No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL J. BAXTER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11600-HH

UNITED STATES OF AMERICA,

Plaintiff - Appellee

versus

MICHAEL J. BAXTER,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Florida

BEFORE: MARCUS, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Michael J. Baxter is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11600
Non-Argument Calendar

D.C. Docket No. 5:17-cr-00026-RH-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL J. BAXTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(June 13, 2019)

Before MARCUS, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

This case began when Michael Baxter, a Florida corrections officer, was charged with one count of acting under the color of law and depriving an inmate, Glover, of his right not to be subjected to cruel and unusual punishment while in official custody, in violation of 18 U.S.C. § 242; and one count of falsification of records, in violation of 18 U.S.C. § 1519. Baxter was tried by a jury, found not guilty of the § 242 offense, but guilty of the § 1519 offense. He appeals his conviction and 60-month sentence for falsification of records, in violation of 18 U.S.C. § 1519. Baxter raises four issues on appeal. First, he argues that the district court erred in granting the government's *Batson*[1] challenge because it did not present a *prima facie* case of racial motivation for the challenged peremptory strike. Second, he argues that the district court abused its discretion in denying his motion for a new trial because the jury's guilty verdict was inconsistent with its acquittal on the charged deprivation of Eighth Amendment rights. Third, he argues that the district court erred in considering acquitted conduct at sentencing because the government did not prove by a preponderance of the evidence that he used excessive force against an inmate. Fourth, he argues that the district court abused its discretion and imposed a substantively unreasonable above-guideline sentence because it considered improper factors, weighed the 18 U.S.C. § 3553(a) factors

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

unreasonably, and did not sufficiently explain its justification for the three-month upward variance.

I.

In reviewing a *Batson* challenge, we give great deference to the district court's finding whether a *prima facie* case of discrimination existed. *United States v. Walker*, 490 F.3d 1282, 1291 (11th Cir. 2007). We review the district court's findings regarding the actual motivation behind the challenged strike for clear error. *Id.*

The Equal Protection Clause forbids a prosecutor from striking potential jurors solely on account of their race, and the Supreme Court has extended that restriction to strikes by defense counsel. *Id.* at 1290. In *Batson*, the Supreme Court articulated a three-part test to evaluate the validity of challenges to peremptory strikes: (1) the moving party must make a *prima facie* showing that a peremptory challenge was exercised on the basis of race; (2) the non-moving party must offer a race-neutral basis for striking the juror in question; and (3) the trial court must determine whether the moving party has shown purposeful discrimination. *Id.* at 1291.

The *prima facie* case determination is not to be based on numbers alone but on the totality of the circumstances. *United States v. Hill*, 643 F.3d 807, 839 (11th Cir. 2011). The district court should consider all relevant circumstances

supporting the challenging party's assertion of discrimination, including the striking party's pattern of striking venire members of a particular race, questions or statements during *voir dire* that support an inference of discriminatory purpose, the subject matter of the case being tried, the race of the defendant, and the racial composition of the pool of the remaining potential jurors. *United States v. Robertson*, 736 F.3d 1317, 1326 (11th Cir. 2013).

At the second step of the *Batson* inquiry, the striking party's reason need not be a good one so long as it is not discriminatory. *Hill*, 643 F.3d at 837. The reason only needs to be plausible and not discriminatory, and may be superstitious, silly, or trivial as long as it was race-neutral. *Walker*, 490 F.3d at 1291.

At the third step, the district court has great discretion to accept the striking party's race-neutral reason as the truth or to reject it as pretextual. *Robertson*, 736 F.3d at 1328. We recognize that the district court's perception of the attorney's credibility is essential to determining whether the proffered reason was pretextual, and the record does not always reflect all that the district court saw and heard. *Walker*, 490 F.3d at 1293-94. Thus, we give great deference to the district court because it is in a better position to make credibility decisions than we are as the reviewing court. *Id.* at 1294. But the district court must focus on the genuineness of the non-moving party's proffered explanation rather than its reasonableness. *Id.* In *Walker*, we found no error in the district court's decision to reject the

defendant's peremptory strike of a potential juror based on his body language when the district court emphasized that it found that the defendant's stated reason for the strike was not genuine. *Id.* at 1293 n.13, 1294. Specifically, the district court found that the potential juror "ha[d] not demonstrated any body language that [the court] could see" and the defendant did not identify any specific body language that was "sufficient to persuade [the court] that the reason articulated for [the juror's] elimination was a race neutral reason." *Id.* at 1293 n.13.

