No. 06-30071

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARK HADDOCK,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

SENTENCING GUIDELINES:

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment by the district court in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291. Defendant-Appellant Mark Haddock was sentenced on January 19, 2006, and final judgment was entered the same day. ER 48.[1] The notice of appeal was filed on January 25, 2006, and is timely under Rule 4(a) of the Federal Rules of Appellate Procedure.

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[1] This brief uses the following abbreviations: "SER __" for the page number of the Appellee United States' Supplemental Excerpts of Record; "ER __" for the page number of Appellant's Excerpts of Record; and "Br. __" for the page number of Appellant's opening brief.

STATEMENT OF THE ISSUES

1. Whether Haddock's appeal should be dismissed based on the knowing and voluntary waiver of appellate rights in his plea agreement.

2. If Haddock's appeal is not dismissed because he waived his right to appeal, whether this Court has jurisdiction to review the district court's refusal to grant Haddock's request for a downward departure based on alleged aberrant behavior, and, if so, whether the evidence supports the district court's refusal to grant the departure.

3. If Haddock's appeal is not dismissed because he waived his right to appeal, whether the district court erred in applying a two-level restraint-of-victim enhancement for purposes of calculating Haddock's sentencing guideline range.

STATEMENT OF THE CASE

1. A federal grand jury indicted Haddock on April 12, 2005. A superseding indictment was returned on May 10, 2005, alleging one violation of 18 U.S.C. 242 (deprivation of rights under color of law) (Count I) and four violations of 18 U.S.C. 1001 (false statements) (Counts II - V). In summary, the superseding indictment charged Haddock, a detention officer, with assaulting an intoxicated female prisoner named Vilena Currie, and making material false statements to federal investigators regarding both this incident and a prior incident involving the use of excessive force against a prisoner named Oren Washakie. ER 6-9.

2. Haddock entered into a plea agreement with the government. On August 16, 2005, Haddock pled guilty to Count I of the superseding indictment (deprivation of rights under color of law in violation of 18 U.S.C. 242) in exchange for dismissal of the remaining false-statement charges contained in Counts II through V. ER 4; SER 3.

By its terms, the agreement puts Haddock on notice that (1) the violation of 18 U.S.C. 242 to which he pled guilty is punishable by up to ten years' imprisonment, SER 5; (2) the district court "has the final authority to decide what the sentence will be," and may "impose a sentence other than the sentence recommended, including the maximum sentence possible for the crimes to which defendant has pled," SER 6; (3) there is no agreement between the parties regarding whether there will be a two-level enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1 or a separate two-level restraint-of-victim enhancement pursuant to Sentencing Guidelines § 3A1.3, with each side reserving its right to argue these points, SER 7; and (4) each side reserves its right "to recommend whatever sentence it feels is appropriate based on the law and facts of the case," SER 7.

The plea agreement also contains an explicit waiver of Haddock's right to challenge his conviction or sentence, except in certain limited circumstances. Specifically, the agreement informs Haddock of his right to appeal his sentence under 18 U.S.C. 3742, but then states as follows:

> Acknowledging this, in exchange for the other terms of this Agreement, the defendant knowingly and voluntarily gives up (waives) all appeal rights defendant may have regarding both defendant's conviction and sentence, including any restitution or forfeiture order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute.

SER 7. Through the agreement, Haddock also acknowledges his right to collaterally challenge his sentence pursuant to 28 U.S.C. 2255, but states that, "in exchange for the other terms of this Agreement," he "knowingly and voluntarily gives up (waives)" this right "except as to an appeal claiming ineffective assistance of counsel based upon facts discovered after the entry of [his] guilty pleas." SER 7-8.[2]

3. During the course of Haddock's change-of-plea hearing, the district court highlighted Haddock's waiver of these rights. See SER 12 ("And you waive almost all of your rights of appeal except you will have a right, the right to continue, claiming you are not satisfied with your trial counsel."). When asked by the district court to outline the terms of the agreement, the government also expressly described the waivers. See SER 13-14 ("[T]here are two parts of the plea agreement that deal with the right to appeal. The defendant waives all of his rights to appeal with two exceptions: One is the right to appeal any sentence that exceeds the statutory maximum. And one is to present a post-conviction claim based on

