

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

United States : CRIMINAL ACTION  
 : No. 99-410-01  
 v. :  
 :  
 Robert McCulligan :

**MEMORANDUM**

**Ludwig, J.**

November 3, 2000

On August 23, 2000, defendant Robert McCulligan was sentenced to 36 months of custody, three years of supervised release, restitution of \$5,092.09, and a special assessment of \$200.<sup>1</sup> His appeal followed. The government did not appeal.

On May 1, 2000, defendant had been convicted by a jury of two counts of a five-count indictment – count one, assault on a federal officer (Deputy United States Marshal Joseph O'Donnell), 18 U.S.C. § 111(a), and count five, destruction of government property, 18 U.S.C. § 1361. He was acquitted of one count of assault on a federal officer (Deputy United States Marshal Robert Kurtz) and two counts of assault on a federal officer with a deadly or dangerous weapon (O'Donnell and Kurtz), 18 U.S.C. §111(b).

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<sup>1</sup> At the time of sentencing, defendant was serving 32 months for violations of supervised release that led to the apprehension and events that occurred in this case. United States v. McCulligan, Cr. No. 94-394-1 (E.D. Pa. July 22, 1999) (Shapiro, J.). Custody in the present sentence was ordered to run concurrently with the final 12 months of that disposition.

At sentencing, the statutory maximum for defendant's offense was determined to be three years, and he was sentenced as a career offender. The total offense level was fixed at 12, which, taken with Criminal History Category VI, produced a guidelines custody range of 30 to 37 months. This memorandum amplifies findings made at sentencing on which the guidelines calculation and statutory rulings were based.

### I. Background

On December 19, 1994, defendant pleaded guilty to conspiracy to distribute cocaine and possession with intent to distribute cocaine. PSR ¶ 7. On April 12, 1995, Judge Shapiro of this Court sentenced defendant to 84 months custody, subsequently reduced to 63 months, and five years of supervised release. Id. On March 5, 1999, supervised release was commenced. Id. On May 14, 1999, a warrant was issued for defendant's arrest for various supervised release violations. Id. ¶ 8.

On June 17, 1999, defendant was apprehended in an apartment house parking lot by members of the U.S. Marshal Service. After observing him getting into a car with his girlfriend, two deputy marshals, Joseph O'Donnell and Robert Kurtz, blocked the lot exit with their vehicle. Id. ¶ 10. When defendant's car approached to within a number of feet, O'Donnell got out of his vehicle and

directed defendant to stop. Instead, defendant accelerated in reverse.<sup>2</sup> *Id.* ¶ 11. Kurtz and O'Donnell drove forward as defendant went backward; he eventually stopped after turning the rear of his car to his left. What happened thereafter is in dispute.

Both Kurtz and O'Donnell testified that defendant, after moving in reverse and coming to a stop, drove forward and rammed the front of his car into the front of the marshals' car. Defendant admitted moving forward, but claimed that the marshals drove into his car as he was attempting to get away. The front bumpers of the vehicles interlocked, and defendant again went into reverse causing the wheels to spin and the car to fish-tail. At this point, O'Donnell was on foot, standing in close proximity to the driver's side of defendant's car. In moments, other marshals arrived, and their vehicle skidded into the rear of defendant's. Kurtz punched out the driver-side rear window of defendant's car with his service revolver, and defendant surrendered. PSR ¶ 13. Kurtz's hand was cut and required treatment, but there were no other personal injuries.

On the issue of whether defendant drove his vehicle into the marshals', or vice versa, the government and the defense each called an accident reconstruction expert. Given the guilty verdict of assault on O'Donnell and not

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<sup>2</sup> Defendant denied being aware that Kurtz and O'Donnell were marshals. Other marshals drove up in a Toyota Land Cruiser. Defendant stated that he thought the Toyota Land Cruiser was owned by a drug dealer to whom he owed money. Tr. April 28, 2000 at 44-45. It was stipulated that the vehicle had been confiscated by the marshal's service from a drug dealer. Tr. April 28, 2000 at 88.

guilty of assault on Kurtz or assault with a deadly or dangerous weapon on either marshal, the jury appears to have been unpersuaded by the government's version of the collision.

