Petition Appendix

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12998
Non-Argument Calendar

D.C. Docket No. 2:14-cr-00076-SPC-MRM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL TERRILL FAIRCLOTH,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(May 6, 2019)

Before MARCUS, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

Michael Terrill Faircloth appeals his conviction for possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1).[1] On appeal, he argues that the district court erred by rejecting his "innocent transitory possession" jury instruction, relying on *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000) (establishing an innocent possession defense to § 922(g)). Faircloth further argues that he presented legally sufficient evidence in support of the innocent transitory possession defense.

At his trial, Faircloth testified in his defense to the following facts. He was at a vacant house owned by his wife to prepare the property for them to live in and to begin moving in their belongings. Among the items he moved into the house, he discovered a purse containing a loaded firearm. Because his cell phone battery was dead and he thought that the law required him to dispossess himself of the firearm immediately, he decided to remove the gun from the house himself and give it to someone who could turn it over to law enforcement. He put the weapon in his back pocket and went over to his neighbor's yard, ostensibly to give the firearm to his neighbor. As he entered his neighbor's property, where his neighbor was doing

[1] 18 U.S.C. § 922(g)(1) states:

> It shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

yardwork, he noticed a truck with dark tinted windows parked behind the property, which he thought was unusual for that location and time of the evening. He asked his neighbor about the truck, and his neighbor responded that he had seen it there for a while. At that point, law enforcement arrived and swarmed the yard, arresting Faircloth.

The jury convicted Faircloth as charged. He now appeals his conviction, and asserts that "he was carrying out his intent to turn the firearm over to his neighbor to turn over to law enforcement when he left his house and carried the gun over to his neighbor, and but for the fortuitous circumstance of the fugitive task force at that very moment arresting him, he would have consummated his intention."

We review for abuse of discretion the decision of a district court to deny a request for a jury instruction. *United States v. Palma*, 511 F.3d 1311, 1314–15 (11th Cir. 2008). "We will find reversible error only if: (1) the requested instruction correctly stated the law; (2) the actual charge to the jury did not substantially cover the proposed instruction; and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." *Id.* at 1315 (quoting *United States v. Fulford*, 267 F.3d 1241, 1245 (11th Cir. 2001)). Although the district court is "vested with broad discretion in formulating" jury charges, a defendant "is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence,

even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *Id.* (quoting *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986)). "In determining whether there is a proper evidentiary foundation for an instruction, the evidence must be viewed in the light most favorable to the accused." *Id.* We review *de novo* whether the defense produced sufficient evidence to sustain a particular jury instruction. *United States v. Moore*, 525 F.3d 1033, 1044 (11th Cir. 2008).

To prove that a defendant committed an offense under 18 U.S.C. § 922(g)(1), the government must establish that: (1) he knowingly possessed a firearm or ammunition; (2) he was previously convicted of an offense punishable by a term of imprisonment exceeding one year; and (3) the firearm or ammunition was in or affecting interstate commerce. *Palma*, 511 F.3d at 1315. We have consistently held that § 922(g) is a strict liability offense without any required specific criminal intent. *Id.*

In *Mason*, the D.C. Circuit held that a defendant could successfully invoke the "innocent transitory possession" defense so long as: (1) the defendant attained the firearm innocently and held it with no illicit purpose; (2) the possession was transitory; and (3) the defendant's actions showed *both* that he had the intent to turn over the weapon to police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct. *Mason*, 233 F.3d at 624.

Interpreting § 922(g), the D.C. Circuit reiterated that it was the retention of the firearm, rather than the brief possession for disposal, that posed the danger criminalized by felon-in-possession statutes. *Id.* at 625 (internal citations omitted).

In *Mason*, the defendant allegedly found a gun and ammunition in a paper bag near a school, placed the gun in his waistband and the ammunition in his pocket, and took the gun with him to his next delivery stop—the Library of Congress—where, he said, he intended to turn the gun over to a police officer with whom he was acquainted. *Id.* at 621. He did not stop to give the gun to a police officer at the entrance gate and was detained with the firearm by an officer stationed inside when he was signing in. *Id.* The D.C. Circuit concluded that these actions created a jury question regarding this defense. *Id.* at 625.

This Court, however, has never recognized the innocent transitory possession defense, and has recently outright rejected it. In *Palma*, which was precedent of this Court when Faircloth made his request for the jury instruction, we noted that we had never recognized the innocent transitory possession defense in a firearm possession case, and held that the district court did not abuse its discretion in refusing the proposed jury instruction because the defense—even if available—was unsupported by the evidence in the case. *Palma*, 511 F.3d at 1316–17. More recently, we have explicitly rejected the use of the defense in this Circuit. In *United States v. Vereen*, No. 17-11147, _F.3d_, 2019 WL 1499149, at *1–2 (11th

Cir. Apr. 5, 2019), we considered the case of a convicted felon who alleged he had unexpectedly found a firearm in his mailbox and intended to take the gun and report it to law enforcement but was immediately arrested. *Id.* After the jury found the defendant guilting of possession of a firearm by a convicted felon, the defendant challenged the district court's denial of his requested jury instruction on the innocent transitory possession defense. *Id.* at *3. This Court affirmed the district court's decision, noting that the facts of the D.C. Circuit's decision in *Mason* were "peculiar," and that it is the only Court of Appeals "out of at least half a dozen" to permit the use of the defense. *Id.* at *5.

We declined to follow *Mason* because "we can find nothing in the text to suggest the availability of an ITP defense to a § 922(g)(1) charge." *Id.* at *3. Specifically, this Court has held that § 922(g)(1) and § 924(a)(2) read together created a mens rea requirement "only that a § 922(g) defendant 'knowingly possessed' the firearm." *Id*. (quoting *United States v. Rehaif*, 888 F.3d 1138, 1143 (11th Cir. 2018)). We concluded that because the offense "only requires that the possession be *knowing*, it is a general intent crime." *Id.* at *4.

> As we see it, the text of the statute answers the precise question presented by the facts of our case: willfulness has been omitted from § 922(g)(1) and we are not free to rewrite the statute and include it. Our position is consonant with the Supreme Court's interpretation of the statute's purpose: "Congress sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society."

Id. at *5 (citing *Small v. United States*, 544 U.S. 385, 393 (2005)).

Accordingly, Faircloth's "motive or purpose behind his possession is irrelevant." *Id.*[2] His requested jury instruction did not "correctly state the law" in this Circuit because it included a defense which we had not adopted at the time, and which we have subsequently rejected. *Palma*, 511 F.3d at 1315; *Vereen*, 2019 WL 1499149, at *5. Accordingly, the district court did not abuse its discretion when it sustained the government's objection to the instruction.

AFFIRMED.

[2] We note—as we did in *Vereen*—that we continue to recognize a "necessity" defense to a felon-in-possession charge, but that defense is only available in "extraordinary circumstances," and requires "nothing less than an immediate emergency." *Vereen*, 2019 WL 1499149, at *6; *United States v. Flores*, 572 F.3d 1254, 1266 (11th Cir. 2009). The necessity defense was not argued in this case, and the facts do not support such a defense.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL TERRILL FAIRCLOTH

Case Number: 2:14-cr-76-FtM-38MRM

USM Number: 37298-004

Lee Hollander, CJA
Suite C-101
2681 Airport Rd S
Naples, FL 34112

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty to Count One of the Indictment. The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Convicted Felon	May 21, 2014	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by United States v. Booker, 543 US 220 (2005).

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment:

June 19, 2017

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

June 20, 2017

Michael Terrill Faircloth
2:14-cr-76-FtM-38MRM

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **120 months, consecutive to the sentence imposed in 14-cr-165, US District Court for the Southern District of Florida.**

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

Michael Terrill Faircloth
2:14-cr-76-FtM-38MRM

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 3 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

Michael Terrill Faircloth
2:14-cr-76-FtM-38MRM

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within **72 hours**.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature:_____ Date:_____

Michael Terrill Faircloth
2:14-cr-76-FtM-38MRM

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall submit to a search of his person, residence, place of business, any storage units under the defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

2. The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.

3. The mandatory drug testing requirements of the Violent Crime Control Act are imposed. The Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.

Michael Terrill Faircloth
2:14-cr-76-FtM-38MRM

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	Assessment	JVTA Assessment [1]	Fine	Restitution
TOTALS	**$100.00**	**$0.00**	**$0**	**$0**

SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Preliminary Order of Forfeiture (Doc. #174), that are subject to forfeiture including a Ruger P95, 9mm pistol, serial number 318-53635; and ten (10) rounds of 9mm ammunition and one (1) test-fired 9mm projectile and casing.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

[1] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

CASE NO. 2:14-CR-00076-SPC-MRM-1
APPEAL NO. 17-12998-HH

vs.

MICHAEL TERRILL FAIRCLOTH,
Appellant.
_____/

BRIEF SUBMITTED ON BEHALF OF
THE APPELLANT, MICHAEL TERRILL FAIRCLOTH

APPEAL FROM THE JUDGMENT AND COMMITMENT ORDER IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION ENTERED ON JUNE 19, 2017 AND, APPEAL FROM THE SENTENCE RECEIVED BY THE APPELLANT AS A RESULT OF THE FOREGOING JUDGMENT.

The Law Firm of
RICHARD D. LAKEMAN- P.A.
Post Office Box 101580
Cape Coral, Florida 33910
Tel: (239) 645-3544
Attorney for Appellant
MICHAEL TERRILL FAIRCLOTH

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States of America vs. MICHAEL TERRILL FAIRCLOTH		Docket No.
Appellee	Appellant	17-12998-HH

11th Cir. R. 26.1 requires that a Certificate of Interested Persons and Corporate Disclosure Statement be included with each brief, petition, answer, motion, or response filed by any party. You may use this form to fulfill this requirement. In alphabetical order, with one name per line, please list the trial judge(s) and all attorneys, persons, associations, or corporations that have an interest in the outcome of this case.

The Honorable Sheri Polster Chappell, United States District Court Judge

MICHAEL TERRILL FAIRCLOTH, Appellant

Lee Hollander, Esq., Law Offices of Hollander and Hanuka, Attorneys for Defendant in the District Court

The Law Firm of Richard D. Lakeman, P.A., Attorney for Appellant

Brian P. Lennon, Esq., Warren, Norcross & Judd LLP, Attorneys for Defendant in the District Court

Sheryl L. Loesch, Clerk, U.S. District Court, Middle District of Florida, Ft. Myers Division

Linda McNamara, Esq., Asst. U.S. Attorney, U.S. Attorney's Office, Appellate Division, Attorney for Appellee

David Rhodes, Chief, Appellate Division, U.S. Attorney's Office, Attorney for Appellee

Charles Schmitz, Esq., U.S. Attorney, U.S. Attorney's Office, Middle District of Florida, Fort Myers Division

United States of America vs. MICHAEL TERRILL FAIRCLOTH		Docket No.
Appellee	Appellant	17-12998-HH

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested in this case. However, counsel for defendant will present himself to the Court for the purpose of oral argument if the Court deems it appropriate for the clarification of the issues and the law on this appeal.