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[2] As used in this sentence, the term "appeal" is a misnomer, as any challenge brought pursuant to Section 2255 must first be brought before the district court.

ineffective assistance of counsel for facts learned after the time of the guilty plea.").[3]

4. Haddock was sentenced on January 19, 2006, and the district court imposed judgment the same day. ER 48. As relevant to this appeal, the contested issues at sentencing were (1) whether the government was entitled to a two-level restraint-of-victim enhancement under Sentencing Guidelines § 3A1.3; and (2) whether Haddock was entitled to a downward departure for aberrant behavior under Sentencing Guidelines § 5K2.20.[4] The government presented evidence during the sentencing hearing with respect to both issues.

The district court held that the government was entitled to the two-level restraint-of-victim enhancement, noting that, "[a]t the time that the incident erupts, there is at least one handcuff still in place, and the testimony would indicate that [] Haddock still had control of that handcuff at the time he punched [Currie] in the face." SER 29. The court thus found that Currie had "one hand restrained," and

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[3] As previously noted, *supra* note 2, Haddock's right "to present a post-conviction claim based on ineffective assistance of counsel for facts learned after the time of the guilty plea" is not, strictly speaking, a "right[] to appeal." SER 13-14.

[4] Additional contested issues at sentencing included (1) whether the government was entitled to an additional two-level enhancement for obstruction of justice; and (2) whether Haddock was entitled to an additional one-level reduction (on top of the two-level reduction the government did not contest) for acceptance of responsibility. The district court answered both questions in the negative. SER 28-31. Neither issue is before this Court on appeal.

therefore could not "adequately defend herself" during the incident, and that she was in "a small space" with "nowhere to go and nowhere effectively to call for help." SER 29-30.

The district court also concluded that Haddock was not entitled to a downward departure based on alleged aberrant behavior, finding that Haddock had harmed another prisoner (Washakie) as well. SER 31-33. Specifically, the district court found that "[Washakie] sustained a broken ankle. He didn't come into the facility with a broken ankle. He went out of the facility with a broken ankle. And it was [] Haddock who was involved in the physical altercation." ER 122. The district court therefore found that it could "only assume that [] Haddock again lost his patience and lashed out at the prisoner." ER 122.

As a result of the district court's rulings, Haddock's total offense level was 16. ER 54; SER 33.[5] With a criminal history category of I, Haddock's guideline range was 21 to 27 months. ER 54; SER 33. The district court sentenced Haddock to 24 months' imprisonment, the middle of the applicable range. ER 49; SER 33.

At the close of the sentencing hearing, the district court advised Haddock of his right to appeal. Specifically, the district court informed Haddock, *inter alia*,

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[5] The total offense level was calculated as follows. Under the applicable guideline provision, Haddock received a base offense level of ten, with a six-level increase for acting under the color of law. ER 12; Sentencing Guidelines § 2H1.1. Haddock then received a two-level reduction for acceptance of responsibility, which was offset by the two-level restraint-of-victim enhancement. SER at 28-30.

that (1) he had the right to appeal his sentence; (2) this right lasted only ten days; and (3) if Haddock wished to appeal his sentence, he needed to inform defense counsel, who could "answer questions for [Haddock] about the appellate process, and also talk with [Haddock] about what issues are appealable." SER 34-35. Haddock indicated he understood these rights. SER 35. This appeal followed.

STATEMENT OF FACTS

1. Vilena Currie Incident

The relevant facts regarding Haddock's assault of Vilena Currie – the act that served as the basis for the violation of 18 U.S.C. 242 to which Haddock pled guilty – were summarized and agreed to by Haddock in the plea agreement.

As stated therein, officers from the Fort Hall police department arrested 19-year-old Vilena Currie in connection with a domestic dispute complaint received from the Fort Hall American Indian Reservation on the evening of July 25, 2004. SER 4. At the time of her arrest, Currie was visibly intoxicated, loud, and argumentative, but was not physically combative and was uninjured. SER 4.

