Nos. 01-4192, 01-4252

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant

v.

DARRELL ANTHONY RATHBURN,

Defendant-Appellant-Cross-Appellee

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

BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

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TABLE OF CONTENTS

PAGE

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

A. The Evidence On Counts One Through Eight - 18 U.S.C. 242 4

B. The Evidence On Count Nine - 18 U.S.C. 922(g)(9) 16

SUMMARY OF ARGUMENT 17

ARGUMENT:

I. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO INSTRUCT THE JURY TO DISREGARD THE EVIDENCE INTRODUCED ON THE COUNT THAT WAS DISMISSED 20

II. THE DISTRICT COURT ERRED IN REFUSING TO INCREASE DEFENDANT'S SENTENCE BY TWO LEVELS FOR OBSTRUCTION OF JUSTICE, PURSUANT TO SECTION 3C1.1, U.S.S.G., WHERE DEFENDANT DENIED UNDER OATH THAT HE HAD COMMITTED THE OFFENSES ON WHICH THE JURY CONVICTED HIM 24

III. THE DISTRICT COURT ERRED IN GRANTING RATHBURN A TWO-LEVEL DEPARTURE SOLELY BASED UPON THE FACT THAT LAW ENFORCEMENT OFFICERS MAY BE SUBJECT TO ABUSE IN PRISON 30

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

CONCLUSION 34

REQUEST FOR ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Koon v. *United States*, 518 U.S. 81 (1996) 19, 30-32

United States v. *Rhodes*, 62 F.3d 1449 (D.C. Cir. 1995), vacated on
on other grounds, 517 U.S. 1164 (1996) 23

United States v. *Atkinson*, 297 U.S. 157 (1936) 21

United States v. *Cedelle*, 89 F.3d 181 (4th Cir. 1996) 23

United States v. *Copelin*, 996 F.2d 379 (D.C. Cir. 1993) 22, 23

United States v. *Dorsey*, 45 F.3d 809 (4th Cir. 1995), cert. denied,
515 U.S. 1168 (1995) 18, 24

United States v. *Dunnigan*, 507 U.S. 87 (1993) 18, 25

United States v. *Koon*, 833 F. Supp. 769 (C.D. Calif. 1993) 32

United States v. *Olano*, 507 U.S. 725 (1993) 17, 21-23

United States v. *Porter,* 821 F.2d 968 (4th Cir. 1987), cert. denied,
485 U.S. 934 (1988) 24

United States v. *Rybicki*, 96 F.3d 754 (4th Cir. 1996) 19, 31-33

United States v. *Smith*, 62 F.3d 641 (4th Cir. 1995) 30

United States v. *Winters*, 174 F.3d 478 (5th Cir. 1999) 33

United States v. *Young*, 470 U.S. 1 (1985) 18, 21

STATUTES: **PAGE**

18 U.S.C. 242 . . . . 1, 2, 17, 19

18 U.S.C. 922 1

18 U.S.C. 922(g)(9) . . . . *passim*

18 U.S.C. 3231 1

18 U.S.C. 3742(b)(2) 1

N.C. Gen. Stat. § 14-33(c)(1) 16

RULES:

Federal Rules of Criminal Procedure:
- Rule 29 20
- Rule 30 20
- Rule 52(b) 18, 21

Federal Rules of Evidence:
- Rule 105 23

SENTENCING GUIDELINES:

U.S.S.G. 2H1.1 . . . . 19, 33

U.S.S.G. 3C1.1 . . . . *passim*

U.S.S.G. 5K2.0 . . . . 3, 30

1995 U.S.S.G. ch.1, pt. A, introductory cmt. 4(b) 31

MISCELLANEOUS: **PAGE**

25 James Wm. Moore, *Moore's Federal Practice* ¶ 614.04[2] (2d ed. 2001) 24

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JURISDICTIONAL STATEMENT

The district court's jurisdiction of this prosecution under 18 U.S.C. 242 and 18 U.S.C. 922 was based upon 18 U.S.C. 3231. The defendant was convicted by a jury on May 10, 2000. Sentence was imposed by the district court on February 28, 2001. These consolidated appeals are from a final judgment entered by the district court on March 8, 2001. The defendant, Darrell Rathburn, filed a notice of appeal on March 6, 2001. The United States filed a notice of cross-appeal on March 28, 2001. The jurisdiction of this Court over the United States' cross-appeal concerning the sentence imposed by the district court is based upon 18 U.S.C. 3742(b)(2).

STATEMENT OF THE ISSUES

Rathburn's appeal (No. 01-4192) presents the following issue:

Whether the district court committed plain error in failing to instruct the jury to disregard or otherwise limit its consideration of evidence relating to a count of the indictment that was dismissed by the court.

The issues presented by the United States in its cross-appeal (No. 01-4252) are:

1. Whether the district court erred in refusing to increase the defendant's sentence by two levels for obstruction of justice, pursuant to Section 3C1.1 of the United States Sentencing Guidelines, where defendant testified under oath in contradiction to the findings necessarily made by the jury in convicting him; and

2. Whether the district court erred in granting the defendant a two-level downward departure solely on the basis that law enforcement officers are subject to abuse in prison.

STATEMENT OF THE CASE

On October 6, 1999, a grand jury sitting in the Western District of North Carolina entered an indictment charging appellant Darrell Anthony Rathburn (Rathburn) of eight felony counts of violating 18 U.S.C. 242 (deprivation of rights under color of law) (Counts One-Eight) and one felony count of violating 18 U.S.C. 922(g)(9) (illegal possession of a firearm following a conviction for the misdemeanor crime of domestic violence) (Count 9) (J.A. Vol. 1 at 10-15). The indictment charged that, between October 1995 and October 1996, Rathburn, while

acting as chief of police of Woodfin, North Carolina, willfully assaulted seven different individuals.

On May 8, 2001, trial began before The Honorable Lacy H. Thornburg, United States District Judge. On May 9, 2001, Rathburn made a motion to dismiss Count Nine of the Indictment, which charged a violation of 18 U.S.C. 922(g)(9). On May 10, 2001, the district court entered an oral order granting Rathburn's motion to dismiss Count Nine and submitted the remaining counts to the jury. That same day, the jury returned a verdict of guilty on Counts One, Two, Four, Five, Six, Seven, and Eight, and not guilty on Count Three.

A sentencing hearing was held on February 28, 2001. The total offense level applicable under the United States Sentencing Guidelines (U.S.S.G.) was 23 (J.A. Vol. 2 at 473). With a criminal history category of one, the imprisonment range was 46-57 months. The United States sought a two-level increase in the offense level, pursuant to U.S.S.G. 3C1.1, based upon Rathburn's extensive testimony under oath in contradiction to the facts necessarily found by the jury in convicting him. Such an enhancement would have subjected Rathburn to an imprisonment within the range of 57-71 months. Without making any findings as to whether Rathburn's testimony constituted obstruction of justice warranting enhancement of defendant's sentence, the district court refused to grant the enhancement.

