No. 18-4036

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL SLAGER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Slager on January 16, 2018. J.A. 1906-1910.[1] Slager

[1] "J.A. ___" refers to page numbers in the Joint Appendix filed by defendant-appellant Michael Slager. "Br. ___" refers to page numbers in Slager's opening brief. "S.A. ___" refers to page numbers in the Supplemental Appendix filed by the United States in conjunction with this brief.

filed a timely notice of appeal on January 16, 2018. J.A. 1911. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in finding that the underlying offense for purposes of the Sentencing Guidelines was second-degree murder instead of voluntary manslaughter, where eyewitness testimony and video evidence showed that Slager fired his weapon at Walter Scott eight times while Scott was unarmed and running away from Slager.

2. Whether the district judge committed reversible error in discussing the autopsy report with his wife, given that (1) the judge did not purport to rely on that discussion in sentencing Slager and (2) even if he had, that reliance would have been harmless because it would not have affected Slager's sentence.

3. Whether the district court plainly erred in applying a two-level enhancement under Section 3C1.1 of the Sentencing Guidelines for obstruction of justice where Slager's false account of the events leading up to the shooting caused both state and federal officials to expend significant resources in their investigations and prosecutions.

4. Whether the district court abused its discretion when it found the report and testimony of defense expert Megan Fletcher unreliable and thus declined to credit them.

5. Whether the district court erred in holding that the Constitution's Double Jeopardy Clause did not bar the United States from prosecuting Slager in federal court.

STATEMENT OF THE CASE

1. Procedural History

a. On May 10, 2016, a federal grand jury in the District of South Carolina returned a three-count indictment charging defendant-appellant Michael Slager, a former officer with the North Charleston Police Department (NCPD), with violating 18 U.S.C. 242 (deprivation of rights under color of law), 18 U.S.C. 924(c) (use of a weapon during commission of a crime of violence), and 18 U.S.C. 1512(b)(3) (obstruction of justice). J.A. 13-15. These charges arose out of Slager's fatal shooting of Walter Scott and Slager's subsequent false statements to law enforcement officers about the incident. The Section 242 count alleged that Slager, "while acting under color of law[,] * * * shot Walter Scott without legal justification, willfully depriving him of the right * * * to be free from the use of unreasonable force by a law enforcement officer." J.A. 13.

b. Before the federal prosecution, Slager was tried in state court on one count of murder. The state jury failed to return a verdict, and the state court declared a mistrial in December 2016. J.A. 562-563.

c. On May 2, 2017, Slager, the United States, and the State of South Carolina entered into a global plea agreement, whereby Slager pleaded guilty to Count 1 of the indictment—deprivation of civil rights under color of law in violation of 18 U.S.C. 242. In exchange for Slager's guilty plea, the United States dropped the remaining counts of the indictment and agreed to recommend a three-level reduction in the applicable offense level under Sentencing Guidelines § 3E1.1 for acceptance of responsibility. In addition, South Carolina agreed not to retry Slager in state court and dismissed the murder charge against him. S.A. 65.

d. Slager's sentencing hearing began on December 4, 2017, and lasted four days. J.A. 944-1629. On December 7, 2017, the district court sentenced Slager to 240 months' imprisonment, two years' supervised release, and a $100 special assessment. J.A. 1627, 1906-1910.

Slager filed a timely notice of appeal. J.A. 1911.

2. Factual Background

a. The Fatal Shooting Of Walter Scott

On the morning of April 4, 2015, NCPD Officer Michael Slager stopped Walter Scott's vehicle after observing that its center brake light was not functioning. After the stop, Scott fled on foot, and Slager pursued him for approximately 200 yards. During the chase, Slager shot his taser probes twice.

The first shot was unsuccessful, but the second brought Scott to the ground. S.A. 63-64; J.A. 1851.

An altercation ensued, the details of which were heavily disputed during the sentencing hearing. The district court credited the testimony of Feidin Santana, a bystander who witnessed the incident. J.A. 1855. Santana testified that he was walking to work when he noticed Slager chasing Scott on foot. J.A. 969. Santana testified that he lost sight of Slager and Scott briefly. J.A. 997. When he saw them again, Scott was on the ground facing down, and Slager was on top of Scott. J.A. 971. Santana testified that he then heard something that sounded like electricity and that Scott sounded like he was being hurt. J.A. 971-972. Santana also saw Slager punch Scott in the back. J.A. 972. He testified that Scott was at no point face-up and that Scott was never on top of Slager. J.A. 972-973. He did not see Scott punch or fight with Slager at any point. J.A. 973. Nor did he witness Scott take control of Slager's taser, charge toward Slager, or attempt to hurt Slager. J.A. 973-976. Santana described Scott's actions during the ground altercation as "[j]ust trying to get away, just trying to leave." J.A. 974.

Santana testified that after the ground altercation, Scott got up quickly, like "a man determined to just get away." J.A. 975. Slager was still holding Scott when the two got up, but Scott managed to break free and run. J.A. 975-976. At that point, Slager pulled out his service weapon and fired multiple times. J.A. 976-

977. When Slager began firing, Scott was at least 16 feet away from him, and when Slager fired his last shot, Scott was approximately 40 feet away from him. J.A. 1117, 1120, 1274. Five shots hit Scott, all entering from behind. S.A. 64; J.A. 1868, 1871. Scott fell to the ground. Slager put handcuffs on Scott but did not administer any medical treatment. J.A. 977.

Santana filmed parts of the incident, including the shooting, on his cell phone. His video footage shows Slager firing eight shots at Scott, all while Scott was unarmed and running away from Slager. J.A. 1185, 1294, 1861; S.A. Volume II (Video). Santana's video also shows Slager recovering his taser from the location where it had fallen, several feet behind where he had been standing when he shot Scott. J.A. 1110-1113, 1186-1187. He dropped the taser next to Scott's body but then picked it up and re-holstered it moments later. J.A. 1186-1187. Scott died on the scene due to injuries from the gunshots. S.A. 64; J.A. 1866, 1899. After finding out that Scott had died, Santana gave the video to Scott's family. J.A. 1010.

b. Investigation And Prosecution

Shortly after the shooting, NCPD Lieutenant Daniel Bowman arrived on the scene. Slager told Bowman that Scott had grabbed Slager's taser away from him and that Scott had been coming at him with the taser when Slager fired his first shot. S.A. 75. Slager also told Bowman that he had rendered emergency aid to

Scott until assistance arrived. S.A. 75. Each of these statements was false. J.A. 1875-1876.

On Monday, April 7, 2015, Slager met with South Carolina Law Enforcement Division (SLED) investigators Special Agent Angela Peterson and Lieutenant Charles Ghent. At the time of the meeting, the SLED investigators and members of the FBI had received and viewed Santana's video but Slager did not know that it existed. J.A. 702, 1056. Before the interview, Slager asked his attorney to verify whether there was video of the shooting. J.A. 702, 761-766. He also asked whether there were any witnesses, and whether the autopsy results were complete. J.A. 701, 761-766. SLED agents did not tell Slager about the video or the autopsy results. J.A. 765-766.

After waiving his *Miranda* rights, Slager provided SLED agents with his own detailed account of the shooting, even providing physical demonstrations. J.A. 1632-1643. He stated that while the two were struggling on the ground, Scott rolled onto his back, grabbed Slager's taser, and then "jerked the Taser out of Slager's hands." J.A. 1639. He said that Scott then pointed the taser at Slager with his arms out. J.A. 1639. Slager said that he then rose up away from Scott because he wanted to get away from the taser. J.A. 1639. Slager stated that Scott then got to his feet and came toward him with the taser, his "arm extending straight out." J.A. 1640. Slager stated that he was "shuffle-stepping" to the left to get out of

Scott's way when he (Slager) started firing his weapon. J.A. 1640-1641. Slager also stated that he recovered his taser from the ground between the spot where he had been shooting and where Scott fell. J.A. 1641. These were all false statements. J.A. 1879, 1896-1897.

SLED agents reviewed their interview notes with Slager and allowed him to make additions and corrections. Slager did so, and his minimal corrections are reflected in the Memorandum of Interview. J.A. 1642. Slager was arrested and charged with murder later that day. J.A. 1877.

Slager's state trial began on October 31, 2016. J.A. 562. In his state court testimony, Slager repeated his claim that during the ground altercation, Scott had rolled over onto his back and had grabbed Slager's taser. J.A. 282, 286-287. Slager also claimed, for the first time, that Scott had "attacked" him and had "overpowered" him. J.A. 286, 367. He also continued to claim that Scott had been coming after him with the taser when he fired his weapon. J.A. 286-288, 365.

