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In the  
**UNITED STATES COURT OF APPEALS**  
for the Seventh Circuit

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**No. 09-1426**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**v.**

**JOSE TAPIA,**

**Defendant-Appellant.**

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**On Appeal from the United States District Court  
for the Northern District of Illinois, Western Division.  
No. 08 CR 50023 — Frederick J. Kapala, *Judge.***

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**BRIEF OF THE UNITED STATES**

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## **JURISDICTIONAL STATEMENT**

The jurisdictional statement of defendant-appellant is not complete and correct.

On June 17, 2008, defendant was charged with a violation of 18 U.S.C. § 922(g)(1). R8.<sup>1</sup> The district court had jurisdiction under 18 U.S.C. § 3231. Defendant was convicted following a jury trial on October 21, 2008. R41.

The district court sentenced defendant on February 6, 2009, and the judgment was docketed on February 17, 2009. R52. Defendant timely filed a notice of appeal on February 18, 2009. R53. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

## **ISSUES PRESENTED FOR REVIEW**

1. Whether the district court erred in determining that the officers conduct of a protective sweep was reasonable.

2. Whether the district court's decision to enhance defendant's sentence for using a firearm in connection with a crime of violence was procedurally sound.

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<sup>1</sup>Documents contained in the record on appeal are designated "R" and followed by the pertinent docket entry number. Citations to the defendants' brief are referred to as "Br," followed by the page number. Citations to documents in the government's appendix are designated "GApp." and followed by the pertinent page number. Citations to documents in the defendants' appendix are designated "DApp." and followed by the pertinent page number.

3. Whether the district court clearly erred in determining, based on the evidence presented by the government that defendant used a handgun in connection with a crime of violence.

### **STATEMENT OF THE CASE**

On June 17, 2008, a single-count indictment was returned by a federal grand jury, charging defendant with one count of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). D.AppA-1, R8.

On July 23, 2008, defendant filed a motion to suppress physical evidence. R13. The motion was heard on August 26, 2008, and denied on September 9, 2008. R20, 22.

Defendant filed motions to exclude evidence under FRE 403 seeking to exclude references to items seized during execution of a search warrant, to include marijuana residue, gun holster and notebooks, and to exclude the use of the term “felon” or “felony.” R29, 34. Defendant also opposed the admission of evidence under FRE 404(b), specifically, evidence concerning: (1) defendant’s involvement in a shooting at 809 South Greenview Avenue a little over a month prior to his arrest; (2) defendant’s gang membership; and (3) defendant’s prior conviction of aggravated unlawful use of a weapon. R28,32.

On October 15, 2008, the district court approved the admission of evidence concerning defendant’s involvement in the 809 South Greenview Avenue

shooting and defendant's most recent conviction of aggravated unlawful use of a weapon, but found that the probative value of defendant's gang affiliation was substantially outweighed by the danger of unfair prejudice. R35. On October 20, 2008, the first day of trial, after defendant moved to exclude testimony concerning the 809 South Greenview Avenue shooting, the government advised the court that it would not be presenting such evidence. R72 at 2-3, 193-194.

On October 21, 2008, after a two-day jury trial, defendant was found guilty. R40, 41. On February 6, 2009, the district court sentenced defendant to serve 120 months' imprisonment, followed by three years' supervised release. R52. The district court also ordered defendant pay a fine of \$500.00 and ordered forfeited defendant's interest in the Springfield Arms, model XD, .45 caliber semi-automatic handgun, serial number US667464 and ammunition, which he was convicted of possessing. *Id.* This appeal followed. R53.

## **STATEMENT OF FACTS**

### ***The Suppression Hearing***

Detective Randy Peraza, of the Rockford Police Department, was assigned to conduct a follow-up investigation of an allegation of domestic battery made by Verta Rodriguez against defendant. DAppB145.<sup>2</sup> In an interview conducted as

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<sup>2</sup> Verta Rodriguez identified herself at the time she made the domestic battery complaint as defendant's girlfriend. D.AppB22. However, just before trial, it was learned that Rodriguez was actually defendant's estranged wife. *See* Br5.

part of this investigation, Rodriguez informed Detective Peraza that defendant had been involved in a shooting at 809 South Greenview. DAppB27-29, B30. Rodriguez told Detective Peraza that the South Greenview shooting was in retaliation for the shootings of two members of the Latin Counts street gang that had previously occurred at 716 Loomis in Rockford, Illinois. DAppB30, DAppB23-25. Peraza was familiar with the Loomis shooting, because he had been assigned to investigate it, and he knew that the victims of the Loomis shooting were two members of the Latin Counts gang. DAppB30. Detective Peraza verified the occurrence of a shooting on South Greenview through law enforcement inquiries, and determined that it had in fact occurred subsequent to the Loomis shooting. DAppB29.

Ms. Rodriguez provided Detective Peraza with the current residence address of defendant, 129 Ridgeview, and reported that the defendant was involved in narcotics sales. DAppB33. She described the Ridgeview residence as the place where the defendant kept his drugs, and reported that the residence served as a clubhouse for the Latin Counts street gang. *Id.* Detective Peraza was also aware through other sources that the upper part of the house was vacant and the defendant was staying in the basement. *Id.*

Defendant was wanted on two outstanding warrants, one for domestic battery and one for a violation of parole. DAppB32-33. On May 19, 2008, law

enforcement officers went to 129 Ridgeview to arrest defendant on the outstanding warrants. DAppB33-34. Approximately eight officers were assigned to make the arrest. DAppB34. Detective Peraza went to the front door and knocked and knocked for several minutes until he finally got a response. *Id.* Defendant opened the door and let the officers into the vacant living room. *Id.* Before the door opened, Detective Peraza heard Deputy Freedlund, who was stationed outside a window by the front side of the house, call out, saying that someone was coming out of the basement. DAppB35, B70.

Deputy Freedlund testified that, after three to five minutes of knocking he saw somebody come towards the front door. DAppB70-71. Deputy Freedlund noticed the person come from and walk out of the kitchen area. DAppB71. Deputy Freedlund testified that, based upon his subsequent walk-through of the house, there was a staircase leading from the kitchen to a back door. *Id.* Officers were stationed at that back door. *Id.*<sup>3</sup>

Officers arrested defendant and conducted a protective sweep of the basement to determine whether there were any other persons present in the residence. DAppB35. Detective Peraza testified that the protective sweep was conducted because they had received information that the location was a gang

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<sup>3</sup> No evidence was presented by either party concerning the floor plan of the residence, or the existence or number of windows or doors permitting ingress and egress from the basement.

clubhouse, that weapons would be there, and that members of the defendant's gang had been involved in shootings in the County. *Id.* The information the officers had indicated that the basement of the house was the portion being used and that there would be a possibility that other gang members would be in the basement. DAppB36.

