

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BRETT PALKOWITSCH,

Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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BRIEF FOR THE UNITED STATES AS APPELLEE

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## **SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT**

Defendant-appellant Brett Palkowitsch, then a police officer in the St. Paul, Minnesota, Police Department, kicked innocent civilian Frank Baker three times in his mid-section, after Baker was already being restrained and bitten by a police K-9 and surrounded by six armed police officers. A federal jury convicted Palkowitsch of depriving Baker of his Fourth Amendment right to be free from unreasonable force, in violation of 18 U.S.C. 242. The district court imposed a sentence of 72 months' imprisonment, below the applicable Guidelines range of 87 to 108 months' imprisonment.

On appeal, Palkowitsch challenges the procedural and substantive reasonableness of his sentence. His arguments lack merit. The district court did not commit any procedural error or abuse its discretion in imposing its sentence, which varied downwards significantly, even if not to the degree that Palkowitsch sought. This Court should affirm.

Because the issues presented on appeal are straightforward, the United States does not believe that oral argument is necessary.

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## STATEMENT OF JURISDICTION

This appeal is from the entry of final judgment in a criminal case in the District of Minnesota. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Brett Palkowitsch on June 2, 2021. Add. 1.<sup>1</sup> The next day, Palkowitsch filed a timely notice of appeal. DCD 170. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

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<sup>1</sup> “Add. \_\_” refers to page numbers in the addendum filed with Palkowitsch’s opening brief. “Br. \_\_” refers to page numbers in Palkowitsch’s opening brief. “DCD \_\_, at \_\_” refers to records on the district court docket by docket number and ECF pagination. “Tr., Vol. \_\_, \_\_” refers to the trial transcript by volume and page number. “Sent. \_\_” refers to page numbers in the sentencing transcript.



## STATEMENT OF THE ISSUES AND APPOSITE CASES

Whether Palkowitsch's below-Guidelines sentence of 72 months' imprisonment is procedurally and substantively reasonable.

*United States v. Boone*, 110 F. Supp. 3d 909, 917 (S.D. Iowa 2015),  
aff'd on other grounds, 828 F.3d 705 (8th Cir. 2016)

*United States v. Dautovic*, 763 F.3d 927 (8th Cir. 2014), cert. denied,  
574 U.S. 1173 (2015)

*United States v. Dodge*, 814 F. App'x 820 (5th Cir. 2020)

*United States v. Tweedy*, No. 3:04-cr-351 (E.D. Va. 2005)

## STATEMENT OF THE CASE

### *1. Factual Background*

This case arises from Brett Palkowitsch's unjustified use of force against an innocent civilian, Frank Baker. Palkowitsch kicked Baker three times, after Baker was already being restrained and bitten by a police K-9 and surrounded by six armed police officers. Baker sustained serious injuries, including several broken ribs and two collapsed lungs, requiring him to take medications for the rest of his life and forgo most physical activities.

#### *a. The St. Paul Police Department Responded To A Report Of A Brawl And Vague Identification Of An Individual With A Firearm*

On June 24, 2016, the St. Paul, Minnesota, Police Department (SPPD) received an anonymous emergency 911 call complaining that a group of people were fighting with golf clubs and bats outside of an apartment building. Tr., Vol. II, 347-348; Tr., Vol. III, 745-746. The caller provided a vague description of a Black male wearing a white t-shirt, having dreadlocks, and carrying a firearm. Tr., Vol. II, 347-348. The SPPD received no other calls about the alleged incident, and officers had doubts about the veracity of the call and existence of a fight. Tr., Vol. II, 348; Tr., Vol. III, 745-746.

Six officers nevertheless responded to the 911 call to "vet the information" provided by the caller. Tr., Vol. II, 349, 373; Tr., Vol. III, 614. The first two, Officers Anthony Spencer and Joseph Dick, circled the block of the apartment

building in their squad car and saw no indication of any disturbance. Tr., Vol. II, 355-357. But as they drove through an alley behind the apartments, they observed a black male with dreadlocks wearing a white shirt and sitting in a parked vehicle. Tr., Vol. II, 358; DCD 125, at 3. The man was later identified as the victim, Frank Baker (age 52), who lived in a nearby apartment. Tr., Vol. II, 358-359; DCD 125, at 3.

The officers saw no reason to stop or question Baker, and circled the block again. Tr., Vol. II, 359-360; DCD 125, at 3. Although Baker fit the unidentified caller's vague description, that description also matched many people in that neighborhood. Tr., Vol. II, 347; Tr., Vol. III, 752. Officer Dick radioed dispatch informing the other officers arriving at the scene that he and Officer Spencer had not seen any street fight or activity matching what the caller reported. Tr., Vol. II, 361; Tr., Vol. III, 753.

Shortly thereafter, the other officers arrived. Defendant Palkowitsch and his partner, Officer Brian Nowicki, arrived in one squad car. DCD 125, at 3. Officer Brian Ficcadenti, his partner Officer John Raether, and Officer Ficcadenti's K-9, Falco, arrived in another car. Tr., Vol. III, 647-648; Tr., Vol. IV, 964-966; DCD 125, at 3.

*b. Officer Ficcadenti Ordered Baker Out Of His Vehicle And Released K-9 Falco Onto Baker*

Officer Ficcadenti observed Baker sitting in his car, exited his squad car with K-9 Falco, and ordered Baker to step out of his car. Tr., Vol. III, 648-651. Baker, who had been talking on his phone at the time, hung up and complied with Officer Ficcadenti's order. Tr., Vol. III, 652; Tr., Vol. IV, 1047-1048. Officer Ficcadenti then ordered Baker to put his hands in the air, and Baker began to comply. Tr., Vol. III, 652. Because, according to Officer Ficcadenti's testimony, Ficcadenti could not see both of Baker's hands, he released K-9 Falco on Baker. Tr., Vol. III, 652-653. K-9 Falco bit Baker's leg and pulled him to the ground. Tr., Vol. II, 371; Tr., Vol. IV, 1053; DCD 125, at 4.

