Nos. 18-10972-AA, 18-11447

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

PHILIP ANTICO,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 - 26.1-3 and 28-1(b), counsel for appellee United States certifies that the list of persons and entities the appellant's amended opening brief filed on August 23, 2018, identified as having an interest in the outcome of this case is complete and correct.

s/ Christopher C. Wang
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Attorney

Date: September 24, 2018

STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to defendant's request for oral argument.

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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 Philip Antico on February 28, 2018. Doc. 294.[1] On March 7, 2018, Antico filed a timely notice of appeal from the court's judgment

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[1] This brief uses the following abbreviations: "Doc. __, at __" refers to the document number assigned on the district court's docket sheet, "GX __" refers to government exhibits admitted at trial, and "Br. __" refers to page numbers in Antico's amended opening brief filed with this Court on August 23, 2018.

and its denial of his post-trial motions for acquittal and for a new trial. Doc. 306. On April 4, 2018, the government filed a timely notice of a cross-appeal of Antico's sentence. Doc. 320. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(b).

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports Antico's conviction for obstruction of justice under 18 U.S.C. 1512(b)(3).

2. Whether the district court plainly erred in giving an *Allen* charge to the jury.

3. Whether the district court abused its discretion in declining Antico's post-verdict requests to investigate his allegations of juror misconduct.

4. Whether the cumulative effect of the claimed errors warrants a new trial.

5. Whether, in determining Antico's Sentencing Guidelines range, the district court erred in declining to use aggravated assault as the underlying offense for his obstruction of justice conviction. (Cross-appeal)

STATEMENT OF THE CASE

1. Procedural History

In October 2017, defendant Philip Antico, a Sergeant with the Boynton Beach Police Department (BBPD), was charged in a superseding indictment, along with three BBPD police officers he supervised, on several counts arising out of the

subordinate officers' use of force against a vehicle's passenger during a traffic stop. Doc. 81. The indictment charged Antico with obstruction of justice for making false and misleading statements to the Federal Bureau of Investigation (FBI) concerning the subordinate officers' Officer Reports, in violation of 18 U.S.C. 1512(b)(3).[2] Doc. 81, at 8 (Count 8). The indictment also charged Antico with two counts of falsification of records for aiding and abetting two subordinate officers in making false entries in their Officer Reports, in violation of 18 U.S.C. 1519. Doc. 81, at 6-7 (Counts 6 and 7).

A jury found Antico guilty under Section 1512(b)(3) of obstructing justice, but acquitted him of the two counts of falsifying records. Doc. 188. He moved the district court for a judgment of acquittal and for a new trial (Doc. 202-203, 217-218), which the court denied (Doc. 231).

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[2] Section 1512(b)(3) provides:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to * * * hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings * * * shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 1512(b)(3).

Antico subsequently moved the district court to interview a juror who sent an e-mail to Antico's counsel alleging juror misconduct during deliberations. Doc. 242. He also moved the court to compel the United States to disclose the contents of a conversation a second juror had with the wife of an Assistant United States Attorney about the second juror's experiences on the jury. Doc. 282; Doc. 287, at 2. The district court denied both motions. Doc. 260, 288.

A separate jury found one of the subordinate officers, Michael Brown, guilty of depriving the vehicle's passenger of his right to be free from unreasonable seizure, in violation of 18 U.S.C. 242. Doc. 161. At sentencing, the district court rejected the government's argument that, when calculating Antico's Sentencing Guidelines range, it should use aggravated assault as the underlying offense based on Brown's unlawful use of a taser against the passively resisting passenger. Doc. 278-279. Use of aggravated assault as the underlying offense would have resulted in a Sentencing Guidelines range of 37 to 46 months' imprisonment. Doc. 221, at 17. Instead, the court applied the base offense level for obstruction of justice, resulting in a Sentencing Guidelines range of 15 to 21 months' imprisonment. Doc. 303, at 9, 16. Granting a downward variance, the court sentenced Antico to three years' probation. Doc. 294; Doc. 343, at 4, 64-65.

Antico has appealed his conviction, and the government has cross-appealed his sentence. Doc. 306, 320.[3]

2. Statement Of The Facts

a. The Underlying Use Of Force, Antico's Review Of The Officers' Use Of Force Reports, And Antico's FBI Interview

i. During the early morning hours of August 20, 2014, a BBPD officer attempted to perform a traffic stop. Doc. 303, at 4. B.H., the driver of the vehicle, did not stop, but drove away, striking and injuring a police officer in the process. Doc. 303, at 4. J.B. was a front-seat passenger in the vehicle. Doc. 303, at 4. A high-speed chase involving several BBPD police officers ensued. Doc. 303, at 4. Eventually, BBPD officer Michael Brown forced the car to stop. Doc. 303, at 4-5. Brown pulled alongside the car, and Brown and officers from other patrol cars approached the vehicle. Doc. 303, at 5.

Brown approached the vehicle with his gun drawn. Doc. 303, at 5. He opened the front passenger door, immediately kicked J.B. without giving him the opportunity to comply with verbal commands, then used his hand to strike J.B.

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[3] Brown, who was tried separately for his assault of the motorist, has filed a separate appeal of his conviction for violating 18 U.S.C. 242 (No. 18-10772). The government has also cross-appealed Brown's sentence in that case (No. 18-11314). Both cross-appeals raise the same issue, *i.e.*, whether the district court erred in declining to use aggravated assault as the underlying offense in calculating the defendant's Sentencing Guidelines range. Two other BBPD officers, Justin Harris and Ronald Ryan, were tried with Brown and acquitted of all charges against them.

repeatedly. Doc. 303, at 5; Doc. 338, at 135, 146. Two other BBPD officers, Justin Harris and Ronald Ryan, also reached into the vehicle and struck J.B. Doc. 303, at 5. Then, while J.B. was still in the car, Brown deployed his taser against J.B., twice pulling the trigger and ejecting the taser's probes. Doc. 303, at 5; Doc. 329, at 41, 44, 97, 118. Brown's attorney conceded that his client believed that the probes had struck and penetrated J.B.'s chest and right leg. Doc. 329, at 40, 42, 97, 118. Other officers deployed their taser against B.H., and struck and kicked him repeatedly as they removed him from the vehicle. Doc. 303, at 5.

The assault inflicted injuries on both J.B. and B.H. Doc. 303, at 5. J.B. sustained visible scrapes, lacerations, and bruises to his face. Doc. 303, at 5. B.H. had severe lacerations and bruises to his head and face and injured eyes that were swollen shut. Doc. 303, at 5. Both individuals also suffered puncture wounds from taser probes. Doc. 303, at 5.

Defendant Antico, a BBPD Sergeant and the direct supervisor of Brown, Harris, and Ryan, was not at the scene. Doc. 210-1, at 66-69 (GX 12a); Doc. 303, at 5. However, he saw B.H. at the hospital the night of the incident and was aware of B.H.'s injuries. Doc. 210-1, at 120-122 (GX 12a); Doc. 338, at 101. He expected his officers to document the strikes they used on B.H. Doc. 210-1, at 124, 209-210 (GX 12a).

A Palm Beach County Sheriff's Office (PBSO) helicopter flying overhead had recorded the officers' use of force against B.H. and J.B. Doc. 303, at 5. BBPD Police Chief Jeffrey Katz obtained a copy of the helicopter video and watched it, which led him to question whether the officers' actions were justified. Doc. 303, at 6; Doc. 338, at 200-202. Katz ordered a subordinate to collect the Officer Reports of the involved officers, compare them to the video, and recommend how to proceed. Doc. 303, at 6. Katz believed that these officers should neither view the video, nor be made aware of its existence, before completing their Officer Reports. Doc. 303, at 6.

ii. Following the incident, each officer involved submitted an Officer Report on his use of force using the BBPD's electronic report writing system. Doc. 303, at 5-7. Before learning that the incident had been recorded, Brown, Harris, and Ryan submitted Reports that disclosed Brown's use of the taser against J.B. after J.B. failed to comply with loud verbal commands to exit the vehicle, but did not describe striking or kicking J.B. Doc. 208-1, at 90-91 (GX 8d); Doc. 303, at 5-6. Of the other officers on the scene, two represented that they did not use force; one officer documented force against the backseat passenger; one officer wrote that he had struck B.H., but only in the back, even though B.H. sustained extensive injuries to his head and face; and one officer involved in B.H.'s apprehension failed to document any strikes, punches or kicks. Doc. 303, at 6-7.

One week after the incident, unbeknownst to Katz, Antico obtained a copy of the PBSO helicopter video of the incident and watched it with Brown. Doc. 303, at 6. After viewing the video, Brown changed his Officer Report to include that he struck J.B. several times with a closed fist after J.B. refused to comply with loud verbal commands to place his hands on the dashboard, and used a taser after J.B. still refused to comply. Doc. 208-1, at 85-90 (GX 8d); Doc. 303, at 7. Brown again omitted that he kicked J.B. Doc. 208-1, at 85-90 (GX 8d); Doc. 303, at 7.

Antico then began reviewing the Officer Reports that were submitted and validated as complete, and thus purported to represent truthful and accurate accounts of what happened. Doc. 338, at 213-214, 239-240. He rejected Officer Reports that did not document strikes or kicks against J.B. and B.H. Doc. 303, at 6. Antico returned Harris's and Ryan's Officer Reports, allowing them to change their Reports to include that they struck J.B. Doc. 303, at 7. But Ryan's amended Officer Report also stated that J.B. had increased his resistance and engaged in threatening behavior—assertions that Ryan did not include in his initial Report. Doc. 303, at 7. Antico also returned the Officer Reports of two officers involved in B.H.'s arrest to allow them to add that they struck him. Doc. 303, at 7. An analysis of the digital audit trail revealed that Antico rejected Officer Reports 11 times within a span of 29 hours after watching the PBSO video, including rejecting

the Reports of Harris and Ryan multiple times each. Doc. 209-1, at 72-75 (GX 23).

