

No. 08-1069

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,  
Plaintiff – Appellee,**

**v.**

**LEROY F. MILLER,  
Defendant – Appellant.**

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**Appeal from the United States District Court  
for the Northern District of Indiana  
Case No. 3:04-CR-00138  
The Honorable Allen Sharp  
United States District Judge**

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**BRIEF AND REQUIRED SHORT APPENDIX  
OF DEFENDANT – APPELLANT LEROY F. MILLER**

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Appellate Court No: 08-1069

Short Caption: United States of America, Plaintiff/Appellee, v. Leroy F. Miller  
Defendant/Appellant

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Leroy F. Miller, Defendant/Appellant  
Ricky L. Fines, Defendant/Appellant

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Matthew D. Soliday, Esq.

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## JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in a criminal case entered by the United States District Court, Northern District of Indiana, South Bend Division. The Appellant Leroy F. Miller and co-defendant Ricky L. Fines were charged by way of a two count Superseding Indictment on April 13, 2006. [Docket No. 27]. The Indictment charged the Appellant with aiding co-defendant Fines in possession of firearms by a convicted felon [Count 2] in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 2. Co-defendant Ricky L. Fines was charged with possession of a firearm by a convicted felon [Count 1] in violation of 18 U.S.C. § 922(g)(1). Following jury trial, each of the defendants was found guilty of their respective charges, and on January 2, 2008, Appellant Miller was sentenced to a term of ten months imprisonment, to be followed by a term of supervised release of two years supervised release. [Docket No. 103]. A timely Notice of Appeal was filed on January 8, 2008<sup>1</sup>. [Docket No. 105].

The district court had original jurisdiction pursuant to 18 U.S.C. § 3231. Jurisdiction now lies with this Honorable Court under the authority of 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1).

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<sup>1</sup>Co-defendant Fines was also sentenced on January 2, 2008. He received a sentence of 48 months imprisonment, to be followed by a term of supervised release of two years. Co-defendant Fines filed a Notice of Appeal on January 10, 2008, and his appeal is proceeding under Appeal No. 08-1089. Both of these appeals have been consolidated for briefing and argument purposes.

## **STATEMENT OF THE ISSUES**

**ISSUE I:** The trial court erred in denying the Appellant Miller's Motion for Judgment of Acquittal Pursuant to FED.R.CRIM.P. 29 on the ground that the evidence was insufficient to sustain a verdict of guilty, which was made at the close of the government's case (and renewed at the conclusion of all evidence).

**ISSUE II:** The trial court erred in holding that the sale of a part of a firearms collection bars a defendant as a matter of law from receiving the benefit of U.S.S.G. § 2K2.1(b)(2).

### **ADOPTION OF CO-DEFENDANT FINES'S ISSUES ON APPEAL**

This Court has ordered this appeal consolidated with the appeal of co-defendant Rickey L. Fines, Appeal No. 08-1089. In accordance with this Court's order of consolidation, the Appellant Leroy F. Miller hereby adopts the issues raised and arguments made by Appellant Fines in his brief as is more fully set forth herein.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This is an appeal from a judgment of conviction in a criminal case entered by the United States District Court, Northern District of Indiana, South Bend Division. The Appellant Leroy F. Miller and co-defendant Ricky L. Fines were charged by way of a two count Superseding Indictment on April 13, 2006. The Indictment charged the Appellant with aiding co-defendant Fines in possession of firearms by a convicted felon [Count 2] in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 2. Co-defendant Ricky L. Fines was charged with possession of a firearm by a convicted felon [Count 1] in violation of 18 U.S.C. § 922(g)(1).

### **Course of the Proceedings and Disposition Below**

The Appellant Leroy F. Miller and co-defendant Ricky L. Fines were charged by way of a two count Superseding Indictment on April 13, 2006. [Docket No. 27]. The Indictment charged the Appellant with aiding co-defendant Fines in possession of firearms by a convicted felon [Count 2] in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 2. Co-defendant Ricky L. Fines was charged with possession of a firearm by a convicted felon [Count 1] in violation of 18 U.S.C. § 922(g)(1). The defendants proceeded to jury trial. Following the conclusion of the government's case, the defendant Miller moved for a judgment of acquittal pursuant to FED.R.CRIM.P. 29, [TR 2:80-87<sup>2</sup>], renewing that motion

