



United States if Gray did not respond. Gray has responded, and the motion is now ripe for the court's consideration.

## I

On June 10, 1998, a grand jury of this court returned a seven-count indictment against Gray charging: (1) possession of an unregistered firearm; (2) possession of a firearm, having been previously convicted of a felony; (3) possession of a firearm, then being an unlawful drug user; (4) possession of a firearm, having been previously convicted of a misdemeanor crime of domestic violence; (5) possession of LSD with intent to distribute; (6) using or carrying a firearm during and in relation to a drug trafficking crime; and (7) possession of methamphetamine. Count One of the indictment specified that Gray unlawfully possessed “a firearm, to wit: one (1) Companhia Brasileira de Cartuchos Model SB, 12 gauge short-barreled shotgun, serial number 879499, having an overall barrel length of less than eighteen inches and an overall length of less than twenty-six inches . . .” in violation of 26 U.S.C.A. §§ 5841, 5861(d) and 5871 (West 1989). (Appendix to § 2255 Mot. (“App.”) at 6.) Similarly, Counts Two, Three, Four and Six charged that Gray possessed, used, or carried “a firearm, to wit: one (1) Companhia Brasileira de Cartuchos Model SB, 12 gauge short-

barreled shotgun, serial number 879499 . . .” in violation of 18 U.S.C.A. §§ 922(g) and 924(c)(1) (West 2000). (App. at 7-8.)

Jay H. Steele, an attorney with approximately twenty years of experience at the Bar, was appointed to represent Gray on July 8, 1998. Steele wrote a letter to Gray dated September 4, 1998, addressing plea negotiations, sentencing, and possible defenses. The letter indicates that the government was willing initially to accept a guilty plea to Count Two of the indictment plus a conditional guilty plea to Counts Five and Six in exchange for dismissal of the remaining charges and a recommended sentence of imprisonment of twenty years (hereinafter the “first plea agreement”). The guilty pleas to Counts Five and Six were to be conditioned so that they could be withdrawn if Gray was found to be subject to an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C.A. § 924(e) (West 2000). The letter states that through continued negotiation, counsel had been able to lower the recommended sentence (under the same terms as the first plea agreement) to imprisonment for fifteen years (hereinafter the “second plea agreement”). One part of the letter, which forms the heart of several of Gray’s arguments, reads:

As I explained to you, a sentence of fifteen (15) years means that you would serve approximately thirteen (13) years in a federal penitentiary. It was my recommendation that you accept the plea agreement under the terms as outlined above. The seven count indictment as it now stands contains three counts (two, three, and four) that carry a

possibility of life in prison on each count with fifteen (15) years mandatory minimum on those three counts. In other words, the mandatory minimum you would face if convicted of those three counts alone would be forty-five (45) years in the penitentiary. The mere possession of the unregistered sawed-off shotgun carries a maximum sentence of ten (10) years. Again, you are looking at a term of fifty-five (55) years on those four counts alone as a minimum.

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As I have stated over and over to you, once you have made the decision to ask for a jury trial, I will do everything within my power to have you found not guilty by a jury. However, I still believe that the plea agreement is in your best interests as it will allow you to be released from prison in time for you to spend a significant portion of the remainder of your life out in society and a free man. Should you be convicted on even half of the things you were charged with, it is my opinion that you will not be released from the penitentiary until you are a very old man.<sup>1</sup>

(App. at 91 (emphasis in original).)

Attorney Steele sent Gray a second letter dated September 15, 1998, describing a third plea agreement, which was the one ultimately accepted. The letter also discusses sentencing possibilities, stating:

As we have discussed over and over again, the sentence that I feel you will receive if convicted by the jury will be in the range of twenty (20) to thirty (30) to forty (40) years, depending upon how many counts you are convicted on. Again, I feel that there is no way that I can see that you will not be convicted of substantially all of the charges which you are facing, particularly those relating to possession of the firearm.

(App. at 94.)

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<sup>1</sup> Gray was twenty-nine years old at the time. (App. at 72.)

