

ADDENDUM

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 18 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC T. RODEN,

Defendant-Appellant.

No. 18-30189

D.C. No. 9:18-cr-00010-DLC-1
District of Montana,
Missoula

ORDER

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 14) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Contrary to appellant's contention, because the waiver bars his right to appeal "any aspect of the sentence," the waiver encompasses the sentencing claim he seeks to raise on appeal. Further, the court imposed the sentence in accordance with the terms of the plea agreement.

DISMISSED.

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9 **IN THE UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF MONTANA
 10 **MISSOULA DIVISION**

11 UNITED STATES OF AMERICA,)
 Plaintiff,) No. CR 18-10-M-DLC
 12 vs.)
) **TRANSCRIPT OF SENTENCING**
 13 ERIC T. RODEN,)
 Defendant.)
 14 _____)

15
 16 **BEFORE THE HONORABLE DANA L. CHRISTENSEN**
CHIEF UNITED STATES DISTRICT COURT JUDGE
 17 **FOR THE DISTRICT OF MONTANA**

18
 19 Russell Smith United States Courthouse
 201 East Broadway
 Missoula, Montana 59802
 20 Thursday, August 23, 2018
 21 10:35:23 to 11:11:39
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25 Proceedings recorded by machine shorthand
 Transcript produced by computer-assisted transcription

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APPEARANCES

For the Plaintiff:	MS. MEGAN L. DISHONG Assistant U.S. Attorney P.O. Box 8329 Missoula, Montana 59807
For the Defendant:	MR. MICHAEL DONAHOE Attorney at Law Federal Defenders of Montana 50 West 14th Street, Suite 300 Helena, Montana 59624

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1 PROCEEDINGS

2 (Open court.)

3 (Defendant present.)

4 THE COURT: Good morning. Please be seated.

5 Amanda, would you please call the next matter on the
6 Court's calendar?

7 THE CLERK: This is the time set for sentencing in
8 Case No. CR 18-10-M-DLC, *United States of America v. Eric*
9 *Roden*.

10 THE COURT: Ms. Dishong, good morning.

11 MS. DISHONG: Good morning, Your Honor.

12 THE COURT: You are here on behalf of Mr. Duerk, I
13 assume.

14 MS. DISHONG: I am. Mr. Duerk is out of town.

15 THE COURT: Have you read the presentence
16 investigation report as it relates to defendant Mr. Roden?

17 MS. DISHONG: I have.

18 THE COURT: And does the United States have any
19 objections to the presentence investigation report?

20 MS. DISHONG: No, Your Honor, although I think we're
21 going to take perhaps a clarification to the base offense
22 level at some point.

23 THE COURT: I have gotten a preview of that, so
24 we'll see where we are.

25 But let me just confirm on the record that the

1 United States is recommending a 2-level decrease from the
2 adjusted offense level for acceptance of responsibility and
3 further moving for an additional 1-level decrease for timely
4 notification of plea. Is that correct?

5 MS. DISHONG: That's correct, Your Honor.

6 And also something I actually forgot to tell
7 Mr. Donahoe, we would also move to dismiss the forfeiture
8 allegation because the firearms here were administratively
9 forfeited and that's been completed.

10 THE COURT: Okay. Well, I'll grant the motion as it
11 relates to the 1-level decrease, and we'll get to forfeiture
12 here shortly. Thank you.

13 Mr. Donahoe, good morning.

14 MR. DONAHOE: Good morning, Your Honor.

15 THE COURT: Have you read the presentence
16 investigation report as it relates to your client?

17 MR. DONAHOE: Yes.

18 THE COURT: And, Mr. Roden, have you read the
19 presentence investigation report in this case?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: And have you had adequate opportunity to
22 discuss it with Mr. Donahoe, your attorney?

23 THE DEFENDANT: Yes.

24 THE COURT: And we do have an objection as to the
25 crime of violence. Where are we on that?

1 Ms. Dishong, I will just tell you I think
2 Mr. Donahoe has got a pretty good argument.

3 MS. DISHONG: I don't disagree, Your Honor.

4 THE COURT: Okay.

5 MS. DISHONG: I think based on the information that
6 was in the presentence report and that the probation office
7 initially had, we had supported that 22 base offense level.

8 Upon seeing Mr. Donahoe's objection in his
9 sentencing memorandum and taking a closer look at that and the
10 documents relied on, I do have some concerns.

11 To make the record clear, I do think Section 69 of
12 the California Penal Code could form the basis for a predicate
13 offense for a crime of violence, so we're not ruling that out,
14 depending on the documents available. But I do have some
15 concern about the document that was relied on here, that it
16 may run afoul of *Shepard* and cause some iffy problems in the
17 record.

18 If the Court decides not to apply the 22, base
19 offense level of 22, I think a base offense level of 20 in
20 2K2.1(a)(4)(B) would be the correct base offense level.

21 THE COURT: Right.

22 Mr. Donahoe, do you wish to speak to your objection?

23 MR. DONAHOE: Yes. So I don't need to talk about
24 that. I think everybody understands the *Lee* case and all of
25 that.

1 THE COURT: And I read the *Lee* case, and I'm
2 familiar with this issue. It's come up.

3 MR. DONAHOE: Yeah. And my compliments to
4 Ms. Dishong. That's pretty fine analysis there; that maybe
5 another case, another day, it could qualify as a crime of
6 violence.

7 But, then, I had a nice, friendly call from counsel
8 yesterday about my error in moving from 22 down to 14.

9 THE COURT: Right.

10 MR. DONAHOE: And we talked that through, and I
11 guess I'm here to concede that I can't get out of that. So
12 it's apparently a Level 20. But I did some quick research
13 yesterday.

14 Can I approach, Your Honor?

15 THE COURT: You may.

16 MR. DONAHOE: (Handing.) That's a decision from an
17 Alabama district court. It's pretty fresh; last month, in
18 fact. And it talks about this enhancement, and there were a
19 couple things I just didn't know about it.

20 And apparently this enhancement was based on the
21 assault weapons ban, which has now been repealed, and there's
22 some discussion in there of that court's concerns about that
23 being repealed and why the enhancement still exists and so on.

