

No. 00-60465  
No. 00-60466

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

CHARLES HARRIS,

Defendant-Appellant/Cross-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

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BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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## STATEMENT REGARDING ORAL ARGUMENT

This case involves important questions concerning the appropriateness of a downward departure from the federal Sentencing Guidelines. Therefore, oral argument would be useful to the Court.

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BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The grand jury returned an indictment in the United States District Court for the Northern District of Mississippi charging defendant-appellant/cross-appellee

Charles Harris with a violation of a federal civil rights criminal statute (R. 1).<sup>1</sup>

The district court had jurisdiction over the case pursuant to 18 U.S.C. 3231.

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<sup>1</sup> "R. \_" refers to the record on appeal; "Tr. \_" refers to the Trial Transcript; "Sent. Tr. \_" refers to the transcript of the sentencing hearing; "Br. \_" refers to Harris's Brief.

A jury found Harris guilty of the charge, and the district court entered its judgment on June 14, 2000 (R. 115). Harris filed a timely notice of appeal of his conviction on June 26, 2000 (R. 128). This Court has jurisdiction over his appeal pursuant to 28 U.S.C. 1291. The United States filed a timely notice of appeal of the sentence imposed by the district court on June 27, 2000 (R. 132). This Court has jurisdiction over the cross-appeal pursuant to 18 U.S.C. 3742 and 28 U.S.C. 1291.

#### STATEMENT OF THE ISSUES

1. Whether the evidence is sufficient to support Harris's conviction for deprivation of civil rights under 18 U.S.C. 242.
2. Whether this Court should remand the case for resentencing because the district court improperly departed downward for victim misconduct when it sentenced Harris.

#### STATEMENT OF THE CASE

On November 18, 1999, a federal grand jury returned an indictment against Charles Harris charging him with depriving Geraldo Lopez of his right under the Constitution not to be subjected to an unreasonable seizure, which includes the right to be free from the intentional use of unreasonable force, by one acting under



color of law, in violation of 18 U.S.C. 242 (R. 1).<sup>2</sup> On February 15, 2000, a jury convicted Harris (R. 95).

On June 14, 2000, the district court conducted a sentencing hearing. The Offense Level Computation in the Presentence Investigation Report (PSR) calculated the Total Offense Level (with enhancements) to be 29 and placed Harris in Criminal History Category I; therefore, the Sentencing Guidelines provided a guideline range for imprisonment of 87 to 108 months (R. 120). Harris did not file any objections to the PSR (Sent. Tr. 4-5). Over the objection of the United States (Sent. Tr. 5, 16-17), the court found that “the victim’s wrongful conduct contributed significantly to provoking the offense behavior; therefore, a downward departure is made pursuant to U.S.S.G. § 5K2.10” (R. 120). The court sentenced Harris to a term of imprisonment of only 13 months (R. 116), less than 15% of the minimum for a Level 29 offense and equivalent to a downward departure of 16 levels. The district court released Harris on bond pending appeal (R. 134).

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<sup>2</sup> Section 242 makes it unlawful for a person acting under color of law to deprive any person of federally protected rights, privileges, or immunities. When, as in this case, the deprivation results in bodily injury to the victim or involves the use of a dangerous weapon, violation of this statute is a felony punishable by imprisonment of not more than ten years.

STATEMENT OF FACTS

Defendant Charles Harris was and continues to be the Chief of Police for Golden, Mississippi. On May 9, 1998, Geraldo Lopez, who is Mexican by birth (Tr. 87), attended a party at a home in Golden (Tr. 88). Harris was on duty that night (Tr. 212).

Harris received complaints from neighbors that the party was creating a disturbance for the neighbors (Tr. 166, 212). Harris visited the party twice by himself to ask the party-goers to quiet down (Tr. 32, 212). While the party was noisy, it was not rowdy (Tr. 74).

After his second visit, Harris placed a radio call to the Tishomingo County Sheriff's Office asking for backup (Tr. 30-32, 107, 163-164, 213).<sup>3</sup> In his radio call to the Sheriff's Department, Harris asked the dispatcher to "[s]end all you got down here; tell them to bring their night sticks, we got a bunch of wetbacks having a party down here" (Tr. 31; see also Tr. 164, 190).

