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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

MICHAEL BROWN,

Defendant-Appellant-Cross-Appellee

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

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REPLY BRIEF FOR THE UNITED STATES  
AS APPELLEE-CROSS-APPELLANT

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*United States v. Michael Brown*

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 - 26.1-3 and 27-1(a)(9), counsel for appellee-cross-appellant United States hereby certifies that the certificate contained in its opening brief and appellant's opening brief comprise a complete list of the persons or entities who may have an interest in the outcome of this case except for the following individual omitted from that list:

Dreiband, Eric, Counsel for the United States

s/ Christopher C. Wang  
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Attorney

Date: November 16, 2018

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UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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REPLY BRIEF FOR THE UNITED STATES  
AS APPELLEE-CROSS-APPELLANT

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As the United States explained in its opening brief (U.S. Br. 35-44),<sup>1</sup> this Court should vacate Brown's sentence and remand for resentencing because the district court erred in calculating his Sentencing Guidelines range. Specifically, the district court erred in declining to use aggravated assault as Brown's

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<sup>1</sup> This brief uses the following abbreviations: "U.S. Br. \_\_\_" refers to page numbers in the United States' opening brief filed with this Court; "Def. R. Br. \_\_\_" refers to page numbers in Brown's response/reply brief filed with this Court; and "Doc. \_\_, at \_\_\_" refers to the document number assigned on the district court's docket sheet.

underlying offense in calculating his Sentencing Guidelines range. Aggravated assault is the appropriate underlying offense here because Brown's offense of conviction, 18 U.S.C. 242, was "a felonious assault that involved \* \* \* a dangerous weapon *with intent to cause bodily injury (i.e., not merely to frighten) with that weapon.*" Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added).

Brown contends (Def. R. Br. 11-14) that this Court should review the district court's findings on Section 2A2.2's applicability for plain error because the United States failed to preserve in the district court the specific objection to the district court's sentencing calculations it makes on appeal. He further asserts (Def. R. Br. 15-20) that, even if the government preserved its argument, the district court did not clearly err in determining that Brown did not tase J.B. with the intent to cause bodily injury. For the reasons that follow, these arguments are without merit.

## **ARGUMENT**

### **THE DISTRICT COURT ERRED IN DECLINING TO USE AGGRAVATED ASSAULT AS BROWN'S UNDERLYING OFFENSE**

#### *A. The United States Preserved Its Argument That The District Court Committed Legal Error In Declining To Use Aggravated Assault As Brown's Underlying Offense*

1. Brown was convicted of violating 18 U.S.C. 242 in connection with his use of force against J.B., a passenger in a car that Brown and his fellow officers stopped after a police chase. Brown's use of force included tasing J.B. Brown's

Presentence Investigation Report (PSR) used the Guideline for aggravated assault, Section 2A2.2, as the underlying offense in calculating his Sentencing Guidelines range. Doc. 256, at 10. Brown objected to the use of aggravated assault. Doc. 234, at 4-5. The United States responded that Brown's offense of conviction was an aggravated assault under Section 2A2.2 because it was a "felonious assault" that involved a dangerous weapon, a taser, "with intent to cause bodily injury." Doc. 241, at 9 (citing Sentencing Guidelines § 2A2.2, comment. (n.1)); see generally U.S. Br. 36-40.

The district court concluded that aggravated assault did not apply because there was insufficient evidence that "Brown's intent in using the Taser was to cause bodily injury, rather than to gain control over J.B." Doc. 278, at 17. The United States filed an objection (Doc. 285) to this order, which the district court construed as a motion for reconsideration, and denied it as procedurally inappropriate (Doc. 289). On cross-appeal, the United States argues that the district court committed legal error in concluding that Brown did not discharge his taser with the intent to cause bodily injury, but rather to gain control over J.B., because those two motives are not mutually exclusive. See U.S. Br. 40-42 (addressing district court's application of the sentencing guidelines).

