UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RANDY GEAN ELLIS, Defendant-Appellant.	**CA No. 99-30261**

APPELLANT'S OPENING BRIEF

STATEMENT OF ISSUES

I. WAS A FOUR-LEVEL INCREASE TO THE OFFENSE LEVEL UNDER U.S.S.G. §2K2.1(b)(5) UNSUPPORTED BOTH LEGALLY AND FACTUALLY, WHEN MR. ELLIS REMAINED IN JOINT CONSTRUCTIVE POSSESSION OF AN UNLOADED HUNTING RIFLE WRAPPED IN A TOWEL LAYING ON THE TOP SHELF OF HIS BEDROOM CLOSET AFTER HE FAILED TO APPEAR IN DISTRICT COURT FOR SENTENCING?

II. WAS AN EIGHT-LEVEL REDUCTION TO THE OFFENSE LEVEL REQUIRED UNDER U.S.S.G. §2K2.1(b)(2), BY MR. ELLIS BEING IN JOINT CONSTRUCTIVE POSSESSION OF AN UNLOADED HUNTING RIFLE OWNED BY HIS GIRLFRIEND FOR "LAWFUL COLLECTION PURPOSES," WHEN THERE WAS NO EVIDENCE THAT MR. ELLIS MADE ANY OTHER USE OF THE RIFLE, NOR INTENDED TO USE THE RIFLE FOR AN UNLAWFUL PURPOSE?

III. WAS A THREE-LEVEL INCREASE TO THE OFFENSE LEVEL UNDER U.S.S.G. §2J1.7 AND 18 U.S.C. §3147 UNSUPPORTED BOTH LEGALLY AND FACTUALLY WHEN THE OFFENSE WAS

COMMITTED AFTER REVOCATION OF RELEASE, RATHER THAN WHILE ON RELEASE?

IV. WAS A THREE-LEVEL INCREASE TO THE OFFENSE LEVEL UNDER U.S.S.G. §2J1.7 AND 18 U.S.C. §3147 UNCONSTITUTIONAL WHEN 18 U.S.C. §3147 WAS APPLIED WITHOUT NOTICE BY INDICTMENT AND TRIAL BY JURY?

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the judgment entered by the Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sentencing Mr. Ellis to 87 months incarceration. [ER 83; CR#104]. [1] The court sentenced Mr. Ellis for his convictions, following trial by jury, on charges of failure to appear, in violation of 18 U.S.C. §3146(a); assault on a federal officer, in violation of 18 U.S.C. §111(a)(1); and felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1). This appeal is limited to issues arising at sentencing.

Jurisdiction and Timeliness

This Court has jurisdiction pursuant to 18 U.S.C. §3742(a) and (e) and 28 U.S.C. §1291. The district court entered the judgment and commitment order on August 9, 1999, [CR#104]. Mr. Ellis filed his timely notice of appeal on August

[1] ER refers to Excerpts of Record; CR refers to Clerk's Record; SER refers to Supplemental Excerpts of Record (the presentence report and related sentencing materials submitted separately under seal herewith).

16, 1999, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, [ER 86; CR#106].

Course of Proceedings

On 20 October 1998, the grand jury returned a three-count, Superseding Indictment. [ER 1; CR#29]. Count 1 charged Mr. Ellis with failing to appear for sentencing scheduled before the Honorable Michael R. Hogan on July 16, 1997, following his felony convictions in *United States v. Randy Gean Ellis,* Case No. CR-96-60137-1. Count 2 charged Mr. Ellis with a simple assault on Deputy U.S. Marshal Jack Smoot on July 18, 1997, which occurred while Mr. Smoot was arresting Mr. Ellis for his earlier failure to appear at sentencing. Count 3 charged Mr. Ellis with possessing a Model 94 AE Winchester 30-30 caliber rifle on or about July 18, 1997, after having been previously convicted of the felony of grand theft. Id; see also [SER 30-31].

Mr. Ellis pled not guilty to these charges, [CR#31], and stood trial by jury commencing 17 March 1999, [CR#81]. The jury returned a verdict of guilty on all counts as charged[2] on 18 March 1999. [CR#85, #87]. After the verdict but prior to sentencing, the parties stipulated that Mr. Ellis would waive his right to appeal his convictions, but retain all appeal rights concerning sentencing issues, in exchange

[2] The parties stipulated that Count 2, assault on a federal officer, alleged acts constituting simple assault, which made it a misdemeanor. [ER 63].

for the Government's dismissal of a related case which this Court had previously reversed and remanded.[3] [ER 69; SER 30].

Pursuant to local rule, the probation office submitted a draft presentence report for the parties comments.[4] Mr. Ellis submitted a letter dated 23 May 1999 that outlined objections to the draft report and notified the United States Probation Officer and the Government that he needed to obtain transcripts of portions of the trial testimony to perfect his objections. [SER 1-4]. The court postponed sentencing to 20

July 1999 to allow Mr. Ellis time to perfect his objections. [CR#93].

On 7 July 1999, Mr. Ellis filed his first sentencing memorandum which provided the factual and legal support for his objections to the draft report, and which also set forth motions to prohibit the application of certain guidelines provisions to his case. [CR#98; SER 5-23]. The court postponed sentencing to 3 August 1999 to allow the United States Probation Officer adequate time to review

[3] This was the case for which Mr. Ellis had failed to appear for sentencing, CR-96-60137-1-MHR, which involved theft of dynamite from a Klamath Falls, Oregon, gravel pit. This Court remanded for retrial on 2 July 1998, CA No. 97-30238.

[4] The local rule calls for the parties to provide any objections concerning factual information, sentencing classifications, sentencing guideline ranges and policy statements contained in or omitted from the report to each other and to the probation officer. Objections which are not resolved through this informal review are brought to the court's attention for findings pursuant to Rule 32, FRCrP.

Mr. Ellis' objections prior to issuing the final presentence report, and to provide the Government time to review and respond to his objections. [CR#99].

The final presentence report, [SER 29-42] contained revisions that eliminated some of the guideline applications and calculations contested by Mr. Ellis, rendering those objections moot.[5] [SER 43].

The presentence report used the felon in possession of a firearm conviction, Count 3, as the primary offense, and grouped the remaining counts. [SER 33]. The presentence report applied the four-level increase specified by U.S.S.G. §2K2.1(b)(5) to the base offense level of 14 for felon in possession of a firearm, stating:

> Specific Offense Characteristics: Guideline §2K2.1(b)(5) directs us to increase the base offense level by four levels if the defendant possessed any firearm in connection with another felony offense. The defendant failed to appear which carries a statutory penalty of 10 years and is a Class C felony. [SER 33].

[5] The final presentence report identified the pertinent defense objections which remained at issue, after revisions to the draft report. [SER 43-44]. For that reason, the draft report is not included in the sealed, Supplemental Excerpts of Record. The defense also filed a second sentencing memorandum to incorporate by reference objections made to the draft report which remained applicable to the revised report. [CR#100].

Mr. Ellis first objected by way of his May 23rd letter to the United States Probation officer and the Government, summarily stating application of §2K2.1(b)(5) "is contrary to the facts and the law; the Government bears the burden of proof on this issue." [SER 2].

Mr. Ellis renewed his objection to the application of this guideline in his First Sentencing Memorandum, pages 8-14, setting forth facts from the trial transcripts and the controlling case law. [SER 5-11]. In brief, Mr. Ellis contended that the Government lacked any evidence to establish his constructive possession of the rifle potentially facilitated his failure to appear or emboldened him to commit that offense; thus, possession of the rifle was not "in connection with" the failure to appear offense, and application of §2K2.1(b)(5) was error. Id.

The Government urged application of this guideline. In its sentencing memorandum [CR#97], the Government contended that failure to appear is a "continuing offense" which was ongoing through the time of Mr. Ellis' arrest on July 18, 1999. [SER 24]. On that date, officers discovered Mr. Ellis hiding on the floor of his bedroom closet, shortly after they had discovered the unloaded hunting rifle on the top shelf of that closet. The Government concluded: "The Defendant's possession of the firearm was clearly 'in connection with' the offense of failure to appear because of its proximity to Defendant at the point of arrest." [SER 24-25].

