Brief of the Appellant
01-4486

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction is based on 28 U.S.C. Section 1291 and 18 U.S.C. Section 3742(a). It is certified in accordance with Federal Rule of Appellate Procedure 28(a)(2)(ii)(a) that this is an appeal from a final judgment of the district court. References in this document to the Joint Appendix are denominated [JA (page number)].

Mr. Smith's appeal is from a final judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division, entered on June 8, 2001. [JA 352]. Notice of Appeal was filed on or about June 18, 2001. [JA 358].

STATEMENT OF ISSUES

Mr. Smith raises three issues on appeal. First, Mr. Smith argues that firearms and other evidence seized from his apartment on July 7, 2000 should have been suppressed because law enforcement officers were not justified in conducting a "protective sweep" of his apartment. Second, Mr. Smith argues that the evidence was insufficient as a matter of law to convict him of possessing a firearm at Gilbert's Small Arms Range on June 12, 1998. Finally, Mr. Smith argues that the Court should not have enhanced his

offense level pursuant to United States Sentencing Guideline Section 2K2.1(a)(3) for being in possession of a machine gun.

STATEMENT OF THE CASE

By Indictment filed on or about November 2, 2000 in the United States District Court for the Eastern District of Virginia, Alexandria Division, William Kinjo Smith was charged with three criminal violations. [JA 15]. Count 1 charged that on or about June 12, 1998 in Lorton, Virginia Mr. Smith possessed a firearm after having prior felony convictions in violation of 18 U.S.C. 922(g)(1) and 924 (e)(1). Count 2 charged that on or about July 7, 2000 in Alexandria, Virginia Mr. Smith possessed numerous firearms after having been previously convicted of felonies in violation of 18 U.S.C. 922 (g)(1) and 924 (e)(1). Count 3 charged that on or about July 7, 2000 Mr. Smith unlawfully and knowingly possessed a destructive device in violation of 26 U.S.C. Section 5861(d) and 5871. [15-19]. Count III was dismissed with prejudice on February 21, 2001 upon motion of the United States. [JA 6, 92].

On February 14, 2001 a hearing took place in the District Court with respect to a motion to suppress filed by the defendant. [JA 21]. Counsel for Mr. Smith argued that evidence seized should be suppressed because officers knew that arrest warrants were being prepared yet unlawfully entered Mr.

Smith's dwelling anyway. [JA 82]. Counsel also argued that exigent circumstances did not exist to search the apartment. [JA 83]. The Court dismissed the defendant's arguments and found that a protective sweep of the apartment was justified in light of the totality of the circumstances. [JA 85].

Trial by jury went forward on February 21, 2001. [JA 89]. Michael Rich, Esquire and Kenneth Gaul, Esquire represented the United States; Richard Gardiner, Esquire represented Mr. Smith. Mr. Smith went to trial on two counts. First, Mr. Smith was tried for being a felon in possession of a firearm at Gilbert's Small Arms range on June 12, 1998. [JA 283]. Second, Mr. Smith was tried for being a felon in possession of firearms in his apartment on July 7, 2000. [JA 284].

The jury returned guilty verdicts on both counts on February 22, 2001. [JA 306]. A presentence report was ordered and filed and sentencing was held June 8, 2001. [JA 317]. Prior to sentencing Mr. Smith, by counsel, filed a written objection to an increase in the Offense Level pursuant to United States Sentencing Guideline Section 2K2.1(a)(3) for being in possession of a machine gun. [JA 330]. The District Court ultimately granted the enhancement for a machine gun being among the weapons possessed. [JA 345].

Mr. Smith was ultimately sentenced to 262 months in the Bureau of Prisons. [JA 349]. Notice of Appeal was filed on June 18, 2001. [JA 358].

STATEMENT OF FACTS

On February 14, 2001 a hearing on defendant's motion to suppress took place before the Honorable Judge Leonie M. Brinkema. [JA 21]. Captain Blaine Corle of the Alexandria Police Department took the stand first. [JA 34]. Captain Corle testified as follows:

On July 7, 2000, in his official capacity as a hostage negotiator, he came into contact with William Smith, the petitioner. [JA 34]. Captain Corle responded to a police call at 4600 Duke Street. [JA 35]. At the scene his reporting officers told him that there had been a reported abduction and assault committed by Mr. Smith; that his girlfriend was at the police station filing a report that Mr. Smith had forced his way into his apartment; that Mr. Smith had held the girlfriend and her son against their will; and that he was armed with some type of hand grenade and a .45 caliber pistol [JA 35, 36].