24 So I would just -- maybe when I make my allocution,
25 I can address that.

1 THE COURT: All right. It appears as if the Alabama
2 court -- I'm just skimming this opinion -- had some concerns,
3 based on what you're describing, Congress's subsequent
4 actions, as to whether or not this 6-level enhancement falls
5 outside of the heartland of cases --

6 MR. DONAHOE: Correct.

7 THE COURT: -- as it relates to this guideline.

8 MR. DONAHOE: So that, that would be where I would
9 leave that.

10 THE COURT: Okay.

11 MR. DONAHOE: And that decision, just for the
12 record, is *United States v. English*, and it's reported at 2018
13 Westlaw 357152.

14 THE COURT: Ms. Dishong, have you seen a copy of
15 this opinion?

16 MS. DISHONG: Yes. Mr. Donahoe provided me a copy.

17 THE COURT: Okay. All right.

18 Well, I'm going to sustain the objection as it
19 relates to the crime of violence base offense level, and I am
20 going to use instead, when I calculate the guidelines here
21 shortly, I will use a base offense level of 20 pursuant to
22 Section 2K2.1(a) -- this is a long subsection. Let me get it
23 here in front of me -- 2K2.1(a)(4)(B)(i)(I).

24 Good luck with that, JoAnn.

25 So we will, we will have a base offense level, then,

1 of 20 based on the fact that the defendant possessed a Russian
2 Model SKS 7.62 by .39 caliber rifle with a loaded 35-round
3 magazine.

4 Are there any other objections or legal issues we
5 need to address this morning?

6 Ms. Dishong?

7 MS. DISHONG: I don't believe so, Your Honor.

8 THE COURT: Mr. Donahoe?

9 MR. DONAHOE: No, Your Honor.

10 THE COURT: Well, let me summarize, then, the
11 punishments that are available to the Court in this matter
12 pursuant to both the United States sentencing guidelines as
13 well as the applicable statutes.

14 Let's start with the guidelines. They are
15 summarized beginning at paragraph 33 of the presentence
16 investigation report.

17 Mr. Roden has pled guilty to Count 1, which charges
18 felon in possession of a firearm under 18 United States Code
19 Section 922(g)(1) and Section 924(a)(1).

20 As I previously indicated on the record, the base
21 offense level here is 20. There are 2 levels added under
22 Section 2K2.1(b)(1)(A) due to the fact that the defendant
23 possessed three firearms. That results in an adjusted offense
24 level of 22, from which I subtract 2 levels for acceptance of
25 responsibility and an additional 1 level for timely

1 notification of plea, resulting in a total offense level
2 of 19.

3 I then turn my attention to Mr. Roden's criminal
4 history as documented in the presentence investigation report.
5 He has some convictions that score under the United States
6 sentencing guidelines; specifically, a 2007 misdemeanor
7 conviction for vehicular manslaughter and gross negligence; a
8 2008 conviction for felony obstruction, resisting, executive
9 arrest; a 2010 conviction for violation of a court order to
10 prevent domestic violence; and a 2011 conviction for elder
11 adult harm/death, misdemeanor; resulting in a subtotal
12 criminal history score of 7, which is the total criminal
13 history score, which produces a criminal history category
14 of IV.

15 So with a total offense level of 19, a criminal
16 history category of IV, that results in a recommended
17 custodial sentence of 46 to 57 months under the guidelines, to
18 be followed by a period of supervised release of one to three
19 years. Mr. Roden is not eligible for probation pursuant to
20 the guidelines. A fine could be assessed in the range of
21 \$10,000 to \$100,000. Restitution is not applicable in this
22 matter. We have a special assessment of \$100 owing pursuant
23 to both the United States sentencing guidelines and the
24 statutory provisions.

25 Pursuant to statute, I could sentence Mr. Roden to a

1 custodial sentence of zero to ten years, followed by
2 supervised release for a period of zero to three years. He is
3 not eligible for probation pursuant to statute, and a fine
4 could be assessed up to \$250,000, and, again, restitution is
5 not applicable. Same special assessment of \$100.

6 Ms. Dishong, have I accurately summarized the
7 punishments available to the Court this morning, pursuant to
8 both the United States sentencing guidelines and the
9 applicable statutes?

10 MS. DISHONG: You have, Your Honor.

11 THE COURT: Do you agree, Mr. Donahoe?

12 MR. DONAHOE: I do.

13 THE COURT: Mr. Donahoe, if you and your client
14 would please approach the podium?

15 MR. DONAHOE: (Complied with request.)

16 THE DEFENDANT: (Complied with request.)

17 THE COURT: I have read everything that has been
18 filed in this case, including: the United States sentencing
19 memorandum, Document 27; your sentencing memorandum and
20 attachments, Mr. Donahoe, Document 28; and then I received a
21 sentencing letter, Document 29-1, from Mr. Roden's mother,
22 Ms. Kimberlee Roden-Wilkinson. I've read all those materials.

23 MR. DONAHOE: And she is present in the court,
24 Your Honor, and wanted to address the Court. Would that be
25 possible now?

1 THE COURT: You can have her address me from the
2 podium when you would like that to happen.

3 MR. DONAHOE: I would like that to happen now.

4 THE COURT: All right.

5 Ma'am, if you would come forward?

6 MS. RODEN-WILKINSON: Good morning, Your Honor.

7 THE COURT: Good morning. You are

8 Ms. Roden-Wilkinson?

9 MS. RODEN-WILKINSON: Yes, I am, Your Honor.

10 THE COURT: And you are the defendant's mother?

11 MS. RODEN-WILKINSON: Yes, I am.

12 THE COURT: You may tell me whatever you'd like me
13 to know.

14 MS. RODEN-WILKINSON: Well, Your Honor, I made quite
15 a trip, coming from California, and -- I'm sorry. I just
16 would like you to consider my son. I know he's done some
17 wrong here in your court, but he has a child, and he's been a
18 wonderful father. He's made some mistakes. I'm hoping going
19 forward we can learn from those, he can learn from those, and
20 I would just ask the Court today to take all that into
21 consideration, if possible.

22 We're quite family-orientated, and I know he's done
23 wrong, and I know he needs to be punished, but if there's any
24 way to get -- you know, so we can all still be together and he
25 can still parent his child, I think it is very important,

1 Your Honor.

2 I have pictures of him with his child. He's a very
3 loving, caring person, and I know there's been some mistakes
4 along the way.