In addition to objecting to the §2K2.1(b)(5) sentence enhancement, Mr. Ellis objected to the presentence report's failure to apply the eight-level reduction specified by U.S.S.G. §2K2.1(b)(2), when the firearm is possessed for lawful sporting or collection purposes. He raised this objection in his May 23rd letter, [SER2], and renewed it in his First Sentencing Memorandum, [SER 11-15]. In brief, Mr. Ellis contended the trial testimony established his girlfriend owned the rifle for lawful collection purposes, and stored it in their bedroom closet; that he was found in joint constructive possession of the rifle; and that her purpose for possessing the rifle should be imputed to him, triggering the §2K2.1(b)(2) reduction, given the absence of evidence to establish that he used or intended to use the rifle for any other purpose. Id.

The Government argued against application of §2K2.1(b)(2), simply stating there was "no support in the record," for it. [SER 25].

The probation officer addressed the presentence report's failure to apply the §2K2.1(b)(2) reduction in conjunction with further rationale for applying the §2K2.1(b)(5) enhancement in her Addendum to the Presentence Report:

> The fact that Ellis did not brandish or otherwise use the firearm does not mean it did not embolden or facilitate his continuing efforts to elude the Court and the Marshal's (sic). I agree with the government's position that Ellis possessed the firearm ' in connection with' his Failure to Appear. He did so by hiding in the closet where the firearm was present and handling the

> weapon (as evidenced by the presence of his fingerprints) sometime prior to his arrest. . . . For the reasons I am applying the four-level enhancement under Guideline §2K2.1(b)(5), I am recommending against the reduction found at Guideline §2K2.(1)(b)(2). [SER 43-44].

The presentence report increased the offense level for felon in possession of a firearm an additional three levels pursuant to U.S.S.G. §2J1.7, stating:

> [A] three-level enhancement applies as defendant committed the offense of Felon in Possession of a Firearm after being released by the U.S. District Court in the District of Oregon, pending sentencing in case number CR 96-60137-HO. This guideline directs the Court to impose the consecutive sentence to address the conduct attributed to this enhancement, however, notes that there is no requirement for a minimum term. Pursuant to Guideline §2J1.7, this three-level enhancement is applied as though it were (sic) a specific offense characteristic. [SER 33].

Mr. Ellis first objected "to the application of the sentencing enhancement provided by 18 U.S.C. §3147 and Guideline §2J1.7, as being contrary to the facts and the law," in his May 23rd letter. [SER 3]. He expanded his objection in his First Sentencing Memorandum to include motions to prohibit application of the statute and guideline as being unconstitutional on their face and as applied to his case. [SER 15-23].

Mr. Ellis raised three different objections to this three-level enhancement:

> First and simplest, Mr. Ellis was not convicted of committing the offense 'while on release,' as required by 18 USC 3147. Mr. Ellis was convicted of Felon in Possession of a Firearm 'on or about July 18, 1997.' See Superseding Indictment, Count 3, and Jury Verdict Form. Mr. Ellis' release was revoked on July 16,

> 1997, when he failed to appear for sentencing. See Warrant for Arrest, Government Exhibit 7, received at trial. [SER 15]
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> * * * *
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> Second, the defense contends that 18 USC 3147 is unconstitutional as a 'sentence enhancement statute' in that it deprives defendants of their rights to indictment and trial by jury, in violation of the Sixth Amendment to the United States Constitution, and the Due Process Clause of the Fifth Amendment to the United States Constitution. If 18 USC 3147 is unconstitutional on its face, then 2J1.7 is likewise unconstitutional or inoperable as a matter of law. [SER16].
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> * * * *
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> The third objection by the defense is that 18 USC 3147 and 2J1.7 are unconstitutional as applied to Mr. Ellis, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, and the notice and jury trial guarantees of the Sixth Amendment. The defense . . . asks the Court to take judicial notice that 18 USC 3147 was not charged by the superseding indictment upon which Mr. Ellis stood trial, nor was the jury asked to find, beyond a reasonable doubt, that he committed the offense of Felon in Possession of a Firearm while on release. As a result, 18 USC 3147 cannot be applied to his case at time of sentencing, and thus, 2J1.7 cannot be applied. [SER 20].

The Government contended that 18 U.S.C. §3147 "unambiguously states that it applies to a person convicted of an offense committed while on release," and that §2J1.7 would properly be applied to the crime of failure to appear while on release. [SER 26]. The Government elected to remain silent regarding the constitutional issues raised by Mr. Ellis. Id.

In her Addendum to the presentence report, the probation officer noted, "The defendant continues to argue that the three-level enhancement under Guideline

§2J1.7 is unconstitutional. These are legal matters which the Court must resolve." [SER 44]. The presentence report did not address the Government's position that §2J1.7 unambiguously applied to Count 1, Failure to Appear. Id.

At the 3 August 1999 sentencing hearing, neither party offered additional objections or arguments to the issues raised by this appeal. [SER 68-72]. The Government did offer, and the court received without objection, two exhibits previously admitted at trial, [ER 60-66]. The trial judge then proceeded to adopt the presentence report in its entirety and to sentence Mr. Ellis to the top of the resulting guideline range, 87 months incarceration. See, e.g., Sentencing Findings of Fact Order, [ER 78; CR#105].

Custody Status

Mr. Ellis is presently incarcerated serving the sentence imposed in this case.

STATEMENT OF FACTS

Mr. Ellis is 31-years-old. He lived the first 23 years without being arrested or convicted of any crime. [SER 34]. After high school, Mr. Ellis enlisted and served four years in the U.S. Navy. "He reports receiving a military meritorious promotion in 'A' school and was a Master of Arms. His employment while in the

military was supervisor of aircraft testing . . . ." Presentence report, page 11, [SER 39].

After being discharged from the Navy in 1991, [SER 39], Mr. Ellis turned to crime as a source of income. He proved somewhat unsuccessful at this venture. During the next three years, Mr. Ellis committed four felonies that resulted in convictions: two thefts, a Felon in Possession of a Firearm, and an Escape. [SER 34-35]. During that same time period, he was arrested and indicted in the District of Oregon for stealing dynamite from a gravel pit in Klamath Falls. [SER 36-37]. The Government lost a motion to dismiss the indictment, and temporally terminated the prosecution. The Government handed Mr. Ellis back to state authorities to serve his sentences on the Escape and Felon in Possession convictions. He got out of prison in late 1995, at the age of 27. [SER 35-36].

Mr. Ellis returned to his hometown of Klamath Falls where his parents resided. He did not return to the commission of property crimes as a source of livelihood.[6] He did not resume his past associations with known criminals in that area. "From December 1995 until July 1997, [Mr. Ellis] was employed at Sykes Enterprise in Klamath Falls, Oregon, as a customer support supervisor earning $35,000 per year. Mr. Ellis' immediate supervisor at that time, Mr. Pape, testified

to Mr. Ellis' trustworthiness and exceptional ability as an employee at trial." Presentence report, page 11,[SER 39].

Then the Government came knocking at his door again. In November 1996, about one year after his release from prison--and more than three years after the date of the crime--Mr. Ellis got summoned back to federal court on the dynamite case, re-indicted as CR-96-60137-1-HO. [SER 37]. The court released Mr. Ellis pending trial, and he continued to work at Sykes Enterprise.

During this time Mr. Ellis had begun a relationship with a co-worker, Caryl Adkisson. He eventually moved into her home in approximately April or May of 1999, and they shared a bedroom. [ER 30-31]. "Mr. Ellis reports that he was trying to put his legal difficulties behind him and change his life with a new job, a new girlfriend, and a different lifestyle," Presentence report, page 4, [SER 32]. Consequently, he did not reveal his convicted felon status to Ms. Adkisson; she only knew he needed to go to court in Eugene, Oregon, about something that had happened in his past. [ER 31].