2. Brown argues (Def. R. Br. 12) that this Court should review the district court's conclusion that his underlying offense was not aggravated assault for plain

error because the government failed to make this “dual-intent” argument below. Brown is not correct. To preserve for appeal an objection to the district court’s sentencing determination, a party “must raise that point in such clear and simple language that the trial court may not misunderstand it.” *United States v. Massey*, 443 F.3d 814, 819 (11th Cir. 2006) (citation and internal quotation marks omitted). Once a party has properly presented a claim on appeal, it “can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). In other words, “[a]lthough new claims or issues may not be raised, new *arguments* relating to preserved claims may be reviewed on appeal.” *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008).

That is the case here. Brown acknowledges that the United States contended before the district court that his conduct constituted aggravated assault under Section 2A2.2 because he tased J.B. with the intent to cause bodily injury. See Def. R. Br. 6-7, 9, 12. Therefore, the United States’ argument on appeal—that Brown’s intent to cause bodily injury accords with an intent to gain control over J.B.—“is not a new claim[,] but a new argument to support what has been [its] consistent claim” that Section 2A2.2 applies given Brown’s use of his taser. *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016) (citation, internal quotation marks, and ellipses omitted). Indeed, the United States had no reason to make this



specific argument until the district court concluded, in its order sustaining Brown's objection to the PSR, that Brown's intent in tasing J.B. was to control J.B., not to cause bodily injury. Moreover, because the district court made clear that it would not entertain a post-order challenge to this determination (Doc. 289), the United States could only make this argument in the first instance on appeal.<sup>2</sup>

*B. The District Court Erred In Concluding That Brown Did Not Tase J.B. With The Intent To Cause Bodily Injury*

In its opening brief, the United States argued (U.S. Br. 40-42) that the district court erred in concluding that the government failed to show that Brown's intent was to cause bodily injury rather than to gain control over J.B. The United States explained that those two motives are not mutually exclusive, and that Brown intended to achieve J.B.'s compliance by causing him bodily injury through the firing of the taser. The United States further argued (U.S. Br. 37-40) that, with this correct legal understanding, an objective view of the evidence supports the

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<sup>2</sup> Brown contends (Def. R. Br. 13) that acceptance of the United States' argument would subject "literally every decision on a guideline application \* \* \* to *de novo* review for procedural error." This assertion is belied by his contemporaneous citation (Def. R. Br. 11, 13) to *Gall v. United States*, 552 U.S. 38 (2007), which limits such review to "significant procedural error, such as \* \* \* improperly calculating \* \* \* the Guidelines range." *Id.* at 51. The district court's erroneous decision not to use aggravated assault as Brown's underlying offense resulted in its improper calculation of a Guidelines range of 21 to 27 months' imprisonment rather than 70 to 87 months' imprisonment—a "significant" error by any measure.

conclusion that Brown intended to cause bodily injury by tasing J.B. Brown's arguments do not undermine these points.

1. As threshold matters, Brown incorrectly characterizes the nature of the United States' sentencing cross-appeal in two ways. First, Brown asserts (Def. R. Br. 15) that the United States' challenge to the district court's calculation of Brown's Sentencing Guidelines range is substantive, not procedural, in nature. That is not correct. "A sentence may be procedurally unreasonable if the district court improperly calculates the Guidelines range," while "[t]he review for substantive unreasonableness involves examining the totality of the circumstances, including an inquiry into whether the statutory factors in § 3553(a) support the sentence in question." *United States v. Gonzalez*, 550 F.3d 1319, 1323-1324 (11th Cir. 2008), cert. denied, 557 U.S. 928 (2009). In any event, Brown does not suggest why this distinction matters here, as he is not arguing that this Court should review the sentence imposed for abuse of discretion. See generally *United States v. Osorio-Moreno*, 814 F.3d 1282, 1287 (11th Cir. 2016) (substantive reasonableness of sentence reviewed for abuse of discretion).

Second, Brown asserts (Def. R. Br. 15) that the district court's finding on intent is a factual finding that this Court reviews for clear error. This argument is also incorrect. It is undisputed that Brown knowingly deployed the taser and believed that the taser's probes had struck and penetrated J.B.'s body. See U.S. Br.

