03-1148

To be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1148

UNITED STATES OF AMERICA,
Appellee,

-vs-

HECTOR SANTIAGO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the District of Connecticut (Stefan R. Underhill, J.) after a jury found the defendant guilty of unlawful possession of a firearm. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to the judgment of conviction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Does the felon-in-possession-of-a-firearm statute, 18 U.S.C. § 922(g)(1), violate the Commerce Clause of the Constitution?

II. Did the district court abuse its discretion in admitting the testimony of Officer Feola concerning what he heard over his police radio, and was any possible error harmless?

III. Did the district court err in its jury instruction on the element of possession, and was any possible error harmless?

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Preliminary Statement

On the night of December 21, 2001, two police officers in Bridgeport, Connecticut, saw the defendant-appellant, Hector Santiago, standing in a dark alley behind an apartment building. When one of the officers approached him, the defendant ran up an exterior staircase. The officer saw the defendant toss away a loaded handgun. Because of the defendant's history of robbery and drug dealing offenses, he was charged in federal court with unlawful possession of a firearm by a convicted felon, and the jury convicted him after trial.

In this appeal, the defendant challenges his conviction on three grounds. FIRST, he argues that the federal felon-in-possession statute exceeds Congress' authority under the Commerce Clause. This Court has repeatedly rejected such a constitutional challenge. It should do so here. SECOND, the defendant contends that the district court improperly admitted the testimony of a police officer concerning another officer's radio call indicating that the defendant had a gun. The Court should reject this argument on the ground that this testimony was admitted for a proper non-hearsay purpose, and that any possible error was harmless. THIRD and finally, the defendant challenges the content of the district court's jury instruction concerning the element of possession, claiming that it improperly invited the jury to base its verdict on a theory of constructive possession. The Court should reject this argument, because the charge made clear that the jury should evaluate only a theory of actual possession. Even assuming the instruction to be ambiguous in this respect, any error was harmless. Accordingly, the Court should affirm.

STATEMENT OF THE CASE

On June 4, 2002, a federal grand jury in Connecticut returned a one-count indictment charging the defendant-appellant, Hector Santiago, with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On October 1, 2002, a trial jury found the defendant guilty of the offense charged. On March 3, 2003, the district court (Stefan R. Underhill, J.) sentenced the defendant to 96 months' imprisonment and three years' supervised release.

On March 5, 2003, the defendant filed a timely notice of appeal. The defendant has been incarcerated since his arrest in this case and is currently serving his sentence.

STATEMENT OF FACTS

Part A below reviews the evidence introduced by the government at trial. Part B reviews the defendant's evidence.

A. Government's Evidence at Trial

On December 21, 2001, at approximately 9:00 p.m., police officers David Uliano and Sean Ronan of the Bridgeport Police Department were on routine patrol in the east end of the city. GA4, GA31.[1] Officer Uliano was driving, and Officer Ronan was in the front passenger seat. GA5. They were in a marked patrol car and dressed in full uniform. GA4. They had been working the 3:00 p.m. to 11:00 p.m. shift and were assigned to patrol a span of several city blocks on the east side of the city. GA4, GA33.

As Officer Uliano was driving northbound on Hallet Street, he turned left onto Ogden Street and illuminated his passenger side "alley light," which is a car-mounted spotlight used to illuminate alleys on either side of the street. GA5, GA35. There were several apartment buildings near the intersection of Ogden and Hallet Streets, and it was routine for officers to check the alleys behind

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[1] The Government's appendix will be referred to using "GA" and the appropriate page number.

these buildings. GA5. Officer Uliano drove past the alley behind 729 Hallet Street, and he and Officer Ronan observed an individual standing in the alley behind the building. GA6, GA35. Officer Uliano stopped the patrol car and backed it up several feet so that it was even with the start of the alley. GA6.

Officer Ronan got out of the patrol car and used his flashlight to illuminate the individual. GA36. He was able to identify him as the defendant, Hector Santiago, someone whom he had known at the time. GA36. He called to the defendant, "Come here," but the defendant ignored him, turned around and walked, at a "fast pace," up an exterior staircase which led into the 729 Hallet Street building. GA36. As Officer Ronan walked up the staircase after him, Officer Uliano used his flashlight to search the alley for any apparent contraband. GA6-GA7, GA37. He found none. GA7.

Officer Ronan walked up the stairs and heard a door open and close on the third floor. GA38. He went to the third floor apartment door and knocked. GA38. After a short time, an unidentified female answered the door, and Officer Ronan saw the defendant standing behind her in the far side of the kitchen. GA38-GA39. He asked the defendant to come out of the apartment and talk to him, but the defendant refused. GA39. Officer Ronan contacted Officer Uliano, advised him that he was unable to talk with the defendant and told him he would meet him back at their patrol car. GA39-GA40. The officers then resumed their normal patrol. GA39.

Approximately twenty minutes later, they arrived again at the intersection of Hallet and Ogden Streets. GA8-GA9, GA40. Once again, they turned left onto Ogden Street from Hallet Street, and Officer Uliano directed his passenger side alley light toward the alley behind 729 Hallet Street. GA9. They saw the defendant standing in the alley, this time with his back against the wall of the 729 Hallet Street building. GA9, GA40.

