

No. 20-444

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ANDREW GARY

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

JOINT APPENDIX

ELIZABETH B. PRELOGAR
*Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

JEFFREY L. FISHER
*Stanford Law School Supreme
Court Litigation Clinic
559 Nathan Way
Stanford, CA. 94305
jlfisher@law.stanford.edu
(650) 724-7081*

*Counsel of Record
for Petitioner*

*Counsel of Record
for Respondent*

PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 5, 2020
CERTIORARI GRANTED: JAN. 8, 2021

TABLE OF CONTENTS

	Page
Court of appeals docket entries (18-4578).....	1
District court docket entries (3:17-cr-00809-JFA-1)	7
Arrest warrant (Jan. 17, 2017).....	11
South Carolina indictments (Mar. 29, 2017, and Aug. 16, 2017).....	12
Bail proceeding records (Jan. 19, 2017).....	16
District court indictment (Sept. 6, 2017)	20
Transcript of change of plea hearing (Feb. 28, 2018)	24
Sentencing memorandum and motion for downward departure or variance (July 26, 2018)	65
Transcript of sentencing (July 30, 2018).....	71
Fed. R. Crim. P. 11(b)	96

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 18-4578

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL ANDREW GARY, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/15/18	<u>1</u>	Criminal case docketed. Originating case number: 3:17-cr-00809-JFA-1. Date notice of appeal filed: 08/13/2018. Case manager: JMoore. [18-4578] JHM [Entered: 08/15/2018 08:35 AM]
		* * * * *
11/20/18	<u>12</u>	BRIEF by Michael Andrew Gary in electronic and paper format. Type of Brief: OPENING. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 11/20/2018. [1000406742] [18-4578] Kimberly Albro [Entered: 11/20/2018 09:32 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
11/20/18	<u>13</u>	Joint FULL ELECTRONIC APPENDIX and full paper appendix by Michael Andrew Gary. Method of Filing Paper Copies: mail. Date paper copies mailed dispatched or delivered to court: 11/20/2018. [1000406750] [18-4578] Kimberly Albro [Entered: 11/20/2018 09:34 AM]
11/20/18	14	Joint SEALED APPENDIX VOLUME(S) (court access only) by Michael Andrew Gary in electronic and paper format. Method of Filing Paper Copies: mail. Date Copies Mailed, Dispatched, or Delivered to court: 11/20/2018.. Filed Ex parte: N. [18-4578] Kimberly Albro [Entered: 11/20/2018 09:36 AM]
		* * * * *
12/10/18	<u>19</u>	BRIEF by US in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/10/2018. [1000417968] [18-4578] Alyssa Richardson

DATE	DOCKET NUMBER	PROCEEDINGS
		[Entered: 12/10/2018 09:39 AM]
12/19/18	<u>21</u>	BRIEF by Michael Andrew Gary in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/19/2018. [1000424218] [18-4578] Kimberly Albro [Entered: 12/19/2018 08:47 AM]
		* * * * *
10/9/19	<u>36</u>	SUPPLEMENTAL AUTHORITIES by Michael Andrew Gary. [1000603992]. [18-4578] Kimberly Albro [Entered: 10/09/2019 12:50 PM]
		* * * * *
11/7/19	<u>39</u>	COURT ORDER filed directing filing of supplemental briefs. Supplemental briefs tendered?: N Copies to all parties. [1000622652] [18-4578] RHS [Entered: 11/07/2019 05:15 PM]
		* * * * *
11/20/19	<u>41</u>	BRIEF by Michael Andrew Gary in electronic and paper

DATE	DOCKET NUMBER	PROCEEDINGS
		format. Type of Brief: SUPPLEMENTAL OPENING. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 11/20/2019. [1000629672] [18-4578] Kimberly Albro [Entered: 11/20/2019 10:12 AM]
		* * * * *
11/21/19	<u>42</u>	BRIEF by US in electronic and paper format. Type of Brief: SUPPLEMENTAL RESPONSE. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 11/21/2019. [1000630874] [18-4578] Alyssa Richardson [Entered: 11/21/2019 11:54 AM]
		* * * * *
12/11/19	45	ORAL ARGUMENT heard before the Honorable Roger L. Gregory, Henry F. Floyd and Stephanie D. Thacker. Attorneys arguing case: Kimberly Harvey Albro for Appellant Michael Andrew Gary and Ms. Alyssa Leigh Richardson for Appellee US. Courtroom

DATE	DOCKET NUMBER	PROCEEDINGS
12/12/19	<u>46</u>	Deputy: Emma Breeden. [1000643083] [18-4578] EB [En- tered: 12/11/2019 12:09 PM] SUPPLEMENTAL AUTHOR- ITIES by US. [1000643902]. [18-4578] Alyssa Richardson [Entered: 12/12/2019 02:56 PM]
1/28/20	<u>48</u>	SUPPLEMENTAL AUTHOR- ITIES by US. [1000671410]. [18-4578] Alyssa Richardson [Entered: 01/28/2020 12:46 PM]
		* * * * *
3/25/20	<u>51</u>	PUBLISHED AUTHORED OPINION filed. Originating case number: 3:17-cr-00809- JFA-1. [1000708832]. [18-4578] JHM [Entered: 03/25/2020 08:29 AM]
3/25/20	<u>52</u>	JUDGMENT ORDER filed. Decision: Vacated and re- manded. Originating case number: 3:17-cr-00809-JFA-1. Entered on Docket Date: 03/25/2020. [1000708836] Copies to all parties and the district court/agency.. [18- 4578] JHM [Entered: 03/25/2020 08:32 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/8/20	<u>58</u>	Corrected PETITION for re-hearing en banc by US. [18-4578] Kathleen Stoughton [Entered: 05/08/2020 03:35 PM]
		* * * * *
5/11/20	<u>60</u>	SUPPLEMENTAL AUTHORITIES by US. [1000736970]. [18-4578] Kathleen Stoughton [Entered: 05/11/2020 03:39 PM]
		* * * * *
5/26/20	<u>62</u>	RESPONSE/ANSWER to re-hearing by Michael Andrew Gary. [18-4578] Kimberly Albro [Entered: 05/26/2020 12:07 PM]
6/9/20	<u>63</u>	SUPPLEMENTAL AUTHORITIES by US. [1000753782]. [18-4578] Kathleen Stoughton [Entered: 06/09/2020 01:13 PM]
7/7/20	<u>64</u>	Published court order filed [1000770389] denying Motion for rehearing en banc [58]. Copies to all parties. [18-4578] JHM [Entered: 07/07/2020 01:16 PM]
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(COLUMBIA)

Docket No. 3:17-cr-00809-JFA-1
UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL ANDREW GARY, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/6/17	<u>2</u>	INDICTMENT (Sealed Grand Jury Ballot attached) as to Michael Andrew Gary (1) count(s) 1, 2. (Attachments: # <u>1</u> GJ Ballot) (ttil) (Entered: 09/07/2017) * * * * *
9/19/17	<u>14</u>	NOT GUILTY PLEA ENTERED as to Michael Andrew Gary (jpet,) (Entered: 09/19/2017) * * * * *
2/28/18	<u>29</u>	Minute Entry for proceedings held before Honorable Joseph F Anderson, Jr: Change of Plea Hearing as to Michael Andrew Gary held on 2/28/2018; Guilty

DATE	DOCKET NUMBER	PROCEEDINGS
		Plea Accepted Michael Andrew Gary (1) Guilty Count 1, 2 of the indictment. Defendant waives competency hearing and the court finds defendant competent to enter a guilty plea. Defendant remains in custody pending sentencing. Court Reporter Kathleen Richardson. CJA Time FPD. (mflo,) (Entered: 03/01/2018)
2/28/18	<u>30</u>	GUILTY PLEA ENTERED to counts 1 and 2 of the indictment as to Michael Andrew Gary (mflo,) (Entered: 03/01/2018)
		* * * * *
7/26/18	<u>37</u>	MOTION to Depart from Guidelines. Type of Departure: Downward by Michael Andrew Gary. No proposed order (Rogers, James) (Entered: 07/26/2018)
7/30/18	<u>38</u>	Minute Entry for proceedings held before Honorable Joseph F Anderson, Jr: Sentencing held on 7/30/2018 as to Michael Andrew Gary; Court adopts PSR as amended and overrules objection; defendant is remanded to the custody of the USM; denying

DATE	DOCKET NUMBER	PROCEEDINGS
7/30/18	<u>40</u>	<p data-bbox="732 344 1196 562"><u>37</u> Motion to Depart from Guidelines by way of a variance as to Michael Andrew Gary (1). Court Reporter Carly Horenkamp. CJA Time FPD. (mflo,) (Entered: 07/30/2018)</p> <p data-bbox="732 579 1196 1545">JUDGMENT as to Michael Andrew Gary (1), Count(s) 1, 2 of the indictment, The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of Eighty-four (84) months. This term consists of Eighty-four (84) months as to each count with said terms to run concurrently. Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years. This term consists of Three (3) years as to each count with said terms to run concurrently. The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions. Payment of \$200.00 special assessment due immediately. The defendant is remanded to the custody of the United States Marshal. Signed</p>

DATE	DOCKET NUMBER	PROCEEDINGS
8/13/18	<u>43</u>	<p>by Honorable Joseph F Anderson, Jr on 7/30/18. (mflo,) (Entered: 07/30/2018)</p> <p>NOTICE OF APPEAL OF FINAL JUDGMENT by Michael Andrew Gary re <u>40</u> Judgment,,,—The Docketing Statement form, Transcript Order form, and CJA 24 form may be obtained from the Fourth Circuit website at www.ca4.uscourts.gov. If applicable, the original CJA 24 form must be sent to the clerk's office upon filing of the Transcript Order form. (Rogers, James) (Entered: 08/13/2018)</p>

* * * * *



ARREST WARRANT
2017A2820200041
 STATE OF SOUTH CAROLINA
 County/ Municipality of CAMDEN

THE STATE
 against
MICHAEL ANDREW GARY
 Address: 619 LAURENS ST
 CAMDEN SC 29020
 Phone: (803) 432-8509 SSN: [REDACTED]
 Sex: M Race: B Height: 5-11 Weight: 160
 DL State: SC DF: 10Z089381
 DOB: [REDACTED] Agency/ORI#: SC0280100
 Prosecuting Agency: CAMDEN POLICE DEPARTMENT
 Prosecuting Officer: PTL. GOLDSMITH
 Offense: FELON IN POSSESSION OF PISTOL
 Offense Code: 2364
 Code/Ordinance Sec: 16-23-0030

This warrant is CERTIFIED FOR SERVICE in the
 County/ Municipality of

is to be arrested and brought before me to be
 dealt with according to law.

Date: _____ Time _____
 Signature of Judge _____ (L.S.)

RETURN
 A copy of this arrest warrant was delivered to
 defendant MICHAEL ANDREW GARY
 on 01/18/2017 at 11:40 AM
 by CPA J. J. Smith 144
 Signature of Constable/Law Enforcement Officer _____

RETURN WARRANT TO:
 CAMDEN MUNICIPAL COURT
 1000 LITTLETON STREET
 CAMDEN, SC 29020
 (803) 432-2421

ORIGINAL DOCUMENT

STATE OF SOUTH CAROLINA
 County/ Municipality of CAMDEN
 Personally appeared before me the affiant DET. RD. RABON who
 being duly sworn deposes and says that defendant MICHAEL ANDREW GARY
 did within this county and state on 01/17/2017 violate the criminal laws of the
 State of South Carolina (or ordinance of County/ Municipality of CAMDEN
 in the following particulars:
DESCRIPTION OF OFFENSE: 16-23-0030 / FELON IN POSSESSION OF PISTOL

I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:
 THAT ON 01/17/2017 THE DEFENDANT, MICHAEL GARY DID COMMIT THE OFFENSE OF FELON IN POSSESSION OF PISTOL WHEN HE WAS
 FOUND TO BE IN POSSESSION OF A .32 CALIBER COLT PISTOL BEARING SERIAL NUMBER #195214. THE DEFENDANT WAS STOPPED BY PTL
 GOLDSMITH, DURING A PROBABLY CAUSE SEARCH OF THE VEHICLE AFTER A LAWFUL ARREST THE PISTOL WAS FOUND INSIDE THE
 VEHICLE. THE DEFENDANT CLAIMED OWNERSHIP OF THE PISTOL. THE DEFENDANT DOES HAVE A CONVICTION FOR CRIME OF VIOLENCE
 BARRING HIM FROM POSSESSION OF A HANDGUN. THIS INCIDENT OCCURRED NEAR THE INTERSECTION OF BROAD ST AND MONROE ST,
 WITHIN THE CITY LIMITS OF CAMDEN, SC. PTL. GOLDSMITH IS A WITNESS TO PROVE THE SAME.

