IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 04-181
	)	
v.	)	
	)	
MICHAEL WAGNER,	)	GOVERNMENT'S TRIAL BRIEF
	)	
Defendant.	)	

COMES NOW the plaintiff, United States of America, by and through its attorney, Kevin E. VanderSchel, Assistant United States Attorney for the Southern District of Iowa, and hereby submits the Government's Trial Brief:

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ISSUE I: THE DEFENDANT'S PRIOR CONVICTION IS A "CRIME OF VIOLENCE" UNDER TITLE 18, UNITED STATES CODE, SECTION 931(a)(1) AND TITLE 18, UNITED STATES CODE, SECTION 16.

Pursuant to Title 18, United States Code, Section 16, the term "crime of violence" can include either "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

In interpreting this section, the Eighth Circuit Court of Appeals has adopted a categorical approach, which looks at the category of the crime of conviction. *United States v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992). In *United States v. Rodriguez*, the Court rejected the defendant's request to examine the facts surrounding his prior statutory rape conviction, and

expressly determined that the crime of "lascivious acts with minors" in violation of Iowa law was "a crime of violence". The court in *Rodriguez* concluded with the following:

> All crimes which by their nature involve a substantial risk of physical force share the *risk* of harm. It matters not one whit whether the risk ultimately causes actual harm. However, scrutiny ends upon a finding that a risk of violence is present. There is no question that the crime to which *Rodriguez* admitted, lascivious acts with children under the tender age of ten, is by its nature a crime of violence. *Id.* at 141.

This principle was affirmed again by the Eighth Circuit Court of Appeals in *United States v. Gomez-Hernandez*, 300 F.3d 974 (8th Cir. 2002) (Honorable Harold D. Vietor, trial judge), and *United States v. Bauer*, 990 F.2d 373 (8th Cir. 1993) (Honorable Charles R. Wolle, trial judge). As the Court in *Gomez-Hernandez* notes, it is not necessary to consider whether the California crime of unlawful sexual intercourse with a minor involves the element of physical force, because there is a physical contact with a victim "who is incapable of lawful consent". *Supra* at 979.

As the Court in *Bauer* reiterates, there is no question that the crime of lascivious acts with children is, by its nature, a crime of violence. *Bauer*, *supra* at 375.

Michael Wagner's previous conviction for the charge of "lewd act upon a child" specifically references physical contact with a child under the age of 14 years, clearly indicating, by its nature, a substantial risk that physical force against the person may be used in the course of committing the offense. This conclusion that there existed a risk of harm is consistent with

the requirement that the defendant was required to register as a convicted sex offender under California law.

ISSUE II: THE DEFENDANT MAY NOT CLAIM A MARITAL PRIVILEGE WITHOUT A LICENSE ISSUED UNDER CALIFORNIA LAW.

Based upon statements made during the hearing on the Defendant's Motion to Suppress, and based upon statements made on behalf of the Defendant during pretrial conferences, it is expected that the Defendant will continue to claim a marital privilege based upon the purported marriage between Michael Wagner and Linda Maguire.

As the Court previously noted in the Order overruling the Motion to Suppress, the confidential communications privilege requires existence of a valid marriage. While the existence of the privilege is a matter decided under federal law, the determination of the validity of the marriage depends upon state law. *United States v. White*, 545 F.2d 1129 (8th Cir. 1976). In determining whether to recognize the existence of a valid marriage under California law, it is also important to recognize "that privileges are disfavored because they impede the search for truth." *United States v. Frank*, 869 F.2d 1177, 1179 (8th Cir. 1989).

Courts in California have consistently interpreted the California Evidence Code to require the existence of a valid marriage in order to invoke the "confidential communications" privilege. *People v. Bradford*, 70 Cal.2d 333, 74 Cal.Rptr. 726, 450 P.2d 46 (1969); *People v. Delph*, 94 Cal.App.3d 411, 156 Cal.Rptr. 422, 4 ALR 4th 416 (1979).

In California, a license must be issued and the marriage must be solemnized in accordance with the applicable statutes in order for a lawful marriage to exist. *Welch v. California*, 83 Cal.App. 4th 1374, 100 Cal.Rptr.2d 430 (2000). California does not accept the doctrine of common law marriage, which was abolished in California. *Edgett v. Cory*, 111 Cal.App.3d 230 168 Cal.Rptr. 686 (1980).

Section 300 of the California Family Code specifically provides:

> Marriage is a personal relation arising out of a civil contract between a man and woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division...."

Another section of the California Family Code, Section 307, contains a separate provision relating to the marriage of members of religious society or denomination which do not have clergy for the purpose of solemnizing marriage. However, California Family Code Section 307(b) also requires that a license and certification of declaration of marriage must be endorsed and returned to the County Recorder within 30 days after the ceremony. Cal.Fam.Code § 307(b).

As the defendant has previously testified that no license was ever obtained, nor was any certificate of marriage ever filed with the county, the Defendant is unable to make a claim for "confidential communication" pursuant to the marital privilege. Regardless of the existence of a religious ceremony, under California law such a ceremony, by itself, is insufficient to constitute a legal or valid marriage.