United States of America vs. MICHAEL TERRILL FAIRCLOTH		Docket No.
Appellee	Appellant	17-12998-HH

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the type size used in this brief is 14 point type and the type style used in this Brief is Times New Roman- Pursuant to the requirements contained within the **Federal Rules of Appellate Procedure 32(a).**

United States of America vs. MICHAEL TERRILL FAIRCLOTH		Docket No.
Appellee	Appellant	17-12998-HH

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in **F.R.A.P.** 32(a)(7)(B). This brief contains 12,284 words.

United States of America vs. MICHAEL TERRILL FAIRCLOTH		Docket No.
Appellee	Appellant	17-12998-HH

TABLE OF CONTENTS

United States of America vs. MICHAEL TERRILL FAIRCLOTH		Docket No.
Appellee	Appellant	17-12998-HH

TABLE OF CITATIONS

CITATION: **PAGE NO.**

CASES

STATUTES

GUIDELINES

RULES

TREATISES

United States of America vs. MICHAEL TERRILL FAIRCLOTH		Docket No.
Appellee	Appellant	17-12998-HH

STATEMENT OF JURISDICTION

The Indictment alleges the commission of crimes against the United States of America. The district courts of the United States of America have original jurisdiction, exclusive of the courts of the states of all offenses against the laws of the United States **Title 18, U.S.C.A. §3231. The Federal Rules of Appellate Procedure** govern procedure in appeals to United States Courts of Appeals from the United States District Courts. **F.R.A.P. 1(a).** An appeal under the **Federal Rules of Appellate Procedure** is permitted by law as of right from a district court to a court of appeals by filing a Notice of Appeal with the Clerk of the District Court within the time allowed by**, F.R.A.P. 3(a), Rule 4. F.R.A.P. 3(a), Rule 4** has been complied with. The Judgment and Commitment Order in the Criminal Case entered on June 20, 2017 and the sentencing decision of the District Court forming part of that Judgment are final decisions of a District Court and reviewable as such by this Court.

STATEMENT OF THE ISSUES

1. Did the District Court Judge abuse her discretion in failing and refusing to read to the jury the defense requested jury instruction of innocent transitory possession to the charged offense in the Indictment/Stipulation?

2. Was the defendant prejudiced by the District Court Judge refusing to read the defense instruction regarding innocent transitory possession?

3. Should the defendant be penalized because of the surprise arrival of law enforcement which prevented Michael Faircloth from carrying out his avowed intention to turn the firearm over to law enforcement via his neighbor?

4. Did the District Court Judge commit judicial error in allowing government witness, Jeffrey Burt, testify to the location of the firearm's manufacture over defense objections that such testimony was hearsay and denied the defendant his right of confrontation guaranteed by Article VI to the United States Constitution?

5. Was Jeffrey Burt the custodian of records of ATF databases, and could he testify as he did without the need of a custodian of records?

6. Should the case be reversed by reason of the wrongful admission of evidence by the Court as to the manufacture location of the firearm?

7. Did the District Court Judge commit prejudicial error when she allowed Exhibit 4, which housed the weapon, ammo and magazine, to be admitted into evidence over the defense's hearsay and confrontation objection to the testimony of Officer Rosario?

8. Did the District Court Judge abuse her discretion and commit prejudicial error in reading the Flight Instruction to the jury?

9. Did Sgt. Heughlin testify that the defendant tried to flee or resist apprehension?

10. Did the District Court Judge commit judicial error in denying the defense's Rule 29(a) Motion for Judgment of Acquittal based upon the insufficiency of the evidence?

STATEMENT OF THE CASE

Proceedings and Dispositions Below

On July 9, 2014, a one count Indictment was returned in open Court as to Michael Terrill Faircloth. Doc 1 - Pg 1. On July 14, 2014 a Notice of Hearing as to Michael Terrill Faircloth and his Initial Appearance in Federal Court was scheduled for July 15, 2014 in Fort Myers before Magistrate Judge Douglas N. Frazier. Doc 3 - Pg 1. On July 14, 2017 a Notice of Appearance was filed on behalf of Michael Terrill Faircloth by Christopher G. Lyons. Doc 4 - Pg 1. On July 15, 2014, the arraignment of Michael Terrill Faircloth was conducted as to Count I to which such defendant pled not guilty. Such defendant's retained counsel Chris Lyons summarized the charges and penalties after which the government requested detention and defendant waived the issue of detention. Doc 5 - Pg 1. Thereafter, the Court ordered the defendant detained without prejudice. Doc 5 - Pg 1.

On July 15, 2014 a Status Conference before the Honorable Sheri Polster Chappell was scheduled for August 11, 2014 and Jury Trial scheduled for the trial term beginning September 2, 2014. Doc 6 - Pg 1. On July 15, 2014, an arrest warrant was returned executed on July 14, 2014. Doc 7 - Pg 1. On July 16, 2014 Magistrate Douglas N. Frazier ordered Defendant detained pending trial. On August 4, 2014, a Motion to Substitute an attorney for Michael Terrill Faircloth was filed with Douglas Molloy filing his Notice of Appearance for such defendant

at that time. Doc 10 - Pg 1; Doc 11 - Pg 1. On August 5, 2014 Magistrate Douglas N. Frazier entered an Order granting the Motion to Substitute Attorneys. Doc 12 - Pg 1. Thereafter, numerous Status Conferences were held and in each instance a continuance was ordered for good cause.

On December 8, 2014 the Court ordered Jury Trial be set for the February 2, 2015 trial term and Status Conference be set for January 12, 2015. Doc 25 - Pg 1.

On January 27, 2015, a Change of Plea Hearing was scheduled before Magistrate Douglas N. Frazier. Doc 31 - Pg 1.

On January 29, 2015 a Motion for miscellaneous relief (i.e. pre plea- Pre sentence report, was filed on behalf of defendant). Doc 32 - Pg 1. Such request for relief, was denied by the Court. Doc 33 - Pg 1.

On February 3, 2015, a Motion to Withdraw as attorney for Michael Terrill Faircloth was filed by Douglas Molloy. Doc 34 - Pg 1.

The Change of Plea Hearing scheduled for February 9, 2015 was cancelled (Doc 35 - Pg 1) and an Order granting the Motion of Douglas Molloy to withdraw as defendant's attorney was granted. Doc 36 - Pg 1. A Status Conference was set for February 13, 2015. Doc 37 - Pg 1. The Court determined at the February 13, 2015 that it had to appoint counsel for defendant (Doc 38 - Pg 1.) and on February 13, 2015 Lee Hollander appeared on behalf of defendant. Doc 39 - Pg 1.

On February 13, 2015, Court-appointed counsel, Lee Hollander, made a Motion to Continue the trial date. Doc 40 - Pg 1. On February 20, 2015, Judge Chappell by her order set Jury Trial for the trial term beginning April 6, 2015 and scheduled the next Status Conference for March 16, 2015 in Fort Myers in front of herself. Doc 41 - Pg 1.

On March 16, 2015 an oral Motion to Continue Trial was made on defendant's behalf at the Status Conference before Judge Chappell wherein the case was continued to the May 2015 trial term. Doc 43 - Pg 1. A Status Conference was scheduled for April 13, 2015 before Judge Chappell. Doc 45 - Pg 1.

A 46 Motion made by defendant's attorney to have U.S. Probation prepare a pre-plea criminal history (Doc 46 - Pg 1.) was denied by Order of Judge Sheri Polster Chappell. Doc 47 - Pg 1.

On April 4, 2015 Jury Trial in this case was scheduled for a date certain on May 6, 2015 at 9:00 a.m. before Judge Sheri Polster Chappell. Doc 53 - Pg 1.

On April 28, 2015 a Motion in Limine was filed by defense counsel to exclude expert testimony (Doc 56 - Pg 1.) and a response thereto was filed by the government on April 30, 2015. Doc 57 - Pg 1.

Proposed Jury Instructions- Proposed Voir Dire and Proposed Verdict Forms were filed by the government on April 30, 2015. Doc 58 - Pg 1; Doc 59 - Pg 1; and

Doc 60- Pg.1 respectively).

A Motion to Continue Trial was made by defendant's attorney on May 3, 2015 (Doc 61 - Pg 1.) and was granted by the Order of Judge Sheri Polster Chappell on May 6, 2015 continuing trial to June 1, 2015 and setting a Status Conference for May 26, 2015.

On May 25, 2015 defense counsel filed a Notice of Objection to the standard 11th Circuit Jury Instruction for Possession of a Firearm by a convicted felon. Doc 73 - Pg 1. On May 26, 2015, a Notice of Attorney Appearance is filed by a Charles D. Schmitz on behalf of the government.

On May 26, 2015 the court again continued the case upon motion of the defense on its need for discovery and the Court by its order on May 27, 2015 continued the case to trial term beginning July 6, 2015. Doc 77 - Pg 1.

On May 31, 2015 a Motion in Limine was filed be defense counsel. Doc 78 - Pg 1. On June 3, 2015 an Order signed by Judge Chappell was filed denying the 73 defense objection to the Standard 11th Circuit Jury Instructions for Possession of a Firearm by a Convicted Felon. Doc 79 - Pg 1.

On June 4, 2015 an order to show cause signed by Judge Chappell was filed directing the defense to show cause at the June 8, 2015 Status Conference why the case should not be immediately set for trial. Doc 80 - Pg 1. Thereafter, on June 8,

2015, the case was continued at such Status Conference to the August 2015 trial term on motion of the defense. Doc 81 - Pg 1; Doc 82 - Pg 1.

The 78 Motion in Limine was granted by Judge Chappell to the extent that the government shall not elicit testimony from its witnesses (1) that Defendant is more dangerous than other arrestees; 2) how the Regional Fugitive Task Force's job is to arrest only the most dangerous fugitives; or 3) that the underlying arrest warrant was for escaping custody. The remainder of 78 Motion was denied by Judge Chappell. Doc 85 - Pg 1.