Later, in a pretrial hearing in federal court, Slager claimed for the first time that Scott had been on top of him and had punched him during the ground altercation. J.A. 728, 732. He also repeated his claim that Scott had grabbed his taser while the two were on the ground and had pursued him with it. J.A. 711. Three days later, in a hearing on April 24, 2017, he claimed that he could not be

certain Scott was ever on top of him. J.A. 863-864. Instead, he claimed almost total lack of memory of the entire incident. J.A. 861-870.

Slager ultimately pleaded guilty to violating 18 U.S.C. 242. In the plea agreement, Slager admitted that "[a]s Scott was running away, Slager fired eight shots at him from his department-issued firearm" while Scott "was unarmed and running away from Slager." S.A. 64. He acknowledged that "[f]ive shots hit Scott, all entering from behind" and that "Scott suffered bodily injury and died on the scene as a result of the injuries from the gunshots." S.A. 64. Slager agreed that he "used deadly force even though it was objectively unreasonable under the circumstances" and that "his actions were done willfully, that is he acted voluntarily and intentionally and with the specific intent to do something that the law forbids." S.A. 64.

c. The Sentencing Proceedings

In applying the Sentencing Guidelines to individuals convicted of violating 18 U.S.C. 242, district courts must determine the base offense level by cross-referencing the offense guideline applicable to the underlying offense. U.S.S.G. § 2H1.1. The government argued that the appropriate underlying offense was second-degree murder, while Slager urged the court to apply the guideline for voluntary manslaughter. S.A. 14-18, 46-52; J.A. 1553, 1557.

The government also requested that the court apply a two-level enhancement under Sentencing Guidelines § 3C1.1 for obstruction of justice based on (1) Slager's attempts to tamper with the crime scene by moving the taser next to Scott after the shooting; (2) Slager's false statements to law enforcement officers immediately after the shooting; (3) Slager's false statements to SLED investigators several days after the shooting; and (4) Slager's false statements in state and federal court. S.A. 7-12, 18-22; J.A. 1872.

The sentencing hearing lasted four days and included testimony from 10 witnesses. Slager attempted to show that the shooting happened after a heated ground fight, during which Scott allegedly climbed on top of Slager, assaulted Slager, grabbed Slager's taser, and used the taser to drive-stun Slager.[2] Slager also argued that his false statements during the investigation and prosecution were not intended to obstruct justice but instead were the result of memory lapses caused by the trauma of the shooting. S.A. 54-58; J.A. 1294-1383.

[2] The type of taser Slager used operated in two different ways—"probe" mode and "drive-stun" mode. See generally J.A. 1467-1505 (testimony of Darko Babic). In "probe" mode, the taser's operator pulls a trigger to cause two electrical probes attached to wires to launch from a cartridge in the device. J.A. 1467, 1472-1473. If both probes attach to a target, they then send an electrical current that causes neuromuscular incapacitation. J.A. 1478-1480, 1503. In "drive-stun" mode, the taser is held directly against a target's body and causes pain but not neuromuscular incapacitation. J.A. 1022. See also S.A. 3-4 nn.4-5.

On December 7, 2017, the court issued its sentence from the bench, concluding that second-degree murder was the appropriate underlying offense. J.A. 1571. The court found that "when the defendant shot Walter Scott, he did so out of malice aforethought." J.A. 1570. The court found that "shooting dead an unarmed and fleeing Walter Scott in the back was reckless, wanton, and a gross deviation from a reasonable standard of care, such that [Slager] was aware of the serious risk of death or bodily harm." J.A. 1570. Further, the court found that there was "not sufficient evidence of heat of passion or sudden quarrel mitigation to reduce [the underlying offense] from second-degree murder to voluntary manslaughter." J.A. 1570. Finally, the court found that "the events that transpired before [Slager] applied deadly force d[id] not constitute provocation that would arouse a reasonable and ordinary person to kill someone." J.A. 1571.

The court also applied a two-level enhancement for obstruction of justice under Section 3C1.1 based on Slager's statements to SLED investigators during the April 7, 2015, interview. The court found that Slager made these statements "with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." J.A. 1571.

Taking these rulings into account, the court determined that Slager's offense level was 38 and his criminal history category was one, resulting in a Guidelines sentence of 235-293 months' imprisonment, two to five years' supervised release,

and a $100 special assessment. J.A. 1573. After hearing from members of Scott's family and from family and friends of Slager, the court sentenced Slager to 240 months' imprisonment and two years' supervised release and ordered him to pay a $100 special assessment. J.A. 1627.

The court entered judgment on January 16, 2018. J.A. 1906-1910. The same day, the court issued a 57-page sentencing order setting out in further detail its reasons for Slager's sentence. J.A. 1849-1905.

SUMMARY OF THE ARGUMENT

This Court should affirm Slager's conviction and sentence because each of his five challenges lacks merit.

1. In determining Slager's base offense level under the Sentencing Guidelines, the district court correctly found that the underlying offense was second-degree murder. In making its factual findings, the court acted within its discretion in crediting the account of Feidin Santana, a bystander who witnessed the events and videotaped the shooting. Santana's account was consistent throughout the investigation, the state prosecution, and the federal proceedings, while Slager's account was inconsistent, evolving, and largely contradicted by Santana's video. The district court also acted within its discretion in declining to accept the conclusions of Slager's expert witnesses. The court explained its

reasons for finding the experts' conclusions unpersuasive, and these credibility determinations are entitled to deference.

Based on these factual findings, the district court properly rejected Slager's argument that the underlying offense was voluntary manslaughter. Because the ground altercation immediately preceding the shooting did not support Slager's claim that he shot Scott in a "heat of passion," a finding of voluntary manslaughter would have been inappropriate. Rather, Slager's act of shooting at Scott eight times as Scott was running away represented a gross deviation from a reasonable standard of care, supporting an inference that Slager was aware of a serious risk of death or serious bodily harm. Thus, Slager possessed the requisite malice aforethought to support the conclusion that the underlying offense was second-degree murder.

2. The district judge's discussion with his wife about the autopsy report did not constitute legal error because there is no indication in the judge's sentencing order that he relied on any information that his wife may have provided. And even if the district court had relied on such information, such reliance would be harmless because it could not have affected Slager's sentence. The autopsy results were not disputed. The government acknowledged that Scott's body showed injuries consistent with a ground altercation. Further, Slager admitted in his plea

agreement that he shot at Scott eight times as Scott was running away, that five of these shots hit Scott in the back of his body, and that Scott died from his wounds.

3. The district court did not plainly err in applying a two-level enhancement for obstruction of justice under Section 3C1.1. Slager's false statements during the April 7, 2015, SLED interview significantly obstructed and impeded the investigation and prosecution of the shooting. In particular, investigators and prosecutors were forced to expend significant time and effort countering Slager's false account of the ground altercation that immediately preceded the shooting.

Even if Slager's false account of these events had not significantly hindered the investigation and prosecution of the events, the court's application of the enhancement could not qualify as *plain* error because the issue of whether Section 3C1.1 required Slager's false statements during the interview to actually obstruct or impede justice is not clear under current law.

4. The district court did not abuse its discretion in discounting as unreliable the state court testimony and report of SLED Agent Megan Fletcher regarding possible sources of markings on Slager's uniform. Slager relied on her testimony and report to support his claim that Scott tased Slager before the shooting. Fletcher's methodology was not subject to peer review or publication and had no established error rate, and her results were not reproduced by anyone else at SLED. Rather, Fletcher admittedly created her method for testing the effect of heat on

polyester clothing for use in this case. Regardless, even if the district court had fully credited her conclusion that a taser could not be excluded as the cause of marks on Slager's uniform, Fletcher's testimony would not have changed the district court's finding that Scott did not drive-stun Slager.

5. The district court correctly held that the Double Jeopardy Clause did not bar Slager's federal prosecution. Binding Supreme Court precedent holds that the Double Jeopardy Clause does not prohibit successive prosecutions by a state and the federal government. But even if the Supreme Court were to abandon this precedent, the Double Jeopardy Clause would not bar Slager's federal prosecution because the jury in Slager's state trial failed to reach a verdict and the court declared a mistrial.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY FOUND THAT THE UNDERLYING OFFENSE WAS SECOND-DEGREE MURDER

A. Standard Of Review

"When determining whether a district court properly applied the [Sentencing] Guidelines, including its application of a cross-reference," this Court "review[s] the district court's legal conclusions de novo and its factual findings for clear error." *United States* v. *Ashford*, 718 F.3d 377, 380 (4th Cir. 2013) (internal quotation marks and citation omitted).

