feels just and within the law. As such a sentence between probation and incarceration, with a provision that Mike perform community service meets all of the requirements set out by Congress when the Guidelines were enacted.

Booker breathed new life into statutory analysis of sentences. Obviously, 28 U.S.C. 994 (k) and 18 U.S.C. 3553 (a) are the two statutes this Honorable Court must rely upon in imposing sentence on a particular Defendant, and this section will discuss the elements of

these statutes to show why a departure to between probation and incarceration, with a provision that Mike perform community service satisfies the statutory requirements of sentencing.

a. 28 U.S.C. 994 (k)

Simply stated, 28 U.S.C. 994 (k) removes the sympathy factor from sentencing, and was implemented to ensure that no defendant was incarcerated in order to put him in a place where it was hoped that rehabilitation would occur.

The aspect of *rehabilitation* is not an issue here. Mike committed a crime based on one thoughtless transaction. He never intended to use the firearm and never did use the firearm. Mike has no criminal history and has been an upstanding member of society his entire life.

994 (k) specifies specific traditional penological purposes for incarceration such as “rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” Again, this is not applicable to Mike.

b. 18 U.S.C. § 3553

If 994 (k) is the proverbial *stick* then for purposes of 18 U.S.C. § 3553, U.S.S.G. Sections 5K2.20 and 5K2.0 are the *carrots* because those sections of the Guidelines allow this Honorable Court to view Mike as a whole before rendering a sentence.

Section 3553 states in pertinent part:

3553. Imposition of a sentence

“(a) factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant;
and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available . . . (and)

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”

Starting with the preamble of 3553 which states “the court shall impose a sentence sufficient, but not greater than necessary,” it is Mike’s hope that after granting his Motions for Downward Departure this Honorable Court will concur that a sentence of between probation and incarceration, with a provision that Mike perform community service is a sufficient sentence, and that under the circumstances it would not appear to be “greater than necessary.”

Regarding 3553 (a)(1), the undersigned has already devoted a great deal of time discussing the nature and circumstances of Mike’s offense. Mike’s history and characteristics are demonstrated by the letters which Mike’s family, friends, and loved ones provided to this Honorable Court. Mike is a good person who has made one horrible mistake. Mike should be punished for his offense because he broke the law, but when looking at the nature of the crime, the circumstances under which it was committed as well as who Mike is, a sentence of between probation and incarceration, with a provision that Mike perform community service is warranted.

The whole problem is that a sentence of between probation and incarceration, with a provision that Mike perform community service appears to a casual outside observer as a light sentence. It will look like Mike is not being punished for possessing an illegal firearm. As such it might be argued that a sentence of between probation and incarceration, with a provision that Mike perform community service would not reflect the seriousness of Mike’s offense. But, that’s precisely why departures exist. This is not a typical case of a “gun nut” buying a machine gun to shoot in the woods. This is a situation where truly in a moment of

not thinking Mike made a huge mistake. He never intended to use the firearm and similarly had it locked away in a safe place. He has lost a wonderful job because of his actions. Quite simply the seriousness of the crime has already been demonstrated to Mike and anyone close to him. A departure to a sentence between probation and incarceration, with a provision that Mike perform community service would give meaning to the downward departures *and* show that this Honorable Court takes this offense seriously.

Subsection (a)(2)(A) of 3553 urges the sentencing court to mete out *just punishment* for the criminal activity. Does a 57 year old, first time offender deserve to go to jail? The undersigned will *NOT* make the easy and obvious argument to tug on this Honorable Court's sentimentality. Certainly Mike's actions have already punished him and his family. His life is in shambles. He can no longer rely on finding employment based on his experience because it is extraordinarily difficult for a "felon" to find a white collar job. But, that is something which comes to any Defendant who breaks the law.

At the same time though, it is wholly unfair to take the position that the *only* just punishment is imprisonment so as to act as a deterrence to other would be illegal firearm purchasers. At first blush the Guidelines with regard to this case appear to be extraordinarily straightforward, and for purposes of subsection 2(B) to Section 3553 a *just sentence* for Mike would require incarceration. To follow this approach would violate the legislative history to Section 3553 (a) where a sentencing court should not show a preference for one purpose of sentencing over another.

Section 3553(a)(3) requires that this Honorable Court *shall* consider the kinds of sentence available. It is not required to sentence Mike to jail. The Guideline ranges should be considered and hopefully this Honorable Court will determine that Mike should not be incarcerated and require him to perform community service.

There have been other "gun cases" which emanate from the same fact pattern. Randy Brown is at the top of the heap and Mike is at the bottom. Randy Brown and other "higher ups" will receive downward departures for their cooperation. Mike cannot receive any

downward departure for his cooperation because he has no information which can be given to the Government. Mike is unique as well because he *never* used the firearm and never intended to use it. As such a sentence of between probation and incarceration, with a provision that Mike perform community service would ensure that there is no unwarranted sentencing disparity.

The undersigned could discuss ad infinitum the various aspects of sentencing, but in reality, if this Honorable Court grants Defendant's Motions for Downward Departure, as well as the principles of *Booker* it is *free* to sentence Mike to whatever sentence it feels would satisfy the requirements of 28 U.S.C. 994 (k) and 18 U.S.C. 3553 (a), and hopefully this Honorable Court will sentence Mike to a sentence of between probation and incarceration, with a provision that Mike perform community service.

IV. Conclusion

Wherefore, Mike requests that this Honorable Court grant his Motions for Downward Departure and determine that his conduct was aberrant behavior and that his case falls outside of the heartland of cases that come before this Honorable Court. As such, Mike requests that this Honorable Court depart to a sentence between probation and incarceration, with a provision that Mike perform community service.

MICHAEL OWENS

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CERTIFICATE OF SERVICE

I hereby certify that on October 28 2005 a copy of the attached *Defendant's Sentencing Memorandum* was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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