Four law enforcement officers responded to the call for assistance (Tr. 33). They met with Harris at a parking lot near the house (Tr. 32-33, 164-165), then went together to the location of the party to show their numbers and ask the party-

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<sup>3</sup> Golden is in Tishomingo County. Harris is generally the only officer on duty for the Golden Police Department. Harris calls for assistance from the Tishomingo County Sheriff's Department when he needs help (Tr. 32).

goers to be quiet one more time (Tr. 33, 110, 167, 213). The party-goers said that they would take care of it, and the officers returned to the parking lot (Tr. 34, 110, 167, 213).

After about five minutes, the noise from the party resumed. The officers returned to the party and placed a number of persons under arrest (Tr. 34-35, 110-111, 167-169, 214). Defendant Harris, who is 6'2" tall and weighs 325 pounds (PSR ¶ 36), arrested Lopez, who is a small man,<sup>4</sup> for public drunkenness (Tr. 214). Harris handcuffed Lopez behind his back (Tr. 36, 90-91, 112, 170) and put him alone in the back seat of his patrol car on the driver's side (Tr. 36, 42, 91, 112, 214). The car had a barrier, variously described as a cage (Tr. 38) or a plexiglass divider (Tr. 42), between the back and front seats. Harris shut the car door and returned to the house (Tr. 36). Lopez did not resist this arrest (Tr. 35-36). Other than the fact that he was intoxicated and attended a noisy party, there is no evidence of any misconduct by Lopez prior to the time he was placed in Harris's car with his hands secured behind his back by handcuffs.

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<sup>4</sup> There is no precise description of Lopez's size in the transcript. Lopez said he is "like five [feet]" (Tr. 94). Stacy estimated his height as 5'8" to 5'10" (Tr. 111), but it is apparent from Stacy's cross-examination that Lopez is around five feet (Tr. 131-132). Trimm estimated his height as 5'6" to 5'7" (Tr. 169). His weight was estimated at 135 pounds (Tr. 95 (Lopez)) to 140 pounds (Tr. 111 (Stacy)).

Lopez then began to kick the window of Harris's patrol car. Lopez was alone in the car and the door was shut. There is no evidence that suggests that he could escape from the car or that Harris or anyone else was in any danger. Nevertheless, Harris returned to the car, opened the door, and struck Lopez on the shin with his baton. Lopez returned to a sitting position and the car door was shut (Tr. 37-38). A short time later, Lopez again became agitated in Harris's patrol car, "rocking back and forth [and] banging his head on the cage" (Tr. 38). Harris became angry that Lopez was banging his head on the cage (Tr. 40, 43). Harris and other officers went to the car to try to get Lopez to stop. As Investigator Flynt of the Sheriff's Department testified, Harris opened the door again, "started at [Lopez's] shins with that stick he had, the baton he had, and hit him on the legs and just went on up; hit him in the face, hit him in the head" (Tr. 38-39. See also Tr. 81). Deputy Sheriff Stacy then stopped Harris from hitting Lopez because Harris "had lost his composure as a law enforcement officer" (Tr. 116). After Harris hit Lopez, "there was blood \* \* \* on [Lopez's] face, running down his shirt \* \* \*, on the side of his head, on his neck, [and] on his ears" (Tr. 41 (testimony of Flynt)).

After Stacy stopped Harris's assault on Lopez, another officer attempted to subdue Lopez with mace. Lopez was finally calmed by one of the other persons who attended the party (Tr. 175-178).

The other officers determined that they should call for an ambulance to take Lopez to the hospital because he was bleeding from the head. Mike Kemp, the owner of the ambulance service, is also a police officer (Tr. 187-188). Kemp responded to the scene when he heard the call for the ambulance (Tr. 193). When he arrived, Harris told him that he had "knocked the s-h-i-t" out of Lopez and that Mexicans weren't "going to take over that town" (Tr. 194 (testimony of Kemp)).