5 THE COURT: All right. Do you have pictures with
6 you?

7 MS. RODEN-WILKINSON: Yes, I do, Your Honor.

8 THE COURT: Would you like me to see them?

9 MS. RODEN-WILKINSON: I would.

10 THE COURT: Would you hand them to the clerk,
11 please?

12 MS. RODEN-WILKINSON: Okay. (Complied with
13 request.)

14 (Pause.)

15 THE COURT: Okay. I have seen 12 photographs of
16 Mr. Roden and photographs of his daughter as well. Is it
17 Dani?

18 MS. RODEN-WILKINSON: Yes, Your Honor.

19 THE COURT: I have seen those. Do you want me to
20 make these part of the record, or would you like to have them
21 back? I've seen them.

22 Mr. Donahoe, what's your preference?

23 MR. DONAHOE: I would like the Court to return them,
24 please.

25 THE COURT: All right. Yes (handing). Thank you.

1 MS. RODEN-WILKINSON: Thank you.

2 THE COURT: Is there anything else you would like to
3 tell me this morning?

4 MS. RODEN-WILKINSON: I think that's pretty much --
5 I think we all have a history, Your Honor, and I'd just really
6 like you to really take that into consideration when making
7 your final decision on this young man's life, please.

8 THE COURT: All right. Thank you.

9 Mr. Donahoe.

10 MR. DONAHOE: Thank you, Your Honor.

11 So, anyway, he's not actually my tallest client
12 ever.

13 THE COURT: Close.

14 MR. DONAHOE: Pretty close. I had one in the late
15 '80s I think named Ken Anderson. He was 7 feet tall, and
16 Judge Lovell asked him if he was really 7 feet tall.

17 I've been working with Mr. Roden for a little while
18 now, and I just want to tell the Court that he's gone through
19 some remarkable changes. He was sort of in a bad way when I
20 first met him. He wasn't feeling well, especially mentally.
21 I think he was suffering spiritually. He just had kind of
22 lost his way and was in a pretty dark place.

23 And it didn't get better right away. On ensuing
24 visits to the jail, he actually experienced tougher times, if
25 Your Honor can believe that. I went in there one day -- I

1 don't know, it's probably three months ago now -- and he had
2 on a piece of clothing that I just -- it was beyond
3 description. I mean, it looked like a spacesuit of some kind.
4 But he was on suicide watch at the time and was just kind of
5 completely despondent. And I was concerned about his welfare,
6 and he was, you know, trying to pick himself up and said he
7 was taking the medication and doing his best. And he did work
8 his way out of that and improved. And over the weeks, he had
9 his regular jail clothes on and seemed a little bit more
10 chipper and was oriented better in time and space.

11 I just find him to be a cooperative person, a decent
12 person. He's an intelligent person. He asks questions that
13 are pretty insightful. He wants to know what's going on with
14 his case. He completely understands the guidelines. He has a
15 family that cares about him. He cares deeply about his
16 children.

17 A new experience for me here in this situation was
18 he has some state things pending, which I know that the Court
19 is probably aware of, and he had been released by Judge Lynch
20 and so was eligible but was being held on the state side. And
21 I was getting these phone calls, asking if I couldn't get him
22 out of federal custody, and I was explaining that the order
23 that Judge Lynch had entered clarified that and it didn't need
24 any further clarification.

25 But he wound up spending time in state custody. He

1 has been writted over on Your Honor's order, which proves the
2 point that he is in state custody.

3 I don't know; I think Mr. Roden will address some of
4 those state proceedings and concerns.

5 I have every confidence he's going to be able to
6 modify his behavior here as far as firearms are concerned.
7 And the last thing I would say would be in the background of
8 the *English* decision, Your Honor, that's a 6-point swing, from
9 14 to 20, and as that decision points out, with no gradations,
10 there's just -- you can just go right kind of to the top.

11 Those SKS rifles can be purchased lawfully, and the
12 magazines -- and I do have the photos from the discovery with
13 me -- they're the ones that come with the firearms. And
14 there's one magazine that had some 22 rounds in it, and then
15 he could speak better to the other magazine, what those rounds
16 were. But there was nothing sinister about having those, and
17 my investigation in the case showed that they were used at a
18 target range. Deep Creek, I think, is the name of the range.
19 Mr. Roden could address that further.

20 But I'd ask Your Honor to please take all those
21 things into consideration. He's been a great client.

22 Thank you, Your Honor.

23 THE COURT: Thank you, Mr. Donahoe.

24 Mr. Roden, you have an absolute right to speak to me
25 this morning before I impose sentence in your case if you

1 would like to do so.

2 THE DEFENDANT: I agree with everything Mr. Donahoe
3 has said, and I don't want to be around firearms ever again,
4 to have this stuff happen, so I'm going to do my best to stay
5 away and not do anything that will get me back in trouble
6 again.

7 MR. DONAHOE: Feeling better.

8 THE DEFENDANT: I've been feeling better since my
9 mental health stuff has been going on. They have me on
10 medication.

11 THE COURT: Okay. All right. Thank you, Mr. Roden.

12 THE DEFENDANT: Thank you.

13 THE COURT: You and Mr. Donahoe may return to
14 counsel table.

15 Ms. Dishong.

16 MS. DISHONG: Thank you, Your Honor.

17 The United States requests a guideline sentence
18 here. This is not the *English* case, Your Honor. There, the
19 Court talked extensively about a defendant who had been in
20 trouble on a fraud matter 20 years before and had no criminal
21 history since.

22 We have the exact opposite here. Mr. Roden has
23 almost a 20-year history of contacts with law enforcement
24 dating back to when he was a juvenile. I think his criminal
25 history calculation here correctly but subjectively

1 underrepresents his criminal history because many of those
2 juvenile convictions were unscored. He has quite a number of
3 pending matters now in the state and, frankly, one of the
4 longer "other conduct" sections I've seen of his ongoing,
5 persistent contacts with law enforcement. And it's clear from
6 those that he represents a danger to the people around him,
7 particularly the women and children who are currently in his
8 life, including his daughter.

9 The history and characteristics of this defendant
10 and the need to protect the public, I think, are a significant
11 concern here and really justify a sentence within the
12 guidelines range.

13 And I would also particularly point out that I think
14 a longer term of supervised release would be very helpful here
15 to perhaps help Mr. Roden to make some of these changes that
16 Mr. Donahoe is seeing in him.

17 It also seems clear he does have some mental health
18 and possibly substance abuse issues, and I definitely think
19 both a term of incarceration and a long period of supervised
20 release would help address those.

