

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v.

JAMES LEARY

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CR No. 15-00113-WES

**REPORT AND RECOMMENDATION**

Lincoln D. Almond, United States Magistrate Judge

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant is in violation of the terms of his supervised release and, if so, to recommend a disposition of this matter. In compliance with that directive and in accordance with 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1, a revocation hearing was held on March 26, 2019. The Government presented two witnesses (ATF Special Agent Christian Jardin and Providence BCI Detective James Clift) and twelve exhibits. After considering the evidence presented at that hearing, I recommend that the Court find Defendant guilty on Violation Numbers 1 and 3 and not guilty on Violation Number 2.<sup>1</sup>

**Background**

On March 12, 2019, the Probation Office petitioned the Court for the issuance of an arrest warrant. On that date, the District Court reviewed the request and ordered the issuance

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<sup>1</sup> Defendant admitted to Violation No. 3 – a Grade C violation related to the use of unprescribed amphetamines. Violation No. 2 – a Grade C associational charge – was dismissed for want of proof at the close of the Government's case.

of a warrant. Defendant was presented in this Court on March 12, 2019 for an initial appearance pursuant to the warrant.

Defendant appeared before the Court for a revocation hearing on March 26, 2019 at which time he contested the following charges:

**Violation No. 1. Standard Condition: While on supervision, Defendant shall not commit another federal, state or local crime.**

On or about December 2018, Defendant committed the offense of Felon in Possession of a Firearm, as evidenced by his possession of a firearm in a video posted on the YouTube website.

**Violation No. 2. Standard Condition: Defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the Probation Officer.**

On or about February 28, 2019 Defendant was in the company of Brendin McKinney who has a prior felony conviction.

Also, at the March 26, 2019 revocation hearing, Defendant admitted to the following charge:

**Violation No. 3. Mandatory Condition: You must refrain from any unlawful use of a controlled substance.**

On November 7, 2018; November 15, 2018; December 3, 2018; December 12, 2018 and again on December 19, 2018, Defendant submitted urine samples for testing that returned positive for the presence of amphetamines.

### **Recommended Disposition**

Title 18 U.S.C. § 3583(e)(2) provides that if the Court finds that Defendant violated a condition of supervised release, the court may extend the term of supervised release if less than the maximum term was previously imposed. The maximum term of supervised release was previously imposed; therefore, the term cannot be extended.

Title 18 U.S.C. § 3583(e)(3) provides that the Court may revoke a term of supervised release and require the Defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if the Court finds by a preponderance of evidence that the defendant has violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be sentenced to a term beyond 5 years if the instant offense was a Class A felony, 3 years for a Class B felony, 2 years for a Class C or D felony, or 1 year for a Class E felony or a misdemeanor. Defendant was on supervision for a Class C felony. Therefore, he may not be required to serve more than two years' imprisonment upon revocation.

Title 18 U.S.C. § 3583(h) and § 7B1.3(g)(2) provide that when a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized, the Court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. The authorized statutory maximum term of supervised release is three years.

Section 7B1.1 provides for three grades of violations (A, B, and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) provides that a Grade A violation constitutes conduct which is punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is

a controlled substance offense, or (iii) involves possession of a firearm or destructive device, or (B) any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year. Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

Section 7B1.3(a)(1) states that upon finding of a Grade A or B violation, the Court shall revoke supervision. Subsection (a)(2) states that upon finding of a Grade C violation, the Court may revoke, extend, or modify the conditions of supervision. Defendant has committed a Grade B violation. Therefore, the Court shall revoke supervision.

Pursuant to § 7B1.3(d), any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. There is no outstanding restitution, fine, community confinement, home detention or intermittent confinement.

Section 7B1.4(a) provides that the Criminal History Category is the category applicable at the time the defendant was originally sentenced. Defendant had a Criminal History Category of III at the time of sentencing.

Should the Court revoke supervised release, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. Defendant committed a Grade B

violation and has a Criminal History Category of III. Therefore, the applicable range of imprisonment for this violation is eight to fourteen months.

Should the Court find that Defendant has committed a Grade B or C violation, § 7B1.3(c)(1) states that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term.

Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(2) states that where the minimum term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (b) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment. The second provision which allows for alternatives for one-half of the minimum term applies to this matter.

