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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	Cr. No. 10-183-N-BLW
)	
Plaintiff,)	GOVERNMENT’S SENTENCING
)	MEMORANDUM
vs.)	
)	
LARRY FAIRFAX,)	
)	
Defendant.)	
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)	
)	

The United States of America, by and through Wendy J. Olson, United States Attorney for the District of Idaho, and the undersigned Assistant United States Attorney’s, submits the following memorandum setting forth the Government’s position at sentencing. The Government recommends that the Court sentence the defendant to a term of imprisonment of thirty (30) months.

BACKGROUND

The defendant, Larry Fairfax, met with members of the North Idaho Violent Crimes Task Force on June 9, 2010. The meeting was arranged after the defendant's attorney contacted the United States Attorney's Office and said Larry Fairfax had information about a murder for hire plot. During the meeting the defendant disclosed to law enforcement that he had accepted \$10,000 from Edgar Steele (Steele) in exchange for the defendant's agreement to kill Steele's wife, and if possible Steele's mother-in-law. Fairfax told law enforcement officers he never intended to go through with the murder and had no intention of ever killing Mrs. Steele. The defendant told law enforcement Steele said he would pay him additional money once the murder occurred.

Larry Fairfax was specifically asked if he had taken any steps to murder Mrs. Steele. The defendant assured law enforcement he had not taken any steps to kill Mrs. Steele but did not know if Steele had contacted any other "hitman". The defendant said he had taken one trip to the Portland area, at the request of Steele, to become familiar with the area. The defendant also said Steele was pressuring him to complete the assignment by Friday, June 11, 2010.

On June 9, 2010, after Fairfax was provided with a law enforcement sensitive recording device, he met with Steele. After the meeting, law enforcement immediately took possession of the recording device and downloaded the recording. The recording verified most of the information which had been provided by the defendant. The investigation continued on June 10, 2010, when Fairfax and his attorney met with law enforcement in the late morning and early afternoon hours. The defendant was again questioned as to whether he had taken any steps to commit the planned murders and he again stated he had not done anything other than take the one trip to the Portland area, at Steele's request to conduct surveillance.

The defendant was again provided a law enforcement sensitive recording device and met with Steele on the afternoon of June 10, 2010. At the conclusion of the meeting, the recording device was again immediately removed by law enforcement and downloaded. Steele was arrested on June 11, 2010. The initial appearance on the Indictment in U.S. vs. Edgar Steele, 10-CR-0148-N-BLW, was held June 15, 2010. Mrs. Steele stopped to get her oil changed on her way to the federal courthouse that day. Employees performing the oil change discovered a pipe bomb affixed to the driver's side under-carriage of Mrs. Steele's Mitsubishi Endeavor. The pipe bomb was removed and rendered safe by the Spokane Bomb Squad.

Law enforcement contacted Larry Fairfax who admitted to construction of the pipe bomb and attaching it to the undercarriage of Mrs. Steele's car on or about May 27, 2010. Fairfax described for law enforcement how he constructed the pipe bomb. He stated he took steps to ensure the pipe bomb would not detonate. When questioned about why he had not disclosed the pipe bomb, the defendant said that after the pipe bomb failed to detonate Steele demanded he go to determine why it had failed and remove it so it would not be found. It was at that time the defendant took the trip, which he had previously disclosed as a "surveillance trip," to the Portland area. The defendant had taken a friend along and asked him to look under the Mitsubishi to see if the pipe bomb was hanging down under the car. The friend did not get a close view but said he could not see it. Therefore, Fairfax believed it had fallen off. An expert with the Bureau of Alcohol, Tobacco, Firearms and Explosives examined the pipe bomb and determined it was viable and it could have detonated despite the defendant's stated intentions. The pipe bomb is a destructive device pursuant to the National Firearms Registration and Transfer Record and was not registered to the defendant.

The defendant, Larry Fairfax was immediately charged by criminal complaint with Possession of an Unregistered Firearm, in violation of 26 U.S.C. § 5861(d), and Manufacturing a Firearm in Violation of the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. § 5861(f). The defendant was arraigned on the criminal complaint on June 16, 2010. A detention hearing was held on June 21, 2010, and Fairfax was ordered detained. The defendant agreed to plead guilty, so an Information was filed on July 22, 2010. The Information charged the defendant with the same offenses listed in the Complaint.

Defendant has continued to cooperate with law enforcement and took the stand twice as a witness in the trial of Edgar Steele.

LEGAL ANALYSIS

The Ninth Circuit has set forth a basic framework which the district court should follow in compliance with the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005):

- (1) Courts are to begin all sentencing proceedings by correctly determining the applicable sentencing guidelines range, precisely as they would have before *Booker*.
- (2) Courts should then consider the § 3553(a) factors to decide if they support the sentence suggested by the parties. Courts may not presume that the guidelines range is reasonable. Nor should the guidelines factors be given more or less weight than any other. They are simply to be treated as one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence.
- (3) If a court decides that a sentence outside the guidelines is warranted, then it must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.
- (4) Courts must explain the selected sentence sufficiently to permit meaningful appellate review.