On July 13, 2015 during a Status Conference upon oral motion on behalf of the defendant the case was continued to the September 2015 trial term. Doc 92 - Pg 1; Doc 93 - Pg 1. An Order granting the 93 motion was signed on July 15, 2015.

A Motion to Dismiss the Indictment in this case was filed by counsel for defendant on August 2, 2015 (Doc 95 - Pg 1.) and government counsel was directed in an Endorsed Order to respond to such Motion on August 6, 2015. Doc 96 - Pg 1. The Response in Opposition by the government to defendant's Motion to Dismiss the Indictment was filed on August 4, 2015. Doc 97 - Pg 1.

On August 6, 2015, the government made a Motion to Supplement its Request for Jury Instruction. Doc 100 - Pg 1.

A Status Conference was held on August 10, 2015 during which an oral

motion by the defense was made to continue trial. Doc 105 - Pg 1; Doc 106 - Pg 1. On August 11, 2015 the Court by its Order Granted the 106 Motion to Continue Trial to the October Trial Term beginning October 5, 2015. Doc 107 - Pg 1.

On August 12, 2015 the court by Judge Sheri Polster Chappell denied the 95 Motion by defendant (Doc 108 - Pg 1.) which was Objected to by the defense. Doc 109 - Pg 1.

On August 19, 2015 the defendant made an Emergency Motion to attend the funeral of his deceased stepmother (Doc 110 - Pg 1) and such 110 Motion was denied by Judge Chappell on August 20, 2015. Doc 111 - Pg 1.

On August 26, 2015 the defense made a Motion to Appoint a DNA Expert (Doc 112 - Pg 1) which Motion was granted on September 2, 2015. Doc 114 - Pg 1.

The Court on September 10, 2015 granted the 116 Motion to continue trial to the November Trial Term.

Thereafter, the Court continued the trial to the Trial Term beginning December 1, 2015 (Doc 120 - Pg 1) following the trial term beginning January 4, 2016. Doc 123 - Pg 1.

On December 20, 2015 an Objection was filed by the defense as to the 70 Response to the 62 Motion in Limine regarding Impeachment of the Defendant by

Reference to his prior Convictions and Incorporated Memorandum of Law. Doc 129 - Pg 1.

A Notice of Hearing for a date certain for Jury Trial was filed by Judge Chappell on December 28, 2015. Doc 131 - Pg 1.

The government filed its Response to the defense's 129 objection filed on December 31, 2015.

Proposed Jury Instructions by counsel for defendant were filed on January 18, 2016. Doc 133 - Pg 1.

The Witness List of the government was filed on January 20, 2016. Doc 134 - Pg 1.

On January 20, 2016 an Endorsed Order was filed by Judge Chappell requiring the defendant to file: 1) a proposed jury verdict form; 2) proposed voir dire questions; and 3) a witness list by January 21, 2016 at 12:00 p.m. Doc 135 - Pg 1. On January 21, 2016 an Endorsed Order signed by Judge Chappell granted defendant's Motion for an Extension of time to file a witness list and verdict form by 5:00 p.m. on January 22, 2016. Doc 137 - Pg 1. Defendant's Witness List was filed on January 21, 2016. Doc 138 - Pg 1. Each of the Proposed Voir Dire and the Proposed Verdict Forms were filed on January 21, 2016. Doc 139 - Pg 1 and Doc 140 - Pg 1, respectively.

An Objection by the government to the defense's 133 Proposed Jury Instructions was filed on January 22, 2016. Doc 141 - Pg 1.

The defense, on January 24, 2016 filed its Response to the 141 Objection by the government on January 24, 2016. Doc 143 - Pg 1.

Transcript of Motion hearing held on May 3, 2015 before Judge Chappell became available for purchase on January 25, 2016. Doc 145 - Pg 1. A Transcript of the Status Conference held on December 14, 2015 by Judge Chappell became available on January 25, 2016 as did the filing of the official transcript on January 25, 2016. Doc 148- Pgg. 1.

A minute entry was entered on January 25, 2016 re proceedings in a Final Pretrial Conference before Judge Sheri Polster Chappell.

On January 26, 2016 the government filed a Witness List as to defendant's case. Doc 150 - Pg 1; Doc 151 - Pg 1. The government filed its Exhibit List and Proposed Jury Instructions respectively on January 27, 2016. Doc 152 - Pg 1; Doc 153 - Pg 1.

A Trial Brief and Proposed Verdict form were filed by the Government respectively on January 27, 2016. Doc 154 - Pg 1; Doc 55 - Pg 1.

Day One of Jury Trial in U.S.A. vs. Michael Terrill Faircloth was conducted before Judge Sheri Polster Chappell on January 27, 2016. Doc 156 - Pg 1.

Day Two of Jury Trial in U.S.A. vs. Michael Terrill Faircloth was conducted before Judge Sheri Polster Chappell on January 28, 2016. Doc 157 - Pg 1.

A Joint Exhibit List by the government and Michael Terrill Faircloth was filed on January 28, 2016. Doc 168 - Pg 1.

The Exhibit List by the government was filed on January 28, 2016. Doc 169 - Pg 1. On January 28, 2016 the Court's Jury Instructions as to the case were filed. Doc 160 - Pg 1.

On January 28, 2016 the Jury Verdict of Guilty on Count I was filed. Doc 161 - Pg 1.

On January 28, 2016 a Notice of Hearing setting the date of May 2, 2016 for Sentencing of defendant was filed. Doc 162 - Pg 1.

On February 28, 2016, the Court by Order of Judge Chappell denied nunc pro tunc 142 the Defendant's Motion for the Court to Take Judicial Notice (Doc 164 - Pg 1) and similarly on such date entered its Order nunc pro tunc 100 Motion to supplement as to Michael Terrill Faircloth. Doc 165 - Pg 1.

On February 8, 2016 Judge Chappell by her Order granted the 62 Motion in Limine Regarding Impeachment of Defendant by Reference to his Prior Convictions for reasons stated on the record during trial proceedings. Doc 166 - Pg 1.

On March 22, 2016 by Order signed by Judge Chappell, the Court granted Defendant's Motion to Continue the date set for Sentencing to June 20, 2016. Doc 171 - Pg 1.

On March 29, 2016 the Court granted the government 167 Motion for Forfeiture of Property as to defendant. Doc 174 - Pg 1.

On April 4, 2016 by an Endorsed Order by Judge Chappell a 175 Motion for New Trial filed by Michael Terrill Faircloth- Pgro se was forwarded to his attorney for consideration. Doc 176 - Pg 1.

On April 20, 2016 the Initial PreSentence Investigation Report as to defendant was made available. Doc 177 - Pg 1.

On May 30, 2016 Judge Sheri Polster Chappell by her signed Endorsed Order denied the 179 Motion to Continue Defendant's Sentencing. Doc 180 - Pg 1.

A Motion for a new trial was filed on defendant's behalf on June 4, 2016. Doc 181 - Pg 1.

On June 5, 2016 an endorsed order signed by Judge Sheri Polster Chappell granting the 182 Motion to Compel and directing that the government provide more specific information regarding the statements they intend to use to request an enhancement of defendant's sentence for obstruction of justice. Doc 183 - Pg 1.

The Final PreSentence Investigation Report under Rule 32(g) as to

defendant was filed on June 13, 2016 and copies made available to parties. Doc 186 - Pg 1.

On June 14, 2016 an Order was filed by Judge Chappell denying the defendant's 181 Motion for a New Trial. Doc 188 - Pg 1. On June 22, 2016 the 189 Sentencing of Defendant was set for August 15, 2016 before the Honorable Judge Sheri Polster Chappell. Doc 190 - Pg 1. On July 5, 2016 both the government and the defendant filed their respective Exhibit Lists for sentencing. Doc 191 - Pg 1 and Doc 192 - Pg 1. On August 3, 2016, defense counsel filed a Motion to Continue Defendant's Sentencing (Doc 193 - Pg 1) and such Motion was granted by Court Order filed August 4, 2016 continuing the sentencing hearing to November 21, 2016. On October 3, 2016 the Defendant's Sentencing Hearing scheduled for November 21, 2016 was rescheduled for December 12, 2016. Doc 196 - Pg 1.

On November 30, 2016 pursuant to Amended Rule 32(g) the Final PreSentence Investigation Report as to defendant was filed. Doc 198 - Pg 1.

On December 8, 2016, the Court, by its Order, granted a 200 Motion by defendant to continue defendant's sentencing to a date to be scheduled by further notice. Doc 201 - Pg 1.

On December 9, 2016, a Sentencing Memorandum as to the defendant was

filed by the government. Doc 202 - Pg 1. A Notice was also filed on December 12, 2016 rescheduling the Sentencing for January 30, 2017 at 1:30 p.m. Doc 203 - Pg 1. Thereafter, Defendant's Sentencing was continued again to April 17, 2017, May 31, 2017 and June 19, 2017. Doc 206 - Pg 1; Doc 209 - Pg 1l ; Doc 212 - Pg 1.

On June 15, 2017, the Court ordered that the unopposed Motion of Defendant for subpoena issuance for sentencing was granted by Magistrate Mac R. McCoy. Doc 216 - Pg 1.

On June 15, 2017 a PreSentence Supplemental Memorandum/attachments were filed as to Defendant. Doc 217 - Pg 1.

An Exhibit List and Witness List were filed by the government on June 16, 2017 to defendant.

On June 19, 2017 an Emergency Motion to allow electronic equipment (laptop computer) by Michael Terrill Faircloth was granted on that date. Doc 224 - Pg 1.

Sentencing Proceedings were held before Judge Chappell on June 19, 2017 with Defendant sentenced as follows: 1) Count I: Imprisonment 120 months, consecutive to 14 CR 65, SDFL; supervised release: 3 years; Special Assessment: $100.00. Doc 225 - Pg 1.

On June 20, 2017 pursuant to Rule 32i(3) the final PreSentence Investigation

Report Court revisions were filed as to Defendant.

On June 20, 2017 Judgment as to Defendant was filed reiterating the sentence filed on June 19, 2017 in 225 Sentence Proceedings. Doc 227 - Pg 1.

The Statement of Reasons as to Defendant were filed on June 20, 2017. Doc 228 - Pg 1.

The Order granting 229 Motion for Forfeiture of Property was signed by Judge Chappell on June 21, 2017. Doc 231 - Pg 1.

Defendant's attorney made a Motion to Correct the Sentence, which was denied by Judge Chappell on June 25, 2017. Doc 235 - Pg 1.

