



U.S. Department of Justice

United States Attorney  
Southern District of New York  
The Silvio J. Mollo Building

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One Saint Andrew's Plaza  
New York, New York 10007

September 19, 2006

**BY HAND**

The Honorable Robert P. Patterson  
United States District Judge  
Southern District of New York  
United States Courthouse  
500 Pearl Street  
New York, New York 10007

**Re: United States v. Warith Deen Umar  
06 Cr. 205 (RPP)**

Dear Judge Patterson:

I write respectfully in connection with the above-referenced case, which is scheduled for sentencing on September 21, 2006, in response to the sentencing submissions of defense counsel, including his August 16, 2006 objections to the Presentence Report, his September 14, 2006 Sentencing Brief, and the September 18, 2006 collection of letters related to sentencing. As set forth below, it is the Government's position that: (1) Umar's United States Sentencing Guideline ("U.S.S.G.") range is properly calculated in the Presentence Report ("PSR"); (2) no departures are applicable; and (3) Umar should be sentenced within the Guideline range to a sentence of between 10 and 16 months' imprisonment.

I. Background

As explained more fully in the Government's Complaint in this matter, attached hereto as Exhibit 1, this case arose when Umar got into a dispute with one of his tenants (the "Victim") at 756 Union Avenue, Bronx, New York. During this altercation, Umar retrieved a shotgun, pointed it at the Victim, and said, in sum and substance, that he was going to kill the Victim. These actions ended the confrontation when the Victim fled. When the police arrived on the scene, an officer questioned Umar about the dispute. Umar reported that he had weapons in the home and showed the officer the weapons, which were kept in the closet. Umar also indicated that he had no permit for the shotgun.

Umar makes various claims in his sentencing brief about the facts surrounding his gun possession, arguing that the facts are not as they were claimed to be in the Complaint. Umar

also spends a significant amount of time in his brief detailing each of the Victim's arrests and convictions, presumably to emphasize that Umar has fewer convictions than the Victim. The Government disagrees with some of Umar's representations concerning the Victim's criminal history. (The Victim's criminal history is, however, extensive). In any case, the Victim's criminal history has absolutely nothing to do with this case. The point to be taken from the events that occurred on December 30, 2005 is the following, and it is undisputed: after getting into an altercation with the Victim, Umar retrieved a weapon, and used that weapon to end the confrontation. Whether he pointed the shotgun at the Victim, whether he said words to the effect of "I'm going to kill you," or whether he merely held up the gun so that the Victim would see it is of no moment. The fact remains, under either side's version of events, that Umar used a weapon that he illegally possessed to threaten another person.

## II. Umar's Guideline Range

The post-Booker sentencing regime differs in several important regards from the prior regime, most prominently in that the Sentencing Guidelines are no longer mandatory. However, while the Guidelines no longer play a mandatory role at sentencing, they nevertheless continue to play a critical role in trying to achieve the "basic aim" that Congress tried to meet in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." United States v. Booker, 543 U.S. 220, 251-52 (2005). In furtherance of that goal, judges will be required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004)." Id. at 259.

After Booker, district courts are required to consider the factors set forth in Title 18, United States Code, Section 3553(a), in sentencing defendants. This provision provides that the sentencing "court shall impose a sentence sufficient but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations:

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

- (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant;
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effect manner;
- (3) the kinds of sentences available;
  - (4) the sentencing range established [in the Sentencing Guidelines]
  - (5) any pertinent policy statement [issued 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.

In Crosby, the Second Circuit explained that district courts should now engage in a three-step sentencing procedure in light of Booker. First, the court must determine the applicable Guidelines range, and in so doing, “the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.” Crosby, 397 F.3d 103, 112 (2d Cir. 2005). The Court explained that a failure to consider the Guidelines range and to instead simply select a sentence without such consideration is error. Id. at 115.

Next, the court should consider whether a departure from that Guidelines range is appropriate. Crosby, 397 F.3d at 112. Lastly, the court must consider the Guidelines range, “along with all of the factors listed in section 3553(a)” and determine the sentence to impose. Id. at 113.

Umar’s U.S.S.G. range was properly calculated by the Probation Office in the PSR. As indicated there, and in the Government’s Pimentel letter, attached hereto as Exhibit 2,

Umar has an offense level of 12 and a criminal history category of I,<sup>1</sup> resulting in a Guideline range of 10 to 16 months.

