

NO: _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHIE WHEELER,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether to be guilty of a violation of 18 U.S.C. §111(b), which requires the use of a deadly weapon while forcibly assaulting, resisting, opposing, impeding, intimidating or interfering a law enforcement officer, is an intent to cause bodily injury by one attempting to elude arrest by recklessly driving a vehicle a required element of the offense.
2. If no intent to cause bodily injury is required to constitute use of a deadly weapon, without a finding of fact by a jury or an admission by a defendant during a guilty plea, can a Court find as a fact that defendant's reckless actions in attempting to elude arrest were capable of causing serious bodily injury or death of another person in the absence of a highspeed chase or any bodily injury suffered by anyone.
3. In a case of a violation of 18 U.S.C. §111(b), in the absence of a finding by a jury or an admission by a defendant as part of a guilty plea of an admission of an intent to commit bodily injury, can a sentencing judge find Sentencing Guideline §2A2.2 not §2A2.4 applies.

PARTIES TO PROCEEDING

The Parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

1. United States of America
2. Richie Wheeler

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING	ii
TABLE OF CONTENTS	iii
INDEX OF APPENDICES	v
TABLE OF AUTHORITIES	vi
UNITED STATES STATUTES	vii
UNITED STATES SENTENCING GUIDELINES	vii
DECISION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
A. Background	2
B. The Plea and Sentence	3
C. Appeal	8
REASON FOR GRANTING THE WRIT	9
I. Whether to be guilty of a violation of 18 U.S.C. §111(b), which requires the use of a deadly weapon while forcibly assaulting, resisting, opposing, impeding, intimidating or interfering a law enforcement officer, is an intent to cause bodily injury by one attempting to elude arrest by recklessly driving a vehicle a required element of the offense.	9
II. If no intent to cause bodily injury is required to constitute use of a deadly weapon, without a finding of fact by a jury or an admission by a defendant during a guilty plea, can a Court find as a fact that defendant's reckless actions in attempting to elude arrest were	

capable of causing serious bodily injury or death of another person in the absence of a highspeed chase or any bodily injury suffered by anyone	16
III. In a case of a violation of 18 U.S.C. §111(b), in the absence of a finding by a jury or an admission by a defendant as part of a guilty plea of an admission of an intent to commit bodily injury, can a sentencing judge find Sentencing Guideline §2A2.2 not §2A2.4 applies	18
CONCLUSION	22

INDEX OF APPENDICES

Docket Sheet	PA 1-7
Notice of Appeal filed on February 5, 2020	PA 8
Judgment of Conviction for D.N.J Criminal Number: 2:28-cr-485	PA 9-13
Indictment	PA 14-18
Plea Agreement	PA 19-26
Plea Transcript dated July 24, 2019	PA 27-41
Sentence Transcript dated February 3, 2020	PA 42-65
Opinion of the Third Circuit Court of Appeals	PA 66-71
First Revised Opinion of the Third Circuit Court of Appeals	PA 72-77
Judgment of the Third Circuit Court of Appeals	PA 78-82

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Blakely v. Washington</u> , 542 U.S. 276, 128 S. Ct. 2531, 159 L.Ed. 2d 403 (2004)	9
<u>Bowles v. Seminole Rock and Sand Co.</u> , 325 U.S. 410, 414 (1995)	12
<u>In re Winship</u> , 397 U.S. 355, 364 (1970)	9
<u>Jones v. United States</u> , 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999)	10
<u>Liparota v. United States</u> , 471 U.S. 419, 427 (1985)	13
<u>United States v. Apprendi</u> , U.S. 530 469 (2000)	10
<u>United States v. Arrington</u> , 309 F. 3d. 40, 45 (D.C. Cir. 2002)	13
<u>United States v. Barcenas-Yanez</u> , 826 F.3d 752, 756 (4 th Cir. 2016)	14
<u>United States v. Booker</u> , 543 U.S. 220 (2005)	9
<u>United States v. Garcia-Jimenez</u> , 807 F.3d 1079, 1086 (9 th Cir. 2015)	14
<u>United States v. Grier</u> , 437 F.3d. 330, (3 rd Cir. 2007)	18
<u>United States v. Gumbs</u> , 964 F.3d 1340, 1350 (11 th Cir. 2020)	11
<u>United States v. Kikumura</u> , 918 F.2d at 1100 (3 rd Cir. 1990)	19
<u>United States v. Morris</u> , 131 F. 3d. 1136, 1138 (5 th Cir. 1997)	13
<u>United States v. Zaragoza-Fernandez</u> , 217 F. 3d. 31,33 (1 st Cir. 2000)	13

