

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ANYSTATE**

UNITED STATES OF AMERICA

vs.

BILLY CLIENT,

Defendant.

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**Sentencing memorandum**

At sentencing, the Court will have to determine whether there is evidence tying Billy Client to a semiautomatic rifle and a 30-round magazine. Preliminary discussions with the Government have indicated that there will be evidence showing that Client possessed the rifle and magazine at some point. Even if the Government proves that Client possessed the rifle and magazine and the base offense level for a semiautomatic firearm with a large capacity magazine in close proximity applies to calculate Client’s advisory guideline range, this Court should reject that guideline range because the Sentencing Commission promulgated the base offense level contrary to “empirical data and national experience,” *Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007), and as a result, it recommends a sentence that is “greater than necessary, to comply with the purposes set forth” in 18 U.S.C. § 3553(a)(2).

**The base offense level was promulgated contrary to empirical data and national experience.** The Violent Crime Control and Law Enforcement Act of 1994 (the Act), *inter alia*, created a new offense at 18 U.S.C. § 922(v) criminalizing the manufacture, transfer or possession of a “semiautomatic assault weapon” listed in 18 U.S.C. § 921(a)(30), and a new offense at 18 U.S.C. § 922(w) criminalizing the transfer or possession of a “large capacity ammunition feeding

device,” defined as capable of accepting more than ten rounds, both subject to a five-year maximum under 18 U.S.C. § 924(a)(1)(B). Pub. L. No. 103-322, §§ 110102, 110103, 108 Stat. 1796, 1996-99 (Sept. 13, 1994). The Act exempted from the ban large capacity magazines that had been manufactured on or before the effective date of the Act. At that time, there were approximately 25 million pre-ban large capacity magazines in the United States and another 4.7 million pre-ban large-capacity magazines were imported between 1995 and 2000.<sup>1</sup>

The Act directed the Sentencing Commission to “provide an appropriate enhancement” for a crime of violence or a drug trafficking crime “if a semiautomatic firearm is involved.” Pub. L. No. 103-322, § 110501, 108 Stat. 1796, 2015 (Sept. 13, 1994). The Commission implemented the directive through an upward departure, § 5K2.17, p.s., for semiautomatic firearms with a magazine capacity of more than ten cartridges possessed in connection with a crime of violence or controlled substance offense. *See* U.S.S.G., App. C., amend. 531 (Nov. 1, 1995) (“This amendment addresses the directive in section 110501 of the Violent Crime Control and Law Enforcement Act of 1994 to provide an appropriate enhancement for a crime of violence or a drug trafficking crime if a semiautomatic firearm is involved.”).

In addition, the Commission amended § 2K2.1 to require the same enhanced base offense levels for possession of a “firearm described in . . . 18 U.S.C. § 921(a)(30)” as for possession of firearms described in 26 U.S.C. § 5845(a) (sawed-off shotguns, machine guns, bombs, silencers), when the firearm was not connected with a crime of violence or drug trafficking offense. *See* U.S.S.G., App. C, amend. 522 (Nov. 1, 1995). No reason was given, *id.*, but presumably it was to provide a guideline range for the new offense at 18 U.S.C. § 922(v). Thus, amended §2K2.1

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<sup>1</sup> Christopher S. Koper, *Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, Report to the National Institute of Justice, U.S. Dept. of Justice (June 2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

increased the base offense level for a felon in possession of any firearm listed in 18 U.S.C. § 921(a)(30), including a semiautomatic rifle with the ability to accept a detachable magazine *and* two of the following: (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; or (v) a grenade launcher. *See* 18 U.S.C. § 921(a)(30)(B) (1995, repealed). The rifle allegedly possessed in this case does not have two or more of those attributes.

By the terms of the Act, the ban on semiautomatic weapons described in 18 U.S.C. §921(a)(30) and the ban on large capacity magazines were repealed on September 13, 2004. Pub. L. No. 103-322, § 110105, 108 Stat. 1796, 2000 (Sept. 13, 1994). A study mandated by Congress to be performed thirty months after enactment of the ban, *id.* § 110104, concluded that, “[a]t best, the assault weapons ban can have only a limited effect on total gun murders, because the banned weapons and magazines were never used in more than a fraction of all gun murders,” and that there was no detectable reduction “in two types of gun murders that are thought to be closely associated with assault weapons, those with multiple victims in a single incident and those producing multiple bullet wounds per victim.”<sup>2</sup> Only five states currently ban magazines based on capacity.<sup>3</sup>

Nonetheless, in 2006, the Commission voted to retain the enhanced base offense levels in § 2K2.1(a)(1), (3) and (4); to broaden their reach from the specific list in former 18 U.S.C. §

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<sup>2</sup> *See* Roth, Koper, et. al, Urban Institute, Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994 at 2, 97 (March 13, 1997), available at [http://www.urban.org/UploadedPDF/aw\\_final.pdf](http://www.urban.org/UploadedPDF/aw_final.pdf).