On June 30, 2016 a Notice of Appeal was filed by Defendant's attorney Lee Hollander. Doc 236 - Pg 1. Defense counsel made a Motion on July 1, 2017 to withdraw as Defendant's attorney (Doc 237 - Pg 1) which Motion was granted by the Court's endorsed Order on July 3, 2017. Doc 239 - Pg 1.

A Text Order of Appointment of CJA counsel, Richard D. Lakeman, was filed by Magistrate Mac R. McCoy on July 3, 2017. Doc 240 - Pg 1.

FACTS

The jury trial of Michael Terrill Faircloth, (hereinafter sometimes referred to as "Faircloth"), with respect to the charge contained in the Indictment in this case, commenced on January 27, 2016. Count One of the Indictment alleged that Michael Terrill Faircloth, being a person convicted of crimes punishable by imprisonment for a term exceeding one year, as set forth in a Stipulation between the parties, did knowingly possess in and affecting commerce, a firearm, namely, a Ruger P95 bearing serial number 318-53635, loaded with eleven (11) rounds of 9 millimeter ammunition, in violation of Title 18, United States Code, Sections 922(g)(1), and 924(e). Doc 1 - Pg 1-5. The government and the attorney for the Defendant- Prior to a commencement of trial, entered into a written Stipulation which stated as follows: "It is hereby stipulated and agreed by and between the United States of America, by and through its representative, Assistant United States Attorney Toma Calderone, and the defendant, Michael Terrill Faircloth, and his attorney, Lee Hollander, that prior to May 21st of 2014, defendant Michael Terrill Faircloth was convicted in court of crimes punishable by imprisonment for a term in excess of one year; that is, for felony criminal offense. Since the defendant and the United States have agreed to this fact, the United States will not have to present any other evidence to you to establish the defendant's prior felony

convictions." Such stipulation is dated and signed by Assistant U.S. Attorney Calderone, by Mr. Faircloth and by Mr. Hollander, his attorney. Doc 156 - Pg 153.

Once the trial commenced and opening statements were delivered, the government called as its first witness to testify, Lee County Sheriff's Officer Sergeant James Heughlin, hereinafter referred to as "Heughlin". Doc 156 - Pg 154. Heughlin testified that he was a member of the Florida Fugitive Task Force, and that they get assigned to cases involving fugitives with active warrants. Doc 156 - Pg 155. Heughlin testified that they had a possible address for defendant of 416 N.W. 24th Place, in Cape Coral, Florida. Doc 156 - Pg 157. Heughlin was paired with Officer Lucas and testified his vehicle was the lead vehicle in the caravan of several vehicles in the operation which took place about 7:00 P.M. when the weather was clear and still daylight. Doc 156 - Pg 158. He identified a subject leaving the aforesaid residence, walking across the street to the neighbor's house. Heughlin testified that his vehicle stopped in the neighbor's yard after which he exited and observed Faircloth take a couple of steps back, reach behind his back and then toss the firearm. Doc 156 - Pg 160,161. Heughlin testified Faircloth was wearing jean shorts, no shirt. Doc 156 - Pg 161. Heughlin's view was unobstructed and his weapon was drawn. Doc 156 - Pg 161,162. Heughlin testified that from the time he showed up, to the time the defendant was placed in custody was only seconds. Doc 156 - Pg 165. Faircloth was arrested on May 21, 2014. Doc 156 - Pg

172. On cross examination, Heughlin testified that his minivan was unmarked. Doc 156 - Pg 174. He further testified on cross-examination that there were several officers. Doc 156 - Pg 174. He also testified under cross-examination that his view was unobstructed and he was approximately 15 feet away from Mr. Faircloth when he first got out of his car. Doc 156 - Pg 176. Heughlin testified that when the defendant looked at them, almost in shock, he took a couple of steps back, then reached back behind him and tossed a firearm just a couple feet away. Doc 156 - Pg 176. He testified on cross-examination that "he didn't bring the firearm up, it was tossed and released from behind his back." Doc 156 - Pg 176. It appeared that Heughlin was the first officer on scene and the officer closest to Faircloth. Heughlin then ran over and handcuffed Mr. Faircloth. Doc 156 - Pg 176. He did not testify to any flight or resistance by Faircloth.

The Government then called K-9 Officer Sean McCreary, (hereinafter called "McCreary") as its next witness. Doc 156 - Pg 179. McCreary testified that he was in the second car and that there was 8 or 10 cars. Doc 156 - Pg 183. This reinforces the defense position that Heughlin was the first officer and closest officer to Faircloth. He testified on direct examination that Faircloth reached with his right hand into the small of his back-pulled the firearm with his right hand and threw it on the ground before giving up. Doc 156 - Pg 185. McCreary then picked up the gun, took it to her car and locked it in the car. Doc 156 - Pg 187. Officer McCreary

testified that there was a round in the chamber. Doc 156 - Pg 187. While McCreary identified the Government's Exhibit 4 as the firearm she recovered in the case and cleared. Doc 156 - Pg 192. On redirect examination of McCreary, she testified that she passed the firearm off to Officer Matthew Fordham, (hereinafter called "Fordham"), who was wearing gloves at the time. Doc 156 - Pg 201.

The Government then called Fordham as its next witness. Fordham testified he was assigned to the street criminal unit of the Cape Coral Police Department. Doc 156 - Pg 202. His role as to the arrest of defendant was simply assisting The Task Force, U.S. Marshalls. Doc 156 - Pg 203. He became the arresting officer on the case and obtained the firearm in the case. Doc 156 - Pg 203. He testified that when he got out of his vehicle, Mr. Faircloth was detained after having walked across the street. Doc 156 - Pg 204, 205. He testified he was wearing latex gloves at the time the custody of Faircloth was passed to him. Doc 156 - Pg 205, 206. McCreary later passed the firearm to Officer Rosario. Doc 156 - Pg 207, 208. He testified on cross-examination that he did not observe Faircloth in possession of the firearm. Doc 156 - Pg 210

Charles Hendrick, the neighbor across the street from the Faircloth house, testified on direct examination that he resided at 413 N.W. 24th Pl on May 21, 2014. He testified that when Faircloth crossed the street to speak with him, Faircloth said, "did you see the vehicle sitting across the road?" but that Faircloth

didn't say anything else during the conversation because "it was too quick." Doc 156 - Pg 229.

On cross-examination by defense counsel, Mr. Hendrick then testified that he did not call the police department, but two weeks earlier his daughter was outside and said that there were two police officers that went into the Faircloth house. Doc 156 - Pg 232. The purpose of such entry was unclear. The government then called Kasey Buckner Broger, a forensic technician, as a witness. She testified on direct examination that she received a written forensic request to process the gun on May 21, 2014, which meant to test fire the firearm and process it for latent fingerprints. Doc 156 - Pg 240. She also testified that she swabbed the gun for DNA. Doc.156 - Pg 240. Ms. Broger took a picture of Exhibit No. 10. Ms. Broger testified on direct examination that what she means when she processes the gun, she test fires the gun, and swabs for DNA and fingerprints. Doc 156 - Pg 240. She would do the DNA swabbing first because it is so delicate, followed by fingerprinting processing. Doc 156 - Pg 240. She testified that she has tried in general to recover fingerprints from items hundreds of times. Doc 156 - Pg 239. However, she later testified that she had only been successfully able to lift a fingerprint from a weapon only one time. Doc 156 - Pg 250.

Jeffrey Burt, (hereinafter called "Burt"), a special agent with the Bureau of Alcohol, Tobacco and Firearms, testified next for the government. Doc 156 - Pg

265. The Court proceeded over objection of counsel, to allow Burt to testify, from his analysis, where the firearm was manufactured. Doc 156 - Pg 274. The Court then allowed Burt, over defense counsel's objection, to state his opinion as to where the firearm was manufactured. Doc 156 - Pg 274. Burt thereafter, again was allowed over defense counsel's objection, to state his opinion as to where the ammunition was manufactured. Doc 156 - Pg 275.

On January 28, 2017, the defendant advised the court that he wished to testify. On direct examination by his attorney, Faircloth admitted that as of May in 2014 he was a convicted felon and that he and his wife have a residence at 416 N.W. 24th Place in Cape Coral, Florida. Doc 248 - Pg 31. Prior to May of 2014, the house was occupied by tenants, but in May Mr. Faircloth and his wife decided to move in. Doc 248 - Pg 32. The defendant stated he started moving into the house probably on the 4th or 12th of May. Doc 248 - Pg 33. He testified he used his truck and his wife's car on two occasions. Doc 248 - Pg 33. He moved personal property by himself from two locations: (a) a place in Fort Myers where he rented a room; and (b) from his and his wife's home in Miami, Florida. Doc 248 - Pg 33, 34.

Defense counsel on direct examination of Faircloth asked the defendant how he came across the firearm and the defendant testified, "the firearm was in a purse on the floor in the foyer." Doc 248 - Pg 34, 35. The defendant stated he apparently moved the purse in there but did not know that there was a firearm in it and said, "I

wouldn't have went within ten feet of the purse had I known." Doc 248 - Pg 35. Mr. Faircloth testified that he was moving two objects from the floor to put them on the counter when the purse fell to the floor. Doc 248 - Pg 36. He testified that when he looked in the purse, he saw a wallet and the butt of a gun." Doc 248 - Pg 37. He testified that he took the gun out, and checked to see if it was loaded. Doc 248 - Pg 37. Faircloth then testified that as a convicted felon he knew he was not allowed to possess a firearm. Doc 248 - Pg 37.

While Faircloth did have a cell phone, it was dead and not usable. Doc 248 - Pg 37. Faircloth then decided to get the firearm out of the house and give it to his neighbor, Mr. Hendrick, who was outside, for him to give it to law enforcement. Doc 248 - Pg 38.