Officer Uliano was the first one out of the car. GA9. He directed his flashlight into the alley and caught a glimpse of the defendant's face as he walked toward the exterior staircase; like Officer Ronan, he too recognized the defendant from prior interactions. GA9-GA10. As Officer Uliano quickened his pace, so did the defendant. GA10. Officer Uliano testified that he was approaching the defendant to talk to him, to "find out why he is in the alleyway." GA10. He called out to the defendant, but the defendant ignored him and ran up the stairs. GA11. As the defendant got about half way up the first flight of stairs, Officer Uliano, who was between 10 to 15 feet behind him, observed him extend his right arm and throw away a handgun. GA11.

> Q. And how – you say you saw him throw a handgun; how do you know it was a handgun?
>
> A. I know a handgun. It had all the characteristics of a handgun. I wasn't that far away, not to question it was a handgun, and I had my light on him. I saw him throw the handgun.

GA11.

Officer Uliano immediately followed the defendant up the stairs and, as he did so, called on his radio that he was "in foot pursuit of a party who just threw a handgun, Ogden and Hallet." GA12. He also yelled to his partner, "Gun, Sean." GA13. The chase continued to the third floor, where the defendant banged loudly on an apartment door and was let in just before Officer Uliano could grab him. GA14. The apartment door "opened and the door was slammed in my face." GA14. He used his radio again to call for a supervisor and let everyone know that he "had a party . . . [who] had dumped a handgun on me and the party went into an apartment . . . ." GA15.

When the patrol car had pulled up to the alleyway the second time, Officer Ronan had decided to go to the corner of the building and watch toward the front, in case the defendant decided to go back through the building and out the front entrance. GA40-GA41. He had seen the defendant turn to flee from his partner, but had turned away before the defendant had run up the stairs and tossed the gun. GA40-GA41. At that point, he had heard Officer Uliano yell, "Sean, I need you back here, he threw a gun." GA41.

Officer Ronan turned and went back into the alley, toward the exterior staircase. GA42. Using his flashlight, he illuminated a gun on the ground at the bottom of the stairs, to the right of the stairwell. GA42. He picked up the gun and ran up the stairs after his partner. GA42-GA43. He saw that the gun was cocked, with its hammer back. GA43-GA44. He did not take the time to uncock it or unload it, because he was pursuing Officer Uliano and the defendant. GA43, GA44.

When Officer Ronan arrived on the third floor landing, he saw Officer Uliano kicking at the apartment door and yelling, "Bridgeport Police. Open the door." GA44. Officer Uliano testified that he was concerned that the defendant might have another firearm on him and that he could pose a danger to those inside the apartment. GA15. Officer Ronan showed Officer Uliano the gun and pointed out that it "was cocked." GA16, GA45. He then placed it down on the floor of the landing, helped Officer Uliano with the door, and pulled out his own duty weapon to cover Officer Uliano as he entered the apartment through the breached door. GA15, GA45.

There were several individuals in the apartment who were yelling and screaming at the officers, and both officers feared for their safety as they attempted to take the defendant into custody. GA20, GA46. Officer Ronan had not seen most of these individuals when he had been to the apartment door earlier that night. GA47. Officer Uliano entered the apartment with his gun drawn, grabbed the defendant by the arm, led him out to the landing and handcuffed him with the help of other officers who, by that time, had arrived as backup in response to the calls on the police radio. GA19-GA20.

At that point, Officer Ronan reholstered his own weapon and picked up the gun from the landing. GA48. He continued to handle it with great care because it was cocked, and he was concerned that it could discharge and jeopardize the safety of the other officers and the residents of the apartment, who were all standing on the landing. GA48. He took the gun down to his patrol car, uncocked it and removed its magazine. GA49. He identified it as a

Llama .380 caliber handgun with serial number 570415. GA50-GA51, GA74-GA75; Gov't's Exs. 1 and 4. It was loaded with four hollow-point bullets, one of which was in the chamber. GA50-GA51.

The elements of the offense required the government to prove not only that the defendant knowingly possessed a firearm, but also that the firearm had previously traveled in interstate or foreign commerce and that the defendant had been previously convicted of a felony offense. See 18 U.S.C. § 922(g)(1). The parties stipulated that, prior to December 21, 2001, the defendant had been convicted of a felony offense. As to the interstate commerce element, the government's proof included testimony from Special Agent John Fretts of the Bureau of Alcohol, Tobacco, Firearms and Explosives that the gun at issue had been manufactured in Spain and imported into this country through Hackensack, New Jersey. See GA74-GA75.

B. The Defendant's Evidence

The defendant called three witnesses during the presentation of his case: John McNicholas, Luz Santiago, and Jose Colon.

John McNicholas was a private investigator hired by the defendant to take measurements at the scene of the crime. Tr. at 316.[2] He took measurements of the "width of the sidewalk, from the curb to the building line." Tr. at 317. He measured "from the curb to the building line,

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[2] Citations to the trial transcript will be referred to as "Tr." along with the page number.

from the building line to the middle of the street, and from the building line across the street to the other curb. Tr. at 318. He also measured "from the back of the building line to the chain link fence, and from the building line to the stairs going up to the back of the building." Tr. at 318. The defendant used these measurements to attempt to contradict the officers' version of events. Tr. at 434-36.

