Nos. 19-4841, 19-4872

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant/Cross-Appellee

v.

ROBERT MICHAEL GEORGE,

Defendant-Appellee/Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS APPELLANT/CROSS-APPELLEE

R. ANDREW MURRAY
United States Attorney

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

AMY RAY
KIMLANI FORD
Assistant United States Attorneys
United States Attorney's Office
Western District of North Carolina
U.S. Courthouse, Room 233
100 Otis Street
Asheville, NC 28801
(828) 271-4661

TOVAH R. CALDERON
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

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BRIEF FOR THE UNITED STATES AS APPELLANT/CROSS-APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal 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-appellee Robert George on October 17, 2019. JA 549-555.[1] The United States filed a timely notice of appeal on November 14, 2019, and

[1] "JA __" refers to the page number of the Joint Appendix filed with this brief. "Gov't Ex. __" refers to the government's exhibits admitted at trial. "ECF __" refers to the docket entry number of documents filed in this Court.

George filed a notice of cross-appeal on November 25, 2019. JA 556-559; see also 18 U.S.C. 3742(a) and (b). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether George's sentence of probation was procedurally and substantively unreasonable, where the district court calculated the advisory Sentencing Guidelines range to be 70-87 months' imprisonment but varied downward significantly from that based on a view of the evidence that contradicted the jury verdict and the weight of the evidence (including video evidence of the offense conduct) supporting George's conviction under 18 U.S.C. 242.

STATEMENT OF THE CASE

1. Summary Of Prior Proceedings

A federal grand jury returned a two-count indictment against George, a former sergeant with the Hickory Police Department in North Carolina. JA 9-12. Count 1 charged George with deprivation of rights while acting under color of state law, in violation of 18 U.S.C. 242. JA 9. The indictment alleged that George willfully deprived "the right of a pretrial detainee to be free from an officer's use of objectively unreasonable force" when he "slammed [the victim] face first to the ground, resulting in bodily injury." JA 9. Count 2 charged George with obstruction of justice, in violation of 18 U.S.C. 1519. JA 10-11.

After a three-day trial (JA 13-483), the jury returned a guilty verdict against George on Count 1 for violation of Section 242, but acquitted him on the obstruction-of-justice charge in Count 2. JA 519.

The district court calculated a Sentencing Guidelines range of 70-87 months' imprisonment but sentenced George to only four years' probation. JA 492-493, 509-517. The court also ordered George to pay $20,492.92 in restitution, capping the payments "at a rate of no greater than $100 per month." JA 548; see also JA 553-554. The United States appealed, and George cross-appealed. JA 556-559; see also ECF 8.

2. Summary Of The Facts And Relevant Trial Evidence

a. Facts. This case involves a use of police force that was captured on a surveillance video. JA 138 (Gov't Ex. 4A).[2] The video, which does not contain audio, showed defendant George, then a police officer with the Hickory Police Department, forcibly pulling an arrestee, Chelsea Doolittle, out of a police car and slamming her face-down on the ground. JA 138 (Gov't Ex. 4A); see also JA 141, 254-255, 287, 315, 346. At all times, Doolittle's hands were cuffed behind her back. JA 287, 315. The forcible impact with the pavement caused Doolittle serious injuries that included a broken nose, severe dental injuries that required

[2] The United States has submitted a CD copy of the video to the Clerk's Office in Volume III of the Joint Appendix for inclusion in the appellate record.

multiple surgeries, a concussion, and facial lacerations. JA 106, 108, 156-157, 164, 182-183. Doolittle continues to suffer from memory loss (and cannot recall the events that occurred after arriving at the police station), panic attacks, and anxiety. JA 169-170, 180, 183.

At trial, the government relied on the video showing George slamming Doolittle to the ground (JA 138 (Gov't Ex. 4A)), and also offered corroborating evidence that included, among other things: medical testimony concerning Doolittle's injuries (JA 155-157, 168-171); testimony from George's supervisor, Captain Gary Lee, who reviewed the video, saw that George "basically threw [Doolittle] on the ground," and reported the matter to the Chief of Police and later to state investigators (JA 141); and testimony from a law enforcement trainer, Floyd Yoder, who had trained George on the rules for using force and who watched the video and opined that George's use of force was contrary to his training and the Hickory Police Department's use of force policy (JA 214-220, 225, 251, 254-256, 262).

The encounter between George and Doolittle occurred on November 11, 2013, when Lieutenant Vidal Sipe, an officer with the Hickory Police Department, noticed that a car was parked in the way of traffic in a parking lot in downtown Hickory. JA 185-186. Sipe observed Doolittle near the car and, after speaking with Doolittle, called for assistance, requesting that an officer bring a portable

breathalyzer to the scene. JA 186-188. George responded to the call. JA 188. Once George arrived, Doolittle refused to take the breathalyzer test, was argumentative with the officers, and refused to follow their commands. JA 188-189. Doolittle then got into the driver's seat of her car. JA 189. When she refused to exit, Sipe pulled Doolittle out of the car. JA 190-191, 308. Doolittle fell on her knees but was not injured. JA 190-191, 308. Sipe arrested Doolittle for disorderly conduct and resisting an officer. JA 192, 292. Together with George, Sipe handcuffed Doolittle's hands behind her back. JA 190, 338. George then drove Doolittle to the police station in his patrol car. JA 192-193, 309.

