IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 11-5357

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ABRAHAM AUGUSTIN,
Defendant-Appellant,

_____

Appeal from The United States District Court
For The Eastern District of Tennessee

_____

INITIAL BRIEF ON APPEAL ON BEHALF OF Defendant-Appellant Abraham Augustin

_____

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), Abraham Augustin respectfully requests oral argument because the Court's consideration of the issues presented by this appeal may be assisted of advanced by the presence of counsel before the Court to comment upon the issues and respond to the inquiries from the Court.

JURISDICTIONAL STATEMENT

Abraham Augustin was charged with several federal criminal violations. Subject matter jurisdiction was vested in the district court by virtue of 18 U.S.C. §3231 which grants original jurisdiction to the district courts of all offenses against the laws of the United States. This appeal is specifically authorized by 28 U.S.C. §1291, which authorizes appeals from final judgment of district courts, as well as 18 U.S.C. §3742, which permits an appeal of a sentence. A timely notice of appeal was filed on March 22, 2011. (R. 115, Notice of Appeal, Page ID# 602).

STATEMENT OF THE ISSUES

I. Whether the district court's failure to dismiss Count 7 of the superseding indictment at the close of evidence and upon Defendant-Appellant's motion for judgment of acquittal where the government's evidence adduced at trial failed to establish beyond a reasonable doubt that Defendant-Appellant reached agreement with another, an essential element of the charge of violation of 18 U.S.C. § 1958(a), was error.

II. Whether the 2006 version of 18 U.S.C. § 1201(a) is an unconstitutional exercise of power by Congress under the Commerce Clause, and as applied to the facts of Defendant-Appellant's case in light of the government's evidence adduced at trial.

III. Whether the district court erred in failing to dismiss Counts 1 and 2 of the superseding indictment at the close of the evidence and upon Defendant-Appellant's motion for judgment of acquittal where the government's proof at trial failed to establish beyond a reasonable doubt that Defendant-Appellant personally used a cellular telephone in the commission of, or in furtherance of, the offense charged.

IV. Whether Abraham Augustin's Sixth Amendment right to trial by jury was violated when the district court imposed a ten-year sentence under 18 U.S.C. §924(c)(1)(A)(iii) based upon facts, found by a preponderance of the

evidence, that were not charged in the superseding indictment, submitted to the jury, or found by the jury beyond a reasonable doubt.

V. Whether the district court failed to properly apply U.S.S.G. § 5H1.11 when it denied Mr. Augustin's motion for a downward departure based on Mr. Augustin's military service in the United States Marine Corps which included a combat tour of duty in Iraq during which he was the victim of an enemy attack utilizing an improvised explosive device.

VI. Whether the 500-month sentence imposed on Abraham Augustin is substantively unreasonable in light of the district court failure to properly consider Mr. Augustin's military service and the circumstances of that service.

STATEMENT OF THE CASE

Abraham Augustin was charged in a multi-count superseding indictment with several counts including kidnapping in violation of 18 U.S.C. §§ 1201(a)(1) and 2, and with using or carrying a firearm during the commission of the kidnapping in violation of 18 U.S.C. § 924(c)(1)(A), being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), using the mails to commit murder for hire in violation of 18 U.S.C. § 1958, witness tampering in violation of 18

U.S.C. §1512(a)(1)(A) and witness tampering in violation of 18 U.S.C. § 1512(c)(2). He was convicted of these counts following a three-day jury trial.

Mr. Augustin was sentenced to a total term of imprisonment of 500 months which included a consecutive 120-month sentence under 18 U.S.C. § 924(c)(1)(A)(iii) for discharging a firearm during the kidnapping. He timely filed a Notice of Appeal on March 22, 2011. This appeal follows.

STATEMENT OF FACTS

Robert Jordan met Abraham Augustin at a club in Chattanooga, Tennessee. (R.122, Trial Transcript Day Two, at 241-42, Page ID# 851-52). According to Jordan, approximately two weeks after they met Mr. Augustin asked Jordan if Jordan could supply him with six ounces of cocaine. (R. 122, Trial Transcript Day Two, at 243-44, Page ID# 853-54). Jordan arranged a sale of six ounces of cocaine to Mr. Augustin from a man Jordan knew only as "Hoss." (R. 122, Trial Transcript Day Two, at 244-45, Page ID# 854-55).

A meeting was set up at a local gas station. Hoss arrived in one car, Augustin in another car, and Jordan – along with a friend Curtis Smith – arrived in a third car. (R. 122, Trial Transcript Day Two, at 245-46, PageID# 855-56). Jordan acted as a middle-man, taking the money from Mr. Augustin, bringing the money to Hoss and then taking the cocaine from Hoss and bringing it to Mr. Augustin. (R.

122, Trial Transcript Day Two, at 245-47, Page ID# 855-57). The transaction did not go smoothly.