Luz Santiago, one of the defendant's sisters, testified that, earlier on the night of the defendant's arrest, she had gone to the airport in New York to pick up her mother. Tr. at 325. She claimed that they had returned to her sister's house on Hallet Street at around 8:30 p.m. that night. Tr. at 325-26. She recalled being in the apartment when a police officer came to the front door looking for the defendant; the officer left without talking to the defendant. Tr. at 327. She then testified that she went out to put transmission oil in her car, which had been parked near the entrance of the alleyway behind 729 Hallet Street. Tr. at 328-29. She did not have a flashlight and used her car's headlights to help her see what she was doing. Tr. at 341. Five minutes after she went outside, she claims her brother joined her at her car to help her with the oil, but she had finished by the time he got to her car. Tr. at 329-330.

Soon after, Luz Santiago says she saw a police car approaching from Ogden Street, not Hallet Street, coming toward her car. Tr. at 330, 347. She was not sure, but thought that the police car drove past her, made a U-turn on Ogden Street and came back toward the alleyway on the same side of the street as her car. Tr. at 351. She quickly got into her car, turned off its headlights, and walked back up the exterior staircase behind 729 Hallet Street. Tr. at

330. As she did so, she thought that the defendant remained on the sidewalk. Tr. at 330.

Ms. Santiago stopped on the first landing, peered over at her car and noticed that the police car had stopped next to her car; both officers had testified that there was no other car parked along the street or between their vehicle and the start of the alleyway during either of their stops. Tr. at 65, 191, 222. She claimed, in contradiction to the officers' testimony, that the car did not have its alley light on and that the passenger, not the driver, immediately got out and approached the defendant. Tr. at 332. The defendant walked away and up the stairs at that point, but did not run. Tr. at 333. The officer followed. Tr. at 333. She admitted that, from her vantage point, she was unable to see the start of the first floor staircase or the defendant, as he walked up this staircase. Tr. at 333; GA71 (photograph of first floor staircase). She also claimed that the driver of the police car never got out of his vehicle. Tr. at 333. The defendant walked past her, she followed, and they both went inside the third floor apartment ahead of the officer. Tr. at 334. Less than five minutes later, two police officers kicked open the front door of the apartment and took the defendant into custody at gun point. Tr. at 335. According to Ms. Santiago, the officers had no reason for arresting the defendant that night. Tr. at 386.

Jose Colon was the last defense witness. He is the defendant's brother-in-law, and he lives at 729 Hallet Street with his wife and the defendant. Tr. at 393-94. On December 21, 2001, at around 9:00 p.m., Colon went to an after hours liquor store to buy beer. Tr. at 396. When he

came back from the store, he saw the defendant and Luz Santiago out on the sidewalk checking the transmission oil in Ms. Santiago's car. Tr. at 398. He claimed that the defendant was the one under the hood of the car checking the oil as Ms. Santiago stood next to him holding a flashlight. Tr. at 400, 407. He admitted that he had not mentioned having seen this when he had previously given a statement about the incident to the police. Tr. at 406. He immediately went upstairs to his apartment and took a shower. Tr. at 398. Soon after, the police kicked in the door and arrested the defendant. Tr. at 398.

SUMMARY OF ARGUMENT

I. The district court did not err when it declined to rule that the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), does not exceed Congress' authority under the Commerce Clause. The statute satisfies the Commerce Clause because it contains an express interstate jurisdictional element and because it constitutes an appropriate regulation of the interstate market in firearms. This Court has repeatedly rejected the type of Commerce Clause argument raised by the defendant in this case, and it should again do so here.

II. The district court did not abuse its discretion in permitting admission of testimony from Officer Feola concerning Officer Uliano's report over his radio that he saw the defendant with a gun. This testimony was admitted subject to a limiting instruction and for a proper non-hearsay purpose to explain the reason for Officer Feola's responding to the scene to back up Officer Uliano. Even assuming a risk that the jury considered the

testimony for its truth, Officer Uliano's contemporaneous warnings were otherwise substantively admissible under the "excited utterance" and "present sense impression" exceptions to the rule against hearsay. Moreover, Officer Feola's testimony constituted a single, fleeting reference to the content of Officer Uliano's report, and the defendant had not previously objected when Officer Uliano had twice previously testified concerning his radio reports. Accordingly, any possible error with respect to Officer Feola's testimony about the radio report was harmless.

III. The district court did not err in the manner that it instructed the jury concerning the element of possession. At the defendant's behest, the court removed a portion of the instruction concerning constructive possession, and the remaining portion that he now challenges was not a constructive possession instruction at all, but an accurate definition of actual possession. In view of the evidence demonstrating actual possession, the government's argument that the defendant actually possessed the gun, and the remaining portion of the possession instruction which stated that any alleged possession must be knowing and purposeful, any possible error in the jury instruction was harmless.

ARGUMENT

I. THE FELON-IN-POSSESSION-OF-A- FIREARM STATUTE DOES NOT EXCEED CONGRESS' AUTHORITY UNDER THE COMMERCE CLAUSE

A. RELEVANT FACTS

On September 22, 2002, the defendant filed a motion to dismiss the indictment on the ground that the felon-in-possession statute "does not regulate an item in interstate commerce nor is it a regulation of an activity that substantially affects interstate commerce." A14.[3] The defendant relied on three Supreme Court decisions to make his argument: United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Jones v. United States, 529 U.S. 848 (2000). A12-A14.

The district court denied the defendant's motion to dismiss. GA86. In doing so, it distinguished Lopez on the basis that the statute at issue in that case did not have an interstate nexus element, whereas the felon- in- possession statute requires proof that, at some point prior to the defendant's possession, the gun traveled in interstate or foreign commerce. GA83-GA86.