In response to defense counsel's questions, Detective Peraza testified that, apart from the information supplied by Rodriguez, he had no additional information regarding the identities or gang affiliations of other persons who stayed at the Ridgeview residence, or the dates or times when other persons could be found there. DAppB48-49. There were no detailed and long term surveillance operations conducted on the Ridgeview location. *Id.* Detective Peraza testified that as a result of drive-by surveillance on three to four occasions and watching a "little bit," officers never saw anyone coming and going. *Id.*

On the day of the arrest, when officers arrived at Ridgeview, a Lincoln Navigator was parked in the driveway of the residence. R16-1 at7; DAppB51. Rodriguez had told Detective Paraza that Tony Milene, one of defendant's associates, had a black Lincoln Navigator, DAppB23-24, B50, and Detective Peraza knew from other investigations that Milene was a gang member, R16-1 at 6; DAppB50, B64. Moreover, Detective Peraza had learned during his

investigation in this case that Milene was an associate of the Latin Counts who traveled back and forth between Winona, Minnesota and Rockford to distribute drugs. *Id.* A record check revealed Tony Milene had a criminal record. *Id.*

Detective Cunningham testified that he conducted a protective sweep, rather than a search for evidence, in the basement area of 129 Ridgeview.

Q. After the defendant was taken into custody, Detective Cunningham, What did you do?

A. Myself and other officers searched the residence, both the first floor and the basement, for other evidence.

Q. Why did you do that?

A. Given the nature of why we were there and who he was, we searched the residence for our own safety.

Q. Were you made aware of the nature of why you were there and who the defendant was prior to approaching 129 Ridgeview Avenue?

A. Yes, sir.

Q. What did you know?

A. That he was an active member of the street gang the Latin Counts, that he was a higher ranking member within the organization for Rockford, that he was suspected of being involved in narcotics dealing, and that the residence itself was being used as a place where other gang members would gather and have meetings, as well as store weapons and narcotics.

Q. Based upon that information, did you feel it was necessary to see if anybody else was there?

A. Yes, sir.

DAppB76-77.

Detective Cunningham described the protective sweep of the basement as lasting approximately thirty seconds. DAppB78. Detective Cunningham testified that, upon seeing a light on in the basement bathroom, he walked into it and to the back of it to make sure there was not another room off of it. *Id.* After clearing the room, as Detective Cunningham turned to exit, he looked up and saw the handle of a pistol sticking out from beyond the ductwork. *Id.* Detective Cunningham testified that he is six foot and three inches tall, and that the ductwork where the pistol lay was about seven to seven and one-half feet above the floor. DAppB79.

On cross-examination the defense challenged Detective Cunningham's decision to enter the bathroom, rather than simply to look in, for the purpose of the protective sweep. DAppB82-84. Detective Cunningham testified that he could not ensure that there was no door on the other side of the bathroom without entering, and clarified that one of the bathroom's walls was not visible from the doorway. DAppB82, 83-84.

Detective Peraza described the sweep as "pretty quick" and estimated that it took a couple of minutes. DAppB36. After determining that no one else was in the basement, the officers exited the residence. DAppB38. A search warrant

was obtained before the Ridgeview residence was searched for evidence.

DAppB39

At the conclusion of the evidence, defendant argued that the handgun recovered by Detective Cunningham should be suppressed because (1) the officers' protective sweep of the basement was unreasonable and in violation of the Fourth Amendment because the information provided by Rodriguez was not reliable; and (2) the handgun was not in plain view and searching above the ductwork exceeded the scope of the protective sweep. R13, 15. Defendant argued that Detective Cunningham exceeded the scope of the protective sweep when he entered the bathroom in which the gun was found. DAppB97.

The district court found that the officers had reason to believe that the defendant and other Latin Counts may be present at the Ridgeview residence and armed. R32. The court listed the facts that supported those reasons as follows:

- (1) the defendant was on parole for a 2005 unlawful use of weapons conviction;
- (2) defendant was the leader of the Rockford Latin Counts;
- (3) defendant was living in the basement of the residence with other Latin Counts;
- (4) the Latin Counts and Latin Kings had recently been shooting at each other, including the drive-by shootings on Loomis street and Greenview Avenue;

(5) defendant may have been involved in the Greenview Avenue shooting using a .45 caliber handgun; and

(6) there was a Lincoln Navigator in the driveway big enough to hold five or six people.

*Id.*

The district court found that these facts, taken together with the observations of the officers at the time of the arrest, including a vacant first floor and the emergence of the defendant from the basement, gave the officers reason to believe that armed Latin Counts could be in the basement. *Id.* The court also found that the information provided by Rodriguez was reliable in that some of the information had been corroborated by Detective Peraza, and other parts were consistent with what Peraza already knew about the defendant. *Id.* Therefore, the court determined, Detective Peraza had reason to believe that information provided by Rodriguez was reliable. *Id.* Moreover, the district court determined that, even if Rodriguez's information conflicted with information obtained from another witness, that would not have eliminated the arresting officers' reasonable bases for fearing that armed Latin Count members might emerge from the basement while they were arresting the defendant. *Id.*

Finally, the district court credited Detective Cunningham's testimony and determined that he found the gun in plain view while acting within the scope of a reasonable protective sweep of the premises. *Id.*

## ***Sentencing***

As a result of defendant's guilty verdict, the probation officer prepared a Presentence Investigation Report ("PSR") pursuant to the district court's order.<sup>4</sup> R40. The probation officer calculated defendant's base offense level as 20 pursuant to Guideline § 2K2.1(a)(4)(A). PSR88-95. The probation officer increased the base offense level by 4 levels pursuant to Guideline § 2K2.1(b)(6), based on a finding that the firearm defendant possessed on May 19, 2008, was previously used by the defendant in a shooting at 809 South Greenview Avenue on April 9, 2008. PSR96-103. At lines 63 through 79 of the PSR, the probation officer discussed the defendant's involvement in the South Greenview shooting on April 9, 2008. PSR 63-79. Relying on forensic analysis of all 64 shell casings recovered from the South Greenview shooting, PSR 70-74, the probation officer specifically stated that defendant fired thirteen rounds from the handgun recovered from his residence on May 19, 2008. PSR 65-67. The probation officer further noted that when the police recovered the handgun on May 19, 2008, it was loaded with CCI brand bullets, the same brand as the recovered South Greenview casings. PSR 75-77. Finally, the probation officer noted that the handgun possessed by the defendant was also matched through a ballistics

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<sup>4</sup>All citations to defendant's Presentence Investigation Report are denoted "PSR" and followed by the applicable line number(s).

analysis to another shooting incident on April 27, 2008 at 716 Blenheim Street. PSR 77-79. The defendant filed no written objections to any of these facts.

The probation officer calculated defendant's criminal history points to be 16. PSR261-62. Prior to the sentencing hearing defendant did not file a written objection to the conclusions contained in the PSR.