Signature of Affiant Det. RD RABON
 Affiant's Address 816 W DEKALB ST
 CAMDEN SC 29020
 Affiant's Telephone 803-425-6025

ARREST WARRANT
 TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
 on 01/17/2017 defendant MICHAEL ANDREW GARY
 did violate the criminal laws of the State of South Carolina (or ordinance of

County/ Municipality of CAMDEN) as set forth below:
**DESCRIPTION OF OFFENSE: WEAPONS / SALE OR DELIVERY OF PISTOL TO, AND POSSESSION BY,
 CERTAIN PERSONS UNLAWFUL; STOLEN PISTOL**

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
 defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
 to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me
 on 01/18/2017 at 4:25 pm
 Date / Time
 H. CLAY GARRUTH (L.S.)
 Judge's Address 1000 LITTLETON STREET
 CAMDEN SC 29020
 Judge's Telephone 803-423-2421
 Issuing Court: Magistrate Municipal Circuit
 Judge Code: 8168
 Case: 2017-0107

ORIGINAL

WITNESSES
(S) Robbie Rabon
- Camden Police Department

DOCKET NO. 2017GS280547
The State of South Carolina
County of
Kershaw

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS
MARCH TERM 2017
K96

Defendant

ARREST WARRANT NUMBER
2017A2820200041

Defendant

ACTION OF GRAND JURY

Witness:

TRUE BILL

C.C.C. PLS. AND G.S.

Foreperson of Grand Jury
Date: *[Signature]* MAR 29 2017
VERDICT

FILED FOR RECORD
2017 MAR 29 PM 4:00
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

Indictment for
UNLAWFULLY CARRYING A PISTOL
SC Code: 16-23-0020
CDR Code: 0044

Foreperson of Petit Jury
Date:

WITNESSES
 (S) Justin E Spivey
 - Kershaw County Sheriff

ARREST WARRANT NUMBER
 2017A2810200070

ACTION OF GRAND JURY
TRUE BILL

Justin E Spivey
 Foreperson of Grand Jury
 Date: **AUG 16 2017**

VERDICT

Foreperson of Petit Jury
 Date:

DOCKET NO. 2017GS281608

The State of South Carolina
 County of
 Kershaw

COURT OF GENERAL SESSIONS
 AUGUST TERM 2017
 K96

THE STATE
 vs.
 Michael Andrew Gary

Indictment for
WEAPONS / SALE OR DELIVERY OF
PISTOL TO, AND POSSESSION BY,
CERTAIN PERSONS UNLAWFUL; STOLEN
PISTOL

SC Code: 16-23-0030
 CDR Code: 2364

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant _____

_____ hereby appear in my own proper person and plead guilty to the within indictment or to _____

Defendant _____

Witness: _____

C.C.C. PLS. AND G.S. _____

FILED FOR RECORD
 2017 AUG 16 PM 2:44

JANET C. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

GARY, MICHAEL ANDREW (#IN2017-00141)

Bin # 105



Jacket #	2008002037	Deceased	No	Marital Status	Married
Sex	Male	Complexion	Light Brown	Citizenship	UNITED STATES
DOB	3/1/91	Race	Black/African American	Country of Birth	UNITED STATES
Age	25	Ethnicity	Unknown	State of Birth	CT
Height	5' 10"	Last Grade	11th	Place of Birth	CT
Weight	156 lbs	Religion			
Build	Medium				
Eye Color	Brown				
Hair Color	Black				

Distinctive Markings

None

Current Address 619 LAURENS ST., CAMDEN 29020

Emergency Contact	Home	(803) 200-5403
Employer	Cell	(803) 310-9190
Gang Affiliations	Bloods	
Occupation	Cell	(803) 200-5403

FILED FOR RECORD
 2017 JAN 25 AM 11:48
 JANET C. HASTY
 CLERK OF COURT
 KENNESAW COUNTY, GA

AFIS 482450	AFIS 212339	AFIS 501841
AFIS 771819	FBI # 106000AD4	Jacket # 2008002037
OLN None 102089381 1 - car/truck	OLN None NO DRIVER LICENSE	SID SC01829500
SSN [REDACTED]	SSN [REDACTED]	SSN [REDACTED]

Inmate Comments

US Citizen: true
 Wears Glasses: false
 Has Moustache: false
 Has Beard: false
 Has GED/Diploma: false
 Wants GED: false

Initial Cell	Intake-Holding Cell 2	Current Cell	B-05
Booked By	Hoffman, Nicholas	Held For	CAMDEN POLICE DEPARTMENT
Booking Date	01/17/17 13:48	Arresting Agency	CPD
Arrest Location		Arresting Officer	Goldsmith, Johnathan
Billed To	CAMDEN POLICE DEPARTMENT	Required Cell Checks	
Treat As			
Gets Work Release	No		
Allows Check Out	No		

PD APPROVED
 HCC
 19 JAN 17
 DATE

Hold Reasons

Ticket

TICKET warrant 5102P0490117 issued by CPD, SC
 56-1-480 - DRIVING UNDER SUSPENSION - 2ND OFFENSE
 Arrest Date 01/17/17 00:00

FBI 106000AD4
 SID SC01829500
 NCIC CHECK ✓
 FP COMPLETED ✓
 LIVESCAN / OR MAILED

Bond - Cash/Surety, \$1270.00, Set By Judge Carruth

TICKET warrant 5102P0490120 issued by CPD, SC
44-53-391 - UNLAWFUL POSSESSION SELL ADVERTISE ETC OF DRUG PARAPHERNALIA
Arrest Date 01/17/17 00:00

Bond - Cash/Surety, \$565.00, Set By Judge Carruth

TICKET warrant 5102P0490119 issued by CPD, SC
44-53-370 - POSSESSION 28G OR LESS MARIJUANA/10G OR LESS HASH 1ST
Arrest Date 01/17/17 00:00

Bond - Cash/Surety, \$615.00, Set By Judge Carruth

Warrant

TICKET warrant 5102P0490121 issued by CPD, SC
56-5-950 - DISREGARD A TRAFFIC SIGNAL
Arrest Date 01/17/17 00:00

Bond - Cash/Surety, \$232.00, Set By Judge Carruth

Arrest warrant 2017A2820200041 issued by CPD
16-23-30 - POSSESSION OF A PISTOL (PERSON CONVICTED OF VIOLENT CRIME)

Bonds for Unresolved Hold Reasons
Cash/Surety

Remaining Amount
\$2682.00
Total \$2682.00

Hold Comments

Release Date	Released By	Release Reason
Recipient		
Release Comments		

I certify that the above information is correct.

Signed GARY, MICHAEL ANDREW Date _____

FILED FOR RECORD
2017 JAN 25 AM 11:48
JANET G. HASTY
CLERK OF COURT
KERSEAW COUNTY, S.C.

Handwritten notes:
2 Bond Form II's
totals \$2,682.00
\$5,000.00
A-Donna Davis Bail Bonds
19 JAN 17 HCC
\$7,682.00
C/S \$5,000.00 19 JAN 17 HCC

2017A2820200641

Criminal Charging Document No.

BAIL PROCEEDING FORM II

STATE OF SOUTH CAROLINA COUNTY OF Kershaw

IN THE COURT OF GENERAL SESSIONS MAGISTRATE COURT MUNICIPAL COURT OF

STATE OF SOUTH CAROLINA

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE

Michael Andrew Gary NAME OF DEFENDANT

Offense Charged: Felon In Possession OF A Pistol

At a bail proceeding conducted by the undersigned judge, for the defendant named above, it was determined by the court (check one or both):

- The release of the defendant on recognizance will not reasonably assure his appearance as required.
The release of the defendant on recognizance will result in an unreasonable danger to the community.

This determination was based upon the following findings of fact: nature of the case

[Considerations: Nature and circumstances of the offense charged, the defendant's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and any record of flight to avoid prosecution or failure to appear at court proceedings.]

THEREFORE, IT IS HEREBY ORDERED:

- 1. That the above named defendant be released from custody on the condition that he will personally appear before the designated court at the place, date and time required to answer the charge made against him and do what shall be ordered by the court and not depart the State without the permission of the court and be of good behavior.
2. That the above named defendant be released from custody provided as follows:

CASH IN LIEU OF BOND

The defendant, acknowledges himself to be indebted to the State of South Carolina in the sum of to secure his release from custody. Should the defendant fail to comply with all terms and conditions of this Order, this sum of money is subject to being forfeited to the State.

CASH PERCENTAGE IN LIEU OF BOND

The defendant, acknowledging himself to be indebted to the State of South Carolina in the full amount of, his release to be obtained by payment to the court of % (not to exceed 10%) of the full amount of the bond, deposits to secure his release from custody. Should the defendant fail to perform the conditions of this Order, the full amount shall be levied on his real and personal property for the use of the State.

APPEARANCE RECOGNIZANCE WITH SURETY

The defendant will provide good and sufficient surety approved by the court, in the form hereinafter set forth in this Order, acknowledging an indebtedness to the State in the amount of \$5,000.00

3. That the defendant shall appear at (check one):

the term of COURT OF GENERAL SESSIONS beginning on 5 APR 17 11:48 AM at 9:00 o'clock, AM, at Kershaw County Courthouse and remain there throughout that term of court. If no disposition is made during that term, the defendant shall appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court.

the session of MAGISTRATE COURT MUNICIPAL COURT beginning on at o'clock, M, at If no final disposition is made during that session, the defendant shall appear at such other times and places as ordered by the court.

INITIALS OF DEFENDANT M.A.G.

4. That the defendant will notify the court promptly if he changes his address from the one contained in this order and he will comply with those conditions described hereinafter in the Order.

H. Clay Carothers SIGNATURE OF JUDGE

19 JAN 17 DATE

ACKNOWLEDGEMENT BY DEFENDANT

I understand that if I violate any condition of this Order, a warrant for my arrest will be issued.

I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence.

It has been explained to me that if I fail to appear before the court as required, a warrant for my arrest will be issued.

619 ~~Lawrence St~~ Lawrence St ADDRESS
Candler S C 28407 803-510-1190 CITY/STATE/ZIP TELEPHONE
[Signature] SIGNATURE OF DEFENDANT
1/19/17 DATE
SOCIAL SECURITY NUMBER DRIVER'S LICENSE OR ID NUMBER ATTORNEY REPRESENTING ACCUSED (IF KNOWN?)

SPECIAL CONDITIONS OF RELEASE

- a. [] Placement in custody. The defendant is placed in the custody of: NAME OF PERSON OR ORGANIZATION
ADDRESS CITY/STATE ZIP TELEPHONE
who agrees (1) to supervise the defendant as set forth by the court, (2) to use every effort to assure the appearance of the defendant at all scheduled hearings before the court, and (3) to notify the court immediately in the event the defendant violates any conditions of his release or disappears.
SIGNATURE OF CUSTODIAN (IF APPROVED) DATE
b. [] Restrictions on Travel, Association or Residence. The defendant will comply with each of the following conditions:
c. [] Part-time Release. The defendant will be released from custody from TIME o'clock, AM/PM to TIME o'clock, AM/PM on DATE(S) on condition that he return to the custody of NAME OF PERSON OR ORGANIZATION at LOCATION as designated.
d. [] Other Conditions. The defendant will comply with the following other conditions of release:

APPEARANCE RECOGNIZANCE WITH SURETY

On the 19th day of January 2017, personally appeared before the undersigned judge the surety named below who acknowledged himself indebted to the State of South Carolina, in the sum of \$5,000.00, such sum to be levied on his real and personal property for the use of the State, should named defendant fail in performing the conditions of this Order.

The surety, being duly sworn, says that he is a resident and free holder within the State and is worth the sum acknowledged and underwritten herein, over all his debts and liabilities, and exclusive of property exempt from execution.