Ms. Adkisson owned a rifle that her ex-husband had given her as a Christmas present several years before Mr. Ellis came to live with her. She

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[6] Mr. Ellis denies any history of drug abuse, and the records back that up. See Presentence Report, page 11, [SER 39]. Drug addiction is an all too common motive for property crimes.

retained it as a keepsake when she and her husband separated. [ER 28-29, 34]. She had two small children, and she never used the rifle, so she kept it rolled up in a towel and out of their view; she placed the rolled-up rifle on the top shelf of her bedroom closet when she moved into the house on August 1, 1996. [ER 34]. She never kept ammunition for the rifle anywhere in the house or in her possession. [ER 35].

Mr. Ellis went to trial on the dynamite case and the jury found him guilty as charged. The court allowed him to remain on release, and set sentencing for July 1997. [SER 37]. About three weeks before his sentencing date, Mr. Ellis discovered Ms. Adkisson kept a firearm in their bedroom closet.

This occurred when he was home alone, packing his belongings to move out, after a "lovers quarrel" had erupted between them at work. [ER 41-42]. He saw the stock end of the rifle rolled up in a towel. He took it down off the closet shelf and unwrapped it to determine what the object was, and then checked if it was loaded, because of the small children in the household.[7] Id.

Ms. Adkisson arrived home not long after Mr. Ellis had wrapped the rifle back up and returned it to the spot where he found it; Mr. Ellis was still packing his

[7] A fingerprint analysis conducted by the Oregon State Police found one identifiable print matched to Mr. Ellis on the rifle. [SER 31].

belongings. [ER 42]. They began talking and worked out their spat. [ER 43-44]. Mr. Ellis acknowledged:

> I had the opportunity to say something to her about the gun. I would have had to have said everything; why I couldn't have been around a firearm. Hence, I would have to bring up my prior convictions.
> The relationship was already—you know, that day was kind of strained. So I wouldn't have tried to put more strain on it by bringing up something like what was in my past. [ER 44].

The court had set Mr. Ellis' sentencing date for 15 July 1997; on 10 July 1997, the court moved the sentencing to July 16th. Mr. Ellis went to work at Sykes Enterprises on July 16th, instead of to his sentencing hearing in Eugene.[8]

The trial judge issued an arrest warrant for Mr. Ellis. When Klamath County Sheriff's deputies attempted to serve the

[8] Mr. Ellis maintains that his attorney had phoned on July 10th to tell him the sentencing was moved to the following Wednesday, and that he mistakenly thought his attorney meant Wednesday the 23rd. [SER 31]. There was conflicting evidence on this point at trial, and the jury found Mr. Ellis' failure to appear was willful.

warrant at his workplace on the 16th, Mr. Ellis elected to leave through the back door. [SER 31]. He met up with Ms. Adkisson that evening, and they stayed at a friend's home. They returned to their home on July 17th, and Mr. Ellis hid out there until his arrest the next day. [ER 45].

Officers searching the home for Mr. Ellis discovered the unloaded hunting rifle under wraps on the right side of the closet shelf where Ms. Adkisson stored it. [ER 6-7, 29-30]. At that time, Mr. Ellis was crouched down on the floor in the far left corner of the closet, hiding behind a garment bag. [ER 10-13]. Officers returned to the bedroom and seized the rifle while conducting a second search of the closet that resulted in the discovery of Mr. Ellis crouched in the corner. At no time during the brief tussel that ensued between Mr. Ellis and the officers, did Mr. Ellis reach for the rifle or any of the officers' guns. [ER 23-25].

On 24 July 1997, the court sentenced Mr. Ellis in the dynamite case to 103 months incarceration, and he has remained in federal custody since his arrest on July 18th. The Government first brought formal charges for the failure to appear against Mr. Ellis by way of indictment on 16 April 1998. [CR#1].

SUMMARY OF ARGUMENT

U.S.S.G. §2K2.1(b)(5)

The Government must show more than "a defendant's mere possession of a firearm" to support application of Guideline §2K2.1(b)(5). *United States v. Routon*, 25 F3d 815, 818-819 (9th Cir. 1994). The Government argued that Mr. Ellis' proximity to the unloaded hunting rifle at the time of his arrest satisfied its burden of proof. The trial judge rejected that analysis, focusing instead on Mr. Ellis retaining constructive possession of the rifle throughout his entire three-day status as a fugitive. [ER 80].

Continuing constructive possession of an unloaded hunting rifle wrapped in a towel resting on the top shelf of a closet in a house devoid of ammunition is nothing more than "mere possession."

The trial judge concluded: "The enhancement is for possession of the gun while in failure to appear status." [ER 80]. This is not the correct legal standard. The evidence must show Mr. Ellis possessed the rifle "in a manner that permits an inference that it facilitated or potentially facilitated—i.e., had some potentially emboldening role—in a defendant's felonious conduct." *United States v. Polanco*, 93 F3d 555, 566-567 (9th Cir. 1996). The trial judge appropriately drew no such inferences from the evidence. [ER 73-74, 80].

The trial court's findings of facts pertaining to the application of §2K2.1(b)(5) are not in dispute. The court's findings do not meet the legal

standard for application of this guideline. Therefore, this Court should vacate the sentence and remand with instructions to resentence Mr. Ellis without this four-level enhancement.

U.S.S.G. §2K2.1(b)(2)

The reduction in offense level prescribed by Guideline §2K2.1(b)(2) should be available to a defendant who jointly possesses a gun owned by another as a keepsake, when there is no evidence the defendant made any other use of the gun. *United States v. Moit*, 100 F3d 605 (8th Cir. 1996).

This Court has not addressed this point.[9] However, in *United States v. Prator*, 939 F2d 844, 846-847 (9th Cir. 1991),

[9] The defense has not located any published opinion and has not attempted to research unpublished opinions in the preparation of this brief.

the Court held this reduction was applicable to convicted felons "if their intended use is for 'lawful sporting purposes or collection.'" The Court noted, "*Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm is probably the most important factor in determining the sentence."* 939 F2d at 846 (emphasis original).

Read together, *Moit* and *Prator* provide legal authority for application of §2K2.1(b)(2) to Mr. Ellis' case. That Mr. Ellis had no contrary intent to Ms. Adkisson's possession of the rifle solely as a keepsake is evidenced by him restoring it to its wrapped position on the closet shelf once determining the object he had discovered was an unloaded rifle, and never touching it again.

The trial judge concluded that application of this guideline was not appropriate, due to its erroneous finding that Guideline §2K2.1(b)(5) applied. [ER 81]. This Court should join the Eighth Circuit in holding that under some circumstances, a defendant who has possession of a gun collection owned by another can receive the benefits of Guideline §2K2.1(b)(2); and vacate the sentence and remand with instructions that the trial judge make findings of facts concerning the application of this guideline to Mr. Ellis.

U.S.S.G. §2J1.7 AND 18 U.S.C. §3147

The three-level enhancement provided by Guideline §2J1.7 for commission of an offense while on release applies only if an enhancement under 18 U.S.C. §3147 applies. 18 U.S.C. §3147 states:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—(1) a term of imprisonment of not more than ten years if the offense is a felony; or (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.

The plain language of 18 U.S.C. §3147 requires the offense of conviction be committed "while released under this chapter," rather than "after having been released under this chapter." *See, e.g., United States v. Night,* 29 F3d 479, 480 (9th Cir. 1994)("If the defendant in fact commits an offense while released on bond," 18 U.S.C. §3147 applies).

Mr. Ellis was not convicted of committing the offense of felon in possession of a firearm while on release as required by 18 U.S.C. §3147. Mr. Ellis' release was revoked and a warrant issued by the trial judge on 16 July 1997, when he failed to appear for sentencing. The jury convicted Mr. Ellis of possessing the rifle on the date of his arrest, 18 July 1999. Thus, 18 U.S.C. §3147 does not apply and the three-level enhancement under Guideline §2J1.7 does not apply.

If 18 U.S.C. §3147 is construed to apply to the commission of crimes while in fugitive status after revocation of release, Mr. Ellis' constitutional challenges to the statute must be addressed.

