

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 18-3165

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UNITED STATES OF AMERICA

v.

JAMAR LYNN MCMILLAN,  
Appellant

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On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(M.D. Pa. No. 1-15-cr-00305-001)  
District Judge: Honorable Christopher C. Conner

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)  
May 3, 2019

Before: RESTREPO, PORTER and FISHER, *Circuit Judges*.

(Opinion Filed: May 29, 2019)

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OPINION\*

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FISHER, *Circuit Judge*.

\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7  
does not constitute binding precedent.

Jamar McMillan appeals his conviction for possession with intent to distribute heroin, phencyclidine (PCP), and synthetic marijuana; possession of a firearm in furtherance of drug trafficking; and being a felon in possession of a firearm. He also challenges his designation as a career offender for sentencing purposes. We will affirm his conviction and sentence.

I.

Officer Nicholas Licata of the Harrisburg Bureau of Police received an internal Bureau email stating that Jamar McMillan was a person of interest in an arson. The email indicated that McMillan drove his girlfriend's black Lexus and white Jeep, was residing at a particular address, and that “[s]omeone close to the investigation” said McMillan “ma[de] his living by dealing drugs.”<sup>1</sup> McMillan was also the subject of an outstanding arrest warrant. Officer Licata set out to run surveillance at McMillan’s suspected address.

When Officer Licata arrived, he saw McMillan leave the house, walk to a black Lexus, “mill[] around for a few minutes,” and then walk back inside.<sup>2</sup> Officer Licata did not attempt to arrest McMillan at that time, but returned two days later after confirming that the warrant for his arrest was still active. McMillan, the black Lexus, and a white Jeep were at the residence, and this time another man was there with McMillan. The two men went to the Lexus, where McMillan took child seats from the trunk and gave them to

<sup>1</sup> App. 71.

<sup>2</sup> App. 349.

the second man, who transferred them to the white Jeep. McMillan then went up to the driver's door of the Lexus and "lean[ed] in . . . doing something in the area of the center console in the driver's seat area."<sup>3</sup>

At this point, backup officers began to arrive, and the individual with McMillan "[took] off running."<sup>4</sup> McMillan paused briefly, but then closed the driver's door of the Lexus and ran. The officers stopped him, arrested him, and searched him. They found a key to a Lexus, a cell phone, a vial containing brown liquid—which Officer Licata recognized as PCP—a "corner tied bag" of what appeared to be synthetic marijuana, and four bundles of heroin (with approximately ten bags per bundle).<sup>5</sup> McMillan had no paraphernalia typical for a heroin user, such as syringes, spoons, pipes, or lighters.

Officer Licata next searched the Lexus "based on the fact that [he] saw Mr. McMillan inside of the vehicle moving items around, as well as the drugs that he possessed."<sup>6</sup> On the driver's seat, Officer Licata found a pouch that contained a loaded .45 caliber gun and a facemask. Officers also discovered another small bag of suspected synthetic marijuana in the trunk.

<sup>3</sup> App. 350.

<sup>4</sup> App. 350.

<sup>5</sup> App. 351. Much of what appeared to be heroin turned out to be fake, and the synthetic marijuana weighed less than thirty grams. Officer Licata testified that heroin users might use a few bags to three bundles daily depending on personal tolerance, but that a vial of PCP is something usually found on a dealer, not a user.

<sup>6</sup> App. 170.

McMillan was charged with possession with intent to distribute heroin, PCP, and synthetic marijuana, as well as possession of the firearm in furtherance of drug trafficking and being a felon in possession of a firearm.<sup>7</sup> McMillan moved to suppress evidence recovered from the Lexus, arguing that the officers lacked probable cause for the search. The District Court denied the motion.<sup>8</sup> McMillan's case went to trial, and a jury found him guilty on all five counts. He was convicted and sentenced to 240 months' imprisonment after the court determined that his two prior Pennsylvania drug convictions<sup>9</sup> were predicate "controlled substance" offenses under the U.S. Sentencing Guidelines career offender enhancement.<sup>10</sup>

## II.<sup>11</sup>

McMillan challenges his conviction, arguing that the District Court erred in denying his motion to suppress. In reviewing the denial of a motion to suppress, we review factual findings for clear error, and exercise plenary review over application of law to fact.<sup>12</sup> McMillan also challenges his sentence, arguing that the court erred in classifying him as a career offender. Our review of whether an offense constitutes a

<sup>7</sup> The operative five-count indictment charged McMillan under 21 U.S.C. § 841(a)(1) and (b)(1)(C), 18 U.S.C. § 924(c)(1)(A), and 18 U.S.C. § 922(g).

