Nos. 01-50081, 01-50163

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant

v.

JACK A. GESTON,

Defendant-Appellant/
Cross-Appellee

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

# REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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# REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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Geston's assertion (Ans. Br. 10) that the district court correctly concluded that an enhancement was improper because action under color of law was considered as an element of proof for Count 1 reflects a fundamental misunderstanding of the calculation of Geston's sentence under United States Sentencing Commission, *Guidelines Manual* (U.S.S.G. or Guidelines) 2H1.1(a)(1) (2000), and the principles of double counting. Geston's base offense level was calculated pursuant to U.S.S.G. 2H1.1(a)(1) and the underlying conduct was aggravated assault. Since aggravated assault does not require action under "color of law," that element is not reflected in Geston's base offense level, and an enhancement based on this factor must be applied pursuant to U.S.S.G. 2H1.1(b).

Alternatively, the enhancement for color of law is not impermissible double counting under this Court's decision in *United States* v. *Reese*, 2 F.3d 870, 895 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994).

1. Pursuant to U.S.S.G. 2H1.1(a), the base offense level for violation of civil rights may be assessed in one of four ways:

(a) Base Offense Level (Apply the Greatest):

> (1) the offense level from the offense guideline applicable to any underlying offense;
> (2) **12**, if the offense involved two or more participants;
> (3) **10**, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or
> (4) **6**, otherwise.

The Application Notes explain that subsection (a)(1) "means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (*other than an offense that is itself covered under Chapter Two, Part H, Subpart 1*)." U.S.S.G. 2H1.1, comment. (n.1) (emphasis added).

Here, Geston's base offense level was determined correctly pursuant to U.S.S.G. 2H1.1(a)(1). Geston's underlying conduct was aggravated assault; he was convicted of assault with a dangerous weapon with intent to do bodily harm (18 U.S.C. 113(a)(3)). Cf. *United States* v. *McInnis*, 976 F.2d 1226, 1233-1234 (9th Cir. 1992) ("underlying offense" of aggravated assault under former U.S.S.G. 2H1.3(a)(3) (which was similar to U.S.S.G. 2H1.1 and then merged with 2H1.1) is first assessed under U.S.S.G. 2A2.2). "'Aggravated assault' means a felonious

assault that involved (A) a dangerous weapon with intent to do bodily harm (*i.e.*, not merely to frighten), or (B) serious bodily injury, or (C) an intent to commit another felony." U.S.S.G. 2A2.2 comment. (n.1). Neither Geston's status as a public official nor his action under color of law was considered in the base offense level for aggravated assault. Accordingly, there is no double counting when either of these factors (color of law or public official) is considered as an enhancement under U.S.S.G. 2H1.1(b). Cf. *United States* v. *Smith*, 196 F.3d 1034, 1036-1037 (9th Cir. 1999) (no impermissible double counting when enhancement (abuse of position of trust) is not considered in base offense level assessment of grouped offenses (money laundering)), cert. denied, 529 U.S. 1028 (2000).

2. While the United States asserts that the analysis set forth in Section 1 fully responds to Geston's claim, the United States also should prevail under the alternative analysis adopted by this Court in *Reese*. In *Reese*, 2 F.3d at 895, this Court explained that "there is nothing wrong with 'double counting' when it is necessary to make the defendant's sentence reflect the full extent of the wrongfulness of his conduct."[1]

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[1] Geston's claim (Ans. Br. 10-11) that Geston is already "punished" once by virtue of his conviction alone ignores that a conviction is independent of sentencing, and a double counting analysis may apply only if a factor is considered more than once at sentencing.

In addition, considering the same fact for different purposes or to address different aspects of the wrongfulness of such conduct is, arguably, not double counting at all. This Court, however, refers to these circumstances as "not impermissible" double counting. See, *e.g.*, *United States* v. *Parker*, 136 F.3d 653,

(continued...)

This Court continued to explain that *im*permissible double counting occurs

> where one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines. In practical terms, this means that impermissible double counting is to be found where one Guidelines provision 'is akin to a 'lesser included offense' of another, yet both are applied (citation omitted). Thus, the use of a single aspect of conduct both to determine the applicable offense guideline and to increase the base offense level mandated thereby will constitute impermissible double counting only where, absent such conduct, it is impossible to come within that guideline. If, on the other hand, it is possible to be sentenced under a particular offense guideline without having engaged in a certain sort of behavior, such behavior may be used to enhance the offense level, for in this situation, the guideline's base offense level will not necessarily have been set *to capture the full extent of the wrongfulness of such behavior*.

*Ibid*. (citations omitted; emphasis added); see *United States* v. *Archdale*, 229 F.3d 861, 869 (9th Cir. 2000) (citing *Reese*).

In other words, if all offenses covered by the applicable offense guideline include a particular element of proof, an enhancement for that element would be impermissible double counting. Cf. *Reese*, 2 F.3d at 895; see also *Archdale*, 229 F.3d at 869 (statutory element may be an enhancement when base offense level is determined by more than one statute). Double counting is permissible, however, if the challenged factor is a possible, but not a mandatory, element of the base offense level. See *United States* v. *Duran*, 127 F.3d 911, 918-919 (10th Cir. 1997), cert.

