No. 19-4841

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

ROBERT MICHAEL GEORGE,

Defendant-Appellee

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

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

This appeal concerns whether a sentence is procedurally or substantively unreasonable where the district court made findings at sentencing that directly contradicted the jury verdict that defendant Robert George violated 18 U.S.C. 242. U.S. Br. 2.[1] This appeal is not, as George argues, about "prioritize[ing] harsh punishments." George Br. 1.

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[1] "JA __" refers to page numbers in the Joint Appendix filed with the United States' opening brief. "Gov't Ex. __" refers to the government's exhibits

(continued…)

As captured on a surveillance video that was shown to the jury, George, a former police officer, forcibly pulled an arrestee, Chelsea Doolittle, out of his police car while Doolittle's hands were handcuffed behind her back and then slammed Doolittle's body face-down on the ground, causing her serious bodily injury that required multiple surgeries. JA 138 (Gov't Ex. 4A); see also JA 108, 141, 182-183, 254-255, 287, 315. Testimony by George's supervisor, Captain Gary Lee, and Floyd Yoder, who trained George on the rules for using force, both corroborated what the jury saw on the video—that George "basically threw [Doolittle] on the ground." JA 141; see also JA 256, 259-262, 287. 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 that he did so willfully. JA 457-458, 519. The district court applied a downward variance of 19 offense levels from the recommended Sentencing Guidelines range of 70-87 months' imprisonment to impose a sentence of four years' probation. JA 488-492, 509-510, 512, 516-517.

The United States argued in its opening brief that George's sentence was procedurally and substantively unreasonable. U.S. Br. 16-31. At sentencing, the district court disagreed with the jury verdict that necessarily found that George

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admitted at trial. References to "U.S. Br. __" are to page numbers in our opening brief. "George Br. __" refers to page numbers in George's answering brief.

acted willfully—*i.e.*, with the specific intent of knowing that his action violated Doolittle's right to be free from unreasonable force or recklessly disregarding that right—by stating that George had merely "lost his grip" on Doolittle when he "pulled her forcefully out of the car." JA 461-463, 510. Primarily based on this reason, the district court imposed a probation sentence. JA 488-492, 509-510, 512, 516-517. Because the district court impermissibly substituted its own view of the facts for the jury's to support the extreme downward variance, the court committed procedural error and abused its discretion by relying on clearly erroneous facts to impose a sentence of probation only. *Gall* v. *United States*, 552 U.S. 38, 51 (2007). The sentence was also substantively unreasonable because the district court failed to provide the necessary justification for the extreme 100% downward variance. *Id.* at 50. Therefore, this Court should vacate the sentence and remand for resentencing.[2]

George makes two principal arguments in response. Neither has merit. First, George argues that the district court's findings were consistent with the jury verdict, because the court's comments that the offense was "almost accidental" and that George "lost his grip" simply reflected the court's determination that George acted "recklessly, rather than deliberately." George Br. 18, 23. But as this Court

[2] This Court can vacate George's sentence on procedural reasonableness grounds without considering whether George's sentence was also substantively unreasonable. *United States* v. *Carter*, 564 F.3d 325, 328 (4th Cir. 2009).

explained in *United States* v. *Blankenship*, although reckless disregard for a victim's constitutional rights can constitute criminal willfulness, "willful" nonetheless "describes conduct that results from an exercise of the will, distinguishing intentional, knowing, or voluntary action from that which is *accidental or inadvertent*." 846 F.3d 663, 672-673 (4th Cir.) (quoting *RSM, Inc.* v. *Herbert*, 466 F.3d 316, 320 (4th Cir. 2006)) (internal quotation marks omitted; emphasis added), cert. denied, 138 S. Ct. 315 (2017). Thus, the district court's finding that George did not "slam [Doolittle] down face-first on the driveway" (he merely "lost his grip") directly conflicts with the jury's finding that George acted with the purpose of depriving Doolittle's constitutional rights. JA 461-463, 510, 519.

Second, George contends that his sentence was substantively reasonable based on the district court's consideration of the 18 U.S.C. 3553(a) factors. George Br. 27-34. This argument fails because the district court's finding that the underlying incident was "almost accidental" infused its Section 3553(a) analysis. JA 509-514. Furthermore, the court's remaining reasons for the significant downward variance do not justify the sentence of probation only. See *Gall*, 552 U.S. at 50.