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<sup>2</sup> References to the trial transcript will be in the form, "TR [Vol]:[Pg No]" and references to the sentencing transcripts will be in the form, "TS [Vol]:[Pg No]."

at the close of all evidence. [TR 3:78]. Both motions were denied. [TR 2:89-92; TR 3:78]. Following argument and instructions to the jury, on April 12, 2007, the jury returned a verdict of guilty against defendant Ricky L. Fines as to Count 1, and against defendant Leroy F. Miller as to Count 2. Presentence reports were prepared, to which each of the defendants filed objections. Among defendant Miller's objections was the failure to grant an offense level reduction to a Level 6 pursuant to U.S.S.G. § 2K2.1(b)(2), on defendant Miller's contention that the firearms were possessed for sporting or collecting purposes. Those objections were overruled, and on January 2, 2008, Appellant Miller was sentenced to a term of ten months imprisonment, to be followed by a term of supervised release of two years supervised release. [Docket No. 103]. Defendant Fines was sentenced to a term of 48 months imprisonment, to be followed by a term of supervised release of two years. Each defendant filed a timely notice of appeal, and their respective appeals followed. This Court consolidated defendant Miller's appeal, Appeal No. 08-1069, and defendant Fines's appeal, Appeal No. 08-1089, for briefing and argument purposes.

## **STATEMENT OF FACTS**

In or around 2001, Ricky Fines had serious health problems. Some even believed he was near death. (TR 3:6). Learning Fines was unable to take care of himself, Leroy Miller and his wife took Fines in and gave him a place to live in their home. Fines moved into the Miller home in the fall of 2001 or 2002. (TR 2:6, TR 2:68, TR 3:17) Fines, who suffered from depression, congestive heart failure, diabetes, obesity, and various other conditions, (TR 3:18), was unable to climb the stairs in the Miller home, (TR 3:7), so he had a room on the first floor. (TR 1:36-7). He was unable to sleep in a conventional bed, and was required to sleep in a recliner. It was readily apparent that Fines was in very serious condition, and the Millers were the only people he could turn to. (TR 3:37).

Fines was also an expert in vintage military firearms. (TR 2:17). Leroy Miller was delighted to have someone who knew firearms so well in his home. He was interested in collecting vintage military firearms, (TR2:125), and Fines was a well-known expert who possessed a vast treasure of information about weapons of war. (TR 3:22-23). It seemed a perfect combination.

Fines also had secret he failed to share with Leroy Miller. Some years earlier, in 1996, he had been convicted of a felony. (TR 1:33, TR 3:25). That was a secret that turned out to be extraordinarily significant to Leroy Miller, whose criminal history was non-existent, and who was employed by the Indiana Department of Corrections. Miller, of course, had not lost his right to possess firearms. (TR 1:53). Fines, by virtue of his felony conviction, had lost his right under federal law to possess firearms. More than a year after Fines moved into Miller's

home, Miller became suspicious of Fines's background and asked him point-blank if he had been convicted of a felony. Fines answered that, in fact, he did have a felony conviction. (Govt. Exhibit 29, TR 3:33-34).

Over an unspecified time period, in part through the advice of Fines, Leroy Miller acquired a number of vintage military weapons, including Enfield rifles, Mosin Nagant rifles, and other military weapons. Some of these weapons needed repair, parts, or restoring. Fines ordered parts on his credit card for a number of Miller's weapons. (Govt. Exhibit 11, TR 3:33). Those parts were not controlled parts, and Fines was not prohibited from purchasing those parts. Fines also admitted to working on restoring the stocks of some of the firearms, (TR 3:25), although he contended that he never handled the receivers, which would be prohibited by federal law. (TR 3:32).

Various individuals visited the Miller home, and were in Fines's room. Glen Hissong first visited Miller's home in connection with the church where he was a youth pastor in the winter of 1999 or 2000. (TR 1:129). He was invited over to shoot on Miller's makeshift firing range for the first time in the summer of 2000. (TR 1:130). Over the next few years, he went to the Miller home to shoot ten or twelve times. On a number of those occasions, he visited Fines's room, where he recalls seeing several rifles, ammunition, and cleaning supplies. (TR 1:131-2). The specific firearms or types of firearms were not identified by make, model, or type. He also recalled seeing gun racks on the wall. Although he was over at the Miller home to shoot on several occasions, he does not recall Fines firing any of the weapons. (TR 1:134).