Defendant's sentencing hearing was conducted on February 6, 2009. R51. DAppA29-36,B134-199,A37-50. At the sentencing hearing, defendant disputed the probation officer's conclusion that defendant was involved in the South Greenview shooting, and the supporting documents to that effect (the police report of interview of Verta Rodriguez [DAppB23-25] and Glifford Gozdal's statement dated October 20, 2008 [DAppB208]). D.AppA31. The defendant disputed the offense level enhancement under §2K2.1(b)(6) even though he had conceded the correctness of the guidelines calculations. D.AppA31-32. Defendant's counsel explained the change of position as having resulted from receiving evidence that contradicted the probation officer from his client that morning. D.AppA32.

The court then questioned whether the government was ready to proceed with evidence. *Id.* The government agreed to present witnesses to attempt to establish the South Greenview shooting. *Id.* The court then clarified that defendant had no other dispute as to the factual findings or conclusions in the

sentencing materials. D.AppA33. Defendant's counsel stated that there were no other disputes. *Id.* Accordingly, the court adopted the factual findings and conclusions contained in the presentence report and accompanying materials, other than evidence pertaining to the South Greenview shooting. *Id.*

**1. Evidence of Defendant's Involvement in the South Greenview Shooting**

**A. Testimony from Officer Investigating the Loomis and Greenview Shootings**

At the time of the defendant's arrest, officers of the Rockford Police Department and the Winnebago Sheriff's Department were investigating a series of suspected gang-related shooting incidents, including:

- (1) April 8, 2008, 4:57 p.m. shooting at 716 Loomis;
- (2) April 9, 2008, 12:45 a.m. shooting at 809 South Greenview;
- (3) April 27, 2008, 1:22 a.m. shooting at 716 Blenheim; and
- (4) May 9, 2008, 12:38 p.m. shooting at 1000 Bruce.

Detective Joseph Stevens testified at defendant's sentencing that he investigated the incident at 716 Loomis Street in which gunshots were fired at the defendant and two others, Daniel Medrano, and Alberto Gomez. DAppB136-37. Gomez suffered gunshot wounds. *Id.* Medrano was interviewed and he was extremely upset about Gomez being injured. D.AppB138. The types of spent ammunition recovered at Loomis included .45 caliber and .22 caliber shell

casings. *Id.* Investigators recovered undischarged ammunition from the house located at 716 Loomis, including .40 caliber and .380 caliber ammunition. *Id.* The only weapon recovered from Loomis was a shotgun. *Id.* The shooting occurred on April 8, 2008. *Id.*

Detective Stevens testified that within eight hours of the Loomis shooting, another shooting occurred at a house on South Greenview, involving the discharge of upwards of 60 rounds. D.AppB139. The types of ammunition recovered from the South Greenview shooting included .40 caliber, .45 caliber, and 9mm shell casings. D.AppB181-82. The family of Pedro Juarez lived at the South Greenview residence. *Id.* Juarez was a well known Latin King, a rival of the Latin Counts. D.AppB139-140, 143.

#### **B. Verta Rodriguez' Interview and Testimony**

Detective Peraza testified that he was assigned to investigate a report brought to him by Verta Rodriguez about the defendant's involvement in a shooting that occurred on April 9, 2008 at 809 South Greenview. D.AppB145. Rodriguez reported that a shooting had occurred on April 8, 2008 at 716 Loomis where two members of the Latin Counts gang, Daniel Medrano, also known as "Blacky" and Alberto Gomez, were shot at. D.AppB145-46. Rodriguez reported that the defendant, known as "Monkey" was very upset that the Latin Kings shot at Blacky and Alberto. D.AppB146. That night a meeting was held at

Verta's house, where the defendant and other members of the Latin Counts, including Jake Larsen (also known as "Snake"), Daniel Medrano, Eric Morales ("Flip"), and the defendant, were present. *Id.*; D.AppB146-47. Rodriguez reported that at that meeting the defendant decided to retaliate, and then Larsen brought in a full box of guns and distributed them to the other members. *Id.* Rodriguez reported that the guns were then loaded, and the gang members left. D.AppB147.

Verta Rodriguez was subpoenaed by both the government and the defense to testify at sentencing. D.AppB149, 165-66. She had advised the government by telephone prior to the sentencing hearing that she intended to invoke the marital privilege and decline to testify. D.AppB149, 165-66. When Rodriguez appeared at the sentencing, government counsel advised the court that Rodriguez had indicated to government counsel that she would invoke her privilege. *Id.* The court directed that Rodriguez be placed on the stand to invoke her privilege on the record, and directed government counsel to handle the questioning of Rodriguez. D.AppB159.

On the stand, Verta Rodriguez proceeded to testify that she had no recall of being present when the defendant and other persons met to discuss the Loomis Street shooting. D.AppB160. She testified that she did recall meeting with Detective Peraza, but claimed to have "made up" the information she

provided to Detective Peraza. *Id.* At that point, government counsel suggested to the court that Rodriguez be advised of the penalties for perjury. *Id.* The court advised Rodriguez of the penalties for perjury and asked whether she had an attorney. D.AppB160-61. Ms. Rodriguez testified that she had an attorney but that she was not going to get on the stand so he did not come with her. D.AppB161. The court proceeded to advise Rodriguez of her right to an attorney. *Id.* Rodriguez advised the court that she would like to have her attorney with her. D.AppB162. The court established that Rodriguez was entitled to representation by a court appointed attorney. D.AppB162-63. Rodriguez was excused to permit the court to appoint an attorney. D.AppB163-65.

Government counsel then made a record of the events leading to the government's decision not to call Rodriguez as a witness at sentencing, and advised that, in light of Rodriguez's assertion of privilege, government counsel intended to rely on Detective Peraza's testimony concerning the South Greenview shooting. D.AppB165. Defendant's counsel advised the court that he too had been advised by Rodriguez that she planned to invoke the marital privilege and decline to testify, and that he had instructed her that she nevertheless had an obligation to appear under subpoena. D.AppB166.

### **C. Clifford Gozdal's Interviews**

#### **1. First Interview on May 9, 2008**

Detective Peraza interviewed Clifford Gozdal on two occasions, and took a written statement each time. D.AppB147. The first interview occurred on May 9, 2008, in relation to an investigation of an incident at 1000 Bruce, in which the occupants of a vehicle shot at a man walking down the street. D.AppB148, B209. Gozdal was apprehended with a gun when the police arrived very quickly at the scene. *Id.* During this first interview, Detective Paraza did not discuss the Loomis or South Greenview shootings with Gozdal. *Id.*, *See also* D.AppB209.

## **2. Second Interview on September 27, 2008**

On September 27, 2008, Gozdal was interviewed by Investigator Glover, a Sheriff's Investigator from Winona, Minnesota, at the request of Special Agent Richardson of the ATF. D.App.B204-207. This interview focused on the shooting that occurred at 1000 Bruce, in which occupants of a vehicle shot a man walking down a street, and after which Gozdal was caught running from the scene carrying a gun. D.AppB204-206. Gozdal had previously given a statement concerning this incident on May 9, 2008,<sup>5</sup> and had identified "Flip" as the person who handed him the gun he was caught carrying. D.AppB206, 209.

