UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
V.	)	No. 2:03-CR-63
	)	
BOBBY E. FISHER	)	

REPORT AND RECOMMENDATION

Defendant originally was indicted for possession of four machine guns in violation of 18 U.S.C. § 922(o). That statute reads as follows: "Except as provided in paragraph 2, it shall be unlawful for any person to transfer **or** possess a machine gun." [Emphasis supplied.]

The relevant exception within paragraph 2 reads as follows: "This subsection does not apply with respect to – . . .any lawful transfer **or** lawful possession of a machine gun that was lawfully possessed before the date this subsection takes effect." [Emphasis supplied.] This exception has no application to defendant. It is quoted only to show the repetition of the disjunctive "or"; it is clear that Congress intended to criminalize not only the transfer of machine guns, but also their possession, irrespective of how they were obtained.

Defendant moved that the indictment be dismissed on the basis that 18 U.S.C. § 922(o) is unconstitutional *as applied to him*. [Doc. 24.] That motion was referred to the United States Magistrate Judge under the standing orders of this Court and pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on January 20, 2004.

On January 27, 2004, the Grand Jury returned a superseding indictment against defendant in which defendant was charged with possession of four machine guns in violation of 18 U.S.C. § 922(o), which of course is precisely the same offenses with which he was

charged in the original indictment. However, the superseding indictment additionally charged defendant with four counts of possessing machine guns which had not been registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. § 5861(d), a taxing statute. Defendant was arraigned on the superseding indictment on January 29, 2004.

The facts are undisputed. Defendant is a member of the Army National Guard and has no criminal background. Although it is a bit premature to state an opinion regarding defendant's intent, and certainly beyond the office of a Report and Recommendation regarding the pending motion to dismiss, this Court believes that defendant had no sinister motive in his possession of the four automatic weapons; simply stated, he is a collector and they were openly displayed in his home. Nevertheless, § 922(o) makes it unlawful to possess a machine gun, regardless of intent or motive.

Defendant purchased "kits" for Sten machine guns, and then assembled those kits into machine guns. He ordered three of the kits from or through Shotgun-News, a magazine/catalog for hunters and gun fanciers. He purchased the other kit at the annual gun show in Knoxville. These kits were nothing more than old machine guns, manufactured overseas, that had been sawed into two pieces; specifically, the receiver[1] had been sawed in half.

The government acknowledged that defendant's acquisition and subsequent possession of these "kits" was legal for purposes of 18 U.S.C. § 922(o).[2] However, defendant

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[1]The receiver is that portion of a rifle (or shotgun) that houses most of the mechanical parts of the firearm and into which, and then through which, a cartridge or shell moves on its way into the barrel's breech, from which the cartridge or shell ultimately is fired. The receiver's location depends upon the type of rifle or shotgun; if a semi-automatic or bolt action firearm, the receiver is immediately in front of the rear stock and above the trigger. In a machine gun, the receiver very well could be at some other point along the entire length of the gun. But, regardless of the location, sawing the receiver in half would render the gun inoperable, beyond any doubt.

[2]But not legal for purposes of 26 U.S.C. § 5861(d) absent registration.

reassembled the firearms, replacing the original and damaged receivers with receivers *which defendant fabricated himself*. He fabricated one receiver out of black iron pipe, and the other three receivers were fashioned from the tailpipe of a Toyota automobile. As a result of defendant's fabrication of the new receivers, the "kits" become operational machine guns, the possession of which is illegal as far as § 922(o) is concerned. And as regards 26 U.S.C. § 5861(d), defendant could not legally possess a machine gun which was not registered to him in the National Registration and Firearms Record.

THE CONSTITUTIONALITY OF 18 U.S.C. § 922(o)

It bears repeating that defendant is charged with mere possession of machine guns; he is not charged with transferring machine guns, either inter- or intra-state. Although § 922(o) clearly criminalizes mere possession of a machine gun, defendant insists that the circumstances of his possession render unconstitutional the application of the statute to him. More specifically, defendant contends that it was beyond Congress's authority under the Commerce Clause of the Constitution[3] to federally criminalize his possession of the four machine guns.

Before embarking upon an analysis of the primary issue in this case, *viz.*, whether § 922(o) is unconstitutional when applied to the specific facts of this case, one additional matter should be noted. The question is not whether mere possession of a machine gun should be a criminal offense, but whether it should be a *federal* criminal offense under the facts presented by this defendant's case. In other words, the real issue is one of federalism, whether § 922(o) may be applied constitutionally to this defendant under the Commerce Clause of the United States Constitution, or whether it is a prosecution which should be left to the state of

[3]Art. I, § 8, cl. 3.

Tennessee.[4]

Although defendant relies upon a Ninth Circuit Court of Appeals case to support his contention that § 922(o) is unconstitutional as applied to him, the Court's analysis must begin with *United States v. Lopez*, 514 U.S. 549 (1995). *Lopez* was something of a sea change in Supreme Court jurisprudence as far as the Commerce Clause is concerned. From the time of Chief Justice John Marshall until the mid-20th Century, the cases under the Commerce Clause dealt with what the Commerce Clause prohibited, either to the states or the federal government. But then in the mid-20th Century, the emphasis shifted; the Supreme Court began to uphold various federal legislative enactments on the basis that even intrastate activities could be federally regulated if those activities affected interstate commerce in some fashion. Since virtually anything and everything, especially in this day and time, can be said to affect interstate commerce at least to some degree, Congress enacted vast amounts of legislation under the Commerce Clause, which was consistently upheld by the Supreme Court.

And then *Lopez* was decided. *Lopez* involved a prosecution under 18 U.S.C. § 922(q)(1)(A) which made it a federal crime to possess a firearm in a school zone. The Court obviously was concerned that the Commerce Clause was becoming a master passkey used by Congress to open every conceivable legislative and regulatory lock. The Supreme Court struck down the statute, finding that it exceeded Congress's authority under the Commerce Clause. *Lopez* held that Congress may regulate three broad categories of activities under the

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[4]Tenn. Code. Ann. § 39-17-1302 makes it an offense to possess or repair a machine gun. The statute goes on to provide that it is a defense to a prosecution under this section if the machine gun is to be merely displayed in a public museum or "exhibition." Defendant had these firearms displayed in his dwelling, so to that extent it could be argued that he was "exhibiting" them. However, the statute goes on to provide that it is an affirmative defense to a prosecution under the statute if an individual possesses a machine gun as a curio or keepsake unless they are capable of functioning. Since defendant's machine guns were capable of functioning, he would not be able to take advantage of this last-mentioned affirmative defense, and its very language would preclude any possibility that his home could be considered a "public exhibition" for purposes of the first-mentioned defense. In other words, defendant could be prosecuted in the state of Tennessee under this statute for his possession of these four machine guns, inasmuch as they were operable.