Rathburn sought a number of downward departures, pursuant to U.S.S.G. 5K2.0, including a five-level downward departure based upon the fact that, as a former police officer who had been responsible for the arrest, detention, trial, and

conviction of hundreds of offenders, placing him in custody for a significant sentence would expose him to abuse by other prisoners in excess of that normally accompanying federal incarceration (J.A. Vol. 1 at 355-356). The district court granted a two-level downward departure on each count, stating that Rathburn "will be at risk of physical abuse as a prisoner and that this factor should and will be taken into consideration by the court" (J.A. Vol. 1 at 439). The district court sentenced Rathburn to a total of 37 months imprisonment, from a 37-46 month sentencing range applicable to an offense level of 21 (J.A. Vol. 1 at 455).

The court's final judgment was entered on March 8, 2001 (J.A. Vol. 1 at 454-460). In the judgment, the court stated that it had granted a two-level departure based upon "defendant's argument that [he] will be subject to excessive trauma and stress while incarcerated based on his prior career in law enforcement" (J.A. Vol. 1 at 460). Rathburn filed a notice of appeal on March 6, 2001 (J.A. Vol. 1 at 452), and the United States filed a notice of cross-appeal on March 28, 2001 (J.A. Vol. 1 at 461).

STATEMENT OF THE FACTS

A. *The Evidence On Counts One Through Eight - 18 U.S.C. 242*

Darrell Anthony Rathburn was the Chief of Police in Woodfin, North Carolina, from June 1994 to December 1997. The evidence at trial demonstrated that during that time, Rathburn engaged in a pattern of using excessive force against individuals with whom he came into contact in connection with his official duties.

1. Count One involved the arrest of Michael Gibbs on October 29, 1995. Gibbs and his brother L.C. were intoxicated and involved in an argument with the clerk of a convenience store near their home (J.A. Vol. 1 at 179, 183). Rathburn and patrol officer Dawn Roberts responded to a call from the owner of the store (J.A. Vol. 1 at 179-180, 184). Both brothers were placed under arrest (J.A. Vol. 1 at 180, 185). L.C. was handcuffed and placed in the back seat of Roberts' patrol car (J.A. Vol. 1 at 185). Michael was handcuffed behind his back and placed in the front seat of Rathburn's unmarked car (J.A. Vol. 1 at 180). On the way to the jail, Gibbs kept trying to tell Rathburn he hadn't done anything wrong, but every time he said anything, Rathburn backhanded him (J.A. Vol. 1 at 181). Gibbs testified that he was slapped 9-13 times, and that it hurt so much he was crying (J.A. Vol. 1 at 181). When they got to the jail, Rathburn told Gibbs that the reason he was slapping him was because of the way Gibbs hollered at his mother one day at the same convenience store (J.A. Vol. 1 at 181-182).

L.C. Gibbs testified that his brother admitted that he was "running his mouth" in the car on the way to the jail and stated the chief "got excited and * * * smacked him all the way to the jail house" (J.A. Vol. 1 at 186-187). Some months later when L.C. was doing community service at the police station, Rathburn noticed that L.C. was avoiding him and wanted to know why. L.C. said "apparently you smacked my brother around," and Rathburn did not deny it (J.A. Vol. 1 at 188).

Rathburn testified under oath that there was no reason for him to hit Gibbs (J.A. Vol. 1 at 278), and he repeatedly denied having done so, stating, "I never

touched the man. I never hit him. * * * I never smacked the man, I never hit him, I didn't have a reason to, he was handcuffed. And he weighs 130 or 40 pounds and I weigh 300. I never touched him" (J.A. Vol. 1 at 247; see also 246, 248).

2. Count Two concerned a traffic stop on October 31, 1995, of a truck in which Bart Aytes was a passenger (J.A. Vol. 1 at 112-113). Aytes and his friend Joey Stillwell were riding in Stillwell's red pickup truck looking for the home of some girls they had met (J.A. Vol. 1 at 112-113). Aytes was carrying a plastic milk jug with about four shots of bourbon whiskey in it (J.A. Vol. 1 at 114). The men got lost and stopped in a parking lot trying to decide which way to go (J.A. Vol. 1 at 115). Dawn Roberts and Rathburn were working a prostitution sting with the Asheville City Police Department (J.A. Vol. 1 at 191). On their way back to Woodfin in an unmarked car, they came upon Stillwell's truck on Weaverville Highway and thought it looked suspicious (J.A. Vol. 1 at 192). Patrol officer Chad Edwards backed them up. When Edwards pulled up, Rathburn was standing at the driver's side door of the truck talking to the driver (J.A. Vol. 1 at 125). Rathburn leaned in, pushed the driver forward, and said something to the passenger, Aytes (J.A. Vol. 1 at 125). In response to Rathburn's inquiry what Aytes had in the jug, he told Rathburn it was bourbon (J.A. Vol. 1 at 116). Rathburn said it was moonshine, but Aytes denied it, saying that "moonshine is clear * * *, this is bourbon" (J.A. Vol. 1 at 117). As Edwards was taking Aytes out of the truck, Rathburn said, "let me have him" (J.A. Vol. 1 at 126). He came and put Aytes in a bent wrist hold, a compliance hold consisting of a joint manipulation that causes severe pain and

potential damage (J.A. Vol. 1 at 126).

Edwards went around to the driver's side and performed a field sobriety test on the driver, which took quite a bit of time (J.A. Vol. 1 at 127). During all of that time, Rathburn kept Aytes in the bent wrist hold (J.A. Vol. 1 at 119, 127). Such a hold is supposed to be used to get control of the subject, and once control is taken, either arrest him or do whatever needs to be done. It is not something that should be used for an extended period of time, because once the individual has been arrested the officer would maintain control by handcuffing him (J.A. Vol. 1 at 195-196). Edwards could tell Rathburn was causing Aytes a lot of pain, because he was screaming and hollering (J.A. Vol. 1 at 127). Aytes had made no aggressive move toward Rathburn or any effort to escape or injure anyone. In fact, he made the comment, "if you will, please let me go, I will not cause you any trouble." (J.A. Vol. 1 at 128). Based upon his training, Edwards concluded that the force used by Rathburn was unreasonable (J.A. Vol. 1 at 128). Both the driver and Aytes were released. The driver was charged with having an open container of alcohol in the truck, and Aytes was charged with "absolutely nothing" (J.A. Vol. 1 at 128). Rathburn told them "things didn't happen like this in Woodfin * * * and they best stay out of his damn town" (J.A. Vol. 1 at 197) (testimony of Dawn Roberts).

