

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NO. 5:08-CR-197-F

UNITED STATES OF AMERICA

v.

BARRY LEWIS,

Defendant.

**Sentencing Memorandum and
Request for Below-Guidelines Sentence**

Defendant Barry Lewis, through counsel, submits this sentencing memorandum in preparation for the sentencing hearing in this matter, set for January 22, 2009, and requests the Court consider imposition of a below-Guidelines range sentence of 24 months' imprisonment. In support of this request, defendant shows the following:

Statement of the Case and of Pertinent Facts

On April 25, 2007, and again in a different location on May 2, 2007, defendant Barry Lewis entered a pawn shop and attempted to purchase a firearm. In the course of filling out necessary paperwork, defendant filled out two ATF 4473 forms (Firearms Transaction Record - Over-the-Counter); question 11(f) of that forms asks: "Have you ever been adjudicated mentally defective (*which includes having been adjudicated incompetent to manage your own affairs*) or have you ever been committed to a mental institution?" Defendant answered "No" to that question on both forms, despite the fact that defendant had previously been committed to Dorothea Dix Hospital, a State-run mental institution, on at least two prior occasions. After one of the pawn shop owners became suspicious of defendant's behavior and reported the matter to the ATF, agents investigated and found that defendant had attempted to purchase both a Romar/Cugir 7.62mm automatic weapon and a Remington 1100 shotgun, and had possessed a Gorosabel shotgun in the meantime (which was found in the trunk of his father's car). On May 7, 2007, agents arrested defendant and charged him with

the instant offenses.

Defendant was charged in the Eastern District with three counts: (1) making a false statement in the attempted acquisition of a firearm on April 25, 2007; (2) possession of a firearm by a prohibited person; and (3) making a false statement in the attempted acquisition of a firearm on May 2, 2007. The Government, at the time of defendant's initial appearance on May 9, 2007, moved for a competency evaluation. Defendant was examined, and by report dated July 17, 2007, Dr. Elissa Miller at the Metropolitan Correctional Center concluded that defendant was incompetent and could not rationally participate in legal consultations with his attorney, could not manifest appropriate courtroom behavior, and could not sit through a lengthy trial. She also found that defendant possessed a factual, but not a rational, understanding of the proceedings against him.

On August 29, 2007, the Court committed defendant for further psychiatric or psychological treatment to determine whether he could be restored to competency. By report dated June 4, 2008, Dr. Bryon Herbel and Dr. Robert Cochrane concluded that defendant had been restored to competency through the use of risperidone, a psychotropic medication. Defendant has continued to take this medication.

On October 6, 2008, defendant appeared with counsel and entered a guilty plea to Count Two of the Indictment herein (possession of a firearm by a prohibited person), pursuant to a negotiated plea agreement. Defendant has been interviewed by the Probation Officer, and a Presentence Investigation Report (PSR) has been filed. The PSR recommends a Guidelines sentence range of 30 to 37 months imprisonment, in addition to supervised release, a reduced fine, and other components.

Discussion and Request for Sentence

The Court can certainly appreciate the difficulties that would have been inherent in trying the

defendant on Counts One and Three: the Government would have to prove that defendant knew he was making a false statement when he said he had never been found mentally defective or committed to a mental institution, and then prove that he had in fact been found mentally defective or had been committed to a mental institution. In essence, the case asks the jury to find the defendant mentally defective at one point in time, and then perfectly rational and sane at a later time. Defense counsel and the Assistant U.S. Attorney discussed these very issues and had conflicting views on how such a trial would have proceeded, but what was inescapable and clear about the case was that defendant was a prohibited person and yet he possessed a firearm, so Count Two would have been proven quite readily. Defendant acknowledged as such by his guilty plea, and now asks the Court to consider imposing a 24-month term of imprisonment, which is slightly below the recommended Guidelines range of 30-37 months, in consideration of two factors: (1) defendant's prior history of poor mental health; and (2) the fact that only one of the firearms in question was recovered from the defendant's constructive possession, and the other two either not sold to the defendant or recovered from the dealer.

Defendant's Mental Health History. Both Dr. Miller's and Dr. Herbel's evaluation reports recount a long mental health treatment history for the defendant, which includes several commitments to mental institutions¹. Defendant has been consistently diagnosed for years with Bipolar Disorder I, usually following a manic episode, and his bipolar disorder is usually aggravated or heightened by illegal drug use (also called "polysubstance abuse" in the reports). Until the instant offense, defendant's involvement with mental health institutions has come at the request of his

¹Defendant asks that the Court review these two evaluation reports prior to sentencing, rather than to have defendant reproduce long portions of those reports herein. The latter report appears as DE # 12; however, the earlier report, which is relied upon by the court in rendering a decision shown at DE # 10, is not designated as a separate docket entry.

family – notably, his sister – or by order of a court. In almost every case, defendant was treated and released from those mental institutions, usually with a prescription for medication that the defendant usually took for a while, and then, on his own decision, stopped taking, which led to further cycles of this behavior. The onset of Mr. Lewis’ mental health problems was as early as middle school, when he was diagnosed with Attention Deficit Disorder (ADD). His illicit drug use began shortly thereafter.