ARGUMENT

GEORGE'S PROBATION-ONLY SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

A. The District Court's Downward Variance Based On Facts Contrary To The Jury Verdict Constituted Procedural Error

As explained in our opening brief, George's sentence was procedurally unreasonable because the district court adopted a version of the facts for sentencing purposes that contradicted the jury verdict and the evidence at trial. U.S. Br. 16-23. In particular, the district court stated that "George did not lift Ms. Doolittle out from under the backseat and slam her down face-first on the driveway" and characterized what happened as "[n]ot quite" but "almost accidental." JA 510-511. The district court found that George had "lost his grip" on Doolittle when he "pulled her forcefully out of the car." JA 510. According to the district court, Doolittle "fell on her face and busted her cheekbones" when George "pulled her out of the car forcefully enough that he lost control of her," and she "stumbled forward * * * perhaps, because of the force with which he pulled her out of the car," or because Doolittle was "inebriated" and "unable to keep her balance." JA 511. The court also characterized Doolittle's injuries as "close to an accidental injury * * * as you can get and still wind up violating the statute." JA 514-515. The district court maintained that "at no time did Mr. George intend to injure or otherwise harm" Doolittle. JA 510.

The district court's findings that George "lost his grip" and that Doolittle was injured when she "fell" are inconsistent with the surveillance video and, more importantly, inconsistent with the jury verdict. JA 511, 519. The district court properly instructed the jury that to convict George on Section 242, it had to find that George acted willfully. JA 461-464. The court instructed the jury that in order for the government to prove this element, the jury needed to find that George "act[ed] voluntarily and intentionally with the specific intent to do something the law forbids." JA 461. The court also told the jury that George acted willfully if the jury finds that the government proved that George acted "with knowledge that his conduct was unlawful" or "with the intent to do something the law forbids because reckless disregard of a person's constitutional rights is evidence of specific intent to deprive that person of those rights." JA 461, 463. Thus, under the court's instructions, the jury could not have found George guilty unless it found that the government had proved beyond a reasonable doubt that George purposefully used more force than was reasonable under the circumstances. JA 457-458. Where, as here, the district court relied on facts for sentencing that contradict the jury verdict, the sentence must be vacated. *United States* v. *Curry*, 461 F.3d 452, 461 (4th Cir. 2006); see also U.S. Br. 19-23 (citing cases).

1. George contends (George Br. 19, 23-25) that the district court's factual findings at sentencing are not "directly inconsistent" with the jury's guilty verdict

because the jury could have found him guilty for acting with reckless disregard, which was not far off from the court's description of George's conduct. George is mistaken. Because the jury found that George willfully violated Doolittle's right to be free from unreasonable force, it necessarily found that George deliberately threw Doolittle face-down on the ground. JA 457-464, 519. Thus, to the extent George is arguing that the element of willfulness can be satisfied by negligent or accidental conduct, his argument misreads the willfulness requirement for a violation of Section 242. George Br. 18-27.

The term "willfully" "[m]ost obviously * * * differentiates between deliberate and unwitting conduct." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998). As the Supreme Court explained in *Screws* v. *United States*, which addressed Section 242's predecessor statute, the specific intent requirement of willfulness can be established by showing that the defendant "is aware that what he does is precisely that which the statute forbids * * * for he either *knows* or *acts* in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right." 325 U.S. 91, 104 (1945) (emphases added). Thus, to prove willfulness, the jury must find that the defendant acted with "the purpose to deprive [a person] of a constitutional right." *Id.* at 107. This Court has similarly defined Section 242's willfulness element as acting with "the particular purpose of violating a protected right made definite by the rule of law," or "recklessly

disregard[ing] the risk" of doing so, and has explained that the government bears the burden of proving that the defendant "*willfully intended* to deprive [a victim] of [the] constitutional right to be free of excessive force." *United States* v. *Mohr*, 318 F.3d 613, 618-619 (4th Cir. 2003) (emphasis in original).

Contrary to George's argument, acting with reckless disregard of a person's constitutional right is not the same as acting negligently or accidentally, because acting with reckless disregard still requires purposeful conduct. In *United States* v. *Blankenship*, this Court made clear that willful conduct consists of "intentional, knowing, or voluntary action," and not "that which is *accidental or inadvertent*." 846 F.3d 663, 672 (4th Cir.) (citation and internal quotation marks omitted) (emphasis added), cert. denied, 138 S. Ct. 315 (2017). Likewise, the Ninth Circuit made clear that willfulness under Section 242 requires a jury to convict, "even if you find that [the defendant] had no real familiarity with * * * the particular constitutional right involved, *provided that you find that the defendant intended to accomplish that which the Constitution forbids*." *United States* v. *Koon*, 34 F.3d 1416, 1449-1450 (9th Cir. 1994) (emphasis added), rev'd on other grounds, 518 U.S. 81 (1996).