When Kemp said that an officer would be required to ride in the ambulance with Lopez, Harris instead took Lopez to the hospital in Harris's car (Tr. 45, 195-196). Stacy followed Harris to the hospital "[f]or the protection of the officer and the arrestee" (Tr. 117). Upon arrival at the hospital, Lopez was examined by medical personnel (Tr. 136-137). The examination revealed that Lopez had two separate injuries to his head -- a laceration on the left side and a very large hematoma (Tr. 137-138).

When Harris was interviewed by FBI agents, he admitted that he had hit Lopez in the head with his baton (Tr. 214-215). Harris told the agents that "Mexicans don't have the same rights as real Americans" (Tr. 216); "Lopez didn't

have any rights at all” (Tr. 217); Harris “was justified in what he did” (Tr. 218); and that “I did it and I’ll do it again, if I get a chance” (Tr. 219). Harris also asked if the FBI could help “get these damn Mexicans out of our town” (Tr. 211).

#### SUMMARY OF ARGUMENT

This Court should affirm Harris’s conviction. The victim testified he was in the back of Harris’s police car with his hands handcuffed behind his back and that Harris struck him in the head with his police baton, causing bodily injury. This testimony was corroborated by the testimony of other law enforcement officers who witnessed the attack and a nurse who treated the victim. Harris also admitted to the ambulance owner and the FBI agents that he struck the victim. This evidence is more than sufficient to support a conviction for violating 18 U.S.C. 242.

This Court should vacate the sentence imposed by the District Court. The Court departed downward from the applicable Sentencing Guideline range of 87 to 108 months’ imprisonment and sentenced Harris to only 13 months based on Lopez’s conduct in the car. The Sentencing Guidelines and controlling case law provide that a downward departure for victim misconduct was unwarranted in this case. Even if warranted, the extreme downward departure ordered for this

defendant was unreasonable. Therefore, this Court should remand the case for resentencing.

## ARGUMENT

### I

#### THE EVIDENCE IS SUFFICIENT TO SUPPORT HARRIS'S CONVICTION FOR VIOLATING 18 U.S.C. 242

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

As this Court observed in *United States v. Asibor*, 109 F.3d 1023, 1030 (5th Cir.), cert. denied, 522 U.S. 902 (1997):

The standard of review for determining whether there was sufficient evidence to convict a defendant is whether the evidence, when reviewed in the light most favorable to the government with all reasonable inferences and credibility choices made in support of a conviction, allows a rational fact finder to find every element of the offense beyond a reasonable doubt. *United States v. Flores-Chapa*, 48 F.3d 156, 161 (5th Cir. 1995). The evidence is viewed in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict. *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996).

See also *United States v. Winters*, 105 F.3d 200, 204 (5th Cir. 1997).

##### B. *The Evidence Establishes That Harris Struck Lopez With A Dangerous Weapon Causing Bodily Injury*

The district court instructed the jury that to establish that Harris violated Section 242, the United States was required to prove four elements: (1) the

defendant was acting under color of law; (2) the defendant's conduct must have deprived the victim of a right secured or protected by the Constitution; (3) the defendant must have acted willfully to deprive the victim of his Constitutional right; and (4) the acts of the defendant must have resulted in bodily injury (including a cut or a bruise or physical pain (R.77)) to the victim,<sup>5</sup> *or* involved the use of a dangerous weapon (Tr. 269-270; R. 66-67) (see n.2, *supra*). The argument set forth in Harris's brief presents a partial attack on proof of the fourth element. The only issue he raises on appeal is "[w]hether or not the evidence against Appellant Harris [is] sufficient to sustain a conviction under 18 U.S.C.A. Section 242 despite the Government's failure to put on substantial credible proof that Harris caused the injuries that formed the basis of the indictment" (Br. 2).

