No. 06-12816-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

WYATT HENDERSON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

PAUL I. PEREZ
United States Attorney

TAMRA PHIPPS
DOUGLAS MOLLOY
Assistant United States Attorneys
Middle District of Florida

WAN J. KIM
Assistant Attorney General

JESSICA DUNSAY SILVER
LISA J. STARK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4491

United States v. *Wyatt Henderson*
No. 06-12816-HH

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for United States of America hereby certifies, in accordance with Fed. R. App. P. 26.1 and 11th Cir. R.26.1-1, that the following persons may have an interest in the outcome of this case and were not included in the appellant's certificate of interested persons and corporate disclosure statement:

1. Wan J. Kim, Assistant Attorney General, Civil Rights Division, United States Department of Justice;
2. Jessica Dunsay Silver, Civil Rights Division, United States Department of Justice, appellate counsel for the United States; and
3. Lisa J. Stark, Civil Rights Division, United States Department of Justice, appellate counsel for the United States.

LISA J. STARK

STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to oral argument.

TABLE OF CONTENTS

PAGE

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

TABLE OF CITATIONS

CASES:

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

GUIDELINES:

RULES:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12816-HH

UNITED STATES OF AMERICA,

Appellee

v.

WYATT O. HENDERSON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

SUBJECT MATTER AND APPELLATE JURISDICTION

Defendant appeals his sentence imposed following a direct appeal to and remand by this Court. See *United States* v. *Henderson*, 409 F.3d 1293 (11th Cir. 2005). The district court resentenced defendant on April 28, 2006, and entered final judgment on May 3, 2006. On May 5, 2006, defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court was entitled to resentence defendant without an

updated presentence report (PSR) when he invited the court to use the PSR prepared for his original sentencing, had an unrestricted opportunity to present information relevant to punishment, and the record reflects that the district court had ample information to meaningfully exercise its sentencing discretion.

2. Whether this Court can review the district court's decision to deny defendant a downward departure when the district court acknowledged that it knew that it had the authority to impose a sentence outside the guideline range.

STATEMENT OF THE CASE

1. Prior Proceedings

On May 28, 2003, a federal grand jury sitting in the Middle District of Florida returned a three-count superceding indictment charging defendant, Wyatt O. Henderson, with using excessive force under color of law in violation of 18 U.S.C. 242 (Count One); engaging in misleading conduct to delay, or prevent communication of information to a law enforcement officer relating to a federal offense in violation of 18 U.S.C. 1512(b)(3) (Count Two); and providing a false statement of a material fact to an FBI agent in violation of 18 U.S.C. 1001 (Count Three) R. 3.[1] Following a jury trial in December 2003, defendant was convicted

[1] "R. ___, p. ___" refers to the document number recorded on the district court docket sheet and page number. "Br." refers to defendant's brief filed with this Court.

as charged.

On March 1, 2004, the district court sentenced defendant to concurrent terms of 87 months on Counts One and Two, and a concurrent term of 60 months on Count Three. R. 105.

Defendant appealed. This Court, in a published opinion, affirmed defendant's convictions and "remand[ed] th[e] case to the district court for resentencing in accordance with [*United States* v.] *Booker*[,]" 543 U.S. 220, 125 S. Ct. 738 (2005). *United States* v. *Henderson*, 409 F.3d 1293, 1308 (11th Cir. 2005). On April 28, 2006, the district court resentenced defendant to concurrent terms of 27 months on each of the three counts. R. 151.

2. Facts

The facts relating to defendant's convictions are summarized in this Court's published opinion and arise from an incident in which defendant, while a corporal with the Charlotte County, Florida Sheriff's Department, used excessive force while arresting Christopher Grant. See *Henderson*, 409 F.3d at 1296-1297. Grant and Detective Keith Barnett, who witnessed the arrest, both testified that once Grant was lying on the ground and offering no resistance, defendant struck him in the face with his service revolver. *Ibid.* As a result, Grant suffered a nondisplaced fracture of his jaw.

After the incident, defendant made incriminating statements to Detective Barnett and another detective that he hit Grant with his pistol. *Henderson*, 409 F.3d at 1297. When defendant was instructed to file a report about the incident, he threw his cellular phone across the room and said, "Jesus Christ, you can't pistol-whip anybody anymore." *Ibid.* Defendant submitted a report that made no reference to his striking Grant and stated that "no force" had been used during the arrest. *Ibid.* He also directed his subordinates not to include any details of the arrest in their reports. *Ibid.*

Subsequently, defendant told an FBI agent investigating the incident that he threw his revolver into his car before approaching Grant. *Henderson*, 409 F.3d at 1297. At trial, defendant testified that he put his gun in his car because he was not wearing a holster and did not want to confront Grant while holding a weapon. *Id.* at 1296-1297.