<sup>8</sup> McMillan later sought reconsideration of his motion to suppress. The District Court denied reconsideration.

<sup>9</sup> See 35 Pa. Stat. Ann. § 780-113(a)(30).

<sup>10</sup> U.S.S.G. §§ 4B1.1(a), 4B1.2(b).

<sup>11</sup> The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

<sup>12</sup> *United States v. Burnett*, 773 F.3d 122, 130 (3d Cir. 2014).

controlled substances offense for the purpose of career offender status under the Guidelines is plenary.<sup>13</sup>

A.

McMillan argues that the District Court erred in denying his motion to suppress because officers searched his vehicle without a warrant or probable cause. Under the “automobile exception,” police may conduct a warrantless search of a vehicle without offending the Fourth Amendment if they have probable cause to believe contraband is in the vehicle.<sup>14</sup> This extends to containers found in a vehicle when an officer has “probable cause to believe contraband or evidence is contained” therein.<sup>15</sup> We evaluate “probable cause” in light of all of the circumstances leading to a search.<sup>16</sup> If circumstances “indicate[] a fair probability” of finding contraband, there is probable cause.<sup>17</sup>

McMillan argues that the nonspecific tip that he dealt drugs, his flight from officers, the drugs on him at the time of his arrest, and his proximity to the Lexus did not amount to probable cause because officers did not see him engage in drug transactions or carry a firearm, and because they did not see contraband in the Lexus before the search.

<sup>13</sup> *United States v. Shabazz*, 233 F.3d 730, 731 (3d Cir. 2000).

<sup>14</sup> *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (per curiam) (citing *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam)).

<sup>15</sup> *California v. Acevedo*, 500 U.S. 565, 580 (1991).

<sup>16</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>17</sup> *United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002); *see also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (“[P]robable cause to search [exists] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found[.]”).

We disagree. The record demonstrates that there was at least a fair probability of finding contraband in the Lexus, justifying the search. First, there was the tip from a source who alleged that McMillan sold drugs for a living. Second, Officer Licata saw McMillan in the Lexus doing something near the center console. Third, when McMillan saw the officers moving in he closed the door of the Lexus and ran. This sudden and deliberate flight suggested wrongdoing.<sup>18</sup> Consistent with the tip that McMillan sold drugs, there were drugs in McMillan's pockets and indicia that McMillan was a dealer rather than a user. Based on the totality of this circumstantial evidence, there was probable cause to search the vehicle for contraband.<sup>19</sup>

B.

A defendant being sentenced for a controlled substances offense who has two prior "controlled substance" convictions is a career offender under the U.S. Sentencing Guidelines.<sup>20</sup> Determining whether a conviction is a "controlled substance" conviction requires comparing the elements of the statute of conviction with the Guidelines definition.<sup>21</sup> If the statute of conviction is overbroad, such that it criminalizes more conduct than the Guidelines definition, then it cannot be a qualifying offense.<sup>22</sup>

<sup>18</sup> See *United States v. Laville*, 480 F.3d 187, 195 (3d Cir. 2007).

<sup>19</sup> See *Burton*, 288 F.3d at 103.

<sup>20</sup> U.S.S.G. § 4B1.1(a).

<sup>21</sup> *United States v. Glass*, 904 F.3d 319, 321 (3d Cir. 2018).