A. [Signature] NAME OF SURETY BONDSMAN TELEPHONE
230 Sycamore Rd ADDRESS OF SURETY BONDSMAN
Candler SC CITY/STATE/ZIP
Palmetto NAME OF INSURANCE COMPANY
109 Riverland Dr ADDRESS OF INSURANCE COMPANY
Charleston SC CITY/STATE/ZIP
[Signature] SIGNATURE OF SURETY BONDSMAN
H Clay Cornith SIGNATURE OF JUDGE
19 JAN 17 DATE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CR. NO.: [3:17-809]
18 USC § 922(g)(1)
18 USC § 924(a)(2)
18 USC § 924(e)
18 USC § 924(d)(1)
28 USC § 2461(c)

UNITED STATES OF AMERICA

v.

MICHAEL ANDREW GARY

Filed: Sept. 6, 2017

INDICTMENT

Count 1

THE GRAND JURY CHARGES:

That on or about January 17, 2017, in the District of South Carolina, the Defendant, **MICHAEL ANDREW GARY**, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce, a firearm and ammunition, that is, a .32 caliber Colt Model 1903 Pistol and .32 caliber Automatic Colt Pistol ammunition, all of which had been shipped and transported in interstate and foreign commerce;

In violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e).

COUNT 2

THE GRAND JURY FURTHER CHARGES:

That on or about June 16, 2017, in the District of South Carolina, the Defendant, **MICHAEL ANDREW GARY**, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce, a firearm and ammunition, that is, a 9mm Taurus Model 24/7 G2C Pistol and 9mm Luger ammunition, all of which had been shipped and transported in interstate and foreign commerce;

In violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e).

FORFEITURE1. **FIREARM OFFENSE:**

Upon conviction for the felony violation of Title 18, United States Code, Section 922(g)(1) as charged in this Indictment, an offense punishable by imprisonment for more than one year, the Defendant, **MICHAEL ANDREW GARY**, shall forfeit to the United States all of the Defendant's right, title and interest in

- (a) any firearms and ammunition (as defined in 18 U.S.C. § 921)—
 - (1) involved in or used in any knowing violation of 18 U.S.C. § 922 or violation of any other criminal law of the United States;

2. PROPERTY:

Pursuant to Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c), the property which is subject to forfeiture upon conviction of the Defendant for offenses charged in this Indictment includes, but is not limited to, the following:

(a) Firearms:

- (1) Colt .32 caliber firearm, model: 1903
(serial number 195214)
Asset ID: 17-ATF-012102
- (2) Taurus 9mm firearm, model: 24/7 G2C
(serial number THZ1787)
Asset ID: 17-ATF-019867

(b) Ammunition:

- (2) Rounds of .32 caliber Automatic Colt Pistol ammunition
Asset ID: 17-ATF-012103
- (18) Rounds of 9mm Luger Cartridges
Asset ID: 17-ATF-019869

Pursuant to Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c).

A [True] Bill
[REDACTED]
FOREPERSON

/s/ BETH DRAKE
BETH DRAKE (new)
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

3:17-CR-00809

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL ANDREW GARY, ET AL., DEFENDANT

Feb. 28, 2018
Columbia, SC

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE JOSEPH F. ANDERSON, JR.
UNITED STATES DISTRICT JUDGE, PRESIDING
CHANGE OF PLEA HEARING

APPEARANCES

FOR THE GOVERNMENT:

NANCY WICKER, AUSA
WILLIAM WITHERSPOON, AUSA
WILLIAM LEWIS, AUSA
United States Attorney's Office
1441 Main Street, Suite 500
Columbia, S.C. 29201

FOR THE DEFENDANT GARY:

JAMES P. ROGERS, AFPD
Federal Public Defender's Office
1901 Assembly Street, Suite 200
Columbia, S.C. 29201

[2]

THE COURT: All right. The first defendant to my far right I believe is Mr. Michael Andrew Gary.

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Gary, I am informed that you want to plead guilty to the one-count indictment now pending against you. Is that correct?

MR. ROGERS: Two counts, Your Honor.

THE COURT: I'm sorry. To both counts?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Is that correct, Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: And you're represented by attorney Jimmy Rogers?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And next to him is Mr. Chavis Littlejohn.

THE DEFENDANT: Yes, sir.

THE COURT: And Mr. Littlejohn, I am informed that you want to plead guilty to the one-count indictment against you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you are represented by

...

MR. ASHMORE: Beattie Ashmore, Your Honor.

THE COURT: I'm sorry. Mr. Beattie Ashmore. Nice to have you down here. And next to him is Mr. Yoel [3] Oquendo-Cabrera. I'm sorry if I mispronounced that. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And I'm informed that you want to plead guilty to Count One of the indictment pending against you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Let me—

MR. WITHERSPOON: To correct the record, I think he's pleading guilty to the lesser included of Count One—

THE COURT: Right.

MR. WITHERSPOON: —According to the plea agreement.

THE COURT: You're right. So Mr. Cabrera—pronounce your last name for me if you . . .

THE DEFENDANT: Oquendo.

THE COURT: Oquendo. Mr. Oquendo, you want to plead guilty to a lesser included offense contained within Count One of the indictment against you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Now, let me say to all three of you, you have all three been charged with violation of federal criminal law in three separate cases that have nothing to do with each other. I have been informed that you want to plead guilty as has just been indicated.

[4]

Before I can accept the guilty plea from any of you, I have to ask you a series of questions to be sure that your plea is being made freely and voluntarily. So if you don't understand any of my questions or any of the words that I use, you should tell me so that I can stop and go over it with you a second time or explain it further.

Do you understand that, Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that, Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that, Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The clerk will please administer the oath to all three defendants.

Michael Gary, Chavis Littlejohn, Yoel Oquendo-Cabrera, after being duly sworn, testified as follows:

MR. ROGERS: Mr. Gary attests.

THE CLERK: Okay. Do you attest that the answers you give to the questions propounded by the Court shall be the truth, the whole truth and nothing but the truth so help you God?

THE DEFENDANT: Yes, sir.

THE CLERK: Thank you.

THE COURT: All right. Do each of you understand, [5] all three of you that you've just taken an oath promising to tell the truth in this courtroom. That means that all of your answers must be entirely truthful. If they are not truthful, you could be charged with another crime of perjury or making false statement. Do you understand all of that?

Mr. Evans? I'm sorry. Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that, Mr. Littlejohn?

THE DEFENDANT: Yes sir.

THE COURT: All right. Let me get some background information for each of you.

First of all, Mr. Gary, how old are you?

THE DEFENDANT: Twenty-six.

THE COURT: How far did you go in school?

THE DEFENDANT: 10th grade

THE COURT: Are you currently under the influence of any drug, medicine, or alcohol?

THE DEFENDANT: No, sir.

THE COURT: Have you ever been treated for mental illness or narcotics addiction?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand what's happening here [6] in Court this afternoon?

THE DEFENDANT: Yes, sir .

THE COURT: All right. Next Mr. Littlejohn, how old are you, sir?

THE DEFENDANT: Thirty.

THE COURT: How far did you go in school?

THE DEFENDANT: Twelfth grade.

THE COURT: All right. Are you currently under the influence of any drug or medicine or alcohol?

THE DEFENDANT: No, sir.

THE COURT: Have you ever been treated for mental illness or narcotics addiction?

THE DEFENDANT: Yes, sir.

THE COURT: I'm sorry?

MR. ASHMORE: May I approach that issue?

THE COURT: Yes, sir.

MR. ASHMORE: Your Honor, my client handed to me today electronic medical records from DMH, I assume is the Department of Mental Health. He's on a number of—let me start by saying I think he's perfectly competent and understanding what's going on here today, but I wanted to bring to your attention he was diagnosed in 2010 with a psychotic disorder, then again January 28th of 2016 unspecified schizophrenia spectrum and other psychotic disorder.

[7]

He's on seven active medications, six of which deal with simply a breathing problem. The seventh is Albuterol, a-l-b-u-t-e-r-o-l. He tells me he takes that as directed by the physician. Again I've spoken with him today, got four family members here today. We have all

talked—I think he fully understands what’s going on here today and the impact of a guilty plea and I just want to put that on the record.

THE COURT: All right. Mr. Littlejohn, how long ago was this treatment that we—that he just talked about?

THE DEFENDANT: Sir?

THE COURT: How long ago was this treatment? How many years ago was the treatment that you received?

THE DEFENDANT: For mental health?

THE COURT: Yes.

THE DEFENDANT: Like 2010 . . .

MR. ASHMORE: He’s still receiving treatment.

THE COURT: Still receiving it now.

THE DEFENDANT: Ongoing.

THE COURT: All right. Mr. Littlejohn, I’m not trying to embarrass you in any way. I am just required to make sure you’re competent to go forward. That is to say I have to be sure you understand what’s happening here—

THE DEFENDANT: Okay.

THE COURT: —And you’re able to think and understand and communicate with me and make important [8] decisions. Do you think you’re able to do that at this point?

THE DEFENDANT: Yes, sir. Yes, sir.

THE COURT: Are you sure about that?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Ashmore, have you been able to communicate with him freely and you think he's—

MR. ASHMORE: I have, Your Honor. And of course, I have met with him on a number of occasions prior to today and he's always understood my thoughts. Again, speaking with his family members today, Your Honor, he understands what's going on here today. I think he's capable of entering a knowing and voluntary plea.

THE COURT: All right. Mr. Littlejohn, tell me—you understand why we are here in this courtroom this afternoon?

THE DEFENDANT: Yes, sir.

THE COURT: Tell me in your own words why we are here.

THE DEFENDANT: For a guilty plea of my count.

THE COURT: All right. What are you charged with?

THE DEFENDANT: That—what I charged with?

THE COURT: What—

THE DEFENDANT: Trafficking in . . .

THE COURT: All right. You seem to be able to [9] understand me very clearly . . . Do you agree?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And then—

THE DEFENDANT: Just that I'm nervous.

THE COURT: Well, don't—nothing to be nervous about. We don't get in a hurry. You'll be fine.

And then finally, Mr. Oquendo, how old are you, sir?

THE DEFENDANT: Twenty-four.

THE COURT: How far did you go in school?

THE DEFENDANT: Twelfth grade.

THE COURT: Are you currently under the influence of any drug or medicine or alcohol?

THE DEFENDANT: No, sir.

THE COURT: Have you ever been treated for mental illness or narcotics addiction?

THE DEFENDANT: No, sir.

THE COURT: Do you understand what's happening here in Court this afternoon?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

MR. ROGERS: Your Honor, sorry to interrupt, but when you were asking Mr. Gary, he has been treated, sent him off to be evaluated. That evaluation came back and we would waive any issues of competency—

THE COURT: Right.

[10]

MR. ROGERS: —Agree to not contest the competency.

THE COURT: Right. And that psychological report is part of the record in this case.

MR. ROGERS: Yes, Your Honor.

THE COURT: You had a change—you have had access to it?

MR. ROGERS: I have. He is on medication today. But based on my conversations with him, he understands what he's doing and he knows he's entering a guilty plea to two counts.

THE COURT: Do you know specifically what medicines he's taking?

MR. ROGERS: No, Your Honor.

THE COURT: Didn't he tell me earlier he had not been taking any medicine?

MR. ROGERS: No, he didn't. When he—when you asked him had he ever been treated, he said yes—

THE COURT: Right

MR. ROGERS: —And you—I think you misunderstood because he had said—

THE COURT: Right.

MR. ROGERS: —In the past. That's why I was made—

THE COURT: All right. Well, I appreciate you [11] correcting me on that. Thank you. But what about his medicine? You don't know—can you tell me what medicines you're taking?

THE DEFENDANT: Celexa.

THE COURT: And what is that for?

THE DEFENDANT: Depression.

THE COURT: How long have you been taking it?

THE DEFENDANT: Since 2009.

THE COURT: All right. Do you agree that you can understand me and we can communicate?

THE DEFENDANT: Yes, sir.

THE COURT: You understand what's happening here in court this afternoon?

THE DEFENDANT: Yes, sir. Yes, sir.

THE COURT: Tell me what's happening, what are we doing here?

THE DEFENDANT: Pleading guilty

THE COURT: All right. Mr. Rogers, you are satisfied your client's competent?

MR. ROGERS: I am, Your Honor.

THE COURT: Mr. Ashmore, do you have any reservations or concerns about your client's competency?

