

No. 08-1069

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

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

v.

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

**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**

**REPLY BRIEF
OF DEFENDANT – APPELLANT LEROY F. MILLER**

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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).

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).

A. The government’s contention that the evidence was sufficient to sustain a conviction for aiding and abetting is incorrect.

The government points out in its brief that, “When reviewing a jury’s conviction for sufficiency of the evidence, all evidence must be considered in a light most favorable to the government.” [Appellee’s Brief, p. 10]. Appellant Miller does not dispute that statement of the standard of review. Mr. Miller, however, does not agree that, even giving the government the benefit of all disputes in the evidence, the government met its burden to prove Mr. Miller guilty beyond a reasonable doubt. To put it another way, the evidence, even when viewed in accordance with that standard, was not sufficient “to allow a reasonable trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *United States v. Thompson*, 523 F.3d 806 (7th Cir. 2008).

Mr. Miller was not a prohibited person. While the recent Supreme Court decision regarding the Second Amendment leaves many issues still to be decided, the Supreme Court has clearly defined a constitutional right for an individual who is not a prohibited person to

have a firearm in his or her home. *District of Columbia v. Heller*, – U.S. –, – S.Ct. –, – L.Ed.2d –, 2008 WL 2520816 (2008). Because such a right is a constitutional right, when evaluating any limitation on Mr. Miller’s right to possess a firearm in his home, something greater than a “rational basis” scrutiny is required:

Justice BREYER correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. Post, at ----. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. See, e.g., *Engquist v. Oregon Dept. of Agriculture*, – U.S. –, 128 S.Ct. 2146, – L.Ed.2d –, 2008 WL 2329768, *6-7, (2008). In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) (“There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments ...”). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

District of Columbia v. Heller – U.S. –, 2008 WL 2520816, 29 (2008).

The Supreme Court, of course, has not declared all regulation of firearms to be unconstitutional:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

District of Columbia v. Heller, – U.S. – , 2008 WL 2520816, 28 (2008). It is within this framework, however, that the evidence against Mr. Miller should be examined.

B. The government’s contention that Appellant Fines was in constructive possession of four firearms found in Mr. Miller’s home was erroneous, and in any event does not support a conviction of Mr. Miller for aiding and abetting the possession of those firearms.

The government contends that Appellant Ricky Fines, a convicted felon, was in constructive possession of four firearms found in Mr. Miller’s home. [Appellee’s Brief, p. 11-12]. Testimony by ATF Agent Emmons was that a .22 rifle was found in the upstairs bedroom of Mr. Miller’s son, Ike Miller. A second rifle, a Remington 12 gauge shotgun, was found upstairs in the master bedroom. Downstairs, a Mossberg 12 gauge shotgun was found behind the door in the hallway . Finally, in Mr. Fines’s room, agents found a coffee can with a receiver/frame for a pistol on the workbench used by Mr. Fines. [TS 1:14-15]¹; Appellee’s Brief p. 12. The jury verdict did not, of course, specify which firearms formed the basis for the conviction. The government argues that the evidence concerning these four firearms support the conviction. For sentencing purposes, the court below found that Mr. Fines was in constructive possession of the four firearms:

I recognize the argument that the stairs would have made it very difficult for Mr. Fines to get to any firearms kept upstairs, but I don’t think that it was impossible. I think those were within reach of Mr. Fines; although it may have

¹References 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].

taken him a great deal of time to be able to work his way up the stairs to get them.

But, in any event, I think the firearms were in Mr. Fines' constructive possession and they were in the house where he lived and he had full range of the house.

[ST I:176]. That finding, however, fails to make a complete analysis of the elements of constructive possession. Further, in denying the motion to dismiss at the close of the evidence, the court below likewise failed to correctly analyze the evidence in the light of the elements of constructive possession. Appellant Miller disagrees with the government and with the court below that Mr. Fines was in constructive possession of the three firearms found outside of Mr. Fines' room, or that Mr. Miller was shown in any way to have aided and abetted any such constructive possession as may have existed of firearms within the house.

