

Introduction

Defendant XXX XXX was convicted of five counts relating to the possession and distribution of controlled substances in a jury trial that concluded on March 8, 2005. The jury also announced itself unable to reach a verdict on a single count alleging a violation of 18 USC § 924(c), possession of a firearm in furtherance of a drug trafficking crime.

Defendant XX now moves this Court for a judgment of acquittal on all counts, under Federal Rule of Criminal Procedure 29. In the alternative, Mr. XX moves this Court for a new trial on the drug counts, under Federal Rule of Criminal Procedure 33.

Discussion

I. The Court Should Grant the Defendant's Rule 29 Motion as to All Counts

The defense timely moved under Federal Rule of Criminal Procedure 29(a) for a judgement of acquittal upon the close of the government's case, and again upon the close of the defense case, before the charges were submitted to the jury. The defense renewed its motion under Federal Rule of Criminal Procedure 29(c) after the jury verdict. With the Court's agreement, decision on the defendant's Rule 29(c) motion was deferred until April 7, 2005, to permit post-verdict briefing.

A. The Court Should Grant the Defendant's Rule 29 Motion as to Count's One through Five

Federal Rule of Criminal Procedure 29(a) requires the Court to grant a judgment of acquittal "of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. Pro. 29(a).

The defense moves for a judgement of acquittal as to the drug counts, counts one through five, for the government's failure to prove each element beyond a reasonable doubt. The defense hence preserves the motion for possible appellate review, but will forego any additional briefing on the Rule 29 motion as to these counts before this Court.

B. This Court Should Grant the Defendant's Rule 29 Motion as the Count Six, the Section 924(c) Count

A repeated issue during this jury trial was the correct instruction for Count Six, the Section 924(c) count. During one instruction conference, the Court asked if the defendant's authority specifically held that it was reversible error if certain language was not included in Section 924(c) instructions. The defense was forced to concede that each of the cases upon which it relied addressed 18 USC § 924(c) in the Rule 29 context, instead of in the jury instruction context.

At this juncture, as the defense argues its Rule 29 motions, this caselaw indisputably controls.¹ Both out of circuit, and Ninth Circuit authority require that this Court grant the defendant's Rule 29 motion as to Count Six, the 18 USC § 924(c) count.

1. Background as to Count Six

With the convictions on counts one through five, the government has secured a mandatory minimum ten year sentence for this mentally-ill defendant – a defendant who has never spent a day in prison and who has no felony convictions. Indeed, it is likely that the guideline range for this defendant will exceed ten years. The Section 924(c) count – if retried, and if it produced a conviction – would add a five year mandatory minimum *consecutive* sentence to the already considerable amount of federal time faced by this defendant. A Rule 29 motion of acquittal on that count would mean that jeopardy attaches to that allegation, and that this allegation will not be retried. Moreover, if the already-astronomical exposures faced by the defendant were insufficient, the government would certainly remain free to argue that the presence of the weapons near the drugs merits a higher guideline or *Booker* sentence.

The undisputed evidence introduced at trial regarding the three weapons alleged in the Section 924(c) count was not sufficient to merit a conviction on that allegation. That evidence included:

¹ Of course, as argued at the instruction conference, the defense views this authority as controlling the Section 924(c) instructions as well.

- A .38 caliber pistol was found in a locked safe next to controlled substances;
- That pistol was within a closed gun case;
- That pistol had a locked gun lock on it when recovered;
- There was no forensic evidence showing that XXX XXX ever handled that weapon;
- A .357 pistol was recovered underneath a mattress, underneath a sheet of wood, underneath XXX XXX's bed;
- That pistol was within a closed gun case;
- That pistol had a locked gun lock on it when recovered;
- There was no forensic evidence showing that XXX XXX ever handled that weapon;
- No key to the gun locks was ever recovered in the search of XXX XXX's home;
- There was no showing that XXX XXX had ever unlocked the gun locks, or that he ever had access to keys for the gun locks;
- There was also a very large hunting rifle, with an attached scope, recovered underneath a mattress, underneath a sheet of wood, underneath XXX XXX's bed;
- There was no forensic evidence showing that XXX XXX had handled that weapon;
- Drugs were located near the weapons. For example, drugs were in the same safe in which the .38 pistol was found. Drugs were also recovered near the bed under which the .357 pistol and the rifle were found.
- None of the weapons were loaded.
- There was no evidence that XXX XXX had ever loaded, fired, or carried the weapons.