MR. ASHMORE: No, sir, Your Honor.

THE COURT: And counsel, Mr. Duncan, do you have any questions about competency?

[12]

MR. DUNCAN: No, sir, Your Honor.

THE COURT: All right. Do any of the US Attorneys have any concerns regarding competency on these specific cases?

MR. LEWIS: As to Mr. Littlejohn, no, Your Honor.

MR. WITHERSPOON: Your Honor, as far as Mr. Oquendo-Cabrera, none.

MRS. WICKER: As to Mr. Gary, no, Your Honor.

THE COURT: All right. I find then all three defendants competent to plead to the charges against them after conducting the required colloquy and having an extensive conversation with certain defendants. All right.

Let me ask each of you about your relationship with your attorney. Have each of you had an ample opportunity to discuss your case with your attorney?

Mr. Gary, have you?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn, have you?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo, have you?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with your attorney's representation in this case?

Mr. Gary?

THE DEFENDANT: Yes, sir.

[13]

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Has your attorney done everything that you have asked him to do for you?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything that you would like for your attorney to do for you at this time before we proceed any further in your case?

Mr. Gary?

THE DEFENDANT: No, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: No, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: No.

THE COURT: All right. Do each of you understand that under the constitution and laws of the United States you have the right to plead not guilty to charges against you, and if you plead not guilty, you would be entitled to a [14] trial before a jury on these charges. Do you understand all of that?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: If you decided to plead not guilty and request a jury trial, you would be entitled to a number of procedural rights as a defendant in this Court. I want to list these rights for you so that you will have a clear understanding of what rights you possess and what you will give up if you plead guilty.

If you decided to plead not guilty and request a jury trial, then first of all at that trial you would have the right to the assistance of attorneys to represent you before the jury. At a trial you would be presumed to be innocent and the government would be required to prove you guilty by competent evidence and beyond a reasonable doubt before you could be found guilty and you would not have to prove that you were innocent.

At a trial the witnesses for the government would have to come to court and testify in your presence and your attorney could cross-examine the witnesses for the [15] government, he could object to evidence offered by the government, and he could offer evidence on your behalf.

At a trial you would have the right to take the witness stand and testify if you chose to do so, but you would also have the right not to testify. And if you decided not to testify, I would instruct the jury they could not hold that against you in determining guilt or innocence. Also, at a trial you would have the right to have the Court issue

subpoenas to compel the attendance of witnesses that you wish to have brought in to testify in your defense.

Now, do you understand these rights I have just outlined for you?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you plead guilty, that means you will give up your right to a jury trial and all the other rights I have just listed, there will be no trial in your case, and I will enter a judgment of guilty and sentence you on the basis of your guilty plea. Do you understand all that?

Mr. Gary?

[16]

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you plead guilty, you will also have to give up your right not to incriminate yourself since I will ask you questions about what you did in order to satisfy myself that you

are guilty as charged, and that means you will have to acknowledge your guilt here in the courtroom under oath. Do you understand all that?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Now that I've discussed all these rights with you, do you still want to plead guilty?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

[17]

THE DEFENDANT: Yes, sir.

THE COURT: Have each of you received a copy of the indictment, that is the written charges made against you in this case?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed the case in general and the specific charges that you wish to plead guilty to with your attorney?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I want to now focus on each individual case. What I'm about to say now applies only to. I am speaking to Mr. Gary and Mr. Gary alone. We've got two counts—Mr. Gary, we have two counts to go over with you Mr. Gary. Count one charges as follows.

On or about January the 17th, 2017 in the District of [18] South Carolina, you, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce a firearm and ammunition, that is a .32 caliber colt model 1903 pistol and .32 caliber automatic colt pistol ammunition, all of which had been shipped and transported in interstate and foreign commerce.

Do you understand that charge against you in Count One, Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If count one were to go to trial—just a minute. Is count two the same offense?

MR. ROGERS: It is, Your Honor.

THE COURT: All right. Count Two, Mr. Gary, charges you with violation of the same law but on a different day and a different weapon. Count Two charges that on or about June 16th, 2007 [sic] in the District of South Carolina you, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce a firearm and ammunition, that is a 9-millimeter Taurus model 247G2C pistol and 9-millimeter Luger ammunition all of which had been shipped and transported in interstate commerce.

Do you understand that charge against you in count two, Mr. Gary?

[19]

THE DEFENDANT: Yes, sir.

THE COURT: Now as to regard to both Count One and Two, if this case were to go to trial, the government would have to prove four essential elements of the crime charged. They would have to—the jury would have to consider each charge separately and independently of the other, but the elements would have to be proved for each Count One and Count Two are the same.

These elements are: number one, that on the specified day indicated in the indictment, which is January 17th of 2017 for Count One and June 16th of 2017 for Count Two, that's the relevant date, number one—the

first element is that you've been convicted of a crime punishable by imprisonment for a term exceeding one year in some court. The second element is that you then possessed a firearm. The third element is that the firearm had traveled in interstate or foreign commerce at some point during its existence. In other words, it had traveled from one state to another state or from one country to another country. And the fourth element is that you did so knowingly; that is that you knew the item was a firearm and your possession of that firearm was voluntarily and intentional.

Do you understand those four elements of Count One and Count Two, Mr. Gary?

THE DEFENDANT: Yes, sir.

[20]

THE COURT: Now Mr. Gary, I'm required to tell you about the maximum penalty that you face. There are two possible penalty provisions that might come into play here depending upon whether you have a violent felony or a serious drug offense on your record.

Ordinarily the maximum term of imprisonment for the offense of Count One and Count Two is 10 years on each count. Everything I'm saying applies to both counts. They could be added together, maximum of 10 years in prison and a fine of up to \$250,000 plus a term of supervised release following imprisonment of at least three years plus a mandatory special assessment of \$100.

Now, if you have at least three prior convictions for a violent felony or for a serious drug offense, then the penalty provision is different. In that case there's a mandatory minimum term of imprisonment of 15 years,

meaning you must receive a sentence of at least 15 years. The maximum could be up to life.

The fine could be up to \$250,000. Then there's a term of supervised release of not more than five years following imprisonment plus a mandatory special assessment of \$100.

Do you understand the potential penalties that apply in your case?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Very good. Now lets move [21] on and talk to Mr. Littlejohn. What I'm about so say now applies to Mr. Littlejohn only; no one else.

Mr. Littlejohn, in count one of the indictment against you charges as follows. On or about August the 21st of 2017 in the District of South Carolina you knowingly, intentionally, and unlawfully did possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine which is a schedule two controlled substance.

Do you understand that charge against you in Count One, Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Now if this case were to go to trial on Count One, there are three essential elements of the crime charged that the government would be required to prove beyond a reasonable doubt before a jury could find you not guilty. These elements are as follows.

Number one, that you knowingly possessed a controlled substance. Second, that you possessed the controlled substance in question—that being the substance and the amount charged in the indictment. And the third element is that you possessed the controlled substance with the intent to distribute it or that you actually did distribute it.

Do you understand those three essential elements of the charge?

[22]

THE DEFENDANT: Yes, sir.

THE COURT: Now in regard to the penalty that you face, the most severe penalty you could receive upon a guilty plea in a case involving 50 grams or more of methamphetamine or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine and a defendant who has no prior felony drug convictions, the law provides for a mandatory minimum term of imprisonment of 10 years, a potential maximum term of imprisonment of life, a fine of up to \$10 million and a term of supervised release following imprisonment of at least five years plus a mandatory special assessment of \$100.

Do you understand the penalty provisions as apply to your case—

THE DEFENDANT: Yes, sir.

THE COURT: —Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Very good. And then finally moving on to Mr. Oquendo—speaking only

to Mr. Oquendo at this time. The charge in the case against you in Count One is as follows. Beginning at a time unknown to the grand jury but at least in or around April of 2016 and continuing thereafter up to and including the date of this indictment in the District of South Carolina and elsewhere, you along with about two other people who were named [23] knowingly and intentionally did combine, conspire, and agree, and have a tacit understanding with each other and others both known and unknown to the grand jury to possess with intent to distribute and distribute marijuana, which is a schedule one controlled substance.

And then a subparagraph relates to you. Subparagraph C alleges that with respect to Yoel Oquendo-Cabrera, the amount involved in the conspiracy attributable to him as a result of his own conduct and the conduct of other conspirators reasonably foreseeable to him is 100 grams or more of a mixture and substance containing a detectable amount of marijuana in violation of federal law.

Now, the plea agreement provides for a lesser included offense where you would only be pleading guilty to conspiring to possess with intent to distribute and distribute less than 50 kilograms or more of marijuana.

What does it mean when it says less than 50 kilograms or more of marijuana?

MR. DUNCAN: Your Honor, I think—I think I missed that in their plea. It should be less than 50 kilograms. And I think the penalty provision provides the penalty for less than 50 kilograms.

THE COURT: I think the words, or more, need to be stricken out; right?

MR. WITHERSPOON: Yes, sir, judge.

[24]

THE COURT: Let's do that to be safe. Let's do it right now. And strike it out and initial it if we could on the original.

MR. WITHERSPOON: Yes, sir.

THE CLERK: Do you have the original in your file or do you want me to print it out? Okay.

MR. DUNCAN: It's—I think that same language is on the second page, Subparagraph C.

THE COURT: All right. Now going back, Mr. Oquendo, the original indictment charges you with being a member of a conspiracy involving 100 kilograms or more of a mixture or substance containing marijuana. The lesser included offense provided for in your plea agreement allows you to plead guilty to less than 50 kilograms of marijuana.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you are charged with being a member of a conspiracy to distribute that amount. And for your information, a criminal conspiracy under the law is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is in a very true sense a partnership in crime, and that is the essence of what a conspiracy consists of.

And going back to the specific allegations of your case, [25] Count One charges you along with Mr.

Gutierrez and Mr. Martinez with being a member of a conspiracy dealing with marijuana. And as I said, the quantity requirement, the weight requirement has been reduced to let you plead guilty to a lesser included offense involving less than 50 kilograms of marijuana.

Do you understand that charge?

THE DEFENDANT: Yes, sir.

THE COURT: Now if this case were to go to trial against you on this Count One, there are three essential elements the government would be required to prove beyond a reasonable doubt before a jury could find you guilty. These three elements are: number one, that you had an agreement between two or more persons with the intent—excuse me—to possess with intent to distribute and to distribute marijuana.

The second element is that you acted knowingly and voluntarily in becoming a member of the conspiracy. The third element is that the—is the quantity requirement which is less than 50 kilograms that the government would have to prove.

They could prove the quantity requirement several different ways. They can prove that you yourself distributed that quantity or you agreed to assist someone else in the distribution of that quantity or the distribution of that [26] quantity was reasonably foreseeable to you and was within the scope of your agreement and understanding when you joined the conspiracy.

Do you understand those three elements I've just outlined for you?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I'm required to tell you about the maximum possible penalty you face. Under federal law if you plead guilty the most severe sentence you could receive is a sentence of not more than five years imprisonment, a fine of up to \$250,000, supervised release for at least two years, and a mandatory special assessment of \$100.

Do you understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I find for the record then that all three defendants understand and comprehend fully the nature of the charges against them. They also understand the essential elements of the crimes charged that the government would be required to prove beyond a reasonable doubt at trial, and they understand the maximum possible penalty provided by law and, where applicable, the mandatory minimum penalty provided—required by law.

All right. Let me say to all three of you again now, if you plead guilty, I will have to determine the appropriate sentence to be imposed in your case at a sentencing hearing [27] to be conducted in about two or three months down the road. In determining the appropriate sentence I'm required to consider first the advisory guidelines that apply in your case. I'm required to consider the statutory sentencing factors of Section 3553(a) of Title 18 of the Federal Code of Laws, and I'm required, of course, to consider the maximum penalty provided by law for the specific offense.

Have you and your attorney talked about how all of these laws might come into play at your sentencing hearing?

Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You understand then that with regard to the Sentencing Guidelines, we cannot calculate your guideline range today. We have to wait until a Presentence Report has been completed and you and the government have been given an opportunity to challenge the reported facts and the application of the guidelines recommended by the probation officer.

Do you understand all that, Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand all that, [28] Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand all that, Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: Do each of you understand that the sentence you receive may be different from any estimate that your attorney may have given you?

