Sent 10/23/03

William Kinjo Smith
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October 22nd, 2003

Clerk of the Court
United States Court of Appeals
For the Fourth Circuit
U.S. Courthouse Annex, 5th Floor
1100 East Main Street
Richmond, Virginia 23219

RE: William Kinjo Smith v. United States 03-7509

Dear Sir/Madam:

Submission of the enclosed Informal Brief (Preliminary) for Habeas and Section 2255 Cases is being forwarded and submitted for filing with the Honorable Court of Appeals accordingly.

Thanking you in advance to the matter here held.

Respectfully yours,

William Kinjo Smith

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PRELIMINARY INFORMAL BRIEF
FOR HABEAS AND SECTION 2255 CASES

Re: 03-7509 US v. Smith

Directions

1. Preparation of Brief. The Court will consider this case according to the written issues, facts, and arguments appellant presents in this Brief. The Court will review the brief in determining whether to grant a certificate of appealability. If a certificate of appealability is granted, the Brief may also serve as appellant's opening brief on the merits of the appeal. Space is provided to present up to four issues, but more issues may be presented as necessary. The Court will not consider issues appellant does not specifically raise. Be brief. Write clearly. Print legibly or use a typewriter. Any documents you attach to the form must be numbered sequentially.

2. Copies Required.

* Send the Court the original and one copy of this Brief. If you would like a file-stamped copy of your Brief returned to you, send an extra copy and a self-addressed stamped envelope. Address your mailing as follows:

  Clerk
  U.S. Court of Appeals, Fourth Circuit
  U.S. Courthouse Annex, 5th Floor
  1100 East Main Street
  Richmond, VA 23219

* Send one copy of your Brief to each of the other parties named in the appeal.

3. Certificate of Service Required. You must certify that you sent each of the other parties or attorneys complete copies of all documents you send the Court. Service on a party represented by counsel shall be made on counsel. Be certain that your certification shows the complete name and mailing address of each party or attorney to whom copies were sent and the date of mailing.

4. Signature Required. You must sign your Brief and all Certificates of Service. If appellant fails to sign the Brief, the appeal will be subject to dismissal under this Court's Local Rule 45.

aweb1

03-7509

PRELIMINARY INFORMAL BRIEF FOR HABEAS AND SECTION 2255 CASES

1. **Jurisdiction**
   A. What is the name of the court from which you are appealing?
   United States District Court-Eastern District of Virginia
   Alexandria Division
   B. What is the date(s) of the order or orders you are appealing?
   August 27, 2003

2. **Timeliness of appeal (for prisoners)**
   When did you give your notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date: September , 2003

3. **Certificate of Appealability**
   Did the district court grant a certificate of appealability?
   ____ Yes ___X___ No

   If Yes, do you want the Court of Appeals to review additional issues that were not certified for review by the district court?
   ____ Yes ____ No

   If Yes, **you must** list below the issues you wish to add to the certificate of appealability issued by the district court. If you do not list additional issues, the Court will limit its review to those issues on which the district court granted the certificate.

4. **Issues on Appeal**
   Use the following spaces to set forth the facts and argument in support of the issues you wish the Court to consider on appeal. You must include any issue you wish the Court to consider, regardless of whether the district court granted a certificate of appealability as to that issue. You may cite case law, but it is not required.

Issue 1.

WHETHER THE DISTRICT COURT ABUSED DISCRETION BY PRELIMINARY DISMISSAL OF PETITION TO VACATE, SET ASIDE, OR CORRECT SENTENCE CONTAINING CONSTITUTIONAL ISSUES

Supporting Facts and Argument.

SEE ATTACHED

Issue 2.

Supporting Facts and Argument.

Issue 3.

Supporting Facts and Argument.

Issue 4.

Supporting Facts and Argument.

5. Relief Requested

What do you want the Court of Appeals to do? Identify exactly the relief you seek. Issues raised relevant to Ineffective Assistance of Counsel are adjudicated accordingly as a matter of law due to the Constitutional violations counsel failed to protect thereof Petitioner/ Appellant, thus, dismissing counts one and two, reducing the sentence thereto the constructive amendment, or grant a new trial.

6. Prior Appeals

A. Have you filed other appeals in this court? ___ Yes __X__ No

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

Signature
[Notarization Not Required]

William Kinjo Smith
[Please Print Your Name Here]

CERTIFICATE OF SERVICE
****

You must serve your papers on appeal on all persons **served** in the lower court case and complete the following certification:

I certify that on 10/22/03 I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

Signature
[Notarization Not Required]

[List here each party's name and complete mailing address]

Clerk of the Court
United States Court of Appeals
For the Fourth Circuit
1100 East Main Street
Richmond, VA 23219

Michael E. Rich, AUSA
U.S. District Court
E.D. of Virginia
Alexandria Division
2100 Jamieson Avenue
Alexandria, VA 22314

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

William Kinjo Smith, Appellant,	:	
vs.	:	03-7509
United States of America, Appellee.	:	

.....

PRELIMINARY INFORMAL BRIEF
FOR HABEAS AND SECTION 2255 CASES

NOW COMES, William Kinjo Smith, Appellant, hereby respectfully moves the Honorable Court to adjudicate the matters herewith as a matter of law. To which, the district court summarily dismissing Petition to Vacate, Set Aside, or Correct Sentence containing Constitutional issues was an abuse of discretion.

SUPPORTING FACTS AND ARGUMENT

The district court's oversights to issues contained therein the 28 U.S.C. § 2255 ("2255") Petition consistent with constitutional violations thereof the Fourth, Fifth, and Sixth Amendments. In addition, the district court's Order ("Order") failing to address these issues, construed Appellant's Petition under the stringent standards of practicing counsel.