The evidence supports a finding that Harris caused the injuries to Lopez's head by striking him with his baton. Lopez testified that he did not start bleeding until after Harris hit him (Tr. 93, 95, 96). His testimony is corroborated by the officers who were present. Bobby Flynt, an investigator with the Tishomingo County Sheriff's Department and one of the officers who responded to Harris's

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<sup>5</sup> See *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) (approving jury instruction defining bodily injury under Section 242 as "any injury to the body, no matter how temporary," including physical pain, burn, or abrasion).



call for assistance (Tr. 28-29), testified that Harris hit Lopez in the face and the head with his baton (Tr. 38-39). Flynt testified that there was no blood before Harris hit Lopez, but afterward “there was blood everywhere” (Tr. 41; see also Tr. 84-85). While Delane Stacy, the officer who stopped Harris’s attack on Lopez, conceded he could not see the blows, he testified that Harris’s actions were consistent with Harris’s striking Lopez. Stacy did not see any indication that Lopez was injured before Harris’s actions, but saw that his head was bleeding afterwards (Tr. 113-117, 126-127). As the nurse who treated Lopez testified, the medical examination found that Lopez had a hematoma and a laceration, and that a blunt object can cause a hematoma (Tr. 137-139) and a laceration (Tr. 150). Viewing this evidence in the light most favorable to the government, a rational jury could find beyond a reasonable doubt that Harris struck Lopez in the head with his baton and that those blows caused a laceration and a hematoma to Lopez’s head -- “bodily injury to the victim.” 18 U.S.C. 242.

Furthermore, as indicated (*supra* at page 10), Section 242 does not require proof of bodily injury to the victim in order to allow imposition of a maximum sentence of ten years. The relevant portion of Section 242 is written in the disjunctive. The statute provides that “if bodily injury results from the acts committed in violation of this section *or* if such acts include the use, attempted

use, or threatened use of a dangerous weapon, [the defendant] shall be fined under this title or imprisoned not more than ten years, or both.” 18 U.S.C. 242

(emphasis added). Consistent with the statute, the jury was instructed that it must find that the acts of the defendant must have either resulted in bodily injury to the victim *or* involved the use of a dangerous weapon (Tr. 270, 276, R. 66-67). The Court further instructed the jury (Tr. 276, R. 77) that

[i]n determining whether or not an object is a dangerous weapon, you may consider both the physical capabilities of the object used and the manner in which it was used by the defendant. In addition, you may consider the size and condition of both the person who used the weapon and the person who was allegedly assaulted.

Cf. *United States v. Estrada-Fernandez*, 150 F.3d 491, 497 (5th Cir. 1998)

(“[W]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to \* \* \* endanger life or inflict great bodily harm. Factors relevant to this determination include the circumstances under which the object is used and the size and condition of the assaulting and assaulted persons. A dangerous weapon is an object capable of doing serious damage to the victim of the assault.”) (internal quotations omitted). Harris did not voice any exception to the charge (Tr. 322).

There is no dispute that Harris used his baton during the assault. Indeed, he told the ambulance owner that he “beat the s-h-i-t” out of Lopez, and told the FBI

agents that he hit Lopez in the head and would do it again if he had the chance. Moreover, he used his baton against a defenseless person whose hands were handcuffed behind his back, and whom he outweighed by nearly 200 pounds. Therefore, the evidence supports a jury verdict that Harris's assault against Lopez involved the use of a dangerous weapon.<sup>6</sup>

The six cases cited in Harris's brief (Br. 16-19) provide no support for reversing Harris's conviction. The cases, all of which affirm convictions under Section 242, demonstrate a wide variety of factual patterns supporting the convictions, but do not negate the facts of this case that support Harris's conviction: Without any justification, Harris beat a handcuffed arrestee with a dangerous weapon, inflicting injuries to the victim's head.<sup>7</sup>

While the United States was required to prove only one or the other, the evidence presented to the jury supports a jury verdict that Harris's acts both

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<sup>6</sup> See, e.g., *United States v. Koon*, 833 F. Supp. 769, 781 (C.D. Cal. 1993) (police baton is a dangerous weapon), aff'd in part, vacated in part on other grounds, 34 F.3d 1416 (9th Cir. 1994), aff'd in part, rev'd in part, 518 U.S. 81 (1996); *United States v. Park*, 988 F.2d 107, 109-110 (11th Cir.), cert. denied, 510 U.S. 882 (1993) (metal pipe raised in a threatening manner considered "dangerous weapon" for purposes of aggravated assault Guideline).