B. Background

1. The District Court's Factual Findings

In its sentencing order, the district court set out the factual findings underlying its rulings. The court found that Scott was face-down during the ground altercation and at no point was on top of Slager. J.A. 1856-1857. It found that Scott never punched or otherwise assaulted Slager and never had control of the taser. J.A. 1856-1857. The court found that during the shooting, "at no point did Scott turn around, let alone attempt to attack Slager." J.A. 1855. Rather, the court found that during the entirety of the incident, Scott was merely trying to get away from Slager. J.A. 1856-1857. In sum, the court concluded "that Scott was not on top of Slager during the ground altercation, that Scott never had the taser, and that Scott was running away from Slager when he was shot and killed." J.A. 1860.

The district court also explained the basis for these findings. J.A. 1854-1860. The court found Santana, the eyewitness who took the video footage, credible because "a review of the statement that Santana gave to SLED, Santana's state court testimony, and his federal court testimony reveals a consistent story that is at odds with Slager's presentation of the sequence of events." J.A. 1855. On the other hand, the court found that "Slager gave different stories to NCPD officers on the scene, to SLED investigators in the 72 hours after the shooting, during his trial in state court, and in the pretrial proceedings in federal court." J.A. 1855. Due to

Slager's "evolving stories" about the incident, the district court found that he was "not a credible witness." J.A. 1855. Framing the choice as one between "Slager's self-serving, evolving, and internally inconsistent testimony" and Santana's testimony, which had been consistent throughout, the court credited Santana's account. J.A. 1860.

The court also explained its reasons for declining to credit the testimony of Slager's expert witnesses. The court discounted the testimony of SLED trace evidence examiner Megan Fletcher about the possible source of marks on Slager's uniform, which Slager argued supported his account that Scott tased him before the shooting, because it found that her methodology was unreliable (J.A. 1860 n.5), and in any case, "merely support[ed] the argument that a taser cannot be conclusively excluded as one possible cause of marks on a uniform." J.A. 1859 n.5. See pp. 46-51, *infra*.

The court also explained why it declined to credit the testimony of Slager's forensic expert, David Hallimore, who testified that after applying filtration and manipulating the sound levels in the Santana video, he could hear Slager say, "let go of the taser or I'll shoot." J.A. 1216-1218. First, the testimony conflicted with Santana's testimony that he never saw Scott with a taser. J.A. 1856 n.4. And second, Hallimore had admitted that the "'digital representative signals' that he used to manipulate the audio" did not actually "tell the listener what the words

are—the listener must still make their own interpretation." J.A. 1856 n.4. The district judge listened to the same audio numerous times and could not hear Slager say, "let go of the taser or I'll shoot." J.A. 1856 n.4.

Finally, the court explained its decision to discount the testimony of Eugene Liscio, a forensic analyst who concluded that the taser was discarded from Scott's hand. J.A. 1857-1859. Liscio admitted that the Santana video never actually showed the taser in Scott's hand. J.A. 1275. Rather, Liscio based his conclusion on the positions of Scott's and Slager's arms. J.A. 1255-1262. He testified that "you have to make your own judgment call" as to the source of the taser. J.A. 1279-1280. The court found that "Liscio's opinion about where the taser originated from is one that any viewer of the video [could] form." J.A. 1858-1859. The court noted that another of Slager's forensic video analysts had declined to opine on where the taser came from and that the government's expert, Anthony Imel, testified that he was "very adamant that we do not know where the taser came from." J.A. 1859. Further, Liscio's "assumption" about the source of the taser conflicted with Santana's eyewitness testimony that Scott never had Slager's taser. J.A. 1859-1860.

2. Application Of The Second-Degree Murder Guideline

Section 2H1.1 of the federal Sentencing Guidelines applies to violations of 18 U.S.C. 242. See U.S.S.G. § 2H1.1, comment. The base offense level under

Section 2H1.1 is calculated by cross-referencing "the offense level from the offense guideline applicable to any underlying offense." U.S.S.G. § 2H1.1(a)(1).[3] In his sentencing memorandum, Slager argued that the court should apply the base offense level for voluntary manslaughter, while the government urged that the appropriate guideline was second-degree murder. S.A. 14-18, 46-52. The pre-sentence report applied a cross-reference to voluntary manslaughter, and the government objected. J.A. 1920, 1933-1934, 1961-1966.[4]

The district court first considered whether voluntary manslaughter was the appropriate underlying offense. After examining relevant case law (J.A. 1853-1863), the court found that "the ground altercation between Scott and Slager that ensued before the first shot was fired * * * was not the sort that would cause an ordinary, reasonable law enforcement officer to shoot and kill someone." J.A. 1863. The court stated that it had considered all the relevant circumstances,

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[3] The only exception is if the level for the underlying offense is less than the level prescribed by Section 2H1.1(a)(2)-(4) (ranging from 6 to 12). That exception does not apply here.

[4] The underlying offenses and corresponding base levels are found in Sentencing Guidelines § 2A1. Section 2A1 cites 18 U.S.C. 1111, which defines "murder" as "the unlawful killing of a human being with malice aforethought." The statute sets forth the various special circumstances that qualify as "murder in the first degree," *ibid.*, none of which is at issue here. The statute further states that "[a]ny other murder is murder in the second degree." *Ibid.* For voluntary manslaughter, Section 2A1 cites 18 U.S.C. 1112, which defines voluntary manslaughter as "the unlawful killing of a human being without malice * * * upon a sudden quarrel or heat of passion."

including "that Scott yelled 'Fuck the police,' that Scott ran away from Slager during the initial traffic stop and disobeyed commands to stop, and that there was a ground altercation immediately prior to the shooting." J.A. 1866. The court found that "taken together, [those circumstances] [did] not constitute adequate provocation to apply the 'heat of passion' mitigation." J.A. 1866.

The court then addressed whether second-degree murder was the appropriate underlying offense. The court explained that whether Slager's actions constituted second-degree murder depended on whether the shooting reflected "malice aforethought," which is established by "evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that" warrants an inference "that the defendant was aware of a serious risk of death or serious bodily harm." J.A. 1867 (quoting *United States* v. *Williams*, 342 F.3d 350, 356 (4th Cir. 2003), cert. denied, 540 U.S. 1169 (2004)). The court found that second-degree murder was the appropriate cross-reference because "[s]hooting an unarmed man in the back as he was running away was a 'gross deviation' from the standard of care for a reasonable law enforcement officer," and Slager "was at the very least aware that there was a risk of serious bodily harm." J.A. 1868; see also J.A. 1871.

On appeal, Slager first argues that the district court erred in making the factual findings underlying its decision to apply the second-degree murder cross-

reference. Specifically, Slager argues that the court erred by fully crediting Santana's account of the events leading up to the shooting and by discounting the testimony of Slager's experts. Br. 5-31. Slager further argues that even if the district court's factual determinations were correct, the court erred in concluding that second-degree murder was the underlying offense. Br. 31-39. None of these arguments has merit.

C. The District Court Did Not Clearly Err In Crediting The Eyewitness Testimony Of Feidin Santana Over That Of Slager's Experts In Making Factual Findings Regarding The Events Leading Up To The Shooting

In reviewing the district court's factual findings, this Court gives "wide latitude to findings of the trial court with respect to credibility of witnesses, and to facts and to inferences therefrom." *Shrader* v. *White*, 761 F.2d 975, 980 (4th Cir. 1985) (quoting *Phillips* v. *Crown Cent. Petroleum Corp.*, 556 F.2d 702, 703 (4th Cir. 1977)). Indeed, "[w]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson* v. *City of Bessemer*, 470 U.S. 564, 575 (1985); see also *United States* v. *Span*, 789 F.3d 320, 334 (4th Cir. 2015).

The district court did not clearly err in crediting the testimony of Santana, who personally witnessed the events at issue, including the ground altercation that

took place immediately before the shooting. The district court found Santana's account credible because Santana gave a "consistent story" during his interview with SLED, in his state court testimony, and in his testimony before the district court. J.A. 1855, 1860. The district judge was able to observe Santana's demeanor during his testimony and to assess his credibility. See *Beatty* v. *Chesapeake Ctr., Inc.*, 818 F.2d 318, 321 (4th Cir. 1987) ("The unique opportunity to observe the demeanor of witnesses requires that the trier of fact's credibility determinations be accorded great deference."); *Teleguz* v. *Zook*, 806 F.3d 803, 812 (4th Cir. 2015) ("[C]redibility determinations are deserving of the highest degree of appellate deference."), cert. denied, 137 S. Ct. 95 (2016).[5]

Similarly, the court did not clearly err in discounting the testimony of Slager's defense experts Megan Fletcher, David Hallimore, and Eugene Liscio. "As with lay witnesses, 'evaluating the credibility of experts and the value of their opinions is * * * a function best committed to the district courts, and one to which appellate courts must defer.'" *United States* v. *Hall*, 664 F.3d 456, 462 (4th

[5] Slager complains that "[n]owhere in its order does the court even acknowledge that Santana was not close to these events when they happened." Br. 16. The district court heard testimony about Santana's distance from the events (see, *e.g.*, J.A. 1284-1285), and presumably was aware of it when making its factual findings. The government knows of no authority requiring a sentencing order to explicitly discuss every fact the district court considered in making its credibility determinations. See *United States* v. *Gillespie*, No. 17-4576, 2018 WL 1560254, at *2 (4th Cir. Mar. 29, 2018) (district court not required to "directly address every fact raised by [defendant]" during sentencing).

