No. 24-5348

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

JAMES JUSTICE, aka James Thomas,

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The district court's error in applying the Sentencing Guidelines is straightforward under this Court's precedent. The United States believes that this Court can resolve the case without oral argument.

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STATEMENT OF JURISDICTION

The district court had original jurisdiction under 18 U.S.C. 3231. It entered final judgment against the defendant on March 15, 2024, and it amended the judgment to correct an error on April 2, 2024. (Amended Judgment, R. 77, Page ID # 272).[1] The United States filed a timely notice of appeal on April 12, 2024, and it refiled the notice on April 15, 2024, with the appropriate filing event in the district court's document-filing system. (Notice of Appeal, R. 80, Page ID # 295). This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court procedurally erred by ruling that the Sentencing Guidelines' cross-reference in Section 2J1.2(c) to Section 2X3.1, which bases the offense level for an obstruction-type offense on the underlying criminal conduct, requires proof of the underlying offense at trial.

INTRODUCTION

Defendant-Appellee James Justice is a former county correctional officer in Tennessee. The United States proved at trial that Justice falsified a report in response to allegations that he sexually assaulted a woman in his custody. A jury

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[1] "R. __" refers to documents, by number, on the district court's docket. "Page ID # __" refers to the page numbers in the consecutively paginated electronic record. "App. __" refers to page numbers in the United States' Appendix filed concurrently with this brief.

thus convicted him of falsifying records in violation of 18 U.S.C. 1519. The presentence investigation report (PSR) calculated a Guidelines range of 97 to 121 months. The PSR appropriately followed a Sentencing Guidelines cross-reference in Section 2J1.2(c) to Section 2X3.1, which applies when a defendant's obstruction "involved obstructing the investigation or prosecution of a criminal offense."

The district court declined to apply the cross-reference because the underlying offense was not proved at trial, and it reduced Justice's Guidelines range to 24 to 30 months. Under this Court's precedent, that decision was erroneous. "Application of the § 2X3.1 cross-reference provision is mandatory," and "proof of the underlying offense is immaterial." *United States v. Kimble*, 305 F.3d 480, 485-486 (6th Cir. 2002). The error renders the district court's sentence procedurally unreasonable. This Court should vacate the sentence and remand for resentencing under the correct Guidelines range.

STATEMENT OF THE CASE

A. Factual Background

1. In 2016, Justice was working as a correctional officer for the Maury County Sheriff's Office (MCSO), assigned to the female pod in the Maury County Jail. (PSR, R. 82, Page ID # 305). On January 18, 2016, a woman in the jail's custody, C.C., was taken to an area hospital for emergency treatment after vomiting blood. (Transcript (Tr.) Vol. 1-B, R. 83, Page ID # 395-396; Tr. Vol. 2,

R. 84, Page ID # 526). She underwent surgery on January 21 to have her gallbladder removed. (Tr. Vol. 2, R. 84, Page ID # 527, 546). Justice was assigned to the night shift during C.C.'s hospital stay, monitoring her before and after her surgery. (Tr. Vol. 2, R. 84, Page ID # 526-527; PSR, R. 82, Page ID # 305-306).

C.C. later alleged that Justice forced her to perform oral sex on him one night while she was sedated. (PSR, R. 82, Page ID # 306). After that shift, Justice told a co-worker at the jail that he had "done something that will land [him] in federal prison." (PSR, R. 82, Page ID # 306; Tr. Vol. 1-B, R. 83, Page ID # 399). After C.C.'s release from the jail months later, Justice contacted her, and in his telling, they engaged in consensual sexual activity one time. (PSR, R. 82, Page ID # 306). C.C. broke it off thereafter. (PSR, R. 82, Page ID # 306).

2. In July 2018, C.C. alleged in an interview on social media that Justice sexually assaulted her as she recovered from surgery. (U.S. Sentencing (Sent.) Memorandum, R. 65, Page ID # 197).[2] The interview came to the attention of MCSO's criminal investigators. (Tr. Vol. 1-B, R. 83, Page ID # 425-427). Justice had not written any incident report at the time. Accordingly, the MCSO official responsible for compliance with the Prison Rape Elimination Act (PREA) told

[2] C.C. repeated the allegation in an interview with a reporter for a local news channel later that year. (PSR, R. 82, Page ID # 306).

