No. 04-10825

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

WALLACE WAYNE HOOKS,

Defendant-Appellant/Cross-Appellee

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

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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United States v. *Hooks*
No. 04-10825

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

I certify that, in addition to the persons listed in the certificate of interested persons in appellant's opening brief, the following person has an interest in the outcome of this case:

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose appellant's request for oral argument.

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

BRIEF FOR THE UNITED STATES
AS APPELLEE/CROSS-APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final decision of the district court in a criminal case. Defendant-Appellant was convicted and sentenced on two counts of violating a federal criminal statute, 18 U.S.C. 242. Final judgment was entered on February 9, 2004. Defendant-Appellant filed a timely notice of appeal of his conviction on February 19, 2004; the government filed a timely notice of appeal of the sentence on March 8, 2004. The district court had jurisdiction pursuant to 18 U.S.C. 3231. This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742(b).

STATEMENT OF THE ISSUES

1. Whether this Court's de minimis force principle affects this defendant's criminal liability where he assaulted two handcuffed arrestees.

2. Whether this Court should overturn Circuit precedent by redefining the term "bodily injury" for purposes of 18 U.S.C. 242.

3. Whether the district court erred in calculating the defendant's sentence. (*Cross-Appeal*)

STATEMENT OF THE CASE

On January 9, 2003, a federal grand jury in the Southern District of Georgia returned a four-count indictment charging law enforcement officers Wallace Wayne Hooks and Ryan Keith Griner with criminal offenses arising from assaults against Steven Tanner and Tony King that took place on October 27, 2001, in Treutlen County, Georgia. (Doc. 1).[1] Count One alleged that, in the course of arresting Steven Tanner, Sheriff Hooks and Deputy Sheriff Griner violated Tanner's right to be free from excessive force by a person acting under color of law, in violation of 18 U.S.C. 242. (Doc. 1 at 1). Counts Two and Three charged Hooks with assaulting Steven Tanner and Tony King, respectively, after both victims were arrested, handcuffed, and awaiting booking at the County jail, in violation of 18 U.S.C. 242. (Doc. 1 at 2-3). Hooks was not named in Count Four.

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[1] "Doc. __" refers to documents in the Record as numbered on the district court docket sheet. "Def. Br." refers to the defendant-appellant's opening brief in this appeal. "PSR" refers to the Presentence Investigation Report.

Hooks was tried before a jury in the Southern District of Georgia from August 18-21, 2003. On August 22, 2003, the jury found Hooks guilty on Counts Two and Three.[2] Following a hearing on February 4, 2004, the district court sentenced Hooks to five years' probation, to include six months' home detention, and a $3500 fine. In reaching this sentence, the district court granted the defendant a two-level adjustment to his base offense level for acceptance of responsibility, and a ten-level downward departure from the applicable sentencing guidelines. The district court based the downward departure on its finding that the victims provoked the assault and that certain facts took this case outside the heartland of cases covered by the applicable sentencing guideline, U.S.S.G. § 2H1.1. Hooks appeals from his conviction; the government cross-appeals from his sentence.

STATEMENT OF THE FACTS

In the early morning hours of October 27, 2001, Ryan Keith Griner, a Deputy Sheriff with the Treutlen County, Georgia, Sheriff's Office, was returning home from duty when he noticed a pickup truck, owned by his first cousin Steven Tanner, speeding toward him. (Doc. 90 at 865, 867-868). The truck contained three occupants, Steven Tanner, Tony King, and Chris Beasley.[3] (Doc. 90 at 152).

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[2] Hooks was acquitted on Count One; Griner was acquitted on Counts One and Four.

[3] Earlier in the evening, Tanner, King, and Beasley had been at a bar in a nearby town for several hours to celebrate Tanner's birthday. (Doc. 90 at 148-149, 420). Tanner and Beasley smoked marijuana on their way to the bar; Tanner, King, and

(continued...)

Aware that Tanner did not have a valid driver's license, but unaware that King was driving at the time, Griner attempted to stop the truck. (Doc. 90 at 869-870, 872-873). This attempt led to a short – but high-speed – pursuit that ended when Griner crashed his police vehicle into a tree after failing to make a sharp turn on a dirt road. (Doc. 90 at 873-875). King stopped the truck at the end of a driveway located a short distance from the accident scene. (Doc. 90 at 159). All of the occupants of the truck initially fled the scene. (Doc. 90 at 160, 428-429). Tanner, however, returned to his truck and waited until the accident scene was cleared, a process that lasted between 30 to 45 minutes. (Doc. 90 at 431-434). He then drove to a nearby restaurant, the Huddle House, where he met up with King and Beasley. (Doc. 90 at 430, 434-437).

Sheriff Hooks was summoned to the accident scene and arrived in his County-issued pickup truck. (Doc. 90 at 687). Hooks and Griner left shortly thereafter in Hooks's truck to continue the search for the occupants of the speeding vehicle. (Doc. 90 at 690). After driving to two separate residences to try and locate Tanner, Hooks and Griner eventually made their way to the Huddle House, where they found Tanner, King, and Beasley. (Doc. 90 at 878; Doc. 90 at 691, 693, 696, 697).

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[3](...continued)
Beasley consumed enough alcohol to become intoxicated. (Doc. 90 at 150-151, 153, 423).

Griner entered the Huddle House, approached the booth where Tanner, King, and Beasley were seated, and forcibly removed Tanner from the booth. (Doc. 89 at 69-70; Doc. 90 at 167-168). Griner dragged Tanner outside to a waiting Hooks, who lifted Tanner into the air and placed him into the back of his (Hooks's) truck. (Doc. 90 at 694). Hooks admittedly pulled Tanner's ear and hit him in the face, which split Tanner's lip and caused it to bleed, in an effort to "maintain control" of Tanner during the developing arrest situation.[4] (Doc. 90 at 695; Doc. 90 at 274, 310, 447; Doc 89 at 80). After Griner brought Beasley outside, Hooks hit Beasley on the side of the head and ordered him to get into the back of the truck. (Doc. 90 at 178; Doc. 90 at 696). Beasley complied. (Doc. 90 at 697). King then came out of the restaurant. (Doc. 90 at 180-181). Hooks began to question King, but King denied knowledge of the car chase and denied he was with Tanner and Beasley earlier in the evening. (Doc. 90 at 181-182). Other deputies soon arrived at the Huddle House; these deputies handcuffed Tanner and Beasley and transported them to the County jail. (Doc. 90 at 518-519, 525, 553, 699).