Cir. 2012) (quoting *Hendricks* v. *Central Reserve Life Ins. Co.*, 39 F.3d 507, 513 (4th Cir. 1994)). As discussed above, the district court fully explained why it found the testimony of Fletcher, Hallimore, and Liscio unpersuasive. See pp. 17-18, *supra*. Its credibility determinations are entitled to deference. Importantly, unlike Slager's experts, Santana actually witnessed the events before the shooting as they unfolded. Courts have not hesitated to uphold trial courts' decisions to credit the testimony of eyewitnesses over that of experts who were not present at the events. See, *e.g.*, *United States* v. *Doggett*, 230 F.3d 160, 167 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001); *In re Cleveland Tankers*, 67 F.3d 1200, 1206-1207 (6th Cir. 1995), cert. denied, 517 U.S. 1220 (1996). Thus, the district court's decision to credit Santana's account of the events preceding the shooting was not clear error.

D. The District Court Did Not Err In Applying The Sentencing Guideline For Second-Degree Murder

The district court's factual findings amply support its decision to apply the base offense level for second-degree murder rather than voluntary manslaughter. This Court has explained that voluntary manslaughter is "the unlawful killing of a human being without malice[,] upon a sudden quarrel or heat of passion," while second-degree murder "requires proof of malice aforethought." *Ashford*, 718 F.3d at 384 (internal quotation marks and citations omitted); see also *United States* v. *Fleming*, 739 F.2d 945, 947 (4th Cir. 1984) ("Malice aforethought, as provided in

18 U.S.C. § 1111(a), is the distinguishing characteristic which, when present, makes a homicide murder rather than manslaughter."), cert. denied, 469 U.S. 1193 (1985). Compare 18 U.S.C. 1111(a) (defining murder, including second-degree murder, as "the unlawful killing of a human being with malice aforethought"), with 18 U.S.C. 1112(a) (defining manslaughter as "the unlawful killing of a human being without malice"). This Court has held that malice aforethought is proven through "evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." *Ashford*, 718 F.3d at 384; *Williams*, 342 F.3d at 356 (same); *Fleming*, 739 F.2d at 948 (same).

Thus, a cross-reference to second-degree murder is appropriate when a district court finds that the defendant's conduct varied so grossly from a reasonable standard of care that he must have been aware of the risk of serious bodily injury or death. For example, in *Ashford*, this Court rejected a defendant's request to apply a cross-reference to attempted voluntary manslaughter where the defendant, after a brief confrontation, shot an unarmed man three times. 718 F.3d at 380. The court stated that even though it was the victim who initiated the confrontation, the defendant "was 'not angry' or in danger when he drew his firearm and pursued the fleeing [victim]." *Id.* at 384. The Court held that these facts "exhibit[ed] the

wanton behavior that warranted an inference of malice" and upheld the cross-reference to attempted second-degree murder. *Ibid.* Notably, the Court in *Ashford* held that "the 'heat of passion' mitigator plainly does not apply to an aggressor who is 'not angry,'" and who had the opportunity to walk away but did not do so. *Ibid.* Similarly, here, Slager testified numerous times in his state court trial that he was not angry during the events at issue. See, *e.g.*, J.A. 347, 374-375, 378-379.

Even if Slager had admitted to being angry, his conduct was sufficiently reckless and wanton to support a cross-reference to second-degree murder. In *United States* v. *Conatser*, 514 F.3d 508, 513 (6th Cir.), cert. denied, 555 U.S. 963 (2008), the Sixth Circuit reviewed the sentence of a corrections officer who was convicted under Section 242 after causing the death of a detainee. Angry that the victim had been causing a commotion and had thrown a roll of toilet paper at him, the defendant and another officer physically assaulted him. *Id.* at 516-517. The Sixth Circuit affirmed the application of the second-degree murder guideline, holding that "[i]t was not clearly erroneous for the district judge to conclude that [the defendant]'s conduct so grossly deviated from a reasonable standard of care that he must have been aware of a serious risk of death or bodily injury." *Id.* at 524.

The Fifth Circuit came to a similar conclusion in *United States* v. *Hicks*, 389 F.3d 514, 529 (5th Cir. 2004), cert. denied, 546 U.S. 1089, reh'g denied, 546 U.S.

1226 (2006). There, a defendant appealed his sentence under 18 U.S.C. 922(g)(8) for possessing firearms and ammunition while being subject to a domestic restraining order. After leading police in a high-speed chase, the defendant stopped approximately 200 yards from the pursuing officers and fired his gun toward the patrol car. *Hicks*, 389 F.3d at 520. One bullet struck a police officer in the head, killing him. *Ibid.* In sentencing the defendant under Section 922(g)(8), the district court applied a cross-reference to second-degree murder. *Ibid.* The Fifth Circuit affirmed, holding that "[b]y intentionally firing his gun at Officer Lamance's police cruiser, which Hicks likely knew to be occupied * * * , Hicks displayed the requisite extreme recklessness and disregard for human life that constitutes malice under federal law sufficient for a finding of second-degree murder." *Id.* at 530.

Here, the district court correctly found that Slager's intent to cause death or serious bodily injury could "be inferred by the manner with which [he] used a dangerous weapon, namely shooting Walter Scott [in] the back * * * while he ran away." J.A. 1511; see also J.A. 1863 ("It is indisputable that shooting at someone's back eight times, with five shots hitting the victim, will very likely lead to death."). Indeed, courts have upheld cross-references to second-degree murder where the defendant acted without regard to a risk of serious bodily injury or death, even in circumstances far less certain to cause death than here. See, *e.g.*, *United*

States v. *Sharma*, 394 F. App'x 591, 597 (11th Cir. 2010) (second-degree murder guideline appropriate where defendant corrections officer moved the victim into a cell with an inmate the defendant knew to be violent, anticipating that the other inmate would "assault [the victim] and cause either serious bodily harm or death"), reh'g and reh'g en banc denied, 409 F. App'x 316, cert. denied, 562 U.S. 1299 (2011); *United States* v. *McDougle*, 82 F. App'x 153, 157-158 (6th Cir. 2003) (affirming application of second-degree murder guideline where employees of care facility fatally assaulted disabled resident), cert. denied, 544 U.S. 934 (2005). Thus, the district court correctly determined in Slager's case that the underlying offense was second-degree murder.

Because Slager did not shoot Scott in a "heat of passion," the district court correctly rejected Slager's request to apply the voluntary manslaughter guideline. J.A. 1852-1866. Courts have described "heat of passion" as "some extreme provocation, beyond what a reasonable person could be expected to withstand, severely impair[ing] [the] capacity for self-control in committing the killing." *United States* v. *Quintero*, 21 F.3d 885, 890 (9th Cir. 1994). Moreover, courts have consistently held that the defendant's "heat of passion" must be reasonable to justify a finding of voluntary manslaughter. See *id.* at 890; *United States* v. *Velasquez*, 246 F.3d 204, 213 (2d Cir. 2001); *United States* v. *Medina*, 755 F.2d 1269, 1272 n.1 (7th Cir. 1985); *United States* v. *Collins*, 690 F.2d 431, 437 (5th

Cir. 1982), cert. denied, 460 U.S. 1046 (1983); *United States* v. *Chapman*, 615 F.2d 1294, 1300 (10th Cir.), cert. denied, 446 U.S. 967 (1980).

Courts have rejected arguments that the defendant acted in the "heat of passion" in circumstances where, as here, the victim posed no actual danger. In *United States* v. *Eagle Elk*, 658 F.2d 644 (8th Cir. 1981), after catching the victim in bed with the defendant's sister, the defendant shot the victim as the victim was fleeing through an open window. The evidence showed that the victim "did not have anything in his hands, did not speak, and did not touch or get closer than three or four feet to the defendant." *Id.* at 649. Thus, the court held that there were "no reasonable grounds" to hold that the defendant's reasoning "was obscured or disturbed by passion to such an extent as would cause the ordinary reasonable person" to shoot. *Id.* at 649 (internal quotation marks and citation omitted); see also *Ashford*, 718 F.3d at 380, 384 (cross-reference to voluntary manslaughter inappropriate where defendant shot an unarmed man three times as the victim attempted to flee); *United States* v. *Milton*, 27 F.3d 203, 208 (6th Cir. 1994) (second-degree murder guideline appropriate where defendant fired two shots into the victim's car).