3. Defendant's Initial Sentencing

On February 19, 2004, the Probation Department submitted a presentence report (PSR). Calculating defendant's overall offense level and guideline range pursuant to the Sentencing Guidelines, the probation officer classified defendant's use of excessive force as an aggravated assault pursuant to Section 2A2.2(a) and added four levels pursuant to Section 2A2.2(b)(2)(B) because defendant otherwise

used a dangerous weapon.

At defendant's sentencing hearing on March 1, 2004, defense counsel repeatedly acknowledged that defendant had a gun in his hand when he hit the victim in the jaw. See R. 111, pp. 4-5, 12. Defense counsel nonetheless argued that since defendant "cover[ed] the gun with his hand," struck the victim "so softly" as not to leave a bruise, and never intended to cause bodily injury with his weapon, defendant's conduct should be classified as a minor, rather than aggravated assault. R. 111, p. 4; see R. 111, pp. 5-8, 11-13. Defense counsel also contended that defendant's offense level should not be enhanced for use of a dangerous weapon for essentially the same reasons and because defendant's firearm was allegedly "incidental to the contact" with the victim. R. 111, p. 16.

The district court disagreed. R. 111, pp. 11, 13, 17. After imposing the weapons-related enhancements based on its finding that "[defendant] did have the gun in his hand at the time he hit [the victim]" and adding various other adjustments, the district court determined that defendant's overall offense level was 29 and his sentencing range 87 to 108 months. R. 111, p. 16; see R. 111, pp. 11, 13, 17-18.

Defense counsel argued for a downward departure. R. 111, pp. 19-39. Even though the district court believed the guideline range was "a little high," it denied

defense counsel's request because "that's what the guidelines call for and that's what [the court is] obligated to" impose. R. 111, p. 40; R. 111, p. 28; see R. 111, pp. 31, 33-34, 40. Consequently, the district court sentenced defendant to 87 months imprisonment on Counts One and Two, and 60 months imprisonment on Count Three, all terms to run concurrently. R. 111, pp. 40, 43-45.

Following imposition of sentence, the district court acceded to defense counsel's request and recommended that defendant be allowed to serve his sentence at a minimum security facility, like Eglin Air Force Base. R. 111, p. 50. On April 26, 2004, upon learning that the Bureau of Prisons (BOP) had designated defendant to be incarcerated at FCI Coleman, the district court delayed defendant's surrender date an additional 90 days. R. 120. The court directed the parties to contact BOP and report the reasons for defendant's designation, should it remain FCI Coleman. R. 120. On June 25, 2004, the district court delayed defendant's surrender date "indefinitely" "[i]n light of defendant[']s unsatisfactory designation with the Bureau of Prisons, and the uncertainty brought about by the United States Supreme Court's decision in *Blakely* v. *Washington*[,]" 542 U.S. 296, 124 S. Ct. 2531 (2005). R. 135.

4. Defendant's Initial Appeal

Defendant appealed his convictions and sentence. This Court affirmed

defendant's convictions and ruled that defendant's 87-month sentence violated *United States* v. *Booker*, 543 U.S. 220, 124 S. Ct. 738 (2005), since the district court imposed firearms-related enhancements that "exceeded the maximum authorized by the facts established by the jury verdict." *Henderson*, 409 F.3d at 1307. Concluding that defendant met his burden of proving the third and fourth prongs of the plain error test because "the district court expressed a desire to impose a lower sentence than the guidelines permitted," this Court "vacat[ed] [defendant's] sentence and remand[ed] th[e] case to the district court for resentencing in accordance with *Booker*." *Id.* at 1308.

5. Defendant's Resentencing

Prior to resentencing, new defense counsel filed a Supplemental Sentencing Memorandum and several letters of recommendation from individuals who had worked with defendant after his conviction. R. 149. Based on a variety of factors, including defendant's employment record and service to the community since defendant's original sentencing, defense counsel argued that the district court should order probation. R. 149, p. 6. Defense counsel also claimed that although the district court had recommended that defendant be allowed to serve his original sentence at Eglin Air Force Base, were it to reimpose a prison term, defendant would be unable to serve his sentence at a minimum security facility since "new

[f]ederal regulations after 9/11 require[] any person convicted of a crime of violence * * * be housed at a maximum security prison." R. 149, p. 4.