21 Thank you, Your Honor.

22 THE COURT: All right. Thanks, Ms. Dishong.

23 Well, the overriding consideration in terms of the
24 sentence that I must impose this morning is that it is to be
25 sufficient but not greater than necessary, taking into

1 consideration the punishments that are available to the
2 Court -- we know what the guideline range is here; it's 46 to
3 57 months -- as well as factors that are found within a United
4 States statute which is 18 United States Code Section 3553(a).

5 Let me address those factors here at this time.

6 Mr. Roden is 31 years old. He does have an
7 extensive criminal history as documented in the presentence
8 investigation report, and this criminal history is somewhat
9 alarming to me. It does have a tendency that reflects -- or a
10 tendency towards possession of weapons, and there's been
11 extensive use of violence throughout Mr. Roden's life in terms
12 of his criminal history.

13 I'm not going to go into the details of it
14 laboriously. There's family members here. It's well
15 documented in the presentence investigation report. But I, I
16 do have some concerns as it relates to safety issues, public
17 safety, family safety, as it relates to Mr. Roden.

18 He currently has a state court action pending for
19 stalking, violation of a protective order, and assaults on a
20 minor. This, of course, is a pending action. It is not a
21 conviction, but it is described and contains facts that are
22 consistent with Mr. Roden's criminal history.

23 There's a lot of information that's provided in the
24 presentence investigation report involving Mr. Roden's
25 previous significant others. I just want the record to

1 reflect that I read all of that but I, I've had a difficult
2 time sorting that out in terms of who is the responsible party
3 in those circumstances, and so I want the record to reflect
4 that I'm not attaching any significance at all to that in
5 terms of the sentence that I impose in this case. Instead, I
6 am focusing on the criminal history that's documented
7 through -- as a result of actual convictions.

8 Nevertheless, there is this sort of pattern that
9 emerges where Mr. Roden presents, in the presentence
10 investigation report, as being a -- let me just say this -- a
11 volatile person that can be dangerous to people that are close
12 to him and around him, and I am concerned about that.

13 Mr. Roden, on the positive side of the ledger, has a
14 positive employment history. He has -- according to the
15 presentence investigation report, in terms of his most recent
16 employment, his boss is complimentary of his work performance.
17 There are some issues regarding punctuality, but overall there
18 is -- it's obvious that Mr. Roden can work and earn a living.
19 He has some stability in his life, having purchased a home and
20 vehicles. He's got very little debt. These are all positive
21 things.

22 I have a question mark in my mind in terms of
23 Mr. Roden's substance abuse. He describes it in a minimal
24 manner, but I've also been provided with psychiatric,
25 psychological reports from the Montana State Hospital which

1 supports that there may be a cannabis-use disorder, perhaps an
2 alcohol-use disorder, which I will address in terms of the
3 sentence that I impose here and the conditions on his
4 supervised release.

5 The mental health status, likewise, is somewhat --
6 is well, well documented. I'm not a psychologist. All I know
7 is what I read. I know that he's been placed at the Montana
8 State Hospital, I believe, on more than one occasion. There's
9 been suicidal threats, suicidal self-harming action taken by
10 Mr. Roden. These also are of concern to me in terms of the
11 need to address those issues while he's on supervision. It
12 does appear that Mr. Roden benefits greatly when he takes
13 antidepression and antianxiety medication.

14 I believe that Mr. Roden is looking to have some
15 stability in his life. I believe he's sincere in his desire
16 to be a constructive member of society.

17 But long and short -- and, Mr. Donahoe, I know you
18 think that the guidelines are overstated here, but I actually
19 am of the belief, based on the criminal history, that the
20 guidelines accurately capture the offense conduct and the
21 issues that I'm supposed to address. So I'm going to impose a
22 custodial sentence on the low end of the guidelines of
23 46 months, followed by three years of supervised release,
24 subject to the usual general conditions as well as a handful
25 of special conditions which I'm going to read here into the

1 record shortly.

2 Mr. Donahoe, if you and Mr. Roden would approach the
3 podium, please?

4 MR. DONAHOE: (Complied with request.)

5 THE DEFENDANT: (Complied with request.)

6 THE COURT: Eric T. Roden, pursuant to the authority
7 vested in me by the Constitution of the United States and the
8 laws enacted by the United States Congress as they have been
9 interpreted by the United States Supreme Court and the Ninth
10 Circuit Court of Appeals, it is my obligation to impose
11 sentence on you.

12 I do so having considered all of the material that's
13 been provided to me, the arguments and recommendations of
14 counsel, your handwritten letter of acceptance of
15 responsibility, and your statement to me here this morning,
16 the information that has been provided to me by your mother,
17 both in writing and in open court here this morning.

18 And having considered all of those matters and those
19 materials, the United States sentencing guidelines, and the
20 factors found within 18 United States Code Section 3553(a), it
21 is the judgment of this Court that you be hereby committed to
22 the custody of the Bureau of Prisons for a term of 46 months.

23 Upon release from imprisonment, you shall be placed
24 on supervised release for a term of three years.

25 Within 72 hours of release from custody of the

1 Bureau of Prisons, you shall report in person to the probation
2 office in the district to which you are released.

3 While on supervised release, you shall not commit
4 any federal, state, or local crime and shall not possess a
5 controlled substance.

6 You shall be prohibited from owning, using, or being
7 in constructive possession of firearms, ammunition, or other
8 destructive devices while on supervision and anytime after the
9 completion of the period of supervision unless granted relief
10 by the Secretary of the Treasury.

11 You shall cooperate in the collection of DNA as
12 directed by the United States probation officer.

13 You shall comply with the standard conditions of
14 supervision as recommended by the United States Sentencing
15 Commission and which have been approved by this Court, and you
16 shall also comply with the following nine special conditions
17 which I must read into the record at this time.

18 Special Condition 1. You shall participate in a
19 program for mental health treatment as deemed necessary by the
20 United States probation officer until such time as you are
21 released from the program by the probation officer. You shall
22 pay part or all of the cost of this treatment as directed by
23 the United States Probation office.

24 Special Condition 2. You must take all mental
25 health medications that are prescribed by your treating

1 physician.