Clause: (1) it may regulate the channels of interstate commerce; (2) it may regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activity; and (3) it may regulate those activities having a "substantial relation" to interstate commerce. 514 U.S. at 558.

If § 922(q) was to be upheld, it would be under the third factor, the "substantial relationship" category. *Id.*, at 559. First, as a criminal statute dealing with possession of a firearm, § 922(q) had nothing to do with commerce in the ordinary meaning of that word; i.e., no commercial transaction was involved. *Id.,* at 561. Second, the statute had no language that limited the prohibited transaction to commerce in any way. Lacking such a "jurisdictional element," a court could not determine in any given case that the particular circumstances of the defendant's possession of a gun somehow involved interstate commerce. *Id.*, at 561-2. Third, although the possession of a gun on school property could obliquely affect interstate commerce, as could practically any activity, the effect was far too attenuated to pass muster under the Commerce Clause. Fourth, the Supreme Court noted that "the question of congressional power under the Commerce Clause is 'necessarily one of degree.'" *Id.,* at 566. The Court held that possession of a gun on school property could have a theoretical impact upon interstate commerce, but that impact was *de minimis*, i.e., far too attenuated. As a result, § 922(q) was held to be unconstitutional.[5]

The Supreme Court later decided *United States v. Morrison*, 529 U.S. 598 (2000), which concerned the Violence Against Women Act, 42 U.S.C. § 13981. This Act created a civil cause of action for anyone injured by the violent act of another, if that violent act was

[5]In a separate concurring opinion, Justice Thomas suggested that Congress should not be able to regulate mere possession of guns. Id., at 585. If possession of guns is beyond the constitutional pale, why not grenades, or rocket launchers? It presents an interesting question.

motivated by the victim's gender. As it did in *Lopez*, the Supreme Court declared that the Act exceeded Congress's power under the Commerce Clause. The Supreme Court indicated that, when considering whether an activity "substantially affects" interstate commerce (the third prong under *Lopez)*, a court should consider four factors: (1) Is the prohibited activity commercial or economic? (2) Is the statute's scope limited by an explicit jurisdictional element within it, i.e., a requirement that the proscribed activity somehow be involved with interstate commerce? (3) Did Congress make findings regarding the effect of the prohibited conduct on interstate commerce? And (4), is the link between the activity and interstate commerce truly substantial, or is it attenuated? 529 U.S. 610-612. Obviously, a violent assault was neither economic nor commercial behavior. *Id.,* at 613. Neither did the statute have any jurisdictional element, such as interstate travel to commit the assault. *Id.* Congress, however, did make findings regarding the impact of gender-motivated violence upon interstate commerce, but the Court noted that a congressional finding of an impact on interstate commerce did not necessarily mean that there was one; the final decision in that regard resided with the Court. *Id.*, at 614. And, finally, the Court concluded that the impact on interstate commerce of the prohibited activity, *viz*, gender-motivated assault, was attenuated. *Id.*, at 615.

Therefore, *Lopez* and *Morrison*, when read together, suggest the following: (1) Practically any intrastate activity can be said to affect interstate commerce. (2) There must be some limit on the power of the federal government to regulate intrastate activity; otherwise, Congress will supplant the state legislatures.[6] (3) Under the Commerce Clause, Congress may

[6]See, Morrison, 529 U.S. 615: ". . . Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority . . . ."

validly regulate the use of the channels of commerce, and it may regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce, and it may regulate those activities that have a *substantial economic or commercial relationship to interstate commerce*. (4) And that "substantial relationship" must truly be substantial, i.e., if it is tenuous or attenuated, it is not sufficient under the Commerce Clause.

Understandably, *Lopez* and *Morrison* have precipitated a goodly amount of constitutional attacks on federal gun and pornography prosecutions. The question is, Do these cases require that the instant indictment be dismissed? Defendant relies on a recent case from the Ninth Circuit Court of Appeals, *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003). But before reaching *Stewart*, it is necessary to discuss an earlier Ninth Circuit case that involved a prosecution under § 922(o). In *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996), defendant was charged under § 922(o) with possession of a machine gun. Relying on *Lopez*, the defendant moved that the indictment against him be dismissed. In affirming defendant's conviction, the *Rambo* Court stated in pertinent part:

> Although *Lopez* is instructive, it does not control our analysis of Section 922(o). We agree with the Fifth and Tenth Circuits that Section 922(o) represents a permissible exercise of the authority granted to Congress under the Commerce Clause. [Citations omitted.]
>
> Section 922(o) prohibits the possession or transfer of machine guns only if they were not lawfully possessed before May 1986. In other words, there can be "no unlawful possession under Section 922(o) without an unlawful transfer." [Citation omitted.] Regulating this category of possession, therefore, regulates commerce. "In effect, the ban on such possession is an attempt to control the interstate market for machineguns by creating criminal liability for those who would constitute the demand-side of the market, i.e., those who would facilitate illegal transfer out of the desire to acquire mere possession."

74 F.3d at 951-2.

> Unlike Section 922(q) [possession of a gun in a school zone], *Section 922(o) comes within the first category enumerated by the Supreme Court in Lopez*, *Id.* Section 922(o) is "a regulation of the use of the channels of interstate commerce" because it is "an attempt to prohibit the interstate transportation of a commodity through the channels of commerce." [Citation omitted.] By regulating the market in machine guns, including regulating intrastate machine gun possession, Congress has effectively regulated the interstate traffic in machine guns. "[T]here is a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession is essential to the effective control of the interstate incidents of such traffic." [Citation omitted.] [Emphasis supplied.]

Id., at 952.

As seen in the last quoted paragraph of *Rambo*, the Ninth Circuit upheld § 922(o) on the first prong of *Lopez*, a "regulation of the use of the channels of commerce."