On April 28, 2006, the district court held a resentencing hearing. R. 157. The district court stated that, in light of this Court's opinion, it would not "use the firearm" to calculate defendant's guideline range. It went on to state that defendant's total offense level, without imposition of any weapons-related enhancements, was 18. R. 157, pp. 2-3. Defense counsel agreed and in response to an inquiry from the district court, stated that "in light of [the district court's] new ruling," he had no objections to the PSR "other than the ones that have previously been argued." R. 157, p. 3. Immediately thereafter, the district "adopt[ed] the factual statements in the presentence report" and noted that the sentencing range under the guidelines was 27 to 33 months. R. 157, p. 3.

Defense counsel, responding to the district court's questioning, represented that he did not "know of any reason why the Court should not proceed with the imposition of sentence." R. 157, p. 4. He then summarized the information in defendant's Supplemental Sentencing Memorandum, emphasized that the sentencing guidelines were merely advisory, and vigorously argued that in light of a variety of factors, including defendant's "demonstrated character and productivity * * * after a conviction two and a half years ago," "probation or some

type of home confinement" should be ordered. R. 157, p. 4, 8; see R. 111, p. 4-8.

The district court rejected defense counsel's recommendation and sentenced defendant to concurrent terms of 27 months on each of the three counts. R. 157, p. 9. The court noted that it had "consider[ed] the advisory recommendations of the United States sentencing guidelines and all the factors identified in * * * Section 3553(a)(1) through (7)." R. 157, p. 10. The court concluded that there was no reason to depart from the guideline range because it is "sufficient, but no greater than necessary to comply with the purposes of sentencing as set forth in [S]ection 3553." R. 157, p. 10. Finally, after imposing sentence, the district court, at defense counsel's urging, recommended that defendant be allowed to serve his sentence at Pensacola Naval Facility since Eglin Air Force Base was no longer open. R. 157, pp. 11-12.

SUMMARY OF ARGUMENT

Defendant contends (Br. 9-18) that the district court violated Fed. R. Crim. P. 32 when it resentenced him without an updated presentence report (PSR). This Court should not consider the merits of defendant's claim because defendant, at his resentencing, never requested an amended PSR and repeatedly invited the district court to rely on the PSR prepared for his original sentencing. In any event, defendant is not entitled to relief because the district court did not violate Fed. R.

Crim. P. 32, and certainly did not commit plain error. Moreover, defendant has failed to demonstrate that he would have received a lesser sentence had an updated PSR been obtained.

Defendant also argues (Br. 19-22) that the district court should have granted a downward departure. This Court will review a district court's decision not to grant a downward departure only when that decision is based on the mistaken belief that the district court cannot depart from the Sentencing Guidelines. Here the district court knew it could depart from the Guidelines, but declined to do so.

ARGUMENT

I

THE DISTRICT COURT WAS ENTITLED TO USE THE ORIGINAL PRESENTENCE REPORT AT DEFENDANT'S RESENTENCING

Defendant contends (Br. 9-18) that the district court violated Fed. R. Crim. P. 32 when it resentenced him without obtaining an updated and redacted presentence report (PSR). Defendant contends (Br. 8) that an amended PSR would have included information about his conduct since his original sentencing, which "would in all probability have led the probation officer to have recommended a sentence lower than the guideline range of 27 to 33 months." Defendant also argues that a new PSR would have had no reference to the firearms-related

enhancements imposed as part of his original sentence. That reference, he contends (Br. 7) "will likely" result in his "serv[ing] his sentence in a low security prison, instead of [a] minimum security camp." For these reasons, he concludes that imposing a new sentence without a new PSR amounted to plain error and should be vacated.

Under the "invited error" doctrine, this Court should not consider defendant's claim. Should this Court reach the merits, defendant is not entitled to relief since the district court did not violate Fed. R. Crim. P. 32, and certainly did not commit plain error, and defendant has not demonstrated that he would have received a lesser sentence had an updated and redacted PSR been obtained prior to resentencing.

A. This Court Should Not Consider Defendant's Claim Since Defendant Invited The District Court To Resentence Him Without An Updated And Redacted Presentence Report

"Where a party invites error, th[is] Court is precluded from reviewing that error on appeal." *United States* v. *Harris*, 443 F.3d 822, 823-824 (11th Cir. 2006). See *United States* v. *Silvestri*, 409 F.3d 1311, 1337 (11th Cir.), cert. denied, 126 S. Ct. 772 (2005); *United States* v. *Fulford*, 267 F.3d 1241, 1247 (11th Cir. 2001). This Court and several other courts of appeals have consistently refused to entertain complaints about a PSR and violation of Fed. R. Crim. P. 32, when a

