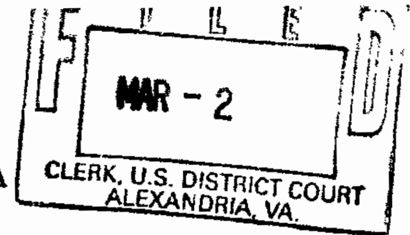

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 00-421-A
	)	
WILLIAM KINJO SMITH	)	
	)	
Defendant	)	

MOTION FOR ACQUITTAL

COMES NOW Defendant, by counsel, and moves this court, pursuant to Fed. R. Crim. Pro. 29(c), for a judgment of acquittal.

Count 1: Smith was found guilty of possessing a firearm on June 12, 1998 at Gilbert Small Arms Range. The Government's only evidence was the testimony of Ernest Lyles and exhibits admitted through him. Because Mr. Lyles did not remember Mr. Smith or the rental of the firearm, he testified, by reviewing the exhibits, that Smith purchased range time and ear and eye protection for two people and filled out a range card.[1] Mr. Lyles further testified that someone who wished to go on the range simply to observe had to fill out a range card and had to have eye and ear protection, that someone could complete a range card and not take possession of a firearm, and that he could not tell from the range card who took possession of the firearm. Finally, Mr. Lyles agreed that it was possible that one person could complete the range card and another could taken possession of the firearm.

The standard for deciding a Rule 29 motion was explained in Jackson v. Virginia, 99 S.Ct. 2781 (1979):

If "reasonable" jurors "must necessarily have . . . a

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[1] A copy of the transcript of Mr. Lyles testimony is attached.

> reasonable doubt" as to guilt, the judge "must require acquittal, because no other result is permissible within the fixed bounds of jury consideration . . . ."

99 S.Ct. at 2789, n.11 (quoting Curley v. United States, 160 F.2d 229 (5th Cir. 1974).

Moreover, if the evidence against a defendant was circumstantial, as in the case at bar:

> 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, 753-4 (6th Cir. 1977).

Finally, 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) concerning proximity to contraband. 618 F.2d at 1077. In Ferg, the court held:

> 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." (citation omitted).

504 F.2d at 917.

In the case at bar, the only evidence concerning possession of the firearm, viewed in the light most favorable to the Government, was that Smith was merely in physical proximity of the firearm since there was no evidence that he had "direct physical control over" the firearm or that he could "knowingly control it and intend[ed] to control it." 2 Devitt, Blackmar and O'Malley,

Federal Jury Practice and Instructions, Section 54.08 (4th ed. 1990). Thus, as 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 necessarily have . . . a reasonable doubt" as to guilt and the court must enter a judgment of acquittal.

Moreover, the evidence, even viewed in the light most favorable to the Government, was circumstantial. Thus, as it is as probable that Smith did not possess the firearm as it is that he possessed the firearm, the "conviction cannot stand." Campion, 560 F.2d at 754.

Counts 1 and 2: The evidence supporting Count 2 was discovered during the execution of a search warrants by the Alexandria Police Department on July 7, 2000 and the Bureau of Alcohol, Tobacco & Firearms on July 26, 2000. The evidence supporting Count 1 was derived from documents found during the execution of the search warrant by the Bureau of Alcohol, Tobacco & Firearms on July 26, 2000. Both warrants were the fruit of the "protective sweep" made at the time of Smith's arrest on July 7, 2000. Thus, if the protective sweep was invalid, the evidence supporting both counts would have been inadmissible. Segura v. United States, 468 U.S. 796, 814-15 (1984). Although the court has already ruled that the "protective sweep" was lawful, counsel would respectfully request that the court reconsider its decision.

At the suppression hearing, Captain Corle testified that he conversed with Smith for about 20 minutes on his (Corle's) cellular

telephone.[2] At that point, Smith opened the door and Corle and at least two other officers entered the foyer of Smith's apartment. Corle immediately directed one of the other officers to handcuff Smith, which was done promptly at the wall in the back of the foyer. As Smith was being handcuffed, Corle asked Smith if he could search the apartment; Smith told him that he could not. Corle then walked down the hallway toward the bedroom, where he saw firearms on the bed; he then returned to the foyer, spoke with other officers, and directed Officer Duquette, who had searched the other side of the apartment, to look into the bedroom where he also saw firearms. Corle also testified that he had no reason to believe anyone other than Smith was in the apartment.

In Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990), the Court held:

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. . . . . We should emphasize that such 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. The sweep lasts no longer than 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.

494 U.S. 334-36, 110 S.Ct. at 1098-99.

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[2] The billing record for Captain Corle's cellular telephone show that the call was received from Smith at 10:53 and lasted for 15 minutes, i.e., until 11:08.

In the case at bar, the Government argues that Captain Corle's and Officer Duquette's searches of the bedroom were "protective sweeps" under the first prong of Buie since the bedroom was "immediately adjoining the place of arrest . . . ."[3] The bedroom was not, however, "immediately adjoining the place of arrest" as the place of arrest was the wall at the back of the foyer, not the hallway. This fact differentiates the instant case from United States v. Ford, 56 F.3d 265 (D.C. Cir. 1995), where the "arrest took place in the hallway, and the bedroom from which Ford emerged was immediately adjoining the hallway . . . ." 56 F.3d at 270.[4]

In addition to the fact that the bedroom was not "immediately adjoining the place of arrest," Captain Corle's and Officer Duquette's searches took "longer than it takes to complete the arrest and depart the premises." Buie, 494 U.S. 336, 110 S.Ct. at 1099.

Captain Corle testified that, upon entering the apartment, he immediately directed one of the other officers to handcuff Smith, which was done promptly at the wall in the back of the foyer. After Smith was handcuffed and in the custody of at least one officer, Corle walked down the hallway toward the bedroom, where he

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[3] In view of Captain Corle's admission that he had no reason to believe that anyone other than Smith was in the apartment, there were no "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Thus, the search cannot be upheld under the second prong of Buie.

[4] In Re Sealed Case 96-3167, 153 F.3d 759 (D.C. Cir. 1998) is also distinguishable as the protective sweep was of a bedroom "adjacent to the room in which [the officer] had apprehended defendant . . . ." 153 F.3d at 763.

saw firearms on the bed; he then returned to the foyer, spoke with other officers, and directed Officer Duquette, who had searched the other side of the apartment, to look into the bedroom. Plainly, as Smith was already handcuffed and could have been removed from the apartment when Corle walked down the hallway to the bedroom, his search lasted longer than it took to complete the arrest and depart the premises. This is even more true of Officer Duquette, who, by the time he walked down the hallway, had already searched the other side of the apartment, returned to the foyer, and been directed by Captain Corle to search the bedroom.

Because the affidavit for the search warrant was sworn out by Officer Duquette, it is the lawfulness of his "protective sweep" of the bedroom that governs the validity of the search warrant. As his "protective sweep" lasted far longer than it took to complete the arrest and depart the premises, his affidavit must fail and the search warrants be invalidated.

Respectfully submitted,

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By Counsel

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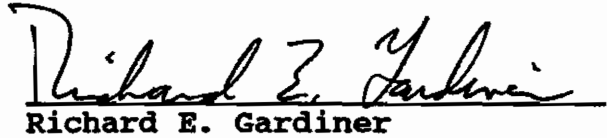
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR ACQUITTAL was hand-delivered to Michael Rich, Assistant United States Attorney, 2100 Jamieson Avenue, Alexandria, VA 22314 this 2nd day of March, 2001.



Richard E. Gardiner