Slager could not show that he acted in the "heat of passion," because an ordinary, reasonable person would not shoot Scott in his situation. The district court found that Scott never had control of Slager's taser, never was on top of

Slager, and never punched or otherwise assaulted Slager. J.A. 1866, 1896. Thus, the court correctly held that "the ground altercation between Scott and Slager that ensued before the first shot was fired * * * was not the sort that would cause an ordinary, reasonable law enforcement officer to shoot and kill someone." J.A. 1863 (internal quotation marks omitted). In any case, when Slager began shooting, the ground altercation had ended and Scott was already at least 15 feet away from Slager, unarmed and running in the opposite direction. J.A. 1871, 1884. See *Ashford*, 718 F.3d at 384 ("the 'heat of passion' mitigator plainly does not apply to an aggressor who is 'not angry,'" and who had the opportunity to walk away but did not do so). Accordingly, the district court did not err in finding that the underlying offense was second-degree murder rather than voluntary manslaughter.[6]

II

THE DISTRICT JUDGE'S DISCUSSION OF THE AUTOPSY REPORT WITH HIS WIFE DID NOT CONSTITUTE REVERSIBLE ERROR

A. Standard Of Review

This court "review[s] de novo whether the district court committed procedural error when sentencing a defendant." *United States* v. *Rivera*, 847 F.3d

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[6] Slager claims that Scott, while he was fleeing, shouted, "Fuck the police!" Br. 13-14, 26-27. Courts have rejected the argument that mere words support a "heat of passion" mitigation. See, *e.g.*, *Velasquez*, 246 F.3d at 213 (citing *United States* v. *Cobb*, 905 F.2d 784, 789 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991)).

847, 849 (4th Cir.), cert. denied, 137 S. Ct. 2228 (2017). If the Court finds that the district court committed procedural error, it reviews to determine if the error was harmless. See *Puckett* v. *United States*, 556 U.S. 129, 141 (2009) ("[P]rocedural errors at sentencing * * * are routinely subject to harmlessness review."). A sentencing error is harmless where the court is "able to say, with fair assurance, that it did not affect the defendant's substantial rights." *United States* v. *Lewis*, 633 F.3d 262, 271 (4th Cir. 2011). "A defendant's substantial rights are affected if the error affected the outcome of the district court proceedings." *Ibid.* (internal quotation marks and citation omitted); see also *United States* v. *Williams*, 503 U.S. 193, 203 (1992) (A sentencing error is harmless where "the reviewing court concludes, on the record as a whole, that the error * * * did not affect the district court's selection of the sentence imposed.").[7]

[7] It is questionable whether Slager preserved this issue for appeal. After the court announced that second-degree murder was the appropriate underlying offense, defense counsel launched into an ambiguous objection in which he argued that the court lacked the authority under the Constitution to make factual findings regarding aggravating factors used to enhance a sentence. J.A. 1606-1608. In the middle of that argument, counsel stated that "[t]he Court * * * admitted that it consulted with a forensic pathologist. A jury would have been held in contempt of court, had they done that, if they didn't determine the facts of the case from the evidence presented under oath in the courtroom." J.A. 1607. Counsel then continued with his vague assertions that "the judge's ability to make [the] decision on aggravating factors [was] unconstitutional." J.A. 1608. This Court need not decide whether defense counsel's statements were sufficient to preserve the issue for appeal and avoid plain error review, because any error that might have occurred was harmless under any standard.

B. Background

In opening remarks at sentencing, the district judge thanked numerous individuals, including his law clerks, his staff, the Marshal's office, and the attorneys on both sides of the case. He also thanked his wife, a forensic pathologist and then president of the National Association of Medical Examiners, for "her support and her technical advice" and for "help[ing] him with some of the autopsy report." J.A. 1569. He did not specify what assistance his wife provided. Later, the court issued a detailed sentencing order setting out its reasoning for imposing Slager's sentence. The order discussed only information contained in the pre-sentence report and elsewhere in the district court record and did not purport to rely on any information provided by the district judge's wife.

C. The District Judge Did Not Purport To Rely On Any Information From His Wife In Sentencing Slager

Contrary to Slager's argument (Br. 39-43), the district judge's discussion with his wife did not violate the Confrontation Clause. It is well-established that a defendant's Sixth Amendment right to confront witnesses does not apply at sentencing. *United States* v. *Powell*, 650 F.3d 388, 393 (4th Cir.) ("[I]n holding that the Confrontation Clause does not apply at sentencing, we join every other federal circuit court that hears criminal appeals."), cert. denied, 565 U.S. 922 (2011); see also *United States* v. *Umana*, 750 F.3d 320 (4th Cir. 2014) (the

Confrontation Clause does not apply at sentencing even in capital cases), cert. denied, 135 S. Ct. 2856 (2015).

The United States recognizes, however, that if the district judge actually *relied* on information provided by his wife when sentencing Slager, such action may have violated Federal Rule of Criminal Procedure 32(i)(1)(B). That rule provides the parties with a reasonable opportunity to comment on "any information excluded from the presentence report * * * on which the court will rely in sentencing." See, *e.g.*, *United States* v. *Garcia*, 797 F.3d 320, 325 (5th Cir. 2015) (district court violated Rule 32 in failing to provide the defendant notice that it intended to rely on testimony from a separate criminal trial, of which defendant had no knowledge, to enhance defendant's sentence). Courts have held that Rule 32 "protects the right to due process by requiring disclosure of most information relied upon at sentencing." *United States* v. *Hayes*, 171 F.3d 389, 392 (6th Cir. 1999).

The district judge's discussion with his wife about the autopsy report did not amount to legal error because nothing in the sentencing order indicates that the judge actually relied upon any information provided by his wife in sentencing Slager. In its 57-page sentencing order, the court thoroughly explained its reasons for sentencing Slager. The order did not purport to rely on any information provided by the district judge's wife, and there is no reason for this Court to

presume that the district court relied on anything other than the reasons set forth in the sentencing order. See *United States* v. *Christensen*, 732 F.3d 1094, 1113 (9th Cir. 2013) ("The integrity of the sentencing process requires that we take a district court at its word as to the reasons for the sentence imposed."). Because the sentencing order provides no basis to believe that the district judge actually relied on information provided by his wife in sentencing Slager, his discussion with her does not violate Rule 32(i)(1)(B). See *Consalvo* v. *Secretary for Dep't of Corr.*, 664 F.3d 842, 848 (11th Cir. 2011) (court's improper references to non-trial testimony at sentencing did not warrant reversal "because the sentencing court did not actually rely on" those facts when sentencing the defendant), cert. denied, 568 U.S. 849 (2012).

D. If Any Error Occurred, It Was Harmless Because It Did Not Affect Slager's Sentence

Even if the district judge had relied on his wife's "technical advice" to understand the autopsy report, that reliance was harmless because it did not affect Slager's sentence. In its sentencing order, the court did not purport to make any factual findings about the autopsy report or even mention the autopsy report at all. This is unsurprising, because the autopsy results were not disputed. The presentence report noted the autopsy's conclusion that Scott was shot five times, all to the posterior of his body. J.A. 1919. At no point in the sentencing hearing did any party challenge any of the autopsy report's conclusions.

Slager argues that the district judge's discussion with his wife was "concerning" because, in finding that Slager had malice aforethought justifying the second-degree murder guideline, the court "relied, to some extent, on [its] finding that Officer Slager shot at Mr. Scott eight times while he was unarmed and running away, and that he was hit five times." Br. 42. Slager asserts that "[t]hese are the sort of facts about which one would consult a forensic pathologist." Br. 42. This argument fails because, in his plea agreement, Slager *admitted* to firing eight shots at Scott while he was running away, and that "[f]ive shots hit Scott, all entering from behind." S.A. 64; see also J.A. 1851. Slager further admitted in the plea agreement that "Scott suffered bodily injury and died on the scene as a result of the injuries from the gunshots." S.A. 64; J.A. 1851.

Slager further asserts that the court may have relied on information provided by the district judge's wife to find that the ground altercation was not sufficiently provocative to give rise to a "heat of passion" warranting a cross-reference to voluntary manslaughter. Br. 42. That argument also fails. In finding that Slager did not shoot Scott in the "heat of passion," the court relied on the eyewitness testimony of Feidin Santana, who testified that Scott was never on top of Slager, never assaulted Slager, and never attempted to gain control of Slager's taser. J.A. 1857, 1860. Nor is it plausible, as Slager argues, that the district judge's wife "indicate[d] that Mr. Scott's autopsy results were inconsistent with a heated ground

altercation." Br. 42. Indeed, the government acknowledged that the autopsy report "revealed abrasions to Scott's back and left forearm, as well as contusions to the left cheek bone and left wrist." J.A. 1073, 1949. The court certainly could have found that such injuries were consistent with Slager's version of the ground altercation, had it found Slager otherwise credible. But the court had numerous other reasons for believing Santana's account of the events over Slager's. See, *e.g.*, J.A. 1855, 1860.