In November 2003, the *Stewart* case presented the Ninth Circuit Court of Appeals with another appeal from a conviction under § 922(o); this appeal presented a more difficult factual situation. In *Stewart*, the defendant made his machine guns from scratch, so to speak. Although the defendant purchased certain of the component parts in other states, those components were not guns of any description. To quote the Ninth Circuit panel, "these components did not add up to a gun. Not even close." 48 F.3d at 1136. The defendant machined the various parts in his own workshop and created "unique" machine guns. In other words, they were totally "homemade." *Id.,* 1136. The Ninth Circuit held that § 922(o), *as applied to the defendant Stewart,* was unconstitutional:

> Stewart's case reveals the limits of *Rambo's* logic. Contrary to *Rambo's* assumption that an unlawful transfer must precede unlawful possession, Stewart did not acquire his machine guns from someone else: He fabricated them himself.

Id., at 1135.

> Thus, although *Rambo* found Section 922(o) to be generally valid under the Commerce Clause, *Rambo*'s reasoning does not cover Stewart's case.

Id., at 1136.

> Even if [defendant] did not *use* the channels of interstate commerce, his possession of machine guns may still have substantially *affected* interstate commerce. . . . We cannot agree that simple possession of machine guns – particularly possession of homemade machine guns – has a substantial effect on interstate commerce. [Emphasis supplied.]

Id.

> Based on the four-factor *Morrison* test, Section 922(o) cannot be viewed as having a substantial effect on interstate commerce. We therefore conclude that Section 922(o) is unconstitutional *as applied to Stewart.* [Emphasis supplied.]

Id.

> Indeed, it is hard to believe the [Supreme] Court would ever eliminate as-applied challenges for one particular area of constitutional law.[7]

Id., at 1142.

Thus, at least in the case of homemade machine guns, the Ninth Circuit retreated from *Rambo*, holding that such possession did not fall within either the first prong (use of channels of commerce) or third prong (a substantial affect on interstate commerce) of *Lopez*.

The Second Court of Appeals has flatly held that § 922(o) is constitutional with respect to "mere possession" of a machine gun. In *United States v. Franklyn*, 157 F.3d 90 (2nd Cir. 1998), the defendant attacked the constitutionality of the "possession component" of § 922(o), relying upon *Lopez*. *Id.*, 93. The Second Circuit stated in pertinent part as follows:

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[7]This "unconstitutional as applied to a given defendant" language is significant, when considering Sixth Circuit precedent, discussed hereafter.

> The first inquiry of the constitutional analysis is "whether a rational basis existed for concluding that [the] regulated activity sufficiently affect[s] interstate commerce." [Citing *Lopez*, *et al.*]

Id., at 93.

> Seven circuits have addressed the constitutionality of § 922(o) since *Lopez* was decided. All of them have found an adequate link between the possession of a machine gun and interstate commerce, although they have differed in rationale. We conclude that § 922(o) (unlike the statute in *Lopez*) regulates activity that may rationally be viewed as substantially affecting interstate commerce.

Id., at 93.

> We distinguish *Lopez* on the ground that § 922(o), by contrast with § 922(q), is integral to the larger federal scheme for the regulation of trafficking in firearms – an economic activity with strong interstate effects.

Id., at 94.

> We therefore agree with the Third, Fifth, Seventh and Eleventh Circuits, which have held that Congress had a rational basis for finding that the machine gun trade "substantially affects" interstate commerce. [Footnote and citations omitted.] We further agree that prohibiting possession of these weapons is a reasonable means of freezing, and ultimately eliminating, the largely interstate market for them.

Id., at 96.

> *It may be that the possession of a single machine gun is neither interstate in nature nor commercial, but Congress is authorized to regulate individual instances of purely intrastate activity where the cumulative effect of such activity would substantially affect interstate commerce.* [Italics supplied.]

Id., at 96.

> The criminal penalty for ownership of the weapons is a marketing impediment to those inclined to violate the prohibition on sale. Accordingly, the statute discourages proliferation of machine guns, as well as unlawful transfer to private hands that from time to time have uses for those guns, none of those uses good and virtually all of them criminal.

Id., at 96-97.

Thus, *Franklyn* upheld § 922(o) on the third *Lopez* prong as "substantially affecting" interstate commerce.[8]

In *United States v. Rybar*, 103 F.3d 273 (3rd Cir. 1996), the Third Circuit Court of Appeals likewise upheld the constitutionality of § 922(o):

> [Defendant] forwards all of the reasons given by the *Lopez* majority, many in *haec verba,* as equally determinative of the invalidity of Congress's prohibition of machine guns. He contends that § 922(o)'s proscription of machine gun transfer and possession can be upheld only as regulation of an "activ-it[y] that substantially affect[s] interstate commerce." [Citation omitted.] He argues that § 922(o) fails this "substantial effect" test, since its attempt to reach mere intrastate gun possession has only the most tenuous links to interstate commerce and would blur past any principled limit on the commerce power. Finally, [defendant] invokes the same federalism concerns expressed in *Lopez*, arguing that Pennsylvania's own regime of machine gun regulation makes relevant the Court's observation in *Lopez* that "[s]tates possess primary authority for defining and enforcing the criminal law." [Citations omitted.]

Id., at 277-78.

> [I]n our analysis of § 922(o), we find that, unlike the situation in *Lopez*, there are legislative findings to aid judicial evaluation of the effect of machine guns on interstate commerce. While these findings did not accompany the passage of § 922(o), the subject matter of § 922(o) is sufficiently similar to that of the other legislation accompanied by these findings so as to be a reliable statement of the rationale for Congress's authority to pass § 922(o). Congressional findings generated throughout Congress's history of firearms regulation link both the flow of firearms across state lines and their consequential indiscriminate availability with the resulting violent criminal acts that are beyond the effective control of the states. Thus, § 922(o) does not "plow new ground," as the *Lopez* majority said § 922(q) did. [Citation omitted.] Rather than represent a "sharp break" in pattern, which concerned the *Lopez* Court, it continues in the stream of prior legislation.

Id., at 279.

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[8]Interestingly, the Second Circuit cited *United States v. Rambo* from the Ninth Circuit; of course, *Franklyn* was decided in 1998, five years prior to the Ninth Circuit's *Stewart* decision.