The government's trial evidence established that the firearm at issue in this case was manufactured in Spain and imported into the United States through New Jersey.

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[3] The defendant's appendix will be referred to using "A" and the appropriate page number.

GA74-GA75. The district court instructed the jury without objection from the defendant that the interstate jurisdictional element could be satisfied on the basis of evidence that the gun previously traveled across a state line or the United States border prior to the defendant's possession of the gun in Connecticut. A-39-A40.

B. GOVERNING LAW AND STANDARD OF REVIEW

The federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), provides, in relevant part that it shall be unlawful for any person who has been previously convicted of a felony offense to "possess in or affecting commerce, any firearm or ammunition." This Court has construed the "in or affecting commerce" element to require that "the prosecution need only make [the] *de minimis* showing that the possessed firearm previously traveled in interstate commerce." See United States v. Palozie, 166 F.3d 502, 505 (2d Cir. 1999) (*per curiam*). Thus, the Court in Palozie affirmed a conviction where the jury was instructed that it must simply find "the firearm allegedly possessed by the Defendant had at some time previously traveled across a state line." Id. at 503.

The Commerce Clause "provides that 'Congress shall have Power ... [t]o regulate Commerce with foreign Nations and among the several States....'" Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir. 2004) (quoting U.S. Const. Art. I, § 8, cl. 3). This Court has suggested that "[a]mong the eighteen Congressional powers enumerated in Article I of the Constitution, the Commerce Power is, perhaps, the most sweeping." United States v. King, 276 F.3d 109, 111 (2d Cir. 2002).

In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court categorized the activities that Congress may permissibly regulate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-59 (internal citations omitted).

This Court conducts *de novo* review of a constitutional challenge to the validity of a federal statute. See United States v. Pettus, 303 F.3d 480, 483 (2d Cir. 2002); King, 276 F.3d at 111.

C. DISCUSSION

The Court should reject the defendant's argument that § 922(g)(1) exceeds the scope of Congress' authority under the Commerce Clause. His reliance on Lopez, Morrison, and Jones is misplaced, because each of these precedents is distinguishable. As set forth below, this Court has made clear that these cases do not invalidate § 922(g) (1) and the manner in which it was applied in this case.

In Lopez, the Court struck down a gun-control law that, unlike § 922(g)(1), did not contain an express interstate jurisdictional requirement that the gun be possessed "in or affecting interstate or foreign commerce." The statute at issue in Lopez was the Gun-Free School Zones Act, formerly codified at 18 U.S.C. § 922(q), which prohibited simple possession of a firearm within a certain distance of a school, with no requirement that the particular gun at issue be tied to interstate or foreign commerce. Thus, section 922(q) would have prohibited possession of a gun that had never crossed state lines. Absent evidence that the statute was a "regulation[] of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce," and absent a "jurisdictional element which ensures, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," 514 U.S. at 561, the Supreme Court struck down the law as exceeding Congress' power to regulate interstate and foreign commerce. Id. at 567-68.

In December 1995, approximately eight months after Lopez was decided, this Court decided United States v. Sorrentino, 72 F.3d 294 (2d Cir. 1995), in which it evaluated Lopez at length and concluded that it did not render § 922(g)(1) unconstitutional. Noting the presence in § 922(g) (1) of a statute-specific jurisdictional element, the Court in Sorrentino concluded that "[t]he statute before us avoids the constitutional deficiency identified in Lopez because it requires a legitimate nexus with interstate commerce." Id. at 296.

Four more times from 1996 to 1998, this Court reaffirmed Sorrentino's holding that Lopez does not invalidate § 922(g)(1). See United States v. Franklyn, 157 F.3d 90, 98 n.4 (2d Cir. 1998); United States v. Trzaska, 111 F.3d 1019, 1028-29 (2d Cir. 1997); United States v. Garcia, 94 F.3d 57, 64-65 (2d Cir. 1996); United States v. Hernandez, 85 F.3d 1023, 1030-31 (2d Cir. 1996).

Then, in 2000, the Supreme Court decided Morrison and Jones, *supra*. At issue in Morrison was the civil remedy provision of the Violence Against Women Act (VAWA), 42 U.S.C. § 13981. As in Lopez, key factors in the Court's analysis was that the VAWA provision did not involve the regulation of economic activity and did not contain an express jurisdictional requirement. See Morrison, 529 U.S. at 613. The Court concluded that the VAWA provision exceeded Congress' authority under the Commerce Clause. See id. at 616-17.

Finally, in Jones, the Supreme Court did not rule at all on the constitutionality of a statute. Instead, it held that an owner-occupied residence that is not used for any commercial purpose does not qualify as "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of the federal arson statute. See 529 U.S. at 850-51. Citing the rule that "constitutionally doubtful constructions should be avoided where possible," the Court suggested that its interpretation of the federal arson statute was "reinforced" by the constitutional concerns expressed in Lopez. Id. at 851.