Appellant contends here that arrest was prior to arrest warrant being signed or executed, counsel failed to supoena, request for dispatch documents/transcripts relevant to arrest where communication continuous. Nor had counsel supeonaed, request for

cell phone records thereof Officer Corle relevant to communication with Officer McCredy, compelling production positing arrest was illegal. Detaining Appellant prior to arrest warrant violates Fourth Amendment. (2255, at 9-11) Herewith, the district court fails to acknowledge Officer Duqette's Search Warrant Affidavit, therewith Officer Corle's pre-trial testimony evince plain view doctrine premised a "protective sweep" due to a hand grenade visible upon entry, forced entry. Questionable becomes the "protective sweep's" findings due to facts documented depict only bed in house barricaded door with furniture. (2255, 12-13; Petitioner's Exhibits ("P.E."), at 11, 17, 65)) It is here where count three supported plain view doctrine, according to evidence presented from Officer Corle and Officer Duquette, a striped hand grenade visibly warranted plain view. (2255, at 8; P.E., at 10-11; 15; 17) However, the district court dismissed count three, thus, resurrecting evidential reference with **res gestae.** Affording prosecution freely to reference elements of count three. (2255, at 8-11) Plausibly, "retroactive misjoinder" incurring as a result.

The district court's assertion conceding Appellant "correctly points out an inconsistency" therewith Captain Corle's testimony and Officer Duquette's trial testimony, upon which deciding the inconsistency "does not bear on the ultimate question of Smith's guilt." Here the district court errs, to which, the testimony of ~~each law official premised~~ count three, the search, and conviction relevant to counts one and two. (2255, at 12-14) In that, forced entry of door is inconsistent with Appellant freely opening the door as enunciated by Captain Corle. (P.E., at 78-81) Failure here where counsel for defense, investigatively, procured maintenance

records/reports from management of the occupied dwelling. Thus, ascertaining repairs had been conducted on the door due to forced entry on July 7, 2000 by Captain Corle and other officers.

Dismissal of count three proved cogent to jurors upon the district court asserting **res gestae** thereto destructive device charged and dismissed may be considered evidentially, positing "prejudicial spillover" incurred, warranting nullification of counts one and two based upon count three's **res gestae** induction during trial proceedings. (2255, at 1-2, 108-109) The district court concluding "It's part of the res gestae of the overall offense. I'm going to allow this evidence to go in. The jury is not being asked to hold this defendant accountable for grenades, that's not part of this case as a charging issue, but as an evidentiaary issue, I think it's relevant to the overall case. Objection overruled." (P.E., at 1-2)

Count three premised the arrest due to arrest warrant not available upon entry, furthermore, compelling "protective sweep" which rest with components of plain view doctrine." (2255, at 6-9) Each count, count one and two convictions pose "retroactive misjoinder" due to lack of evidence thereto count three warranting dismissal. Posting evidence seized during search inadmissible.

Further contention rest with "constructive amendment" of indictment, district court's illustration of matter addressed on appeal relevant to United States Sentencing Guidelines upward departure, does not negate the constitutional violations incurred which counsel failed to address under the Fifth Amendment. Opting to dispute this matter under the United States Sentencing Guidelines posits weaker argument, due to Guidelines not immersed by the

Constitution, per se, the Fifth Amendment, it is here where counsel's duty to protect Appellant's rights were pertinent at this critical stage. Counsel ignorred this potential meritorious issue which was ripe for a Fatico Hearing and appeal. (2255, at 22-23; P.E., 195)

District court's oversight as to 18 U.S.C. § 922 "vagueness" akin to possessing firearm at Gilbert's Small Arms Range, more specifically, a gun range is not delineated in the subsections thereof § 922. In that, mere presence or association with gun range premise violation of law. The statute is silent as to such possession of firearm(s) by a felon at a gun range, thus, Appellant not cognizant that presence was a prohibited act. Surely, counsel's failure to investigate whether Gilbert's Small Arms Range or the law prescribes notice enunciating, pronouncing prohibited person, convicted felons from being present at gun range. Here, simulative to purchases of firearms from retailers are prohibited by felons and/or convicted persons. 18 U.S.C. § 922. (2255, at 14-16) The district court ignors Appellant's argument relevant to disjunctive "or" relevant to elements posed to the jury. (2255, at 16) Positing here count one dismissed due to vagueness akin to gun range.

Count two can be disposed by dismissal, in which, the district court failed to consider, where Ms. Karen Campbell's conveyance to Attorney Hicks and AUSA Michael Rich clearly indicates ownership specifically prescribed to Ms. Campbell. Here, Appellant's resident factored for charge and conviction due to constructive, joint, or actual ownership was not clarified by the jury's general verdict. Counsel made no efforts to ascertain therewith interview conducted by Attorney Hicks with Ms. Campbell.

(P.E., at 174-177; 36-52, 53-59, 60-63)

Ms. Campbell's testimony impeded due to judicial intervention coercing defense to negate Ms. Campbell as a witness. (P.E., at 58) "I think this would be within the scope of that, because either she's the owner or she's not. They could certainly go into the nature. If the jury hears that your client has got straw purchases going on, I mean, that would all be over. We might as well go home." Supporting the prosecution's theory to truthfulness, illustrating either course would be detrimental for Ms. Campbell or Appellant. (P.E., at 56) "If she takes the stand and testifies, I think the government has the, has the opportunity to cross-examine her and attempt to impeach her testimony by acts going to truthfulness, and if I ask her that question, "Isn't it true that you straw-purchased these weapons for the defendant?" she's only got two answers to make, yes or no. If she says yes, she 's incriminated herself. If she says no, she's perjured herself." Alternatively, Attorney Hicks compelled by supoena ignorred.

Ms. Campbell's "Queen-for-a-day" immunity posits invoking Fifth Amendment confirming straw purchases were made negates prosecution upon self-incrimination. Coercion by the judical court and prosecution impeding defense for Appellant, persuasively. Indeed, Ms. Campbell's testimony exonerates Appellant thereto count two as charged. (2255, at 18-21). Ms. Campbell's testimony for the defense was denied tactically by the district court, thus, denying Appellant a right to present a defense.