Captain Corle and other officers approached Mr. Smith's apartment at approximately noon. [JA 38]. The officers knocked on the door and called out to Mr. Smith, but there was no response. [JA 39]. Captain Corle managed to contact Mr. Smith by cellular phone. [JA 40]. After a period of

discussion, Mr. Smith opened the door voluntarily and invited the officers into the apartment. [JA 42].

Captain Corle testified that he entered first. [JA 44]. Captain Corle testified that he observed a grenade sitting on canisters of propane gas, some large blue drums, and several containers of kerosene. [JA 44]. After gaining entry to the apartment, Captain Corle informed Mr. Smith that he was under arrest and had him place his hands on the wall. [JA 45]. Captain Corle asked for permission to search the apartment to see if anyone else was there, and Mr. Smith denied that permission. [JA 46]. Captain Corle then testified that he secured and handcuffed Mr. Smith, and that he and other officers conducted a sweep of the apartment to make sure no one else was in there. [JA 46]. During the sweep Captain Corle entered the bedroom through an open door. [JA 47]. On the bed Captain Corle observed a number of firearms, military hardware, gas masks, ammunition, handguns, assault rifles, a shotgun, and a knapsack or two. [JA 48]. Captain Corle also looked in a closet and found ammunition, ordinance, and other weapons. [JA 51]. Captain Corle testified that the apartment was swept and deemed secure of additional persons within about a minute. [JA 53]. Captain Corle dispatched Officer Duquette to obtain a search warrant for the apartment,

which was done. [JA 33]. Bomb squads and hazardous materials teams arrived at the scene to assist. [JA 54].

Thus ended the direct testimony of Captain Blaine Corle.

Counsel for defendant then cross-examined Captain Corle. [JA 55]. Defense counsel admitted into evidence an incident report prepared by an Officer Grossman that indicates that Captain Corle and others responded to the apartment in question at about 10:45 a.m. [JA 56]. Captain Corle testified without reservation that the time indicated was incorrect, and that they arrived a considerable time after 10:45 a.m. [JA 56].

Counsel for defendant then called Officer Harold Duquette, patrol officer for the City of Alexandria, to the stand. [JA 75]. He responded to Mr. Smith's apartment on July 7, 2000 along with Captain Corle at approximately 10:00 a.m. [JA 75]. At approximately 10:30 to 10:45 a.m. Officer Duquette and the other members of law enforcement met to discuss the situation in the parking lot and then proceeded to Mr. Smith's apartment. [JA 77]. They arrived at Mr. Smith's apartment at about 11:00 a.m. [JA 78].

Counsel for Mr. Smith then called Mr. Smith to the stand. He testified only that he received the first cellular phone call from Captain Corle at 10:52

a.m., and that he began his extended conversation at around 10:57 a.m. [JA 81].

Counsel for Mr. Smith argued that the evidence seized should be suppressed because the officers knew that arrest warrants, which were issued beginning at 11:28 a.m., were being prepared, yet chose to enter without a warrant anyway. [JA 82]. Counsel also argued that exigent circumstances did not exist. [JA 83].

The Court found that the entry into the apartment, because it was consensual, was permissible even though the arrest warrants had not arrived. [JA 85]. The Court also found that once inside, the officers visually saw items such as a grenade that provided instant probable cause for an warrantless arrest. [JA 85]. The Court then found that the protective sweep thereafter was justified in light of the totality of the circumstances. [JA 85].

Trial by jury went forward on February 21, 2001. [JA 89]. The United States was represented by Mike Rich and Ken Gaul; defendant was represented by Richard Gardiner. [JA 89]. Mr. Smith faced trial on a two count indictment. Count I charged Mr. Smith with being a felon in possession of a firearm at Gilbert's Small Arms range on June 12, 1998. [JA 283]. Count II charged Mr. Smith with being a felon in possession of

firearms in his apartment on July 7, 2000. [JA 284]. Stipulations were published to the jury regarding five prior felony convictions of Mr. Smith. [JA 112, 113].