Possession of a firearm may be either actual or constructive, sole or joint. *United States v. Kitchen*, 57 F.3d 516 (7th Cir. 1995). Constructive possession applies when “a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.” *United States v. Garrett*, 903 F.2d 1105, 1110 (7th Cir.1990), *cert. denied*, 498 U.S. 905 (1990), (stating that constructive possession cannot, however, be shown by mere proximity to a firearm.) But mere proximity to a firearm is insufficient to demonstrate constructive possession:

Moreover, the requisite knowledge and intention can be inferred from circumstances, such as a defendant's control over the area where the contraband is found (e.g., defendant's home or automobile). See *Zavala Maldonado*, 23 F.3d at 7-8. [*United States v. Zavala Maldonado*, 23 F.3d 4 (1st

Cir. 1994)] But knowledge must be fairly inferable from the circumstances. See *id.* at 7; *United States v. Booth*, 111 F.3d 1, 2 (1st Cir.1997)(knowing possession required); see also *United States v. Weems*, 322 F.3d 18, 24 (1st Cir. 2003)(mere proximity to a firearm is not enough to establish actual or constructive possession); *Garcia*, 983 F.2d at 1164 [*United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993)] (“Mere presence or association with another who possessed the contraband is, however, insufficient to establish constructive possession.”) Thus, “[t]here must be some action, some word, or some conduct that links the individual to the contraband and indicates that he had some stake in it, some power over it.” *In re Sealed Case*, 105 F.3d 1460, 1463 (D.C. Cir.1997).

United States v. McLean, 409 F.3d 492, 501 (1st Cir. 2005), *cert. denied*, *Navarro v. United States*, 546 U.S. 954 (2005).

The facts in this case show simply that Mr. Fines was occupying a room on the first floor of Mr. Miller’s home, while Mr. Miller and his son Ike Miller each had a bedroom on the second floor. Mr. Fines’ medical condition would make it extremely difficult for him to go up to those bedrooms. Further, there were rifles in each of those upstairs bedrooms belonging to Mr. Miller and his son. As to those two weapons, there was absolutely no evidence that Mr. Fines exercised any dominion or control over those premises or the firearms within those rooms; indeed, there is no evidence that he knew that there were firearms in those rooms.

As to the firearm behind a door in the downstairs part of the home, there is again no evidence that Mr. Fines ever exercised any dominion or control, or even that he intended to exercise any dominion or control over that shotgun. Mere proximity to a firearm is, of course, insufficient to establish constructive possession. *United States v. Garcia*, 983 F.2d at 1164.

Finally, as to all four of the firearms found within the house, there is no evidence that Mr. Miller in any way aided or facilitated Mr. Fines' possession, if in fact there was any such possession. There is no evidence that Mr. Miller even knew of the frame/receiver in the coffee can in Mr. Fines' bedroom; the two rifles upstairs were in areas where he would have no reason to believe that Mr. Fines might go, and in any event, there was no evidence that he gave Mr. Fines any counsel or permission regarding those firearms. Finally, with regard to the shotgun behind the door downstairs, Mr. Miller had a right under the Second Amendment to keep a firearm in his home. No evidence was presented before the jury or at sentencing that Mr. Miller did anything more with that shotgun, or in fact with any of the four firearms found in the home, to encourage, assist, or promote Mr. Fines' constructive possession, if any, of those firearms. Mr. Miller contends that as to the two shotguns and the rifle, there was no evidence of Mr. Fines' constructive or actual possession of any of those four firearms. In any event, regardless of whether there was evidence of Mr. Fines' constructive or actual possession of any of those four firearms, Mr. Miller could not have been held responsible for those firearms. The four firearms cited by the government would not sustain the conviction of aiding and abetting or be countable for sentencing purposes in the number of firearms.

C. The government is incorrect in its claim that the evidence was sufficient to show that Mr. Miller aided and abetted Mr. Fines' possession of any of the firearms seized from the shed at any time after he learned that Mr. Fines was a convicted felon.

The government contends that Mr. Miller aided and abetted Mr. Fines in his possession of

the 31 firearms found in Mr. Miller's shed. [Government's Brief, p. 11-15]. It was, of course, necessary to prove that Mr. Miller knew that Mr. Fines was a convicted felon at the time he aided Mr. Fines in the possession of any firearms. While there was differing testimony as to when Mr. Miller learned such information, the Court on a judgment of acquittal argument reviews the evidence in the light most favorable to the government. The government contends that the evidence, taken in the light most favorable to the government, shows that Mr. Fines moved in with Mr. Miller in November of 2001, and that Mr. Miller learned of Mr. Fines' felony conviction about a year later. While there was conflicting evidence as to those dates, giving the government those most favorable dates, the evidence still fails to show that Mr. Miller aided and abetted Mr. Fines' possession of the 31 firearms seized from the shed outside Mr. Miller's residence.