Other officers, including Palkowitsch, formed a semi-circle around Baker to assist if necessary. Tr., Vol. II, 369-371; Tr., Vol. III, 754-755; DCD 125, at 4. Officer Ficcadenti and the other officers, including Palkowitsch, gave Baker conflicting orders, both to stop moving and to turn over; Baker continued to scream and writhe in pain, flailing his arms, as K-9 Falco maintained its bite and pulled on Baker's leg. Tr., Vol. II, 376-378; Tr., Vol. III, 515, 609. Baker's behavior is a normal pain reaction in response to a K-9 bite. Tr., Vol. III, 756-757; Tr., Vol. V, 1295.

*c. Palkowitsch Repeatedly Kicked Baker's Ribcage*

Palkowitsch yelled at Baker not to move, despite Baker being bitten and restrained by K-9 Falco. Tr., Vol. II, 381; DCD 125, at 4. Palkowitsch then kicked Baker twice in his ribcage area. Tr., Vol. II, 381; Tr., Vol. III, 610.

Although Palkowitsch testified that Baker's "hand [was] coming right towards the \* \* \* waistband area" (Tr., Vol. VI, 1608), suggesting that Baker was making an intentional movement for his waistband where he could have been hiding a gun, other officers present at the scene testified that Baker was screaming in pain, flailing around in what appeared to be a reaction to the pain, and not making intentional, volitional reaching movements toward his waistband or presenting a threat in this way (see Tr., Vol. II, 473, 476-477; Tr., Vol. III, 556, 616-618, 663; Tr., Vol. IV, 1025).

K-9 Falco again pulled on Baker's leg. Tr., Vol. II, 399; DCD 125, at 4. Baker sat up in response, and Palkowitsch then kicked Baker a third time in the ribcage area. Tr., Vol. II, 381, 399; Tr., Vol. III, 610, 663. St. Paul police officers, including Palkowitsch, received specific training that once a police dog starts biting someone, an officer should not use any additional force. Tr., Vol. II, 296-298, 372; Tr., Vol. III, 607-608. And if additional force is required, the canine handler should instruct the other officers to assist. Tr., Vol. III, 608, 659. Officer Ficcadenti, who released K-9 Falco and had control of the situation (Tr., Vol. III,

659), did not instruct Palkowitsch or any of the other officers to use physical force against Baker. Tr., Vol. III, 608. No other officer at the scene used force against Baker. See generally DCD 125, at 3-4.

Palkowitsch then handcuffed Baker, and Officer Ficcadenti pulled K-9 Falco off of Baker. Tr., Vol. II, 384; Tr., Vol. III, 665-666. Baker had difficulty standing and complained he could not breathe. Tr., Vol. II, 413. The officers searched the area and found no weapons or any other evidence at the scene to suggest Baker was involved in the incident described in the 911 call. Tr., Vol. II, 411.

*d. Palkowitsch Boasted About Inflicting Baker's Injuries, Which Included Several Broken Ribs And Collapsed Lungs, And SPPD Initiated An Internal Investigation And Administrative Proceeding*

An ambulance transported Baker to a nearby hospital for medical treatment. Tr., Vol. II, 413. He was in critical condition; Palkowitsch's kicks to Baker's ribcage had broken his ribs and collapsed his lungs. Tr., Vol. II, 415; DCD 125, at 4. Baker had to undergo surgery for his lungs. Tr., Vol. IV, 1067-1068; DCD 125, at 4. He separately sustained injuries to his leg from the K-9 bites. Tr., Vol. IV, 894-895.

Officers Spencer and Dick checked on Baker's condition at the hospital. Tr., Vol. II, 413-414. When they returned to the police station, the officers overheard Palkowitsch bragging to other officers about his three kicks to Baker's ribcage,

including telling the officers that his third kick “got that fucker good.” Tr., Vol. II, 248; Tr., Vol. III, 622-625, 769. Officer Ficcadenti also overheard Palkowitsch and testified that his behavior after the incident was inappropriate and unprofessional. Tr., Vol. III, 622-623.

Officers Spencer and Dick, concerned about Palkowitsch’s conduct during and after the incident, informed Palkowitsch’s supervisor about his behavior. Tr., Vol. II, 419-420. But the sergeant dismissed their concerns. Tr., Vol. II, 422. Palkowitsch continued to boast about his actions, in one instance sending a text message to another officer that included a photograph of Baker lying in a hospital bed and commented on his broken ribs. Tr., Vol. II, 284-286.

Palkowitsch filed an incident report, which omitted key facts about his use of force. See Tr., Vol. VII, 1729-1731. He omitted the fact that when he repeatedly kicked Baker, K-9 Falco was biting Baker’s leg and Baker was screaming in pain. Tr., Vol. VII, 1730-1731.

The SPPD later opened an internal investigation into the incident, and an administrative proceeding followed. Tr., Vol. II, 423-424. Officers Spencer and Dick testified at this proceeding against Palkowitsch. Tr., Vol. II, 424; Tr., Vol. III, 778, 781. As a result, other officers retaliated against them. For example, an officer wrote “rat” above a photograph of Officer Spencer included in a newspaper article about Baker, and posted it near Officer Dick’s locker. Tr., Vol. III, 591-

592, 635; see also Tr., Vol. III, 626 (Officer Ficcadenti testified for Palkowitsch, as opposed to against him, for fear of retaliation).

