IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	**CA 08-30223**
	)	
SHANE MEDORE MAGGI,	)	
	)	
Defendant/Appellant.	)	**CR-07-125-GF-SEH**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

OPENING BRIEF OF APPELLANT

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I. STATEMENT OF JURISDICTION

A. Subject Matter Jurisdiction in the District Court.

The district court had subject matter jurisdiction in this matter as it was a criminal prosecution by Indictment for a criminal offense.

B. Jurisdiction in the Court of Appeals.

This is a direct appeal from a final decision of the United States District Court for the District of Montana, Great Falls Division, entering its Judgment of a criminal conviction and sentence. This Court has jurisdiction of the appeal because it is an appeal to this Court from a final criminal judgment.

C. Appealability and Timeliness of the Appeal.

The district court filed and entered its Judgment and Commitment in the criminal docket on June 11 2008. (CR 56, ER Tab 4). Maggi filed a Notice of Appeal to this Court from the Verdict and Sentencing Order on June 15, 2008. (CR 57, ER Tab 5). The appeal is timely under Rule 4(b) of the Federal Rules of Appellate Procedure.

II. STATEMENT OF THE ISSUES

A. WHETHER THE DISTRICT COURT ERRED BY REVERSIBLE ERROR BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL BASED ON HIS NON-INDIAN STATUS

B. WHETHER THE COURT ERRED BY SENTENCING MAGGI TO A MANDATORY 25 YEAR SENTENCE WITHOUT NOTICE IN THE INDICTMENT OF THIS POSSIBLE PENALTY

C. WHETHER THE DISTRICT COURT ERRED BY SENTENCING MAGGI TO 507 MONTHS IN PRISON BECAUSE THE SENTENCE IS UNREASONABLE CONSIDERING 18 U.S.C. § 3553

III. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a sentence judgment following a jury finding of guilty for assault and use of a firearm offenses entered in the United Court on June 9, 2008, in the United States District Court for the District of Montana, Great Falls Division.

B. Course of Proceedings

As stated in the PSR and District Court record, on October 5, 2007, the United States Attorney for the District of Montana filed a four-count Information charging in Count I that on or about May 16, 2007, at Browning, in the State and District of Montana and within the boundaries of Blackfeet Indian Reservation, being Indian country, the defendant, Shane Maggi, an Indian person, with the intent to do bodily harm, knowingly and intentionally assaulted Kelly Hoyt with a weapon, a pistol, in violation of 18 U.S.C. §§ 113(a)(3) and 1153.

Count II charged that the defendant, with the intent to do bodily harm, knowingly and intentionally assaulted Kimberly Hoyt with a weapon, a pistol, in violation of 18 U.S.C. §§ 113(a)(3) and 1153.

Count III charged that the defendant knowingly used and discharged a firearm, a pistol, during and in relation to a crime of violence which may be prosecuted in a court of the United States, namely the offense of Assault With a Dangerous Weapon, as alleged in Count I, in violation of 18 U.S.C. § 924(c)(1)(A)(iii).

Count IV charged that the defendant knowingly used and brandished a firearm, a pistol, during and in relation to a crime of violence which may be prosecuted in a court of the United States, namely the offense of Assault With a Dangerous Weapon, as alleged in Count II, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). An arrest warrant was issued.

On October 22, 2007, the defendant was arrested and made an Initial Appearance before United States Magistrate Judge Jeremiah C. Lynch in Missoula, Montana. The defendant was detained.

On November 7, 2007, the Grand Jury for the District of Montana handed down a four-count Indictment charging the defendant with the same counts contained in the Information.

On November 15, 2007, the defendant appeared for Arraignment before United States Magistrate Judge Keith Strong in Great Falls, Montana. The defendant entered a plea of not guilty to the Indictment and was detained pending future court proceedings.