defendant at his sentencing hearing waives preparation of a PSR, represents that he has no objections to the factual representations in a PSR, or urges the district court to rely on the PSR and proceed with imposition of punishment. See, *e.g.*, *Harris*, 443 F.3d at 823-824 (holding that any error as a result of district court's imposing sentence without a PSR in violation of Rule 32 was "invited" and not reversible since defense counsel waived the PSR and directed the district court "to proceed with sentencing"); *United States* v. *Milano*, 32 F.3d 1449, 1501 (11th Cir. 1994) (refusing to consider whether district court was required pursuant to Rule 32 to make findings as to alleged inaccuracies in PSR prior to imposing sentence at defendant's probation revocation hearing since defense counsel stated at hearing when defendant was originally placed on probation, "we needn't do anything with the PS[R]" and "what's in the PS[R] doesn't matter"), superseded by statute, 18 U.S.C. 3565, on other grounds, as recognized by *United States* v. *Cook*, 291 F.3d 1297, 1300 n.3 (11th Cir. 2002); *United States* v. *Hester*, 140 F.3d 753, 761-762 (8th Cir. 1998) (refusing to consider whether district court violated Rule 32 by imposing certain adjustments and calculating total offense level when defense counsel represented that all "objections remain as stated" and "allowed sentencing to proceed without specifically renewing" written objections to drug quantity determination or offense level computation reflected in the PSR); *United States* v.

Manarite, 44 F.3d 1407, 1419 (9th Cir.) ("declin[ing] to reach the merits" of claim that district court failed to make findings about factual inaccuracies in the PSR in violation of Rule 32 when defendants did "not raise any objection to the [PSR] at the time of sentencing"), cert. denied, 515 U.S. 1158, 115 S. Ct. 2610, and cert. denied, 516 U.S. 851, 116 S. Ct. 148 (1995); *United States* v. *Ramusack*, 928 F.2d 780, 783 (7th Cir. 1991) (refusing to consider whether district court relied on inaccurate information in the PSR and imposed sentence in violation of Rule 32 since defense counsel represented that he had "no objection" to PSR).

Applying precedent, this Court should not consider whether the district court was required to obtain an updated and/or redacted PSR since defendant invited the court to rely on the original PSR at his resentencing. At defendant's resentencing hearing, when defense counsel was asked whether he had any objections to the PSR, he never disputed its factual statements, failed to request an updated PSR, and did not ask that any information, including references to the weapons-related enhancements, be deleted. In addition, in response to questioning from the district court, defense counsel represented that he did not "know of any reason why the [c]ourt should not proceed with the imposition of sentence." R. 157, pp. 3-4. Accordingly, because defense "counsel waived [an updated] PS[R] and that waiver invited any error that may have arisen here," defendant's claim should be rejected

without this "Court[']s * * * reviewing [it] on appeal." *Harris*, 443 F.3d at 823-824.

Even if defendant had not explicitly directed the court to rely on the initial PSR at his resentencing, he nonetheless forfeited his specific claim that the district court was required to delete references to the weapons-related enhancements. At defendant's original sentencing, defense counsel did not object to any factual statements in the PSR and repeatedly acknowledged that defendant had a gun in his hand when he hit the victim in the jaw. See, *e.g.*, R. 111, p. 4 (defendant "had a weapon in his hand"); R. 111, p. 4 (defendant "cover[ed] the gun with his hand"); R. 111, p. 5 ("it was [defendant's] hand holding a gun"); R. 111, p. 12 ("[i]f you wanted to cause bodily injury with that weapon, you don't put your hand around it"). As a result, defendant has no basis to complain in this appeal about the use of a PSR at his resentencing that included information and/or made references to enhancements relating to his use of a gun. See *Milano*, 32 F.3d at 1501. See, *e.g.*, *United States* v. *Helmsley*, 941 F.2d 71, 98 (2d Cir. 1991) (defendant's "accept[ance] [of] the correctness of the figures" in the PSR when "arguing for leniency" allowed sentencing court "to rely * * * [on those] figures" when imposing punishment), cert. denied, 502 U.S. 1091, 112 S. Ct. 1162 (1992). *Cf.* *United States* v. *Burge*, 407 F.3d 1183, 1191 (l1th Cir.) (district court's

enhancement of defendant's sentence for pointing a gun at the arresting officers was not error under *Booker* because defendant at his sentencing hearing abandoned objections to the factual statements in the PSR regarding his relevant conduct), cert. denied, 126 S. Ct. 551 (2005); *United States* v. *Shelton*, 400 F.3d 1325, 1330 (11th Cir. 2005) (enhancement of defendant's sentence based on district court's fact-finding as to drug quantity was not error under *Booker* since defense counsel "raise[d] no objections" and stated that "we don't dispute the factual matters in the PSI"). This Court should affirm defendant's sentence without considering whether the district court was required to obtain an updated and/or redacted PSR prior to resentencing.