Leroy Miller's son, Ike, also recalls spending time in Fines's room. (TR 2:15). Ike observed Fines working at his workbench at various times, including in the year prior to the execution of the search warrant in 2004. (TR 2:16). According to Ike, Fines would tear down, rebuild, and clean guns. He recalled seeing "close to thirty" firearms in the room in late 2003 and early 2004. (TR 2:16). He recalled taking a pair of photographs in late 2003 or early 2004 which depicted Fines seated in his room with a gun rack and guns over his head, and a companion photo of Leroy Miller in the same room. (Govt. Exhibits 12 and 13).

In March of 2004, ATF agents received a "tip" that there were numerous firearms at the Miller home. (TR 1:25). A local law enforcement officer, Tom Wallace, had some unrelated business to conduct at the Miller home, (TR 1:29), so on March 9, 2004, Agent Jeff Emmons, ATF, accompanied Wallace to the Miller home. (TR 1:30). The two officers were admitted to the Miller home, and as they were leaving, Agent Emmons observed what appeared to be a .22 rifle behind the door of the kitchen. (TR 1:31). The rifle was not seized, and no further search was conducted that day. (TR 1:60).

ATF agents then obtained a search warrant, and, on April 8, 2004, prior to executing the search warrant, called Leroy Miller and Ricky Fines in to the Cass County Sheriff's Office for an interview regarding firearms. (TR 1:32). While Miller and Fines were being interviewed, agents executed a search warrant on the Miller property. No rifles or ammunition were found in Ricky Fines's room. Agents reported that a canister containing firearms parts, including the frame or a receiver of a firearm was found on Fines's workbench. (TR 1:86). In a locked shed outside the residence, a number of firearms wrapped

in blankets were found, along with ammunition canisters with various caliber ammunition. Agents also found a .22 rifle upstairs in Ike Miller's room, a shotgun in the main bedroom upstairs (the Millers' bedroom), and a shotgun behind the door of the kitchen. In total, 34 firearms were seized in the search of the residence and shed. (TR 1:106, Govt. Exhibit 23). No usable fingerprints were recovered to identify anyone who had handled those firearms. (TR 1:48). During his interview, Miller stated that he had first learned about Fines's felony conviction about a year after he had moved in. (Govt. Exhibit 29).

Ike Miller said that his father had the various firearms mainly for collecting purposes, but a few had been sold. (TR 2:25). At sentencing, a defense expert testified that the firearms seized were all military firearms or reproductions, (TS 1:136), and that most were in the \$300.00 or less price category. (TS 1:135). The expert testified that the price paid for the firearms by Miller were significantly higher than the valuation placed on them by ATF (TS 1:135), and that if an individual wanted to make a "business" of selling restored firearms, the expenses associated with buying a firearm, restoring it, and reselling it would mean that such a "business" would not be a profitable venture. (TS 1:138). Finally, he testified that it was his experience that collectors will often own more than one of a specific collectable, and will sell surplus parts of their collections as a means of enhancing the collection. (TS 1:137).

## SUMMARY OF THE ARGUMENT

**ISSUE I:** The trial court erred in denying the Appellant Miller's Motion for Judgment of Acquittal Pursuant to FED.R.CRIM.P. 29 on the ground that the evidence was insufficient to sustain a verdict of guilty, which was made at the close of the government's case (and renewed at the conclusion of all evidence).

Appellant Miller was charged with aiding co-defendant Fines in the possession of a firearm by a convicted felon. At the close of the government's case, and again at the close of the evidence, Appellant Miller moved for a judgment of acquittal pursuant to FED.R.CRIM.P. 29. That motion was denied. Appellant contends that the evidence was insufficient.

The evidence at trial showed that Miller was not a convicted felon and not a prohibited person. The evidence showed that, while co-defendant Ricky L. Fines was a convicted felon, Miller only provided a room for him to live in. There was no evidence that at the time Fines moved into the room in Miller's home, Miller had any knowledge that Fines was a convicted felon; and the evidence failed to show that after he learned that Fines was a convicted felon, and during the time alleged in the indictment, he took any steps to aid Fines in the possession of a firearm.

