
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIE MARSHAY GREER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

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Fed. R. Crim. P. 32(i)(3)(A)24

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-5701

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIE MARSHAY GREER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary because the calculation of Greer's base offense level is governed by this Court's decision in *United States v. Kimble*, 305 F.3d 480 (6th Cir. 2002), and the other issues Greer raises are insubstantial and adequately addressed in the briefs. The United States will appear for oral argument if this Court believes that argument will be helpful.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal matter under 18 U.S.C. 3231. The court entered final judgment against defendant Greer on May 2, 2016. (Judgment, R. 47, PageID# 385-390).¹ Greer filed a timely notice of appeal on May 16, 2016. (Notice of Appeal, R. 51, PageID# 399). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. Whether the district court correctly calculated Greer's base offense level for witness tampering in respect to a criminal civil rights investigation involving his alleged sexual assault of a female motorist by applying the Sentencing Guideline for criminal sexual abuse.

2. Whether Greer's sentence is procedurally and substantively reasonable when: (a) in sentencing Greer, the district court properly considered the relevant Section 3553(a) factors and adequately explained its reasoning; and (b) the district court sentenced Greer to ten months below the bottom of Greer's Guidelines range.

¹ Citations to "R. ____" refer to documents, by number, on the district court docket sheet. Citations to "PageID# ____" refer to the page numbers in the consecutively paginated electronic record. Citations to "Br. ____" refer to the page numbers in Greer's opening brief.

3. Whether this Court has jurisdiction to review the district court's refusal to grant Greer's request for a downward departure from the Guidelines range and, if so, whether the evidence supports the district court's refusal to grant the request.

STATEMENT OF THE CASE

1. Statement Of The Facts

The relevant facts were summarized and agreed to by defendant Willie Marshay Greer in the plea agreement as follows: Greer was employed as a deputy sheriff patrol officer with the Hamilton County Sheriff's Department. (Plea Agreement, R. 24, PageID# 61). In the early morning hours of January 5, 2014, Greer, while acting under color of law, conducted a traffic stop of M.T., a female motorist. (Plea Agreement, R. 24, PageID# 61). During the traffic stop, Greer, without being "sexually propositioned" by M.T., "had [her] perform oral sex on him." (Plea Agreement, R. 24, PageID# 62).

M.T. immediately reported to the Hamilton County Sheriff's Department that one of its officers had sexually assaulted her, leading the department to open a criminal sexual assault investigation. (Plea Agreement, R. 24, PageID# 62). On or about January 5, 2014, a sheriff's department detective interviewed Greer. (Plea Agreement, R. 24, PageID# 62). At the time of the interview, Greer knew that M.T. had reported a sexual assault, that he was being investigated for the assault,

and that the investigation could lead to state and federal charges against him. (Plea Agreement, R. 24, PageID# 62).

Greer initially told the investigating detective that he had only run M.T.'s license plate, that he had no personal interaction with her, and that he could not even identify her. (Plea Agreement, R. 24, PageID# 62). Later in the interview, Greer acknowledged interacting with M.T., but falsely stated that he had not turned on his emergency lights to detain her. (Plea Agreement, R. 24, PageID# 62).

Greer also falsely claimed that M.T. had approached him and sexually propositioned him, and that he had stopped the sexual encounter. (Plea Agreement, R. 24, PageID# 62). In fact, as he subsequently acknowledged in his plea agreement more than 19 months later, Greer had detained M.T. with his back directional lights and had her perform a sexual act. (Plea Agreement, R. 24, PageID# 62).

2. *Procedural History*

In October 2015, the United States filed an information charging Greer with violations of 18 U.S.C. 242 (deprivation of rights under color of law), 924(c)(1)(A) (use of a firearm during and in relation to a crime of violence), and 1512(b)(3) (witness tampering). (Superseding Information, R. 23, PageID# 56-57). The witness-tampering count alleged that Greer obstructed the investigation of M.T.'s allegation that a police officer had sexually assaulted her. Specifically, it alleged

that Greer “engaged in misleading conduct toward * * * , and knowingly attempted to corruptly persuade,” a law enforcement officer investigating the alleged sexual assault “with intent to hinder, delay and prevent the communication to a federal law enforcement officer and federal judge of truthful information relating to the commission or possible commission of a federal offense, namely” the Section 242 count. (Superseding Information, R. 23, PageID# 57; Plea Agreement, R. 24, PageID# 61-62). Concurrent with the information’s filing, Greer pleaded guilty to the Section 1512(b)(3) count in exchange for the United States dismissing the Sections 242 and 924(c)(1)(A) counts. (Plea Agreement, R. 24, PageID# 60-61; Rearraignment Tr., R. 52, PageID# 410, 412-413, 418-419).