The government contends that the evidence, taken in the light most favorable to the government, shows that firearms were moved from Mr. Fines' room a few weeks prior to an ATF search on April 8, 2004. [Appellee Brief, p. 12]. The government refers specifically to the testimony of Mr. Miller's son, Ike Miller, for the proposition that all of the firearms found in the shed were moved to that shed just prior to the ATF search. Ike Miller was actually not able to testify as to all of the guns:

- Q. All right. Now, at some point in time were the guns moved out of Mr. Fines' room?
- A. Yes, they were.
- Q. When did that happen – in relationship to the search warrant, when did it happen?
- A. I believe it was two to three weeks, possibly a month, beforehand.
- Q. Were you there when the guns were removed from that room?

- A. Yes, when some of them were.
Q. When some of them were?
A. Yes.
Q. And who moved the guns?
A. Some of them were moved when I was gone. I don't know who moved those. I moved the rest of them.
Q. Where did you move them to?
A. To the – out to the wooden building that was next to the house.
...
Q. Did you take any guns out there and put them under the workbench?
A. Yes, I did.
Q. Why did you do that?
A. Because I was told to.
Q. By whom?
A. By my father.
Q. And were the guns – about how many did you take out there?
A. Probably a dozen, maybe 15.

[TR 2:22-23].

Significantly, Ike Miller was not present when the bulk of the guns were moved into the shed. He was unable, consequently, to testify as to who moved those guns, or exactly when they were moved. The only information he had is that he had moved “probably a dozen, maybe 15.”

That number becomes significant because the government was never able to establish when the various firearms were moved into Mr. Fines' room². Fines moved into Mr. Miller's home in November of 2001, and Mr. Miller learned of the firearms conviction around

²The government contends, “Finally, the photographs of Fines' room, full of guns, along with the testimony of Ike Miller, Hissong, and Graf, established that Miller stored his guns in Fines' room, giving him unrestricted access to them at any time.” That statement appears wholly unsupported by the evidence. These witnesses testified that there *were* guns in Fines' room, not that they belonged to Mr. Miller or that Mr. Miller had stored them there at any time, much less after November of 2002.

November of 2002. Consequently, unless Mr. Miller had knowledge of Fines's conviction at the time he took any action to aid Mr. Fines's acquisition and possession, he cannot be held responsible for knowingly aiding Mr. Fines in the possession of any of those 31 firearms.

The record discloses no evidence as to when or how Mr. Fines may have acquired any of the firearms located in his room. The only testimony is from witnesses who saw firearms located in his room. Attached to the Appellee's Brief is a copy of government's Exhibit C, detailing the firearms seized in the execution of the search warrant. The exhibit lists 22 firearms for which there were no receipts. A second part of that exhibit lists a number of firearms for which there were receipts. Of those weapons for which there were receipts, 11 were among those seized from the shed. Of those 11, only five were acquired after November of 2002. The remaining six were acquired before Mr. Miller learned that Mr. Fines had a felony conviction.

Ike Miller could only testify that in 2004 he took a dozen or so of the 31 firearms out to the shed. He was unable to testify who took the remaining firearms out; those were taken before he arrived. He did not specifically identify *any* of the firearms he removed from Mr. Fines's room as being firearms that were acquired after November of 2002, and he could not testify as to where the remaining firearms came from – Mr. Fines's room, or some other place.

In short, neither Ike Miller nor any other witness was ever able to identify any of the firearms seized from the shed as firearms that were acquired after November of 2002, and which came from Mr. Fines's room. The evidence shows only that Mr. Fines had firearms in his room after November of 2002. It does not show that Mr. Miller assisted him in acquiring

any of those firearms after November of 2002 or that Mr. Miller delivered any of those firearms to him after November of 2002. While there is plenty of evidence that Mr. Fines was in possession of firearms after his felony conviction, and that he had those firearms in his room at Mr. Miller's house, there is no evidence that Mr. Miller, after November of 2002, actively aided him in that possession.

Because Mr. Miller could only be held accountable as an aider and abettor for firearms he assisted Mr. Fines with after he learned that Mr. Fines was a convicted felon, *United States v. Samuels*, 521 F.3d 804 (7th Cir. Apr. 10, 2008), the court below should have granted Mr. Miller's Rule 29 Motion for Judgment of Acquittal.

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).

A. The government is incorrect in its claim that Government Exhibit C supports a finding that Mr. Miller and Mr. Fines were engaged in selling firearms.

The government argues that the court below was correct in finding that Mr. Miller was not eligible for an adjustment in his offense level pursuant to U.S.S.G. § 2K2.1(b)(2). [Appellee's Brief p. 15-21]. Mr. Miller contends that the government and the court below incorrectly found that he was ineligible for such an adjustment.