> In suggesting that this case is like *Lopez*, where the Court found that possession of a gun in a local school zone had an insubstantial effect on interstate commerce, the dissent disregards a significant distinction. The statute at issue in *Lopez* attempted to regulate possession of guns only inside school zones – a discrete area unlikely to have a meaningful aggregate effect on commerce. By contrast, the regulation affected by § 922(o) is not limited to possession "on one's own property," . . . ; it regulates possession of a class of firearms – machine guns – in a much more disbursed and extensive area. *Congress could reasonably have concluded that such a general ban of possession of machine guns will have a meaningful effect on interstate commerce that would be more substantial than the effect of banning possession within school zones.* [Emphasis supplied.]

Id., at 282.

> Unlike the conclusion in *Lopez* that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," [citation omitted] it is evident from § 922(o) that "possession and transfer" of a machine gun is an economic activity that Congress could reasonably have believed would be repeated elsewhere and thereby substantially affect interstate commerce.

Id., at 282.

> *Although [defendant] would have us view machine gun possession as a purely intrastate phenomenon, Supreme Court cases have long sustained the authority of Congress to regulate singular instances of activity when the cumulative effect of a collection of such events might ultimately have substantial effect on interstate commerce.* [Citations omitted.] [Emphasis supplied.]

Id., at 283.

> In sustaining § 922(o), the Courts of Appeals for the Fifth, Sixth and Ninth Circuits viewed § 922(o) as a regulation of "the use of the channels of interstate commerce," the first of the three categories of activity reachable under the commerce power [citing, *inter alia*, *United States v. Beuckelaere* from the

> Sixth Circuit].[9]

Id., at 284.

In sum, *Rybar* upheld § 911(o) on the "substantial effect" or third prong of *Lopez.*

The Eleventh Circuit Court of Appeals also has upheld the constitutionality of § 922(o). In *United States v. Bailey*, 123 F.3d 1381 (11th Cir. 1997), defendant was charged with possession of four machine guns. In this post-*Lopez,* post-*Rambo,* but pre-*Stewart* case, the Eleventh Circuit stated as follows:

> This court has determined that the legislative history for Section 922(o) "reveal[s] clearly (1) that Congress intended to change the law to prospectively preclude the private possession of machine guns . . . . We also have held that Section 922(o) is constitutional under the Commerce Clause. [Citation omitted.] We decided that Section 922(o) satisfied the third *Lopez* category of activities affecting commerce and concluded that "Congress had a rational basis to determine that a total ban on machineguns would have a substantial effect on interstate commerce." [Footnote and citation omitted.] We distinguished the total prohibition on the possession and transfer of machine guns by private individuals from the *Lopez* restricted regulation on the possession of firearms in school zones, "a limited, discrete geographic sphere."
>
> [W]e join all the other circuits that have addressed a Commerce Clause challenge to Section 922(o) since *Lopez* with the unanimous determination that this statute is constitutional.[10]

123 F.3d at 1393.

Thus, the Eleventh Circuit upheld § 922(o)'s application to mere possession on the basis of *Lopez*'s third factor.

In 1997, in an *en banc* decision in which sixteen circuit judges participated, an evenly

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[9]In addition to the *Beuckelaere* case from the Sixth Circuit, *Rybar* also cited as authority the *Rambo* case from the Ninth Circuit. Again, *Rybar* was decided in 1996, whereas the *Stewart* case from the Ninth Circuit was decided in November 2003.

[10]In light of the Ninth Circuit's Stewart case, it is no longer unanimous, of course.

divided Fifth Circuit Court of Appeals, in *United States v. Kirk,* 105 F.3d 997 (5th Cir. 1997), upheld the constitutionality of § 922(o) regarding a conviction for possession of machine guns. In a *per curium* opinion, the opinion of eight of the judges in favor of affirmance of the conviction stated in part as follows:

> Every circuit that has examined 18 U.S.C. § 922(o) – both before and after *United States v. Lopez* . . . – has determined that § 922(o) does not exceed the authority granted to Congress by the Commerce Clause. [Citing *Beuckelaere* from the Sixth Circuit, and *Rambo* from the Ninth Circuit, among others.]

105 F.3d at 998.

> We are persuaded that a legislative judgment that possession of machine guns acquired after 1986 has a *substantial effect* on interstate commerce, particularly by facilitating the trade in illegal drugs, is supported by our judicial experience and facts about machine guns and interstate criminal activity common to public discourse. Congress did not exceed its power under the Commerce Clause, and we today correctly affirm this conviction. [Emphasis supplied.]

Id.

The other eight judges of the Fifth Circuit voted against the constitutionality of § 922(o) and would have reversed the conviction. These judges vigorously insisted that § 922(o) did not "substantially affect" interstate commerce as far as "mere possession" of a machine gun is concerned:

> [W]e have concluded that mere intrastate possession is neither an economic activity nor an intrastate activity whose regulation is essential to a larger commercial regulatory regime, [and] § 922(o) cannot pass muster under the *Lopez* substantial effects test.

Id., at 1015.

> Regardless of one's view of the wisdom of banning the private possession of machineguns, the question before this court is whether the Commerce Clause grants Congress the authority to ban private, intrastate possession of a machinegun with no

> showing that the prohibition is connected in any way to interstate commerce or is part of a broader federal regulatory scheme. Congress's commerce powers are broad, reaching even Roscoe Filburn's wheat field in Ohio. [Citation omitted.] *Lopez*, however, closely controls this case. *Lopez* does not permit Congress, acting pursuant to the Commerce Clause, to criminalize the mere intrastate possession of machineguns without some indication that the possession ban is necessary to the regulation of, or has some other substantial tie to, interstate commerce. Section 922(o)'s ban on the mere possession of a machinegun exceeds Congress's authority under the Commerce Clause.

Id., at 1016-17.

And this brings us to the Sixth Circuit Court of Appeals. In *United States v. Beuckelaere,* 91 F.3d 781 (6th 1996), defendant was a collector of assault weapons, two of which were fully automatic machine guns. In upholding the constitutionality of § 922(o), the Court of Appeals held:

> We agree that § 922(o) is a proper exercise of the authority granted to Congress under the Commerce Clause because the statute falls within the *first* category articulated in *Lopez* – a regulation of the use the channels of interstate commerce. . . . As the [Ninth Circuit] Court in *Rambo* pointed out, illegal possession of a machinegun cannot occur without an illegal transfer, which given the national market place for machineguns, involves the channels of interstate commerce. [Italics supplied.]

Id., at 784.

> Machineguns travel in interstate commerce, posing a threat to local law enforcement, which has a disruptive effect on interstate commerce.