In April 2016, the district court held a sentencing hearing and sentenced Greer to 60 months’ imprisonment, ten months below the bottom of Greer’s Guidelines range. (Sentencing Hr’g Tr., R. 53, PageID# 422, 464-465). The court adopted the Probation Office’s Presentence Investigation Report’s (PSR) calculation of Greer’s offense level. (Sentencing Hr’g Tr., R. 53, PageID# 433-434, 458). The PSR calculated a total offense level of 27 for the Section 1512(b)(3) count in the following manner:

- The Guideline for a violation of 18 U.S.C. 1512(b)(3) is located in U.S.S.G. § 2J1.2 (Obstruction of Justice) and provides a base offense level of 14, but through a cross reference directs courts to apply U.S.S.G. § 2X3.1 (Accessory After the Fact) “if the offense involved obstructing the investigation * * * of a criminal offense” and doing so would result in a greater offense level. U.S.S.G. § 2J1.2(c)(1).

- Section 2X3.1(a)(1) provides a base offense level of “6 levels lower than the offense level for the underlying offense.”
- The Guideline for the underlying offense – in this case, an alleged violation of 18 U.S.C. 242 – is located in U.S.S.G. § 2H1.1 (Offenses Involving Individual Rights) and establishes the base offense level to be “the offense level from the offense guideline applicable to any underlying offense.” U.S.S.G. § 2H1.1(a)(1).
- The Guideline for the underlying offense of the civil rights violation is located in U.S.S.G. § 2A3.1(a)(2) (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) and provides a base offense level of 30.
- Subtracting 6 from 30, as required by Section 2X3.1(a)(1), results in a base offense level of 24, which is greater than 14 (the base offense level for obstruction of justice).
- Section 2H1.1(b)(1) mandates adding 6 to the base offense level if the defendant was a public official at the time of the offense or the offense was committed under color of law. Adding 6 to Greer’s base offense level of 24 results in an adjusted offense level of 30.
- The Guideline for Acceptance of Responsibility, U.S.S.G. § 3E1.1, reduces Greer’s base offense level by two levels (from 30 to 28) and by one additional level (from 28 to 27) because he assisted authorities in the investigation or prosecution of his misconduct by timely notifying them of his intention to plead guilty.
- Greer’s total offense level is 27.

(Revised Presentence Report, R. 40, PageID# 146-147). Given this offense level and Greer’s criminal history category of I, his advisory Guidelines imprisonment range was 70 to 87 months. (Revised Presentence Report, R. 40, PageID# 151).

Greer objected to the PSR's calculation of the base offense level and moved for a downward departure or a non-Guidelines sentence (Objs. to Presentence Report, R. 37, PageID# 132-137; Downward Departure Mot., R. 36, PageID# 123-131). As relevant to this appeal, he argued: (1) that his base offense level for witness tampering should be calculated by applying the lower base offense level for obstruction of justice rather than the base offense level for criminal sexual abuse; and (2) that he is entitled to a downward departure from the Guidelines range because his behavior was aberrant or because the victim's misconduct provoked his offense.

After hearing from both sides, the district court concluded that applying the base offense level for criminal sexual abuse was required by the Guidelines and this Court's decision in *United States v. Kimble*, 305 F.3d 480 (6th Cir. 2002). (Sentencing Hr'g Tr., R. 53, PageID# 433). The court also found that Greer was not entitled to his requested downward departure because his abuse of his position as a police officer was not an exceptional case that the aberrant-behavior departure guideline contemplates. (Sentencing Hr'g Tr., R. 53, PageID# 455-458). Accordingly, the district court decided that it would impose a sentence within Greer's Guidelines sentencing range of 70 to 87 months unless it saw "some other reason to go outside of the guideline range." (Sentencing Hr'g Tr., R. 53, PageID# 433-434, 458).

At the outset of the sentencing discussion, Greer's counsel requested a sentence of 70 months' imprisonment, the low end of the Guidelines range. (Sentencing Hr'g Tr., R. 53, PageID# 459). The court discussed the factors that 18 U.S.C. 3553(a) requires courts to consider in imposing a sentence – in particular the need for deterrence and a sentence that reflects the seriousness of the offense – and the facts of the case. (Sentencing Hr'g Tr., R. 53, PageID# 461-464). The court determined, based upon the arguments of Greer's counsel and Greer's personal statement, that a sentence below the Guidelines range would satisfy these factors, and sentenced Greer to 60 months' imprisonment. (Sentencing Hr'g Tr., R. 53, PageID# 464-465). After announcing and explaining this sentence, the court asked both parties if they had any objections in addition to the objections they already raised, and both answered in the negative. (Sentencing Hr'g Tr., R. 53, PageID# 466).

After the sentencing hearing, Greer moved the court to reconsider his sentence, arguing that the Section 3553(a) factors of general deterrence and of the need to appreciate the seriousness of the crime warranted a sentence in the range of 10 to 16 months. (Mot. to Reconsider Sentence, R. 44, PageID# 373-379). The court denied this motion, concluding that Greer's argument regarding deterrence was best directed toward Congress or the Sentencing Commission, and that his argument that his offense was more analogous to bribery was inapropos because he

knowingly obstructed a sexual-assault investigation. (Order Denying Recons., R. 49, PageID# 395-397).

In May 2016, the district court entered final judgment. (Judgment, R. 47, PageID# 385-390). This timely appeal followed. (Notice of Appeal, R. 51, PageID# 399).