There is no dispute that the autopsy was consistent with the district court's factual findings about the ground altercation. It is implausible that the "technical advice" that the district judge's wife offered regarding the autopsy report would have changed Slager's sentence. Thus, any error that may have occurred in this regard was harmless.

III

THE DISTRICT COURT DID NOT PLAINLY ERR IN APPLYING A TWO-LEVEL ENHANCEMENT FOR OBSTRUCTION OF JUSTICE

A. Standard Of Review

Slager argues for the first time on appeal that the court improperly applied a two-level enhancement for obstruction of justice under Section 3C1.1 because his false statements to SLED investigators did not "significantly obstruct" an investigation or prosecution. Because Slager did not make this argument below, this Court reviews it for plain error. See *United States* v. *Brack*, 651 F.3d 388, 392

(4th Cir. 2011). Thus, Slager must establish that "an error occurred, that the error was plain, and that the error affected his substantial rights." *United States* v. *Hastings*, 134 F.3d 235, 239 (4th Cir.) (citing *United States* v. *Olano*, 507 U.S. 725, 732 (1993)), cert. denied, 523 U.S. 1143 (1998).[8]

B. Background

Section 3C1.1 of the Sentencing Guidelines provides for a two-level enhancement where a "defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." Application note 4

[8] Slager did not raise this issue at any point during the sentencing proceedings. In his closing remarks at the sentencing hearing, Slager's counsel briefly suggested that no obstruction occurred because when Slager gave the false statements to SLED agents, the agents already had seen Santana's video. See J.A. 1547. Slager's counsel did not, however, advance any argument based on the application notes to Section 3C1.1, or even argue generally that unsworn statements made to law enforcement officers do not qualify for the obstruction enhancement. Thus, defense counsel's remarks were not sufficient to put the district court on notice of the argument that Slager now raises on appeal. See, *e.g.*, *United States* v. *Rouse*, 362 F.3d 256, 260 (4th Cir.) ("While Rouse's counsel did inquire of the court whether the federal sentence would be served concurrently or consecutively to the state sentence, he neither cited § 5G1.3(b) nor argued that the court was required to impose a concurrent sentence. Therefore, our review is for plain error."), cert. denied, 543 U.S. 867 (2004); see also *United States* v. *Sanchez-Espinal*, 762 F.3d 425, 429 (5th Cir. 2014) ("Parties must raise objections that are specific enough to put the district court on notice of potential issues for appeal and allow the district court to correct itself."); *United States* v. *Hurt*, 527 F.3d 1347, 1354-1355 (D.C. Cir. 2008); *United States* v. *Schalk*, 515 F.3d 768, 776 (7th Cir. 2008).

to Section 3C1.1 provides a "non-exhaustive" list of examples of conduct covered by the Guideline, including "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1, comment. (n.4(G)). Note 5 lists examples of conduct that "ordinarily do[es] not warrant application of" the enhancement. Included in that list is "making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above implies." U.S.S.G. § 3C1.1, comment. (n.5(B)).

In the sentencing order, the district court found that Slager's statements to SLED investigators on April 7, 2015, constituted obstruction of justice under Section 3C1.1. J.A. 1876-1887. It explained that Slager's statements were made "with the willful intent to provide false testimony." J.A. 1887. The court cited Slager's detailed description of the ground altercation, including Slager's claim that Scott had grabbed the taser with both hands, pulled it out of Slager's hands, and pursued Slager with it "at pretty close range." J.A. 1880-1881; see also J.A. 1025-1026. The court also cited Slager's statements that Scott was coming at him, arms outstretched with the taser pointed at him, when Slager began shooting. J.A. 1879, 1881. The court credited the testimony of SLED investigator Lieutenant Ghent, who was present at the interview and testified that Slager did not appear to

be confused or to have any trouble remembering the incident when he gave these statements. J.A. 1880-1881, 1884.[9]

C. Slager's False Statements During The April 7, 2015, SLED Interview Significantly Obstructed And Impeded The State And Federal Investigations And Prosecutions Of The Shooting

The district court did not err, plainly or otherwise, in applying the two-level enhancement for obstruction of justice for Slager's April 7, 2015, statements to SLED investigators because Slager's false account of his ground altercation with Scott caused both state and federal investigators to expend significant resources to prove disputed, material facts.

Slager argues that under the commentary to Section 3C1.1, making unsworn false statements to law enforcement officers does not constitute obstruction of justice unless such statements "significantly obstructed or impeded the official investigation or prosecution of the instant offense." Br. 44-45 (quoting U.S.S.G. § 3C1.1, comment. (nn.4(G) and 5(B)). He asserts that the story Slager gave to SLED investigators, even if false, did not significantly impede the investigation

[9] Because it found that the predicate for an obstruction enhancement was met by Slager's April 7, 2015, statements to SLED, the court declined to decide whether Slager's statements to officers at the scene of the shooting constituted obstruction. J.A. 1876. The court also declined to decide whether Slager's testimony during the state trial and the federal pretrial hearings constituted obstruction, though the court found that the "numerous contradictions" during that testimony "render[ed] Slager an incredible witness." J.A. 1891; see also J.A. 1887. On the other hand, the court found that Slager's action of moving his taser close to Scott's body did not constitute obstruction. J.A. 1875.

because when Slager made the statements, investigators already had Santana's video. Br. 45. This argument fails because, as explained below, Santana's video did not clearly show the ground altercation—the facts of which were the central focus of the state court trial and the sentencing proceedings.

As the district found, Slager's April 7, 2015, statements to SLED investigators advanced a false narrative about the ground altercation that took place immediately before Slager shot Scott. Slager told SLED investigators that during the ground altercation, Scott grabbed Slager's taser with both hands and jerked it out of Slager's hands. J.A. 1639. Slager stated that Scott then turned the taser around and pointed it directly at Slager. Slager stated that he tried to push himself away from Scott with his hands but that Scott continued to "com[e] forward at him with the Taser." J.A. 1639. He stated that Scott continued to pursue him, arms outstretched, as Scott got to his feet. J.A. 1639. The district court found that this account was false, concluding that Scott never had the taser and never pursued Slager with it. J.A. 1860, 1866, 1896. Though the video taken by Santana clearly contradicted Slager's account of the shooting itself, it did not present a clear picture of what happened during the ground altercation. J.A. 1084-1085, 1143-1145; S.A. Volume II. Nor did it make clear whether Scott ever had control of the taser. J.A. 1177, 1275; S.A. Volume II.

The details of the ground altercation, including whether Scott ever controlled Slager's taser, were essential to Slager's conviction and sentence and therefore were the subject of extensive litigation in both the state and federal proceedings. In the state trial, Slager argued that the circumstances of the ground altercation justified an acquittal based on self-defense. J.A. 1646.[10] The parties therefore continued to litigate the facts of the ground altercation and location of the taser throughout the state murder trial. And they continued to do so through pretrial proceedings in federal court, including in pretrial motions.[11] Had Slager been truthful during the SLED interview about the ground altercation and the fact that Scott never controlled the taser, the State and federal government would not have been forced to expend time and resources investigating and litigating those facts. See *United States* v. *Selvie*, 684 F.3d 679, 684 (7th Cir. 2012) ("Material misinformation that exerts any impact on the government's resources may elicit an obstruction enhancement.").

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[10] Section 3C1.1 applies where the defendant's obstruction took place in the context of state proceedings as long as the conduct underlying the state and federal proceedings is the same. See *United States* v. *Self*, 132 F.3d 1039, 1042-1044 (4th Cir. 1997), cert. denied, 523 U.S. 1102 (1998).

[11] See J.A. 37-45, 141-144, 170-172, 281-288, 292, 346, 357-359, 365-366 (state proceedings); J.A. 6-9, 726-732, 862-864, 890-932, 933 (federal proceedings).

Even after Slager pleaded guilty in federal court to violating Section 242, the government continued to expend time and resources in the sentencing proceedings to counter the false statements that Slager made during the SLED interview.[12] In those federal sentencing proceedings, the district court stated that the choice between voluntary manslaughter and second-degree murder "depend[ed] on whether Scott was ever 'on top of' Slager during the ground altercation and/or was in control of his taser, and whether Scott tased or attempted to tase Slager." J.A. 1854. To rebut Slager's false account of the ground altercation, including Slager's assertion that Scott had wrested away his taser, the government had to prepare for and present testimony from Santana and FBI forensic audio and video expert Anthony Imel. J.A. 1107-1111, 1145-1147. The government also had to cross-examine defense witnesses Fredericks, Liscio, and Hallimore, whom Slager had offered to support his claim that Scott had taken control of his taser during the ground altercation. J.A. 1169-1184 (Fredericks); J.A. 1248-1280 (Liscio); J.A. 1218-1220 (Hallimore). Indeed, the details of the ground altercation were the central focus of Slager's four-day sentencing hearing.