Haddock was the detention officer on duty that evening at the jail to which Currie was taken. Upon her arrival, Currie refused to exit the police car. SER 4. The plea agreement summarizes the subsequent course of events as follows:

> Haddock * * * attempted to coax [Currie] out of the car. When she refused, [Haddock] pulled her out of the car and dragged her into the female drunk tank. Once in the drunk tank, [Haddock] put [] Currie against the back wall and as part of standard procedure began to remove her

> handcuffs. Two police officers were standing at the door of the cell at the time. As [Haddock] removed the first handcuff, [] Currie reached toward him to steady herself. [Haddock] responded by punching [] Currie several times in the face and taking her to the ground. [Haddock] then removed the second handcuff and told the officers to leave. A few seconds later, Haddock kneed [] Currie in the face several times. As a result of the assault, [] Currie sustained a bloody nose, a swollen lip and a bump to her head.

SER 4.

2. Oren Washakie Incident

In response to Haddock's request for a downward departure based on his claim that the assault on Currie represented aberrant behavior, the government presented evidence during the sentencing hearing regarding a prior incident of excessive force by Haddock involving a prisoner named Oren Washakie.

On December 2, 2003, officers delivered Washakie to the detention center while Haddock was on duty. Like Currie, Washakie was brought to the detention center handcuffed and intoxicated, but was not physically combative and was not injured when he arrived at the detention center. SER 15-17, 20-22.

The use of excessive force occurred during the part of the intake process at which Haddock was attempting to obtain Washakie's cooperation so Haddock could pat him down. Other officers were nearby, but did not see the incident. Fellow detention officer Rebecca Lee testified that she heard a "thud," then turned around and saw Washakie lying on his stomach with Haddock "standing over

him." SER 18. According to Lee's testimony, Haddock then said "something about not doing something, and then called [Washakie] an asshole." SER 19.

During this time, Haddock had a grip on Washakie's handcuffs, which were behind his back, and used the handcuffs to drag Washakie (still on his stomach) to the male drunk tank, SER 19, leaving a blood trail behind. SER 23. As the district court found, Washakie suffered a broken ankle at some point during this incident. ER 122.

3. Investigations Into The Currie And Washakie Incidents

Agents from the Interior Department's Bureau of Indian Affairs investigated both the Currie and Washakie incidents. SER 24-25. Both investigations included interviews with Haddock regarding his version of events. SER 25. Investigators concluded that Haddock violated departmental regulations in connection with the Currie incident, SER 26, and that Haddock used excessive force in the Washakie incident. SER 27. Haddock's statements to investigators during the course of these investigations served as the bases for the false-statement charges contained in Counts II through V of the superseding indictment, which were dismissed as part of the plea agreement.

SUMMARY OF ARGUMENT

As part of his plea agreement, Haddock waived his right to file a direct appeal unless his sentence exceeded the statutory maximum, which it does not. Haddock does not challenge the knowing and voluntary nature of this waiver or otherwise explain why the waiver does not foreclose his arguments on appeal. Thus, this Court should enforce the waiver and dismiss Haddock's appeal without reaching the merits of his arguments.

Even absent such a waiver, this Court lacks jurisdiction to review the district court's discretionary refusal to grant Haddock a downward departure based on alleged aberrant behavior. And that decision was proper at any rate, as the evidence indicates that Haddock's assault of the victim in this case was not an isolated event.

Moreover, the district court's application of a two-level restraint-of-victim enhancement was proper, because victim restraint is not accounted for either in the substantive offense to which Haddock pled guilty or in the base offense level. Thus, the district court did not engage in impermissible double-counting as Haddock asserts.

ARGUMENT

I

HADDOCK'S APPEAL SHOULD BE DISMISSED BASED ON HIS KNOWING AND VOLUNTARY WAIVER OF APPELLATE RIGHTS

Through his plea agreement, Haddock waived his right to challenge his conviction or sentence except in two instances: (1) Haddock may file a direct appeal if his sentence exceeds the maximum permitted by statute; and (2) he may bring a collateral challenge at the district court level pursuant to 28 U.S.C. 2255 based on newly-discovered evidence of ineffective assistance of counsel, and, of course, may appeal from the denial of any such collateral challenge. SER 7-8. Because Haddock received a sentence well below the statutory maximum, this direct appeal should be dismissed without consideration of the merits.