Justice to submit a report in response to the "third party complaint of sexual misconduct with [C.C.]." (PSR, R. 82, Page ID # 305-306; Tr. Vol. 1-B, R. 83, Page ID # 360-361).

Justice submitted the report in August 2018. (Tr. Vol. 1-B, R. 83, Page ID # 361). In the report, Justice claimed that C.C. made "a comment during conversation" on January 20, 2016, which he interpreted as "an inappropriate advancement toward me," and he "turned down her advance." (PSR, R. 82, Page ID # 306-307). Justice wrote that C.C. "made more notable advances" the next night, January 21. (PSR, R. 82, Page ID # 307). This would have been right after her gallbladder surgery. (Tr. Vol. 2, R. 84, Page ID # 527).

According to Justice's report, C.C.'s advances on January 21 included "attempting to fall on [him] when out of the bed," asking him to kiss her, and "expos[ing] herself," all of which he declined. (PSR, R. 82, Page ID # 306-307). He claimed to have "informed both Lt Debra Wagonschutz and Sgt Robert Truette of the events that occurred" and asked them "if [he] should make a written report of the incident, but was advised not to do so by them both." (PSR, R. 82, Page ID # 306-307). Justice's report omitted mention of sexual contact with C.C. after she was released from the jail.

B. Procedural Background

1. On May 19, 2022, Justice was charged in an indictment with a single count of violating 18 U.S.C. 1519. (Indictment, R. 3, Page ID # 3). That statute penalizes anyone who "knowingly . . . falsifies, or makes a false entry," in a record with intent to obstruct or impede the investigation of a matter within federal jurisdiction. The indictment alleged that, in "responding to allegations that [he] had nonconsensual sexual contact with C.C.," Justice knowingly falsified his 2018 incident report with the intent to obstruct in three respects: (1) falsely claiming to MCSO supervisors Wagonschutz and Truette that C.C. made sexual advances towards him while in his custody at the hospital; (2) falsely claiming that Wagonschutz and Truette advised him not to write a report about those alleged sexual advances; and (3) omitting that he had a sexual relationship with C.C. after her release from the jail. (Indictment, R. 3, Page ID # 3).[3]

2. The case went to trial in April 2023. (Tr. Vol. 1-B, R. 83, Page ID # 323). The trial did not explore the veracity of C.C.'s allegations that Justice sexually assaulted her. C.C. did not testify, and at a pretrial conference, the district court ruled that it would be unfairly prejudicial to allow testimony about C.C.'s

[3] The indictment reflects that Justice's name at the time was James Thomas. (Indictment, R. 3, Page ID # 3). He later obtained a legal name change to James Justice. (Motion to Amend Indictment, R. 28, Page ID # 42-43).

allegations against Justice. (Pretrial Conference, R. 89, Page ID # 679). Instead, the court ordered the parties to reach a stipulation about Justice's alleged conduct. (Pretrial Conference, R. 89, Page ID # 681-685). The stipulation, provided to the jury at trial, was as follows:

> In July of 2018 a member of the Maury County community alleged via social media that the defendant engaged in conduct covered by the Prison Rape Elimination Act involving a female inmate in his custody while guarding her at the Maury Regional County Hospital. The alleged conduct required reporting to the United States Department of Justice under the Prison Rape Elimination Act. The alleged conduct by the defendant also fell under a federal criminal statute that is investigated by the Federal Bureau of Investigation, an agency of the United States Department of Justice.[4]

(Tr. Vol. 1-B, R. 83, Page ID # 347-348).

Following a two-day trial, the jury found Justice guilty of violating 18 U.S.C. 1519. (Verdict, R. 53, Page ID # 177; Tr. Vol. 3, R. 85, Page ID # 657).

3. The probation office prepared a PSR in August 2023, revising it in February 2024 and again in March 2024. (PSR, R. 82, Page ID # 301). The calculation of the Guidelines range remained the same throughout.