Id., at 785.

> [W]e believe the statute is constitutional because machineguns are "things in interstate commerce" which flow across state lines for profit by business entities and hamper local and state law enforcement efforts. Just as courts have held that Congress can regulate narcotics, including intrastate narcotics

> possession, to effectively regulate the interstate trafficking in narcotics, we believe a similar rationale applies in the present case.

Id., at 785.

> [U]nlike § 922(q), the possession and transfer of machine guns arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affect interstate commerce. *Id.* Whereas *Lopez* found Congress did not have the power to prohibit possession of all firearms within a particular intrastate locality that was unrelated to commerce, we believe that Congress has the power to regulate the traffic in machineguns introduced into the channels of commerce after 1986 by prohibiting their possession and transfer at any location because of their potentially harmful use.

Id., at 786-7.

Three important factors in *Beuckelaere* should be noted: Firstly, Judge Suhrheinrich dissented, finding that *Lopez* had rendered § 922(o) unconstitutional. *Id.,* at 787. Secondly, the *Beuckelaere* case involved a precedent transaction that involved the crossing of state lines – defendant lived in Michigan, but purchased the guns and parts from a gun dealer in Kentucky. *Id.*, at 782. Thirdly, and very significantly, the Sixth Circuit found § 922(o) constitutional on *all three prongs of the Lopez test*: It is a regulation of the use of interstate commerce (*id.,* at 784); it is a "thing in interstate commerce" (*id.*, at 785); and possession of machine guns substantially affects interstate commerce (*id.*, at 786).

The other Sixth Circuit Court of Appeals case that is of some significance is not a gun case at all, but rather is a child pornography case. In *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001), defendant was convicted of a violation of 18 U.S.C. § 2252(a)(4)(B), possession of child pornography. Specifically, defendant possessed photographs of an under-aged female engaged in various sexual acts, which photographs "were produced using [photographic paper] which had been shipped and transported in interstate and foreign commerce . . . ." *Id,* at 327.

The defendant attacked the constitutionality of § 2252(a)(4)(B) on the basis of *Lopez*. After an extensive discussion of decisions from other circuits regarding child pornography statutes in light of *Lopez*, the Sixth Circuit held that (1) § 2252 was not "facially unconstitutional," but (2) *its application to defendant was unconstitutional* because the nexus to interstate commerce (the use of foreign-manufactured photographic paper) was simply too tenuous under the *Lopez* analytical framework. *Id.*, at 332-33. *Corp* is cited in this Report and Recommendation to point out that the Sixth Circuit, like the Ninth Circuit in *Stewart, supra*, recognizes "unconstitutional as-applied" challenges to a statute.

Lastly, at least one district court within the Sixth Circuit has dealt with the factual situation virtually identical to the one before this Court: The defendant "obtained certain parts [of machine guns] through interstate channels, . . . [which] did not become actual weapons until [defendant] assembled them together with certain critical components he had manufactured himself wholly within the State of Michigan." *United States v. Bournes*, 105 F.Supp.2d 736, 740-1 (E.D. Mich. 2000). The district court noted that the statutory definition of a machine gun in 26 U.S.C. § 5845(b) encompasses not only the assembled weapon, but also its constituent parts. After mentioning this statute, the district court stated:

> Thus, even if § 922(o) included an express jurisdictional element – which it does not – requiring that the machine gun in question must have a connection with or effect on interstate commerce, it is by no means clear that this element would not be satisfied through a showing that many of the principal components of the weapon traveled in interstate commerce.

Id., at 741.

It is with this background that the Court begins its analysis of defendant's Motion to Dismiss. As previously noted, defendant relies on the Ninth Circuit's *Stewart* case which, as

the government admits, is virtually on "all fours" with the facts of this case. The government relies on *Beuckelaere*, the facts of which are somewhat similar to those in the case before this Court, but not precisely; in *Beuckelaere* the defendant acquired fully operational machine guns in a commercial transaction that involved two states, Kentucky and Michigan.

The Ninth Circuit, when confronted with the difficult set of facts presented in *Stewart* (a machine gun wholly manufactured intrastate by the defendant), retreated from its prior ruling in *Rambo*, which suggested that § 922(o) was constitutional regardless of the circumstances underlying the defendant's possession of a machine gun. Will the Sixth Circuit similarly retreat from its *Beuckelaere* decision when confronted with facts such as those before this Court? It should not be forgotten that the Sixth Circuit has manifested a willingness to declare unconstitutional the *application* of a statute to a particular defendant in a particular factual situation, *Corp, supra.*

And of course there is the ultimate question: What would the Supreme Court do? Justice Thomas believes that possession of a gun, without any attendant interstate commercial or economic activity, is beyond the power of Congress to regulate under the Commerce Clause. The majority opinion in *Lopez* indicates that it always is a "question of degree" when deciding whether there is a substantial relationship between the proscribed activity and interstate commerce. But "degree" of what? Would Justice Thomas take into consideration the type of weapon, all other considerations aside? Would he believe possession of a handgun has an insufficient relationship to, or effect upon, interstate commerce, but feel that possession of explosives (or a machinegun) *does* substantially affect interstate commerce?

And then of course there is the danger of judging the "substantial relationship" of an

activity to interstate commerce, and thus its constitutionality, on the basis of *the defendant's intent.*[11] The defendant before this Court appears to be an otherwise law-abiding citizen who only wanted to maintain a collection of "historic" machine guns; most people would find it unpleasant to convict this defendant of a federal felony. But perhaps the antidote to that natural reaction is the distinct possibility that defendant's home could be robbed and his machine gun stolen and then used in some horrific criminal activity. Without a doubt, machine guns are attractive to drug traffickers; a burglary of defendant's home would be an easy way to acquire them.

To put is starkly, it is a guessing game. Admittedly, the guess is not made in a total vacuum, but it is still a guess – what would the Sixth Circuit do if confronted with these facts?