A. Waivers Of Appellate Rights Are Valid And Enforceable If Knowingly And Voluntarily Made

"There is no constitutional right to appeal." *United States* v. *Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). Rather, "[t]he right is purely statutory," and "an express waiver of the right to appeal in a negotiated plea of guilty is valid if knowingly and voluntarily made." *Ibid.* This Court reviews *de novo* the question whether an appellant waived his or her statutory right to appeal. *Id.* at 479.

"The sole test of a waiver's validity is whether it was made knowingly and voluntarily." *United States* v. *Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000) (quoting *United States* v. *Anglin*, 215 F.3d 1064, 1068 (9th Cir. 2000)).

Accordingly, if a defendant knowingly and voluntarily waives his or her appellate rights, this Court should end its inquiry into the validity of the waiver and dismiss the appeal. *Ibid*.

B. Haddock Knowingly And Voluntarily Waived His Appellate Rights

Pursuant to the unambiguous terms of the plea agreement, Haddock knowingly and voluntarily waived his right to a direct appeal unless his sentence exceeded the maximum allowed under the statute. SER 7-8. Haddock's opening brief makes no argument regarding this point. Rather, Haddock ignores the waiver entirely, offering no explanation as to why it should not apply to bar this appeal and failing to include the plea agreement in the record excerpts filed with his brief.

Even if properly raised, however, that sole exception does not apply here. Haddock received a sentence of 24 months. ER 49. This sentence is well below the statutory maximum sentence of ten years. 18 U.S.C. 242. Thus, the length of his sentence cannot serve as a basis for the instant appeal.[6]

Haddock also does not argue on appeal that the waiver of appellate rights contained in his plea agreement was not knowing and voluntary. Nor would any such argument have merit. Haddock conceded the knowing and voluntary nature

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[6] This appeal clearly is not from the denial of a collateral challenge to Haddock's sentence. And even if it were, Haddock makes no allegation regarding ineffective assistance of counsel. Indeed, he continues to be represented by the same attorney that handled his case below. Thus, newly-discovered evidence regarding ineffective assistance of counsel also cannot serve as a basis for this appeal.

of his plea in the agreement itself. See SER 3 (acknowledging that "the plea is voluntary and did not result from force, threats, or promises, other than any promise made in this Plea Agreement"); *id.* at 7 (acknowledging that Haddock's statutory right to appeal his sentence is "knowingly and voluntarily" waived in exchange for other terms contained in the plea agreement); *ibid.* ("knowingly and voluntarily" waiving the right to challenge "pleas, conviction, or sentence in any post-conviction proceeding"). And the waiver was twice addressed during the change-of-plea hearing. See SER 12 (statement by district court to Haddock that "you waive almost all of your rights of appeal except you will have a right, the right to continue, claiming you are not satisfied with your trial counsel."); SER 13-14 (government statement that Haddock "waives all of his rights to appeal with two exceptions: One is the right to appeal any sentence that exceeds the statutory maximum. And one is to present a post-conviction claim based on ineffective assistance of counsel for facts learned after the time of the guilty plea.").

Finally, Haddock does not assert that the government failed in any way to fulfill its obligations under the terms of the plea agreement. Nor could he. Haddock, through his execution of the plea agreement, induced the government to dismiss the four remaining counts contained in the superseding indictment and to make the sentencing recommendation described therein. The government fulfilled these obligations. Having obtained the benefit of this bargain, Haddock should not

now be heard on appeal. The waiver of appellate rights contained in the plea agreement is valid and enforceable, and Haddock's appeal should be dismissed.[7]