On September 16, 1998, Gray signed a plea agreement with the government, agreeing to plead guilty to Count Two of the indictment. Gray agreed also to enter a conditional plea of guilty to Count Five, with the condition being that if Gray was found to be an armed career criminal, he could withdraw the guilty plea as to Count Five. In exchange, the government agreed to dismiss all of the remaining counts in the indictment. The plea agreement recited that Gray “stipulate[s] that there is a sufficient factual basis to support each and every material factual allegation contained within the charging document to which [he] is pleading guilty.” (United States’ Ex. B at 5.) The plea agreement provided that Gray waived his right to appeal directly or collaterally any and all issues except for a determination that he is an armed career criminal. Gray initialed each page of the plea agreement and signed the last page.

A plea colloquy, pursuant to Federal Rule of Criminal Procedure 11, was conducted on September 16, 1998. At the plea colloquy, the following exchange took place:

THE COURT: Mr. Gray, have you received a copy of the indictment, that is, the written charges against you in this case?

THE DEFENDANT: I have seen a copy.

THE COURT: Have you had an opportunity to discuss the indictment and your case in general with your attorney, Mr. Steele?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Gray, I'm going to ask the clerk to hand you the written plea agreement that's been submitted to the court, and ask you if you can identify that as the agreement which you signed?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you. You may return it. Did you sign this agreement and initial each page to show that you, in fact, read it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with your attorney's representation?

THE DEFENDANT: Thus far, yes.

(App. at 20-21.)

Later in the plea colloquy, the court asked Gray to state, in his own words, what made him guilty of the two offenses. Gray responded as follows: "I possessed the firearm after knowing I was convicted of a felony, and I possessed the LSD, but they say I'd be pleading guilty to that many dosage units that it was, that the Government can say that I was trying to distribute it because of the amount of drugs." (App. at 38.) The prosecutor then summarized the following facts that the government was prepared to prove at trial: Gray had been driving his vehicle when he was stopped by a police

officer; the officer observed what appeared to him to be a sawed-off shotgun in Gray's vehicle; the officer seized the shotgun and placed Gray under arrest for possession of a sawed off-shotgun; the officer recovered twenty-one pills later determined to be LSD from Gray's pocket during the search incident to arrest; and a certain Virginia State Trooper was prepared to testify as an experienced narcotics investigator that "21 hits of LSD would be consistent with intent to distribute, [and] would not be consistent with merely personal use." (App. at 39-41.) The court accepted the guilty plea after finding that Gray was competent to enter a guilty plea, aware of the nature and possible consequences of the plea, and informed of the essential elements of the offenses.

A sentencing hearing was conducted on December 14, 1998. The court found that Gray was not an armed career criminal, but that he was a career offender,<sup>2</sup> with a total offense level of 29 and a criminal history category of VI. His guideline range of imprisonment was 151 to 188 months and the court sentenced him to 180 months.

Gray appealed to the United States Court of Appeals for the Fourth Circuit. Counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967),

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<sup>2</sup> The respondent argues that it "would have been impossible for Attorney Steele to definitively determine whether the defendant would have been considered an armed career criminal." (United States' Resp. at 4.) Gray states, in his reply to the government's brief, that "Gray [is not] faulting Attorney Steele for not absolutely determining whether Gray would be considered an Armed Career Criminal for sentencing prior to the issuance of the presentence report." (Reply at 3.)

expressing his belief that there were no meritorious issues for appeal. Gray filed a pro se supplemental brief arguing that: (1) the plea agreement is void because it does not bear the signature of the United States Attorney; and (2) the court erred in accepting his guilty plea on the drug charge because the record is devoid of a factual basis for the plea, the court failed to inform Gray of the nature of the offense, and the court failed to determine whether Gray understood the charge. The Fourth Circuit dismissed the appeal, holding that because the district court had found that Gray was not an armed career criminal, the appeal waiver was valid and Gray's claims had been waived. *See United States v. Gray*, No. 98-4929, 1999 WL 515434, at \*1 (4th Cir. July 21, 1999) (unpublished). Thereafter, Gray filed the present § 2255 motion, in which he requests the court to set aside his convictions and allow him to withdraw his guilty plea.