Inclusive with this matter is fact, counsel failed to compel the presence and testimony of Mr. Lloyd Wyatt who was present at Gilbert's Small Arms Range. Mr. Wyatt's testimony pertinent to

count one, investigatively, counsel's endeavors to clarify whether Appellant possessed firearm(s) in accord with § 922(g), thus, disputing the prosecution's charge before the jury with Mr. Wyatt's recollection. Supoena unto Mr. Wyatt was an option counsel failed to pursue for the defense. (2255, at 17) Clearly, it is counsel's duty to investigate potential witnesses and determine whether testimony pertinent to defense, as the district court affirms (Order, at 11, fn. 1), counsel seemingly recognized Mr. Wyatt's testimony significant to appear to testify.

District court fails to ascertain identity evidence was not affirmative as to individual depicted in "balaclava gear" clad persons determined to be Appellant. (Order, at 13; 2255, at 22) To which, the government's assertion to the jury, "There is actual possession, holding it in your hand, similar to the photo that we saw with Mr. Smith in his balaclva with that shotgun with the sidesaddle with the shells in it." (P.E., at 148, 152-152c) The prosecution makes its affirmation absent expert analysis. "This is really strange. He didn't just have the guns; he had posed photos of the guns. This guy is a gun nut. And if there's any doubt about Mr. Smith and his modus and his love for firearms, take a look at that photo, Ladies and Gentleman, and again, look at the sidesaddle. Look at the pistol grip on that shotgun. That's the Mossberg. Let's zoom in a little bit closer, if we could. Whoops, wrong button. Ladies and Gentlemen, you've seen those eyes, those eyebrows in this courtroom today. That's the defendant. The balaclava doesn't hide who that person is holding that shotgun." (P.E., 146-147) Counsel failed to object to this prejudicial impact upon the jury.

Considering counsel's opening statement delineates objectives for defense, counsel failed to pave directives for the jury upon production of defense case, these factors were void in counsel's dissertation to the jury. The district court failed to address this matter therein the Order, cognizant that counsel's opening statment is critical unto the jury, painting a picture, a vision as to where the defense shall contest, prove, discount, or ascertain at various stages of the prosecution's case that Appellant is innocent or not. (2255, at 19) However, the district court addresses there below relevant to witnesses for defense.

Character evidence plausibly submitted is to highlight fact Appellant good character, district court allusion that prosecution may present 'bad character' evidence fails, due to stipulations thereto prior felon convictions and preclusion by the prosecution evincing propensity probable to commit crimes. Prejudice pervades. Here, Appellant's character witnesses being colleagues and employers to which, employment held with computer firm. (Order, at 12-13; 2255, at 20)

Exhibits not relevant to induction during trial proceedings contained in the exhibits binder plausibly prejudiced Appellant, the district court fails to ascertain whether the binder reserved exhibits the government by-passed portioned to discovery and production. Counsel made no efforts to ascertain whether exhibits not introduced presented therein the exhibits binder. Perusal pertinent to prevent prejudice to exhibits not introduced. (Order, at 13-14, 2255, at 22)

Chain of custody raised by counsel at the sentencing proceedings clearly improperly raised as the district court

recognized at the sentencing proceeding (P.E., 137-140), in the Order, the Court fails to consider Appellant's exhibits noted in the 2255, where Exhibit 166 notes Exhibit 64 was received inoperable, Upon Mr. Ols' test firing some time thereafter October 18, 2000 (P.E., 166) posits tampering with firearm. In addition, Exhibit 62 (P.E., at 159) differs with Exhibit 59 (P.E., 162) serial numbers, implying chain of custody disturbed between October 10, 2000 and January 8, 2001, Government Exhibit 10 (P.E., 159(1)) of the former seemingly replaced. Exhibit 64 received inoperable tampered to operate. As to Exhibit 59 (P.E., 159; 162; 166) constructive amendment incurs. (2255, at 22-23)("Constructive Amendment" at 3-4) cf. (P.E., at 159 (Ex. 62 with Government Exhibit 10)

It is here where the "machine-gun" enhancement is triggered, however, due to the chain of custody interferred, it is questionable as to firearm's original position, operable or inoperable, presuming alteration occurred while possessed by law officials. Counsel failed to object to reference of thefirearm being automatic during Officer Charles C. Pak's testimony relevant to questioning Appellant. (P.E., at 195) Officer Pak's implication to 'automatic' firing of weapon further prejudice Appellant thereby constructively amending firearm seized and charged, automatic negated. (P.E., 196) These indications were plausibly considered by the jury, persuasion to verdict of guilty, thus, enhanced as a result.

District court overlooks prosecution's illustration to jury thereof prior convictions stipulated. (P.E., 144) Here, prosecution gives detail of amount of crimes committed with number of victims involved, locations differing. (P.E., 144-148) Closing arguments here were not necessary to divulge upon stipulation ascertaining prior convictions. Emphasizing Appellant "six-time felon" prejudicial.

(P.E., 151), reminding the jury of the district court's asserting to "outset of the government's case in chief." (Order, at 14) Furrthermore, the district court's allusions to Appellant's prior convictions prejudiced Appellant. (P.E., at 153-154) Assisting the prosecution in anointing prejudice with the jury charge, noting specific types of crimes committed. (P.E., at 153-154) Counsel failed to make any objections relevant hereto.

To which, bifurcation of the offense charged plausibly would have prevented this prejudicial impact. Counsel opted not to pursue such an objective for the defense. (2255, at 24-26)

Officer Charles C. Paks direct examination relevant to arrest by State Police thereof Alexandria Police Department lucidly and explicitly evince Miranda readings were only dispensed on July 7, 2000, not on October 10, 2000 upon federal arrest. (Order, at 8-9; 2255, at 26-27; P.E., 189-199) Considering the charged offenses relevant to federal charges were dismissed by the State Court of Virginia warrants re-arrest on these charges premise readings of Miranda Rights. The district court over-steps this principle of law relevant to re-arrest and Miranda Rights. Here, counsel during trial or for appeal failed to dispute this matter relevant as a matter of law.