It follows that regardless of whether George acted with the intent to deprive Doolittle of her right to be free from unreasonable force or with reckless disregard of that right, the jury necessarily found that George acted with the purpose of

depriving Doolittle of a constitutional right in order to convict him under Section 242. See *Screws*, 325 U.S. at 107; *Mohr*, 318 F.3d at 618-619. Simply put, Section 242 does not allow a defendant to be convicted for accidental or negligent actions. The statute's willfulness requirement, as construed by the Supreme Court in *Screws* and this Court in *Mohr*, requires proof that a defendant took deliberate actions whether knowing or recklessly disregarding the risk that such deliberate actions will violate the Constitution. Therefore, the district court's finding that the offense George was convicted of was "almost accidental" because George "lost his grip" and that Doolittle was injured because she "fell" is necessarily at odds with the jury verdict and cannot be used for sentencing for that crime. JA 511.[3]

George asserts that, because the jury instructions did not require the jury to find that George "slammed" Doolittle to the ground, the jury could have found that George injured "Doolittle by losing his grip due to recklessness," but this is

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[3] Contrary to George's suggestion (George Br. 19-20), these findings do not characterize conduct that rises to the "reckless disregard" level. The court repeatedly stated that it did not believe that George acted deliberately: George "lost his grip" on Doolittle; he "lost control of her"; "at no time did Mr. George intend to injure or otherwise harm Ms. Doolittle"; "I characterize what happened as almost accidental"; Doolittle was injured when she "fell" after George "pulled her out of the car forcefully enough that he lost control of her and she stumbled forward unable, perhaps, because of the force with which [George] pulled her out of the car, or perhaps because of her inebriated condition." JA 510-511. Thus, these characterizations of the evidence are inconsistent with the jury's finding that George acted willfully, even if it found that George acted only in reckless disregard of Doolittle's constitutional rights. See *Blankenship*, 846 F.3d at 672; *Mohr*, 318 F.3d at 618-619.

incorrect. George Br. 22. Presenting several hypotheticals, George suggests that the jury convicted him of using excessive force—not because of the egregious force captured on the video, *i.e.*, his slamming Doolittle to the ground—but because George used force on Doolittle too quickly, without waiting for assistance, or that he "used more force than necessary[,] and lost his grip." George Br. 20-21. But these hypotheticals are flawed. George Br. 20-21. To reach any of the conclusions in George's hypotheticals, the jury would have had to ignore the language in the indictment, which alleged that George used excessive force and violated Section 242 when he "slammed [Doolittle] face first to the ground, resulting in bodily injury to [Doolittle]." JA 9. Furthermore, the parties' stipulation as to the final element in the Section 242 charge—that "the incident resulted in bodily injury" (JA 464)—underscores that Doolittle's injury resulted from the underlying offense conduct, George's intentional use of excessive force, and not an accidental slip of his grip.

In sum, this case is similar to *Curry* where the district court's findings at sentencing were "impossible to square with the verdict." George Br. 23. In *Curry*, this Court held that the sentence was unreasonable because the district court based the sentence on its factual finding that the defendant, who was convicted of mail fraud, had not initially intended to defraud the victims even though that finding "contradicted the weight of evidence and the verdict." 461 F.3d at 460-461. Here,

as in *Curry*, the district court's findings at sentencing were inconsistent with the jury verdict and the evidence at trial. See U.S. Br. 18-19 (discussing trial evidence). The district court found that although George "pulled [Doolittle] out of the car forcefully," George "lost his grip" (JA 510-511) and Doolittle was injured when she "fell" (JA 511). But the guilty verdict reflects the jury's determination that George acted with the purpose of depriving Doolittle of her right to be free from unreasonable force, and that conclusion necessarily means that George did not act accidentally. JA 457-458. Accordingly, because the district court relied on its findings of fact that are at odds with the verdict, this Court should vacate George's sentence and remand for resentencing. See *Curry*, 461 F.3d at 461.

2. George suggests that his acquittal for obstruction of justice under 18 U.S.C. 1519 supports his argument that the district court correctly characterized his conduct at sentencing because, in acquitting him on this count, the jury must have believed that George's statement in his use-of-force report that Doolittle "fell to the ground" was true. George Br. 10, 20-21, 25. This argument fails because, although it is appropriate to infer from a guilty verdict that the jury found that the government had proven beyond a reasonable doubt the elements of the charged offense, the basis for a jury's acquittal verdict is unknowable.