Bearing in mind the Supreme Court's instruction that the question of an activity's relationship to interstate commerce is a question of degree, § 922(o) should be held to be constitutional even when applied to this defendant's "mere possession" of machine guns. Machine guns far and away have more potential for far-ranging and catastrophic destruction than ordinary guns. Defendant acquired the parts for his personal fabrication of these weapons in interstate commerce. If stolen from defendant, and then used in the manner for which they are designed, the impact on interstate commerce would be more than trifling or theoretical. Criminalizing mere intrastate possession at the very least would minimize the interstate demand for parts which can be fabricated in one's basement to make a fully operational machine gun. And the Sixth Circuit's analogy to federal prohibition of even intrastate possession of narcotics is rather important. Methamphetamine is "homemade" in every sense

[11]The aphorism "hard facts make bad law" comes to mind.

of the word, and its possession is illegal under federal law. If § 922(o) cannot constitutionally reach possession of a homemade machine gun, it would seem that 21 U.S.C. § 844 cannot reach possession of methamphetamine.

The question is a difficult one, especially when the question is considered not in the abstract, but with respect to this defendant, who certainly does not appear to be a "bad man." But the fact remains that he violated state law, and he violated federal law if indeed § 922(o) is constitutional as applied to him.

For the reasons set forth above, this Court believes that the Sixth Circuit would uphold the constitutionality of § 922(o) with respect to its prohibition against the intrastate possession of machine guns, especially since that court validated § 922(o) on the basis of all three factors enunciated in *Lopez*, thereby rendering less significant the fact that the defendant in *Beuckelaere* acquired operational machine guns from another state.

Like the defendant in *Bournes, supra*, defendant herein acquired "component parts" for four machine guns that undeniably were shipped in interstate commerce. Then, like the defendant in *Bournes*, the defendant herein reassembled those components by adding additional components he fabricated himself. The result was four operable machine guns. Defendant utilized the channels of interstate commerce, and certainly the manufacture of machine guns has a substantial effect on interstate commerce.

SIMULTANEOUS PROSECUTION OF DEFENDANT UNDER 18 U.S.C. § 922(o) AND 26 U.S.C. § 5861(d)

At first blush, the superseding indictment which charges defendant with both a violation of 18 U.S.C. § 922(o) (unlawful possession of machine guns) and a violation of 26 U.S.C. §

5861(e) (unlawful possession of *unregistered* machine guns) seemed somewhat incongruous, if not outright inconsistent. This Court's initial reaction was that defendant could not be convicted under both offenses for the same conduct, any more than an individual could be convicted of both first degree murder and voluntary manslaughter for the killing of the same person. After all, the same defendant is involved, and the same possession is involved; the only difference is that there are two separate penal statutes that criminalize that same possession, albeit for different reasons.

Because its curiosity was piqued, the Court initiated some legal research on its own initiative. As fate would have it, two cases from the Tenth Circuit Court of Appeals seemed to confirm this Court's initial reaction. Actually, these two Tenth Circuit cases involved the mirror-image of the facts now before this Court. In *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), the defendant was charged with possessing and transferring an unregistered machine gun in violation of 26 U.S.C. § 5861(d). Upon an appeal of that conviction, the defendant claimed that it was impossible for him to register the machine gun inasmuch as 18 U.S.C. § 922(o), which was enacted after 26 U.S.C. § 5861(d), flatly outlaws the possession of machine guns. After all, so that defendant argued, the Registry would not allow an individual to register a weapon that could not be possessed legally. The Tenth Circuit agreed, finding that the subsequent enactment of 18 U.S.C. § 922(o) repealed *by implication* § 26 U.S.C. § 5861(d). 960 F.2d at 126.

The defendant in *Dalton* won the battle, but ultimately lost the war. After the Tenth Circuit reversed his conviction under 26 U.S.C. § 5861(d), the government indicted the defendant *under 18 U.S.C. § 922(o)*. After the District Court dismissed that prosecution on double jeopardy grounds, the government appealed. The Tenth Circuit reversed the dismissal,

finding that there was no double jeopardy. *United States v. Dalton*, 990 F.2d 1166 (10th Cir. 1993).

The significance of "*Dalton I"* and "*Dalton II*" is that, as far as the Tenth Circuit is concerned, a person cannot be guilty of violating *both* § 922(o) and § 5861(d) with respect to the same act of possession.

However, the Tenth Circuit in *Dalton I* stands alone as far as the circuit courts of appeal are concerned. In *United States v. Elliott*, 128 F.3d 671 (8th Cir. 1997), the defendant was charged with illegal possession of a machine gun in violation of § 922(o), and with failing to register that machine gun in violation of § 5861(d). As did the defendant in *Dalton I* in the Tenth Circuit, the defendant in *Elliott* argued that his § 5861(d) conviction violated due process, insisting that § 5861(d) was implicitly repealed by the later-enacted § 922(o). 128 F.3d at 672. In a rather pithy opinion, the Eighth Circuit simply stated, "because Elliott can comply with both statutes by simply refusing to possess the machinegun, we agree with the Fourth, Fifth, Seventh, Ninth and Eleventh Circuits that the statutes are reconcilable." The Eighth Circuit noted the *Dalton* case from the Tenth Circuit but obviously did not follow it. *Id.*

In *United States v. Jones*, 976 F.2d 176 (4th Cir. 1992), the defendant was convicted under 26 U.S.C. §§ 5801-72 for failing to register two machine shotguns. The defendant argued that "the government's decision to charge him under the National Firearms Act (26 U.S.C. § 5801, *et seq.*), rather than under the Gun Control Act of 1968 (18 U.S.C. § 921, *et seq.*) violated due process because an amendment to the Gun Control Act – specifically, the enactment of what ultimately became § 922(o) – rendered unenforceable the applicable provisions of the National Firearms Act. In other words, defendant argued that § 922(o)

impliedly repealed registration requirements of 26 U.S.C. § 5801, *et seq.* 976 F.2d at 182. Defendant insisted that the ban of 18 U.S.C. § 922(o) on possessing machine guns rendered it impossible for him to comply with the registration requirements of 26 U.S.C. § 5801, *et seq.* *Id.* In response to defendant's argument of implicit repeal, the Fourth Circuit noted "'the only permissible justification for repeal by implication is when the earlier and later statutes are *irreconcilable.*'" *Id.,* at 176. [Emphasis supplied.]

> [T]he two statutes are not irreconcilable because, despite [defendant's] assertions to the contrary, [he] *can* comply with both acts. While he may not be able to register newly-made machine guns in which he deals, neither act requires him to deal in such guns. Simply put, [defendant] can comply with both acts by refusing to deal in newly-made machine guns.

Id., at 183.