The calculation depended on a series of cross-references. The guideline for violations of 18 U.S.C. 1519 is Section 2J1.2, which provides a base offense level

[4] Federal law prohibits deprivations of rights by persons acting under color of law, including sexual assaults by law enforcement officers. *See* 18 U.S.C. 242; *United States v. Morris*, 494 F. App'x 574, 580-581 (6th Cir. 2012).

of 14. Sentencing Guidelines § 2J1.2(a). When the violation involves "obstructing the investigation or prosecution of a criminal offense," it refers to Section 2X3.1, if that provision yields a higher offense level. Sentencing Guidelines § 2J1.2(c). Section 2X3.1, the guideline for accessories after the fact, provides that the offense level is "6 levels lower than the offense level for the underlying offense," up to a maximum of 30. Sentencing Guidelines § 2X3.1(a)(1) and (3).

The PSR cited "Violation of Rights Under Color of Law" as the underlying offense, a reference to 18 U.S.C. 242, for which Section 2H1.1 provides the sentence. (PSR, R. 82, Page ID # 308). That guideline, in turn, relies on the "guideline applicable to any underlying offense." Sentencing Guidelines § 2H1.1(a)(1). The PSR identified "criminal sexual abuse" as the deeper underlying offense, for which the guideline is Section 2A3.1 and the base offense level is 30. (PSR, R. 82, Page ID # 308). Though Justice's status as a public official and C.C.'s status as a person held by a correctional facility would have increased the offense level further, Section 2X3.1 capped the offense level at 30. (PSR, R. 82, Page ID # 308-309). Given Justice's Category I criminal history, the PSR calculated a Guidelines range of 97 to 121 months. (PSR, R. 82, Page ID # 316). The United States concurred in that calculation. (U.S. PSR Position, R. 64, Page ID # 194).

Justice objected to the PSR's "cross reference to an underlying offense of criminal sexual abuse" because that offense was not proved at trial. (Defendant's (Def.'s) PSR Position, R. 66, Page ID # 202). He argued that the appropriate underlying offense should be "18 U.S.C. § 1001, False Statements." (Def.'s PSR Position, R. 66, Page ID # 202).

On March 13, 2024, the probation office prepared an addendum at undocketed direction from the district court that dispensed with the cross-reference to Section 2X3.1, consistent with Justice's objection. (Sent. Tr., R. 75, Page ID # 248; App. 10-11). The addendum applied the base level of 14 under Section 2J1.2, adding three levels for "substantial interference with the administration of justice." Sentencing Guidelines § 2J1.2(b)(2). A two-level adjustment for abusing a position of public trust was offset by a two-level reduction for his status as a "Zero-Point" offender. Sentencing Guidelines §§ 3B1.3 and 4C1.1. The resulting total offense level was 17, yielding a Guidelines range of 24 to 30 months. (App. 11).

4. The court held a sentencing hearing on March 15, 2024. In response to Justice's objection, the United States noted that the lack of evidence on Justice's underlying conduct resulted from the district court's ruling at the pretrial conference disallowing testimony about C.C.'s allegations. (Sent. Tr., R. 75, Page ID # 249-250). The United States also pointed out that Justice had stipulated that

the alleged conduct "required reporting to the United States Department of Justice under the Prison Rape Elimination Act" and "fell under a federal criminal statute" investigated by the FBI. (Sent. Tr., R. 75, Page ID # 249-250).

The district court understood that Justice had obstructed "a federal investigation into an allegation that he had sexually assaulted a woman prisoner." (Sent. Tr., R. 75, Page ID # 263). It nevertheless sustained Justice's objection to criminal sexual abuse as the underlying offense, reasoning as follows:

> This prosecution was for basically obstruction, destruction of records with intent to obstruct. The victim, who allegedly was sexually abused, did not testify in this trial. The government's opening statement said to the jury, you will not be asked to figure out what he did sexually. In other words, you will not have to decide whether he did this sexual abuse of this victim.
>
> The government based the entire prosecution on the fact that he didn't say that he had a relationship with her afterwards and they had sex. This was entirely about the investigation. The proof of what actually took place was extremely thin, was hinged almost entirely upon the defendant saying when he came out of the room, ["]I've done something that could land me in prison.["]
>
> And, of course, that's a very incriminating statement. But the fact that it was never proved what, if anything, he did makes me rule that this cross-reference is not appropriate. So we're going to go with the addendum computations.