Removal of jurors associated/affilated with National Rifle Association were ejected as potential jurors, the district court fails to address this matter in the Order. Sixth Amendment precludes removal of juror(s) due to affiliation, the district court's ejections were prejudicial and abuse of discretion. (2255, at 27-28) Positing here the issue is meritorious.

Furthermore, the district court negates to address counsel's

failure to object, have the court strike the record thereto reference to an Uzi silencer which was not charged nor portioned to the jury by evidence. (2255, at 31; P.E., at 148) Nor had counsel objected to AUSA Gaul's depicting Appellant as a "gun nut." (P.E., 148) Which the district court further ignors, surely positing prejudice unto Appellant.

Appellate counsel failed to adhere to Sixth Amendment hereto aforementioned issues, the district court fails to recognize the constitutional grounds relevant to the issues herein relevant to Fourth, Fifth, and Sixth Amendment violations incurred. Noting, appellate counsel will be found deficient where issues ignorred are clearly stronger than those raised on appeal. (Order, at 15) Issues here mentioned relevant to arrest taken place prior to arrest warrant issued therewith fact search warranted due to plain view doctrine contradicted by Officer Corle's forced entry; constructive amendment; Appellant's right to a defense, in short, were substantial issues consistent with Supreme Court decisions. The district court held Appellant's 2255 to stringent standards reserved for practicing and licensed counsel, Decisively denying Petition pursuant to 28 U.S.C. § 2255 summarily was an abuse of discretion.

MEMORANDUM OF LAW IN SUPPORT

The significance of a pro se filing is based upon defendant unable to procure professional legal skills endeavoring to adjudicate issues relevant to law (Common Law or United States Law), violations of United States Constitution. District court's summarily dismissal thereof Petitioner's 28 U.S.C. § 2255 Petition seemingly construed under the stringent standards of practicing and license attorney. In accord with the United States Supreme Court, in **Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972)**, thus, pro se pleadings per long-standing practice is to be construed more liberally. In that, some deference from the courts are entitled upon Appellant here.

Considering the District Court's excision therein the Order and Memorandum Opinion posit liberal construing of § 2255 Petition negated. Oversight of constitutional issues evaded, presumption counsels efforts were cognizable for argument before the district court and on direct appeal. To wit: No arrest warrant issued at time of arrest, Fourth Amendment violation; plain view doctrine seemingly warranted probable cause to arrest, Fourth Amendment violation, due count three dismissed; counsel's failure to provide persuasive interpretation of the evidence and persuade the jury of the defendant's innocence at this critical stage of the trial, Sixth Amendment; counsel's failure to address removal of potential jurors due to affiliation/association with National Rifle Association, Sixth Amendment.

Appellant asserts here, the district court's abuse of discretion precluded adjudication of the merits as a matter of law consistent with the United States Constitution.

I. Arrest

Entry upon premises where arrest occurred is silent and absent evidentially as to Captain Corle enunciating an arrest warrant validate entry to Appellant's apartment shared with Ms. Karen Campbell, per lease. P.E., at 72; 81 Captian Corle injects the hand grenade in the same breath, positing the arrest stems from plain view doctrine. P.E., at 77-80. Appellant's movement being restrained with Officer Blanchet securing vehicle in parking lot, P.E., at 96. The Supreme Court premise warrantless arrest in the home violates the Fourth Amendment as explicated in **Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S. Ct. 1371 (1980),**

> "Judge Levanthal concluded that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection."

445 U.S. at 588.

Exemplifying the Second Circuit's position, further asserting:

> ""To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.""

445 U.S. at 589.

Herein the instant case, no exigent circumstances existed, positing Captain Corle to suspend formality relevant to a valid arrest. Seemingly, the district court opted not to resolve this issue, plausibly due the illegal entry is unjustified. **U.S. v. Campbell, 945 F. 2d 713 (4th Cir. 1991).** The Fourth Circuit

remanded with instructions due independent source not justified the initial entry. **Id. at 716.** Herein the instant matter, trial counsel failed to procure State Court (Alexandria) records akin to the arrest, in that, offenses relevant to arrest were dismissed, with exception of property destruction charge. Captain Corle's illegal entry premised the search warrant, subsequently dismissed by the district court was count three which plausibly warranted the arrest. To which, the hand grenade(s) initiated the arrest, here independent of itself. See also: **U.S. v. Bradley, 922 F.2d 1290, 1295-1296 (6th Cir. 1991); U.S. v. Gooch, 6 F.3d 673 (9th Cir. 1993),**

> "Exigent circumstances are "'those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [or arrest] until a warrant could be obtained.'""

Id. at 679.

The Ninth Circuit further expressed,

> "Exigent circumstances are present when "a reasonable person [would] believe that entry ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.""

Id.

This factor, exgient circumstances are negated in the case before the court to justify arrest without a warrant. Thus, the district court failed to resolve this issue as presented. (2255, at 9-10) Time lines differ with arrest and arrest warrant. P.E., 109-110

II. Inconsistent Assertions/Statements

The inconsistency of Officer Duquette's testimony rest on

whether forced entry occurred, consent, or otherwise. Regarding documents illustrative of door barricaded with only bed in house, mattresses and furniture (2255, at 13) compared to Officer Duquette noting "a bed" in apartment posit forced entry occurred. (2255, at 13) In addition, inconsistent with Captain Corle's pre-trial testimony thereto grenade (2255, at 13) which differs from Officer Duquette's illustration. Officer Duquette's presentation before the Magistrate Judge to obtain the search warrant was under oath, pursuant to Rule 801(d)(1)(A) relevant to hand grenade was indeed inconsistent with trial testimony. (P.E., 116; cf. P.E. 80) Officer Duquette's testimony being substantive evidence relevant to arrest, search and controverting Captain Corle's testimony (pre-trial)(2255, at 13; P.E., at 80). The district court clearly asserts taint is plausible, to which, the district court reads the search warrant independent of arrest. P.E., 108) It is the grenade and questionable becomes the handgun, grenade dismissed (P.E., 71; Attachment 1-4) which premised the arrest. (P.E., at 107-109) To which, Officer Duquette's testimony significant to material facts relevant to arrest, ultimately, hand grenade premised arrest and search, which State Court dismissed. (P.E., at 10-11) Absent from Search Warrant Affidavit are Captain Corle/Officer Duquette's alleged findings upon "only bed" in apartment. (P.E., at 79-89)

Officer Duquette's search warrant affidavit may be deemed substantial evidence relevant to the instant matter. Here counsel failed to introduce the search warrant affidavit as defense evidence. **Sam's Club , A Div. of Wal-Mart Stores v. N.L.R.B., 160 F.3d 191 (4th Cir. 1998),**

> "The General Counsel never made a motion to enter Porter's affidavit into evidence. As a result, Sam's never had an opportunity to contest the document's reliability and the ALJ never had a meaningful chance to examine that issue. Thus, the affidavit was never

> properly admitted as substantive evidence during the hearing and the ALJ's use of it as such was error."

