

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:
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	:
v.	:
	:
	:
	:
RICHARD IRIZARRY	:

CRIMINAL NO. 99-180

GOVERNMENT’S TRIAL MEMORANDUM AND MOTIONS IN LIMINE

I. INTRODUCTION

Richard Irizarry, a convicted felon, is charged in a one count indictment with knowingly possessing a firearm (*i.e.*, a Strum Ruger & Company 9 millimeter Luger semi-automatic pistol with an obliterated serial number) on October 31, 1998 in the Eastern District of Pennsylvania in violation of 18 U.S.C. §922(g)(1).

The government submits this memorandum to assist the Court in deciding factual and evidentiary matters that may arise at trial. The government respectfully requests rulings in limine on the evidentiary issues discussed below. The trial of this case, which is scheduled to start on June 9, 1999 before the Honorable Jay C. Waldman, is expected to last from 1 to 2 days.

II. BACKGROUND FACTS

On October 31, 1998, at approximately 10:30 p.m., Philadelphia Police Officers Harris and Smothers saw the defendant fire a pistol in the air three times near the intersection of 5th and Wyoming. The defendant, who was wearing a plaid shirt, was standing on the east side of South 5th Street -- approximately 1/4 of a block south of the intersection of Wyoming and South 5th Streets.

When the defendant saw the patrol car, he started running north toward the corner of 5th & Wyoming Streets. Perceiving the commission of an undeniable crime, Officer Harris made a U-turn so that his police patrol car could travel northbound on 5th Street toward Wyoming Street -- followed by a right-hand turn onto Wyoming Street -- where he saw a bar on the right hand side of the street.

Having lost sight of the defendant after turning onto Wyoming, Officers Harris and Smothers decided to enter the bar since it was the only commercial establishment that the defendant could have entered within a minute or less of the officer's observation of him firing the pistol. When the officers entered the bar, approximately 30 people were in the establishment. Several patrons pointed toward the restroom in the rear of the building, a gesture which caused the officers to proceed toward the bathroom. When the officers entered the bathroom, they saw the defendant standing at the urinal. Located not far from the urinal was a plaid shirt similar to the shirt the officers had seen the defendant wearing at the time they saw him firing a pistol in the air.

Because they recognized defendant Irizarry as the man they had seen firing a pistol, they decided to "frisk" him; the officers did not know whether the defendant still possessed the gun they had seen him firing. When the officers did not find the gun on defendant's body, they took him outside of the bar to search for the gun, which they found laying on the ground between two cars parked in front of the bar. The officers also found the gun's ammunition magazine, which had been removed from the gun, partially laying under one of the cars.

The officers concluded that the gun they found under the car in front of the bar was the same gun they had seen the defendant firing because of: (a) its shape; (b) the fact that it was a semi-automatic pistol; (c) the fact that there were no other individuals in the area who could have thrown

the gun to the ground; (d) the pointing of bar patrons toward the bathroom when the officers entered the bar; (e) the finding of the plaid shirt in the bathroom -- a shirt similar to the shirt the defendant had been wearing; and (f) the amount of time that elapsed between the officers' initial sighting of the defendant and their finding him the bar.

III DEFENDANT'S POSSESSION OF THE FIREARM VIOLATED SECTION 922(g)(1) BECAUSE OF HIS "STATUS" AS A CONVICTED FELON AT THE TIME OF POSSESSION.

Title 18, United States Code, Section 922(g)(1) reads, in part, as follows:

It shall be unlawful for any person -

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

...

to . . . possess in or affecting commerce, any firearm or ammunition. . . .

To establish a *prima facie* violation of Section 922(g)(1), the government must present evidence which proves beyond a reasonable doubt three elements:

(1) the defendant knowingly possessed a firearm or ammunition;

(2) at the time that the defendant knowingly possessed the firearm or ammunition, he stood convicted of a crime punishable by more than one year's imprisonment; and

(3) the firearm or ammunition was possessed in or affected interstate or foreign commerce.

United States v. Xavier, 2 F.3d 1281, 1286 (3d Cir. 1993).