On January 8, 2008, the defendant appeared in Great Falls for Jury Trial before the Honorable Sam E. Haddon on January 8, 2008, at 4:55 p.m., the jury went to deliberation; at 9:00 p.m., the jury found the defendant

guilty of the Counts contained in the Indictment. Judge Haddon set sentencing for May 1, 2008, and the defendant was detained pending sentencing.

C. Disposition in the District Court

On June 9, 2008, Maggi was sentenced to a period of 507 months imprisonment which consisted of 87 months on Count I and 87 months on Count II, with the terms of Count I and Count II to run concurrent, one with the other, 120 months on Count , III, ro run consecutive to Counts I and II; and 300 months (mandatory 25 years) on Count IV, to run consecutive to all other counts, to be followed by term of 3 years of supervised release. (CR 56, ER Tab 4).

Maggi contests the finding by the district court that he was an Indian person, that a mandatory 25 year sentence applies and that the sentence was reasonable.

D. Bail Status of Defendant-Appellant

Maggi is currently serving the 507 month prison sentence imposed by the district court at the FCI Victorville federal facility in Adelanto, California. His address is reproduced in the Certificate of Service.

IV. STATEMENT OF THE PERTINENT FACTS

At the trial the Government introduced a birth certificate for Maggi showing that Kathy Maggi was his mother (Exhibit 11) and a tribal enrollment certificate (Exhibit 3) for Maggi's mother without objections. (TRIAL page 33, ER Tab 2, page 33).

Witness Misty Hall testified that she worked at the Blackfeet enrollment Department. She discussed the Government's Exhibit 3 which was a tribal affiliation form for Maggi. The form showed that Maggi's blood relationship to the Blackfeet tribe is one half of his mother's. Maggi is 1/ 64th Blackfeet and 1/32 Cree, which would give him a total of 3/ 64th tribal affiliation. (TRIAL page 38, ER Tab 2, page 38). The witness stated that Maggi was a descendant member of the Blackfeet tribe, he received free Indian health service and also free hunting and fishing rights on the reservation. (TRIAL page 41, ER Tab 2, page 4).

On cross examination, defense counsel introduced defendants exhibit 500 without objection. The witness agreed that children are eligible for enrollment in the tribe if they were born prior to August 30, 1962 to any blood member of the Blackfeet tribe. The witness further agreed that

defendant Maggi was born after 1962 and that a descendent of the tribe born after 1962 had to have 1/4 of Blackfeet blood to be an enrolled tribal member. (TRIAL pages 43-44, ER Tab 2, pages 43-44).

Witness Kenneth Smith testified he was employed at the Blackfeet Community Hospital and he is a custodian of medical records there. He stated that Maggi received treatment at the hospital facility on the basis of his being a descendant of a tribal member.(TRIAL page 52, ER Tab 2, page 52).

Witness Frances Evans testified that she was a tribal prosecutor for the Blackfeet tribal court. She's testified she prosecuted federally recognized Indian members of the tribe and descendants of any tribe and also because Maggi is a descendant of a tribal member. The Tribal Court had jurisdiction to prosecute him in the past when he was on the reservation. (TRIAL pages 57- 59, ER Tab 2, pages 57- 59).

Kelly Hoyt testified she knows the defendant because he is the nephew of an ex wife and he had known Maggi at least 20 years. Kelly Hoyt stated he was working on his truck that afternoon of May 16 and

Kimberly his wife, Maggi and Richard Smith were also there. (TRIAL page 63, ER Tab 2, page 63).

Kelly went into the house to eat dinner at about 8:00 o'clock and Maggi kicked open the door. Maggi then struck Kelly with a black pistol. (TRIAL page 65, ER Tab 2, page 65). Kelly fell to the floor and he was kicked in the ribs. Maggi started shooting at the wall about 5 times while he was laying on the floor about 2 to 3 feet away. (TRIAL page 67, ER Tab 2, page 67).The witness was shown a picture of brown dots on the wall which he said were bullet holes. (TRIAL page 71, ER Tab 2, page 71).