UNITED STATES STATUTES

	<u>Page</u>
18 U.S.C. § 3231	1
18 U.S.C. § 3742(a)	2
18 U.S.C. 111 (a)(1) and (b)	2
18 U.S.C. 111 (a)(2)	11
21 U.S.C. 841(a)(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1254(1)	2

UNITED STATES SENTENCING GUIDELINES

USSG §1B1.1	1
USSG §2A2.2	6
USSG §2A2.4	6
USSG §2A2.4(a)	6
USSG §2A2.4(b)(1)	21
USSG §3A1.2(c)(2)	6
USSG §3D1.4	6
USSG §3E1.1(c) and (b)	21

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TERM _____

RICHIE WHEELER

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richie Wheeler, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

DECISION BELOW

The United States Court of Appeals for the Third Circuit affirmed Petitioner's conviction and sentence with a non-precedential Revised Opinion issued on November 20, 2020 (PA 72-77)¹

JURISDICTION

The United States Court for the District of New Jersey (D.N.J. _____) exercised jurisdiction over this Federal criminal case pursuant to 18 U.S.C. § 3231. The Third Circuit Court of Appeals (No. 20-1262) has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The United States Court of Appeals for the

¹PA refers to Petitioner's Appendix

Third Circuit entered judgment on November 20, 2020 (PA 78-82). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely filed within 90 days of the entry of judgment.

STATEMENT OF CASE

A. Background

On August 15, 2018, a Federal Grand Jury returned a 4 Count Indictment against defendant Richie Wheeler and co-defendant Vincent Carlisle. Counts 1 through 3 charged defendant with assaulting, resisting or impeding 3 officers or employees by use of deadly or dangerous weapon, a Black Dodge Charger motor vehicle on March 8, 2018 in violation of 18 U.S.C. 111 (a)(1) and (b). Count 4 charged defendant Wheeler and co-defendant Carlisle with possession of cocaine with intent to distribute in violation of 21 U.S.C. 841(a)(1) (PA 14-18).

On July 24, 2019, the defendant entered a plea of guilty to counts 1 through 3 of Indictment 18-485 before the Honorable Susan D. Wigenton, U.S.D.C.J. Count 4 of the Indictment was dismissed as part of the plea agreement (PA 1-7).

On February 3, 2020, Judge Wigenton sentenced defendant to 120 months incarceration on each count of the Indictment, concurrent with each other, and further imposed a 3 year period of parole supervision upon release from prison (PA 9-13).

Notice of Appeal was filed on February 5, 2020 (PA 8).

On October 8, 2020, the Third Circuit Court of Appeals affirmed defendant's sentence (PA 72-77).

Petitioner filed for a rehearing on October 15, 2020. On November 20, 2020, the Third Circuit granted the Motion for rehearing and issued a revised Opinion again affirming defendant's sentence. The request for an En Banc Hearing was denied.