ISSUE III: EVEN IF THE COURT WERE TO CONCLUDE THAT A VALID MARRIAGE EXISTS, CERTAIN CONDUCT IS NOT PRIVILEGED.

For the confidential communication privilege to exist, there must be a communication. The taking of fingerprints, handwriting samples, and records have been held not to be testimonial communicative evidence in the context of the confidential communications privilege. *United States v. Thomann*, 609 F.2d 560, 564 (1st Cir. 1979); *United States v. Cotton*, 567 F.2d 958 (10th Cir. 1977). This privilege extends only to communications intended by one spouse to convey a message to the other and does not include acts or observations of acts. *United States v. Smith*, 533 F.2d 1077 (8th Cir. 1976); *United States v. Klayer*, 707 F.2d 892, 894 (6th Cir. 1983); *United States v. Brown*, 605 F.2d 389, 396 (8th Cir. 1979).

In the present case, statements which were blurted out as a reaction to observations of other acts, and not intended to communicate a message to a spouse, are not confidential communications.

The communications privilege also requires that the communications be made in confidence. In this regard, the burden is on the party seeking to defeat the claim of privilege to overcome the presumption of confidentiality. *In re Grand Jury Investigation*, 603 F.2d 786, 788 (9th Cir. 1979).

In the present case, statements made between Michael Wagner and Linda Maguire in the backseat of a trooper's vehicle were not communications made "in confidence". Such statements were made in the backseat of a trooper's vehicle along the side of an interstate highway, and were in a position where the defendant would not have an expectation of privacy.

The parties to the conversation could have anticipated that a tape recording could be made of conversations taking place in the backseat of the vehicle, and therefore, there was no expectation of privacy and no expectation that the communications were made "in confidence".

ISSUE IV: EVEN IF THE COURT WERE TO CONCLUDE THAT A VALID MARRIAGE EXISTS, CONVERSATIONS BETWEEN A HUSBAND AND A WIFE JOINTLY PARTICIPATING IN CRIMINAL CONDUCT ARE NOT WITHIN THE PROTECTION OF THE COMMUNICATION PRIVILEGE.

An exception to the confidential communications privilege exists where both spouses are coconspirators in the matter under investigation. For example, conversations between a husband and a wife about crimes in which they are presently jointly participating are not within the protection of the privilege. *United States v. Evans*, 966 F.2d 398, 401 (8th Cir. 1992); *United States v. Ammar*, 714 F.2d 238, 257 (3d Cir. 1983); *United States v. Price*, 577 F.2d 1356, 1364 (9th Cir. 1978); *United States v. Mendoza*, 574 F.2d 1373, 1379 (5th Cir. 1978); *United States v. Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974). The focus of the "joint criminal participation" exception is actual participation, and it does not matter if only one spouse, in fact, was prosecuted for the criminal activity. *United States v. Hill*, 967 F.2d 902, 912 (3d Cir. 1992). In the Sixth and Eighth Circuits, the exception is limited to communications regarding "patently illegal activity." *Evans*, 966 F.2d at 401; *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985).

In the present case, Michael Wagner and Linda Maguire spent the majority of the conversation in the backseat of the trooper's vehicle comparing notes and determining ways in which they would provide false statements to law enforcement officials which appeared to be consistent. In addition, extensive communications transpired where Michael Wagner and Linda Maguire were communicating ways in which to flee the scene, thereby constituting joint criminal participation in the crimes of obstruction of justice and/or "interference with official acts."

ISSUE V: ACTUAL OR CONSTRUCTIVE POSSESSION, NOT OWNERSHIP, IS ALL THAT THE CHARGED OFFENSES REQUIRE IN ORDER TO SATISFY THE MENS REA REQUIREMENT.

Under Title 18, United States Code, Section 922(g)(1), it is possession of the firearm -- not ownership -- that constitutes the offense. *United States v. Mains*, 33 F.3d 1222, 1228 (10th Cir. 1994); *United States v. Hernandez*, 972 F.2d 885, 887 (8th Cir. 1992). Possession can be either actual or constructive. Actual possession exists when the defendant is in immediate possession or control of the object. Constructive possession exists when the defendant does not have actual possession, but instead knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others. See *United States v. Mills*, 29 F.3d 545, 549 (10th Cir. 1994); *United States v. Wight*, 968 F.2d 1393, 1397-98 (1st Cir. 1992); *United States v. Moreno*, 933 F.2d 362, 373 (6th Cir. 1991); *United States v. Winchester*, 916 F.2d 601, 605 (11th Cir. 1990); *United States v. Beverly*, 750 F.2d 34, 37 (6th Cir. 1984); *United States v. Lamare*, 711 F.2d 3, 5-6 (1st Cir. 1983).