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[4] The trial testimony differs as to the amount of force Hooks used in effecting Tanner's arrest. Prosecution witnesses testified that Hooks elbowed Tanner in the face (Doc. 90 at 273), punched him on and about the face more than once (Doc. 90 at 174, 273, 444-445), and repeatedly twisted his ear (Doc. 90 at 312, 314, 444). The differences, however, are immaterial, as the jury acquitted Hooks of using excessive force in the course of making this arrest.

Hooks and Griner drove together to the jail in Hooks's truck. (Doc. 90 at 700, 889). Once there, Hooks spoke to Beasley and learned that King, not Tanner, had been driving the truck that evening. (Doc. 90 at 598-599, 698-700). Hooks therefore released Beasley from custody and directed two other deputies to return to the Huddle House to arrest King. (Doc. 90 at 530, 700). Hooks then approached Tanner, who was sitting on a bench in the jail's booking room. (Doc. 90 at 599). Tanner's hands were secured behind his back in handcuffs. (Doc. 90 at 454). Tanner was not acting violently, nor was he resisting or attempting to flee. (Doc. 90 at 600-601, 717). Hooks hit Tanner across the left side of his face with an open hand. (Doc. 90 at 455, 600, 701). The assault was forceful enough to cause Tanner physical pain, and hard enough to cause Tanner's right earring to fall out. (Doc. 90 at 455-457). According to Hooks, he hit Tanner partly because of "his attitude. He acted like [he] had no remorse or anything like that whatsoever." (Doc. 90 at 701).

Shortly thereafter, a deputy brought King into the jail. (Doc. 90 at 531). The deputy instructed King to walk down the hallway toward Hooks, and King complied. (Doc. 90 at 532). At the time, King's hands were secured behind his back in handcuffs. (Doc. 90 at 189-190, 532). Hooks approached King and asked him why he had lied earlier in the evening. (Doc. 90 at 188, 703). When King did

not respond, Hooks hit him across the face with an open hand, causing him pain.[5] (Doc. 90 at 188, 190, 650, 703-704). The force of the blow was strong enough to be heard by deputies standing in another room on the first floor of the jail. (Doc. 90 at 533, 558). Hooks testified that, by hitting Tanner and King, he "was hoping [he] got their attention." (Doc. 90 at 705).

In a federal indictment issued January 9, 2003, Hooks was charged with three counts of deprivation of rights under color of law, in violation of 18 U.S.C. 242.[6] (Doc. 1). Count One corresponded to the use of force in arresting Tanner at the Huddle House. Counts Two and Three corresponded to the assaults against Tanner and King, respectively, at the County jail. At trial, Hooks presented a defense of diminished capacity. Through lay and expert opinion, Hooks attempted to establish that he was sleep-deprived on the night of the incident, and that his exhaustion affected the events of that evening.[7] (Doc. 90 at 750-751). Hooks

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[5] According to some witness testimony, Hooks hit King more than once. (Doc. 90 at 190, 651).

[6] Griner was also charged with one count of violating 18 U.S.C. 242 in connection with Tanner's arrest, and one count of witness tampering, in violation of 18 U.S.C. 1512. Griner was acquitted on both counts.

[7] The evidence at trial revealed that Hooks had been working on a bank robbery investigation for the three days leading up to the night of the offense conduct. The evidence also shows that on the evening of October 25 and into the early morning hours of October 26, 2001, Hooks attended a party until 1 or 2 am. On the day of October 26, 2001, after participating in a County parade, Hooks and Griner drove to Atlanta, participated in the surveillance and subsequent arrests of the bank

(continued...)

testified that "had [he] not been tired the whole situation would have been handled different." (Doc. 90 at 750). Hooks also testified that he "knew it was wrong" to hit Tanner at the jail (Doc. 90 at 750), and that he knew it was wrong to hit King. (Doc. 90 at 757). He also argued, through counsel, that his exhaustion precluded him from forming the specific intent required to sustain a conviction under 18 U.S.C. 242. (Doc. 91 at 1009-1012).

On August 22, 2003, the jury found Hooks guilty on Counts Two and Three. Following the jury's verdict, the district court directed the jury to make a written finding of the nature and extent of force Hooks used against Tanner and King and the level of bodily injuries he inflicted upon them. The jury found that the nature and extent of force Hooks used against both Tanner and King was an "angry open hand slap loud enough to hear throughout the first floor," and that the level of bodily injury Hooks inflicted upon Tanner and King was "physical pain." (Doc. 79 at 3-4).

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[7](...continued)
robbery suspects, and returned to Treutlen.

The Probation Office calculated Hooks's adjusted offense level at 20.[8] (PSR at 10). Given his Criminal History category of I, Hooks's recommended sentence was between 33 and 41 months' imprisonment.[9] Hooks objected to the Presentence Report, arguing that he was entitled to an adjustment for acceptance of responsibility. (PSR - Addendum ¶ 2). Hooks also moved for a downward departure on grounds that (1) the victims' misconduct provoked him; (2) he was operating in a state of diminished capacity due to sleep deprivation; (3) he is subject to abuse in prison as a former law enforcement officer; and (4) the force involved and injury inflicted was de minimis. (Doc. 84). Based on these reasons, Hooks argued that his case fell outside the heartland of U.S.S.G. § 2H1.1 and warranted a significant downward departure. (Doc. 84).

The district court held a sentencing hearing on February 4, 2004. Over the government's objection, the judge determined that Hooks was entitled to an adjustment for acceptance of responsibility. The court reasoned that even though Hooks subjected the government to a trial on Counts Two and Three, he had

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[8] The base offense levels for Counts 2 and 3 were set at ten because the offenses involved the use of force. See U.S.S.G. § 2H1.1(a)(3). The offense levels were then increased by six levels because Hooks committed the offenses under color of law, see U.S.S.G. § 2H1.1(b)(1), and an additional two levels because the victims were handcuffed at the time of the assaults, see U.S.S.G. § 3A1.3. This resulted in an offense level of 18 for both counts, so Hooks's final offense level came to 20 after an additional two levels were added through the multiple-counts adjustment. See U.S.S.G. § 3D1.4.