## II. The Sentencing Guidelines

The government, defendant and the Court made three different Sentencing Guidelines calculations as the result of disputes as to the statutory maximum sentence, the base offense level, and the career criminal classification. In response to a post-trial order, September 25, 2000, defendant submitted a statement of grounds for appeal, which are summarized in the question, "Did the district court violate . . . Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) when it made factfindings at sentencing that resulted in the imposition of a term of imprisonment for the violation of 18 U.S.C. § 111(a) that exceeded the maximum sentence prescribed by that statute?" Def.'s stmt. of grounds for app. 1.

### Government's Calculation<sup>3</sup>

- Base Offense Level: 15 Aggravated assault, U.S.S.G. § 2A2.2(a)
- Specific Offense Characteristics: +4 Use of a dangerous weapon, U.S.S.G. § 2A2.1(b)(2)(B)  
+2 Victim sustained bodily injury, U.S.S.G. § 2A2.2(b)(3)(A)
- Enhancements: +3 Substantial risk of bodily injury to a law enforcement official, U.S.S.G. § 3A1.2(b)
- Total Offense Level: 24
- Criminal History: VI Required by Career Offender Guideline, U.S.S.G. § 4B1.2
- Guideline Range: 100-125 months

### Defendant's Calculation

- Base Offense Level: 6 Obstructing or impeding officers, U.S.S.G. § 2A2.4
- Total Offense Level: 6
- Criminal History: V (12 criminal history points)
- Guideline Range: 9-15 months

### Court's Calculation<sup>4</sup>

- Base Offense Level: 6 Obstructing or impeding officers, U.S.S.G. § 2A2.4
- Enhancements: +2 Reckless endangerment during flight from a law enforcement officer, U.S.S.G. § 3C1.2
- Career Offender Offense Level: 12 U.S.S.G. § 4B1.2
- Total Offense Level: 12

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<sup>3</sup> The government agreed with the probation officer's calculation.

<sup>4</sup> The assault and the destruction of government property convictions were grouped, U.S.S.G. § 3D1.2(b). Each resulted the same total offense level. Destruction of government property was a base offense level of four, U.S.S.G. §§ 2B1.3(a), which was increased four levels because the amount of loss, fixed at \$5,092.09, exceeded \$5,000, U.S.S.G. §§ 2B1.3 (b)(2), 2B1.1.

- Criminal History: VI Required by Career Offender Guideline, U.S.S.G. § 4B1.2
- Guideline Range: 30-37 months

A. Applicable offense guideline: Obstructing or impeding officers with a base offense level of six – disputed. U.S.S.G. § 2A2.4.

Under the guidelines nine-step calculation process, U.S.S.G. § 1B1.1, the first step is to locate the offense of conviction in the Statutory Index. Watterson v. United States, 219 F.3d 232, 235 (3d Cir. 2000). For the offense of conviction here, 18 U.S.C. § 111, the Statutory Index refers to both § 2A2.2 and § 2A2.4.

The government advocated the use of § 2A2.2, which applies to aggravated assault. Govt.’s sent. mem. at 3. The Guidelines’ definition of aggravated assault is “a felonious assault that involved a dangerous weapon with intent to do bodily harm.” U.S.S.G. § 2A2.2, app. n.1. As at trial, the government asserted that defendant’s conduct constituted an aggravated assault and that defendant’s intent could be inferred from having driven into the marshals’ vehicle. Govt.’s sent. mem. at 3. However, the offense of conviction, as set forth in count one, was assault on a federal officer, 18 U.S.C. § 111(a), not counts three and four, the aggravated assaults, which resulted in acquittals.