<sup>22</sup> *Id.*

McMillan argues that his two prior convictions under a Pennsylvania drug offenses statute<sup>23</sup> are not “controlled substance” offenses because the statute criminalizes mere offers to buy or sell. That argument is foreclosed by our precedent,<sup>24</sup> and a panel of this Court cannot abrogate that precedent.<sup>25</sup> McMillan argues that this Court erred in our earlier consideration of the Pennsylvania statute of conviction because we failed to consider case law from the Pennsylvania Superior Court criminalizing mere “solicitation.”<sup>26</sup> He argues that the cited Pennsylvania Superior Court case shows a “realistic probability” that Pennsylvania uses his statute of conviction to prosecute individuals who offer to buy or sell controlled substances.<sup>27</sup> However, in another recent precedential opinion, this Court specifically considered the Pennsylvania Superior Court case McMillan points to, and decided that it does not undermine our determination that the Pennsylvania statute does not criminalize mere “offers to sell,” nor is the statute otherwise overbroad.<sup>28</sup>

<sup>23</sup> See 35 Pa. Stat. Ann. § 780-113(a)(30). McMillan’s convictions included a 2003 conviction for possession with intent to manufacture or deliver cocaine and a 2005 conviction for unlawful delivery of a controlled substance.

<sup>24</sup> See *Glass*, 904 F.3d at 324.

<sup>25</sup> 3d Cir. I.O.P. 9.1 (2018); *United States v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009).

<sup>26</sup> Appellant’s Br. 15 (citing *Commonwealth v. Donahue*, 630 A.2d 1238 (Pa. Super. Ct. 1993)).

<sup>27</sup> Appellant’s Br. 16 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

<sup>28</sup> *United States v. Daniels*, 915 F.3d 148, 163-64 (3d Cir. 2019) (“Daniels purportedly cites to an authority suggesting that Pennsylvania does in fact prosecute offers to sell. . . . We do not agree.” (citing *Donahue*, 630 A.2d at 1242-44)).

III.

For the reasons stated in this opinion, we will affirm the conviction and sentence.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 18-3165

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v.

JAMAR LYNN MCMILLAN,  
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On Appeal from the United States District Court  
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District Judge: Honorable Christopher C. Conner

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)  
May 3, 2019

Before: RESTREPO, PORTER and FISHER, Circuit Judges.

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JUDGMENT

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This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on May 3, 2019. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered September 27, 2018, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

Costs shall not be taxed.

ATTEST:

s/ Patricia S. Dodszuweit  
Clerk

Dated: May 29, 2019

## UNITED STATES DISTRICT COURT

Middle District of Pennsylvania

UNITED STATES OF AMERICA	)	JUDGMENT IN A CRIMINAL CASE
v.	)	
JAMAR LYNN MCMILLAN	)	Case Number: 1:15-CR-0305-01
	)	USM Number: 74301-067
	)	Wendy J.F. Grella, Esquire
	)	Defendant's Attorney

**THE DEFENDANT:**

pleaded guilty to count(s) \_\_\_\_\_

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) 1, 2, 3, 4 & 5 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21:841(a)(1)	Possession with Intent to Distribute Heroin	8/14/2015	1
21:841(a)(1)	Possession with Intent to Distribute Phencyclidine (PCP)	8/14/2015	2
(See Page 2 for additional offenses)			

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) \_\_\_\_\_

Count(s) 1, 2 & 3 of the Indictment  is  are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/21/0218  
Date of Imposition of Judgment

S/ Christopher C. Conner  
Signature of Judge

CHRISTOPHER C. CONNER, CHIEF JUDGE  
Name and Title of Judge

9/26/2018  
Date

DEFENDANT: JAMAR LYNN MCMILLAN  
CASE NUMBER: 1:15-CR-0305-01

## **ADDITIONAL COUNTS OF CONVICTION**

DEFENDANT: JAMAR LYNN MCMILLAN  
CASE NUMBER: 1:15-CR-0305-01

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Two Hundred Forty (240) Months. This term represents a term of 180 months on each of Counts 1, 2, and 3, and 120 months on Count 5, all of which are to be served concurrently, and a term of 60 months on Count 4, to be served consecutively to Counts 1, 2, 3, and 5.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that a facility as close as possible to Harrisburg, Pennsylvania, be designated as the place of confinement. The Court further recommends that the defendant be considered for eligibility and participation in the Bureau of Prison's residential drug and alcohol treatment program (RDAP).