<sup>7</sup> Harris suggests that he was justified in striking Lopez because Lopez "was a threat to his own safety" (Br. 17). The fact that an arrestee may hurt himself by his actions in a car does not justify beating him on the head with a baton to stop those actions.

resulted in bodily injury to Lopez *and* involved the use of a dangerous weapon. Therefore, Harris's conviction for violating 18 U.S.C. 242 should be affirmed.<sup>8</sup>

## II

### THE DISTRICT COURT ERRED BY DEPARTING DOWNWARD IN SENTENCING HARRIS

#### A. *Standard Of Review*

A district court's decision to depart downward from the Sentencing Guidelines is generally reviewed for abuse of discretion. *Koon v. United States*, 518 U.S. 81, 97-99 (1996); *United States v. Winters*, 174 F.3d 478, 482 (5th Cir.), cert. denied, 528 U.S. 969 (1999). "The district court's interpretation of the sentencing guidelines is a conclusion of law that [this Court] review[s] *de novo*." *United States v. Clayton*, 172 F.3d 347, 353 (5th Cir. 1999). See also *United States v. Lister*, 53 F.3d 66, 69 (5th Cir. 1995). The district court's findings of fact are reviewed for clear error. 18 U.S.C. 3742(e)(4); *United States v. Koon*, 518 U.S. at 97. See also *Buford v. United States*, 2001 WL 265345, at \*4 (U.S. March 20, 2001) (No. 99-9073).

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<sup>8</sup> Harris's brief does not question proof of the other elements.

B. *The Sentencing Guidelines Do Not Authorize A Downward Departure For Victim Misconduct In This Case*

A district court may depart downward from the Guidelines range if it finds that there are mitigating circumstances of a kind or to a degree not adequately considered by the Sentencing Commission in formulating the Guidelines. 18 U.S.C. 3553(b); U.S.S.G. ch. 1, pt. A § 4(b). In determining if the Commission adequately considered certain mitigating factors, the court may only consider the Guidelines, policy statements, and official commentary of the Commission. 18 U.S.C. 3553(b). If the court imposes a sentence that is outside the applicable Guidelines range, it must state the specific reason for the departure. 18 U.S.C. 3553(c).

Under the Sentencing Guidelines, Harris should have been sentenced to a term of imprisonment of 87 to 108 months (Total Offense Level 29) for his violation of 18 U.S.C. 242 (R. 120). The district court sentenced him to only 13 months (R. 116). This constitutes approximately an 85% reduction from the minimum sentence prescribed for that level, equivalent to a downward departure of 16 levels from Level 29 to Level 13.

The district court explained its reasons for the departure as follows (R. 120):

The guidelines range for imprisonment derived in the instant case is identical to the range of imprisonment in a case where a totally

compliant victim is assaulted by a law enforcement officer. The victim in the instant case was not compliant with arresting officers, including the defendant. It is the Court's opinion the victim in the instant case was extremely persistent in his wrongful conduct which significantly provoked the defendant's excessive use of force against the victim. Due to the aforementioned factors, it is the Court's opinion the victim's wrongful conduct contributed significantly to provoking the offense behavior; therefore, a downward departure is made pursuant to U.S.S.G. § 5K2.10.

In arriving at this dramatic departure, the court plainly misinterpreted the Sentencing Guidelines.

Section 5K2.10, the Guideline section on which the district court relied for the downward departure, provides:

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

- (a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;
- (b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;
- (c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;
- (d) the danger actually presented to the defendant by the victim; and
- (e) any other relevant conduct by the victim that substantially contributed to the danger presented.

The circumstances in which a downward departure for victim misconduct is appropriate were aptly summarized by the Third Circuit in *United States v. Paster*, 173 F.3d 206, 211 (3d Cir. 1999):

By its terms, § 5K2.10 hinges a departure on two criteria: 1) the victim must have committed “wrongful conduct;” 2) and such conduct must have “contributed significantly to provoking the offense behavior.” \* \* \* By delineating [the] five factors, the guidelines contemplate[] departures where the victim’s conduct posed actual, or reasonable perceived, danger to the defendant, with emphasis on physical danger. Court decisions confirm what the context of guideline § 5K2.10 implies: Generally, only violent conduct, albeit wrongful, justifies a downward departure. See *Blankenship v. United States*, 159 F.3d 336, 339 (8th Cir. 1998), cert. denied, [525 U.S. 1090] (1999) (affirming denial of departure because while conduct was “wrongful,” it was not violent); see also *United States v. Bigelow*, 914 F.2d 966, 975 (7th Cir. 1990) (physical blocking of doorway was not “sufficient *physical* contact to provoke the attack”) (emphasis added).