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<sup>5</sup> The incident occurred on May 9, 2008, and the statement signed by Gozdal bears that date. However, Detective Peraza testified the interview occurred on approximately April 8, 2008.

When asked what he knew about the defendant, Gozdal described defendant as a gang member, described the house where defendant was living, and provided a physical description of the defendant. D.AppB205. Gozdal reported that the defendant was a Latin Count and that defendant wanted to kill Gozdal because Gozdal told the police that “Flip” (Eric Morales) handed Gozdal the gun after the shooting on Bruce Street. *Id.* Gozdal told Investigator Glover that the defendant was not involved in the Bruce shooting, however. D.AppB206.

As to the South Greenview shooting, Gozdal reported to Inspector Glover that Taylor Hawk had bragged about shooting a house up in Rockford but Gozdal did not say who was with Hawk. *Id.*

Detective Peraza testified that he never reviewed the report of Inspector Glover’s interview of Gozdal, and that he had taken only two statements from Gozdal. D.AppB150-51.

### **3. Third Interview on October 20, 2008**

Detective Peraza conducted a third interview of Gozdal (the second interview of Gozdal conducted by Detective Peraza) on October 20, 2008. D.AppB150. As part of this interview, Gozdal provided a written statement. D.AppB208. The focus of this interview was a shooting of a house in Rockford shortly before April 11, 2008 (the South Greenview shooting). Gozdal reported

that on April 11, 2008, the defendant and another Latin Count, Taylor Hawk, bragged about shooting at a house in Rockford Illinois and said that he shot the house 50-60 times. *Id.* The defendant and Hawk told Gozdal that they used an XD45 .45 caliber pistol, a .40 caliber pistol, and a 9 mm pistol. *Id.* They reported that they hit both the house and a car that was located at the house. *Id.* Gozdal, also reported that Hawk had left Minnesota to go to Rockford two to three days prior to April 11, 2008. *Id.*

**D. South Greenview Shooting Investigation and Forensic Evidence**

Deputy Daniel Liston, Crime Scene Technician, investigated the South Greenview shooting. D.AppB174-75. Deputy Liston testified he recovered a total of 64 shell casings from the scene, including thirteen .45 caliber CCI brand shell casings. D.AppB175. Deputy Liston testified that he diagramed the locations of the shell casings and the bullet strikes to the house and a vehicle.

Deputy Liston identified 29 photographs depicting the scene, which photographs displayed that a vehicle had been hit by gunfire, that the house (which was occupied at the time, D.AppB185), had sustained 37 bullet strikes, that bullet strikes and bullet fragments were recovered inside the house. D.AppB177-181. Bullet strikes and fragments were recovered and photographed in such places as inside the kitchen where a highchair sat, the living room sofa

struck by bullets, and in a bedroom. D.AppB179-81. Based upon the casings Deputy Liston recovered which included nine millimeter, .40 caliber, and .45 caliber; along with the pattern of the casings, he concluded that at least three different types of weapons were used. D.AppB181-82. A forensic scientist and firearms identification expert testified that the casings recovered at the South Greenview Shooting were fired from the gun recovered from the defendant at the time of his arrest. D.AppB169-70. This evidence was consistent with the information provided by Clifford Gozdal on October 20, 2008. D.AppB208.

Finally, Deputy Liston testified that the house had been occupied at the time the shooting occurred. D.AppB185.

#### **E. Defendant's Sentencing Witnesses**

Defendant presented Jacob Larson who testified that he did not see the defendant on April 8, 2008, and did not recall seeing him on April 9, 2008. D.AppB186. Larson also testified that he did not bring the defendant a box of guns. D.AppB188-89. Later during cross-examination, Larson testified that he had no specific recollection where he was on April 8, 2008. D.AppB190. Larson admitted to having a conversation with Rodriguez outside the courtroom while waiting to testify where he told her that what she had been doing lately was wrong. D.AppB190-91.

The defense then advised the court that he planned to present the testimony of Verta Rodriguez, and inquired whether the parties would proceed with Verta as a defense witness or the government's witness. D.AppB192. The court found that Rodriguez was still the government's witness and instructed government counsel to continue. *Id.* Verta Rodriguez was returned to the stand after having been given an opportunity to consult with counsel. D.AppB190-91. Government counsel asked Rodriguez if she wished to continue and answer questions. *Id.* Rodriguez exercised her Fifth Amendment right not to answer questions. *Id.*

#### **F. The Court's Findings**

The court found it uncontroverted that the gun casings found at the scene of the South Greenview shooting were fired from the gun that the defendant possessed on the day of his arrest. D.AppA38. The court found Verta Rodriguez' statement made near the time of the shooting to Detective Peraza more credible than any statement she made in court during the sentencing. *Id.* The court found Clifford Gozdal's statement to Detective Peraza credible, specifically noting that the types of guns Gozdal identified as having been used in the shooting (a .45 caliber, a .40 caliber, and a 9 mm) matched law enforcement identifications of the casings found at the scene. *Id.* Finally, the court found

that the government had sustained its burden and the four-level enhancement under §2K2.1(b)(6) applied. *Id.*

The court adopted the guidelines calculations contained in the PSR, and determined that defendant's total offense level was 24, his criminal history category was VI, and that his advisory Guidelines range was 100 to 120 months. *Id.* The parties presented no additional evidence on the §3553(a) factors. D.AppA38-39. The court heard the arguments of counsel and the defendant addressed the court directly. D.AppA39-44.

In pronouncing sentence the court characterized the South Greenview shooting upon which the §2K2.1(b)(6) enhancement was based as an outrageous and callous act of violence. D.AppA44. The court highlighted defendant's criminal history for its recidivism, aggressive and violent behavior, and non-compliance with court supervision, conditional discharge, probation, and parole. D.AppA45. Turning to defendant's personal history and characteristics, the court noted defendant had hardly any history of verifiable employment, despite having an 11 year-old son to support, has a history of substance abuse, and involvement in street gang activity. *Id.* Defendant's childhood and accomplishments(obtaining his GED) were recognized in mitigation, and the court held that the offense was mitigated by the fact that no physical harm resulted. *Id.* The court expressed that defendant's sentence should deter him

from criminal conduct and protect the public from his further crimes. D.AppA45. The court sentenced defendant to a term of 120 months' imprisonment. D.AppA48.

### **SUMMARY OF ARGUMENT**

The district court correctly concluded that the officers' protective sweep of the basement of defendant's residence was reasonable under the Fourth Amendment and the handgun which defendant was charged with possessing was found in plain view during that sweep. In this case because 129 Ridgeview was reported to be a location where the defendant met with other members of the Latin Counts street gang, because a vehicle capable of carrying six or more persons was parked in the driveway when the officers arrived to arrest the defendant, because the defendant and members of his gang had been identified as the participants in a number of recent shootings, and because the configuration of the home, particularly the basement was unknown to the arresting officers, a protective sweep was necessary to ensure a safe departure from the premises.

