

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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UNITED STATES OF AMERICA :  
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-vs- :  
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WILLIAM K. SMITH, :  
Defendant. :  
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Cr. No. 00-421-A

SENTENCING HEARING

June 8, 2001

Before: Leonie M. Brinkema, Judge

APPEARANCES:

Michael E. Rich and Kenneth W. Gaul, Counsel for the U.S.

Richard E. Gardiner, Counsel for the Defendant

The Defendant, William K. Smith, in person

1 THE CLERK: Criminal case number 2000-421-A, the  
2 United States of America versus William Kinjo Smith.

3 Will counsel please note their appearance for the  
4 record.

5 MR. RICH: Good morning, Your Honor. Mike Rich  
6 and-- Good afternoon, Your Honor. Mike Rich and Ken Gaul  
7 for the United States.

8 MR. GARDINER: Good afternoon, Your Honor. Richard  
9 Gardiner for Mr. Smith.

10 THE COURT: All right. Mr. Gardiner, before we  
11 get to the sentencing, I want to make sure we have addressed  
12 the various motions that are floating around in this case.

13 I think out of an abundance of caution we do need  
14 to address the May 7 motion of Mr. Smith for judgment of  
15 acquittal. I think it is fairly repetitive of what has  
16 previously been filed.

17 But do you want to argue any of that on his  
18 behalf?

19 MR. GARDINER: Your Honor, may I talk to Mr. Smith  
20 for a second?

21 THE COURT: Yes.

22 NOTE: A discussion is had between the defendant  
23 and his counsel.

24 MR. GARDINER: Your Honor, he asks that he be  
25 allowed to address you on that motion.

1 THE COURT: All right. The defendant come up to  
2 lectern. This is, for the record, or was filed as a pro se  
3 motion, as I recall.

4 THE DEFENDANT: Yes, Your Honor. Good afternoon,  
5 Your Honor.

6 Before either lawyer presents his case, it is  
7 imperative that I address the Court. This issue goes to the  
8 heart of my having a fair hearing.

9 On prior occasions I have filed three motions and  
10 two letters with this Court. The substance of one particular  
11 motion raises the issue of ineffective assistance of counsel.  
12 Two letters were written as direct actions of ineffective  
13 assistance of counsel claims. The first such letter was an  
14 attempt to withdraw the motion based on my filing the motion  
15 under Rule 29(c).

16 The second letter corrects the first letter by  
17 citing the proper statute allowing the Court to entertain the  
18 motion. The statute, U.S.C. 28 Section 2241, and Rule 11 --  
19 and, excuse me, Rule 12.

20 Given that I have corrected the error regarding  
21 jurisdiction, it is my claim now that sentencing should be  
22 postponed so that new counsel can argue ineffective  
23 assistance of counsel.

24 Two. Additionally, there are other issues of  
25 ineffective assistance of counsel I would like to address.

1 They are, my attorney specifically promised me that he would  
2 file a motion in favor of my correcting my criminal history.

3 At the time of the promise my lawyer did not advise  
4 me of any reason that would prohibit him from filing this  
5 motion. Against my attorney's promise, he failed to file the  
6 motion and I lost the opportunity to correct my prior  
7 criminal history for today's sentencing. My attorney reasons  
8 that he needs more money.

9 Number two. My attorney informs me that he will  
10 not argue any of my motions that I have filed with respect to  
11 sentencing.

12 All these reasons is why I am asking this Court for  
13 a continuance so that substitute counsel will have the  
14 opportunity to review and proceed on my behalf.

15 This request is not for the purpose of delay, but  
16 for the purpose of serving the interests of justice in a fair  
17 manner. I say this because not having effective assistance  
18 of counsel at sentencing and not being adequately prepared  
19 sufficient -- when sufficient evidence is present is a claim  
20 that must be raised now as opposed to later because of the  
21 preservation of the appellant issue rule.