After the officers made these changes to their Officer Reports, Antico approved and transmitted the Reports to Katz. Doc. 303, at 7. At the same time, Antico transmitted his Supervisor Incident Report (SIR), which stated that the officers used the force "necessary to take all three suspects into custody" and that "no further action should be taken." Doc. 303, at 7. All the Officer Reports were dated August 20, 2014, the date of the incident, despite the material changes to the initial Reports Antico allowed the officers to make several days later. Doc. 303, at 7-8.

After receiving the final Officer Reports, along with Antico's SIR, Chief Katz referred the matter to the State Attorney's Office and the FBI to determine whether the officers violated any laws. Doc. 303, at 8.

iii. On February 19, 2015, the FBI questioned Antico. Doc. 303, at 8. At that time, both Antico and the FBI were unaware that the BBPD reporting system retained a digital audit trail of the changes the officers made to their Officer Reports. Doc. 303, at 8. During the interview, at which his counsel was present, Antico was able to recall accurately details of the incident and its aftermath. For example, Antico remembered the original call from the officer who attempted to stop the car carrying J.B., the officers involved in the pursuit, and the direction the

car was traveling. Doc. 210-1, at 42-43, 58, 68-69 (GX 12a). He further remembered the sequence of the chase, including that Harris called for the PBSO helicopter and that he (Antico) told the officers "no" when they asked whether they could "take [the car] out." Doc. 210-1, at 70-72 (GX 12a). Antico also recollected staying with the officer who had been hit and learning that the three occupants of the car were in custody. Doc. 210-1, at 60, 81, 91 (GX 12a). He also recalled watching the PBSO video with Brown and reading every Officer Report "[w]ord-for-word." Doc. 210-1, at 207, 214, 221 (GX 12a).

Antico further stated that the Officer Reports mentioned that the officers had thrown punches and kicks, and were consistent with their use of force he observed on video. Doc. 210-1, at 208, 227-228, 279-280 (GX 12a). But Antico failed to tell the FBI that the officers' *initial* Reports did not disclose that conduct. When asked whether he returned any of the Reports to the officers for corrections, Antico replied, "I'd have to check and see * * * if I rejected anybody's reports," adding, "I might have rejected a couple." Doc. 210-1, at 249-250 (GX 12a). Despite Antico's repeated rejection of Officer Reports that did not document strikes and kicks officers used against J.B. and B.H., Antico told the FBI agents that he's "never really had an issue with * * * these guys not being accurate in their * * * report writing," and "paint[ing] a picture of what happened." Doc. 210-1, at 197-198, 200 (GX 12a). He recalled that, for this incident, the only statement he

questioned, and should have had the officer change, was a "grammatical error" stating that a suspect's face hit the officer's hand instead of vice versa. Doc. 210-1, at 202 (GX 12a).

b. The District Court's Allen *Charge*

Antico was indicted on one count of obstruction of justice, in violation of 18 U.S.C. 1512(b)(3), and two counts of falsification of records, in violation of 18 U.S.C. 1519. Doc. 81, at 6-8. Trial took place in November 2017. On the fourth day of trial, the case went to the jury. Doc. 341, at 73. After several hours of deliberating, the jury sent the court a note stating, "Your Honor, we as a jury have reached a verdict on two counts. On the third we cannot agree. We sincerely request your insight on this matter." Doc. 341, at 82. After conferring with counsel, the court told the jury to break for the evening and return the following morning to continue deliberating. Doc. 341, at 83-85.

The following morning, the jury sent the court a second note that read, "Your Honor, we, the jury, are not able to agree on one count. No amount of time, talk, contemplation or discussion provided shall result in a unanimous decision." Doc. 374, at 2. At this point, the court gave the jury an *Allen* charge, adopted from this Circuit's 2016 Pattern Jury Instructions. Doc. 374, at 4-5. Neither party objected to this charge. The jury left the courtroom to continue deliberating. After a short recess, the jury sent the court a third note stating that the court's "comments

were/are material," and that as a result, it had reached a verdict. Doc. 374, at 6. The jury found Antico guilty of the obstruction of justice count, but not guilty of the two falsification of records counts. Doc. 374, at 7.

c. Antico's Post-Trial Motions

In December 2017, after the jury convicted Antico of violating Section 1512(b)(3) for his false and misleading statements to the FBI, Antico moved for a judgment of acquittal. Doc. 203. Antico argued that the evidence was insufficient for a reasonable jury to find that he knowingly engaged in misleading conduct or acted with the intent to hinder or delay the FBI's investigation, because he told the FBI that he could not remember whether he returned the Officer Reports for corrections and offered to follow-up on the matter. Doc. 218, at 2-4.

The government responded that the jury reasonably concluded that Antico knowingly made false statements to the FBI by vouching for the credibility of the subordinate officers, and intentionally concealed material facts by failing to reveal that (1) the officers submitted initial Reports that failed to document the force they used, and (2) he returned numerous Reports several times so that officers could detail the force they used. Doc. 225, at 9. The government further asserted that Antico's ability to recall accurately numerous details about the events in question belied his claim of faulty memory. Doc. 225, at 10-11.

Antico also moved the district court for a new trial. Doc. 202. He argued that the *Allen* charge was "unconstitutionally coercive" because it asked the jury to consider, in trying to reach a unanimous verdict, the costs of the trial and possible retrial. Doc. 217, at 2-4. The government responded that the *Allen* charge mirrored this Circuit's 2016 pattern *Allen* charge and that this Court has repeatedly upheld a similarly worded *Allen* charge that referenced the cost of the trial. Doc. 225, at 12-13. In his reply, Antico acknowledged that the district court's *Allen* charge tracked the Eleventh Circuit's pattern instructions, but argued that the district court should reconsider the validity of the instruction in light of case law from other federal courts of appeals. Doc. 227, at 8-9.

The district court denied Antico's post-trial motions. Doc. 231. First, the court concluded that there was sufficient evidence for the jury to conclude that Antico knowingly misled the FBI by "not disclos[ing] that he had rejected several reports in quick succession because the reports did not accurately reflect the use of force that Sergeant Antico saw in the PBSO video." Doc. 231, at 4. The court also observed that Antico's memory of other details of the incident was "sufficient evidence * * * demonstrat[ing] a knowing intent to mislead the FBI." Doc. 231, at 4. Second, the district court rejected Antico's argument that the *Allen* charge was unduly coercive, noting that its language came from the Eleventh Circuit's

pattern jury instructions and this Court has approved similar language in several cases. Doc. 231, at 4.

d. Antico's Post-Verdict Allegations Of Juror Misconduct

i. In late January 2018, after the district court's denial of Antico's post-trial motions, a juror (the first juror) sent Antico's counsel an e-mail suggesting that jurors had engaged in misconduct by (1) voting for guilt to ensure that someone would be held accountable for the use of force viewed on video; (2) harboring bias against police officers; and (3) bullying jurors to reach a verdict. Doc. 239-1. As a result, Antico requested that the district court interview the juror in chambers, with counsel present, to determine whether further investigation was warranted. Doc. 242, at 2-3.

The government responded that such a post-verdict interview with a juror was impermissible under Federal Rule of Evidence 606(b), the "no-impeachment rule," which prohibits a juror from testifying about jury deliberations. Doc. 244, at 2-5. The government also argued that the e-mail did not raise matters that fell within the Rule's specifically enumerated exceptions for outside influence, reliance on extraneous information, or a mistake in filling out the verdict form. Doc. 244, at 5; see Fed. R. Evid. 606(b)(2).

The district court denied Antico's motion. Doc. 260. The court explained that Rule 606(b) and this Court's precedent establish "very stringent limitations"

on its authority to question jurors about their deliberations and use juror testimony to impeach a verdict. Doc. 260, at 2-3 (citation omitted). The court stated that "[t]he juror's vague allegations that some jurors made up their mind quickly or felt that someone needed to be held accountable is not clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety occurred during the deliberations." Doc. 260, at 5. The court also explained that the first juror's allegations that another juror was biased against police officers did not satisfy the narrow exception to the no-impeachment rule that applies to *racial* bias. Doc. 260, at 5-7. Finally, the court found that the allegations of bullying "describe[] nothing more than typical features of jury deliberations," and thus are "insufficient to violate the no impeachment rule." Doc. 260, at 7 (citation omitted).

ii. In February 2018, Antico learned that a second juror had spoken to the wife of Assistant United States Attorney (AUSA) Adam McMichael,[4] to discuss his or her experiences on the jury. Doc. 282, at 2; Doc. 287, at 2. Based on this knowledge, Antico moved the district court to compel the government to disclose what the second juror said to McMichael's wife, arguing that it is akin to *Brady* material and must be provided to defense counsel to allow him to evaluate the

[4] AUSA McMichael had no involvement in this case. The identity of the second juror, an acquaintance of his wife, is not in the record. It is possible that the first juror and second juror are the same person.

disclosure and determine whether to file an appropriate motion. Doc. 282, at 2. The government responded that further disclosure was unwarranted because the conversation fell within Rule 606(b)'s ban on testimony regarding jury deliberations. Doc. 287, at 3-4.

The district court denied Antico's motion. Doc. 288. The court concluded that Antico's motion to compel "fails to present any evidence that impropriety has occurred," but instead "simply states that a juror spoke with the wife of an AUSA about his or her experience as a juror." Doc. 288, at 4.

e. The District Court's Sentencing Determinations

i. Antico's initial Presentence Investigation Report (PSR) calculated a total offense level of 21 for his Section 1512(b)(3) conviction. The PSR reasoned, in relevant part, as follows:

- The applicable guideline for a violation of 18 U.S.C. 1512(b)(3) is Sentencing Guidelines § 2J1.2 (Obstruction of Justice). Under the cross-reference in subpart (c)(1), "[i]f the offense involved obstructing the investigation * * * of a criminal offense," and a higher offense level would result, courts apply Sentencing Guidelines § 2X3.1 (Accessory After the Fact).

- Section 2X3.1(a)(1) provides a base offense level of "6 levels lower than the offense level for the underlying offense."