When George arrived at the secure entryway to the police station, a motion-activated camera recorded George opening the rear door and waiting for Doolittle to exit the vehicle. JA 138 (Gov't Ex. 4A); see also JA 199, 254-255. According to George, Doolittle had been verbally abusive on the ride to the police station, and he had to ask Doolittle three or four times to step out of the car upon arriving at the station. JA 310, 313. The surveillance video captured George forcibly pulling Doolittle out of the car while her hands were still handcuffed behind her back and slamming her body face-down on the ground. JA 138 (Gov't Ex. 4A); see also JA 141, 254-255, 287, 315. After Doolittle hit the ground, George reached into the patrol car to retrieve Doolittle's cap before roughly jerking Doolittle up to walk her into the police station. JA 138 (Gov't Ex. 4A); see also JA 320-321.

b. Video Evidence And Use Of Force Testimony. The government called as a witness Floyd Yoder, an expert in police tactics and use of force training. JA 214-216, 243-244, 251-252. Yoder helped create the Hickory Police Department's use of force policy and trained George regarding the appropriate use of force. JA 214-222, 225. He testified both as a fact witness, regarding the training he had provided to George, and as an expert witness on the use of force generally. JA 214-266. Yoder testified that George had been trained that his use of force in any situation had to be "reasonable and necessary" (JA 235), and stated that the use of force depicted on the video was inconsistent with that training (JA 262).

Yoder also testified about his observations of the video. JA 254-262. Observing that as George stood in the open car doorway talking to Doolittle, Doolittle initially slid from the right side of the backseat towards George and placed one foot on the pavement, Yoder opined that the video showed that Doolittle appeared to be trying to comply with George's order and exit the car. JA 255-257; see also JA 299. As Yoder explained, the video then showed George waiting just "seconds" before he reached in the car, forcibly pulled Doolittle out with both his hands, and threw her face-down on the ground with such force that

she rolled away from George due to the impact. JA 256, 259-262, 287; see also JA 346-347.[3]

According to Yoder, George's use of force on Doolittle was inconsistent with George's training. JA 262. When asked about George's statement in an incident report—that Doolittle had passively resisted being pulled from the car and then had "[gone] limp" and fallen to the ground—Yoder disagreed. JA 262-263, 265. Yoder opined that Doolittle was not passively resisting being pulled out of the car, because if Doolittle had been passively resisting by going limp or making her body a deadweight, she would have "dropped straight down" to the ground by the backseat door, rather than landing several feet away from George and rolling away from him, as shown in the video recording. JA 261; see also JA 273.

Yoder further testified that George's use of force violated the Hickory Police Department's use of force policy. JA 262. That policy provides that an officer's use of force should match the suspect's "level of resistance." JA 247-248; see also JA 123 (Gov't Ex. 7). Accordingly, whether a use of force is objectively

[3] By contrast, George and his expert witness testified that George had *lost his grip* while he was pulling Doolittle out of the police car and that Doolittle fell down because her body went limp. JA 318, 379-381. George also asserted for the first time at trial that Doolittle had wedged herself into the backseat of the police car to resist exiting the vehicle by pushing her legs into the partition separating the rear part of the car from the front. JA 314-315, 340. George did not include this assertion in his incident report even though his own expert witness said that this kind of information would have been an important fact that should have been in the incident report. JA 402-404.

reasonable depends on the severity of the suspect's crime, the kind of threat that the suspect poses, and whether the suspect is actively resisting or attempting to flee. JA 235-236. Yoder stated that because Doolittle was handcuffed and in a secure area at the police station, George's use of force was inconsistent with that policy. JA 260, 262; see also JA 348.

3. Jury Instructions

As relevant here, the district court instructed the jury that, in order to convict George under 18 U.S.C. 242, it needed to find beyond a reasonable doubt, among other things, (1) that George used objectively unreasonable force against Doolittle, and (2) that he acted willfully. JA 457-458.

With respect to the unreasonable use of force element, the court instructed the jury that "a law enforcement officer cannot use more force than is reasonably necessary under the circumstances." JA 459. The court stated that in determining what level of force is reasonable, the jury may consider, among other factors, (1) the threat Doolittle "posed to the safety of officers"; (2) whether Doolittle was "actively resisting arrest"; (3) the "amount of force used, if any"; (4) the "relationship between the need for the use of force and the amount of force used, if any"; (5) "any effort made by the defendant to temper or limit the amount of force used"; (6) the "severity of any security problems," if any; and (7) the extent to

which Doolittle was "actively attempting to escape or not comply with the order given by the defendant or the law enforcement officer." JA 460.