B. The Plea and Sentence

Pursuant to a plea agreement with the Government on May 29, 2019, the parties stipulated to the following facts.

a. On or about March 8, 2018, Wheeler was the driver of a black Dodge Charger motor vehicle bearing Missouri Registration Number AK8EOD ("the Dodge Charger").

b. While Wheeler was the driver of the Dodge Charger, he became aware that law enforcement officers were attempting to arrest him by blocking the Dodge Charger.²

c. After becoming aware that law enforcement officers were attempting to arrest him, Wheeler drove the Dodge Charger in the direction of vehicles being used by the law enforcement officers, and struck a vehicle occupied by three Federal law enforcement officers attempting to make the arrest (emphasis added). (PA 19-26)

There was no admission by the defendant as part of the stipulation that he either intended to cause a collision with any police vehicle, or that he intended to cause any occupant of any police vehicle bodily injury. Further, there was no

²Petitioner was never indicted on the underlying charges which were the basis of the arrest warrant.

allegation by the Government that any of the law enforcement occupants of the police vehicle suffered bodily injury³.

As part of the plea agreement, the parties agreed that to the extent that the parties do not stipulate to a particular fact or legal conclusion, each reserves the right to argue the existence of and the effect of any such fact or conclusion upon the sentence (PA 8). It was further stipulated that either party had a right to appeal if the Court found as a fact something not stipulated. (PA 8)

On July 24, 2019, the defendant entered a guilty plea to counts 1-3 of the Indictment pursuant to the plea agreement. As part of the proceedings, defendant gave a factual basis as follows:

THE COURT: Okay. All right.

So, I am going to ask you some questions, Mr. Wheeler, that relate to the factual basis. And once again, your verbal responses are required. I will not have the maximum penalties repeated for you unless you believe that's necessary.

Do you need those repeated?

THE DEFENDANT: No.

THE COURT: Okay. All right.

So as it relates to the factual basis, on or about the evening of March 8th, 2017, were you in the driver's seat of – is it 2017 or 2018?

MR. DONNELLY: I'm sorry, Judge. That is a typographical error. It should be, I believe, 2018.

THE COURT: '18, right.

All right. So on or about the evening of March 8th, 2018, were you in the driver's seat of a black Dodge Charger motor vehicle bearing Missouri Registration

³The incident reports indicated that no one was injured as a result of the collision.

Number AKS-EOD, known as the Dodge Charger, in the area of Osborne Terrace and Lehigh Avenue in Newark?

THE DEFENDANT: Yes.

THE COURT: And while you were in the Dodge Charger, was there another individual named Vincent Carlisle seated in the passenger seat of that car?

THE DEFENDANT: Yes.

THE COURT: At that time was there an active warrant for your arrest that had been issued by the New Jersey Superior Court in Essex County for another matter that had occurred weeks earlier?

THE DEFENDANT: Yes.

THE COURT: At approximately 9:30 PM, did you become aware that law enforcement officers, Victims 1 through 3, were attempting to arrest you by blocking in the Dodge Charger?

THE DEFENDANT: Yes.

THE COURT: After becoming aware that law enforcement officers, including Victims 1 through 3, were attempting to arrest you, did you drive the Dodge Charger in the direction of vehicles being used by the law enforcement officers?

THE DEFENDANT: Yes.

THE COURT: And did you strike one those vehicles which was occupied by the Victims 1 through 3, as they were attempting to make the arrest?

THE DEFENDANT: Yes. (emphasis added). (PA 37-38)

At no time during the plea hearing did defendant admit that he intended to collide with any police vehicle attempting to arrest him nor did he intend to cause any occupant bodily injury.

The Pre-Sentence Report opined that §2A2.2; §3A1.2(c)(2); and §3D1.4 of the Sentencing Guidelines applied. It concluded that based on these sections the Sentencing Guidelines called for an offense level of 29, and based on his acceptance of responsibility warranting a 3 point reduction, defendant had an offense level of 26. They calculated a Criminal History Category of VI. The defendant objected to the applicability of §2A2.2; §3A1.2(c)(2); and §3D1.4 and argued in a Sentencing Memorandum that only section §2A2.4 applied to the case sub judice. The base level for §2A2.4(a) was 10 and an additional 3 points for physical contact or possession of a dangerous weapon.