Section 7B1.5(b) provides that, upon revocation of supervised release, no credit shall be given toward any term of imprisonment ordered, for time previously served on post-release supervision.

### **Discussion**

The Government bears the burden of proving these violation charges by a preponderance of the evidence. United States v. Portalla, 985 F.2d 621, 622 (1<sup>st</sup> Cir. 1993). “The preponderance standard requires proof that the defendant’s violation of supervision was

‘more likely than not.’” United States v. Edwards, 834 F.3d 180, 199 (2<sup>nd</sup> Cir. 2016) (quoting United States v. Hertular, 562 F.3d 433, 447 (2<sup>nd</sup> Cir. 2009)). Also, the exclusionary rule is inapplicable in supervised release violation proceedings. United States v. Jimenez-Torres, CR No. 06-135-(PG), 2010 WL 2650318 at \*4 (D.P.R. June 30, 2010); and United States v. Gravina, 906 F. Supp. 50, 55 (D. Mass. 1995). Finally, hearsay evidence can be admissible in a supervised release revocation hearing subject to certain findings by the Court. See Fed. R. Evid. 1101(d)(3); Portalla, 985 F.2d at 622 (holding that the “tests of admissibility set forth in the Federal Rules of Evidence” are not applicable in revocation hearings but that evidence that does not satisfy those rules “must nonetheless be reliable”); see also United States v. Lowenstein, 108 F.3d 80, 83 (6<sup>th</sup> Cir. 1997) (supervised release violation finding may rest upon reliable hearsay).

After considering all of the evidence presented, I conclude that the Government has met its burden of proof as to Violation No. 1 (unlawful firearm possession) but not as to Violation No. 2 (associating with a convicted felon). I explained the reasons for my findings in open court on April 5, 2019 and incorporate by reference that detailed explanation and citation to relevant legal authority into this Report and Recommendation. In a nutshell, this violation case arises out of a rap music video that was recorded in late 2018 and posted on YouTube in February 2019. (Gov’t Exh. 1). The video focuses on a lead rapper (Mr. Damon Winslow)<sup>2</sup> and includes a number of other young men performing in a background role. Some of the others in the rap video are at times making hand signals and, at other times, holding and pointing what

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<sup>2</sup> Based in part on Mr. Winslow’s apparent unlawful possession of a firearm in the video, warrants for the search of his apartment and for his arrest were issued on March 11, 2019. The search resulted in the seizure of a loaded firearm, and Mr. Winslow is facing a federal felon in possession charge. See United States v. Winslow, Case 1:19-MJ-0009-PAS (D.R.I.). Another participant in the video (Mr. Eric Valdez) faces a supervised release violation charge similar to that pending against Defendant. See United States v. Eric Valdez, Case 1:11-CR-00163-WES-PAS (D.R.I.).

reasonably appear to be actual handguns.<sup>3</sup> Defendant was one of those young men and, while masked, held and pointed a two-tone pistol with a green laser sight during the video. He also made certain gang-related hand signals during the video. The instant violation charges Defendant, a convicted felon, of once again unlawfully possessing a firearm.

After considering the credible evidence and the reasonable inferences drawn therefrom, I find for the reasons detailed on the record during the April 5, 2019 Court hearing that the Government has proven by a preponderance that: (1) Defendant is a convicted felon; (2) he knowingly possessed an actual firearm in the video; and (3) the firearm was manufactured outside this District and thus was possessed in or affecting interstate commerce. See 18 U.S.C. § 922(g)(1).

As to sentence, this is a Grade B violation and the guideline range is eight to fourteen months. The statutory maximum sentence is twenty-four months. The Government argues that Defendant is a danger to the community and that a high-end sentence of fourteen months is warranted. Defendant argues for a low-end sentence. Although this is Defendant's first formal violation proceeding, it is effectively his second violation involving criminal conduct. On February 15, 2018, Defendant assaulted a delivery truck driver and subsequently pled nolo to simple assault and battery – a misdemeanor. See State v. James Leary, 31-2018-02541 (3<sup>rd</sup> Div. Dist. Ct. R.I.). His conditions were modified as a result of this offense to include a sixty-day period on a curfew with electronic monitoring. He also tested positive for using cocaine in late 2017. Accordingly, a first offense low-end sentence is not warranted.