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[1](...continued)
655 (9th Cir.) (same factor can be considered for base offense level and criminal history category given different purposes served by these computations), cert. denied, 525 U.S. 942 (1998); *Reese*, 2 F.3d at 894-895.

denied, 523 U.S. 1061 (1998) (enhancement for use of a dangerous weapon is permissible since this factor is a potential but not an essential element of U.S.S.G. 2A2.2 for aggravated assault); *Reese*, 2 F.3d at 896. Significantly, in *Reese*, 2 F.3d at 896-897, this Court rejected a claim that it was impermissible double counting to enhance the base offense level for then-U.S.S.G. 2H1.2, Conspiracy to Interfere with Civil Rights, due to defendants' status as public officials.[2] This Court noted that private individuals can violate 18 U.S.C. 241, and "because being a public official is not a necessary element of the offense covered by section 2H1.2, there was no impermissible double counting in adjusting appellants' base levels in accordance with that section [2H1.2(b)(1)]." *Ibid.*

U.S.S.G. 2H1.1 applies for several civil rights violations in addition to 18 U.S.C. 242, many of which do *not* require action under color of law. Violations of 18 U.S.C. 241 (conspiracy against rights), 245(b) (federally protected activities), 246 (deprivation of relief benefits), 248 (Freedom of Access to Clinic Entrances Act), 1091 (genocide), and 42 U.S.C. 3631 (housing rights) are assessed under U.S.S.G. 2H1.1, and these crimes may be committed by private individuals not acting under color of law. Thus, color of law is not an element of *every* violation covered by U.S.S.G. 2H1.1 nor, as shown with Geston, is it considered in every method to assess the base offense level. Thus, subsection (b) is not akin to the

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[2] U.S.S.G. 2H1.2(b) provided an enhancement by four levels "if the defendant was a public official at the time of the offense." The 1990 Amendments to the Sentencing Guidelines merged 2H1.2 with 2H1.1. U.S.S.G., app. C, amend. 327 (1990).

"lesser included offense" of all crimes covered by U.S.S.G. 2H1.1(a). *Reese*, 2 F.3d at 895. Accordingly, there is no impermissible double counting for action under color of law or by a public official when a defendant is convicted under 18 U.S.C. 242, sentenced pursuant to any method set forth in 2H1.1, and his sentence is enhanced pursuant to U.S.S.G. 2H1.1(b). Cf. *Reese*, 2 F.3d at 896-897.[3] Given Geston's position as a Department of Defense police officer at the time he assaulted Hernandez, U.S.S.G. 2H1.1(b) must be applied here.[4]

This Court and others have repeatedly recognized that given the Commission's general approval of double counting, the Commission will expressly

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[3] Under 18 U.S.C. 242, it does not matter whether the enhancement is for being a public official or for acting under color of law because they overlap. When acting as a public official, Geston was acting under color of law. There are offenses covered by Guideline 2H1.1, however, that do not require color of law. If such an offense is committed by a public official, the enhancement of 2H1.1(b) would apply.

[4] While defendants frequently raise a double counting challenge, only two courts of appeal (in published opinions) have addressed this claim in the context of U.S.S.G. 2H1.1(b) and 18 U.S.C. 242. See *United States* v. *Webb*, 214 F.3d 962, 965 (8th Cir. 2000); *United States* v. *Livoti*, 196 F.3d 322, 327 (2d Cir. 1999), cert. denied, 529 U.S. 1108 (2000). In *Webb*, 214 F.3d at 965, and *Livoti*, 196 F.3d at 327, the defendants asserted that an enhancement under Guideline 2H1.1(b) would be impermissible double counting because action under color of law is encompassed in the conviction under 18 U.S.C. 242. Neither the Second or Eighth Circuits resolved this specific argument but, instead, held that the upward adjustment was warranted given the alternative basis to apply 2H1.1(b), that is, the defendant's status as a public official. See *Webb*, 214 F.3d at 965 (defendant's stipulation of position as a public official defeats assertion that 2H1.1(b) enhancement is inapplicable); *Livoti*, 196 F.3d at 327. We believe the better analysis, and that adopted by this Court in *Reese*, 2 F.3d at 894-895, is that the enhancement does not constitute impermissible double counting because not all offenses covered by Guideline 2H1.1 require proof of color of law.

prohibit such calculation if that is its intention. See *Duran*, 127 F.3d at 918; *United States* v. *Williams*, 954 F.2d 204, 207 (4th Cir. 1992); *Reese*, 2 F.3d at 894; U.S.S.G. 2C1.1, comment. (n.3) (U.S.S.G. 3B1.3 adjustment for abuse of position of trust not applicable since extortion under color of law incorporates that aspect in the base offense level). In the absence of a clear prohibition, however, double counting is not only permissible, but required. See *Reese*, 2 F.3d at 894 ("on its face this Guidelines section [2A2.2] clearly requires the 'double counting' of which appellants complain here"); *Williams*, 954 F.2d 207 ("[a]n adjustment that clearly applies [here, double counting] to the conduct of an offense must be imposed unless the Guidelines expressly exclude its applicability").[5] Accordingly, the district court erred by denying the six-level enhancement under U.S.S.G. 2H1.1(b).

## CONCLUSION

The appellant's conviction should be affirmed.

This Court, however, should order a limited remand on sentencing with instructions that the district court increase the current total offense level by six

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[5] As stated in our opening brief (U.S. Br. 56-58), the district court has no authority to reject mandatory enhancements that are triggered when the factual predicate is present. See *United States* v. *Ancheta*, 38 F.3d 1114, 1117-1118 (9th Cir. 1994). Thus, to the extent the district court denied the enhancement under U.S.S.G. 2H1.1(b) because he did not believe Geston's actions or Hernandez's injuries were sufficiently serious to warrant the longer sentence that would apply if he included this six-level upward adjustment, this conclusion is erroneous (S. Tr. 20-21/SRE 207-208).

points, and that the district court determine an appropriate sentence within the range established by that adjustment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any related case pending in this Court.

## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points, and contains 2,029 words.

September 21, 2001

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Jennifer Levin

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief For The United States As Cross-Appellant was served, via first-class mail, postage prepaid, on the following counsel, this 21st day of September, 2001:

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