07-3120-cr

To Be Argued By:
ANTHONY E. KAPLAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3120-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

GARY L. JOHN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF AND APPENDIX
FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, U.S.D J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered July 23, 2007. (JA 52-53). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) that same day. (JA 17, Doc. 155). On August 3, 2007, Judge Hall issued an amended judgment correcting a clerical error in the original judgment (JA 55-57), and on August 5, 2007, John filed a notice of appeal with respect to that judgment. (JA 55-57, Doc. 160). This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court properly rejected the defendant's claim that it constituted impermissible double-counting to calculate his sentencing guidelines using a base offense level applicable to a variety of assaults, plus an enhancement for physical contact?

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-vs-

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Preliminary Statement

Gary John was a retired special agent with the Federal Bureau of Investigation who was wanted by the State of Rhode Island for violations of no-contact and protective orders with respect to his former wife and for failing to appear in court. When John was located by Deputy United States Marshals and Rhode Island Deputy Sheriffs, he refused to comply with their instructions, resisted arrest, and threw a punch striking one of the Deputy United

States Marshals. John was tried and convicted of assaulting a federal officer.

At sentencing, John claimed that his guidelines offense level was too high. In particular, he claimed that the Probation Office impermissibly double-counted the fact that he had made physical contact with the arresting officer since that fact was both an element of the offense and a basis for enhancing his base offense level under the guidelines. The district court rejected that argument. This is the defendant's only claim on appeal. For the reasons that follow, this Court should also reject his argument and affirm the sentence imposed by the district court.

Statement of the Case

On January 10, 2006, Gary L. John was charged in an indictment with felony assault on a federal officer, in violation of 18 U.S.C. §§ 111(a)(1). (JA 19).[1] A jury was selected before the Honorable Janet C. Hall (United States District Judge) on January 8, 2007, and the evidence commenced on January 16, 2007. On January 18, 2007, the jury returned its verdict finding John guilty on count one of the indictment charging him with felony assault.

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[1] References to the defendant Gary John's Appendix are designated "JA," references to the Government's Addendum to this Brief are designated "GA," and references to the Presentence Report are designated by the designation "PSR" and paragraph number of that report which has been filed with the Court under seal.

Judge Hall held a sentencing hearing on July 12, 2007. Prior to sentencing, John raised a number of objections to the Presentence Report and advanced several bases for a downward departure or non-guideline sentence. While sustaining one of John's objections relating to criminal history, she rejected his other objections and motions for a downward departure or non-guideline sentence, and sentenced John principally to a term of imprisonment of 30 months, which was the bottom of the applicable range of 30 to 37 months. (JA 52-57).

The defendant is presently incarcerated.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The offense conduct

The following facts were adduced during the two-day trial before Judge Hall and the jury.[2]

On November 28 and 29, 2005, Captain Albert LaFagia of the Rhode Island Sheriff's Department spoke to the defendant on the telephone in an effort to convince him to surrender on arrest warrants issued by the State of Rhode Island. Those warrants arose out of the defendant's violations of no-contact and protective orders relating to

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[2] Since the facts are not at issue in this appeal, the complete transcripts of the trial were not ordered. Accordingly, a summary of the facts is drawn from the Offense Conduct as articulated in the Presentence Report.

his former wife and his failure to appear for related court proceedings. Although John considered Captain LaFagia's request, he ultimately declined, stating that he would surrender on his own terms and did not want to go back to prison. Accordingly, efforts to locate and arrest John continued. (*See* PSR ¶ 4).

On December 8, 2005, Deputy United States Marshals from Rhode Island and Connecticut and members of the Rhode Island Sheriff's Office attempted to locate the defendant in Connecticut. Based upon the investigation, it was determined that the defendant might be in the vicinity of 371 Piute Lane, Unit B, Stratford, Connecticut. At approximately 10:00 p.m., Deputy United States Marshal M. James Masterson was dispatched to see if the defendant's vehicle was there. (*Id*. at ¶ 5).