We apply harmless error review to a misapplication of *Batson* that results in an otherwise qualified juror being seated. *United States v. Williams*, 731 F.3d 1222, 1236 (11th Cir. 2013). Under harmless error review, the government bears the burden of showing that the error did not affect the defendant's substantial rights. *Id.*

Here, the district court did not clearly err in determining that Baxter's motive for striking Juror M was based on her race and disallowing it. *Walker*, 490 F.3d at 1291. The court properly determined that the government presented a *prima facie* case of race-based discrimination. While Baxter argues that the government did not show a *prima facie* case of race-based discrimination because striking two out of three African Americans on the venire did not establish a pattern of striking African American jurors, the *prima facie* case does not succeed or fail based on numbers alone. *See Hill*, 643 F.3d at 839. The district court could

infer that Baxter wanted to strike African American potential jurors because the defendant was a white corrections officer, the victim (Glover) was a black inmate, and the government's theory of the case included allegations that Baxter's use of force was motivated by Glover's impending interracial marriage and that Baxter had used a racial slur when referring to the relationship. *See Robertson*, 736 F.3d at 1326. And, as the government noted, Juror M had not given any responses that would offer a facially race-neutral reason for using a peremptory strike. Thus, based on the totality of the circumstances, this Court defers to the district court's *prima facie* case determination. It was within the district court's sound discretion to determine that Baxter's explanation for the strike—that Juror M had exhibited negative body language—was not genuine based on the court's observation of Juror M and its finding that she had not demonstrated negative body language. *See Walker*, 490 F.3d at 1293-94, 1293 n.13. Further, the district court did not find Baxter's explanation that Juror M had stretched away, crossed her arms, and appeared tight and negative unreasonable but found that it was a pretext for racial discrimination instead of a genuine non-discriminatory reason. *Walker*, 490 F.3d at 1294. Because the district court had an opportunity to observe Juror M and evaluate Baxter's attorney's credibility, it did not clearly err in finding that Baxter's motivation for striking Juror M was actually because of her race and properly disallowed the strike.

II.

We review the denial of a motion for a new trial for an abuse of discretion. *United States v. Perez-Oliveros*, 479 F.3d 779, 782 (11th Cir. 2007). The district court has the discretion under Fed. R. Crim. P. 33 to grant a new trial "if the interest of justice so requires." *United States v. Albury*, 782 F.3d 1285, 1295 (11th Cir. 2015) (quotation marks omitted). In considering the motion, the district court may weigh the evidence and consider the credibility of witnesses. *Id.* But we will only overturn the denial of a motion for a new trial if the evidence "preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id.* (quotation marks and brackets omitted).

A jury's verdicts are insulated from review on the ground that they are inconsistent as long as there was sufficient evidence to support its finding of guilt. *Id.* The jury is free to choose among reasonable constructions of the evidence in reaching its guilty verdict. *See United States v. Foster*, 878 F.3d 1297, 1304 (11th Cir. 2018). If the defendant testified at trial, the jury is free to disbelieve his statements and consider them as substantive evidence of his guilt. *United States v. Shabazz*, 887 F.3d 1204, 1220 (11th Cir. 2018).

To prove a violation of 18 U.S.C. § 242, the government must present evidence that establishes beyond a reasonable doubt that the defendant acted (1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States. *United States v. House*, 684 F.3d 1173, 1198 (11th Cir. 2012). To prove that a defendant falsified records in violation of 18 U.S.C. § 1519, the government must show that the defendant (1) knowingly (2) altered, destroyed, mutilated, concealed, covered up, falsified, or made a false entry in a record or document (3) with the intent to impede, obstruct, or influence an investigation. *See United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008); *see also* 18 U.S.C. § 1519.