- The guideline for the underlying offense—in this case, 18 U.S.C. 242—is Sentencing Guidelines § 2H1.1 (Offenses Involving Individual Rights). That guideline provides that the base offense level is "the offense level from the offense guideline applicable to any underlying offense." Sentencing Guidelines § 2H1.1(a)(1).

- The PSR determined that the underlying offense was "Aggravated Assault," Sentencing Guidelines § 2A2.2, which provides a base offense level of 14.

Doc. 221, at 9. The PSR then added four levels because a dangerous weapon was "otherwise used," Sentencing Guidelines § 2A2.2(b)(2)(B); three levels for bodily injury, Sentencing Guidelines § 2A2.2(b)(3)(A); and six levels for acting under color of law, Sentencing Guidelines § 2H1.1(b)(1). Doc. 221, at 9. Finally, as directed by Section 2X3.1(a)(1), the PSR deducted six levels, resulting in a total offense level of 21. Doc. 221, at 9-10. Under a criminal history I, Antico's resulting Sentencing Guidelines range was 37 to 46 months' imprisonment. See Doc. 221, at 17.

Antico objected to the PSR. Doc. 233. He argued that the PSR should have used "[f]alsification of [r]eports" (18 U.S.C. 1519) as his underlying offense, rather than deprivation of rights (18 U.S.C. 242), because "[t]he gravamen of the Government's obstruction case was that [Antico] failed to be truthful as to whether he rejected reports of officers he supervised." Doc. 233, at 5-6. Using falsification of reports as the underlying offense, the base offense level would be 14 (the base offense level for 18 U.S.C. 1519) under Sentencing Guidelines § 2J1.2, resulting in a Sentencing Guidelines range of 15 to 21 months' imprisonment. Doc. 233, at 6-7. The government responded that the PSR correctly applied the cross-reference to deprivation of rights (18 U.S.C. 242), the more serious offense, because "the FBI

agents who interviewed [Antico] were investigating both the BBPD officers' use of excessive force and their falsification of their reports." Doc. 241, at 8.

After a hearing (Doc. 274), the district court issued an order concluding that the appropriate underlying offense was obstruction of justice. Doc. 279. The court determined that a cross-reference to aggravated assault could not be based on *Brown's* conduct because it had concluded at sentencing in Brown's case (in an order issued the same day) that he had not committed aggravated assault. Doc. 279, at 4. The court reached that conclusion based on its determination that there was insufficient evidence to find that "Brown's intent in using the Taser was to cause bodily injury, rather than to gain control over J.B." Doc. 278, at 17. Despite evidence that J.B. sustained taser puncture wounds, the court also found that there was no evidence that Brown's taser actually electroshocked J.B., given the absence of evidence of penetration marks on J.B.'s right leg and chest, the spots Brown reported his taser probes struck J.B.'s body. Doc. 278, at 16-17. Further, the court suggested that Brown may have been mistaken that his taser actually deployed because the sound may have been inaudible due to ambient outdoor noise. Doc. 278, at 17.[5]

[5] The court also concluded that it could not rely on aggravated assaults committed by other officers at the scene to determine Antico's base offense level because the government failed to prove by a preponderance of the evidence that other officers on the scene committed aggravated assault. Doc. 279, at 5. On

(continued…)

ii. On February 27, 2018, the district court sentenced Antico on the Section 1512(b)(3) charge. Doc. 343. Given the court's conclusion that Brown's conduct was assault, and not aggravated assault, the cross-reference to Section 2J1.2(c)(1) did not apply because using assault would result in a lower base level than that for obstruction of justice. The court therefore applied the base offense level for obstruction of justice, which under Section 2J1.2(a) is 14. See Doc. 303, at 9. Under base offense level 14, Antico's recommended Guidelines range was 15 to 21 months' imprisonment. Doc. 343, at 4. The court imposed a non-custodial sentence of three years' probation. Doc. 343, at 64-65; see generally Doc. 343, at 51-65 (summarizing the parties' arguments and applying the Section 3553(a) factors).

On March 7, 2018, Antico filed a timely notice of appeal of his conviction and the denial of his post-trial motions. Doc. 306. On April 4, 2018, the government filed a timely notice of cross-appeal of Antico's non-custodial sentence. Doc. 320.

SUMMARY OF ARGUMENT

1. The evidence was more than sufficient to support Antico's conviction for obstruction of justice under 18 U.S.C. 1512(b)(3) based on his intentional

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(…continued)
appeal, the government relies solely on Brown's conduct to support its argument that aggravated assault is the appropriate base offense level for Antico.

misstatements and omissions to the FBI during his February 19, 2015, interview. To establish a violation of Section 1512(b)(3), the government must prove that a defendant (1) knowingly engaged in misleading conduct toward another person; (2) with the intent to hinder, delay or prevent the communication of information to a federal official; (3) about the commission or the possible commission of a federal crime. Here, Antico's misleading conduct consisted of (1) falsely vouching for the credibility of his subordinate officers and stating that he never had a problem with the accuracy of their Reports; (2) omitting the fact that the officers' initial Reports did not mention that they punched and kicked J.B. and B.H.; and (3) omitting the fact that he returned several Reports to the officers over a short period of time for corrections after watching the video. These omissions occurred despite Antico's detailed recollection of numerous other details of the incident, many of which did not involve him. A reasonable jury could conclude from this evidence that Antico knowingly and willfully engaged in misleading conduct during the FBI interview with the intent to hinder the FBI's investigation.

2. The district court did not plainly err in giving the *Allen* charge to the jury. The *Allen* charge was adopted from this Circuit's 2016 Pattern Jury Instructions. Moreover, this Court repeatedly approved the use of an earlier version of the charge that placed *more* emphasis on the costs of trial and retrial (the 2010 instruction). Also, the charge included the statement that no juror is expected to

give up an honest belief he or she may have as to the weight or effect of the evidence. In these circumstances, the *Allen* charge was not error, much less plain error.

3. The district court did not abuse its discretion in denying Antico's requests that the court investigate post-verdict allegations of juror misconduct. The first juror alleged that some jurors harbored bias against police officers and bullied other jurors into reaching a verdict. These allegations concern internal matters on which a juror may not testify under Federal Rule of Evidence 606(b). The first juror also alleged that several jurors voted guilty because they wanted to hold someone responsible for the use of force they witnessed on video. This vague allegation that an impropriety may have occurred falls far short of triggering a district court's duty to investigate allegations of juror misconduct. In any event, during jury selection, the district court questioned potential jurors who indicated they knew something about the case, and the court instructed the jury at the beginning of trial that it should consider only the evidence presented and must not base its decision on any information acquired outside the courtroom.

The second juror's conversation with AUSA McMichael's wife about his or her experiences on the jury also implicated the jury's deliberations. As such, this conversation falls squarely within Rule 606(b)'s prohibitions on post-verdict juror testimony concerning jury deliberations. And because McMichael confirmed that

the conversation did not fall under any of Rule 606(b)'s enumerated exceptions allowing juror testimony, the district court had no duty to investigate further. Accordingly, the district court also did not abuse its discretion in denying Antico's motion to compel the United States to further disclose this conversation's contents.

4. Because Antico has failed to establish that any of the issues he raises on appeal constitutes error, he cannot prevail on his cumulative-error claim. Moreover, even assuming that the district court erred, Antico has failed to demonstrate that the combined errors affected his substantial rights or denied him the right to a fair trial, particularly in light of the compelling evidence of his guilt on the Section 1512(b)(3) count.

5. Cross-Appeal. The district court erred in declining to use aggravated assault as the underlying offense in calculating Antico's Sentencing Guidelines range for his obstruction of justice conviction. Section 2J1.2 of the Sentencing Guidelines, which applies to convictions under Section 1512(b)(3), includes a cross-reference to the offense level of an underlying offense if the obstruction involved the investigation of a criminal offense and a higher offense level would result. In this case, Antico obstructed the investigation into Officer Brown's assault of J.B., including Brown's use of a taser. Under Sentencing Guidelines § 2A2.2, an aggravated assault is "a felonious assault that involved * * * a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten)

with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1). The government proved by a preponderance of the evidence that Brown's assault constituted an aggravated assault, *i.e.*, that Brown had the objective intent to cause J.B. bodily injury when he shot J.B. with the taser probes.

The district court erred in concluding that Brown's corresponding intent to gain control over J.B. precluded a finding that he had the intent to cause J.B. bodily injury. These two motives are not mutually exclusive. The court also erred in viewing the issue of whether Brown's taser actually electroshocked J.B. as relevant to this inquiry. For these reasons, this Court should vacate Antico's sentence and remand for resentencing using aggravated assault as the underlying offense.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN ANTICO'S CONVICTION FOR VIOLATING 18 U.S.C. 1512(B)(3)

A. Standard Of Review

This Court reviews *de novo* challenges to the sufficiency of the evidence. *United States* v. *Reeves*, 742 F.3d 487, 497 (11th Cir. 2014). In so doing, the Court "view[s] the evidence in a light most favorable to the jury verdict and draw[s] all inferences in its favor." *Ibid.* The Court is "obliged to affirm the conviction[] if a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Ibid.*

B. The Evidence Was Sufficient To Establish That Antico Knowingly Engaged In Misleading Conduct During His February 2015 Interview With The Intent To Hinder The FBI's Investigation

As relevant here, to establish that a defendant violated 18 U.S.C. 1512(b)(3), the government must prove beyond a reasonable doubt that he (1) knowingly "engage[d] in misleading conduct toward another person"; (2) with the intent to "hinder, delay or prevent the communication of information to a federal official"; (3) about the "commission or the possible commission of a [f]ederal crime." *United States* v. *Ronda*, 455 F.3d 1273, 1284 (11th Cir. 2006), cert. denied, 549 U.S. 1212 (2007). "[M]isleading conduct" is defined in 18 U.S.C. 1515 to include "knowingly making a false statement" and "intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement." 18 U.S.C. 1515(a)(3)(A)-(B). The purpose of Section 1512(b)(3) is to ensure that information received by federal investigators regarding a potential crime is correct, truthful, and complete. See, *e.g.*, *United States* v. *Veal*, 153 F.3d 1233, 1253 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999), abrogated on other grounds by *Fowler* v. *United States*, 563 U.S. 668 (2011).