*e. The Aftermath*

Officer Ficcadenti wrote Baker a citation for Obstructing the Legal Process in connection with the incident. Tr., Vol. III, 670-671. The prosecuting attorney later dropped the charge due to insufficient evidence to support a conviction. DCD 125, at 4. Baker subsequently filed a complaint with the SPPD (Tr., Vol. IV, 1059-1061), which led to an internal affairs investigation. DCD 125, at 4. In November 2016, SPPD fired Palkowitsch as a result of his excessive use of force. DCD 125, at 4-5. Although SPPD reinstated Palkowitsch after he filed a grievance, SPPD again fired him after his conviction in this case. DCD 125, at 5.

*2. Procedural History*

a. On January 16, 2019, a federal grand jury returned a one-count indictment charging Palkowitsch with violating 18 U.S.C. 242 for willfully depriving Baker of his Fourth Amendment right to be free from unreasonable force. DCD 1. The indictment alleged that Palkowitsch repeatedly kicked Baker while Baker was on the ground and incapacitated by a police canine; the offense involved the use of a dangerous weapon; and the offense resulted in bodily injury to Baker. DCD 1. Palkowitsch pleaded not guilty and was tried before a jury, which found him guilty. DCD 6, 100.



b. The Probation Office calculated Palkowitsch's Sentencing Guidelines range to be 87 to 108 months' imprisonment.<sup>2</sup> DCD 125, at 6, 13. The parties then filed briefs setting forth their respective positions on sentencing. DCD 130, 133. The United States asked the Court "to adopt the factual findings and advisory Guidelines calculations in the final pre-sentence report, and to sentence Defendant Palkowitsch to 87 months of imprisonment, the low end of his Guideline range." DCD 133, at 1. Palkowitsch asked the Court "to calculate his advisory guideline range at 21-27 months and grant him departures and a variance from the advisory guideline range and place him on probation." DCD 130, at 1.

To bridge this gap, Palkowitsch then proposed, and the United States agreed, to enter into a joint sentencing agreement, under which Palkowitsch agreed to request a sentence of no less than 48 months' imprisonment, waive his right to appeal, and make a public apology. DCD 165, at 3-4. In exchange, the United States agreed to recommend a sentence of no more than 60 months' imprisonment. DCD 165, at 3.

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<sup>2</sup> Using the 2018 Guidelines Manual, the Probation Office calculated the total offense level to be 29. DCD 125, at 6. This calculation was based on a base offense level of 14, a four-level increase because the defendant used a shod foot, a five-level increase because the victim sustained serious bodily injury, and a six-level increase because the offense was committed under color of law. DCD 125, at 6. With a criminal history category of I and a total offense level of 29, the Guidelines range was 87 to 108 months' imprisonment. DCD 125, at 13.

c. At the sentencing hearing, Palkowitsch withdrew his objections to the Presentencing Report's proposed guidelines calculations. Sent. 7-8. The district court then adopted the Report's calculations and conclusion that the applicable Guidelines range was 87 to 108 months' imprisonment. Sent. 8-9. The court next considered, and denied, Palkowitsch's motion for a downward departure from the Sentencing Guidelines based on Sections 5K2.10(3) (defendant reasonably perceived danger), 5K2.11 (defendant committed crime to avoid perceived greater harm), and 5K2.20 (defendant's conduct was an aberration). Sent. 9-11.

Next, the court heard the parties' arguments on comparator cases. Palkowitsch argued that, to avoid an unwarranted sentencing disparity, the court should impose a sentence of 48 months—the bottom of the range presented by the joint sentencing agreement. Sent. 18. Palkowitsch also noted that he had cited numerous comparator cases in his brief, but addressed at the hearing only three cases also cited in the United States' sentencing brief. Sent. 18-19. The United States proposed a sentence of 60 months' imprisonment, and asserted “that it's not particularly instructive to the Court for each side to cherry-pick cases of particularly high sentences for the government, low sentences for the defendant.” Sent. 26, 28. The United States explained that “[t]hat is not a principled way to decide a sentence” and “the best way to achieve sentencing uniformity typically is to follow the guidelines.” Sent. 28. The United States then addressed one of the

comparator cases both parties cited, and explained why the numerous aggravating factors in Palkowitsch's case warranted a greater sentence. See Sent. 29-33.

After hearing Palkowitsch's apology and Baker's victim statement, the court imposed a below-Guidelines sentence of 72 months' imprisonment and three years' supervisory release. Sent. 12-43.

d. In imposing its sentence, the court considered the Section 3553(a) factors and gave a thorough explanation for the sentence. The court stated that its sentence was "sufficient, but it is not greater than necessary, to reflect the seriousness of [Palkowitsch's] crime," and to provide "just punishment for [his] offense." Sent. 45. The court further explained that the sentence was appropriate to deter Palkowitsch and others from committing the same or similar crimes and to protect the public from Palkowitsch. Sent. 45. The court also stated that the sentence was not greater than necessary "to avoid unwarranted disparities between [Palkowitsch's] sentence and the sentences of defendants with similar records who have been found guilty of similar offenses and conduct." Sent. 45.

The court emphasized that its sentence was "appropriately tailored to the facts and the circumstances that are present" in this case. Sent. 45. It explained that Palkowitsch was "entrusted with a position of authority, to serve and protect the public," but "flagrantly betrayed that trust" by "violently assault[ing]" an "innocent member of the community." Sent. 45-46. The court also highlighted

that while Palkowitsch argued that his conduct was an aberration and isolated incident, “the effects of [his] conduct were not isolated. They were far-reaching.” Sent. 46. It underscored that Palkowitsch had “put an innocent man in the hospital with multiple broken ribs and two collapsed lungs,” and had “permanently scarred Mr. Baker, physically, mentally, [and] emotionally.” Sent. 46-47. The court also noted that the officers who spoke out against Palkowitsch’s actions had faced retaliation. Sent. 47.