In *Hunter v. United States*, 73 F.3d 260 (9th Cir. 1996), defendant was convicted of a violation of 26 U.S.C. § 5861(d). He later collaterally attacked that conviction under 28 U.S.C. § 2255, maintaining that the statute under which he was convicted – 26 U.S.C. § 5861(d) – was unconstitutional in light of the subsequent enactment of 18 U.S.C. § 922(o):

> Relying on *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992) [defendant] contends that criminalizing possession of an unregistered machine gun is fundamentally unfair because the statute prevents him from complying with the registration requirement, and that this unfairness renders his conviction unconstitutional. We disagree.
>
> Although this circuit *in dictum* has "note[d] with favor the analysis in *Dalton*," *U.S. v. Kurt*, 988 F.2d 73, 75 (9th Cir. 1993), three circuits have expressedly rejected the *Dalton* holding. In *U.S. v. Jones*, 976 F.2d 176 (4th Cir. 1992), the Fourth Circuit reasoned that the registration requirement is not unfair, even as to machine guns made illegal under § 922(o) because individuals can comply with both acts by refusing to deal in newly-made machine guns." 976 F.2d at 183. Although the passage of § 922(o) effectively rendered the possession of a machine gun a violation of both § 5861(d) and

> § 922(o), the Constitution does not forbid making the same conduct illegal under two statutes, and the government is permitted to prosecute under either one.

73 F.3d 260, 261-2.

In *United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994), the Fifth Circuit Court of Appeals stated the issue before it as follows: "whether . . . 18 U.S.C. § 922(o), which amended the Gun Control Act of 1968 by making possession of machineguns illegal, implicitly repealed . . . [26 U.S.C. § 5861(d)]." 19 F.3d at 179. Defendant in *Ardoin* argued that "since individuals may not possess machineguns manufactured after May 1986, and ATF refuses to accept applications to register or to pay the tax on such weapons, the constitutional authority for . . . [26 U.S.C. § 5861(d)] . . . is gone." *Id.* The Fifth Circuit noted *Dalton* from the Tenth Circuit and explicitly rejected that court's reasoning. *Id.*, at 180. Rather, the Fifth Circuit adopted the reasoning of the Fourth Circuit in *Jones*, supra.:

> . . . 18 U.S.C. § 922(o), prohibiting post-1986 machineguns, can be reconciled with § 5861. Citing *Minor v. United States*, 396 U.S. 87, 96-97, 90 S.Ct. 284, 288-89, 24 L.Ed.2d 283 (1969), for the proposition that Congress can tax illegal conduct such as the sale of narcotics, the court concluded that the prohibition of post-1986 machineguns does not mean that Congress cannot tax them. Although it is illegal to possess or manufacture these weapons, one illegally doing so would be required to register them with ATF and pay taxes on them. And if ATF refuses to allow registration or the payment of taxes, one can comply with § 5861(d) by not violating § 922(o), i.e., by not possessing or manufacturing any post-1986 machineguns. *Jones*, 976 F.2d at 183 (citing *Minor*).
>
> . . . .
>
> We adopt the analysis of the Fourth Circuit.

19 F.3d 180.

Three district courts within the Sixth Circuit have addressed this issue, one of which

followed the *Dalton* case from the Tenth Circuit,[12] and two of which expressly followed *Jones* of the Fourth Circuit and rejected the Tenth Circuit *Dalton* decision.[13]

The vast bulk of authority is in line with the reasoning of the Fourth Circuit enunciated in *Jones*, *supra, viz.*, that 18 U.S.C. § 922(o) did not explicitly or implicitly repeal 28 U.S.C. § 5861(d).

And thus we arrive at the question: May defendant be simultaneously prosecuted under both statutes, or must the government elect to prosecute defendant under one or the other?

The government concedes that, in the case of a dual conviction, defendant can only be sentenced under one or the other statutes, but not both. But the government vigorously argues that the defendant may be prosecuted under both statutes, and convicted under both statutes.

The issue of whether defendant may be simultaneously prosecuted under 18 U.S.C. § 922(o) and 26 U.S.C. § 5861(d) with respect to the same possession of the same machine guns implicates the Double Jeopardy clause of the Fifth Amendment.

For sixty years, cases involving double jeopardy were analyzed under the so-called *"Blockberger*" test:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Gavieres v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433: 'a single act may be an offense against two statutes; and if each statute requires

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[12]United States v. Gambill, 912 F.Supp. 287 (S.D. Ohio 1996).

[13]United States v. Wolfe, 32 F.Supp.2d 945 (E.D. Mich. 1999); United States v. Bournes, 105 F.Supp.2d 736 (E.D. Mich. 2000).

> proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' [Citations omitted.]

284 U.S. at 304.

Thus, the *Blockberger* test focused on the *elements of the offenses*, i.e., the statutes which the defendant violated.

In 1990, the Supreme Court was called upon to address double jeopardy again, in *Grady v. Corbin*, 495 U.S. 508 (1990). In *Grady*, the Supreme Court "enhanced" the *Blockberger* or "same elements" test: "[I]f, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," double jeopardy attaches. *Id.,* at 510. Thus, for the purpose of determining if jeopardy had attached, *Grady* shifted the focus from the two statutes, i.e., from the elements of each offense, *to the defendant's conduct.* In other words, under *Grady*, if the same conduct resulted in offenses under two different statutes, prosecution under one statute barred prosecution under the other; jeopardy had attached. Inasmuch as defendant herein committed precisely the same act (possession of a machine gun) that resulted in a violation of both § 922(o) and § 5861(d), under *Grady* there is little doubt that jeopardy would attach upon prosecution of one statute or the other. It would logically follow that *Grady* would preclude a simultaneous prosecution of defendant under both statutes.

However, *Grady* is no longer the law. Three years after *Grady* was decided, the Supreme Court reversed itself and expressly overruled *Grady. United States v. Dixon*, 509 U.S. 688, 703-05 (1993). The Supreme Court stated that the "same-conduct" rule announced in *Grady* was "wholly inconsistent with earlier Supreme Court precedent . . . ." *Id.,* at 107.