22 And that's all I have to say.

23 THE COURT: All right. Stay there, Mr. Smith.

24 First of all, I do intend to consider and to  
25 address each of the pro se motions that you filed today. So,

1 they are going to be heard. The Government has actually  
2 responded, I believe, to most of them.

3 THE DEFENDANT: Okay.

4 THE COURT: Specifically, I want you to tell the  
5 Court what it is about your state convictions that you feel  
6 would be a basis for their being set aside since, as I am  
7 sure you know from having the Government's response, a  
8 collateral attack upon final convictions in the state court  
9 when raised in this type of a proceeding, that is in a  
10 federal sentencing proceeding, normally is nothing that the  
11 law will recognize or permit.

12 One basis, however, might be if you didn't have  
13 counsel, but my understanding from the record is you were  
14 represented by a lawyer in those state court proceedings.

15 Are you telling the Court at this time you did not  
16 have an attorney representing you in those cases?

17 THE DEFENDANT: I did have an attorney; however,  
18 that attorney did not afford me all my rights and  
19 constitutional protections that I had.

20 I do have another motion here, if you would like to  
21 read it; however, I would rather not argue these motions  
22 myself because I am not an attorney.

23 Also, I do have another motion which I have given  
24 the prosecution and would like to hand to you. Motion to  
25 arrest judgment.

1 THE COURT: On page 2 of your motion in paragraph  
2 six you indicate that the prior state convictions were in  
3 1998 removed from being held against you.

4 Are you saying they have been vacated?

5 THE DEFENDANT: There is a possibility of that.  
6 The prosecution has had a very hard time proving that I have  
7 been a convicted felon. Their records that they do have were  
8 obtained from my attorney from 1987, even though the Court  
9 did certify those copies; however, the Court does not have  
10 any copies. And my attempts to get them from archives have  
11 been unfruitful.

12 THE COURT: Did you at any point after you pled  
13 guilty and were sentenced file an appeal or a habeas corpus  
14 in state court concerning those convictions?

15  *knowingly I did.* THE DEFENDANT: That I did not, due to the fact  
16 that I did not know that my constitutional rights were  
17 violated--

18 THE COURT: Then it is impossible that those  
19 convictions are not of record.

20 All right. I am just looking at this very quickly.

21 THE DEFENDANT: The prosecution did have a hard  
22 time. They had to go to my attorney to get the copies, which  
23 are the only ones known to be in existence.

24 THE COURT: All right. As you correctly note in  
25 your motion to arrest judgment, normally an attack on the

1 my mind to find that Mr. Gardiner was ineffective in

2 representing you in that respect.

3 Mr. Kinjo has raised this argument about some

4 problems with the records of his convictions. Mr. Rich, do

5 you want to address that?

6 Is the United States aware of any failure to have

7 these judgments registered with the court?

8 MR. RICH: Not that I am aware of, Your Honor.

9 There is always a problem with local courts getting certified

10 copies of convictions because we are working under the

11 guidance that we need to get every page certified.

12 But as far as access to the records, we didn't

13 have, at least I was not apprised of any particular

14 difficulty by my case agent, or I was aware of no particular

15 difficulty in preparing for trial.

16 THE COURT: Well, also given the fact that the

17 defendant himself admits that he has filed neither an appeal

18 nor a habeas corpus proceeding in state court, there is

19 absolutely no basis to believe that those are not at the

20 present time valid state court convictions.

21 And as you point out in your memo, valid state

22 court convictions at the time of the weapon's possession is

23 sufficient to sustain a conviction.

24 At this point on this record, there is no basis to

25 find that there is any inadequacy in that element of the

*I actually did not know it*

1 offense; that is, that the defendant is a multiply-convicted  
2 felon and that those convictions are valid.

3 So, I am going to deny the motion to arrest  
4 judgment that was just filed in court this morning.

5 And this and all the other rulings that we make  
6 are, of course, subject to review on appeal, which will be  
7 the defendant's right.

8 All right. I want to address the other motions  
9 filed by the defendant. I am going forward with the  
10 sentencing of this defendant today.