B. Assuming Defendant's Claim May Be Reviewed, The District Court Did Not Violate Fed. R. Crim. P. 32, And Certainly Did Not Commit Plain Error When It Resentenced Defendant Without An Updated Presentence Report

Defendant concedes (Br. 9-11) that his claim must be reviewed under a plain error standard because he did not request an updated PSR and did not object to proceeding with the original PSR at resentencing. To establish plain error, defendant must show "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States* v. *Rodriguez*, 398 F.3d at 1291, 1298 (11th Cir.), cert. denied, 125 S. Ct. 2935 (2005) (quoting *United States* v. *Cotton*, 535 U.S. 625, 631, 122 S. Ct. 1781, 1785 (2002)). "If all three conditions are met, an appellate

court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Rodriguez*, 398 F.3d at 1298 (quoting *Cotton*, 535 U.S. at 631, 122 S. Ct. at 1785).

1. Rule 32 of the Federal Rules of Criminal Procedure sets forth the circumstances in which a sentencing court is obligated to obtain a PSR. Section 32(c)(1)(A)(ii) provides:

> (A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
>
> * * * * * * * *
>
> (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. 3553, and the court explains its finding on the record.

The Rule, by its terms, does not impose an absolute requirement that a district court obtain a PSR prior to sentencing a defendant. Rather, it allows a sentencing court to impose punishment without a PSR when it "finds there is sufficient information in the record to enable it to make a determination and the court explains such a finding." *United States* v. *Latner*, 702 F.2d 947, 949 (11th Cir.), cert. denied, 464 U.S. 914, 104 S. Ct. 274 (1983). Since Rule 32 does even not mention "resentencing" or updating a PSR "[i]t would strain [its] language * * * to impose a mechanical requirement that a PSR be 'updated' in the event of

resentencing, without regard to the particular circumstances" of the case. *United States* v. *Conhaim*, 160 F.3d 893, 896 (2d Cir. 1998). See *United States* v. *Pelensky*, 129 F.3d 63, 68-69 (2d Cir. 1997) ("[n]othing in Rule 32 suggests that an additional presentence report must be prepared" before defendant's supervised release is revoked and defendant is sentenced for violating the terms of his probation); *United States* v. *Hardesty*, 958 F.2d 910, 915-916 (9th Cir. 1992) (Rule 32 does not require district court to order updated PSR before imposing consecutive sentence and denying defendant probation); *United States* v. *Bleike*, 950 F.2d 214, 220 (5th Cir. 1991) (Rule 32 does not require district court to obtain an updated PSR when a case is remanded for resentencing); *United States* v. *Fernandez*, 916 F.2d 126, 129 (3d Cir. 1980) (no abuse of discretion in district court's refusing defendant's request to update PSR prior to defendant's resentencing), abrogated on other grounds by *Rutledge* v. *United States*, 517 U.S. 292, 116 S. Ct. 1241 (1996). Consequently, contrary to defendant's claim, Rule 32 does not impose an absolute requirement that a district court obtain an updated PSR prior to resentencing.

Rule 32 also does not require that a PSR include any information about a defendant's post-conviction conduct. Sections (d)(1) and (2) of Rule 32 set forth the information that must be in a PSR. They do not mention a defendant's post-

conviction conduct nor mandate that every fact relevant to a defendant's punishment be included in a PSR. In addition, nothing in Rule 32 obligates a probation officer to include a specific recommendation as to sentence. See Advisory Committee Notes, 1994 Amendments (noting that a probation officer's "final recommendation concerning the sentence * * * *if any*, is subject to disclosure") (emphasis added). Since there is no requirement that a PSR include any information relating to a defendant's post-conviction conduct, the district court could not have violated Rule 32 merely because it used a PSR at resentencing that did not contain that material. See, *e.g.*, *Hardesty*, 958 F.2d at 915-916 (no abuse of discretion or violation of Rule 32 when district court resentenced defendant using a six-year old PSR that did not contain information as to defendant's "good behavior" while in prison); *United States* v. *Soto-Alvarez*, 958 F.2d 473, 481 (1st Cir.) (no violation of Rule 32 when district court refused to update PSR to reflect reversal of conspiracy charge prior to resentencing), cert. denied, 506 U.S. 877, 113 S. Ct. 221 (1992).