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on \_\_\_\_\_.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JAMAR LYNN MCMILLAN

CASE NUMBER: 1:15-CR-0305-01

## **SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of :

Four (4) Years. This term consists of terms of three years on each of Counts 1, 2, 3 and 5, to be served concurrently, and four years on Count 4, also be served concurrently. (See Page 6 for additional conditions of supervised release.)

## **MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JAMAR LYNN MCMILLAN

CASE NUMBER: 1:15-CR-0305-01

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: JAMAR LYNN MCMILLAN  
CASE NUMBER: 1:15-CR-0305-01

### **ADDITIONAL SUPERVISED RELEASE TERMS**

1. You must participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.) which could include an evaluation and completion of any recommended treatment.
2. You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must disclose the prescription information to the probation officer and follow the instructions on the prescription.
3. You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.
4. You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption, except with the prior approval of the probation officer.
5. You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program which could include an evaluation and completion of any recommended treatment. You must take all mental health medications that are prescribed by your treating physician.
6. You must submit your person, property, house, residence, vehicle, papers, computers, other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. You must apply all monies received from income tax refunds, lottery winnings, judgments, and/or other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.
8. You shall cooperate in the collection of a DNA sample as directed by the probation officer, unless a sample was collected during imprisonment.

DEFENDANT: JAMAR LYNN MCMILLAN

CASE NUMBER: 1:15-CR-0305-01

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<b>TOTALS</b>	<b>Assessment</b>	<b>JVTA Assessment*</b>	<b>Fine</b>	<b>Restitution</b>
	\$ 500.00	\$ 0.00	\$ 1,500.00	\$ 0.00

The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<b>Name of Payee</b>	<b>Total Loss**</b>	<b>Restitution Ordered</b>	<b>Priority or Percentage</b>
<b>TOTALS</b>	\$ 0.00	\$ 0.00	

Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the  fine  restitution.

the interest requirement for the  fine  restitution is modified as follows:

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JAMAR LYNN MCMILLAN  
CASE NUMBER: 1:15-CR-0305-01

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A  Lump sum payment of \$ 500.00 due immediately, balance due  
 not later than \_\_\_\_\_, or  
 in accordance with  C,  D,  E, or  F below; or

B  Payment to begin immediately (may be combined with  C,  D, or  F below); or

C  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after the date of this judgment; or

D  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E  Payment during the term of supervised release will commence within \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F  Special instructions regarding the payment of criminal monetary penalties:

The special assessment consists of \$100 on each of Counts 1 through 5. The fine is applicable to Count 1. During the term of imprisonment, the fine is payable every three months in an amount after a telephone allowance, equal to 50 percent of the funds deposited into the defendant's inmate trust fund account. In the event the fine is not paid in full prior to the commencement of supervised release, the defendant shall, as a condition of supervised release, satisfy the amount due in monthly installments of no less than \$50, to commence 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.  
 The defendant shall pay the following court cost(s):  
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA  
HARRISBURG DIVISION

UNITED STATES OF AMERICA, ) CASE NO.  
Plaintiff ) 1:15-CR-00305-CCC-01  
vs. )  
JAMAR LYNN MCMILLAN, )  
Defendant )  
\_\_\_\_\_  
)

TRANSCRIPT OF CRIMINAL JURY TRIAL, DAY 3  
BEFORE THE HONORABLE CHRISTOPHER C. CONNER  
UNITED STATES CHIEF DISTRICT JUDGE  
1 MARCH 2018 - 8:55 A.M.