The witness testified that he passed out and does not remember anything else that day. He remembered waking up the next day at the Starr School and later going to a friends house who took him to the hospital. He did not remember what happened at the hospital but "they thought I was drunk up there, instead of beat up". (TRIAL page 80, ER Tab 2, page 80). On cross the witness stated he did not call 9-1-1 and he did not have a phone. A nearby home about a quarter of a mile away from had a phone and he did not report the incident to any police officer until the 17th and he also

went to the hospital and was sent home that day. (TRIAL page 87-88, ER Tab 2, page 87-88).

Witness Kimberly Hoyt testified that on May 16, 2007, she heard gunshots. She saw Shane firing a gun at her husband and she heard Maggi saying to her husband "why was he dogging him and everything. (TRIAL page 96, ER Tab 2, page 96). She stated that Maggi grabbed her and he was shooting a gun toward with two shots being fired above her head. (TRIAL page 97, ER Tab 2, page 97).

Maggi struck her with the gun and ammunition clip fell out of the gun. She took the clip and stuck it in a clothes basket. Maggi and Richard Smith then left the house. (TRIAL page 100, ER Tab 2, page 100). Kimberley Hoyt stated her lip had been split open from the gun striking her face, but she never received any medical care for the injury.(TRIAL page 106, 110, ER Tab 2, page 106, 110).

Immediately after the incident Kelly and Kimberly went to a friends house near Starr School. They did not go to the hospital until about two days after the incident. (TRIAL page 104, ER Tab 2, page 104).

FBI Agent Michael Wineman testified that he went to the Hoyt home on the late evening hours of May 17, 2007, and more likely early on May 18, to investigate the bullet holes and pistol magazine.. He located a pistol near a hot tub and bullet holes.(TRIAL pages 115-117, ER Tab 2, pages 115-117). He also testified that no police had been at the scene from the 16th through the 18th to keep the scene secure.(TRIAL page 120, ER Tab 2, page 120).

Following this witness ,the Government concluded their case and defense counsel made a motion for judgment of acquittal. The defense maintained the Government had not carried its burden to prove that Maggi was an Indian and subject to jurisdiction of the court.(TRIAL page 122, ER Tab 2, page 122), the District Court heard argument and denied defense counsel's motion.(TRIAL page 127, ER Tab 2, page 127). The defense did not call any witnesses and the trial was concluded

V. SUMMARY OF ARGUMENT

It is disputed that Maggi was an Indian person subject to the jurisdiction of the Court. Although the Government produced some evidence of medical care, the availability of tribal hunting and fishing rights

and alluded to religious practices, this does not meet the necessary threshold. Maggi was not an enrolled member of any Indian tribe and only held 1/64th of Indian blood through his parents.

Maggi was never given notice in a charging document that he could be sentenced to a mandatory 255 year prison term if he was convicted. Without this information his case was compromised because he could not make a fully informed decision whether to seek a plea agreement that may have avoided a minimum sentence.

The district court imposed an unreasonable sentence in light of *United States v. Booker* and established sentencing procedure when it failed to assess, analyze and meaningfully consider § 3553(a) factors. Maggi's resulting sentence of 507 months was not reasonable because the district court failed to analyze his background.

VI. ARGUMENT

A. WHETHER THE DISTRICT COURT ERRED BY REVERSIBLE ERROR BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL BASED ON HIS NON-INDIAN STATUS

1. Standard of Review

Counsel for Maggi moved for a judgment of acquittal pursuant to Rule 29 at the close of the Government's case, arguing that the Government had failed to prove that Mr. Cruz was an Indian person. A trial court's ruling on a motion for acquittal is reviewed *de novo*. *United States v. Johnson*, 357 F.3d 980, 983 (9th Cir. 2004). This court reviews evidence presented against the defendant in a light most favorable to the Government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003), *cert. denied*.