SUMMARY OF THE ARGUMENT

This Court should affirm Greer's sentence. The district court properly calculated his base offense level for witness tampering by applying the Guideline for criminal sexual abuse – the offense whose investigation he impeded – rather than the lower Guideline for obstruction of justice. This Court's decision in *United States v. Kimble*, 305 F.3d 480 (6th Cir. 2002), and the decisions of other federal courts of appeals, confirm the correctness of the district court's calculation. Greer's argument that the district court erred in applying this Guideline because the government did not prove that the underlying sexual assault occurred is without merit. Neither the Guidelines nor the case law requires proof that someone committed an underlying criminal offense to calculate properly a defendant's base offense level for obstructing the investigation of such offense.

Greer's sentence is procedurally reasonable. After determining his Guidelines range, the district court properly considered the relevant factors set forth in 18 U.S.C. 3553(a) and adequately explained its reasoning in imposing a

sentence of 60 months' imprisonment. The district court did not, as Greer contends, improperly rely on unproven facts in imposing this sentence. But even if the court had relied on such facts, the court would not have erred in doing so. The facts were clearly set forth in the PSR, and Greer did not object to them either in his Objections to the Presentence Report or at sentencing.

Greer's 60-month sentence is substantively reasonable. Because this sentence is ten months lower than the bottom of his Guidelines range, it is presumptively reasonable. Greer fails to carry his "heavy burden" of rebutting this presumption. He contends that the district court unreasonably weighed the factor of general deterrence of other police officers at the cost of other relevant factors in imposing its sentence, but he does not point to anything in the record indicating that the court gave deterrence undue weight. Indeed, the record indicates that the court departed below the Guidelines after considering the factors Greer claims it neglected. His argument that the court should have weighed the factors differently and given him an even larger downward variance from his Guidelines range is an argument that is beyond this Court's scope of review for reasonableness.

Finally, this Court lacks jurisdiction to review the district court's discretionary refusal to grant Greer a downward departure from the Guidelines based on his alleged aberrant behavior or the victim's conduct. The district court understood its discretion to depart and decided not to do so. This decision was

proper in any event. The court correctly found that Greer's abuse of his position as a police officer did not constitute an exceptional case that the departure based on aberrant behavior contemplates. Greer also fails to explain how the victim's conduct contributed significantly to provoking his subsequent obstruction of the investigation of her sexual-assault allegation.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY CALCULATED GREER'S BASE OFFENSE LEVEL

A. Standard Of Review

This Court reviews de novo a district court's legal conclusions and the application of the Guidelines to a set of undisputed facts. *United States v. Kimble*, 305 F.3d 480, 485 (6th Cir. 2002).

B. The District Court Correctly Applied The Guideline For Criminal Sexual Abuse To Calculate Greer's Base Offense Level For Witness Tampering In Respect To A Criminal Civil Rights Investigation Involving Greer's Alleged Sexual Assault Of A Female Motorist

The district court properly calculated Greer's base offense level. Section 2J1.2 of the Guidelines, entitled "Obstruction of Justice," provides a base offense level of 14 for Greer's crime of conviction, 18 U.S.C. 1512 (witness tampering), but directs district courts to apply Section 2X3.1 (Accessory After the Fact) "[i]f the offense involved obstructing the investigation or prosecution of a criminal

offense” and doing so would result in a greater offense level. U.S.S.G. § 2J1.2(a), (c)(1). Section 2X3.1, in turn, directs courts to apply a base offense level six levels lower than the offense level for the underlying offense. U.S.S.G. § 2X3.1(a)(1). The underlying offense whose investigation Greer pleaded guilty to obstructing is 18 U.S.C. 242 (deprivation of rights under color of law). Section 242’s offense level is set forth in Section 2H1.1 of the Guidelines (Offenses Involving Individual Rights), which defines the base offense level as “the offense level from the offense guideline applicable to any underlying offense.” U.S.S.G. § 2H1.1(a)(1). Because the conduct underlying the civil rights violation being investigated was sexual assault, the applicable offense guideline is Section 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). Applying the base offense level of 30 set forth in Section 2A3.1(a)(2) with Section 2X3.1(a)(1)’s commandment to reduce the base offense level by six levels results in a base offense level of 24 for Greer’s offense.

This Court’s decision in *United States v. Kimble*, 305 F.3d 480 (6th Cir. 2002), confirms the applicability of the Section 2X3.1 cross reference in this case, even though the government dropped the underlying Section 242 charge in exchange for Greer’s guilty plea on the obstruction charge. In *Kimble*, the defendant pleaded guilty to criminal contempt for refusing to testify at the trial of two defendants charged with drug crimes. *Id.* at 482-483. His plea agreement

stated that the applicable Guideline was Section 2J1.2, and the district court cross-referenced Section 2X3.1 to determine his base offense level. *Id.* at 483-484. As here, the defendant appealed his sentence and argued that it should have been calculated solely by reference to Section 2J1.2. *Id.* at 485.