## APPEARANCES:

### For the Government:

Chelsea B. Schinnour, Esq., AUSA  
Carlo D. Marchioli, Esq., AUSA  
U.S. Attorney's Office  
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(717) 221-4482

**For the Defendant:**

Wendy J.F. Grella, Esq.  
1119 North Front Street, Suite 1  
Harrisburg, PA 17102  
(717) 234-6001

## Court Reporter:

Wesley J. Armstrong, RMR  
Official Court Reporter  
U.S. Courthouse & Federal Building  
228 Walnut Street  
Harrisburg, PA 17101  
(717) 542-5569

Proceedings recorded by machine shorthand; transcript produced by computer aided transcription.

1 of firearm; four, whether the firearm is stolen; five, whether  
2 the defendant possesses the firearm legally or illegally; six,  
3 whether the firearm is loaded; seven, the time and  
4 circumstances under which the firearm is found; and eight,  
5 proximity to drugs or drug profits.

6                   Ladies and gentlemen, in addition to your verdict on  
7 Counts 1 through 4 of the indictment the verdict form asks you  
8 to answer two special interrogatories, or questions. Those two  
9 questions are, one, did the defendant Mr. McMillan on or about  
10 August 14, 2015 knowingly possess a Heckler & Koch .45 caliber  
11 handgun; and two, did the defendant Mr. McMillan possess that  
12 firearm in or affecting interstate or foreign commerce as  
13 defined in these instructions.

14                   In or affecting interstate commerce defined. The  
15 second interrogatory asks whether the firearm was, whether the  
16 firearm specified was in or affecting interstate or foreign  
17 commerce. This means that the government must prove that at  
18 some time before the defendant's possession the firearm had  
19 travelled in interstate commerce. It is sufficient for the  
20 government to satisfy this element that proving that any time  
21 prior to the date in the indictment the firearm crossed a state  
22 line.

23                   The government does not need to prove that  
24 Mr. McMillan himself carried it across the state line or to  
25 prove who carried it across or to how it was transported. It

1 is also not necessary for the government to prove that  
2 Mr. McMillan knew that the firearm had travelled in interstate  
3 commerce. In this regard there has been evidence that the  
4 firearm in question was manufactured in a different state other  
5 than the state where Mr. McMillan is charged with possessing  
6 it. You are permitted to infer from this fact that the firearm  
7 travelled in interstate commerce. However, you are not  
8 required to do so.

9           Having instructed you on the elements of the offenses  
10 charged in the indictment, I remind you that the burden lies on  
11 the government to prove each and every element of each offense  
12 beyond a reasonable doubt. This concludes my instructions  
13 explaining the law regarding the testimony and other evidence  
14 and the offenses charged.

15           Now let me explain some things about your  
16 deliberations in the jury room and your possible verdict. The  
17 first thing that you should do in the jury room is choose  
18 someone to be your foreperson. That person will speak for the  
19 jury here in court. He or she will also preside over your  
20 deliberations. However, the views and vote of the foreperson  
21 are entitled to no greater weight than those of any other  
22 juror.

23           Second, I want to remind you that your verdict,  
24 whether it is guilty or not guilty, must be unanimous. To find  
25 the defendant guilty of each offense every one of you must

1 what is your verdict, the jury has selected guilty.

2                   On question 4-A, if you find Mr. McMillan guilty of  
3 possession of a firearm in furtherance of a drug trafficking  
4 crime on or about July 1, 2015 to August 14, 2015, please  
5 indicate the drug trafficking crime that you have found Mr.  
6 McMillan committed, mark all that apply. All three are applied  
7 with respect to each substance.

8                   With respect to the special interrogatories, 1, did  
9 defendant Jamar McMillan on or about August 14, 2015 knowingly  
10 possess a Heckler & Koch .45 caliber handgun, the answer the  
11 jury has picked is yes. Question number 2, was the firearm  
12 described in special interrogatory number 1 possessed in or  
13 affecting interstate or foreign commerce, the jury has selected  
14 yes, and the verdict is properly signed by our foreperson and  
15 dated. Counsel, would either party exercise the right to a  
16 poll of the jury?

17                   MS. SCHINNOUR: No, Your Honor, thank you.

18                   MS. GRELLA: No, Your Honor.

19                   THE COURT: All right. Thank you. It appearing that  
20 the jurors have reached a unanimous verdict on this part of the  
21 jury proceeding, the clerk of court is directed to enter a  
22 judgment in accordance with that verdict. Ladies and  
23 gentlemen, there is an additional part of this case.