11 I will, of course, allow you, Mr. Smith, to speak.

12 And, Mr. Gardiner, you are still the attorney of  
13 record. And so, I am going to allow you as well to speak.

14 I believe all the other motions-- And just for the  
15 record, I have, in essence, reinstated whatever motions Mr.  
16 Smith thinks he withdrew. I have re-evaluated his motion for  
17 judgment of acquittal. There is no basis to grant that  
18 motion. I have denied it once before. There was adequate  
19 evidence in this record.

20 And under the standard of drawing all inferences in  
21 favor of the Government, which is the proper standard of  
22 review at this point after a jury verdict, I find that there  
23 was more than sufficient evidence to sustain the convictions  
24 of the defendant on all counts. In my view there was more  
25 than enough evidence to establish the defendant's guilt



1 beyond a reasonable doubt.

2 So, the motion is denied.

3 All of the other motions of the defendant really  
4 address sentencing matters. And, therefore, we will go  
5 forward now with the sentencing.

6 Mr. Gardiner, have you had enough time to  
7 thoroughly review the presentence report prepared in this  
8 case and to go over it thoroughly with Mr. Smith?

9 MR. GARDINER: Yes, Your Honor.

10 THE COURT: And were you able to work with Mr.  
11 Smith, to talk to him about the presentence report?

12 MR. GARDINER: I was. I sent him a copy of it.  
13 And we have had any number of phone conversations to go over  
14 it and lots of other subjects as well.

15 THE COURT: All right. Now, are there any factual,  
16 I am not talking about guideline calculation matters, but are  
17 there any factual corrections, changes, additions or  
18 deletions you are asking to have made to the report?

19 MR. GARDINER: The only one-- The Probation  
20 Officer amended the one factual dispute that we had in part.  
21 And that dealt with his net worth. She had indicated  
22 originally that his 2000 shares of stock option were worth  
23 what the value of the stock was. And she has now corrected  
24 that.

25 However, in the corrections I notice at paragraph

1 114 on the corrected page, it indicates nonetheless that the  
2 defendant reports assets totalling about \$74,000. And if you  
3 took out the \$70,000 from the unencumbered assets, in fact  
4 his assets are worth \$4,000, not \$74,000.

5 THE COURT: All right. I think that should be  
6 corrected.

7 MR. GARDINER: And then it goes on to say in 116  
8 that he has the assets to pay a fine. And I just want to  
9 make it clear that he has \$4,000 worth of assets, and that  
10 may be an exaggeration.

11 THE COURT: All right. Is there anything else?

12 MR. GARDINER: No. The only other issue we have is  
13 with respect to the guidelines.

14 THE COURT: To the guidelines. All right. Well,  
15 let's address those issues now.

16 The first issue, which I think we will dispose of  
17 pretty quickly, is the issue about the prior record.

18 Do you want to be heard on any of that?

19 MR. GARDINER: With respect to the burglary  
20 conviction from Fairfax?

21 THE COURT: Yes.

22 MR. GARDINER: It appears to me, Your Honor, maybe  
23 Mr. Smith should address it more, but it appears to me that  
24 those are valid convictions from what Your Honor just said.

25 THE COURT: Well, first of all, they are by

1 definition crimes of violence as the federal system defines  
2 them.

3           Number two, as I understand it, each one of those  
4 convictions occurred on a different date. They were  
5 relatively close in time, but they are over a four- or five-  
6 month span. I think they all occurred in the Springfield,  
7 Virginia area. But basically they were a series of violent  
8 crimes in a mini-crime spree that occurred over a finite  
9 period of time.

10           There is absolutely, in the eyes of the law, no way  
11 of finding that those are not separate individual  
12 convictions.

13           Do you have any knowledge yourself that any of  
14 those convictions have been set aside or are in any way not  
15 valid at this point?

16           MR. GARDINER: I have no knowledge independent of  
17 what Mr. Smith has told me.

18           THE COURT: Do you know whether there was the same  
19 attorney, or were there different attorneys on those various  
20 cases?