Later that evening, Jordan received a call from Hoss during which Hoss told Jordan that Mr. Augustin had paid only $4,200 while the agreed price had been $5,100. (R. 122, Trial Transcript Day Two, at 247, Page ID# 857). Jordan testified that he called Mr. Augustin who told him he would fix the problem first thing in the morning. (R. 122, Trial Transcript Day Two, at 247-48, Page ID# 857-58). The next morning, Mr. Abraham called Jordan to advise that he was ready to fix the problem and arrangements were made for Jordan to meet Mr. Augustin. (R. 122, Trial Transcript Day Two, at 248, Page ID# 858).

Jordan and Curtis Smith went to the location but, when they arrived, they were told to get into a car in which another man was sitting. Once inside the car, Mr. Augustin and the second man pulled guns. (R. 122, Trial Transcript Day Two, at 249-52, Page ID# 859-62). Mr. Augustin told Jordan that the cocaine received from Hoss was fake and also told Jordan that he could do one of three things – return the money paid for the cocaine, bring Hoss to them, or bring them real cocaine. (R. 122, Trial Transcript Day Two, at 252, Page ID# 862).

Smith was released but Jordan was not. Mr. Augustin and the other man drove Jordan out to a rural area where he was allowed to use his cell phone to get what Augustin and the other man wanted. (R. 122, Trial Transcript Day Two, at

257, PageID# 867). Mr. Augustin told Jordan he didn't care who he called. (R. 122, Trial Transcript Day Two, at 257-58, PageID# 867-68). Jordan used his cell phone and voluntarily called his mother. (R. 122, Trial Transcript Day Two, at 258, PageID# 868). Mr. Augustin never spoke directly to Jordan's mother and never used Jordan's cell phone to communicate with Jordan's mother or anyone else. (R. 120, Trial Transcript Day One, at 169-70, PageID# 726-27; *Id.* at 174, PageID# 731). Jordan testified that Mr. Augustin fired the gun at one point. (R. 122, Trial Transcript Day Two, at 262-63, Page ID# 872-73).

Eventually, the police became involved and Mr. Augustin and the other man – later identified as Lorrance Dais – were arrested. They first were in state custody and later were arrested on a federal criminal complaint. (R. 1, Criminal Complaint, Page ID# 1 *et seq*.). Mr. Augustin and Dais were charged with kidnapping in violation of 18 U.S.C. §§ 1201(a)(1) and 2, with using or carrying and discharging a firearm during the commission of the kidnapping in violation of 18 U.S.C. § 924(c)(1)(A)(iii), and with being felons in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (R. 12, Indictment, Page ID# 17 *et seq*.).

While in federal custody, authorities intercepted letters sent by Mr. Augustin to an acquaintance which allegedly were an attempt to arrange a "hit" on Jordan, Smith, and Jordan's mother. (R. 120, Trial Transcript, Wayne Jackson Testimony, at 119-42, Page ID# 676-99). The information about the letters came from a

jailhouse informant, Gibson, who provided the information to Mr. Augustin about the name and contact for the would-be hired killer. (R. 120, Trial Transcript Day One, at 188, PageID# 745).

The letters were intercepted by the Government in the hands of the letter's recipient and never were sent further. (R. 120, Trial Transcript Day One, at 178, PageID# 735). She had no idea that the letter was even being mailed and no idea what was contained in the letter.

Subsequently, a superseding indictment was filed charging Mr. Augustin and Dais with kidnapping in violation of 18 U.S.C. §§ 1201(a)(1) and 2, with using or carrying a firearm during the commission of the kidnapping in violation of 18 U.S.C. § 924(c)(1)(A),with conspiring to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), with using and carrying a firearm during the commission of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A), being felons in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), using the mails to commit murder for hire in violation of 18 U.S.C. § 1958, witness tampering in violation of 18 U.S.C. § 1512(a)(1)(A) and witness tampering in violation of 18 U.S.C. § 1512(c)(2). (R. 28, Superseding Indictment, Page ID# 56).

Mr. Augustin and Mr. Dais went to trial before a jury. They were convicted on all counts except the drug trafficking charge and the charge of using and

carrying a firearm during the commission of a drug trafficking offense. (R. 89, Verdict, Page ID# 445 *et seq*.).

A Presentence Investigation Report (PSR) was prepared in anticipation of sentencing.[1] Among other issues, the PSR recommended that Mr. Augustin receive a ten-year mandatory consecutive sentence on Count 2 based on his having discharged a firearm. (PSR at paragraphs 19, 33, 119, Document 006110941649 at pgs. 6, 7, 18). Mr. Augustin objected to this recommendation, arguing that the issue of discharging or brandishing the firearm was not submitted to the jury so only a five-year sentence was applicable.[2] (Objections to Pre-Sentence Investigation Report at 4: PSR, Addendum at 1-2).

Mr. Augustin also sought a downward departure based on his having served in combat in Iraq in the United States Marine Corps and his having been subjected to an attack involving an improvised explosive device. (R. 108, Motion for Downward Departure, Page ID# 581 *et seq*.). At sentencing, the district court heard argument on the objection to a ten-year mandatory consecutive sentence for

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[1] The Presentence Investigation Report was not filed and given page ID numbers in the district court. A copy of the PSR is contained in this Court's file and numbered by this Court as Document 066110941649.