Antico argues that the evidence failed to establish that he engaged in misleading conduct with the intent to hinder an investigation because his statements reflected that he simply "could not remember or recall exact events."

Br. 21. In other words, he argues that the evidence was insufficient to establish that his statements were "knowingly false" and "intended to hinder the investigation." Br. 22-23. Rather, he asserts, the evidence showed that he "answered the questions presented to him to the best of his ability based on the information available to him at that time"; he "simply could not remember every detail of the investigation." Br. 22-23.[6]

Antico's arguments are not persuasive. Viewing the evidence in the light most favorable to the verdict, a reasonable jury could conclude that Antico knowingly made false statements to the FBI investigators and omitted information with the intent to hinder the federal investigation.

1. First, the evidence was sufficient to establish that Antico *knowingly engaged* in misleading conduct by his statements during the FBI interview that included: (1) falsely vouching for the credibility of his officers and stating that he's never had an issue with "these guys not being accurate" in their Reports (Doc. 210-1, at 197-198, 200 (GX 12a)); (2) omitting the fact that the initial Reports the officers submitted did not fully or accurately reflect the force they used against J.B. and B.H. (Doc. 303, at 7); and (3) omitting the fact that he returned *11* Reports to officers over a span of 29 hours so that the officers could change their Reports to

[6] Antico appears to challenge the sufficiency of the evidence as to Section 1512(b)(3)'s first two elements only.

be consistent with the force shown on the video (Doc. 209-1, at 72-75 (GX 23)). These statements were patently misleading, and Antico does not argue otherwise. Accordingly, based on this evidence, the jury could reasonably have concluded that Antico knowingly engaged in "misleading conduct," *i.e.*, false statements and omissions, necessary for conviction under Section 1512(b)(3). See *Ronda*, 455 F.3d at 1295-1296 (officer convicted for false and misleading testimony that suspect was armed, when evidence showed that officer knew in fact that suspect was unarmed).

Second, the evidence was sufficient to establish that Antico made these misstatements and omissions *with the intent to hinder* the investigation of the police officers' assault of the motorist. During the interview, Antico was able to recall minute details of the incident. For example, he recalled numerous details about the car chase that led to the officers' use of force against J.B. and B.H., including the nature and sequence of the chase. Doc. 210-1, at 42-43, 58, 68-72 (GX 12a). Antico also remembered staying with the officer who had been hit and learning that the three occupants of the car were in custody. Doc. 210-1, at 60, 81, 91 (GX 12a). He also recalled watching the helicopter video of the incident with Brown and reading every written Officer Report "[w]ord-for-word." Doc. 210-1, at 207, 214, 221 (GX 12a). Yet he failed to mention to the FBI that multiple officers involved in the same incident submitted Officer Reports that did not

accurately describe the use of force against J.B. and B.H., and that he rejected *11* of these Reports.

In these circumstances, a reasonable jury could conclude that Antico's precise recollection of numerous details of the incident, many of which did not directly involve him, demonstrated his intent to mislead the FBI concerning the Officer Reports and the nature of the officers' conduct after the traffic stop. As the district court concluded, "[t]here was sufficient evidence to conclude that Sergeant Antico's memory of some details but not of others demonstrates a knowing intent to mislead the FBI." Doc. 231, at 4; cf. *United States* v. *Umbach*, 708 F. App'x 533, 542 (11th Cir. 2017) (jury not required to conclude that, because defendant's interview was long after incident, any irregularities were accidental, where other circumstantial evidence demonstrated that defendant was lying about what he did and did not remember).[7]

[7] The evidence shows that Antico's false statements and omissions did hinder the investigation. FBI agent Stuart Robinson, one of the interviewers, testified that Antico's statement that he never had an issue with the subordinate officers being inaccurate in their report writing, and his identification of a "grammatical error" as the one error he would have changed, led Robinson to believe that none of the Reports had been altered. Doc. 339, at 189-190. Robinson further testified that Antico's statements gave the FBI the impression that Antico "justified the force used because he believed that everything he knew about this incident was in the reports and the people on the scene had explained why the force was justified to his satisfaction." Doc. 339, at 191. According to Robinson, learning that Antico had allowed officers to make material alterations to Reports

(continued…)

2. Antico's arguments to the contrary are unavailing. His principal argument is that his false statements and omissions during his interview reflected his inability to remember certain details, not an intent to hinder the FBI's investigation. Br. 21-23. But as noted above, a reasonable jury could conclude that Antico's ability to remember accurately other details of the incident showed that he also remembered the details of the Reports and initially rejecting the Reports, but intentionally chose not to reveal that information. Moreover, if the jury concluded that Antico made false statements and omissions in his statements concerning the Reports, a reasonable jury could also conclude that Antico's offer to the FBI agents to go back and check to see if he rejected any Officer Reports did not refute this intent to hinder, but rather was misleading itself. See Br. 21, 23. Likewise, the jury could conclude that Antico's qualifications of his answers with phrases like "I don't know" and "I would have to check" (see Br. 22-23) were also intentionally misleading because Antico was not communicating everything he knew. See *Umbach*, 708 F. App'x at 542 (jury could have viewed defendant's "to my knowledge" statements as intentionally misleading). At bottom, Antico is really asking this Court to second-guess the jury's assessment of the evidence. But

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(…continued)
submitted for final approval was a "big deal" because it called into question the credibility of these officers and their motivation to lie. Doc. 339, at 191-193.

because ample evidence supports the jury's conclusion that Antico intentionally misled the FBI, this Court must decline that invitation.

Antico also suggests (Br. 19, 21) that his acquittal on the two Section 1519 counts (Counts 6 and 7) for falsifying the Officer Reports somehow undermines the sufficiency of the evidence supporting the jury's verdict on the Section 1512(b)(3) count. That is not so. The Section 1519 counts alleged that Antico aided and abetted Brown and Harris in making false entries in their Officer Reports. Doc. 81, at 6-7. The Section 1512(b)(3) count, by contrast, alleged that Antico vouched for the credibility of his officers and their reports to the FBI while concealing that he allowed them to make material changes to the Reports to conform to the video of the incident. Doc. 81, at 8. Because the statutes require proof of different elements, and the evidence showed that Antico intentionally misled the FBI interviewers about his handling of the Reports, the jury had a basis for convicting Antico on the Section 1512(b)(3) count while acquitting him on the Section 1519 counts.[8] In any event, even if the verdicts were inconsistent, which they are not, such inconsistency is irrelevant to the issue of whether a reasonable

[8] For example, the jury could have concluded on the Section 1519 counts that Antico did not assist Brown and Harris in making false entries in their Officer Reports, while also concluding on the Section 1512 count that Antico misled the FBI into believing that none of the Officer Reports had been materially altered after their initial submission.

jury could conclude that Antico was guilty beyond a reasonable doubt of violating Section 1512(b)(3). See *Veal*, 153 F.3d at 1252-1253.

Finally, Antico recites the facts of three prior cases in which this Court upheld obstruction-of-justice convictions of police officers against sufficiency challenges, and suggests that because the facts in the instant case are inapposite, they cannot support his conviction. Br. 19-21. But nothing in those cases suggests that the facts here cannot support Antico's conviction. Those cases, like this one, simply involved applying the particular facts to well-settled legal standards. The cases did not impose new requirements on Section 1512(b)(3), and therefore, contrary to Antico's suggestion otherwise, the facts that Antico was not present at the incident, and engaged in the allegedly misleading conduct six months later when questioned by the FBI (Br. 21), are not fatal to his conviction. In short, here, too, there was sufficient evidence for the jury to conclude that Antico violated Section 1512(b)(3) by providing his FBI interviewers with incorrect, untruthful, and incomplete information regarding the Officer Reports.

II

THE DISTRICT COURT DID NOT PLAINLY ERR IN GIVING AN *ALLEN* CHARGE TO THE JURY

A. Standard Of Review

This Court reviews for abuse of discretion the district court's decision to give the jury an *Allen* charge, and will find such abuse "only if the charge was

inherently coercive." *United States* v. *Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008). But where, as here, a party does not contemporaneously object to the *Allen* charge, this Court's review is for plain error. See *United States* v. *Taylor*, 530 F.2d 49, 51 (5th Cir. 1976). This Court may "correct an error under the plain error standard where (1) an error occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Duncan*, 400 F.3d 1297, 1301 (11th Cir.), cert. denied, 546 U.S. 940 (2005). As a general matter, "[t]o determine whether an [*Allen*] charge is plain error, [this Court] must evaluate whether the particular charge is coercive in light of the facts and circumstances of the case and whether further instructions following timely objection could correct the problem." *Taylor*, 530 F.2d at 51.

B. The District Court's Allen *Charge Mirrored This Circuit's 2016 Pattern Jury Instruction And Was Not Otherwise Inherently Coercive, And Therefore Was Not Plain Error*

After the jury twice indicated to the district court that it could not reach a unanimous agreement on one of the counts, the district court gave the jury an *Allen* charge taken from this Circuit's 2016 Pattern Jury Instructions.[9] The *Allen* charge stated:

[9] This Circuit's 2016 Pattern Jury Instructions describe this charge as a "Modified Allen Charge." See Eleventh Circuit Pattern Jury Instructions (Criminal (continued…)

This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and prosecution. If you should fail to agree on a verdict the case will be left open and may have to be tried again. Another trial will increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should consider whether your doubt is a reasonable one since it appears to make no effective impression on the minds of others. On the other hand, if a majority or even smaller number of you are in favor of an acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence, but after full deliberation and consideration of the evidence in the case, you must agree upon a verdict if you can do so.

You must also remember that if the evidence fails to establish guilt beyond a reasonable doubt, the Defendant should have your unanimous verdict of not guilty.

(…continued)
Cases) 2016, available at http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016Rev.pdf. For convenience, we refer to it simply as the *Allen* charge.