Id. at 199-200

Plausibly, Officer Duquette's prior inconsistent statement on search warrant affidavit could have been submitted as substantive evidence for the truth of its contents under the new law established by Rule 801(d)(1)(A) of the Federal Rules of Evidence. **United States v. Coran, 589 F.2d 70, 76 (1st Cir. 1978)** Here simulative to **United States v. Grandison, 780 F.2d 425, 431 (4th Cir. 1985),** substantive effect can be given hereto, which is further contrasted by AUSA Hackney's documented motion and Captain Corle's pre-trial testimony relevant to forced entry, hand grenade, and arrest. (2255, at 13)

The Sixth Circuit illustrates "out-of-court" statements made by McKinney were made under oath and hence could be used as substantive evidence. **U.S. v. Ricketts, 317 F.3d 540, 544 (6th Cir. 2003.** However, failure to distinguish between sworn statements that could be used as substantive evidence and unsworn statements that could not, were not submitted to the court accordingly, thus, substantive evidence was not determined.

III. Prejudicial Spillover-Retroactive Misjoinder

Res gestae permitted evidence relevant to count three, the dismissed count to be referred during trial proceedings, thus, prejudice unto Appellant. Count three premised the arrest based on Ms. Karen Campbell's statements to Alexandria Police Officers (P.E., 71-73) However, Ms. Campbell's assertions do not imply a cache of weapons are stored in the apartment, nor affirmatively noting Appellant carried a .45 caliber firearm, positing this could

have been a cell phone. (P.E., 41)

The district court notes Appellant fails to specify evidence wrongfully admitted. (Order, at 9) Here, Appellant asserts the evidence relevant to counts one and two (P.E., 123-123d) therewith documents, receipts associated with Gilbert's Small Arms Range inadmissible due to count three's dismissal, which count three premise arrest and search, thus, retroactive misjoinder incurred due to dismissal. (2255, at 7-12) Count three's dismissal rest on conduct that is not criminal, the district court's presentation of res gestae posits this conduct as being criminal, in that, the hand grenade was not a destructive device within the meaning of the statute. **Davis v. United States, 417 U.S. 333, 346 (1974)** Clearly a miscarriage of justice prevails herewith the instant matter.

In accord with **United States v. Jones, 16 F.3d 487 (2nd Cir. 1994)**, the Second Circuit explicitly demonstrates "retroactive misjoinder" nullifying remaining counts, alternatively, reversing the conviction and imposed sentence due to prejudice spillover. **Id. 493** (2255, at 7; Order, at 9) As the district court stated during the trial proceedings relevant to weapons evidence:

> "That's not how I read the motion. In other words, the way the motion reads is that the initial information, the visual observation of these weapons on the bed and that sort of thing, that's the essence of the search warrant, and if that's tainted, then the warrant will fall. If it's not tainted, the warrant and the affidavit upon which it is based, my understanding is that's not being attacked."

(Tr., at 52, P.E., at 108) cf. **Attachments 1-4**

Officer Duquette's Search Warrant Affidavit premise Appellant displaying "a yellow stripe around same" such being a "fatigue green" colored cylindrical tube. (P.E., at 10) "The suspect

Smith, opened his door and handed your affiant what appeared to be a military style hand grenade." (P.E., at 11) Cf. (P.E., 80, Tr., at 24) To which, the Government's dismissal with prejudice of count three, however, the record is absent as to reasons for dismissal. (P.E., at 25-26; Tr. 4-5) Non criminal conduct used evidentially prejudice Appellant here in the instant matter, upon disttrict court's res gestae. **U.S. v. Aldrich, 169 F.3d 526, 528 (8th Cir. 1999)**

IV. Constructive Amendment

Trial testimony evident "constructive amendment" therewith Officer Charles Pak illustrating test firing of firearms. (P.E., at 196) Counsel failed to object thereto, during cross-examination counsel furthered Officer Pak's illustration of automatic weapon. (P.E., at 197-198) The jury's exposure to this alteration of charged offense contributing to verdict of guilty, plausibly.

Upon which, the Fourth Circuit authority hereto "constructive amendment" of indictment failing to include element (automatic firearm) in indictment renders a defective indictment. **U.S. v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988),**

> "The requirement of notice derives from the defendant's Sixth Amendment right to be informed of the nature and cause of the accusation. The inclusion of all elements also derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present."

Id. at 1230.

Considering counsel's failure to object thereto Officer Pak's testimony relevant to automatic weapon further impedes Appellant's rights. **U.S. v. Pupo, 841 F.2d 1235 (4th Cir. 1988),**

> "As we have stated in **Hooker**, when an indictment fails to include an essential

> element of the offense charged, it thereby fails to charge **any** federal offense and a conviction under the indictment may not stand, provided the omission is timely raised."

Id. at 1239.