The district court correctly determined that defendant was subject to a 4-level enhancement for using the firearm in connection with the commission of another felony offense. The district court correctly calculated the advisory Guidelines range and conducted a thorough and meaningful 18 U.S.C. § 3553(a)

analysis after which the district court articulated valid reasons for the sentence imposed. Defendant's sentence was therefore reasonable.

## ARGUMENT

### **I. The Protective Sweep of the Defendant's Basement was Constitutional.**

#### **A. Standard of Review**

The district court's decision that the police acted reasonably when conducting a protective sweep is reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). The district court's findings of historical fact and credibility are reviewed for clear error. *Id.* Because the resolution of a motion to suppress is fact-dependent, the reviewing court "must give particular deference to the district court that had the opportunity to hear the testimony and observe the demeanor of the witnesses." *United States v. Edwards*, 898 F2d 1273, 1276 (7th Cir. 1990). Finally, the reviewing court is to give due weight to the inferences drawn from those facts by the resident judge and local law enforcement. *Ornelas* at 699.

## B. Analysis

Contrary to defendant's contentions, the district court's determination that the officers had a reasonable basis to conduct a protective sweep of defendant's basement was supported by ample evidence.

### 1. **The Police had a Reasonable Basis to Believe That Persons Other than Tapia Were in the Basement and Posed a Danger to Those on the Arrest Scene.**

The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Maryland v. Buie*, 494 U.S. 325, 337 (1990). In *Buie*, comparing the law enforcement officer's use of a protective sweep, to a search under *Terry v. Ohio*, 392 U.S. 1 (1968) or under *Michigan v. Long*, 463 U.S. 1032 (1983); the Supreme Court recognized that:

[t]he risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A *Terry* or *Long* frisk occurs before a police-citizen confrontation has escalated to the point of arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purposes of prosecuting him for a crime. Moreover, unlike the encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

*Maryland v. Buie*, 494 U.S. at 333.

The Supreme Court also made clear that arresting officers are permitted to “take reasonable steps to ensure their safety after, and while making, the arrest.” *Id.* at 334. The Court explained that “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.* Furthermore, the Court clarified that a protective sweep which is for the purpose of protecting the arresting officers “may extend only to a cursory inspection of those spaces where a person may be found” and may last “no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” *Id.* at 335. Finally, the circumstances of a particular encounter must be “assessed carefully in light of the overarching policy concerns articulated in *Buie* and its first cousins, *Terry* and *Long*,” including “a proper regard for the safety of police officers.” *Leaf v. Shelnut*, 400 F.3d 1070, 1087 (7th Cir. 2005).

In *Buie*, on the same day that two men committed an armed robbery, police obtained an arrest warrant for Buie and his accomplice, who were the suspected armed robbers. Buie’s house was placed under surveillance. After two

days of surveillance, where no comings and goings were observed, police executed an arrest warrant and arrested Buie after he exited the basement of the house. *Buie v. State*, 580 A.2d 167, 168 (Md. 1990), *cert. denied*, 489 U.S. 1106 (1991). Promptly after his arrest an officer entered the basement, from which Buie had emerged just prior to his arrest to see if anyone else was down there. *Id.* at 168-69.

After the Supreme Court remanded the case, the State court upheld the sweep, reasoning that because Buie had not been seen during a two-day period of surveillance, the officer was entitled to “reasonably suspect that Buie had come to his home shortly after the robbery, and that he had been hiding out there ever since.” *Buie v. State*, 580 A.2d at 170-71. The court went on to point out that it was entirely reasonable for the arresting officer to suspect that his accomplice had come to Buie’s house with him after the robbery, and might well be in the basement. *Id.* Furthermore, the court emphasized that the officer “knew that Buie had used a gun in the robbery, and the gun had not been found when Buie was arrested.” *Id.* The *Buie* court on remand upheld the protective sweep and certiorari was denied. *Buie v. State*, 580 A.2d at 172, *cert. denied*, 489 U.S. 1106 (1991).

Defendant minimizes the significance of the facts relied upon by the district court to support his argument that the police had no reasonable basis to believe that anyone other than Tapia was in his home or posed any danger to the officers. The argument lacks merit. As the district court found,

(1) the defendant was on parole for a 2005 unlawful use of weapons conviction;

(2) defendant was the leader of the Rockford Latin Counts;

(3) defendant was living in the basement of the residence with other Latin Counts;

(4) the Latin Counts and Latin Kings had recently been shooting at each other, and those gangs had been identified as participating in drive-by shootings on Loomis Street and Greenview Avenue;

(5) defendant may have been involved in the Greenview Avenue shooting using a .45 caliber handgun;

(6) there was a Lincoln Navigator in the driveway big enough to hold five or six people.

*Id.*

Thus, the officers had far more reason to fear the presence of additional, armed individuals than the mere fact that the officers were attempting to arrest the defendant for a violent crime. (see Br. 19-20). These facts were sufficient to support a reasonable belief that other Latin Counts might be present with defendant at the 129 Ridgeview residence, that they were dangerous, and that they may be armed. R32.

In *Buie* the protective sweep was held constitutional despite the facts that: (1) the arrested defendant had not resisted after he emerged from the basement, (2) prior to the arrest the premises had been under a 2-day surveillance, and (3) the sweep went into a basement that might have been secured by posting guards at the stairway while the officer's completed the arrest and departed the scene. *Buie v. State*, 580 A.2d at 172, *cert. denied*, 489 U.S. 1106 (1991). Here, while Tapia did not resist, his emergence from the basement was not immediate and, as indicated above there was other evidence indicating that others might be present in the basement. Thus, just as was ultimately found in *Buie*, the arresting officers could reasonably suspect that the basement harbored an individual who posed a danger to those on the arrest scene, and they were justified in conducting a cursory sweep of that area to neutralize the danger.

The inquiry into “whether a protective sweep was reasonable is necessarily a very fact-specific one.” *Leaf v. Shelnett*, 400 F.3d 1070, 1087 (7th Cir. 2005); see also *United States v. Burrows* 48 F.3d 1011, 1016 (7th Cir. 1005). “[T]he particular configuration of the dwelling and the characteristics of those known to be present and who might be present must be the primary focus of the officer’s assessment.” *Burrows*, 48 F.3d at 1016. An “ambush in a confined setting of unknown configuration is more to be feared than it if in open, more familiar surroundings. *United States v. Richards*, 937 F.2d 1287, 1291 (7th Cir. 1991).