Umar contends in his August 16, 2006 letter that his offense level should have been reduced to level 6 pursuant to U.S.S.G. § 2K2.1(b)(2). Umar is wrong. That reduction applies to those defendants who possessed “all ammunition and firearms solely for lawful sporting purposes or collection” [who] “did not unlawfully discharge or otherwise use such firearms or ammunition.” U.S.S.G. § 2K2.1(b)(2) (emphasis added). Umar’s argument for application of Section 2K2.1(b)(2) fails on two grounds. First, Umar does not even claim to have possessed the relevant weapons for sporting purposes or collection. Instead, Umar ignores the word “sporting” and simply argues that he possessed the guns for a “lawful purpose (which includes lawful defense of his home)”. By the plain terms of Section 2K2.1(b)(2), Umar’s claimed purpose of personal protection takes him outside of its reach.<sup>2</sup> Second, because, as is charged in the Complaint, Umar unlawfully used one of the firearms to threaten one of his tenants, his argument fails for that reason as well.

Accordingly, Umar’s Guideline range was correctly calculated by the Probation Department as 10-16 months’ imprisonment.

### III. No Departures Are Applicable

Umar next claims that two different Guideline provisions support downward departures in this case. First, Umar argues that Section 5K2.11, the “lesser harms” provision, supports departure.

Guidelines § 5K2.11 provides, in relevant part:

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<sup>1</sup> Umar’s prior felony conviction for weapons possession is not counted because it occurred more than 15 years prior to the instant offense. U.S.S.G. § 4A1.1, App. Note 1.

<sup>2</sup> It is clear from the Application Note that Section 2K2.1(b)(2) is not meant for defendants like Umar, as it states that relevant surrounding circumstances from which one should determine whether the firearms were possessed for “lawful sporting purposes or collection” include “the location and circumstances of possession and actual use” – here, the guns were kept in Umar’s closet in the Bronx, and one of them was used to threaten one of his tenants – and “the nature of the defendant’s criminal history (e.g., prior convictions for offenses involving firearms)” – here, Umar’s prior felony is, in fact, a weapons possession conviction. U.S.S.G. § 2K2.1(b)(2), App. Note 7.

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction of sentence is not warranted (emphasis added).

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, when a war veteran possessed a machine gun or grenade as a trophy.<sup>3</sup>

Thus, U.S.S.G. §5K2.11 provides that a downward departure "may be appropriate" when the defendant commits "a crime in order to avoid a perceived greater harm" or where "[i]n other instances, conduct may not cause or threaten the harm or evil sought to be prevented." Umar cannot succeed under either prong.

On the first argument, Umar's motion depends on the essential claim that his not being able to possess a shotgun was a "greater harm" than violating the federal firearms statute. This is simply nonsensical, and no case cited by Umar supports such a departure. On the second, Umar must show that his conduct did not cause the sort of harm the statute was meant to prevent. In a situation where a convicted felon kept a shotgun in his home for the purpose of using it to "protect" himself by using the gun against other people, Umar cannot make such a showing.

The cases cited by Umar are easily distinguishable. In United States v. White Buffalo, 10 F.3d 575, 576 (8<sup>th</sup> Cir. 1993), the court affirmed a lesser harms departure because the defendant's "actions were not the kind of misconduct and danger sought to be prevented by the gun statute." In that case, the defendant was found with an unloaded gun (and no ammunition) in his car during a traffic stop. There was no evidence that the defendant "ever brandished the gun or used it in a threatening way." The defendant "had no criminal record," and the gun was possessed by the defendant "to shoot animals." Id. Therefore, the court found "no quantifiable risk of accidental harm to others" particularly since the defendant lived in a remote area. Id.

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<sup>3</sup> The few courts that have considered the "lesser harms" departure have cautioned that it should not be interpreted broadly. See United States v. Warner, 43 F.3d 1335, 1338 (10<sup>th</sup> Cir. 1994) ("The lesser harms rationale for departing from the sentencing guidelines should be interpreted narrowly"); United States v. Rojas, 47 F.3d 1078, 1081 (11<sup>th</sup> Cir. 1995) (same); United States v. Barajas-Nunez, 91 F.3d 826, 831 (6<sup>th</sup> Cir. 1996) (§5K2.11 departure "applies only in narrow, extreme circumstances.")

This is a far cry from our case, where Umar, a felon, possessed and brandished a shotgun in the Bronx, which he had for the purpose of his own personal protection, i.e., to use to threaten (or shoot) other people, which, in fact, he actually did. This case is exactly the kind of situation sought to be prevented by the gun statute.