As to the willfulness element, the court instructed the jury that to find that George acted willfully, it needed to find that George "intended to use more force than was reasonable under the circumstances"; in other words, the jury needed to find beyond a reasonable doubt that George acted "voluntarily and intentionally" with "knowledge that his conduct was unlawful." JA 461-463; see also JA 463 (instructing the jury that "reckless disregard of a person's constitutional rights is evidence of specific intent to deprive that person of those rights"). The court told the jury that it may consider any facts that may be relevant to George's state of mind, including what George said or did or failed to do, how George acted, and "whether [George] knew through training or experiences his actions were unlawful." JA 462.

After the district court correctly instructed the jury on the elements of a Section 242 violation, the jury convicted George under 18 U.S.C. 242, finding beyond a reasonable doubt that George had used objectively unreasonable force against Doolittle and did so willfully. JA 519.

4. Sentencing

a. PSR And Objections. Following George's conviction, the probation office prepared a presentence investigation report (PSR). JA 560-578. In

describing George's offense conduct, the PSR stated that the surveillance video showed George "lift[ing] Ms. Doolittle out from the back seat and slam[ming] her down, face first, onto the driveway while her hands [were] still handcuffed behind her back." JA 563. Based on these facts, and because George's actions caused serious bodily injury to Doolittle, the PSR applied a five-level increase to the base offense level for aggravated assault to arrive at an adjusted offense level of 19. JA 566. The PSR then added the following enhancements: six points because the offense was committed under color of law, two points because the victim was restrained during the course of the offense, and two points for obstruction of justice. JA 567. These enhancements resulted in a total offense level of 29, and a recommended Guidelines range of 87-108 months' imprisonment. JA 492, 567.

George did not object to the PSR's description of George's actions underlying his conviction. Instead, he objected to the PSR's five-level increase to the base offense level for aggravated assault based on George's causing serious bodily injury to Doolittle, and to the two-level enhancement for obstruction of justice. JA 523-527. George also argued that the factors under 18 U.S.C. 3553(a) and Sentencing Guidelines policy considerations, such as George's vulnerability to abuse in prison, supported a downward variance. JA 527-535. The government opposed George's objections. JA 540-545.

b. Sentencing Hearing. At sentencing, the district court rejected George's argument that Doolittle's injuries did not justify the cross-reference to the Guidelines provision for aggravated assault rather than simple assault. JA 487-488. The court, however, agreed with George that the facts did not support the two-level enhancement for obstruction of justice and calculated the total offense level to be 27, resulting in a recommended Guidelines range of 70-87 months' imprisonment. JA 488-492.

The government requested that the court sentence George "at the low end of the [G]uidelines range." JA 504. In support of a within-Guidelines sentence, the government asserted that the Guidelines range takes into account that (1) George was "a police officer and abused his authority," (2) George lacked a criminal history; (3) "the offense involved an aggravated assault and serious bodily injury"; and (4) the victim was restrained when he assaulted her. JA 504-505.

The district court stated that the particular Guidelines calculation was irrelevant, because even if it was "wrong" about the applicable Guidelines range, it was going to "com[e] out in the same place" and impose a sentence of four years' probation based on consideration of the 18 U.S.C. 3553(a) factors. JA 509-510, 512, 516-517. As required by Section 3553(a), the court addressed first whether the sentence reflected the "seriousness of the offense." 18 U.S.C. 3553(a)(2)(A); JA 510. The court explained that it disagreed with the PSR's statement that

George "lift[ed] Ms. Doolittle out from the back seat and slam[med] her down, face first, onto the driveway while her hands [were] still handcuffed behind her back." JA 563. The court stated specifically that "the statement of offense in the presentence report is not correct and at no time did Mr. George intend to injure or otherwise harm Ms. Doolittle." JA 510.

Instead, the court found that that "George did not lift Ms. Doolittle out from the backseat and slam her down face-first on the driveway." JA 510. The court stated that it was "obvious from the video" that although George pulled Doolittle out of the police car "forcefully," George "lost his grip on her" and Doolittle then stumbled either because of "the force with which [George] pulled her out of the car, or perhaps because of her inebriated condition she was unable to keep her balance and fell forward." JA 510-511. In the court's view, the incident was "almost accidental[,]" "[n]ot quite but almost." JA 511. The court also characterized Doolittle's injuries as "close to an accidental injury * * * as you can get and still wind up violating that statute." JA 514-515.

The district court then discussed the other Section 3553(a) factors. Among other things, the court gave weight to the fact that George had been a law-abiding citizen since the underlying incident; that he had already been punished by losing his job and pension as a police officer; that he must pay $20,492.92 in restitution; and that he endured a lengthy delay awaiting the federal prosecution. JA 511-516,

591. The court also emphasized that George must endure "lifelong consequences" of a felony conviction, such as his inability to bear arms and to vote. JA 513. Although the district court stated that the "very high" restitution amount would promote respect for the law and provide just punishment (JA 513), the court subsequently ordered George to "begin paying his restitution fee 60 days after becoming employed and * * * to repay that fee at a rate of no greater than $100 per month." JA 548.