**ISSUE II:** The trial court erred in holding that the sale of a part of a firearms collection bars a defendant as a matter of law from receiving the benefit of U.S.S.G. § 2K2.1(b)(2).

U.S.S.G. § 2K2.1(b)(2) provides for an adjustment in the offense level in a firearms case to an offense level 6 if the firearms were held solely for collecting purposes. The evidence in this case showed that Appellant Miller held the firearms for collecting purposes, but that on occasion he sold a firearm from his collection. The trial court determined that any sale from a collection, even if the purpose of the sale was to enhance the collection, takes the case out of the provisions of U.S.S.G. § 2K2.1(b)(2).

Appellant contends that the proper reading of U.S.S.G. § 2K2.1(b)(2) includes a sale as a part of the process of collecting. Appellant contends that the act of collecting includes buying, selling, and trading items for the collection, and that where a person has acquired a firearm for a collection, and possesses that firearm for collecting, the sale of the firearm is a part of the “use” provision of that guideline, and so long as the sale is lawful, the defendant is still eligible for an adjustment under that guideline provision.

## **STANDARD OF REVIEW**

The standard of review for a challenge to the sufficiency of the evidence is whether, evaluating the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Douglas*, 874 F.2d 1145 (7<sup>th</sup> Cir. 1989); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The standard of review for questions of law involving the interpretation of a Guideline provision are reviewed *de novo*. *United States v. Purchess*, 107 F.3d 1261, 1266 (7<sup>th</sup> Cir. 1997).

## ARGUMENT

**ISSUE I:** The trial court erred in denying the Appellant Miller's Motion for Judgment of Acquittal Pursuant to FED.R.CRIM.P. 29 on the ground that the evidence was insufficient to sustain a verdict of guilty, which was made at the close of the government's case (and renewed at the conclusion of all evidence).

In this case, the Appellant Miller was charged with aiding the Appellant Fines in the possession of a firearm by a convicted felon. The Appellant Miller moved for a judgment of acquittal pursuant to FED.R.CRIM.P. 29 at the close of the government's case, on the ground that the evidence was insufficient to support a verdict of guilty as to the defendant Miller. The Court denied that motion. [TR 2:89-92]. The Appellant Miller presented no evidence following the denial of that motion, although the Appellant and co-defendant Fines presented witnesses, and renewed the motion at the conclusion of all of the evidence. The trial court again denied the Defendant-Appellant Miller's motion for judgment of acquittal. [TR 3:78].

This Court has viewed the Appellant's task to be a difficult one when challenging the denial of a motion for judgment of acquittal pursuant to FED.R.CRIM.P. 29. Indeed, this Court has called such an attack "a daunting task." *United States v. Wortman*, 488 F.3d 752, 754 (7<sup>th</sup> Cir. 2007). This case, however, is the rare case in which that difficult threshold is met. The Appellant Miller's motion for judgment of acquittal should have been granted.

In reviewing a sufficiency of the evidence challenge, this Court must:

Consider the evidence in the light most favorable to the government, defer to the credibility determinations of the jury, and . . . overturn a verdict only when the record contains no evidence, regardless of how it is weighed, upon which a rational trier of fact could find guilt beyond a reasonable doubt. *United States v. Dabney*, 498 F.3d 455, 460 (7<sup>th</sup> Cir. 2007) (quoting *United States v. Cummings*, 395 F.3d 392, 397 (7<sup>th</sup> Cir. 2005)).

Appellant Miller was charged, in Count 2 of the Superseding Indictment, with

From on or about April 8, 2003 to April 8, 2004 in Cass County in the Northern District of Indiana, Leroy F. Miller (2), defendant herein, did knowingly aid Ricky L. Fines, a person who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, to knowingly possess, in and affecting interstate or foreign commerce one or more firearm(s), all in violation of 18 U.S.C. Section 2, 922(g)(1) and 924(a)(2).

In order to sustain a conviction as charged, the government was required to prove first, that Defendant-Appellant Ricky L. Fines had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and that Defendant-Appellant Fines, knowingly possessed, in and affecting commerce, one or more firearms.