Both the courts and the Guidelines Commission treat 18 U.S.C. §3147 as a "sentence enhancement statute," rather than as a separate offense which would entitle defendants to the full panoply of constitutional rights. *E.g., United States v. Patterson*, 820 F2d 1524, 1526 (9th Cir. 1987). As such, the courts have not required that a violation of 18 U.S.C. §3147 be charged by indictment, nor proven to a jury beyond a reasonable doubt.

If 18 U.S.C. §3147 permits notice by presentence report, and judicial factfinding by a preponderance to suffice for the imposition of higher penalties beyond the maximum provided by law for the underlying offense, it violates the Due Process Clause of the Fifth Amendment and the jury trial guarantees of the Sixth Amendment to the United States Constitution. *Jones v. United States*, 119 S.Ct. 1215 (1999).

Although *Jones* dealt with an analysis of the federal carjacking statute, the Court set forth the principle upon which its holding rested:

> [W]e re-state it here: under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in

> an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty. 119 S.Ct. at 1224 n.6.

18 U.S.C §3147, like the provisions of the carjacking statute at issue in *Jones*, "rais[es] the ceiling of the sentencing range available," *id.,* 119 S.Ct. at 1228; in conjunction with 2J1.7, it raises the presumptive sentencing range by three levels, and mandates a consecutive sentence.

18 U.S.C §3147 requires proof of the facts that a defendant was on release during the commission of the crime of conviction. *Patterson, supra*, 820 F2d at 1527. There was no proof at trial that Mr. Ellis was in fact on release during the commission of the crime of felon in possession of a firearm, rather than in fugitive status; nor was there any notice by indictment that these facts would be at issue. 18 U.S.C §3147 is therefore unconstitutional on its face, or as applied to Mr. Ellis.

This Court should vacate the sentence and remand with instructions that the three-level enhancement under Guideline §2J1.7 not be imposed on resentencing.

ARGUMENT

I. THE FOUR-LEVEL INCREASE TO THE OFFENSE LEVEL UNDER U.S.S.G. §2K2.1(b)(5) WAS IMPROPER BASED ON THE TRIAL JUDGE'S FINDING THAT MR. ELLIS REMAINED IN POSSESSION OF AN UNLOADED HUNTING RIFLE WRAPPED IN A TOWEL LAYING ON THE TOP SHELF OF HIS BEDROOM CLOSET DURING HIS STATUS AS A FUGITIVE.

Guideline 2K2.1 governs the crime of Felon in Possession of a Firearm. Subsection (b)(5) is a specific offense characteristic which provides, in pertinent part, that "[i]f the defendant used or possessed any firearm in connection with another felony offense . . . increase by 4 levels."

There is no claim by the presentence report or the Government, nor any finding by the trial judge, that Mr. Ellis "used" the rifle; the issue is whether the rifle was possessed "in connection with" his failure to appear for sentencing, which occurred on July 16, 1997. Mr. Ellis acknowledges that for purposes of determining statute of limitations and *ex post facto issues*, the courts have held that Failure To Appear is a continuing offense, i.e, once committed on July 16, 1997, the offense would be deemed to continue through the time of arrest on July 18th.[10]

This Court has held the 18 USC 924(c) is "a appropriate guide for interpreting" the phrase "in connection with." As a result, "the prosecution will have to make a greater showing than a defendant's mere possession of a firearm." *United States v. Routon*, 25 F3d 815, 818-819 (9th Cir. 1994). The Government

[10] Whether the "continuing offense" doctrine is applicable in other situations is unclear. See, e.g., *United States v. Nelson*, 919 F2d 1381, 1384 (9th Cir. 1990)("As the district court pointed out at sentencing, '[t]he crime is committed and completed when a defendant who is charged with the underlying crime fails to appear"; court discussing application of specific offense characteristics to crime of Failure to Appear). Without waiving an objection that the "continuing offense" doctrine does not extend the relevant time period for the Failure To Appear in the case at bar, Mr. Ellis will argue that in any event, 2K2.1(b)(5) does not apply.

bears the burden of proof by a preponderance of the evidence. *E.g., United States v. Polanco*, 93 F3d 555, 566 (9th Cir. 1996).

The Government must show the defendant possessed the firearm "in a manner that permits an inference that it facilitated or potentially facilitated—i.e., had some potential emboldening role—in a defendant's felonious conduct." *Id,.* at 566-567.

The application of Guideline §2K2.1(b)(5) to Mr. Ellis' constructive possession of the unloaded hunting rifle was unsupported both legally and factually.[11] In its Findings of Facts Order, page 3, the trial court decided:

> The court finds that the increase for possession of a firearm is appropriate as the defendant was in possession of the firearm during the entire time he was a fugitive. The court finds the analysis should not be considered at the time he was arrested, but the enhancement is for possession of the gun while in failure to appear status. [ER 80; CR#105].

[11] There is no evidence in the record at trial that Mr. Ellis so much as touched the rifle on July 18, 1997, the day of his arrest. Fingerprint experts found Mr. Ellis' left thumbprint on the gun. Mr. Ellis testified that he had discovered the rifle about three weeks before his arrest, and had touched it in the process of determining if it was loaded, then returned it to the closet shelf where he'd found it. [ER 41-42]. No evidence contradicted this testimony, and the prosecutor argued it to the jury as proof of the Felon in Possession charge. [ER 54-57]. The prosecutor did not claim that other evidence or circumstantial evidence supported some other scenario. Id. Thus, the only evidence before the jury concerning Mr. Ellis' relationship with the rifle on the day of his arrest was constructive, versus actual, possession. The trial judge also found Mr. Ellis to have been in constructive possession from the date of nonappearance through his arrest. [ER 73].

In its submissions to the court, the Government had argued that Mr. Ellis' proximity to the rifle—by hiding in the very closet where the rifle was secreted—established more than "mere possession." [ER 24-25; CR#97]. During the sentencing hearing, the court rejected the Government's analysis, commenting:

> The remaining considerations are whether the guideline should be increased for possession of a firearm in connection with another felony offense . . . .
>
> The—with regard to the gun enhancement, defendant was in a fugitive status from July 16, 1997, through July 18, 1997. By his own admission, he was in constructive possession of the firearm the whole time, because he knew of its presence and had the power and intention to control it.[12]
>
> The analysis here should not be on the moment he was arrested. If that were the analysis, I think the defendant would have a pretty good argument, because this firearm was on the shelf of the closet; and the defendant was hiding in the corner of the closet, presumably under the shelf. But the enhancement is for possession of the gun while in failure-to-appear status.
>
> And that was not an instantaneous consideration. That occurred over a period of time. This defendant had plenty of time to make sure this weapon was out of the residence, but he did not do so, and he's no novice when it comes to weapons and the use of them.
>
> I find that the defendant possessed this firearm in connection with another felony offense concerning the failure to appear,

[12] Mr. Ellis testified at trial. He admitted to knowledge of the rifle's presence, and that, given its location, he would have the power to control it. He denied any intent whatsoever to exercise control of the rifle: "And I wrap it back up in the towel, and I put it exactly where I found it. It's not mine. I don't want nothing to do with it. Nothing." [ER 42].

> and the four-level enhancement is appropriate under Guideline §2K2.1(b)(5). [ER 73-74].

The trial judge did not find that Mr. Ellis' constructive possession of the unloaded rifle in his bedroom closet facilitated or potentially emboldened Mr. Ellis to miss his court date or remain a fugitive. *Polanco, supra,* 93 F3d at 566-567. Thus, the facts found by the trial judge do not meet the legal standard established by this Court's case law. See also *Routon, supra,* 25 F3d at 818-819.

The trial judge misinterpreted Guideline 2K2.1(b)(5) to require nothing more than continuous constructive possession of a firearm during the commission of an offense and ensuing flight, in order for the possession to be "in connection with" an offense. This Court reviews de novo the district court's application of the Sentencing Guidelines and reviews for clear error its factual findings in the sentencing phase. *Polanco*, 93 F3d at 564.