[2] The Objections were not filed in the district court but were submitted directly to the presentence investigator. A copy of the objections is attached to the Presentence Investigation Report contained in this Court's file along with the Presentence Investigation Report. This Court has numbered the Objections as Document 006110941650 and Page 4 of the Objections is designation page 25 of 27 as part of the Presentence Investigation Report.

discharging a firearm determining it was bound by *Harris*. (R. 124, Sentencing Transcript at 10, Page ID# 1220).[3] The district court rejected the arguments against imposition of the ten-year mandatory consecutive sentence. (R. 124, Sentencing Transcript at 4-10, Page ID# 1214-20).

The district court also heard argument on Mr. Augustin's motion for downward departure. The argument centered on whether Mr. Augustin suffered any psychological issues as a result of his military service. (R. 124, Sentencing Transcript at 14-20, Page ID# 1224-30).

The district court denied the motion, finding that there was no connection between his military service and mental health issues and the offenses of which he was convicted. (R. 124, Sentencing Transcript at 21-22, Page ID# 1231-32). The district court imposed a total sentence of 500 months imprisonment, which included a 120-month consecutive sentence on the firearm count. (R. 124, Sentencing Transcript at 30, Page ID# 1240).

A timely notice of appeal was filed on March 22, 2011. (R. 115, Notice of Appeal, Page ID# 602). The appeal was held in abeyance pending resolution in the United States Supreme Court regarding the case of *Alleyne v. United States*, 133 S.Ct. 2151 (2013), which was specifically to address the issue raised by Mr. Augustin at sentencing.

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[3] *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (2002).

SUMMARY OF ARGUMENT

Abraham Augustin properly preserved the issues identified herein first, objecting to the jury instructions when given, and further, objecting to the sufficiency of the evidence notwithstanding the jury's verdict in Mr. Augustin's post-trial motion for judgment of acquittal.

Finally Mr. Augustin properly preserved his challenge to the sentence imposed by filing objections to the Presentence Investigation Report and during the sentencing hearing, specifically reserving the issue of whether the mandatory consecutive ten-year sentence imposed under 18 U.S.C. § 924(c)(1)(A)(iii) may be found by the sentencing court by a preponderance of the evidence or whether those facts must be charged in the indictment, submitted to the jury, and found by the jury beyond a reasonable doubt as required by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

As will be argued herein, the government's evidence at trial failed to establish that Mr. Augustin used a cellular telephone in the commission of the kidnapping, failed to establish that Mr. Augustin used the mail in furtherance of a murder-for-hire scheme, and failed to establish an essential element of the murder-for-hire, to wit, an agreement with the would-be killer. Further, the district court erred in not properly instructing the jury on the definition and application of "substantial step" as it related to the murder-for-hire scheme, and erred in charging

the jury that, as a matter of law, a cellular telephone is an instrumentality of interstate commerce as contemplated by the statute thus relieving the government of its burden to establish all elements of the offense charged.

Further, the district court failed to dismiss Counts 1 and 2 of the superseding indictment on both jurisdiction and predicate grounds as identified above. These errors were not harmless and go the heart of the matters charged. Each of these substantive errors below requires this Court to vacate the judgment and to dismiss the indictment.

As it relates to the sentencing issues, the United States Supreme Court expressly overruled *Harris v. United States*, 536 U.S. 545 (2002), in *Alleyne v. United States*, 133 S.Ct. 2151 (2013). *Harris* was the basis for the district court imposing the mandatory consecutive 10-year sentence, Mr. Augustin's sentence must be vacated and this case remanded for resentencing.

The district court further did not recognize the extent of its authority to depart downward under U.S.S.G. § 5H1.11 based on Mr. Augustin's combat service in the United States Marine Corps and the fact that he survived an enemy attack with an improvised explosive device. The failure to consider this information renders the sentence substantively unreasonable. This failure requires vacatur of the sentence and remand for sentencing.

STANDARD OF REVIEW

"The standard of review for a sufficiency of evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Jones*, 102 F.3d 804, 807 (6th Cir. 1996). When presented with a challenge to the sufficiency of the evidence to support a conviction, as presented in this appeal on several counts, the relevant question turns on whether "any rational trier of fact" could have found that the government had proved the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.C.t 2781 (1979). In making this determination, the Court must "refrain from independently judging the credibility of witnesses or [the] weight of the evidence." *United States v. Walls*, 293 F.3d 959, 967 (6th Cir. 2002). All reasonable inferences are to be drawn in the government's favor. *United States v. Kelly*, 204 F.3d 652, 656 (6th Cir. 2000).