This Court rejected this argument. The Court first held that a district court sentencing a defendant under Section 2J1.2 “is required to calculate the base offense level for the offense of conviction under *both* the ‘Obstruction of Justice’ guideline, U.S.S.G. § 2J1.2, *and* the ‘Accessory After the Fact’ guideline, § 2X3.1, and apply the greater of the two sentences.” *Kimble*, 305 F.3d at 485. (citations omitted). This Court further held that the government need not “prove facts sufficient to establish a defendant’s guilt as an ‘Accessory After the Fact’ in order to impose a sentence under § 2X3.1; the section merely serves as a tool to calculate the base offense level ‘for particularly serious obstruction offenses.’” *Ibid.* (relying on *United States v. Russell*, 234 F.3d 404, 410 (8th Cir. 2000), and *United States v. Brenson*, 104 F.3d 1267, 1285 (11th Cir. 1997)). “In fact, *proof of the underlying offense is immaterial*,” this Court concluded, “since the point of the cross-reference is to ‘punish more severely . . . obstructions of . . . prosecutions with respect to more serious crimes.’” *Ibid.* (emphasis added) (quoting *United States v. Arias*, 253 F.3d 453, 459 (9th Cir. 2001)).

Contrary to Greer's contention (Br. 20), the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), does not "seriously undermine" *Kimble*'s holding that the application of the Section 2X3.1 cross-reference is mandatory when a district court sentences a defendant convicted of witness tampering in a criminal investigation. *Booker* held that the Guidelines are "effectively advisory," and require a sentencing court to consider a calculated Guidelines range, but allow the court to "tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245. *Booker* had no effect on *how* a sentencing court calculates the Guidelines range that the Supreme Court deemed advisory. Thus, Section 2J1.2's plain language, as confirmed by *Kimble*, requires a district court to apply the Section 2X3.1 cross-reference when calculating the Guidelines range of a defendant who has obstructed the investigation or prosecution of a criminal offense.

Greer also argues (Br. 20-21) that *Kimble* does not control because in that case there was no dispute that an underlying offense actually was committed. This argument is without merit. In holding that proof of the defendant's guilt as an accessory after the fact or of the underlying offense is irrelevant to Section 2X3.1's application, *Kimble*, 305 F.3d at 485, this Court relied on cases from other circuits expressly rejecting Greer's argument (Br. 21-22) that the government must prove

by a preponderance of the evidence that the underlying offense was committed.

See *Kimble*, 305 F.3d at 485-486.

In *Arias*, for example, the Ninth Circuit considered “whether the underlying offense whose prosecution is obstructed must be proved by a preponderance of the evidence (or any other measure) before applying § 2J1.2(c)(1).” 253 F.3d at 459. The court concluded that it did not. It explained that “[n]o court of which we are aware would permit inquiry into the sufficiency of the evidence on the underlying offense whose prosecution was obstructed.” *Ibid.* Section 2X3.1’s application “is intended not to treat the defendant as having committed the underlying offense, but to weigh the severity of one’s actions in obstructing justice based on the severity of the underlying offense that was the subject of the judicial proceeding sought to be obstructed, impeded or influenced.” *Ibid.* (citation and internal quotation marks omitted). Consequently, Section 2J1.2(c)(1) “requires cross referencing without regard to whether the underlying offense whose prosecution was obstructed was or is provable.” *Id.* at 461.

Similarly, in *Brenson*, the Eleventh Circuit reaffirmed its earlier holding in *United States v. McQueen*, 86 F.3d 180, 182 (11th Cir. 1996), that “[t]he language of the cross-referencing provision [§ 2J1.2] is mandatory when the offense involves ‘obstructing the investigation or prosecution of a criminal offense’ without any qualification and without regard to whether defendant or anybody else

was convicted of the underlying offense, *or whether an offense could be shown to have been committed at all.*” 104 F.3d at 1285 (emphasis added); accord *Russell*, 234 F.3d at 410.

Greer’s argument (Br. 17-18) that Section 2J1.2(c)(1)’s commentary requires proof that an underlying offense was committed is also incorrect. The commentary explains that

[b]ecause the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to § 2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

U.S.S.G. § 2J1.2, comment. (backg’d.). This commentary’s history indicates, however, that the purpose of this explanation is not to require proof that an offense was “committed,” but rather to make clear that the cross-reference is applicable regardless of whether the underlying offense is attributable to the defendant or to another individual. See *McQueen*, 86 F.3d at 183. Indeed, if the government were required to prove that the underlying offense occurred, as Greer contends, a defendant who obstructed the investigation or prosecution of the offense “would be able to benefit from [obstruction] that successfully persuaded a grand jury not to indict or a petit jury not to convict.” *United States v. Dickerson*, 114 F.3d 464, 468 (4th Cir. 1997) (applying same logic in holding that Section 2X3.1 does not require

underlying offense involved in perjury to be offense of conviction); accord *Arias*, 253 F.3d at 461. This cannot be the law.

Greer's arguments (Br. 18-19) based on Section 2X3.1's commentary and this Court's decision in *United States v. Shabazz*, 263 F.3d 603 (6th Cir. 2001) also lack merit. Greer observes that such commentary defines "underlying offense" as "the offense as to which the defendant is convicted of being an accessory." U.S.S.G. § 2X3.1 comment. (n.1).² But as this Court held in *Kimble*, "[i]t is not necessary for the government to prove facts sufficient to establish a defendant's guilt as an 'Accessory After the Fact' in order to impose a sentence under § 2X3.1; the section merely serves as a tool to calculate the base offense level for particularly serious obstruction offenses." 305 F.3d at 485 (citations and internal quotation marks omitted). Greer's guilty plea to obstructing the investigation of a civil rights violation based upon a sexual assault was thus sufficient to trigger Section 2X3.1's application in this case.