40. But the district court concluded that Brown could not have discharged the taser with the intent to cause bodily injury because, instead, he tased J.B. with the intent to *gain control* over J.B. Doc. 278, at 17. Because this conclusion is more akin to a legal interpretation of the phrase “intent to cause bodily injury” than a factual finding, it warrants no deference from this Court. See, e.g., *United States v. Maddox*, 803 F.3d 1215, 1220 (11th Cir. 2015) (“We review *de novo* the district court’s interpretation and application of the Sentencing Guidelines.”), cert. denied, 136 S. Ct. 852 (2016).

2. Brown’s primary argument (Def. R. Br. 16-18) is that although the jury, in convicting him of violating 18 U.S.C. 242, found that he used unlawful force against J.B., the jury did not determine what actions constituted the unlawful force (*i.e.*, the punching, kicking, and/or tasing). Therefore, according to Brown, his use of the taser may have been reasonable and cannot support the PSR’s use of aggravated assault as the underlying offense.

This argument misunderstands both how the government charged this case and Section 2A2.2’s definition of “aggravated assault.” Contrary to Brown’s attempt to parse out his separate uses of force, the government charged, and the jury convicted, him of committing *one* assault that resulted in J.B.’s bodily injury and violated Section 242. See Doc. 81, at 2 (charging Brown and his co-defendants with violating Section 242 by “assault[ing] J.B. during a traffic stop, by

repeatedly striking J.B. with a closed fist, a hand clasping a firearm, feet, and knees, and by electroshocking J.B. with an X26 Taser, a dangerous weapon; all of which resulted in bodily injury”); Doc. 161, at 1 (finding Brown guilty of Deprivation of Rights Under Color of Law that resulted in bodily injury). Because it is undisputed that Brown tased J.B. during the assault and that a taser is a dangerous weapon, it follows that this “felonious assault \* \* \* *involved* \* \* \* a dangerous weapon.” Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added).

3. Finally, Brown makes no serious attempt to contravene the United States’ argument that the district court relied on an erroneous understanding of the “intent to cause bodily injury” standard and that, correctly understood, an objective view of the evidence demonstrates that he intended to cause bodily injury by tasing J.B. Rather, Brown lists (Def. R. Br. 19-20) facts the district court found regarding his use of the taser, none of which undermines the United States’ position. First, neither testimony by police witnesses that Brown tased J.B. to gain his compliance, nor the absence of government evidence as to when Brown deployed his taser, calls into question Brown’s intent to achieve J.B.’s compliance by causing him bodily injury through the firing of the taser.<sup>3</sup> See U.S. Br. 40-42. Second, the

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<sup>3</sup> In a footnote, Brown observes (Def. R. Br. 19 n.7) that evidence that he tased J.B. after J.B. had been brought into custody “might provide objective

(continued...)

district court clearly erred in finding that there was no evidence that Brown's taser actually electroshocked J.B., and in any event, any doubt as to whether Brown successfully deployed his taser is irrelevant to Section 2A2.2's applicability to this case. See U.S. Br. 42-44. Finally, J.B.'s refusal to comply with loud verbal commands to exit the vehicle constituted passive resistance, which did not justify Brown's use of a taser in response.<sup>4</sup> See U.S. Br. 19-22.

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(...continued)

evidence of an intent to commit bodily injury." Brown may be basing this suggestion upon his apparent belief (see Def. R. Br. 19) that intent to cause bodily injury requires a showing that the defendant possessed some kind of animus toward the victim. Brown cites no basis for such a requirement, and there is none.

<sup>4</sup> Brown also notes (Def. R. Br. 20) the district court's finding that before being removed from the vehicle, J.B. reached between the driver and passenger seats, which led to a fear that he was reaching for a weapon. This perception of J.B.'s activity was *Officer Ryan's* (see Doc. 278, at 15), which is irrelevant to *Brown's* response. Brown acknowledged in all versions of his Officer Report that he used force in response to nothing more than J.B.'s failure to comply with loud verbal commands. See Doc. 211-1, at 117-123. And, in any event, the jury found that Brown's use of force was unlawful.

## CONCLUSION

For the reasons set forth in this brief and the United States' opening brief, this Court should vacate Brown's sentence and remand for resentencing with instructions to recalculate his Sentencing Guidelines range using aggravated assault as the underlying offense for his Section 242 conviction.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,140 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
Attorney

Date: November 16, 2018

## **CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2018, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by Federal Express.

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
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