(Sent. Tr., R. 75, Page ID # 250-251). The court otherwise adopted the PSR as its findings of fact. (Sent. Tr., R. 75, Page ID # 251).

The court thus calculated the Guidelines range as 24 to 30 months. (Sent. Tr., R. 75, Page ID # 251; Statement of Reasons, R. 78, Page ID # 279). The court

varied downward to 15 months, citing mitigating aspects of Justice's character and background. (Sent. Tr., R. 75, Page ID # 263-267; Statement of Reasons, R. 78, Page ID # 280-281). Ultimately, it regarded the matter "basically [a]s an obstruction case, not a sexual abuse case." (Sent. Tr., R. 75, Page ID # 267).

5. The district court entered judgment the same day. (Judgment, R. 72, Page ID # 223). It issued an amended judgment on April 2, 2024, correcting an erroneous statement that Justice had pleaded guilty, rather than that he was found guilty at trial. (Amended Judgment, R. 77, Page ID # 272).

6. The United States timely appealed. (Notice of Appeal, R. 80, Page ID # 295).

SUMMARY OF ARGUMENT

This Court should vacate Justice's sentence and remand for resentencing because the district court procedurally erred in calculating the Sentencing Guidelines range for his falsifying-records conviction. Declining to apply Section 2J1.2(c)'s cross-reference to Section 2X3.1, the court calculated Justice's Guidelines range as 24 to 30 months' imprisonment. Had the district court applied the cross-reference as this Court's precedent requires, Justice's Guidelines range would have been 97 to 121 months.

When an obstruction offense involves obstructing the investigation or prosecution of a crime, the Sentencing Guidelines base the calculation of the

sentence on the underlying offense that the obstruction was intended to insulate. That is what Section 2J1.2(c)'s cross-reference to Section 2X3.1 requires. "[P]roof of the underlying offense is immaterial" under this Court's precedent. *United States v. Greer*, 872 F.3d 790, 795 (6th Cir. 2017) (quoting *United States v. Kimble*, 305 F.3d 480, 485 (6th Cir. 2002)). Applying the cross-reference is mandatory, even if the defendant is innocent of the underlying crime. Obstructing the investigation of a serious crime is correspondingly more serious than obstructing the investigation of a lesser crime, so it warrants more punishment. Thus, sentences for defendants convicted of obstruction offenses routinely are based on serious underlying crimes, up to and including homicide, regardless of the defendants' responsibility for those crimes.

Here, Justice falsified a report to obstruct the investigation of his alleged criminal sexual abuse, a federal crime. Accordingly, it was mandatory to apply the cross-reference from Section 2J1.2(c) to Section 2X3.1. The district court erred by refusing to do so. It reasoned that Justice's sexual assault of C.C. was never proved. But this Court's precedent forecloses that reasoning. Justice's sentence would properly be based on criminal sexual abuse even if an investigation had

proved him innocent of the allegation. Neither Justice nor the district court cited any legal authority to the contrary.

Sound practical considerations support this Court's binding rule that proof of the underlying offense is immaterial to the application of the cross-reference. Most notably, efforts to obstruct justice may defeat or impede prosecution of the underlying crimes. That should not be rewarded with lighter penalties.

Remand for resentencing is required because the district court's calculation error was not harmless. The court's failure to apply the cross-reference reduced Justice's advisory Guidelines range by three-quarters, from the correct range of 97 to 121 months to the erroneous range of 24 to 30 months. The district court gave no indication that it would re-impose the same sentence even under the correct, much higher range. Accordingly, this Court should vacate Justice's sentence and remand for resentencing under the correct range.

ARGUMENT

This Court should vacate Justice's sentence and remand for resentencing because the district court procedurally erred by failing to apply the Sentencing Guidelines' cross-reference in Section 2J1.2(c) to Section 2X3.1.