This evidence was insufficient to maintain a Section 924(c) conviction.

2. Developing Circuit Authority on Section 924(c) Requires That This Court Grant a Judgment of Acquittal as to Count Six

Section 924(c) of Title 18 provides for a five year mandatory consecutive sentence

if a firearm is possessed *in furtherance* of a drug trafficking offense:

§ 924. Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

18 USC § 924(c)(1)(A).

In the last four years, circuit courts have developed an increasingly demanding standard for determining whether weapons alleged in Section 924(c) charges were used “in furtherance” of drug trafficking offenses or crimes of violence.

One thoughtful example of this evolution is the Sixth Circuit’s decision in *United States v. Mackey*, 265 F.3d 457 (6th Cir. 2001). In *Mackey*, the defendant was arrested with crack cocaine in his possession. *Id.* at 459. A search of his house produced a loaded short-barreled shotgun in the living room, as well as a scanner, electronic scales, and razor blades. *Id.* The front door was barricaded, “as is typical in a crack house,” and there were no signs that the house was being used as a residence – there were no implements, food, or other signs of use in the kitchen or bathroom. *Id.*

The defendant was convicted on a Section 924(c) count, of possessing a gun in furtherance of a drug trafficking crime. *Id.* On appeal, the defendant raised a claim very similar to that of Mr. XX’s: “Defendant concedes that he constructively² possessed the gun, but he claims that there was no evidence that the possession was ‘in furtherance’ of a drug crime.” *Id.* at 460.

² Mr. XX does not claim “constructive possession,” but instead admitted during his testimony that he actually possessed the weapons.

The Sixth Circuit was accordingly confronted with the question of what “in furtherance” meant. *Id.* Given its ordinary, natural meaning, the Court viewed “in furtherance” as “helping forward: advancement, promotion.” *Id.* at 461.

The Court in *Mackey* turned to the legislative history of Section 924(c) for further guidance. As the Sixth Circuit explained, a previous version of the statute had only required that gun be carried “during and in relation to” crimes of violence and drug offenses. *Id.* In *United States v. Bailey*, 516 U.S. 137 (1995), the Supreme Court rejected this broad interpretation of “use” and “held that use required some active employment.” *Id.*, citing *Bailey*, 516 U.S. at 144.

As explained by the Sixth Circuit, legislative reaction to the *Bailey* decision “indicates that Congress intended the ‘in furtherance of’ limitation to be a higher standard than ‘during and in relation to,’ which continues to modify the use and carry prongs of the statute.” *Id.* The legislative history emphasized that the “in furtherance” requirement was *not* satisfied by showing mere possession:

The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. *The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence.* Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity.

Id. at 461 (emphasis added). At the Sixth Circuit explained, “By requiring that the possession be ‘in furtherance of’ the crime, Congress intended a specific nexus between the gun and the crime charged.” *Id.* at 462.

Turning again to legislative history, the Court in *Mackey* provided an illustration of what is an *insufficient* nexus to satisfy Section 924(c):

[A] prosecution expert testified . . . that drug dealers frequently carry a firearm to protect themselves, as well as their drugs and money. Standing on its own, this evidence may be insufficient to meet the ‘in furtherance’ test. The government would have to show that the firearm located in the trunk of the car advanced or promoted Mr. Bailey’s drug dealing activity.

Id. citing H.R. Rep. No. 105-344, 1997 WL 6638339, at *12.

After this exhaustive review of the legislative history, the Sixth Circuit emphasized a rule compelled by that history and by the Supreme Court's *Bailey* decision: "[T]he possession of a firearm on the same premises as a drug transaction would not, without a showing of a connection between the two, sustain a § 924(c) conviction. In order for the possession to be in furtherance of a drug crime, the firearm *must be strategically located so that it is quickly and easily available for use.*" *Id.* at 462 (emphasis added).