2. Argument

As set forth in 18 U.S.C. § 1153, status as an Indian person was an element of the crime charged in the Indictment. Accordingly, the burden of proof was upon the Government to prove Maggi's status as an Indian person beyond a reasonable doubt. The defense had no burden on that issue.

The generally accepted test for Indian status considers "(1) the degree of Indian blood; and (2) tribal or Government recognition as an Indian." *United States v. Keys,* 103 F.3d 758, 761 (9th Cir. 1996). The general blood requirement is of only “some” Indian blood. *United States v. Bruce* 394 F.3d. 1215, 1223 (9th Cir. 2005). But see *United States v. Ward*, C.C.S.D.Cal.1890, 42 F. 320, 14 Sawy. 472 (The son of a negro father by an Indian mother was not an Indian, within former section 548 of this title, as the child follows the condition of the father.)

The second prong of the test – tribal or federal Government recognition as an Indian – "probes whether the Native American has a sufficient non-racial link to a formerly sovereign people." When analyzing this prong, courts have considered, in declining order of importance, evidence of the following: " 1) tribal enrollment; 2) Government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *Bruce, supra* at 1224 (internal citations omitted).

Maggi is not an enrolled member of the Blackfeet tribe per testimony of the witnesses Misty Hall and Kenneth Smith.. To be an enrolled member of the Blackfeet tribe you must possess one-fourth degree of Blackfeet blood.

Maggi's mother is an enrolled member of the Blackfeet tribe and the analysis must turn to whether the Government proved that Maggi had a sufficient non-racial link to a formerly sovereign people. *St. Cloud v. United States,* 702 F.Supp. 1456, 1460 (D.S.D. 1988), cited with approval in *Bruce, supra.* Those factors are to be considered in *declining* order of importance. *Bruce, supra*, at 1224 (emphasis add and ed). The first factor is tribal

The Government failed to prove that Maggi was enrolled in the

Blackfeet tribe .

The next factor to be considered is Government recognition formally and informally through receipt of assistance reserved only to Indians, *Bruce, supra*, at 1224. Little evidence was introduced that Maggi received any assistance reserved only to Indians. Medical personnel testified that Maggi received medical benefits through the Indian Health Services.

Bruce, supra, does not define what is meant by the third factor, enjoyment of the benefits of tribal affiliation. *Bruce, supra*, at 1224. Because it is listed as a separate factor, presumably it is different than the receipt of assistance reserved only to Indians.

The Government introduced scant evidence that Maggi received any social recognition as an Indian through residence on a reservation and participation in Indian social life, which is the fourth factor under *Bruce, id.* There was testimony that Maggi may have talked about sweat lodges and smudging. No witness testified they saw Maggi at these functions or participate in any Indian religious ceremonies.

The Government failed to prove the "tribal or federal Government recognition as an Indian prong" set forth in *Bruce*. Even when reviewed in the light most favorable to the Government, the evidence adduced at trial was insufficient to prove that Maggi was an Indian person. He is not an enrolled tribal member and he received no benefits from the tribe or federal Government. He did not participate in any Indian ceremonies or religious activities and he did not hold himself out to be an Indian. The district court

committed reversible error in denying the appellants motion for judgment of acquittal at the close of the Government's case.

B. WHETHER THE COURT ERRED BY SENTENCING MAGGI TO A MANDATORY 25 YEAR SENTENCE WITHOUT NOTICE IN THE INDICTMENT OF THIS POSSIBLE PENALTY

1. Standard of Review

The appellate court determines whether the district court properly calculated the applicable range under the advisory guidelines. *United States v. Mohamed*, 459 F.3d 979, 985 (9th Cir. 2006), citing *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

2. Argument

After the initial Presentence Report was completed the parties made various objections to the applicable guideline range and whether a 25 year mandatory sentence was appropriate. The following arguments were submitted by Maggi and these arguments were overruled by the district court at sentencing.

