No. 19-30488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RODERICK DOUGLAS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with defendant-appellant that oral argument is not necessary in this case. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. See Fed. R. App. P. 34(a)(2)(C).

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

GUIDELINES:

GUIDELINES (continued): **PAGE**

MISCELLANEOUS:

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JURISDICTIONAL STATEMENT

This appeal is from the 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-appellant Roderick Douglas on June 7, 2019. ROA.162-166.[1] Douglas timely appealed on June 11, 2019. ROA.167. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

[1] "ROA.___" refers to page numbers of the Record on Appeal. "Br. ___" refers to page numbers in appellant's opening brief.

STATEMENT OF THE ISSUES

1. Whether the district court correctly calculated Douglas's sentence under the United States Sentencing Guidelines.

a. Whether the district court correctly applied the four-level "dangerous weapon" enhancement, Sentencing Guidelines § 2A2.2(b)(2)(B).

b. Whether the district court correctly applied the three-level "bodily injury" enhancement, Sentencing Guidelines § 2A2.2(b)(3)(A).

c. Whether the district court correctly applied the six-level "color of law" enhancement, Sentencing Guidelines § 2H1.1(b).

2. Whether the district court's selection of a 60-month, within-Guidelines sentence was substantively reasonable.

STATEMENT OF THE CASE

1. Factual Background

Roderick Douglas pleaded guilty to a violation of 18 U.S.C. 371 for conspiracy to deprive five inmates of their constitutional rights under color of law. ROA.162-166, 207-211. He was one of five correctional officers charged in connection with an incident at the Richwood Correctional Center (RCC) in Richwood, Louisiana. ROA.12-20, 214, 223. On or about October 30, 2016, Douglas, a captain at the time, along with his four co-defendants, subjected five inmates to lengthy questioning about potential gang activity at RCC. ROA.214,

223. When none of the inmates admitted to gang affiliation, Douglas and his co-defendants escorted the inmates to an area that did not have security cameras. ROA.214, 223. They positioned the inmates on their knees, facing the walls, with their hands cuffed behind their backs. ROA.214, 223.

While holding a can of pepper spray, Douglas asked one inmate if he was a gang member. ROA.214, 223. After the inmate denied any gang affiliation, Douglas sprayed the handcuffed inmate at close range directly in the eyes with pepper spray. ROA.214, 223, 225. Douglas sprayed a second handcuffed inmate at close range directly in the eyes when that inmate also denied any gang affiliation. ROA.215, 223, 225. Douglas then passed the can of pepper spray to his co-defendants, three of whom took turns spraying the remaining inmates in the eyes. ROA.215, 223-224. The pepper spray used to spray the inmates was "Phantom" pepper spray, which is more potent than the usual pepper spray. ROA.225-226, 240. At the time they were sprayed, the inmates were restrained and compliant; none posed a physical threat to anyone or tried to evade or struggle with the officers. ROA.215, 224. Once they finished spraying the inmates, Douglas and his co-defendants escorted the inmates to a medical station for treatment for their eyes. ROA.215, 224. Because of Douglas's and his co-defendants' actions, the inmates suffered bodily injury. ROA.215, 224, 226-227, 240.

After the incident, Douglas stated that he and his co-defendants needed to be "on the same page" about the incident. ROA.225. Douglas and his co-defendants later filed false Unusual Occurrence Reports about the spraying incident using similar language. ROA.215, 224, 226. The reports indicated that Douglas sprayed one of the inmates involved in the incident after the inmate had jerked away from his escort, and that spray had affected the other inmates, requiring all of the inmates to receive medical care. ROA.215, 224-225.

During a voluntary interview with an FBI agent on March 1, 2017, Douglas admitted to spraying one of the inmates and to giving his pepper spray to the other officers, who sprayed the other inmates. ROA.215-216, 224. Douglas also admitted that he lied to the Warden about the incident over the phone and in the written account of the incident. ROA.216, 224.

2. Guilty Plea And Sentence

a. On March 29, 2018, a grand jury returned a seven-count indictment against Douglas and four co-defendants. ROA.12-20. On January 30, 2019, Douglas pleaded guilty to a bill of information charging him with one felony count of violating 18 U.S.C. 371 for conspiracy to commit a violation of 18 U.S.C. 242, which prohibits the deprivation of constitutional rights under color of law. ROA.150-155, 207-218. The count to which Douglas pleaded guilty stated that the offense resulted in bodily injury to the inmates and "involved the use of a

dangerous weapon, namely, chemical agent spray." ROA.151. As part of his guilty plea, Douglas acknowledged that the maximum sentence for his Section 371 conviction was five years. ROA.212-213. Douglas also stipulated to the factual basis for his guilty plea. ROA.214-216.

b. The United States Probation Office prepared a presentence investigation report (PSR). ROA.219-236. The PSR's calculation of Douglas's sentence under the United States Sentencing Guidelines (Guidelines) began with Sentencing Guidelines § 2X1.1, which addresses a violation of 18 U.S.C. 371. ROA.228. Under that guideline, the base offense level is established by the guideline for the substantive offense. Sentencing Guidelines § 2X1.1(a). The base offense level for the substantive offense, 18 U.S.C. 242, is found in Sentencing Guidelines § 2H1.1. Under Section 2H1.1(a), the base offense level is found in the offense guideline applicable to any underlying offense. Here, the guideline addressing the underlying offense of aggravated assault is Sentencing Guidelines § 2A2.2. Under Section 2A2.2(a), the base offense level is 14. See ROA.228.

