

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS,  
SAN ANTONIO DIVISON**

<b>UNITED STATES OF AMERICA,</b>	§	<b>SA 18 CR 390-OLG</b>
	§	
<b>Plaintiff,</b>	§	
	§	
<b>VS.</b>	§	
	§	
<b>ROBERT MIKELL USSERY,</b>	§	
	§	
<b>Defendant</b>	§	

**DEFENDANT’S MOTION TO SUPPRESS EVIDENCE**

**TO THE HONORABLE ORLANDO L. GARCIA, CHIEF UNITED STATES DISTRICT JUDGE FOR THE SAN ANTONIO DIVISION OF THE WESTERN DISTRICT OF TEXAS:**

COMES NOW, undersigned counsel, and in and for his representation of the Defendant, ROBERT MIKELL USSERY, a defendant in the above styled and numbered cause, and for Just and Good Cause files herein *Defendant’s Motion to Suppress Evidence*, and in support thereof, would show unto this Honorable Court as follows:

I.

Defendant ROBERT MIKELL USSERY moves to Suppress All Evidence obtained by and in possession of the of the government which was the result of the investigation as charged in Counts One and Two of the Indictment and referred to herein, as SA 18 CR 390-OLG. Counts One and Two charge Defendant with *Felon*

*in Possession of a Firearm.* Defendant, herein, maintains that his statements, audio and video recordings and alleged possession of firearms<sup>1</sup>, and which are in the possession of the government investigators, agents, officers, representatives and / or other persons acting on their behalf, and at their direction, were all obtained in violation of his rights as guaranteed to him by the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution.*

## II.

### BACKGROUND

The November 5, 2017, First Baptist Church of Sutherland Springs, Texas:

On or about November 5, 2017, a tragedy occurred at the *First Baptist Church of Sutherland Springs, Texas*, wherein, in a mass shooting, twenty-five persons were killed and an additional 20 persons were shot and wounded, wherein, as worshippers who were gathering and preparing for a Sunday church service, a lone gunman, the shooter,<sup>2</sup> approached the church and with a loaded Ruger AR-556, semi-automatic rifle, began firing upon and shooting church worshippers. USSERY was not present and is not alleged to have been present at the time of the shooting. USSERY does, herein, deny that said mass shooting ever occurred. Over 700 rounds of ammunition were expended by the shooter in and around the church and its premises. Fifteen empty magazines were recovered. The magazines were identified as belonging to

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<sup>1</sup> Defendant, herein, understands that no gun was seized or is in the government's possession which serves to support the Count One. Accordingly and Notice is hereby given, that pretrial, Defendant will move to Dismiss Count of the Indictment.

<sup>2</sup> The shooter is not herein named, nor is he given attribution or notoriety herein.

the shooter and having been fired from his rifle. That rifle was recovered at the scene of the shooting.<sup>3</sup> Forensic evidence and examination of the weapon and magazines support this finding. In all, 26 persons were reported killed on that day, Sunday, November 5, 2017.<sup>4</sup>

Defendant USSERY'S Beliefs:

Defendant is part of a group of individuals or sub-culture which said group maintains that no *First Baptist Church of Sutherland Springs, Texas* mass shooting ever occurred, that no person or persons were shot, injured or killed and that said “reported incident” was nothing more than a complete & utter fabrication which was orchestrated and choreographed by the government of the United States. USSERY argues that this claimed *fabrication* by the government was intended and designed to put pressure on and to turn public opinion away from legitimate gun owners – and their possession of firearms. Allegedly, according to USSERY, the government’s long-term goal was to repeal or completely emasculate the tenets of the *Second Amendment*. The Second Amendment of the United States Constitution provides for a

*Well-regulated Militia, being necessary to the security of a Free State, the right of the people to keep and bear arms, shall not be infringed.*

Defendant maintains, according to his individual lexicon, that the government, in an

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<sup>3</sup> Defendant maintains, herein, that no shooting took place.

<sup>4</sup> In addition, the shooter was also killed, but not counted herein. As well, an unborn baby was also killed which brings the number of victims to 27 and not counting the shooter as a victim.

effort to carry out its scheme to defraud the public, employed “crisis actors” whose role it was to pose as victims of mass shootings, where, in fact, as Defendant argues, no mass shooting occurred, and no persons were shot or killed.