When Deputy Masterson drove by Piute Lane, he saw John's vehicle parked outside. Deputy Masterson took up surveillance and, shortly thereafter, saw the defendant go to the trunk and then appear to be getting in the car. Deputy Masterson got out of his car, approached the defendant with his weapon drawn, and identified himself as a Deputy United States Marshal. (*Id*. at ¶ 6).

The defendant initially responded to Deputy Masterson, "shoot me." Deputy Masterson continued to identify himself and instructed John to show his hands and lie on the ground. The defendant refused to comply with these repeated instructions and advanced toward the Deputy. Deputy Masterson, backing up, continued to tell John to show his hands and get on the ground. The

defendant continued to refuse and, despite instructions to keep his hands visible, told Deputy Masterson that he was reaching in his pocket for a cellular telephone. John then retrieved a telephone from a pocket and made a call to his then-girlfriend. (*Id*. at ¶ 7).

After John told Deputy Masterson to shoot him, Deputy Masterson called the Stratford 911 operator to request back-up. The tape of that call was played to the jury. As reflected during that call, while Deputy Masterson sought to detain the defendant, the elderly owner of the townhouse where John was staying and his former girlfriend's mother (Constance Guerrere), approached Deputy Masterson and asked who he was. Deputy Masterson can be heard on the recording identifying himself and telling Ms. Guerrere to stay back and call the police. Deputy Masterson can also be heard on the recording repeatedly telling John to show his hands, get on the ground, and keep back. (*Id*. at ¶ 8).

When Deputy United States Marshal Thomas Hammon arrived on the scene, he identified himself as a Deputy United States Marshal and drew his firearm to provide cover for Deputy Masterson, who was going to take John into custody. Deputy Masterson holstered his weapon and walked toward the defendant in an effort to execute the arrest. (*Id*. at ¶ 9).

As Deputy Masterson approached the defendant, the defendant yelled at him and tried to strike Deputy Masterson's head with his fist. He made physical contact with Deputy Masterson, who was able to partially block

the punch with his arm. The defendant kept trying to hit Deputy Masterson and then wrapped both arms around him while throwing more punches. (*Id*. at ¶ 10).[3]

Moments later, other law enforcement officers joined in an effort to take John into custody. The defendant kept fighting and even tried to bite one of the deputies. The defendant was eventually handcuffed and taken into custody. (*Id*.).

John testified at trial in his own defense. He admitted that he had told Deputy Masterson to shoot him and had taken a couple of steps toward the Deputy when first approached. John nevertheless testified that he had, thereafter, kept his arms up and his hands in plain sight during the entire encounter and that he had made no other movements toward Deputy Masterson or been threatening in any way. John further testified that when he heard other law enforcement officers approach, he lowered his eyes and was prepared to submit to arrest when Deputy Masterson hit him in the face without any provocation. He stated that he never tried to punch Deputy Masterson. (JA 37).

B. The jury instructions and verdict

In her charge to the jury, at the defendant's request and without objection from the Government, Judge Hall charged both felony assault, i.e., assault involving physical

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[3] Deputy Masterson did not suffer any significant physical injury as a result of the assault. (*Id*.)

contact, as charged in the indictment,[4] and simple assault (*i.e.*, forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering without physical contact). In particular, Judge Hall instructed the jury that in order to find John guilty they had to find beyond a reasonable doubt:

> First, you must find that on or about the date specified in the indictment, James M. Masterson was a federal officer as I will define that term for you.
>
> Second, you must find that at that time the defendant Mr. John forcibly assaulted or resisted or opposed or impeded or intimidated or interfered with Mr. Masterson. This forcible action involved actual physical contact with Mr. Masterson.
>
> Third, you must find at that time Mr. Masterson

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[4] The indictment charged that

> On or about December 8, 2005, in the District of Connecticut, **GARY L. JOHN**, the defendant, knowingly and willfully, did forcibly and with actual physical contact, assault, resist, oppose, impede, intimidate, and interfere with Deputy United States Marshal James M. Masterson, while Deputy Masterson was engaged in the performance of his official duties.

(JA19).

> was engaged in the performance of his official duties and
>
> Fourth, you must find that the defendant Mr. John acted willfully.