See also *United States v. Shortt*, 919 F.2d 1325, 1328 (8th Cir. 1990) (embracing the idea that while “there’s hardly any greater provocation than to have someone having an affair with your spouse,” this provocation does not warrant downward departure).

The district court made no finding on danger, and there is no evidence before the district court on which it could base a finding that Lopez’s conduct posed an actual, or reasonably perceived, danger to Harris. According to Harris’s statement to the FBI agents who interviewed him, he arrested Lopez for public

drunkenness (Tr. 214). Lopez did not resist the arrest and was cooperative walking to Harris's car and getting into the back seat of the car (Tr. 35-36). There is no evidence of any conduct by Lopez that could be considered "wrongful" within the meaning of Section 5K2.10, before he was put into Harris's car.

Lopez did become agitated after being put in the car. Since Lopez was alone in the car, the door was closed, and Lopez was handcuffed, Harris could not reasonably perceive that he or any other person was in any danger, U.S.S.G. § 5K2.10(c), and Lopez's action in fact presented no danger to Harris or to any other person with the possible exception of himself, U.S.S.G. § 5K2.10(d). Even if Lopez were somehow to manage to break the window and exit the car, Harris and four other armed police officers were present to control the situation. Thus, Lopez's conduct did not create any danger. U.S.S.G. § 5K2.10(e). While there was a remote possibility of damage to the car, damage to property is not a "danger" within the meaning of Section 5K2.10. Furthermore, damage to property does not justify hitting a handcuffed person (Tr. 178-179). Nevertheless, Harris opened the car door and struck Lopez on the shin with his baton.

A short time later, Lopez again became agitated. Again, neither Harris nor anyone else was in any danger, but again Harris chose to initiate a confrontation with Lopez. This time, Harris opened the car door and hit Lopez a number of



times, resulting in bodily injury (Tr. 38-41). He only stopped when one of the other officers then stepped between Harris and the door to get him to stop because Harris “had lost his composure” (Tr. 116).

Rather than perceiving any danger, Harris “was mad because [Lopez] was banging his head on the cage. \* \* \* He was cussing about that” (Tr. 40 (testimony of Flynt)). The other officers on the scene testified as to the proper methods to be used to control a person acting how Lopez was acting: “You can put seatbelts on them, restrain their feet” (Tr. 58 (testimony of Flynt)); “I think he should have waited until myself and the other deputies would have helped him restrain him, restrain his feet and buckle him in with the seatbelt” (Tr. 120 (testimony of Stacy)). “Wrongful conduct” within the meaning of Section 5K2.10 did not provoke Harris’s attack. Harris’s anger, coupled with his perception of Lopez as a Mexican who does not “have the same rights as real Americans” (Tr. 216), provoked the attack.

It is apparent from the transcript of the sentencing hearing that the district court was concerned only with Section 5K2.10(b). The court, however, failed to consider even this section in its entirety, focusing on what the court perceived as Lopez’s wrongful conduct, but giving no consideration to the fact that Harris made no effort to avoid or prevent confrontation as Section 5K2.10(b) specifies.

Since Lopez at no time put Harris or anyone else in physical danger, his conduct was not “wrongful” within the meaning of Section 5K2.10. Therefore, Harris is not entitled to a downward departure for victim misconduct.<sup>9</sup>

Even when a victim has engaged in conduct that is wrongful within the meaning of Section 5K2.10, downward departure is not justified if the defendant’s response is grossly disproportionate to the provocation. *United States v. Paster*, 173 F.3d at 212; *United States v. Shortt*, 919 F.2d at 1328 (“A concern for the proportionality of the defendant’s response is manifested by the terms of § 5K2.10.”). Harris is much larger than Lopez, and Lopez was confined in the back seat of a car with his hands handcuffed behind his back with no means of escape. Four other law enforcement officers were in the immediate area to prevent Lopez from escaping if he were able to exit the car. The officers described what would have been a proportionate response to Lopez’s conduct (*supra* at page 18-19). Indeed, one of those officers went to his own car to get a hobble that could be used to restrain Lopez, a matter that would take 30 seconds to