> You should not be in a hurry in your deliberations and take all the time which you feel is necessary.
>
> I ask you to retire again and continue your deliberations with these additional comments in mind and apply them in conjunction with the other instructions I have previously given to you.

Doc. 374, at 4-5. Antico did not contemporaneously object to the charge. The jury convicted Antico on Count 8, but acquitted Antico on Counts 6 and 7.

In his motion for a new trial, Antico challenged the *Allen* charge for the first time. Doc. 217. He argued that the *Allen* charge's reference to the costs of retrial was sufficiently prejudicial and coercive to constitute plain error. Doc. 217, at 2-4. The government filed an opposition (Doc. 225), and the district court denied the motion (Doc. 231).

Antico now asserts that the *Allen* charge was impermissibly coercive and thereby undermined any confidence in the jury's verdict. Br. 23. But the *Allen* charge the court read to the jury was consistent with this Circuit's 2016 revised pattern *Allen* charge, and places less emphasis on retrial costs than the 2010 pattern *Allen* charge that this Court has repeatedly upheld.[10] Accordingly, the charge was not error, let alone plain error.

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[10] The Eleventh Circuit Judicial Council passed a resolution in April 2016 authorizing its Committee on Pattern Jury Instructions to distribute and publish the Committee's Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (2016 revision). The resolution noted, however, that it "shall not be construed as an adjudicative approval of the content of such instructions which must await case-by-

(continued…)

1. The Supreme Court has long accepted that a district court may instruct a deadlocked jury to keep deliberating. *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896). Although this Court has sometimes criticized the practice, "the law of the circuit approves the practice." *United States* v. *Davis*, 779 F.3d 1305, 1312 (11th Cir.), cert. denied, 136 S. Ct. 97 (2015). This Court has explained that a district court "has broad discretion in this area but must not coerce any juror to give up an honest belief." *Ibid.* Therefore, this Court's "review of a district court's decision to give an *Allen* charge is limited to evaluating the coercive impact of the charge." *United States* v. *Trujillo*, 146 F.3d 838, 846 (11th Cir. 1998). In determining whether an *Allen* charge was coercive, warranting reversal, this Court "consider[s] the language of the charge and the totality of the circumstances under which it was delivered." *Woodard*, 531 F.3d at 1364.

Against this backdrop, this Court has repeatedly approved use of prior versions of the *Allen* charge, including the 2010 pattern instruction that included the statement that "*[o]bviously*, another trial would *only* serve to increase the costs to both sides" (emphasis added). See *United States* v. *Rey*, 811 F.2d 1453, 1459-1460 (11th Cir.) (noting that it was bound by Circuit precedent approving this

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case review by the Court." Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2016, available at http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016Rev.pdf.

language), cert. denied, 484 U.S. 830 (1987);[11] Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2010, available at http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstruction.pdf. Indeed, as recently as 2017, this Court stated that it has "repeatedly" held that an *Allen* charged derived from the 2010 Eleventh Circuit pattern jury instruction "is appropriate and not coercive." *United States* v. *Oscar*, 877 F.3d 1270, 1286 (11th Cir. 2017); accord, *e.g.*, *United States* v. *Bush*, 727 F.3d 1308, 1319-1320 (11th Cir. 2013), cert. denied, 571 U.S. 1152 (2014); *Woodard*, 531 F.3d at 1364; *United States* v. *Dickerson*, 248 F.3d 1036, 1050 (11th Cir. 2001), cert. denied, 536 U.S. 957 (2002).

If, as this Court has held, the 2010 pattern *Allen* charge, with its more emphatic reference to the costs of retrial, is not unduly coercive, the 2016 pattern *Allen* charge given here is also not unduly coercive. Accordingly, because the district court gave the jury this Circuit's revised 2016 pattern *Allen* charge, the court did not abuse its discretion and there was no error, let alone plain error.

2. Antico's challenges to the district court's *Allen* charge are without merit. First, he cites decisions of other federal courts of appeals holding that *Allen*

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[11] As Antico notes (Br. 26-28), some decisions of this Court have expressed skepticism about the effect of this language and references to the cost of trial on the jury. See, *e.g.*, *Rey*, 811 F.2d at 1459. This Court has nevertheless held that this language is not impermissibly coercive.

charges that reference the costs of retrial are improper. Br. 28-29. But given this Court's precedent, it is irrelevant that other courts of appeals may have reached a contrary conclusion.

Antico also suggests (Br. 30-33) that another portion of the *Allen* charge is inherently coercive. He cites the following language:

> If a substantial majority of your number are in favor of a conviction, those of you who disagree should consider whether your doubt is a reasonable one since it appears to make no effective impression on the minds of others. On the other hand, if a majority or even smaller number of you are in favor of an acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Doc. 374, at 5. But this language is also taken from this Circuit's 2016 pattern *Allen* charge (and the language was the same in the 2010 pattern charge), and this Court has repeatedly approved this language as well. See, *e.g.*, *Bush*, 727 F.3d at 1319-1320; *United States* v. *Chigbo*, 38 F.3d 543, 545-546 (11th Cir. 1994), cert. denied, 516 U.S. 826 (1995). Indeed, this Court has observed that the second sentence actually cuts in the *defendant's* favor. See *Davis*, 779 F.3d at 1312.

Antico also asserts (Br. 31-32) that because the jury deliberated for no more than an hour following the *Allen* charge, the holdout jurors *must* have been pressured by the charge to give up their honestly held beliefs and reach a verdict. But that is mere speculation. In any event, this Court has held that an *even shorter* window of time between a judge giving the *Allen* charge and the jury returning the

verdict is not indicative of coercion. See *Chigbo*, 38 F.3d at 545-546 (holding that a 15-minute window between the *Allen* charge and the return of the jury's verdict did not demonstrate that the charge was coercive); see also *United States* v. *Jones*, 518 F. App'x 741, 743 (11th Cir.) (30 minutes), cert. denied, 571 U.S. 928 (2013); *United States* v. *Miller*, 451 F. App'x 896, 898 (11th Cir.) (eight minutes), cert. denied, 568 U.S. 856 (2012). Here, there is nothing in the circumstances under which the district court gave the *Allen* charge that would support the conclusion that the charge was inherently coercive, or that it seriously affected the fairness, integrity or public reputation of judicial proceedings. After the jury informed the court that it reached a verdict on two counts but could not agree on the third count, the court instructed the jury to retire for the evening and return in the morning for additional deliberations. Doc. 341, at 82-85.

Finally, Antico attempts to distinguish the *Allen* charge given in this case on the ground that the jury "specifically informed the court that the charge was material to the verdict."[12] Br. 32. This statement is hardly indicative of coercion compared to circumstances in previous cases in which this Court *upheld* the *Allen*

[12] Antico also notes that a juror subsequently "came forward and explained she was pressured into a verdict and that the verdict was not based on the evidence presented." Br. 32-33. As we explain below, see pp. 44-49, *infra*, this testimony is inadmissible under Federal Rule of Evidence 606(b) in an inquiry into the validity of a verdict. Accordingly, it should play no role in determining whether the totality of the circumstances in which the *Allen* charge was given was coercive.

charge. For example, the *Allen* charge was not given late in the day so that it required the jurors to stay late, it did not delay or deny a meal for the jury, and did not affect a juror's need to attend to some personal business. See *Bush*, 727 F.3d at 1321-1322 (addressing these factors). Further, the charge was neither preceded by the court's polling of the jury to single out the dissenting juror, see *Chigbo*, 38 F.3d at 545-546, nor followed by the resignation of the jury's foreperson, see *Rey*, 811 F.2d at 1460. And critically, the pattern *Allen* charge included language telling the jury to remember "at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence" (Doc. 374, at 5), which this Court has determined indicates a lack of coercion. See *Trujillo*, 146 F.3d at 846-847. Thus, no reasonable juror would believe, as Antico contends (Br. 29), that the jury "had no choice but to disregard the evidence, split their differences and unlawfully convict Antico of one out of three counts." Cf. *United States* v. *Jones*, 504 F.3d 1218, 1219 (11th Cir. 2007) ("An instruction which appears to give a jury no choice but to return a verdict is impermissibly coercive.").

In sum, the trial court's *Allen* charge mirrored this Circuit's revised 2016 pattern *Allen* charge, and this Court has repeatedly approved the materially similar 2010 pattern *Allen* charge (which placed greater emphasis on the cost of trial). Furthermore, there is no evidence that the circumstances under which the district

court gave the charge rendered it inherently coercive. Therefore, the district court's decision to give the *Allen* charge was neither an abuse of discretion nor plain error.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING ANTICO'S POST-VERDICT REQUESTS TO INVESTIGATE ALLEGED JUROR MISCONDUCT

A. Standard Of Review

"Investigation of alleged juror misconduct is committed to the discretion of the district court and is reviewed only for an abuse of that discretion." *United States* v. *Prosperi*, 201 F.3d 1335, 1340 (11th Cir.), cert. denied, 531 U.S. 956 (2000). "The district court's discretion * * * is at its zenith when the alleged misconduct relates to statements made by the jurors themselves, and not from media publicity or other outside influences." *United States* v. *Bradley*, 644 F.3d 1213, 1277 (11th Cir. 2011) (citation and internal quotation marks omitted), cert. denied, 566 U.S. 986 (2012). "[T]hat discretion extends even to the initial decision of whether to interrogate the jurors." *United States* v. *Augustin*, 661 F.3d 1105, 1129 (11th Cir. 2011) (citation and internal quotation marks omitted), cert. denied, 566 U.S. 981, and 566 U.S. 1015 (2012).