Despite the testimony of patrol officers Chad Edwards and Dawn Roberts concerning Rathburn's behavior as to this incident, Rathburn testified under oath that he didn't work that night and doesn't remember participating in any traffic stop with Dawn and Chad (J.A. Vol. 1 at 249-250). He stated, "I have never seen Mr.

Aytes until he walked into the courtroom today. * * * I have never seen Mr. Aytes before" (J.A. Vol. 1 at 249).

3. Count Four involved the arrest of Randall Rogers on December 19, 1995, at his residence. Rogers was a suspect in the breaking and entering of a vehicle in the Food Lion parking lot (J.A. Vol. 1 at 157-158). Witnesses stated that the perpetrator, wearing a red t-shirt, fled on a bicycle and went behind the Country Corner apartments, where Rogers was living (J.A. Vol. 1 at 158). The manager of the apartment complex let Rathburn and patrol officer Pete Allen into Rogers' apartment (J.A. Vol. 1 at 158). Rogers denied any involvement (J.A. Vol. 1 at 159-160). Rathburn became very agitated, like he was angry (J.A. Vol. 1 at 135). Rogers was handcuffed behind his back (J.A. Vol. 1 at 136). Allen went outside, while Rathburn stayed behind, alone with Rogers (J.A. Vol. 1 at 161). Rathburn got "right in [Rogers'] face" and said he was going to ask one more time why Rogers was breaking into cars in the parking lot (J.A. Vol. 1 at 137). When Rogers denied it, Rathburn hit him in the chest with his fist and knocked him down onto the bed J.A. Vol. 1 at 137). It hurt, and almost knocked the breath out of him (J.A. Vol. 1 at 137).

Allen returned in time to see Rathburn cursing at Rogers and talking to him in a loud voice from a distance of about a foot (J.A. Vol. 1 at 162). Rathburn was advising Rogers to leave Woodfin (J.A. Vol. 1 at 162). Allen saw Rathburn strike Rogers in the chest, knocking him back on the bed (J.A. Vol. 1 at 164). Rogers let out an audible gasp when he fell back (J.A. Vol. 1 at 164). Allen did not see Rogers

make any aggressive move toward Rathburn before Rathburn "heart punched" him (J.A. Vol. 1 at 171). On the basis of his training in arrest techniques, and "[b]ased on the fact that the suspect was handcuffed at the time, not offering any kind of resistance, [Allen] would judge [the force] to be unreasonable" (J.A. Vol. 1 at 164).

Allen testified that Rathburn had told officers that he wanted Rogers run out of Woodfin, and that if they saw Rogers out, to "split his head, that he would take the complaint and that he would handle it" (J.A. Vol. 1 at 163). Chad Edwards also remembered Rathburn telling his officers that if they came across Rogers to "stop our patrol vehicle and get out and hit him in the head with the flashlight * * * to bust his head" (J.A. Vol. 1 at 124).

Rathburn denied under oath that he hit Rogers on December 19, 1995. He stated, "I never hit him or slapped him. I turned his wrist and manipulated his body down onto the bed" (J.A. Vol. 1 at 254). Rathburn admitted that, if the jury were to believe Rogers and Allen that Rogers was heart punched while handcuffed, that would be an unreasonable use of force (J.A. Vol. 1 at 276-277).

4. Count Five also involved Randall Rogers. On March 17, 1996, Dawn Roberts received information amounting to probable cause to arrest Rogers for stealing a rollback wrecker in Asheville and leaving it in the Food Lion parking lot near his apartment (J.A. Vol. 1 at 201-202). Rogers was brought into Woodfin for questioning, where he was handcuffed to a chair (J.A. Vol. 1 at 147). Rathburn left the room for about 10 minutes, and when he returned, he asked Rogers to sign a blank statement about taking the wrecker (J.A. Vol. 1 at 148, 203-204, 206). Rogers

refused and said he wanted his attorney (J.A. Vol. 1 at 204). Rathburn told him he wasn't getting an attorney, that "he was going to sign the damn statement" (J.A. Vol. 1 at 205). Rogers again said he wouldn't sign the statement. Rathburn "told him that he was going to sign the damn thing and lunged towards him, said he was sick and damn tired of him being in this town, he had told him several times he needed to get out, and he was tired of the things he was doing" (J.A. Vol. 1 at 206) See also J.A. Vol. 1 at 149 (testimony of Rogers that Rathburn stated, "I told you over and over and over that you are not going to live in this town, you will leave this town, I own it, this town belongs to me and you will not live here").

Rathburn kicked the chair in which Rogers was sitting, and it fell over (J.A. Vol. 1 at 150, 206). Rathburn "got a handful of [Rogers'] hair, tilted his head down, and started kneeing him to the side of his body" (J.A. Vol. 1 at 206). Roberts left the room. She stated, "It wasn't right and I was not going to stand and watch it" (J.A. Vol. 1 at 207). But she also felt she couldn't challenge Rathburn because he had threatened her at other times when he thought she was disrespecting his authority (J.A. Vol. 1 at 207-208, 211). From where she was sitting down the hall she could hear screaming and thumps as though a book was hitting the wall (J.A. Vol. 1 at 209). Rathburn called her to come down the hall. Rogers was lying face down on the ground in the office he was in when she left, with his head facing the door, and he was handcuffed behind his back (J.A. Vol. 1 at 209). Rathburn said he needed help standing Rogers up (J.A. Vol. 1 at 210). Rogers didn't say another word until he was alone in the car with Roberts. At that point he started screaming

at her for letting Rathburn beat him and pull his hair (J.A. Vol. 1 at 210). Rogers had red marks on his face, and his hair was standing up all over his head (J.A. Vol. 1 at 211). She took Rogers to the Buncombe County detention facility, and Rathburn followed her there (J.A. Vol. 1 at 212).

Billy Dean Anders was employed at the detention facility as a booking officer when Randall Rogers was brought in by Rathburn and Roberts (J.A. Vol. 1 at 173). Rogers, who was very agitated, said that Rathburn "had held him down on the floor, had kicked him, choked him and pulled the hair out of his head" (J.A. Vol. 1 at 175). Anders saw red marks on Rogers' neck and a couple of red marks on his face (J.A. Vol. 1 at 177). Rathburn was there about an arm's length away. He made no verbal response, but "just kind of grinned" (J.A. Vol. 1 at 175). He did not deny the accusations. When Anders told Rogers to empty his pockets, the first thing that came out was a small handful of hair (J.A. Vol. 1 at 174). He had never seen anything like that before (J.A. Vol. 1 at 178).