Mr. Faircloth testified the clothes he was wearing when arrested was shorts, flip flops and no shirt. Doc 248 - Pg 38. He did not conceal the firearm in any way, but placed it in his back pocket rather than walking over to his neighbor, Mr. Hendrick, with a gun in his hand, because Hendrick had kids in the yard. Doc 248 - Pg 38. Obviously, he did not wish anyone to become scared. It was just before 7:00 p.m. and as his initial statement to his neighbor he asked if he knew there was a truck parked in the back of his house? Doc 248 - Pg 38, 39. Mr. Faircloth said his response was: "Yeah. It's been back there for a while. I said your kids are out in the yard, you're not worried, about…you know, and he said if something happens I

got something for them." Doc 248 - Pg 39. "So, in my mind, it meant that it was ok to give him this firearm." Doc 248 - Pg 39. "…all I wanted to do was get rid of it." Doc 248 - Pg 39. I heard motors revving and high RPMs, looked up and saw all these cars, trucks and SUVs converging on us. Doc 248 - Pg 40. They had pulled into his front yard, almost hit his house and I thought we were going to get run over. Doc 248 - Pg 40. When the doors flew open, they identified themselves as police officers. Doc 248 - Pg 40. "I had taken two steps - only" I thought they were going to shoot me. Doc 248 - Pg 40. I spread my feet, I put my hands in the air, and I told them you don't have to hurt anybody. There's kids in the yard." Doc 248 - Pg 40. Detective Lucas then laid on top of his neighbor and Faircloth stated he said "I have a firearm. I'm going to take it out. My hands were in the air. I reached behind me with my right hand with two fingers, scared to death. I let him see what it was, and I tossed it across my body." Doc 248 - Pg 41. Faircloth further testified that he told the cops "you don't have to hurt nobody. You want to handcuff me, I'll cuff up." Doc 248 - Pg 41. Faircloth testified he then got on his knees- put his face in the dirt and was handcuffed. Doc 248 - Pg 41.

Faircloth's attorney then asked him, did you intend to do anything illegal with the firearm to which Faircloth responded No, and that he just wanted to get it off him. Doc 248 - Pg 41, 42.

As far as the gun was concerned, Faircloth testified he tossed it across his

body onto the slope, the side of the swale. Doc 248 - Pg 44.

Faircloth's counsel then asked Faircloth if you had had the opportunity to hand the gun to Mr. Hendrick, what were you going to tell him to do with it? His response was, "Well, I would have told him to give it to law enforcement." Doc 248 - Pg 45.

On the cross-examination of Faircloth by the government when asked whether he stipulated that he's been convicted of felony offenses, he replied, "Apparently so". Doc 248 - Pg 47. When asked on cross-examination whether he knew it was unlawful for him to possess a firearm, he responded, "Probably, I did." Doc 248 - Pg 49,50. Faircloth did acknowledge saying that he said he had two problems. One, he had a firearm in my back pocket and two he was a convicted felon. Doc 248 - Pg 40. He was further asked on cross-examination if he knew there was a warrant for his arrest and he testified, "No, I did not." Doc 248 - Pg 50. The Court queried, "How do you not know that you have a warrant because you've escaped?" Doc 248 - Pg 51. Counsel for Faircloth responded, "This is something that I know because he contacted Zaremba, who represented him in the '06 case, and Zaremba told him that he had had his investigator, Dominic check and they told him there was no warrant." Doc 248 - Pg 51. They were wrong but that's what they told Faircloth. Doc 248 - Pg 52. That was what he knew when cops arrived. The Court sustained defense counsel's objection that the defense opened the 403

door, because the defense did not open that door and the government's questions concerning the warrant were far more prejudicial than probative. Doc 248 - Pg 52,53.

The defendant was asked by the government attorney if he started to flee. Doc 248 - Pg 56. The defendant answered, "No, sir, I did not" at least two times. Doc 248 - Pg 56. The government ascertained that defendant moved everything in the house on the 14th of May so the firearm was in that house for seven days; isn't that right? Doc 248 - Pg 57. Defendant's response was "I can't tell you how long it was in the house." Doc 248 - Pg 57. Defendant testified he had no idea how long the gun was in the house and that he had reason to believe that people were in the house. Doc 248 - Pg 58. See also Doc 156 - Pg 232. See neighbor Hendrick's comments concerning his daughter's observations of two police officers entering the Faircloth house two weeks earlier. Doc 156 – Pg 232. Defendant then testified when he found the gun on May 21, 2014, he picked it up he walked straight over to his neighbor's house within 4 minutes of finding it. Doc 248 - Pg 58. As a convicted felon, Faircloth testified he knew it was unlawful to possess a firearm. Doc 248 - Pg 59. He didn't recharge the phone because the law requires immediacy. Doc 248 - Pg 60. Faircloth also knew similarly that it was unlawful to possess ammunition. Faircloth testified the purse he found was the firearm in was not his wife's purse. Doc 248 - Pg 60. Faircloth took the firearm to his neighbor's

yard in the state in which he found it. Doc 248 - Pg 61,62. He placed the firearm in his back pocket. Faircloth testified that he couldn't call his wife or law enforcement because his phone was dead. Doc 248 - Pg 63. Faircloth testified his intention was to give the loaded firearm to the neighbor across the street who he had met on one prior occasion, tell him he was a convicted felon, and to please send the firearm to the police. Doc 248 - Pg 64.

STANDARDS OF REVIEW

1. The Standard for Review as to the interpretation of Title 18, United States Code, §922(g)(1) discussed in Point I of Appellant's Brief is the plain meaning of the law embodied in Title 18, United States Code, §922(g)(1). Puello v. BCIS, 511 F.3d 324, 327 (2nd Cir. 2007); see also United States v. Whitley, 529 F.3d at 156.

2. The Standard for Review as to the District Court's evidentiary rulings related to Points I, II, III and IV of this Brief is that the District Court committed "plain error," not harmless error, and such error was prejudicial and detrimentally affected the substantial rights of Michael Terrill Faircloth, United States v. Walker, (1971) 146 U.S. App. D.C. 95, 449 F.2d 1171. United States v. West, 142 F.3d 1408, 1414 (11th Cir. 1998).

3. The Court of Appeals reviews a District Court's decisions related to Point V of thie Brief *de novo* in determining the sufficiency of the Rule 29 evidence challenge. United States v. Piesak; (2008, CA 1 Mass) 521 F.3d 41; see also United States v. Lopez-Patino, (2004, CA 9 Cal) 391 F.3d 1034.

SUMMARY OF THE ARGUMENT

Point I – The District Court Judge committed prejudicial error by sustaining the government's objection to the defendant's jury instruction that when dealing with possession of a firearm by a convicted felon in this case that such judge read to the jury the defense instruction relating to the legal concept of "innocent transitory possession" which the judge denied thereby abusing the court's discretion.

Point II – The District Court Judge committed prejudicial error in allowing a government witness to wrongfully testify as to the manufacture location of the firearm of a convicted felon in this case over the defense objections of hearsay and confrontation.

Point III – The District Court Judge committed prejudicial error in allowing Exhibit 4 to be admitted into evidence over the objections of defense counsel on the grounds that it was hearsay.

Point IV – The District Court Judge abused her judicial discretion and committed prejudicial error by ruling over defense objection that it was appropriate to read the government proposed flight instruction to the jury finding that the evidence could lead a reasonable jury to conclude that the defendant fled to avoid apprehension for the charged offense.

Point V – The District Court Judge committed prejudicial error in denying the defense counsel's Rule 29(a) Motion for Judgment of Acquittal based upon the insufficiency of the evidence.

Point VI – The defendant contends that he did not receive effective assistance of counsel as required under Article VI of the United States Constitution and therefore was denied a fair trial.

ARGUMENT AND CITATIONS OF AUTHORITY

POINT I

THE DISTRICT COURT JUDGE COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION IN SUSTAINING THE GOVERNMENT'S OBJECTION TO THE READING OF THE DEFENSE INNOCENT TRANSITORY POSSESSION JURY INSTRUCTION AND IN READING TO THE JURY THE PATTERN JURY INSTRUCTON 34.6 DEALING WITH POSSESSION OF A FIREARM BY A CONVICTED FELON.

The District Court Judge maintained that the 11th Circuit has already held that its pattern instruction for Section 922(g)(1) is a correct statement of the law, and that by using this instruction, the District Court would properly advise the jury so that they understood the legal issues and that she basically found support for that legal position in the Phillips Case. Doc 248 - Pg 17. See United States v. Phillips, 202 F. Appx 442, 445 (11th Cir. 2006).

Defense counsel emphatically maintained that there were (3) three elements involved that should be embodied in the reading of the instruction to the jury, to wit: "(1)….Possession is one element; (2) the affecting of interstate or foreign commerce was a second one; and, …being a convicted felon was the third one." Doc 248 - Pg 17. Defense Counsel, in making its argument, relied on the case of United States v. Mason, 233F. 3d 619 (District Court Circuit, 2000).

Defense counsel submitted to the Court an alternative jury instruction to

34.6 as is more particularly set forth in the Appendix to this Brief. The jury never had the opportunity to consider it.

The Defense contended that Faircloth's possession of the weapon was largely a question of what the defendant did with the firearm once he came into possession of it, and, that Mr. Faircloth intended by his actions in crossing the street in front of his house to the other side to give it to his neighbor, Mr. Hendrick. Faircloth's express purpose in giving the firearm to his said neighbor, was to give it to law enforcement. Doc 248 – Pg 38,41,42.

The defendant testified that within 4 minutes of finding the weapon, he knew that as a convicted felon he was not allowed to possess a firearm. Doc 248 - Pg 37. He could not telephone his wife because his cell phone was dead and not useable. Doc 248 - Pg 37. His intention, as testified, was clear in that he reasoned to turn the weapon over to neighbor, Hendrick, for him to give the firearm to law enforcement. Doc 248 - Pg 38. The weather must have been warm because he did not have a shirt on and wore shorts and flip flops on his feet. Doc 248- Pg 38. He neither concealed the weapon nor walked to the Hendrick yard with the weapon in his hands. If he had gone to such neighbor with the firearm in his hands, his intentions could have been misunderstood and scare the Hendrick children in the yard. Doc 248 - Pg 38. Therefore, he placed the firearm in the back pocket of his shorts, but not for the purpose of concealing the firearm. Doc 248- Pg 38. Faircloth

testified, "all I wanted to do was get rid of it." Doc 248- Pg 39. The government contended that the defendant crossing the street with a plan to turn the firearm over to the neighbor was not action to turn the weapon over to the police. Counsel disagrees because such explanation clearly makes sense. The evidence was clear about defendant's intent to give the weapon to the neighbor to give to law enforcement. The "actions" taken by Faircloth were putting the newfound firearm in his back pocket and crossing the street to his neighbor's yard to give him the firearm for the express purpose of giving the firearm to law enforcement. Faircloth's "actions" in fulfilling his intent to give up the firearm would have no other purpose, given the fact that he viewed the immediacy to do so important in the law. Doc 248 - Pg 38. The completion of Faircloth's intent and actions in pursuant of such intent could not be fulfilled because of the arrival and intervention of the Marshall's caravan of vehicles and personnel just feet away from him and his neighbor, "preventing" Faircloth from further action to complete his avowed intention. Doc 248 - Pg 40. Counsel believes that the government actions in this regard should not be allowed or accepted as justification for the conclusory proposition that neither Faircloth nor his neighbor completed the required actions of turning the firearm over to law enforcement. Defense counsel stated "and the 11th Circuit, I think, has five, six or seven cases involving this defense and they__ __ and Mason accepted it. The 11th Circuit, on five, six or seven occasions, has

never said no." Doc 248 - Pg 79. "The Court: I understand." Doc 248 - Pg 79. "Mr. Hollander: I'm sorry. Have they?" Doc 248 - Pg 79. "The Court: No. I understand." Doc 248 - Pg 79. Defense Counsel submitted that the Mason Instruction should be read to the jury and if the government didn't think the intent was to get the firearm to law enforcement, your instruction would cover that.