As contested on appeal, the PSR included upward adjustments for the use of a dangerous weapon, Sentencing Guidelines § 2A2.2(b)(2)(B), infliction of bodily injury, Sentencing Guidelines § 2A2.2(b)(3)(A), and for commission of the offense under color of law, Sentencing Guidelines § 2H1.1(b). ROA.228. The PSR also included uncontested upward adjustments for the physical restraint of the victims,

Sentencing Guidelines § 3A1.3, and Douglas's leadership role in the offense, Sentencing Guidelines § 3B1.1(a)—resulting in an adjusted offense level of 33. ROA.228. After making downward adjustments for Douglas's acceptance of responsibility, the PSR calculated Douglas's total offense level as 30, which, with a criminal history category of I, results in a Guidelines range of 97-121 months' incarceration. ROA.228-229, 234. Because the maximum sentence for violating Section 371 is a five-year (60 months) term of imprisonment, the PSR reduced the Guidelines sentence to 60 months. ROA.234; see Sentencing Guidelines § 5G1.1(a) (when the statutory maximum sentence is less than the minimum of the applicable guideline range, "the statutorily authorized maximum sentence shall be the guideline sentence").

Douglas submitted objections to the PSR challenging the three upward adjustments for use of a dangerous weapon, bodily injury, and color of law. See ROA.238-241. He objected to the dangerous weapon and bodily injury adjustments on the basis that pepper spray is not capable of inflicting death or serious bodily injury and is not associated with permanent injury requiring more than minimal treatment. ROA.239-240. Douglas also objected that, because he worked for a private correctional facility, he was not a "public official" and could not have committed his offense "under color of law." ROA.241.

The Probation Office rejected these objections. ROA.240-241. As described in the PSR, inmate D.W. reported that one of the correctional officers had threatened the victims with the chemical agent spray by stating that he was going to "stick this mace can in your butt and light ya'll's asses on fire" if the inmates did not tell the officers what their tattoos meant. ROA.240. When the victims offered no explanation, "they were handcuffed and instructed to kneel * * * [and] to look at the correctional officers with their eyes open." ROA.240. The officers then sprayed the victims repeatedly in the face from only inches away with Phantom pepper spray, a more potent form of pepper spray. ROA.240. The PSR also noted the extent of the injuries suffered by D.W., which included recurrent headaches, the need to use eyedrops and wear glasses since the incident, and fears for his life and flashbacks. ROA.240; see also ROA.226-227 (describing the victim impact). The PSR concluded that "[t]he officers' intent was clearly to cause bodily injury," as defined in Sentencing Guidelines § 1B1.1, comment. (n.1(B)), and that the chemical agent spray "was capable of causing serious bodily injury" when it was misused in the manner in which the officers used it on the victims. ROA.240 (emphasis omitted). Finally, the PSR rejected Douglas's challenge to the color of law objection because the count to which he had pleaded

guilty had, as an element, that the defendant was acting under color of law. ROA.241.

Douglas submitted a sentencing memorandum reiterating his objections to the PSR and seeking a downward variance from the Guidelines sentence. ROA.272 (Sealed).

c. The district court held a sentencing hearing on June 5, 2019. ROA.168-206. First, as relevant here, the court addressed Douglas's objection to the "dangerous weapon" enhancement under Sentencing Guidelines § 2A2.2(b)(2). ROA.176-196. The court heard testimony from Mark Johnson, Douglas's expert witness, regarding pepper spray and the generally minimal nature of the injuries it inflicts when used properly. ROA.177-193. Johnson agreed on cross-examination that both the warning on the can of pepper spray and his training manual cautioned that if the spray is used at too close of a range, it can cause more severe damage than just watery eyes and temporary discomfort. ROA.191-192.

After considering Johnson's testimony and the facts contained in the PSR, the district court rejected Douglas's objections to the dangerous weapon enhancement. ROA.194-196. The court found that the close-range use of the pepper spray by Douglas and his co-defendants and the threatened use of forcing the can in an inmate's rectum made both the pepper spray and the can qualify as a dangerous weapon because both are "capable of" inflicting "serious bodily injury."

ROA.194-196. The court also noted that an instrument not ordinarily used as a weapon can be a dangerous weapon where it is used "with the intent to commit bodily injury," as was indicated here by both the use and threatened use of the pepper spray. ROA.194-195.