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[7] This Court's decision in *United States* v. *Buchanan*, 59 F.3d 914 (9th Cir.), cert. denied, 516 U.S. 970 (1995), is not to the contrary. In *Buchanan*, this Court held that that statements by a district judge advising the defendant of his right to appeal rendered the waiver of appellate rights contained in his plea agreement unenforceable because the defendant, as the result of the district court's statements, "could have a reasonable expectation that he could appeal his sentence" despite the waiver of appellate rights. *Id.* at 917. Here, the district court told Haddock, *inter alia*, that he could appeal his sentence, and that defense counsel could "answer questions * * * about the appellate process, *and also talk with [him] about what issues are appealable*." SER 34-35 (emphasis added). Given the specificity with which Haddock's ability to challenge his conviction and sentence was explained (1) in the terms of the plea agreement, see SER 7-8, (2) by the district court, see SER 12, (3) by the government, see SER 13-14, and, presumably, (4) by Haddock's own attorney, the district court's comments at the close of the sentencing hearing could not have created a reasonable expectation in Haddock's mind that he could appeal his sentence on the ground that the district court erred in its aberrant behavior and restraint-of-victim determinations. Thus, the district court's statements to Haddock that he may appeal his sentence and speak with defense counsel regarding "what issues are appealable," SER 35, may properly be viewed simply as a fulfillment of the requirement of Federal Rule of Criminal Procedure 32 that the district court inform a defendant of *any* right to appeal. See Fed. R. Crim. P. 32(j)(1)(B) ("After sentencing – regardless of the defendant's plea – the court *must* advise the defendant of *any* right to appeal the sentence.") (emphases added).

II

THE DISTRICT COURT'S REFUSAL TO GRANT A DOWNWARD DEPARTURE BASED ON ALLEGED ABERRANT BEHAVIOR IS NOT REVIEWABLE, AND WAS PROPER AT ANY RATE

Even if Haddock has not waived his right to bring this appeal, he is not entitled to relief from this Court.

After the Supreme Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), this Court "continue[s] to review the district court's interpretation of the Sentencing Guidelines de novo, the district court's application of the Sentencing Guidelines to the facts of [a] case for abuse of discretion, and the district court's factual findings for clear error." *United States* v. *Zavala*, 443 F.3d 1165, 1167-1168 (9th Cir. 2006) (quoting *United States* v. *Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006)). This Court "review[s] the district court's construction of the sentencing statute * * * de novo," and "review[s] the ultimate sentence for reasonableness." *Id.* at 1168.

A. The District Court's Refusal To Grant The Downward Departure Is Not Reviewable

Haddock requested a downward departure from the applicable guideline range under Sentencing Guidelines § 5K2.20, which provides that "[t]he court may depart downward under this policy statement only 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."

Sentencing Guidelines § 5K2.20(b). The district court denied this request, finding that Haddock had "lashed out" at a prisoner (Washakie) on another occasion as well. SER 31-33.

This Court "review[s] de novo a district court's conclusion that it lacks authority to depart downward, but lack[s] jurisdiction to review a discretionary refusal to depart downward." *United States* v. *Rojas-Millan*, 234 F.3d 464, 474 (9th Cir. 2000) (citations omitted). See also *United States* v. *Rearden*, 349 F.3d 608, 617 (9th Cir. 2003) ("We have jurisdiction to review a district court's determination regarding its *authority* to depart downward under the Guidelines, but we lack jurisdiction to review a *discretionary* denial of a downward departure."), cert. denied, 543 U.S. 822 (2004).[8] This standard applies with equal force to refusals to grant downward departures for aberrant behavior. See *United States* v. *Pizzichiello*, 272 F.3d 1232, 1239 (9th Cir.), cert. denied, 537 U.S. 852 (2002).

The "critical question" in an inquiry regarding a district court's refusal to grant a downward departure "is whether the district court * * *, in denying the downward departure, concluded that it lacked authority to depart downward, or instead exercised its discretion and declined to do so." *Rojas-Millan*, 234 F.3d at 474. In ruling on a request for a downward departure, "[a] district court need not expressly acknowledge its discretion on the record." *United States* v. *Campos-*

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[8] This Court has continued to apply the same principle of non-reviewability following the Supreme Court's decision in *Booker*. See *United States* v. *Allen*, 425 F.3d 1231, 1236 (9th Cir. 2005), cert. denied, 126 S. Ct. 1487 (2006).