B. Antico's Post-Verdict Requests To Investigate Alleged Juror Misconduct Failed To Satisfy The Stringent Limitations That Federal Rule Of Evidence 606(b) And This Court Impose On A District Court's Authority To Question Jurors About Their Deliberations

1. Factual And Legal Background

a. Approximately two months after the jury verdict, a juror sent an e-mail to Antico's counsel stating that she "ha[d] been having a hard time with my conscience" and was told "to share my opinion and feelings as to what happened in the [j]ury room." Doc. 239-1. The e-mail suggested three types of improper juror misconduct. First, the e-mail alleged that two jurors had decided on Antico's guilt before the jury began deliberating, and that several other jurors leaned toward guilt on the second day not because they believed Antico was guilty, but because they believed someone should be held responsible for the officers' use of force. Second, the e-mail alleged that one juror insinuated that he did not like police officers and that other jurors possessed prior misconceptions about police officers. Finally, the e-mail made accusations of bullying: the three holdouts for a not guilty verdict (which included the sender of the e-mail) were told by others on the jury that Antico was lucky to be acquitted on two counts, and that they (the holdouts) "finally gave in from exhaustion and the fear that another jury would find him guilty of all 3." Doc. 239-1. Antico notified the district court, and also requested the court call the juror into chambers for questioning, with all counsel present, to determine whether further investigation was warranted. Doc. 239, 242.

Shortly thereafter, a second juror on Antico's jury contacted the wife of AUSA Adam McMichael to discuss the juror's experience in the case. Doc. 282, at 2. The juror was an acquaintance of McMichael's wife, and McMichael had no involvement in the Antico case. After McMichael learned of this conversation, he informed AUSA Susan Osborne, one of the federal prosecutors in the case. Doc. 287, at 2. Osborne asked McMichael not to reveal any specific information about the conversation, and McMichael did not. But Osborne confirmed from McMichael that the second juror's information did not fall within one of the exceptions to Rule 606(b), *i.e.*, it did not involve (1) extraneous prejudicial information during the deliberations, such as media reports; (2) any outside influence that was improperly brought to the jury; or (3) any mistake in the verdict form. Doc. 287, at 3-4.

A few weeks later, Osborne and McMichael met with Antico's counsel to discuss the second juror. Doc. 287, at 2-3. McMichael did not reveal any information about the second juror's conversation with his wife, but only confirmed that the second juror did not have any information falling into one of the exceptions to Rule 606(b). Doc. 287, at 3. After Antico learned about this matter, he moved the district court to compel the government to disclose the contents of this conversation between the second juror and McMichael's wife. Doc. 282.

The district court denied both motions, citing Federal Rule of Evidence 606(b) (the no-impeachment rule) and case law. Doc. 260, 288; see generally pp. 14-16, *supra*.

b. Federal Rule of Evidence 606(b) addresses inquiries into the validity of a verdict. It provides, as relevant here, that "[d]uring an inquiry into the validity of a verdict * * * , a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict." Fed. R. Evid. 606(b)(1). This rule "give[s] substantial protection to verdict finality and * * * assure[s] jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations." *Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 861 (2017).

Given this rule, "[d]istrict courts are subject to very stringent limitations on their authority to question jurors about their deliberations, and to use one or more juror's testimony to impeach the verdict of all." *United States* v. *Foster*, 878 F.3d 1297, 1309 (11th Cir. 2018) (citation omitted). As a practical matter, the Rule "imposes a nearly categorical bar on juror testimony." *Ibid.* (citation omitted). "Largely for reasons of finality in litigation, the district court may not question the jurors after the verdict is rendered, thereby impeaching the verdict." *United States* v. *Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990).

The Rule provides three limited exceptions, allowing a juror to testify about whether "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." Fed. R. Evid. 606(b)(2). Under the first exception, a district court has a duty to investigate alleged juror misconduct "only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Cuthel*, 903 F.2d at 1383. "[T]he defendant must do more than speculate; he must show clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred." *Ibid.* (citation, ellipses, and internal quotation marks omitted).

The Supreme Court has recognized one additional, but extremely limited, exception to the no-impeachment rule. See *Pena-Rodriguez*, 137 S. Ct. at 868-870. In that case, the Court held that the no-impeachment rule must give way "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Id.* at 869. The Court justified this exception on the ground that "racial bias implicates unique historical, constitutional, and institutional concerns" that "if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 868. The Court found this exception applicable on the facts before it, where a juror allegedly "deploy[ed] a

dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, [and] also encouraged other jurors to join him in convicting on that basis." *Id.* at 870.

2. The First Juror's Allegations Of Juror Misconduct Did Not Warrant An Interview With The Juror

a. The district court did not abuse its discretion in denying Antico's request that the court interview the first juror about the allegations of juror misconduct in her e-mail. First, the juror contended that some jurors voted guilty to ensure that someone would be held accountable for the use of force viewed on the video. Although Rule 606(b) excludes "extraneous prejudicial information [that] was improperly brought to the jury's attention" from its general prohibition on admissibility of statements and conduct that occurred during jury deliberations, Fed. R. Evid. 606(b)(2)(A), a party alleging such improper reliance on extrinsic information must show "substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred," *Cuthel*, 903 F.2d at 1383 (ellipsis and citation omitted). Here, Antico argued below that the first juror's e-mail "brings into question whether there were outside influences or prejudicial information brought to the jury's attention" because "it *appears* that several jurors *may* have not honored their commitment to follow the Court's instructions" to avoid media reports. Doc. 242, at 3 (emphasis added). But the juror *never* mentioned media reports or any other extraneous evidence. Accordingly, the district court correctly

concluded that the "vague allegations that some jurors made up their minds quickly or felt that someone needed to be held accountable" were insufficient to establish the "clear, strong, substantial and incontrovertible evidence" necessary to invoke the exception he seeks. Doc. 260, at 5 (quoting *Cuthel*, 903 F.2d at 1383); see also *Cuthel*, 903 F.2d at 1383 ("The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate.") (citation omitted).

Second, the juror alleged that some jurors suggested that they were biased against police officers. Doc. 239-1. But this type of allegation falls squarely within the no impeachment rule. See Fed. R. Evid. 606(b)(1) ("[A] juror may not testify about any statement made or incident that occurred during the jury's deliberations."). As this Court has recognized, "[j]uror conduct during deliberations, such as * * * statements made during deliberations, including statements calling into question a juror's objectivity," are "internal matters" that are inadmissible under Rule 606(b). *Foster*, 878 F.3d at 1310 (citations and alteration omitted). Moreover, as the district court explained, each juror filled out a questionnaire that included a question whether the juror, a family member, or friend ever worked in law enforcement, and whether there was anything in the juror's background or feelings that would prevent the juror from being impartial. Doc. 260, at 6. The parties, which had the questionnaires, were able to question

the jurors. Doc. 260, at 6. In this way, the court guarded against bias; the no-impeachment rule prohibits the kind of inquiry Antico sought here.

Finally, the juror's assertion that she and other holdout jurors were bullied into reaching a verdict likewise implicates internal matters that this Court has described as "nothing more than typical features of jury deliberations." *Foster*, 878 F.3d at 1310. In *Foster*, a juror asserted that during deliberations other jurors "overwhelmingly bullied [her] into focusing on only the [government's] evidence," and "guided [her] into disregarding all the evidence" that supported Foster's case. *Ibid.* (alterations in original; citation omitted). The Court concluded that "[s]uch statements lie at the heart of evidence made inadmissible by Rule 606(b)." *Ibid.*; see also *Cuthel*, 903 F.2d at 1381 (allegation that jury was pressured into making a decision "can suggest the normal dynamic of jury deliberations, with the intense pressure often required to reach a unanimous decision").

In any event, because of the prior media attention about the trial, the court asked the potential jurors whether they knew anything about the case. Doc. 260, at 4. Those jurors that answered affirmatively were subject to questioning by the parties and the court. The court also instructed the jurors at the beginning of trial to consider only the evidence presented and not to base their decision on any information acquired outside the courtroom. See Doc. 260, at 4. In these

circumstances, there is no basis to conclude that "the integrity of the trial process was impugned." *Cuthel*, 903 F.2d at 1383.

b. Antico now argues (Br. 37-39) that the district court abused its discretion by denying his motion for a court interview with the first juror without holding a hearing to determine whether her allegations had any merit. Antico notes (Br. 37-38) that the district court in *Cuthel* held a hearing before denying defendant's motion to interview jurors. See *Cuthel*, 903 F.2d at 1382.

But nowhere in *Cuthel* did this Court suggest that a district court must hold a hearing before ruling on a defendant's motion to interview a juror. A more reasonable reading of this Court's decisions addressing jury misconduct is that district courts have broad discretion to determine whether and how to investigate allegations of juror misconduct, including whether to hold a hearing on such a request. See, *e.g.*, *Prosperi*, 201 F.3d at 1340 ("We repeatedly have recognized the breadth of the district court's discretion under Rule 606(b), and a failure to hold a hearing constitutes an abuse of discretion only when there is evidence that the jury was subjected to influence by outside sources.") (citation and internal quotation marks omitted); *Cuthel*, 903 F.2d at 1382-1383 ("No per se rule requires the trial court to investigate the internal workings of the jury whenever a defendant asserts juror misconduct."). As discussed above, here the district court did not abuse that discretion in denying Antico's motion absent a hearing because the juror's vague

allegations of juror misconduct, even if accepted as true, failed to "make[] an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Cuthel*, 903 F.2d at 1383. Moreover, as discussed above, Rule 606(b) squarely foreclosed inquiry into the allegations of juror bias, so there was no basis for a hearing to address this assertion.

Antico also suggests (Br. 39-40) that the district court should have held a hearing to address the first juror's suggestion in the e-mail that another juror dismissed her opinion because she (the first juror) had a "crush" on Antico. (citation omitted). See Doc. 239-1. Antico asserts that this comment amounted to gender bias by one juror against the first juror. But this statement does not necessarily have that import—*i.e.*, that the first juror could not judge the evidence against Antico objectively because she was a woman, and therefore her views during deliberations should be dismissed. Indeed, that conclusion is purely speculative. Accordingly, this comment more plausibly falls into the category of an internal matter beyond the court's purview. See *Foster*, 878 F.3d at 1310 (jurors' use of their age and "occupational eliteness" as swaying tactics during jury deliberations were inadmissible under Rule 606(b)) (citation omitted).