21           MR. GARDINER: My understanding is that it was the  
22 same attorney.

23           THE COURT: Because they were handled at one time  
24 in court?

25           MR. GARDINER: Yes. And my understanding is that

1 there was one attorney who represented him on all the  
2 charges.

3 THE COURT: All right. Mr. Smith, is there  
4 anything you want to add? This is actually your motion to  
5 exclude prior convictions.

6 THE DEFENDANT: Your Honor, I don't believe I  
7 should be the one arguing this motion. I did not want Mr.  
8 Gardiner arguing these issues because one of my motions does  
9 cite him as ineffective assistance of counsel.

10 If we are going to proceed to sentencing, I do have  
11 a few other aspects--

12 THE COURT: I am only addressing this particular  
13 issue right now that is of the prior record.

14 Who was the attorney who represented you in state  
15 court?

16 THE DEFENDANT: Nadir Tiwil.

17 THE COURT: I am sorry?

18 THE DEFENDANT: Nadir Tiwil. T-i-w--

19 THE COURT: Was he retained or court-appointed?

20 THE DEFENDANT: He was court-appointed.

21 THE COURT: All right. The Government-- I am  
22 sorry. The Probation Officer, in my opinion, has correctly  
23 found your criminal history. As I said, those are separate  
24 felony convictions for crimes of violence. They have not  
25 been set aside. They are still valid at this point. And I

1 have no basis on this record to make any kind of a finding  
2 that they are even subject to collateral attack.

3 So, the motion to exclude prior convictions is  
4 denied.

5 THE DEFENDANT: Okay.

6 THE COURT: All right. The next issue that was  
7 raised, and I think this is one that Mr. Gardiner also has  
8 addressed, is this issue as to the nature of the Bushmaster  
9 model XM15-E2S, Government's Exhibit No. 17. And that is  
10 whether or not that should be considered a machine gun.  
11 Which, if it is, then results in an increase in the Offense  
12 Level because of the way the guidelines operate.

13 Do you want to add anything on that? I will  
14 certainly let Mr. Gardiner argue that.

15 THE DEFENDANT: Actually, I would like Mr. Gardiner  
16 to-- First, I do have something to add that depends on, it  
17 depends upon the outcome of the prosecution and my attorney's  
18 argument as to whether I have anything to add to that.

19 THE COURT: All right. Mr. Gardiner, do you want  
20 to put anything else on the record on that?

21 MR. GARDINER: Excuse me, Your Honor, I didn't hear  
22 what you said.

23 THE COURT: Did you want to put anything further on  
24 the record concerning the--

25 MR. GARDINER: Yes, I would like to do that, Your

1 Honor.

2 There are really two issues here. One is whether  
3 mens rea is an element for sentencing purposes.

4 And then if it is an element for sentencing  
5 purposes, whether there is evidence that would show by a  
6 preponderance of the evidence that that element has been met.  
7 And I would first address the mens rea element.

8 The Government cites this unpublished opinion from  
9 the Fourth Circuit, U.S. versus Bryant, involving a sawed-off  
10 shotgun as holding that the decision in the Staples case,  
11 which says that when you are prosecuting somebody for  
12 possession of a machine gun--indeed it involved the very same  
13 gun that is at issue here--that mens rea had to be shown.

14 Fourth Circuit unpublished opinions, obviously, are  
15 not, the use of them is not favored here. And I think that  
16 that is a readily distinguishable case. First of all, it  
17 could have been decided on the knowledge issue and the result  
18 would have been the same because obviously the fact that the  
19 barrel was six-and-a-half inches too short would have been  
20 immediately apparent to anybody.

21 Here, like in Staples, we have a situation where  
22 you cannot tell from the outside of the firearm. And that is  
23 indeed the holding of Staples, that as to this particular  
24 model of firearm, that it is fully automatic. The only way  
25 you can tell that to be sure is to fire it.