Officer Harold Duquette, a uniformed officer with the Alexandria Police, testified first for the United States [JA 113]. He testified that on July 7, 2000 he entered a residence at 4600 Duke Street in Alexandria and saw Mr. Smith there. [JA 114]. Mr. Smith opened the door and passed a grenade to Captain Corle, who then handed it to Officer Duquette. [JA 115]. Officer Duquette then stated he conducted a protective sweep of the apartment and found a number of weapons in the bedroom on the bed and in a closet. [JA 117]. Officer Duquette then obtained a search warrant from the Alexandria magistrate, which was executed. [JA 31]. Numerous firearms were seized and inventoried. [JA 124]. Officer Duquette stated that there was evidence that someone was living in the apartment: clothes, food, dishes, etc. [JA 132]. Officer Duquette could not testify that any items specifically linked Mr. Smith to the apartment. [JA 134].

Victor Casto, an ATF agent present at 4600 Duke Street on July 7, testified next for the government. [JA 138]. He observed and inventoried the firearms in the apartment. [JA 140]. Agent Castro testified that he

observed an employee ID with a photograph and the name Bill Smith in the apartment. [JA 140].

The next witness, Alexandria Police Detective Charles Pak, stated that he was present at 4600 Duke Street on July 7, 2000. [JA 160]. Detective Pak testified that Mr. Smith stated the he and girlfriend Karen Campbell lived I the apartment, and that she moved out in December 1999. [JA 170]. Mr. Smith said the firearms were in the apartment before she moved out and were there after she moved out until the date of the interview with Detective Pak. [JA 170]. Mr. Smith admitted to previously firing one of the guns on full automatic, though he did not state when he did so. [JA 171, 174]. Detective Pak also successfully test-fired one of the seized weapons, but it would not fire in automatic mode. [JA 172, 174].

Special Agent Michael Mund, an expert in firearms identification, testified next for the government. [JA 175]. Stipulations were entered as that the various weapons were manufactured outside the state of Virginia. [JA 178]. Special Agent Mund continued by describing all of the different types of firearms, firearms manuals were found in the apartment. [JA 178-197]. Documents such as mail with Mr. Smith's name on it and male clothing were also recovered in the apartment. [JA 198].

Finally, the United States called to the stand Ernest William Lyles, general manager and co-owner of Gilbert Small Arms Range (a private member indoor shooting range and gun shop). [JA 216]. The United States then entered into evidence a membership application (filled out when person joins the club) and range card (filled out each day when a person shoots) bearing the signature of Mr. Smith. [JA 218]. The United States also entered a photocopy of a business logbook entry for William Smith and a sales receipt for a pistol grip for a shotgun for Mr. Smith ordered 6-12-98. [JA 223].

On cross-examination Mr. Lyles admitted that the documentation showed that someone in addition to Mr. Smith was on the shooting range on the day in question. [JA 228]. He also stated that if a person only wanted to go out on the range to observe and not to shoot, they still had to fill out a range card. [JA 228]. While the firearm checked out was charged financially to Mr. Smith, Mr. Lyles had no independent recollection of what individual actually took possession of the firearm. [JA 230]. Also, while there was a record of a special order for a pistol grip, Mr. Lyles had no independent recollection of it ever being picked up. [JA 230]. In sum, defense counsel argued that although the evidence showed a gun rental and sale of ammunition to Mr. Smith, Mr. Lyles had no recollection that Mr.

Smith was actually the individual who took possession of those items. [JA 237].

The United States rested its case. [JA 236]. Counsel for Mr. Smith moved for a directed acquittal as to Count 1 of the indictment (felon possessing a firearm on June 12, 1998). Counsel argued while Mr. Lyles presented evidence that Mr. Smith bought a weapon, there was no evidence that Mr. Smith actually took possession of it. [JA 237]. The Court denied the motion, finding that the circumstantial evidence was sufficient to overcome the objection. [JA 237].

The defense began its' case by calling Angela Dickinson to the stand. [JA 238]. Ms. Dickinson testified that in May of 2000 she visited Mr. Smith in his apartment. [JA 238]. Ms. Smith testified that on that date she observed women's clothing, teenage Seventeen magazines, and female cosmetics. [JA 240]. Ms. Dickinson then testified that she returned to Mr. Smith's apartment on July 26, 2000 (after the search that took place on July 7, 2000). [JA 240]. On that day she and Karen Campbell packed up Mr. Smith's belongings to put them in storage. [JA 241]. Ms. Dickinson again observed some women's clothing in the apartment. [JA 242]. Ms. Dickinson also returned to the apartment on July 28, 2000. [JA 243]. On that day, Ms. Campbell requested the return of two boxes that were

previously packed so that she could retrieve some of her personal items. [JA 243]. Ms. Dickinson testified that Ms. Campbell packed some of her other personal belongings that were in the apartment, such as clothes and books. [JA 243]. Other items that belonged to Ms. Campbell were left in the apartment. [JA 244]. Ms. Dickinson testified that it was her understanding that Ms. Campbell was the girlfriend of Mr. Smith. [JA 246].