After hearing arguments as to the Sentencing Guidelines, the District Court rejected all of defendant's arguments including that there could be no finding by the Court of an intent to cause bodily harm and found that §2A2.2; §3A1.2(c)(2); and §3D1.4 applied resulting in an offense level of 26⁴ which recommends a sentence between 120 and 150 months.⁵ She proceeded to impose a sentence of 120 months incarceration with 3 years of parole supervision on each count concurrent with each other. (PA 42-65)

⁴The Court obviously gave defendant 3 points for acceptance of responsibility.

⁵If the Court found that §2A2.4(a) to apply instead of §2A2.2 it would result in a guideline of 13 with a range of 33-41 months.

Concerning the argument that defendant denied he had any intent to collide with the police vehicle or cause its occupant's bodily injury the District Court stated the following:

But it's important to note that under the Guidelines Section 2A2.2, it describes this incident. While the case law that's been cited by the Government may have some different factual components, in large part it does talk about the use of a weapon; in this case the vehicle, and whether there was serious bodily injury or not, the intent to cause that.

I appreciate the argument that the Court can't make a decision as to intent in the post Booker days but based on all the facts and the circumstances surrounding what happened here, it is clear that it can be concluded that this was more than I'm just trying to get away when you are driving a vehicle straight at law enforcement. So, it was – and as I said, it could have been worse.

The fact that it wasn't worse does not lessen or decrease the importance of what happened. It does not eliminate the seriousness of what occurred. And it does not therefore absolve you of the responsibility of what you were engaged in.

So, I do find that Section 2A2.2 does apply under the Guidelines (emphasis added). (PA 59-60)

While the defendant admitted that he drove his vehicle in the direction of the police vehicles attempting to arrest him, he did not admit as the Court stated that he drove the vehicle "straight at law enforcement". According to the incident reports and factual basis, the police vehicles were trying to box in the defendant's vehicle in order to effectuate an arrest. Simultaneously the defendant was trying to escape from that situation. The incident took seconds. Clearly, the police vehicle was not stationary at the time of the collision. Nor was there a highspeed chase.

C. Appeal

The Third Circuit held that intent to commit bodily harm was not required to prove the element of use of a dangerous weapon under 18 U.S.C. § 111(b) (PA 37-74). It further found that the defendant admitted that he intended to use his car and did so in a manner that it was capable of causing serious bodily injury or death to another (PA 74).

Despite the fact that the District Court did not specifically state that it found that the defendant intended to cause bodily harm with a dangerous weapon, thus making his conduct an aggravated assault and therefore Sentencing Guideline §2A2.2 applicable, the Appellate Court nonetheless found that it did in fact so find and held that the sentence imposed pursuant to the applicable Sentencing Guideline of 120 was not unreasonable (PA 74-75).

REASONS FOR GRANTING THE WRIT

POINT I

**WHETHER TO BE GUILTY OF A VIOLATION OF 18 U.S.C. §111(b) WHICH
REQUIRES THE USE OF A DEADLY WEAPON WHILE FORCIBLY
ASSAULTING, RESISTING, OPPOSING, IMPEDING, INTIMIDATING OR
INTERFERING A LAW ENFORCEMENT OFFICER, IS AN INTENT TO CAUSE
BODILY INJURY BY ONE ATTEMPTING TO ELUDE ARREST BY
RECKLESSLY DRIVING A VEHICLE A REQUIRED ELEMENT OF THE
OFFENSE**

As one of its arguments below and on appeal, defendant raised the issue of whether the District Court was constitutionally able to find that defendant had the intent to cause bodily harm with a dangerous weapon, arguing that this was an element of the crime outlined in 18 U.S.C. § 111 (b) which must be found by a jury beyond a reasonable doubt or admitted to by defendant at the time of his guilty plea. In United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the United States Supreme Court ruled that the Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) holding applied to Federal sentencing and held that:

any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Id. at 15.

The holding is based on the due process claims which protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with whichever he is charged. In re Winship, 397 U.S. 355, 364 (1970).