Appellant Miller was not himself, however, a prohibited person. He was charged in Count 2 of the Superseding Indictment with “aiding” Defendant-Appellant Fines in such possession. The government’s burden, then, was to prove the offense of aiding. In order to sustain a conviction for “aiding,” as defined in 18 U.S.C. § 2, Appellant Miller must be shown to:

have knowledge of the underlying illegal activity and a desire to assist in the success of the activity, and provide an act of assistance. *United States v. Serrano*, 434 F.3d 1003, 1004 (7<sup>th</sup> Cir. 2006); *United States v. Stott*, 245 F.3d 890, 904 (7<sup>th</sup> Cir. 2001).

*United States v. Samuels*, - - - F.3d - - - , 2008 WL 962834 (7<sup>th</sup> Cir. April 10, 2008).

Considering the evidence in the light most favorable to the government, and deferring to the credibility determinations of the jury the record contains no evidence, regardless of how it is weighed, upon which a rational trier of fact could find guilt beyond a reasonable doubt.

The government's evidence established that on March 9, 2004, after having received reports that firearms were possibly being kept at Appellant Miller's home, ATF agent Jeffery Emmons accompanied Cass County Sheriff's Deputy Tom Wallace to Miller's home to serve some civil papers. Agent Emmons observed what he believed to be a .22 rifle propped up next to the rear door of the home. ATF agents obtained a search warrant, and on April 8, 2004, Defendant-Appellant Fines and Appellant Miller were brought to the Cass County Sheriff's Office, for two purposes. The first was to secure the home while the search warrant was executed. The second was to interview Miller and Fines about firearms in the home.

Agents learned from those interviews and from subsequent interviews of witnesses that Fines had been living in Appellant Miller's home since around 2001 or 2002. Fines had a prior felony conviction. Miller advised during his interview that he learned of Fines's conviction about a year after Fines moved in.

During the execution of the search warrant, agents learned that Fines was staying in a room on the first floor of the home. No weapons were found in that room. Agents found a number of firearms and a large quantity of ammunition in a locked shed adjacent to Miller's home. The firearms were vintage military rifles, with a couple of vintage military pistols. The firearms found in the shed were wrapped in blankets for protection. There was no evidence

that Fines had a key to the shed or any access to those firearms. In addition to the firearms in the shed, a Mossberg shotgun was found behind the door in a downstairs room, a Remington 12-gauge shotgun was found in the master bedroom upstairs, and a .22 caliber rifle was found in Miller's son's room upstairs.

In Defendant-Appellant Fines's room, agents found a number of books about firearms, a workbench with woodworking supplies and tools, and a can containing parts for a pistol.

Two witnesses testified that they had seen the room in a different condition previously. Glen Hissong first visited Miller's home 1999 or 2000. In the summer of 2000, he was invited to Miller's home to shoot on Miller's makeshift firing range. He visited the home on ten to twelve occasions over the years, the last being in 2003 or 2004. On some of those occasions he visited Fines's room, and recalled having seen several rifles, ammo, and cleaning supplies in the room. He did not recall Fines ever shooting a weapon. He had also provided his own gun for cleaning, but does not know who cleaned it. In short, Hissong's testimony was simply that at some point in time beginning in 1999 or 2000, he had started visiting the Miller home, and on some occasions he had seen firearms in Fines's room. He could not identify those firearms, and provided no testimony that Miller had in any way assisted Fines in acquiring or possessing those firearms.

The second witness was Miller's son, Ike Miller. Ike testified that Fines had moved into the house in 2001. In the subsequent years, Fines had a workbench in his room, and would "tear down, clean and rebuild guns." Ike recalled seeing "close to 30 guns" in Fines's room. He identified the guns as "AK47s, a couple of M1-A1s, a number of Lee Enfields, a

number of Mosin Nagants.” He recalled Fines cleaning and rebuilding Hissong’s gun, and that Fines did some minor repair to Ike’s Romanian training rifle.

According to Ike Miller, in late 2003 or early 2004, he took a couple of photographs in Fines’s room. Those photographs, Government Exhibits 12 and 13, showed a gun rack and rifles hanging on the wall of Fines’s room. Ike Miller further testified that two to three weeks, possibly a month prior to the execution of the search warrant, he came home, and his father asked him to help move firearms out of Fines’s room into the shed. Ike Miller moved approximately fifteen firearms into the shed, but was not present when the remaining firearms were placed in the shed. He did not identify which of the firearms he moved into the shed from Fines’s room. In fact, no witness was able to identify any specific firearm seized in the execution of the search warrant as having been in Fines’s room. While Ike Miller testified as to approximately 15 firearms he took out of the room, it is impossible to say which 15 of the seized firearms were the ones moved by Ike Miller.