Following both Morrison and Jones, this Court has again rejected Commerce Clause challenges to § 922(g)(1). In United States v. Santiago, 238 F.3d 213 (2d Cir. 2001) (*per curiam*), the Court ruled that "Morrison does not alter the principles under the Commerce Clause that led us to uphold § 922(g) in Sorrentino." Id. at 216. It noted that "[u]nlike the statutes at issue in either Lopez or Morrison, § 922(g) includes an express jurisdictional element requiring the government to provide evidence in each prosecution of a sufficient nexus between the charged offense and interstate or foreign commerce." Id. [4]

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[4] Not to the contrary is this Court's more recent decision in United States v. Holston, 343 F.3d 83 (2d Cir. 2003), a case involving a constitutional challenge to a child pornography statute, 18 U.S.C. § 2251(a), that contained an express jurisdictional element requiring that the materials used to produce child pornography have previously moved in interstate commerce. There, the Court "question[ed] whether the mere existence of jurisdictional language purporting to tie criminal conduct to interstate commerce can satisfactorily establish the required 'substantial effect,' where, as here, the interstate component underpinning the jurisdictional element, for example, the shipment of a video camera, is attenuated from the criminal conduct--the production of child pornography--which occurs entirely locally." Id. at 89. It concluded, however, that the pornography statute was constitutional because of Congress' interest in regulating the national market in pornography. See id. at 90. This regulation-of-the-market theory applies with equal force to the firearms market; indeed, the Court has previously upheld on this basis a firearms statute that did not have any express jurisdictional requirement. See Franklyn, 157 F.3d at 93-95 (rejecting Lopez (continued...)

To the same effect, the Court in Santiago noted that the Supreme Court's decision in Jones involved only a question of statutory interpretation. "Since Jones involved the interpretation of a different criminal statute altogether, 18 U.S.C. § 844(i), it certainly did not fashion any new rule altering the extent of the nexus to interstate commerce required by the jurisdictional element of 18 U.S.C. § 922(g)." Id.

The Court concluded:

> Neither Morrison nor Jones requires us to revisit our holding in Sorrentino. We therefore reiterate that § 922(g), as interpreted prior to Lopez, is properly within Congress's authority under the Commerce Clause.

Id. at 217.

Seeking to distinguish Santiago, the defendant argues that the case involved application of "plain error" review, whereas the Commerce Clause challenge in this case had been raised below. See Brief for Defendant ("Def. Br.") at 17. But, although the Santiago court recites the "plain error" standard, its language dealing with the Commerce Clause issue makes clear that the Court determined as a

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[4] (...continued)
Commerce Clause challenge to 18 U.S.C. § 922(o), which bans possession of a machine gun); see also United States v. Haney, 264 F.3d 1161, 1167-71 (10th Cir. 2001) (rejecting Lopez/Morrison challenge to 18 U.S.C. § 922(o)), cert. denied, 536 U.S. 907 (2002).

matter of law that § 922(g)(1) continues to be constitutional even after Morrison and Jones. It found no legal error at all, much less plain error.

Any doubts concerning this issue are put to rest by this Court's later decision in United States v. Gaines, 295 F.3d 293, 302 (2d Cir. 2002). In Gaines, the Court once again upheld the constitutionality under the Commerce Clause of § 922(g)(1), without any suggestion of "plain error" review as to this issue: "Santiago held that neither Morrison nor Jones requires us to revisit our prior holding that only a minimal nexus with interstate commerce is necessary under § 922(g). As such, appellant's interstate commerce challenge is without merit." Id. at 302. The Gaines decision – which is not cited or discussed by the defendant in his brief – forecloses his claim that the constitutionality of § 922(g)(1) remains unsettled in this Circuit.

In short, this Court should follow its prior decisions and reject the defendant's Commerce Clause challenge to § 922(g)(1). In light of the statute's express jurisdictional element as well as its role in Congress's regulation of the national market for firearms, § 922(g)(1) does not exceed the authority of Congress under the Commerce Clause.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF OFFICER FEOLA CONCERNING OFFICER ULIANO'S RADIO REPORT, AND ANY ERROR WAS HARMLESS

A. RELEVANT FACTS

The government's first trial witness, Officer Uliano, testified on direct examination that he saw the defendant throw a gun as he fled up the exterior staircase behind 729 Hallet Street. GA11. He then stated that, as soon as he saw the defendant throw the gun, he called a "priority" in over his radio. GA11-GA12. He was talking on his radio as he was running. GA12. He gave his location and said that he "was in foot pursuit of a party who just threw a handgun." GA12. He also gave the party's name. GA12. He then requested "cover." GA13. At the same time, he called out to his partner, Officer Ronan: "Gun. Sean." GA13. Officer Uliano called over the radio again, just prior to entering the defendant's apartment, and called for a supervisor because he"had a party, again, had dumped a handgun on me and the party went into an apartment . . . ." GA15. The defendant did not object during any of this testimony concerning what Officer Uliano said to Officer Ronan and over the radio about the defendant's possession of a gun.

The government's second trial witness, Officer Ronan, confirmed that Officer Uliano had called out to him about the gun. GA41. According to Officer Ronan, he had heard his partner shout to him, "Sean I need you back here. He

threw a gun." GA41. He also confirmed that he had heard his partner call out on the radio for assistance. GA47. Again, the defendant did not object to this testimony concerning Officer Uliano's out-of-court statements.

The government's third trial witness, Officer Feola, testified concerning his activities as a back-up officer on the night of the defendant's arrest. Only then did the defendant object to testimony about Officer Uliano's radio report that the defendant had a gun:

> Q. At some point around nine or 9:30, did you hear Officer Uliano come over the radio?
> A. Yes.
> Q. What did you hear?
> A. He was in foot pursuit of Mr. Santiago and he had a weapon in his hands.
> Q. And –
>
> MR. O'REILLY: Objection, Your Honor. It's hearsay.
>
> MR. SPECTOR: Not offered for the truth, Your Honor. It's offered to show his actions.
>
> MR. O'REILLY: I ask it be stricken.
>
> THE COURT: Overruled, although I'm going to instruct the jury that I'm admitting this testimony simply for the fact that it was said. You should not consider this as evidence of the truth of the statement.