Even if Antico's characterization of the statement in the e-mail is a fair reading, his argument fails. The Supreme Court has carved out a narrow exception to the no-impeachment rule only for juror statements evincing reliance on *racial*

stereotypes or animus. See *Pena-Rodriguez*, 137 S. Ct. at 868-870. We are unaware of any court decisions extending *Pena-Rodriguez*'s exception to allegations of gender bias, and Antico ignores the *Pena-Rodriguez* Court's emphasis on the "unique historical, constitutional, and institutional concerns" of racial bias that underlie its decision. 137 S. Ct. at 868. Moreover, Antico fails to recognize that the alleged bias at issue in *Pena-Rodriguez* was directed at the defendant himself and the defendant's alibi witness, not at a fellow juror. Antico does not allege, much less provide evidence, that anyone on his jury was biased *against Antico* or *Antico's witnesses* because of *their gender*.

3. The Second Juror's Conversation With AUSA McMichael's Wife Did Not Warrant Disclosure Of The Conversation's Contents

The district court also did not abuse its discretion in denying Antico's request to compel the government to disclose the contents of the second juror's conversation with the wife of AUSA McMichael. This conversation concerned the second juror's impressions of his or her jury service. See Doc. 282, at 2; Doc. 287, at 2. As the district court noted, Antico "fail[ed] to present any evidence that [an] impropriety has occurred." Doc. 288, at 4. Rather, Antico "simply stat[ed] that a juror spoke with the wife of an AUSA about his or her experience as a juror." Doc. 288, at 4. In these circumstances, there was no basis for the court to inquire into what the juror said to AUSA McMichael's wife.

In any event, because the conversation concerned jury deliberations, Rule 606(b) would have barred the juror from testifying on this matter during any inquiry into the validity of the verdict. Also, AUSA McMichael confirmed that the conversation between his wife and the juror did not involve information that would fall into one of the exceptions to Rule 606(b). See Doc. 287, at 2. As this Court made clear in *Cuthel*, "[t]he duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." 903 F.2d at 1383 (citation omitted).

Antico suggests (Br. 41-42) that he was prejudiced by the district court's ruling because the government knew what the juror disclosed but he did not, and the court, not the government, should have determined whether the information involved juror misconduct. But Antico cites no authority to support his contention that the district court had the obligation to investigate the content of the juror's conversation with the AUSA's wife. As the party alleging juror impropriety, it was Antico's burden to show "substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred." *Cuthel*, 903 F.2d at 1383 (ellipsis and citation omitted). Antico has not pointed to *any* evidence that the second juror mentioned *any* impropriety, much less impropriety that involved the exposure of the jury to extrinsic information. Because "[t]he more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate,"

United States v. *Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985), and Antico relies solely on unsubstantiated speculation about the second juror, the district court acted well within its broad discretion in relying upon the government's representations and declining to order further investigation.

Antico also asserts (Br. 41-42) that disclosure of the conversation's contents is warranted because (1) the government's disclosure to defense counsel that the conversation occurred at all indicates its importance; and (2) disclosure would not prejudice the government because by its own admission the information does not fall within one of Rule 606(b)'s exceptions. Antico's first argument is mere speculation. His second argument turns Rule 606(b) on its head and presumes that, because a juror may not ultimately testify about the information under the Rule, disclosure would be harmless and the government has the burden to prove otherwise. This rationale undermines the "very stringent limitations" this Court places on the authority of district courts "to question jurors about their deliberations, and to use one or more juror's testimony to impeach the verdict of all." *Foster*, 878 F.3d at 1309 (citation omitted). In short, because there was no indication that the second juror's statements about his or her impressions about what happened during deliberations implicated extrinsic influence on the jury, they are precisely the kind of statements barred by Rule 606(b), and therefore the district court was under no obligation to pursue the matter further.

IV

NO "CUMULATIVE ERROR" REQUIRES REVERSAL OF ANTICO'S CONVICTION

A. Standard Of Review

"The cumulative error doctrine provides that an aggregation of non-reversible errors (*i.e.*, plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States* v. *Capers*, 708 F.3d 1286, 1299 (11th Cir.) (citation omitted), cert. denied, 571 U.S. 847, 571 U.S. 859, and 571 U.S. 899 (2013). "The harmlessness of cumulative error is determined by conducting the same inquiry as for individual error—courts look to see whether the defendant's substantial rights were affected." *Ibid.* (citation omitted). Reversal under the cumulative error doctrine is unwarranted where no error exists in the district court's challenged actions. See *ibid.*

B. Antico Cannot Establish Cumulative Error

Antico contends (Br. 42-43) that this Court should reverse his conviction because the cumulative effect of the claimed errors by the district court denied him a fair trial. For the reasons explained above, Antico has failed to establish that any of the issues he raises on appeal constitutes error. Accordingly, Antico cannot prevail on his cumulative-error claim. See *Capers*, 708 F.3d at 1299; *United States* v. *House*, 684 F.3d 1173, 1210 (11th Cir. 2012) ("[W]here there is no error or only

a single error, there can be no cumulative error."), cert. denied, 568 U.S. 1249 (2013).

Even assuming error in some or all of the rulings Antico appeals, Antico would not be entitled to reversal. In light of the compelling evidence of his guilt on the Section 1512(b)(3) count, see pp. 23-30, *supra*, Antico has failed to demonstrate that "the combined errors affected his substantial rights," *United States* v. *Ladson*, 643 F.3d 1335, 1342 (11th Cir.) (citation omitted), cert. denied, 565 U.S. 992 (2011), or that "an aggregation of non-reversible errors yields a denial of the constitutional right to a fair trial," *United States* v. *Reeves*, 742 F.3d 487, 505 (11th Cir. 2014). Antico's cumulative error argument therefore fails.

V

THE DISTRICT COURT ERRED IN DECLINING TO USE AGGRAVATED ASSAULT AS THE UNDERLYING OFFENSE TO CALCULATE ANTICO'S SENTENCING GUIDELINES RANGE FOR HIS OBSTRUCTION OF JUSTICE CONVICTION (CROSS-APPEAL)

A. Standard Of Review

"If a district court improperly calculates the appropriate sentencing guidelines range, the court commits procedural error." *United States* v. *Hill*, 783 F.3d 842, 844 (11th Cir. 2015). "This Court reviews the district court's interpretation and application of the guidelines to factual findings *de novo*." *Ibid.* "When the district court's application of sentencing guidelines to facts involves

primarily a legal decision, such as the interpretation of a statutory term, less deference is due to the district court than when the determination is primarily factual." *United States* v. *Williams*, 340 F.3d 1231, 1239 (11th Cir. 2003) (citation omitted).

B. The District Court Erred In Declining To Use Aggravated Assault As The Underlying Offense In Sentencing Antico

In calculating Antico's Sentencing Guidelines range under Section 2J1.2, the applicable guideline for a violation of 18 U.S.C. 1512(b)(3), the district court rejected the PSR's use of aggravated assault as the underlying offense. Doc. 279, at 4-5. Sentencing Guidelines § 2A2.2 defines aggravated assault as "a felonious assault that involved * * * a dangerous weapon *with intent to cause bodily injury* (*i.e.*, not merely to frighten) with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added). The district court concluded that there was insufficient evidence to find that "Brown's intent in using the Taser was to cause bodily injury, rather than to gain control over J.B." Doc. 278, at 17. But in reaching this conclusion, the court relied on an erroneous understanding of the "intent to cause bodily injury" standard. An intent to gain control and an intent to cause bodily injury are not mutually exclusive motives. Accordingly, because the district court did not apply the correct standard for "intent to cause bodily injury," and the government proved by a preponderance of the evidence that Brown deployed his taser against J.B. with that intent, this Court should vacate Antico's

sentence and remand for resentencing using aggravated assault as the underlying offense.

1. Section 2J1.2 of the Guidelines, entitled "Obstruction of Justice," provides a base offense level of 14 for violations of Section 18 U.S.C. 1512(b)(3), but directs district courts to apply Section 2X3.1 (Accessory After the Fact) "[i]f the offense involved obstructing the investigation or prosecution of a criminal offense" and doing so would result in a greater offense level. Sentencing Guidelines § 2J1.2(a) and (c)(1). Section 2X3.1, in turn, directs courts to apply a base offense level six levels lower than the offense level for the underlying offense. Sentencing Guidelines § 2X3.1(a)(1). Here, Antico was found guilty of obstructing the investigation into Brown's use of excessive force against J.B. in violation of 18 U.S.C. 242 (deprivation of rights under color of law). Therefore, the underlying offense is Section 242, and under Section 2H1.1 (Offenses Involving Individual Rights) the base offense level is "the offense level from the offense guideline applicable to any underlying offense." Sentencing Guidelines §2H1.1(a)(1). The PSR determined that the underlying offense for the Section 242 violation is aggravated assault, Section 2A2.2, based on Brown's use of a taser against J.B. Doc. 221, at 8-9.

Section 2A2.2 defines aggravated assault, as relevant here, as "a felonious assault that involved * * * a dangerous weapon *with intent to cause bodily injury*

(*i.e.*, not merely to frighten) with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added).[13] The evidence presented at trial and the sentencing hearing established, by a preponderance of the evidence, that Brown's actions satisfied that standard.