## II

A guilty plea is valid if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A waiver of appeal rights contained in a plea agreement does not preclude a challenge, based on counsel's ineffectiveness, to the voluntariness of the waiver or the guilty plea. *See United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993). A guilty plea can be withdrawn based on ineffective assistance of counsel only

if the defendant can show: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that he was prejudiced in the sense that "there [was] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); see *Hammond v. United States*, 528 F.2d 15, 18 (4th Cir. 1975) (grossly incorrect advice as to the potential punishment if the accused went to trial rather than pleaded guilty constituted ineffective assistance of counsel).

### III

In Gray's various claims, he alleges that counsel did not give good-faith, accurate advice about the sentencing consequences and possible defenses to the various counts in the indictment. Specifically, Gray alleges that counsel would not investigate his criminal record to predict if he would be determined to be an armed career criminal, did not explain the distinctions between the sentencing schemes for an armed career criminal versus a career offender, failed to account for grouping of the sentences for sentencing purposes, wrongly told him that Count One would run consecutive to the other firearm offenses, failed to advise him that the government would have to prove that he knew the illegal characteristics of the firearm he possessed, and failed to advise him that intent cannot be proven by mere quantity of drugs. The effect of all this

misinformation, argues Gray, rendered his plea involuntary and unknowing. Moreover, Gray alleges that there was an insufficient factual basis to support his conviction, he was not advised of each element of the offenses to which he pleaded guilty, and he did not admit to each element of the convicted offenses.

Gray's principal argument is that counsel's "gross mischaracterization of the sentencing consequences" denied him "vital information necessary to make an informed decision." (Mem. Supp. § 2255 Mot. at 40.) Gray points to Steele's misstatement in the September 4 letter that Gray faced minimum imprisonment of fifty-five years on the weapons charges in the indictment.

There is no doubt that certain of attorney Steele's advice in the letter was wrong. There is no mandatory minimum sentence for the offenses charged in Counts One, Two, Three, and Four. *See* 18 U.S.C.A. § 924(a)(2); 26 U.S.C.A. § 5871. The maximum penalty for each count is ten years and not life imprisonment. *See id.* Moreover, since there was only one possession of the firearm, Gray could not have been convicted and sentenced under more than one of Counts Two, Three or Four. *See United States v. Dunford*, 148 F.3d 385, 389 (4th Cir.1998) (holding that regardless of defendant's membership in more than one disqualifying class, he only violates § 922(g) once for each act of possession).

Steele made a revised sentencing estimate in the September 15, 1998 letter, which addressed and predated by one day the plea agreement that Gray ultimately accepted. The updated sentencing advice was that if Gray went to trial on all counts in the indictment, he was risking a sentence “in the range of twenty (20) to thirty (30) to forty (40) years, depending upon how many counts [Gray is] convicted on.” (App. at 94.) That updated advice was substantially accurate. Regardless of Gray’s armed career criminal status, an additional conviction on Count Six alone would have increased his sentence by a mandatory minimum of ten years for using or carrying the sawed-off shotgun in relation to his commission of a drug trafficking offense. *See* 18 U.S.C.A. § 924(c)(1)(B)(i); *United States v. Studfin*, 240 F.3d 415, 419-24 (4th Cir. 2000) (mandatory minimum under § 924(c) to run consecutively to the mandatory minimum under the Armed Career Criminal Act).

Had Gray gone to trial on all counts and been convicted, he likely would have not received the three-level reduction for acceptance of responsibility and his guideline range, instead of 151 to 188 months, would have been 210 to 262 months. *See* U.S. Sentencing Guidelines Manual, Sentencing Table (2001). In addition, he would have received, for Count Six, the mandatory consecutive sentence of 120 months under § 924(c), for a total maximum of 382 months, or nearly thirty-two years.

Moreover, by negotiating for the guilty plea on Counts Five and Six to be conditioned upon a finding that Gray was not an armed career criminal, counsel shielded Gray from an additional lengthy sentence for Count Six on top of a possible mandatory fifteen-year sentence under the Armed Career Criminal Act.