In *Routon*, the defendant's sentence was enhanced for "possession" of a firearm in connection with the felony theft of a car, based upon the defendant being apprehended in the stolen car with a revolver located in a compartment in the car's console. The Court determined that the defendant's gun "emboldened him to maintain unlawful possession of the [stolen car]." 25 F3d at 819. See also *United States v. Collins*, 90 F3d 1420, 1423 (9th Cir. 1996)(2K2.1(b)(5) correctly applied

where defendant carried loaded pistol during a night-time burglary; not erroneous to infer pistol had some emboldening role in that felonious conduct).

This Court also found 2K2.1(b)(5) to be applicable in *Polanco*, explaining:

> Polanco's gun was loaded with ammunition and wedged between the driver's seat and the console of his car. Unlike the defendant in *Routon*, Polanco was not apprehended while driving the car. . . . During the time he was selling marijuana, Polanco occasionally returned to his parked car. The search of Polanco's car turned up, among other things, a large amount of cash, suggesting that Polanco was depositing his drug sale proceeds in his car. Although Polanco was not always within arm's reach of his gun like the defendant in *Routon*, nevertheless he was selling marijuana in the vicinity of his car and thus could have availed himself of his gun at any time. The presence of the gun in Polanco's car potentially emboldened him to undertake his illicit drug sales, since it afforded him a ready means of compelling payment or of defending the cash and drugs stored in the car. 93 F3d at 567.

In the case at bar, the testimony at trial was uncontradicted and unimpeached on the following, material facts:

- Mr. Ellis' girlfriend at the time, Caryl Adkisson, was the lawful owner of the rifle; her ex-husband had given it to her for a Christmas present several years before, and she retained it as a keepsake upon their separation. [ER 28-29, 34].
- Ms. Adkisson kept the rifle unloaded, and there was no ammunition in the house at all times relevant to these proceedings. [ER 34-35].
- Ms. Adkisson kept the unloaded rifle wrapped in a towel and placed on the top shelf of her bedroom closet, an area of her home that Mr. Ellis

came to share with her upon moving in several months before the Failure to Appear. [ER 29-31, 34].

- Ms. Adkisson never observed the rifle moved from that stored position until seized by arresting officers on July 18, 1997. [ER 34, 37].
- The unloaded hunting rifle was discovered by officers wrapped or covered by a towel or blanket in the location where Ms. Adkisson kept it stored. [ER 6-7, 29-30.
- One officer, Deputy Krieger, observed the butt of the rifle in that location during the officers' first sweep of the bedroom closet. Some minutes later, when he returned to the bedroom to seize the rifle, it had not been moved. [ER 6-8, 20].
- The rifle was located on the right-hand side of the closet as one would face it. The closet is approximately 11 feet wide, and the shelf approximately 6 feet high. [ER 17-18]. After the rifle was seized by the officers, a further search of the closet ensued and Mr. Ellis was discovered crouched on the floor behind a garment bag, in the far left-hand corner of the closet. [ER 10-13]. Mr. Ellis' location and the closet dimensions placed him clearly out of reach of the rifle. [ER12, 21-22; see also ER 49-50].
- After discovered by officers, but before being taken into physical custody, Mr. Ellis did not make any movement toward the location where the rifle had been stored, nor did Mr. Eillis make any efforts to grab any officer's gun. [ER 23-25].
- During the brief struggle, Mr. Ellis did not strike, kick or bite the officers, nor did he attempt to use any object as a weapon. Id.
- Mr. Ellis' left thumb print was later detected on the receiver of the rifle.

The Government offered no evidence concerning when, where or how Mr. Ellis' fingerprint was placed on the rifle. Mr. Ellis testified at trial regarding those circumstances. His testimony was uncontradicted, but subject to impeachment due to prior felony convictions and his interest in the outcome of the case. However, his testimony also constituted an admission against penal interest, with inherent guarantees of trustworthiness, and the Government adopted and argued Mr. Ellis' admissions concerning his contact with the rifle to the jury to support its proof of the crime of Felon in Possession of a Firearm. [ER ,54-57].

Mr. Ellis testified that his sole contact with the rifle occurred approximately three weeks before his arrest on July 18th, when he was in the process of packing his belongings to move out, after a "lovers quarrel" with Ms. Adkisson. He saw the stock end of the rifle, which was wrapped in a towel. He took it down to check if it was loaded, because of there being children in the household:

> So I opened it up, make sure that it wasn't loaded. It's not mine. I don't want nothing to do with it. So I kind of wipe it down. A real quick wipe down of it. And I wrap it back up in the towel, and I put it exactly where I found it. It's not mine. I don't want nothing to do with it. Nothing. [ER 41-42].

The trial judge made findings of fact consistent with the evidence at trial, finding that Mr. Ellis was in constructive possession of the rifle from the date of his nonappearance through the date of his arrest. [ER 80].

There is no evidence nor finding by the court that the presence of the rifle "potentially emboldened" Mr. Ellis to choose to go to work in Klamath Falls on July 16th, rather than appear in federal court in Eugene.

There is no evidence nor finding by the court that the presence of the rifle "potentially emboldened" Mr. Ellis to eventually return to his home to hide out from the officers, instead of hiding in another location or staying on the run.[13]

There is no evidence nor finding by the court that the presence of the unloaded rifle "potentially emboldened" Mr. Ellis to hide in the same closet where the rifle was stored, when he saw the officers approaching his house. Indeed, the Government argued at trial that Mr. Ellis would logically want to distance himself from the rifle at that point in time:

> I submit to you that Mr. Ellis does not want to have the marshals making the connection between him and the gun. I also submit to you that there's a reason why he's not holding the gun when they find him, because the marshals are armed. Their guns are out. . . . Imagine the scene if the defendant had actually had the gun in the corner. That's not the evidence though. But the evidence is that the defendant was occupying the very closet where the gun was found." [ER 57].

"The evidence is that the defendant was occupying the very closet where the gun was found." Id. That is the only evidence.[14] The reasonable inference to be

[13] The testimony by Ms. Adkisson, the Government's witness, and by Mr. Ellis, was that after staying with friends on the night of July 16th, Ms. Adkisson requested that they go home, and Mr. Ellis agreed. [ER 32, 45].

drawn from this evidence is that it is improbable that Mr. Ellis' constructive possession of the rifle at that time and under those circumstances was connected with any other offense. *Compare*, Guideline 2D1.1, *Commentary, Application Note* 3 ("The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. *For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet*.")(emphasis supplied).

Based on the trial judge's findings of facts, as well as the evidence at trial, application of Guideline §2K2.1(b)(5) was improper, when the facts are analyzed under the correct interpretation of the guideline.

II. THE EIGHT-LEVEL REDUCTION TO THE OFFENSE LEVEL PROVIDED UNDER U.S.S.G. §2K2.1(b)(2) IS APPLICABLE TO MR. ELLIS, WHO WAS IN JOINT CONSTRUCTIVE POSSESSION OF AN UNLOADED HUNTING RIFLE OWNED BY HIS GIRLFRIEND FOR "LAWFUL COLLECTION PURPOSES," WHEN THERE WAS NO EVIDENCE THAT MR. ELLIS MADE ANY OTHER USE OF THE RIFLE, NOR INTENDED TO USE THE RIFLE FOR AN UNLAWFUL PURPOSE.

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[14] Mr. Ellis explained that, given the layout of the house, there was no other readily available hiding spot, and that choosing it had nothing to do with the rifle stored there. [ER 46-47].

In calculating the offense level for felon in possession of a firearm, the trial court found it was "not appropriate" to apply the reduction prescribed by specific offense characteristic 2K2.1(b)(2). [ER 81]. That guideline provides, in relevant part, that "[i]f the defendant . . . possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6."