GA61-GA62. Accordingly, Officer Feola's account of Officer Uliano's radio report was admitted for the non-hearsay purpose of explaining why Officer Feola responded to the scene as he did. Tr. at 22, 466

(preliminary and final instructions explaining significance of limiting instructions).

B. GOVERNING LAW AND STANDARD OF REVIEW

The Federal Rules of Evidence generally preclude the admission of hearsay evidence. See Fed. R. Evid. 802. The definition of "hearsay" does not extend to all out-of-court statements; it includes only such statements that are "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "[T]he 'hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements.'" United States v. Freeman, 816 F.2d 558, 563 (10th Cir. 1987) (quoting Dutton v. Evans, 400 U.S. 74, 88 (1970)).

It is well-established that the government may present out-of-court statements through law enforcement officers for the limited, non-hearsay purpose of assisting the jury to understand why the officers acted the way they did. "[I]n some instances, information possessed by investigation agents is received at trial not for the truth of the matter, but as 'background' to explain the investigation, or to show an agent's state of mind so that the jury will understand the reasons for the agent's subsequent actions." United States v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994) (citing cases). "Testimony containing hearsay may be admissible not for its truth but as background information if (1) 'the non-hearsay purpose by which the evidence is sought to be justified is relevant,' and (2) 'the probative value of this evidence for its non-hearsay purpose is [not] outweighed by the danger of unfair prejudice resulting from the

impermissible hearsay use of the declarant's statement.'" Ryan v. Miller, 303 F.3d 231, 252 (2d Cir. 2002) (quoting Reyes, 18 F.3d at 70). The Court has cautioned, however, that the government's identification of a relevant non-hearsay use for such evidence is "insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice." United States v. Forrester, 60 F.3d 52, 59 (2d Cir. 1995).

A district court's evidentiary rulings are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. See United States v. Yousef, 327 F.3d 56, 156 (2d. Cir.) (manifestly erroneous), cert. denied, 124 S. Ct. 353 (2003); United States v. Dhinsa, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

In addition, this Court "will not order a new trial because of an erroneous evidentiary ruling if [it] conclude[s] that the error was harmless." United States v. Abreu, 342 F.3d 183, 190 (2d Cir. 2003). "In order to uphold a verdict in the face of an evidentiary error, it must be highly probable that the error did not affect the verdict," and "[r]eversal is necessary only if the error had a substantial and injurious effect or influence in determining the jury's verdict." United States v. Dukagjini, 326 F.3d 45, 61-62 (2d Cir. 2003).

C. Discussion

Without citing any case authority, the defendant argues that the district court abused its discretion when it allowed the admission of Officer Feola's testimony concerning the

radio transmission from Officer Uliano. But the testimony was relevant to its proffered non-hearsay purpose, which was to explain why Officer Feola was responding to the scene of the foot chase. Moreover, the probative value of the testimony was not outweighed by the danger of unfair prejudice, because the district court specifically told the jury not to consider the statement for its truth and, prior to Officer Feola's testimony, Officer Uliano had already testified in far greater detail as to the content of his radio transmissions and the fact that he had twice broadcasted that he was chasing an individual who had thrown a gun. See United States v. Salameh, 152 F.3d 88, 144 (2d Cir. 1997) (holding that jury presumed to follow limiting instruction unless "there is an overwhelming probability that the jury [was] unable to follow the court's instructions and the evidence is devastating to the defense").[5]

This Court has previously affirmed the admission as non-hearsay of statements of the police concerning the basis for their subsequent actions. See, *e.g.*, United States v. Gilliam, 994 F.2d 97, 103-04 (2d Cir. 1993) (testimony relating to anonymous caller's discussion of second gun permissible because caller's statements not offered for

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[5] The defendant's brief suggests that admission of Officer Feola's testimony was not only inadmissible hearsay but also violated his rights under the Confrontation Clause. Def. Br. at 21. The defendant, however, did not raise a Confrontation Clause objection in the district court, and therefore this claim is forfeited on appeal. See Dukagjini, 326 F.3d at 60 ("as a general matter, a hearsay objection by itself does not automatically preserve a Confrontation Clause claim").

their truth or to "prove the fact that there was a second gun," but to explain in response to defense cross-examination the actions of police in returning to the scene); United States v. Hoffer, 869 F.2d 123, 126 (2d Cir. 1989) (officer's testimony about "responding to a call of 'an officer needing assistance'" was not hearsay because it was not offered for its truth, but merely to show "how the police came to arrive at the scene").

Not to the contrary are Reyes and Forrester, *supra*. In both those cases, the Court reversed convictions where there were multiple out-of-court statements elicited for assertedly non-hearsay purposes in circumstances that gave rise to an unacceptable risk that the jury would accept them for their truth and also where the out-of-court declarants did not testify and were not subject to cross-examination at trial. See Forrester, 60 F.3d at 60-65; Reyes, 18 F.3d at 67-72. Here, by contrast, there was a single statement, and the out-of court declarant (Officer Uliano) testified at trial and was subject to cross-examination; indeed, both Officer Uliano and Officer Ronan testified without objection concerning Officer Uliano's prior statements at the time of the incident that the defendant had a gun.