Courts have upheld obstruction-of-justice enhancements under Section 3C1.1 where a defendant's unsworn lies to law enforcement have caused

[12] See J.A. 948, 957, 971-975, 984-985, 997-999, 1020-1026, 1072-1073, 1088-1091, 1143-1144, 1163-1169, 1516-1517, 1521-1525, 1528, 1554-1555.

government officials to expend resources unnecessarily during the sentencing phase. For example, in *United States* v. *Quirion*, 714 F.3d 77, 82 (1st Cir. 2013), the court upheld an obstruction enhancement where the defendant's false statements to federal agents necessitated "a need to amend the PSI Report, a presentence conference with the court, the expenditure of government funds to conduct further investigation, and an evidentiary hearing to resolve contested sentencing issues." The court explained that these "costly and time-consuming events * * * would not have been required but for the defendant's persistent prevarication." *Ibid.* The fact that SLED agents already had viewed Santana's video when they interviewed Slager on April 7, 2015, did not relieve federal and state investigators and prosecutors of the burden of countering all the false claims Slager made in that interview. Thus, the district court did not err in applying the enhancement because both state and government officials expended unnecessary resources to counter Slager's false account of his ground altercation with Scott before Slager shot and killed him.[13]

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[13] Because Slager did not raise this argument below, the district court did not make specific findings that Slager's false statements about the ground altercation significantly impeded or obstructed the investigation or prosecution of this case. To the extent that the court was required to do so, such error was harmless because, as explained pp. 39-42, *supra*, Slager's statements clearly caused investigators and prosecutors to expend time and effort to prove in the state trial that the circumstances of the ground altercation did not justify Slager's actions, and to prove in the federal sentencing proceedings that they did not

D. The District Court's Application Of The Enhancement For Obstruction Of Justice Was Not Plain Error

Even if this Court finds that Slager's false statements to SLED investigators did not qualify for the enhancement because they did not significantly obstruct or impede the state or federal investigations or prosecutions, the Court should uphold Slager's sentence because any error the district court may have committed was not plain. "An error is 'plain' when it is 'obvious or clear under current law,'" meaning the error must be clear under "the settled law of the Supreme Court or this circuit." *Brack*, 651 F.3d at 392 (internal quotation marks and citations omitted).

Whether the notes to Section 3C1.1 preclude application of the enhancement where a defendant has made materially false statements to law enforcement that do not significantly obstruct justice is not clear under settled law of this Circuit. First, Section 3C1.1, by its terms, applies where "a defendant willfully obstructed or impeded, *or attempted* to obstruct or impede" justice. U.S.S.G. § 3C1.1 (emphasis added). Application note 5 to Section 3C1.1 lists circumstances that "ordinarily" do not warrant application of the enhancement, including "making false statements, not under oath, to law enforcement officers" unless the statement was "material" and "significantly obstructed or impeded" justice. U.S.S.G. § 3C1.1,

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support a cross-reference to voluntary manslaughter. See *United States* v. *Rickett*, 89 F.3d 224, 227 (5th Cir.) (finding harmless error in district court's failure to make specific findings that defendant's actions significantly hindered the investigation), cert. denied, 519 U.S. 1000 (1996).

comment. (n.5). The note therefore leaves open the possibility that there may be circumstances in which the enhancement applies to false, unsworn statements made to law enforcement officers that do not significantly obstruct justice. *Ibid.* The note itself is thus ambiguous, particularly because the Guideline's text applies not only to actual obstruction of justice, but also to *attempts* to obstruct. U.S.S.G. § 3C1.1. Moreover, the notes acknowledge that "the conduct to which th[e] enhancement applies is not subject to precise definition." U.S.S.G. § 3C1.1, comment. (n.3).

Second, neither the Supreme Court nor this Court has addressed whether Section 3C1.1 can ever apply to unsworn statements made to law enforcement officers where the statements did not significantly impede or obstruct the investigation or prosecution of the offense. And circuits that have considered the question are split. Compare, *e.g.*, *United States* v. *Adejumo*, 772 F.3d 513, 528-529 (8th Cir. 2014), cert. denied, 135 S. Ct. 1869, reh'g denied, 135 S. Ct. 2883 (2015) (requiring a showing that false statements made to law enforcement actually and significantly obstructed an investigation), and *United States* v. *Griffin*, 310 F.3d 1017, 1022-1023 (7th Cir. 2002) (same), with *United States* v. *Wolverine*, 584 F. App'x 646, 649-650 (9th Cir. 2014), cert. denied, 135 S. Ct. 1700 (2015) (holding that requiring a showing of actual obstruction for such statements would be "inconsistent with the guideline itself," which "requires enhancement for mere

attempt"). Thus, the effect of the application notes is not "clear under current law." *Brack*, 651 F.3d at 392.

If the Court finds that the district court committed plain error, it should remand the case for resentencing. See *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1911 (2018) ("In the ordinary case, * * * the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings" and require remand for resentencing).[14] The district court strongly suggested that Slager's false statements during his state and federal court testimony also would qualify for the enhancement. J.A. 1887-1891. The application notes to Section 3C1.1 expressly apply the enhancement to "committing, suborning, *or attempting* to suborn perjury." U.S.S.G. § 3C1.1, comment. (n.4(B)). Thus, if this Court were to reverse the obstruction of justice enhancement based on Slager's April 7, 2015, statements to SLED investigators, the proper remedy would be to remand the case

[14] The government recognizes that if the district court plainly erred, then that error likely affected Slager's substantial rights. In a sentencing appeal, that part of the plain error test is satisfied where the error caused the defendant's sentence to be "longer than that to which he would otherwise be subject." *United States* v. *Angle*, 254 F.3d 514, 518 (4th Cir.) (en banc), cert. denied, 534 U.S. 937 (2001). The district court based its sentence on a base offense level of 38, and corresponding Guidelines range of 235-293 months. J.A. 1593. Without the enhancement for obstruction of justice, Slager's base offense level would have been 36, and his Guidelines range would have been 188-235 months. U.S.S.G. Ch. 5, Pt. A.

to the district court to determine whether Slager's testimony during the state and federal proceedings constituted independent grounds to apply the enhancement.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO CREDIT MEGAN FLETCHER'S STATE COURT TESTIMONY AND REPORT

A. Standard Of Review

The Sentencing Guidelines provide that "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3. This Court reviews a district court's determinations with respect to reliability for abuse of discretion. *United States* v. *Pineda*, 770 F.3d 313, 318 (4th Cir. 2014), cert. denied, 135 S. Ct. 1515 (2015).[15]

B. Background

In support of his argument at sentencing that the court should apply the cross-reference to voluntary manslaughter, Slager claimed that Scott grabbed Slager's taser away from him and drive-stunned Slager. To bolster his claim that

[15] Slager's arguments based on the Federal Rules of Evidence (Br. 47-48), are misplaced, as those rules do not apply in sentencing proceedings. Fed. R. Evid. 1101(d)(3); see also *United States* v. *Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010).

Scott tased him, Slager cited testimony from Megan Fletcher, a trace examiner with SLED who testified for Slager in his state trial. S.A. 44 n.16. In her state court testimony, Fletcher concluded that "the damaged fibers on Officer Slager's left pocket showed characteristics of having been melted. And a taser could not be excluded as a possible source of that melting." J.A. 900.

On February 10, 2017, before Slager pleaded guilty, the government filed a motion in limine to exclude Fletcher's testimony from the federal trial on the ground that it was speculative and unreliable under Federal Rule of Evidence 702. S.A. 87-93. Fletcher testified in connection with the motion in limine at the April 24, 2017, pretrial *Daubert* hearing. J.A. 890-926. She testified that to determine whether a taser could damage a polyester garment, she obtained an exemplar shirt from the NCPD. J.A. 894. Two SLED agents then tested a taser on the uniform in drive-stun mode in various time increments ranging from five to 30 seconds. J.A. 894-895, 904-907. Fletcher concluded that the taser was capable of "creating melted fibers, as well as creating holes within [polyester] garments." J.A. 894-895, 904. But Fletcher and the other agents did not measure the amount of pressure they put on the fabric when conducting these tests, though they could have done so. J.A. 909, 916. Nor did Fletcher test whether her results would have been different if the uniform was worn over a bulletproof vest, or if the uniform previously had been ironed or dry-cleaned. J.A. 913-915.