Second, the district court rejected Douglas's objection to the bodily injury enhancement, recognizing, based on the facts in the PSR, that the inmates suffered "obviously painful" injuries for which they sought medical treatment. ROA.195-196.

Finally, the district court denied Douglas's objection to the "color of law" enhancement, noting that in pleading guilty to a conspiracy to violate the inmates' constitutional rights, Douglas admitted that he was acting under color of law. ROA.197-198; see ROA.151. The court also relied on the fact that Douglas was a correctional officer who worked in a facility housing state inmates. ROA.197-198.

After rejecting Douglas's objections, the district court adopted the factual findings set forth in the PSR, as clarified by the court's rulings on controverted factual issues. ROA.199, 201-202. Douglas also made a statement to the court about his role in the incident, and the court considered letters attesting to his character. ROA.199-201. The court then addressed the Section 3553(a) factors, including Douglas's "personal history, personal characteristics and involvement in the instant offense." ROA.202-203. The court concluded that "the guideline

range, after application of the statutory maximum, reasonably addresses the real conduct of defendant that underlies his crime, achieves the goals of Section 3553(a) and provides an appropriate sentence." ROA.202. The court sentenced Douglas to 60 months' imprisonment, three years of supervised release, and a $100 assessment, and entered judgment. ROA.162-166, 202-203, 242-245. Douglas timely appealed. ROA.167.

SUMMARY OF ARGUMENT

1. The district court correctly applied the sentencing enhancements for the use of a dangerous weapon, the infliction of bodily injury, and acting under color of law (among other adjustments), and Douglas has not demonstrated that the court clearly erred in making the factual findings necessary to apply these enhancements. Given the testimony of Douglas's own expert, the manner in which the pepper spray was used, and the injuries the inmates reported after the incident and the medical attention they received, the district court properly concluded that the dangerous weapon and bodily injury enhancements applied. The district court similarly did not err in applying the color of law enhancement in light of Douglas's guilty plea admitting that element and the public role he fulfilled as a correctional officer overseeing state inmates. As a result, the district court properly calculated

Douglas's Guidelines sentence as the statutory maximum term of imprisonment for 18 U.S.C. 371 (60 months).

2. The district court did not abuse its discretion in denying Douglas's request for a downward variance. Because the court imposed a Guidelines sentence, Douglas's sentence is entitled to a presumption of reasonableness. Douglas has not alleged any error with respect to the district court's weighing of the sentencing factors under 18 U.S.C. 3553(a). Instead, Douglas simply invites this Court to reweigh the sentencing factors and reach a different outcome. This Court should reject the invitation to do so in the absence of any evidence that the district court failed to give or erroneously applied significant weight to one of the sentencing factors or clearly erred in weighing the sentencing factors.

For these reasons, this Court should affirm the judgment of the district court and uphold Douglas's sentence to a 60-month term of imprisonment.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY CALCULATED DOUGLAS'S GUIDELINES SENTENCE

A. Standard Of Review

This Court reviews the sentencing court's "application of the [Sentencing] Guidelines de novo, and [its] factual findings—along with the reasonable inferences drawn from those facts—for clear error." *United States* v. *Velasco*, 855

F.3d 691, 693 (5th Cir. 2017) (emphasis omitted). "A factual finding is clearly erroneous if it is not plausible in light of the record as a whole." *United States* v. *Olarte-Rojas*, 820 F.3d 798, 801 (5th Cir.), cert. denied, 137 S. Ct. 232 (2016). Even if there was an error with the Guidelines calculation, this Court does not reverse if that error is harmless. *United States* v. *Delgado-Martinez*, 564 F.3d 750, 752 (5th Cir. 2009). If a Guidelines' calculation error "did not affect the district court's selection of the sentence imposed," then the error is harmless and this Court "need not vacate and remand." *United States* v. *Martinez*, 614 F. App'x 165, 168 (5th Cir. 2015) (citation and internal quotation marks omitted).

B. The District Court Correctly Applied The Upward Adjustments In Calculating Douglas's Sentence

Douglas disputes (Br. 5-11) three upward adjustments applied to his base offense level by the district court (and in the PSR): (1) four levels for use of a dangerous weapon, Sentencing Guidelines § 2A2.2(b)(2)(B); (2) three levels for bodily injury, Sentencing Guidelines § 2A2.2(b)(3)(A); and (3) six levels because the offense was committed under color of law, Sentencing Guidelines § 2H1.1(b)(1). In light of the record below, all of the district court's factual findings permitting the application of these enhancements were abundantly supported and therefore not clearly erroneous. Relying on these findings, the district court (and the PSR) properly imposed these adjustments and correctly calculated Douglas's total offense level as 30. That total offense level, with a

criminal history category of I, would have yielded a Guidelines range of 97-121 months. Because the statutory maximum sentence for a violation of 18 U.S.C. 371 is five years, however, the applicable Guidelines sentence was a term of imprisonment of 60 months. Sentencing Guidelines § 5G1.1(a).