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<sup>9</sup> As indicated above (*supra* at page 5), there is a great disparity in size between Harris (6'2", 325 pounds) and Lopez (approximately one foot shorter and 200 pounds lighter). Thus, U.S.S.G. § 5K2.10(a) cannot be used to justify a downward departure for a defendant so much larger than his victim. Moreover, there is no evidence in the record that Lopez had a reputation for violence, or that Harris thought that he did. See U.S.S.G. § 5K2.10(c).

one minute to complete (Tr. 112-113, 116). Nevertheless, Harris opened the door twice and beat Lopez with his baton. This response was grossly disproportionate to any provocation; therefore, even if Lopez engaged in wrongful conduct within the meaning of Section 5K2.10, Harris's grossly disproportionate response precludes downward departure for victim misconduct.

In addition, the district court's comments at the sentencing hearing indicate that the downward departure was influenced by factors not appropriately considered in the context of victim provocation. The court stated (Sent. Tr. 10):

Frankly, \* \* \* it just does not appear to the Court that this case, under the guidelines, calls for a sentence anywhere near as severe as the Government seems to want this defendant to receive. Nine years is a long time for a police officer \* \* \* who's never had a blemish on his record to serve in prison for hitting someone back-handed who's causing a lot of uproar after having been lawfully arrested when there was not very much damage done to this victim at all.

First, it is evident that the district court's decision to depart downward was motivated at least in part by disagreement with the sentence prescribed by the Guidelines. This Court has repeatedly held, however, that a personal disagreement with the Guidelines does not reflect reasonable consideration of the proper factors for sentencing. See, e.g., *United States v. Barbontin*, 907 F.2d 1494, 1499 (5th Cir. 1990); *United States v. Lopez*, 875 F.2d 1124, 1126 (5th Cir. 1989). In *Lopez*, for example, this Court cited certain comments at the sentencing hearing,

such as the Guidelines “were weak and ineffectual with respect to [this] crime” and “I think the guidelines are wrong,” as indicative of the district court's personal disagreement with the Guidelines. *Id.* at 1126. The court's comment in this case that “[n]ine years [the maximum for Level 29] is a long time” expresses a belief that the Guidelines are wrong. It appears to have motivated the drastic downward departure imposed by the court and is a misapplication of the Guidelines. 18 U.S.C. 3742(e)(1).

Second, the downward departure was motivated by Harris’s employment as “a police officer \* \* \* who’s never had a blemish on his record” (Sent. Tr. 10). Section 5H1.5 is the section of the Sentencing Guidelines addressing consideration of a defendant’s employment record, and any downward departure for employment record should have been considered pursuant to that section. “A defendant's employment record \* \* \* [is] not ordinarily relevant in determining whether a departure is warranted.” *United States v. Burlison*, 22 F.3d 93, 94 (5th Cir.), cert. denied, 513 U.S. 911 (1994) (quoting U.S.S.G. § 5H1.5). See also 28 U.S.C. 994(e) (instructing the Sentencing Commission to assure that the Guidelines “reflect the general inappropriateness of considering the \* \* \* employment record \* \* \* of the defendant”). Since employment record is a discouraged factor, the sentence imposed should depart downward only “in

exceptional cases.” *Koon v. United States*, 518 U.S. at 95 (quoting U.S.S.G. ch. 5, pt. H, intro. comment). See also *United States v. Winters*, 174 F.3d at 482. The record does not contain any exceptional factors justifying a downward departure because of Harris’s employment record. Even when relevant, the employment record cannot be considered as a factor in a downward departure for victim misconduct as the district court did here. Cf. *United States v. Harrington*, 82 F.3d 83, 88-89 (5th Cir. 1996) (district court should have considered upward enhancement for abuse of position of trust pursuant to Section 3B1.3, not Section 5K2.0).