Finally, the court emphasized that Palkowitsch’s actions had sown enduring distrust into the community, making it harder for law enforcement to protect and serve the community. Sent. 47. The court found significant Palkowitsch’s lack of remorse or acceptance of responsibility before sentencing, and noted that Palkowitsch had bragged about the injuries he inflicted and drafted a police report that misrepresented and downplayed the seriousness of his conduct. Sent. 47. At the same time, the court acknowledged Palkowitsch’s apology at sentencing and the letters of support from his family and friends, and that Palkowitsch experienced significant collateral consequences as a result of his actions. Sent. 48-49.

Palkowitsch, disagreeing with the court’s sentence and explanation, timely appealed his sentence. DCD 170.

## SUMMARY OF ARGUMENT

This Court should affirm Palkowitsch's sentence. Palkowitsch's challenges to the procedural and substantive reasonableness of his below-Guidelines sentence lack merit.

1. The district court did not commit procedural error in imposing Palkowitsch's below-Guidelines sentence of 72 months' imprisonment. Palkowitsch argues that the district court committed procedural error by failing to consider adequately the parties' comparator cases and to explain its decision to depart from the joint sentencing agreement's proposal of a sentence between 48- and 60-months' imprisonment. But the court, after hearing arguments from both parties, explicitly mentioned the need to avoid unwarranted disparities in imposing its sentence and set forth an in-depth and thorough explanation for its below-Guidelines sentence and departure from the joint sentencing agreement.

2. Palkowitsch's below-Guidelines sentence of 72 months was substantively reasonable. This Court has been clear that "[w]here a district court has sentenced a defendant below the advisory guidelines range, 'it is nearly inconceivable that the court abused its discretion in not varying downward still further.'" *United States v. Torres-Ojeda*, 829 F.3d 1027, 1030 (8th Cir. 2016) (brackets in original) (quoting *United States v. Moore*, 581 F.3d 681, 684 (8th Cir. 2009)). Here, the district court appropriately considered and weighed the Section 3553(a) factors in sentencing

Palkowitsch. For that reason, the district court's decision in this case to impose a sentence 15 months below the bottom of the Guidelines range did not constitute an abuse of discretion.

Palkowitsch argues that "a unique combination of mitigating circumstances" warrant less prison time, and his sentence creates an unwarranted sentencing disparity among similarly situated defendants. But, as the district court set forth in detail, Palkowitsch's case presents numerous aggravating circumstances: the severity of Baker's injuries; that Baker was already restrained by a K-9 at the time Palkowitsch repeatedly kicked him in the ribs; Palkowitsch's lack of remorse up to the sentencing hearing, including his boasting to colleagues about his use of force; Palkowitsch's inaccurate and misleading statements in his officer report to downplay his misconduct; the retaliation officers experienced in speaking out about Palkowitsch's misconduct; and the distrust of police officers Palkowitsch's actions created in the community. And, despite Palkowitsch's assertions to the contrary, the district court's sentence does not create an unwarranted disparity among defendants convicted of similar conduct under similar circumstances.

## ARGUMENT

### I

#### **THE DISTRICT COURT DID NOT COMMIT PROCEDURAL ERROR IN IMPOSING PALKOWITSCH'S BELOW-GUIDELINES SENTENCE OF 72 MONTHS' IMPRISONMENT**

##### *A. Standard Of Review*

In reviewing a sentence for procedural reasonableness, the Court reviews a defendant's sentence for "significant procedural error," such as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence."

*United States v. Godfrey*, 863 F.3d 1088, 1094-1095 (8th Cir. 2017) (quoting *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc)). Although this Court has recently stated that its precedent "is not entirely clear" whether the appropriate standard of review in this context is for abuse of discretion or de novo, *United States v. Mays*, 993 F.3d 607, 618 (8th Cir. 2021), the Court need not resolve that question here. Under either standard, Palkowitsch's arguments fail.

##### *B. The District Court Considered The Section 3553(a) Factors And Adequately Explained Palkowitsch's Sentence*

The district court calculated Palkowitsch's applicable Guidelines range to be 87 to 108 months' imprisonment. Sent. 8-9. The court imposed a term of 72 months' imprisonment and three years' supervisory release. Sent. 42-43.

Palkowitsch does not dispute the calculation of the Guidelines range, but argues that the district court committed procedural error by sentencing him without addressing “the need to avoid unwarranted sentencing disparities.” Br. 16.

Palkowitsch specifically asserts that the district court failed to consider the parties’ comparator cases, and to explain its decision to depart from the joint sentencing agreement’s proposal of a sentence between 48 and 60 months. Br. 16.

Palkowitsch’s arguments fail and provide no basis to overturn his sentence.

The district court, in explaining its below Guidelines sentence, explicitly stated that the sentence was not greater than necessary “to avoid unwarranted disparities between [Palkowitsch’s] sentence and the sentences of defendants with similar records who have been found guilty of similar offenses and conduct.” Sent. 45. The court explained that its sentence “is appropriately tailored to the facts and the circumstances that are present here in this case.” Sent. 45. And the court relied on the following facts to support a sentence departing from the joint sentencing agreement:

On June 24, 2016, without a reasonable basis for you doing so, you violently assaulted Mr. Frank Baker. He was an innocent member of the community for whom you had sworn to protect and to serve.  
\* \* \* And although your conduct on that night, the night of the offense, might have been an isolated incident in comparison to your life and to your career as a whole, the effects of your conduct were not isolated. They were far reaching. You put an innocent man in the hospital with multiple broken ribs and two collapsed lungs. \* \* \*  
You permanently scarred Mr. Baker, physically, mentally, emotionally. And you’ve contributed to a distrust of the police in this



community. And it's not lost on me that the officers who had the courage to speak up against you and who attempted to hold you accountable for your actions, they faced retaliation. \* \* \* Also significant to me is your general lack of remorse or acceptance of responsibility before today. Now, the evidence presented at your trial demonstrated a disturbing lack of compassion from you. You bragged to multiple people about breaking a man's ribs, collapsing his lungs, putting him in the hospital. You showed little, if any, concern of your victim's, Mr. Baker, well-being or his recovery. You drafted a police report that downplayed the seriousness of your conduct. The police chief testified that you showed no remorse, that you refused to admit you had done anything wrong.