While it is disturbing that appointed counsel made such specific errors as are reflected in the September 4 letter, his later written advice to Gray, made shortly before the guilty plea was entered, cured those deficiencies. Moreover, the general import of counsel's advice was always true: Gray would have been subject to a considerably longer sentence had he gone to trial and been convicted on all or nearly all of the counts in the indictment. I am convinced that Gray's decision to plead guilty was a rational one and that no injustice has occurred.

Gray asserts two defenses that counsel allegedly neglected to pursue. First, Gray claims that the quantity of drugs cannot be used to prove intent to distribute. However, the Fourth Circuit has held repeatedly that intent to distribute can be inferred from drug quantity inconsistent with personal use. *See United States v. Brandon*, 247 F.3d 186, 192 (4th Cir. 2001) ("Distribution of drugs is a greater threat to society than is mere use of the drugs, though both constitute great dangers, and it is natural and reasonable to assume that those who possess very large quantities of drugs intend to distribute those drugs."); *United States v. Fisher*, 912 F.2d 728, 730 (4th Cir. 1990) ("Intent to

distribute may be inferred from possession of drug-packaging paraphernalia or a quantity of drugs larger than needed for personal use.”). Gray’s prediction that the proffered expert testimony regarding quantity and intent would have been excluded or refuted at trial is completely speculative. Moreover, Steele states in an affidavit that he anticipated that the prosecution would also attempt to prove intent to distribute at trial by “introduc[ing] Mr. Gray’s prior drug distribution convictions to show a pattern or practice, [or] knowledge.” (Steele Aff. ¶ 17.) See Fed. R. Evid. 404(b); *United States v. Mark*, 943 F.2d 444, 448 (4th Cir. 1991).

Gray’s second alleged defense relates to his possession of the sawed-off shotgun. Gray contends that he “has maintained throughout his arrest that although he knew that he possessed a sawed-off shotgun, he never knew the characteristics of the firearm that brought it within the structures of the allegations set forth in count two of the indictment, i.e., that the sawed-off shotgun had ‘an overall barrel length of less than eighteen inches and an overall length of less than twenty-six inches.’” (Mem. Supp. § 2255 Mot. at 47.) Gray claims that he was not informed of this element of the weapons charges and that he did not admit to it. In support of this argument, Gray cites *Staples v. United States*, 511 U.S. 600, 619 (1994) (requiring, as an element of the offense, knowledge of a weapon’s internal modification that makes its unregistered possession a crime under 26 U.S.C.A. § 5861(d)), and *United States v. Edwards*, 90

F.3d 199, 205 (7th Cir. 1996) (applying *Staples* to sawed-off shotguns, and permitting the defendant to withdraw guilty plea to 26 U.S.C.A. § 5861(d) charge when he was not advised that the government would have to prove his knowledge of the gun's characteristics).

Although there appears to be no Fourth Circuit opinion on point, it is arguable that for Count One, which charges a violation of 26 U.S.C.A. § 5861(d), the government would have been required to prove that Gray knew that the sawed-off shotgun had an overall barrel length of less than eighteen inches and an overall length of less than twenty-six inches. *See* 26 U.S.C.A. § 5845(a) (West 1989); *Edwards*, 90 F.3d at 205. However, for Counts Two, Three, and Four, the indictment alleges a violation of 18 U.S.C.A. § 922(g), which, unlike 26 U.S.C.A. § 5861(d), defines “firearm” so as to include any shotgun. *See* 18 U.S.C.A. § 921(a)(3) (West 2000). Accordingly, knowledge of the shotgun's length is not an element of Counts Two, Three, and Four, even though the firearm was described as a short-barreled shotgun in those counts. *See United States v. Redd*, 161 F.3d 793, 796 (4th Cir. 1998) (“Several courts, including this Court, have held that the inclusion of a description of a weapon in an indictment does not render that description an essential element of the offense.”).