A subsequent district court case from the Eastern District of Michigan contains a concise statement of the law after *Dixon*:

> In *Dixon, supra*, the Supreme Court reiterated its adherence to the *Blockberger* "same elements" test and expressly rejected the "same conduct" approach taken by the Court in *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which is the approach urged upon this Court by [defendant]. Under the *Grady* test, the Double Jeopardy clause was held to bar a second prosecution "if to establish an essential element of an offense charged in that prosecution, the government [would] prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. 509-11, 110 S.Ct. at 2087. *Grady*, however, was expressly **overruled** in *Dixon*, 509 U.S. at 703-05, 113 S.Ct. at 2860: . . . .
>
> As further explanation for its overruling of *Grady*, *Dixon* incorporated by reference the *Grady* dissent, *id.,* in which Justice Scalia, joined by Justices Rhinquest, Kennedy, and O'Connor explained:
>
> > Blockberger furnishes, we have observed, the "established test" for determining whether successive prosecutions arising out of the same events are for the "same offense". This test focuses on the statutory elements of the two crimes with which a defendant has been charged, ***not on the proof that is offered or relied upon to secure a conviction.*** "If each statute requires proof of a fact that the other does not, the Blockberger test is satisfied, ***notwithstanding a substantial overlap in the proof offered to establish the crimes."***
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> 495 U.S. at 527-29, 110 S.Ct. at 2097 [Emphasis in original.]

United States v. Forman, 990 F.Supp. 875 (E.D. Mich. 1997).

Therefore, under *Blockberger* and *Dixon*, this court must focus on the elements of the two statutes involved – § 922(o) and § 5861(d), *not on the defendant's conduct.* Does each of these statutes require proof of an additional fact which the other does not? Both statutes rather obviously require "possession" of a firearm. Indeed, that is all that 18 U.S.C. § 922(o)

requires: mere possession of a machine gun. 28 U.S.C. § 5861(d), requires not only proof of possession of a firearm, but also proof of the defendant's failure to register that firearm with the National Firearms Registration and Transfer Record.[14]

It should be emphasized that the *Blockberger* test requires that *each* offense contain an element not within the other; the *Blockberger* test is not satisfied if only one of the offenses contains an element not contained within the other. *See, Costo v. United States,* 904 F.2d 344 (6th Cir. 1990). Rather obviously, § 5861(d) contains an element that § 922(o) does not – a failure to register the machine gun. On the other hand, § 922(o) does not contain an element that is unique to it, i.e., that is not contained within § 5861(d). Therefore, under the *Blockberger* test, a conviction or acquittal for either of these statutes that involve the same underlying transaction would bar a prosecution under the other statute.

But does this mean that there may be no *simultaneous* prosecution of a defendant for two different offenses that fail the *Blockberger* test?

In *United States v. Elliott,* 128 F.3d 671 (8th Cir. 1997), the defendant was indicted for, and convicted of, (1) being a convicted felon in possession of a firearm in violation of § 922(g)(1), (2) illegal pos-session of a machine gun in violation of § 922(o), and (3) failing to register that machine gun in violation of § 5861(d). The *Elliott* opinion addressed only the issue of whether § 922(o) impliedly repealed § 5861(d); it did not address the question of whether defendant could be convicted under both statutes. If it was improper, one would think that the Eighth Circuit would have addressed it on its own motion.

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[14]"Firearm" for purposes of § 5861 includes a machine gun. See, 28 U.S.C. § 5845(a) and (b).

Similarly, in *United States v. Morgan,* 216 F.3d 557 (6th Cir. 2000), the defendant was convicted of being a felon in possession of a firearm [18 U.S.C. § 922(g)], possession of an unregistered machine gun [26 U.S.C. § 5861(d)], and unlawful possession of a machine gun [18 U.S.C. § 922(o)]. Similar to the *Elliott, supra*, case, the issue of simultaneous prosecution was not addressed, and neither did the Sixth Circuit Court of Appeals raise it on its own motion. Therefore, one could safely conclude that there is no inherent problem in simultaneous prosecutions of offenses which otherwise could not be successively prosecuted under the *Blockberger* criteria.

The Fifth Amendment guarantee against double jeopardy consists of *three separate constitutional protections*: It protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; *and it protects against multiple punishments for the same offense. North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). This validates the government's contention that defendant may be tried and convicted of both § 922(o) and § 5861(d) with respect to the same possession of the same firearm, but that he may not be sentenced for both convictions. Directly on point is the case of *United States v. Xavier*, 2 F.3d 1281 (3rd Cir. 1993). In *Xavier*, the defendant was convicted in the Virgin Islands of (1) possessing a firearm, and (2) possessing a firearm during a violent crime. Citing *Pearce, supra*, the Third Circuit noted that the double jeopardy clause protects against a second prosecution for the same offense after acquittal or conviction, and it protects against multiple punishment for the same offense. *Id.,* at 1290. Defendant received consecutive sentences on his convictions upon these two offenses. The Third Circuit stated:

> The Double Jeopardy Clause does not necessarily preclude concurrent prosecution under a single indictment for crimes

> arising from single transaction – even if the multiple counts in the indictment are, as here, under different sections of the same statute. [Citing *Blockberger.*] In the context of concurrent (rather than consecutive) prosecutions, the Clause only prohibits the government from seeking, and the courts from imposing, punishments exceeding legislative authorization. The Supreme Court made this clear in *Missouri v. Hunter,* 459 U.S. 359, 368-69, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983): "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."

Id.

Accordingly, § 922(o) and § 5861(d) fail the *Blockberger* test inasmuch as only one of the offenses contains an element not within the other. Therefore, the double jeopardy clause of the Fifth Amendment would preclude subsequent prosecutions of this defendant under either statute should he be convicted or acquitted in an earlier trial of the other statute. Nevertheless, that is no impediment to indicting defendant under both statutes for the same transaction and putting him to trial under both statutes. In that circumstance, the double jeopardy clause only inhibits the Court from imposing consecutive sentences. *Xavier*, *supra*, at 1290. *See also, Pandelli v. United States*, 635 F.2d 533 (6th Cir. 1980).

CONCLUSION

It is respectfully recommended to the Court as follows:

1. That defendant's Motion to Dismiss all counts of the indictment alleging a violation of 18 U.S.C. § 922(o) because the statute is unconstitutional as applied to him be DENIED;

2. That defendant be tried on all eight counts, four of which charge defendant under 18 U.S.C. § 922(o) and four of which charge defendant under 26 U.S.C. § 5861(d); and

3. That if defendant is convicted under both § 922(o) and § 5861(d) with respect to a particular machine gun, that his sentences be ordered to run concurrently.

Respectfully submitted,

_____

DENNIS H. INMAN
UNITED STATES MAGISTRATE JUDGE