Moreover, the record in the instant case reflects that there was no reason for the district court to update the PSR to obtain information or a revised recommendation relating to defendant's conduct after his original sentencing. Defendant cannot dispute that he was provided an unrestricted opportunity to

present any information relevant to punishment prior to his resentencing. Indeed, counsel provided the district court with information relating to defendant's post-sentencing conduct, including his employment record, verification of his service to the community, a detailed supplemental sentencing memorandum, and several letters of recommendation. Under these circumstances, the district court did not violate Rule 32 when it resentenced defendant without an amended PSR. See, *e.g.*, *United States* v. *Quintieri*, 306 F.3d 1217, 1234 (2d Cir. 2002) (no error, "much less plain error" in district court's resentencing defendant without updating four-year old PSR since defendant "was provided a full opportunity to supplement the original PSR"), cert. denied, 539 U.S. 902, 123 S. Ct. 2246 (2003); *Bleike*, 950 F.2d at 220 (no error in district court's relying on five-year old PSR to resentence defendant since "the facts of [the] case" reflect that it was not necessary to obtain an updated PSR); *Fernandez*, 916 F.3d at 129 (no abuse of discretion in resentencing defendant without updating five-year old PSR when district court had "information sufficient to enable the meaningful exercise of sentencing discretion").

2. Defendant also is not entitled to relief under the plain error standard because he has failed to demonstrate that an updated PSR would have resulted in a lesser sentence. See *United States* v. *Wood*, 430 F.3d 1323, 1326 (11th Cir. 2005)

(explaining that "[t]he third prong of the plain-error test almost always requires that the error must have affected the outcome of the district court proceedings") (internal quotation marks omitted).

First, defendant's claim (Br. 14-15) that the probation officer "likely would have [recommended a sentence below] the guideline range of 27-33 months" had an updated PSR been obtained, is pure speculation. Defendant has not submitted an affidavit from the probation officer, or cited any record evidence that suggests that the probation officer favored a sentence below the guideline range. In addition, since the probation officer was present at defendant's resentencing, see R. 157, p. 4, and did not endorse any sentence, there is no reason to believe that an updated PSR would have included any recommendation. Even if it had, there is nothing to suggest that a recommendation from the probation officer based on the very same information the district court considered when resentencing defendant would have resulted in its imposing a sentence below the guideline range. After all, defense counsel vigorously argued that probation or home detention was warranted for a variety of reasons, including defendant's record since his original sentencing. R. 157, pp. 4-8. The district court nonetheless rejected defense counsel's recommendation and explained that a sentence within the guideline range was "necessary to comply with the purposes of sentencing as set forth in [S]ection

3553." R. 157, p. 10. Accordingly, because defendant has failed to demonstrate that an updated PSR with information about his post-sentencing conduct would "actually [have] ma[de] a difference" as to his punishment, he is not entitled to relief under the plain error standard. *Rodriguez*, 398 F.3d at 1300.

C. Assuming Defendant's Claim May Be Reviewed, The District Court Did Not Violate Fed. R. Crim. P. 32, And Certainly Did Not Commit Plain Error When It Resentenced Defendant Without Excising References In The Presentence Report To Weapons-Related Enhancements

1. Defendant claims that the district court violated Rule 32 by failing to remove from the PSR references to weapons-related enhancements. The Rule, however, does not impose *any* requirement that contested matters be deleted from the PSR. See *United States* v. *Smith*, 101 F.3d 202, 217 (1st Cir. 1996); *United States* v. *Okoronkwo*, 46 F.3d 426, 438 (5th Cir.), cert. denied, 516 U.S. 833, 116 S. Ct. 107 (1995); *Bayless* v. *United States*, 14 F.3d 410, 411-412 (8th Cir. 1994); *United States* v. *Robertson*, 901 F.2d 733, 735 (9th Cir.), cert. denied, 498 U.S. 962, 111 S. Ct. 395 (1990); *United States* v. *Johnson*, 767 F.2d 1259, 1276 (8th Cir. 1985). That is so, even when the disputed information may be inaccurate. See, *e.g.*, *United States* v. *Melendez*, 279 F.3d 16, 19 (lst Cir. 2002) (district court not required to strike paragraph of PSR describing defendant's ostensible possession of a weapon even though it "made an implicit finding that [defendant] did not possess a weapon in connection with offense of conviction"), cert. denied,

535 U.S. 1120, 122 S. Ct. 2346 (2002); *United States* v. *Beatty*, 9 F.3d 686, 689 (8th Cir. 1993) (district court not required to delete statements in PSR describing murder for which defendant was the main suspect, but was never charged or arrested). *Cf. United States* v. *Miller*, 406 F.3d 323, 332-333 (5th Cir.) (Rule 32 does not require district court provide probation officer an opportunity to recalculate offense level after applying the wrong guideline in the PSR.), cert. denied, 126 S. Ct. 207 (2005). Consequently, in the instant case, the district court was not required to strike references in the PSR to weapons-related enhancements, even if defendant had properly requested such relief.