Any possible error in the admission of Officer Feola's testimony was harmless. To begin with, Officer Uliano's contemporaneous warning about the defendant's possession of a gun in the course of fleeing from the police would have been independently admissible under both the "excited utterance" or "present sense impression" exceptions to the hearsay rule. See Fed. R. Evid. 803(2)-(3); United States v. Jones, 299 F.3d 103, 112-13 (2d Cir. 2002) (affirming admission under "excited utterance" and

"present sense impression" exceptions "nearly contemporaneous" statements by woman and child to police officer about sexually lewd conduct of man across street).

Moreover, Officer Feola made a single reference to Officer Uliano's radio statement, and the contents of the radio report had already been admitted without objection during the course of prior testimony, along with the contents of a second radio report by Officer Uliano and Officer Uliano's statement to Officer Ronan that he had found a gun. On these facts, it is highly probable that the error did not affect the jury verdict, and was therefore harmless. See Dukagjini, 326 F.3d at 61. Accordingly, the Court should reject the defendant's challenge to the admission of Officer Feola's testimony concerning Officer Uliano's statements over the radio.

III. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF POSSESSION

A. RELEVANT FACTS

The trial court held a charge conference on the record to review the proposed jury instructions and address any objections. At that conference, the defendant raised an objection to the constructive possession instruction. GA90. He claimed that there had been no evidence of constructive possession. GA90. In response, the government indicated that "the gun wasn't actually found on the defendant, he tossed it, and I don't want the jury to

get confused that the gun had to actually have been found on him." GA90.

The defendant was concerned that the jury would get confused and convict him even if they concluded that the gun could have been placed in the alley by some other individual. GA90. As an alternative, the defendant suggested an instruction which directed the jury that it could find that the defendant possessed the firearm if it concluded that he threw the weapon to the ground. GA91. The government agreed that this language could replace the standard constructive possession instruction, and the court stated that it would make the change if the defendant provided the suggested language. GA91

Just prior to the start of closing arguments, the court reviewed the jury charge with counsel. GA95. The defendant reminded the court about the proposed change to the constructive possession charge, and the court stated that it had made the change. GA95. It stated that the government was not making a constructive possession argument and suggested the following sentence to address the concerns expressed by defense counsel: "If you find that the defendant actually possessed the weapon or the gun, even if you further find that he discarded the, or relinquished possessed by discarding the gun, you may find for the government." GA95. Both sides agreed with this change, which replaced the former instruction: "If you find that the defendant had actual possession of the firearm, or that he had the power and intention to exercise control over it, even though it was not in the defendant's physical possession, you may find that the government has proven possession." GA93.

The court then instructed the jury and, as to the issue of possession, charged the jury as follows:

> To "possess" means to have something within a person's control. This does not necessarily mean that the defendant must hold it physically, that is, have actual possession of it. As long as the firearm is within the defendant's control, he possesses it. If you find that the defendant had actual possession of the firearm, even if you also find that he relinquished physical possession, you may find that the government has proven possession.

A38, GA94. The court went on to explain that the possession also had to be knowing, which "means that [the defendant] possessed the firearm purposefully and voluntarily, and not by mistake." A38.

After the court delivered the charge and the jury retired to deliberate, the defendant raised an objection to what he termed as "constructive possession" language. A61. He objected to the portion of the charge which indicated that "possess" means to have something within a person's control, but not necessarily that the defendant must hold it physically. A61. In this case, according to the defendant, "he either possessed [the firearm] and tossed it away or he did not possess it." A62.

In response, the government argued that the court had already redressed the defendant's concerns by taking out the language that he initially viewed as objectionable. A63. "The reference to constructive possession . . . was

taken out at the defendant's behest. It was not in the charge." A63.

The court overruled the defendant's objection based on its finding that the instruction set forth the proper legal standard and that it included a sentence which was drafted at the defendant's behest. A63. The defendant explained that some of the constructive possession language remained in the charge and that it "invited the jury to speculate as to how that gun arrived there." A63. According to the defendant, the language invited the jury to speculate that the gun found lying in the alleyway must belong to the defendant even if they did not believe that Officer Uliano had seen him discard it. A63.

The court disagreed. "If its laying on the ground, then it's not in his control within any reasonable meaning, understanding of that term. If it's lying on the ground and it's not his, he doesn't have possession of it and if the jury is going to speculate that a gun laying on the ground belongs to this defendant, then we all have much bigger problems that this charge." A64. The government noted that it would argue only an "actual possession" theory at closing argument. A64.[6] The court overruled the defendant's objection. A64.

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[6] See also Tr. at 423-24 (government's closing argument framing issue as whether "the defendant actually possessed the gun" and that "[t]he issue here is did the defendant do what the officer say he did," *i.e.*, tossing the guy away in response to pursuit of Officer Uliano).

B. GOVERNING LAW AND STANDARD OF REVIEW

The government may establish the element of possession in a § 922(g) case by showing that a defendant either *actually* or *constructively* possessed a firearm. "The first, actual possession, requires the government to show defendant physically possessed the firearm." Gaines, 295 F.3d at 300. "The second, constructive possession, 'exists when a person has the power and intention to exercise dominion and control over an object, [which] may be shown by direct or circumstantial evidence.'" Id. (quoting United States v. Payton, 159 F.3d 49, 56 (2d Cir. 1998)); see also Dhinsa, 243 F.3d at 676-77 (same).