Rathburn testified under oath that he neither choked Rogers nor pulled his hair out (J.A. Vol. 1 at 262 - "I didn't pull his hair out"; "I never was near his throat"; "there was nothing anywhere around his throat or his head"; J.A. Vol. 1 at 263 - "I never choked him").

5. Count Six involved Harry Clubb. On March 3, 1996, Clubb was walking down the road to get some gas for his truck that had broken down (J.A. Vol. 1 at 90-91). Because he matched the description of a suspect in a rape investigation, Officer Tony Massey picked him up (J.A. Vol. 1 at 221-222) (testimony of Dawn

Roberts). Clubb was handcuffed behind his back and taken to Woodfin for questioning (J.A. Vol. 1 at 93). Officer Rob Austin questioned Clubb, who denied raping the victim (J.A. Vol. 1 at 94, 101). Chief Rathburn was there during the questioning.[1] While Clubb was sitting in a chair, Rathburn crossed in front of the desk and hit him with his shoulder "almost like a football tackle," knocking him and the chair over (J.A. Vol. 1 at 102). Clubb, who had his hands cuffed behind him, fell on his side, and it hurt his back (J.A. Vol. 1 at 99). Since Clubb had not provoked Rathburn or resisted in any way, Austin stated that the use of force by Rathburn was neither reasonable nor necessary and was excessive (J.A. Vol. 1 at 102-103). Clubb was not charged with rape and was released (J.A. Vol. 1 at 100, 103).

Rathburn testified under oath that he was questioning Clubb and while trying to make a point, he slapped the desk. He stated that it made such a loud noise that it "startled [Clubb] and he turned the chair over" (J.A. Vol. 1 at 257-258). He denied using his forearm and shoulder to knock Clubb over and knock him out of his chair (J.A. Vol. 1 at 258 - "I never touched him or the chair.").

6. Count Seven involved Gary Parker, who came into the police department on August 28, 1996, seeking help to get a vehicle back from his cousin after the

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[1] Clubb stated that he could not identify Rathburn because he only saw him for about 30 seconds (J.A. Vol. 1 at 96), but both Rob Austin and Dawn Roberts testified that Rathburn was in the room (J.A. Vol. 1 at 101-102, 223), and Rathburn admitted being there as well (J.A. Vol. 1 at 257-258).

cousin did not pay him (J.A. Vol. 1 at 68). Officer James Harwood told Parker it was a civil matter, and he should contact his attorney (J.A. Vol. 1 at 68). Outside the police station, Parker encountered Rathburn (J.A. Vol. 1 at 83). Parker went up to Rathburn and told him he had come for help, and no one would help him (J.A. Vol. 1 at 53-54). Rathburn said that if Parker wanted help with his truck, he'd have to inform on someone he knew for selling drugs and breaking into houses (J.A. Vol. 1 at 53-54). Rathburn started yelling at him and using vulgar language (J.A. Vol. 1 at 53-54). Parker refused to become an informant (J.A. Vol. 1 at 54). As he started to walk back to his vehicle, Rathburn tackled him from behind, and he ended up face first on the ground (J.A. Vol. 1 at 54). In the attempt to pick Parker up off the ground by his shoulder, Rathburn ended up holding Parker's hair and elbow (J.A. Vol. 1 at 54-55). He pushed Parker towards the back door of the town hall (J.A. Vol. 1 at 55). Harwood, who was doing some paperwork with another officer, heard the back door slam and the chief say, "get your ass in there" (J.A. Vol. 1 at 69). He saw Parker in front of the chief, who was very mad (J.A. Vol. 1 at 69). Rathburn and Parker were "exchanging words" (J.A. Vol. 1 at 70).

Rathburn told Harwood to put Parker under arrest for disorderly conduct (J.A. Vol. 1 at 70). Rathburn grabbed Parker in a choke hold and by his hair and put him down on the desk (J.A. Vol. 1 at 70). Parker's face was turning blue from lack of oxygen (J.A. Vol. 1 at 71), and he tried to push Rathburn's hand off of his throat (J.A. Vol. 1 at 57). Parker didn't appear to have engaged in disorderly conduct until after the chief told Harwood to arrest him (J.A. Vol. 1 at 70). In Harwood's

opinion, Rathburn's choking Parker was "unreasonable" and "very excessive" (J.A. Vol. 1 at 72).[2]

Rathburn testified under oath and denied choking Parker once he had him inside the station, "No, sir, I never had my hand near his neck. * * * I never choke[d] the man" (J.A. Vol. 1 at 266).

7. Count Eight involved the arrest of James Metcalf on October 13, 1996, for assaulting his sister (J.A. Vol. 1 at 37). When Rathburn and Harwood came to Metcalf's father's house in the morning, Metcalf was sleeping on the living room sofa in a pair of baggy shorts (J.A. Vol. 1 at 39). He was not wearing a shirt or shoes (J.A. Vol. 1 at 39). When he went to get his shoes, as he was told to, Rathburn grabbed him, spun him around and handcuffed him (J.A. Vol. 1 at 40). He was handcuffed behind his back and was not permitted to get his shoes or a shirt (J.A. Vol. 1 at 41). Metcalf was very embarrassed and upset because the shorts had fallen around his ankles, and he was in plain view of other nearby relatives' homes (J.A. Vol. 1 at 41-42). Metcalf was put in the back of the vehicle, Officer Harwood was driving, and Rathburn sat in front in the passenger seat (J.A. Vol. 1 at 42, 63). Metcalf was "belligerent" and was cursing Rathburn and "letting [his] point of view be known" (J.A. Vol. 1 at 42-43, 63).

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[2] Harwood told reserve officer Randy Higgins that he had seen Rathburn place Parker in a choke hold and thought he was going to have to pull Rathburn off of Parker because he "had choked him so much and wasn't stopping" (J.A. Vol. 1 at 89).

When they stopped at a stop sign, Rathburn got in the back seat, hooked his left arm around Metcalf and began slapping him with his hand (J.A. Vol. 1 at 64-65). Rathburn said "[n]ow I'm in control here, you are going to do what I say you are going to do" (J.A. Vol. 1 at 44). See also Harwood testimony, J.A. Vol. 1 at 66 (Rathburn told Metcalf, "I'm your daddy.") During the entire trip from Woodfin to the Buncombe County jail, about a 10 minute trip, every time Metcalf tried to speak, Rathburn would hit him with an open palm (J.A. Vol. 1 at 45, 66). Rathburn, who Metcalf described as "quite a good size man, a whole lot bigger than I am," was in a rage (J.A. Vol. 1 at 45). He said, "this is my town." (J.A. Vol. 1 at 46). Harwood said he "wouldn't want to be slapped as hard as Rathburn was slapping [Metcalf]" (J.A. Vol. 1 at 65). Metcalf, who was handcuffed behind his back, was in pain, and his face was red (J.A. Vol. 1 at 45, 65). In Harwood's opinion, the slapping was unnecessary, excessive, and unreasonable (J.A. Vol. 1 at 67).