Here, the district court did not abuse its discretion in denying Baxter's motion for a new trial. Notably, deprivation of a constitutional right under color of law and falsification of records are distinct crimes with no overlapping elements, so an acquittal on the first and a guilty verdict on the second are not inherently inconsistent. *Compare House*, 684 F.3d at 1198 with *Hunt*, 526 F.3d at 743. Even if the jury acquitted Baxter on Count One because it believed his version of events, it could still find that he had knowingly fabricated some portion of his report to influence the use-of-force investigation. *Hunt*, 526 F.3d at 743. It is equally possible that the jury did not believe Baxter's version of events but found that the government had not proven one or more elements of the excessive force claim

beyond a reasonable doubt. *See House*, 684 F.3d at 1198. Nonetheless, even if the jury's verdicts were inconsistent, they were insulated from review on that basis because the guilty verdict on Count Two was supported by sufficient evidence. *See Albury*, 782 F.3d at 1295. Baxter's report stated that Glover advanced toward Baxter and "forcefully" struck his head against Baxter's, but Silcox testified that Baxter approached Glover and Glover did not "head-butt" Baxter, but their heads simply "collided." The report also stated that Baxter punched Glover when he "charged" towards him and kicked him in the head and shoulders in response to continued resistance, but witnesses testified that Baxter kicked Glover in the face, Glover did not resist while on the floor, and Silcox was able to subdue Glover with a chokehold. While testimony from other witnesses supported the statements in the report, the jury was free to choose among reasonable constructions of the evidence in reaching its conclusion that at least some of the statements in the report were false. *See Foster*, 878 F.3d at 1304. In particular, the jury was free to disbelieve Baxter's trial testimony and consider it as substantive evidence that he had falsified records. *See Shabazz*, 887 F.3d at 1220. Moreover, this evidence does not demonstrate that it would be a miscarriage of justice to let the verdict stand. *Id.*

III.

We review *de novo* the district court's interpretation and application of the Sentencing Guidelines and constitutional challenges to a federal sentence. *United States v. Maddox*, 803 F.3d 1215, 1220 (11th Cir. 2015). We review the court's factual findings at sentencing for clear error. *Id.*

The Supreme Court has held that a district court may consider at sentencing any conduct underlying the defendant's acquitted charge so long as the government proves the occurrence of that conduct by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 157 (1997). We added that the resulting sentence must fall below the maximum statutory penalty authorized by the jury's verdict. *Maddox*, 803 F.3d at 1220. Acquitted conduct may be considered at sentencing because an acquittal does not mean that the defendant was innocent of the charged conduct but only that the jury found that the conduct was not proven beyond a reasonable doubt. *Id.* at 1221. Moreover, the jury's general not-guilty verdict does not reveal whether it rejected any particular fact, so facts underlying the acquitted charge may still be proven at sentencing by a preponderance of the evidence. *See id.*

Here, as an initial matter, Baxter argues that *Watts* should be overruled, citing to several district court opinions from other circuits disagreeing with *Watts*'s holding that consideration of acquitted conduct may be considered at sentencing.

Because *Watts* remains binding precedent, the district court did not violate Baxter's constitutional rights by considering conduct underlying the acquitted excessive force charge as long as the conduct was proven by a preponderance of the evidence and the resulting sentence was below the statutory maximum. *See Watts*, 519 U.S. at 157; *Maddox*, 803 F.3d at 1220.

First, the district court did not err in finding that the government proved by a preponderance of the evidence that Baxter used excessive force against Glover. *See Maddox*, 803 F.3d at 1220. While evidence showed that Glover raised his voice, was "flailing around," and was talking with his hands, witness accounts varied regarding whether Glover headbutted Baxter or if their heads simply collided at some point. But Silcox, who was present for the entire incident, and several other witnesses testified that they did not observe Glover strike, punch, kick, or grab Baxter at any point or, at least, when he was on the ground. Witnesses consistently testified, however, that Baxter punched Glover in the face twice and kicked Glover in the head or face twice while he was lying on the ground. While Baxter testified that he kicked Glover to overcome his physical resistance and grabbing, other witnesses testified that Glover may have reached for Baxter but never grabbed him. Accordingly, the district court did not clearly err in finding that Baxter did not have a legitimate reason for kicking Glover when he was on the ground. In addition, Baxter's 60-month sentence was well below the

statutory maximum of 240 months' imprisonment. *See Maddox*, 803 F.3d at 1220. Thus, the district court did not err in considering the acquitted use-of-force conduct at sentencing.

IV.

We review the substantive reasonableness of a sentence under the deferential abuse-of-discretion standard of review. *Gall v. United States*, 552 U.S. 38, 41 (2007). The party who challenges the sentence bears the burden of showing that the sentence was unreasonable considering the record and the § 3553(a) factors. *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir. 2010).