Mr. Gary, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you understand that under the federal system parole has been abolished and that if you're sentenced to prison, you would not be released early on parole.

Do you understand that, Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that, Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that, Mr. Cabrera—

THE DEFENDANT: Yes, sir.

THE COURT: —Mr. Oquendo?

[29]

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you understand that if the sentence you receive is more severe than you expected it to be, you will still be bound by your guilty plea and have no right to withdraw your guilty plea.

Do you understand that, Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that, Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that, Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: I mentioned supervised release a moment ago. If you plead guilty and if you are sentenced to prison, the law requires that upon your release from prison you be subjected to a term of supervised release. If you are placed on supervised release status, you're under a court order that sets out rules for your behavior while you're on supervised release. If you violated any of those rules of behavior set out in the court order, you could be given additional time in prison.

Do you understand all that, Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

[30]

THE DEFENDANT: Yes, sir.

THE COURT: All right. Has anyone threatened you or anyone else or forced you in any way to plead guilty?

Mr. Gary?

THE DEFENDANT: No, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: No, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of your own free will because you are guilty? Mr. Gary?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Littlejohn?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Oquendo?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I have been given a written plea agreement. Is it correct that you entered into a negotiated written plea agreement with—I'm speaking now just to Mr. Oquendo.

Mr. Oquendo, is it correct you've entered into a negotiated written plea agreement with the government?

THE DEFENDANT: I didn't understand.

THE COURT: Have you signed a written plea agreement—all right. Mr. Cabrera, we are going to come [31] back to your case in just a minute. We will talk about that plea agreement.

But let's first go back and just talk about the case against Mr. Gary. Mr. Gary, you're pleading guilty to the indictment as charged with no plea agreement. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I'm going to ask the assistant us attorney who is handling this case to summarize for me the evidence the government has collected in its investigation and tell me what the government would be prepared to go forward and prove if we held a trial in your case.

Mrs. Nancy Wicker, Assistant US Attorney, is going to tell us about the evidence the government has developed.

MRS. WICKER: If it please the Court, Your Honor. First as to Count One. On January 17th, 2017 at approximately 9 am Camden Police Officer Jonathan Goldsmith was on parole when he saw a 2006 Impala run a red light. Officer Goldsmith got behind the Impala to stop it. The driver did not immediately stop, but eventually pulled into a parking lot.

Mr. Gary was the driver of that car. Mr. Gary volunteered that he was at the time driving under suspension. Officer Goldsmith smelled what he believed to be marijuana [32] coming from inside the car. Officer Goldsmith verified through dispatch that Mr. Gary's license was in fact suspended.

Officer Goldsmith and Corporal Scott asked Mr. Gary and a passenger with Mr. Gary—who was with Mr. Gary to get out of the car. Mr. Gary was arrested for driving under suspension and he volunteered to the officers that everything in the car belonged to him.

During an inventory search of the car Officer Goldsmith discovered a .32 caliber colt pistol and a baggie containing 9 grams of marijuana. Again Mr. Gary acknowledged that the gun and the marijuana were his.

We did not charge Mr. Gary in federal court with marijuana, Your Honor. I simply mention that because it was part of the facts.

On January 17th, 2017, Mr. Gary had at that time several prior felony convictions for which he had not been pardoned. Neither the gun nor the ammunition were manufactured in South Carolina and, therefore, both of them had traveled in interstate commerce at some point.

As to Count Two, Your Honor, approximately five months later on June 16th, 2017, at 9:49 pm Kershaw county deputies arrested Mr. Gary after officers smelled marijuana in an area where Mr. Gary and another person were. Investigators Justin Spivey and Deputy Mark Bass were patrolling the parking lot of the Camden West End Hotel at the time. They saw two men, [33] one of whom was later identified as Mr. Gary, sitting outside of one of the hotel rooms. At the same time officers smelled an odor of marijuana coming from their direction.

As officers approached they realized that the men had moved from in front of the room to the back seat of a silver Honda which was parked in front of the room. And at that time officers approached the Honda. Mr. Gary was sitting on the back seat passenger's side and he opened the door. Officers could smell a strong odor of marijuana coming from the car.

Investigator Spivey then walked over to the other person who was on the back seat on the driver's side and saw a marijuana blunt or cigarette lying in his lap. The men stated that the owner of the car was inside room 137 and the—that the Honda was parked in front of.

The officers talked to the owner and she consented to the search of the Honda at that time stating she didn't have anything illegal in there. Officers then returned to the car, got Mr. Gary and the other person out of it. When the officers opened the trunk, they noticed a strong odor of marijuana. There they located in addition to some marijuana they located a pistol, a Taurus 9-millimeter and 18 rounds of ammunition.

Dispatch advised that the pistol had been stolen out of Darlington County six months earlier. Mr. Gary was read his [34] Miranda rights and he stated that the pistol belonged to him and that he bought it on the street. The other person who was in the car claimed the marijuana that was found.

As noted in connection with Count One, at that time Mr. Gary had been convicted of a fell—several prior felony convictions. He had not been pardoned for those convictions and neither the gun nor ammo were manufactured in South Carolina and, therefore, at some point traveled in interstate commerce.

THE COURT: All right. Mrs. Wicker, as—we have two counts; right?

MRS. WICKER: That's correct, Your Honor.

THE COURT: And that there's no—there's no provision second—to run consecutive? I know we got the—

MRS. WICKER: I'm sorry. I did not hear the question.

THE COURT: I know if he has three prior convictions for a violent felony or serious drug offense, we are looking at a mandatory minimum of 15 years. But

assuming he doesn't have that, there's no requirement that the two, Count One and Count Two sentence, run consecutive?

MRS. WICKER: There is no requirement—

THE COURT: For the weapon.

MRS. WICKER: —There is no requirement to my knowledge that they run consecutive, Your Honor.

[35]

THE COURT: All right.

MRS. WICKER: And I will tell the Court, although we always advise the potential of the armed career criminal penalty—

THE COURT: Right.

MRS. WICKER: —We do not believe he is an armed career—

THE COURT: All right. Mr. Gary, was that a correct summary of your criminal activity in this case?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Very good. Let's move on to the next case then and have the—Mr. Lewis is going to now tell us about the evidence the government has collected in this second case against Mr. Littlejohn.

Mr. Littlejohn, listen very carefully. When he finishes, I'm going to ask you if he's correctly summarized what you did. Yes, sir.

MR. LEWIS: Your Honor, were we to go to trial, the government would be able to show that on August 21st, 2017 Mr. Littlejohn was traveling in a Buick down

I-77 in Chester County. He got pulled over by a Deputy Frock of Chester County Sheriff's Department for speeding. As Deputy Frock was talking to Mr. Littlejohn, he starts asking him a couple of questions about where he's going. Based on that, Deputy Frock, in his answers believed that he doesn't—there's [36] something suspicious.

He then gets a K9 there. The K9 hits on the car. They ultimately pull Mr. Littlejohn out of the car. They interviewed him post-Miranda. He—they ask him what's in the car. He states it's marijuana. Ultimately a search of the car, the Buick, was done. No one else was in the car with Mr. Littlejohn, and about approximately a thousand grams of methamphetamine were found in the back seat along with \$9,000 in cash approximately.

That methamphetamine had subsequently been tested. Tested positive for containing methamphetamine thus were we to go to trial we'd be able to show that Mr. Littlejohn was in possession of more than 500 grams of a mixture or substance containing a detectable amount of methamphetamine, Your Honor, with intent to distribute.

THE COURT: All right. Mr. Littlejohn, is that a correct summary of your involvement in this criminal activity?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Very good. Now let's move on to Mr. Oquendo's case. We have to first talk about the plea agreement. Mr. Oquendo, you told me you did sign a plea agreement. I'm going to ask Mr.

William Witherspoon, who is handling this case, to summarize for me the essential terms of your plea agreement. Listen very carefully, when he [37] finishes, I'm going to ask you if he's correctly summarized what you have agreed to.

Now, what is said now applies only to the case against Mr. Oquendo. Mr. Witherspoon.

MR. WITHERSPOON: Your Honor, paragraph one he believes—agrees to plead guilty to a lesser included charge in Count One of the indictment. Paragraph two he understands, agrees that the monetary fines and penalties must be paid including special assessment and any restitution or fines the Court so imposes.

Paragraph three he understands that his obligations of the government within this agreement are contingent upon him abiding by federal, state laws and complying with all—any bond executed in this matter. Paragraph four is our cooperation and forfeiture language. He agrees to be fully truthful and forthright with law enforcement concerning any activities—knowledge that he has about illegal activities.

Paragraph five he agrees to submit to a polygraph examination if required by the government. The government agrees—he agrees to allow the government to select the polygrapher, and he must pass to the satisfaction of the government. Paragraph six the government agrees that any self-incriminating information provided by him about himself will not be used except in these four very limited circumstances.

[38]

Paragraph seven. Provided he cooperates pursuant to this agreement and that cooperation reaches to the level of substantial assistance, the government agrees to move for a downward departure under 5K1.1 or Federal Rule of 35b of the Criminal Rules. Paragraph eight he represents he has met with his attorney sufficiently, he has no problems or issues with his attorney.

Paragraph nine he waives his right to contest his conviction or sentence under 3742 or 28 USC 2255. He retains his rights under 2255 for ineffective assistance of counsel, prosecutorial misconduct, or future changes in the law. Paragraph 10 he waives his rights under the Freedom of Information Act. Paragraph 11 says this is the complete agreement of the parties.

THE COURT: All right. Mr. Oquendo, is that a correct summary of your plea agreement?

THE DEFENDANT: Yes.

THE COURT: All right. Now all the paragraphs, all the paragraphs of this agreement are important, but I want to go back and single out two paragraphs in particular to be sure there's no misunderstanding. First, paragraph seven provides for the possibility of a reduction in your sentence in return for your cooperation and substantial assistance.

Two things important about this paragraph. If you cooperate and if you—the government prosecutor determine [39] that your cooperation in terms of helping them investigate someone else who has committed a crime rises to the level of what is known as substantial assistance, they will ask me to give you a break at sentencing

and give you a downward departure or a reduced sentence.

They don't have to make that request unless the US Attorney's Office determines in its own mind that your cooperation rises to the level of substantial assistance.

Secondly, even if they do make that request of me at your sentencing hearing, it's not binding on me. I don't have to necessarily go along with it. Do you understand those two things?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, the second thing is a partial appeal waiver on—in paragraph nine. In any criminal case a defendant has a right to take an appeal to the Court of Appeals to correct some error that might have occurred and also a second round of appeal in what is known as a collateral attack under Section 2255.

These appeal rights can be bargained away or given up. And in paragraph nine of your agreement there's a provision that you preserve certain grounds of appeal and you waive all other grounds. You would preserve the right to bring a Section 2255 collateral attack challenging ineffective assistance of counsel, prosecutorial misconduct, or future [40] changes in the law that affect your sentence, but you would give up your appeal rights in all other respects.

Do you understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, you told me that's a correct summary of your plea agreement. Did

you sign your signature, your genuine signature, on the last page of that document?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now Mr. Oquendo, there are certain promises in this plea agreement made by the government. Did—anyone made any promise to you outside of the plea agreement—in other words, any promise that I do not know about—that caused you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: All right. All right. Mr. Witherspoon, would you tell us about the facts the government has developed in its investigation of the case against Mr. Oquendo.

MR. WITHERSPOON: Your Honor, this conspiracy originally began with a sled UC talking to Jose Guadalupe Martinez about purchasing drugs. Eventually on April 27th, 2016 Martinez gave a sled UC a 1-ounce sample of marijuana. The transaction was recorded on audio and video. These calls and controlled purchase served as a basis for a Title Three [41] on Martinez's phone that began on May 26th, 2016.

While up on Martinez's phone, agents identified Rosario Gutierrez as a source of supply for Martinez. They also ID'd Mr. Joel Oquendo-Cabrera as an associate of both Mr. Martinez and Gutierrez. Cabrera's primary role is as a distributor for the DTO. He also used his residence to have shipments delivered.

While intercepting Martinez's phone agents learned that a package was in route from San Diego to an address utilized by Martinez, Gutierrez and Cabrera. On

June 23rd, 2016, with the help of the postal service agents seized a package which contained approximately 10 pounds of marijuana. Agents also intercepted calls between all three subjects discussing the missing shipment of marijuana.