Sent. 46-47.

While the court did not specifically address each of the parties' comparator cases, Palkowitsch cites no cases suggesting that a district court commits procedural error by not responding to every argument or case mentioned by a defendant. A district court need only "set[] forth enough to satisfy [a reviewing court] that he has considered the parties' arguments and has a reasoned basis' for the sentence imposed." *Mays*, 993 F.3d at 619 (first set of brackets in original) (quoting *United States v. Saguto*, 929 F.3d 519, 525 (8th Cir. 2019)). Thus, "not every reasonable argument advanced by a defendant requires a specific rejoinder by the judge." *Ibid.* (alteration omitted) (quoting *United States v. Lee*, 553 F.3d 598, 600 (8th Cir. 2009)). To the contrary, "[i]n determining whether a district court has adequately explained its reasons for imposing a particular sentence, the context for the appellate court's review is the entire sentencing record, not merely

the district court's statements at the hearing.” *Ibid.* (quoting *United States v. Robinson*, 516 F.3d 716, 718 (8th Cir. 2008)).

Here, the district court heard both parties' arguments concerning the comparator cases. In particular, the United States argued that addressing every proposed comparator case would not be “particularly instructive” given that the parties would “cherry-pick cases of particularly high sentences for the government, low sentences for the defendant.” Instead, the United States recommended that to avoid unwarranted sentencing disparities, the district court should follow the Guidelines. Sent. 28.

That is exactly what the district court properly did. It explicitly considered the Section 3553(a) factors, and explained the basis for its sentence. Sent. 45. Under these circumstances, “[a] court’s statement that it has taken all the § 3553(a) factors into consideration—without listing each—is enough to demonstrate that it considered all the factors.” *United States v. Anthony*, 829 F. App’x 737, 738-739 (8th Cir. 2020). As this Court has emphasized, “when a sentencing judge correctly calculates and carefully reviews the Guidelines range, [s]he necessarily gives significant weight and consideration to the need to avoid unwarranted disparities.” *United States v. Heim*, 941 F.3d 338, 340 (8th Cir. 2019) (brackets in original) (quoting *United States v. Velazquez*, 726 F. App’x 530, 531 (8th Cir. 2018)). Thus, the district court did not commit any procedural error.

The cases Palkowitsch relies on to argue otherwise are inapposite.

Palkowitsch cites *United States v. Lente*, 647 F.3d 1021, 1032-1036 (10th Cir. 2011), for the proposition that a sentencing court must “address” a “material, non-frivolous sentencing-disparity argument.” Br. 17-18. But that out-of-circuit case challenged a district court’s decision to impose an *upward* variance, which some courts have held requires a more in-depth explanation to justify than a within- or below-Guidelines sentence. See, e.g., *Lente*, 647 F.3d at 1032-1036. And *United States v. Smith*, 860 F.3d 508, 518-519 (7th Cir. 2017), which Palkowitsch cites for the proposition that courts must also explain sentencing-disparity arguments in cases where there is a downward variance (Br. 21-22), is an out-of-circuit case involving the *government’s* objection to a below-Guidelines sentence, not the defendant’s. Finally, the two primary comparator cases Palkowitsch offers (Br. 19) are not truly comparable because they do not involve similarly situated defendants found guilty of “similar conduct.” 18 U.S.C. 3553(a)(6). Neither *Watson* nor *Dukes* involved an excessive force conviction. See *United States v. Watson*, No. 5:15-cr-243 (N.D. Ala. 2016) (convicting defendant for obstruction); *United States v. Dukes*, No. 4:17-cr-00010 (W.D. Ky. 2018) (convicting defendant for false arrest), *aff’d*, 779 F. App’x 332 (6th Cir. 2019). In sum, the district court did not commit procedural error in “declining to address these inapposite cases,

especially given that the court established that it had a reasoned basis for its opinion.” *Godfrey*, 863 F.3d at 1099.

## II

### **THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED PALKOWITSCH TO A BELOW-GUIDELINES SENTENCE OF 72 MONTHS’ IMPRISONMENT**

#### *A. Standard Of Review*

This Court reviews the substantive reasonableness of a district court’s sentencing decision under “a deferential abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 41 (2007); *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc). “An abuse of discretion occurs ‘if a sentencing court fails to consider a relevant factor [under 18 U.S.C. 3553] that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.’” *United States v. Fiorito*, 640 F.3d 338, 352 (8th Cir. 2011) (quoting *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), cert. denied, 546 U.S. 913 (2005)), cert. denied, 565 U.S. 1246 (2012).

For a sentence to be substantively reasonable, the district judge does “not need to mechanically recite the factors in the record.” *United States v. Hewitt*, 999 F.3d 1141, 1149 (8th Cir. 2021) (quoting *United States v. Davenport*, 910 F.3d

1076, 1083 (8th Cir. 2018)). And the “court has wide latitude to weigh the § 3353(a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence.” *Ibid.* (quoting *United States v. Bridges*, 569 F.3d 374, 379 (8th Cir. 2009)). It can “rely more heavily on some sentencing factors than others, and a defendant challenging the district court’s sentence must show more than the fact that the district court disagreed with his view of what weight ought to be accorded certain sentencing factors.” *Ibid.* (quoting *United States v. Long*, 906 F.3d 720, 727 (8th Cir. 2018), cert. denied, 140 S. Ct. 464 (2019)). In this case, Palkowitsch cannot satisfy the standard for overturning the sentence imposed.