Defendant includes as examples of the government’s network of fraud and fabrication the following *alleged* mass shootings: Columbine 1999, El Paso, Texas 2019, Parkland, Florida 2018, Las Vegas 2017, and Sandy Hook 2012, among other mass shootings.

#### IV.

The Subsequent, March 5, 2018, confrontation at the First Baptist Church of Sutherland Springs, Texas:

On or about March 5, 2018, the Defendant, ROBERT MIKELL USSERY, aka “Side Thorn” and his girlfriend, companion, and co-defendant, Jodie Marie Mann, aka “Conspiracy Granny”, were present at *First Baptist Church of Sutherland Springs, Texas*, and in a loud, very visible and public display & confrontation challenged the minister of the church, as well as congregants and other persons present. ensued. With a television crew pre-arranged to be present, USSERY argued that no mass shooting ever occurred on November 5, 2017, and passionately / belligerently – a matter of perspective, challenged the minister to admit to the same. That is, that no mass shooting occurred. As such, USSERY demanded that the minister admit that he was a knowing participant in a broader and greater scheme to mislead the citizens of the United States and lawful gun owners.

Defendant is charged with Felon in Possession of a Firearm on that occasion and while present at the church, March 5, 2018.<sup>5</sup>

V.

The Charges:

On or about May 22, 2018, and following as a consequence of the March 5, 2018, confrontation at the *First Baptist Church of Sutherland Springs, Texas*, ROBERT MIKELL USSERY, as defendant, was charged by *Criminal Complaint*.<sup>6</sup> It is charged that on or about March 5, 2021, at the *First Baptist Church of Sutherland Springs, Texas*, USSERY, as a felon, was in Possession of a Firearm, in violation of Title 18, United States Code, Section 922(g)(1).

Thereafter, on June 6, 2018, a Four Count, Two defendant indictment was returned in the San Antonio Division of the Western District of Texas. Charged were Defendant ROBERT MIKELL USSERY, aka “SideThorn” and co-defendant and girlfriend Jodie Marie Mann, aka “Conspiracy Granny.” USSERY was charged alone in Counts One and Two. USSERY was charged, in relation to the March 5, 2018, confrontation, described herein, with *Felon in Possession of a Firearm*, [Count One]. USSERY was additionally charged in relation to a May 23, 2018,

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<sup>5</sup> It is not believed that this gun has ever been identified or recovered.

<sup>6</sup> Case No. 5:18-MJ-655, San Antonio Division, Western District of Texas.

execution of a search warrant, also, with *Felon in Possession of a Firearm*, [Count Two], in violation of Title 18, United States Code, Section 922(g)(1), Dkt. 15.

USSERY'S charges related to his alleged possession on March 5, 2018 [Count One] – the day of the confrontation, described herein, March 5, 2018, and a May 23, 2018 [Count Two], execution of a search warrant at a rural property, located at or near Lockhart, Texas, which allegedly had a relationship to USSERY and where additional guns were seized.

## VI.

Defendant maintains that Probable Cause does not exist and therefore all evidence should be suppressed as said searches, seizures and oral and other statements all violate his rights as guaranteed to him by the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution*, and, as well, the United States Supreme Court's holding in *Wong Sun v. United States*, 371 U.S. 471, as said searches and seizures were a product of “*the fruit of the poisonous tree*”, that is, consent was not given and probable cause did not exist – on March 5, 2018 and May 23, 2018, to obtain search warrants, to obtain and seize evidence of alleged possession of guns USSERY. USSERY maintains that the affidavit supporting the May 23, 2021 is, as a matter of law, insufficient on its face, and further, that some recitations contained therein are the proverbial *Fruit of the Poisonous Tree*.

Defendant complains that the search warrant executed on May 23, 2018 lacked probable cause and contains references to information which violated his

constitutional *Due Process* protections and therefore should be excluded at his trial as it being “fruit of the poisonous tree.”

Defendant, herein, maintains that his statements, audio and video recordings and alleged possession of firearms<sup>7</sup> were obtained by government investigators, agents, officers, representatives and / or other persons acting on their behalf, and at their direction, in violation of his rights as guaranteed to him by the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution*.