The trial judge did not elaborate on its reasons for finding application of this guideline was "not appropriate," but may have so concluded based on its findings that Mr. Ellis had possessed the rifle "in connection with" his failure to appear so that Guideline §2K2.1(b)(5) applied. The court made no findings of fact in regard to Guideline §2K2.1(b)(2). [ER 81]. This Court reviews de novo the district court's application of the Sentencing Guidelines. *Polanco*, supra, *93 F3d at 564.*

In *United States v. Prator*, 939 F2d 844, 846-847 (9th Cir. 1991), the Court held Guideline §2K2.1(b)(2) was applicable to convicted felons, and that the word "lawful" refers to the intended use of the firearm, not the lawfulness of its possession: "All persons who cannot lawfully possess a firearm are entitled to a reduction in punishment if their intended use is for 'lawful sporting purposes or collection.'" In reaching this conclusion, the court discussed the background of this guideline, noting the Commission had reviewed current sentencing practices

and found: "*Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm is probably the most important factor in determining the sentence*." 939 F2d at 846 (emphasis original).

In *United State v. Moit*, 100 F3d 605 (8th Cir. 1996), the court held that a defendant felon who constructively possessed firearms at his home which were owned by his father for collection purposes was entitled to the 2K2.1(b)(2) reduction. Officers searched Moit's home during an unrelated investigation and seized five firearms, including three shotguns, a .30-.60 rifle, and a .22 rifle. The officers also seized numerous unfired .22 rifle rounds and spent .22 rifle shell casings from Moit's clothing, his vehicle and his driveway, and noted the presence of other ammunition inside the residence. Moit asserted that his father—who lived at the residence before Moit moved in with his wife and child—owned the guns, possessed them solely for lawful sporting purposes or collection, and had left the guns at the residence upon moving to a nearby town. 100 F3d at 606.

Moit admitted he constructively possessed the guns, but asserted he had not used them. Moit and his father testified in conformity with these assertions at sentencing, and Moit argued that the evidence established that his father possessed the guns as keepsakes, solely for collection purposes, and that Moit kept the guns in his house for his father. *Id.*

The district court rejected Moit's position, summarily stating that the evidence and appropriate inferences showed the guns and ammunition were not used solely for lawful sporting purposes or collection, and that Moit failed to carry his burden of proof. On appeal, Moit argued that the district court clearly erred in its finding, noting that no evidence was presented that he made any other use of the guns or that he unlawfully discharged the guns. The Eighth Circuit agreed with Moit and reversed. *Id.* "We reject the government's argument that one who possesses a gun collection owned by another can never receive a section 2K2.1(b)(2) decrease." 100 F3d at 607.

There is no law to the contrary in the Ninth Circuit that Mr. Ellis has been able to find. The holding in *Moit* is consistent with *Prator's* recognition that "intended lawful use, as determined by the surrounding circumstances, is a mitigating factor." 939 F2d at 846. Read together, *Moit* and *Prator* stand for the proposition that in the case of joint possession, and in the absence of evidence showing the defendant felon used or intended to use the firearms for an unlawful purpose, the non-defendant owner's lawful use or intended use of the firearms will be imputed to the defendant.

In the case at bar, Mr. Ellis moved in to Ms. Adkisson's home, and eventually came to be in joint possession of the unloaded hunting rifle she owned and kept stored in their bedroom closet. Ms. Adkisson had received the rifle as a

Christmas present from her ex-husband several years before, and upon their separation, retained it as a keepsake.[15] [ER 28-29, 34].

In the absence of evidence showing Mr. Ellis used or intended to use the rifle for an unlawful purpose or a purpose otherwise disallowed by 2K2.1(b)(2), Ms. Adkisson's "lawful sporting purposes or collection" of the rifle should be imputed to Mr. Ellis. *Moit; see also Prator*. Like the defendant in *Moit*, Mr. Ellis simply allowed the pre-existing storage arrangement to continue, rather than ask Ms. Adkisson to remove the firearm.

In further support of this contention, Mr. Ellis incorporates by reference the facts set forth in the preceding discussion of 2K2.1(b)(5). There is no claim by the Government nor finding by the trial court that Mr. Ellis unlawfully used or discharged the rifle; and there is no evidence that ammunition was ever

[15] Ms. Adkisson testified, in response to why she kept the rifle wrapped in a towel in the closet, "I have two small children, and I never used the rifle. So I wanted it just kept put away." [ER 34].

present in Adkisson's residence while Mr. Ellis resided there.

The *Commentary* to this guideline provides:

> Under subsection (b)(2), 'lawful sporting purposes or collection' as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstance of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms,), and the extent to which possession was restricted by local law) *Id., Application Note* 10.

Applying these factors to the facts of the case at bar reveals:

Relevant factors	**Evidence in Ellis case**
Number of firearms	1
Type of firearms	Small-caliber hunting rifle
Amount of ammunition	None--unloaded
Type of ammunition	None anywhere on premises
Location of firearm	Top shelf of bedroom closet, shared with owner of rifle
Circumstance of possession	Joint and constructive
Actual use	• By Ellis, none • By owner and joint possessor, lawful collection
Defendant's criminal history (e.g., whether involving firearms)	• No crimes of violence • Theft of firearms (for profit) • Felon in Possession (stolen handgun, loaded, under seat of car at time of arrest)

The only factor suggestive of an intended unlawful use is Mr. Ellis' criminal history which includes two firearm offenses. [SER 34-36]. The propensities suggested by those prior offenses do not, however, outweigh the totality of circumstances suggesting no unlawful intended use in the case at bar.

Mr. Ellis was gainfully employed and financially secure [ER 38-40]; these facts do not support the inference that he intended at some future time to steal Ms.

Adkisson's hunting rifle and sell it for profit. To the extent Mr. Ellis' prior conviction for felon in possession of a firearm suggests a propensity to unlawfully arm himself with loaded handguns—the type of weapon easily concealed and readily available for criminal purposes—that propensity is simply not served by his access to an unloaded hunting rifle stored in the bedroom closet in a house with no ammunition.

In sum, the "if he's done it before, he'll do it again" inference based on Mr. Ellis' prior firearm offenses is not logically supported by the facts of the instant case. None of the other relevant factors identified by the guideline and applied to the facts of this case suggest Mr. Ellis intended to make unlawful use of the rifle. He is entitled to the 2K2.1(b)(2) reduction.

III. THE THREE-LEVEL INCREASE TO THE OFFENSE LEVEL UNDER U.S.S.G. §2J1.7 AND 18 U.S.C. §3147 WAS IMPROPER BECAUSE THE OFFENSE OF CONVICTION WAS COMMITTED AFTER REVOCATION OF RELEASE, RATHER THAN WHILE ON RELEASE.

The trial judge applied a three-level enhancement pursuant to Guideline §2J1.7 to the base offense level for felon in possession of a firearm. At sentencing, the court explained this guideline applied "since defendant committed the offense . . . after being released by this Court pending sentencing in case number CR 96-60137-HO." [ER 74]. In its Findings of Fact Order, page 3, the court wrote:

"[T]he defendant was in possession of a firearm in connection with the felony offense of failure to appear and a three-level enhancement is appropriate." The standard of review is de novo. *Polanco, supra.*

Guideline §2J1.7 is titled, "Commission of Offense While On Release." It provides: "If an enhancement under 18 U.S.C §3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release." Thus, §2J1.7 is not an autonomous offense characteristic, but rather will be triggered only "if an enhancement under 18 U.S.C. §3147 applies." *Id.*

18 U.S.C. §3147 is titled, "Penalty for an offense committed while on release." It declares:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to — (1) a term of imprisonment of not more than ten years if the offense is a felony; or (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.

The court sentenced Mr. Ellis by applying this statute to his conviction on Count 3, which charged felon in possession of a firearm. Mr. Ellis was not convicted of committing this offense "while released," as required by 18 U.S.C. §3147. The superseding indictment charged Mr. Ellis committed this offense "on or about July 18, 1997." [ER 2; CR#29]. The trial court revoked Mr. Ellis' release

on 16 July 1997 when he failed to appear for sentencing. Mr. Ellis was no longer on release; he was on the run. [ER 80].