Maggi maintains that the district court may not sentence him to more than the consecutive mandatory 10 year sentence and consecutive mandatory 7 year sentence presented to him in the Indictment for the following reasons.

The criminal Indictment in this case, which was filed November 7, 2007, contained four criminal Counts and a notice of the associated penalties. Counts I and II charged the defendant with the offense of assault with a dangerous weapon. It provided a penalty of 10 years imprisonment, a fine and three-years supervised release. Count III charged Maggi with use and discharge of a firearm during a crime of violence. The Indictment stated a "mandatory minimum 10 years to life imprisonment, consecutive to any other sentence, a fine and five years supervised release. Count IV finally charged Maggi with using and brandishing a firearm during a crime of violence. The notice of penalty provided a mandatory minimum seven years to life imprisonment, consecutive to any other sentence, a fine and five years supervised release. (Emphasis added).

The Indictment filed in November 2007, superseded the criminal complaint, which was filed October 5, 2007. The Complaint likewise charged Maggi with the same four Counts, as in the Indictment. For the

offense of assault with a dangerous weapon in Counts I and II the penalty was stated as 10 years imprisonment. For the discharge of a firearm during a crime of violence in Count III, the penalty was stated as a mandatory 10 years imprisonment and a maximum term of life imprisonment, consecutive to any other sentences, a fine and five years supervised release. Count IV of the Complaint , which charged the defendant with brandishing a firearm during a crime of violence, provided a penalty of a mandatory minimum seven years to life imprisonment, consecutive to any other sentence, a fine and five years supervised release. (Emphasis added.). (CR 8, ER Tab 1).

Maggi did not sign a plea agreement on any of the charges and he was convicted following a jury trial. The Government maintains, pursuant to 18 U.S. 24(c)(1)(C)(I), that Maggi is subject to a mandatory minimum sentence of 25 years on Count IV consecutive to any other sentences. Maggi argues to the Court that the 25 year sentence should not be applied because defendant never received notice of this possible enhancement in either of two places, the Complaint or the Indictment.

In both the Criminal Complaint and Indictment Maggi was informed that if he was convicted of Count IV that he would receive at least a mandatory seven-year sentence consecutive to any other sentence he may be convicted of. Possible sentences are always a consideration when deciding whether to resolve the case with a trial or a plea agreement.

From Rule 11, Fed. R.Crim. Proc., and related case law, is very clear that a defendant has a right to be notified of any consequences of the plea. Fed. Rule Crim. Proc. 11 provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . . . (Emphasis added.)

The fact that a defendant has been found guilty following a jury trial should not negate the very important notice of the possible penalties. Even though there was no plea agreement in the instant case, there is a factual understanding on the face of the Indictment between the defendant and the Government of his possible penalties upon conviction. Maggi was warned in the Indictment that he was facing mandatory consecutive sentences of 10 and

7 years for Counts III and IV if he was convicted. There was no mention of the mandatory 25 year sentence.

Absent a plea agreement in this case, there was clearly no sentencing agreements. It is established case law that a breach of a plea agreement can be dealt with harshly by the courts when the parties are unclear of what was understood in a plea agreement.

When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427 (1971). In determining whether a plea agreement has been broken, courts look to "what was 'reasonably understood by [the defendant] when he entered his plea of guilty.'" *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979) (quoting *United States v. Crusco*, 536 F.2d 21, 27 (3d Cir. 1976)). If disputed, the terms of the agreement will be determined by objective standards. *United States v. Arnett*, 628 F.2d at 1164. The Government will be held to "the literal terms of the agreement." *United States v. Garcia*, 519 F.2d 1343, 1344-45 (9th Cir. 1975).

The Supreme Court suggested in *Apprendi* that indictments must allege enhancements so defendants have adequate notice of them. The *Apprendi* Court praised the common law's determinate sentences because they allow defendants to predict their sentences from the faces of the Indictment. *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2356 (2000) ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime." (citing 4 William Blackstone, Commentaries 369-70).