Rathburn testified under oath that he got into the back seat because Harwood told him that Metcalf's kicking of the back seat was going to cause him to wreck the car (J.A. Vol. 1 at 269).[3] Rathburn testified that he only pulled Metcalf back against

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[3] Reserve officer Higgins had a conversation with Rathburn about the Metcalf arrest in which he stated that he got in the back seat with Metcalf because Metcalf was screaming, yelling, and cussing. Rathburn said he was "baby slapping" Metcalf in the face every time he cursed or screamed (J.A. Vol. 1 at 88).

Metcalf had a conversation with Officer Chad Edwards in which he said that Rathburn and Harwood picked him up at his residence, arrested him, and took him

(continued...)

the seat, put his other hand on his chest ("like you would hug him") and told him to sit his "ass" back (J.A. Vol. 1 at 269). Rathburn stated that he did not have Metcalf in a hammer lock and never slapped or hit him. (J.A. Vol. 1 at 269-270 – "No, sir, I never hit him." "I never had him in any kind of lock like that"; "I never slapped or hit Jimmy Metcalf"; "No, sir, I did not hit him and I did not slap him.").

B. *The Evidence On Count Nine - 18 U.S.C. 922(g)(9)*

Count Nine of the indictment charged that Rathburn, "having been convicted of a misdemeanor crime of domestic violence, did knowingly possess in and affecting commerce a firearm * * * which had been transported in interstate commerce" in violation of 18 U.S.C. 922(g)(9) (J.A. Vol. 1 at 14-15). In order to show that Rathburn had been convicted of the misdemeanor crime of domestic violence, the government offered testimony by Rathburn's ex-wife, Sharon Gass, that, while they were married, Rathburn struck her with a pistol during an argument, that she was injured by that assault, and that Rathburn was convicted under North Carolina law of assault with a deadly weapon (J.A. Vol. 1 at 21-27). Her testimony was corroborated by a certified record of Rathburn's conviction on May 14, 1980, under N.C. Gen. Stat. § 14-33(c)(1) (J.A. Vol. 1 at 343), and by medical records of treatment for her injuries that occurred during the assault (J.A. Vol. 1 at 344-345). Although the jury saw the exhibits, they were not sent into the jury room during its

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[3](...continued)
to jail and that Rathburn got into the back of the vehicle with him and smacked and beat on him all the way to the jail (J.A. Vol. 1 at 129).

deliberations (J.A. Vol. 1 at 334).

In order to show that Rathburn knowingly possessed a firearm that had been transported in interstate commerce, the government introduced testimony from Woodfin police officer Pete Allen (J.A. Vol. 1 at 165-168).[4] Allen testified that Rathburn told him that he had been asked by someone in the media about his conviction of domestic violence and whether 18 U.S.C. 922(g)(9) applied to him (J.A. Vol. 1 at 166). Rathburn stated that he told the media inquirer that the federal statute did not apply to him because he was not represented by counsel before pleading "no contest" to the charges and, further, that he had received a pardon from the governor (J.A. Vol. 1 at 166-167). Allen also testified that Rathburn told him that he had an affidavit from the victim stating that the assault had never happened (J. A. Vol. 1 at 168).

SUMMARY OF ARGUMENT

Rathburn was convicted on eight counts of violating 18 U.S.C. 242. In this appeal he raises only one issue, which involves jury instructions. In Part I, we demonstrate that the district court did not commit plain error in failing specifically to instruct the jury, after Count Nine was dismissed, that it should disregard the evidence introduced on that count. In order to demonstrate plain error, Rathburn

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[4] The government also introduced testimony from Brent Culbertson, an agent of the North Carolina State Bureau of Investigation (Tr. 37-51) and Nathaniel Jones, an agent of the Federal Bureau of Alcohol, Tobacco, and Firearms (Tr. 51-62). Rathburn does not claim that the testimony of these agents was so prejudicial as to affect his substantial rights.

must show "an 'error' that is 'plain' and that 'affect[s] substantial rights.'" *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Even if those showings are made, this Court should not exercise the discretion granted by Rule 52(b) of the Federal Rules of Criminal Procedure to notice plain error unless it finds that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Young*, 470 U.S. 1, 15 (1985). Where, as here, the evidence of guilt is so overwhelming that its sufficiency is not contested on appeal, and the jury has shown by rendering a mixed verdict that it has carefully weighed the evidence on each count, *United States* v. *Dorsey*, 45 F.3d 809, 817 (4th Cir. 1995), cert. denied, 515 U.S. 1168 (1995), Rathburn has not shown that the failure to give a more detailed limiting instruction was either so prejudicial as to affect substantial rights or seriously affected the fairness of his trial. Accordingly, we argue that his conviction should be affirmed.

The United States' cross-appeal argues that Rathburn's sentence does not comport with the U.S.S.G. in two respects. In Part II, we argue that the district court erred in refusing to add a two-level enhancement to Rathburn's sentence, pursuant to U.S.S.G. 3C1.1, for obstruction of justice. Rathburn testified under oath that he did not willfully assault the victims named in the counts on which he was convicted. For an obstruction of justice enhancement based upon perjury, the court must find that he gave false testimony under oath concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. *United States* v. *Dunnigan*, 507 U.S. 87, 94

(1993). The jury's verdict establishes that his testimony was false, and there is no apparent explanation for his false testimony other than that he intentionally perjured himself. Since the evidence would support the findings necessary to make an obstruction of justice enhancement, this Court should vacate the sentence and remand for the district court to make findings as to whether the enhancement is warranted.