Later on October 14th, 2016, agents were direct—were contacted by the postal service regarding two packages that had been mailed from San Diego. The packages were distant—for different addresses associated with Gutierrez, Martinez and Cabrera including Mr. Cabrera’s address.

Agents obtained a search warrant for the packages and recovered 11 pounds of marijuana from each package for a total of 22 pounds. Postal service also informed agents that between June 4th, 2016 and October 27th, 2016 there were at least seven packages shipped from the same San Diego zip code to Mr. Cabrera’s address in Leesville, South Carolina.

[42]

Each of these packages were consistent in size and weight with the packages previously seized. Among those packages also—assuming those packages also contained 10 pounds of marijuana, that would be a total of 70 pounds in addition to the 32 pounds that were seized for a total of 102 pounds or approximately 46 kilos of marijuana.

THE COURT: All right. Mr. Oquendo, is that a correct summary of your involvement in this criminal activity?

THE DEFENDANT: Yes.

THE COURT: All right. Then I'm satisfied that a proper showing has been made under Rule 11 of the Rules of Criminal Procedure in all three cases. Case of United States versus Michael Andrew Gary, case of United States versus Chavis Littlejohn, and the case of United States versus Yoel Oquendo Cabrera, in each case the defendant is fully competent and capable of entering an informed plea and that his plea to the respected charges set out against them are—their pleas to the respected charges set out against them are all knowing and voluntary pleas containing each of the essential elements of the offense charged.

They are now adjudged guilty. The Clerk has a form you will need to sign and formally record your guilty plea.

(whereupon there was a pause.)

THE CLERK: May it please the Court. Defendants, [43] having withdrawn their plea of not guilty, now plead guilty after arraignment in open court. Signed by the defendants.

THE COURT: All right. The procedure from this point forward will be as follows. The Probation Office will assign one of its probation officers to meet with you to get some information to go in your presentence report. When that report is completed you will be given a copy to read over with your attorney.

If there's anything in the report that you think is not correct legally or factually, you may file an objection through your attorney. We will then schedule your sentencing hearing. First thing we will do, if necessary, is resolve any objections that come in, then we will calculate the Sentencing Guidelines that apply in your

case, then we will hear from you and your attorney before determining the sentence to be imposed. Thank you very much.

Ready to move into the next case. What about—who is out on bond now?

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ KATHLEEN RICHARDSON
KATHLEEN RICHARDSON, RMR, CRR

Sept. 6, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CR. No.: 3:17-809 (JFA)
UNITED STATES OF AMERICA
v.
MICHAEL ANDREW GARY

Filed: July 26, 2018

**SENTENCING MEMORANDUM AND MOTION FOR
DOWNWARD DEPARTURE OR VARIANCE**

The defendant files this sentencing memorandum in support of the objection he has filed to the Presentence Investigation Report (PSR). The defendant contends that the 4-level specific offense characteristic enhancement for Possession with Intent to Distribute (PWID) Marijuana contained in paragraph 46 of the PSR is not warranted because the defendant never had knowledge of nor possessed the marijuana.

The defendant pled guilty to Count 1 of the indictment which charged Felon in Possession of a Firearm. This offense occurred on January 17, 2017. Count 2 charged that, on June 17, 2017, the defendant was again arrested for Felon in Possession of a Firearm. This is the offense that resulted in the enhancement. The circumstances surrounding this arrest are that the defendant and Denzel Dixon were sitting in a car outside the Camden West Inn hotel located in Kershaw County.

The car was owned by Shamique Rutledge who was in room 137. Kershaw County officers approached the car and smelled marijuana. The officers also observed a marijuana cigarette on Mr. Gary's lap. Both men were asked to get out of the car. The officers obtained consent to search the car from Ms. Rutledge. While the officers searched the inside of the car, Mr. Dixon was leaning on the trunk, as if to conceal something. The Kershaw County officers searched the trunk and found a large quantity of marijuana. Mr. Dixon admitted that the marijuana belonged to him. A pistol was found and the defendant admitted ownership. Mr. Dixon was arrested for PWID marijuana and the defendant was arrested for Possession of a Stolen Weapon.

The defendant objects to the 4-level enhancement because, in order for a defendant to be held accountable for possession in connection with another felony offense, he has to know of the felony offense. There is no evidence in the record that the defendant knew there was a large quantity of marijuana in the trunk. Had there been probable cause to believe that the defendant knew of the marijuana in the trunk, he would have been arrested for PWID marijuana. In fact, the evidence supports that Mr. Dixon had knowledge of the contents of the trunk by his action of leaning on the trunk.

Section 2K2.1(b)(6)(B) of the Sentence Commission Guidelines provides for a 4-level enhancement if the weapon was possessed in connection with another felony offense. This requirement is satisfied if the firearm had some purpose or effect with respect to the other offense. This requirement is not satisfied, however, where "the firearm was present due to mere accident or coincidence". U.S. v. Green, 606 Fed. Appx. 720 (4th

Cir. 2015), U.S. v. Jenkins, 566 F. 3d 160 (4th Cir. 2009). In Green, he and his co-defendants were arrested in a car containing a backpack with 150 grams of marijuana, both loose and packaged into smaller units consistent with the intent to sell. Although the backpack was on the driver's side floor board, the backpack was also in proximity to Green, the front passenger. All three occupants had guns concealed in the car and easily available. Two sets of digital scales and a large amount of cash was found in the center console. Green held that these facts were consistent with a finding that the occupants of the car jointly possessed the marijuana with the intent to distribute and used the guns in connection with that trafficking offense.

Here, the defendant was sitting in the rear passenger side seat and Mr. Dixon was sitting in the rear driver's side passenger seat. Mr. Dixon had a digital scale in his front pocket. The car did not belong to the defendant. Admittedly, the defendant had a marijuana cigarette in his lap. Allegedly the armrest in the center of the back seat was pulled down giving access to the trunk, but there is no evidence that, even if the armrest was down, you could see the contents of the trunk. Although the gun was found in the trunk, the defendant adamantly denies that he was aware that there was marijuana present in the trunk, and there is no evidence that he knew. Mr. Dixon admitted that the marijuana in the trunk was his. Therefore, if Mr. Gary had no knowledge of the marijuana in the trunk, he could not have possessed the weapon in connection with that offense.

In U.S. v. Jeffries, 587 F.3d 690 (5th Cir. 2009), the court held that the discovery of a firearm and a single rock of cocaine did not support the imposition of the

4-level enhancement. The nexus between a weapon and the other felony offense cannot be presumed and the facts here were too “sparse” to support that conclusion. The court stated, “the evidence that would allow us to draw those conclusions must be something more than the simultaneous possession of a small quantity of drugs and a gun in the same vehicle . . . ”

Again the defendant contends that there is no evidence to support the conclusion that he knew marijuana was in the trunk of the car or ever possessed it. Therefore, a 4-level enhancement is not warranted.

FACTORS THAT WARRANT A VARIANCE

A. History and Characteristics of Defendant

Mr. Gary is 27 years old and was born in New Haven, Connecticut. He is single, having never been married, and has one daughter, age 8. The mother of his daughter died when his daughter was 8 months old due to an infection. He pays court ordered child support. Mr. Gary completed the 9th grade and has worked consistently since 2014. He was evaluated by the Bureau of Prisons in December 2017, and he was diagnosed with Major Depressive Disorder, Alcohol Use Disorder, Cannabis Use Disorder, and Antisocial Personality Disorder. It was determined that he could benefit greatly from Anger Management and Drug Counseling.

B. Nature and Circumstances of the Offense

Mr. Gary takes fully responsibility for his conduct. On two occasions, he was found to be in possession of a weapon. The weapon was not used in any way, therefore, this is not a violent offense. Even though he was aware that he was not supposed to have a weapon, he simply had it for his protection.

Although Felon in Possession of a Weapon is a serious offense, based on the facts and circumstances of this case, a lengthy period of incarceration is not warranted.

C. The Need to Reflect the Seriousness of the Offense And To Provide Just Punishment

18 U.S.C. § 3553(a) of the Sentence Commission Guidelines mandates that the court shall impose a sufficient sentence, but not greater than necessary. Although this is a serious offense, Mr. Gary contends that an advisory guideline range of 84 to 105 months is greater than necessary. He has expressed remorse for his conduct. Even though his criminal history points are high, the court has the discretion the defendant's mental evaluation diagnosis and, where appropriate make adjustments. Unfortunately, the guidelines do not take into consideration a person's mental diagnosis. A guideline determination would be the same for a person with no mental problem as it would be for a person who does. This court has the authority and discretion to make such an adjustment, even though Mr. Gary's condition does not rise to the level of a defense.

A "just punishment" promotes respect for the law, for law enforcement, and the judiciary. "Just punishment" is punishment that fits the offense and the individual. Mr. Gary contends that just punishment in this case is less than 84 months.

For all the reasons outlined above, Mr. Gary respectfully asks this court to grant his objection to the PSR and to consider a sentence below the advisory guideline range.

Respectfully submitted,

/s/ JAMES P. ROGERS
JAMES P. ROGERS
Assistant Federal Public Defender
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
Telephone: (803) 765-5087
ATTORNEY ID # 3530
Email address: James_Rogers@fd.org

Columbia, South Carolina

July 26, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Case No. 3:17-CR-00809-JFA
UNITED STATES OF AMERICA, PLAINTIFF
v.
MICHAEL ANDREW GARY, ET AL., DEFENDANT

July 30, 2018
10:10 A.M.

TRANSCRIPT OF SENTENCING BEFORE
THE HONORABLE JOSEPH F. ANDERSON, JR.
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFF:

MS. ALYSSA LEIGH RICHARDSON, AUSA
Office of U.S. Attorney
1441 Main Street
Suite 500
Columbia, SC 29201

FOR THE DEFENDANT:

MR. JAMES P. ROGERS, AFD
Federal Public Defender's Office
1901 Assembly Street
Suite 200
Columbia, SC 29201

[2]

(Open Court, 10:10 a.m.)

THE COURT: Good morning. Please be seated. Ms. Richardson, please call the first case this morning.

MS. RICHARDSON: Yes, Your Honor. The first case is United States of America versus Michael Andrew Gary, Criminal Docket No. 3:17-809. We are here for Mr. Gary's sentencing.

THE COURT: All right. The government has no objections to the report?

MS. RICHARDSON: No, Your Honor, the government has no objections to the report.

THE COURT: All right. Mr. Rogers, good morning.

MR. ROGERS: Good morning, Your Honor.

THE COURT: Have you had enough time to read over the presentence report and discuss it carefully with your client?

MR. ROGERS: Yes, Your Honor.

THE COURT: I'm aware of the one objection you have filed relating to the cross-reference to a marijuana charge. Other than that, is there anything in the presentence report that you disagree with?

MR. ROGERS: Yes, Your Honor, there are three other factual matters that I'd like to bring to the Court's attention.

THE COURT: All right.

MR. ROGERS: On page 2 of the presentence report where it indicates that the defendant was released from custody by [3] executing a bond, he was never released from custody, so he has been in since June 16th on these charges.

THE COURT: All right.

MR. ROGERS: In paragraph 56 on page 17, three lines from the bottom where it says, referring to his brother, S.G. [REDACTED], who passed away around 2011 at age 15, it should be at age 11. And—

THE COURT: Not 15, all right.

MR. ROGERS: I'm sorry?

THE COURT: Age 11, not age 15.

MR. ROGERS: Age 15, that's correct, Your Honor.

And on page 20, paragraph 73, where it refers to a "Tessa Foundation," probation's attempts to verify that that foundation was in existence were unsuccessful, it says, but Mr. Gary is adamant that that foundation was running. He was working with at-risk youth in the neighborhood. He had five young men involved in the program consisting of various things in addition to washing cars.

One of the reasons that I was attempting to wait, his uncle, Latrezz Johnson, was involved in that with him and he was ostensibly to be here just to verify—

THE COURT: Well, we can wait until he gets here to decide

MR. ROGERS: —that the foundation was (cross-talking)—

[4]

THE COURT: —that issue. Let's just hold that one open then.

MR. ROGERS: Yes, Your Honor.

THE COURT: I assume the government does not object to the first two changes?

MS. RICHARDSON: No objection, Your Honor.