Concurring Judge Scalia devoted a paragraph to notice as an essential part of fairness - the law should "tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years .. . . [to ensure that] the criminal will never get more punishment than he bargained for when he did the crime. *Id.* at 2367 (Scalia, J., concurring).

Maggi requests the Court to find that he is not subject to a mandatory 25 year sentence enhancement because he received incorrect information on the sentencing potential enhancement. Maggi went to trial using the sentencing information presented in the Indictment. At no time before the

trial did Maggi have the opportunity to consider the mandatory sentence enhancement with his decision whether to negotiate a plea or to go to trial.

C. WHETHER THE DISTRICT COURT ERRED BY SENTENCING MAGGI TO 507 MONTHS IN PRISON BECAUSE THE SENTENCE IS UNREASONABLE CONSIDERING 18 U.S.C. § 3553

1. Standard of Review

The appellate court determines whether the district court properly calculated the applicable range under the advisory guidelines. *United States v. Mohamed*, 459 F.3d 979, 985 (9th Cir. 2006), citing *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

Appellate courts review sentences for "unreasonableness" in light of the sentencing factors in 18 U.S.C. § 3553(a).*United States v. Booker*, 125 S. Ct. 738, 765-67 (2005), Courts must sentence within the applicable Guidelines range subject only to limited "departure" authority, 18 U.S.C. § 3553(b)(1), and appellate courts review de novo the exercise of this departure power. See *Booker*, 125 S. Ct. at 764-65 . The legal determinations that form a given sentence are still reviewed *de novo*. *See e.g.*, *United States v. Cirino*, No. 03-10711 (9th Cir. August 15, 2005).

2. Argument.

Post-*Booker* district courts have the discretion to sentence individuals outside the sentencing ranges established in the Federal Sentencing Guidelines, but, they still must take the applicable Guidelines range into consideration during sentencing. The Ninth Circuit has held that, "at a minimum," the Guidelines consultation requirement "obliges the district court" to correctly calculate the sentencing range prescribed by the Guidelines. *Cantrell,* 433 F.3d at 1280; *see also United States v. Merryweather,* 431 F.3d 692, 696 (9th Cir. 2005).

to comply with the *Booker* mandate courts normally must determine and consider the Guidelines (Guideline calculation must be made, but it is only the starting point, and the sentencing court must then determine the proper sentence applying all of the § 3553(a) factors). Finally, "[district courts must provide defendant-specific reasons for imposing a certain sentence to comply with § 3553." *United States v. Knows His Gun*, 438 F.3d 913, 918 (9th Cir. 2006) (internal citation).

Maggi must concede that if he was properly y convicted after consideration of the above arguments, that the district court has discretion in his sentencing under

the advisory guideline range. But, under any analysis the 507 months top of the guideline range sentence he received is unreasonable in light of the factors set forth in 18 U.S.C. § 3553(a). *See Cantrell,* 433 F.3d at 1279.

The district court insufficiently evaluated the relevant factors when it sentenced Maggi. *See United States v. Knows His Gun,* 438 F.3d at 918. (holding that *Booker* requires the district court to consider the factors in section 3553(a)). A sentencing judge may sufficiently consider the sentencing factors even though he does not specifically articulate each factor or mechanically recite all of the factors at the sentencing hearing. *Id. see also United States v. Dean,* 414 F.3d 725, 728-29 (7th Cir. 2005).

The Supreme Court explained in *Booker* that review for reasonableness is meant to assess the ultimate sentence imposed to determine whether the sentencing judge gave meaningful consideration to the factors of 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 260-261.