In the case at bar, the government will prove that the defendant knowingly possessed a firearm through the trial testimony of Philadelphia Police Officers Eugene Harris and Yvette Smothers. The government will also prove that the firearm possessed by the defendant traveled in

interstate commerce before arriving in the Commonwealth of Pennsylvania either by stipulation or by eliciting trial testimony from a Bureau of Alcohol Tobacco & Firearms special agent who has researched the location of the manufacturer of the firearm and is prepared to testify that the firearm the defendant possessed was not manufactured in the Commonwealth of Pennsylvania. Finally, the government will prove by stipulation, or by offering into evidence, a certified copy of a prior felony conviction which will prove that at the time the defendant possessed the firearm at issue in this case, he stood convicted of a crime punishable by a term of imprisonment in excess of one year.

IV. MOTION IN LIMINE TO IMPEACH DEFENDANT WITH PRIOR CONVICTIONS PURSUANT TO RULE 609(a)(1).

If the defendant's testifies at trial, his credibility, as is the case with any other witness, may be attacked through a number of modes of impeachment.¹ In the case at bar, the defendant has several prior convictions which are set forth below:

1. carrying a firearm on a public street/place and carrying a firearm without a license for which he was initially sentenced on October 4, 1995 to 2 years probation in case number in MC#9406-2518 in the Municipal Court of Philadelphia. Defendant was resentenced in this case on October 10, 1996, because of a probation violation, to a term of imprisonment of between 6 months and 1 year.
2. manufacturing, delivering and possessing with the intent to manufacture, deliver or possess a controlled substance for which he was sentenced on September 25, 1995 to a term of imprisonment of 1 to 2 years in case

¹. Fed. R. Evid. 608, 609 and 613(b) allow four types of evidence to be used to support or impeach a witness credibility. These include: (a) character evidence (Rule 608(a)); specific instances of conduct (Rule 608(b)); prior convictions (Rule 609)); and prior inconsistent statements (Rule 613(b)). Additionally, there are other types of evidence that can be used to impeach a witness's credibility which includes evidence of: (a) bias; (b) impairment of the witness's ability to observe, remember, or communicate; (c) mental illness; or (d) evidence obtained illegally that is inadmissible for its substance, but can be used for impeachment purposes. *See* 4 Weinstein Sections 607.02[2][a], 607.10[1], at 607-16 to 607-17, 607-111 to 607-113.11.

number CP#9507-1286 in the Philadelphia Court of Common Pleas.

3. carrying a firearm without a license for which he was sentenced on December 26, 1996 to a term of imprisonment of between 1 and 2 years in case number CP# 9610-0770.
4. Prostitution and criminal solicitation for which he was sentenced to a term of imprisonment of between 6 months and 1 year on December 16, 1996 in case number MC# 9609-2757.

Should the defendant testify at trial, the government respectfully requests permission to impeach him pursuant to Rule 609(a)(1)² with the two prior firearms convictions described above in paragraphs 1 and 3. As noted in these paragraphs, the defendant was convicted of carrying a firearm on a public street, and with carrying a firearm without a license, on October 4, 1995³ in the Philadelphia Municipal Court. The defendant was also convicted on December 26, 1996 in the Philadelphia Common Pleas Court of carrying a firearm without a license for which he was sentenced to a term of incarceration of between 1 and 2 years in case number CP# 9610-0770. Both

². Fed. R. Evid. 609(a) reads, in part, as follows: “[f]or the purpose of attacking the credibility of a witness (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement regardless of the punishment.”

³. In Case Number MC#9406-2518, the defendant was originally sentenced to 2 year probation. Because of a probation violation, he was subsequently resentenced to a term of imprisonment of not less than 6 months and not more than 1 year. This conviction may be used under Fed. Evid. R. 609(a)(1) even though the period of incarceration imposed upon defendant did not exceed 1 year. Rule 609(a)(1) allows impeachment by introduction of evidence of a prior crime of conviction if the crime “was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted.” Stated differently, the actual sentence imposed need not have exceeded one year in order for impeachment of a crime under Rule 609(a)(1) to be proper.

convictions occurred within the past 10 years. See United States v. Lipscomb, 702 F.2d 1049, 1061 (D.C. Cir. 1983).⁴ Also see Virgin Islands v. Bedford, 671 F.2d 758, 761 (3d Cir. 1982).⁵

In determining whether the probativeness of a prior conviction outweighs its prejudicial effect, the Third Circuit has instructed trial courts to consider factors which include: (1) the nature of the crime; (2) when the conviction occurred; (3) the importance of the defendant's testimony; and (4) the degree to which the defendant's credibility is central to the case. Id., at 761 n.4.