“When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense charged in

the count of which the defendant was convicted.” U.S.S.G. § 1B1.2, app. n.1; see United States v. Boylan, 5 F.Supp.2d 274, 276 (D.N.J. 1995) (explaining that “the nature of the charged conduct [is] a subset of information which is likely to be narrower than ‘relevant conduct’ as defined in section 1B1.3”).<sup>5</sup>

B. Aggravated assault cross-reference – disputed. U.S.S.G. § 2A2.4(c)(1).

The government argued that § 2A2.4(c)(1)’s cross-reference to § 2A2.2 for aggravated assault should have been applied. U.S.S.G. 2A2.2, app. n.1. In addition to the selection of an applicable offense of conviction guideline, relevant conduct within the entire record may be considered in using cross-references. U.S.S.G. § 1B1.3; Watterson, 219 F.3d at 236. Relevant conduct may include evidence introduced at trial relating to acquitted charges, so long as the necessary facts were established by a preponderance of the evidence.<sup>6</sup> United States v.

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<sup>5</sup> Arguably, the minor assault guideline was the closest fit given the offense of conviction. U.S.S.G. § 2A2.3. In our Circuit, however, the guidelines prescribed for an offense of conviction should be disregarded only in the “atypical case’ in which the guideline specified in the Statutory Index is ‘inappropriate.’” Watterson, 219 F.3d at 236 (citing United States v. Crawford, 185 F.3d 1024, 1026-27 n.7 (9th Cir. 1999)). Here, obstructing or impeding officers, § 2A2.4, was not inappropriate.

<sup>6</sup> In rare instances, facts underlying the acquitted conduct must be established by clear and convincing evidence. See U.S. v. Baird, 109 F.3d 856, 865 n.8 (3d Cir. 1997) (five-level departure is not extreme enough to require proof by the clear and convincing standard); United States v. Mezas de Jesus, 217 F.3d 638, 645 (9th Cir. 2000) (nine-level departure requires proof by clear and convincing evidence). Because the government did not show by a  
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Watts, 519 U.S. 148, 156, 117 S.Ct. 633, 638 (1997). Here, it was unclear from the trial evidence that defendant used his vehicle as a deadly or dangerous weapon. The government did not prove by a preponderance that application of the cross-reference was warranted.<sup>7</sup> Tr. Aug. 23, 2000 at 10-11.

C. Reckless endangerment during flight from a law enforcement officer: Increase of two levels, for a total offense level of eight – not appealed. U.S.S.G. §§ 3C1.2, 2A2.4, app. n.1.<sup>8</sup>

D. Career offender provision applied to produce a total offense level of 12 – disputed. U.S.S.G. § 4B1.1(G).

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<sup>6</sup>(...continued)

preponderance that the cross-reference should apply, it was unnecessary to decide whether the nine-level increase in this case necessitated clear and convincing evidence.

<sup>7</sup> Similarly, the request for a three-level enhancement under § 2A2.4(b)(1) was denied because the government did not prove that defendant's conduct involved physical contact, or that he threatened the use of a dangerous weapon. U.S.S.G. § 2A2.4(b)(1).

<sup>8</sup> This enhancement was appropriate given either the government's or defendant's view of the facts. As with the base offense level of 6, it was subsumed in the career offender offense level of 12.

At sentencing, defendant asserted that the career offender provision of § 4B1.1 did not apply in part because the “Offense Statutory Maximum”<sup>9</sup> should have been fixed at one year, instead of three.<sup>10</sup> Tr. Aug. 23, 2000 at 4.

The statute, 18 U.S.C. § 111, under which defendant was charged, provides:

(a) In general.—Whoever—

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title . . . shall, where the acts in violation of this section constitute only

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<sup>9</sup> “Offense Statutory Maximum,” as defined in this guideline, is “the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record. . . .” U.S.S.G. § 4B1.1, app. n.2. Defendant also argued that he was not convicted of a crime of violence. Def.’s sent. mem. at 12; tr. Aug. 17, 2000 at 21. A “crime of violence” includes an offense that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” or (2) “. . . involves conduct that presents a serious potential risk of physical injury to another.” U.S.S.G. § 4B1.2, app. n.1. By forcibly assaulting a federal officer, 18 U.S.C. § 111(a), defendant committed a crime of violence. See United States v. Dorsey, 174 F.3d 331, 333 (3d Cir. 1999) (for purposes of the career offender guideline, a Pennsylvania simple assault is a crime of violence); United States v. Pratt, 913 F.2d 982, 993 (1st Cir. 1990) (assault is a crime of violence despite “[t]he fact that simple assault and assault on a police officer are not listed as examples of crimes of violence in the Guidelines’ Commentary”).