[9] The government did not object to the Presentence Report.

repeatedly admitted to hitting Tanner and King at the jail. "He did that before trial and he did that at the trial. He acknowledged at trial that it was wrong, that he was tired and that he was irritable and that's enough for me." (Doc. 95 at 17). The court reasoned that requiring Hooks to "admit an intent to specifically violate a constitutional right as an admission of the factual conduct of the offense of conviction sufficient to gain an acceptance of responsibility is to put too fine a point on the question." (Doc. 95 at 17). The court thus ordered the presentence report be amended to include an adjustment for acceptance of responsibility. (Doc. 95 at 17).

The court then considered Hooks's motion for a downward departure. The court began its analysis by summarizing several 18 U.S.C. 242 appellate cases reported in the past ten years and noted that the majority involved a greater use of force and resulted in more severe injuries than that presented in this case. The court also found that Hooks was tired and irritable on the day of the offense conduct, and that he was concerned about the safety of his deputy. And while the court recognized that "there was no instant provocative act while these [victims] were there in handcuffs standing, probably meekly and submissively, before the sheriff," the court explained that based on *Koon* v. *United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996), it could not "ignore the conduct and the overall disagreeable nature of the attitude of these victims" that occurred over the course of the evening. (Doc. 95 at 97). The court further noted that there was "nothing racial in this case," and that "the Civil Rights Act of 1964 was largely devoted to concerns

about bringing true equality to the races in the southeastern United States and other places." (Doc. 95 at 103). This case, the court observed, involved "no invidious activity other than a sheriff's overreaction to some earlier provocation." (Doc. 95 at 103).

The court also reviewed civil cases in which this Court granted law enforcement officers qualified immunity against excessive force claims because the use of force was de minimis and the victim's injuries were relatively minor. The court noted that "it is an interesting apparent contradiction when the conduct of a police officer may well be more culpable in a criminal context than it might be in a civil context." (Doc. 95 at 98-99). The court continued that Hooks could have inflicted more serious injuries than he did to both victims. (Doc. 95 at 104-105).

The court also reasoned that Hooks's lack of any prior criminal history "is not all that can be said about a person who has given a lifetime for hire to public service." (Doc. 95 at 106). The court acknowledged that it had "heard many good things" and "some things about [Hooks] that aren't so good" through letters sent to the court, and explained that it "can't simply look at this matter with blinders on, saying that it's a criminal history one and [the court] can go no further into the lifetime that, in balance, presents a significant or even vast majority of good works as opposed to not so good works." (Doc. 95 at 106; Doc. 95 at 107).

Based on the foregoing reasoning, the court concluded that it was "unable to impose a sentence of confinement which would respond to the definition of a federal felony and offer any aspect of custody in a federal facility," because to do

so "would be more of an injustice than Mr. Hooks might have inflicted upon Tanner and King." (Doc. 95 at 112). The court therefore departed downward ten levels from an adjusted offense level of 18 "to bring this offense level down to what [the court] think[s] is reasonable under these circumstances." (Doc. 95 at 112). The court explained that the 18 U.S.C. 242 cases he surveyed define the heartland of facts contemplated by the Sentencing Commission, and that "this case is vastly different," and should be brought down to Zone A of the Guidelines. (Doc. 95 at 113). The court then imposed a sentence of five years' probation, to include six months of home detention and a $3500 fine.[10]

SUMMARY OF ARGUMENT

1. Hooks argues that his use of force against Tanner and King was minimal and, therefore, should be excused under this Court's de minimis force principle. Contrary to the defendant's characterization of this Court's de minimis force principle, it does not freely permit officers to use force in all situations without facing liability, so long as the amount of force used is minor. Rather, this Court has held in similar cases that an officer's use of force rises to the level of a constitutional violation when the circumstances demand little or no force, the amount of force used is clearly excessive or grossly disproportionate to any need for force under the circumstances, and the force used causes injury to the victim.

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[10] The district court failed to state in its written order of judgment the specific reasons for departing from the guidelines as required by 18 U.S.C. 3553(c)(2). (See Doc. 94).

Here, no use of force was required at the jail, Hooks clearly knew that the amount of force he used against Tanner and King was excessive under the circumstances, and Tanner and King were injured as a result. As such, Hooks cannot avoid criminal liability merely by asserting that the amount of force he used, while admittedly excessive under the circumstances, was nonetheless slight. Indeed, to apply the principle as an exception to criminal liability, as Hooks urges, would defeat the purpose of 18 U.S.C. 242 prosecutions – which is to ensure that law enforcement officers are held liable whenever they willfully deprive a citizen of his constitutional right to be free from excessive force.

2. Hooks takes issue with the definition of "bodily injury" for purposes of 18 U.S.C. 242, as set forth in *United States* v. *Myers*, 972 F.2d 1566 (11th Cir. 1992). *Myers*, however, is binding precedent that this panel is not free to overturn. Even so, there is no compelling reason for this Court to reconsider its definition of bodily injury. This Court's definition of bodily injury is consistent with how the term is used in other criminal statutes and maintains the distinction between misdemeanor and felony violations of 18 U.S.C. 242.

3. The district court erred in sentencing Hooks. First, by contesting the requisite mens rea for a conviction under 18 U.S.C. 242, Hooks denied an essential factual element of the crime for which he was charged. Under this Court's precedent, he is ineligible for an adjustment based on acceptance of responsibility. Second, the district court erred in finding that the behavior of Tanner and King earlier in the evening significantly provoked Hooks into assaulting them an hour or

two later at the County jail such that a departure was warranted under U.S.S.G. § 5K2.10. None of the factors listed in Section 5K2.10 support a downward departure in this case. Unlike the defendants in *Koon* v. *United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996), the case upon which the district court relied, Hooks's use of force did not escalate from lawful to excessive during the course of a dynamic arrest situation. Rather, Hooks assaulted two handcuffed, unresisting, non-threatening arrestees while they were secured in the County jail. Finally, the district court erred in finding that the facts of this case place it outside the heartland of cases covered by U.S.S.G. § 2H1.1. The district court initially erred by comparing the facts of this case to the wrong subset of excessive force prosecutions. Moreover, the district court relied on factors that either cannot form the basis of a downward departure, or are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline.