Fuerte, 357 F.3d 956, 961 (9th Cir. 2004), superseded by statute on other grounds as stated in *Penuliar* v. *Ashcroft*, 395 F.3d 1037, 1042 (9th Cir. 2005); *Penuliar* v. *Gonzales*, 435 F.3d 961, 968 (9th Cir. 2006). Indeed, this Court "ha[s] 'clearly stated that '[t]he court's silence regarding authority to depart is not sufficient to indicate that the court believed it lacked power to depart.'" *United States* v. *Davis*, 264 F.3d 813, 816-817 (9th Cir. 2001) (quoting *United States* v. *Davoudi*, 172 F.3d 1130, 1134 (9th Cir. 1999)). Instead, "decisions to deny downward departure will be considered discretionary unless the district court indicates that its refusal to depart rests on its view that it could not as a matter of law do so." *United States* v. *Pinto*, 48 F.3d 384, 389 (9th Cir.), cert. denied, 516 U.S. 841 (1995).

No such indication exists here, as nothing in the district court's ruling signals a belief that the court lacked authority to depart downward based on aberrant behavior. See SER 31-33. Rather, the district court reviewed the evidence, determined there was at least one other incident in which Haddock "lashed out" at a prisoner, SER 32, and accordingly sentenced Haddock within the applicable guideline range. SER 33. Under these circumstances, the district court's refusal to depart is not reviewable. See *Pinto*, 48 F.3d at 389 ("Since the judge's decision does not indicate that he believed he was prevented from departing downward as a matter of law, the decision is discretionary and thus not reviewable.").

Haddock's opening brief does not directly address the question of reviewability. Instead, to the extent Haddock addresses the issue at all, he does so indirectly in the context of discussing the applicable standard for evaluating requests for downward departures based on aberrant behavior under the law of this Circuit. See, *e.g.*, Br. 10 (noting that the district court "apparently believ[ed] that § 5K2.20 can only be applied if the criminal conduct was limited to one occurrence"); *id.* at 10-11 (asserting that the district court "misapprehended the standard to depart in the Ninth Circuit for aberrant behavior"); *id.* at 12 (arguing that the district court "clearly believed that it could not entertain the request if more than one criminal occurrence was shown"). Under this Court's precedents, such arguments are insufficient to establish that the district court believed it lacked authority to depart downward. See *Pinto*, 48 F.3d at 389. This Court therefore lacks jurisdiction to review the district court's discretionary denial of Haddock's request for a downward departure based on aberrant behavior.[9]

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[9] If this Court determines that ambiguity exists regarding whether the district court believed it had the authority to depart, it should remand to the district court for clarification. See *Rojas-Millan*, 234 F.3d at 474 ("Because, after reviewing the record, we are left with some doubt concerning whether the district court in this case exercised its discretion or, instead, determined that it lacked the authority to do so, we decline to rule on this question at this time. Rather, we leave it to the district court on remand to clarify its ruling on the aberrant behavior departure."); *United States* v. *Dickey*, 924 F.2d 836, 839 (9th Cir.) ("Since we are unable to determine from the record whether the district court's ruling on this issue was an exercise of its discretion or a legal ruling, we must remand for clarification on this question."), cert. denied, 502 U.S. 943 (1991).

B. Even If Reviewable, The District Court's Denial Of A Departure Based On Aberrant Behavior Was Proper

Haddock's argument would fail even if this Court had jurisdiction to address it. First, there is no basis for Haddock's challenge to the district court's finding regarding the Washakie incident. As found by the district court, the facts surrounding the incident are simple: "[Washakie] sustained a broken ankle. He didn't come into the facility with a broken ankle. He went out of the facility with a broken ankle. And it was [] Haddock who was involved in the physical altercation." ER 122. The district court therefore made the only finding available to it in light of these facts, stating that it could "only assume that [] Haddock again lost his patience and lashed out at the prisoner." ER 122. This finding is not clearly erroneous. Moreover, although not cited by the district court, testimony in the record indicates that Haddock gripped Washakie's handcuffs, which were behind his back, and used the handcuffs to drag Washakie on his stomach to the male drunk tank, SER 19, leaving a blood trail behind. SER 23.

Second, the district court applied the proper standard in analyzing and denying the request for a downward departure. As noted above, Section 5K2.20 allows a court to depart downward "*only* 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." Sentencing Guidelines § 5K2.20(b) (emphases added).