Ultimately all sentences must be reviewed for "unreasonableness." *Id.* at 261; *see United States v. Plouffe,* 445 F.3d 1126, 1131 (9th Cir.2006). "In determining whether a sentence is unreasonable, we are guided by the sentencing

factors set forth in 18 U.S.C. § 3553(a), including the sentencing range established by the Sentencing Guidelines.

During Maggi's sentencing the court did not purposefully discuss the relevant considerations embodied in § 3553(a) and failed to support its conclusion that the most appropriate sentence was within the range the advisory sentencing guidelines recommended. Maggi's sentence of 507 months was not within the reasonable range of sentences the district court could have imposed in light of the § 3553(a) factors.

Maggi was 35 years old at the time of his sentencing in 2008. (PSR, page 2). He has he has maintained a relationship with Cindy Torres since 2004. She presented information in the PSR that she has known Maggi for 12 years and she has never seen him violent. (PSR page 11, No. 48.).

With a 507 month (42 years) sentence Maggi will likely be imprisoned close to his 77th birthday when he is released.

Due process requires a fair and consistent sentencing procedure. *United States v. Harrison-Philpot*, 978 F.2d 1520, 1528-1529 (9th Cir. 1992), *cert. den*., 508 U.S. 929 (1993). *See United States v. Coletta*, 682 F.2d 820, 827 (9th Cir.

1982), *cert. den*., 459 U.S. 1202 (1983) (stating that due process requires fair consideration of sentencing information); *United States v. Doe*, 655 F.2d 920, 927 (9th Cir. 1980) (vacating sentence for violation of the defendant's "due process right to a fair sentencing hearing").

This principle is explicitly set forth in the Sentencing Guidelines, which directs that a "court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has a sufficient indicia of reliability to support its probable accuracy". U.S.S.G. § 6A1.3(a). The right to a fair and accurate sentencing process is not merely procedural, but rather extends to the result of the sentencing process.

During Maggi's sentencing witness Christine Cobell testified that she was the Director of Social Services with the Indian Health Services and she had known Maggi for probably 25 years. She said Maggi was a hard worker with chemical addiction problems. Maggi had completed a 30 day treatment program and did excellent. (SENT page 12, ER Tab 3 page 12). She felt Maggi would benefit from a long term drug treatment program.

Although the victims in this case testified at trial that they were scared of Maggi's actions towards them, they made no immediate efforts to contact law enforcement and there was a home which had a had a phone approximately 1/4 mile from the Hoyt residence. The Hoyts did not feel the need to contact law enforcement or even seek medical attention. This same attitude was taken by the friends at the home that the Hoyts went to after the assault. These people made no efforts to seek medical attention for Kimberly Hoyt until the following day, about 8 hours after the incident.

VII. CONCLUSION

Maggi maintains that he is not subject to the Court's jurisdiction because of his non-Indian status and the case should be dismissed.

In the alternative, the imposition of a mandatory 25 years sentence for Count IV is unwarranted. Prior to the PSR objections by the Government the guideline range was set at 274-291 months. (PSR page 13, No. 66). Maggi maintains that a sentence at the lower end of this range may be appropriate.

RESPECTFULLY SUBMITTED this 10th day of November, 2008.

/s/ James B. Obie

James B. Obie

VIII. CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief of Defendant-Appellant is in compliance with Ninth Circuit Rule 32(a) (as amended). The Brief's line spacing is double spaced. The brief is proportionately spaced, the body of the argument has a Times New Roman typeface, 14 point size and contains approximately 6,14 words at an average of 280 words (or less) per page, including footnotes and quotations.

DATED this 10th day of November, 2008.

/s/ James B. Obie
James B. Obie

IX. STATEMENT OF RELATED CASES

The undersigned, counsel of record for the Defendant-Appellant, pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, states that, to his knowledge, there are no related cases pending before this Court.

DATED this 10th day of November, 2008.

/s/ James B. Obie
James B. Obie

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF systems.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users, I have mailed the foregoing document by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non/CM/ECF participants:

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/s/ James B. Obie
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