Trial Evidence does  
not produce a  
"machine gun"

1                   And the Government says that this is  
2 distinguishable from the Staples situation because it is a  
3 sentencing factor. That's true, but the really significant  
4 point here, Your Honor, is that this is essentially being  
5 treated as if it was another crime.

6                   If you find that this was a machine gun and apply  
7 the sentencing factor, Mr. Smith's penalty goes up anywhere  
8 from 74 to 92 months; that is, six to eight years. And  
9 essentially what it is being treated as is as if he is being  
10 prosecuted separately for possession of a machine gun with  
11 that kind of sentence.

12                   The maximum penalty for possession of a machine gun  
13 under the statute is ten years. And I believe that in light  
14 of that fact, that this dramatically increased sentence  
15 applies, that the same logic of Staples that Staples applied  
16 should apply to this particular type of firearm because it is  
17 not immediately obvious from looking at the firearm whether  
18 it is automatic.

19                   And someone who is-- The problem is with the use  
20 of the word "innocent." In the sense that Mr. Smith is not  
21 innocent because he is a convicted felon, that's true, but I  
22 think what the Supreme Court talked about when it was using  
23 the word "innocent" was innocent of the knowledge that it was  
24 a machine gun. And that's why they applied mens rea.

25                   And I think for the same reasons, because of the

1 dramatically increased sentence that applies here, that the  
2 mens rea element should also apply for a sentencing  
3 enhancement.

4 THE COURT: But you would agree that the Fry case  
5 in the Fifth Circuit, which is apparently what the Fourth  
6 Circuit adopted in its unpublished opinion, holds to the  
7 contrary?

8 MR. GARDINER: I would agree with that. I just  
9 believe it was not correctly decided under Staples, but I  
10 agree that that's what it holds.

11 THE COURT: All right.

12 MR. GARDINER: I think it just misconstrued the  
13 lesson of Staples.

14 THE COURT: Well, you know, I have said this  
15 before, but one of the sort of artificial elements that  
16 guidelines sentencing has inflicted into traditional  
17 sentencing in criminal cases is it almost makes mini-trials  
18 on these various sentencing issues.

19 The reality of it is, your client was found guilty  
20 of an offense that has a mandatory minimum sentence of 15  
21 years and as much as life. He is exposed to life  
22 imprisonment right now.

23 The fact that the presence of the machine gun may  
24 ratchet up the guidelines doesn't change the fact that his  
25 exposure is to life imprisonment.



1 MR. GARDINER: I would dispute that, actually, Your  
2 Honor, if I might. I have given that a lot of thought  
3 because I think that is-- I don't think that's what that  
4 statute says. If I might address that just for a minute  
5 because I have been concerned about that as well.

6 The statute, 924(e), the 15-year provision, says  
7 not less than 15 years. But it doesn't say, as you will find  
8 in another part of 924, it doesn't say "for life." And I  
9 think if Congress had intended that to be a life term,  
10 potential life term, it would have said that.

11 What I think 924(e) is addressed to is a situation  
12 where someone is convicted of possession, a convicted felon,  
13 possession by a convicted felon, and has the three prior  
14 convictions, but is looking at a maximum sentence of ten  
15 years. And Congress wanted to insure that that kind of  
16 person got at least 15 years no matter what his actual  
17 sentence turned out to be.

18 But I don't think that provision gives the Court  
19 the authority to go anywhere from 15 up to life.

20 If Congress wanted to say "life," it knew how to  
21 say "life" or "up to life."

22 I think what that provision is insuring is that no  
23 matter what the actual sentence turns out to be, you don't go  
24 any lower than 15 years.

25 And I think that what Mr. Smith is looking at, of

Appendix?

1 course with two counts, is a minimum of 30 years if they are  
2 run consecutively. That no matter what his sentence comes  
3 out to be, if we weren't under the guidelines, that you would  
4 have to give him at least the 30 years.