Mr. Smith elected not to testify on his own behalf, and the defense rested. [JA 247]. The following day, the jury returned guilty verdicts on both counts of the indictment. [JA 306].

Counsel for Mr. Smith filed post-trial motions for a judgment of acquittal citing two grounds. First, Mr. Smith renewed his motion to suppress [JA 312]. The Court denied the motion and again ruled that the search of Mr. Smith's apartment did not violate any of Mr. Smith's civil rights. [JA 314]. The Court then considered Mr. Smith's argument as to the sufficiency of the evidence as to Count I. The Court found that there was sufficient circumstantial evidence to support a finding that Mr. Smith possessed a weapon on June 12, 1998 at the firearms range. [JA 315].

Sentencing took place on June 8, 2001. Mr. Smith, by counsel, filed a written objection to the increase in the Offense Level that was made pursuant to a finding that the firearm known as a Bushmaster Model X515-

E2S was a machine gun as defined by law. [JA 330, JAII 382]. The argument revolved around whether or not the government had to prove that Mr. Smith knew that the gun was machine gun in order for the enhancement to be applied. If so, the next question was whether or not knowledge had been proven. [JA 331]. After hearing argument, the District Court ruled that knowledge or intent was not required to be proved in order for the machine gun enhancement to apply. [JA 337]. Moreover, the District Court found that the evidence lead to the conclusion that Mr. Smith did know that the Bushmaster rifle could function as a fully automatic machine gun. [JA 338].

The District Court ultimately granted the enhancement for a machine gun being among the weapons possessed. [JA 345]. The Court determined that the appropriate Offense Level was 34 [JA 346], the correct Criminal History Level was VI, and Mr. Smith qualified as an Armed Career Criminal. [JA 347]. The guidelines range was 262 to 327 months. [JA 347]. Mr. Smith was sentenced to 262 months in the Bureau of Prisons. [JA 349].

Notice of Appeal was filed on June 18, 2001. [JA 358].

SUMMARY OF ARGUMENTS

Mr. Smith first argues that evidence seized during his arrest on July 7, 2000 should have been suppressed. After Mr. Smith was restrained, officers conducted a search of his apartment under the guise of doing a "protective sweep" to insure officer safety. Evidence was seen in plain view in one of the back rooms of the apartment. Using that evidence to establish probable cause, a search warrant was issued and evidence was seized. [JA 11].

Where officers possess "articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual who poses a danger", a protective sweep may be performed to insure the safety of the officers. Maryland v. Buie, 494 U.S. 325 (1990).

A protective sweep was not justified under the circumstances. When law enforcement approached Mr. Smith's apartment they had no information that anyone other than Mr. Smith was inside. During the course of the arrest, no new information came to light that indicated anyone else was in the apartment or that otherwise justified a protective sweep. Evidence uncovered during the search pursuant to a search warrant was fruit of the poisonous tree.

Mr. Smith next argues that the evidence was insufficient as a matter of law to convict him of possessing a firearm at Gilbert's Small Arms Range on June 12, 1998. Ernest William Lyles, manager and co-owner of Gilbert Small Arms Range, produced four documents: 1) a membership application bearing the signature of Mr. Smith, 2) a "range card" bearing the signature of Mr. Smith, 3) a photocopy of a business logbook entry bearing the name William Smith, and 4) a sales receipt for a shotgun pistol grip ordered 6-12-98 by Mr. Smith. [JA 217-223].

While Mr. Lyles could authenticate business documents that implicated Mr. Smith, he had no independent recollection of Mr. Lyles being in his establishment. He could not testify from personal knowledge that Mr. Smith ever took possession of a weapon or ammunition at his establishment. [JA 228-231]. The most that the evidence proves is that Mr. Smith was in close proximity to weapons at the firearms range. Proximity, however, does not equal possession, and the charge against Mr. Smith should have been dismissed.