2 Special Condition 3. You shall submit your person,
3 residence, place of employment, vehicles, and papers to a
4 search, with or without a warrant, by any probation officer
5 based on reasonable suspicion of contraband or evidence in
6 violation of a condition of release. Failure to submit to
7 search may be grounds for revocation, and you shall warn any
8 other occupants that the premises may be subject to searches
9 pursuant to this condition. You shall allow seizure of
10 suspected contraband for further examination.

11 Special Condition 4. You shall participate in and
12 successfully complete a program of substance abuse treatment
13 as approved by the United States Probation office until you
14 are released from the program by the probation officer. You
15 shall pay part or all of the cost of this treatment as
16 directed by the United States Probation office.

17 Special Condition 5. You shall abstain from the use
18 of alcohol and shall not frequent establishments where alcohol
19 is the primary item of sale.

20 Special Condition 6. You shall participate in
21 substance abuse testing to include not more than 365
22 urinalysis tests, not more than 365 Breathalyzer tests, and
23 not more than 36 sweat patch applications annually during the
24 period of supervision. You shall pay all or part of the costs
25 of testing as directed by the United States Probation office.

1 Special Condition 7. You shall not possess, ingest,
2 or inhale any toxic substances such as but not limited to
3 synthetic marijuana, kratom, and/or synthetic stimulants such
4 as bath salts and spice that are not manufactured for human
5 consumption for the purpose of altering your mental or
6 physical state.

7 Special Condition 8. You shall not purchase,
8 possess, use, distribute, or administer marijuana or obtain or
9 possess a medical marijuana card or prescription.

10 And final, Special Condition 9. You shall comply
11 with all child support obligations and/or pay child support as
12 ordered.

13 Mr. Roden, I find you do not have the ability to pay
14 a fine. I'm not going to assess a fine in this case. The
15 fine obligation is waived.

16 If you haven't already done so, you shall pay to the
17 United States the special assessment of \$100, which shall be
18 due immediately.

19 Ms. Dishong, I believe you indicated that forfeiture
20 has been handled administratively; is that correct?

21 MS. DISHONG: That is correct, Your Honor.

22 THE COURT: All right. So I believe, then, the
23 forfeiture count should be dismissed at this time, correct?

24 MS. DISHONG: That is correct, Your Honor, and I
25 would so move.

1 THE COURT: The forfeiture allegation is dismissed
2 with prejudice.

3 During your custodial sentence, Mr. Roden, you'll be
4 making criminal monetary penalty payments at a rate of not
5 less than \$25 per quarter. These payments are made through
6 the Bureau of Prisons Inmate Financial Responsibility Program,
7 and they will be made to the Clerk of Court, United States
8 District Court, the address of which is P.O. Box 8537,
9 Missoula, Montana 59807.

10 Mr. Donahoe, I believe Mr. Roden has waived his
11 right of appeal; is that correct?

12 MR. DONAHOE: That's correct, Your Honor.

13 THE COURT: Mr. Roden, you have waived your right of
14 appeal, but if you think I've done something wrong here this
15 morning and you wish to attempt to appeal, you will have
16 14 days from the date of entry of judgment in which to appeal.
17 Judgment will be entered today, so that means you would have
18 14 days from today's date. Do you understand that, sir?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: All right.

21 Ms. Dishong, any legal objections to this sentence?

22 MS. DISHONG: No, Your Honor.

23 THE COURT: Mr. Donahoe, any legal objections to
24 this sentence?

25 MR. DONAHOE: No, Your Honor.

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THE COURT: All right. Anything further, Counsel?

MR. DONAHOE: No, Your Honor. Thank you.

THE COURT: All right.

Mr. Roden, I'm going to remand you back to the custody of the U.S. Marshals Service to carry out the judgment of the Court, and we'll be in recess.

Thank you.

(Proceedings were concluded at 11:11:39.)

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REPORTER'S CERTIFICATE

I, JoAnn Corson Bacheller, a Registered Diplomat Reporter and Certified Realtime Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana this 1st day of September, 2018.

/s/ JoAnn Corson Bacheller

JoAnn Corson Bacheller
United States Court Reporter

333 F.Supp.3d 1311
United States District Court, M.D.
Alabama, Northern Division.

UNITED STATES of America,
v.
Timothy Andre ENGLISH

CRIMINAL ACTION NO. 2:18cr122-MHT
|
Signed 07/24/2018

Synopsis

Background: Defendant pled guilty to one count of being a felon in possession of a firearm and moved for downward variance.

Holdings: The District Court, [Myron H. Thompson, J.](#), held that:

[1] downward variance to defendant's sentence by two offense levels was warranted, and

[2] defendant was not entitled to sentence of probation following guilty plea.

Motion granted.

West Headnotes (5)

[1] **Sentencing and Punishment**

🔑 **Mandatory or advisory**

Under the Supreme Court's current framework, the Sentencing Guidelines are not mandatory. [U.S.S.G. § 1B1.1 et seq.](#)

[Cases that cite this headnote](#)

[2] **Sentencing and Punishment**

🔑 **Factors or Purposes in General**

Sentencing and Punishment

🔑 **Operation and effect of guidelines in general**

Although district courts still must consult the Guidelines and take them into account when sentencing defendants, they must also independently determine whether the sentence is reasonable under the statutory sentencing factors. [18 U.S.C.A. § 3553\(a\)](#); [U.S.S.G. § 1B1.1 et seq.](#)

[Cases that cite this headnote](#)

[3] **Sentencing and Punishment**

🔑 **Operation and effect of guidelines in general**

While the Guidelines calculations are an attempt to approximate diverse factors, a judge may, in the course of an individual sentencing, determine that the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply or the Guidelines sentence itself fails properly to reflect statutory considerations. [18 U.S.C.A. § 3553\(a\)](#); [U.S.S.G. § 1B1.1 et seq.](#)

[Cases that cite this headnote](#)

[4] **Sentencing and Punishment**

🔑 **Weapons and explosives**

Downward variance by two levels to defendant's sentence for being a felon in possession of a firearm was warranted; six-level semiautomatic weapons enhancement applied to sentence, but did not provide for gradation to reflect different nature of defendant's offense, primary if not sole reason that defendant possessed firearms was for hunting with his sons, in rural area of Alabama in which they resided, firearms were not used in connection to another offense, there was no evidence that guns were used in any manner that was violent or illicit, there was no evidence that defendant had been involved in any other criminal activity, much less violent criminal activity, within the last 19 years, and none of his previous convictions involved gun violence. [18 U.S.C.A. § 922\(g\)\(1\)](#); [U.S.S.G. § 2K2.1\(a\)\(4\)\(B\)](#).