Third, the district court improperly focused on the damage Harris’s blow did to Lopez, stating “there was not very much damage done to this victim at all” (Sent. Tr. 10). Harm to Lopez was considered in the Presentence Investigation Report pursuant to Section 2A2.2(b)(3) of the Guidelines. The Base Offense Level was increased by two levels (the smallest increase of the three options provided) because of the injury that Lopez suffered (PSR ¶ 14). Harm to the victim is a circumstance “adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” 18 U.S.C. 3553(b). Therefore, the

Guidelines do not permit the district court to reconsider the harm to Lopez in departing downward for victim misconduct.<sup>10</sup>

C. *Even If Downward Departure Were Authorized, The Departure Entered By The District Court Was Unreasonable*

When a district court imposes a sentence that is outside the applicable guideline range, this Court has the statutory responsibility to examine the sentence and determine whether it is unreasonable. 18 U.S.C. 3742(e)(3); *Williams v. United States*, 503 U.S. 193, 201-202 (1992); *United States v. Winters*, 174 F.3d at 482 (citing *United States v. Harrington*, 82 F.3d at 87). If it determines that the sentence is unreasonable, the Court may vacate the sentence and remand for further sentencing proceedings. 18 U.S.C. 3742(f)(2). As discussed above, under the facts of this case, no downward departure is justified under Section 5K2.10. Even if one were justified, the district court abused its discretion in reducing the sentence from the Guideline range of 87 to 108 months to only 13 months.

*Koon v. United States*, *supra*, is the most prominent case concerning a downward departure because of victim misconduct for a police officer convicted

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<sup>10</sup> The court also seems to minimize the force of the blow struck to Lopez's head, describing it as "hitting someone back-handed" (Sent. Tr. 10). Whether Harris struck Lopez forehanded or back-handed has nothing to do with victim misconduct. Furthermore, there was no evidence presented at trial or at sentencing that a back-handed blow with a baton is any less damaging than a forehanded blow.

of a violation of Section 242. In that case, the victim had led law enforcement officers on an eight-mile highway chase at speeds up to 100 m.p.h. After stopping and exiting his car, the victim refused to assume the prone position as ordered. Four officers tried to force him down, but he became combative. The victim then rose from the ground and charged one of the officers, who struck him with a baton. The victim fell to the ground. He attempted to rise, but was prevented from doing so by baton blows delivered by two officers. One officer continued to administer repeated blows to the victim's legs and chest, at which point the victim rolled over and lay prone. At this point, the district court found that the officers no longer perceived the victim to be a threat; therefore, when the officers continued to strike the victim, what had begun as a lawful use of force became unlawful within seconds of this provocation. *Koon v. United States*, 518 U.S. at 86-87. The Supreme Court held that the district court did not abuse its discretion departing downward, and that this victim's extensive provocation justified a downward departure of *five* levels. *Id.* at 89, 113.<sup>11</sup>

In contrast, Lopez did not resist arrest. This was not a situation where Harris used lawful force against Lopez that escalated into unlawful force. The

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<sup>11</sup> The district court in *Koon* also decided other factors justified further downward departure. Those factors are not present in this case.

only acts by Lopez that could be considered to be provocative involved potential damage to property or to himself. Despite being in no physical danger, and rather than making “any efforts \* \* \* to prevent confrontation,” U.S.S.G. § 5K2.10(b), Harris succumbed to his anger and *initiated* the confrontation with a much smaller, defenseless man with his hands handcuffed behind his back. In these circumstances, even if Lopez’s actions justified some downward departure, the district court abused its discretion in imposing a downward departure equivalent to 16 levels, reducing the sentence to 15% of the minimum required by the Guidelines.



CONCLUSION

Harris's conviction for violating 18 U.S.C. 242 should be affirmed. The sentence imposed by the district court should be vacated and the case remanded for resentencing.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2001, two copies of the Brief For The United States As Appellee/Cross-Appellant and one computer readable disk copy of the brief were mailed first class, postage prepaid, to the following counsel of record:

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## CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

- A. Exclusive of the exempted portions in 5th Cir. R. 32.2, the brief contains 6218 words.
- B. The brief has been prepared in proportionally spaced typeface using WordPerfect 9 software in Times New Roman typeface, 14 point type.
- C. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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