(JA 84-85). With respect to the second element, the court later stated that the jury should "[r]emember [that] the government has charged [that] Mr. John acted forcibly and that Mr. John's forcible conduct resulted in actual physical contact with Mr. Masterson. Therefore, in order to satisfy the second element of the offense, the government must prove beyond a reasonable doubt that Mr. John acted forcibly toward Mr. Masterson and that this forcible action resulted in physical contact." (*Id*. at 87).

Judge Hall also instructed the jury on the lesser included offense of simple assault. In that instruction, Judge Hall instructed the jury

> If . . . you conclude that the government has proved beyond a reasonable doubt that Mr. John acted forcibly but you have a reasonable doubt as to whether Mr. John's forcible conduct resulted in actual physical contact with Mr. Masterson, then you must find the defendant not guilty of the assault that's charged – explicitly charged in the indictment. At that point, though, if you were to be at that point, you must then consider whether Mr. John is guilty of what's known in the law as a lesser included offense. In this case, the lesser included offense of simple assault. In general a

> lesser included offense consists of some but not all the elements of the offense that's charged in the indictment. Simple assault [,] the lesser included offense here[,] differs from assault [,] the one that's charged in the indictment. In simple assault the government must still prove the defendant acted forcibly but does not have to prove that Mr. John's forcible conduct resulted in actual physical contact with Mr. Masterson. The government must still prove all of the other elements 1, 3, and 4 of assault as I have already instructed you on. As I mentioned, I'm sending a copy of the indictment for you to have during your deliberations but I will remind you again that the indictment is merely an accusation and not to be used by you as proof of any of the conduct charged.

JA 89-90.

The jury returned its verdict finding the defendant guilty of assault as charged in the indictment. (GA 1).

C. The sentencing

A presentence report was prepared by the United States Probation Office. Applying the 2006 Guidelines Manual, the probation officer calculated the base offense level as 10 pursuant to U.S.S.G. § 2A2.4(a). (PSR ¶ 16). The officer added three levels pursuant to U.S.S.G. § 2A2.4(b)(1)(A) since the offense involved physical contact. *(Id*. at ¶ 17). Two additional levels were added for obstruction of justice since the defendant committed perjury in his trial testimony.

U.S.S.G. § 3C1.1. (*Id*. at 20). Based on a total offense level of 15 and a Criminal History Category V, the officer found a guideline imprisonment range of 37-46 months (*id*. at ¶ 58) and a fine range of $4,000 to $40,000 (*id*. at ¶ 64).

The defendant filed various objections to the presentence report. Both he and the Government submitted sentencing memoranda addressing those objections and the various grounds advanced by John in support of his argument for a downward departure or non-guideline sentence. (JA 20-33). With respect to the instant appeal, John argued that the three-level upward adjustment for actual physical contact was impermissible double-counting since that same physical contact was an element of the offense as charged to the jury, which made the offense a felony as opposed to a misdemeanor. (JA 21-25).

On July 20, 2007, the defendant appeared for sentencing. (JA 104-194). The court considered each of the defendant's objections and arguments in support of a downward departure or non-guideline sentence. The court sustained the defendant's objections as to criminal history, reducing his criminal history from Category V to IV. With respect to John's claim, pursued on appeal, that the three-level adjustment for physical contact was impermissible double-counting, Judge Hall noted that

> The difficulty I'm having is when the guideline writers created this section and they created the base offense level, they included within the coverage of that base offense an offense which did not include physical contact. It didn't include that harm, if you

want to call it a harm, if the enhancement reflects some greater harm and I'm looking at for example U.S. vs. Napol[i], a '99 Second Circuit case, footnote 9, where they say impermissible double counting occurs when one part of the guidelines is applied to increase the defendant's sentence to reflect the kind of harm that's already been fully accounted for by another part of the guidelines, and I don't see how you can say that subpart A, the base offense level fully accounts for the harm of physical contact because 10 covers the lesser included. That's the difficulty I'm having. I think the Second Circuit and I don't know if all circuits are this way but I understand the preceden[ts] in the Second Circuit on this issue has to look at whether I'm double counting in the guidelines. In other words, I'm taking a section and applying to the defendant when in fact another section I have gone to covers that same thing. So, for example, if the base offense level didn't apply to the lesser included offense, it only applied to the kind of assault he was convicted of, then it would be double counting to add on three levels for physical contact but that isn't the case and so I have difficulty concluding that it is double counting under the guidelines. I do recall what you are saying about our struggle with this question. The Second Circuit versus other cases which tended to suggest there might be a crime at the higher level of this crime without any touching but I don't think that's Second Circuit law. I charged it as I understood Second Circuit law and, therefore, I think with that as my view point, I don't see how I

