

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MATTHEW B. CORDER,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Case No. 16-6592

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MATTHEW B. CORDER

Defendant - Appellant

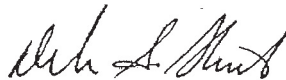
BEFORE: GUY, GIBBONS and COOK, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk



Issued: February 27, 2018

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 18a0072n.06

No. 16-6592

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
MATTHEW B. CORDER,)
)
Defendant-Appellant.)
_____ /)

FILED
Feb 12, 2018
DEBORAH S. HUNT, Clerk

On Appeal from the United States
District Court for the Western District
of Kentucky

BEFORE: GUY, GIBBONS, and COOK, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge. Defendant Corder, a police officer, was indicted and convicted after a jury trial of willfully depriving Derek Baize of his constitutional right to be free from unreasonable seizure and malicious prosecution. 18 U.S.C. § 242. On appeal, defendant raises a number of alleged errors. After careful consideration of the issues raised we find there was no error requiring reversal, and we affirm.

I. FACTS¹

Late at night on October 22, 2014, Deric Baize arrived at his mobile home to discover that defendant Matthew Corder, a deputy with the Bullitt County Sheriff's Office, had parked his

¹ Although there are several issues in this appeal, the events of October 22, 2014 are primarily relevant to defendant's sufficiency claim. Accordingly, we state them in a light most favorable to the government. *United States v. Cunningham*, 679 F.3d 355, 370 (6th Cir. 2012).

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police cruiser in front of Baize's home in Baize's parking spot. (PageID # 657, 814, 818). Baize asked defendant what was going on, to which defendant told Baize to mind his own business. (PageID # 658.) Baize asked defendant to move his car, but defendant told Baize that he would move his car when he was ready. (PageID # 658.) Baize admitted that he told defendant to "fuck off" and began walking back into his house; defendant asked Baize to repeat himself, and Baize stated "I did not stutter. I said 'fuck off.'" (PageID # 658.) At trial, the parties disputed whether Baize was shouting during this exchange. Baize conceded that he "raised his voice," because defendant asked him to repeat himself. (PageID # 687.) Baize's stepsister, who lived in the same trailer as Baize with her boyfriend, testified that Baize's voice was "[a] little bit above average, not too much, but not yelling." (PageID # 712.) No neighbor called the police or came out of their home to complain. (PageID # 705.)

Baize then walked into his home and closed the front door. (PageID # 658-59, 824-825, 357). Defendant and Baize's roommate both testified that defendant ordered Baize to stop; Baize testified that he did not hear that command. (PageID # 376-79, 712, 688-689.)

After Baize went inside, defendant activated his body camera and knocked on Baize's screen door. Baize opened his front door but left his screen door closed. Defendant opened Baize's screen door and told Baize to come outside "or there are going to be issues." Baize repeatedly refused, saying that defendant needed a warrant, but defendant responded that he did not "need no warrant." Defendant told Baize that "right now you're out here hollering at me and you ran in there, which means there's exigent circumstances." Baize again refused to come outside. Defendant reached inside Baize's home to grab Baize, who braced himself against his doorjamb and said "you are not allowed in my house." Defendant then entered Baize's home, grabbed Baize by the back of the neck, and began to arrest him. Defendant's fellow deputy,

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Billy Allen, arrived and assisted with the arrest. Defendant tased Baize into submission and completed the arrest.

Defendant prepared a post-arrest complaint charging Baize with three misdemeanors: disorderly conduct in the second degree, Ky. Rev. Stat. § 525.060; fleeing or evading in the second degree, Ky. Rev. Stat. § 520.100; and resisting arrest, Ky. Rev. Stat. § 520.090. The post-arrest complaint operated as the charging document. (PageID # 515, 739.) In support of the first two charges, defendant alleged in the complaint that the “[i]ncident caused alarm to neighbors & occupants of trailer” and that Baize “to evade ran inside [his] trailer.”

After reviewing defendant’s charges and supporting allegations, the magistrate judge detained Baize on a \$1500 cash bond. The judge stated that she rejected the default unsecured bond because the complaint charged Baize with evading police and resisting arrest. (PageID # 794-95.) Baize could not afford the cash bond and spent two weeks in jail.

On December 8, 2014, the prosecutor and Baize’s public defender, without Baize’s knowledge, agreed on an order of dismissal, which included the following: “The Court notes that [Baize] stipulates that there was probable cause with respect to the charges herein.” (PageID # 250.) It is undisputed that Baize never personally agreed to that stipulation. Baize found out that his case had been dismissed when he arrived for his pretrial hearing several weeks later. (PageID # 669.)