The Panel in its initial Opinion on October 8, 2020 did not address this constitutional issue also recognized in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999); United States v. Apprendi, U.S. 530 469 (2000); United States v. Booker, 543 U.S. 220 (2005); and Blakey v. Washington, 542 U.S. 276, 128 S. Ct. 2531, 159 L.Ed.2d 403 (2004). Instead, it held the following:

Though Wheeler pleaded guilty to simple assault the District Court enhanced his sentence after finding that the assault was aggravated (PA 67).

It seems clear based on its original Opinion that the Panel reviewed defendant's factual basis during his guilty plea and determined that he had only admitted guilt to simple assault pursuant to 18 U.S.C. § 111 (a) since he did not admit either that his vehicle was a deadly weapon or that while he was attempting to avoid arrest, he intended to cause bodily injury to the officers attempting to arrest him. The maximum sentence allowed for simple assault pursuant to 18 U.S.C. § 111 (a)(2) is 1 year.⁶

Believing that the sentence of 120 months on each count of the Indictment was a violation of the Constitutional principal expressed in Booker, Petitioner requested a rehearing, specifically arguing that he had not admitted that he had the intent to cause bodily harm to the occupants of the police vehicle, but rather was simply attempting to elude the officers who were attempting to effectuate an arrest. Thus, it argued that 18 U.S.C. § 111 (b) which carried an enhanced sentence

⁶The penalty is 8 years if his actions involved physical contact with the victim of that assault or the intent to commit another felony.

maximum of 20 years if a dangerous or deadly weapon was used did not apply since he did not admit that his vehicle was a deadly weapon as defined by Federal Law. In responding to this argument, the Panel in its revised Opinion on November 20, 2020 stated the following:

[A] car counts as a dangerous weapon because it can easily injure or kill ... But § 111 is a general – intent Statute ... Wheeler did not have to specifically intend to use a car as a deadly weapon to violate 18 U.S.C. § 111 (b). United States v. Gumbs, 964 F.3d 1340, 1350 (11th Cir. 2020). Instead, he had to intend to use the car and did so “in such a manner that it [was] capable of causing serious bodily injury or death to another person”. Id. (quoting United States v. Arrington, 309 F. 3d. 40, 45 (D.C. Cir. 2002) (PA 74).

Petitioner submits that 18 U.S.C. § 111 (b) constitutes more than a simple assault. The language of 18 U.S.C. § 111 (a) itself states clearly that anyone who forcibly assault, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer who is engaged in the performance of official duties is guilty of simple assault. Pursuant to 18 U.S.C. § 111 (b) there is an enhanced penalty of up to 20 years if in committing any of those acts the perpetrator uses a dangerous or deadly weapon. The definition of a dangerous or deadly weapon is contained in the Application Notes of the Sentencing Guidelines as follows:

Dangerous weapon means (1) an instrument capable of inflicting death or serious bodily injury, and includes any instrument that is not ordinarily used as a weapon (e.g. a car, a chair, or an ice pick) if such instrument is involved in the offense with the intent to commit bodily injury. (see § 1B1.1 and § 2A2.2)

It is well settled that the Application Notes should be given deference unless plainly erroneous or inconsistent with the regulation itself. Bowles v. Seminole Rock and Sand Co., 325 U.S. 410, 414 (1995).

The Opinion of the Panel is in contravention to the definition contained in the Application Notes. It seems clear that under the Federal Sentencing Guidelines a car is not per se a deadly or dangerous weapon, and does not become one unless the driver of said car has the specific intent to commit bodily injury. During his factual basis, Petitioner did not admit to a specific intent to cause bodily injury or that his vehicle was a dangerous or deadly weapon. Nor did the Government insist on such an admission as part of the Plea Agreement. It is submitted that, if in an attempt to elude the police trying to effectuate an arrest, defendant's vehicle unintentionally but recklessly collides with a police vehicle attempting to arrest him, that the defendant did not use a dangerous weapon to forcibly assault, resist, oppose, impede, intimidate, or interfere with a person engaged in the performance of his official duties. Put another way, Petitioner submits an individual cannot be found guilty of a crime involving use of a dangerous weapon based on reckless conduct while driving a vehicle where there is no bodily injury or intent to commit bodily injury under 18 U.S.C. § 111(b). The Panel's Opinion incorrectly held that the defendant did not have to intend to use a car with an intent to cause bodily injury to violate 18 U.S.C. § 111 (b), and only had to intend to use the car in such a manner that [w]as capable of causing serious bodily injury or death to another person. In so holding the Panel essentially held that a reckless state of mind was sufficient to