24                   Now that you have completed your initial  
25 deliberations there is one additional matter for you to

1 consider. Count 5 of the indictment charges Mr. McMillan with  
2 being a felon in possession of a firearm on or about August 14,  
3 2015, which is a separate violation of federal law Section  
4 922(g).

5 It is necessarily separate and distinct from the  
6 charge of possession of a firearm in furtherance of a drug  
7 trafficking crime. To find Mr. McMillan guilty of this offense  
8 you must find that the government proved each of the following  
9 three elements beyond a reasonable doubt.

10 First, that Mr. McMillan was previously convicted of  
11 a felony, that is a crime punishable by imprisonment for a term  
12 exceeding one year. Second, that after this conviction  
13 Mr. McMillan knowingly possessed a Heckler & Koch .45 caliber  
14 handgun. And third, that Mr. McMillan's possession was in or  
15 affecting interstate commerce as that term has already been  
16 defined for you.

17 By answering the two special interrogatories on the  
18 verdict form in the affirmative you have already determined  
19 that the government has satisfied its burden of proving the  
20 second and third elements of this offense. The only remaining  
21 issue for you to decide with respect to Count 5 is whether the  
22 government has satisfied its burden of proving the first  
23 element of the offense beyond a reasonable doubt, that is  
24 whether Mr. McMillan had been convicted of a crime punishable  
25 by imprisonment for a term exceeding one year prior to August

1 14, 2015. Counsel, would you please approach?

2 (Side bar at 2:52 p.m.)

3 THE COURT: The government may present evidence of the  
4 length of the punishment, but this is clearly a matter that I  
5 would think we could stipulate to. What is your client  
6 prepared to do, Ms. Grella?

7 MS. GRELLA: My client wants her to present testimony.

8 MS. SCHINNOUR: And, Your Honor, there is in the  
9 evidence Government's Exhibit 42 and 43 a certified copy of  
10 conviction. Those convictions do indicate what the sentence  
11 was within their document, and the government would represent  
12 or redirect the jury to Government's Exhibits 42 and 43.

13 THE COURT: All right. I think that can be done by  
14 oral argument as opposed to your, because it's already in  
15 evidence. I don't think they need a separate sponsoring  
16 witness, but if your client would insist on that then I think  
17 you need to identify by exhibit number what those documents  
18 are, direct the jury to, the jury's attention to those  
19 documents for purposes of proving the first element of that  
20 charge.

21 MS. SCHINNOUR: Okay.

22 THE COURT: Okay?

23 MS. SCHINNOUR: Thank you, Your Honor.

24 (Side bar concluded at 2:54 p.m.)

25 THE COURT: Ladies and gentlemen, at this time Ms.

1 Schinnour will direct your attention to the evidence which they  
2 believe establishes the first element. As I said, the second  
3 two elements are already determined. That first element that  
4 the government must prove beyond a reasonable doubt is whether  
5 Mr. McMillan had been convicted of a crime punishable by  
6 imprisonment for a term exceeding one year prior to August 14,  
7 2015. The government may present evidence to you on that.

8 Ms. Schinnour?

9 MS. SCHINNOUR: Thank you, Your Honor. At this time I  
10 would like to direct the jury's attention to two previously  
11 submitted exhibits. Should I --

12 THE COURT: No, you can do it from counsel table.

13 MS. SCHINNOUR: For two previously submitted exhibits  
14 which you may have examined in your previous deliberations.  
15 These are Government's Exhibits 42 and 43. These documents are  
16 both certified copies of conviction records pertaining to  
17 Mr. Jamar L. McMillan with a date of birth of June 8th of 1984.

18 Within these documents, and I'll begin with  
19 Government's Exhibit 42, there is information related to a  
20 prior conviction which lists as its grade an "F", which the  
21 government submits is a felony level offense. On page 2 of the  
22 document it does indicate that on December 15th of 2003 there  
23 was a guilty plea to this offense which is labeled as a felony  
24 offense, and the period of confinement or the potential penalty  
25 of this offense was a minimum of two years. Additionally if

1 you look at the --

2 (Brief pause.)

