

NATIONAL LEGAL PROFESSIONAL ASSOCIATES

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MEMORANDUM

TO: ALL INTERESTED DEFENSE COUNSEL

FROM: NATIONAL LEGAL PROFESSIONAL ASSOCIATES

NAME: ROGERS

RE: SENTENCING ISSUES: HOW TO AVOID ENHANCEMENT FOR POSSESSION OF AMMUNITION IN CONNECTION WITH ANOTHER FELONY OFFENSE (U.S.S.G. §2K2.1(b)(5))

The United States Federal Sentencing Guidelines provide various enhancements based upon the type of offense, the circumstances associated with the charged conduct, and the criminal history of the defendant. One such enhancement is incorporated in the guideline addressing unlawful possession of firearms and ammunition, U.S.S.G. § 2K2.1. Under subsection (b)(5) of this guideline, a sentencing court is obligated to increase a defendant's sentence computation by four additional levels if the defendant used or possessed a firearm or ammunition in connection with another felony offense. Under certain circumstances, such an enhancement can correspond to a minimum of an additional 60% in prison time!

There are, however, criteria for the imposition of this enhancement and NLPA has worked closely with counsel of record, applying these factors in the past to help a defendant avoid having his sentence enhanced for the alleged possession of a firearm or ammunition. NLPA was contacted by Attorney Keith Kimball of Virginia Beach, Virginia for assistance in just this regard in the case of *United States v. Rogers*. In that case, Mr. Kimball was representing a defendant who was charged with being a felon in possession of a firearm or ammunition as well as maintaining a location for the use and distribution of cocaine base. When the police came to arrest Mr. Rogers at his residence, they searched his home and seized ammunition. However, no firearms were located. Further, it was clear that no firearms existed at his home nor were tied to the defendant in his illegal business.

The defendant entered into a plea agreement with the Government in which the second count dealing with narcotics was dismissed and the defendant pleaded guilty to the first count, being a felon in possession. However, the probation department and the Government sought judicial imposition of this guideline enhancement. Based on the ammunition seized, the Government sought to impose the § 2K2.1(b)(5) enhancement claiming that a box of Winchester .40 caliber ammunition was related to, facilitated, and emboldened the felony offense of selling narcotics.

Under this specific offense characteristic of the Guideline, the court would be required to increase any base offense level by four levels.

Attorney Kimball approached NLPA and asked it to join in the defense team, researching and preparing for his review a reply to the Government's position regarding sentencing.

From NLPA's research, it was clear that §2K2.1(b)(5) was added out of concern about crimes of violence, drug offenses, and the use or possession of firearms in connection with these offenses. At its core definition, Mr. Kimball argued to the Court in a formal sentencing

memorandum, the § 2K2.1(b)(5) enhancement provides that there must be a legally sufficient nexus between the presence of the firearm or ammunition and some other felonious acts. For the enhancement to be applicable, the firearm or ammunition seized must serve to facilitate, embolden, enhance, or support the felonious conduct of the other felony offense.

In Mr. Rogers case, this standard simply did not exist. The Government proved that it found and seized ammunition, but nothing more. The defense countered that since no firearm was found and since .40 caliber shells, by themselves, cannot facilitate the illegal sale of narcotics (except perhaps by throwing them at someone), the enhancement should not be applied. To broaden the application of this enhancement to include the mere possession of passive shells would be, it was argued, an expansion of logic unwarranted by the § 2k2.1(b)(5) enhancement.

The sentencing court agreed with the arguments researched for Mr. Kimball by NLPA, sustaining the defense's objection to the four level enhancement without even entertaining oral arguments. As indicated on the attached letter, this decision saved Mr. Rogers "considerable months of imprisonment," corresponding to at least **two years of incarceration!**

If you have a client facing similar sentencing issues in Federal court and would like NLPA's experienced staff of attorneys on your team, please contact us.

NLPA: WE CARE, WE LISTEN, WE GET RESULTS!

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