The government objected to the court's refusal to apply an enhancement for obstruction of justice and the extent of the downward variance. JA 517.

c. Judgment And Statement Of Reasons. The district court entered its judgment and Statement of Reasons on October 17, 2019. JA 549-555, 588-591. In its Statement of Reasons, the court asserted that the downward variance reflected: (1) the nature and circumstances of the offense; (2) the fact that the offense was aberrant behavior in light of George's history and characteristics; (3) the "seriousness of the offense, to promote respect for the law, and to provide just punishment"; and (4) the need to provide adequate deterrence, to avoid unwarranted sentencing disparities, and to provide restitution to the victim. JA 590.

SUMMARY OF ARGUMENT

The Court should vacate George's probation-only sentence as unreasonable and remand for resentencing.

1. George's sentence of only probation was procedurally unreasonable. A sentence is procedurally unreasonable if it is "based on clearly erroneous facts," *Gall* v. *United States*, 552 U.S. 38, 51 (2007). This Court held in *United States* v. *Curry*, 461 F.3d 452, 460-461 (4th Cir. 2006), that a sentencing court is "bound" to accept facts "necessarily implicit in the verdict" and abuses its discretion when it imposes a sentence based on a view of the evidence that contravenes the jury verdict. Under *Curry*, the district court abused its discretion by relying on clearly erroneous facts to significantly vary downward from the advisory Sentencing Guidelines range of 70-87 months' imprisonment. Specifically, the district court impermissibly substituted its own view of the evidence—that "George did not lift Ms. Doolittle out from the backseat and slam her down face-first on the driveway" but, instead, inadvertently "lost his grip" on Doolittle when he pulled her out of the vehicle resulting in Doolittle landing on her face and sustaining injuries—for the jury's finding that the government had proved beyond a reasonable doubt that George willfully deprived Doolittle of her right to be free from objectively unreasonable force, in violation of 18 U.S.C. 242. Tellingly, the district court's view of the evidence was virtually identical to George's defense—that George had

lost his grip while he was pulling Doolittle out of the police car and Doolittle fell down because her body went limp—which the jury rejected when it convicted George of violating Section 242. Indeed, the district court's view was contrary to the weight of the evidence, which included, in particular, a video showing George forcibly pulling Doolittle from the patrol car and throwing her face-down on the ground. Because the court's downward variance from a recommended Guidelines range of 70-87 months' imprisonment to probation only relied on clearly erroneous facts, George's sentence of probation was procedurally unreasonable and should be vacated.

2. George's probation-only sentence, which represents a 100% downward variance (or 19 offense levels under the Guidelines), was also substantively unreasonable because it lacks a sufficiently compelling justification for such a major deviation. The district court's impermissible view of the trial evidence drove its consideration of the statutory sentencing factors in 18 U.S.C. 3553(a), but that view does not accurately reflect the nature and circumstances of the offense or support the need to avoid unwarranted sentencing disparities. The district court's cursory consideration of George's history and characteristics, George's susceptibility to abuse in prison, the need for the sentence to afford adequate deterrence, and the restitution award imposed also fail to support such a dramatic downward variance.

Accordingly, George's sentence is both procedurally and substantively unreasonable and this Court should vacate it and remand for resentencing.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY VARYING DOWNWARD TO A SENTENCE OF PROBATION ONLY BASED ON FINDINGS OF FACT THAT THE JURY REJECTED

A. Standard Of Review

"[A]ny sentence, within or outside of the Guidelines range, as a result of a departure or variance, must be reviewed * * * for reasonableness pursuant to an abuse of discretion standard." *United States* v. *Diosdado-Star*, 630 F.3d 359, 365 (4th Cir.), cert. denied, 563 U.S. 1027 (2011); see also *Gall* v. *United States*, 552 U.S. 38, 51 (2007).

B. George's Sentence Was Procedurally Unreasonable

A sentence is procedurally unreasonable if the district court incorrectly calculates or fails to calculate the Guidelines sentence, treats the Guidelines as mandatory, fails to consider the 18 U.S.C. 3553(a) factors, relies on clearly erroneous facts, or inadequately explains the sentence. *Gall*, 552 U.S. at 49-51. George's sentence of probation was procedurally unreasonable because it was based on "clearly erroneous facts." *Gall*, 552 U.S. at 51. Specifically, the district court adopted a version of the facts for sentencing purposes that directly contradicted the jury verdict. This Court and others have held that doing so is an

abuse of discretion and the sentence should be vacated. See *United States* v. *Curry*, 461 F.3d 452, 460-461 (4th Cir. 2006); see also *United States* v. *Bertling*, 611 F.3d 477, 480 (8th Cir. 2010); *United States* v. *Morgan*, 635 F. App'x 423, 446 (10th Cir. 2015).