United States v. Carty, 520 F.3d 984, 991-92 (9th Cir. 2008).

SENTENCING GUIDELINES CALCULATION

I. Statutory Maximum and Minimum Sentence

For the defendant's convictions for Possession of an Unregistered Firearm, the Court may impose a sentence of ten (10) years imprisonment, a \$250,000.00 fine, followed by at least three (3) years supervised release and a \$100 special assessment and the same sentence for Manufacturing a Firearm.

II. United States Sentencing Guidelines Calculation

"As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007).

A. Criminal History Calculation

The United States Probation Office calculated the defendant's criminal history points at zero. The defendant did not object to this calculation. The Government also agrees with this calculation.

B. Offense Level Calculation

The probation office calculated the defendant's total offense level at twenty-three (23). The defendant has objected to this calculation. (See Defendant's Objection to Preliminary Presentence Investigation Report, here after "Defendant's Objection." p.2)

The probation office started with a base offense level of twenty (20), citing the defendant's prior felony conviction. The defendant denies a prior felony conviction and believes the base offense level should be eighteen (18) pursuant to USSG § 5845 (a)(5). While the United States believes this is a legal matter for the Court to decide, based upon the offense

characteristics associated with the prior felony conviction which was for a second degree burglary of a business twenty-one years ago, the Government agrees that the base offense level should be eighteen (18).

The defendant further objects to the two (2) point increase pursuant to USSG § 2K2.1(b)(3)(B) based upon the use characteristics of the destructive device. (Defendant's Objection, p.2). The United States believes the two (2) point increase pursuant to USSG § 2K2.1(b)(3)(B) is appropriate, as the device meets the definition of a destructive device.

The defendant also objects to the Probation Office's calculation of a four (4) point increase pursuant to USSG § 2K2.1(b)(6). (Defendant's Objection, p.2). The defendant does not believe the offense was committed in furtherance of another felony offense. The United States has no information that after June 9, 2010, the defendant intended to proceed with his verbal agreement with Edgar Steele to kill Mrs. Steele. If the United States possessed such information, and could prove the offense against the defendant and Mr. Steele, the United States would have charged Larry Fairfax with additional offenses. The United States will not present evidence at sentencing to support the increase pursuant to USSG § 2K2.1(b)(6).

C. Advisory Guideline Range

The probation office calculated the defendant's adjusted base offense level at twenty three (23) with an advisory guidelines range at forty-six (46) to fifty-seven (57) months.

The defendant submits the appropriate offense level is seventeen (17) and the advisory guideline range is twenty-four (24) to thirty (30) months prior to the Court's consideration of any of the defendant's motions for downward departure. The defendant has not submitted such motions and indicates he will do so at a later date.

Given a three (3) point reduction for Fairfax's acceptance of responsibility, the United States believes the correct adjusted base offense level is seventeen (17) with a resulting guideline range of twenty-four (24) to thirty (30) months.

IMPOSITION OF SENTENCE

I. Imposition of a Sentence under 18 U.S.C. § 3553

A. 18 U.S.C. § 3553(a) factors

1. The nature and circumstances of the offense

The facts show this offense was very serious. Larry Fairfax recklessly gambled with other human beings' lives. While the defendant may have truly believed he had constructed the pipe bomb so it would not detonate, the reality is he had not: with more heat on the two fuses, the pipe bomb could have detonated. Bomb experts also point to redundancy in the construction of the bombs fuses and methods of attachment to the car, clear indicators of the makers intent to assure the pipe bomb would work. Regardless of whether the defendant ever meant to fulfill his verbal agreement to Mr. Steele, he should not have placed himself in the position of endangering lives. The defendant created a pipe bomb to satisfy Mr. Steele and relieve the pressure Steele put on Fairfax to get the job done. If Fairfax had spurned Steele's inducement immediately, or had he gone to law enforcement immediately, none of this would have happened. The defendant has no one but himself to blame for the position he now finds himself in. This offense is serious. The circumstances surrounding the offense are appalling. It was the defendant's greed for money that motivated him to be willing to set aside basic human feelings and agree, albeit without the intent to carry it through, to kill another human being.

2. The history and characteristics of the defendant

Larry Fairfax is a forty-nine-year old married man with two grown sons. He grew up in northern Idaho, attended high school, and later earned his general equivalency degree. He attended two semesters of college. The defendant has always been self-employed and holds a commercial driver's license.