<sup>10</sup> A defendant is a career offender subject to a sentencing enhancement if: (1) defendant was at least eighteen years old at the time of the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1. The government has the burden of proving the elements of § 4B1.1 by a preponderance of the evidence. United States v. Hernandez, 218 F.3d 272, 278 (3d Cir. 2000).

simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than three years, or both.

(b) Enhanced penalty.--Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 111.<sup>11</sup> Our Court of Appeals has not considered the distinction between simple assault, with a one-year maximum sentence, and assault “in all other cases” with a three-year maximum. As read by the government, § 111 presents two extremes – a one-year maximum sentence for simple assault, and a 10-year maximum for assault with a deadly or dangerous weapon. Tr. Aug. 17, 2000 at 10-11. According to the government, if defendant’s conduct fell between the two extremes, the three-year maximum sentence applied. Id.

Defendant argued that he was convicted of simple assault because his conduct did not involve physical contact with Marshal O’Donnell – and he was

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<sup>11</sup> Only “forcibly assaults” was submitted to the jury: “Forcible assault means any deliberate and intentional attempt or threat to inflict physical injury on another person with force or strength when the attempt or threat is coupled with an apparent present ability to do so. In other words, it appears that the attempt or threat can be carried out. A forcible assault may be committed by a defendant without actually touching, striking, or doing bodily harm to the other person, but the actions of the defendant must have been of such a nature as to have put a reasonable person in fear of immediate bodily harm, that is, that such harm was about to occur right away.” Tr. May 1, 2000 at 4-5.

acquitted of the aggravated assaults that would have involved his use of his car as a deadly or dangerous weapon. Tr. Aug. 17, 2000 at 12. He relied on United States v. Chestaro, 197 F.3d 600 (2d Cir. 1999), which defined 18 U.S.C. § 111 in terms of “three distinct categories of conduct: (1) simple assault, which, in accord with the common-law definition, does not involve touching; (2) ‘all other cases,’ meaning assault that does involve contact but does not result in bodily injury or involve a weapon; and (3) assaults resulting in bodily injury or involving a weapon.” Chestaro, 197 F.3d at 606.<sup>12</sup>

In enacting § 111(a), Congress, by its silence, presumptively intended to adopt the common law definition of simple assault. Id. (citing United States v. Shaboni, 513 U.S. 10, 13, 115 S. Ct. 382, 384, 130 L. Ed.2d 225, 227 (1994)). Under the Model Penal Code, “a person is guilty of simple assault if he (a) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another; (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury.” Model Penal Code § 211.1 (1985); see United States v. Duran, 96 F.3d 1495, 1509 (D.C. Cir. 1996) (the Model Penal Code is used to define simple assault in § 111(a)). In construing the statute “so that each part is given effect and no part is rendered inoperative or superfluous,” Bell Atlantic Corp. v. United States, 224 F.3d 220, 224 (3d Cir. 2000), the category of “all other cases” in §

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<sup>12</sup> If this formulation requires classifying all § 111 non-contact assaults as under category (1), or excludes therefrom all assaults involving bodily contact, it is not accepted here. See Model Penal Code § 211.1 (1985).

111(a) must include assaults not coming within the common law definition of simple assault or those contemplated by § 111(b).