Shabazz does not help Greer's argument, because the issue there was whether a defendant being sentenced for obstruction of justice in connection with another person's prosecution should have his offense level calculated based on the principal's underlying *total* offense level or his underlying *base* offense level; the

² Greer also quotes (Br. 19) two additional definitions of "underlying offense" found in Application Note 1 that are inapplicable because they are limited to criminal law violations not at issue here.

issue was *not* whether the government should have to prove that the underlying offense had been committed. See 263 F.3d at 608. The defendant in *Shabazz* pleaded guilty to obstructing the prosecution of another individual, Paul Corrado, who was charged with multiple counts of conspiracy and Racketeer Influenced and Corrupt Organizations Act violations. See *id.* at 604-605. The plea agreement was limited to obstruction of only the counts on which Corrado was convicted. See *id.* at 610 n.3. The defendant challenged the calculation of his base offense level for obstruction of justice, contending that the district court should have made findings “regarding his knowledge of aggravating sentencing factors of the underlying offense,” rather than on “the total offense level of the underlying offense obstructed.” *Id.* at 604. This Court agreed, explaining that Section 2X3.1’s commentary’s reference to the application notes in Section 1B1.3 (Relevant Conduct) requires adjustments to the base offense level of the underlying offense to account for what the defendant “knew or reasonably should have known” of specific offense characteristics of that offense, *id.* at 608, “so long as the prosecutor lays a sufficient factual predicate for doing so,” *id.* at 611.

Because *Shabazz* stands for the proposition that the touchstone for determining the defendant’s base offense level under Section 2X3.1 is his *knowledge* of the offense that he was covering up – not proof that the underlying offense was committed – it hurts rather than helps Greer’s challenge to his base

offense level. Indeed, unlike in *Shabazz*, 263 F.3d at 609, Greer’s plea agreement makes clear that Greer had knowledge of the circumstances of the sexual assault of which he was accused when he obstructed its investigation. See Plea Agreement, R. 24, PageID# 62 (“The defendant knew that M.T. had reported an assault, which he understood was a sexual assault. The defendant knew he was being investigated for sexually assaulting M.T., and the defendant knew that this investigation could lead to state and federal charges.”). Accordingly, the district court properly calculated Greer’s base offense level for obstruction of justice based on the Section 2X3.1 cross-reference and the underlying offense whose investigation he obstructed.

II

GREER’S SENTENCE IS PROCEDURALLY AND SUBSTANTIVELY REASONABLE

A. Standard Of Review

Criminal sentences must be procedurally and substantively reasonable, and this Court reviews timely challenges to reasonableness for an abuse of discretion. See *United States v. Brooks*, 628 F.3d 791, 795 (6th Cir. 2011).

This Court’s reasonableness review begins with a determination of whether the district court committed “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the section 3553(a) factors, selecting a sentence

based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *Brooks*, 628 F.3d at 795-796. If a defendant has a “meaningful opportunity” to raise an objection based on procedural unreasonableness immediately after the district court renders its sentence, and does not, this Court will review challenges raised for the first time on appeal for plain error. See *United States v. Vonner*, 516 F.3d 382, 385-386 (6th Cir.) (en banc) (quoting *United States v. Bostic*, 371 F.3d 865, 873 n.6 (6th Cir. 2004)), cert. denied, 555 U.S. 816 (2008).

If this Court concludes that the sentence is procedurally reasonable, it then must determine whether the sentence is substantively reasonable under an abuse-of-discretion standard. See *United States v. Bolds*, 511 F.3d 568, 581 (6th Cir. 2007). “Because ‘[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a),’ this [c]ourt applies a great deal of deference to a district court’s determination that a particular sentence is appropriate.” *United States v. Mayberry*, 540 F.3d 506, 519 (6th Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). To that end, this Court applies a rebuttable presumption of reasonableness to sentences that fall within a properly calculated Guidelines range. See *Vonner*, 516 F.3d at 389. Where, as here, the district court imposes a sentence below the Guidelines range, “simple logic compels the conclusion that * * * [the] defendant’s task of persuading [this Court] that the

more lenient sentence * * * is unreasonably long is even more demanding.”

United States v. Curry, 536 F.3d 571, 573 (6th Cir.), cert. denied, 555 U.S. 1059

(2008); see also *United States v. Greco*, 734 F.3d 441, 450 (6th Cir. 2013)

(defendants who bring substantive-reasonableness challenge to below-Guidelines sentence “bear a heavy burden”).

B. In Sentencing Greer, The District Court Properly Considered The Relevant Section 3553(A) Factors And Adequately Explained Its Reasoning

Section 3553(a) of Title 18 lists several factors that a district court should consider in imposing a sentence, including “the nature and circumstances of the offense and the history and characteristics of the defendant,” “the need for the sentence * * * to afford adequate deterrence to criminal conduct,” and “the need for the sentence * * * to reflect the seriousness of the offense.” 18 U.S.C.