Count Six, charging using or carrying a firearm during and in relation to a drug trafficking crime, subjected Gray to a mandatory minimum sentence of ten years, rather

than five years, because the firearm was a short-barreled shotgun. To obtain this enhanced sentence, the government likely need not prove that the defendant knew that the firearm had an illegal length. *See United States v. Johnson*, 978 F. Supp. 1305, 1310 & n.6 (D. Neb. 1997), *aff'd sub nom. United States v. Valdez*, 146 F.3d 547 (8th Cir. 1998). However, even if lack of knowledge of the length of the firearm was a defense to Count One or to the longer mandatory minimum under Count Six, it would have been a weak one since the government need only prove that the defendant had the opportunity to observe the distinct characteristics of the weapon. “The fact that a shotgun’s length is obvious and apparent is . . . a means of proving knowledge . . . .” *Edwards*, 90 F.3d at 205. Had Gray’s case gone to trial, the government would have been able to show that Gray had attempted to conceal the shotgun from the police officer’s view during the vehicle stop (App. at 121-22), thus permitting an inference that Gray knew of the weapon’s illegal characteristics.

For these reasons, the court finds that Gray has not shown a claim of ineffective assistance of counsel on the basis that he was not properly advised by the attorney of valid defenses to the crimes charged against him.

Gray also alleges that he was not advised of the elements of the offenses to which he pleaded guilty, namely, the requirements that he had knowledge that the shotgun had an overall barrel length of less than eighteen inches and an overall length

of less than twenty-six inches for Count Two and that he had actual intent to distribute the LSD for Count Five. As noted above, Count Two has no such element. As to Count Five, the court read the charge at the plea colloquy, which unambiguously alleges that Gray possessed LSD with the intent to distribute. Moreover, near the end of the plea colloquy the court made a factual finding that Gray had been informed of the essential elements of the offense. *See United States v. Lambey*, 974 F.2d 1389, 1395 (4th Cir. 1992) (en banc) (“Statements of fact by a defendant in Rule 11 proceedings may not ordinarily be repudiated, and, similarly, findings by a sentencing court in accepting a plea constitute a formidable barrier to attacking the plea.”) (internal quotation omitted).

Gray claims that he did not actually admit to all the elements of Counts Two and Five at the plea colloquy. However, in his own words, he did admit to the elements of Count Two (“I possessed the firearm after knowing I was convicted of a felony”), and he recognized that the government was prepared to argue that intent could be inferred from the quantity of LSD he possessed (“I possessed the LSD, but they say I’d be pleading guilty to that many dosage units that it was, that the Government can say that I was trying to distribute it because of the amount of dosage.”) (App. at 38.) Moreover, there is no constitutional requirement that a defendant actually admit to

committing every element of an offense before the court can accept a knowingly, voluntary, and intelligent guilty plea. *See Alford*, 400 U.S. at 37-38.

Gray further contends that the government did not establish a sufficient factual basis for every element of the offense. As noted above, his own admission plus the proffered evidence establishes a factual basis for the elements of Count Two. Gray's admission to possessing LSD and the government's proffered expert testimony regarding drug quantity and intent establishes a factual basis for Count Five. Moreover, the plea agreement recited that Gray agrees there is a factual basis for each of the counts in the indictment to which Gray pleaded guilty.

In sum, the court finds that based on the plea colloquy, Gray was aware of the nature and possible consequences of the charges, informed of the essential elements of the offense, and entered a knowing, voluntary, and intelligent guilty plea. Counsel's advice in the September 15, 1998 letter regarding the potential sentencing exposure on the dismissed counts of the indictment was substantially accurate inasmuch as he advised Gray that he faced a significantly longer sentence if he went to trial and was convicted on all counts. Moreover, the defenses that Gray raises are of dubious merit, and he has failed to identify any elements of the convicted offenses of which he was not informed. Accordingly, Gray has not demonstrated that counsel performed deficiently

or that but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *See Hill*, 474 U.S. at 58-59.

#### IV

Based on the foregoing, the court finds no ground upon which Gray is entitled to relief under § 2255 and therefore will deny his motion. A separate judgment consistent with this opinion is being entered herewith.

Gray is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within sixty days of the date of entry of the judgment, or within such extended period as the court may grant pursuant to Rule 4(a)(5) or 4(a)(6).

DATED: April 12, 2002

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United States District Judge