STANDARD OF REVIEW

The Court's review of Hooks's claims of legal error should be reviewed *de novo*.

ARGUMENT

I

HOOKS'S USE OF FORCE IN THIS CASE WAS CLEARLY UNREASONABLE UNDER THE CIRCUMSTANCES

Hooks argues that the force he used in striking Tanner and King was "extremely slight" and, therefore, should be excused under this Court's de minimis

force doctrine. (Def. Br. at 13). He urges this Court to apply its de minimis force principle in cases like his because otherwise, whenever a suspect is safely in custody and not presenting a physical threat, law enforcement officers are vulnerable to felony charges arising from any unnecessary "pinch, poke or nudge." (Def. Br. at 14). First, Hooks's position demonstrates a fundamental misunderstanding of how this Court's de minimis force principle applies in determining whether force is unreasonable under a given set of circumstances. Second, it suggests both a gross overstatement of what constitutes a felony violation of 18 U.S.C. 242, and a gross understatement of Hooks's use of force in this case.

The focus in cases of alleged excessive force is whether the amount of force used is objectively unreasonable under the circumstances.[11] *Graham* v. *Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1989). In determining whether force is unreasonable, courts must examine (1) the need for the application of force,[12] (2) the relationship between the need and amount of force used, and (3) the extent of

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[11] Determining whether an officer charged with using excessive force is entitled to qualified immunity from civil liability also requires an inquiry into whether the amount of force used would "inevitably lead" every reasonable officer in the defendant's position to conclude the force was unlawful. *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994); see generally, *Saucier* v. *Katz*, 533 U.S. 194, 124 S. Ct. 2151 (2001).

[12] As this Court explained in *Lee* v. *Ferraro*, this includes an analysis of whether the force used is proportionate to the force required, as determined by "the severity of the crime, the danger to the officer, and the risk of flight." 284 F.3d 1188, 1198 (11th Cir. 2002) (interpreting *Graham*).

the injury inflicted. See *Draper* v. *Reynolds*, No. 03-14745, 2004 WL 1086852 (11th Cir. May 17, 2004), at *5. The de minimis force principle does not, as Hooks suggests, shield an officer from liability in every situation where an officer uses minimal force, *regardless* of the circumstances. Rather, it factors into this Court's total calculus of whether, *under* the circumstances, the amount of force used rises to the level of a constitutional violation.

In cases where this Court has referenced its de minimis force principle in granting officers qualified immunity, the facts make clear that the circumstances usually demanded the use of force, the amount of force applied was not disproportionate to the need for force, and the extent of the victims' injuries were not severe. See *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559-1560 (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994) (force not clearly unlawful where officer pushed arrestee against wall immediately after using necessary force in arresting him and applying handcuffs); *Jones* v. *City of Dothan*, 121 F.3d 1456, 1460-1461 (11th Cir. 1997) (officers who "slammed [innocent citizen who matched suspect's description] against the wall, kicked his legs apart, required him to raise his arms above his head, and pulled his wallet from his pants" were entitled to qualified immunity because circumstances would not inevitably lead an officer in similar position to conclude that the force was unlawful); *Gold* v. *City of Miami*, 121 F.3d 1442, 1446-1447 (11th Cir. 1997), cert. denied, 525 U.S. 870, 119 S. Ct. 165 (1998) (during arrest of citizen for disorderly conduct, officer applied handcuffs too tightly; court held that reasonable officer would not conclude that

force used to apply handcuffs was unlawful); *Nolin* v. *Isbell*, 207 F.3d 1253, 1258 n.4 (after officer witnessed what he thought was an assault, officer grabbed suspect from behind, threw him against a van, kneed him in the back, pushed his head into the side of the van, searched his groin in an uncomfortable manner, and applied handcuffs; court likened this to the "amount of force * * * involved in a typical arrest").

As is evident from these cases, the officers faced situations that clearly necessitated the use of some force. Indeed, most arrest situations do. See *Graham*, 490 U.S. at 396, 109 S. Ct. at 1871-1872 (recognizing that the right to make an arrest necessarily carries with it the right to use some degree of physical force); see also *Lee* v. *Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002). And many involve circumstances that require the officer to make split-second judgments. See *Graham*, 490 U.S. at 397, 109 S. Ct. at 1872. Accordingly, an officer's actions must be judged not with "the 20/20 vision of hindsight," but with an "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-397, 109 S. Ct. at 1872.

But where, as here, the need for force was nonexistent, the amount of force used was grossly disproportionate to the need, and the victims suffered injury from the force, this Court has held that the use of force is plainly unreasonable and the officers are not entitled to qualified immunity. For example, in *Lee*, this Court held

that an officer who slammed the head of a handcuffed, unresisting, non-threatening arrestee against her vehicle was not entitled to qualified immunity because the amount of force used was clearly unreasonable under the circumstances. *Id.* at 1198; see also *Thornton* v. *City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (force clearly unreasonable where officers grabbed victim and wrestled him to the ground, and threw another victim on the hood of patrol car before handcuffing him, because there was no evidence to suggest that such use of force was necessary); *Sheth* v. *Webster*, 145 F.3d 1231, 1238 (11th Cir. 1998) (force clearly unreasonable where officer pushed victim against soda machine, handcuffed her, and dragged her to police car because there was no evidence to suggest that such use of force was necessary)[13]; *Vinyard* v. *Wilson*, 311 F.3d 1340, 1348 (11th Cir. 2002) (force clearly unreasonable where in response to slightly intoxicated arrestee's screaming and using foul language in back of patrol car, officer stopped patrol car, grabbed handcuffed arrestee hard enough to bruise her, and then used pepper spray on her). As such, the de minimis force principle, as applied by this Court in its calculus of what is reasonable under the circumstances, does not affect Hooks's liability in this case.[14]

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[13] *Nolin* attempts to distinguish *Sheth* and *Thornton* on grounds that the officers had no probable cause to arrest the victims, thus no amount of force was warranted. While probable cause existed to arrest Tanner and King, that fact alone did not entitle Hooks to assault them at the jail.

[14] The United States acknowledges, however, that under different circumstances,

(continued...)