> can conclude that three-level enhancement is double counting.
>
> ***
>
> The court is going to conclude that in addition to the base offense level under 2A2.4 that the special offense characteristic as suggested by the probation officer of a three-level enhancement for physical contact based on the jury's finding be applied.

(JA 114-115).

After considering each of the defendant's other objections to the Presentence Report,[5] rejecting the various arguments advanced by John for a downward departure and/or non-guideline sentence, and considering the sentencing factors articulated in 18 U.S.C. § 3553(a), the district court imposed a sentence of incarceration of 30 months, to be followed by three years of supervised release, and a $4,000 fine. (JA 178-189).

SUMMARY OF ARGUMENT

The district court correctly calculated John's sentencing guidelines for felony assault by adding three levels to the base offense level for obstructing or impeding

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[5] By virtue of having sustained John's objection to his criminal history scoring, John's criminal history category was reduced from V to IV, changing his range from 37-46 months to 30-37 months. (JA 131-134).

an officer under U.S.S.G. § 2A2.4(b)(1)(A) since the offense involved physical contact. There was no impermissible double-counting because the base offense level under U.S.S.G. § 2A2.4 would apply equally to offenses that do not involve physical contact. Increasing the offense level for physical contact simply acknowledged that an assault with physical contact is more serious than an assault with no physical contact.

ARGUMENT

I. The district court did not engage in impermissible double counting in calculating John's sentencing guidelines

A. Governing law and standard of review

When evaluating a district court's guideline calculation, this Court reviews "issues of law de novo, issues of fact under a clearly erroneous standard, and mixed questions of law and fact either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005).

John does not challenge the jury's finding that there was physical contact or the district court's adoption of that factual finding in applying the three-level enhancement pursuant to Section 2A1.4(b)(1)(A). Accordingly, the district court's application of the Guidelines in this case is reviewable de novo.

B. Discussion

Section 111 of Title 18 of the United States Code provides:

> (a) In general.– Whoever –
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
>
> (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,
> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

18 U.S.C. § 111(a).[6]

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[6] Section (b), which is not applicable here, provides for an enhanced penalty of 20 years for whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a (continued...)

18 U.S.C. § 111 can be violated in three different ways, only one of which necessarily involves physical contact. *See United States v. Chestaro*, 197 F.3d 600, 606 (2d Cir. 1999). Under *Chestaro*, "[Section] 111 creates three distinct categories of conduct: (1) simple assault, which . . . does not involve touching; (2) . . . assault that does involve contact but does not result in bodily injury or involve a weapon; and (3) assaults resulting in bodily injury or involving a weapon." 197 F.3d at 606.

Appendix A to the Guidelines Manual, the Statutory Index, provides two applicable guidelines from which to choose for a violation of 18 U.S.C. § 111: U.S.S.G. §§ 2A2.2 and 2A2.4. Section 2A2.2 relates to aggravated assaults and is not relevant to the conduct involved in this case. Accordingly, without objection, the court utilized Section 2A2.4, which involves obstructing and impeding officers. That section sets a base offense level of 10, which is increased three levels if the offense involved physical contact. U.S.S.G. § 2A2.4(b)(1)(A).

John argues that using the fact that physical contact was involved in the offense both as a element of the offense and a sentencing enhancement is impermissible double-counting. This claim is without merit.