The district court must impose "a sentence sufficient, but not greater than necessary, to comply with the purposes" listed in 18 U.S.C. § 3553(a)(2), including the need to reflect the seriousness of the crime, promote respect for the law, provide just punishment, deter criminal conduct, and protect the public from the defendant's future criminal conduct. 18 U.S.C. § 3553(a), (a)(2)(A)-(C); *see also United States v. Irey*, 612 F.3d 1160, 1196 (11th Cir. 2010) (*en banc*). The court must also consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In considering these factors, the district court does not have to discuss each one individually but must acknowledge its consideration of the defendant's arguments and the § 3553(a)

factors as a whole. *United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008).

We do not presume that a sentence outside the guideline range is unreasonable, but we must consider the extent of any variance and "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *United States v. Turner*, 626 F.3d 566, 573 (11th Cir. 2010) (quotation marks omitted). When the district court decides after "serious consideration" that a variance is appropriate based on the § 3553(a) factors, it should explain that variance "with sufficient justifications." *Gall*, 552 U.S. at 46-47. The court's justification must be "compelling enough to support the degree of the variance and complete enough to allow meaningful appellate review," but an "extraordinary justification" is not required for a sentence outside the guideline range. *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009) (quotation marks omitted).

We will only remand for resentencing when we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case. *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). The weight to be given each § 3553(a) factor is within the district court's sound discretion. *United States v. Kuhlman*, 711

F.3d 1321, 1327 (11th Cir. 2013). However, a district court can abuse its discretion when it (1) fails to consider relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment by balancing the proper factors unreasonably. *Id.* at 1326-27.

Here, the district court's 3-month upward variance to a 60-month sentence was substantively reasonable. First, the district court considered all the relevant § 3553(a) factors presented at sentencing. *See Kuhlman*, 711 F.3d at 1326; *Gonzalez*, 550 F.3d at 1324. Contrary to Baxter's argument, it considered mitigating factors, such as Baxter's personal history and characteristics, stating that he had an otherwise "exemplary" record and this was an isolated event. 18 U.S.C. § 3553(a)(1). It also considered Baxter's support of his family, including his children. 18 U.S.C. § 3553(a)(l). But the court balanced these mitigating factors against the nature and circumstances of the offense, finding that it was an "egregious event" and that Baxter had used unnecessary and excessive force against Glover, causing serious injury. 18 U.S.C. § 3553(a)(1). Balancing all of the relevant factors, it concluded that a term of imprisonment was warranted. *See Kuhlman*, 711 F.3d at 1326. And while Baxter repeats that consideration of conduct underlying the acquitted excessive force charge was improper, that

argument fails for the reasons discussed above. Thus, the district court did not abuse its discretion in considering and weighing the relevant § 3553(a) factors.

In addition, the district court sufficiently explained its three-month upward variance based on its consideration of the § 3553(a) factors. *Turner*, 626 F.3d at 573. It emphasized the need for general deterrence within the department of corrections regarding false reports about the use of force as the most compelling reason for the upward variance. *See Shaw*, 560 F.3d 1230, 1238; 18 U.S.C. § 3553(a)(2)(B). Further, it considered the government's argument that an above-guideline sentence would promote respect for the law, particularly in light of Baxter's role as a high-ranking corrections officer. 18 U.S.C. § 3553(a)(2)(A); *Turner*, 626 F.3d at 573. Because the court properly weighed the § 3553(a) factors and adequately explained its reasoning for the three-month upward variance, it did not commit a clear error of judgment in fashioning its sentence. *Pugh*, 515 F.3d at 1191.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA

-vs-

Case # 5:17cr26-001

MICHAEL J. BAXTER

USM # 25773-017

Defendant's Attorney:
Ethan A. Way (Retained)
P.O. Box 10017
Tallahassee, Florida 32302

JUDGMENT IN A CRIMINAL CASE

A jury returned a verdict on January 25, 2018 finding the defendant not guilty on count 1 and guilty on count 2 of the indictment. Accordingly, IT IS ORDERED that the defendant is adjudged guilty of count 2, which involves the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 U.S.C. § 1519	Falsification of Records	January 13, 2015	2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence:
April 12, 2018

s/Robert L. Hinkle
United States District Judge
April 15, 2018

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **60 months.**

The Court recommends to the Bureau of Prisons:

The defendant should be designated to a facility as near as possible to Sneads, Florida.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons before 2:00 p.m. on June 12, 2018.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **1 year.**

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
   The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
3. You must cooperate in the collection of DNA as directed by the probation officer.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. PROBATION OFFICE USE ONLY

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature_____ Date _____

SPECIAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant must provide the probation officer all requested financial information, business or personal.