THE COURT: All right. Well, the probation officer can just make the changes to reflect that he has been in custody since June the 16th.

And secondly, that in paragraph 56, his brother who passed away was age 11, not age 15.

We'll hold open the objection to paragraph 73 regarding this foundation until the family member gets here.

MR. ROGERS: Very well, Your Honor. Thank you.

THE COURT: All right. Let me speak to the defendant.

Mr. Gary, have you had enough time to read over the presentence report in your case and discuss it carefully with Mr. Rogers?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And we have this one objection related to the marijuana that was found in the trunk of the car. We're going to take that up in just a minute. We're also going to hold open the question about this foundation referred to in paragraph 73. Apart from

that, is there anything else in this presentence report that you think is not correct?

[5]

THE DEFENDANT: No, Your Honor.

THE COURT: Very good. You can be seated.

Then the objection goes to the cross-reference to the marijuana that was in the trunk of the car on the second stop, I believe, correct?

MR. ROGERS: That's correct, Your Honor.

THE COURT: And since this is an enhancing factor, the government bears the burden of proof by a preponderance of the evidence, so I'll be glad to hear from the government.

MS. RICHARDSON: Yes, Your Honor. As the presentence investigation report sets forth, during this particular offense, Mr. Gary was found in possession of the firearm and it was on top of a quantity of marijuana. And Your Honor, as—

THE COURT: Wait a minute. The gun was on top of the marijuana?

MS. RICHARDSON: Yes, Your Honor. One moment.

THE COURT: I thought the marijuana was in the trunk and the gun was in the cabin of the car.

MR. ROGERS: The trunk—the gun was found in the trunk, but I don't see that the incident report said that the gun was found on top of the marijuana. It just has it in the trunk.

THE COURT: So both the marijuana and the gun were both in the trunk.

MR. ROGERS: That's correct.

[6]

THE COURT: He admits ownership of the gun, but not the marijuana.

MR. ROGERS: Correct.

THE COURT: Or he admits possession of the gun.

MR. ROGERS: He admits to possession of the weapon and not the marijuana.

THE COURT: All right. I don't know why I had the gun inside the car. I know we had two stops, right?

MR. ROGERS: Yes, Your Honor, and I was a little confused about that at first. Based on the way the incident report was written up with regard to the second arrest, it just wasn't clear where the gun was found. I thought it was originally found in the back seat with him, but then in talking to Mr. Gary, he said that the gun was in the trunk, but he still had no knowledge that marijuana was in the trunk.

MS. RICHARDSON: Your Honor, while I don't disagree with that characterization, my understanding from the facts as set forth in the probation report, and the report that we have, is that the firearm was—the pistol loaded with 18 rounds of 9-millimeter ammunition was lying beside the pullout that leads to the interior of the car.

And Your Honor, my reading of that is that that was in the trunk. A pullout leading in between the trunk and the interior of the car, if that makes sense.

Your Honor, nevertheless, the firearm was found within [7] a few feet of where the sum or the quantity of marijuana was located.

THE COURT: Well, let me interject.

MS. RICHARDSON: Yes, Your Honor.

THE COURT: He did not waive his appeal, so I need to get a good clean record here for the Court of Appeals in case this goes up. The pullout is the little part of the back seat of the—part of the cushion of the back seat that folds down and gives you access to the trunk—

MS. RICHARDSON: Yes, Your Honor.

THE COURT: —so you can reach back in there?

MS. RICHARDSON: Yes, Your Honor. And as law enforcement made their approach, they noted that the pullout leading between the interior of the car and the trunk was open leading to easy access.

THE COURT: Right.

MS. RICHARDSON: Your Honor, and I agree, it is unclear—it is unclear where that firearm would have been, whether it was in the trunk or in the—in the actual pullout portion of the trunk, but regardless, there was—the distance between the firearm and the marijuana would have been within a couple of feet.

THE COURT: Well, the fact that the pullout was open gives rise to the implication, and I'm not say-

ing I find this, but that when they saw the law enforcement coming, they tried [8] to quickly pull it down to put the gun in the back trunk. But I don't think I can assume that happened since we don't have that—

MR. ROGERS: Your Honor, if I could address that for a moment?

THE COURT: All right.

MR. ROGERS: The way the incident report read, it says that the armrest was pulled down—

THE COURT: Right.

MR. ROGERS: —in the back seat. Both of them were sitting in the back seat.

THE COURT: Right.

MR. ROGERS: But as I understand it, even if the armrest is pulled down, there is a separate flap or door that gains access to the trunk. And so even if the armrest was pulled down, that doesn't—and we don't admit that it was—that doesn't necessarily give someone access to the trunk if that other door to the trunk was not opened. You know, when you pull down the armrest, the armrest is just down. The trunk isn't visible at that point.

THE COURT: Right.

MR. ROGERS: You have to do something else to have access to the trunk. And that's my argument. That even if the armrest was pulled down, he still didn't have access to the trunk where the marijuana was found.

[9]

MS. RICHARDSON: Your Honor, if I can add some clarity to I think where the confusion is coming from between the trunk and the interior. As I'm reading the report, law enforcement opened the trunk and at that point that's when they saw the firearm. So as to the position of exactly where the firearm was, it was visible from them looking within the trunk. So they're looking inside the trunk, they see the quantity of marijuana and they also see the firearm.

Now, the report does not detail exactly where the firearm was, but as the report is written, the firearm would have been visible near the marijuana. And to be honest, I can't tell from the report whether it was—would have been in the trunk or in that sort of in between portion between the interior and the fire—interior and the trunk.

Your Honor, nevertheless, as to this particular objection, or to the enhancement under 2K2.1(b)(6)(B), whether the firearm was used in connection with another felony offense, the possession with intent to distribute marijuana is what would be at issue here. Your Honor, the application note for that particular objection is clear and says that an enhancement is applicable where a firearm is found in close proximity to the drugs because the presence of the firearm would have the potential to facilitate another offense.

Your Honor, that would be the exact scenario here. While Mr. Gary was not charged with possession with intent [10] to distribute, the other person in the vehicle who admitted ownership of the marijuana was charged with the PWID. Your Honor, I won't get into

Monday-morning quarterbacking as to why Mr. Gary was not charged. However, Your Honor, the facts in this instance certainly give rise to Mr. Gary being in that vehicle, being in a position to aid and abet in the distribution of marijuana.

Your Honor, additionally, Application Note 14 for the enhancement at issue also goes into the definitions of felony offense, and Your Honor, what it does say is that this application or this enhancement will apply regardless of whether a defendant is charged or whether a criminal charge is brought, so I don't believe that that is any barrier as to why this enhancement would be applicable.

Your Honor, I believe under the standard, accepting the language of the presentence report, it is clear and I'm—it is clear that when law enforcement approached, when they smelled marijuana, when they observed the quantity of marijuana, and they opened that trunk, saw the firearm, saw the marijuana, Your Honor, that easily gives rise to an inference that these two were there at that location to distribute marijuana. Therefore, Your Honor, I do believe—or the government does argue that that enhancement is applicable.

Your Honor, the guidelines also give sort of instructive framework in looking at sort of a general relevant [11] conduct analysis, where the discussion goes into whether the firearm would have been used in the same course of conduct or the common scheme and plan.

Again, Your Honor, the firearm within arm's reach of a large quantity of marijuana certainly gives rise. This is all under the same course of conduct; and

thus, the possession of the firearm would be used in furtherance of the PWID.

THE COURT: All right. Thank you.

Be glad to hear from the defendant.

MR. ROGERS: Your Honor, I didn't address Count 1 because I didn't think it was applicable, but in paragraph 46 of the presentence report it makes reference to paragraph 10 which references Count 1. That was the first arrest in January. There was a small amount of marijuana found on the defendant at that time, but it was only 9 grams. We would submit that that is not another felony offense because you would have to have at least 28 grams, or the way it was packaged, and I understand it was in one package, so we would contend that that certainly would not be, for Count 1, possession in connection with another felony offense.

With respect to Count 2, the second arrest, Your Honor, there was no information from the officers that they saw either of these individuals dealing drugs. The evidence seems to be that the officers saw the two individuals sitting in the rear of the car. They approached the car. They smelled [12] marijuana. They got both of the individuals out of the car. The owner of the car in fact was a young woman who was in the motel where the car—in the parking lot where the car was parked. She—they contacted her and she came out and gave them permission to search the entire vehicle.

During that time, the other individual, Mr. Dixon, was of course acting like he knew what was in the trunk because the officers indicated that he was leaning on the trunk as if to conceal something. Money was found on

him. His name was Mr. Dixon. Money was found on him. He readily admitted ownership of the marijuana and Mr. Gary readily admitted ownership of the weapon.

There is no evidence in the record, Your Honor, that shows that Mr. Gary was aware that marijuana was in the trunk. His gun was in the trunk. That certainly could have been placed there prior to the marijuana being placed there. We just have no evidence on that whatsoever. But I would point out, which I think is significant, the government could have called Mr. Dixon, who was the other individual in the car, to say, yeah, we were dealing drugs and he knew there was marijuana in the trunk. That's not present.

So I would think, Your Honor, my argument is that the four-level enhancement is not warranted because the government has failed to show that Mr. Gary knew that there was marijuana in the trunk. All of the factors indicate to the contrary.

[13]

I cited the case of *Jenkins* and the case of *Green* in my sentencing memorandum, Your Honor, that says that mere presence of a firearm, that's not enough, it could be a coincidence. It's just not enough. And if you look at all of the factors, the evidence that we have before us, there's just no evidence that supports that Mr. Gary knew. Mr. Dixon had the money, Mr. Dixon had digital scales, Mr. Dixon acted as if he was aware that there was marijuana in the trunk, and finally, the record is silent from what Mr. Dixon would say with respect to Mr. Gary's knowledge.

Your Honor, I cited the Fifth Circuit case, and I recognize that it's only persuasive, but we just have to

have something more than simultaneous presence of a weapon under these circumstances. It wasn't even Mr. Gary's car so he can't even be presumed to know the contents of someone else's car. So again, the mere simultaneous possession with a quantity of drugs we don't think supports a finding that that weapon was possessed in connection with another felony offense.

THE COURT: All right. Ms. Richardson, reply?

MS. RICHARDSON: Brief response, Your Honor.

Mr. Rogers has argued that there's no evidence that Mr. Gary would have known there was marijuana in the trunk. Your Honor, I would point out on both of these occasions, since probation and Mr. Rogers have referenced paragraph 10, the earlier incidents, both of these occasions involved the same partner or [14] would-be codefendant, Mr. Dixon, who was in possession of marijuana.

Your Honor, additionally, on the Count 2 which we've been discussing, there was evidence of distribution not found in the trunk, but also found in the interior of the car. There were—under paragraph 13 of the PSR, there were distribution baggies located in the interior of the car.

Your Honor, that—

THE COURT: Is that on the first stop or the second stop?

MS. RICHARDSON: On the second stop, Your Honor.

THE COURT: Baggies in the car.

MS. RICHARDSON: Yes, Your Honor. A bookbag containing distribution baggies found in the interior of the car.

Your Honor, that—those distribution baggies, in combination with a firearm that the defendant admits is his, in combination with marijuana just a few feet away in the trunk, Your Honor, I certainly believe that gives a strong rise to the understanding that that firearm was used with the intent to distribute marijuana.

Your Honor, I believe that those facts demonstrate that Mr. Gary would have had actual knowledge as to why he was in that car with the same person. Knowledge and intent, Your Honor. He's in the car with the same person for whom they [15] dealt drugs previously and here they are again in the car, large quantity of marijuana, with the firearm, Your Honor. That firearm was certainly there with the presence for facilitating in the use—facilitating in the distribution of marijuana.

Again, Your Honor, Mr. Dixon was in fact charged with possession with intent to distribute marijuana, and the fact that Mr. Gary was there with his firearm present, that certainly facilitated Mr. Dixon in his ability to protect his drugs and then distribute his drugs.

MR. ROGERS: Your Honor, if I may, Mr. Dixon is not a codefendant. The government characterized him as a codefendant. He was not a codefendant in either the first stop or the second stop. And there was no evidence—

THE COURT: He was charged in state court?

MR. ROGERS: No, Your Honor. He was charged in state court, correct.

THE COURT: Right.

MR. ROGERS: But they were not codefendants.