*B. Palkowitsch’s 72-Month Sentence Is Substantively Reasonable*

Although the district court varied downward by 15 months, Palkowitsch argues that his sentence is still substantively unreasonable because the court did not vary downwards even more. Br. 22-41. This Court has made clear, however, that “[w]here a district court has sentenced a defendant below the advisory guidelines range, ‘it is nearly inconceivable that the court abused its discretion in not varying downward still further.’” *United States v. Torres-Ojeda*, 829 F.3d 1027, 1030 (8th Cir. 2016) (brackets in original) (quoting *United States v. Moore*, 581 F.3d 681, 684 (8th Cir. 2009)). That should be the end of the matter.

Palkowitsch nevertheless makes two arguments in challenging his sentence – that the facts of his case are unique, and that his sentence creates an unwarranted sentencing disparity. Neither argument has merit.

1. Palkowitsch first argues that his “case presents a unique combination of mitigating circumstances that warrant far less prison time than most 18 U.S.C. § 242 defendants.” Br. 23. But Palkowitsch overstates the mitigating circumstances and improperly downplays the aggravating circumstances of his crime.

a. First, Palkowitsch asserts that his conduct was an “‘isolated incident’ in [his] otherwise exemplary career as a St. Paul officer.” Br. 25 (citing Sent. 46). But the record at sentencing does not support that characterization. Although Palkowitsch may not have been formally reprimanded for misconduct, his colleague testified at trial that Palkowitsch needlessly escalated situations, was quick to use force, and mistreated civilians. Tr., Vol. II, 353-354. For example, in one instance, Palkowitsch and his partner “were dealing with a homeless guy who had several carts of things with him. They had spilled out all the contents [sic] of this homeless guy’s belongings all over the street, berated him, and left him to pick everything up after they were done.” Tr., Vol. II, 353.

Second, Palkowitsch claims that Baker’s non-responsiveness to his commands somehow makes his actions less egregious. Br. 27. Palkowitsch is

wrong. The other officers at the scene did not perceive Baker to be a threat. See, e.g., Tr., Vol. III, 556, 616-618, 663. There was also testimony at trial that Baker's behavior was a normal and well-known pain reaction in response to a K-9 bite (Tr., Vol. III, 757; Tr., Vol. V, 1295), and that St. Paul police officers received training to that effect (Tr., Vol. II, 299-300; Tr., Vol. III, 615, 660; Tr., Vol. IX, 2223-2224). Palkowitsch's police training further made clear that once a police dog starts biting someone, an officer should not use any additional force. Tr., Vol. II, 297-298, 372; Tr., Vol. III, 607. And if additional force is required, then other officers should not assist unless the canine handler instructs them to do so, which Officer Ficcadenti did not do here. Tr., Vol. III, 608, 659, 662. Despite receiving this training and understanding the circumstances, Palkowitsch willfully used excessive force against Baker.

Third, Palkowitsch stresses that he apologized for his excessive use of force. Br. 27. But his apology comes too late to serve as a strong mitigating factor. Palkowitsch apologized only *after* a jury convicted him and it became clear he would serve significant time in prison. As the district court explained at sentencing, "the evidence presented at \* \* \* trial demonstrated a disturbing lack of compassion from [Palkowitsch]. [Palkowitsch] bragged to multiple people about breaking a man's ribs, collapsing his lungs, putting him in the hospital. [He] showed little, if any, concern of [his] victim's, Mr. Baker, well-being or his

recovery.” Sent. 47. The court further noted that Palkowitsch had “drafted a police report that downplayed the seriousness of [his] conduct”; that the police chief testified that Palkowitsch “showed no remorse” and “refused to admit” that he “had done anything wrong”; and that “it is only now, here, when [he] stand[s] convicted and [is] facing the consequences of [his] actions, that [he has] begun to show remorse and acknowledge the severity of [his] actions.” Sent. 47-48.

Indeed, at the police station and after the incident with Baker, officers overheard Palkowitsch bragging to his colleagues that his third kick “got that fucker good.” Tr., Vol. II, 248; Tr., Vol. III, 622-625, 769. And even after being confronted about his use of force by two colleagues, Palkowitsch continued to boast about his actions and texted a picture of Baker lying on a hospital bed to another officer and commented about Baker’s broken ribs. Tr., Vol. II, 284-286. If anything, Palkowitsch’s attitude toward Baker after the assault is an aggravating, not a mitigating, factor. So it could hardly require an even greater downward departure than the one the district court adopted. In *United States v. French*, this Court concluded that the district court properly factored into the defendant’s sentence that he “demonstrated a lack of remorse and an unwillingness to take responsibility for his actions.” 719 F.3d 1002, 1009 (8th Cir. 2013). Indeed, one court of appeals has actually overturned a district court’s below-Guidelines sentence in similar circumstances. See *United States v. Smith*, 860 F.3d 508, 516



(7th Cir. 2017) (overturning a below-Guidelines sentence for police officer convicted of excessive force, reasoning that the sentence failed to account for several aggravating factors, including that the defendant-officer “bragged about his behavior and mocked his fellow officers when they questioned his actions”).

Palkowitsch makes three other arguments that fare no better. He asserts that he did not act out of retribution or other animus; that he kicked at Baker’s mid-section and not his head; and that his life outside of work was “exemplary,” as demonstrated by the letters the court received. Br. 26-28. But the first two arguments are not mitigating factors at all; they are merely the absence of additional aggravating factors. As for Palkowitsch’s life outside of work, the district court acknowledged that it had read “dozens of letters that [it] received from [Palkowitsch’s] family and from [his] friends, and [it was] grateful for them because they provided evidence of the fact that [Palkowitsch is] more than this crime that brought [him] here into this court today.” Sent. 48. But Palkowitsch does not explain why that evidence would require an even greater downward departure than the one he received.

b. Even if there are some mitigating factors in this case, they are vastly outweighed by the other aggravating factors identified by the court.