The government's argument is based on two theories. First, that Mr. Miller and Mr. Fines must have been in the business of selling firearms, because there was evidence that they sold a number of guns. In support of that theory, the government relies on Government's Exhibit C, attached to the Appellant's Brief. The government contends that this receipt shows that 17 guns were sold or otherwise sold. A review of that exhibit shows only that during the period from some time around December 19, 2001 until the execution of the search warrant in April of 2004, Mr. Miller purchased 28 firearms. Three of those receipts carried no date, and could have been at any time. Eleven of those firearms were found in the shed in April of 2004, but there was no evidence of where they were from the time of their purchase until the seizure. Specifically, there was no evidence they were in Mr. Fines' possession.

Of the remaining 17 firearms which were not located in the search, only five were acquired after November of 2002, when Mr. Miller learned that Mr. Fines had a felony conviction. The remaining 12 may well have been disposed of prior to November of 2002. Since Mr. Miller can only be held responsible for actions taken to aid Mr. Fines in the possession of firearms if he knew that Mr. Fines was a convicted felon, *United States v. Samuels*, 521 F.3d 804 (7th Cir. Apr. 10, 2008), the five firearms which were not accounted for are the *only* evidence of firearms actually disposed of by Mr. Miller during the period for which he is accountable.

The problem with the government's theory is that none of those five firearms can be linked in any way to Mr. Fines. Mr. Miller is not a prohibited person, and is free to acquire and dispose of firearms as he sees fit. The only firearms that become an issue in this case are the ones for which he and Mr. Fines are jointly liable – and none of these five firearms can be identified as firearms which Mr. Fines ever possessed or worked on.

B. The government's argument that Mr. Miller's possession of a shotgun in his own house excludes him from consideration of an adjustment in his offense level for "sporting or collecting" purposes pursuant to U.S.S.G. § 2K2.1(b)(2) is incorrect.

The second theory on which the government contends that Mr. Miller should be denied the offense level adjustment is the fact that there was "at least one firearm in the house, a loaded shotgun, that was not used for collecting purposes, but for home security." [Appellee's Brief, p. 18.] As argued earlier in this reply, Mr. Miller has a Second Amendment right to have a firearm in his home for protection, and his possession of that

shotgun is lawful. Having it in his home, where a tenant with a felony conviction is in proximity to the shotgun, may give the government an opportunity to make a “constructive possession” argument against Mr. Fines, but the mere fact that Mr. Miller is exercising his constitutional right to keep and bear arms is an insufficient basis for a finding that he actively aided and abetted Mr. Fines in any possession.

As stated, Mr. Miller has the lawful right to possess firearms. In making a determination as to whether he, as an aider and abettor, is entitled to consideration for an adjustment under U.S.S.G. 2K2.1(b)(2), firearms which he may legitimately purchase and possess for his personal use should not be factored into the analysis. Those firearms do not constitute “relevant conduct” under U.S.S.G. § 1B1.3, for the simple reason that they do not violate the law. In determining whether he is eligible for an adjustment under U.S.S.G. 2K2.1(b)(2), the firearms for which Mr. Fines and Mr. Miller are jointly responsible are the only ones that should be considered.

Because no specific firearms can be identified as firearms which Mr. Fines and Mr. Miller jointly acquired, refinished, and resold for profit, the court below erred in finding that the firearms for which Mr. Fines and Mr. Miller were responsible were not held solely for sporting or collecting purposes, and thus in denying Mr. Miller the requested adjustment.

C. The government is incorrect in its assertion that any sale of a firearm operates to deny a defendant of the adjustment under U.S.S.G. § 2K2.1(b)(2), even if the sale is in connection with the improving of a collection.

The government contends that Mr. Miller was not a collector for the purposes of U.S.S.G. § 2K2.1(b)(2). [Appellee’s Brief, p. 15]. The court below determined that *any* sale of a firearm, even if it is within the confines of collecting, operates to deny a defendant of the adjustment under U.S.S.G. § 2K2.1(b)(2):

Mr. Miller argues that all the firearms are (entry level) collectibles, and selling duplicates and later models to be able to buy other collectibles is precisely what a collector does. Perhaps so, but the court does not read 2K2.1(b)(2) as protecting such activity. That provision speaks of an offender having “possessed all . . . firearms solely for . . . collection[.]” Once Mr. Miller sold a firearm, even if he did so as a step toward improving the collection, he no longer possessed it for collection. The guideline reduction does not contemplate sales for collection, as distinct from acquisition, or simple continued possession. This case shows why. Two witnesses – Glenn Hissong and James Ford – 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. The line between doing so to improve a collection, and doing so as a side business, is an exceedingly hazy one, and the court sees no basis to think the Sentencing Commission intended sentencing courts to make such ephemeral findings.