Mr. Smith next argues that the Court improperly enhanced his offense level pursuant to U.S.S.G. 2K2.1(a)(3). Among weapons seized from Mr. Smith's apartment was a Bushmaster Model X515-E2S that could be fired on automatic as a machine gun. The defense did not contest the

categorization of the weapon as a machine gun. Mr. Smith does argue, however, that the United States needed to prove that he knew the gun could be fired on automatic before the enhancement could be applied, and that the United States had not met that burden. [JA 331].

ARGUMENTS

I. THE DISTRICT COURT ERRED WHEN IT FAILED TO SUPPRESS THE EVIDENCE UNCOVERED DURING THE PROTECTIVE SWEEP OF THE APARTMENT

Standard of Review

The Court of Appeals reviews the district court's legal conclusions regarding a motion to suppress de novo, while factual determinations are reviewed using the clearly erroneous standard. United States v. Kitchens, 114 F.3d 29, 31 (4th Cir. 1997). Accord United States v. Johnson, 114 F.3d 435, 441 (4th Cir.), cert denied, 522 U.S. 903 (1997); and United States v. McKinnon, 92 F.3d 244, 246 (4th Cir. 1996).

In this instance a motion to suppress was timely filed and argued, and the issue is whether the court's legal conclusions comport with the evidence presented. Thus, the district court's legal conclusions as to the motion to suppress should be reviewed de novo.

Argument

"Protective sweep" searches of a dwelling done contemporaneously with the arrest of a person who is in or immediately outside of the dwelling are sometimes permissible for the purpose of protecting the safety of the arresting police officers. Maryland v. Buie, 494 U.S. 325 (1990); Mincey v. Arizona, 437 U.S. 385, 392 (1978); United States v. Bernard, 757 F. 2d 1439 (4th Cir. 1985); United States v. Baker, 577 F.2d 1147 (4th Cir. 1978). Where officers possess "articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual who poses a danger", a protective sweep may be performed to insure the safety of the officers. Maryland v. Buie, 494 U.S. at 326 (1990).

The Supreme Court emphasized that "a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." Id. at 335. Moreover, the sweep is to last "no longer that is necessary to dispel the reasonable suspicion of danger and ***in any event no longer than it takes to complete the arrest and depart the premises.***" Id. at 335-226. (emphasis added).

The principle underlying the protective sweep exception to the rule against warrantless searches is the desire for officer safety, not the desire to procure or preserve evidence. Maryland v. Buie, 494 U.S. 325 (1990). Evidence obtained during a search which lasts longer than the time needed to complete the arrest and depart the premises will not be admissible under the protective sweep exception to the warrant requirement. See e.g. United States v. Houshfar, 78 F.3d 1442 (9th Cir. 1996).

There is no class of crimes for which protective sweeps are automatically justified. For example, the fact that a drug crime is involved in an arrest situation does not automatically justify a protective sweep. See United States v. Hatcher, 680 F. 2d 438, 444 (6th Cir. 1982). Also, it is improper to use the characteristics of the arrestee to measure the dangerousness of some other individual who might be present and thereby try to justify a protective sweep. United States v. Colbert, 76 F.3d 773 (6th Cir. 1996).

In the case at hand, a protective sweep was not justified under the circumstances. Mr. Smith's encounter with the police began with allegations that Mr. Smith had forced his way into his girlfriend's apartment and then abducted and assaulted her, and that Mr. Smith was armed with some type of grenade and a .45 caliber pistol [JA 35, 36]. There was no information that

any person other than Mr. Smith was involved in the crime or that any other person might be present in the apartment. Attachment A of the search warrant affidavit makes no mention of any other suspects in the apartment. [JA 13-14]. During the course of the arrest, no new information or circumstances came to light that would reasonably have given the police any reason to believe that any other individuals may have been present in the apartment.

Once the police gained entry to the apartment, Mr. Smith was immediately placed under arrest and handcuffed near the entrance to the apartment. [JA 45, 46]. Visible to the officers in the area near the door were a smoke grenade that was handed to them by Mr. Smith and some drums of kerosene and canisters of propane. [JA 44]. No traditional weapons or firearms were in view from the doorway area. Captain Corle requested consent to search the apartment, but Mr. Smith denied that permission. [JA 46]. Undeterred by this denial of consent, officers immediately conducted a protective sweep of the premises to make sure no one else was hiding in the apartment. [JA 46]. This "protective sweep" was done despite the fact that there was no information whatsoever that any other person might be in the apartment, and despite the fact that the officers could

have insured their own safety by simply leaving out the front door with Mr. Smith.