Impermissible double-counting occurs only when application of a Guidelines provision increases the defendant's sentence to reflect a "kind of harm that has

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[6] (...continued)
defective component) or inflicts bodily injury.

already been fully accounted for *by another part of the guidelines*." *United States v. Napoli*, 179 F.3d 1, 12 n. 9 (2d Cir. 1999) (internal quotation marks omitted) (emphasis added). This Court has recognized "that it is within the Sentencing Commission's and Congress's prerogative to adopt double counting. . . . Impermissible 'double counting' is the judicial augmentation of a defendant's sentence in contravention of the applicable statute or Sentencing Guideline." *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003) (citations and internal quotation marks omitted) (finding no impermissible double-counting where defendant's conduct triggered an increase in both criminal history score and offense level); *see also United States v. Aska*, 314 F.3d 75, 78 (2d Cir. 2002) (rejecting impermissible double-counting argument where criminal history points were added for committing crime while under criminal justice sentence, and defendant was convicted of failing to surrender to serve sentence)

Moreover, as this Court has explained, "double counting . . . is certainly not improper if it serves a legitimate purpose intended by Congress and the Sentencing Commission." *United States v. Pedragh*, 225 F.3d 240, 247 (2d Cir. 2000). Accordingly, "with very few limitations, Congress is free to prescribe any sentence that in its view reflects the seriousness of the underlying offense and the characteristics of the offender." *United States v. Torres-Echavarria*, 129 F.3d 682, 699 (2d Cir. 1997). Indeed, this Court has "repeatedly held . . . that a district court calculating a Guidelines sentence may apply multiple Guidelines provisions based on the same

underlying conduct where that is the result clearly intended by Congress and the Sentencing Commission. While such calculations may involve 'double counting' in a literal sense, they do not involve *impermissible* double counting." *United States v. Maloney*, 406 F.3d 149, 152 (2d Cir. 2005) (emphasis in original).

In the instant case, the district court did not double-count – much less impermissibly double-count – the fact that the offense involved physical contact. First, Section 111(a)(1) punishes a range of conduct from aggravated assault with a weapon or resulting in bodily injury (a twenty-year felony), to felony assault (involving physical contact and with an eight-year maximum penalty), and simple assault (a misdemeanor). As such, Section 2A2.4 provides for incrementally increased maximum sentences based on the nature and extent of the conduct, setting a base offense level of 10 (Section 2A2.4) for any violation of Section 111 – whether the offense involves physical contact or not – where the offense conduct involves forcibly obstructing or impeding officers. The Guidelines then direct the court to add three levels if physical contact was involved (Section 2A2.4(b)(1)(A)) or a dangerous weapon was used or threatened (Section 2A2.4(b)(1)(B)), and to add additional two levels if the victim sustained bodily injury (U.S.S.G. § 2A2.4(b)(2)).

Accordingly, the base offense level for Section 2A2.4 does not incorporate the element of physical contact. The only way in which that factor was incorporated into the defendant's guidelines calculation was in the three-level enhancement. Put another way, physical contact was not

"fully accounted for by another part of the guidelines." *Napoli*, 179 F.3d at 12 n 9. There was, therefore, no double-counting, much less impermissible double-counting, in increasing the base offense level here based on the fact that the defendant's conduct involved physical contact.

In this regard, while physical contact must be established to raise the offense from a misdemeanor to a felony, Section 111 can be violated without any physical contact. *See United States v. Wollenzien*, 972 F.2d 890, 891-892 (8th Cir. 1992). As such, "the guideline enhances for an additional factor that will not be present in every conviction under § 111." *United States v. Padilla*, 961 F.2d 322, 327 (2d Cir. 1992).

Further, Application Note 2 to Section 2A2.4 discusses the application of various Chapter Three adjustments, for example, noting that since "[t]he base offense level incorporates the fact that the victim was a governmental officer performing official duties," the district court should not enhance the sentence pursuant to Section 3A1.2 for conduct involving an official victim. There is no such prohibition regarding an enhancement for physical contact. *See, e.g., United States v. Shepardson*, 196 F.3d 306, 312-14 (2d Cir. 1999) (explaining that application notes clearly spell out where enhancement for stolen firearm or obliterated serial number should not be applied under Section 2K2.1(b)(4), and there was no impermissible double-counting to apply enhancement for stolen firearms where defendant was convicted for stealing firearms).