In Part III, we argue that the district court erred in granting Rathburn a two-level downward departure based upon his susceptibility to abuse in prison as a former law enforcement officer. The decision in *Koon* v. *United States*, 518 U.S. 81 (1996), on which the district court relied, does not imply that *every* law enforcement officer convicted of a crime is entitled to a departure. Since most defendants convicted of deprivation of rights under color of law in violation of 18 U.S.C. 242 will be law enforcement officers, the district court must find that there are extraordinary circumstances, such as the unusual publicity and notoriety present in the *Koon* case, to take the case out of the heartland of the offenders sentenced pursuant to Section 2H1.1 of the U.S.S.G. This Court has so found in *United States* v. *Rybicki*, 96 F.3d 754, 757 (1996). Thus, we argue that the sentence should be vacated and remanded for the district court either to make findings of unusual circumstances or to recalculate the sentence without the downward departure.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO INSTRUCT THE JURY TO DISREGARD THE EVIDENCE INTRODUCED ON THE COUNT THAT WAS DISMISSED

At the end of the government's case in chief, Rathburn moved, pursuant to Rule 29, Federal Rules of Criminal Procedure, for acquittal as to Count Nine, which charged him with illegal possession of a firearm by a person convicted of a crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) (Tr. 522). The district court granted that motion (J.A. Vol. 1 at 319). During its charge to the jury following the close of the evidence, the district court stated: "You previously heard testimony concerning a [sic] charges regarding possession of a firearm. That charge has been disposed of and is no longer before you for deliberation" (J.A. Vol. 1 at 321). Rathburn argues (Br. 15-24) that the district court should also have instructed the jury to disregard the evidence introduced on Count Nine. Since Rathburn did not request such an instruction either at the time Count Nine was dismissed or in the charge conference, or object to the omission of such an instruction from the final charge, he must demonstrate that the court committed plain error.[5] See Fed. R. Crim. P. 52(b).

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[5] See Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.")

In *United States* v. *Olano*, 507 U.S. 725 (1993), the Supreme Court clarified the standard that must be applied by a court of appeals under Rule 52(b) before an error not raised at trial can be corrected. First, "[t]here must be an 'error' that is 'plain' and that 'affect[s] substantial rights.'" 507 U.S. at 732. Even if those three conditions are met, courts of appeals should not exercise the discretion given to them by Rule 52(b) to correct the "forfeited error" unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Ibid.* (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985) and *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

Rathburn argues (Br. 17-20) that the omission of an instruction to the jury to disregard the evidence on Count Nine was error because the evidence would not have been admissible to prove Counts One through Eight. The United States does not dispute the fact that the evidence would have been inadmissible were it not for Count Nine. We submit, however, that there was no error here because the instruction given by the district court was sufficient to alert the jury that it should not consider the Count Nine evidence as to the remaining counts. The court specifically referred to the testimony that the jury had heard concerning charges regarding possession of a firearm and told them that charge was no longer before them. The court's failure to take the next step and specifically state that the jury should no longer consider that evidence was not error. Indeed, defendant did not feel that the instruction was inadequate at the time, because he failed to propose a further instruction. Thus, his argument that it was *plainly* error is unconvincing.

Even if Rathburn could show that it was error for the court to fail to give a more detailed limiting instruction, and that the error was plain, he bears the burden of persuasion with respect to whether the error is prejudicial, *i.e.*, affected the outcome of the district court proceedings. *Olano,* 507 U.S. at 734. Rathburn has failed to bear that burden.

Rathburn relies upon the decision of the D.C. Circuit in *United States* v. *Copelin*, 996 F.2d 379 (1993), for his argument that the district court's failure to immediately caution the jury to disregard the evidence as to the remaining counts constituted plain error. In *Copelin*, the district court permitted the government to elicit testimony on cross-examination of the defendant that the defendant had tested positive for the use of cocaine during pre-trial release. That testimony was intended to impeach the defendant's testimony on direct examination that the only time he had ever seen drugs was on television. Defense counsel did not request an instruction limiting the use of the testimony to impeachment, and the district court did not give one either contemporaneously or as part of the final charge. The court of appeals stated that there is a "huge presumption of plain error when a trial judge omits a cautionary instruction when admitting impeachment evidence to which a jury could give substantial effect against a criminal defendant." 996 F.2d at 385. It concluded that the judge's failure to give a cautionary instruction constituted reversible plain error because, "[i]f the jury considered the evidence for other, impermissible purposes, it was likely to be substantially prejudiced against Mr. Copelin." *Id.* at 386.

What Rathburn has neglected to mention is that the D.C. Circuit has overruled this aspect of *Copelin*. Relying on the fact that Rule 105 of the Federal Rules of Evidence requires a limiting instruction only "*upon request*," the court concluded that it could not "impose on district courts the obligation to give such an instruction *sua sponte*." *United States* v. *Rhodes*, 62 F.3d 1449, 1454 & n.* (D.C. Cir. 1995), vacated on other grounds, 517 U.S. 1164 (1996). This reversal of position severely undermines Rathburn's argument that this Court should follow *Copelin*.

Even assuming a possibility of prejudice from the court's omission, this Court should not exercise its discretion to notice the "forfeited error" because it did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. The inquiry whether the proceedings "resulted in a fair and reliable determination of guilt" should be made "in the context of the proceedings taken as a whole," *United States* v. *Cedelle*, 89 F.3d 181, 185-186 (4th Cir. 1996).[6] That inquiry should lead to a conclusion of no plain error.

The evidence of Rathburn's guilt on the counts on which he was convicted was overwhelming. The testimony of every victim was corroborated by that of one or more law enforcement witnesses. Every law enforcement officer testified that

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[6] The circumstances in *Cedelle*, cited by Rathburn (Br. 23-24) are inapposite. In *Cedelle*, the court failed to instruct the jury on an element of the crime. Such an omission affects substantial rights because it is impossible to tell in that situation whether the jury found all of the elements of the offense beyond a reasonable doubt.

Rathburn used unnecessary and excessive force. Even more significant, however, is the fact that the jury found Rathburn not guilty as to Count Three involving the incident with Pearl Gosnell. This mixed verdict shows that the jury weighed and sifted the evidence carefully as to each count and makes it very unlikely that the jury placed undue emphasis on the evidence of Rathburn's 1980 domestic violence conviction. *United States* v. *Dorsey*, 45 F.3d 809, 817 (4th Cir. 1995), cert. denied, 515 U.S. 1168 (1995). See also *United States* v. *Porter,* 821 F.2d 968, 972 (4th Cir. 1987) ("Convictions should be sustained if it may be inferred from the verdicts that the jury meticulously sifted the evidence."), cert. denied, 485 U.S. 934 (1988); 25 James Wm. Moore, *Moore's Federal Practice* ¶ 614.04[2] (2d ed. 2001) (same). Accordingly, the district court did not commit plain error in failing to instruct the jury expressly that it should disregard the evidence introduced on Count Nine.

II

THE DISTRICT COURT ERRED IN REFUSING TO INCREASE DEFENDANT'S SENTENCE BY TWO LEVELS FOR OBSTRUCTION OF JUSTICE, PURSUANT TO SECTION 3C1.1, U.S.S.G., WHERE DEFENDANT DENIED UNDER OATH THAT HE HAD COMMITTED THE OFFENSES ON WHICH THE JURY CONVICTED HIM

The United States sought a two-level enhancement of Rathburn's sentence because Rathburn's testimony under oath amounted to obstruction of justice within the meaning of Section 3C1.1 of the U.S.S.G.