Review of a properly preserved constitutional challenge to a defendant's sentencing, such as a claim under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), is *de novo*. *United States v. Johnson*, 440 F.3d 832, 847 (6th Cir. 2006). Criminal sentences imposed under the post-*Booker* sentencing regime must be reviewed by this Court for reasonableness. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 596-97 (2007). The Court of Appeals reviews a sentence under

an abuse of discretion for reasonableness. *United States v. Bolds*, 511 F.3d 568, 578 (6th Cir. 2007).

In doing so, the Court reviews the procedural and substantive reasonableness of the sentence. *Id*. A sentence is substantively unreasonable if "the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Conaster*, 514 F.3d 508, 520 (6th Cir. 2008), *citing United States v. Webb*,403 F.3d 373, 385 (6th Cir. 2005).

Failure to object at sentencing forfeits any challenge to sentencing on appeal. See *United States v. Kincaide*, 145 F.3d 771, 784 (6th Cir. 1998). However, this Court may notice plain error when reviewing an issue raised for the first time on appeal if the error is clear or obvious and it affects substantial rights. See, e.g., *United States v. Barajas-Nunez*, 91 F.3d 826, 830 (6th Cir. 1995). A claim of substantive unreasonableness is not subject to plain error review. *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc).

ARGUMENT

I. The Government failed to produce sufficient evidence at trial to establish the essential elements necessary for the jury to convict Abraham Augustin of murder-for-hire in violation of 18 U.S.C. § 1958(a).

> "Whoever travels in or causes another (including the victim) to travel in interstate or foreign commerce, or uses or causes another (including the victim) to use the mail or any facility of interstate or foreign commerce, with the intent that a murder be committed in violation of the laws of any state or the United States *as consideration for the receipt or, or as consideration for a promise or agreement to pay, anything of pecuniary value*, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death of life imprisonment, or shall be fined not more than $250,000, or both." 18 U.S.C. § 1958(a)(emphasis added).

Here, the government failed to present prima facie evidence of each element of this offense.

A. There was no evidence produced at trial that there was an agreement between the hiring party and the person hired, an essential element of the crime.

18 U.S.C. § 1958(a) is the federal "murder-for-hire" statute. This Court has held consistently that "murder-for-hire" is a conspiracy-type crime requiring a criminal agreement and a confederation between two or more people." *United States v. Acierno*, 579 F.3d 694 (6th Cir. 2009). An essential element of the crime of murder-for-hire is an agreement between the hiring party and the person hired that the latter will be compensated for his services." *Getsy v. Mitchell*, 456 F.3d 575, 591-92 (6th Cir. 2006). In the present case, the Government concedes this

essential point: "The essence of conspiracy is an agreement." (R. 123, Trial Transcript Day 3, at 490, Page ID# 1100).

However the government at trial failed to offer any evidence whatsoever that there was an agreement between the hiring party, Mr. Augustin, and the person hired, someone identified, but never confirmed to be, a Mr. Terrence Smith. The only evidence of this supposed murder-for-hire scheme was the contents of a letter Mr. Augustin wrote to Justine Van Orden (not a party to this agreement) that was contained within another letter that was written to a friend Ashleigh Hall (or Hall-Bridges). The letter to Ms. Van Orden presumably contained instructions to contact a third party, Mr. Smith, who was an alleged gang member, to identify someone he knew who could arrange the "hit". (R. 120, Trial Transcript Day One at 139, PageID# 696).

The government never produced any evidence first that the supposed contact, Terrence Smith, ever existed. The evidence at trial demonstrated that Mr. Smith was not, in fact, a member of the Bloods gang. (R. 120, Trial Transcript Day One, at 189, PageID# 746). There is no information that the government ever attempted to speak with Mr. Smith despite its knowledge that he was the would-be hired killer and was provided a telephone number of this second party. *Id.* Additionally, the evidence at trial establishes that the letter was never sent or

received in the first place because it was intercepted by the government. (R. 120, Trial Transcript Day One, at 178, PageID# 735).

The government never produced any evidence of any kind that Mr. Augustin and Mr. Smith ever spoke about any so-called "murder-for-hire" scheme, let alone agreed to any specific terms, such as a fee. Mr. Augustin did not know Mr. Smith and never met him previously, or ever. The identification in the first place of Mr. Smith was provided by a jailhouse informant who suggested Smith and gave Mr. Augustin the information that Mr. Smith was a gang member who could arrange the "hit." (R. 120, Trial Transcript Day One, at 189, PageID# 746; Id. at 192, PageID# 749). The government failed to offer any evidence of any discussion of a required quid pro quo. Further, there was no evidence that Mr. Augustin and Mr. Smith agreed or even spoke about a price for the "hit" and no evidence there was any discussion of a required quid pro quo.

To meet the requirements of §1958, the consideration "does require a quid pro quo in the contract sense." *United States v Wickland*, 114 F.3d 151, 153 (10th Cir. 1997); see also *United States v. Washington*, 318 F.3d 845, 854 (8th Cir. 2003) ([p]ayment need only be a quid pro quo contractual arrangement between the hiring and the hired parties.") Consideration, like agreement, is an essential element of a §1958 prosecution and on this record, the government has not offered

a single piece of evidence sufficient to meet its burden of proof. As a consequence, this Court should vacate the conviction and dismiss this count.