Moreover, Section 2A2.4, like most sentencing guidelines, was written to cover a variety of offenses. In the case of Section 2A2.4, those offenses all involve obstructing or impeding officers, but some of them may or may not involve physical contact, a dangerous weapon or bodily injury. In this regard, in addition to a violation of 18 U.S.C. § 111, the Statutory Provisions to Section 2A2.4 note that it applies to violations of 18 U.S.C. § 1501 (Assault on process server), 18 U.S.C. § 1502 (Resistance to an extradition agent), and 18 U.S.C. § 3056(d) (Obstructing, resisting or interfering with a Federal law enforcement agent engaged in protective functions).[7]

These principles are illustrated by *United States v. Wollenzien*, 972 F.2d 890 (8th Cir. 1992), where the defendant struck an IRS agent and was convicted of assaulting a federal officer. The district court enhanced

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[7] In fact, Appendix A of the Sentencing Guidelines also applies Section 2A2.4 to: 18 U.S.C. § 758 (concerning high speed flight from immigration checkpoints); 26 U.S.C. § 7212(a) (relating to attempts to interfere with administration of the internal revenue laws); 30 U.S.C. §§ 1461(a) [sic] (3), (4), (5), and (7) and 1463 (relating to enforcement of mining deep sea resources; 33 U.S.C. § 1232(b)(2) (relating to enforcement of waterway safety); 42 U.S.C. §§ 9151(2), (3), (4), and (5) and 9152(d) (relating to enforcement of ocean thermal energy conversion); and a number of Title 16 offenses relating to fishery enforcement (16 U.S.C. §§ 773e(a)(2), (3), (4), (6); 773g; 973c(a)(8), (10), (11), (12); 973e; 1417(a)(5), (6), (b)(2); 1437(c); 1857(1)(D), (1)(E), (1)(F), (1)(H); 1859; 2435(4), (5), (6), (7); 2438; 3606; 3637(a)(2), (3), (4), (6), (c); 5009(5), (6), (7), (8); and 5010(b)).

the defendant's base offense level by three levels for striking the agent. The defendant argued that this increase was impermissible since, as the conduct proscribed by Section 111 involved forcible contact, it was double-counting to assess additional offense levels for physical contact. Noting that Section 111 can be violated by minimal physical contact or without the presence of any physical contact, the court rejected the double-counting argument, holding that physical contact is not an element of the crime under Section 111.

Although *Wollenzien* reached the correct result, its language is somewhat imprecise and the defendant's argument is premised on that imprecision. For purposes of rendering an assault a felony, rather than a misdemeanor under 18 U.S.C. § 111, physical contact is – contrary to *Wollenzien*'s suggestion – an element of the offense. The question, for double-counting, however, is not whether a particular fact is an element of the offense but, rather, whether that fact triggers one or more components of a guideline calculation. If the defendant here (or in *Wollenzien*) had been convicted of a misdemeanor violation of Section 111, he still would have been subject to the 10-level base offense level of Section 2A2.4. Accordingly, that element is not double-counted in the guidelines, much less impermissibly so.

In *United States v. Maloney*, 406 F.3d 149, 152 (2d Cir. 2005), the defendant argued, as does John here, that it is impermissible double-counting to enhance a sentence based on a characteristic which is an element of the offense. In support of that argument, the defendant in

Maloney cited language from *United States v. Rosario*, 7 F.3d 319 (2d Cir. 1999), to the effect that application of an enhancement is proper so long as the conduct underlying that enhancement "is not an element of the primary offense for which the defendant is being sentenced . . . ." 406 F.3d at 154. Noting that the argument took this "primary offense conduct" language out of context, *Maloney* held:

> A proper reading of the above-quoted language from *Rosario* makes clear that we were referring only to circumstances in which the Guidelines do not specifically contemplate that multiple provisions will apply to the same conduct. In such circumstances, district courts calculating a Guidelines sentence must be careful not to apply enhancements based on harms that have already been fully accounted for by another Guidelines provision. *Rosario* does not, however, prohibit district courts from applying multiple Guidelines provisions to account for multiple harms emanating from the same conduct, or from otherwise engaging in double counting where Congress and the Sentencing Commission have unambiguously provided for it.