The position Hooks takes before this Court also draws upon a misconception of what constitutes a felony violation of 18 U.S.C. 242, and a misrepresentation of what Hooks did. First, contrary to Hooks's contentions, not every "pinch, poke or nudge" constitutes unreasonable force resulting in bodily injury; therefore, not every "pinch, poke or nudge" results in a constitutional violation that will be prosecuted as a felony under 18 U.S.C. 242. There are, of course, situations when it may be necessary to use some force against a secured, non-threatening suspect. Where that force is reasonable under the circumstances, it will not result in liability under 18 U.S.C. 242. Moreover, a Section 242 felony charge requires a finding of bodily injury. *Ibid.* Bodily injury, at a minimum, requires actual physical pain. See *United States* v. *Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017, 113 S. Ct. 1813 (1993). Clearly not all pinches, pokes, and nudges induce pain, as that term is commonly understood. (See discussion, pp. 23-24, *infra*). In situations where a victim does not suffer bodily injury, an officer would not face felony criminal charges.

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[14](...continued)
the de minimis force principle may affect criminal liability, in that not every application of unnecessary force rises to the level of a constitutional violation. For example, if the amount of force used was not grossly disproportionate to the need and no injuries resulted, then a constitutional violation may not arise. The facts of this case, however, clearly show that Hooks's use of force caused injury and was "plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under *Graham*." *Lee*, 284 F.3d at 1198.

Second, Hooks did not "pinch, poke or nudge" Tanner and King. He hit them. He hit them while they were "in handcuffs standing, probably meekly and submissively," before him. (Doc. 95 at 97). He hit them, not because they were fleeing, resisting, threatening anyone, or engaging in any other behavior that would necessitate the use of force, but because he wanted to "get their attention." He hit Tanner hard enough to dislodge his earring, and he hit King hard enough that others in the jail heard the assault even though they did not see it.

Moreover, Hooks admittedly knew, as would any reasonable officer, that assaulting two non-threatening, non-resisting, handcuffed arrestees while they were secured at the County jail constituted excessive force:

GOV'T COUNSEL:	Would you agree that a police officer is never allowed to hit someone who is not resisting arrest?
HOOKS:	It is wrong.
GOV'T COUNSEL:	So, it is wrong for a police officer to hit someone who is not resisting and the officer cannot hit them?
HOOKS:	He should not hit them.

(Doc. 90 at 713). Tanner and King were not posing an immediate threat to either themselves or others when Hooks assaulted them. See *Graham*, 490 U.S. at 396, 109 S. Ct. 1872. Nor were they attempting to flee, or engaging in any other behavior that would necessitate the use of force.[15] *Ibid.* In fact, they had been

[15] The evidence suggests that during the arrest at the Huddle House, Tanner was (continued...)

compliant for over an hour. They were also secured in handcuffs. In similar "obvious clarity" cases, where an officer's conduct is "far beyond the hazy border between excessive and acceptable force," this Court has denied qualified immunity to officers facing civil charges. *Smith* v. *Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997); see *Vinyard*, 311 F.3d at 1347-1349; *Lee*, 284 F.3d at 1198; *Sheth*, 145 F.3d at 1238; *Thornton*, 132 F.3d at 1400). Indeed, the circumstances of this case make clear that Hooks "used force that was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under *Graham*." *Lee*, 284 F.3d at 1198.

Finally, applying the de minimis force principle in the manner Hooks urges – to shield an officer from criminal liability whenever the amount of force used, though known to the officer to be unreasonable under the circumstances, is not egregious – is untenable. Doing so would have the practical effect of permitting a law enforcement officer to willfully assault a victim with an amount of force that he knows is unlawful, and to do so with immunity from criminal prosecution. Such an outcome cannot be reconciled with 18 U.S.C. 242.

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[15](...continued)
resisting Hooks and disobeying his commands to remain in the truck. Hooks testified that it was necessary to use force against Tanner to maintain control of the rapidly developing arrest situation. Although Tanner was injured during the arrest, the jury acquitted Hooks on the excessive force charge stemming from that application of force.

II

THIS COURT SHOULD REJECT APPELLANT'S INVITATION TO OVERTURN *UNITED STATES* V. *MYERS*

Appellant recognizes that under this Court's decision in *United States* v. *Myers*, 972 F.2d 1566 (11th Cir. 1992), the injuries inflicted upon Tanner and King amount to "bodily injury" within the meaning of 18 U.S.C. 242. This Court has previously held that, in the context of Section 242, "bodily injury means any injury to the body, no matter how temporary," and includes "physical pain as well as any burn or abrasion." *Id.* at 1572. Nevertheless, appellant asks this Court to overturn *Myers* and adopt a definition that distinguishes between bodily injury and serious bodily injury so that "any unnecessary touch by a law enforcement officer" is not charged as a felony. (Def. Br. at 19). Failing to modify the definition, according to Appellant, would render the misdemeanor offense of depriving a citizen of his constitutional right to be free from excessive force "a nullity." (Def. Br. at 19). This Court should reject outright Appellant's invitation to overturn *Myers* because this Court lacks the authority to overturn Circuit precedent, and because there is no reason to modify the current definition of "bodily injury."

A. A Panel Of This Court Cannot Overturn Circuit Precedent

This Court must reject Appellant's invitation to overturn *Myers*. "The law of this Circuit is emphatic that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision." *Cargill* v. *Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997). See also *United States* v. *Steele*, 147 F.3d 1316, 1317-1318

(11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding * * * ."), cert. denied, 528 U.S. 933, 120 S. Ct. 335 (1999); *United States* v. *Brown*, 342 F.3d 1245 (11th Cir. 2003) (same), petition for cert. pending, No. 03-9931 (filed Apr. 16, 2004).

B. This Court's Definition Of "Bodily Injury" Should Not Be Modified

Even if this Court could reconsider the definition of "bodily injury" as it is used in 18 U.S.C. 242 cases, there is no compelling reason to do so. In *Myers*, this Court rejected a definition of bodily injury that would have required a finding of substantial discoloration, swelling, bruising, or other characteristics capable of being perceived by another person. 972 F.2d at 1572. This Court reasoned that when Congress does not define a particular word, Congress is presumed to have adopted the word's established meaning. *Ibid.* In other criminal contexts, the "definition [of bodily injury] commonly used" by Congress is (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary. See 18 U.S.C. 831(f)(4); 1365(h)(4); 1515(a)(5); 1864(d)(2). "[P]hysical pain as well as any burn or abrasion," the definition for bodily injury approved by this Court for Section 242 purposes, is fully consistent with Congress's established meaning of "bodily injury." *Myers*, 972 F.2d at 1572-1573; see also *United States* v. *Harris*, 293 F.3d 863, 871 n.6 (5th Cir.) (noting a definition of bodily injury that included "a cut or bruise or physical pain" would not

be clearly erroneous) (emphasis omitted), cert. denied, 537 U.S. 950, 123 S. Ct. 395 (2002).