uphold a finding of guilt to an enhanced penalty statute requiring use of a deadly or dangerous weapon, when a vehicle can only be a dangerous weapon if there is an intent to cause bodily harm according to the Sentencing Guidelines definition. At a minimum, it is submitted the elements required to constitute a violation of 18 U.S.C. § 111 (b) are ambiguous. It is submitted that under the rule of levity, Courts must construe penal laws strictly and resolve ambiguities in favor of the defendant. Liparota v. United States, 471 U.S. 419, 427 (1985).

In support of its Opinion on this issue, the Panel primarily relied on the case of United States v. Gumbs, 964 F.3d 1340, 1350 (11th Cir. 2020) which cited the case of United States v. Arrington, 309 F. 3d. 40, 45 (D.C. Cir. 2002). It should be noted at the outset that the Gumbs case was only decided several months ago on July 15, 2020.⁷ The Arrington case was decided prior the landmark case of Booker. Gumbs was a case of a jury trial in which a jury convicted the defendant of a violation of 18 U.S.C. § 111 (b). Similar to the case sub judice, defendant in Gumbs claimed that he was simply trying by car to elude being arrested by police. The jury rejected his defense and convicted him. Defendant claimed that the Court's charge as to the elements of the use of a deadly or dangerous weapon were flawed. The Circuit Court disagreed and found that based on its entirety, the Trial Court's charge did not constitute reversible error. In its opinion, the Court acknowledged that the defendant's version of events if believed by the jury would constitute a

⁷No other Courts or Appeal post Booker have so interpreted 18 U.S.C. § 111(b) on this issue. See United States v. Zaragoza-Fernandez, 217 F.3d. 31, 33 (1st Cir. 2000) and United States v. Morris, 131 F.3d 1136,1138 (5th Cir. 1997) cited by the Government below. Both were decided pre Booker.

defense as to the charge of violating 18 U.S.C. § 111 (b). Contrary to Gumbs, in the case sub judice the defendant did not get convicted by a jury of violating 18 U.S.C. § 111 (b) and is thus distinguishable. Assuming arguendo, that this Court considers the facts in Gumbs on this issue to be indistinguishable from the case sub judice, it is submitted that the Gumbs opinion is also violative of defendant's due process rights, and that this issue is compelling and should be reviewed and decided by this Court.

As to the issue of specific intent to cause bodily injury being an element of 18 U.S.C. § 111 (b), it is submitted that there are relevant decisions in analogous situations in other Circuits. Specifically, there is the related issue of whether certain State crimes of aggravated assault constitute a Federal crime of violence. See e.g. United States v. Garcia-Jimenez, 807 F.3d 1079, 1086 (9th Cir. 2015) (concluding that the generic definition of aggravated assault also requires more than extreme indifference recklessness); accord United States v. Barcenas-Yanez, 826 F.3d 752, 756 (4th Cir. 2016).

Those cases hold that a mens rea of recklessness was insufficient to meet the Federal definition of a crime of violence which required knowing or purposeful conduct. See United States v. Barcenas-Yanez, 826 F.3d 752 at 756 (4th Cir. 2016) (analyzing Texas aggravated assault with mens rea of recklessness). The Ninth Circuit in Garcia-Jimenez examined aggravated assault Statutes in fifty States, the District of Columbia, the Federal definition, and the Model Penal Code to determine that a mens rea of extreme indifference recklessness is more broad than the generic

definition of aggravated assault. It noted that thirty-three States and the District of Columbia do not punish as aggravated assault an offense committed with only extreme indifference recklessness.