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<sup>3</sup> Agent Jardin, based on his view of the video and his training and experience, testified credibly that all of the guns in the video were actual firearms (including one observed with a loaded cartridge visible). See Gov't Exh. 10). This opinion is also reliably corroborated by Mr. Winslow's post-arrest statement against interest that the guns in the video were real and loaded, and the subsequent seizure of the unique two-tone pistol with green laser sight by the Providence Police. (See Gov't Exhs. 15 and 17).

The Government argues for a high-end sentence because of Defendant's continuing affiliation and interaction with members of the Lockwood Street Gang. It offered credible testimony at the sentencing hearing of such affiliation and the meaning of certain hand signals exhibited by Defendant and others during the video.<sup>4</sup> The Government argued that Defendant's actions in the video with both the firearm and hand signals was intended to taunt rival gangs and thus contributed to an increased threat to the community posed by gang street violence. (See, e.g., Gov't Exhs. 2, 4 and 5).

Defendant received a 12-month below-guidelines<sup>5</sup> sentence for the underlying felon-in-possession conviction in 2016 due, in part, to a recognition that he needed mental health treatment and could be more quickly connected to a provider if released sooner rather than later. While Defendant has engaged in such treatment and was recently prescribed medication, he has failed to change his life pattern, and, in particular, his social network. It is clear from this violation case and Defendant's history on supervised release that he continues to associate with street gang members, and he continues to involve himself with firearms.

While the facts are troubling, there is no evidence that Defendant has ever used a firearm in committing a crime of violence. Also, there is no evidence that the unique firearm held by Defendant as a "prop" in the video was otherwise possessed by him or ultimately seized from him by the Providence Police. Finally, there is no evidence that Defendant has any lead role in the Lockwood Street gang and he unfortunately appears to be a follower to his detriment. In the end, applying the 18 U.S.C. § 3553 sentencing factors, I conclude that a mid-range sentence

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<sup>4</sup> Providence Police Investigator Matthew McGloin testified credibly at a sentencing hearing on April 12, 2019, that the tattoos on Defendant's forearms ("Woodboy and "Lockwood, OG") (see Gov't Exh. 41) were identifiers of membership in the Lockwood Street Gang. He also testified credibly that a still image from the rap video (Gov't Exh. 2) showed Defendant using his right hand to make the "Lockwood hand sign."

<sup>5</sup> He faced a 15-21 month guideline range.



of 11 months is warranted for these second violations. I also recommend the maximum additional term of 25 months<sup>6</sup> of further supervised release with the same special conditions imposed with Defendant's original sentence in this case. It is hoped that such supervised release will assist Defendant in obtaining mental health treatment and with other supports and resources to assist him in positively altering his life patterns and associations.

### **Conclusion**

For the foregoing reasons, I recommend that the Court find Defendant guilty of violating his conditions of supervised release as charged regarding Violation Numbers 1 and 3 and not guilty of Violation No. 2 and that the Court revoke supervised release and impose a term of 11 months of incarceration to be followed by 25 months of supervised release with the following special conditions:


1. The Defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office. The Defendant shall contribute to the costs of such treatment based on ability to pay as determined by the Probation Officer.
2. The Defendant shall participate in a program of substance abuse testing (up to 72 drug tests per year) as directed and approved by the Probation Office. The Defendant shall contribute to the costs of such testing based on ability to pay as determined by the Probation Officer.
3. The Defendant shall permit the Probation Officer, who may be accompanied by either local, state, or federal law enforcement authorities, upon reasonable suspicion of a

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<sup>6</sup> In making this mid-range 11-month sentence, I took into consideration that this would permit a longer term of supervised release (25 months) than would be permitted (22 months) with the high-end 14-month sentence advocated by the Government. In addition, a 14-month sentence with earned good time credits would, in any event, roughly approximate time served on the 11-month sentence.

violation of supervision, to conduct a search of the Defendant's residence, automobile, and any other property under the defendant's control or ownership.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen days of its receipt. LR Cr 57.2; Fed. R. Crim. P. 59. Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the District Court and the right to appeal the District Court's Decision. United States v. Valencia-Copete, 792 F.2d 4 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1<sup>st</sup> Cir. 1980).



/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
May 10, 2019