Moreoever, Section (i)(3)(B) of Rule 32, Fed. R. Crim. P., sets forth the procedures a sentencing court is to follow when a defendant objects to factual statements in the PSR. It provides:

> (3) Court Determinations. At sentencing, the court:
>
> > (B) must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing[.]

Therefore, Rule 32 does not impose any obligation on the district court with regard to the weapons-related enhancements mentioned in the PSR. First, the Rule expressly states that a district court need not make findings as to disputed

information that does not affect a defendant's sentence, or that it does not consider. See, *e.g.*, *Okoronkwo*, 46 F.3d at 438 (no need to redact contested allegations in PSR since "the district court formally stated during sentencing that she had not factored the disputed facts into the sentence"); *United States* v. *Smith*, 40 F.3d 933, 936 (8th Cir. 1994) (no need to delete controverted comments in PSR that defendant was an alcoholic and abused his wife since they were not considered at sentencing). In the instant case, defendant does not even allege that the weapons-related enhancements affected his new sentence and the district court represented that it would not "use the firearm" in determining defendant's sentencing range. R. 157, p. 2. Indeed, defendant has repeatedly conceded (R. 157, pp. 2-3) that his sentence was correctly calculated.

In addition, Rule 32(i)(3)(B) does not apply unless a defendant is able to demonstrate that disputed information in the PSR is materially untrue. A mere objection, without supporting evidence, is insufficient to meet that burden. See *United States* v. *Aleman*, 832 F.2d 142, 145 (11th Cir. 1987). See also *United States* v. *Cothran*, 302 F.3d 279, 286 (5th Cir. 2002); *United States* v. *Reiss*, 186 F.3d 149, 157 (2d Cir. 1999). Since defense counsel, as noted *supra*, repeatedly acknowledged at the original sentencing hearing that defendant hit his victim with a gun and defendant has not offered any evidence to contradict those admissions,

the Rule affords defendant no protection as to any information in the PSR relating to his use of a gun.

2. In any event, defendant is not entitled to relief under the plain error standard. Since defendant does not even contend that the references to weapons-related enhancements in the PSR affected his new sentence and the record unequivocally demonstrates that they did not, he cannot establish that his substantial rights have been affected. Defendant's claim (Br. 7) that he "will likely serve his sentence in a low security prison instead of [a] minimum security camp" because of the PSR's references to weapons-related enhancements, or his use of a gun, does not dictate a contrary conclusion. See, *e.g.*, *Smith*, 101 F.3d at 217 (district court not obligated pursuant to Rule 32 to excise references in the PSR to vacated state court convictions even though BOP "uses these PSRs to allocate the prison population among its institutions and programs"); *Bayless*, 14 F.3d at 411-412 (district court not required to delete disputed findings in PSR as to drug quantity and defendant's role in the offense even though information may "affect[] * * * offense severity rating on [defendant's] parole guideline worksheet").

In addition, the Advisory Notes to Rule 32 make clear that the rule does not protect against the BOP's reliance on contested information in the PSR to determine a defendant's suitability for a particular facility or parole eligibility date.

See Advisory Committee Notes, 1983 Amendments ("[i]t is possible that the Bureau [of Prisons] or [Parole] Commission in the course of reaching a decision on such matters as institution assignment, eligibility for programs, or computation of salient factors will place great reliance upon factual assertions unchallenged at the time of sentencing"). In fact, in 2002, the Advisory Committee, rejected a proposed amendment to Rule 32, which would have required a district court to make findings related to contested information in the PSR not relied upon at sentencing that might affect BOP's decision-making. The Committee explained its decision in the Notes accompanying the 2002 Amendment to the Rule:

> Finally, the Committee considered, but did not adopt, an amendment that would have required the court to rule on any 'unresolved objection to a material matter' in the presentence report, whether or not the court will consider it in imposing an appropriate sentence. The Amendment was considered because an unresolved objection that has no impact on determining a sentence under the Sentencing Guidelines may affect other important post-sentencing decisions[,] [including] where a defendant will actually serve his sentence of confinement. * * *
>
> To avoid unduly burdening the court, the Committee elected not to require resolution of objections *that go only to service of sentence*.

(Emphasis added.). Accordingly, the district court did not violate Rule 32 when it resentenced defendant without redacting the PSR prepared for his original sentencing.