[Cases that cite this headnote](#)

[5] **Sentencing and Punishment**

🔑 **Weapons and explosives**

Defendant was not entitled to sentence of probation following guilty plea conviction to being felon in possession of firearm; although defendant argued that he primarily used firearms for hunting with his sons, he lacked recent convictions, and had responsibility to provide for his two teenage sons and infant grandchildren, sentence of probation would have required a downward variance of some 10 offense levels, court granted his unopposed motion for staggered sentences, in event that his wife was sentenced in case, so that one parent may be released on supervision while other was serving sentence, and although circumstances warranted a downward variance two offense levels, sentence of imprisonment was necessary, particularly given fact, demonstrated by defendant's pending clemency application to state, that he knew that his possession of firearms was illegal. [18 U.S.C.A. § 922\(g\)\(1\)](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

[Denise O. Simpson](#), [Robert Randolph Neeley](#), United States Attorney's Office, Montgomery, AL, for United States of America.

OPINION

[Myron H. Thompson](#), UNITED STATES DISTRICT JUDGE

*1312 Defendant Timothy Andre English pled guilty to one count of being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)\(1\)](#). At his sentencing, the court granted his motion for a downward variance, but did not accept his proposed sentence of probation. Instead, English was sentenced to 18 months imprisonment followed by three years of supervised release. The court orally gave its reasons for the variance at the sentencing

hearing; however, for the sake of clarity, this opinion outlines those reasons.

I. FINDINGS OF FACT

English is 48 years old. He has four sons, ages 16 to 24, and two grandchildren. Prior to his arrest on the instant offense, he resided on a multi-acre property in Kent, Alabama, with his two youngest sons, his eldest son and his son's wife, and his two infant granddaughters.

In 1999, English was convicted in Florida of fraud, a crime punishable by imprisonment for a term of more than one year. As stated in the Presentence Investigation Report, he has had no convictions or arrests since 1999, other than for the instant offense.

Because of his prior felony conviction, English was not legally permitted to own a firearm. Indeed, knowing this, he petitioned the State of Florida in 2012 for clemency to have his civil rights restored. However, because of a strong desire to go hunting with his sons, and an apparent embarrassment to admit to his sons that he was not legally allowed to possess a gun, English obtained several firearms before any action was taken on the clemency petition.

In August 2017, U.S. Postal Inspectors executed a search warrant of English's residence based on a suspected Internet fraud scheme occurring there, and found ten firearms, assorted ammunition, six firearm magazines (including one 30-round magazine), and various gun cases. The firearms included one Bushmaster .223 caliber semiautomatic rifle, which was found either with a large capacity magazine attached or in close proximity. According to the plea agreement, as well as all of the evidence presented in this case, the firearms were not used or possessed in connection with another felony offense. English was interviewed after the search and candidly admitted to having purchased them or arranged for their purchase. An investigation was then initiated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). English was later arrested for being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)\(1\)](#), and in April 2018 pled guilty to that offense.

II. LEGAL STANDARD

[1] [2] [3] Under the Supreme Court's current framework, the Sentencing Guidelines are not mandatory. See *United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Instead, although district courts “still must consult the Guidelines and take them into account when sentencing defendants,” *United States v. Todd*, 618 F.Supp.2d 1349, 1352-53 (M.D. Ala. 2009) (Thompson, J.), they must also independently determine whether the sentence is reasonable under the sentencing factors listed in 18 U.S.C. § 3553(a):

“(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

*1313 “(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;

“(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the [sentencing] guidelines ...

“(5) any pertinent policy statement [by the Sentencing Commission] ...

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

“(7) the need to provide restitution to any victims of the offense.”

While the Guidelines calculations are an attempt to approximate these diverse factors, a judge may, in the course of an individual sentencing, determine that “the case at hand falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply [or] the Guidelines sentence itself fails properly to reflect § 3553(a) considerations.” *Rita v. United States*, 551 U.S. 338, 351, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).

III. DISCUSSION

[4] There are two main reasons for which the court concluded that the Guidelines provisions did not adequately calculate a reasonable sentence in this case, and that a downward variance was therefore warranted.

The first reason is that the primary if not sole reason that English possessed the firearms was for hunting with his sons, in the rural area of Alabama in which they resided. The government conceded that the firearms were not used in connection to another offense, and could not offer any evidence that the guns were used for any reason other than hunting. That is, there is no evidence that the guns were used in any manner that is violent or illicit, other than the fact that English could not possess them as a convicted felon. Moreover, according to the Presentence Investigation Report, English has not been convicted or even arrested within the past 19 years, and he has abided by all conditions of pretrial release. A 48-year-old man who has not been convicted in 19 years, who possesses guns—albeit several—to teach his children to hunt, appears well outside the heartland of the typical felon-in-possession case. For this reason, the court varied downward by two offense levels.

The second reason for a variance is that the six-level base offense enhancement for possession of a “semiautomatic firearm that is capable of accepting a large capacity magazine,” see USSG § 2K2.1(a)(4)(B), does not apply with any gradation, and fails to reasonably capture the level of enhancement that should apply to English's possession of the Bushmaster semiautomatic rifle. This

enhancement was a major reason why English, who had a criminal-history category of I, was facing a Guidelines sentencing range of multiple years for gun possession unrelated to another offense. Rather than the full six-level enhancement, however, the court determined that a two-level enhancement was reasonable in English's case.

The enhancement in § 2K2.1 for semiautomatic firearms was adopted at the direction *1314 of Congress pursuant to the Violent Crime Control and Law Enforcement Act of 1994. Among other provisions, that Act introduced a national “assault weapons ban,” which covered firearms such as the semiautomatic rifle that English possessed. In response, the Sentencing Commission amended the enhancement in § 2K2.1(a)(4)(B)—which already applied to sawed-off shotguns, silencers, machine guns, bombs, grenades, rockets, and poison gas devices, *see* 26 U.S.C. § 5845(a) & (f)—to include the semiautomatic weapons banned by the Act.

Congress allowed the assault weapons ban to lapse on September 13, 2004. In addition, Congress commissioned a study conducted after the enactment of the ban, which made findings that appear to undermine the rationale for the ban. *See* Jeffrey A. Roth et al., Urban Institute, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994*, at 2 (Mar. 1997).