Further, this Court has found that “officers may be at as much risk while in the area immediately outside the arrestee’s dwelling as they are within it.” *Burrows* 48 F.3d at 1016, citing *United States v. Arch*, 7 F.3d 1300, 1303 (7th Cir. 1993). “All of these factors must be assessed from the perspective of the officer on the scene. It is the reasonableness of the officer’s judgment at the time he was required to act that counts.” *Burrows*, 48 F.3d at 1016. The protective sweep is justified by the need, based on the facts known to a law enforcement officer, to ensure officer and bystander safety. *Buie*, 494 U.S. at 327. The circumstances of a particular encounter be assessed carefully in light of the overarching policy concerns articulated in *Buie* and other cases recognizing exceptions to the warrant requirement when officer safety is at risk. *See Leaf*, 400 F.3d at 1087; *Burrows*, 48 F.3d at 1016.

Defendant describes what the officers knew in this way:

When the officers arrested Tapia, they knew only that Tapia’s home, like all homes, occasionally hosted visitors and that the car parked in his driveway, like all cars, could accommodate more than one person.

Br14. See also Br17 and 22.

In fact however, the officers knew far more facts that pointed to the possibility that others were in the basement and posed a danger to the officers. Detective Peraza testified that the protective sweep was conducted to look for other

persons because they had received information that the location was a gang clubhouse, that weapons would be there, and that the gangs members had been involved in shootings in the County. DAppB33. The information the officers had indicated that the basement of the house was the portion being used for meetings between members of a violent street gang, including the defendant, clearly made it reasonable to suspect that other gang members might be in the basement. DAppB36-37

Moreover, when officers arrived at Ridgeview on the day of the arrest, a Lincoln Navigator was parked in the driveway of the residence. The officers had received a report that a Lincoln Navigator was being used by Tony Milene, a known gang member and associate of the Latin Counts who traveled back and forth between Winona, Minnesota and Rockford to distribute drugs. R16-1 at7; DAppB51; R16-1 at 6; DAppB64; B50. Therefore, in addition to general information regarding the gang's use of the residence, the officers found, parked at the residence, a second gang member's car in the driveway.

Finally, Detective Cunningham more succinctly described the specific and articulable facts upon which he reasonably concluded that a protective sweep of the basement was necessary to protect officers and bystanders at the arrest scene. Detective Cunningham knew that the defendant was an active member of the Latin Counts street gang, that he was a higher ranking member within

the organization for Rockford, that he was suspected of being involved in narcotics dealing, and that the residence itself was being used as a place where other gang members would gather and have meetings, as well as store weapons and narcotics. DAppB76-77.

Having received information that gang associates met with Tapia at the home from Verta Rodriguez, this case is similar to *United States v. Barker*, 27 F.3d 1287 (7th Cir. 1994) where a protective sweep was permitted because an undercover agent provided information that he had seen the defendant at the location and also saw other persons there. Having received information from police investigators of the defendant's involvement along with these associates in several shootings and the weapons as yet unaccounted for, it was reasonable to conclude that defendant, together with gang associates, had committed violent crimes with a firearm, and that defendant and his associates used the residence to meet and store drugs, the officers reasonably concluded that a protective sweep was necessary. Thus, this case is also similar to *United States v. Burrows*, 48 F.3d 1011 (7th Cir. 1995).

In summary, the arresting officers possessed credible information that defendant was dangerous, that he and his associates possessed firearms and had recently been involved in acts of violence, and that the arrest site – 129 Ridgeview – served as a clubhouse for members of the gang and was used as a

location to store weapons and drugs. These facts and others amply supported the officers' reasonable belief that a protective sweep of the bathroom was necessary and, therefore, the seizure of the firearm, which was found in plain view and which the officer had probable cause to believe was evidence of a crime, was lawful under the Fourth Amendment. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

**2. The Configuration of 129 Ridgeview did not Foreclose the Necessity for Arresting Officers to Conduct a Protective Sweep of the Basement.**

Defendant argues for the first time in this appeal that the configuration of the basement – that is, its lack of windows and means of ingress and egress other than the stairway leading to the basement from the kitchen – precluded the need for a protective sweep because, even were it reasonable to conclude that another individual was hiding in the basement, it was not reasonable to believe that he or she posed any danger. Br23, 24. Even if defendant did not waive or forfeit his argument by failing to make it in the district court, the argument lacks merit as a matter of fact and law.

First, the record evidence does not support defendant's contentions that the basement was windowless, or that there were no means of ingress or egress other than the stairs leading to the kitchen door. Indeed, defendant relies solely on the absence of testimony regarding windows and doors to the basement, and

partial view photos entered into the record to show the locations of the officers prior to and during defendant's arrest. Br26-27; D.AppB201-203. Defendant identifies, and the record reveals, no testimony establishing that (1) the basement was in fact windowless; or (2) the basement had only one means of ingress or egress – the stairs leading to the kitchen. This lack of evidence is not surprising, in light of the fact that defendant did not argue below that the configuration of the basement was significant.

Even more importantly, the defendant points to, and the record reveals, no evidence showing that the officers had any awareness of the configuration of the basement of the residence. Accordingly, even if the defendant were correct in stating that the basement had no windows or other doors (and he is not), he nevertheless has presented nothing in support of his contention that the officers knew it.

Moreover, as a legal matter, there is no requirement that law enforcement officers secure a location rather than conduct a protective sweep in all circumstances. Defendant relies on Justice Stevens' concurring opinion in *Buie*, as support for his argument that where a location is so isolated that the officers can effectively guard against ambush without entering it, they are required to do so. Br24. This reliance is misplaced. *Buie* did not make such an alternative course a requirement; to the contrary, Justice Stevens' concurrence expressly

deferred to the trial court as better equipped to assess the reasonableness of the officers on remand. *Buie* at 338. And Justice Kennedy, in a separate concurring opinion, made clear that Justice Stevens’ advocacy of a “secure the basement” approach should not be taken as authoritative guidance for application of the court’s ruling to the facts of the *Buie* case on remand. *Buie* at 339. Ultimately, on remand, the district court upheld the protective sweep, despite the officers’ failure to pursue the course of securing the basement stairwell. *Buie v. State*, 580 A.2d at 172, *cert. denied*, 489 U.S. 1106 (1991). The Supreme Court made clear in *Buie* that the interest of permitting arresting officers “to ensure their safety *after*, and while making, the arrest” is sufficient to outweigh an intrusion no more than necessary to protect the officer from harm, with the line to be drawn with reference to the unique facts of every case. *Buie* at 333-34. And the validity of a protective sweep “does not turn on the availability of less intrusive investigatory techniques.” *United States v. Winston*, 444 F.3d 115, 120 (1st Cir. 2006), citing *United States v. Sokolow*, 490 U.S. 1, 11 (1989).

Requiring arresting officers to forego a protective sweep and instead select the option of guarding against ambush, particularly of a basement, requires too much at the risk of officer safety. The danger to officers departing an arrestee’s home poses an equivalent, if not greater, risk to the safety of the officers and others, the particular facts may necessitate that officer conduct a protective

sweep before they can safely depart the premises. *See Burrows*, 48 F.3d at 1016. Particularly where, as here, defendant has fallen far short of establishing that the officers could have protected themselves using less intrusive means, and that they had reason to know that, the district court's determination that the officers' conduct of a protective sweep was reasonable should be upheld.