In fact, the record does not even support defendant's claim (Br. 12) that he is likely to be confined in a "low security institution, as opposed to a [f]ederal [p]rison camp" because the district court failed to "excise all enhancements relating to [his use of a] firearm" from the PSR. First, the record on appeal does not contain BOP's designation as to his new sentence.[2] Defendant maintained, without citation, in his Supplemental Sentencing Memorandum that "[f]ederal regulations after 9/11 requires any person convicted of a crime of violence * * * be housed at a maximum security prison." R. 149, p. 4. Under federal regulations, however, defendant committed a "crime of violence" because he assaulted his victim, which necessarily involves the use of force, regardless of his use of a dangerous weapon. See U.S. Dept. of Justice, Fed. Bureau of Prisons, Program Statement 5162.02, Definition of Term "Crimes of Violence" 5-6 (April 23, 1996) (noting that convictions for an offense listed below are "crimes of violence" depending on whether they involved the "use, attempted use, or threat of force, or presented the substantial risk that force might be used against [a] person" and listing 18 U.S.C. 242 (deprivation of rights under color of law)).

---

[2] Defendant's claim as to where he will likely serve his sentence is inconsistent. Compare Br. 7 (stating that he "will likely serve his sentence in a low security prison") with R. 149, p. 4 (stating that because he was convicted of a crime of violence, he is likely to "be housed at a maximum security prison").

Finally, assuming BOP wrongly relied on information in the PSR in designating the facility where defendant will serve his sentence, the proper remedy is not to vacate defendant's sentence, particularly since he does not even allege it is incorrect. This appeal is not the proper venue for challenging the prison officials' decision.

II

THIS DECISION NOT TO GRANT A DOWNWARD DEPARTURE IS COMMITTED TO THE DISTRICT COURT'S UNREVIEWABLE DISCRETION

Defendant contends (Br. 19-22) that the district court erred in refusing to grant a downward departure. That decision is committed to the discretion of the district court and is not reviewable by this Court. The only exception to that rule is where "the district court incorrectly believed that it lacked the statutory authority to depart from the guideline range." *United States* v. *Norris*, 452 F.3d 1275, 1282 (11th Cir. 2006). See *United States* v. *Winingear*, 422 F.3d 1241, 1245-1246 (11th Cir. 2005).

A defendant bears the burden of demonstrating that the district court was unaware of its authority to depart. See *United States* v. *Ortiz-Delgado*, 451 F.3d 752, 754 (11th Cir. 2006); *United States* v. *Talley*, 431 F.3d 784, 788 (11th Cir. 2005). A defendant does not satisfy that burden merely because a court does not

explicitly state that it has such authority. Rather, "when nothing in the record indicates otherwise, [this Court] assume[s] the sentencing court understood it had authority to depart downward." *United States* v. *Chase*, 174 F.3d 1193, 1195 (11th Cir. 1999). See, *e.g.*, *United States* v. *Hansen*, 262 F.3d 1217, 1255 (11th Cir. 2001) (assuming that sentencing court understood its authority to depart because nothing in the record establishes otherwise), cert. denied, 535 U.S. 111, 122 S. Ct. 2326 (2002).

The record in this case demonstrates that the district court was well aware of its authority to impose a sentence outside the guideline range. Prior to imposing punishment, defense counsel advised the district court that the sentencing guidelines were merely advisory and argued for a sentence of probation. Immediately after imposing a sentence of 27 months, the district court noted that the sentencing guidelines are "*advisory recommendations.*" R. 157, p. 10 (emphasis added). Thus, although not required, the record unequivocally establishes that the district court understood that it had authority to depart downward.

Defendant nonetheless claims (Br. 20) that the district court's comment that there was "no reason in this case to depart from the sentence called for by application of the guidelines" suggests that the district court believed it lacked

authority to depart downward. R. 157, p. 10. There is no support for that claim. That statement simply demonstrates that the court concluded that, based on the facts, defendant's case did not merit departure. Indeed, immediately before the quoted comment, the district court explained that "after considering * * * all the factors identified in 18 [U.S.C.], Sections 3553(a)(1) through 7," it imposed a sentence within the guideline range because it was "sufficient, but not greater than necessary to comply with the purposes of sentencing as set forth in [S]ection 3553." R. 157, p. 10. Accordingly, because the district court understood that it had the discretion to depart downward, but chose not to depart from the guideline range, this Court cannot review the district court's decision.

CONCLUSION

Defendant's sentence should be affirmed.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

WAN J. KIM
Assistant Attorney General

TAMRA PHIPPS
DOUGLAS MOLLOY
Assistant United States Attorneys
Middle District of Florida

JESSICA DUNSAY SILVER
LISA J. STARK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4491

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief For The United States As Appellee is proportionally spaced, has a typeface of 14 points, and contains 6,468 words.

Date: September 15, 2006

LISA J. STARK
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2006, two copies of the foregoing Brief For The United States As Appellee were served by overnight mail, postage prepaid, on the following counsel:

Fred Warren Bennett, Esq.
Bennett & Lawlor, LLP
6301 Ivy Ln, Suite 419
Greenbelt, MD 20770-6345

LISA J. STARK
Attorney