Section 3C1.1 provides:

> [i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of

> the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Application Note 4(b) of the Commentary to Section 3C1.1 states that committing perjury is an example of the types of conduct to which this adjustment applies. For purposes of Section 3C1.1, perjury has the same definition as it does under the federal criminal perjury statute: giving false testimony under oath concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993). If a defendant objects to an enhancement based upon his trial testimony, the district court is required to "review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice" under that definition. *Id.* at 95.

Here the district court denied the United States' motion to apply Section 3C1.1 and failed to make any findings as to why the enhancement was not appropriate. The evidence in this case would support the findings necessary to establish perjury.

On the counts for which Rathburn was convicted, six victims testified about Rathburn's use of excessive force against them while he was acting under color of law -- for a total of seven incidents. The victims' testimony was corroborated by numerous law enforcement witnesses who observed the incidents. Rathburn took the stand in his own defense and denied under oath that he had committed the acts

described by these witnesses. In finding him guilty, the jury necessarily found beyond a reasonable doubt that the accounts by the victims and the other law enforcement witnesses were true and that Rathburn's denials were false. With the exception of Count Two, involving the traffic stop of Bart Aytes, where he stated that he had no memory of having participated in the traffic stop, Rathburn made no claim that his testimony was due to confusion, mistake, or faulty memory. There was thus ample evidence from which the district court could have made factual findings to support all of the elements of perjury warranting a sentence enhancement. The court's failure to do so constitutes reversible error.

On Count One, Rathburn testified that he never hit, smacked, or even touched Michael Gibbs. The jury's verdict of guilty on that count necessarily means that it found that Rathburn had not only used force against Gibbs but also that Rathburn willfully used "greater than the force which would have been reasonably necessary under the circumstances to an ordinary and reasonable officer on the scene" (J.A. Vol. 1 at 331 (jury instructions)), and that the force resulted in injury to Gibbs.

On Count Two, Rathburn testified that he didn't work on the night of October 31, 1995, had no memory of participating in a traffic stop of Bart Aytes and Joey Stillwell, and had never seen Aytes until he walked into the courtroom. Patrol Officer Dawn Roberts testified that she was riding with Rathburn when they came upon the suspicious vehicle and that Chad Edwards backed them up. Both Roberts (J.A. Vol. 1 at 193-197) and Edwards (J.A. Vol. 1 at 125-128) testified that they saw Rathburn keep Aytes in a bent wrist lock for an extended period of time, and Aytes

identified Rathburn as the officer who had caused him "excruciating pain" by pulling his arm back behind his head (J.A. Vol. 1 at 116-120). The district court thus had ample evidence from which to find that Rathburn's claim of having no memory of the incident was false.

Rathburn testified as to the December 19, 1995, arrest of Randall Rogers (Count Four) that he never hit or slapped Rogers (J.A. Vol. 1 at 252-254). Both Rogers and Officer Chad Edwards testified that Rathburn hit Rogers in the chest, and Edwards testified that he did not see Rogers, who was handcuffed, make any aggressive move toward Rathburn before Rathburn "heart punched" Rogers (J.A. Vol. 1 at 171).

In regard to the second arrest of Randall Rogers (Count Five), Rathburn testified under oath that he neither choked Rogers nor pulled his hair out (J.A. Vol. 1 at 262-263). Rathburn maintained that Rogers was cursing and screaming once Rathburn told him he was under arrest and that he tried to pull away when Rathburn got him by the wrist (J.A. Vol. 1 at 260-261). In contrast, Rogers testified that after he refused to sign a statement confessing to stealing a wrecker, Rathburn grabbed his hair, hit him with his forearm on the side of the head, knocked the chair in which Rogers was sitting to the floor, kneed him in the ribs while he was on the floor and pulled a lot of his hair out (J.A. Vol. 1 at 148-150). Rogers said that, while he was on the floor, he managed to pick up the hair and put it in his pocket (J.A. Vol. 1 at 151). Dawn Roberts testified that she was there when Rathburn told Rogers that he was under arrest and she saw Rathburn grab a handful of Rogers' hair and knee him

in the side, left the room because what Rathburn was doing "wasn't right," heard screaming and thumping after she left the room, and returned to see Rogers lying face down on the ground (J.A. Vol. 1 at 206-210). The booking officer at Buncombe County jail testified that Rogers pulled a handful of his hair out of his pocket and that Rogers had red marks on his face and throat (J.A. Vol. 1 at 174-177).

Rathburn testified under oath that Harry Clubb ended up on the floor as a result of tipping over his chair after being startled by Rathburn's slapping the desk (Count Six) (J.A. Vol. 1 at 257-258). He denied touching Clubb or the chair (J.A. Vol. 1 at 258). Clubb testified that, while he was handcuffed behind his back, an officer he saw only briefly and could not identify came from behind him and kicked or pushed over the chair with him in it (J.A. Vol. 1 at 99). Officer Rob Austin corroborated Clubb's testimony, stating that Rathburn hit Clubb with his shoulder like a football tackle, knocking him and the chair over, although Clubb was not resisting in any way (J.A. Vol. 1 at 102). Nothing in Rathburn's testimony suggested that he had any reason to use force against Clubb.

Concerning the arrest of Gary Parker (Count Seven), Rathburn denied under oath that he ever had his hand on Parker's neck or that he choked Parker (J.A. Vol. 1 at 266). Parker testified that Rathburn choked him, and Officer James Harwood testified that Rathburn had Parker in a choke hold for so long that Parker's face was turning blue (J.A. Vol. 1 at 70-71), and reserve officer Randy Higgins testified that Harwood had told him about the incident (J.A. Vol. 1 at 89).

As to Count Eight, involving the arrest of James Metcalf, Rathburn testified that he only got in the back seat of the police car because Harwood asked him to stop Metcalf from kicking the seat and causing a dangerous driving situation (J.A. Vol. 1 at 269). He denied slapping or hitting Metcalf or holding him in a hammer lock position (J.A. Vol. 1 at 269-270). Harwood testified that Rathburn told him to stop the car because Metcalf was using abusive language (see J.A. Vol. 1 at 64-65), and both Metcalf and Harwood testified that Rathburn repeatedly slapped Metcalf very hard during the entire ten minute trip to the jail (J.A. Vol. 1 at 45-46, 64-67). Reserve officer Higgins testified that Rathburn admitted to him that he had gotten in the back seat because Metcalf was screaming and cursing and that he "baby slapp[ed]" Metcalf all the way to the jail every time he cursed or screamed (J.A. Vol. 1 at 88).