B. The District Court erred in not granting Abraham Augustin's Motion for Acquittal on Counts 8-11 of the Superseding Indictment when the government's evidence failed to establish there was a murder-for-hire scheme.

Based upon the lack of any evidence of a murder-for-hire scheme, Mr. Augustin cannot be found guilty of the three counts of attempted murder, counts 8-10 of the superseding indictment. Mr. Augustin is charged with attempting to kill the two "victims" and Jordan's mother by way of a murder-for-hire. If there is no murder-for-hire, there can be no attempted murder as a result.

Finally, count 11 of the superseding indictment charges obstruction of justice for attempting to kill the two "victims" and Jordan's mother by means of a murder-for-hire scheme. Cut away the murder-for-hire scheme. Because the murder-for-hire and the related and dependent counts of the indictment are necessarily deficient, these charges must be dismissed.

II. The 2006 Amendment to 18 U.S.C. §1201(a)(1), the federal kidnapping statute, is unconstitutional as an improper exercise of Congress' power pursuant to Art. 1, Sec. 8, Clause 3 of the United States Constitution (the Commerce Clause) and unconstitutional as applied to the facts in this case.

The Federal Kidnapping Act was originally enacted in 1932.[4] Because kidnappings involving the crossing of state lines posed difficulties for the individual states to investigate and prosecute, the purpose of the law was to extend federal jurisdiction to cases involving the transportation of the victim across state lines. *Chatwin v. United States*, 326 U.S. 455, 462-463 (1946).

Since its enactment, the statute has undergone amendment but never to its core purpose of covering those kidnappings involving transportation of victims across state lines. In 1998 the statute was amended by the Protection of Children from Sexual Predators Act of 1998, which included the provision that the federal kidnapping statute applied both to victims who were living at the time they were transported across state lines and to those victims who were kidnapped, killed, and then transported across state lines.[5]

In 2006 Congress changed the language of the statute which altered the kidnapping law's core purpose and function.[6] Congress added to the interstate transportation language of the statute, "or the offender travels in interstate or

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[4] Chatwin v. United States, 326 U.S. 455, 463 (1946).

[5] Pub. L. No. 105-314, 112 Stat 2974 (1998).

[6] The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense …" Title 18 U.S.C. 1201(a)(1)(2006).

The purpose of the Act was clearly to protect children from sexual predators and not to substantively change the federal kidnapping statute.[7] Yet in granting federal law enforcement the power to prosecute any kidnapping in which "any means, facility, or instrumentality" of interstate commerce was used "in committing or in furtherance of" the offense, Congress dramatically expanded the jurisdiction of the federal kidnapping statute and assumed a federal police power not recognized by the Constitution.

No Federal Circuit has yet addressed the constitutionality of the 2006 revision to 18 U.S.C. §1201(a)(1)(2006). In the single case where the issue was addressed, the district court in New Mexico found the revision constitutional on the grounds that Congress had the authority to regulate both the telephone and the internet as instrumentalities of interstate commerce, even if, in a particular case, their use was solely intrastate. *United States v. Ochoa*, 2009 WL 3878520, @ *2-3. (D.N.M. 2009). However and importantly, the court found the instrumentality had actually been used in interstate commerce. *Id.*

[7] Senators and Representatives addressing the purposes of the Act gave no mention to the revision to the kidnapping statute. See 152 Cong. Rec. S8012-02 (July20, 2006) and H5705-01 (July 25, 2006) (comments of Senators Hatch and Frist and Representative Sensenbrenner).

The Constitution grants to Congress under the Commerce Clause the authority to "regulate Commerce with Foreign Nations, and among the several states, and with Indian Tribes." U.S. Constitution, Article 1, Section 8, Clause 3. The Supreme Court has developed its Commerce Clause jurisprudence so that an establish framework can be employed to review challenges. *United States v. Lopez*, 51 U.S. 549, 551 (1995)(Congress may not enact a law under its Commerce Clause authority unless it actually regulates a commercial activity or is connected to actual interstate commerce). Under *Lopez*, there are three legitimate areas for exercise of the interstate commerce authority: (1) the regulate the "use of the channels of interstate commerce," (2) to regulate "and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities, and (3) to regulate "those activities that substantially affect interstate commerce." *Lopez,* supra., at 558-59. According to *Lopez*, interpreting the Commerce Clause to grant Congress police authority beyond these three areas would result in construing the federal government to have a general police power, something the Constitution clearly does not envision. *Id.* at 567.

The Supreme Court has already concluded that a clause in 18 U.S.C. §1201(a) that read, "who receives, possesses, or transports in commerce or affecting commerce …" had to be understood to mean "who receives [in interstate

commerce or affecting interstate commerce], possess [in interstate commerce or affecting interstate commerce], or transports in interstate commerce or affecting interstate commerce," because Congress may regulate criminal activity traditionally within the purview of the states only where there is a demonstrable interstate nexus. *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

The Court struck down portions of the Violence Against Women Act of 1994 on the grounds the statute was not based on any of Congress' enumerated powers. While Congress had rested its authority to enact the VAWA of 1994 on both the Commerce Clause and the Fourteenth Amendment, the Supreme Court concluded the link to interstate commerce was too tenuous. *United States v. Morrison*, 529 U.S. 598 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local … The regulation and punishment of intrastate violence is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states.")