There are other factors that may help to distinguish weapons "possessed" from weapons used "in furtherance": "whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found." *Id.*

In this case, under the analysis set forth in *Mackey*, the facts cannot support a Section 924(c) conviction. None of the three weapons were loaded, suggesting they were not used "in furtherance." The only drug activity in which Mr. XX was seen to be engaged was one, extraordinarily small hand-to-hand sale on a busy and public street – not the type of large scale and clandestine drug activity for which weapons are necessary. Most importantly, however, the circumstances under which the weapons were found cannot support a conviction under Section 924(c), for the only two weapons that could conceivably be used in urban drug sales – the pistols – were *both locked with gun locks for which no key was recovered*. The large deer rifle, with a scope, was not the "type of weapon" that could be used in a drug trafficking offense such as at issue in this case. *Id.* at 462 (discussing "type of weapon). The pistol that the government trumpeted as being the classic concealable weapon, the .38, was also locked inside of a safe. No fair view of the evidence adduced at trial can characterize these weapons as being "strategically located so that [they are] quickly and easily available for use." *Id.* The defendant's Rule 29 motion should therefore be granted as to count six.

Ninth Circuit authority mandates the same result. For example, the Ninth Circuit also considered the definition of "in furtherance" in *United States v. Krouse*, 370 F.3d

965 (9th Cir. 2004). In *Krouse*, police officers executing a search warrant on the defendant's home found five firearms, 86.5 grams of cocaine, and almost 150 pounds of marijuana. *Id.* at 966. The narrow issue before the Court in *Krouse* was "whether the firearms discovered in Krouse's home furthered his drug trafficking operation." *Id.* (quotations omitted).

Just as the Sixth Circuit had done in *Mackey*, the Ninth Circuit first turned to a dictionary definition of "in furtherance," and then cited the identical legislative history relied upon by the Ninth Circuit. *See id.* at 967, citing H.R. Rep. No. 105-344 (1997), 1997 WL 6683339, at *12. Just as the Sixth Circuit had explained, the Ninth Circuit emphasized that "Evidence that a defendant merely possessed a firearm at a drug trafficking crime scene, without proof that the weapon furthered an independent drug trafficking offense, is insufficient to support a conviction under § 924(c)." *Id.*

The Court in *Krouse* recited an eight-part "test" that had evolved regarding whether a gun was used "in furtherance:"

- The type of drug activity involved;
- the accessibility of the firearm;
- the type of weapon;
- whether the weapon is stolen;
- whether the defendant legally possessed the weapon;
- whether it is loaded;
- the proximity of the weapon to the drugs;
- the time and circumstances under which the gun is found.

Id. The Court continued, however, to explain "Such tests may not aid the analysis in all cases." *Id.* For example, the Court did not believe that "loaded or unregistered firearms are particularly indicative of drug trafficking or crimes of violence." *Id.* at 968. The Court explicitly rejected a formulaic approach (such as had been urged by the government in the *XXX XXX* case): "When deciding whether sufficient evidence supports a conviction under § 924(c), we will not resort to a checklist that has little relation to the crime

charged.” *Id.*

The holding of the Ninth Circuit in *Krouse* is indistinguishable from that of the Sixth Circuit’s in *Mackey*: “We hold that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense.” *Id.* In fact, the Ninth Circuit favorably cites *Mackey* repeatedly throughout its decision. *See id.* citing *Mackey*, 265 F.3d at 462; *see also id.* citing *Mackey*, 265 F.3d at 462 (“[T]he firearm must be strategically located so that it is quickly and easily available for use.”)

Although the conviction was upheld in *Krouse*, under the reasoning of that decision the defendant’s Rule 29 motion for acquittal is appropriate here. Unlike *Krouse*, the weapons recovered in XXX XXX’s home were not loaded. Unlike *Krouse*, the weapons recovered in Mr. XX’s residence were locked, with gun locks, with no key recovered. Moreover, unlike *Krouse*, one of the weapons in Mr. XX’s case was both locked with a gun lock *and* locked within a safe. Under both *Krouse* and *Mackey*, this Court should grant Mr. XX’s Rule 29 motion.