A. Standard of review

A sentence based on an incorrect calculation of the Sentencing Guidelines range is procedurally unreasonable. *United States v. Bailey*, 931 F.3d 558, 562 (6th Cir. 2019). That is so whether or not the district court actually imposed a

sentence within the Guidelines range. *Gall v. United States*, 552 U.S. 38, 51 (2007). This Court "review[s] *de novo* a district court's legal conclusions and the application of the Guidelines to a set of undisputed facts." *United States v. Kimble*, 305 F.3d 480, 485 (6th Cir. 2002).

B. Justice's obstruction offense triggers the Sentencing Guidelines' cross-reference from Section 2J1.2(c) to Section 2X3.1.

1. Section 2J1.2 provides the guideline for numerous offenses involving the obstruction of justice, including 18 U.S.C. 1519. *See* Sentencing Guidelines App. A. It provides a base offense level of 14, but it refers to Section 2X3.1 when the defendant's obstruction "involved obstructing the investigation or prosecution of a criminal offense" and "the resulting offense level is greater." Sentencing Guidelines § 2J1.2(c)(1). Under Section 2X3.1, the defendant's offense level is tied to the underlying offense: "6 levels lower than the offense level for the underlying offense," up to a maximum of 30. Sentencing Guidelines § 2X3.1(a)(1) and (3). In short, a court must "determine which offense [the defendant] obstructed, find the appropriate guideline for that offense, use that guideline's base-offense level, and then subtract six." *United States v. Pennington*, 78 F.4th 955, 964 (6th Cir. 2023).

As this Court has held, "[a]pplication of the § 2X3.1 cross-reference provision is mandatory." *Kimble*, 305 F.3d at 486. It applies whether or not the underlying offense is proved. Indeed, "proof of the underlying offense is

immaterial." *Id.* at 485-486. "[T]he obstruction of a criminal *investigation* is punishable even if the prosecution is ultimately unsuccessful or even if the investigation ultimately reveals no underlying crime." *United States v. Greer*, 872 F.3d 790, 798 (6th Cir. 2017). "[I]t does not matter whether the defendant is actually guilty of the crime referenced in § 2X3.1 in order for the higher sentence recommendation to be imposed." *Kimble*, 305 F.3d at 486.

This has long been the rule throughout the circuits. *See United States v. Arias*, 253 F.3d 453, 459 (9th Cir. 2001) ("No court of which we are aware would permit inquiry into the sufficiency of the evidence on the underlying offense whose prosecution was obstructed." (collecting cases)). Under this rule, the cross-reference applies even when the defendant was acquitted of the underlying charge. *See, e.g.*, *id.* at 456-457, 461 (affirming Section 2X3.1-based sentence for defendant convicted of witness tampering but acquitted on underlying gun and drug charges); *United States v. McQueen*, 86 F.3d 180, 182-185 (11th Cir. 1996) (affirming Section 2X3.1-based sentence for defendant convicted of witness tampering but acquitted on underlying money-laundering charges).

Proof of the underlying offense is immaterial because, as this Court has explained, "the point of the cross-reference is to 'punish more severely . . . obstruction of . . . prosecutions with respect to more serious crimes.'" *Kimble*, 305 F.3d at 485 (quoting *Arias*, 253 F.3d at 459). The obstruction statutes reach

conduct aimed at impeding all manner of proceedings, from administrative inquiries to serious criminal prosecutions. *Compare United States v. Kirst*, 54 F.4th 610, 615-623 (9th Cir. 2022) (affirming convictions for false statements to National Transportation Safety Board as it reviewed small plane crash), *cert. denied*, 143 S. Ct. 2681 (2023), *with Bailey*, 931 F.3d at 562-565 (affirming sentence for threatening witnesses at trial about sexual exploitation of minor). "[O]bstruction of the investigation of a more serious crime is correspondingly more serious than [obstruction] of an investigation into a less serious crime," so it "warrants more punishment." *Greer*, 872 F.3d at 798.