The Court also has struck down the application of the federal arson statute, 18 U.S.C. §844(i), to private residences. *United States v. Jones*, 529 U.S. 848, 850-51(2000). The Court reasoned that because the statute applied only to buildings used in activities affecting interstate commerce, a private residence could not fall under the law and that the phrase "used in interstate commerce" means an active employment for commercial purposes." *Id.* at 854, 855.

Of the regulatory categories acknowledged in *Lopez*, none provide a justification for the authority Congress sought to grant the federal government in the 2006 revision to 18 U.S.C. §1201(a)(1). Kidnapping is a crime of violence, and the Supreme Court has noted, "the regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states." *United States v. Morrison*, 529 U.S. at 618. The revised kidnapping statute has simply inserted the federal government into an area of criminal law that is properly left to the states.

The revised § 1201(a) does contain an interstate commerce jurisdictional element, "the offender … used the mail or any means, facility, or instrumentality of interstate or foreign commerce," but recitation of words cannot bring the kidnapping statute under the ambit of the Commerce Clause where the statute is not directed at the means facility, or instrumentality of interstate or foreign commerce. *United States v. Morrison,* 529 U.S. at 618; *United States v. Bishop*, 66 F.3d 569, 585 (3d Cir. 1995)(mere presence of a jurisdictional element does not render a statute constitutional).

While the 2006 version of § 1201(a) appeals the to "instrumentalities of interstate commerce" prong of *Lopez* to justify the expansion of its jurisdiction, at its essence, kidnapping remains a crime of violence traditionally left to the states to regulate under the general police power. *United States v. Morrison,* 529 U.S. at

618 (the Constitution denied the federal government, and reserved to the state governments, the authority to suppress violent crimes); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)(federal law may not intrude in intrastate matters to exercise general powers of government reserved to the states).

Where the interstate nexus provided by the "instrumentalities" prong is so weak, the Court should analyze the constitutionality of the 2006 version of §1201(a) under the *Lopez* "substantially affects" test. Under this standard, the 2006 kidnapping statute cannot be upheld. On the whole the crime of kidnapping does not have a substantial effect on interstate commerce (save where the channels of interstate commerce are affected by the transportation of the victim across state lines). 18 U.S.C. § 1201(a)(1) seeks the regulate activity that is not essentially an "economic" crime. Nor does the statute provide a mechanism for distinguishing between those kidnappings that affect interstate commerce and those that do not. In essence, virtually every kidnapping would be a federal crime. The Constitution prohibits Congress from using the trivial impact the telephone may have on interstate commerce during a kidnapping "as an excused for broad regulation of state or private activities." *United States v. Lopez*, 51 U.S. at 558 (1995).

As applied to the facts in this case, §1201(a)(1) is unconstitutional because the evidence upon which the government relied, namely that Mr. Jordan spoke with his mother on the phone and that Mr. Augustin and Mr. Dais, the co-

defendant below, spoke to each other on the telephone, demonstrates that both acts took place completely within the State of Tennessee. The only possible interstate commerce connection under *Lopez* upon which the government can reasonably rely is the "uses an instrumentality of interstate commerce", the cell phone. Based upon the evidence presented at trial and the government's theory of the case, the use of the cell phone, the Court should find the interstate commerce nexus is too attenuated to apply in this case and Mr. Augustin's conviction pursuant to 18 U.S.C. § 1201(a)(1) should be vacated.

C. The District Court lacked jurisdiction to prosecute Abraham Augustin for kidnapping pursuant to 18 U.S.C. §1201(a)(1) where the government failed to produce sufficient evidence that Abraham Augustin used an instrumentality of interstate commerce in furtherance of the commission of the offense.

The government failed to prove at trial that Mr. Augustin ever used a cell phone in this case. The evidence introduced at trial was that Mr. Jordan, and Mr. Jordan alone, used his own cell phone to contact his mother. (R. 122, Trial Transcript Day Two, at 257, PageID# 867; *Id.* at 259, PageID# 868). The government's chief witness, FBI Special Agent in Charge Wayne Jackson, conceded Mr. Augustin never actually used the cell phone and spoke with Jordan's mother. (R. 120, Trial Transcript Day One, at 174, PageID# 731).

Special Agent Jackson, in fact, refused at first but when pressed said his belief was "she might have talked to him. I want to think at some point she did. (R. 120, Trial Transcript Day One at 169-170, PageID# 726-27).