## **II. The District Court Satisfied the Procedural Requirements Before Imposing an Enhancement Under § 2K2.1(b)(6).**

### **A. Standard of Review**

This Court reviews sentencing decisions for reasonableness under an abuse-of-discretion standard. *Gall v. United States*, 128 S. Ct. 586, 591, 597 (2007); *United States v. Omole*, 523 F.3d 691, 696 (7th Cir. 2008). This court reviews a district court's application of the sentencing guidelines *de novo*. *United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008). The court reviews questions of law *de novo* and findings of fact for clear error. *United States v. Haddad*, 462 F.3d 783, 793 (7th Cir. 2006)

### **B. Analysis**

#### **1. The District Court Properly Resolved Contested Issues of Fact Material to its Decision to Enhance Defendant's Sentence.**

Defendant argues that the district court failed to explain how it resolved contested issues of fact concerning the defendant's use of the firearm in

connection with the commission of another felony offense – the South Greenview shooting – thus violating Federal Rule of Criminal Procedure 32 and the holding of *United States v. Gall*. This argument lacks merit.

At sentencing the court clarified that other than disputes concerning the conclusions in the PSR about the Greenview shooting, defendant had no other dispute as to the factual findings or conclusions in the sentencing materials. D.AppA33. Defendant’s counsel stated that there was no other disputes. *Id.* The court adopted the factual findings and conclusions contained in the presentence report and accompanying materials, other than evidence pertaining to the South Greenview shooting. *Id.* Thus, the court properly adopted the version of the facts in the PSR other than the evidence pertaining to Greenview as required. *See United States v. Heckel*, 570 F.3d 791, 796-797 (7th Cir. 2009).

While defendant did not identify the portions of the PSR that he specifically disputed, as required by Rule 32 of the Federal Rules of Criminal Procedure and the Guidelines, the district nevertheless heard evidence and ruled on the issue of whether he was involved in the South Greenview shooting.

The court considered the police interview of Verta Rodriguez and Clifford Gozdal’s statement dated October 20, 2008. D.AppA31. First, the district court expressly found that Verta Rodriguez’ statement made near the time of the shooting to Detective Peraza more credible than any statement she made in

court during the sentencing proceeding. D.AppA38. The court had the opportunity to observe Rodriguez demeanor during her testimony, as well as the the demeanor of Detective Peraza. Defendant presented the court with no reliable or compelling evidence that Rodriguez statement to Detective Peraza lacked credibility, nor evidence that Detective Peraza had fabricated her statement. Given all of the relevant circumstances, the district court was well within its discretion in finding that Rodriguez's earlier statements were more credible than her subsequent recantation, and was not required to detail every basis for that determination.

Defendant presented Jacob Larson who testified that he did not see the defendant on April 8, and could not recall seeing him on April 9. Larson also testified that he was not involved in the Greenview shooting. Larson's testimony was at best of neutral value. It certainly did not come close to requiring a reassessment of the weight to be given Rodriguez's original statements. First, The Greenview shooting occurred in the early morning hours of April 9, when Larson "could not recall" whether he had seen the defendant. Second, if Larsen truly was not present during the Greenview shooting, he was in no position to identify those who were, or were not, involved. Finally, Larsen's bald assertion that Rodriguez was biased and would lie because Larsen used to cover for the defendant while he spent time with other women, provided no serious basis for

discounting Rodriguez's statements to the Detective (and crediting her subsequent recantation). Even the testimony of a potentially biased witness is sufficient to support a finding of fact. *United States v. Zehm*, 217 F.3d 506, 514 (7th Cir. 2000). Other than Larsen, defendant presented no other statements or testimony that contradicted Rodriguez' statement to Detective Peraza and Gozdal's written statement to Detective Peraza.<sup>6</sup>

Defendant's assertion that Gozdal made a contradictory statement that defendant was not involved in the Greenview shooting (Br31,fn4) is based on a misunderstanding of the record. In the September statement, Gozdal's stated that the defendant was not involved in the 1000 Bruce Street shooting, rather than the Greenview shooting. In the limited information he provided regarding Greenview, he mentioned only that one of participants (Taylor Hawk) was bragging about it following the shooting. In the October 2008 statement, Gozdal added the following details: (1) he met with Hawk and the defendant on or about April 11, 2008 and during that meeting Hawk and the defendant bragged to him about shooting at a house in Rockford; and (2) he knew that Hawk had traveled to Rockford to meet defendant two to three days before their conversation on

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<sup>6</sup> Defendant's claim that it should be easy to corroborate Rodriguez's description of the pre-shooting meeting where Larson distributed firearms given the number of individuals present, obviously lacks any merit. Everyone present at such a meeting has a motive to deny it as well as, possibly, a fifth amendment right to refuse to discuss it.

April 11, 2008. Thus, there was no contradiction between Gozdal's September and October 2008 statements. D.App206. More importantly, the court found Clifford Gozdal's statement credible pointing to its independent consistency with the casings found at the scene of the Greenview shooting and ballistics evidence tying those casings to the gun recovered from defendant's residence. D.AppA38.

“[A] district court in determining a sentence is not bound by the same stringent evidentiary standards as are applicable in a criminal trial. *United States v. Taylor*, 72 F.3d 533, 543 (7th Cir. 1995). Hearsay may be considered at sentencing, and has been characterized as an integral part of the sentencing process. *United States v. Hankton*, 432 F.3d 779, 789 (7th Cir. 2005). The court must limit consideration to information that is reliable. *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005); U.S.S.G. § 6A1.3(a). The evidence relied upon by the district court, the testimony of Detective Peraza, the statement of Clifford Gozdal, and ballistics and forensic evidence, was mutually corroborating and reliable, and the district court's decision to credit that evidence and its explanation for doing so was sufficient, and should be affirmed.

**2. The District Court Made Sufficient Findings Regarding the Violent Crime Committed by Defendant.**

Defendant also argues the district court failed to identify the elements of the other offense or explain how the evidence satisfied those elements. Once again, the district court did not commit procedural error.

The government sought an enhancement for defendant's use of the firearm he possessed in the Greenview shooting which violated 720 Ill. Comp. Stat. 5/24-1.2(a)(1) (Aggravated discharge of a firearm). PSR, Government's Version. Defendant argues that the district court's failure to specifically identify the elements of the offense or address it during the sentencing hearing was error. First, the offense for which the court was being asked to enhance defendant's sentence on account of the Greenview shooting was clearly identified by the government and adopted by the PSR. PSR96-103, Government Version at page 2. Secondly, the offense identified is a felony. 720 ILCS 5/24-1.2(b).