The reselling of the firearms is inconsistent, factually and legally, with the conduct described in U.S.S.G. § 2K2.1(b)(2).

[TS II:6-7].

The court below contended that the Sentencing Commission would not require the sentencing court to draw the fine distinctions between business sales and sales to improve collections. But that is exactly what one court has required of the trier of fact.

In a Third Circuit case, Defendant James Palermi had a private firearms collection. He was not a licensed firearms dealer. In a prosecution for dealing in firearms without a license, he attempted to raise a defense that he was merely selling from his personal

collection. After his conviction, he appealed. The Third Circuit reversed his conviction and remanded for a new trial, holding:

[I]f Palmieri sold firearms to Lyman from his private collection, he had a defense under § 921(a)(21)(C) that these sales were “for the enhancement of a personal collection or for a hobby,” or constituted the sale of “all or part of his personal collection of firearms.” Once again, however, there is no bright-line rule. The fact-finder must determine whether the transactions constitute hobby-related sales or engagement in the business of dealing from the nature of the sales and in light of their circumstances.

United States v. Palmieri, 21 F.3d 1265, 1268 -1269 (3rd Cir. 1994) , *cert. granted, judgment vacated on other grounds*, 513 U.S. 957 (1994). The Third Circuit clearly, then, expects the jury, as trier of fact, to make such “ephemeral findings.” Indeed, the statute itself distinguishes the fine line between sales for profit and collections. The applicable statute 18 U.S.C. § 922(a) provided:

(a) It shall be unlawful-

(1) for any person-

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms....

18 U.S.C.A. § 922(a)(1)(A). “Engaged in the business” was defined as:

a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms....

18 U.S.C. § 921(a)(21)(C), while the same statute distinguished sales for collection purposes:

shall not include a person who makes occasional sales, exchanges, or purchases of firearms *for the enhancement of a personal collection or for a hobby*, or who sells all or part of his personal collection of firearms . . .

[Emphasis added]. The Court then distinguished “engagement in the business” from “collecting,” requiring the trier of fact to determine whether Palermi was “engaged in the business” or whether he was selling “for the enhancement of a personal collection or for a hobby:”

Hence, if Palmieri sold firearms to Lyman from his private collection, he had a defense under § 921(a)(21)(C) that these sales were “for the enhancement of a personal collection or for a hobby,” or constituted the sale of “all or part of his personal collection of firearms.” Once again, however, there is no bright-line rule. The fact-finder must determine whether the transactions constitute hobby-related sales or engagement in the business of dealing from the nature of the sales and in light of their circumstances.

United States v. Palmieri, 21 F.3d 1265, 1268 -1269 (3rd Cir. 1994).

Congress has recognized that both acquisitions and dispositions of firearms are components of collecting. The *Palmieri* court has recognized that both acquisitions and dispositions of firearms are a component of collecting. The Third Circuit has recognized that the trier of fact is responsible for drawing the “exceedingly hazy” line, as the court below characterized it, between dealing and legitimate dispositions in connection with collecting.

The court below did not make a finding as to whether or not Mr. Miller was selling or disposing of firearms to improve his collection. Rather, the court below made a legal determination that it was not necessary to make “such ephemeral findings.” That legal conclusion was erroneous. The trier of fact must make such a finding, because both statutory construction and case law recognize that sales are a legitimate component of collecting. The matter should be remanded for resentencing.

CONCLUSION

The court below erred in denying the Appellant Miller's Rule 29 Motion for Judgment of Acquittal at the close of the evidence, and erred in holding that, as a matter of law, the mere sale of a handgun from a collection is inconsistent with U.S.S.G. § 2K2.1(b)(2).

The conviction of Mr. Miller in this case should be reversed. Alternatively, Mr. Miller's sentence should be set aside, and the matter remanded for resentencing.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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1. This reply brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because:

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Dated: July 14, 2008

Northern District of Indiana
Federal Community Defenders, Inc.

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

PROOF OF SERVICE

I hereby certify that on July 14, 2008, two copies of the **Reply Brief of Defendant-Appellant Leroy F. Miller** 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 Defendant-Appellant Ricky L. Fines.

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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 July 14, 2008

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