The district court stated that it was applying a downward variance from the Guidelines range of 70-87 months' imprisonment to impose a sentence of only probation based, in part, on the nature and circumstances of the offense. JA 488-492, 509-510, 512, 516-517; see also 18 U.S.C. 3553(a). In doing so, the district court explained that it was rejecting "the statement of the offense in the presentence report" that the surveillance video showed that George "lift[ed] Ms. Doolittle out from the back seat and slam[med] her down, face first, onto the driveway while her hands [were] still handcuffed behind her back." JA 510, 563. The court found that this description "is not correct." JA 510. Instead, the court stated that "George did not lift Ms. Doolittle out from the backseat and slam her down face-first on the driveway" and characterized what happened as "not quite" but "almost accidental." JA 510-511. The district court described that George had just "lost his grip" on Doolittle when he "pulled her forcefully out of the car" and "at no time did Mr. George intend to injure or otherwise harm" her. JA 510. This view of the evidence was virtually identical to George's defense—that he lost his

grip while he was pulling Doolittle out of the police car and that Doolittle fell down because her body went limp. JA 318, 379-381.

The district court's finding that George's offense was "almost accidental" because he just "lost his grip" (JA 510-511), however, contradicts the jury verdict. The district court specifically instructed the jury that, to convict George under 18 U.S.C. 242, it needed to find that the government proved beyond a reasonable doubt that George used objectively unreasonable force against Doolittle and that he did so willfully. JA 457-458. By convicting on this count, the jury necessarily determined that the government met its burden of proof on these elements. Accordingly, the jury verdict precludes the district court from finding, for purposes of sentencing, that George did not use objectively unreasonable force because he inadvertently "lost his grip" or that George did not act willfully because his conduct was "almost accidental." JA 510-511.

The district court's view of George's convicted offense also contravenes the weight of the trial evidence. The surveillance video of the secure entryway to the police station, which shows George throwing Doolittle to the ground face-down and having no reaction to her landing on her face and sustaining injuries, underscores that the district court relied on erroneous facts in sentencing George. JA 138 (Gov't Ex. 4A); see also *Scott* v. *Harris*, 550 U.S. 372, 378-381 (2007) (suggesting that an appellate court may appropriately rely on its own review of

video evidence). The video unambiguously shows George deliberately slamming Doolittle to the ground rather than inadvertently losing his grip on Doolittle. JA 138 (Gov't Ex. 4A). Instead of trying to cushion Doolittle's impact or inquiring if she was hurt, George reached into the patrol car to retrieve Doolittle's cap and then roughly jerked Doolittle up to walk her into the police station. JA 320-321; see also JA 138 (Gov't Ex. 4A). Furthermore, both the government's expert witness, Floyd Yoder, and George's supervisor, Captain Gary Lee, testified that the video showed that George "basically threw [Doolittle] on the ground." JA 141; see also JA 260-261, 273. Floyd also testified that George's use of force on Doolittle, whose hands were handcuffed behind her back the whole time, was inconsistent with George's training and violated the Hickory Police Department's use of force policy. JA 254, 260, 262, 287, 315. The district court's reasons for a downward variance are incompatible with this evidence.

This Court's decision in *Curry*, requires that George's probation-only sentence be vacated because the district court abused its discretion by applying a downward variance based on a view of the evidence that contradicts the jury verdict. In *Curry*, the court of appeals held that a 12-month prison sentence, based on a downward variance of 70% from the advisory Guidelines range, was unreasonable because it was based on the district court's belief that the defendant, who had been convicted of mail fraud, had not initially intended to defraud the

victims, a conclusion that "contradicted the weight of the evidence and the verdict." 461 F.3d at 460-461. In fact, the district court specifically stated that it based the downward variance on its "conclusion from listening to the facts that this didn't start out as a scam, but somehow or another it ended up as one from the standpoint of using people's money that had been given to [the defendant] for other purposes." *Id.* at 460 (citation omitted). As this Court explained, however, implicit in the jury's conviction of the defendant for mail fraud was a finding that the defendant used the mail to further a scheme to defraud. *Id.* at 461. The Court held that the district court was "bound 'to accept th[is] fact[] necessarily implicit in the verdict"' and "erred, therefore, in sentencing [the defendant] based on a conclusion that contravened the jury's verdict." *Id.* at 461 (alteration is in original; citation omitted).

As in *Curry*, the district court's reasons for the downward variance disregarded the facts "necessarily implicit in the verdict"—that George willfully used objectively unreasonable force on Doolittle—and therefore cannot be the basis for George's sentence. 461 F.3d at 461 (citation omitted); see also *United States* v. *Cheatham*, 601 F. App'x 194, 200 (4th Cir. 2015) (explaining that sentencing court is bound to accept the facts implicit in the jury verdict); *United States* v. *Boomer*, 519 F. App'x 778, 780 (4th Cir.) (stating that the sentencing court is "required to sentence in compliance with the jury's verdict"), cert. denied,

571 U.S. 981 (2013). Indeed, this Court emphasized in *United States* v. *Calderon*, 554 F. App'x 143, 155 (4th Cir. 2014), that a "sentencing court cannot, under its own preponderance standard, upend the jury's findings, particularly when those findings are expressed in no uncertain terms in the verdict." Thus, because the district court's downward variance was "based on factors that were in direct opposition to the jury verdict and the weight of the evidence," *United States* v. *Curry*, 523 F.3d 436, 438 (4th Cir. 2008), the district court abused its discretion, and the sentence should be vacated as unreasonable. See *Curry*, 461 F.3d at 460-461.