3553(a). “The court need not explicitly consider each of the § 3553(a) factors; a sentence is procedurally reasonable if the record demonstrates that the sentencing court addressed the relevant factors in reaching its conclusion.” *United States v. Dexta*, 470 F.3d 612, 614-615 (6th Cir. 2006), cert. denied, 551 U.S. 1171 (2007).

Moreover, in discussing the relevant factors, a district court is not required to “engage[e] in a rote listing or some other ritualistic incantation.” *Id.* at 615. The touchstone of reasonableness is whether “the district court explains its reasoning to a sufficient degree to allow for meaningful appellate review.” *United States v.*

Trejo-Martinez, 481 F.3d 409, 412-413 (6th Cir. 2007).

The record indicates that in sentencing Greer, the district court properly considered the relevant Section 3553(a) factors and adequately explained its reasoning. Of these factors, the court found most important (1) the need for a sentence that adequately deters criminal conduct, and (2) the need for a sentence that reflects the seriousness of the offense. (Sentencing Hr'g Tr., R. 53, PageID# 462-464). Although the court found that Greer's offense was sufficiently serious to preclude a sentence of rehabilitation, it also discounted the need for specific deterrence because he would not find employment with a police department in the future. (Sentencing Hr'g Tr., R. 53, PageID# 464). The district court then noted the arguments of Greer's counsel and Greer's personal statement (Sentencing Hr'g Tr., R. 53, PageID# 464) – which covered the nature and circumstances of Greer's offense, his personal history and characteristics, and the need to protect the public from his future crimes (Sentencing Hr'g Tr., R. 53, PageID# 435-441, 443-450, 459-461) – and determined that a below-Guidelines sentence of 60 months' imprisonment would satisfy the Section 3553 factors. The court's discussion is more than sufficient for meaningful appellate review, as it demonstrates that the district court considered Greer's arguments and had a sound basis for selecting his sentence.

Greer does not challenge the district court's consideration of the Section 3553(a) factors or the adequacy of its sentencing explanation. Rather, he argues

(Br. 23-27) that the district court procedurally erred in sentencing him in reliance upon facts that were not proven by a preponderance of the evidence – *i.e.*, that M.T. was under the influence of alcohol at the time of the traffic stop, and that Greer knew that M.T. had an outstanding warrant for her arrest but let her go after their sexual encounter. Greer did not make this complaint when the district court asked the parties whether they had any additional objections to the sentence it just imposed (Sentencing Hr’g Tr., R. 53, PageID# 466), as required by the procedural rule this Court set forth in *Bostic*. Accordingly, this Court reviews this issue for plain error, which requires Greer “to show (1) error (2) that was obvious or clear, (3) that affected [his] substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings.” *Vonner*, 516 F.3d at 386 (citation and internal quotation marks omitted).

Greer cannot show error, much less plain error. First, Greer’s argument that the district court relied upon the unproven facts of M.T.’s intoxication and outstanding warrant misrepresents the record. When read in context, it is clear that the district court discussed police officers’ temptation to engage in bribery and extortion when they encounter women who are intoxicated or who have outstanding warrants for their arrest to refute Greer’s assertion that his conduct would not have been criminal if his sexual encounter with M.T. was consensual. (Sentencing Hr’g Tr., R. 53, PageID# 446-450, 457, 463; Order Denying Recons.,

R. 49, PageID# 396). But in sentencing Greer the court was clear that Greer's offense was "lying in an official investigation," and it relied upon several Section 3553(a) factors – not M.T.'s alleged intoxication or outstanding warrant – in imposing a below-Guidelines sentence. (Sentencing Hr'g Tr., R. 53, PageID# 464).

Even if the district court had relied on the facts with which Greer takes issue, the court would not have erred because such facts were set forth in Greer's PSR. A sentencing court "may accept any undisputed portion of the presentence report as a finding of fact," Federal Rule of Criminal Procedure 32(i)(3)(A), and need not "make independent findings outside the PSR when the facts are undisputed," *United States v. Treadway*, 328 F.3d 878, 886 (6th Cir. 2003). The PSR established that (1) M.T. was aware that she had been drinking when Greer pulled her over; (2) M.T. may have had an outstanding failure-to-appear warrant; (3) Greer told M.T. that she was going to jail after running her record and indicated that she would owe him if he let her go; and (4) Greer let her go after their sexual encounter. (Revised Presentence Report, R. 40, PageID# 144-145). Greer did not dispute these findings in his Objections to the Presentence Report (Objs. to Presentence Report, R. 37, PageID# 132-137), and he reiterated at sentencing that the PSR "correctly state[d] the facts" (Sentencing Hr'g Tr., R. 53, PageID# 434). The closest thing to an objection in the record that Greer cites is an equivocal

statement by his trial counsel at sentencing that “it is not clear that Mr. Greer knew that [M.T.] had a warrant at the time.” Br. 25 (quoting Sentencing Hr’g Tr., R. 53, PageID# 454). Under these circumstances, the district court would not have erred in relying on such facts. See *United States v. Lang*, 333 F.3d 678, 682 (6th Cir. 2003) (attorney’s unsupported letter contesting material fact in PSR did not create dispute requiring district court to take additional evidence).