Fletcher then examined Slager's uniform with a microscope to determine whether there was any damage to the left pocket that could have been caused by a taser. J.A. 895. She determined that "there were some individual fibers that showed characteristics of having been melted." J.A. 896. Fletcher testified that she also tested an iron, a laminator press, and a lighter for comparison, all of which produced markings that differed from the ones on Slager's uniform. J.A. 898-899. She concluded that she could not exclude the taser as the cause of the damage to the uniform. J.A. 921.

Fletcher testified that she had never before done an analysis to determine whether fibers on clothing had been subjected to heat. J.A. 897. She created the methodology after consulting with one textbook on fiber damage and another on "characteristics of polyester." See J.A. 898, 899 (agreeing that she "contrived" the method herself). Though she searched for peer-reviewed articles about taser damage to fabric, she could not locate any. J.A. 899, 902. On cross-examination, she agreed that "the state of science as it now stands is not capable of identifying a mark or damage to fabric [as] having come from a taser." J.A. 902. She also admitted that neither she nor anyone else had replicated the results of her tests. J.A. 922. She admitted that other sources of heat she did not test also could not be ruled out as the cause of the damage on Slager's uniform. J.A. 923-924.

Before the district court could rule on the government's motion to exclude Fletcher's testimony, Slager pleaded guilty. In his sentencing memorandum, Slager cited Fletcher's state court testimony to bolster his contention that Scott had drive-stunned him with the taser. S.A. 44 n.16. Slager did not call Fletcher as a witness in his sentencing hearing.

In its sentencing order, the district court held that it did "not view any of the tests that Fletcher conducted on Slager's uniform reliable enough to consider at the sentencing phase." J.A. 1859-1860 n.5. Referring back to the pretrial *Daubert* hearing, the court explained that it "had significant concerns" about Fletcher's methodology, which was "not subject to peer review or publication, nor were [her results] ever reproduced by anyone else at SLED—including Fletcher herself." J.A. 1860 n.5. The court also was concerned that there was "no error rate established for her experiments" and that Fletcher "did not rule out alternative sources of a burn such as firework embers." J.A. 1860 n.5. In any case, the court noted that Fletcher's testimony did "not affirmatively prove that Scott tased Slager, or even that a taser was the cause of the marks on Slager's uniform." J.A. 1859 n.5. Instead, it "merely support[ed] the argument that a taser cannot be conclusively excluded as one possible cause of marks on a uniform." J.A. 1859 n.5.

C. The District Court Did Not Abuse Its Discretion In Finding Agent Fletcher's Testimony Unreliable

The district court acted within its discretion in discounting Fletcher's testimony on possible sources of burn marks on Slager's uniform because it was not sufficiently reliable.

Slager does not challenge the district court's conclusions as to lack of peer review or publication, replication, or error rate. Rather, he argues that these indicia of reliability are not important where the methodology is generally accepted. Br. 48. Slager cites *United States* v. *Barnes*, 481 F. App'x 505, 514 (11th Cir. 2012), an unpublished Eleventh Circuit opinion upholding the admission of testimony by government experts whose methods "did not allow for quantification, but * * * were generally accepted." Br. 48. Unlike in *Barnes*, Fletcher did not and could not testify that her methodology was generally accepted. Though she testified that "[u]sing a stereo microscope to examine an article of clothing or other fiber article is an accepted practice for determining the physical characteristics of individual fibers, threads, or weaves" (J.A. 901), Fletcher *did not* testify that the procedure she used here—burning an exemplar item of clothing with various tools—was a generally accepted methodology. Rather, she acknowledged that she could not locate any guidance on a taser's effect on polyester fabric, so she created one herself for this case. J.A. 898-899. She further admitted that she did not take into consideration the amount of pressure applied with the taser, or whether the results

would vary if the taser were worn over a bulletproof vest (as was the case here, see J.A. 280) or had been ironed or dry cleaned. J.A. 909, 913-916. Under these circumstances, the district court did not abuse its discretion in finding Fletcher's testimony unreliable and declining to credit it.

D. Even If The Court Had Erred In Discounting Fletcher's Testimony As Unreliable, Such Error Would Be Harmless

Even if the district court abused its discretion in finding that Fletcher's report and testimony were unreliable, the error was harmless. Slager acknowledges that Fletcher's conclusions were "very limited." Br. 48. As the district court noted, "Fletcher's conclusion does not affirmatively prove that Scott tased Slager, or even that a taser was the cause of the marks on Slager's uniform." J.A. 1859 n.5. In fact, Fletcher's *only* conclusion was that "a taser cannot be conclusively excluded as one possible cause of marks on a uniform." J.A. 1859 n.5; see also J.A. 900, 921. Thus, even if the court had accepted Fletcher's report and testimony and had fully credited her conclusion, it would not have changed the outcome here. The district court clearly believed eyewitness Feidin Santana, who testified that Scott never had Slager's taser. The court found Santana's testimony on that issue more credible than that of Slager, Fredericks, Hallimore, or Liscio. It is implausible that Fletcher's determination that a taser "could not be excluded" as the source of melted fabrics on Slager's uniform would have altered the court's conclusion.

V

THE DISTRICT CORRECTLY HELD THAT THE FEDERAL PROSECUTION WAS NOT BARRED BY THE CONSTITUTION'S PROHIBITION ON DOUBLE JEOPARDY

A. Standard Of Review

Where a district court's denial of a motion to dismiss an indictment depends solely on a question of law, this court's review is de novo. *United States* v. *Bridges*, 741 F.3d 464, 467 (4th Cir. 2014).

B. Background

In February 2017, Slager moved to dismiss the federal indictment on the ground that it violated the Double Jeopardy Clause because he had already been tried by the State. J.A. 562-582. At the time, Slager's state trial had ended in a mistrial, and the State planned to retry him in August 2017. His federal trial was scheduled for May 2017. J.A. 562-563. Slager acknowledged in his motion to dismiss that Supreme Court precedent foreclosed his claim (J.A. 563-564), but argued that these cases were wrongly decided (J.A. 564-581; see also J.A. 641-645). The district court denied the motion to dismiss. J.A. 646.

C. The Double Jeopardy Clause Did Not Bar Slager's Federal Prosecution

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. Slager acknowledges (Br. 49-50), that Supreme Court precedent currently

holds that the Double Jeopardy Clause does not prohibit successive prosecutions by a state and the federal government. See *United States* v. *Wheeler*, 435 U.S. 313, 316-318 (1978); see also *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016) (explaining that the Double Jeopardy Clause "drops out of the picture when the 'entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns'") (quoting *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985)); *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). Given this settled law, the district court correctly denied Slager's motion to dismiss the indictment on Double Jeopardy grounds. Nevertheless, Slager seeks to preserve this issue should the Supreme Court overrule this precedent during the pendency of this appeal. Br. 50.[16]

But even if the Supreme Court were to overrule this precedent, it would have no effect on this case. Contrary to Slager's assertion (Br. 49), *he was not acquitted of murder* in state court. South Carolina charged Slager with one count of murder in violation of S.C. Code Ann. 16-3-10. J.A. 562. The jury returned no verdict at all, and the court declared a mistrial. J.A. 562, 1850.[17] Thus, the Double Jeopardy

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[16] The Supreme Court has granted a petition for writ of certiorari on the issue of whether it should overrule this precedent. *Gamble* v. *United States*, No. 17-646, 2018 WL 3148287 (June 28, 2018).

[17] Slager appears to base his assertion that he was "acquitted" of murder in state court on a magazine article in which one juror claimed that the jury did not

Clause does not apply. See *Yeager* v. *United States*, 557 U.S. 110, 118 (2009) (Double Jeopardy does not apply where a state seeks to retry a defendant "after its first attempt to obtain a conviction results in a mistrial because the jury has failed to reach a verdict"); *United States* v. *Goodine*, 400 F.3d 202, 206 (4th Cir. 2005) ("[I]t is well-settled that the Double Jeopardy Clause does not preclude a retrial of a criminal charge that has resulted in a hung jury.").

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wish to convict him of murder and was undecided on the lesser-included offense of voluntary manslaughter. S.A. 49-50; J.A. 964. But as the district court noted, such "findings," even if true, do not constitute an acquittal. J.A. 1866-1867 n.11. Slager was charged with only one count in state court, and the jury failed to reach a verdict on that count. Put another way, the Double Jeopardy Clause not only did not prevent the *federal* government from trying Slager; it also did not preclude the *State* from trying him again. Indeed, the State planned to retry Slager (J.A. 563), but dismissed the charge when Slager agreed to plead guilty in federal court to violating Section 242. J.A. 562-563.

CONCLUSION

This Court should affirm Slager's conviction and sentence.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to oral argument if the Court believes it would be helpful.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 12,980 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

s/ Elizabeth P. Hecker
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Date: July 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that one paper copy of the foregoing brief was sent to the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by Federal Express on July 5, 2018.

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