The Court stated in United States v. Mason, 233 F.3d 619, 624 (D.C. Cir. 2000) "There are two general requirements that must be satisfied in order for a defendant to successfully invoke the innocent possession defense. The record must reveal that (a) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory – i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." In particular, "a defendant's actions must demonstrate that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct." Logan v. United States, 402 A2d 822, 827 (D.C. 1979). The Court then stated "When these requirements are met, possession is excused and justified as stemming from an affirmative effort to aid and enhance social policy underlying law enforcement." Hines v. United States, 326 A2d 247, 248 (D.C. 1974). The Court went on to say "it is well established that a defendant is entitled to an instruction on a defense theory if it has

a basis in the law and in the record." Quoting Hasbrouck v. Texaco, Inc., 842 F2d 1034, 1044 (9th Cir, 1987), aff'd, 496 U.S. 543, 110 S. Ct. 2535, 110 L.Ed. 492(1990). The Court held that this is precisely the kind of dispute that should be up to the jury. The jury should have been allowed to access the evidence and determine, in light of the facts and circumstances presented, whether Faircloth took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible and without getting himself killed in the process. The importance of this is that factual questions is the sole province of the jury. United States v. Antonucci, 663 F. Supp. 243, 245 (N.D. 111. 1987).

The Court agreed that possession was transitory under the circumstances. The cellphone was dead and the defendant had the intent to turn the firearm over. Doc 248 - Pg 81. Notwithstanding the foregoing, the District Court Judge held there were no actions. "So again, I do not believe that the third element has been met." "….therefore I am going to sustain the government's objection to the court reading the defense of innocent transitory possession." Doc 248 - Pg 82. Thereafter, the court read the jury instruction to the jury which reflected that there were only two elements the jury had to find, rather than giving the jury the instruction containing the third element, as stated herein above and allowing the jury to make the determination as to whether the defense had proven there was innocent transitory possession.

A defendant is constitutionally entitled to present a defense. "The defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient or of doubtful credibility." Lively, 803 F2d at 1126 (quoting United States v. Young, 464 F2d 160, 164 (5th Cir. 1972) (emphasis in Lively)." United States v. Opdahl, 930 F2d 1530, 1535 (11th Cir. 1991). The government mentioned to the District Court Judge in this case that "there is good reason to reject the defense as a matter of law." Doc 141, Government's Objection - Pg 6. The 11th Circuit, while assuming the Defense of Innocent-Transitory-Possession existed had yet to decide whether the facts involved supported such a defense. United States v. Palma, 511 F3d 1311 (11th Cir. 2008); United States v. Moussaoui, 368 Fed. Appx. 970 (11th Cir. 2010); United States v. Giles, 343 Fed. Appx. 479 (11th Cir, 2009)("We have neither recognized nor rejected the availability of an Innocent-Transitory-Possession defense to §922(g)(1) Id at 481.

Mr. Faircloth, in trying to, with immediacy, rid himself of the firearm, was also (1) Complying with Florida Statute §705.102 by reporting his finding of lost or abandoned property; and, also(2) Compling with Florida Statute §790.174 by not leaving on his premises a loaded firearm to which a reasonable person could conclude a minor could have access to. Mr. Faircloth, has argued, by attempting to comply with such Florida Statutes was entrapped by estoppel which "is a viable

defense to §922 cases. "United States v. Thompson, 25 Fed 1558, 1564 (11th Cir. 1994).

The jury never heard the defense of Innocent-Transitory-Possession. The jury could have and should have been permitted by the District Court Judge to evaluate the facts to determine the viability of such defense in this case based on the facts.

POINT II

THE DISTRICT COURT JUDGE COMMITTED PREJUDICIAL JUDICIAL ERROR WHEN SHE WRONGFULLY OVER-RULED DEFENSE OBJECTIONS OF HEARSAY AND CONFRONTATION GROUNDS TO THE TESTIMONY OF GOVERNMENT WITNESS JEFFREY BURT CONCERNING THE LOCATION OF WHERE THE SUBJECT FIREARM IN THIS CASE WAS MANUFACTURED

During the course of the government putting on its case, the Assistant United States Attorney called Jeffrey Burt, a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives in Tampa, Florida, to the witness stand. Doc 156 - Pg 265. The government through this witness showed him Exhibit 4, which was the Ruger P95 9mm pistol that witness Burt had examined in December of 2014. Doc 156 - Pg 268. He testified that he conducted research to determine the place and manufacturer of this pistol. Doc 156 - Pg 265. When the Assistant U.S. Attorney asked Mr. Burt, "Where was it manufactured?" defense counsel objected on the grounds of hearsay and confrontation, because witness Burt was simply

referring to something he read somewhere in a database or somebody told him. Doc 156 - Pg 269. The Court advised the Assistant U.S. Attorney to lay his foundation. Witness Burt then testified as to how he determined where the gun was manufactured; by physically examining the firearm and noting any markings on it. Doc 156 - Pg 270. He testified: "This particular firearm I noticed Ruger P95 which stands for the model on it and that there was a serial number stamped on the handle." Doc 156 - Pg 270. He also testified to his noticing markings on the other side of the pistol marked Prescott, Arizona with the name Ruger also marked. Doc 156 - Pg 270. He further testified he went to a database maintained by ATF and that ATF has databases containing business records, place of manufacture and sometimes variances. Doc 156 - Pg 270. "…at that point I went into the database and researched Ruger." Doc 156 - Pg 271. The U.S. Attorney then asked witness Burt: "Did you review where Ruger manufactures its firearms?" to which witness Burt replied, "Yes". Doc 156 - Pg 271. Once again the U.S. Attorney queried, "Where does it manufacture its firearms?" Doc 156 - Pg 271. Faircloth's attorney objected on "hearsay and confrontation" grounds. Doc 156 - Pg 271. The Court indicated to the government attorney, I believe you indicated that he testified as to where the research comes from and stated it was from business records of ATF. Doc 156 - Pg 272.

Defense Counsel then, in repeating his objection to allowing this witness to

testify to where the gun was manufactured, stated: "To do that, he simply is relying on what he read or what he read somewhere in a database in ATF. If it's an ATF database, that's relying on hearsay. And they haven't shown it's not hearsay, nor an exception to the hearsay requirement, number one. Number two, and separately, we don't know anything about who put that information in there, that person is not testifying and that is the confrontation issue separate from hearsay." Doc 156 - Pg 272,273. The Court then, in helping the government, queried: "What about the exception to the hearsay rule?" Doc 156 - Pg 273. Government Counsel replied, these are business records and ATF maintains these in the normal course of business. Doc 156 - Pg 273. Defense Counsel stated: "But he's not a records custodian." The District Court Judge then overruled defense counsel's objections on the above stated two grounds.

Under the 6th Amendment to the United States Constitution an accused has the right to confront the witnesses against him. Defense Counsel was quite correct when he stated, We don't know anything about who put the information in the database relied upon by Mr. Burt when he went to the ATF database. Doc 156 - Pg 272, 273. That opportunity and constitutional right was surreptitiously denied to Faircloth by the Judge who, in reality, did not specifically address her reasons in denying the defendant's objection or addressing the lack of records custodian testifying.

However, under the 6th Amendment to the United States Constitution, the defendant has the right to confront such person about what he read. Further, Rule 801(c) of the Federal Rules of Evidence states: "Hearsay means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." However, there are exceptions to the Rule against Hearsay, under Rule 803(6) one such exception pertains to Records of a Regularly Conducted Activity, often which is referred to as the Business Exception to the Hearsay Rule. Such section states: "A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by-or from information transmitted by someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicates a lack of trustworthiness." Federal Rules of Evidence, Rule 803(6). Jeffrey Burt was not a custodian of records or other qualified person who could satisfy the criteria of the Business Records Exception and neither he nor anyone else testified in a manner

which satisfied the criteria specified to be such an exception to the hearsay rule set forth in Evidence Rule 801(c). Therefore, the District Court Judge committed judicial error denying defense counsel's objection on hearsay and confrontation grounds. That being said, Jeffrey Burt's testimony as to where the firearm was manufactured must be stricken with the result that the portion of charging Indictment and Stipulation requiring the weapon to have traveled in Interstate Commerce cannot be proven. This portion of the trial testimony constitutes sufficient basis at least for Reversal of the Judgment and Dismissal of this case.

POINT III

THE DISTRICT COURT JUDGE ERRONEOUSLY AND TO THE PREJUDICE OF DEFENDANT ADMITTED EXHIBIT NO. 4 INTO EVIDENCE OVER THE OBJECTION OF DEFENSE COUNSEL ON HEARSAY GROUNDS ALL TO THE PREJUDICE OF DEFENDANT

Rule 801 of Federal Rules of Evidence, Federal Criminal Code and Rules, 2017 Revised Edition states: "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. A 'statement' means a person's oral assertion, written assertion or non-verbal conduct, if the person intended it as an assertion." Officer William Rosario was testifying for the government and on direct examination after testifying that he was ultimately passed a firearm in connection with the apprehension of Michael Terrill Faircloth.

Doc 156 – Pg 218, 219. He testifies that the gun and ammunition and the magazine were in the bag marked as Exhibit 4. He advised the Court that he created the label on the bag to identify the evidence that's inside the bag. Doc 156 - Pg 220. Upon the Assistant U.S. Attorney moving for the admission of the bag in evidence, defense counsel objected as being hearsay, an out-of-court statement. Doc 156 - Pg 220. The Court ruled "Sustained at this point, go ahead." Doc 156 - Pg 220. The witness then went on to say: that the firearm was in the same or substantially similar to when it was passed to him; that he got the information because he was on-scene of the incident and personally observed all that was on the label regarding who the officer was that handed him the firearm. Doc 156 - Pg 221. The Assistant U.S. Attorney then asked Officer Rosario if all the information on the label was true, accurate and of his own personal knowledge to which in each instance such officer replied, "yes". Doc 156 - Pg 221. Upon the Assistant U.S. Attorney moving the bag in evidence, defense counsel stated "same objection, Judge". Doc 156 - Pg 221. The District Court Judge overruled defense counsel's objection and the government's Exhibit No. 4 was admitted into evidence. Under cross-examination, Officer Rosario testified by the time he arrived on scene he never saw Mr. Faircloth in possession of the firearm and did not even see the firearm at the scene until it was handed off to him by Officer Fordham. Doc 156 - Pg 223. He further testified on cross-examination, that when the ammo, firearm and magazine were

handed to him they were in a brown bag, already open, and it wasn't a sealed or secured bag. Doc 156 - Pg 223.