2. The defendant must make payments toward any unpaid assessment and fine balance in the amount of at least $100.00 per month (or any adjusted amount set by further court order based on the defendant's ability to pay). The payments must begin within 60 days after the defendant is released from custody.

Upon a finding of a violation of probation or supervised release, I understand the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____

Defendant Date

_____ _____

U.S. Probation Officer/Designated Witness Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

ASSESSMENT	JVTA* ASSESSMENT	FINE	RESTITUTION
$100.00	-0-	$1,000.00	-0-

The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows: at least $100 per month.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 5:17cr26-RH

MICHAEL J. BAXTER,

Defendant.

_____/

VERDICT

WE THE JURY unanimously return the following verdict:

1. On count one, we find the defendant Michael J. Baxter:

GUILTY _____ NOT GUILTY ✓

If your verdict on count one is not guilty, please skip question 1(a) and go directly to question 2. If your verdict on count one is guilty, please answer question 1(a).

1(a). Did the assault cause bodily injury to Mr. Glover?

YES _____ NO _____

FILED IN OPEN COURT THIS
1/25/18
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

Please answer question 2.

2. On count two, we find the defendant Michael J. Baxter:

GUILTY ✓ NOT GUILTY _____

SO SAY WE ALL on January 25, 2018, in Panama City, Florida.

REDACTED

Foreperson

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL J. BAXTER

SEALED
INDICTMENT

5:17cr26/RH

THE GRAND JURY CHARGES:

COUNT ONE

On or about July 13, 2015, in the Northern District of Florida, the defendant,

MICHAEL J. BAXTER,

while acting under color of law, as a correctional officer of the State of Florida, did assault and strike D.G., an inmate at the Apalachee Correctional Institution, resulting in bodily injury to D.G., and thereby did willfully deprive D.G. of a right secured and protected by the Constitution and laws of the United States, that is, the right not to be subjected to cruel and unusual punishment while in official custody and detention by one acting under color of law.

In violation of Title 18, United States Code, Section 242.

FILED IN OPEN COURT THIS
9/12/17
CLERK, U.S. DISTRICT COURT, NORTH DIST. FLA.

Returned in open court pursuant to Rule 6(f)
9-12-17
Date
Elizabeth M. Timothy
United States Magistrate Judge

COUNT TWO

On or about July 21, 2015, in the Northern District of Florida, the defendant,

MICHAEL J. BAXTER,

did knowingly cover up, falsify, and make a false entry in a record and document with the intent to impede, obstruct, and influence the investigation and proper administration of a matter within the jurisdiction of the Federal Bureau of Investigation, a department and agency of the United States, and in relation to and in contemplation of such a matter. That is, in a Report of Force Used and Incident Report, **BAXTER** made the following entry, knowing it to be false:

(1) D.G. "advanced towards" **BAXTER**;

(2) D.G. acted "forcefully and intentionally striking his head against" **BAXTER's** forehead;

(3) D.G. "aggressively charged" **BAXTER** "in an attempt to again batter" **BAXTER;**

(4) **BAXTER** had to punch D.G. "in an attempt to compel him to cease his forward advance towards" **BAXTER**;

(5) D.G. was "attempting to strike us with closed fists, and was violently kicking his legs in the direction of us all";

(6) **BAXTER** "struck the desk in the Major's office as well as the table that was in the corner prior to forcefully falling to the floor";

(7) D.G. "grabbed" **BAXTER** "by the left leg and began repeatedly pulling it"; and

(8) **BAXTER** was in "imminent danger" from D.G.'s "violent attempts to harm us."

In violation of Title 18, United States Code, Section 1519.

A TRUE BILL:

REDACTED

FOREPERSON

12 SEP 2017

DATE

for CHRISTOPHER P. CANOVA
United States Attorney

DAVID L. GOLDBERG
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY, FLORIDA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	*Case No: 5:17-cr-26*
	)	
vs.	)	*Panama City, Florida*
	)	*January 19, 2018*
MICHAEL J. BAXTER,	)	*9:24 A.M.*
	)	
Defendant.	)	
	)	

SEALED PROCEEDINGS
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TRANSCRIPT OF JURY-SELECTION PROCEEDINGS
BEFORE THE HONORABLE ROBERT L. HINKLE,
UNITED STATES DISTRICT JUDGE, and a venire

APPEARANCES:

For the Plaintiff, United States of America:	Christopher P. Canova United States Attorney By: DAVID L. GOLDBERG Assistant U.S. Attorney david.goldberg@usdoj.gov 21 East Garden Street Suite 400 Pensacola, Florida 32501
For the Defendant, Michael J. Baxter:	Way Law Firm, P.A. By: ETHAN A. WAY Attorney at Law eway@waylawfirm.com Post Office Box 10017 Tallahassee, Florida 32302

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[redacted], to the government.