406 F.3d at 154-55. *Cf. United States v. McAninch*, 994 F.2d 1380, 1385 (9th Cir. 1993) (holding that, because many types of threatening communications fall within the ambit of Section 2A6.1, the guideline which provided the base offense level for sending a threatening communication to the President, the relevant comparison in determining whether there was double-counting in this

case is between the applicable guidelines provisions, not between the guidelines provisions and the criminal code).[8]

While the jury here was instructed that in order to find felony assault it had to find that the offense involved physical contact, given the lesser-included offense charge, the jury could have instead found John guilty of a misdemeanor violation of Section 111(a)(1) even if physical contact had not been established. Indeed, the defendant's analysis suggests that the three-level upward adjustment could have been applied only if the defendant had been convicted of misdemeanor assault (that is, an assault where physical contact was not established to a jury beyond a reasonable doubt) and the judge had then found by a preponderance of the evidence that there had been physical contact. It cannot be applied here, under his argument, where the defendant is convicted of the more serious felony assault charge that involved physical

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[8] *United States v. Hudson*, 972 F.2d 504 (2d Cir. 1992), does not suggest otherwise. In that case, the defendant was convicted of assaulting a Deputy United States Marshal with an automobile. The district court applied U.S.S.G. § 2A2.2, the Aggravated Assault Guideline, which set the base offense level at 14, and then increased the offense level by four levels since the defendant otherwise used a dangerous weapon. This Court reversed, finding that the use of a dangerous weapon had already resulted in an increase in the base offense level by utilizing the aggravated assault guideline. In the instant case, the fact of physical contact is not incorporated into the base offense level under Section 2A2.4 applied here for obstructing or impeding officers, since that same guideline would have been triggered absent physical contact.

contact. It is respectfully submitted that neither Congress nor the Sentencing Commission could have intended such an anomalous result.

The prohibition against impermissible double-counting is a principle that makes sense only when applied internally within the United States Sentencing Guidelines. It does not make sense to inquire whether a particular factor is an element of the offense versus a factor triggering an enhancement. It is only when the element necessarily triggers a particular base offense level that impermissible double-counting would be implicated within the Sentencing Guideline system. As such, the district court properly increased John's offense level since the assault involved physical contact, a fact which had not otherwise been accounted for in the base offense level for Section 2A2.4.

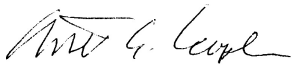
Conclusion

Accordingly, the Government respectfully requests that the judgment of conviction be affirmed.

Dated: October 10, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



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GOVERNMENT'S APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 3:06-cr-5 (JCH)
v.	:	
GARY L. JOHN	:	JANUARY 18, 2007

VERDICT FORM

1/18/2007
Clerk

1. COUNT ONE (Physical Assault on a Federal Officer):

As to the charge in Count One of the Indictment, We the Jury unanimously find the defendant Gary L. John:

Not Guilty _____ Guilty X

If you found Gary L. John "Not Guilty" on Count 1, proceed to Question 2.

If you found Gary L. John "Guilty" on Count 1, skip Question 2 and proceed to the final instructions.

2. LESSER INCLUDED OFFENSE (Simple Assault on a Federal Officer):

As to the lesser included charge in Count One of the indictment, We the Jury unanimously find the defendant Gary L. John:

Not Guilty _____ Guilty _____

You have now completed the verdict form. Please have your foreperson date and sign this verdict form.

1/18/07
Date

Jury Foreperson

ADDENDUM

18 U.S.C. § 111. Assaulting, resisting, or impeding certain officers or employees

(a) In general.--Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

U.S.S.G. § 2A2.4. (2006) Obstructing or Impeding Officers

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If (A) the offense involved physical contact; or (B) a dangerous weapon (including a firearm) was possessed and its use was threatened, increase by 3 levels.

(2) If the victim sustained bodily injury, increase by 2 levels.