In United States v. Rojas, 47 F.3d 1078 (11<sup>th</sup> Cir. 1995), the court reversed a lesser harms departure, finding that, in a case where the defendant was convicted of possessing weapons and ammunition that he was trying to smuggle to a Cuban resistance movement, neither prong fit. Specifically, the court determined that, having considered Congress's "deep-rooted concern with the loss of human life," the statute was designed to reach the defendant's conduct, id. at 1081, and that the defendant's political beliefs did not succeed in making his conduct a lesser harm, id. at 1082. In United States v. VanLeer, 270 F.Supp.2d 1318 (D. Utah 2003), the court granted a lesser harms departure where the defendant, a felon, had possessed the weapon only for the purpose of pawning it for money at a pawn shop. In so holding, the court noted that the defendant's "brief possession of a firearm does not threaten the harms at which § 922(g) was directed. The facts plainly reveal that VanLeer briefly possessed the gun only because he intended to dispose of that gun." Id. at 1326. Stating that "a gun that leaves the hands of a felon is less dangerous than a gun remaining in the hands of a felon," the court determined that a departure was warranted. Clearly, VanLeer does not support Umar's claim. Finally, in United States v. Lewis, 249 F.3d 793, 796 (8<sup>th</sup> Cir. 2001), the court found that a lesser harms departure could be available in a case where a felon made a false statement (that he was not a felon) in connection with trying to obtain his family heirloom firearm from a pawn shop, because the weapon sought was not sought for a purpose the statute was intended to proscribe.<sup>4</sup>

Umar's case is better illustrated by, and in fact is even more egregious than, United States v. Lam, 20 F.3d 999, 1003 (9<sup>th</sup> Cir. 1994). In Lam, the defendant, who was not a felon, was convicted of a firearm registration offense because, unbeknownst to him, he possessed a weapon for personal protection that had been modified in such a way as to make its registration mandatory. The weapon was discovered during an unrelated search in the defendant's shop. The Lam court determined that possession of a weapon to protect one's self and family, even by a non-felon, is not a "lesser harm" than violation of federal firearm laws. That court distinguished cases where the defendant possessed the weapon for a purpose closer to the sporting or collection purposes noted in U.S.S.G. § 2K2.1(b)(2), finding it significant that even though Lam was not a felon and had not actually used the weapon to threaten anyone, "the weapon was held for the purpose of shooting or threatening human beings." Lam, 20 F.3d at 1005.

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<sup>4</sup> United States v. One Star, 9.F.3d 60 (8<sup>th</sup> Cir. 1993), cited in support of Umar's lesser harms argument, is not a lesser harms case.

In this case, Umar simply cannot argue that his possession of a gun for the purpose of threatening and potentially shooting people is a lesser harm. As a convicted felon, Umar is exactly the kind of person that Congress sought to keep from having a weapon, as has been made repeatedly and abundantly clear. See Barrett v. United States, 423 U.S. 212, 218 (1976) (noting legislative intent of “keep[ing] firearms away from the persons Congress classified as potentially irresponsible and dangerous,” and finding that defendants who might be prohibited from possessing a firearm due to their status as a felon (or for some other reason) are under an obligation to ascertain their status before possessing a gun). Courts have typically observed that convicted felons and other prohibited defendants are not “ordinary citizens” who can expect to be free from regulation when possessing a gun, and therefore that it behooves these individuals to check their status prior to obtaining a gun. See Lewis v. United States, 445 U.S. 55, 62 (1980); Bonfiglio v. Hodden, 770 F.3d 301, 305 (2d Cir. 1985).

Nor can Umar argue effectively that the purpose for which he possessed the gun is not the purpose against which the statute was designed to guard. Unlike the cases where the defendant possessed a gun to shoot small animals, to get money from a pawn shop, or to show off as a trophy, Umar possessed his gun to potentially use it for its intended purpose. If lesser harms departures were available under the circumstances of this case, every convicted felon who supposedly needed a gun for “protection” would be eligible for a downward departure, even though Congress has made no such exception in the statute. See United States v. Marcello, 13 F.3d 752, 760 (3<sup>rd</sup> Cir. 1994) (lesser harms departure denied for structuring currency transactions to evade reporting requirements even though defendant’s currency was neither subject to tax nor illegally obtained). Umar’s lesser harms departure request should be denied.