## VII.

Moreover, as well, at trial, the issue regarding Possession, actual or constructive, may be problematic for the government and therefore ripe for Federal Rules of Criminal Procedure, Rule 29 – Motion for a Judgment of Acquittal, consideration by the District Court.<sup>8</sup>

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<sup>7</sup> Defendant, herein, understands that no gun was seized or is in the government’s possession which serves to support the Count One. Accordingly and Notice is hereby given, that pretrial, Defendant will move to Dismiss Count of the Indictment.

<sup>8</sup>

Title 18, United States Code, Section 922(g)(1) prohibits a felon. . . from "knowingly possess[ing] a firearm," either actually or constructively. United States v. Huntsberry, 956 F.3d 270, 279 (5th Cir. 2020); United States v. Meza, 701 F.3d 411, 418-19 (5th Cir. 2012). A defendant has actual possession over a firearm when he has "direct physical control"—such as when he has the firearm "on his person," is seen "carrying the firearm," or is tied to the firearm with "forensic evidence." United States v. Hagman, 740 F.3d 1044, 1048, 1049 & n.2 (5th Cir. 2014) (collecting cases). Constructive possession is broader: a defendant has constructive possession when he has

"ownership, dominion, or control" over either the firearm itself or over the premises in which the firearm is found. Id. at 1049. The common denominator between the two is control; absent some indication that the defendant controlled the firearm, conviction is improper under either theory of possession.<sup>5</sup> Id.

Granted, factually, the USSERY case has yet to play-out, whether possession was actual or constructive, or not at all. However, the plain text of § 922(g), logic, and an analysis of our precedents all reveal that mere touching is insufficient to establish possession. First, the text. The statute, § 922(g), proscribes only "possess[ing] . . . [a] firearm." 18 U.S.C. § 922(g). A look at the dictionary confirms the common-sense intuition that possession does not encompass mere touching; to possess something is to control it—it is "to be master of" the thing or "to have and hold [it] as property." Webster'S New International Dictionary 1926 (2d ed. 1934) ("Webster'S Second").<sup>9</sup> By contrast, to touch something is merely "[t]o lay the hands, fingers, etc., upon so as to feel" it or "to perceive [it] by [\*\*8] means of the tactile sense." Id. at 2676.<sup>10</sup>

Indeed, quoting Smith, every other circuit to address the subject has reached the same conclusion: it is error to convict on mere touching alone. United States v. Teemer, 394 F.3d 59, 65 (1st Cir. 2005) (noting with approval that the instruction in the case "did not say that merely to touch the [firearm] constituted a crime"); United States v. Beverly, 750 F.2d 34, 37 (6th Cir. 1984) (per curiam) (concluding that "touch[ing]" a firearm is insufficient to establish constructive possession); United States v. Wilson, 922 F.2d 1336, 1339 (7th Cir. 1991) ("Merely touching would not be possessing [a firearm]."); United States v. Williams, 29 F. App'x 486, 488-89 (9th Cir. 2002) (per curiam) (noting that "[c]ase law supports the theory that briefly [\*\*12] sampling or handling contraband does not constitute constructive possession" and concluding that the district court reversibly erred in not giving a

Therefore, said evidence should be excluded and Defendant's motion, herein, be Granted.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that the this Honorable Court grant the relief herein sought and Grant Defendant's Motion to Suppress Evidence.

Respectfully Submitted,

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Attorney for Defendant ROBERT USSERY

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jury instruction that "momentarily touch[ing] or hold[ing]" is not possession (citing United States v. Kearns, 61 F.3d 1422, 1425 (9th Cir. 1995) (holding that the defendant did not possess marijuana by "briefly touch[ing] and smell[ing] it"))).

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2021, I electronically filed the foregoing Defendant's Motion to Suppress Evidence with the Clerk of the Court using the CM/ECF system which will give notification of such filing to the following:

Karina O'Daniel  
Assistant United States Attorney  
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San Antonio, Texas 78216

THOMAS J. MCHUGH  
Attorney for Defendant

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**ORDER**

Came on this day to be considered the Defendant’s, ROBERT MIKELL USSERY, and his Motion to Suppress Evidence, the government’s Response, therein, and having heard arguments of counsel, it is hereby: (GRANTED) / (DENIED).

SIGNED on this the \_\_\_\_ day of June, 2021.

IT IS HEREBY ORDERED

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ORLANDO L. GARCIA  
UNITED STATES DISTRICT JUDGE, CHIEF