Even assuming that the Section 242 and obstruction-of-justice verdicts were inconsistent, this Court has recognized that "an inconsistent verdict can result from

mistake, compromise, or lenity, and a jury could just as likely err in acquitting as in convicting." *United States* v. *Louthian*, 756 F.3d 295, 305 (4th Cir.), cert. denied, 574 U.S. 960 (2014); see *United States* v. *Hassan*, 742 F.3d 104, 144 n.36 (4th Cir.) ("[A] jury is permitted to return an inconsistent verdict if it sees fit to do so."), cert. denied, 574 U.S. 861 (2014). As the Supreme Court explained in *United States* v. *Powell*, 469 U.S. 57, 68 (1984), "all we know [from split verdicts] is that the verdicts are inconsistent." For this reason, "[c]ourts have always resisted inquiring into a jury's thought processes," *id.* at 67, and this Court should do so here. The central question before this Court is whether the district court's findings at sentencing conflict with the jury's guilty verdict on the Section 242 charge. The acquittal for obstruction of justice should not be accorded any weight in this analysis.

3. Nor can the district court's use of erroneous facts in sentencing be deemed harmless. George Br. 26-27. Citing *United States* v. *Howard*, 773 F.3d 519, 528 (4th Cir. 2014), George contends that even if the Court finds procedural error, the error is harmless so long as the district court provides an independent rationale for the sentence. George Br. 26. *Howard*, however, involved whether a sentence was substantively unreasonable. 773 F.3d at 528. A review for substantive reasonableness takes into account the "totality of the circumstances," so it makes sense that if the sentencing court deviates from the Guidelines range

and provides "two or more independent rationales" for the deviation, "the appellate court cannot declare the sentence unreasonable if it finds fault with only one of the rationales." *Ibid.*

By contrast, a procedural sentencing error is harmless only if the error "did not have a 'substantial and injurious effect or influence' on the result." *United States* v. *Lynn*, 592 F.3d 572, 585 (4th Cir. 2010) (citation omitted). The procedural error here cannot be deemed harmless. A direct effect of the procedural error was the district court's imposition of a probation-only sentence, far below the applicable Guidelines range. JA 510-515. Indeed, based on its erroneous view of the evidence, the district court expressly stated that the recommended Guidelines range "greatly overstates the seriousness of the offense," and then imposed the 100% downward variance. JA 512. George contends that any error is harmless because the district court's consideration of the 18 U.S.C. 3553(a) factors supports George's sentence. George Br. 26-27. But that argument ignores the fact that the district court's erroneous view of the evidence also permeated its Section 3553(a) analysis. See pp. 15-16, *infra*; see also U.S. Br. 25-26.

George further argues (George Br. 26) that any procedural error is harmless because the district court indicated that it "would wind up in the same place," even if it had applied an enhancement for obstruction of justice to the Guidelines range, as set forth in the presentence report. JA 517; see also JA 512, 567. As George

concedes (George Br. 26), the court made this statement with respect to the obstruction enhancement. Because this Court cannot say with any "fair assurance," *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946), that the district court's proper consideration of the intentional nature of George's offense would not have affected the sentence imposed, the Court should vacate the sentence as procedurally unreasonable and remand for resentencing. Cf. *Lynn*, 592 F.3d at 585 (vacating sentence where harmlessness of a procedural error was a "close question").

B. The District Court's 19-Level Downward Variance Lacks Sufficient Justification And Therefore Is Also Substantively Unreasonable

George asserts that a sentence is substantively reasonable "as long as 'the reasons justifying the variance are tied to [18 U.S.C.] 3553(a) and are plausible.'" George Br. 28 (quoting *United States* v. *Provance*, 944 F.3d 213, 219 (4th Cir. 2019)). Although this Court stated in *Provance* that it "generally" would find such a sentence substantively reasonable, it clarified that "when the variance is a substantial one * * * *we must more carefully scrutinize the reasoning offered by the district court in support of the sentence*." *Id.* at 219-220 (citation omitted; emphasis in original). The Court further explained that "[t]he farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." *Id.* at 220 (citation omitted). Thus, the Court must carefully scrutinize the district court's Section 3553(a) reasons for adopting a

downward variance of 19 offense levels under the Guidelines to sentence George to only probation.[4]

A careful scrutiny of the district court's consideration of the Section 3553(a) factors reveals that the district court based its justification for the extreme downward variance on (1) its own view of the facts that conflicts with the jury verdict; (2) common factors already taken into account in calculating the applicable Guidelines range of 70-87 months' imprisonment; and (3) non-exceptional reasons that do not warrant the magnitude of the downward variance. As discussed below, these reasons are not "sufficiently compelling" to support the district court's downward variance, and this Court should vacate the sentence as substantively unreasonable. *Gall* v. *United States*, 552 U.S. 38, 50 (2007) (stating that a "major" deviation "should be supported by a more significant justification than a minor one"); see also U.S. Br. 23-31.