Finally, a recent Ninth Circuit decision that is factually on point requires this Court to grant a judgment of acquittal on the Section 924(c) count. *See United States v. Mann*, 389 F.3d 869 (9th Cir. 2004). In *Mann*, a search of a campsite revealed a meth lab and resulted in the arrest of the defendants. *Id.* at 872-73. In a pickup truck belonging to a defendant, law enforcement found a .40 caliber pistol, a loaded “pen gun”, ammunition, pseudoephedrine pills, and other drug paraphernalia. *Id.* at 873.

During its analysis of the appeal of the denial of the Rule 29 motion, the Court distinguished facts in *Mann* from the “ample evidence” in *Krouse*. *Id.* at 879. In *Mann*, the firearms recovered in the truck were “*locked inside a safe, the key to which was found lying on a propane tank inside the sleeping tent.*” *Id.* (emphasis added). While the firearms were in the safe, which itself was within the truck, “the key was kept in an area of the campsite in which [the defendants] slept, and the guns *were not easily accessible* in an area where drugs were manufactured and stored.” *Id.* at 880 (emphasis added).

The Court specifically rejected the government's argument that the fact that the guns were unregistered or illegal supported the Section 924(c) conviction: "XX conclude . . . that Appellant's possession furthered a drug trafficking conspiracy simply because the weapons were unregistered or illegal *is to accept precisely the sort of questionable inference we disapproved of in Krouse.*" *Id.* at 779-80 (emphasis added). As the Court explained, "If we were to uphold Appellants' convictions on this ground, it would render the 'in furtherance' element mere surplusage." *Id.* at 880.

In *Mann*, the Court acknowledged that those engaged in criminal activities "will frequently carry weapons to protect their enterprise." *Id.* The Ninth Circuit warned, however, that "Congress has not made mere possession, when it occurs contemporaneously with drug manufacture, a strict liability crime." *Id.*

Under *Mann*, this Court should refuse the government's attempt to treat Section 924(c) as a strict liability crime, and should grant Mr. XX's motion for judgment of acquittal. In *Mann*, the conviction was overturned even though a key to the gun safe was located in the campsite in which methamphetamine was being manufactured. *Id.* at 880. In the present case, by contrast, *no key* was ever recovered to the gun locks on the two pistols that were recovered. In both cases, weapons were stored inside a locked safe. In this case, as in *Mann*, the guns were not "easily accessible." *Id.* Therefore, in the present case there was insufficient evidence to support a conviction on the Section 924(c) count.

Because *Mackey*, *Krouse*, and *Mann* all correctly acknowledge the heightened evidentiary showing required for Section 924(c) counts after *Bailey* and legislative amendments, and because the government failed in the present case failed to make this heightened showing, this Court should grant the defendant's Rule 29 motion as to the Section 924(c) count. Granting this motion will cause no prejudice to the government, which still has ample sentencing exposure within which to seek an extraordinarily long sentence for this defendant.

III. This Court Should Grant a Mistrial, or a Motion for a New Trial, Because Extrinsic Material was Used During the Jury Deliberations

After the verdicts were returned on March 8, 2005, some of the jurors remained outside the courtroom to discuss the case with counsel and staff. During those discussions, one juror admitted that she had brought a dictionary into the jury room and had consulted it during her deliberations. *See Exhibit A, Decl. Melissa Frink.* That juror further admitted that several jurors had consulted the dictionary. *Id.* The juror resorted to using the dictionary because she was frustrated with this Court's definitions of legal terms. *Id.*

Admittedly, this sole juror stated that the dictionary was only used to look up terms relating to the Section 924(c) count. *See Exhibit B, Decl. Elizabeth Falk; see also Exhibit C, Decl. Rob Ultan.* It is unknown, however, what terms other jurors looked up in the dictionary, how widely it was consulted, or whether other jurors used this extrinsic source for definitions relating to the drug counts.