The Sentencing Guidelines' commentary confirms that the cross-reference to Section 2X3.1 exists to address "more serious forms of obstruction." Sentencing Guidelines § 2J1.2, comment. (backg'd.). Obstruction "is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense." *Ibid.* The cross-reference "will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person." *Ibid.*

Accordingly, it is routine for defendants convicted of obstruction-type offenses to receive Guidelines ranges based on the serious crimes their obstruction aimed to insulate. *See, e.g.*, *Bailey*, 931 F.3d at 562 (sexual exploitation of minor);

Greer, 872 F.3d at 793 (aggravated rape); *Kimble*, 305 F.3d at 483-484 (homicide). The more serious the underlying crime is, the more grave is the Guidelines sentence for the obstruction offense.

2. This Court's decision in *Greer* aptly shows how the cross-reference in Section 2J1.2(c) to Section 2X3.1 is supposed to work, in circumstances much like the present case. A female driver complained that the defendant, a Tennessee deputy sheriff, sexually assaulted her during a traffic stop. *Greer*, 872 F.3d at 792. The defendant lied to a detective investigating the complaint and later pleaded guilty to an obstruction charge. *Id.* at 792-793. At sentencing, he argued that it was "merely an inappropriate but consensual sexual rendezvous," and the government had not proved a crime. *Id.* at 793. The district court ascertained that there was at least no dispute that the driver had complained of sexual assault. *Ibid.* The court thus adopted the PSR's Guidelines calculation, which applied the same chain of cross-references as in this case: from Section 2J1.2(c) to Section 2X3.1 to Section 2H1.1 and ending with Section 2A3.1, the guideline for criminal sexual abuse. *Id.* at 793-794.

This Court affirmed, rejecting the defendant's argument that the cross-reference should apply "only if the prosecutor can prove by at least a preponderance of the evidence that the underlying crime actually occurred." *Greer*, 872 F.3d at 794-799. The Court explained that "the obstruction of a

criminal *investigation* is punishable even if the prosecution is ultimately unsuccessful or even if the investigation ultimately reveals no underlying crime," because the investigation of a serious offense "itself is a very serious thing and its obstruction cannot be tolerated." *Id.* at 798.

Here, the PSR's sentencing calculation correctly followed the same chain of references as in *Greer*. (PSR, R. 82, Page ID # 308-309). Justice's conviction under 18 U.S.C. 1519 prompted the application of Sentencing Guidelines § 2J1.2. The conviction "involved obstructing the investigation or prosecution of a criminal offense," triggering Section 2X3.1. That provision sets a base offense level "6 levels lower than the offense level for the underlying offense," triggering Section 2H1.1, which governs offenses involving individual rights. That provision refers in its turn to the "underlying offense," triggering Section 2A3.1, which governs criminal sexual abuse.

Section 2A3.1 sets a base offense level of 30. Reduced by six under Section 2X3.1, increased by six due to Justice's status as a public official (Section 2H1.1(b)(1)), and increased by two due to C.C.'s status as a person in custody (Section 2A3.1(b)(3)), the resulting total offense level would be 32. Because Section 2X3.1(a)(3) caps sentences at 30 levels, the correct offense level for Justice is 30.

C. The district court erred by refusing to apply the cross-reference for lack of proof of the underlying offense.

The district court reasoned erroneously that "this cross-reference is not appropriate" because "it was never proved what, if anything, [Justice] did." (Sent. Tr., R. 75, Page ID # 251). That approach is precisely what this Court rejected in *Greer* because it is foreclosed by the rule that "proof of the underlying offense is immaterial." 872 F.3d at 795-796 (quoting *Kimble*, 305 F.3d at 485-486). Justice would be subject to the cross-reference "even if the investigation ultimately reveal[ed] no underlying crime." *Id.* at 798. It is "plainly erroneous and inconsistent with the Guidelines" to demand that the government "prove that the defendant committed the underlying crime." *Ibid.*

This was not a dispute—as sometimes arises—about the right way to characterize the underlying crime for the purpose of applying Section 2X3.1. *See, e.g.*, *United States v. Leifson*, 568 F.3d 1215, 1221-1222 (10th Cir. 2009) (considering whether underlying offense was kidnaping or second-degree murder); *United States v. Dickerson*, 114 F.3d 464, 468-470 (4th Cir. 1997) (remanding for district court to determine whether underlying offense was assault resulting in serious bodily injury or assault with intent to murder).