Other circuits have similarly vacated sentences where the district court applied a downward variance based on its belief that the evidence did not support a requisite element of the convicted offense, despite the jury verdict finding otherwise. For example, in *Bertling*, 611 F.3d at 480, the district court varied downward from the advisory Guidelines range for defendants convicted of conspiracy under 18 U.S.C. 371 by finding that the defendants "did not have 'any intent' to carry out the purpose of the conspiracy." The Eight Circuit held that the district court abused its discretion because the district court's finding that defendants did not have the requisite intent for the convicted offense "amounted to a declaration that no crime had been committed" and "contradicted the jury's verdict." *Id.* at 481. The court of appeals explained that the district court "acted

improperly in substituting its view of the evidence concerning [the defendant's] criminal intent for the jury's verdict." *Bertling*, 611 F.3d at 481; *ibid.* (citing *Curry*, 461 F.3d at 461, for the principle that sentencing courts are bound to accept facts necessarily implicit in the jury verdict).

Likewise, in *Morgan*, the Tenth Circuit held that a sentence of probation was procedurally unreasonable where the district court "varied downward in large part due to its disagreement with the jury's verdict." 635 F. App'x at 446. There, the district court sentenced the defendant, who was convicted of bribery, to five years' probation despite the applicable Guidelines range of 41-51 months' imprisonment. *Id.* at 439, 441. At sentencing, the district court made comments casting doubt on the jury verdict, stating that the conviction was "based on some very suspect evidence," including "the testimony of a convicted felon" and that "I sat through this, as did the jury, and I had some definite opinions about the evidence that I don't get to voice when the jury does." *Id.* at 440-441, 443. The court of appeals held that the district court's "estimation of the evidence, contrary to the jury's, played a role in Morgan's sentence" and constituted procedural error. *Id.* at 444, 446. The court of appeals further explained that consideration of the nature and circumstances of the offense "does not permit effectively voiding the consequences necessarily attending the jury's verdict." *Id.* at 446; see also *United States* v. *Rivera*, 411 F.3d 864, 866 (7th Cir.) (explaining that a jury's "verdict controls [at

sentencing] unless the evidence is insufficient or some procedural error occurred" and that "it is both unnecessary and inappropriate for the judge to reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt"), cert. denied, 546 U.S. 966 (2005).

Accordingly, the Court should vacate George's sentence on procedural unreasonableness grounds because the district court abused its discretion by relying on clearly erroneous facts inconsistent with the jury verdict.

C. George's Sentence Was Substantively Unreasonable

For similar reasons, George's probation-only sentence also was substantively unreasonable. Although the Court should vacate George's sentence and remand for resentencing because the sentence was procedurally unreasonable, this Court also may review George's sentence for substantive reasonableness. See *United States* v. *Engle*, 592 F.3d 495, 504 (4th Cir.) (vacating probation sentence as both procedurally and substantively unreasonable), cert. denied, 562 U.S. 838 (2010).[4]

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[4] In cases where the district court has indicated, as it did here, that it would have reached the same result regardless of its calculation of the advisory Guidelines range, this Court generally applies a harmless-error review to claims of procedural error by "assum[ing] that a sentencing error occurred" and proceeding to examine whether the sentence was substantively unreasonable. See *United States* v. *Hargrove*, 701 F.3d 158, 161 (4th Cir. 2012), cert. denied, 569 U.S. 999 (2013). It is unclear if *Hargrove*'s harmless-error analysis applies in this case, where the procedural error is not a question of the appropriate Guidelines range

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1. Appellate review of sentences for substantive reasonableness focuses on whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. 3553(a). See *Gall*, 552 U.S. at 51. Section 3553(a) mandates that courts impose sentences that are "sufficient, but not greater than necessary" to (1) "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment"; (2) "afford adequate deterrence to criminal conduct"; (3) "protect the public from further crimes of the defendant"; and (4) "provide the defendant with needed educational or vocational training [or] medical care." 18 U.S.C. 3553(a)(2)(A)-(D). In determining the sentence to be imposed, the sentencing court must also consider the following factors: the nature and circumstances of the offense; the history and characteristics of the defendant; the applicable advisory Guidelines range for the defendant; the pertinent policy statements of the Sentencing Guidelines; the need to avoid unwarranted sentence disparities; and the need to provide restitution to any victims of the offense. 18 U.S.C. 3553(a)(1)-(6).