C. Greer’s Below-Guidelines Sentence Is Substantively Reasonable

In reviewing a sentence for substantive reasonableness, this Court must “take into account the totality of the circumstances[.]” *Gall*, 552 U.S. at 51. The “essence” of this inquiry is “whether the length of the sentence is ‘greater than necessary’ to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a).” *United States v. Tristan-Madrigal*, 601 F.3d 629, 632-633 (6th Cir. 2010). “The sentence may be substantively unreasonable if the district court chooses the sentence arbitrarily, grounds the sentence on impermissible factors, or unreasonably weighs a pertinent factor.” *Brooks*, 628 F.3d at 796.

In this case, after calculating the appropriate Guidelines range, the district court properly considered and weighed the Section 3553(a) factors in imposing Greer’s sentence. As noted above, see p. 22, *supra*, the court found particularly important (1) the need for a sentence that adequately deters criminal conduct, and (2) the need for a sentence that reflects the seriousness of the offense. Despite

these concerns, the court also considered factors that cut in Greer's favor, including the nature and circumstances of his offense, his personal history and characteristics, and the need to protect the public from his future crimes. Based upon the totality of the circumstances, the court determined that a sentence of 60 months' imprisonment – ten months *below* both the bottom of Greer's Guidelines range and the sentence Greer's counsel requested at the outset of the court's Section 3553 analysis – was sufficient to satisfy the Section 3553 factors. (Sentencing Hr'g Tr., R. 53, PageID# 464-465). This below-Guidelines sentence is presumptively reasonable. See, *e.g.*, *Curry*, 536 F.3d at 573; *Vonner*, 516 F.3d at 389.

Greer bears a "heavy burden," *Greco*, 734 F.3d at 450, to overcome this presumption. He argues (Br. 27-28) that the district court unreasonably weighed his position as a police officer and the factor of general deterrence of other police officers at the cost of other Section 3553(a) factors, such as his individual background and the specifics of his offense. While the district court indisputably attached great weight to the need for a sentence to provide adequate deterrence to similar criminal conduct, merely emphasizing a single factor does not constitute reversible error. See *United States v. Zobel*, 696 F.3d 558, 571 (6th Cir. 2012), cert. denied, 134 S. Ct. 157 (2013). Where, as here, the district court "explicitly or implicitly considers and weighs all pertinent factors," Greer must make the

difficult showing that “the court has given an *unreasonable* amount of weight to any particular one.” *Ibid.* (emphasis added) (internal quotation marks omitted).

Greer falls far short in his proof. He marshals (Br. 28-30) a list of academic articles that purport to show that the certainty of punishment is the true deterrent, and contends (Br. 30-31) that a long sentence is unnecessary for general deterrence because the secondary consequences of arrest, prosecution, and conviction will deter any police officer tempted to lie in an official investigation. This argument erroneously suggests that a lengthy sentence is *always* evidence that a district court gave undue weight to the need for deterrence, regardless of that court’s actual Section 3553(a) analysis. It compounds this mistake by asserting that a sentencing court may minimize the need for general deterrence in favor of consideration of a conviction’s collateral consequences on a “generally law-abiding person” (Br. 31), contrary to Congress’s intent in enacting Section 3553(a) and well-settled precedents of this Court. See, *e.g.*, *United States v. Musgrave*, 761 F.3d 602, 608-609 (6th Cir. 2014) (overturning sentence in white-collar crime case where district court failed to address how a one-day sentence would afford adequate general deterrence and impermissibly relied upon the toll four years of legal proceedings, legal fees, likely loss of CPA license, and lifelong felony convictions took on defendant).

Greer has not shown that the district court gave undue weight to deterrence compared to the other relevant Section 3553(a) factors. Indeed, the record indicates the opposite: The court took note of the Section 3553(a) factors that Greer alleges received too little consideration, and relied upon these factors in determining that a below-Guidelines sentence was sufficient to satisfy Section 3553(a). At its base, therefore, Greer's contention is that the district court should have weighed the Section 3553(a) factors differently and given him an even larger downward variance from his Guidelines range. This argument is "simply beyond the scope of [this Court's] appellate review, which looks to whether the sentence is reasonable, as opposed to whether in the first instance [this Court] would have imposed the same sentence." *United States v. Sexton*, 512 F.3d 326, 332 (6th Cir. 2008) (quoting *United States v. Ely*, 468 F.3d 399, 404 (6th Cir. 2006)).