First, the district court appropriately considered the severity of Baker’s injuries, stating that Palkowitsch “put an innocent man in the hospital with multiple

broken ribs and two collapsed lungs” and “permanently scarred Mr. Baker physically, mentally, [and] emotionally.” Sent. 46-47. This Court has recognized that a defendant-officer’s “infliction of serious injury” is an “aggravating circumstance[.]” the district court can appropriately factor into the defendant’s sentence. *United States v. Dautovic*, 763 F.3d 927, 935 (8th Cir. 2014), cert. denied, 574 U.S. 1173 (2015). Palkowitsch argues, however, that the district court incorrectly put the blame on Palkowitsch for all of Baker’s injuries, including the K-9 bite. Br. 40. But, as noted above, p. 17, *supra*, the court specifically mentioned the injuries Palkowitsch caused, and there is nothing to suggest that the court attributed the K-9 bite to Palkowitsch. See Sent. 46-47. Baker’s statements at the sentencing hearing also demonstrate that Palkowitsch’s misconduct specifically caused and contributed to Baker’s significant physical, mental, and emotional scars. See Sent. 35-38.

Second, the court properly considered the circumstances of the altercation, particularly that Baker was restrained by a K-9 when Palkowitsch repeatedly kicked him. Because Officer Ficcadenti was the canine handler that released K-9 Falco, he had control of the situation. Tr., Vol. III, 659. Palkowitsch received specific training that once a police dog starts biting someone, an officer should not use any additional force. Tr., Vol. II, 296-298, 372; Tr., Vol. III, 607-608. The canine handler must instruct the other officers to assist if additional force is

required. Tr., Vol. III, 608, 659. But Officer Ficcadenti did not do that here, and Palkowitsch, despite his training, proceeded to use additional and excessive force.

Third, the court emphasized that Baker was an innocent member of the community. Sent. 46, 48. Although Palkowitsch argues that it was improper for the district court to rely upon this factor (Br. 39-40), this Court has considered a victim's innocence in reviewing the appropriateness of a sentence even when the defendant perceived the victim as a threat at the time he used force. See *Dautovic*, 763 F.3d at 934. Here, the other officers at the scene did not believe Baker to be a threat. See Tr., Vol. II, 473, 476-477; Tr., Vol. III, 556, 616-618, 663; Tr., Vol. IV, 1025. No weapon was found on Baker's person or at the scene. Tr., Vol. II, 411. And the charge against him for obstruction was dropped based on lack of evidence. DCD 125, at 4.

Fourth, the district court considered Palkowitsch's inaccurate and misleading statements in his police report that misrepresented his use of force—*e.g.*, that he failed to mention that K-9 Falco was biting Baker's leg and that Baker had been screaming in pain when Palkowitsch kicked Baker. Tr., Vol. VII, 1730-1731. As this Court has recognized, a defendant's "perjurious statements and his refusal to accept responsibility for his offenses \* \* \* are permissible factors for the court to consider when imposing a sentence." *United States v. Felicianosoto*, 934 F.3d 783, 788 (8th Cir. 2019), cert. denied, 140 S. Ct. 2644 (2020). The district court

also explained, relatedly, that Palkowitsch’s misconduct contributed to a distrust of police in the community. Sent. 47. Palkowitsch contends that, in relying on this factor, the court impermissibly punished him “for the broader societal concerns with policing that have dominated the headlines in recent years.” Br. 41. But the court made clear that its sentence was “appropriately tailored to the facts and the circumstances that are present here in this case.” Sent. 45. And, as the district court found, Palkowitsch’s behavior—boasting about his misconduct, misrepresenting his actions in his police report, and his willful criminal conduct resulting in retaliation against other officers hoping to rectify the situation—specifically contributed to a distrust of the police. See Sent. 45-48.

Finally, the court considered the retaliation officers experienced after reporting Palkowitsch’s use of excessive force upon a restrained, non-threatening, innocent victim. There is nothing wrong with that. See *United States v. Boone*, 110 F. Supp. 3d 909, 917 (S.D. Iowa 2015) (noting defendant’s conduct “damage[d] the reputation of [law enforcement] officers generally,” and “impugn[ed] the credibility and work of the hundreds of upstanding officers”), aff’d on other grounds, 828 F.3d 705 (8th Cir. 2016). And even if it is unclear whether Palkowitsch orchestrated retaliatory efforts, there is no question that officers faced retaliation for taking a stand against Palkowitsch’s criminal conduct. See Tr., Vol. III, 591-592, 635. As the court correctly explained, that retaliation

contributes to “the distrust that’s sown in [the] community \* \* \* which makes it harder for \* \* \* colleagues to protect and to serve the community that deserves to be protected and served.” Sent. 47.

In sum, Palkowitsch’s “disagree[ment] with the court’s assessment’ of his culpability is not ‘a basis for concluding that the sentence is unreasonable.’”

*Hewitt*, 999 F.3d at 1150 (brackets in original) (quoting *United States v. Brunken*, 581 F.3d 635, 638 (8th Cir. 2009), cert. denied, 562 U.S. 949 (2010)).

Palkowitsch’s case does not present a unique set of mitigating circumstances to warrant a sentence even further below the Guidelines.

2. Palkowitsch also asserts that his sentence creates an unwarranted sentence disparity among similarly situated defendants. But the district court expressly stated that it considered “the need 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). In so doing, the court stated that its sentencing decision was “appropriately tailored to the facts and the circumstances” presented in the case, including that he flagrantly betrayed his position of trust and responsibility to protect and serve the public. Sent. 45-47. And, as noted above, the court explained that Palkowitsch’s case presents numerous aggravating circumstances that warrant a greater sentence. See Sent. 45-47. There is no reason for this Court to reverse Palkowitsch’s sentence based on an alleged disparity.