5 But there is nothing in the-- There is nothing in  
6 the statute in 924(e) or indeed in 924(a) which talks about  
7 machine guns. That's a separate provision. And I think that  
8 the fact that the guidelines increases by six to eight years,  
9 as I said, I think the Staples language, the Staples  
10 reasoning should apply.

11 THE COURT: All right. Does the United States want  
12 to respond to that?

13 MR. GAUL: Yes, Your Honor, very briefly. It is  
14 clear that even though the statute, 924(e), does not have an  
15 explicit maximum cap, that it is life imprisonment as the  
16 maximum.

17 The Supreme Court in the Custis versus United  
18 States case that was the subject of our amended filing this  
19 morning, at the very beginning of the written opinion Chief  
20 Justice Rehnquist starts off with, and I quote: The Armed  
21 Career Criminal Act of 1984 -- and then he goes on to cite it  
22 -- raises the penalty for possession of a firearm by a felon  
23 from a maximum of ten years in prison to a mandatory minimum  
24 sentence of 15 years and a maximum of life in prison without  
25 parole if the defendant, quote, has three previous

1 convictions for a violent felony or a series drug offense,  
2 unquote.

3 That is clear, the Supreme Court understands what  
4 the maximum penalty is, and it is not a particularly close  
5 issue.

6 THE COURT: But that is not coming though from the  
7 literal language of 924(e), is it? It is coming from the  
8 Armed Career Offender--

9 MR. GAUL: That is 924(e). The citation is 18  
10 U.S.C. Section 924(e), the Armed Career Criminal Act.

11 THE COURT: I am looking at it now. Where does it  
12 say "life"?

13 MR. GAUL: It does not say "life." It simply says  
14 a mandatory minimum of 15 years. It appears the courts,  
15 including the Supreme Court, clearly understand that to be 15  
16 years to life.

17 THE COURT: All right. I mean, I have to follow  
18 the Supreme Court, but it is interesting that that's not  
19 literally in the statute. That's all I can say.

20 But in any case, we are not looking at a life  
21 sentence in this case. We are looking at a sentence that is  
22 generated by the guidelines.

23 On the machine gun issue, Mr. Gardiner, the  
24 reasoning in Fry I think is sound. The difference between  
25 the mens rea requirement to adjudicate a person guilty and

1 whether mens rea should also be required in order to use an  
2 enhancement in a sentencing situation-- And again, we don't  
3 have an Apprendi issue here where the maximum is being  
4 exceeded. There is a rational difference between those two  
5 situations that would justify a lower standard at the  
6 sentencing level.

7 And as you know, in almost every situation the  
8 factual predicate in a sentencing adjudication is simply  
9 preponderance. It is not the same high standard of  
10 reasonable doubt.

11 Based on the reasoning of Fry, as I think has been  
12 adopted by the Fourth Circuit, I am not finding that mens rea  
13 is a requirement.

14 But even if it were, the Government, as you know,  
15 has also submitted an extensive amount of evidence that would  
16 clearly allow any reasonable fact finder to conclude  
17 inferentially that the defendant must have known.

18 Among other things, there is information on his  
19 computer at the time it was seized by the Government having  
20 to do with the inner workings of the Bushmaster. And we have  
21 the M16 parts there. We have evidence that the defendant  
22 clearly knew about the innards of this gun.

23 The very interesting evidence is that the person  
24 who had purchased the guns told the agents that it was not in  
25 a machine gun format when he got it. It was immediately

1 turned over to Mr. Smith's, I guess, former girlfriend. She  
2 then gave it to Smith. It is found in his possession. And  
3 when it is found in his possession, the ATF people who have  
4 tested it have said that it was at that point an operable  
5 machine gun.

6 So, I mean, one can easily draw from that evidence  
7 and the additional things that the Government included in its  
8 brief that your client did know, even if scienter were  
9 required.

10 MR. GARDINER: Your Honor, I don't know if it is  
11 appropriate to address some of those points --

12 THE COURT: This is the time to do it.

13 MR. GARDINER: -- if you are ruling on the scienter  
14 issue. But I would like to get in the record some of my  
15 concerns about the Government's evidence.