The trial judge instructed the jury that use of the cell phone by Mr. Augustin, the instrumentality of commerce, was a required element. R. 123, Trial Transcript Day Three, at 565, PageID#1175). However, the government failed to introduce any evidence that Mr. Augustin used a cell phone. In fact, the evidence established the exact opposite. As a consequence, the conviction on count I must be vacated and the charge dismissed.

Further, because Count 2 of the superseding indictment relies upon the kidnapping charged in Count 1, and as noted above, that the government failed to offer any proof to support use of the cell phone in the kidnapping, the conviction on Count 2 must also be vacated.

D. Abraham Augustin's Sixth Amendment right to trial by jury was violated when the district court imposed a ten-year consecutive sentence under 18 U.S.C. § 924(c)(1)(A)(iii) based on facts that were not charged in the superseding indictment, submitted to the jury, or found by the jury beyond a reasonable doubt.

Abraham Augustin was charged with using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A), and 2. (R. 28, Superseding Indictment, Count 2, Page ID# 56). The jury was instructed on that specific offense, i.e., only use or carrying a firearm. (R. 123, Trial Transcript

Day 3, at 571-72, Page ID# 1181-82). The jury verdict reflected that Mr. Augustin was convicted of using and carrying a firearm. (R. 89, Verdict Form, Page ID# 445).

The Presentence Investigation Report (PSR), however, listed this charge as "*discharging* a firearm in relation to a crime of violence." (PSR at page 2, Document 006110941649 at page 2) (emphasis added). The PSR further indicated that the offense was subject to a minimum ten- year sentence. (*Id*.). The Report further stated: "It should be noted that while in the wooded area, Mr. Augustin put a revolver to Mr. Jordan's head and began playing 'Russian Roulette.' Then Mr. Augustin fired a round near Mr. Jordan's head and told Mr. Jordan that no one could hear them." (PSR at paragraph 19, Document 006110941649 at page 6). These facts were not submitted to the jury in a special verdict form.

In calculating the statutory sentencing range, the Presentence Investigation Report concluded that the ten-year mandatory minimum sentence applied. (PSR at paragraph 119, Document 006110941649 at page 18). Mr. Augustin objected to the ten-year mandatory minimum sentence. (PSR, Addendum, at 1-2, Document 006110941649 at 20-21). In his objection to the PSR, Mr. Augustin argued: that since the jury made no finding on this fact, the mandatory minimum was only five years pursuant to 18 U.S.C. § 924(c)(1)(A)(I)." (Objections to Pre-Sentence Investigation Report at 4, Document 006110941650 at 25).

At sentencing, defense counsel reiterated this objection and argued that the jury failed to find beyond a reasonable doubt that Mr. Augustin specifically "brandished" the firearm and that there was at most only a five-year mandatory-minimum consistent with the finding that Mr. Augustin used or carried the firearm. (R. 124, Sentencing Transcript at 4-5, Page ID# 1214-15). The district court rejected Mr. Augustin's argument on the authority of the plurality decision in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (2002). (R. 124, Sentencing Transcript at 10, Page ID# 1220).

Harris stood for the proposition that it was not necessary for the jury to find facts that would increase a mandatory minimum beyond a reasonable doubt and that the Court could so find. The Supreme Court in *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum.

However, the Court's decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), stated this reasoning was inconsistent with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and as a result overturned *Harris* specifically. The Court's reasoning in *Alleyne* followed its reasoning in *Apprendi* but applied it to the mandatory minimum end of sentencing, noting that limiting the sentencing court's discretion at the low end of a sentencing range by setting a mandatory minimum sentence based on certain facts implicates the Sixth Amendment right to jury trial

as strongly as a sentence that relies upon facts supporting a sentence above the statutory maximum. Pursuant to the Court's *Apprendi-Alleyne* jurisprudence, the law is now settled that where there are facts necessary to increase a penalty for a specific crime, such as facts which increase a mandatory minimum, they must be presented to the jury, and proven beyond a reasonable doubt.

Defendant-Appellant argued below the jury never found facts that increase the mandatory minimum sentence for an offense under 18 U.S.C. § 924(c)(1)(A) and in fact, the jury returned a verdict without specifically finding brandishing or discharge of the weapon. Consistent with *Alleyne*, the Court should vacate Mr. Augustin's sentence and remand it back to the district court for resentencing.

E. Remand for resentencing is warranted to allow proper consideration of Abraham Augustin's military service.

Mr. Augustin's motion for a downward departure was based on his prior military service. (R. 108, Motion for Downward Departure, Page ID# 581-82). At sentencing, the district court addressed the motion, but considered it only in the context of whether Mr. Augustin suffered any psychological effects as a result of his military service. (R. 124, Sentencing Transcript at 14-22, Page ID# 1224-32). The district court referred to U.S.S.G. § 5H1.11 as the basis for a departure based on military service. (R. 124, Sentencing Transcript at 20, Page ID# 1230). The district court's comments, however, show that the court failed to consider the full extent of the discretion afforded by this policy statement.

The policy statement to which the district court referred states, in relevant part: "Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." U.S.S.G. § 5H1.11. By its terms, this policy statement is broader than the scope ascribed to it by the district court.