It is submitted that those cases stand for the general proposition that a reckless state of mind is less serious than a purposeful state of mind. Therefore, it is submitted a reckless state of mind while attempting to elude arrest by car does not constitute the necessary element of use of a deadly or dangerous weapon.

POINT II

IF NO INTENT TO CAUSE BODILY INJURY IS REQUIRED TO CONSTITUTE USE OF DEADLY WEAPON, WITHOUT A FINDING OF FACT BY A JURY OR AN ADMISSION BY A DEFENDANT DURING A GUILTY PLEA, CAN A COURT FIND AS A FACT THAT DEFENDANT'S RECKLESS ACTIONS IN ATTEMPTING TO ELUDE ARREST WERE SUFFICIENT TO FIND DEFENDANT CAPABLE OF CAUSING SERIOUS BODILY INJURY OR DEATH OF ANOTHER PERSON IN THE ABSENCE OF A HIGH-SPEED CHASE OR ANY BODILY INJURY SUFFERED BY ANYONE

Assuming arguendo that under 18 U.S.C. § 111 (b) the Panel is correct that the required element of use of a dangerous or deadly weapon only requires that one had to intend to use a car, and to do so in such a manner that it was capable of causing serious bodily injury or death to another person, Petitioner submits that his due process rights were violated in that a jury did not make a finding as to this element of the offense, and contrary to the Panel's Opinion, Petitioner did not admit to this element during his guilty plea (PA 37-38).

During his factual basis defendant simply admitted that he drove his vehicle recklessly in the direction of the police vehicles as they attempted to box him in. This was not a high-speed chase and there were no facts presented as to how fast he was driving at the time his car collided with a police vehicle. The fact that no occupant of the police vehicle suffered bodily injury or received any medical attention is indicative that defendant was not driving at a high rate of speed. The fact that his vehicle was apparently rendered inoperable has very little probative value as to the issue of how fast he was driving. Further the fact that the police vehicles were attempting to box him in raises questions about the proximate cause of the car collision.

Also, since the police vehicles were attempting to box him in, there is no basis for the Panel's apparent finding of fact that defendant had a safer avenue of escape i.e. driving in reverse, instead of in the direction of the police vehicle he ultimately collided with (PA 75).

POINT III

IN A CASE OF A VIOLATION OF 18 U.S.C. §111(b), IN THE ABSENCE OF A FINDING BY A JURY OR AN ADMISSION BY A DEFENDANT AS PART OF A GUILTY PLEA OF AN INTENT TO COMMIT BODILY INJURY, CAN A SENTENCING JUDGE FIND SENTENCING GUIDELINE §2A2.2 NOT §2A2.4 APPLIES.

Assuming arguendo that this Court finds that the defendant did admit during his factual basis that he did operate his car in such a manner that it was capable of causing bodily harm or death to another person thus admitting a violation of 18 U.S.C. § 111 (b), defendant submits that it was a violation of his right to due process for the Court to find that his state of mind was an intention to cause bodily injury in fashioning the appropriate sentence. It is submitted that based on Petitioner's admission during his guilty plea Sentencing Guideline §2A2.4 should have applied.

While it is true that an individual violating 18 U.S.C. § 111 (b) faces an enhanced penalty of a maximum of 20 years, it is submitted that the inquiry of whether his due process rights were violated should not end simply because the imposed sentence was less than the maximum permitted.