Here, the third factor (the importance of the defendant's testimony -- if he testifies) would weigh in favor of allowing the government to impeach the defendant with his prior firearm convictions given the limited theories of defense that are available to the defendant.⁶ Admittedly, it is difficult to assess *the centrality of the defendant's credibility* to the case since the theory of his defense, if one is advanced, is still unknown. For this reason, trial courts will either defer ruling on motions in limine under Rule 609(a)(1) until after the defendant has testified or until after an offer of proof has been made. See United States v. Luce, 469 U.S. 38, 41 (1984) (*to perform this*

⁴. In Lipscomb, the court held that: "all convictions that meet the Rule 609(a)(1) threshold are at least somewhat probative of credibility and that a trial court has discretion to decide how much background, if any, it needs to perform a Rule 609(a)(1) balance of probativeness against prejudice to the defendant." 702 F.2d at 1051.

⁵. In Bedford, the court held that evidence of a prior conviction can be admitted under Rule 609(a)(1) solely for purposes of attacking credibility. However, the trial court, before admitting evidence of a prior conviction, must make a determination that the probative value of the evidence outweighs its prejudicial effect to the defendant. The government bears the burden of persuading the court that the evidence should be admitted (i.e., that its probative value outweighs its prejudicial effect). The defendant is then permitted to rebut the Government's presentation explicating the potentiality for unfair prejudice from admission of the evidence.

⁶. Assuming, for the sake of argument, that the defendant stipulates to the "prior conviction" and "interstate nexus" elements of Section 922(g), the remaining disputed trial issue is whether he possessed the pistol at issue on the date that Officers Harris and Smothers claimed they saw him firing the gun.

balancing test, the court must know the precise nature of the defendant's testimony).

Courts of appeals have consistently held that a defendant puts his credibility directly at issue when he testifies to his innocence and presents an alternative version of the events in question and that this weighs heavily in favor of allowing the government to impeach the defendant with his prior convictions even when they are similar to the charged crime. See, e.g., United States v. Perkins, 937 F.2d 1397, 1406 (9th Cir. 1991) (*affirming use of bank robbery conviction to impeach defendant in bank robbery case in part because defendant's credibility and testimony were central to the case as [defendant] took the stand and testified that he did not commit the robbery and impeachment with prior conviction paint[ed] a complete picture of defendant's trustworthiness as a witness*).

In the case at bar, only one factor counsels against allowing the government to impeach the defendant with his two prior firearms convictions: the similarity of the prior convictions to the circumstances surrounding the charged crime and any prejudice that might result from this. However, the fact that there may be some similarity between the circumstances surrounding the charged offense, and the nature of the defendant's prior conviction, is not, in and of itself, a bar to using the prior convictions for impeachment. Courts of appeals have consistently affirmed the decision of trial courts to allow impeachment of a defendant with similar, even identical, prior offenses when the impeachment value of those offenses outweigh their prejudicial impact. See United States v. Meyers, 952 F.2d 914, 917 (6th Cir.) (*affirming use of armed robbery conviction to impeach defendant in Section 922(g) cases*) cert. denied, 503 U.S. 994 (1992).

In Perkins, the Ninth Circuit wrote:

here, all of the factors except the similarity of the prior offense

to the charged offense counseled in favor of admissibility. We therefore specifically noted that if ‘a bank robbery conviction serves a proper impeachment purpose, it, like evidence of other crimes, may be admissible in spite of its similarity to the offense at issue.’ Accordingly, the admission under Rule 609 of a bank robbery conviction in a bank robbery trial is not an abuse of discretion when the conviction serves a proper impeachment purpose, such as when the defendant’s testimony and credibility are central to the case, as [the defendant] took the stand and testified that he did not commit robbery. We therefore conclude that the district court did not abuse its discretion in denying [the defendant’s] motion to preclude the government from asking him about his recent prior convictions for bank robbery, which [the defendant] admitted on direct examination, and [which painted] a complete picture of [the defendant’s] trustworthiness as a witness.