III

THE DISTRICT COURT'S REFUSAL TO GRANT GREER'S REQUEST FOR A DOWNWARD DEPARTURE FROM THE GUIDELINES RANGE IS NOT REVIEWABLE, AND IS PROPER IN ANY EVENT

A. *Standard Of Review: The District Court's Refusal To Grant The Downward Departure Is Not Reviewable*

This Court lacks "jurisdiction to review a decision of a district court 'not to depart downward unless the record shows that the district court was unaware of, or did not understand, its discretion to make such a departure.'" *United States v. Bazazpour*, 690 F.3d 796, 804 (6th Cir. 2012) (quoting *United States v. Santillana*,

540 F.3d 428, 431 (6th Cir. 2008)). In ruling on a request for a downward departure, a district court need not “explicitly state that it is aware of its discretion to make such a departure.” *Santillana*, 540 F.3d at 431. Instead, this Court “presume[s] that the district court understood its discretion, absent clear evidence to the contrary.” *Ibid.* This Court “review[s] de novo whether the district court was aware of its authority to make a downward departure, examining the transcript of the sentencing hearing to make this determination.” *United States v. Ridge*, 329 F.3d 535, 544 (6th Cir. 2003).

In this case, the sentencing hearing transcript indicates that the district court was aware of its authority to depart downward from the Guidelines and simply exercised its discretion not to do so. The district court engaged in an extended colloquy with both parties on Greer’s motion for a downward departure based on his alleged aberrant behavior or the victim’s conduct. (Sentencing Hr’g Tr., R. 53, PageID# 435-455). The court then determined that because the aberrant-behavior departure Guideline applies only to the “exceptional case,” it should not apply to Greer’s misconduct, which the court described as abuse of his position as a police officer in a typical officer-citizen encounter to receive a personal benefit. (Sentencing Hr’g Tr., R. 53, PageID# 455-456). And because Greer “d[id] not do any of the things we expect a police officer to do” when he pulled the victim over and when he responded to an investigation of her allegations of sexual assault, the

court also found that the victim's conduct did not warrant a downward departure. (Sentencing Hr'g Tr., R. 53, PageID# 457-458). Under these circumstances, there is no clear evidence in the record – and Greer does not argue otherwise in his opening brief – showing that the district court's decision is reviewable. See *Santillana*, 540 F.3d at 431.

B. Even If Reviewable, The District Court's Denial Of A Departure Based On Greer's Alleged Aberrant Conduct Or The Victim's Conduct Was Proper

Greer's argument for a downward departure based on his alleged aberrant conduct or the victim's conduct would fail even if this Court had jurisdiction to review it. Section 5K2.20 of the Guidelines allows a district court to depart downward to account for a defendant's aberrant behavior in an "exceptional case," U.S.S.G. § 5K2.20(a), if: "the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20(b). Thus, in order to grant a departure under Section 5K2.20, a court must find both that a defendant's case is "exceptional" *and* that his misconduct was aberrant as defined by the

Guideline. See, e.g., *United States v. LaVallee*, 439 F.3d 670, 708-709 (10th Cir. 2006) (interpreting earlier, similarly worded version of Section 5K2.20).³

Greer argues (Br. 32-33) that in rejecting his departure request, the district court mistakenly focused on the everyday situations police officers face and the expectation that they not abuse their authority, rather than his personal history and the specific circumstances of his misconduct, as required to determine whether a his behavior was aberrant under Section 5K2.20. But the court discussed Greer's abuse of his position as a police officer in the context of answering the threshold question whether his case was an exceptional one warranting the possibility of a downward departure. (Sentencing Hr'g Tr., R. 53, PageID# 455-456). Greer does not challenge the court's finding on appeal that his case was not "exceptional." Accordingly, he was not eligible for a downward departure, and the court had no need to consider whether Greer's behavior was aberrant.

Equally unpersuasive is Greer's contention (Br. 33-34) that the district court erred in not taking into account the victim's conduct in conjunction with Greer's aberrant behavior in denying his request for a downward departure. Section

³ In determining whether a case is "exceptional," a sentencing court "may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." U.S.S.G. § 5K2.20 comment. (n.3); see *United States v. May*, 359 F.3d 683, 692-693 (4th Cir. 2004) (applying factors in concluding that the defendant's case was "demonstrably unexceptional").

5K2.10 allows a district court to depart downward “[i]f the victim’s wrongful conduct contributed significantly to provoking the offense behavior” and notes that “this provision usually would not be relevant in the context of non-violent offenses.” U.S.S.G. § 5K2.10. Even assuming, *arguendo*, that the sexual encounter between Greer and the victim was consensual, and that the victim lied to police investigators in filing a sexual-assault complaint, Greer fails to explain how her conduct “contributed significantly to provoking” his obstruction of the subsequent investigation of her allegations. Accordingly, the district court did not err in concluding that the victim’s conduct did not warrant a downward departure.

CONCLUSION

This Court should affirm Greer’s sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 7,198 words.

2. This brief 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

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Date: February 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGEID# RANGE
23	Superseding Information	56-57
24	Plea Agreement	60-68
36	Downward Departure Mot.	123-131
37	Objs. to Presentence Report	132-137
40	Revised Presentence Report	140-153
41	U.S. Resp. to Downward Departure Mot. and Objs. to Presentence Report	154-161
44	Mot. to Reconsider Sentence	373-379
47	Judgment	385-390
49	Order Denying Recons.	395-397
51	Notice of Appeal	399
52	Rearraignment Tr.	400-421
53	Sentencing Hr'g Tr.	422-467