Finally, a definition of bodily injury that includes physical pain does not blur the distinction between misdemeanor and felony violations of 18 U.S.C. 242. (Def. Br. at 19). First, 18 U.S.C. 242 encompasses *any* deprivation of a right secured by the Constitution or laws of the United States committed under color of law, not just those that result from the use of excessive force. 18 U.S.C. 242. Thus, if a defendant's act does not result in bodily injury, or does not involve the use, attempted use, or threatened use of a weapon, explosives, or fire, then the defendant is charged with a misdemeanor violation. See, *e.g.*, *United States* v. *Lanier*, 123 F.3d 945 (6th Cir. 1997) (en banc) (dismissing appeal from case where state judge was convicted on misdemeanor counts of violating 18 U.S.C. 242 for sexual harassment of state judicial employees); *United States* v. *Sanchez*, 74 F.3d 562 (5th Cir. 1996) (law enforcement officer convicted of misdemeanor and felony violations under 18 U.S.C. 242 after using threat of arrest to coerce suspected prostitutes into engaging in various sexual acts with him against their will).

Second, and contrary to Appellant's assertion, not every "unnecessary touch" by a law enforcement officer triggers a felony offense under the statute.[16]

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[16] Officers have been charged with misdemeanor violations of 18 U.S.C. 242 in some cases where they participated in or refused to stop another officer's use of excessive force. See, *e.g.*, *United States* v. *Christian*, 342 F.3d 744, 746-747 (7th Cir. 2003) (setting forth facts in which co-defendants were convicted of misdemeanor violations of 18 U.S.C. 242 after holding down victim while other co-defendant officer forcefully kneed and punched victim), cert. denied, 124 S. Ct. 1095 (2004); *United States* v. *Reese*, 2 F.3d 870 (9th Cir. 1993) (police sergeant

(continued...)

(See Def. Br. at 19) (suggesting that any physical contact resulting in "discomfort that is remarkably slight" subjects a defendant law enforcement officer to a felony prosecution). As discussed, pp. 23-24, *supra*, a necessary element of a felony under Section 242 is bodily *injury* – defined by this Court to include actual physical *pain* – which is determined by the trier of fact. If the victim does not experience pain from an officer's use of excessive force, then a felony charge is not appropriate. Of course, the jury in this case easily concluded that each victim suffered physical pain from the assaults. Hooks hit each victim hard enough for the assaults to be heard throughout the first floor of the jail. Indeed, Hooks hit Tanner hard enough to dislodge his earring.

III

THE DISTRICT COURT ERRED IN CALCULATING HOOKS'S SENTENCE UNDER THE GUIDELINES

A. The District Court Clearly Erred In Finding That Hooks Accepted Responsibility For His Actions

The district court erred in granting Hooks a two-level reduction in his offense level for acceptance of responsibility. A defendant must prove that he clearly demonstrates acceptance of responsibility for his offense to receive an adjustment

[16](...continued)
convicted of misdemeanors under 18 U.S.C. 242 for refusing to order officers under his command to stop using excessive force against inmates), cert. denied, 510 U.S. 1094, 114 S. Ct. 928 (1994).

under U.S.S.G. § 3E1.1, and an appellate court reviews a district court's decision to grant or deny an adjustment for acceptance of responsibility for clear error. *United States* v. *Anderson*, 23 F.3d 368, 369 (11th Cir. 1994).

An adjustment for acceptance of responsibility does not apply "to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E.1.1, cmt. n.2. Nonetheless, conviction by trial does not automatically preclude a defendant from consideration for this adjustment. In "rare situations," such as when a defendant proceeds to trial on issues that do not relate to factual guilt, a defendant may remain eligible for the adjustment. *Ibid.* That is not the case here.

The district court granted Hooks a reduction in his base offense level on grounds that Hooks admitted assaulting Tanner and King. Indeed, Hooks admitted assaulting the victims in two, formal pre-trial interviews with FBI agents, and again at trial.[17] In granting the adjustment over the government's objection, the court reasoned that, to receive the adjustment, Hooks was not required to admit to an intent to deprive his victims of their constitutional rights. (Doc. 95 at 17). This was error. This Court previously held that a district court's grant of an adjustment for

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[17] In an informal conversation with the investigating FBI agent, however, Hooks stated that Tanner, King, and Beasley were free of any injuries following their arrests, interrogations, and bookings, and that any injuries Tanner and King received would have occurred at the jail following their placement in cells. (Court's Exh. 1).

acceptance of responsibility was clearly erroneous where a defendant admitted at trial to the offense conduct but denied the requisite mens rea to sustain a conviction. In *United States* v. *Starks*, 157 F.3d 833 (11th Cir. 1998), the defendant was charged with violating the anti-kickback provision of the Social Security Act. At trial the defendant admitted to making payments in return for certain referrals, but denied having any intent to induce referrals – an essential element of the charge of which he was convicted. The district court nonetheless granted the defendant an adjustment based on acceptance of responsibility. This Court reversed, holding that, by contesting the specific intent of the crime charged and putting the government to its burden of proof, "[the defendant's] arguments at trial amounted to a factual denial of guilt and were therefore inconsistent with acceptance of responsibility." *Id.* at 840. This Court concluded that the defendant was ineligible for the adjustment. *Id.* at 841; see also *United States* v. *Hendricks*, 319 F.3d 993 (7th Cir.) (upholding district court's denial of adjustment under U.S.S.G. § 3E1.1 where defendant admitted most conduct, but denied specific intent of "knowing possession" necessary for conviction under 18 U.S.C. 922(g)(1)), cert. denied, 124 S. Ct. 149 (2003); see also *United States* v. *Reaume*, 338 F.3d 577 (6th Cir. 2003) (upholding district court's denial of adjustment under U.S.S.G. § 3E1.1 where defendant admitted most conduct, but denied specific intent to defraud a bank necessary for conviction under 18 U.S.C. 1344), cert. denied, 124 S. Ct. 1182 (2004).