Defendant is not asking the Court to consider imposing a 24-month sentence solely because he has a history of mental health problems. Rather, he is asking for this consideration because his criminal history, such as it is, is directly tied to the cycles of his bipolar disorder and the lack of proper oversight of any regimen of psychotropic medication. Now that defendant has been restored to competency, and the proper therapeutic level of his psychotropic medication has been determined and documented, why use a prison to oversee his medication when defendant can be put to task to provide proof of such compliance, at his own expense? Defendant has been in custody for some 20 months, and the taxpayers have provided him with a clear diagnosis and history of his mental health problems, and a plan to control the behavioral swings associated with his illness through medication. He has been incapacitated during that time from committing other crimes, and such a detention period already reflects a just punishment for possessing a firearm. It is time for defendant to demonstrate that he can comply with such a plan of treatment without the regimented routine of prison to reinforce it. An extended period of supervised release would further the purposes of 18 U.S.C. § 3553(a)(1) and (a)(2)(D) far better than continuing incarceration. Probation officers are trained and equipped to conduct testing for illegal drugs and similarly equipped to monitor defendant’s compliance with his risperidone treatment.

Firearms. Upon this conviction, defendant is doubly barred from possessing firearms ever

again: once as a prohibited person due to mental illness, and twice as a convicted felon. The question of any future possession of firearms is foreclosed, and the need for his sentence to deter his future criminal conduct (18 U.S.C. § 3553(a)(2)(B)) has been met. The Court should, however, weigh the criminal conduct – possessing a firearm – in this case in light of defendant’s mental illness history.

Defendant’s Guidelines sentence is calculated as having involved three firearms: (1) a Remington shotgun, (2) a Romar/Cugir 7.62mm rifle, and (3) a Gorosabel shotgun. Defendant never obtained the Remington shotgun – the pawn shop owner refused to sell it to him. The rifle – a Romanian high-capacity firearm sold over-the-counter – was in the possession of the second pawn shop owner because defendant had returned the gun for repairs after having used it for target practice with a friend. The remaining gun – the Spanish Gorosabel shotgun – was found by ATF agents at defendant’s residence (his father’s house), in the trunk of his father’s car, along with ammunition of various sorts.

The Guidelines, § 2K2.1(b)(1)(A), impose a two-level increase if the offense involved between 3 and 7 firearms. Clearly, the defendant possessed two firearms at some point in time, but he never possessed the third, the Remington shotgun, because his behavior was bizarre enough for the pawn shop owner to have refused the sale. In other words, defendant’s untreated mental illness itself may have prevented his further possession of a firearm. If this third gun were not counted, of course, the two-level enhancement would not apply, and defendant would be in a Guidelines range of sentences of 24-30 months’ imprisonment. The law under which defendant was charged in the two dismissed counts – 18 U.S.C. § 922(a)(6) – makes it a crime to make a false statement in the acquisition or attempted acquisition of a firearm, and it is only because his statement of “No” was made in an *attempt* to purchase a shotgun that the Remington is counted in the total firearm

calculation. Although the concept of “relevant conduct” casts a wide net, defendant should not be automatically caught in its scope as to firearms he never actually obtained, used, fired or otherwise possessed.

Conclusion

Defendant respectfully asks the Court to consider that the circumstances of this offense are sufficiently distinct enough to warrant a below-Guidelines sentence in order to provide defendant with a needed balance of close supervision, medical treatment and opportunity to work and remain independent. A sentence of 24 months’ imprisonment followed by a substantial term of supervised release would accomplish this aim in a more efficient and less costly way than simply imprisoning the defendant for as long as possible.

This the 12th day of January, 2009.

Robert J. McAfee

/s/ ROBERT J. MCAFEE
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has personally served a copy of the foregoing document, with attachments unless otherwise noted, according to the applicable civil procedure rules of this Court, to-wit:

- First class mail, postage prepaid, care of the United States Postal Service and addressed as shown below
- Personal (hand) delivery as shown below
- Delivery to courthouse box (Craven County cases only)
- CM/ECF (U.S. District Courts; U.S. Courts of Appeal)
- Facsimile transmission as shown below
- UPS Next Day Delivery / Other Courier
- Other:

Date: 1/12/2009

Robert J. McAfee
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