Modern statutes generally grade assaults according to the gravity of the intended harm. In Pennsylvania, an assault with the intent to cause serious bodily injury is a felony in the first degree, with a maximum sentence of 20 years. 18 Pa. C.S.A. §§ 1103, 2702(a)(1), (b). An assault with intent to cause bodily injury to a police officer in the performance of duty and an assault with intent to cause bodily injury with a deadly weapon are felonies in the second degree, with a maximum sentence of 10 years. 18 Pa. C.S.A. §§ 1103, 2702(a)(3), (a)(4), (b). All of these assaults can be committed without bodily contact. The Model Penal Code also differentiates an assault involving bodily injury (simple assault) from one involving serious bodily injury (aggravated assault). Model Penal Code § 211.1 (1985).<sup>13</sup>

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<sup>13</sup> Model Penal Code § 211.1:

- (1) Simple Assault. A person is guilty of assault if he:  
(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or  
(b) negligently causes bodily injury to another with a deadly weapon; or  
(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

- (2) Aggravated Assault. A person is guilty of aggravated assault if he:

- (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under

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Here, the facts of the assault on O'Donnell reasonably implicit in the count of conviction do not appear to have included physical contact. Even so, the fish-tailing movements of defendant's car when O'Donnell was standing close by are enough to support an aggravated assault, albeit not necessarily with a deadly or dangerous weapon.<sup>14</sup>

Under § 111(a)(1)'s catch-all provision for other than simple assaults, the maximum sentence is three years.<sup>15</sup> Accordingly, the offense statutory maximum was "[m]ore than 1 year, but less than 5 years," U.S.S.G. § 4B1.1(G),

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<sup>13</sup>(...continued)

circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

<sup>14</sup> Conceivably, the jury could have based the assault conviction on the government's version of the collision between the two vehicles. If so, however, with the Kurtz assault acquittals, the issue would arise of inconsistent verdicts – which, given the most likely verdict scenario of the facts, need not be reached.

<sup>15</sup> On June 26, 2000, in Apprendi v. New Jersey, \_\_ U.S. \_\_, 120 S.Ct. 2348, \_\_ L. Ed. 2d \_\_ (2000), the Court held that, except for "the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. According to Apprendi, the relevant inquiry is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id. at 2364. Because defendant received a sentence that did not exceed the maximum prescribed by 18 U.S.C. § 111(a), Apprendi would not apply unless that decision is extended to sentencing calibrations within the statute of conviction. Defendant was convicted a number of weeks before Apprendi was decided and was sentenced after Apprendi.

and coupled with the conviction of a crime of violence, supra note 9, the career offender classification was applicable.

III. The sentence of 36 months runs concurrently with the final 12 months of the sentence for violation of supervised release – not appealed.

The issue is whether discretion exists under § 5G1.3(c) to impose a concurrent, partially concurrent, or consecutive sentence. Govt.'s sent. mem at 13; def.'s sent. mem. at 9. Inasmuch as the government did not appeal, this sentencing dispute may not have been preserved for review.

Application note six to § 5G1.3(c):

If the defendant was on federal or state probation . . . at the time of the instant offense, and has had such probation . . . revoked, the sentence of the instant offense should be imposed to run consecutively to the term imposed for the violation of probation . . . in order to provide an incremental penalty for the violation of probation[.]

U.S.S.G. § 5G1.3, app. n.6. Our Court of Appeals has not ruled on whether application note six reposes discretion in the sentencing judge. Other Courts of Appeals are divided. Compare United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999) (not mandatory based on use of “should” rather than “shall”) and United States v. Walker, 98 F.3d 944, 945 (7th Cir. 1996) (not mandatory, but a strong presumption exists in favor of consecutive sentencing), with United States v. Goldman, 2000 WL 1448518, at \*2 (8th Cir. Sept. 29, 2000) (mandatory notwithstanding the use of the term “should”), United States v. Alexander, 100

F.3d 24, 26-27 (5th Cir. 1996) (per curiam) (same), and United States v. Gondek, 65 F.3d 1, 2-3 (1st Cir. 1995) (holding an earlier version of application note six to be mandatory).

Last year, in United States v. Maria, the Court of Appeals for the Second Circuit held that the note's use of the word "should" "implies, suggests, and recommends, but does not require." Maria, 186 F.3d at 71. Persuaded by that reasoning – and believing that a partial concurrence was consistent with fairness – defendant's 36-month sentence was imposed concurrently with the final 12 months of the sentence being served for the violations of supervised release.

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Edmund V. Ludwig, J.