3 MS. SCHINNOUR: The fourth page of the document at  
4 line 5 it does indicate that on that day on December 15th of  
5 2003 the defendant in open court pleads guilty to Count 1 and  
6 it indicates herein that he was to serve a sentence of one to  
7 two years in SCI Camp Hill.

8 Moving on to Government's Exhibit 43, which has been  
9 previously submitted to the jury, this is again a certified  
10 conviction record. This conviction record relates to Jamar  
11 McMillan, with a date of birth of June 8th of 1984. This  
12 record indicates that on April 6th of 2006 there was a guilty  
13 plea to a felony level charge, indicated here that the minimum  
14 penalty for that offense was one year and the maximum was  
15 three.

16 And moving on to page 4 of the document it does  
17 indicate at line 4 that on April 6th of 2006 there was a  
18 sentence imposed in that case and the defendant was ordered to  
19 serve one to three years in SCI Camp Hill. I will note for the  
20 jury that the SCI Camp Hill is indeed a prison facility here in  
21 the state of Pennsylvania.

22 THE COURT: All right.

23 MS. SCHINNOUR: Thank you, Your Honor.

24 THE COURT: Ms. Grella, is there any evidence that you  
25 would like to present?

1 MS. GRELLA: No, Your Honor.

2 THE COURT: All right. Ladies and gentlemen, at this  
3 time I will provide you with the second verdict form, which  
4 asks the single question, on the charge of being a felon in  
5 possession of a firearm on or about August 14, 2015 against  
6 defendant Jamar McMillan, what is your verdict. I invite you  
7 now to return to the jury deliberation room to complete this  
8 second and final verdict form. Ms. McKinney, would you kindly  
9 escort the jury?

10 (Jury deliberations continued at 2:56 p.m.)

11 THE COURT: We are in recess until the jury returns a  
12 second verdict.

13 (Recess taken at 2:56 p.m.)

14 (Trial resumed at 3:17 p.m.)

15 THE COURT: Please be seated. The court has been  
16 apprised of a verdict on the bifurcated phase of this  
17 proceeding with respect to Count 5 and the charge of  
18 Mr. McMillan being a felon in possession of a firearm in  
19 violation of Section 922(g)(1). Ms. McKinney, would you please  
20 escort the jury?

21 COURTRoom DEPUTY: Yes.

22 (Jury seated at 3:19 p.m.)

23 THE COURT: Ladies and gentlemen, please be seated.  
24 Again I would ask the foreperson to please stand, and I do have  
25 the same two questions for you. Have you reached a verdict on

1 the second aspect of this proceeding, the bifurcated Count 5  
2 matter?

3 JURY FOREPERSON: Yes.

4 THE COURT: Is your verdict unanimous?

5 JURY FOREPERSON: Yes.

6 THE COURT: If you would please hand the envelope to  
7 Ms. McKinney?

8 (Brief pause.)

9 THE COURT: The verdict form is in order. Ladies and  
10 gentlemen, I will now publish the verdict. Count 5, on the  
11 charge of being a felon in possession of a firearm on or about  
12 August 14, 2015 against defendant Jamar McMillan, what is your  
13 verdict, the jury has selected guilty. The form is  
14 appropriately signed and dated by the foreperson. Counsel,  
15 would either party like to exercise their right to a poll of  
16 the jury with respect to this aspect?

17 MS. SCHINNOUR: No, Your Honor, thank you.

18 MS. GRELLA: No, Your Honor.

19 THE COURT: Very good. Thank you. It appearing that  
20 the jurors have reached a unanimous verdict, the clerk of court  
21 is directed to enter judgment in accordance with the verdict.  
22 Ms. McKinney, here is the official verdict slip.

23 COURTROOM DEPUTY: Thank you.

24 THE COURT: Members of the jury, I would like to speak  
25 with you privately very briefly in the jury room before you