No endeavors by counsel to raise this issue prior to the verdict incurred. Counsel (Appeal) opting to raise the weaker argument on appeal failed to address the constitutional dimensions here noted. (2255, at 23) As the district court asserts in the Order (at 15) "'Winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." (quoting, **Pruett v. Thompson**)

V. Void for Vagueness

Statutory delineation (§ 922) forbids possession of a firearm by a felon, subsections demonstrative illegal and unlawful acts relevant. However, § 922 fails to denote proscription of a person convicted of a felon is prohibited from a gun range, on a mere presence or mere association basis. **U.S. v. Osiemi, 980 F.2d 344 (4th Cir. 1993).** The Fourth Circuit in **Osiemi** held the language of a criminal statute construed by the Court, taken literally, and given its plain and ordinary meaning. **Id. at 348.**

Noting the statute in **Osiemi**, 18 U.S.C. § 1546(a), as amended, criminalizes the knowing possession of any counterfeit or altered document prescribed by statute and regulation. This instant matter presents no subsection or regulation proscribing Appellant's mere presence or association with a gun range, positing vagueness. As the United States Supreme Court stated in

Colautti v. Franklin, 439 U.S. 379 (1979), noted therein Appellant's § 2255 (at 14), the criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or so indefinite it encourages arbitrary and erratic arrests and convictions, is void for vagueness.

Appellant notes here that cognizance to prohibited law relevant to Gilbert's Small Arms Range, as to presence and association is not defined in § 922, nor are there regulations posted there at the Small Arms Range prohibiting prohibited persons presence and/or association. (2255, at 15-16) Counsel failed to compel the testimony of Mr. Lloyd Wyatt to ascertain whether Appellant possessed firearms congruent with receipts, positing spectating being Appellant's objective reason for presence there at Gilbert's Small Arms Range. (2255, at 19) Counsel's investigation spurred Mr. Wyatt's identity, thus, counsel objective for calling Mr. Wyatt premise from trial counsel's investigation. (Order, at 11) Appellant has a right to present defense, alternatively, compelling witness testimony by supoena. (2255, at 19; Order, at 6)

VI. Dismissal of Count Two (18 U.S.C. § 922(g)(1))

Ms. Karen Campbell's communication to former counsel William Hicks exculpates Appellant from charged offense, however, coercion from the district court and prosecution persuaded Ms. Campbell to derail her testimony for the defense. (P.E., at 36-52; 53-59; 60-63) Asserting right to Fifth Amendment against self-incrimination.

Prosecution's immunity extended to Ms. Campbell posed no prosecution relevant to the firearms under the **Kastigar** principle. Thus, counsel compelling Ms. Campbell to testify by subpoena in accord with the Supreme Court's authority in **United States v. Morton**

Salt Co., 338 U.S. 632, 642-643 (1950). Posing here, Ms. Campbell would not be prosecuted for her testimony. U.S. v. Squillacote, 221 F.3d 542 (4th Cir. 2000),

> "(stating that Kastigar "particularly emphasized the critical importance of protection against a future prosecution based on knowledge and sources of information obtained from the compelled testimony"

Id. at 559.

Intervention by the district court or prosecution persuading a witness from testifying for the defense warrants reversal. (2255, at 20; P.E. 56-58) Consequently, the jury requested a reading, defining "joint possession" relevant to deliberation. (P.E., at 124-127; cf. 156-158) Here, the district court skirts this issue, seemingly, the jury's reading posed Ms. Campbell's ownership was plausible. Positing counsel's failure to subpoena Attorney Hicks to clarify firearms ownership therefrom interview exculpates Appellant.

Relevant to counts one and two, the United States Supreme Court in Brown v. Maryland, 25 U.S. 419, 6 L.Ed. 678 (1827) held that upon an item conveyed via interstate commerce comes to rest, unpackaged for resale or use, interstate commerce cease to exist, thus federal reulation negated. Reasoning count one thereto Gilbert's Small Arms Range was not a retailer of weapons, only to lease/rent as delineated herewith the instant case. Possession of a firearm here failed to meet the Supreme Court's holding.

As to count two, Ms. Campbell's purchase of the firearms explicitly proven negates Appellant as affecting interstate commerce. Posing here, that at no time on the date(s) of purchase the firearms were conveyed in interstate commerce, in accord with

the "original package" doctrine, interstate commerce is absent, due to the conveyance ceased. Whereupon, retailer/seller disposed the original package, thus, placing the firearms in a gun shop for lawful sale under regulatory firearms selling procedures. To which, Ms. Campbell's lawful purchase of firearms did not prohibit purchase, nor amount to placing the firearms back into or affecting interstate commerce.

Clearly, Ms. Campbell opted to move to a separate apartment in the same building to safeguard her daughter from acsess to the firearms. (P.E., at 24) As she asserted to Attorney Hicks, intimacy continued irregardless of this demarcation. (P.E., at 41) In addition, fact Appellant retains keys to Ms. Campbell's apartment. (P.E., at 45, 50)

Delay in indicting Appellant can be ascertained by fact, State Court (Alexandria) dismissal was cognizant unto the Federal Government soon after, posing counts one and two were not ripe for adjudicating due to insufficient evidence. The district court purports pre-trial Motion to Detain warrants excluding time under 18 U.S.C. § 3161. (Order, at 6-7) Appellant contends this matter decisive for the Appellate Court. (2255, at 16)

Counts one and two posit dismissal as delineated in § 2255, argumentatively, as a matter of law thereto counsel's deficient performance as outlined. (2255, at 14-18) Considering the district court and prosecution's intervention with witness, Ms. Karen Campbell, drove Appellant's sole witness from the witness stand. (2255, at 20) Illustrative therein that counsel made no attempts to obtain defense witnesses, alternatively, absent Ms. Campbell's negation.

VII. Identity Evidence Inadequate

Recovery of photos depicting "balaclava gear" clad persons without ascertaining identity affirmatively to be Appellant presumes prejudice incurred upon evincing to jury. Counsel made no attempt to mitigate photos thereby stipulation or expert witness refuting government's depiction thereof Appellant. (P.E., at 147-148) Herewith, prosecution's depiciton of Appellant being "gun nut" further prejudice Appellant. (P.E., at 146) No testimony by witnesses corroborated photos, authentication or identification required by Rule 901(a) of the Federal Rules of Evidence negated, positing district court's admission of photos abused discretion, herewith counsel's failure to object. **U.S. v. Crockett, 49 F.3d 1357, 1359-1360 (8th Cir. 1995).** (2255, at 22)

VIII. Opening Statement

Counsel failed to delineate unto the jury whether evidence to be depicted by the defense would evince innocence, persuasively. Considering the opinion of the jury rests initially with counsel's assertions at this critical stage. Adopting Chief Justice Berger's descriptive relevant to the opening statement,

> "An opening statement has a narrow purpose and scope. It is to state what evidence will be persented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict."