1. Dangerous Weapon Enhancement

Douglas contends (Br. 5-8) that the district court erred in finding that pepper spray was a dangerous weapon for purposes of applying the enhancement under Sentencing Guidelines § 2A2.2(b)(2)(B), which requires a four-level increase where "a dangerous weapon * * * was otherwise used" in an assault. Whether an item is a dangerous weapon is a finding of fact subject to clear error review. *Velasco*, 855 F.3d at 693. The district court did not err in applying the relevant Guideline here, and indeed, the count of the information to which Douglas pleaded guilty stated that the offense "involved the use of a dangerous weapon." ROA.151.[2]

[2] We note that Douglas has also effectively conceded the issue by not contesting that the district court and the PSR correctly relied on Sentencing Guidelines § 2A2.2. By definition, this guideline applies to an assault "that involved (A) a dangerous weapon with intent to cause bodily injury * * * with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting strangling or suffocating; or (D) an intent to commit another felony." Sentencing Guidelines § 2A2.2, comment. (n.1). Given that there is no allegation related to (B), (C), or (D), Douglas has effectively admitted that (A) applies.

Sentencing Guidelines § 2A2.2 provides the base offense level and specific offense characteristics for Douglas's underlying offense. See p. 5, *supra*. Section 2A2.2, Application Note 1, states that the term "[d]angerous weapon" has the meaning given to the term in Sentencing Guidelines § 1B1.1, Application Note 1, and "includes any instrument not ordinarily used as a weapon (*e.g.*, a car, a chair, or an ice pick)" if it is "involved in the offense with the intent to commit bodily injury." Sentencing Guidelines § 2A2.2, comment. (n.1). Section 1B1.1, in turn, defines "dangerous weapon" to mean "(i) an instrument capable of inflicting death or serious bodily injury" or "(ii) an object that is not an instrument capable of inflicting death or serious bodily injury" but either "closely resembles" such an instrument or is used by the defendant in such a manner as to "create the impression that the object was such an instrument." Sentencing Guidelines § 1B1.1, comment. (n.1(E)).

a. Given the manner in which Douglas and his co-defendants used the pepper spray in committing the assault, the district court did not err, much less clearly err, in concluding that the pepper spray was a dangerous weapon.

The district court correctly found that pepper spray, as it was used here, was "capable of inflicting death or serious bodily injury." ROA.194-196; Sentencing Guidelines § 1B1.1, comment. (n.1(E)(i)). Douglas and his co-defendants sprayed restrained inmates "directly in the eyes" and "at very close range." ROA.214-215,

223, 225; see also ROA.195. Douglas's own expert admitted that such improper use could cause "severe damage." ROA.191-192, 195. Thus, the district court's finding that the pepper spray was capable of inflicting serious bodily injury, ROA.194-196, was well founded.

The district court further recognized that the pepper spray, as used here, was a dangerous weapon because Douglas and his co-defendants used the pepper spray "with the intent to commit bodily injury," based on the circumstances of its use and its threatened use. ROA.194-195, 201-202, 240; see Sentencing Guidelines § 2A2.2, comment. (n.1).

The intent to commit bodily injury "is measured objectively, by what someone in the victim's position might reasonably conclude from the assailant's conduct." *Velasco*, 855 F.3d at 693. Anyone in the inmates' position could reasonably conclude that Douglas and his co-defendants intended to injure them. In addition to the close-range use of pepper spray on the inmates (ROA.195), Douglas and his co-defendants used a more potent form of pepper spray than typically used (ROA.225-226, 240). The court emphasized that, when the victims did not offer an explanation of their tattoos, "[t]hey were instructed to look at the correctional officer with their eyes open and they [were] sprayed repeatedly in the face only inches away." ROA.195. Moreover, the officers' threatened use of the pepper spray reinforced that their intent was to cause bodily injury. As the district

court stated, one of the correctional officers involved in the assault threatened to stick the spray can "up their rear end." ROA.195; see also ROA.240. Accordingly, the court did not err in recognizing that Douglas and his co-defendants used the pepper spray with the intent to commit bodily injury.

b. Douglas's argument (Br. 6) that pepper spray is not a dangerous weapon rests principally on the testimony of his expert witness that pepper spray is not known to leave long lasting injuries or injuries requiring a medical procedure to treat. ROA.184-185. However, the district court did not err in finding that this testimony did not detract from the conclusion that pepper spray, as misused in the commission of this offense, was a dangerous weapon. The expert's testimony regarding the general minor effects of pepper spray was premised upon the understanding that the pepper spray was being used "proper[ly]" and at "a relative distance" from the target. ROA.188-193. Given the improper use at issue here, Douglas's expert admitted that pepper spray could cause "more severe damage." ROA.191-193. As a result, the district court correctly found that pepper spray was a dangerous weapon under Sentencing Guidelines § 2A2.2(b)(2)(B).