There was never a question that Justice's falsified report obstructed the investigation of alleged criminal sexual abuse. It was clear throughout the case. The indictment specified that Justice falsified his report in response to allegations

he had "nonconsensual sexual contact with . . . a female inmate in his custody." (Indictment, R. 3, Page ID # 3). At trial, Justice stipulated that the alleged conduct "involv[ed] a female inmate in his custody," was "covered by the Prison Rape Elimination Act," and was within the FBI's jurisdiction. (Tr. Vol. 1-B, R. 83, Page ID # 347-348). After the PSR detailed the alleged conduct and applied the guideline for criminal sexual abuse, Justice responded only that the allegations had not been proved, not that the PSR mischaracterized the nature of the allegations. (Def.'s PSR Position, R. 66, Page ID # 202). At sentencing, the district court adopted the PSR for its findings of fact, and it acknowledged that Justice obstructed "a federal investigation into an allegation that he had sexually assaulted a woman prisoner." (Sent. Tr., R. 75, Page ID # 251, 263).

Neither Justice nor the district court cited any legal authority for requiring proof of the underlying conduct. Justice's objection to the PSR was short and purely factual. (Def.'s PSR Position, R. 66, Page ID # 202). The district court likewise cited no legal authority at the hearing in support of its oral ruling that applying the cross-reference required "proof of what actually took place." (Sent. Tr., R. 75, Page ID # 251). No post-hearing order identified legal authority for the court's approach either.

Moreover, it is not unfair to apply the cross-reference in cases where the defendant's culpability for the underlying offense is not proved at trial. The cross-

reference to Section 2X3.1 serves to punish defendants based on the severity of their convicted obstruction conduct, not to punish them for the unproven underlying crime indirectly. "[Section 2X3.1] merely serves as a tool to calculate the base offense level 'for particularly serious obstruction offenses.'" *Kimble*, 305 F.3d at 485 (quoting *United States v. Russell*, 234 F.3d 404, 410 (8th Cir. 2000)). "[U]sing the cross reference does not equate to 'a sentence for the underlying offense but [is] merely a measure or point of reference for the severity of offenses involving the administration of justice.'" *Arias*, 253 F.3d at 459-460 (quoting *United States v. Brenson*, 104 F.3d 1267, 1285 (11th Cir. 1997)). Through the cross-reference, Justice is sentenced not for his unproven conduct but for his *convicted* conduct—obstructing the investigation of C.C.'s serious allegations.

D. Sound considerations support this Court's rule that proof of the underlying offense is immaterial.

Sound practical considerations support this Court's rule that "proof of the underlying offense is immaterial," *Kimble*, 305 F.3d at 485-486. Problems would readily emerge under the district court's approach. Most plainly, a defendant's obstruction may inhibit proof of the underlying offense. As this Court put it in *Greer*, it is "unlikely that the Guidelines intended that a defendant should avoid or minimize punishment for obstruction of a criminal investigation just because that obstruction was so successful that he prevented a conviction on the underlying crime." 872 F.3d at 798; *cf. Dickerson*, 114 F.3d at 468 ("[P]erjurers would be

able to benefit from perjury that successfully persuaded a grand jury not to indict or a petit jury not to convict.").

In addition, oftentimes a person subject to a Section 2X3.1-based sentence for obstruction was not involved in the underlying crime, so proof of that crime is irrelevant to the culpability of their conduct. For instance, in *United States v. Demmler*, 655 F.3d 451 (6th Cir. 2011), the defendant offered bribes to procure favorable testimony from a likely witness at an upcoming trial against his close friend. *Id.* at 453-456. Such obstructive acts are wrong whether or not the underlying crimes actually occurred, and whether or not the government charged the right perpetrators for them.