United States v. DeRosa, 548 F.2d 464, 471 (3rd Cir. 1977)

The Third Circuit in **DeRosa** explicated pertinence of the opening statement, is to divulge the outlines of the case, thus, enabling the jury to comprehend events forthcoming. **Id. at 470.** Here, the district court side-steps the significance of Appellant's argument hereto this claim/issue. Positing the jury was in limbo as to defense theory. (2255, at 19; P.E., at 174-176)

IX, Character Evidence

District court premise prosecution may present evidence rebutting Appellant's "good character" evidence with detailed testimony thereto Appellant's criminal history. The Supreme Court forbids such admissions by the government. **Michelson v. United States, 335 U.S. 469, 475-476 (1948)** Positing character witnesses for defense inquiry relevant to criminal history limited to "Have you heard?" not "Do you know?" upon cross-examination. Direct evidence of Appellant's criminal history may not be clarified by the prosecution or the district court. **U.S. v. Guay, 108 F.3d 545, 552-553 (4th Cir. 1997)** cf. **U.S. v. Queen, 132 F.3d 991, 995 (4th Cir. 1997).** (2255, at 20; Order, at 13-14) Evidence to discredit witness credibility plausibly admissible.

X. Inadmissible Exhibits in Jury Room

Counsel's failure to review the exhibit binder for documents not introduced by the district court plausibly prejudice Appellant. In that, counsel presumed documents irrelevant to trial evidence may be contained therein, however, counsel made no efforts to apprise the trial court for review of the exhibit binder. **U.S. v. Williams-Davis, 90 F.3d 490, 500 (D.C. Cir. 1996); U.S. v. Holton, 116 F.3d 1536, 1544 (D.C. Cir. 1997).** (Order, at 13-14; 2255, at

22)

XI. Chain of Custody

The district court recognizes counsel's improper attempt to argue "chain of custody" issue during sentencing proceedings. (P. E., at 140) Evidentially, exhibited relevant to inoperable firearm inclusive in Petitioner's exhibits (P.E., at 159-167), the district court errs (Order, at 14) in asserting evidence is not provided.

On October 18, 2000, Laboratory Report by Special Agent Michael Hephner ascribed Exhibit 64 as inoperable (P.E., at 166). On February 1st, 2001, Agent Martin G. Ols Rule 16(a)(1)(E) Notice asserts Exhibit 22 was received inoperable. **Attachment 5-7** This matter clearly indicates therewith Special Agent Michael Hephner's Report of Technical Examination noting Exhibit 64 as "Test firing disclosed that Exhibit 64 with two rounds of commercially Federal brand 9mm functioned as intended by design" was tampered during the chain of custody process between October 10th, 2000 and according to Agent Hephner's aforementioned Report, January 8. 2001. **Attachment 8-10**

Relevant to Exhibit 10 (P.E., at 159), undoubtedly differs from Exhibit 62 (P.E., 162), the serial numbers posit the facts. Bushmaster SN: L100080 (P.E., at 159 and 161 Ex. 59) compared with Bushmaster SN: 844587 (P.E., at 162 (Ex. 59), dates of each being July 7, 2000 (Date of Arrest), January 8, 2001 (Ex. 59, P.E., at 161), and August 7, 2000 (Ex. 59; P.E., at 162), respectively.

Positing tampering thereby removal/replacement occurred during chain of custody process, clearly tampering by officials. Questionable becomes Officer Pak's testimony as to Exhibit 22 firing automatic. (P.E., at 194-196) Where chain of custody

tampered between law officals. Significant here is authority therein § 2255 on this matter, **U.S. v. Stewart, 104 F.3d 1377, 1383-1384 (D.C. Cir. 1997)**, where the prosecution must show a proper chain of custody demonstratively. Considering the possibilities of misidentification or alteration were not eliminated in the instant matter by reasonable probability, presumes counsel's efforts to defend at this critical stage was deficient, which the district court overlooks. **U.S. v. Allen, 106 F.3d 695, 700 (6th Cir. 1997).**

Relevant for consideration is Agent Hephner's Declaration stating the Bushmaster was identified on sight to be altered to an automatic firearm, compared thereto Agent Ols Declaration. (May 29, 2001, May 25, 2001, respectively) **Attachments 11-25** This Bushmaster's serial number equivalent to L100080.

XI. Prior Convictions Assertions Prejudicial

Stipulation to prior convictions suffice negation to alert jurors detailing convictions thereof Appellant. (P.E., 144-146; 151) The district court assist the government in highlighting the prior convictions (P.E., at 154) Indeed, mentioning prior convictions belies prejudice unto Appellant, counsel made no endeavors to preclude the prejudicial impact by objections or requesting the district court strike the record. (P.E., 174-177)

Furthermore, the district court by-passes this matter in the Order, where upon "introducing potentially prejudicial evidence concerning prior felony" should be stricken from the record. **U.S. v. Muse, 83 F.3d 672, 678 (4th Cir. 1996)** (2255, at 24-26) Here, counsel made no endeavor to object to prior convictions assertion by the prosecution and trial court. Counsel failed to propose bifurcation of prior offense charge (18 U.S.C. § 924(e), thus,

eliminating prejudice. **U.S. v. Aldrich, 169 F.3d 526, 528-529 (8th Cir. 1999),**

> "It cannot be gainsaid that there is "a high risk of undue prejudice whenever, as in this case, joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." . . . ""Evidence of a prior crime 'is always ... prejudicial to a defendant. It diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to improper issue of his bad character.'"

Id. at 528.