<sup>3</sup> Zachary Schurin, *Federal and State Restrictions on Ammunition Transfer and Possession*, 2007 (banning states are California, Maryland, Massachusetts, New Jersey and New York), available at <http://www.cga.ct.gov/2007/rpt/2007-R-0217.htm>.

921(a)(30) to any “semiautomatic firearm that is capable of accepting a large capacity magazine,” *i.e.*, one with a magazine capable of accepting more than 15 rounds attached or in close proximity, U.S.S.G. § 2K2.1, comment. (n.2); and to amend the definition in §5K2.17, p.s., to require more than 15 rounds. The only reason the Commission gave for retaining and expanding the enhanced base offense levels was that it had “received information regarding inconsistent application as to whether the enhanced base offense levels apply . . . in light of the ban’s expiration.” U.S.S.G., App. C., amend. 691 (Nov. 1, 2006). The Department of Justice recommended that the Commission use the upward departure only and *not* enhanced base offense levels “in light of the fact that possession of such firearms are no longer illegal *per se*.”<sup>4</sup> The Federal Defenders provided extensive comment demonstrating that the increased base offense levels were contrary to empirical evidence, contrary to congressional intent, and would include ordinary firearms with legitimate uses and little risk of unlawful violence.<sup>5</sup> The Commission never considered whether the increased base offense levels should apply at all in light of the repeal of the ban and the empirical evidence, instead seizing on the vague assertion of the Probation Officers’ Advisory Group that “courts are handling this issue in a variety of manners, whether applying it and granting a downward departure and/or variance, or not applying it and giving an upward departure and/or variance, resulting in disparity in sentences imposed nationally.”<sup>6</sup> The Commission cited no data confirming that this assertion was accurate, and did not explain why it had any bearing on achieving the purposes of sentencing.

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<sup>4</sup> DOJ Written Testimony at 11 (March 15, 2006), [http://www.uscc.gov/hearings/03\\_15\\_06/Richard-Hertling.PDF](http://www.uscc.gov/hearings/03_15_06/Richard-Hertling.PDF).

<sup>5</sup> Defenders Written Testimony at 2-10 (March 9, 2006), [http://www.uscc.gov/hearings/03\\_15\\_06/rhodes-testimony.pdf](http://www.uscc.gov/hearings/03_15_06/rhodes-testimony.pdf).

<sup>6</sup> POAG Written Testimony at 3 (Mar. 15, 2006), [http://www.uscc.gov/hearings/03\\_15\\_06/Battistelli-testimony.pdf](http://www.uscc.gov/hearings/03_15_06/Battistelli-testimony.pdf).

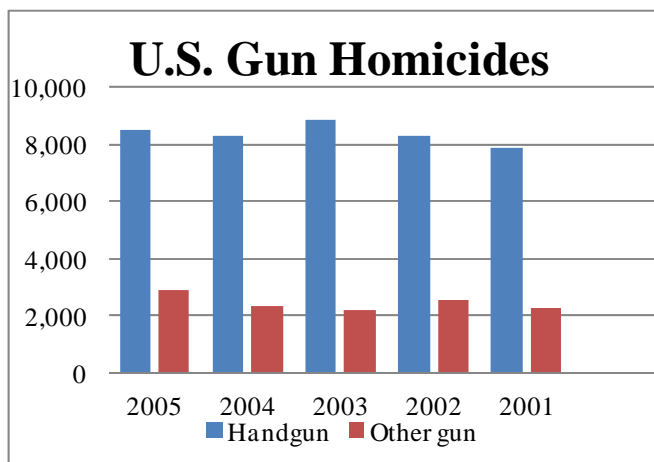
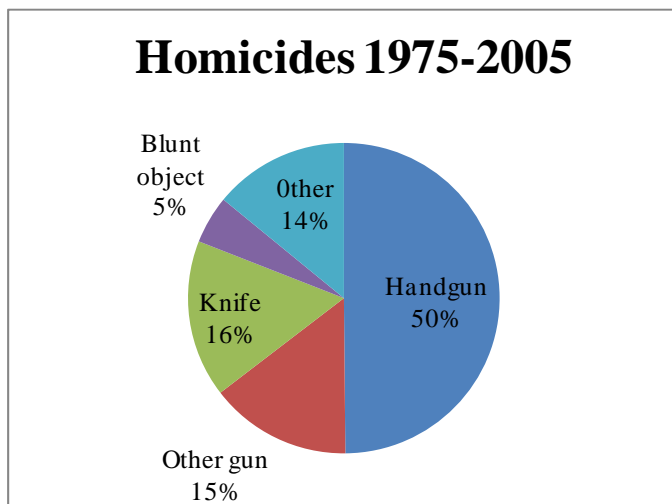
Indeed, there is no rationale grounded in empirical research or sentencing purposes for punishing possession of large-capacity magazines so severely. Large capacity magazines are legal to buy, sell and trade. If there was any evidence that they were especially dangerous or attractive to criminals, a political consensus would have developed to continue the on ban them. There is no such evidence, and no such consensus has developed. The fact that the assault weapons ban was allowed to expire in 2004 indicates a societal judgment that large capacity magazines should not be outlawed. In spite of that, the Commission chose to retain increased punishment not only for possession of firearms with magazines covered by the repealed ban, but for possession of firearms with magazines that were not covered by the ban even when it was in effect.