The remaining evidence offered in the government’s case as to Mr. Miller simply went to Miller’s activities as a firearms collector. Miller sometimes went to gun shows. He was accompanied on occasion by Fines. It is not unlawful for either Miller or Fines to attend gun shows. He sometimes went to gun shops, and on some of those occasions he was accompanied by Fines. It is not unlawful for either Miller or Fines to visit gun shops. There was no evidence that at either the gun shows or the gun shops Fines made any request to Miller to purchase any weapon. There was no evidence that Miller acted in any way as

Fines's agent in either place. Finally, there was evidence that Fines ordered parts for firearms, but all of the parts he ordered were lawful for him to purchase.

In short, there was substantial evidence that showed that Fines had a prior felony conviction; and that he had firearms in his room. There was evidence that at some point in time, a year or more after Fines moved into Miller's home, Miller learned of Fines's conviction. There was absolutely no evidence that after Miller learned of Fines's conviction, he provided any firearms to Fines, that he facilitated Fines's acquisition of firearms, or that he assisted Fines in any way in Fines's possession of a firearm. No witness saw Miller hand a firearm to Fines. No witness heard Fines ask Miller to provide him with a firearm. No witness heard Miller offer to provide a firearm to Fines. While Miller provided a home for Fines, there was no evidence that Miller, knowing at the time that Fines was a convicted felon, did anything to provide any assistance of any kind to facilitate Fines in his possession of one or more firearms.

Considering the evidence in the light most favorable to the government, the evidence of guilt is still wholly absent. No reasonable trier of fact could conclude that the evidence is sufficient to sustain a verdict of guilty beyond a reasonable doubt. The conviction should be reversed.

**ISSUE II:** The trial court erred in holding that the sale of a part of a firearms collection bars a defendant as a matter of law from receiving the benefit of U.S.S.G. § 2K2.1(b)(2).

U.S.S.G. § 2K2.1(b)(2) provides:

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

At sentencing, Mr. Miller contended that U.S.S.G. § 2K2.1(b)(2) should apply in his case.

There was ample testimony to support Miller’s contention that all of the firearms were for collection purposes. The firearms that were seized from the locked shed in the execution of the search warrant were, by all of the testimony, vintage military weapons or reproductions. All of the weapons were of the type described as “entry level collectibles.” The testimony of Ike Miller and Ricky Fines confirmed that the weapons were being held for collection. The trial court, however, denied Appellant Miller’s request for the application of U.S.S.G. § 2K2.1(b)(2):

Mr. Miller argues that all the firearms are, at least, entry-level collectables, and that selling duplicates and later models to be able to buy other collectables is precisely what a collector does. And that may well be true, but I don’t read Section 2K2.1(b)(2) as protecting that activity. The provision speaks of an offender having “possessed all firearms solely for collection.” Once Mr. Miller sold the firearms, even if he did so as a step toward improving the collection, he no longer possessed it for collection. I don’t think that the guideline reduction contemplates sales for collection, as distinct from acquisition, or simple continued possession. And this case shows why.

Glenn Hisson and James Ford – to take the witnesses whose credibility was not as heavily attacked as Ike Miller’s – the two of them testified that Mr. Miller and Mr. Fines said they were refurbishing and reselling guns, and the evidence at the sentencing hearing corroborates that Mr. Miller and Mr. Fines were doing so.

There may well be a line between doing that to improve a collection and doing it as a side business. If there is a line, it’s, at best, a very hazy one, and I see no basis to think that the Sentencing Commission intended for sentencing judges to make findings that would be that ephemeral.