The plain language of 18 U.S.C. §3147 requires the offense of conviction be committed "while released under this chapter," rather than "after having been released under this chapter." *See, e.g., United States v. Night*, 29 F3d 479, 480 (9th Cir. 1994)(defendant committed bank robberies while on release for violation of supervised release; "If the defendant in fact commits an offense while released on bond," 18 USC 3147 applies.); *United States v. Patterson*, 820 F2d 1524, 1526 (9th Cir. 1987)(court addresses statutory construction of 18 USC 3147 in general, noting: "There is nothing exceptional about the statute, nor is it vague or ambiguous. The language is plain and the meaning is clear.").

Perhaps in recognition of the difficulty of stretching the language of 18 U.S.C. §3147 to extend to crimes committed after revocation of release, the Government in its submissions to the trial judge cited case law from the Sixth Circuit applying this statute and Guideline §2J1.7 to the offense of failure to appear occurring prior to revocation. [ER 26].

For these reasons, the application of 18 U.S.C. §3147 and Guideline §2J1.7 was improper.

IV. THE THREE-LEVEL INCREASE TO THE OFFENSE LEVEL UNDER U.S.S.G. §2J1.7 AND 18 U.S.C. §3147 WAS

UNCONSTITUTIONAL WHEN 18 U.S.C. §3147 WAS APPLIED WITHOUT NOTICE BY INDICTMENT AND TRIAL BY JURY.

18 U.S.C. §3147, "Penalty for an offense committed while on release," states in its entirety:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to —
>
> > (1) a term of imprisonment of not more than ten years if the offense is a felony; or
> >
> > (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. §3147 is unconstitutional as a "sentence enhancement statute" in that it deprives defendants of their rights to indictment and trial by jury, in violation of the Sixth Amendment to the United States Constitution, and the Due Process Clause of the Fifth Amendment to the United States Constitution. If 18 U.S.C. §3147 is unconstitutional on its face, or as applied to Mr. Ellis, then Guideline §2J1.7 is likewise unconstitutional or inoperable as a matter of law. This guideline, by its express terms, applies only "if an enhancement under 18 U.S.C. §3147 applies."

The trial judge noted Mr. Ellis had challenged these provisions as being unconstitutional; without expressly addressing the constitutional issues, the judge

found application of Guideline §2J1.7 to be appropriate. [ER 80]. This Court reviews de novo the trial court's application of the Sentencing Guidelines, *Polanco, supra*.

Both the courts and the Guidelines Commission have treated 18 U.S.C. §3147 as a "sentence enhancement statute," rather than as a separate offense which would entitle defendants to the full panoply of constitutional trial rights. *E.g., Patterson, supra,* 820 F2d at 1526 ("We hold that 18 U.S.C. §3147 does not create a separate offense. Section 3147 is a sentence enhancement statute which simply mandates an enhanced sentence for someone who commits an offense while released on bail."); Guideline §2J1.7 *Commentary, Application Note* 1 ("18 U.S.C. §3147 is an enhancement provision, rather than an offense"). As such, the courts have not required that a violation of 18 U.S.C. §3147 be charged by indictment. See, e.g., *Night, supra*, 29 F3d at 480-481 (rejecting claim that the statute requires the magistrate to orally advise the defendant of the enhancement, finding written notice on the release order to be adequate notice).[16] The courts likewise have not

[16] *Night* and other cases speak of this advice concerning enhanced penalties as the "notice requirement," which predicates application of 18 U.S.C. §3147. See, e.g., *United States v. Lewis*, 991 F2d 322, 323 (6th Cir. 1993)(collecting cases and discussing split of authority regarding what notice is required). This "notice requirement" comes from the courts' reading of 18 U.S.C. §3142(h), which instructs the magistrate "in a release order" to "advise the defendant of the penalties for committing an offense while on pretrial release," as a prerequisite to the application of18 U.S.C. §3147. *Night*, 29 F3d at 480-481. Thus, this "notice requirement" does not necessarily equate with constitutional notice. Indeed, if 18

required the violation of 18 U.S.C. §3147 be proven to a jury beyond a reasonable doubt for the sentence enhancement to apply, although that issue appears unresolved in the Ninth Circuit.[17]

Mr. Ellis contends that if Congress intended 18 U.S.C. §3147 to be a "sentence enhancement statute," which dispenses with the notice and jury trial guarantees of the Sixth Amendment, and permits notice by presentence report, and judicial factfinding by a preponderance, to suffice, then the statute violates the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment to the United States Constitution. Mr. Ellis' position rests on the recent landmark decision in *Jones v. United States*, 119 S.Ct. 1215 (1999).

In *Jones*, the Supreme Court rejected the Government's claim that provisions of the carjacking statute which established higher penalties to be imposed, depending on the severity of the victim's injuries, were sentence enhancement provisions that could be imposed by the court at sentencing, absent

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U.S.C. §3147 were viewed as a separate offense, the "notice requirement" would simply be an element of that offense, providing the *mens rea* element, rather than considered a part of the constitutional safeguards for imposing punishment. *Cf*., Guideline §2J1.7, *Commentary, Background* ("An enhancement under 18 U.S.C. §3147 may be imposed only after sufficient notice to the defendant by the government or the court"; does not elaborate on what is "sufficient notice").

[17] See *Patterson, supra*, 820 F2d at 1527 n.4 ("Because evidence as to Patterson's bail status was presented during the trial and the issue was resolved by the jury, we do not decide whether it would have been sufficient for the government, at the time

notice in the indictment and a jury determination at trial. The Court interpreted these provisions as constituting "separate offenses," requiring the usual constitutional guarantees of notice by indictment and trial by jury. Although much of the opinion discusses statutory construction and legislative history specific to the carjacking statute, the Court's holding rests on a constitutional analysis which is equally applicable to, and thus controlling of, the statute in the case at bar.

Jones rejected the Government's claim that the subsections of the carjacking statute at issue were sentence enhancement provisions, rather than separate offenses, because the Court ultimately determined that the Government's interpretation would render the statute unconstitutional.[18]

Patterson was sentenced, to have presented proof that he was out on bail at the time he committed the firearm offense.").

[18] In tracing the historical development of this principle, the Court discussed *McMillan v. Pennsylvania*, 106 SCt 2411 (1986), in which the defendant challenged a provision that a judge's finding by a preponderance of visible possession of a firearm would require a mandatory minimum sentence for certain felonies, but a minimum that fell within the sentencing ranges otherwise prescribed. Although the Court rejected the defendant's claim insofar as it would have required a finding beyond a reasonable doubt of any fact upon which a mandatory minimum sentence depended, it did observe that the result might have been different if proof of visible possession had "exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact." 119 SCt at 1223-1224.

18 U.S.C. §3147, and guideline, §2J1.7, require an additional, consecutive sentence for any crime committed while on release, thereby exposing a defendant to a greater sentence than that provided for the underlying offense without reference to the fact that it was committed while on release.

The Court explained:

> The dissent repeatedly chides us for failing to state precisely enough the principle animating our view that the carjacking statutes, as construed by the Government, may violate the Constitution. . . . [W]e re-state it here: under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty. 119 S.Ct. at 1224 n.6.

18 U.S.C. §3147, like the provisions of the carjacking statute at issue in *Jones*, "rais[es] the ceiling of the sentencing range available," *id.,* 119 S.Ct. at 1228; in conjunction with Guideline §2J1.7, it raises the presumptive sentencing range by three levels, and mandates a consecutive sentence.

The purpose of 18 U.S.C. §3147, according to its legislative history, is "to deter those who would pose a risk to community safety by committing another offense when released . . . and to punish those who indeed are convicted of another offense," *Senate Report No*. 98-225, 98th Cong., 2nd Sess., *reprinted in* 1984 *US Code Cong. & Ad.News* 3182. Thus, the real objective of 18 U.S.C. §3147 is to punish those who offend the spirit and purpose of release--by committing any new crime while at liberty granted by the court--rather than to deter the commission of any new crime for which separately prescribed penalties exist. *Cf., Jones, supra*,

119 S.Ct. at 1237 (Kennedy, J., dissenting)(observing that "separate offense" treatment would be more appropriate if "the real objective [of these carjacking provisions was] punishing, without constitutional safeguards, those who caused serious bodily harm, rather than to prevent the underlying conduct of carjacking.").