The reasoning of *Starks* applies here. To prove a defendant violated 18 U.S.C. 242, the government must prove that the defendant willfully deprived another of a constitutional right while acting under color of law. See *United States* v. *Williams*, 343 F.3d 423, 431-432 (5th Cir.), cert. denied, 124 S. Ct. 966 (2003). "Willfulness," as defined within the context of 18 U.S.C. 242, requires the jury to find that the defendant acted "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *Screws* v. *United States*, 325 U.S. 91, 105, 65 S. Ct. 1031, 1037 (1945). Hooks offered a defense of diminished capacity – arguing that, due to exhaustion, he lacked the specific intent necessary to sustain a conviction under 18 U.S.C. 242. (Doc. 91 at 1010-1011). Thus, while Hooks admitted that he assaulted Tanner and King at the jail, he, like the defendant in *Starks*, challenged "an essential element of the charges on which he was convicted." *Starks*, 157 F.3d at 840. This "amounted to a factual denial of guilt," and is "inconsistent with acceptance of responsibility." *Ibid.* The district court clearly erred in awarding Hooks a two-level adjustment under Section 3E1.1. See *id.* at 841.

B. The District Court Erred In Granting Hooks A Downward Departure Based On Victim Misconduct

A court may reduce a defendant's sentence below the guideline range if the victim's wrongful conduct "contributed significantly to provoking the offense behavior." U.S.S.G. § 5K2.10. Such a departure is reviewed *de novo*. 18 U.S.C. 3742(e). Here, the district court reasoned that it could not ignore "the conduct and

the overall disagreeable nature of the attitude" of the victims, even though "there was no instant provocative act" at the jail before the assault. (Doc. 95 at 97). Relying on *Koon* v. *United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996), the district court concluded that it could consider the victims' conduct "an hour or even two hours" prior to the assault as "one of the elements in the entire calculus of what happened that night." (Doc. 95 at 109-110). Citing their use of marijuana and alcohol and "irresponsible driving," the district court found that the victims' behavior earlier in the evening was "more than minimal" and supported a downward departure based on victim provocation. (Doc. 95 at 104).

A departure for victim provocation is not warranted here. First, *Koon* offers little, if any, support for the district court's decision. The Supreme Court in *Koon* credited the sentencing court's finding that the defendants' conduct crossed the line from legal to unlawful force "all in a matter of seconds, during the course of a dynamic arrest situation." *United States* v. *Koon*, 518 U.S. 81, 102, 116 S. Ct. 2035, 2048 (1996) (citing *United States* v. *Koon*, 833 F. Supp. 769, 787 (C.D. Cal. 1993)). Here, the district court acknowledged that any provocative act by the victims occurred an hour or two before the assault. Moreover, unlike *Koon*, Hooks did not exert unlawful force in a dynamic arrest situation, but well after the victims had been subdued, arrested, and transported to a secure location.[18] Second, none

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[18] The *Koon* court credited the sentencing court for recognizing that the Guideline range applies to both "a government official who assaults a citizen without provocation" as well as instances where "what begins as legitimate force becomes excessive." 518 U.S. at 105, 116 S. Ct. at 2050. The facts of this case align more (continued...)

of the factors listed in U.S.S.G. § 5K2.10 supports a downward departure in this case. When deciding whether to grant a departure, U.S.S.G. § 5K2.10 directs a court to consider the comparative size and strength of the victim and defendant; the persistence of the victim's conduct and any efforts by the defendant to prevent the confrontation; the perceived and actual danger presented to the defendant by the victim; and any other relevant victim conduct that substantially contributes to the danger presented. Here, Hooks assaulted two unresisting, handcuffed arrestees in the booking room of the county jail. He was considerably larger than his victims, the victims presented no actual or perceived danger to him, and the record contains no evidence that he attempted to prevent the confrontation.[19] See U.S.S.G. § 5K2.10(a)-(e). Indeed, Hooks testified that he "knew it was wrong" to assault Tanner and King at the jail. (Doc. 90 at 750, see also Doc. 90 at 757).

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[18](...continued)
closely with the former than the latter.

[19] *Even if* the victims' wrongful conduct supports a downward departure from the applicable guideline range, the district court's decision to grant a ten-level departure is wholly unsupported by the facts of this case. A court is to consider the same factors in deciding whether to grant a departure and in determining *the extent* of the departure (*e.g.*, comparative size of victim and defendant, etc.). If Rodney King's physically combative behavior in *Koon* supported only a five-level departure in that case, then Tanner's and King's behavior cannot be the basis for a ten-level departure here.

C. *The District Court's Other Reasons For Granting Hooks A Downward Departure Are Not Supported By The Facts Of The Case*

A district court's decision to depart from the Guidelines is reviewed *de novo*. 18 U.S.C. 3742(e). Here, the district court's finding that the facts of this case bring it outside the heartland of cases covered by U.S.S.G. § 2H1.1 was error. The district court offered several reasons for justifying its "heartland" decision, but these reasons neither individually nor collectively support a downward departure.

1. *Comparison To Other 18 U.S.C. 242 Cases*

As part of its analysis of whether Hooks's case fell outside the heartland of cases covered by U.S.S.G. § 2H1.1, the district court summarized the facts of several 18 U.S.C. 242 cases from other Circuits. The court explained that, "[i]n an effort to find [the] best perspective on how this case should be handled by way of sentencing," it "amassed a collection of cases," which the court described as "probably most of the reported cases which have been tried and in which opinions have been written about various facets of [18 U.S.C. 242] cases in the last several years." (Doc. 95 at 85). The court further explained that its review was meant to "develop a perspective or backdrop against which" to sentence the defendant. (Doc. 95 at 92). While the district court's effort was admirable, its analysis was fundamentally flawed. Failing to recognize that the appropriate cases for comparison would be those arising from simple assaults and resulting in non-serious bodily injury, the court focused on cases with offense conduct that either warranted an *upward* departure, see, *e.g.*, *United States* v. *Livoti*, 196 F.3d 322