The district court is not alone in concluding that pepper spray, or similar chemical agents, can be a dangerous weapon under the Sentencing Guidelines. See, *e.g.*, *United States* v. *Melton*, 233 F. App'x 545, 547 (6th Cir. 2007) (pepper spray); *United States* v. *Neill*, 166 F.3d 943, 949-950 (9th Cir.) (pepper spray),

cert. denied, 526 U.S. 1153 (1999); *United States* v. *Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998) (mace), cert. denied, 525 U.S. 1093 (1999); *United States* v. *Dukovich*, 11 F.3d 140, 141-142 (11th Cir.) (tear gas), cert. denied, 511 U.S. 1111 (1994). Though not addressing the question directly, this Court has interpreted the term dangerous weapon "expansive[ly]," including "virtually any item that has the capacity, given the manner of its use, to endanger life or inflict great bodily injury." *Olarte-Rojas*, 820 F.3d at 801. Indeed, "in the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs." *Id.* at 802 (citation omitted).

c. Even if this Court concluded that the district court erred in finding pepper spray was a dangerous weapon under Section 2A2.2(b)(2)(B), such error would be harmless because the district court would have imposed the same sentence without the error. "A procedural error during sentencing is harmless if 'the error did not affect the district court's selection of the sentence imposed.'" *Delgado-Martinez*, 564 F.3d at 753 (citation omitted). Here, there is "evidence in the record that * * * the district court had a particular sentence in mind and would have imposed it, notwithstanding the error" in calculating the Guidelines range if the dangerous weapon enhancement did not apply. *United States* v. *Meuir*, 344 F. App'x 3, 5 (5th Cir. 2009).

In imposing Douglas's sentence, the district court expressly found that the "guideline range, after application of the statutory maximum, reasonably addresses the real conduct of the defendant that underlies his crime, achieves the goals of Section 3553(a), and provides an appropriate sentence." ROA.202. The court further noted that Douglas's attorneys did "a pretty good job" in getting him a plea deal resulting in a sentence limited to the statutory maximum of 60 months' imprisonment, given the otherwise higher guidelines range (97-121 months' imprisonment). ROA.202. Removal of the four-level dangerous weapon enhancement alone would not have lowered the guidelines range below the statutory maximum. The adjusted offense level of 26 (down from 30) with a criminal history category of I provides for a Guidelines sentencing range of 63-78 months' imprisonment, which is still above the maximum sentence of five years for a violation of 18 U.S.C. 371. As a result, the district court's ruling that the statutory maximum of 60 months' imprisonment "provides an appropriate sentence" in light of a higher guidelines range would remain undisturbed. See ROA.202.

2. Bodily Injury Enhancement

Douglas also argues (Br. 5-8) that the district court erred in imposing the three-level increase for bodily injury under Sentencing Guidelines § 2A2.2(b)(3)(A). Whether bodily injury is sustained is a finding of fact subject to

clear error review. *United States* v. *Lister*, 229 F. App'x 334, 340 (5th Cir.), cert. denied, 552 U.S. 967 (2007). Again, the district court did not err in finding that the inmates suffered bodily injury, as underscored by the fact that Douglas admitted both in the count of the information to which he pleaded guilty and in the factual basis for his plea agreement that the offense "resulted in bodily injury." ROA.151, 215.

The enhancement for bodily injury under Sentencing Guidelines § 2A2.2(b)(3)(A) relies on the definition set forth in Application Note 1 to Sentencing Guidelines § 1B1.1. See Sentencing Guidelines § 2A2.2, comment. (n.1). That application note defines "[b]odily injury" as "any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." Sentencing Guidelines § 1B1.1, comment. (n.1(B)).[3] "[M]inor but identifiable injuries" are sufficient to satisfy the definition of bodily injury under the Guidelines. *United States* v. *Washington*, 500 F. App'x 279, 283 (5th Cir. 2012).

[3] Douglas argues (Br. 6-7) that the definition of "bodily injury" in 18 U.S.C. 242, as interpreted by this Court in *United States* v. *Gonzales*, 436 F.3d 560, 575 (5th Cir.), cert. denied, 547 U.S. 1139, 547 U.S. 1180, and 549 U.S. 823 (2006), is inappropriate for determining whether the bodily injury enhancement under Section 2A2.2(b)(3)(A) applies. The Court need not reach that argument, as neither the district court nor the PSR relies on the definition under 18 U.S.C. 242 in applying the enhancement.