So based on my belief that the reselling of the firearms is inconsistent, both factually and legally, with the conduct described in the guideline, I overrule Mr. Miller’s objection that the Presentence Report improperly recommends against application of 2K2.1(b)(2). [TS 2:6-7]

Other courts have considered whether the transfer of a firearm from a collection would bar a defendant from eligibility for consideration under the “sporting and collection” purposes guidelines. In *United States v. Collins*, 313 F.3d 1251 (10<sup>th</sup> Cir. 2002), the defendant twice surrendered a firearm from his collection as collateral for an auto repair job. The Tenth Circuit found that the proper analysis was not only on the “possession,” but on any collateral use:

The text of the provision requires a defendant to show two things: (1) that the defendant “possessed all ammunition and firearms solely for lawful sporting purposes or collection” and (2) that he “did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition.” U.S.S.G. § 2K2.1(b)(2) (emphasis added). We note that the provision makes a distinction between possession and use; the provision must not be interpreted such that this distinction collapses, rendering part of the provision a nullity. *See Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10<sup>th</sup> Cir. 2001) (stating that courts must avoid, “wherever possible, a statutory interpretation that would render superfluous other provisions in the same enactment” (quotation omitted)); *see also Lamb v. Thompson*, 265 F.3d 1038, 1051 (10<sup>th</sup> Cir. 2001) (reiterating the “cardinal principle that it is our duty to give effect, if possible, to every clause

and word of a statute rather than to emasculate an entire section” (quotations and alteration omitted)).

*United States v. Collins*, 313 F.3d 1251, 1254 (10<sup>th</sup> Cir. 2002). A *Collins* analysis of the facts in this case would lead to a similar conclusion – that the *possession* was for lawful collecting purposes, and the *use* made at the time of the disposition was to sell a part of the collection for the purposes of collection. In other words, the possession was for lawful collecting purposes, and the use was not for any illegal purposes.

The Fifth Circuit has also considered the *use* to which a firearm is put, in addition to the *possession*:

The point of this analysis is to make clear that the reduction provisions of the guidelines for felons in possession do not turn on the axiomatic truism that a felon can never lawfully possess a firearm. The entire reduction provision would clearly be subsumed in such a proposition. Rather, the availability of the reduction turns on the purpose or use for which the firearm is acquired or possessed and the lawfulness of such use if it were to be exercised by a citizen not under any legal disability- *lawful* hunting, *lawful* target practice, or *lawful* gun collecting. The unavailability of the reduction in *Pope* [*United States v. Pope*, 871 F.2d 506 (5<sup>th</sup> Cir. 1989)] stemmed not from the fact that felons cannot possess guns in a collection, but from the unlawful nature of the gun collection-one which included an unregistered silencer-because even a citizen free of all disabilities could not lawfully possess such a collection. The same would be true, for example, if the felon possessed a shotgun for the purpose of hunting wild turkey, but did so out of season, in an illegally baited area. As that would be an *unlawful* sporting possession by any citizen, the sporting purpose reduction would be unavailable to the convicted felon. Likewise, if a felon possessing a target rifle were apprehended while shooting out street lights within the city limits, the reduction would not be available because his shooting would not be *lawful* target practice even if the shooter were not a convicted felon.

*United States v. Shell*, 972 F.2d 548, 552 -553 (5<sup>th</sup> Cir. 1992). Again, the emphasis is not on an action removing the *character* of the possession, but in the *possession* being, first, for

lawful sporting or collecting purposes, and second, that the *use* be an activity for which someone who was not a prohibited person would not be acting unlawfully. Under this analysis, if the possession was for sporting and collecting purposes, and if the use to which the firearm was put in connection with that sporting or collecting purposes was put (sale for the purpose of enhancing the collection) would not be unlawful if the person were not a prohibited person, then the defendant would qualify for the adjustment.

Applying these principles to the instant case, it is clear that the Court erred in holding that, as a matter of law, the sale of a firearm from a collection removes the protection of U.S.S.G. § 2K2.2(2)(b). Collectors not only acquire items for their collection, but as an integral part of that collecting, will sell or trade surplus items in the collection in order to be able to enhance the collection. Firearms collectors are no different in kind or substance than any other collector. It is not unusual for a firearms collector to trade or sell items from their collection. The testimony before the trial court was that Defendant-Appellant Miller was, in fact, a collector; that the firearms in question were vintage military weapons or reproductions; that they were entry-level collectibles with no real potential for profit on resale; that the number that appeared to have been disposed of over the period of the collection was less than twenty; and that Miller had paid more than the fair market value for most, if not all, of the firearms in his collection, making it extremely unlikely that there was any profit motive in acquiring any of the firearms. Although the trial court was faced with substantial evidence that the firearms were acquired for collecting purposes, the court determined that:

Once Mr. Miller sold the firearms, even if he did so as a step toward improving the collection, he no longer possessed it for collection. I don't think that the guideline reduction contemplates sales for collection, as distinct from acquisition, or simple continued possession.