During the protective sweep weapons were found in the back bedroom sitting in plain view. [JA 47, 51]. The presence of those weapons was used as the probable cause for the search warrant that was later obtained. Specifically, those weapons were listed in paragraph 6 of the search warrant affidavit and Attachment A to the search warrant affidavit. [JA 11, 14].

There was no information given to or gathered by the police that justified a "protective sweep" search for hidden individuals in the apartment. The officers handcuffed Mr. Smith immediately after entering the apartment. A protective sweep of the apartment was not necessary to insure the safety of the officers. In fact, the simplest and best way for the officers to insure their safety would have been to leave the apartment with Mr. Smith.

The weapons observed in the back bedroom formed the basis for a search warrant that was later executed. Since the facts used to establish probable cause were obtained in violation of the Fourth Amendment rule against warrantless searches, the search warrant should never have been issued, and all evidence of the firearms should have been suppressed at trial.

II. THERE WAS INSUFFICENT EVIDENCE TO CONVICT MR. SMITH OF POSSESSION OF A FIREARM AT GILBERT'S SMALL ARMS RANGE ON JUNE 12, 1998

Standard of Review

The standard of review for an issue concerning the sufficiency of the evidence is de novo. The evidence as to the applicable facts is not disputed. What is disputed, however, is the legal conclusion that the jury made based on the evidence presented. Thus, de novo is the proper standard of review. United States v. Kitchens, 114 F.3d 29, 31 (4th Cir. 1997). Accord United States v. Johnson, 114 F.3d 435, 441 (4th Cir.), cert denied, 522 U.S. 903 (1997); and United States v. McKinnon, 92 F.3d 244, 246 (4th Cir. 1996).

Argument

Count I of the Indictment charged Mr. Smith with being a felon in possession of a firearm at Gilbert's Small Arms Range on June 12, 1998 after having been previously convicted of a felony in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1). [JA 15]. The evidence against Mr. Smith as to this count consisted primarily of the testimony of Ernest William Lyles, manager and co-owner of Gilbert Small Arms Range. [JA 216]. Mr. Lyles did produce business documents that implicate Mr. Smith. First, a membership application to the range was produced bearing the signature of Mr. Smith. [JA 219]. Second, Mr. Lyles produced a range card, a document that is filled out by a person on the day that they go out onto the range, bearing the signature of Mr. Smith. [JA

219]. Finally, Mr. Lyle produced a photocopy of a business logbook entry bearing the name William Smith and a sales receipt for a pistol grip for a shotgun for Mr. Smith ordered 6-12-98. [JA 223].

While Mr. Lyles could authenticate the business documents, that was all that he could do. The range card had to be filled out by anyone on the range, even if they did not shoot. [JA 228]. The records indicated that there was more than one person on the range on the day in question. [JA 228]. The records indicated that Mr. Smith purchased range time and eye and ear protection for two people. [JA 232, 233]. Finally, Mr. Lyle had no independent recollection of Mr. Smith ever taking possession of any firearms or ammunition at his place of business, and he could not testify that Mr. Smith took possession of a weapon on that day. [JA 230].

Mr. Smith, as does every appellant, admittedly bears a significant burden in his challenge to the sufficiency of the evidence. When reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The appellate court must "allow the government the benefit of all reasonable inferences from the facts proven to those sought to

be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). A jury's verdict must be upheld if there is substantial evidence, viewed in the light most favorable to the government, to support it. Burks v. United States, 437 U.S. 1, 17 (1978). However, in the Jackson case the United States Supreme Court made it clear that if "reasonable" jurors "must necessarily have. . .a reasonable doubt" as to guilt, the judge "must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. . ." Jackson, 443 U.S. at 318, note 11 (quoting Curley v. United States, 160 F.2d 229, 232-233 (5th Cir. 1974).

The evidence that Mr. Smith possessed a firearm on June 12, 1998 is wholly circumstantial. Circumstantial evidence may be considered in the resolving of a challenge to the sufficiency of the evidence. United States v. Jackson, 863 F.2d 1158, 1173 (4th Cir. 1989). Circumstantial evidence may be enough to withstand a sufficiency of the evidence challenge even in those instances where the circumstantial evidence does not "exclude every reasonable hypothesis of innocence." Jackson, 863 F.2d at 1173. Accord United States v. Murphy, 35 F.3d 143, 148 (4th Cir. 1994).