The district court did not err in finding that the inmates suffered "bodily injury" as defined by the Guidelines. The record below makes clear that the inmates suffered injuries that were "painful and obvious" in light of their complaints and were "of a type for which medical attention ordinarily would be sought." Sentencing Guidelines § 1B1.1, comment. (n.1(B)). Shortly after the assault, all five inmates were taken to the medical station to receive medical attention and were treated with eye drops. ROA.215, 224, 227; see also ROA.240. One inmate, J.V., after showering as directed, experienced burning to his eyes, face, chest, and genitalia after the incident. ROA.227. J.V. also reported a loss of vision in his right eye the next day, and he was taken to a medical center, where he received further medical treatment, including antibiotics. ROA.227. Additionally, he reported having anxiety attacks, nightmares, and insomnia after the incident. ROA.227. Another inmate, D.W., was initially treated by the RCC, received further medical attention at a hospital, and has had follow-up appointments. ROA.227. He reported that he suffered from recurrent headaches after the incident and now must wear eyeglasses and use eye drops three times daily. ROA.227, 240. He also suffers from nightmares, and flashbacks and fears for his life when placed in handcuffs. ROA.240. The district court found that the injuries suffered by the inmates were "obviously painful," and "they all went in for medical

attention," and that some inmates had to go in for treatment "even later." ROA.196.

This Court has previously acknowledged that injuries similar to those suffered by the inmates here suffice to establish "bodily injury" under the Guidelines, such as when a victim is sprayed with mace, causing "pain for hours and residual effects for days" or requiring the victim to "obtain medical treatment." *United States* v. *Guerrero*, 169 F.3d 933, 946 (5th Cir. 1999) (citing *United States* v. *Taylor*, 135 F.3d 478, 482 (7th Cir. 1998), and *United States* v. *Robinson*, 20 F.3d 270, 278-279 (7th Cir. 1994)). In *Taylor*, the victims found to have suffered bodily injury from mace experienced burning and irritated skin in the face and mouth area and were taken to the hospital to receive medical treatment. 135 F.3d at 482. The trauma of the incident also caused them to subsequently miss work. *Ibid.* Here, the inmates reported similar injuries, as well as more severe symptoms, after the incident. Thus, the district court did not err, much less clearly err, in finding that the inmates suffered bodily injury within the meaning of the Guidelines.

Douglas does not address any of the specific injuries of the inmates in the record. Rather, his challenge (Br. 6, 8) seems largely tied to his (incorrect) insistence that pepper spray is not a dangerous weapon. However, this Court has made clear that "the focus of the inquiry is * * * *on the injury sustained*."

Guerrero, 169 F.3d at 946. For this reason, whether the pepper spray, as used here, was a dangerous weapon under the Guidelines has no bearing on whether bodily injury was sustained by the inmates for purposes of applying the enhancement under Sentencing Guidelines § 2A2.2(b)(3)(A).

Finally, even if this Court found that the district court erred in imposing the bodily injury enhancement, the error would be harmless because the district court would have imposed the same sentence anyway. See *Delgado-Martinez*, 564 F.3d at 753. As described above, the district court found that the Guidelines sentence, after application of the statutory maximum, was the "appropriate sentence" and a "pretty good" result for Douglas. ROA.202; see also p.18, *supra*. Removal of the three-level bodily injury enhancement alone would not have dropped the Guidelines range below the statutory maximum. An adjusted offense level of 27 (down from 30) and a criminal history category of I provide for a sentencing range of 70-87 months' imprisonment, which is still significantly above the statutory maximum under 18 U.S.C. 371. As a result, the district court's ruling that the statutory maximum of 60 months' imprisonment "provides an appropriate sentence" in light of a higher guidelines range would not change. See ROA.202.

3. Color Of Law Enhancement

Finally, Douglas contends (Br. 8-11) that the district court improperly applied the enhancement under Section 2H1.1(b), which increases an offense level

by six levels if a defendant was a "public official at the time of the offense" or the offense was "committed under color of law." The enhancement applies here. Sentencing Guidelines § 2H1.1(b).

As the district court recognized, Douglas's guilty plea is sufficient on its own for the application of the enhancement under Section 2H1.1(b). See ROA.197-198. Count 1 of the information, to which he pleaded guilty, specifically alleges that Douglas:

> willfully combined, conspired, and agreed with other RCC officers that they would injure, oppress, threaten, and intimidate Inmates S.S., D.W., J.K., A.C., and J.V., housed at the RCC, in their free exercise and enjoyment of the right * * * not to be subjected to cruel and unusual punishment *by one acting under color of law*, in violation of 18 U.S.C. § 242.

ROA.150-151 (emphasis added). A guilty plea "is an admission of all the elements of a formal criminal charge." *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). Douglas acknowledged that the elements of Count 1 of the information involved demonstrating that the offense occurred "while acting under color of law." ROA.217-218. As the district court found, Douglas "basically * * * pled guilty to that." ROA.198. Thus, he cannot reasonably argue on appeal that the court erred in applying the color of law enhancement.