That holding simply mis-characterizes the nature of collecting. Collectors buy, trade, *and sell* in order to improve their collection. To hold, categorically, that the sale of a firearm from a collection, even when the sale itself is not unlawful, removes that firearm from the category of "collection," fails to acknowledge the test of the guideline - first, that the firearm is held for collection, and second, that it is not "used" (transferred) unlawfully. In summary, the "use" of the firearm by selling it is a lawful component of the act of collecting, and the possession and disposition of the firearm is a part of the possession for collecting purposes.

The trial court erred in holding that a collector of firearms who disposes of a part of his or her collection is not "possessing" the firearm for the purposes of collection. Mr. Miller's case should be remanded for resentencing.

## CONCLUSION

Because the evidence was insufficient to sustain a conviction of aiding the possession of a firearm by a convicted felon, the conviction of Appellant Miller should be reversed.

Alternatively, because the trial court erred in finding that as a matter of law, a defendant who sells part of a collection of firearms, even if the purpose is to improve the collection, is not eligible for the adjustment to Offense Level 6 as provided in U.S.S.G. § 2K2.1(b)(2), the case as to Appellant Miller should be remanded for resentencing.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FED.R.APP.P. 32(A)(7)**

The Defendant-Appellant's principal brief does not exceed 30 pages in length.  
Accordingly, no Certificate of Compliance with FED.R.APP.P. 32(a)(7) is required.

Dated: April 30, 2008

Northern District of Indiana  
Federal Community Defenders, Inc.

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H. Jay Stevens, Attorney for  
Defendant-Appellant Leroy F. Miller

**PROOF OF SERVICE**

I hereby certify that on April 30, 2008, two copies of the **Brief and Required Short Appendix of Defendant-Appellant** and a computer disk copy of the same were served by United States mail to John M. Maciejczyk, Assistant United States Attorney, 204 S. Main Street, South Bend, IN 46601, and to Matthew D. Soliday, 205 E Jefferson St., Valparaiso, IN 46383, counsel for Appellant Ricky L. Fines.

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## CIRCUIT RULE 30(d) STATEMENT

The attached Required Short Appendix contains the following documents, which are all of the materials required by Circuit Rule 30(a) and (b):

1. Court's Order Denying Appellant Miller's Rule 29 Motion (TR 2:89-2:92)
2. Court's Ruling on Appellant Miller's Objection to PSR (U.S.S.G. § 2K2.1(b)(2)) [TS 2:6-7]
3. Sentencing Memorandum (Docket No. 101) Entered January 2, 2008
4. Judgment in a Criminal Case (Docket No. 103) Entered January 2, 2008

Dated April 30, 2008

Northern District of Indiana  
Federal Community Defenders, Inc.

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**CIRCUIT RULE 31(e) CERTIFICATION**

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

Dated April 30, 2008

Northern District of Indiana  
Federal Community Defenders, Inc.

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H. Jay Stevens, Attorney for  
Defendant-Appellant Leroy F. Miller

**No. 08-1069**

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,  
Plaintiff – Appellee,**

**v.**

**LEROY F. MILLER,  
Defendant – Appellant.**

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**Appeal from the United States District Court  
for the Northern District of Indiana  
Case No. 3:04-CR-00138  
The Honorable Allen Sharp  
United States District Judge**

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**SHORT APPENDIX OF DEFENDANT – APPELLANT  
LEROY F. MILLER**

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***Court's Order Denying Appellant Miller's***

***Rule 29 Motion***

**(TR 2:89-2:92)**

***Court's Ruling on Appellant Miller's  
Objection to PSR (U.S.S.G. § 2K2.1(b)(2))***

**[TS 2:6-7]**

*Sentencing Memorandum*

**3:04-Cr-00138**

**(Docket No. 101)**

*Judgment in a Criminal Case*

**3:04-Cr-00138**

**(Docket No. 103)**