"'The propriety of a jury instruction is a question of law that we review *de novo*.'" United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004) (quoting United States v. George, 266 F.3d 52, 58 (2d Cir. 2001)). "'A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" United States v. Pimentel, 346 F.3d 285, 301 (2d Cir. 2003) (quoting United States v. Walsh, 194 F.3d 37, 52 (2d Cir. 1999)).

The Court does not "review portions of the instructions in isolation, but rather consider[s] them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." United States v. Weintraub, 273 F.3d 139, 151 (2d Cir. 2001). Said another way, this Court must look to "the charge as a whole" to determine whether it "adequately reflected the law" and "would have conveyed to a

reasonable juror" the relevant law. See United States v. Jones, 30 F.3d 276, 284 (2d Cir. 1994).

Even assuming error in a jury instruction, the Court "will vacate a criminal conviction 'only if the error was prejudicial and not simply harmless.'" Pimentel, 346 F.3d at 301-02 (quoting George, 266 F.3d at 58). "Such error is harmless only if 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Id. (quoting George, 266 F.3d at 61).

C. Discussion

Without citing any case authority, the defendant claims that the district court erred in its instruction on possession because, in addition to instructing the jury on the concept of "actual possession," it included an instruction on the concept of "constructive possession." Def. Br. at 21. But this argument ignores that, at the defendant's behest, the district court removed the constructive possession language.

The defendant takes issue with a single sentence of the instruction which stated that "[a]s long as the firearm is within the defendant's control, he possesses it." A38; Def. Br. at 21. This definition, however, is an accurate statement of the law and – insofar as it references the defendant's "control" over the firearm – properly relates to actual possession, not just constructive possession. "Actual possession corresponds to the everyday sense of tangible, physical dominion or control over an object." Kuhali v. Reno, 266 F.3d 93, 105 (2d Cir. 2001) (emphasis added). "A person who knowingly has direct physical

control over a thing, at a given time, is then in actual possession of it." Black's Law Dictionary (6th ed.) at 1163.

To be sure, the instruction also stated: "This does not necessarily mean that the defendant must hold it physically, that is, have actual possession of it." A38. But this sentence must be read in the context of the very next sentence, which states: "If you find that the defendant had actual possession of the firearm, even if you also find that he relinquished physical possession of the firearm by discarding the weapon, you may find that the government has proven possession." A38. Considered together, these two sentences did not invite the jury to base a verdict on constructive possession; rather, they make clear that a verdict on the basis of actual possession of the gun is not defeated by the fact that there came a time that the defendant no longer actually possessed the gun after he threw it away.

Equally clear is that the jury was not invited to convict the defendant simply because the firearm was found lying on the ground near where he had once been. To the contrary, the jury was instructed that it must find that the defendant "possessed the firearm purposefully and voluntarily, and not by accident or mistake." Id. "[B]y emphasizing that possession could not be established by an accident or mistake, the court informed the jury that it could not convict the defendant for simple misfortune." United States v. Vasquez, 82 F.3d 574, 578 (2d Cir. 1996).

Even assuming that the instruction could be read to allow the jury to return a verdict on the basis of a

constructive possession theory, this would not mean that the district court erred. As noted above, possession in a § 922(g) case may be either actual or constructive. See Gaines, 295 F.3d at 300; Dhinsa, 243 F.3d at 676. Although the government argued an actual possession theory to the jury and the evidence most strongly supported this theory, a factual basis existed for a constructive possession verdict (albeit one that would have required the jury to first conclude that the defendant actually possessed the gun). The jury could have concluded that the defendant fully intended to return to recover the gun he threw away and would have done so if not for his arrest by the police.

Nevertheless, even assuming the absence of any proper factual basis for a constructive possession verdict, it does not follow that it would have been harmful error for the court to have instructed the jury on a constructive possession theory. That is because the evidence fully supported a verdict on the alternative ground of an actual possession theory, and juries are presumed to *follow* their instructions; they cannot be presumed to have returned a guilty verdict on grounds for which the evidence was not sufficient. See United States v. Adeniji, 31 F.3d 58, 63 (2d Cir. 1994) (not error for court to instruct jury on "conscious avoidance" alternative to "actual knowledge" even if factual basis for "conscious avoidance" theory was inadequate); United States v. Pyle, 424 F.2d 1013, 1016 (9th Cir. 1970) "[w]hile an instruction on actual possession was all that was required, we do not believe the giving of an additional instruction on constructive possession prejudiced the defendant"). Thus, this Court has held that "[w]hen the jury is properly instructed on two alternative

theories of liability, as here, we must affirm when the evidence is sufficient under either of the theories." United States v. Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996).

In short, the Court should reject the defendant's jury instruction challenge. The instruction is most reasonably interpreted to require a verdict on the basis of an actual possession theory of liability. To the extent that the instruction can be interpreted to suggest a constructive possession theory, § 922(g) permits such an alternative basis for liability, and there was no prejudice to the defendant from instructing the jury on constructive possession. Any possible error in the wording of the jury instruction was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: May 28, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that ten copies of the foregoing Brief for the United States of America were sent by United States mail to the Clerk of Court and two copies of the foregoing brief were sent by United States mail to the following persons or counsel of record on this day of June 1, 2004, to:

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9791 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

ASSISTANT U.S. ATTORNEY