1. The district court relied heavily on its impermissible view that George's offense was "almost accidental" and that Doolittle was injured because she "fell"

[4] George also contends that a "presumption of reasonableness" applies to below-Guidelines sentences. George Br. 27 (quoting *United States* v. *Susi*, 674 F.3d 278, 289 (4th Cir. 2012)). In *Susi*, the Court applied a rebuttable presumption of reasonableness where the defendant challenged a below-Guidelines sentence as too harsh, but specifically provided that "this presumption of reasonableness would not be applied where the Government appeals that a district court's sentence is substantively unreasonable." 674 F.3d at 289-290 & n.4. Accordingly, George's sentence is not entitled to any presumption of reasonableness.

when George "lost his grip" on her in its sentencing decision. JA 509-514. Based on this incorrect view of the facts, the court declared that the Guidelines range "greatly overstates the seriousness of the offense." JA 512. In fact, the district court indicated that the recommended Guidelines range was appropriate only for officers who intentionally deprive others of their constitutional rights, as opposed to George. JA 510-515. Because it was error for the district court to substitute its own view of the facts for the jury's, and because this view substantially affected the court's consideration of the Section 3553(a) factors, the sentence is substantively unreasonable. See *United States* v. *Zuk*, 874 F.3d 398, 410-411 (4th Cir. 2017) (vacating sentence as substantively unreasonable where the district court considered an impermissible factor); see also *United States* v. *Hunt*, 521 F.3d 636, 649 (6th Cir. 2008) (holding sentence was substantively unreasonable because the district court indicated that it "doubt[ed]" that the defendant intended to commit the fraud underlying his conviction), cert. denied, 556 U.S. 1221 (2009).

2. The district court's consideration of George's history and characteristics under 18 U.S.C. 3553(a)(1) also does not support a probation sentence because the factors the court relied on are either already taken into account in the Sentencing Guidelines' criminal history category or are common circumstances in Section 242 cases that do not justify the dramatic downward variance. See U.S. Br. 27-28. George argues that the district court's findings that this offense was "aberrant

behavior" in light of his "spotless record" as a police officer support the downward variance. George Br. 28-31. But, as George recognizes, "police officers convicted in excessive-force cases generally do not have prior *criminal* records." George Br. 30. George disputes that his criminal history category of I fully reflects his spotless record, asserting that many police officers "have a history of administrative or citizens complaints alleging the use of excessive force" and that George is "an outlier" because he has not been administratively disciplined for other incidents of using excessive force. George Br. 30. None of this, however, was before the district court at sentencing, and nothing in the record shows that the district court took this into account in its Section 3553(a) consideration. Thus, the district court's finding that this offense was "aberrant behavior" for George was based on circumstances that are not atypical in Section 242 cases—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 511-512)—and did not support the extreme downward variance granted here. See *United States* v. *Morace*, 594 F.3d 340, 350 (4th Cir.) (holding that "common circumstances" did not justify a sentence of probation instead of a term of imprisonment), cert. denied, 562 U.S. 924 (2010).

3. George's remaining arguments are similarly unavailing. First, George asserts that *Koon* v. *United States*, 518 U.S. 81 (1996), supports the district court's

concern that George would be "more susceptible to abuse in prison" than another non-law enforcement person. George Br. 31-32. Not so. *Koon* involved "notoriety and national [media] coverage." 518 U.S. at 112 (citation omitted). As the Fifth Circuit pointed out in *United States* v. *Winters*, the identities of the officers who were prosecuted for beating Rodney King in *Koon* "received such sustained national media coverage as to permeate prison facilities nationally." 174 F.3d 478, 485, cert. denied, 528 U.S. 969 (1999). By contrast, *Winters*, like this case, involved only local media coverage, and nothing in the record supported finding that the defendant was more susceptible to abuse in prison than any other former law enforcement officer. *Id.* at 485-486; see also JA 515. Distinguishing the local media coverage in *Winters* with the national coverage and emotional outrage in *Koon*, the Fifth Circuit found that the district court abused its discretion when it departed downward from the Guidelines based on the defendant's susceptibility to abuse by other prisoners. *Winters*, 174 F.3d at 485-486.