In light of the introduction of this extrinsic material into jury deliberations, Mr. XX challenges the convictions on counts one through five on several grounds. First, this was a violation of Federal Rule of Criminal Procedure 43, because the use of extrinsic material amounted to additional jury instructions outside of the presence of the defendant. Fed. R. Crim. Pro. 43. In addition, the use of this extrinsic material violated Mr. XX's Confrontation Clause rights, because he was unable to challenge the definitions that were given in the dictionary and used by the jury. More specifically, the use of the dictionary violated the Confrontation Clause rights recognized by the Supreme Court in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). The dictionary definitions were hearsay – out of court statements that were used for the truth of the matters asserted (for example, that “nexus” had a certain meaning). Finally, use of alternative definitions was an error of law, because these definitions were not consistent with legal instructions nor were they approved by this Court. *See United States v. Birges*, 723 F.2d 666, 670-71 (9th Cir. 1984) (“Questions or disputes as to the meaning of terms which arise during jury deliberations should be settled by the court after consultation with counsel, in supplemental instructions. Such guidance will avoid the danger that jurors will use the dictionary to

construct their own definitions of legal terms which do not accurately or fairly reflect applicable law.”) This error is particularly glaring, because the jury resorted to the dictionary after rejecting the instructions given by this Court. *See* Exhibit A, Decl. Melissa Frink.

Under Ninth Circuit authority, it appears that once a dictionary has been introduced into jury deliberations “the Government ha[s] an obligation to prove that the presence of the dictionary was harmless beyond a reasonable doubt.” *United States v. Kupau*, 781 F.2d 740, 744 (9th Cir. 1986). In similar cases, the Ninth Circuit has repeatedly held that giving a dictionary to a jury is error. *See id.* (“The district judge, in this case, erred in giving the dictionary to the jury.”); *see also Birges*, 723 F.2d at 670 (“[W]e have no doubt that the sending of a dictionary into the jury room, without consulting counsel, is error.”) This Court must now determine whether the use of the dictionary could have affected the verdict. *United States v. Plunk*, 153 F.3d 1011, 1024 (9th Cir. 1998), *overruled on other grounds, as recognized by United States v. Hankey*, 203 F.3d 1160, 1168 & n.7 (9th Cir. 2000) (“[W]henver a jury ‘obtains or uses’ evidence extrinsic to the trial record, a new trial is warranted only if there existed a reasonable probability that the extrinsic material could have affected the verdict.”)

Admittedly, the Ninth Circuit has in some cases upheld convictions despite the fact that the jury referred to a dictionary. Often in those cases, however, the district court provided curative instructions to mitigate the damage caused by this extrinsic material. *See Kupau*, 781 F.2d at 744 (discussing cautionary instructions given by judge when a dictionary was provided, and curative instructions provided when the dictionary was removed); *see also Plunk*, 153 F.3d at 1024 (district court specifically instructed the jury that it could not consult the dictionary). In the present case, of course, this Court provided no cautionary or curative instructions to the jury about the use of the dictionary during its deliberations.

Moreover, cases in which convictions have been upheld despite the introduction of extrinsic materials often involve *de minimus* consultation of the materials. *See id.* (jury

had possession of a dictionary for one or two minutes, and did not have time to look up any words). In the present case, it appears that the jury had full use of a dictionary for an extended period – in fact, it had actually been used it to look up several terms. *See* Exhibit A, Decl. Melissa Frink.

In *Plunk*, the Ninth Circuit listed five separate factors to consider regarding any prejudice that may arise from the introduction of extrinsic evidence before the jury:

In several cases, we have suggested that courts reviewing juror-misconduct appeals involving extrinsic evidence should consider five separate factors to determine the probability of prejudice: (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

153 F.3d at 1024-25 (quotations omitted).

Of course, it is impossible for this Court to evaluate these five factors without securing more evidence about the nature and extent of this jury misconduct. This Court should accordingly conduct an evidentiary hearing, and permit each juror to be questioned under oath as to the use of the dictionary during deliberations. Indeed, in the Ninth Circuit this Court *must* conduct such an evidentiary hearing now that it has learned of a possible incident of juror misconduct:

The trial court, upon learning of a possible incident of juror misconduct, *must hold an evidentiary hearing* to determine the precise nature of the extraneous information. The defendant is entitled to a new trial if the judge finds a possibility that the extrinsic material could have affected the verdict.

United States v. Steele, 785 F.2d 743, 745 (9th Cir. 1986), quoting *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981) (emphasis added).

In light of the evidence of juror misconduct – specifically, the reliance upon extrinsic materials during deliberations – this Court must either grant the defendant’s motion for a new trial as to counts one through five, or conduct an evidentiary hearing “to determine the precise nature of the extraneous information.” *Steele*, 785 F.2d at 745.