Haddock's argument is based on the assertion that his behavior must be viewed in light of the "aberrant behavior spectrum" this Court articulated in *United States* v. *Dickey*, 924 F.2d 836 (9th Cir.), cert. denied, 502 U.S. 943 (1991), and further developed in *United States* v. *Fairless*, 975 F.2d 664 (9th Cir. 1992), and *United States* v. *Colace*, 126 F.3d 1229 (9th Cir. 1997). But, even when so viewed, Haddock fails to qualify for a downward departure.

As stated in *Colace*, courts "may consider a 'convergence of factors' and should take into account the 'totality of circumstances' when considering where a defendant's behavior falls along the spectrum and whether to grant a downward departure." *Colace*, 126 F.3d at 1231 (quoting *Fairless*, 975 F.2d at 667). Even under this analysis, however, "there is a limit; when all is said and done, the conduct in question must truly be a short-lived departure from an otherwise law-abiding life." *Colace*, 126 F.3d at 1231. Indeed, while this Court "ha[s] not required that the behavior be a single spontaneous or thoughtless act involving no planning, [it] ha[s] to some extent relied on the concept of singularity or spontaneity." *Id.* at 1232. (internal quotations omitted). Thus, "[o]nly very rarely do[es] [this Court] permit aberrant behavior departures when the defendant committed more than one criminal act." *Ibid.*

Here, the district court found that, in addition to beating Currie in July 2004, Haddock "lashed out" at another prisoner (Washakie) in December 2003 as well. SER 31-33. Thus, the court found two separate criminal acts roughly seven

months apart. This finding is not clearly erroneous, and therefore supports the district court's conclusion that Haddock is not entitled to a downward departure for aberrant behavior.

In addition, although not cited by the district court, Haddock also was indicted on four false-statement counts based on his statements to federal investigators in August and September 2004. ER 7-9. While these false-statement charges were dismissed as part of the plea agreement, they may be considered relevant conduct for sentencing purposes. See *United States* v. *Fine*, 975 F.2d 596, 603 (9th Cir. 1992) (holding that it is permissible to use dismissed counts in determining offense level). Thus, in total, there was evidence of six separate criminal acts spanning approximately nine months. Under these circumstances, Haddock is not entitled to a downward departure based on aberrant behavior.

III

THE DISTRICT COURT CORRECTLY APPLIED THE RESTRAINT-OF-VICTIM ENHANCEMENT

Haddock asserts that the district court erred in applying a two-level enhancement under Sentencing Guidelines § 3A1.3. Section 3A1.3 states that the offense level should be increased by two levels "[i]f a victim was physically restrained in the course of the offense." Sentencing Guidelines § 3A1.3. The term "[p]hysically restrained" is, in turn, defined as "the forcible restraint of the victim such as by being tied, bound, or locked up." Sentencing Guidelines § 1B1.1. The examples of physical restraint contained in this definition "are merely illustrative,

and other conduct may constitute physical restraint." *United States* v. *Thompson*, 109 F.3d 639, 641 (9th Cir. 1997) (citing *United States* v. *Foppe*, 993 F.2d 1444, 1452 (9th Cir.), cert. denied, 510 U.S. 1017 (1993)).

In challenging the district court's application of this enhancement, Haddock argues the enhancement is inapplicable to him because of his position as a detention officer. Specifically, he asserts that – as a detention officer – all potential victims with whom he comes in contact arguably are "restrained" by virtue of their incarceration, that he is not personally responsible for the existence of such restraint, and that application of the restraint-of-victim enhancement therefore constitutes impermissible double-counting because the conduct that serves as the basis for the enhancement already is accounted for under the six-level enhancement he received for acting under the color of law. Br. 17-21.

This argument is without merit. As noted by the district court, at the time of the assault on Currie, "there is at least one handcuff still in place, and the testimony would indicate that [] Haddock still had control of that handcuff at the time he punched [Currie] in the face." SER 29. The court thus found, *inter alia*, that Currie had "one hand restrained," and therefore could not "adequately defend herself" during the incident. SER 29-30. Thus, Haddock's actions would have qualified for the restraint-of-victim enhancement even outside the setting of a jail.