This case is more like *Winters* than *Koon*. Aside from the district court's statements that the video of this event was "widely seen" (JA 515), the record does not contain anything else that indicated that George was "unusually susceptible to prison abuse." *Koon*, 518 U.S. at 112 (citation omitted); cf. *United States* v. *LaVallee*, 439 F.3d 670, 708 (10th Cir. 2006) (upholding downward departure due to police officers' susceptibility to abuse in prison where evidence demonstrated

that a publication distributed among federal inmates had reported on the investigation; that because of their notoriety, defendants were on 23-hour lockdown; and that other inmates threatened defendants' lives). Without more, the district court's findings regarding George's susceptibility to abuse in prison cannot justify the extreme downward variance. See *United States* v. *Thames*, 214 F.3d 608, 614 (5th Cir. 2000) (rejecting downward departure based on susceptibility to abuse in prison absent "extenuating circumstances"); see also *United States* v. *Rybicki*, 96 F.3d 754, 758-759 (4th Cir. 1996) (holding that a defendant's mere status as a law enforcement officer cannot justify a downward departure).[5]

Second, George argues that the district court properly considered whether the sentence provides adequate deterrence to others, as required by 18 U.S.C. 3553(a)(2)(B), when it concluded that "a more severe sentence was not needed 'to deter [George] or anyone else employed as a police officer.'" George Br. 32 (quoting JA 513-514). General deterrence is not only "one of the key purposes of sentencing," *United States* v. *Medearis*, 451 F.3d 918, 920 (8th Cir. 2006), but it also "becomes particularly important when the district court varies substantially from the sentencing guidelines." *United States* v. *Walker*, 844 F.3d 1253, 1258

[5] *Koon* is also distinguishable in that the "burden [on the defendant] imposed by a lengthy state prosecution that preceded the federal conviction" in that case is significantly different from the delay before the federal indictment here, where George was not actively defending himself in a state proceeding during that time. See George Br. 32.

(10th Cir. 2017) (citing *United States* v. *Musgrave*, 761 F.3d 602, 609 (6th Cir. 2014)). Here, the district court mentioned the deterrence of other officers in a single sentence; the court's central focus was on whether the sentence provides adequate deterrence for *George*. JA 513-514. The court's discussion therefore shows that it did not give proper consideration to general deterrence. At a minimum, the district court should have indicated how a non-custodial sentence for using excessive force in violation of Section 242 serves as a deterrence for other law enforcement officers.

George also suggests that the district court's references to the collateral consequences of the conviction on George, including the "loss of two jobs" and the "stain of a felony conviction," in its consideration of the need for the sentence to promote respect for the law under 18 U.S.C. 3553(a)(2)(A), applies equally to the court's consideration of general deterrence under 18 U.S.C. 3553(a)(2)(B). George Br. 33. But it is clear from the sentencing hearing that the district court discussed these collateral consequences only as they applied to George, and not for purposes of general deterrence. JA 512-513. Even if those considerations applied to whether George's sentence was adequate to afford general deterrence, losing a job and living with the consequences of a felony conviction are "not unusual for a public official who is convicted of using his governmental authority to violate a

person's rights" and are hardly sufficient to support finding that a probation sentence would provide adequate general deterrence. *Koon*, 518 U.S. at 110.

Lastly, the district court was correct that the approximately $20,000 restitution award "would hardly suffice for a guideline departure." JA 513. George does not disagree with that conclusion. George Br. 33-34. Instead, George asserts that the restitution award, together with the district court's other Section 3553(a) findings, support the downward variance. George Br. 33-34. But in light of the problems with the district court's consideration of the Section 3553(a) factors discussed above, the restitution award is also insufficient to justify the 19-level downward variance. See *Curry*, 461 F.3d at 461.

Accordingly, the district court's reasons for imposing a sentence of probation are not sufficiently compelling, rendering the sentence substantively unreasonable. The Court should vacate George's sentence and remand for resentencing.

CONCLUSION

For the reasons stated here and in the United States' opening brief, this Court should vacate the sentence as either procedurally or substantively unreasonable and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF FOR THE UNITED STATES 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 4950 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Dated: July 23, 2020