The label on the bag is a statement that is hearsay evidence, because it reflects that it contains information which is products of out-of-Court statements- presumably made by Officer Fordham to Officer Rosario. This was a judicial error and the bag (containing the ammo, firearm and magazine) identified as Exhibit No. 4, should not have been moved into evidence. This is a reversible error by the District Court Judge and the case by reason therefore must be dismissed in the absence of key pieces of evidence in Exhibit 4.

POINT IV

THE DISTRICT COURT JUDGE ABUSED HER DISCRETION AND COMMITTED JUDICIAL ERROR IN READING TO THE JURY A GOVERNMENT PROPOSED FLIGHT INSTRUCTION FINDING THAT THE EVIDENCE COULD LEAD A REASONABLE JURY TO CONCLUDE THAT THE DEFENDANT FLED TO AVOID APPREHENSION FOR THE CHARGED OFFENSE OVER OBJECTION OF DEFENSE COUNSEL.

The facts presented to the jury as testimony revealed that the defendant wore jean shorts, no shirt, and flip flops. Doc 156 – Pg 156-161. This testimony by several officers was reinforced by the defendant himself testifying to such facts. Doc 248 – Pg 38. The defendant testified, he had taken two steps – only because he thought they were going to shoot him.

Doc 248 – Pg 40. In addressing the weapon, the defendant testified "all I wanted to do was get rid of it." Doc 248 – Pg 39. Many cars, trucks and SUVs were all of a sudden converging on his position. In addressing his mentality at the time that all these cars, trucks and SUVs converged at his location, Faircloth testified they had pulled into his front yard, almost hit his house and "I thought we going to get run over." Doc 248 – Pg 40. Heughlin testified he was in the lead (first) vehicle and that his vehicle stopped in the neighbor's yard, after which he exited and observed Faircloth take a couple of steps back and then toss the firearm. Doc 156 – Pg 160-161. Heughlin testified when he got out and looked at him he kind of stuttered – I don't think he expected us coming up that close on him. Doc 156 – Pg 162-163. "He kind of 'backed up', reached in the small of his back, tossed the firearm." Doc 156 – Pg 165. "We hopped out, couple steps, tossed the firearm, took a couple of steps, gave up, placed him in cuffs." Doc 156 – Pg 176. It is a fact that at no time did Faircloth attempt to flee or resist arrest. Did Faircloth back up a couple steps because he was shook and thought Heughlin's vehicle was going to hit him? Perhaps, he did stutter. Several officers, and Faircloth himself in describing what he was wearing noted Faircloth wore flip flops. Doc 248 – Pg 38. Anyone who had ever worn flip flops knows and understands that you cannot run with them and no officer

testified that Faircloth tried to run, nor resisted arrest or did anything but comply with Heughlin's commands to him. While there is a conflict between Heughlin and McCreary's testimony, McCreary's testimony that Faircloth moved six feet then 15 yards is too different to be relied on. Common sense was not a strong point in the application by the District Court Judge that day. Heughlin was the first officer on scene to reach Faircloth and closest to him since it was his responsibility to take Faircloth into custody and he was in the lead vehicle. Heughlin's testimony largely tracks that of Mr. Faircloth. The District Court Judge in citing the 11th Circuit case of United States of America v. Willie James Haugabraok, 13-11102 (11th Cir. 2014), decided in 2014 basically held that the flight instruction in question can be given where the evidence could lead a reasonable jury to conclude that the Defendant fled to avoid apprehension for the charged crime. Doc 248 – Pg 13. However, there was no flight to avoid apprehension by Faircloth. It was an abuse of the Court's discretion for the Court to allow flight to be introduced to the jury where none existed. The testimony of Heughlin and the Defendant do not suggest either that Defendant was attempting to flee or avoid apprehension. If anything, the evidence suggests and confirms that the Defendant was "compliant". The Defendant in fact thought the officers were going to shoot him because he was a convicted felon and that is why he got rid of the gun

right away. Doc 248 – Pg 40-41.

The 11th Circuit 2008 case of United States v. Williams, 541 F3d 1087, @ 1089 held that District Court's jury instructions are reviewed under an abuse of discretion standard. The 11th Circuit also held in United States v. Prather, 205 F3d 1265, 1270 (11th Cir. 2000) that they review the legal correctness of a jury instruction de novo but defer to the District Court on questions of phrasing absent an abuse of discretion. The facts of the instant case before this Court are totally distinguishable from the Haugabrook case and the Williams case. The 11th Circuit held in United States v. Fulford, 267 F3d, 1241, 1245 (11th Cir. 2001) that we examine whether the charge sufficiently instructed the jurors so that they understood the issues and were not misled. The 11th Circuit reviews the reasonableness under a deferential abuse of discretion standard. Peugh v. United States, 133 S.Ct. 2072, 2080 18 L.Ed. 84 (2013). While the party challenging the sentence has the burden of establishing its unreasonableness, the ruling of the Court in this case in giving the flight instruction seriously affects the fairness, integrity and public reputation of judicial proceedings. The fact remains there was neither flight nor resistance in this case but rather the government's successful attempt in creating the illusion for the District Court Judge that the defendant was trying to escape which under the facts clearly did not happen.

Under the facts of this case if the defendant had attempted to flee, he would have been immediately shot dead. Heughlin, who was first on the scene in defendant's arrest testified that when the defendant looked at them, almost in shock, he took a couple of steps back, then reached behind his back and tossed the firearm just a couple feet away. Doc 156 – Pg 176. He did not testify as to any flight or resistance by Faircloth. He testified that from the time he showed up to the time Faircloth was placed in custody was only seconds. Doc 156 – Pg 165. The shock and two steps back before Faircloth tossed the firearm could logically be attributed to the fact the Heughlin's vehicle came to a stop in the neighbor's yard, close enough that all the cars, trucks and SUVs converged on him and the neighbor. Doc 248 – Pg 40. Faircloth testified they had pulled into his front yard, almost his house and "I thought we were going to get run over." Doc 248 – Pg 40. "I thought they were going to shoot me." Doc 248 – Pg 40. Throughout the testimony the fact that the defendant wore flip flops was frequently mentioned. However, it is relevant that neither the government nor the District Court Judge considered the obvious difficulty that any defendant would have had in trying to run away wearing flip flops had he attempted to do that which he did not do.

The facts of the arrest of Michael Terrill Faircloth did not warrant the

District Court Judge in giving the flight instruction. Yes, the enormity of the police arrival surprised him, but he did not try to flee, and threw out the firearm to the ground. No act on his part represented his attempt to flee the scene. The suggestion of the District Court Judge that a reasonable jury could conclude Faircloth was attempting to flee is ludicrous and contrary to the testimony of the two people closest to the scene, Sgt. Heughlin and Faircloth.

POINT V

THE DISTRICT COURT JUDGE COMMITTED PREJUDICIAL ERROR IN DENYING DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF AQUITTAL PUSUANT TO RULE 29(a) BASED ON THE INSUFFICIENCY OF THE EVIDENCE

Once the government rested its case, the Court asked the defense if it had any motions to make. The defense then made a Rule 29(a) Motion for a Judgment of Acquittal Based on Insufficiency of the Evidence. Period. Doc 248 - Pg 22. Rule 29(a) before Submission to the Jury states: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction…." Federal Rules of Criminal Procedures, Rule 29 (a). Counsel incorporates in this Point V all case law and arguments set forth in

Points I, II and IV of this Brief with the same force and effect as if repeated herein verbatim. When defense council made its Rule 29a Motion the District Court Judge stated: "Viewing the evidence in the light most favorable to the Government, which is what the Court has to do at this time pursuant to Rule 29(a), the Court finds there is sufficient evidence for any rational juror to conclude that Mr. Faircoth's guilt as to each element of the criminal charge against him beyond a reasonable doubt. Therefore, Court is denying the Rule 29(a) Motion for a Judgment of Acquittal." Doc 248 - Pg 22. However, clearly the evidence submitted to the jury was insufficient and incorrect. It was insufficient in the sense that the jury was never allowed, based on the testimony of the prosecution witnesses and the defendant to hear the jury instructions prepared by defense counsel reflecting the legal concept of "Innocent Transitory Possession", in determining whether the defendant satisfied the requirements of law as to whether he was a convicted felon in possession of a firearm as set forth in the Indictment and Stipulation pertaining thereto. The District Court Judge abused her discretion in preventing the jury from receiving this knowledge of the facts and law relating to said legal concept.

Secondly, the case shouldn't have gone to the jury over the defendant's Rule 29(a) Motion because the court wrongfully allowed evidence to be submitted of the location of where the firearm was manufactured over the hearsay and confrontation objections of defense counsel, which if such objections had been sustained by the

District Court Judge, the government could not have proved that the weapon had traveled in Interstate Commerce. Lastly, the District Court Judge, by giving a flight instruction to the jury when there was at best a conflict between Sergeant Heughlin and Officer McCreary as to whether there was any flight or resistance, wrongfully led the jury down the path of believing that the defendant was trying to flee the scene and resist arrest when the evidence was clear as to how compliant the defendant was with directions given by law enforcement, in particular, Sgt. Heughlin.

The Rule 29(a) Motion should have been granted.

POINT VI

THE DEFENDANT CONTENDS THAT HE DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF LEGAL COUNSEL IN THIS CASE

The basis for the defendant's contention that he did not receive the effective assistance of counsel at trial by the attorney was threefold:

(1) His attorney failed to call as witness on his behalf, his prior attorney, named Zaremba and said attorney's investigator as witnesses on his behalf at trial. Doc 248 - Pg 51. Had his attorney done so it would have lent credence to the testimony of defendant/Attorney Hollander, that the reason the defendant did not know there was a warrant out for his arrest was because he called his prior attorney who had

his investigator check it out and advised defendant that no warrant for his arrest was issued. Doc 248 - Pg 51.