3. The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment

As outlined above, the offense for which Larry Fairfax appears for sentencing is serious. This Court has heard and will again hear from Mrs. Steele regarding the emotional impact that finding the destructive device had on her and her family. While Fairfax did not intend for the device to go off and did not intend to harm Mrs. Steele or others, that cannot excuse his behavior. He is an adult with real life experience, family experience and business experience. He presumably has all of the cognitive and reasoning skills to consider his actions and understand the consequences to his volitional acts of manufacturing a destructive device and placing it on another individual's car. The seriousness of the defendant's offenses coupled with the need to promote respect for the law, and the need to provide just punishment should result in a guideline sentence.

4. The need for the sentence imposed to afford adequate deterrence and to protect the public

A sentence should provide both general and specific deterrence. If there is no consequence for law violations, then laws are meaningless. It is not unreasonable to acknowledge there are people who weigh the risks and benefits of violating the law. For some it may involve speeding because they are willing to pay the ticket to get where they are going more

quickly. For others it may be taking a risk of lying on their taxes because they do not think there is a great chance they will get caught. Others they refrain from even trying illegal narcotics because they do not want the stigma of a criminal charge. There are people who do not engage in criminal conduct because they do not want to lose their freedom. The general deterrent effect of incarceration is real and cannot be ignored.

The defendant, by his knowing and voluntary actions, created a risk to not only Mrs. Steele but the public at large. Whatever sentence the Court fashions will need to take into consideration the protection of the public.

5. The need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

The defendant has earned his GED and has completed some college classes in his educational endeavors. He reports no history of mental or emotional problems and there is no evidence of substance abuse issues. The defendant has received training in various vocations. It does not appear this particular defendant is in the same position as many defendants who are uneducated, unemployed, and without sufficient skills to participate constructively and profitably in society.

6. The kinds of sentences available

This Court has the statutory authority to sentence the defendant to a maximum of ten (10) years incarceration on each count. The maximum term of supervised release is three (3) years on each count, with these terms running concurrently. The defendant can also be sentenced on each count to not less than one (1) nor more than five (5) years probation pursuant to 18 U.S.C. §

3561(c)(1). A fine of up to \$250,000 can be imposed on each count. The Court clearly has many options to consider when sentencing the defendant.

B. Application of the Guidelines in Imposing a Sentence under 18 U.S.C. § 3553(b)

The Government's within-guidelines recommendation is based in part on the fact that such a sentence properly reflects the accumulated wisdom and expertise of the Sentencing Commission, and serves the vital goal of uniformity and fairness in sentencing. The guidelines, formerly mandatory, now serve as one factor among several that courts must consider in determining an appropriate sentence. *Kimbrough v. United States*, 552 U.S. 85, 90 (2007). It remains, however, that "the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Id.* at 108-09 (internal quotation marks omitted). Thus, "the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)).

The guidelines are the sole means available for assuring some measure of uniformity in sentencing, thereby fulfilling a key congressional goal in adopting the Sentencing Reform Act of 1984. Reference to the guidelines, while carefully considering the § 3553(a) factors, is the only available means of preventing the disfavored result of basing sentences on the "luck of the draw" in judicial assignments. Therefore, "district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6.

The guidelines deserve significant respect. The Government recognizes that the guidelines are entirely advisory, and that a district court has discretion to vary from an advisory

range, subject only to deferential appellate review for reasonableness. A district court, however, must consider the guidelines range, *see* § 3553(a)(4), and is usually well-advised to follow the Sentencing Commission's advice in order to assure fair, proportionate, and uniform sentencing of criminal offenders. Moreover, there are no other § 3553(a) factors in this case which militate against imposition of a sentence within that range; to the contrary, the § 3553(a) factors on balance support the imposition of the recommended guidelines sentence. Accordingly, the Government recommends a within-guideline sentence of thirty (30) months.

CONCLUSION

Application of 18 U.S.C. § 3553 supports a sentence of thirty (30) months for the defendant's commission of the crimes of Possession of an Unregistered Firearm and Manufacturing a Firearm. The Government submits that a sentence of thirty (30) months is sufficient, but not greater than necessary, to accomplish the goals of sentencing, and that a lesser sentence is not supported by application of the 18 U.S.C. § 3553(a) factors. The United States believes a three (3) year term of supervised release is appropriate and believes Fairfax should be ordered to forfeit the proceeds in the amount of \$10,000 he received from Edgar Steele when he was hired to kill Mrs. Steele. The defendant has returned twenty-six (26) one-ounce silver coins and that will be applied to the forfeiture of the \$10,000.

Respectfully submitted this 6th day of May, 2011.

WENDY J. OLSON
UNITED STATES ATTORNEY
By:

/s/ Marc Haws
MARC HAWS
TRACI J. WHELAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of May, 2011, the foregoing **GOVERNMENT'S SENTENCING MEMORANDUM** was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

John Miller
jmillerlaw@cda.twcbc.com

/s/ Maria Wahl

Legal Assistant