937 F.2d at 1406 (internal citations omitted).

The government further submits that it should be allowed to impeach the defendant with his prior firearm convictions even if he agrees to stipulate to the existence of one of his conviction.⁷ As the Seventh Circuit reasoned in United States v. Toney, 27 F.3d 1245, 1253-54 (7th Cir. 1994), even where a defendant in a felon-in-possession case stipulates to a prior felony conviction, “[t]he jury has a right under the law to hear that any witness, whether it be the defendant or not, has a felony record that is or can be considered to be impeaching.” If anything, the fact that the jury is aware that the defendant is a previously convicted felon actually diminishes the prejudicial impact of impeaching him with his prior offense. See United States v. Halbert, 668 F.2d 489, 495 (10th Cir.) (*court considered fact that jury knew defendant was in the penitentiary for something as a factor that diminished prejudice of impeaching defendant with prior bank robbery conviction in bank robbery*

⁷. By stipulating to one of his prior felony convictions, the government need not present any additional evidence to satisfy this element of 18 U.S.C. Section 922(g)(1) in this case.

trial). cert. denied, 456 U.S. 934 (1982).

The Court can minimize any potential prejudice to the defendant by instructing the jury that a prior conviction can only be used to evaluate credibility. Jurors are presumed to follow such limiting instructions. Shannon v. United States, 512 U.S. 573 (1994). Accordingly, the government respectfully requests that the Court grant its motion in limine to impeach the defendant with his prior firearm convictions for the reasons discussed above.

V. MOTION IN LIMINE TO PROHIBIT DEFENSE OR WITNESS FROM REFERENCING PUNISHMENT FOR CHARGED OFFENSE.

If convicted of the crime charged in the indictment, the defendant faces a period of incarceration which ranges from 77 to 96 under the Federal Sentencing Guidelines, a prison sentence that substantially exceeds the sentence imposed upon him in his two previous firearm conviction cases in the Commonwealth of Pennsylvania Courts. If the jury is aware of this fact, it is possible that the jury might base its verdict on improper considerations.

The punishment for the offense charged is not a proper matter for the jury's consideration. See Shannon v. United States, 513 U.S. 573 (1994); United States v. Fisher, 10 F.3d 115, 121 (3d Cir. 1993), cert. denied, 512 U.S. 1238 (1994); United States v. Austin, 533 F.2d 879, 885-86 & n.14 (3d Cir. 1976), cert. denied, 429 U.S. 1043 (1977); see generally 1 L. Sands, J. Siffert, W. Loughlin, and S. Reiss, Modern Federal Jury Instructions -- Criminal ¶ 9.01 (1993).

In United States v. Greer, 620 F.2d 1383, 1384 (10th Cir. 1980), the court held that: “[t]he authorities are unequivocal in holding that presenting information to the jury about possible sentencing is prejudicial.” Questions and arguments addressing these issues would, therefore, be improper. Moreover, the Third Circuit has ruled that a trial court has “a duty to limit the jury’s

exposure to only that which is probative and relevant and must attempt to screen from the jury any proffer that it deems irrelevant.” United States v. Romano, 849 F.2d 812, 815 (3d Cir. 1988). An in limine order is a proper method of restricting irrelevant evidence. Id. Evidence should be excluded where it is irrelevant to the issue being tried or where it will “induce the jury to decide the case on an improper basis, commonly an emotional one, than on the evidence presented. . .”. United States v. Vretta, 790 F.2d 651, 655 (7th Cir.), cert. denied, 479 U.S. 851, 107 S. Ct. 179 (1986) (citation omitted).

Accordingly, the government respectfully requests that the Court grant its motion in limine to exclude all references by defense counsel or witnesses to punishment for the offense charged.

VI. CONCLUSION

For the foregoing reasons, the government respectfully requests that its motions in limine be

granted.

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Date _____, 1999.

CERTIFICATE OF SERVICE

I, Floyd J. Miller, do hereby certify that a copy of the Government's Trial Brief was served

upon counsel for Defendant Richard Irizarry this _____ day of _____, 1999 by placing a copy of the document in the United States with suffice postage affixed thereto which was addressed toe the following individual as the address listed below:

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