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but, rather, whether the district court based the downward variance on clearly erroneous facts that are contrary to the jury verdict. In any event, regardless of whether the Court examines this appeal for procedural or substantive reasonableness, George's sentence is unreasonable because the district court abused its discretion by substituting its view of the trial evidence for the jury's.

Before a court imposes a sentence outside of the advisory Guidelines range, it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. As the Supreme Court made clear in *Gall*, a "major" deviation "should be supported by a more significant justification than a minor one." *Ibid.*; see also *United States* v. *Morace*, 594 F.3d 340, 345-346 (4th Cir.) (a downward variance from a Guidelines range of 41-51 months' imprisonment to five years' probation was "significant[]"), cert. denied, 562 U.S. 924 (2010). Thus, a dramatic variance of 100% (or 19 offense levels under the Sentencing Guidelines) such as the one in this case "should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50. The district court failed to provide that necessary justification here.

2. The district court misapplied the factors in 18 U.S.C. 3553(a). As a general matter, the court's impermissible view of the evidence that the underlying incident was "almost accidental" permeated its consideration of the Section 3553(a) factors, including the district court's determinations regarding the nature and circumstances of the offense and the need to avoid unwarranted sentencing disparities. JA 509-514. In the court's view, the Guidelines range was not appropriate for George because that range reflected the appropriate sentence for

officers who willfully deprive others of their constitutional rights, and George did not fall in that category despite being found guilty under Section 242. JA 510-515.

The district court's impermissible view of the trial evidence alone supports finding that the sentence was substantively unreasonable. See *United States* v. *Hunt*, 521 F.3d 636, 649 (6th Cir. 2008), cert. denied, 556 U.S. 1221 (2009). For example, in *Hunt*, the Sixth Circuit held that the sentence of probation was substantively unreasonable because the district court's reasons for the downward variance "rel[ied] on facts directly inconsistent with those found by the jury beyond a reasonable doubt." *Ibid.*; see also *ibid.* (vacating sentence because the district court "relied in substantial part on its doubt that [the defendant] intended to commit [the] fraud" underlying his conviction). Similarly, this Court has vacated a sentence as substantively unreasonable where the district court's focus on the defendant's disability at sentencing was "questionably related to the defendant's criminal conduct." See, *e.g.*, *United States* v. *Zuk*, 874 F.3d 398, 410-411 (4th Cir. 2017). Accordingly, regardless of whether the district court's errors in determining George's sentence are deemed procedural or substantive, the district court abused its discretion by considering factors that contradicted the jury verdict in imposing a sentence of probation.[5]

[5] Other courts of appeals similarly have vacated sentences as substantively unreasonable where the sentencing court considered impermissible factors in

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3. Aside from the district court's impermissible view of the evidence that George's offense was "almost accidental," the court's other reasons for the significant downward variance do not justify the sentence of probation only.

a. In considering George's history and characteristics and the need for the sentence to provide just punishment (see 18 U.S.C. 3553(a)(1) and (2)(A)), the district court improperly relied on the fact that George had a spotless record as a police officer before this incident, lost his job as a police officer and pension due to his conviction, and is law-abiding. JA 511-513. These factors, however, are already reflected in George's criminal history category of I. JA 588. They are also common circumstances in Section 242 cases and do not support a sentence of probation where the Guidelines recommend a range of at least 70 months' imprisonment, even under the district court's calculation. See *Morace*, 594 F.3d at 350 (finding that "common circumstances" like the defendant's honorable discharge from the military and effort at rehabilitation did not justify a sentence of

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sentencing. *United States* v. *Cookson*, 922 F.3d 1079, 1095 (10th Cir.), cert. denied, 140 S. Ct. 276 (2019) (vacating a probation sentence as substantively unreasonable where the sentence was based in part on the court's misunderstanding about the terms of the defendant's conditional plea); *United States* v. *Musgrave*, 761 F.3d 602, 604, 608 (6th Cir. 2014) (vacating a one-day sentence as substantively unreasonable where the district court considered impermissible factors, such as the "defendant's humiliation before his community, neighbors, and friends," at sentencing).

probation instead of a term of imprisonment within the Guidelines range of 41-51 months).

b. The district court's concern that George, as a former law enforcement officer, would be "more susceptible to abuse in prison than another non-law enforcement person" also does not support a sentence of probation. JA 515. Courts generally have declined to vary downward based on susceptibility to abuse in prison absent exceptional circumstances. See, *e.g.*, *United States* v. *Thames*, 214 F.3d 608, 614 (5th Cir. 2000) (rejecting downward departure for former police officer because of absence of "extenuating circumstances"). An exception may exist where media coverage of the incident was overwhelming, such as in the case of the officers who beat Rodney King. See, *e.g.*, *Koon* v. *United States*, 518 U.S. 81, 111-112 (1996). Although the district court commented that this case was widely covered by local television stations (JA 515), that hardly rises to exceptional circumstances to make this case sufficiently "unusual" to justify imposing no prison time at all. See *Koon*, 518 U.S. at 112; see also *United States* v. *Winters*, 174 F.3d 478, 485 (5th Cir.) (distinguishing *Koon* from case that received only local media coverage), cert. denied, 528 U.S. 969 (1999). On the contrary, as the Fifth Circuit stated, "a defendant's status as a law enforcement officer is often times more akin to an aggravating as opposed to a mitigating sentencing factor, as criminal conduct by a police officer constitutes an abuse of a