Despite Congress's repeal of the ban, and the findings of its study in support of that repeal, the Sentencing Commission in 2006 decided to retain the § 2K2.1 enhancement for semiautomatic weapons, and in fact expanded its definition into its current form. The only reason given by the Commission for the 2006 Amendment was “inconsistent application” of the enhancement “in light of the ban's expiration.” USSG, App. C, amend. 691 (Nov. 1, 2006). The Commission never addressed whether the enhancement for semiautomatic firearms should continue to apply or continue to apply to the same degree after Congress had repealed the Act under which it was initially adopted, or in light of the findings in the congressional study.

This history casts some doubt on whether, in light of the original reason for the semiautomatic weapons enhancement and Congress's subsequent actions, it continues to be reasonable for courts to apply a six-level enhancement to defendants for possessing such weapons, which are now legal for non-felons to possess.

Regardless, however, even if enhancement is warranted, it is clear that English's possession of the Bushmaster semiautomatic rifle falls outside of the ‘heartland’ of cases under § 2K2.1(a)(4)(B), and that the full six-level enhancement should therefore not apply. As previously stated, there is no evidence to indicate that English possessed or used the guns for any reason other than hunting with his sons, and no evidence that he has been involved in any other criminal activity, much less violent criminal activity, within the last 19 years. In addition, the Presentence Investigation Report indicates that none of his previous convictions involved gun violence. Simply put, the circumstances of English's possession of the semiautomatic Bushmaster rifle *for hunting* are not on par with the typical felon in possession of the other weapons listed in § 2K2.1(a)(4)(B), namely *silencers, bombs, poison gas, and the like*.

Despite the concerns raised above regarding the Commission's retention of the semiautomatic weapons enhancement, the court adopted and applied that enhancement here, as the court could not conclude that no enhancement was warranted. However, the court concluded that English's conduct warranted only a two-level enhancement, rather than the full six levels. Because § 2K2.1(a)(4)(B) does not provide for any gradation in order to reflect the different nature of English's offense, the court varied downward to correct that.

After applying a variance based on the two grounds discussed, English's resulting offense level was 15, with a sentencing range of 18 to 24 months.

[5] English requested a sentence of probation, which would have required a *1315 downward variance of some 10 offense levels. *See* USSG § 5B1.1(a) (describing Guidelines ranges eligible for a sentence of probation). As grounds for that request he relied primarily on his use of the firearms for hunting, his lack of recent convictions, and his responsibility to provide for his two teenage sons and infant grandchildren. With regard to English's family responsibilities, the court granted his unopposed motion for staggered sentences, in the event that his wife is sentenced in this case, so that one of the parents may be released on supervision while the other is serving their sentence. In any case, while the circumstances here do warrant a downward variance as described, the court explained that a sentence of imprisonment is necessary

—particularly given the fact, demonstrated by English's pending clemency application to the State of Florida, that he knew that his possession of the firearms was illegal. The court cannot 'wink' at such a knowing violation of the law, and imposing anything less than a sentence of imprisonment here would amount to such 'winking.' Accordingly, the court sentenced English to 18 months imprisonment.

* * *

For the above reasons, the court found that the sentence imposed of 18 months custody followed by three years of supervised release to be sufficient but not greater than necessary to comply with the purposes of § 3553(a).

DONE, this the 24th day of July, 2018.

All Citations

333 F.Supp.3d 1311

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FILED

FEB 28 2018

Clerk, U.S. Courts
District Of Montana
Missoula Division

**ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

UNITED STATES OF AMERICA, Plaintiff, vs. ERIC T. RODEN, Defendant.	CR 18- 10 -M- DLC INDICTMENT FELON IN POSSESSION OF A FIREARM Title 18 U.S.C. § 922(g)(1) (Penalty: Ten years imprisonment, \$250,000 fine, and three years supervised release) FORFEITURE Title 18 U.S.C. § 924(d)
---	---

THE GRAND JURY CHARGES:

That on or about September 6, 2016, at Missoula, and within Missoula County, in the State and District of Montana, the defendant, ERIC T. RODEN, having been convicted in 2008 of a crime punishable by imprisonment for a term

exceeding one year under the laws of the State of California, knowingly possessed, in and affecting interstate commerce, a firearm, namely a Glock, Model 22, .40 caliber pistol (serial number EVD415US), a Ruger, Model 10/22, .22 caliber LR semiautomatic rifle (serial number 0005-01356), and an Unknown Make, Model SKS, 7.62 x 39 caliber semiautomatic rifle, (serial number 7488), in violation of 18 U.S.C. § 922(g)(1).

FORFEITURE ALLEGATION

Pursuant to 18 U.S.C. § 924(d), the defendant, ERIC T. RODEN, shall forfeit to the United States any ammunition and any firearm involved in and used in the offense charged in this indictment.

A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.


KURT G. ALME
United States Attorney


JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

WARRANT state custody
BAIL _____

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FILED
MAY 02 2018
Clerk, U.S. Courts
District Of Montana
Missoula Division

**ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>ERIC T. RODEN,</p> <p>Defendant.</p>	<p>CR 18-10-M-DLC</p> <p>PLEA AGREEMENT</p>
--	---

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, represented by W. Adam Duerk, Assistant United States Attorney for the District of Montana, and the defendant, Eric T. Roden, and the defendant's attorney, Michael Donahoe, have agreed upon the following:

<u>MAD</u>	<u>ERIC T. RODEN</u>	<u>5/2/18</u>
AUSA	DEF ATTY	Date

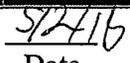
Page 1

1. **Scope:** This plea agreement is between the United States Attorney's Office for the District of Montana and the defendant. It does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority, or the United States Probation Office.

2. **Charges:** The defendant agrees to plead guilty to the sole count of the indictment, which charges the crime of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). This offense carries a maximum punishment of ten years imprisonment, a \$ 250,000 fine, three years of supervised release, and a \$100 special assessment. The indictment also contains a forfeiture allegation, which the defendant will admit.

3. **Nature of the Agreement:** The parties agree that this plea agreement will be governed by Rule 11(c)(1)(B), *Federal Rules of Criminal Procedure*. The defendant acknowledges that the agreement will be fulfilled provided the government makes the recommendations provided below. The defendant understands that even if the Court does not accept or follow the recommendations made by the United States, there will not be an automatic right to withdraw the plea. Rule 11(c)(3)(B), *Federal Rules of Criminal Procedure*.