Based on the landmark decision of *Jones*, 18 U.S.C. §3147 cannot withstand constitutional scrutiny if construed, as it has been by the courts, as exempt from the Sixth Amendment guarantees: Its real objective is to punish those who offend the purpose of release by committing any new crime while at liberty granted by the court, without constitutional safeguards. It does so by mandating imposition of a separate, consecutive sentence; and in conjunction with Guideline §2J1.7, it raises the ceiling of the sentencing range available by a substantial three levels. It also requires the determination of facts in addition to those required to prove the underlying offense, and these facts concern matters other than a defendant's prior convictions.[19]

[19] As originally promulgated, Guideline §2J1.7 called for a base offense level of six, with enhancements based upon the severity of the offense committed which on release. The Justice Department argued that section 3147 did not set forth an offense but was a penalty enhancement provision. The Commission probably drafted a guideline for section 3147 as if that provision were an offense because section 3147 mandates a separate sentence consecutive to any other term of imprisonment, for engaging in certain prohibited conduct. The *mens rea* element has been read into the statute by the courts requiring proof of knowledge of enhanced penalties for commission of a crime while on release. See, e.g., *Night, supra,* and related discussion at note 16, *supra.*

18 USC 3147 and Guideline §2J1.7 are unconstitutional as applied to Mr. Ellis, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, and the notice and jury trial guarantees of the Sixth Amendment. 18 U.S.C. §3147 was not charged by the superseding indictment upon which Mr. Ellis stood trial, [ER 1-3], nor was the jury asked to find, beyond a reasonable doubt, that he committed the offense of Felon in Possession of a Firearm while on release. See Jury Verdict Form, [ER 58; CR#87]. As a result, 18 U.S.C. §3147 cannot be constitutionally applied to his case at time of sentencing, and thus, Guideline §2J1.7 cannot be applied.

Although *Patterson, supra*, held that 18 U.S.C. §3147 was a sentence enhancement statute and not a separate offense, the Court left unresolved the process for applying the enhancement, other than noting: "Due process requires that 'a release offender cannot be sentenced under 18 U.S.C. §3147 without an admission or proof that he was in fact on release during the commission of the crimes for which he was convicted.'" 820 F2d at 1527 (citation omitted). In *Patterson*, the indictment charged the defendant with felon in possession of a firearm, and contained the additional allegation that at the time of the offense, he was on release. Proof of his release status was submitted to the jury at trial, and the jury returned a general verdict to the indictment. *Id.*

The Court found "there was substantial evidence presented to the jury that Patterson was out on bail at the time he committed the firearm offense. This question was in fact submitted to the jury. And the jury's general verdict resolved it." *Id.* Because of these circumstances, the Court specifically reserved ruling on whether 18 U.S.C. §3147 could be applied to a defendant who stood trial, if raised for the first time during the sentencing proceedings. 820 F2d at 1527 n.4.

In the case at bar, the issue of whether Mr. Ellis was at liberty on release at the time he committed the crime of felon in possession of a firearm was neither submitted to nor decided by the jury. Rather, the Government set out to prove that Mr. Ellis' release was revoked by the Court when he failed to appear for sentencing on 16 July 1997, and that his status changed at that point from a defendant at liberty on release, to a fugitive running from officers attempting to execute a warrant for his arrest. The Government also set out to prove that Mr. Ellis possessed a firearm "on or about July 18, 1997," when he was discovered by officers hiding crouched on the floor of a bedroom closet where a rifle was located minutes earlier, secreted on the top shelf. The Government relied on constructive, joint possession at that time, arguing that of all the places to hide in the house, Mr. Ellis chose the closet containing the rifle, thus showing his intent to exercise dominion and control over the firearm. [ER 56-57].

Mr. Ellis testified in his own defense at trial. He told the jury he had acquired knowledge of the rifle's existence several weeks earlier, but had no intent to exercise control over the weapon. [ER 42]. This is an admission of some but not all of the elements of the crime of felon in possession of a firearm; it is not an "admission . . . that he was in fact on release during the commission of the crimes for which he was convicted." *Patterson, supra,* 820 F2d at 1527 (emphasis supplied). There was proof at trial that Mr. Ellis was on release during the time period he admitted finding the rifle, but he was not convicted of being a felon in possession "on or about June 1997," nor did he admit to ever committing that crime. [ER 41-42].

There was no admission or proof at trial that Mr. Ellis was in fact on release during the commission of the crime of felon in possession of a firearm as that crime was alleged in the superseding indictment and as found by the jury, as occurring "on or about July 18, 1997." See Jury Verdict Form, [ER 59; CR#87]. The Government approved the Jury Verdict Form, and did not request a special verdict on the issue of possession of the rifle in June 1997 or prior to the revocation of his release, after hearing Mr. Ellis' testimony.

The superseding indictment gave Mr. Ellis no notice that the Government would seek application of 18 USC 3147, nor did the Government give any such notice orally or in writing at any time during the trial, so his failure to request a

special verdict cannot be viewed as a waiver of any rights to notice and proof. Indeed, had the Government given notice of seeking application of 18 U.S.C. §3147 in the indictment, Mr. Ellis may very well have elected a different trial strategy, choosing to not contest the firearm charge and thereby not provide any evidence concerning when he gained knowledge of the rifle's presence.

Thus, the facts and circumstances in the case at bar raise the issue that *Patterson* left undecided: when a jury determination has not been waived, is it sufficient for the Government, at time of sentencing, to present proof that Mr. Ellis was out on bail at the time he committed the firearm offense, so that the increased, consecutive penalties prescribed by 18 U.S.C. §3147 and Guideline §2J1.7 apply? *Patterson, supra*, 820 F2d 1527 n.4.

The inquiry thus posed to the factfinder far exceeds the inquiry for sentencing enhancements based solely on proof of a prior conviction.[20] Under the facts and circumstances of the case at bar, the issues left unresolved by *Patterson* have been answered definitively by the Supreme Court in *Jones*. Because 18 U.S.C. §3147 and Guideline §2J1.7 operate to increase the potential severity of the penalty for the crime of felon in possession of a firearm, and a jury determination

[20] As noted by *Jones*, "One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures

was not waived by Mr. Ellis, those provisions are unconstitutional when applied for the first time at sentencing, in violation of the Fifth and Sixth Amendments to the United States Constitution. *Jones, supra,* 119 S.Ct. at 1224 & n.6.

For these reasons, application of Guideline §2J1.7 to increase Mr. Ellis' sentencing range by three levels was improper.

CONCLUSION

For the foregoing reasons, the Court should vacate the sentence and remand for resentencing.

RESPECTFULLY SUBMITTED this 30th day of November, 1999.

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Terri Wood
Attorney for Defendant-Appellant

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satisfying the fair notice, reasonable doubt, and jury trial guarantees." 119 S.Ct. at 1227.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RANDY GEAN ELLIS, Defendant-Appellant.	**CA No. 99-30261**

CERTIFICATE OF RELATED CASES

I, Terri Wood, undersigned counsel of record for defendant-appellant, Randy Gean Ellis, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

DATED: November 30, 1999.

Terri Wood
Attorney for Defendant-Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee, **CA No. 99-30261**

v.

RANDY GEAN ELLIS,

Defendant-Appellant.

BRIEF FORMAT CERTIFICATION
PURSUANT TO RULE 32(E)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the APPELLANT'S OPENING BRIEF is proportionately spaced, has a typeface of 14 points or more, and contains 12,150 words.

DATED: November 30, 1999.

Terri Wood
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT'S OPENING BRIEF on Assistant U.S. Attorney William Fitzgerald by depositing in the U.S. Mail at the Eugene Downtown Branch Post Office on November 30, 1999, two

true, exact and full copies thereof with postage paid, addressed to him at the U.S. Attorney's Office at 701 High Street, Eugene, Oregon, 97401.

_____

Terri Wood
Attorney for Defendant-Appellant