16 THE COURT: All right. Go ahead.

17 MR. GARDINER: First of all, as Your Honor knows, I  
18 requested a continuance so that I could interview and  
19 possibly subpoena the witnesses that the Government  
20 interviewed, namely primarily Miss Campbell. I have been  
21 looking for her for the last 48 hours. I have not been able  
22 to locate her.

23 But I would have liked to have called her as a  
24 witness because my client tells me that she may not on the  
25 witness stand, may not make those same kinds of statements.

1 And I believe I should have had an opportunity to test that.

2 Even though I recognize that the standard is  
3 preponderance, that still requires, as Your Honor said, it  
4 probably would require a mini-trial on that issue. And I  
5 wanted to have an opportunity to have that mini-trial.

6 But the Government's position is that from all this  
7 evidence, that at best Smith must have known that the firearm  
8 was a machine gun. Of course, the standard, the mens rea  
9 standard would be knowledge, not must have known.

10 So, even if you assume that the Government can  
11 prove everything that it states factually in its motion or in  
12 its position paper is true, the farthest they get is must  
13 have known. Which does not get over the top to known, which  
14 I think is what the mens rea element requires.

15 With respect to the computer pages, Your Honor.  
16 There is a whole issue which we would have examined with  
17 regard to chain of custody of the computers and who had  
18 access to them, who was playing with them from the time --  
19 not only from the time they were seized, but to the time they  
20 were examined.

21 And I would note that according to the information  
22 I got, they weren't examined until February 8 of 2001, which  
23 is eight or nine months after they were seized. There is a  
24 chain of custody issue there.

25 There is also-- We don't know, and I would make

1 the proffer from Mr. Smith, that he wasn't the only one who  
2 had access to these computers. As you know from the trial,  
3 Miss Campbell and he shared this apartment. She continued to  
4 have the key even after she moved out. She could have easily  
5 been the one who downloaded that information into the  
6 computer.

7 And in a subsequent letter to me from the  
8 Government yesterday, which you probably don't have, Mr. Gaul  
9 made clear, and I think he is correct, and if I might just  
10 read part of this letter--

11 THE COURT: Go ahead.

12 MR. GARDINER: That the date and time that any  
13 computer file is listed as having been created, saved or  
14 accessed depends on a number of factors, including the  
15 accuracy of the system clock, paren, which itself is affected  
16 by a number of issues ranging from whether the CMOS clock and  
17 battery are properly set and working, to whether the machine  
18 is Y2K compliant, to a host of other factors. Times listed  
19 for the HTML pages here are themselves suspect. One might  
20 question whether a correctly working system would indicate  
21 that several separate web pages were all accessed or saved  
22 either precisely 00:00 or 20:02:28. I believe that is why  
23 Agent Hephner qualified his statement that the files simply,  
24 quote, appear to have been saved on March 12, 2000 and maybe  
25 why he did not try to aver what time or times they were

1 saved. He also did not aver when they were originally  
2 downloaded from the web.

3 And I believe Mr. Gall is entirely right about all  
4 that. That we don't know and probably can't know without  
5 some testimony as to when all that information was  
6 downloaded.

7 It may have been done by Miss Campbell. I mean,  
8 she was, after all, admittedly, apparently the one who  
9 wanted -- purchased the firearm from the other gentleman.

10 So, I don't think that the Government has shown by  
11 a preponderance of the evidence that Mr. Smith was the one  
12 who brought this down, downloaded this information, or that  
13 he, therefore, ever read it.

14 And Miss Campbell herself is not, I don't believe  
15 is a credible witness. We have put on evidence dealing with  
16 that. I understand from Mr. Smith that he has letters from  
17 her which tend to conflict with what she has told the agent.