Moreover, people may commit obstruction offenses even as the government is still investigating some other, larger wrongdoing. For instance, some Section 2X3.1-based sentences are for obstruction related to grand jury proceedings. *See, e.g.*, *Rita v. United States*, 551 U.S. 338, 341-342, 360 (2007) (affirming sentence for defendant who gave false testimony to grand jury investigating importation of unregistered machineguns). In such situations, the government may still be building its larger case. The district court's proof requirement would put the government to a difficult choice: prematurely present a minitrial of its evidence on the underlying crime, wait to bring an obstruction case even though it is ready to

be prosecuted, or surrender its pursuit of the full sentence for the obstruction that the Sentencing Guidelines provide.

E. Remand for resentencing is required because the district court's calculation error was not harmless.

This Court should remand for resentencing because the district court's calculation error was not harmless. "[A] remand for an error at sentencing is required unless [this Court is] certain that any such error was harmless—*i.e.* any such error 'did not affect the district court's selection of the sentence imposed.'" *United States v. Aldridge*, 98 F.4th 787, 799 (6th Cir. 2024) (quoting *United States v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005)). "[A]bsent some indication that the district court would have imposed the same sentence regardless of the error, it is for the district court to 'decide whether, starting from the correct Guidelines range, a downward variance remains appropriate.'" *United States v. Nicolescu*, 17 F.4th 706, 731 (6th Cir. 2021) (quoting *United States v. Montgomery*, 998 F.3d 693, 700 (6th Cir. 2021)).

The district court's error had significant effects. It reduced Justice's offense level by 13, from an offense level of 30 down to 17. (Sent. Tr., R. 75, Page ID # 251). The court's error thus reduced the Guidelines range from the correct 97 to 121 months to the erroneous 24 to 30 months, a reduction of approximately three-quarters. This Court has remanded for resentencing based on much less. *See, e.g.*, *Nicolescu*, 17 F.4th at 730-731 (rejecting harmlessness and remanding where error

changed offense level by one). And it has remanded for resentencing when calculation errors yielded incorrectly low Guidelines ranges. *See, e.g.*, *United States v. Vicol*, 514 F.3d 559, 562 (6th Cir. 2008) (ruling in government's favor that calculation error was not harmless where application of obsolete guidelines yielded "a lower base offense level and a lower sentencing range"); *United States v. Sawyers*, 360 F. App'x 621, 624-625 (6th Cir. 2010) (ruling in government's favor that court's failure to apply cross-reference and obstruction enhancement was not harmless).

Though the district court cited certain mitigating factors in Justice's life, it gave no indication that it would have imposed a 15-month sentence even under the correct, higher Guidelines range. *Cf. United States v. Carson*, 560 F.3d 566, 590 (6th Cir. 2009) (holding district court "made a finding in the alternative" that rendered calculation error harmless). Instead, the district court acknowledged that its decision not to apply the cross-reference to Section 2X3.1 "would considerably change the guideline." (Sent. Tr., R. 75, Page ID # 248). The court also recognized that the underlying sex offense for which Justice faced investigation was "obviously a whole lot more serious" than the obstruction offense of which he was convicted. (Sent. Tr., R. 75, Page ID # 264). Thus, it is far from certain that the district court would impose the same 15-month sentence after correctly

accounting for the admittedly more serious underlying offense by way of the cross-reference to Section 2X3.1.

The district court's choice to depart downward from the erroneous range does not render its calculation error harmless. The 15-month sentence it imposed was a reduction of just nine months from the lower bound of the incorrect 24-to-30-month range. It would reflect a far larger reduction, 82 months, from the lower bound of the correct 97-to-121-month range. To be sure, sentencing "is a matter of reasoned discretion, not math." *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). But "extreme downward variance[s]" are harder to justify and face vacatur if they do not adequately reflect the offense's gravity or deter such offenses by others. *United States v. Demma*, 948 F.3d 722, 729-733 (6th Cir. 2020) (vacating sentence where district court focused on defendant's mitigating "individual characteristics . . . to the exclusion of other considerations"). Even if the district court remains inclined to depart downward, it is not certain that the court would depart from the Guidelines much more drastically than it did before.

CONCLUSION

For the foregoing reasons, this Court should vacate Justice's sentence and remand for resentencing.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 5,646 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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Date: July 15, 2024

CERTIFICATE OF SERVICE

On July 15, 2024, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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ADDENDUM

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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