(2) The second basis in support of this Point VI is that his attorney at trial waived his making of a closing statement to the jury. The judge did ask defendant whether he was in agreement with that decision and the defendant said he was. However, closing argument is the last opportunity defense counsel has to talk directly to the jury before they deliberate so that this is a critical stage of a trial and an opportunity for counsel to respond to the Government's closing argument as well as tie pieces of evidence together by going over favorable testimony which supported the defense case.

(3) Lastly, there was a note the defendant claims he wrote to his wife and left at his house moments before he crossed the street to give the firearm to his neighbor. His attorney did not introduce such note into evidence nor question the defendant about it at trial. The defendant contends that note further supported not only his intentions as to the firearm, but also his actions in support of such intentions. Thus, defendant contends that such note, had it been introduced into evidence, would have been further evidence of defendant's intention to turn the firearm over to law enforcement. Defendant further contends that such action, could have been used in arguments to the District Court Judge that such note further supported the "innocent transitory possession" theory set forth in Point I of this brief.

The right to counsel under the Sixth Amendment to the United States Constitution, prevents the states from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). There are apparently two components to the test: deficient attorney performance and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question. In order to establish prejudice resulting from attorney error the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668 @ 694 (1984). But for the three errors, defendant contends the jury verdict would have been different. It was only at the end of Faircloth's sentencing hearing that Faircloth related to the judge the existence of the note to his wife. The District Court Judge received and read it to herself but made no further comment about it. Such note was never received in evidence at trial. Defendant Faircloth believes the foregoing caused him to be denied a fair trial, guaranteed by Article VI of the United States Constitution.

CONCLUSION

Premised on the foregoing facts in the record, argument and authorities in support of argument of MICHAEL TERRILL FAIRCLOTH, the District Court Judgment and Commitment Order and the sentence received by defendant in this case should be remanded back to the District Court for a new sentencing and/or relief consistent with that relief sought by this appeal in Points I, II, III, IV, V and VI of this Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief Submitted on behalf of the Appellant, MICHAEL TERRILL FAIRCLOTH has been furnished by U.S. Mail this 8th day of November, 2017 to:

MICHAEL TERRILL FAIRCLOTH
37298-004
FDC MIAMI
FEDERAL DETENTION CENTER
P.O. BOX 019120
MIAMI, FL 33101

David Rhodes, Chief, Appellate Division
U.S. Attorney's Office – Main Office
400 North Tampa Street, Suite 3200
Tampa, Florida 33602

Charles Schmitz
Assistant U.S. Attorney
U.S. Attorney's Office
2110 First St., Suite 3-137
Ft. Myers, FL 33901

Linda McNamara, Assistant U.S. Attorney, Appellate Division
U.S. Attorney's Office – Main Office
400 North Tampa Street, Suite 3200
Tampa, Florida 33602

and that the uploading of Appellant's Brief to the Court of Appeal's web site at www.ca11.uscourts.gov was completed on this 8th day of November, 2017 at 3 p.m. in compliance with 11th Cir. Rule 31-5.

The Law Firm of
RICHARD D. LAKEMAN- Pg.A.
Attorney for Appellant,
MICHAEL TERRILL FAIRCLOTH
Post Office Box 101580
Cape Coral, Florida 33910
Tel: 239-645-3544
RDLakeman@gmail.com

BY:
Richard D. Lakeman, Esq.
Trial Counsel
FBN 0010995

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 17-12998-HH

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MICHAEL TERRILL FAIRCLOTH
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

REPLY BRIEF OF APPELLANT

KENT & MCFARLAND
ATTORNEYS AT LAW

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
904-398-8000
904-348-3124 Fax
kent@williamkent.com

Counsel for Appellant Faircloth

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

Bagge-Hernandez, Michael – Assistant United States Attorney

Bentley, A. Lee, III – former United States Attorney

Calderone, Tama – former Assistant United States Attorney

Chappell, Hon. Sheri Polster – United States District Judge

Faircloth, Michael – Defendant/Appellant

Frazier, Hon. Douglas N – United States Magistrate Judge

Gershow, Holly L. – Assistant United States Attorney

Hollander, Lee – Counsel for Faircloth, terminated

Kent, William Mallory – Appellate Counsel for Faircloth

Lakeman, Richard D. - CJA appointed counsel for Appellant Faircloth

Lopez, Maria Chapa, United States Attorney

Lyons, Christopher G. – Counsel for Faircloth, terminated

McCoy, Hon. Mac R. – United States Magistrate Judge

McNamara, Linda Julin – Assistant United States Attorney, Deputy Chief, Appellate Division

Molloy, Douglas – Counsel for Faircloth, terminated

Muldrow, Stephen – Acting United States Attorney

Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division

Rhodes, Yvette – Assistant United States Attorney

Schmitz, Charles D. – Assistant United States Attorney

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

ARGUMENT

WHETHER THE COURT ERRED IN REFUSING FAIRCLOTH'S THEORY OF DEFENSE INSTRUCTION ON INNOCENT TRANSITORY POSSESSION OF A FIREARM?

The Government's Brief argues first that Faircloth's requested innocent transitory possession jury instruction was not a correct statement of the law, and second that even if the district court recognized the defense, the evidence here did not support giving the instruction. The government argues that this Court "has never recognized the innocent-transitory-possession defense as a legitimate defense to possessing a firearm as a convicted felon." [Government's Brief, pg. 6]. In *United States v. Palma*, 511 F.3d 1311 (11th Cir. 2008), this Court stated that the existence of a temporary innocent possession defense is a question of first impression, but refused to reach the question whether the defense is available to a felon charged with possession of a firearm because the facts of that case would not have supported such a defense. *Palma* at 1316. Likewise, in *United States v. Warwick*, 503 F. App'x 766 (11th Cir. 2013); *United States v. Moussaoui*, 368 F. App'x 970 (11th Cir. 2010); *United States v. Giles*, 343 F. App'x 479 (11th Cir. 2009); *United States v. Harkness*, 305 F. App'x 578 (11th Cir. 2008); and *United States v. Webster*, 296 F. App'x 777 (11th Cir. 2008) this Court has refused to reach the question of whether a temporary innocent possession defense is available because the facts of those cases have not satisfied the thee elements of *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir.

2000)(permitting the defense only when (1) the firearm was attained innocently; (2) the possession was transitory; and (3) the defendant had the intent to turn the firearm over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct.). Faircloth's case is therefore a case of first impression for this Court as, unlike in the above cited cases, here the testimony adduced at trial supported all three elements set forth in *Mason*.

The Government Brief cites dicta in *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001) which questions the authority of the courts to recognize the affirmative defense of necessity not provided by the statute. However, in *Oakland Cannabis Buyers' Co-op.*, the Court went on to acknowledge that the Court on other occasions has discussed the possibility of such a defense without rejecting it. *Oakland Cannabis Buyers' Co-op.*, at 490 (citing *United States v. Bailey*, 444 U.S. 394, 415 (1980). The Court's questioning of the specific affirmative defense of necessity in that case does not preclude, as the government suggests, courts from recognizing valid affirmative defenses in other cases. Indeed, the Supreme Court in *Dixon v. United States*, 548 U.S. 1 (2006), described the courts' role in recognizing and applying common law affirmative defenses: "federal crimes are solely creatures of statute, and therefore [] we are required to effectuate the duress defense as Congress may have contemplated" *Dixon v. United States*, 548 U.S. 1, 12 (2006) (internal citation omitted). Furthermore, the government's

argument that 18 U.S.C. 922(g) is a strict liability offense and requires only "knowing" not "willful" possession of a firearm has no bearing on the applicability of affirmative defenses to the crime.

The Government Brief argues that "policy considerations counsel against this affirmative defense." [Government Brief, pg. 10]. The government's argument in this regard amounts to a bald-faced attempt to reduce the effort required by the government in investigating and prosecuting cases despite the risk of wrongly convicting defendants. Cases like *Mason* demonstrate the need for these types of affirmative defenses. If the government's suggested policy were implemented, defendants in Mason's position are expected, by law, to leave the gun at the school rather than do the right thing.

Finally, the Government Brief argues that the facts of this case do not support giving the innocent transitory possession instruction. The government argues that Faircloth did not take adequate measures to rid himself of possession of the firearm as promptly as reasonably possible. The government cites *United States v. Jackson*, 598 F.3d 340 (7th Cir. 2010) for the proposition that Faircloth's action was not immediate enough, but the facts of that case are vastly different than the facts of Faircloth's. In *Jackson*, the defendant asked his mother to find someone else to turn the gun over to law enforcement, as series of events which would not immediately result in the gun being removed from the convicted felon's possession. Here,

Faircloth, upon innocently finding the gun and realizing that his cell phone was dead, immediately walked out of his house and across the street to give the gun to a neighbor to give to the police. (Doc. 248, pp. 37-41). The government argues that this was not a reasonable course of action, and instead, Faircloth should have left the gun where he found it and asked to borrow a phone from his neighbor. The purpose of section 922(g), as explained in the Government's Brief, is to protect the public from the potential danger of convicted felons possessing guns. *See United States v. Gilbert*, 430 F.3d 215 (4th Cir. 2005). The government's proposed "reasonable" course of action of leaving the gun unattended in the house and asking the neighbor to borrow a phone to call law enforcement would necessarily result in a potentially dangerous situation in which law enforcement would be tasked with retrieving the gun from the convicted felon at his home rather than it be turned over to them by an innocent third party. Faircloth's chosen course of action, to get the gun out of his possession as quickly as possible by giving it to his neighbor, was clearly a reasonable choice, if not the most reasonable choice given the circumstances. Regardless of whether his course of action was the most reasonable at the time, the facts of this case, taken in the light most favorable to Faircloth, clearly entitle him to a jury instruction on his theory of defense and the district court abused its discretion by refusing to give it.

CONCLUSION

Michael Terrill Faircloth respectfully requests this Honorable Court vacate the judgment and sentence in his case based on the arguments above and remand the case for further proceedings consistent herewith.

Respectfully submitted,

KENT & McFARLAND
ATTORNEYS AT LAW

s/William Mallory Kent
William Mallory Kent
Florida Bar No. 0260738
24 North Market Street
Suite 300
Jacksonville, FL 32202
(904) 398-8000
(904) 348-3124 FAX
(904) 662-4419 Cell Phone
kent@williamkent.com

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This document complies with the word limit of Fed. R. App. P 32(a)(7)(B)(i) because this document contains 1,036 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Time Romans 14 point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/William Mallory Kent
William Mallory Kent