**The base offense level overstates the seriousness of the offense.** See 18 U.S.C. § 3553(a)(2)(A). In this case, the increase in the base offense level for possession of an otherwise legal 15+ round magazine doubles the sentence otherwise recommended by the guideline

range. This extreme increase is not supported by evidence of a high risk of harm to others. According to the Department of Justice, most homicides involve handguns, not rifles or shotguns. Handguns were involved in half of all homicides from 1975-2005, while guns

other than handguns were involved in

only 15% of all homicides during the same period.<sup>7</sup> Long guns were less lethal than handguns or knives from 1975-2005.<sup>8</sup> As noted above, a congressionally-mandated study concluded that “the banned weapons and magazines were never used in more than a fraction of all gun murders,” and there was no detectable reduction “in two types of gun murders that are thought to be closely



Data from Bureau of Justice Statistics, *Homicide Trends in the United States*

<sup>7</sup> James Allan Fox and Marianne W. Zawitz, *Homicide Trends in the United States*, Bureau of Justice Statistics, 2005, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf>.

<sup>8</sup> *Id.*

associated with assault weapons, those with multiple victims in a single incident and those producing multiple bullet wounds per victim.”<sup>9</sup>

**The base offense level serves no deterrent purpose.** See 18 U.S.C. § 3553(a)(2)(B). Even assuming that increased severity deters, this could only work if a significant number of individuals learned that if they possessed otherwise legal magazines in addition to possessing firearms they would face tougher sanctions because of a provision in the Guidelines. If anything, it would make more sense to increase the offense level for illegal possession of a handgun because it is far more likely that a handgun will be used to commit a crime than a rifle with a large capacity magazine. In any event, all reliable empirical research shows that “increases in severity of punishments do not yield significant (if any) marginal deterrent effects. . . . Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence.” Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006). This is because potential criminals are not generally aware of penalties for their prospective crimes, do not believe they will be apprehended and convicted, and simply do not consider sentence consequences in the manner one might expect of rational decision makers. *Id.* “There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms.” Gary Kleck, et al, *The Missing Link in General Deterrence Theory*, 43 *Criminology* 623 (2005).

**The base offense level creates unwarranted disparity and unwarranted uniformity.** See 18 U.S.C. § 3553(a)(6). Client is worse off under the current guideline than he would have been when the assault weapons ban was in effect because the rifle did not fall within the description in

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<sup>9</sup> See Roth, Koper, et. al, *supra* note 2.

§ 921(a)(30). As the following table shows, Client’s guideline range would have been half during the assault weapons ban period what it is after the ban expired and the Commission retained and broadened the enhanced base offense levels in 2006.

Year	Initial Offense level	Type of firearm	Stolen	Base offense level	Range
1994	14	NA	+2	16	21-27
1995	14	Initial offense level would be 20 if weapon had: i) a folding or telescoping stock; ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; iii) a bayonet mount; iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and v) a grenade launcher.	+2	16	21-27
2006	20 (15+ magazine)		+2	22	41-51

The guideline treats 15+ round magazines the same as guns regulated under the National Firearms Act. Solely because of the presence of the magazine, the firearm is treated as the equivalent of a machine gun, sawed off shotgun, short-barreled rifle, or destructive device. *See* 26 U.S.C. § 5845(a). This creates unwarranted uniformity. *See United States v. Serna*, 435 F.3d 1046, 1049 (9th Cir. 2006) (“We find more significant the fact that, when the federal assault-



weapon ban ended, Congress didn't require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.").

**The base offense level is not necessary to protect the public from further crimes of Client.** 18 U.S.C. § 3553(a)(2)(C). Client did not possess any firearm in connection with a crime of violence or drug trafficking offense. As an employed 55-year-old man, client's risk of recidivism is exceedingly low. U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 12 & Exs. 9, 10 (2004)

Because the large capacity magazine provision was not based on empirical data or national experience and recommends a sentence that is greater than necessary to reflect the seriousness of the offense, to deter others, or to prevent any further crimes of Client, the court should vary from the guideline range by at least an equivalent number of levels.