(2d Cir. 1999) (defendant's base offense level subjected to upward departure when defendant police officer applied choke hold to non-resisting arrestee who died as a result), cert. denied, 529 U.S. 1108, 120 S. Ct. 1961 (2000), or corresponded to a higher base offense level than Hooks's because the underlying offense constituted *aggravated* assault and/or involved the use of a weapon, see, *e.g.*, *United States* v. *Johnstone*, 107 F.3d 200 (3d Cir. 1997) (defendant sentenced to 87 months on 6 counts of 18 U.S.C. 242 after kicking, punching, and striking handcuffed arrestees with flashlight); *United States* v. *Mohr*, 318 F.3d 613 (4th Cir. 2003) (defendant sentenced to 120 months after releasing police dog on unresisting, non-threatening homeless man); *United States* v. *Bradley*, 196 F.3d 762 (7th Cir. 1999) (defendant fired weapon into non-fleeing car to effectuate traffic stop). (Doc. 95 at 85-92).

The appropriate comparative cases are those that arise from simple assaults, result in non-serious bodily injury, and are committed by law enforcement officers acting under color of law. These cases typically produce an adjusted offense level of 16 or 18 (depending on whether the victim was restrained), and correspond to a sentencing range between 21 to 33 months. For example, in *United States* v. *Christian*, 342 F.3d 744 (7th Cir. 2003), cert. denied, 124 S. Ct. 1095 (2004), the defendant police officer punched and kneed a restrained victim in the face. The victim sustained only minor injuries, and the defendant was sentenced to 33 months' imprisonment. In *United States* v. *Brugman*, 364 F.3d 613 (5th Cir. 2004), the defendant Border Patrol agent was sentenced to 27 months' imprisonment for kicking and punching an unresisting illegal alien. As in *Christian*,

the victim in *Brugman* sustained only minor injuries. See also *United States* v. *Clayton*, 172 F.3d 347 (5th Cir. 1999) (defendant sheriff sentenced under earlier version of guideline to 12 months' imprisonment for kicking handcuffed arrestee; case remanded for re-sentencing to include enhancement for restrained victim).

The district court also concluded that Hooks's case was not within the heartland of U.S.S.G. § 2H1.1 because Hooks could have inflicted much greater injuries upon Tanner and King than he did, and had this been a civil case, the court did not think Hooks would be liable because Tanner and King suffered only minor injuries from de minimis force. (Doc. 95 at 99-105). This analysis was also flawed. First, the fact that Hooks could have inflicted a greater injury than he did does not warrant a *downward* departure. Sentencing courts may *increase* a defendant's offense level if significant physical injury results, see U.S.S.G. § 5K2.2, but the Guidelines do not suggest that a sentencing court should grant a downward departure simply because the defendant "could have killed them with a couple of blows maybe or injured them severely," but did not. (Doc. 95 at 110). Second, as already discussed, pp. 17-18, *supra*, this Court's decisions in civil cases demonstrate that, when an officer uses force that is clearly unreasonable under the circumstances because little or no force was required, the amount of force was grossly disproportionate to the need for force, and injuries resulted, the officer *will* be held liable for using excessive force. See, *e.g.*, *Lee* v. *Ferraro*, 284 F.3d 1188 (11th Cir. 2002); *Vinyard* v. *Wilson*, 311 F.3d 1340 (11th Cir. 2002).

The applicable guideline, U.S.S.G. § 2H1.1, encompasses simple assaults committed by law enforcement officers that result in minor injuries, see *Christian*, *Brugman*, and *Clayton*, pp. 31-32, *supra*, and the district court offered no facts to take this case out of that heartland. The district court also failed to identify any other mitigating circumstance of a kind or to a degree that is not adequately taken into consideration by the Sentencing Commission. See U.S.S.G. § 5K2.0. As discussed below, the additional factors the district court identified in support of its departure decision are either discouraged or prohibited factors upon which to base a downward departure.

2. Other Factors Considered By The Court

In addition to relying on the wrong sub-class of excessive force cases as a basis for comparison in its heartland analysis, the district court also erred in relying on Hooks's "personal characteristics" to support its downward departure. See *United States* v. *Winters*, 174 F.3d 478, 484 (5th Cir.), cert. denied, 528 U.S. 969, 120 S. Ct. 409 (1999). The district court, like the jury, rejected Hooks's claim that he was suffering from diminished capacity at the time he assaulted Tanner and King. (Doc. 95 at 94). The court nonetheless stated that it could consider as part of its sentencing calculus the fact that Hooks "was tired, irritable, he was [awakened] and feeling fairly rough, [and] angry" prior to assaulting Tanner and King. (Doc. 95 at 110). This was error. The Guidelines indicate that a defendant's mental, emotional, and physical conditions (U.S.S.G. §§ 5H1.3, 5H1.4) are ordinarily not relevant in determining whether a sentence should be outside the

applicable guideline range unless that characteristic is present "to an unusual degree," and distinguishes the case from the heartland of cases covered by the applicable guideline. U.S.S.G. § 5K2.0. The district court did not identify any facts which indicate that Hooks's fatigue was present to such an "unusual degree" that it justified a downward departure.

The district court also considered Hooks's years of law enforcement service and lack of any previous criminal history as mitigating factors during sentencing. The court reasoned that a Criminal History Category of I "is not all that can be said about a person who has given a lifetime for hire to public service." (Doc. 95 at 106). This was also error. The Guidelines instruct that a defendant's employment record, public service, and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. U.S.S.G. §§ 5H1.5, 5H1.11. Moreover, the Guidelines clearly state that "a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate." U.S.S.G. § 4A1.3; see also *Koon*, 518 U.S. at 111, 116 S. Ct. 2052-2053. The Guidelines already provide a means for sentencing courts to credit a defendant law enforcement officer's previously unblemished record: "The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism." U.S.S.G. § 4A1.3. As such, the lower *limit* of the applicable guideline range applies to Hooks, not a lower range altogether.

CONCLUSION

This Court should affirm the defendant's conviction, vacate the sentence imposed by the district court, and remand the case to the district court with instructions to impose a sentence that conforms to the Sentencing Guidelines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 9588 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: June 4, 2004

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2004, two copies of the BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT were served by overnight delivery on the following counsel of record:

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