Furthermore, in addition to relying on Douglas's guilty plea, the district court correctly concluded that Douglas acted "under color of state law" because he worked as a correctional officer in a private correctional facility "housing DOC

state prisoners." ROA.198. Douglas argues (Br. 8-11) that his employment by a private correctional facility precludes the application of the enhancement. But as this Court has recognized, a defendant's private employment status does not bar a finding that he acted under color of law at the time of his offense. For example, this Court concluded, in the context of determining whether defendants were acting under color of law for purposes of 42 U.S.C. 1983, that "private prison-management companies and their employees * * * perform[] a government function traditionally reserved to the state," which gives their actions the color of law. *Rosborough* v. *Management & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003); see also *United States* v. *Wallace*, 250 F.3d 738 (Table), No. 00-40242, 2001 WL 274098, at *2 (5th Cir. Feb. 12, 2001) (finding jailer for private prison company acted under color of law in violation of 18 U.S.C. 242); cf. *United States* v. *Thomas*, 240 F.3d 445, 447 (5th Cir.) (recognizing, in interpreting the federal bribery statute, that "[p]rotecting the public from incarcerated criminals is a quintessentially sovereign function, carrying with it a significant measure of public trust," which is "the touchstone for determining whether an individual is a public official"), cert. denied, 532 U.S. 1073 (2001). The "confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function." *Rosborough*, 350 F.3d at 461.

Even apart from his admission in his guilty plea, Douglas does not deny that he committed his offense while carrying out his duties as a correctional officer in a facility housing state inmates. As a result, the district court properly concluded that Douglas committed his offense under the color of law for purposes of applying the six-level enhancement under Section 2H1.1(b).

II

THE DISTRICT COURT'S WITHIN-GUIDELINES SENTENCE IS SUBSTANTIVELY REASONABLE

A. Standard Of Review

A challenge to the denial of a motion for a downward variance in light of the factors under 18 U.S.C. 3553(a) amounts to a challenge to the substantive reasonableness of a sentence. See *United States* v. *Haro*, 753 F. App'x 250, 256-257 (5th Cir. 2018). This Court reviews a defendant's sentence for substantive reasonableness under an abuse of discretion standard of review. *United States* v. *Duhon*, 541 F.3d 391, 395 (5th Cir. 2008). When the district court imposes a sentence that is within a properly calculated Guidelines range, this Court applies "a rebuttable presumption of reasonableness." *United States* v. *Cooks*, 589 F.3d 173, 186 (5th Cir. 2009), cert. denied, 559 U.S. 1024 (2010). To rebut this presumption, the defendant must make a "showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment

in balancing sentencing factors." *Ibid.* Ultimately, "[a]ppellate review is highly deferential as the sentencing judge is in a superior position to find facts and judge their import under § 3553(a) with respect to a particular defendant." *United States* v. *Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir.), cert. denied, 555 U.S. 935 (2008).

B. Douglas's 60-Month Sentence Is Substantively Reasonable In Light Of The Record

The district court's imposition of a sentence of 60-months imprisonment is entitled to a presumption of reasonableness because it was Douglas's Guidelines sentence, in light of the five-year statutory maximum. Sentencing Guidelines § 5G1.1(a); ROA.234; *United States* v. *Robinson*, 620 F. App'x 234, 235 (5th Cir. 2015) (applying presumption of reasonableness to sentence of statutory maximum term of imprisonment, which was the applicable Guidelines sentence). Douglas has not identified any specific error with the district court's balancing of the sentencing factors or asserted that any factor improperly received or failed to receive significant weight. Indeed, Douglas's opening brief merely reiterates (Br. 11-18)—verbatim, at times—the factors argued in his sentencing memorandum for a downward variance (ROA.272 (Sealed)), which the district court considered and rejected. He cites nothing in the record below or any case law to demonstrate that the district court failed to properly consider any of these factors in imposing his sentence. As a result, Douglas's arguments "amount to no more than a mere

disagreement with the district court's weighing of the § 3553(a) factors, which is insufficient to rebut the presumption of reasonableness that attaches to his within-guidelines sentence." *United States* v. *Harris*, 770 F. App'x 710, 711 (5th Cir. 2019).

In any event, even if his disagreement with the district court warranted further consideration, Douglas has not shown that his sentence was unreasonable.

a. The bulk of Douglas's argument (Br. 13-17), as in his sentencing memorandum, simply compares his *total* offense level of 30 to the *base* offense level for a series of unrelated offenses (ranging from drug-related offenses to sexual offenses to manslaughter). Yet, these comparisons yield nothing of relevance with respect to Douglas's sentence and whether it reflects the seriousness of his offense, promotes respect for law, and provides just punishment under Section 3553(a)(2)(A). This is not an apples-to-apples comparison.

First, the PSR, adopted by the district court, used a base offense level of 14 (ROA.228), which is significantly lower than the base offense levels for the other offenses that Douglas cites in his brief. Naturally, the total offense level for individuals committing these other offenses would be much higher in the presence of similar aggravating circumstances, including those he does not dispute (that his victims were physically restrained and that he played a leadership role in a criminal activity involving five or more participants). See ROA.228. Second, Douglas's

ultimate Guidelines sentence is based on the statutory maximum term of imprisonment, which is, in fact, significantly lower than the range of 97-121 months' imprisonment his total offense level of 30 (and criminal history category of I) otherwise would yield. ROA.234. Thus, Douglas did not actually receive the sentence for the total offense level upon which he bases his inapposite comparisons. Douglas cannot credibly argue that the district court abused its discretion in rejecting this argument.