But even if this were not the case, neither the fact that most potential victims with whom Haddock comes in contact arguably qualify for this enhancement, nor

the question of who is personally responsible for such restraint, has any bearing on the question whether application of the enhancement amounts to impermissible double-counting. Rather, as this Court has held, "[i]mpermissible double counting 'occurs where one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines." *United States* v. *Speelman*, 431 F.3d 1226, 1233 (9th Cir. 2005). Accordingly, "use of a single aspect of conduct both to determine the applicable offense guideline and to increase the base offense level mandated thereby will constitute impermissible double counting only where, absent such conduct, it is impossible to come within that guideline." *Ibid.*

By contrast, if "it is possible to be sentenced under a particular offense guideline without having engaged in a certain sort of behavior, such behavior may be used to enhance the offense level." *Speelman*, 431 F.3d at 1233. This is because "the guideline's base offense level will not necessarily have been set to capture the full extent of the wrongfulness of such behavior" in such situations. *Ibid.*

Here, Haddock pled guilty to violating 18 U.S.C. 242, which prohibits the deprivation of a victim's rights under color of law, but makes no mention of victim restraint. As stated in the presentence report, both sides agreed that Sentencing Guidelines § 2H1.1 provides the applicable base offense level. ER 12. Section 2H1.1 calls for a base offense level of ten "if the offense involved * * * the use of

threat or force against a person," Sentencing Guidelines § 2H1.1(a)(3), and for a six-level increase where "the offense was committed under color of law," Sentencing Guidelines § 2H1.1(b)(1). Like 18 U.S.C. 242, Section 2H1.1 of the Guidelines makes no mention of victim restraint.

Thus, there is no overlap between the elements of the substantive offense (18 U.S.C. 242) or base offense level (Sentencing Guidelines § 2H1.1) and the elements of the restraint-of-victim enhancement (Sentencing Guidelines § 3A1.3). Indeed, while the Application Notes for the restraint-of-victim enhancement state that it is inapplicable "where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself," Sentencing Guidelines § 3A1.3, comment (n.2), neither situation is present here.

Under these circumstances, it is possible for a defendant to be sentenced under the applicable offense guideline (Section 2H1.1) without having engaged in the behavior described in the enhancement (Section 3A1.3). See *Speelman*, 431 F.3d at 1233. Section 2H1.1 is simply a guideline of general application for "Offenses Involving Individual Rights." Sentencing Guidelines § 2H1.1. The fact that Section 2H1.1 provides for a six-level increase when the offense is committed under color of law in no way indicates that it purports to punish the specific conduct covered by the restraint-of-victim enhancement. Indeed, it is not even necessary for a law enforcement officer to come into direct physical contact with –

let alone restrain – a victim in order to violate 18 U.S.C. 242. See, *e.g.*, *United States* v. *Bradley*, 196 F.3d 762, 765 (7th Cir. 1999) (affirming conviction under 18 U.S.C. 242 of police officer who fired his gun at another vehicle during a low-speed chase); *United States* v. *Perez-Perez*, 72 F.3d 224, 225-228 (1st Cir. 1995) (affirming Section 242 conviction of police officer who shot and wounded two motorcycle riders while seeking to bring the vehicle to a stop).

Thus, where, as here, a district court applies the restraint-of-victim enhancement to punish a defendant for behavior not encompassed in the substantive offense or offense guideline, such application does not amount to impermissible double-counting. See *United States* v. *Long Turkey*, 342 F.3d 856, 859 (8th Cir. 2003) (holding application of restraint-of-victim enhancement appropriate where victim restraint is not an element of substantive offense or other applicable enhancement). Haddock's argument to the contrary therefore fails.

CONCLUSION

This Court should dismiss Haddock's appeal. In the alternative, if the Court determines that dismissal is not appropriate, it should affirm Haddock's sentence of 24 months' imprisonment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am not aware of any related cases pending in this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 6,093 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE and one copy of the accompanying SUPPLEMENTAL EXCERPTS OF RECORD were served by first-class mail, postage prepaid, on the following counsel of record:

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