4. **Admission of Guilt:** The defendant will plead guilty because the defendant is guilty of the charge contained in the indictment. In pleading guilty, the defendant acknowledges that:

			
AUSA	DEF	ATTY	Date

First, the defendant knowingly possessed an a Glock, Model 22, .40 caliber pistol (serial number EVD415US), a Ruger, Model 10/22, .22 caliber LR semiautomatic rifle (serial number 0005-01356), and an Unknown Make, Model SKS, 7.62 x 39 caliber semiautomatic rifle, (serial number 7488);

Second, the firearms had been transported from one state to another; and

Third, at the time the defendant possessed the firearms, the defendant had been previously convicted of Resisting an Executive Officer in 2008, in violation of California law, which is a crime punishable by imprisonment for a term exceeding one year.

Forfeiture Allegation: The defendant agrees to abandon all right title and interest in any firearm and any ammunition involved in and used in the offense charged in this indictment, specifically the firearms referenced above.

5. Waiver of Rights by Plea:

(a) The government has a right to use against the defendant, in a prosecution for perjury or false statement, any statement given under oath during the plea colloquy.

(b) The defendant has the right to plead not guilty or to persist in a plea of not guilty.

<u>msd</u>	<u>sl</u>	<u>[Signature]</u>	<u>5/2/18</u>
AUSA	DEF	ATTY	Date

Page 3

(c) The defendant has the right to a jury trial unless, by written waiver, the defendant consents to a non-jury trial. The United States must also consent and the Court must approve a non-jury trial.

(d) The defendant has the right to be represented by counsel and, if necessary, have the Court appoint counsel at trial and at every other stage of these proceedings.

(e) If the trial is a jury trial, the jury would be composed of 12 laypersons selected at random. The defendant and the defendant's attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt.

(f) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not the judge was persuaded of the defendant's guilt beyond a reasonable doubt.

(g) At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against the defendant. The

rmj SC AKJ 5/2/18
AUSA DEF ATTY Date

defendant would be able to confront those government witnesses and the defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence. If the witnesses for the defendant would not appear voluntarily, their appearance could be mandated through the subpoena power of the Court.

(h) At a trial, there is a privilege against self-incrimination so that the defendant could decline to testify and no inference of guilt could be drawn from the refusal to testify. Or the defendant could exercise the choice to testify.

(i) If convicted, and within 14 days of the entry of the Judgment and Commitment, the defendant would have the right to appeal the conviction to the Ninth Circuit Court of Appeals for review to determine if any errors were made that would entitle the defendant to reversal of the conviction.

(j) The defendant has a right to have the district court conduct the change of plea hearing required by Rule 11, Federal Rules of Criminal Procedure. By execution of this agreement, the defendant waives that right and agrees to hold that hearing before, and allow the Rule 11 colloquy to be conducted by, the U.S. Magistrate Judge, if necessary.

(k) If convicted in this matter, a defendant who is not a citizen of the United States may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

<u>mjs</u>	<u>ZK</u>	<u>CS</u>	<u>5/2/16</u>
AUSA	DEF	ATTY	Date

Page 5

The defendant understands that by pleading guilty pursuant to this agreement, the defendant is waiving all of the rights set forth in this paragraph. The defendant's attorney has explained those rights and the consequences of waiving those rights.

6. Recommendations: The United States will recommend the defendant's offense level be decreased by two levels for acceptance of responsibility, pursuant to USSG §3E1.1(a), unless the defendant is found to have obstructed justice prior to sentencing, pursuant to USSG §3C1.1, or acted in any way inconsistent with acceptance of responsibility. The United States will move for an additional one-level reduction, pursuant to USSG §3E1.1(b), if appropriate under the Guidelines. The parties reserve the right to make any other arguments at the time of sentencing. The defendant understands that the Court is not bound by this recommendation.

7. Sentencing Guidelines: Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable.

8. Appeal Waiver: The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a); 28 U.S.C. §§ 2241, 2255. Based on the concessions made by the United States, the defendant knowingly waives any right to appeal or collaterally attack

<u>MLS</u>	<u>ER</u>	<u>[Signature]</u>	<u>5/2/18</u>
AUSA	DEF	ATTY	Date

Page 6

any aspect of the sentence, including conditions of probation or supervised release. This waiver includes challenges to the constitutionality of any statute of conviction and arguments that the admitted conduct does not fall within any statute of conviction. This waiver does not prohibit the right to pursue a collateral challenge alleging ineffective assistance of counsel.

9. Voluntary Plea: The defendant and the defendant's attorney acknowledge that no threats, promises, or representations have been made to induce the defendant to plead guilty, and that this agreement is freely and voluntarily endorsed by the parties.

10. Detention/Release After Plea: Pursuant to 18 U.S.C. § 3143(a)(1), the defendant acknowledges that he will be detained upon conviction unless the Court finds, by clear and convincing evidence, that he will not likely flee or pose a danger to the community.

11. Breach: If the defendant breaches the terms of this agreement, or commits any new criminal offenses between signing this agreement and sentencing, the U.S. Attorney's Office is relieved of its obligations under this agreement, but the defendant may not withdraw the guilty plea.

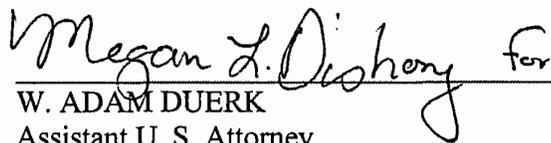
12. Entire Agreement: Any statements or representations made by the United States, the defendant, or defense counsel prior to the full execution of this plea agreement are superseded by this plea agreement. No promises or

MD EA [Signature] 5/2/18
AUSA DEF ATTY Date

Page 7

representations have been made by the United States except as set forth in writing in this plea agreement. This plea agreement constitutes the entire agreement between the parties. Any term or condition which is not expressly stated as part of this plea agreement is not to be considered part of the agreement.

KURT G. ALME
United States Attorney


W. ADAM DUERK
Assistant U. S. Attorney
Date: 5/2/18


ERIC T. RODEN
Defendant
Date: 5/2/18


MICHAEL DONAHOE
Defense Counsel
Date: 5-2-18

MLD eb MD 5/2/18
AUSA DEF ATTY Date