Even if Douglas's comparison of inapposite offenses were viewed as suggesting that the district court failed to avoid sentencing disparities under Section 3553(a)(6), he fails to raise any colorable argument that his sentence would create such a disparity. That provision directs the court to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). As an initial matter, the unwarranted disparity factor is not "grant[ed] significant weight where the sentence is within the Guidelines range," as is Douglas's sentence here. *United States* v. *Diaz*, 637 F.3d 592, 604 (5th Cir.), cert. denied, 565 U.S. 800 (2011). Moreover, to find the existence of an unwarranted disparity under Section 3553(a)(6), Douglas must show a "disparity between his sentence and the sentences of similarly situated defendants nationwide." *United States* v. *Broussard*, 882 F.3d 104, 113 (5th Cir. 2018). He cites no such disparity here.

Instead, Douglas cites (Br. 12-13) national averages from the reports of the United States Sentencing Commission for "Civil Rights Crimes" and for "federal offenses" generally. These statistics do not provide any information about the underlying conduct giving rise to the offenses collected for measurement.[4] In addition, "[n]ational averages of sentences that provide no details underlying the sentences are unreliable" to determine whether there is an unwarranted disparity "because they do not reflect the enhancements or adjustments for the aggravating or mitigating factors that distinguish individual cases." *United States* v. *Willingham*, 497 F.3d 541, 544-545 (5th Cir. 2007).

Douglas's comparison (Br. 13) of his sentence to those of the defendants in *Koon* v. *United States*, 518 U.S. 81 (1996)—which were imposed more than 20 years ago—is similarly inappropriate. In *Koon*, the Supreme Court found that the district court properly granted downward departures based on mitigating circumstances not present in the instant case, including the victim's provocation of

[4] Indeed, the term "Civil Rights" as a primary offense category in the United States Sentencing Commission Sourcebook encompasses a broad range of underlying offenses, including "interference with rights under color of law; force or threats to deny benefits or rights; obstructing an election or registration; manufacture, *etc.*—eavesdropping device; other deprivations/discrimination; obstructing correspondence; peonage, servitude, and slave trade; intercept communication or eavesdropping; and conspiracy to deprive individual of civil rights." United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, at S-169 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf.

the defendants' wrongdoing, *id.* at 105, and the defendants' successive prosecutions under state and federal law, *id.* at 112.

b. Douglas gives little attention to the remaining factors he raises. He admits that his argument about the nature and circumstances of his offense is merely a rehash of his challenges to the calculation of his Guidelines sentence. See Br. 11-12 (directing this Court to revisit his previous arguments on those points). He also notes (Br. 12, 17-18) his lack of criminal history, his assertion that he would be unlikely to re-offend, and the potential for retribution given his employment as a correctional officer. Douglas makes no effort to explain any potential error or abuse of discretion in the district court's consideration of these points; instead, he simply seems to invite this Court to reweigh them.

In doing so, Douglas ignores the record and his central role in both the assault and the attempted cover-up. Douglas was the captain and ranking officer in charge at the time of the offense. ROA.214, 223, 226. He sprayed two restrained and compliant inmates with pepper spray directly in the eyes at close range. ROA.214-216, 223, 225. He passed the pepper spray to his co-defendants—his subordinates—who each took turns spraying an inmate in the eyes. ROA.214-216, 223-224. He then lied to the warden on the phone and in the written reports about the incident. ROA.215-216, 224-225. Douglas admits his role as a leader in this incident. ROA.199.

In imposing its sentence, the district court considered the Section 3553(a) factors, the defendant's sentencing memorandum, as well as Douglas's "personal history, personal characteristics and involvement in the instant offense." ROA.201-203. The court heard a statement from Douglas in court and reviewed letters speaking to his character. ROA.199-201. The court understood that it was not bound by the Guidelines calculation. ROA.202. Based on these considerations, the district court found that the Guidelines sentence, "after application of the statutory maximum, reasonably addresses the real conduct of the defendant that underlies his crime, achieves the goals of Section 3553(a) and provides an appropriate sentence." ROA.202.

In sum, in view of the "totality of the circumstances," the district court's determination of the appropriate sentence based on the Section 3553(a) factors is entitled to deference. *United States* v. *McElwee*, 646 F.3d 328, 337 (5th Cir. 2011) (citation omitted). Douglas has not demonstrated "that the district court failed to consider any significant factors, gave undue weight to any improper factors, or clearly erred in balancing the sentencing factors." *United States* v. *Pena-Luna*, 595 F. App'x 398, 400 (5th Cir. 2014), cert. denied, 135 S. Ct. 2066 (2015). As a result, in light of the record, Douglas has not rebutted the presumption of reasonableness that applies to his within-Guidelines sentence.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 1, 2019, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Barbara Schwabauer
BARBARA SCHWABAUER
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6977 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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

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Date: October 1, 2019