18 And in addition, Your Honor, of the computer  
19 materials, there is nothing in there about the auto sear,  
20 which is the key part that makes an M16 or an AR15 fire fully  
21 automatically as if it was an M16. That is the additional  
22 part that I think Agent Hephner makes reference to that they  
23 did find in this gun.

24 And that brings me-- And, of course, there is no  
25 evidence that Mr. Smith ever fired it. There is no evidence



1 of that at all.

2 And that brings me really to the second concern  
3 about the gun itself. And the first concern with respect to  
4 the gun itself is also we have a chain of custody problem.

5 The gun was seized on July 7. It is examined by  
6 Mr. Ols on October 18. And Mr. Ols, who is supposed to be an  
7 expert, albeit he is a ballistics expert, says that he  
8 examined the rifle on October 18. And now he is saying that  
9 he put in a single round. Yet this expert, even though he is  
10 not maybe the best expert in the world, doesn't notice that  
11 it is automatic. He even fires a round from it and he  
12 doesn't notice that it is automatic. He examined it and he  
13 doesn't notice that it is automatic.

14 Now, his explanation is, well, I wasn't looking for  
15 that. But what I think that strongly indicates is that it  
16 wasn't so obvious that it was automatic. And this is by  
17 somebody who is qualified at least to some degree to be an  
18 expert. He doesn't notice that.

19 It isn't until January of this year, shortly before  
20 the trial, almost three months after Mr. Ols examines the  
21 gun, that it is found to be fully automatic.

22 Now, we don't have any chain of custody between  
23 July 7 and October 18, and no chain of custody between  
24 October 18 and January 8.

25 So, I think there is a significant problem with

1 proving that the gun was in that condition when it was in Mr.  
2 Smith's -- when it was found in the apartment in July of last  
3 year.

4 In addition, the Staples case, which, which is the  
5 mens rea issue case, in that case it is not clear in the  
6 Supreme Court decision, but if you look at the Court of  
7 Appeals decision from which that arose, Mr. Staples fired  
8 that rifle and it only fired semiautomatically. Yet when the  
9 case was remanded by the Supreme Court after deciding that  
10 mens rea was an element, the lower court nonetheless  
11 concluded that they couldn't prove that he knew that it was  
12 fully automatic, even though he had fired it, because the  
13 only testimony was that it had fired semiautomatically.

14 Here there is no evidence that Mr. Smith ever fired  
15 it.

16 And the experts, both the Government experts in  
17 this case, but particularly Mr. Cooney, the latter expert who  
18 determined that it was a machine gun, wasn't prepared to say  
19 that until he test fired it. And I think that is very  
20 significant. That until you test fire it, you can't know for  
21 sure that it functions automatically by a single pull of the  
22 trigger.

23 Clearly the Government's experts themselves  
24 wouldn't go so far as to say simply because they examined the  
25 parts, that they know it was fully automatic. It wasn't

1 until they test fired it.

2 So, I think all those things combined, Your Honor,  
3 make it clear that the Government has not met its standard of  
4 showing by a preponderance of the evidence that Mr. Smith had  
5 the knowledge.

6 THE COURT: All right. Well, first of all, on the  
7 issue about inadequate time to prepare for the sentencing,  
8 first of all, as I recall, this case was originally set for  
9 the 25th of May. We continued it because the Court had a  
10 conflict.

11 So, there has been extra time to prepare for this  
12 hearing.

13 Secondly, the Government's response was filed on  
14 May 29. Today is June 8. So, there has been certainly more  
15 than a day or two to find Miss Campbell or any other  
16 witnesses who you-all might have needed.

17 So, I think there has been more than enough time to  
18 prepare for the sentencing in this case.

19 The arguments about chain of custody and those  
20 sorts of issues, again, I think might be better made in the  
21 context of a trial where the high burden of proof beyond a  
22 reasonable doubt is necessary.

23 Those arguments, in my mind, are not at all fatal  
24 to the evidence that I have before me. As I said, under Fry  
25 I don't even think mens rea is necessary. But if it were, I

5th clearly notes  
Inspector's Assist  
of Counsel.