As is noted above, the district court considered a departure in the context only of psychological issues caused by military service. However, when the Sentencing Commission amended that policy statement in 2010, it made clear that this policy statement considered more than psychological effects of military service. In fact, the Sentencing Commission did not give any indication that it had specifically considered the psychological effect of military service in adopting the amended policy statement.

The reasoning given by the Sentencing Commission related to military service *vel non*: The Commission determined that applying this departure standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing. See, e.g., *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those

who fought on the front lines . . . ."). Amendment 739, Reason for Amendment, U.S.S.G. App. C – Vol. III at 350-51 (Nov. 1, 2011).

Abraham Augustin enlisted in the United States Marine Corps and served with distinction. (PSR at paragraph 107, Document 006110941649 at page 16). During his military service, Mr. Augustin served in Iraq where a vehicle in which he was riding was struck by an improvised explosive device. (R. 108, Motion for Downward Departure at 1, Page ID# 581). He received several decorations, medals, and badges in recognition for his service. (*Id*.) Clearly, Mr. Augustin served in combat on the front lines which the Supreme Court recognized as a potential ground for leniency. In addition to merely serving, Mr. Augustin was the victim of an enemy attack. Military service such as this is outside the norm, and is unusual and of a degree that is not typical of military service.

As this Court has indicated, the failure of the district court to consider all of the circumstances shows that the district court was not aware of its discretion to depart. *United States v. Hall*, 71 F.3d 569, 573 (6th Cir. 1995). In *Hall*, this Court held that the failure of a sentencing court to recognize circumstances which could merit a departure under a particular policy statement warranted a remand so the district court could make findings of fact and conclusions of law as to whether downward departure under that policy statement was appropriate. *Id*. Here, the failure of the district court to appreciate the full extent of its discretion and its

failure to consider the nature of Abraham Augustin's military service also should warrant remand.

Similarly, the failure of a sentencing court to consider all relevant sentencing factors or to give unreasonable weight to a pertinent factor renders the sentence substantively unreasonable. *United States v. Conaster*, 514 F.3d 508, 520 (6th Cir. 2008), citing *United States v. Webb*, 403 F.3d 373, 385 (6th Cir. 2005). That is what occurred here. The district court failed to consider Mr. Augustin's military service except in the context of whether it resulted in psychological issues showed that the pertinent factor of combat service and having been attacked was not considered and the apparent lack of diagnosed psychological issues was given excessive weight. This combination rendered the sentence substantively unreasonable.

CONCLUSION

Based upon the foregoing reasons, this Court should vacate Mr. Augustin's convictions and dismiss the charges contained in the superseding indictment. In the event the Court is unwilling to vacate the convictions, Mr. Augustin is entitled to relief from the sentence imposed based upon the decision from the U.S. Supreme Court in *Alleyne* and the matter should be remanded for resentencing.

Dated: August 23, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitation of said rule. Exclusive of the exempted portions in said rule, the brief, which was prepared using Microsoft Word, contains 8,017 words.

/s/ Robert L. Sirianni, Jr.
ROBERT L. SIRIANNI, JR.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was filed electronically on August 23, 2013, and that copy was made upon opposing counsel through the Court's CM/ECF system.

/s/ Robert L. Sirianni, Jr.
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APPELLANT'S DESIGNATION
OF RECORD FROM THE DISTRICT COURT

Appellant, pursuant to Sixth Circuit Rule 30(g)(1)(A), hereby designates the following filings in the district court's record as items relevant to the disposition of this appeal.

Pleadings

Docket Entry No.	Document Description	Date	Page ID #
R. 1	Criminal Complaint	12/09/2009	1
R. 12	Indictment	12/22/2009	17
R. 28	Superseding Indictment	03/23/2010	56-59
R. 89	Verdict	10/20/2010	445
R. 108	Motion for Downward Departure	03/10/2011	581-82
R. 113	Judgment	03/17/2011	588-94
R. 115	Notice of Appeal	03/22/2011	602
R. 34	Motion to Dismiss Counts 1 and 2 of the Superseding Indictment	04/16/2010	70-71
R. 35	Memorandum in Support of Motion to Dismiss Counts 1 and 2 of the Superseding Indictment	04/16/2010	72-83
R. 97	Motion for Judgment of Acquittal or New Trial	11/03/2010	523-527

Transcripts of Hearings

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R. 120	Jury Trial – Day 1	10/18/2010	696, 726-27, 731, 735, 746, 749
R. 122	Jury Trial – Day 2	10/19/2010	851-52, 853-54, 854-55, 855-57, 857, 857-58, 858, 859-62, 862, 867, 867-68, 872-73
R. 123	Jury Trial – Day 3	10/20/2010	1100, 1175
R. 124	Sentencing	03/10/2011	1214-15, 1220, 1224-32, 1230

Confidential Document

Docket Entry No.	Document Description	Date	Page ID #
N/A	Presentence Investigation Report	01/25/2011	Not Available to District Court ECF