MR. GOLDBERG: Respectfully challenge.

THE COURT: [redacted], to the defense.

MR. WAY: Strike, Your Honor.

MR. GOLDBERG: I have a *Batson* challenge. The defense struck Mr. [redacted] and Ms. [redacted]. I don't believe Ms. [redacted] said anything that would disqualify her.

THE COURT: The panel has three African-Americans. Mr. Way struck Mr. [redacted], who is an African-American. He did not strike Ms. [redacted], who is on the jury and is African-American. He now has struck Ms. [redacted] who is the third and final African-American. Mr. Way has struck one white, Mr. [redacted].

Mr. Way, would you like to tell me the legitimate nondiscriminatory reason for striking Ms. [redacted]?

MR. WAY: Yes, Your Honor. Did you want me to address [redacted] or [redacted]?

THE COURT: [redacted].

MR. WAY: As to Ms. [redacted] I have been watching her during the course of the jury selection. She apparently has slight negative body language, and I noticed her arms were crossed and stretching away from Mr. [redacted] for a period of time during questioning. I just, in terms of the court's questions, I found that her body language seemed to be tight and negative compared to the other prospective jurors, so I

made a note early on as to bad body language. It's just not my preference to have her on the jury, Your Honor.

THE COURT: Tell me about Mr. [redacted].

MR. WAY: Your Honor, this is the gentleman with a heart condition, who I know the court did make some consideration perhaps having a position for him to have his feet up. He did appear, when he was before the court, he did have sweat on his forehead. He does have health concerns. I thought for a three-day trial, particularly when I am going to want close and careful attention paid on the second full day of the trial, I want a person on the jury that is not distracted and can be alert and attentive. I have the same concern that is going to come up with Ms. Baxter, having to go to the bathroom three times an hour.

THE COURT: Mr. Goldberg, I'm going to grant the *Batson* challenge and disallow the strike on Ms. [redacted] if that's what you want me to do.

MR. GOLDBERG: Yes, Your Honor.

THE COURT: You'll have to write the red brief and defend that decision, if indeed my finding is overruled.

The explanation is not supported by the facts. If a defense lawyer could just say, I noticed the body language unacceptable, when I don't think there has been unacceptable body language, if that were a legitimate basis for a race-based strike, then *Batson* might as well be taken out of

the book. There's never been a good trial lawyer that couldn't offer that kind of explanation, no matter how much race is the actual reason. So my finding is that that's not true. It's not a legitimate nondiscriminatory reason, and I'm prepared to grant the *Batson* challenge and put Ms. [redacted] on the jury.

Is that what you want me to do?

MR. GOLDBERG: Yes, Your Honor, please. I believe that's a proper interpretation of *Batson*.

THE COURT: I disallow the strike.

Let me say that the law of the Circuit is, first, the Judge determines whether a *prima facie* case has been made for the *Batson* challenge; then offers the allegedly offending attorney a chance to explain the challenge; then makes a finding on pretext. I didn't make an explicit finding in the case on a *prima facie* case, but that the government had made a *prima facie* case, and my finding is that this was a race-based challenge. Ms. [redacted] is Juror Number 6.

[redacted] to the government.

MR. GOLDBERG: Acceptable.

MR. WAY: I would strike Ms. [redacted] Your Honor.

THE COURT: [redacted] to the defense.

MR. WAY: [redacted] is acceptable, Your Honor.

MR. GOLDBERG: Acceptable.

THE COURT: [redacted] is Juror 7.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY, FLORIDA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	*Case No: 5:17-cr-26*
	)	
vs.	)	*Panama City, Florida*
	)	*April 12, 2018*
MICHAEL J. BAXTER,	)	*9 A.M.*
	)	
Defendant.	)	
_____	)	

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE ROBERT L. HINKLE,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff, United States of America:	Christopher P. Canova United States Attorney By: DAVID L. GOLDBERG Assistant U.S. Attorney *david.goldberg@usdoj.gov* 21 East Garden Street Suite 400 Pensacola, Florida 32501
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record. The government has not suggested that there were other occasions when Mr. Baxter abused prisoners. And so this seems to be an isolated event, and that's a factor that cuts toward the lower end of punishment.