However, purely circumstantial evidence should be considered with extreme care before it can be considered sufficient to sustain a conviction.

The Sixth Circuit Court of Appeals stated the following with respect to circumstantial evidence:

> Although circumstantial evidence alone may sustain a guilty verdict, even if it fails to exclude all reasonable hypotheses consistent with a theory of innocence, (citation omitted) where the jury is called upon to choose between 'reasonable probabilities' of equal weight, one innocent and the other criminal, a conviction cannot stand. United States v. Campion, 560 F.2d 751, 753-754 (6th Cir. 1977).

Even when the evidence against Mr. Smith is viewed in the light most favorable to the Government, it is as probable that on June 12, 1998 Mr. Smith watched someone else shoot as it is that he personally possessed a firearm. Thus, the "conviction cannot stand." Campion, 560 F.2d at 754.

Moreover, the most that the evidence proves is that Mr. Smith was in close proximity to weapons at the firearms range. Proximity, however, does not equal possession, as possession requires some element of dominion and control. In United States v. Laughman, 618 F. 2d 1067 (4th Cir. 1980) the Fourth Circuit cited as authority the Fifth Circuit's holding in United States v. Ferg, 504 F.2d 914 (5th Cir. 1974). In Ferg the court held the following:

> Proof of physical proximity to controlled drugs is not sufficient to establish either actual or constructive possession. As this court has consistently observed, 'mere presence in the area where the narcotic is discovered or mere association with the person who does control the

> drug or the property where it is located, is insufficient to support a finding of possession. Ferg, 504 F.2d at 917.

Since proof of physical proximity to an object "is not sufficient to establish either actual or constructive possession," Ferg, 504 F.2d at 917, reasonable jurors must have reasonable doubt as to Mr. Smith's possession of a firearm on June 12, 1998. Thus, the Judge should have entered a judgment of acquittal.

III. THE DISTRICT COURT ERRED WHEN IT ENHANCED MR. SMITH'S OFFENSE LEVEL UNDER THE SENTENCING GUIDELINES FOR POSSESSION OF A MACHINE GUN

Standard of Review

The legality of a sentence pursuant to the United States Sentencing Guidelines is reviewed de novo, as is the Court's interpretation of Guidelines provisions. United States v. Jackson, 176 F.3d 1175, 1176 (9th Cir. 1999).

Argument

The United States Probation Office applied a base offense level of 22 pursuant to United States Sentencing Guideline 2K2.1(a)(3). [JAII 382]. U.S.S.G. Section 2K2.1(a)(3) calls for a base offense level of 22 in the following circumstance:

> . . .if the offense involved a firearm described in 26 U.S.C. Section 5845(a) or 18 U.S.C. 921(a)(30), and the defendant had one prior felony conviction of either a crime of violence or controlled substance offense. . .. U.S.S.G. 2K2.1(a)(3) as amended November 1, 2000.

Firearms described in 26 U.S.C. Section 5845(a) and 18 U.S.C. 921 (a)(30) include machine guns, i.e.firearms that fire in automatic mode. The Probation Officer contended that among the weapons seized from Mr. Smith as evidence was a Bushmaster Model X515-E2S that could be fired on automatic as a machine gun.

The defense did not contest the categorization of the weapon as a machine gun. The defense did argue, however, that the United States needed to prove that Mr. Smith knew the gun could be fired on automatic before the enhancement could be applied, and that the United States had not made such a showing. [JA 331].

In Staples v. United States, 114 S.Ct. 1793 (1994) the United States Supreme Court held as follows:

> . . .to obtain a conviction [pursuant to 26 U.S.C. 5861(d)], the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of [26 U.S.C. Section 5861(d)]. 114 S.Ct at 1804.

The Supreme Court rejected arguments that the knowledge and intent were not required to be proved. The Court found that if knowledge or intent did not have to be proved, ". . .the statute potentially would impose criminal sanctions on a class of persons whose mental state – ignorance of the characteristics of weapons in their possession – makes their actions entirely innocent." 114 S.Ct. at 1802. The Court pointed out how a person might be ignorant that a weapon had the capability to be fired on automatic mode:

> . . .virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machine gun within the meaning of the Act. . .. Such a gun may give no externally visible indication that it is fully automatic. 114 S.Ct. at 1802.

The appellant now argues that since knowledge or intent is an element of a criminal conviction for possession of an unregistered machine gun, that element should also have to be proven by the Government for sentencing purposes. See United States v. Davis, 184 F.3d 366 (1999) (A sentencing factor must be proven by the Government by preponderance of the evidence).