The evidence recited herein so clearly demonstrates that Rathburn willfully gave false testimony under oath concerning the facts necessarily found by the jury in convicting him that the district court abused its discretion in failing to make findings that would either support an obstruction of justice enhancement, as requested by the United States, or explain why such an enhancement was not warranted. Although we believe that the evidence is clear enough for this Court to find that the enhancement applies, we understand that it is ordinarily this Court's practice to remand to the district court to make such findings in the first instance. *United States* v. *Smith*, 62 F.3d 641, 647-648 n.3 (1995). Accordingly, this Court should vacate the sentence imposed by the district court and remand with

instructions that the district court make findings as to whether the enhancement called for by Section 3C1.1 of the Guidelines is warranted.

III

THE DISTRICT COURT ERRED IN GRANTING RATHBURN A TWO-LEVEL DEPARTURE SOLELY BASED UPON THE FACT THAT LAW ENFORCEMENT OFFICERS MAY BE SUBJECT TO ABUSE IN PRISON

Prior to sentencing, Rathburn filed a motion seeking a number of downward departures, pursuant to U.S.S.G. 5K2.0. He sought a five-level downward departure based upon the fact that, as a former police officer who had been responsible for the arrest, detention, trial, and conviction of hundreds of offenders, placing him in custody for a significant sentence would expose him to abuse by other prisoners in excess of that normally accompanying federal incarceration.[7] Defendant cited the Supreme Court's decision in *Koon* v. *United States*, 518 U.S. 81 (1996), as authority for granting a downward departure. The district court granted a two-level downward departure based upon *Koon*. In support of its decision to depart, the court stated that Rathburn "will be at risk of physical abuse as a prisoner and that this factor should and will be taken into consideration by the court" (J.A. Vol. 1 at 439).

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[7] Significantly, however, defendant requested placement in the Seymour Johnson Federal Correctional Institution located in Goldsboro, North Carolina (J.A. Vol. 1 at 448). If defendant believed that he would be at risk of abuse at the hands of individuals he had helped to put in prison, he should have requested to be placed in a facility in some jurisdiction other than the one in which he had all of his law enforcement experience.

In *Koon*, the Court held that in the ordinary case, a district court must impose a sentence falling within the range of the applicable guideline. The Court explained that each guideline "carv[es] out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." 518 U.S. at 93 (quoting 1995 U.S.S.G. ch.1, pt. A, introductory cmt. 4(b)). The guidelines do, however, authorize a sentencing court to depart from that range in "unusual" or "atypical" cases. In permitting such departures, the guidelines preserve an area of judicial discretion, and the Court held in *Koon* that an appellate court should review a departure decision for abuse of discretion. *Id.* at 98-100.

After determining the "circumstances and consequences of the offense of conviction," the sentencing court must decide whether any of those circumstances or consequences "appear 'atypical,' such that they potentially take the case out of the applicable guideline's heartland." *United States* v. *Rybicki*, 96 F.3d 754, 757 (4th Cir. 1996). In classifying the factors and considering whether they take the case out of the heartland, the district court must make a "refined assessment of the many facts bearing on the outcome," and compare the overall picture with other guidelines cases from its day-to-day experience. *Id.* at 758. While this ultimate decision is reviewed for abuse of discretion, factual findings made in the course of this decision are, however, reviewed for clear error, and if the court's departure is based on a misinterpretation of the guidelines, review of that underlying ruling is *de novo*. *Ibid.*

The district court based its departure decision solely upon the fact that, as a law enforcement officer, defendant would be subject to abuse in prison at the hands of individuals that he may have arrested and helped to convict. Such a departure is based upon legal error, and "[a] district court by definition abuses its discretion when it makes an error of law." *Koon*, 518 U.S. at 100. *Koon* does not stand for the proposition that law enforcement officers, as a class, are entitled to more favorable treatment under the Sentencing Guidelines. In *Koon*, the Court noted that the district court in that case found as a fact that "[t]he extraordinary notoriety and national media coverage of this case, coupled with defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse." 518 U.S. at 112 (quoting *United States* v. *Koon*, 833 F. Supp. 769, 785-786 (C.D. Calif. 1993)). In relying upon *Koon* for its departure decision in this case, the district court ignored the fact that the district court in *Koon* had found that Koon and Powell were "particularly likely to be targets of abuse during their incarceration" because of the "widespread publicity and emotional outrage" that surrounded the case and, therefore, that the case was "unusual." 518 U.S. at 112 (quoting 833 F. Supp. at 788).

This Court has reversed a departure granted under circumstances analogous to those in this case. In *Rybicki*, *supra*, the district court based a downward departure on the combination of six factors, one of which was that the defendant's imprisonment would be "'more onerous' because law enforcement officers 'suffer disproportionate problems when they are incarcerated.'" 96 F.3d at 758 (quoting the

district court's decision). This Court held that while exposure to extraordinary punishment in prison "might, in appropriate circumstances, be a basis for departure," the district court must identify what circumstances in a particular case warrant departure. *Id.* at 759. To the extent that the district court in *Rybicki* "suggest[ed] that law enforcement officers, as a class, are entitled to more favorable treatment under the Sentencing Guidelines," it committed legal error. *Ibid.* This Court found no "indication that either Congress or the Sentencing Commission intended to shield law enforcement officers as a group from the otherwise universally applicable effects of incarceration on convicted criminals." *Ibid.*

Moreover, as the Fifth Circuit has recognized in *United States* v. *Winters*, 174 F.3d 478, 486 (1999), permitting a departure solely on the basis that the defendant is a law enforcement officer "would thwart the purpose and intent of the guidelines." The court in *Winters* noted that the "Sentencing Commission surely considered the possibility that some defendants convicted of violating a person's civil rights *under color of law* would be law enforcement officers," and it "applied *greater* not lesser sentences for such crimes." *Ibid.* (emphasis in original). Since defendants in cases under Guidelines Section 2H1.1 frequently are police officers, the fact that defendant is a police officer does not take him out of the heartland of offenders under Section 2H1.1.

Accordingly, the district court's downward departure should be reversed.

CONCLUSION

The conviction should be affirmed. The two-level downward departure should be reversed, and the sentence should be vacated with instructions that thedistrict court either apply the two-level enhancement for obstruction of justice in Section 3C1.1 of the Guidelines or make findings as to why it does not apply.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellant has requested oral argument of his appeal. The United States respectfully requests oral argument as to the issues in its cross-appeal.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief For The United States As Appellee-Cross-Appellant upon the defendant-appellant-cross-appellee by mailing two copies to counsel of record, first class, postage prepaid, at the following address:

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This 8th day of August, 2001.

____
Marie K. McElderry
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