THE COURT: Right.

MR. ROGERS: Either in state court or he was certainly not charged in federal court.

The incident report says, While searching the interior of the car, inside of Mr. Dixon's bookbag was a baggie containing yellow-in-color distribution baggies.

[16]

So the baggies were found inside another bag that Mr. Dixon claimed. So, again, there's no evidence that Mr. Gary knew what was in Mr. Dixon's bookbag. And so in order for the government to conclude that his possession of the gun in the second arrest facilitated the drug dealing, they would have to make some showing that he knew there was drugs in the trunk. And I think that's the key element that's missing here. There's just no evidence whatsoever to show that he knew that there was marijuana in the trunk.

THE COURT: Now, on the first stop you said there was—did you say 9 grams or nine-tenths of a gram?

MR. ROGERS: 9 grams, Your Honor. And under South Carolina law, to be a felony it has to be 28 grams, unless it is packaged in many packages for resale, which would trigger the presumption that it was PWID.

THE COURT: All right. Well, as I said, I need to have a clean record for the Court of Appeals here in the event of an appeal, so I'm going to determine that in

regard to the first stop which occurred on January the 17th of 2017 involving the defendant here, Mr. Gary, and Mr. Dixon, where the defendant acknowledged possession of the firearm and 9 grams of marijuana, that does not satisfy the cross-reference for the other crimes enhancement.

However, I would go the other way on the second stop on June the 16th, over the strong objection of Mr. Rogers, who [17] has done a wonderful job of articulating his client's position, but it appears that the circumstances from the record on that second stop involve a large amount of marijuana in the trunk of the car and a stolen weapon that was at least in the trunk or near the trunk. The record is not clear whether the weapon was physically in the trunk with the marijuana or on top of the marijuana or perhaps in the little passageway between the trunk and the back seat, but suffice it to say that the incident report reflects that the officers opened the trunk lid and saw both the marijuana and the gun in plain view from the view of the—looking through the trunk lid opening. That puts the gun very close to the marijuana, a large quantity of marijuana, and I find that that does meet the—the government has met its burden of proof for showing that the gun was used in connection with another offense, specifically, possession with intent to distribute marijuana, based upon the large quantity of marijuana present, the baggies that were contained admittedly in a bag owned and possessed by the other gentleman in the car, Mr. Dixon, but nevertheless, drug paraphernalia was also found in the same car.

So over the strong objection of the defendant, I overrule the objection and find the government has carried its burden of proof on this particular guideline that cross-references the drug charge.

So with that, I will adopt the presentence report as [18] written as the Court's findings for purposes of sentencing in this case. That means that we're looking at the following provisions: Under the statute, as to each count, there's a maximum sentence of ten years. Under the advisory guidelines, the total offense level is 23, the criminal history category is V, the sentencing guideline range, which is advisory only, is 84 to 105 months of imprisonment, supervised release following imprisonment would be one to three years, the fine was not calculated due to inability to pay, and the special assessment fee is \$200.

Anything from the government regarding sentencing generally?

MS. RICHARDSON: No, Your Honor. I'm happy to argue under 3553 if that's what you would—if that's what you are asking for.

THE COURT: Well, let me see what Mr. Rogers has to say and we'll come back to you then. Mr. Rogers, I've read your memorandum that you submitted requesting a variance or a departure and I'm familiar with the facts contained in that document.

MR. ROGERS: Yes, Your Honor. I don't have much more to add to that. Your Honor, I think that the factors under 3553(a) warrant a departure or warrant a variance. Mr. Gary is 27 years old. He's relatively young. He has an eight-year-old daughter, and as I in-

licated, the mother of the daughter died [19] shortly after the child was born, and it was as a result of that that he started this Tessa Foundation.

Some of the family members have come in. If I may just have a moment, Your Honor.

THE COURT: All right.

(Off-the-record discussion.)

THE COURT: I had forgotten I left open the Tessa Foundation, so we need to go back and revisit that. I said I adopted the presentence report, but . . .

MR. ROGERS: Your Honor, what the family has handed me is apparently the I guess indications and the applications for individuals to join the Tessa Foundation. He was trying to apparently start it as a 501(c)(3) organization. He has the—apparently he has the application forms for filing. I don't know if he's actually been incorporated and filed as a 501(c)(3).

But in any event, Your Honor, it was as a result of the death of his child's mother that he started this foundation. He tells me he has, so far, five individuals in it, he's trying to mentor them, and what they do is go around the neighborhood and perform car washes. So some of the money that was found on him when he was arrested at the second arrest was money from that operation and from the jobs that he had at I believe Lizard's Thicket and—

THE DEFENDANT: Little Caesars.

[20]

MR. ROGERS: —Little Caesars, so he did have a job that he was working.

Also, Your Honor, the presentence report has made reference to him being in a gang. He got out of the gang when his baby's mother passed, although he says he kept the weapon for protection because other gang members were aware that he had been in a gang, but he had stopped his affiliation with the gangs shortly after the death of the mother.

Your Honor, based on the nature and circumstances of this offense, certainly the gun was not used in any way, this is not a violent offense, and we simply just don't think it warrants a seven-year sentence.

I also indicated, Your Honor, we had Mr. Gary evaluated and the diagnosis came back that he had major depressive disorder, alcohol use disorder, cannabis use disorder, and antisocial personality disorder. He wants to get anger management counseling, he wants to get drug counseling in the Bureau of Prisons, and he also wants to avail himself of any vocational programs that might be offered.

So based on the need for the sentence to reflect the seriousness of the facts of this case, because the gun wasn't used, because we have a tenuous connection to drug dealings, I would ask you to consider a sentence below the 84 months.

I believe Mr. Gary would like to address the Court.

THE COURT: All right. Mr. Gary, you have a right [21] under our rules of procedure to make any

statement that you wish at this time. This is your chance to speak. I'll be glad to hear from you.

THE DEFENDANT: I want to just apologize. I know I was wrong for having the firearm, but like my attorney said, I was only having it to protect myself from other people who tried to inflict harm on me. I never really—I never wished to put harm on anyone. I just wanted to be there for my daughter and to try to get the other kids to see that there's more to life just than gangs and alcohol and firearms. So I really, I just ask that you all have leniency on me and that's really just it.

THE COURT: All right. Thank you, sir.

MR. ROGERS: And I do believe one family member wants to address the Court.

THE COURT: All right.

(Off-the-record discussion.)

MR. ROGERS: Your Honor, they don't want to address the Court, but I'm sure they are here because they support him and—

THE COURT: The record will reflect that there are five or six family members present supporting the defendant.

MR. ROGERS: And finally, Your Honor, he has expressed his desire to me, that's his daughter, she's—and he wants to get back to her as soon as possible.

[22]

THE COURT: All right. Let me ask you, the 501(c)(3) papers you mentioned, they were all dated before the date of the arrest in this case?

MR. ROGERS: Yes, Your Honor. It's February 2016.

THE COURT: All right. Well, I'm going to give the defendant the benefit of the doubt, then, since it was not clear before, and assume for sentencing purposes that he did form this charitable corporation to assist at-risk youth in the community and I'll give him credit for that.

Ms. Floyd?

(Off-the-record discussion.)

THE COURT: All right. Anything further from the government?

MS. RICHARDSON: Nothing further, Your Honor. The government believes a guideline sentence is appropriate under 3553.

THE COURT: All right. Well, I agree. I'm going to sentence within the guidelines, but I will sentence at the very low end due to the facts and circumstances of this case.

Having carefully considered the advisory sentencing guidelines and having also considered the relevant statutory sentencing factors contained in Section 3553(a) of Title 18, it is the judgment of the Court that the defendant, Michael Andrew Gary, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 84 months, which [23] consists of 84 months as to each count—each of the two counts, to run concurrently.

I find the defendant does not have the ability to pay a fine. Therefore, the fine is waived.

He shall, however, pay the mandatory special assessment of \$200 which is due immediately. That's \$100 per count of conviction.

Do we have any forfeiture issues in this case, Ms. Richardson?

MS. RICHARDSON: Your Honor, I believe there was forfeiture language in the indictment. And Your Honor, at this time I would move to dismiss any forfeiture.

THE COURT: All right. So ordered.

Upon his release from imprisonment, the defendant shall be placed on supervised release for a term of three years, consisting of three years as to both counts, to run concurrently.

Within 72 hours of his release from custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which he is released.

While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision outlined in Section 3583(d) of Title 18, and also the following special conditions:

Number one, he shall participate in a random drug [24] testing program as administered by the probation office. He shall contribute to the cost of this program in an amount determined reasonable by this Court using the probation offices sliding scale for service.

Number two, unless able to secure stable and verifiable employment, the defendant shall participate in a vocational training or work force development program as approved by the probation office.

And number three, unless able to verify that he has a high school diploma or GED, the defendant must participate in an educational program with the objective of obtaining his GED. Once again, he shall contribute to the cost of such program in accordance with the sliding scale for services established by the probation office.

I'll recommend that he be allowed to participate in the Intensive Drug Treatment Program while incarcerated if he otherwise qualifies. That will help him potentially shave up to one year off of his sentence.

Mr. Rogers, did you want to request a place of incarceration?

MR. ROGERS: Yes, Your Honor. Either Butner or Bennettsville.

THE COURT: All right. I'll recommend that he be incarcerated either at Butner, North Carolina, or Bennettsville, South Carolina, if possible. That's a [25] recommendation only and not binding on the Bureau of Prisons.

Now, my reasons for imposing this sentence are as follows: I have adopted the presentence report as written with the one modification being the credit for the charitable corporation the defendant originated and sponsored to help at-risk youth in the community. I give him credit for that work which derived from the untimely death of his baby's mother in this case.

I have carefully considered all the 3553(a) factors, including the nature and circumstances of the offenses. Here, we have two counts of possession of a firearm by a convicted felon, both occurring within six months of each other, both involving vehicle stops, both involving marijuana being found in the vehicle.

The first stop, I gave the defendant the benefit of the doubt and did not attribute the cross-reference to the drug crime.

The second one was different for the reasons I stated earlier. The marijuana was in the trunk. The gun was in the trunk or at least in the passageway leading to the trunk very close to a large quantity of marijuana. Also in the car were drug packaging baggies contained in a container or bag possessed by the other person in the car, Mr. Dixon.

I acknowledge that the defendant was not charged with the marijuana distribution in this case. Mr. Dixon was charged [26] with that offense in state court. But the guidelines clearly state that it is not necessary for the cross-reference to apply for the defendant himself to be charged.

The close proximity of the drugs and the gun, coupled with the large quantity of marijuana involved, in my view tip the scales towards the cross-reference.

I've also considered the history and characteristics of the defendant. Mr. Rogers has asked for a variance based upon his relatively young age at the time of the commission of the crime, age 27. That is a factor, of course, that I considered in sentencing at the low end of the guidelines, but I do not think it's a strong enough factor to warrant a departure or variance.

Also, I considered the fact that he has an eight-year-old daughter who lost her mom tragically shortly after her birth, and as a result, the defendant started this foundation or this nonprofit organization. I've taken all of that into consideration.

I've taken into consideration his apparent remorse expressed here in court and the strong family support he has, as evidenced by his family here in the courtroom.

I've also considered, as required by law, the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment and adequate deterrence, and also to protect the public from [27] future crimes of the defendant. Those are all my reasons.

Now, Mr. Gary, you have a right to appeal the sentence the Court has imposed. If you wish to appeal, you would have to file your notice of appeal within 14 days from the date the judgment order containing your sentence is filed with the Clerk. If you wanted to appeal and could not afford an attorney for appeal purposes, the Court would appoint one for you.

Any remaining counts to be dismissed, Ms. Richardson?

MS. RICHARDSON: No, Your Honor.

THE COURT: All right. Anything else from either side in this case?

MR. ROGERS: No, Your Honor.

THE COURT: All right. Thank you very much. Nice to see all of you. We'll be in recess.

MS. RICHARDSON: Thank you.

(Proceedings concluded at 10:45 a.m.)

* * * * *

Fed. R. Crim. P. 11(b) provides:

(b) **Considering and Accepting a Guilty or Nolo Contendere Plea.**

(1) ***Advising and Questioning the Defendant.***

Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or

promises (other than promises in a plea agreement).

(3) ***Determining the Factual Basis for a Plea.*** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.