Defendant's reliance upon *United States v. Robinson* is misplaced. In *Robinson* the district court had not made clear what statute he considered to have been violated by the defendant's use of the gun, making review of the court's finding impossible where there were a number of statutory offenses that might apply under the facts of the case, some felonies and others misdemeanors. *Robinson*, 537 F.3d 798, 803 (7th Cir. 2008). Here, the specific statute at issue has been identified and is a felony.

Furthermore, as required, each element of the offense has been established by a preponderance. *See United States v. Shannon*, 518 F.3d 494, 496 (7th Cir. 2008). To be guilty of an aggravated discharge of a firearm under 720 ILCS 5/24-1.2(a)(1) defendant must be found to have (1) knowingly discharged a firearm; (2) in the direction of or into a building; and (3) knew or should have known the building was occupied. Ill. Pattern Jury Instructions, Crim18.12.

The evidence presented to the district court satisfied these elements. The court heard forensic and ballistic evidence that revealed at least 64 bullets were fired, 13 of which came from the gun defendant possessed; that the home located on South Greenview was struck multiple times and a large number of bullet strikes and fragments were recovered inside the home; and finally that the shooting occurred in the early morning hours when the home would be likely to be occupied, and in fact was.<sup>7</sup> *See Deputy Liston Testimony*, D.App174-185.

Unlike the *Robinson* case upon which defendant relies, the district court was not faced with a choice of multiple possible applicable offenses, but instead was considering a felony offense that was specifically identified by the government and in the conclusions of the probation officer. Thus, once the

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<sup>7</sup> This final element is also supported by the testimony of Detectives Peraza and Stevens which indicated that both Rodriguez' statements and the timing of the Greenview shooting established that the shooting was intended as retaliation for an earlier shooting by the rival gang in which one of defendant's associates was injured.

specific offense the district court has been asked to use to apply the §2K2.1(b)(6) enhancement has been identified, and the court need only make findings regarding whether the evidence supports application of the enhancement. The court is not required to specifically state which piece of evidence satisfies each element of the offense.

The district court's handling of the enhancement in defendant's case satisfies the dictates of *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005). There this Court held that before applying a Section 3 enhancement (in that case, §3A1.4, for promoting a federal crime of terrorism), the district court was required to identify the federal crime he purportedly promoted and determine that the elements of that crime were satisfied, and also that the court was required to support its conclusions by a preponderance of the evidence from the facts of record. *Arnaout*, 431 F.3d at 1004. As previously noted, the offense which was alleged to satisfy §2K2.1(b)(6) was identified, the elements of that crime were satisfied, and the court's conclusions were supported by a preponderance of the evidence.

### **III. The Evidence Relied Upon by the District Court Was Reliable.**

#### **A. Standard of Review**

This court reviews the district court's factual findings at sentencing for clear error and the application of those facts to the Sentencing Guidelines *de*

*novo. United States v. Haddad*, 462 F.3d 783, 793 (7th Cir. 2006). Clear error exists only if, after reviewing all the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *United States v. Arocho*, 305 F.3d 627, 641 (7th Cir. 2002). The district court’s determination of the reliability of hearsay evidence at sentencing is reviewed for an abuse of discretion. *United States v. Smith*, 280 F.3d 807, 810 (7th Cir. 2002). “Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.” *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

## **B. Analysis**

The information relied upon by the district court must bear “sufficient indicia of reliability to support its probable accuracy.” *United States v. Morrison*, 207 F.3d 328, 337 (7th Cir. 2000). A district court’s determination as to the reliability of hearsay sentencing evidence is reviewed for an abuse of discretion. *See United States v. Barnes*, 117 F.3d 328, 337 (7th Cir. 1997).

The district court did not abuse its discretion in crediting Detective Peraza’s testimony about Rodriguez’ earliest statements, and crediting those statements over Rodriguez’ subsequent recantation. The court found that Rodriguez’ statements made closer to the time of the shooting were more credible than any statement she made in court. D.AppA38. Timing of a statement is a

proper factor to be used in assessing credibility and reliability. *See United States v. Johnson*, 227 F.3d 807, 815 (7th Cir. 2000). Furthermore, it is permissible to find statements reliable where “they were generally consistent, both internally and with the remainder of the evidence.” *United States v. Westmoreland*, 240 F.3d 618, 630 n.4 (7th Cir. 2001). Here, the court found just that, noting that Rodriguez’s identification of defendant as a participant in the Greenview shooting was corroborated by Clifford Gozdal’s statement to Detective Peraza, which was in turn corroborated by other evidence showing that the casings found at the scene matched the guns Gozdal identified as being used in the shooting (a .45 caliber, a .40 caliber, and a 9 mm). D.AppA38. Both witnesses’ statements were further corroborated by the fact that a gun of the same type was recovered from defendant.

Nor did inconsistent statement seriously undermine the credibility of Gozdal or Rodriguez. See Br41. As explained previously, Gozdal’s October 2008 statement was not inconsistent with his September 2008 statement. Gozdal stated that defendant was not involved in the Bruce shooting, but never said that defendant was not involved in the Greenview shooting. Instead, in September Gozdal provided substantial information concerning the Bruce shooting and a small amount of information about the Greenview shooting. With respect to the Greenview shooting, Gozdal merely said that Hawk had bragged

about shooting at a house in Rockford. In October, Gozdal provided additional information concerning Greenview, stating that he met with Hawk and defendant on or about April 11, 2008, that during this meeting they both bragged about shooting up a house in Rockford, and that he knew that Hawk had traveled to Rockford to meet defendant two to three days earlier. Thus Gozdal's September and October statements did not contradict one another. D.AppB204-210.

As to Rodriguez, the court had only Detective Peraza's testimony about her statements near the time of the shooting, which the court found more credible than any statement she made at the hearing. Prior to asserting her privilege, Rodriguez testified that she did not recall "at the moment" where she was on April 8, 2008, had no recall of being present at the meeting prior to the Greenview shooting, and that she made up the activity she discussed with Detective Peraza. D.AppB160. Having observed her demeanor on the stand, the district court was entitled to find that Rodriguez' in-court statements were not credible and, by implication, that her previous out-of-court statements were credible. That is particularly true in light of the fact that, as discussed above, Rodriguez' out-of-court statements were corroborated by substantial evidence, including information provided by one of defendant's associates, spent casings and other evidence recovered from the scene, forensic and ballistic evidence tying

the spent casings to the gun recovered from defendant's residence. Under these circumstances, the court did not err, much less clearly err, in crediting the statements made by Rodriguez and Gozdal indicating that defendant was a participant in the Greenview shooting, and that the shooting was in retaliation for the Loomis Street shooting earlier the same day in which one of defendant's gang associates was injured. D.AppB144-147; D.AppB136-143.

Thus, the district court's findings were supported by sufficient reliable evidence and should be affirmed.

### **CONCLUSION**

For all of the foregoing reasons, the government respectfully requests that this Court affirm the conviction and sentence of defendant-appellant Jose Tapia.

Respectfully submitted,

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