In order to prove actual possession, the prosecution must introduce some evidence linking the firearms to the defendant. *United States v. Blue*, 957 F.2d 106, 107-08 (4th Cir. 1992). However, courts have consistently refused to reverse convictions based on evidence that included the testimony of a police officer that he saw the defendant holding a firearm, even if the defendant was not in possession of the gun when arrested, and there was no physical evidence linking him to the firearm. *See United States v. Haney*, 23 F.3d 1413, 1416-17 (8th Cir. 1994) (evidence sufficient to show possession when officer saw defendant drop what looked like a handgun on seat of truck, where police subsequently found revolver); *United States v. Hammell*, 3 F.3d. 1187, 1190 (8th Cir. 1993) (upholding conviction where officer saw defendant throw two guns out of car window where they were subsequently recovered); *United States v. Williams*, 33 F.3d 876, 878 (7th Cir. 1994).

Courts have concluded that sufficient evidence of constructive possession exists under various factual scenarios. *See United States v. Hiebert*, 30 F.3d 1005, 1008-09 (8th Cir. 1994) (firearm found in vehicle defendant drove to work on morning of arrest); *United States v. Prudhome*, 13 F.3d 147, 149 (5th Cir. 1994), (although car belonged to passenger, firearm was found under defendant driver's seat and matching ammunition was found on his person); *United States v. Klein*, 13 F.3d 1182, 1183 (8th Cir. 1994) (testimony that defendant accidentally shot friend, coupled with subsequent discovery of the handgun in his pocket, is more than sufficient evidence that Klein knowingly exercised control or dominion over the weapon); *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir. 1993) (firearm seized at defendant's residence); *United States v. Eldridge*, 984 F.2d 943, 946 (8th Cir. 1993) (defendant had control

of keys to trunk of car which contained firearms); *United States v. Woodall*, 938 F.2d 834, 837-38 (8th Cir. 1991) (firearm found in car hauler listed to defendant and parked in parking lot adjacent to

defendant's motel room); *United States v. Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991) (eyewitness testimony of neighbors who saw defendants with firearms in front yard of residence, coupled with defendants' continued presence at house where guns were found); Winchester, 916 F.2d at 605 (travel bag which contained firearm had papers and photographs identifying it as belonging to defendant); *United States v. Shirley*, 884 F.2d 1130, 1134 (9th Cir. 1989) (evidence that defendant knew that firearm was located in trunk of car and keys to trunk were in ashtray); *United States v. Rumney*, 867 F.2d 714, 721 (1st Cir. 1989) (at trial, defendant admitted that gun was found in his coat in his closet).

However, in order to establish constructive possession, the prosecution must introduce some evidence linking the defendant to the firearm. In cases involving joint occupancy, the courts have repeatedly held that the discovery of a firearm is not, by itself, sufficient to establish constructive possession. *See United States v. Mills*, 29 F.3d 545, 550 (10th Cir. 1994) ("[m]ere dominion and control" over dining room insufficient to show constructive possession when the only evidence of defendant's contact with weapons was that he had placed them in garage six days prior to search, and co-occupant testified that she had hidden the firearms on the dining room table); *United States v. Wright*, 24 F.3d 732, 735 (5th Cir. 1994) (constructive possession on part of driver of vehicle was not established by police testimony that he had made "furtive movements" near glove box where firearm was found, when passenger,

who owned the vehicle, was in possession of the key to the glove box); *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993) (firearm found in mattress in apartment in which defendant was living with his girlfriend was not, standing alone, sufficient to show constructive possession). *See also United States v. Blue*, 957 F.2d 106 (4th Cir. 1992) (police officer's claim that he saw defendant's shoulder dip as if reaching under car seat where gun was later found, insufficient when defendant was merely a passenger in car and no other evidence linked firearm to him); Beverly, 750 F.2d at 37 (defendant's presence in kitchen of another's residence near where guns were located held insufficient evidence of constructive possession).

The concept of constructive possession in Section 922(g)(1) cases also has been extended to include joint possession, when a firearm is shared by two or more persons. *See United States v. Martin*, 706 F.2d 263, 266 (8th Cir. 1983); *United States v. Montenieri*, 652 F. Supp. 237, 239-40 (D. Vt. 1986), *aff'd.*, 823 F.2d 545 (2d Cir. 1987). In addition, several courts have held that a person can be liable for the possession of a firearm of another under a theory of constructive possession. *See United States v. Speer*, 30 F.3d 605, 612 (5th Cir. 1994) (driver, who did not own vehicle, was in constructive possession of firearms visibly possessed by passenger, when driver indicated to undercover agent that weapon was present to prevent him from being robbed); *United States v. Moore*, 936 F.2d 1508, 1526 (7th Cir. 1991) (one of two armed robbers aware of co-defendant's possession of weapon); *United States v. Moreno*,

933 F.2d 362, 373 (6th Cir. 1991) (defendant's incarceration did not affect his ability to exercise control over firearms through other persons).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2004, I electronically filed the foregoing with the Clerk of Court using the EFC system which will send notification of such filing to the following:

I hereby certify that a copy of this document was served on the parties or attorneys of record, shown below by:

Ronald L. Wheeler

___ U.S. Mail _X_ Fax ___ Hand Delivery

UNITED STATES ATTORNEY

By: /s/ Kevin E. VanderSchel