While the Panel cited United States v. Grier, 437 F.3d. 330, (3rd Cir. 2007) in support of the proposition that in general, sentencing Courts may find facts by a preponderance of the evidence and use them to raise sentences to a level below the Statutory maximum (PA75), it failed to note that the Court in Grier also recognized a potential exception to that general rule by stating the following:

The primary issue in this case is whether the due process clause requires facts relevant to enhancements

under the United States Sentencing Guidelines; particularly those that constitute a "separate offense" under Governing Law to be proved beyond a reasonable doubt. The Supreme Court did not reach this decision in Booker, see 543 U.S. at 259 and we declined to address it in Cooper, 437 F.3d. at 330 and N.7 Id.

and later

Under the Fifth and Sixth Amendments, individuals have a right to demand that each and every element of the alleged crime be submitted to a jury and proved beyond a reasonable double before sentencing is imposed. It follows, then, that the fundamental question for those purpose is what facts constitute the "elements" of a crime. Id.

The Petitioner submits that an intentional state of mind is significantly more serious than a reckless state of mind, and therefore should be considered an element of the crime outlined in 18 U.S.C. § 111(b). Therefore, if one is found guilty of a reckless state of mind by a jury, or only admits to a reckless state of mind as part of a guilty plea, it is a violation of Due Process of Law for a Sentencing Court to find the greater state of mind of an intentional state of mind for purposes of sentencing. Furthermore, it has been held that if the magnitude of the contemplated departure from the Guidelines range is sufficiently great that the sentencing hearing can fairly be characterized as a case which "wags the dog" of the substantive offense, the factfinding underlying that departure must be established at least by clear and convincing evidence. See United States v. Kikumura, 918 F.2d at 1100 (3rd Cir. 1990).

At the Sentencing Hearing, the Court initially seemed to accept the defense argument that it did not have the authority to make a factual finding that defendant intended to cause bodily injury and did not specifically make such a finding.

I appreciate the argument that the Court can't make a decision as to intent in the post Booker days, but based on all the facts and circumstances surrounding what happened here, it is clear that it can be concluded that this was more than I'm just trying to get away when you are driving a vehicle straight at law enforcement. So, it was – and is I said, it could have been worse. (emphasis added) (PA 59-60)

Despite the District Court apparently not specifically finding intent to cause bodily injury, it nonetheless found that §2A2.2, which requires an intent to cause bodily harm applied, and then sentenced defendant to a term of 120 months on each count concurrently(PA 42-65). In affirming the sentence below, seemingly contrary to the record, the Panel found that the Sentencing Court did so find this specific intent and that this finding was not unreasonable (PA 74-75). It thus appears that the panel made a De Novo finding of intent to cause bodily harm. However, in doing so it applied the ordinary Appellate Court abuse of discretion standard of review to the facts(PA 75). It is submitted that the use of the abuse of discretion standard in affirming that the sentence was improper.

Without a finding that defendant intended to cause bodily injury, guideline §2A2.2 would not apply since defendant's actions would not constitute aggravated assault (see Application Notes). Rather, in the absence of an intent to cause bodily injury with a dangerous or deadly weapon, guideline §2A2.4 would apply since

according to the Application Notes the conduct would only constitute an aggravated assault if there was an intent to cause bodily harm. Applying that guideline would have resulted in a significantly lower sentencing guideline recommendation, and in all likelihood a sentence significantly lower than the 120 months that was imposed. Instead of an offense level of 26 as calculated by the Court, a finding that §2A2.4 applied as opposed to §2A2.2 would have resulted in an offense level of 13 (see §2A2.4(a) and (b)(1); §3D1.4; and §3E1.1(c)and(b)). The guideline range for this with a criminal history of VI is 33-41 months. It is submitted that this disparity in the guidelines between reckless conduct and intentional conduct is so great that this was a situation which can be characterized as an unconstitutional “wag the dog” case. Due Process of Law requires that the element of intent to cause bodily harm had to have been found by a jury beyond a reasonable doubt or admitted by the Petitioner during his guilty plea. Furthermore, the standard considered by the Panel used on the instant case of by a preponderance of the evidence does not comport with Petitioner’s constitutional rights.⁸

⁸The Sentencing Court did not make a specific finding that it found an intent to commit bodily harm by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that there are compelling reasons to grant this writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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