In United States v. Fry, 51 F.3d 543 (5th Cir. 1996) the Fifth Circuit confronted a Staples challenge to a Section 2K2.1(a)(3) enhancement for being a felon in possession of a machine gun. The Fifth Circuit pointed out that other sections of the Sentencing Guidelines contain explicit mens rea requirements, but Section 2K2.1(a)(3) does not. The Court held that because the Section is plain on its face, it appears that there is no scienter requirement in 2K2.1(a)(3). Fry, 51 F.3d at 546.

In United States v. Bryant, 1997 WL 745828 at **1 (4th Cir. 1997) an unpublished Fourth Circuit opinion, the Fourth Circuit adopted a rationale similar to that found in Frye. [JA]. That case dealt with a sentence enhancement where a felon in possession convicted under 18 U.S.C. Section 922(g)(1) had a sawed-off shotgun. The Fourth Circuit said the following:

> We find persuasive the Fifth Circuit's finding that the 'section is plain on its face and should not, in light of the apparent intent of the drafters, be read to imply a scienter requirement. United States v. Fry, 51 F.3d 543, 546 (5th Cir. 1995). We further find that [the defendant's] reliance on Staples v. United States, 511 U.S. 600 (1994), is misplaced. As a threshhold matter the Court in Staples expressly warned that its holding was a narrow one. Id. at 619. Moreover, the statute in Staples was a criminal statute, while the provision at issue in this case is a sentencing enhancement without the same risk of conviction of an innocent party. Finally, we have previously held that for felon-in-

> possession statutes, there is 'no need to apply a scienter requirement to each of the statutory elements.' United States v. Langley, 62 F.3d 602, 607 (4th Cir. 1995) (en banc), cert. denied 516 U.S. 1083 (1996).

Appellant argues that the Fifth Circuit in Fry and the Fourth Circuit in Bryant misapplied the lessons of Staples. The Supreme Court in Staples focused on the possibility that in the absence of a scienter requirement, a person who to his own reasonable knowledge was engaging in lawful possession of a lawful firearm could be imprisoned for possession of a machine gun. Staples, 114 S.Ct. at 1802. Furthermore, the Supreme Court in Staples focused on the fact that it cannot be ascertained by looking at the outside of a weapon whether or not the weapon is able to be fired automatically. Staples, 114 S.Ct. at 1802.

Appellant concedes that the analogy between the Staples case and Mr. Smith's situation is not perfect. The Supreme Court in Staples worried about persons who think they are lawfully possessing a firearm only to later learn that it is an unlawful unlicensed machine gun.

Mr. Smith, as a felon, arguably knew he had no right to lawfully possess any firearms, machine gun or not. Thus, it is true that Mr. Smith is not "innocent" in the same sense as the individuals envisioned by the Supreme Court in Staples. However, Mr. Smith might be "innocent" of the

aggravated situation of knowingly possessing a machine gun, particularly in the situation whereby there is no external way to tell that the gun can be fired on automatic mode. In order to eliminate penalizing persons in Mr. Smith's position for unknowingly compounding their offense by having in their possession a firearm that can fire on automatic mode, this Court should read U.S.S.G. Section 2K2.1(a)(3) to include a scienter requirement.

CONCLUSION

For the reasons stated herein, Mr. Smith respectfully requests the following. With respect to his first argument, Mr. Smith asks this Honorable Court to find that the evidence seized during the "protective sweep" should have been suppressed and remand the case for action in accordance therewith. With respect to the argument about the sufficiency of evidence for possession at Gilbert's Small Firearms Range, Mr. Smith requests that the conviction be reversed. Finally, with respect to the objection to the offense level enhancement, Mr. Smith asks that the District Court's application of the enhancement be reversed and the case remanded for action in accordance therewith.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a true copy of this Brief of Appellant and Appendix were mailed or delivered to Michael Rich and Kenneth Gaul, Esquires, Office of the United States Attorney, 2100 Jamieson Avenue, Alexandria, VA 22314, and to William K. Smith, appellant, on this _____ day of December 2001.

_____

Craig W. Sampson, Esquire

STATEMENT REGARDING ORAL ARGUMENT

Appellant William K. Smith desires to state orally, before a panel of Judges of the Fourth Circuit United States Court of Appeals, why his appeal should be heard.