The Sentencing Commission set the Guideline ranges precisely to avoid unwarranted sentencing disparities. *Gall*, 552 U.S. at 54. And this Court has explained “that a district court that correctly calculates and carefully reviews the Guidelines range necessarily gives significant weight and consideration to the need to avoid \* \* \* unwarranted disparit[ies].” *United States v. Bueno*, 549 F.3d 1176, 1181 (8th Cir. 2008) (citing *Gall*, 552 U.S. at 54). Indeed, as the Seventh Circuit has explained, “[t]he best way to curtail ‘unwarranted’ disparities is to follow the Guidelines, which are designed to treat similar offenses and offenders similarly.” *United States v. Bartlett*, 567 F.3d 901, 908 (7th Cir. 2009), cert. denied, 558 U.S. 1147 (2010).

Palkowitsch nevertheless argues that his sentence should be vacated because it is “harsher than any sentence imposed on a comparable defendant” and “sentences imposed on far more culpable defendants,” citing numerous cases. Br. 28-36. But comparing a “defendant’s sentence to those imposed in other singular cases” is “‘weak evidence’ to show a sentence disparity.” *United States v. Burrows*, 832 F. App’x 381, 385 (6th Cir. 2020) (quoting *United States v. Rossi*, 422 F. App’x 425, 435 (6th Cir.), cert. denied, 565 U.S. 1019 (2011)).<sup>3</sup> And even

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<sup>3</sup> Palkowitsch cites (Br. 28) *Dautovic*, 763 F.3d at 935, for the proposition that “unwarranted disparity necessitates resentencing.” But the Court in *Dautovic* did not suggest that any disparity requires sentencing, it focused solely on that particular case, finding that the “district court’s justification for the [downward]

(continued...)

if those cases were particularly relevant, it is not true that Palkowitsch’s sentence reflects an unwarranted disparity. There are numerous comparable cases in which a law enforcement officer convicted of a single non-fatal Section 242 excessive force violation received a similar or higher sentence. See *United States v. Dodge*, 814 F. App’x 820, 826 (5th Cir. 2020) (108 months)<sup>4</sup>; *United States v. Tweedy*, No. 3:04-cr-351 (E.D. Va. 2005) (108 months); *United States v. Rivera-Nazario*, No. 3:12-cr-738 (D.P.R. 2015) (96 months); *United States v. Fletcher*, No. 1:11-cr-748 (N.D. Ill. 2013) (75 months for two counts). Palkowitsch does not cite any of these cases.

Among other cases, Palkowitsch puts considerable weight on *United States v. Boone*, 110 F. Supp. 3d 909, which the United States cited below as an analogous case for purposes of sentencing (DCD 133, at 4, 11-12). In *Boone*, the

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(...continued)

variance fail[ed] to support the degree of the variance in this case.” 763 F.3d at 935. Thus, the Court held that the district court’s sentence was substantively unreasonable because it was *too low* and did not adequately consider the aggravating factors of that case, many of which are also present in this case. See *ibid.* In *Dautovic*, the defendant’s “offense conduct involved aggravating circumstances, including the use of a dangerous weapon, the physical restraint of [the victim] during the course of the beating, and the infliction of serious injury. Moreover, acting under the color of law, [the defendant] tried to conceal his wrongdoing by falsifying a police report and lying under oath.” *Ibid.*

<sup>4</sup> Although the officer was also convicted of obstruction, that offense had a minor effect on his Guidelines range and sentence. *United States v. Dodge*, No. 6:17-cr-323 (W.D. La. 2019).

defendant-officer responded to an arrest-in-progress in which a suspect was on the ground and non-compliant but was not actively resisting. 110 F. Supp. 3d at 911-912. The officer kicked the suspect with his boot, inflicting serious injuries, and later bragged about his use of force. *Id.* at 911-913. The officer also misrepresented the extent of his actions in his incident report. *Id.* at 911 n.1. The district court sentenced the defendant-officer to 63 months' imprisonment. *Id.* at 916. Palkowitsch asserts that his conduct was less severe than that of the officer in *Boone*, yet he was sentenced to nine more months' imprisonment. Br. 29-30. Even if that were a meaningful disparity, there are other aggravating circumstances in this case that make Palkowitsch's conduct more egregious than Boone's, including the life-threatening nature of Baker's injuries, the fact that Baker was being bitten by a K-9 and not fighting with officers when Palkowitsch kicked him, and that Palkowitsch had been trained precisely not to do what he did. Indeed, it is for that reason the United States initially proposed a sentence of 87 months' imprisonment, consistent with the Guidelines range, and offered *Boone* as a comparator case. See DCD 133, at 11-12. Moreover, the district court did not need to explicitly state the differences between Palkowitsch's case and the defendant-officer's case in *Boone*; it needed only to explain adequately the reason for its sentence. It did that here. *Hewitt*, 999 F.3d at 1149-1150.



Palkowitsch cherry picks other cases where an officer received a shorter sentence. Br. 30-36. But, as noted above, the mere fact that there are some Section 242 cases that resulted in shorter sentences does not mean that Palkowitsch's below-Guidelines sentence was substantively unreasonable. There are, of course, also cases where officers received greater sentences. At bottom, as recounted above, the district court considered the 3553(a) factors and discussed the reasons for its sentence at length. Its below-Guidelines sentence of 72 months' imprisonment was not substantively unreasonable.

### CONCLUSION

For the foregoing reasons, this Court should affirm Palkowitsch's sentence.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing 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 7636 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 was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font.

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

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Date: October 1, 2021

## CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2021, I 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 Eighth Circuit by using the appellate CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (ten copies) and to the following counsel of record (one copy) pursuant to Local Rule 28A(d):

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