On the other hand, although it's an isolated event, it's an egregious event.

Now, I don't suggest that Mr. Glover was quite as quiet and compliant as he says. I suspect he -- he may have said something or not been as respectful as one would want a prisoner to be. I suspect he was wrongly accused the afternoon before. There was some evidence about that. That doesn't really have much to do with this, whether he was or not. Mr. Glover may not have been the model person he presented himself as.

But I do find that he was not disruptive to the point that any physical force properly could be used against him. He didn't try to assault Mr. Baxter. Mr. Baxter was behind the desk and came around, and force was used against Mr. Glover for no reason at all.

My finding is that Mr. Baxter willfully inflicted unnecessary brutal force and badly injured Mr. Glover, and then tried to cover it up, made false reports about it, and induced others to provide false information about it.

So every step of that is a serious -- every step of that is serious misconduct.

As I noted earlier, the Supreme Court has made clear that acquitted conduct can properly be considered, and that's so here. So I do consider the force that was used against Mr. Glover. Lying about it, preparing false reports is a serious offense all by itself.

Another aggravating factor is this:

Mr. Baxter caused lower ranking people at the Department to participate in providing false reports. That's criminal, and it has an effect on those people. And particularly aggravating is what he did to his own secretary, assistant, who he caused to get in line and tell -- give false information. And to her credit, she got to the point where she couldn't live with that and told the truth. And now -- and anybody who watched her on that witness stand with an open mind knows just how bad of an effect this had on her.

Mr. Glover suffered substantial -- a substantial beating. One looks at that picture and knows his eyes were closed. He was kicked on the ground with substantial force. He suffered a physical injury.

The secretary may have had it worse. She's lived with this most every day, and she's in a very small town where people, she described it, she doesn't get treated very well. It took a lot of courage for her to come forward and tell the truth and do the right thing. And for that, she's been treated shabbily. Mr. Baxter caused all that. He is the one

that caused all of that.

I don't think it's a right description, and Mr. Way says here everybody is lying, well, that's not quite what the government said. But everybody got pushed toward telling the party line, and it's not so, and those people don't sleep as well at night either. They know what happened.

Now, it's true most sentences -- and punishment is part of sentencing. Deterrence is part of sentencing. Deterrence doesn't work very well. General deterrence doesn't work very well in most cases. The government is right. Most of the time I impose a sentence, nobody really finds out what that sentence was. People who deal drugs don't say, "Gee, the sentence for this is 10 years, not 5 years, I'm not going to do it." They deal drugs; they don't think they're going to get caught, and nobody takes into account very much what the sentence is going to be.

This is a case where deterrence may have an effect. Now, to the extent that the word in the Department of Corrections is that Mr. Baxter was wrongly convicted, and he didn't do anything wrong, and he shouldn't have been convicted, and the judge got it all wrong, then I suppose the sentence won't do much good.

But there are people in the Department of Corrections that know that unlawful force is sometimes used, and they need to find out that the punishment for doing it, that the

punishment for giving -- making false reports is substantial.

I'm going to sentencing Mr. Baxter to 60 months, 5 years, in the Bureau of Prisons. That's an above guideline sentence. I have taken into account all of the 3553(a) factors.

This has an impact on the family. That's what happens with a sentence. The lawyers may have heard me say this before, I certainly said it in a number of other cases. If I had a magic wand and I could wave it and change the world, I would change it so that no parent ever committed a crime that called for a prison sentence. The fact that Mr. Baxter is a parent, that he's got a good family, that his kids need him at home, those are all factors properly taken into account. But when a crime calls for a prison sentence, I can't just say I'm not going to sentence the defendant to prison because, after all, he has children.

Imagine two cases, both just like this one. In one case the defendant has children; in the other case the defendant has no children; but, otherwise, they live the same life, they have done the same things, they committed the same crime. If I send the one with no children to prison, and I say to the other one, I'm going to put you on probation, how would I explain that to the defendant who has no children? You're going to prison because you don't have children? That doesn't make any sense. So it's a factor to be considered,