To the extent Umar seeks a departure under U.S.S.G. § 5K2.0, he would have to show that his case is outside of the relevant Guideline’s “heartland” of cases. Moreover, it is “the [Sentencing] Commission’s expectation that departures based on grounds not mentioned in the Guidelines will be ‘highly infrequent.’” United States v. Lipman, 133 F.3d 726, 730 (9<sup>th</sup> Cir. 1998) (citations omitted).

In connection with this motion, Umar contends that he has “over three decades of outstanding citizenship and service.” (Umar Br. 16). This ground is one for which the Guidelines specifically disapprove of a departure. See U.S.S.G. § 5H1.5 (employment record not ordinarily relevant); § 5H1.11 (civic, charitable, or public service, employment-related contributions, record of prior good works not ordinarily relevant). Other than this claim, Umar simply asserts in support of his § 5K2.0 argument that he did not know the ownership of the guns was illegal, and had no intention to use the guns in an unlawful manner. Umar’s case is not outside of the heartland of felon-in-possession cases. Umar’s conduct – a felon possessing a gun for the purpose of using it against other people – is exactly the conduct the law was meant to prohibit. The argument that Umar had a “lack of intent to use the firearms in an unlawful manner” (Umar

Br. 17) is belied by the facts of this case – where Umar kept a weapon and actually retrieved that weapon and brandished it at an unarmed tenant with whom he was arguing. Umar’s knowing and wilful possession, and his purposeful use of a weapon to threaten someone place him squarely within the heartland of such cases.

Because Umar does not fall into the narrow categories described in U.S.S.G. §5K2.11, and does not otherwise fall outside the "heartland" covered by the Sentencing Guidelines, this Court should deny his motions for a downward departure.

#### IV. 18 U.S.C. ¶ 3553(a) Factors

Finally, Umar makes a number of arguments that he claims warrant a sentence below the applicable Guideline range. Many of these arguments are irrelevant; for example, Umar goes to great lengths to convince the court that his possession of firearms was unknowing and not likely to lead to criminal activity, even going so far as hiring an “expert” to opine that the weapons were “probably intended for use as hunting or target use” (Umar Br. 7) even though Umar never claims to be either a hunter or a target shooter, and Umar elsewhere in his brief concedes that the guns were possessed “for reasons of self-defense” (Umar Br. 8).

Umar also seeks a non-Guidelines sentence by claiming that his personal history and characteristics warrant one. The Government strongly disagrees. Specifically, Umar supports his request for a sentence below the Guideline range with a number of letters from friends and supporters. Many of these letters describe Umar as a peaceful, religious person. Many of the letters also specifically refer to statements Umar has made publicly, and complain of Umar’s treatment by the NYPD and the Government in this case, supposedly because of those statements. (See, e.g., Letter of Imam Muhammed; Letter of May Saffar-Khemili; Letter of Michael Rice; Letter of Howie Hawkins). These letters require a response.

According to published news reports, in 2003, Umar was quoted in the Wall Street Journal as praising the 9/11 hijackers, stating, among other things, that “even Muslims who say they are against terrorism secretly admire and applaud” the hijackers. As a result of his statements, Umar was banned from the state prison system, where he had continued to visit inmates after his retirement. (See Exhibit 3, attached hereto). Umar also gave an interview to Channel 9 news after an NYPD search of his home pursuant to a search warrant, in which he stated: “So we hope the Muslim community will rise up and contend with this. This is unacceptable. They don’t frighten me, they don’t frighten me. They make me angry. They make me hate them more.” (See Exhibit 4, attached hereto). Finally, in 2005, prior to Umar’s arrest, Umar was once again engaged in incendiary speech during periodic Friday sermons he gave at a mosque in the Bronx. During these speeches, Umar frequently preached about jihad, describing it as fighting and killing. . . . that’s the real jihad. Umar discussed his banishment from the



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prisons, and talked about his next step as “jihad.” Umar railed about the Iraq war, describing how “brothers” in Iraq were killing “pigs” (American soldiers). Finally, Umar stated that he does not want to die of old age, but as a martyr, and advocates fighting if you can, or if you’re older, to give money to the brothers who are fighting. These are merely a few examples of the kind of actions Umar advocates to his followers.

In essence, what Umar is doing here is blithely asking the Court to agree that Umar is a peaceful individual who deserves to be treated differently, and better, than other convicted felons who are found possessing firearms. Given the circumstances of Umar’s arrest on December 30, 2005, as well as his personal history, there is simply no basis to do that.

The Government requests the Court to follow the recommendation of the Probation Department and sentence Umar within the applicable Guidelines range of 10 to 16 months’ imprisonment.

Respectfully submitted,

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