public position." *Thames*, 214 F.3d at 614; see also *United States* v. *Winters*, 105 F.3d 200, 207 (5th Cir. 1997) ("The theory of the Guidelines punishes criminal acts committed under color of law precisely because the [Sentencing] Commission considered criminal acts committed by government agents to require a firmer response in order to prevent them.").[6]

c. The district court's sentence of probation also fails to "afford adequate deterrence to criminal conduct." 18 U.S.C. 3553(a)(2)(B); see *United States* v. *Camiscione*, 591 F.3d 823, 834 (6th Cir. 2010) (Section 3553(a)(2)(B) requires sentences to provide adequate general and specific deterrence); *United States* v. *Gomez-Jimenez*, 625 F. App'x 602, 605-606 (4th Cir. 2015) (same), cert. denied, 136 S. Ct. 1211 (2016). The district court purported to consider the need for the sentence to provide deterrence, but its comments make clear that the court was not giving proper weight to the need to deter other persons, especially other police officers, from committing similar crimes. Instead, it focused almost exclusively on George's risk of future criminal conduct. The court stated that "[i]t's extremely

[6] The district court also found that George "has suffered quite a bit," noting, among other things, that George had to "deal" with an almost five-year delay before his federal indictment. JA 500, 512-514, 516. As the government explained at sentencing, the United States indicted George within the applicable statute of limitations, as George's state prosecution repeatedly was continued. JA 500. Any such delay is not an appropriate basis for a downward variance under Section 3553(a). See *Musgrave*, 761 F.3d at 608 (district court impermissibly considered defendant's "four years of legal proceedings" to conclude that defendant had "been punished extraordinarily" in support of a one-day sentence).

unlikely that Mr. George would re-offend," and "[h]is behavior under supervision" during the delay before his federal prosecution "reinforces [that] there's little need to do anything to deter him or anyone else employed as a police officer from committing crimes." JA 513-514. Although the court briefly mentioned other police officers, it failed to address general deterrence in any meaningful way, even though "[g]eneral deterrence" is "one of the key purposes of sentencing." *United States* v. *Medearis*, 451 F.3d 918, 920 (8th Cir. 2006) (finding that a sentence of probation for a drug-related firearms offense, despite a Guidelines range of 46-57 months' imprisonment, was unreasonable).

d. Lastly, the district court was incorrect when it stated that the approximately $20,000 restitution award would be sufficient to promote respect for the law and just punishment. JA 513. As this Court stated in *Curry*, a sizeable restitution award "by itself [was] insufficient to justify the 70% [downward] variance," let alone the 100% downward variance here. 461 F.3d at 461; see also *ibid.* (holding that the substantial downward variance to 12 months' imprisonment from a Guidelines range of 41-51 months was impermissibly large where it was not justified by compelling mitigating circumstances and was supported only by the defendant's restitution efforts). The district court even acknowledged that the "high amount" of the restitution award "would hardly suffice for a guideline departure." JA 513. In any event, the power of the restitution amount to promote

respect for the law or just punishment was severely undercut in this case by the court's subsequent order requiring George to "repay that fee at a rate no greater than $100 per month." JA 548. At that rate, it would take more than 16 years for George to satisfy the restitution order.

In sum, it was substantively unreasonable for the district court to sentence George without any prison time. The jury found that George willfully used objectively unreasonable force on Doolittle when she was in his custody. JA 519. The district court's explanation for George's sentence does not accurately reflect the nature and circumstances of the offense and is not supported by any of the other factors in 18 U.S.C. 3553(a). Accordingly, the Court should vacate George's sentence and remand for resentencing.

CONCLUSION

For the reasons stated, this Court should vacate the sentence and remand for resentencing.

Respectfully submitted,

R. ANDREW MURRAY
United States Attorney

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

s/ Teresa Kwong
TOVAH R. CALDERON
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

AMY RAY
KIMLANI FORD
Assistant United States Attorneys
United States Attorney's Office
Western District of North Carolina
U.S. Courthouse, Room 233
100 Otis Street
Asheville, NC 28801
(828) 271-4661

STATEMENT REGARDING ORAL ARGUMENT

Although the United States believes that this appeal can be resolved on the briefs, particularly given that the issues on appeal are straightforward and the district court's sentencing errors are obvious, the United States will appear for oral argument if the Court deems argument would be helpful.

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLANT/CROSS-APPELLEE does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2019 and contains 7230 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Teresa Kwong
TERESA KWONG
Attorney

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