In line with the Supreme Court, the Eighth Circuit here evinced ,

> "It is for this very reason that courts typically hold that "joinder of an ex-felon count with other charges requires either severance, bifurcation, or some other effective ameliorative procedure.""

Id.

XII. Miranda Rights Negated on Re-arrest

Upon re-arrest on October 10, 2000 by Federal Officers, Appellant's Miranda Rights were not read, Officer Charles C. Pak of the Alexandria Police Department testified relevant to Miranda Rights read on July 7, 2000, date of arrest by State of Virginia on State Criminal offenses. Considering the State charges were dismissed relevant to felon in possession posits Miranda Rights extinguished, unto which re-arrest would warrant Miranda readings anew. **Carlson v. Landon, 342 U.S. 542, 546-547, 96 L.Ed. 547, 72 S. Ct. 525 (1951),**

> "It has been said that the rule in criminal cases is that a warrant once executed is exhausted. This guards against precipitate

arrest."

Id. at 342 U.S. 546.

Rearrest by federal officials deem restriction on Appellant's freedom as to render him "in custody." **United States v. Parker, 262 F.3d 415, 419 (4th Cir. 2001)** (2255, at 26-27; P.E., at 14, 184-189). Rearrest occurring thereafter Appellant's completion of State sentence charged therefrom arrest by Officer Charles C. Pak on July 7, 2000. (Order, 8-9) Posit evidence Inadmissible. 2255, 7-13

XIII. Removal of Potential Jurors Prejudicial

Once again, the district court skirts the matter, here relevant to removal of potential jurors due to affiliation/ association with National Rifle Association, to which, counsel failed to object and assert Appellant's right to jurydrawn from venires representative of community. (2255, at 27-28)

Considering the National Rifle Association is deemed a "distinctive" group in community, systematic exclusion of group based on membership in an organization that supports a particular view, upon which exercising "wholesale, arbitrary, and irrational exclusion of persons with affiliations of said association is prejudicial error executed by the district court. **United States v. Salamone, 800 F.2d 1216, 1226-1227 (3rd Cir. 1986)**

XIV. Prejudicial Comments by Prosecution

Counsel failed to address prosecution's comments that Appellant was a gun nut, in addition, mention of Uzi silencer which held no relevance to trial proceedings, evidentially. The district court fails to address this matter in Appellant's 2255 (2255, at 31; P.E., at 146; 148) **U.S. v. Cannon, 88 F.3d 1495, 1502-1503 (8th Cir. 1996)**

> "Prosecutors must refrain from using methods calculated to produce a wrongful conviction. . . Although a prosecutor "may strike hard blows, [the prosecutor] is not at liberty to strike foul ones."

Id. See also; **U.S. v. Martinez-Medina, 279 F.3d 105 (1st Cir. 2002)**

In **Martinez-Medina**, counsel made the initiative to object to the prosecutor's repeated and graphic references to the various murders described at trial, claiming that this inflamed the passions of the jury and distracted from the merits of the case. **Id. at 118.** However, counsel's efforts continued due to further characterization of defendants by the prosecution. The First Circuit opined no prejudicial effect incurred, counsel's efforts to object and strike from the record are clear, as opposed to counsel herein the instant matter. Thereto the Uzi silencer having no evidential imput during the trial, nor characterization of Appellant as a "gun nut." **Gall v. Parker, 231 F.3d 265, 311-313 (6th Cir. 2000)**

XV. Ineffective Assistance of Counsel (Trial and Appellate)

Trial counsel has an obligation to pursue, investigatively, all open avenues of defense. **Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978)** Plausibly, counsel's opening statement negates defense theory, positing trial strategy/tactics were abandoned. **United States v. DeRosa, 548 F.2d 464, 471 (3rd Cir. 1977)** Counsel failed to pursue witnesses, adamantly, for the defense, compelling testimony in the alternative of Attorney William Hicks and Lloyd Wyatt thereby subpoena. **Washington v. Texas, 388 LU.S. 14, 19 (1967)** Counsel's compliance with the district court and prosecution to restrain from calling Ms. Karen Campbell as witness, coercively persuading Appellant to concede cannot be deemed trial strategy.

Silva v. Woodford, 279 F.3d 825, 846 (9th Cir. 2002) Counsel has an overall duty to make reasonable investigations or to make reasonable decision that makes particular investigations unnecessary. **Lindstadt v. Keane, 239 F.3d 191, 200-204 (2nd Cir. 2001)** Here, the record indicates counsel made no attempts to interview witnesses outside of Mr. Wyatt. Pretrial investigation and preparation being key components to effective representation of counsel. **United States v. Tucker, 716 F.2d 576, 581 (9th Cir. 1983)**

Appellant counsel failed to winnow out weaker claims and submit stronger claims for appeal. Here evinced as to the arrest, prejudice spillover/retroactive misjoinder, constructive amendment, void for vagueness, "original package doctrine", Miranda rights, each immersed in the United States Constitution relevant to the Fourth, Fifth, and Sixth Amendment. **Mayo v. Henderson, 13 F.3d 528 (2nd Cir. 1994),**

> "("His lawyer failed to raise either claim, instead raising weaker claims.... No tactical reason-no reason other than oversight or incompetence-has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had.")"

Id. at 533.

Herewith the sentence imposed, the United States Supreme Court in **Williams v. Taylor, 529 U.S. ---, 146 L.Ed.2d 389, 120, S.Ct. --- (2000).** Held that prejudice flowed from the asserted error in sentencing. Reasoning that an increase, significant it indeed warrants prejudice due to counsel's failure to to investigate and to present substantial mitigating evidence to the sentencing jury.

CONCLUSION

For the reasons set forth here above, Appellant respectfully request Court of Appeals for the Fourth Circuit reverse and remand Petition under 28 U.S.C. § 2255, as a matter of law due to the Constitutional violations incurred. Upon which counts one and two warrant dismissal due to prejudicial spillover/retroactive mijoinder, constructive amendment, illegal arrest, and failure to administer Miranda warnings upon re-arrest.

Respectfully submitted,

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