First, a defendant's intent to cause bodily injury is determined objectively and may be determined from the surrounding circumstances, including by considering "what someone in the victim's position might reasonably conclude from the assailant's conduct." *United States* v. *Velasco*, 855 F.3d 691, 693 (5th Cir. 2017); accord *United States* v. *Carroll*, 3 F.3d 98, 100 & n.4 (4th Cir. 1993) (for purposes of the aggravated assault guideline of Section 2A2.2, "intent to do bodily harm must 'be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude'") (quoting *United States* v. *Perez*, 897 F.2d 751, 753 (5th Cir.), cert. denied, 498 U.S. 865 (1990)). Decisions of this Court are consistent with this analysis. In *United States* v. *Park*, 988 F.2d 107, 110 (11th Cir.), cert. denied, 510 U.S. 882 (1993), this Court applied an older version of Section 2A2.2 and rejected defendant's claim

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[13] As a threshold matter, there is no dispute that when Brown shot J.B. with a taser, he used a "dangerous weapon." Brown acknowledged that a taser satisfies the applicable definition (see Doc. 278, at 15), and case law supports this concession. See, *e.g.*, *United States* v. *Quiver*, 805 F.3d 1269, 1271 & n.1, 1272 (10th Cir. 2015) (explaining that a taser is a dangerous weapon capable of inflicting serious bodily injury for purposes of Sentencing Guidelines § 2A2.2(b)(2)).

that he did not intend to harm victims whom he threatened with a metal pipe. This Court explained that the district court was not required to believe defendant's testimony in the face of contrary evidence, which included one victim's statement that she feared for her life. See *ibid.*

Moreover, in *United States* v. *Guilbert*, 692 F.2d 1340 (11th Cir. 1982), cert. denied, 460 U.S. 1016 (1983), this Court concluded that the "intent to do bodily harm" element of the federal assault-with-a-dangerous-weapon statute, 18 U.S.C. 113, is measured objectively. In that case, the Court explained that the intent to do bodily harm "'is not to be measured by the secret motive of the actor, or some undisclosed purpose merely to frighten, not to hurt,' but rather 'is to be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude.'" *Id.* at 1344 (quoting *Shaffer* v. *United States*, 308 F.2d 654, 655 (5th Cir. 1962), cert. denied, 373 U.S. 939 (1963)); see also *Perez*, 897 F.2d at 753 (applying *Shaffer* objective test to judge intent for Section 2A2.2's definition of aggravated assault with a dangerous weapon).

Under this standard, the evidence supports the conclusion that Brown intended to cause bodily injury by tasing J.B. After the vehicle containing J.B. finally stopped at the end of a high speed chase, Brown walked up to the front passenger side of the car, opened the door, and kicked J.B. without giving him the opportunity to comply with loud verbal commands. Brown then struck J.B. and,

contrary to BBPD policy,[14] deployed his taser on a passively resisting victim by twice pulling the trigger and releasing the taser's probes. A taser is *designed* to cause bodily injury and incapacitate its target, and therefore there is no reason to fire a taser *other than* to bring about incapacitation through bodily injury. See *Rodriguez* v. *County of L.A.*, 891 F.3d 776, 796 (9th Cir. 2018) ("taser is a 'painful and dangerous device'") (citation omitted); see also *Bryan* v. *MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010) (explaining that pain from a taser "is intense, is felt throughout the body, and is administered by effectively commandeering the victim's muscles and nerves," and that "[b]eyond the experience of pain, tasers result in 'immobilization, disorientation, loss of balance, and weakness,' even after the electrical current has ended") (citation omitted); *Abbott* v. *Sangamon Cty., Ill.*, 705 F.3d 706, 726 (7th Cir. 2013) (collecting cases that have "recognized the intense pain inflicted by a taser").

It is also undisputed that Brown knowingly deployed the taser and that he believed that the taser's probes had struck and penetrated J.B.'s body. Doc. 303, at 5; Doc. 329, at 40-44, 97, 118. The evidence therefore establishes that Brown did not use the taser merely to "frighten" J.B. by threatening to use force against him;

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[14] BBPD Sergeant Sedrick Aiken, the government's use-of-force expert, testified that BBPD policy does not permit an officer to use a taser against a passively resisting individual who refuses to comply with the officer's verbal commands to exit a vehicle. Doc. 338, at 149-150.

after all, J.B. had already been physically assaulted by Brown (and other officers). Rather, in deploying the taser by twice squeezing the trigger and releasing the probes, Brown intended to cause bodily injury to J.B., as that is the foreseeable and ordinary result of such action. See *Cavanaugh* v. *Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) (explaining that a taser causes "temporary paralysis and excruciating pain," and that their use "unquestionably 'seizes' the victim in an abrupt and violent manner"); *Velasco*, 855 F.3d at 694; see also *United States* v. *Serrata*, 425 F.3d 886, 909-910 (10th Cir. 2005) (rejecting argument that correctional officer kicked inmate to gain control and therefore did not have intent to cause bodily injury where inmate was kicked in the head while he was on the ground).

2. In reaching the contrary conclusion, the district court relied on an erroneous legal understanding of the "intent to cause bodily injury" standard. The court ruled that the government failed to show that "Brown's intent in using the Taser was to cause bodily injury, *rather than* to gain control over J.B." Doc. 278, at 17 (emphasis added). But those two motives are not mutually exclusive, and the district court did not cite any authority to the contrary.

In this case, Brown intended to achieve J.B.'s compliance by causing him bodily injury *through* the firing of the taser. Indeed, one of the reasons why a defendant (whether he is a law-enforcement officer or not) might use force against

another person is because such force will injure and incapacitate the victim, and thereby render him or her subject to the defendant's control. To be sure, in the context of use of force by law enforcement, an officer's intentional use of physical force—even that which will foreseeably result in bodily injury to the target—is lawful if that use of force is reasonable under the circumstances. See, *e.g.*, *Draper* v. *Reynolds*, 369 F.3d 1270, 1278 (11th Cir.) (asserting that "being struck by a taser gun is an unpleasant experience" but holding officer's use of taser against non-compliant driver was reasonable under the circumstances and therefore officer was not liable under 42 U.S.C. 1983, the civil counterpart to 18 U.S.C. 242), cert. denied, 543 U.S. 988 (2004). Here, however, the jury found beyond a reasonable doubt that Brown's use of force against J.B.—even *if* that force was intended to control J.B.—was *unlawful.* See Doc. 161. More importantly, and contrary to the district court's reasoning, Brown's attempt to incapacitate J.B. through physical force does not negate Brown's intent to cause bodily harm. See *United States* v. *Brown*, 250 F.3d 580, 586 (7th Cir. 2001) (upholding convictions under 18 U.S.C. 242 where defendants used "disproportionate force" to compel the victim's compliance).

The district court buttressed its conclusion that Brown did not act with the intent to cause bodily injury by stating that "there was no evidence that [Brown's] taser actually electroshocked J.B." Doc. 278, at 16. The district court clearly erred

in making this finding. First, a preponderance of the evidence supports a finding that Brown did, in fact, electroshock J.B. Brown's own Officer Report indicated that his taser struck J.B. (Doc. 208-1, at 85-91 (GX 8d)), as did Officer Ryan's report (Doc. 209-1, at 14-19 (GX 8f)). And the court's speculation (which was unsupported by any evidence introduced at trial) that Brown might have been mistaken, given the presence of "ambient noise" (Doc. 278, at 17 (citation omitted)), does not outweigh the government's evidence to the contrary and Brown's and Ryan's own statements.

In any event, even if there was any doubt whether Brown had actually shocked J.B., that doubt would not disprove that Brown committed aggravated assault. Application Note 1 to the guideline defines aggravated assault as "a felonious assault that *involved* * * * a dangerous weapon with *intent to cause bodily injury*." Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added). Under that definition, it suffices if there is an intent to cause bodily injury, even if such injury does not actually occur.[15]

[15] By contrast, the district court's observation might be relevant if Brown claimed that he *brandished* the taser to frighten J.B. and it accidently discharged. In that scenario, the alleged absence of evidence that the taser actually electroshocked J.B. might tend to corroborate Brown's story. But Brown has never argued that he merely brandished the taser. Rather, he asserted in his Officer Report that he *did* shock J.B., and has never contended that that was not the intended result of his actions.

Case law makes this distinction clear. In *United States* v. *Quiver*, 805 F.3d 1269 (10th Cir. 2015), the Tenth Circuit explained that "[u]nder th[is] guideline, an assaulter's using a dangerous weapon *in any fashion* unleashes an unacceptable risk that death or serious bodily injury might follow. Its four levels apply *whether or not* any bodily injury ensues." *Id.* at 1272 (emphasis added) (rejecting argument that taser must be used in a way that is capable of causing death or serious bodily injury for Section 2A2.2(b)(2)(B) to apply). Likewise, in *United States* v. *Dayea*, 32 F.3d 1377, 1380 (9th Cir. 1994), the court explained that "use of a dangerous weapon" requires only use "for the purpose of injuring or threatening to injure" (emphasis omitted). Indeed, when a defendant's use of a dangerous weapon actually causes bodily injury, Sentencing Guidelines § 2A2.2(b)(3) provides extra punishment depending on that injury's severity. See *Quiver*, 805 F.3d at 1272 (Sentencing Guidelines § 2A2.2(b)(2)(B)'s "four levels apply whether or not any bodily injury ensues. When assaulters do in fact cause bodily injuries with dangerous weapons, the assaulters receive *extra* punishment under § 2A2.2(b)(3) based upon the severity of the bodily injury."). Therefore, whether or not Brown's taser actually electroshocked J.B. has no bearing on Section 2A2.2's applicability to Brown's use of that dangerous weapon.

3. In sum, the district court erred in concluding that Brown did not commit aggravated assault against J.B. with a taser. Accordingly, the underlying offense

for calculating Antico's Guidelines offense level should be Brown's aggravated assault—the most serious offense whose investigation Antico obstructed. See *United States* v. *Harrell*, 524 F.3d 1223, 1228-1229 (11th Cir.) (instructing district court on remand to calculate base offense level for obstruction of justice by subtracting six levels from the most serious crime obstructed), cert. dismissed, 554 U.S. 940 (2008). Using aggravated assault as the underlying offense, Antico's total offense level would be 21, resulting in a Sentencing Guidelines range of 37 to 46 months' imprisonment, as reflected in Antico's initial PSR (compared to the 15 to 21 months guideline range the district court used). Doc. 221, at 9-10, 17. The case should return to the district court for resentencing under this new Guidelines range.

CONCLUSION

This Court should affirm Antico's conviction. This Court should vacate Antico's sentence and remand the case to the district court with instructions to recalculate his Sentencing Guidelines range using aggravated assault as the underlying offense for his obstruction of justice conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 15,145 words.

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rules 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.

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Date: September 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT with the United States Court of Appeals for the Eleventh 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 seven paper copies of the foregoing brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

s/ Christopher C. Wang
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Attorney