II. PROCEDURAL HISTORY

A grand jury returned a two-count indictment charging defendant with violating 18 U.S.C. § 242 by depriving Baize of his constitutional rights under color of law. Count 1 charged that defendant violated Baize’s right to be free from unreasonable seizures by seizing Baize without probable cause to believe a crime had been committed, and by unlawfully entering

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Baize's home to effect the seizure. Count 2 charged that defendant violated Baize's right to be free from unreasonable seizures, i.e., the right to be free from malicious prosecution, by charging Baize with "disorderly conduct" and "fleeing and evading" without probable cause to believe that Baize committed those crimes, and by knowingly including "false and misleading information in the charging document," which caused Baize to be detained in jail. (PageID # 1-2). After a four-day trial, a jury convicted defendant of both counts. (PageID # 310.) The court sentenced defendant to concurrent terms of 27 months of imprisonment on Count 1 and 12 months of imprisonment on Count 2. (PageID # 1068.)

III. ANALYSIS

Defendant first argues that the jury did not hear sufficient evidence to convict on either count under 18 U.S.C. § 242, because in his view the evidence only permits a conclusion that Baize was, in fact, disturbing the peace and fleeing and evading, which justified an arrest and prosecution. Defendant also takes issue with two of the jury instructions, asserting that one of them misstated § 242's mental-state requirement and the other misstated the physical boundary at which police must recognize the Fourth Amendment's protection of the home. In his fourth and fifth assignments of error, defendant challenges the district judge's evidentiary rulings, i.e., the decision to redact the stipulation in the state-court order dismissing the charges against Baize, and the decision to permit the government to question him about prior lies he told to police investigators in the 1990s. Finally, defendant objects to the inclusion of an enhancement for physically restraining the victim in the calculation of his Guidelines range. We consider his arguments in turn.

A. Sufficiency of the Evidence

We review de novo a district court's denial of a motion for acquittal based on the insufficiency of the evidence, *United States*

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v. Mabry, 518 F.3d 442, 447 (6th Cir. 2008), and must affirm the district court's decision if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because we may not independently weigh the evidence or "substitute our judgment for that of the jury," *Johnson v. Mitchell*, 585 F.3d 923, 931 (6th Cir. 2009), a defendant making an insufficiency-of-the-evidence argument "bears a very heavy burden." *United States v. Daniel*, 329 F.3d 480, 485 (6th Cir. 2003).

United States v. Cunningham, 679 F.3d 355, 370 (6th Cir. 2012).

Count 1 of defendant's indictment, brought under 18 U.S.C. § 242, required the jury to find that defendant deprived Baize of his right "to be free from an unreasonable seizure[], which includes the right not to be arrested without probable cause, and the right to be free from warrantless arrests in one's home absent consent or exigent circumstances." (PageID # 1, 282). Count 2, brought under the same statute, required the jury to find that defendant deprived Baize of his right to be free from unreasonable seizures, which includes the right to be free from malicious prosecution. (PageID # 1-2, 284, 286-87.) Malicious prosecution occurred if defendant issued the arrest citation "without probable cause to believe that [Baize] actually committed the charged crime[s]."

"To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

Defendant's arrest citation charged Baize with disorderly conduct in the second degree, Ky. Rev. Stat. Ann. § 525.060(1)(b), which occurs when a person "[m]akes unreasonable noise." (PageID # 288.) Jury Instruction 13, which defendant does not challenge, establishes this as a

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fact question: “When considering whether a noise is unreasonable under subpart (b), [the jury] may consider the time, place, and manner of the noise.” (PageID # 288.)

Defendant’s sufficiency argument asks us to second-guess the jury’s factual finding as to whether Baize generated noise that was unreasonable. There was evidence that Baize did not generate noise that was unreasonable, including his testimony, the testimony of one of the trailer’s other occupants, and the fact that no one in the neighborhood complained. There was evidence to the contrary, as well, but the jury was entitled to find Baize credible and defendant not credible, and we may not independently weigh the evidence or substitute our judgment for that of the jury. *Cunningham*, 679 F.3d at 370. Defendant has not carried his “very heavy burden” to show that no rational trier of fact could have found that he lacked probable cause to arrest Baize for disorderly conduct. *See id.*

Defendant also cited Baize for fleeing or evading in the second degree, Ky. Rev. Stat. Ann. § 520.100(1)(a). To effectuate an arrest under that statute, a police officer must have probable cause to believe that the suspect,

[1] with intent to elude or flee, . . . [2] knowingly or wantonly disobeys a direction to stop, [3] given by a person recognized to be a peace officer [4] who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and [5] in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person.

(PageID # 289.) We cannot say that no reasonable trier of fact could have found that defendant lacked probable cause to arrest Baize for fleeing or evading in the second degree. Most important, the jury was entitled to find that defendant lacked even “an articulable reasonable suspicion that a crime [had] been committed by the person fleeing,” i.e., disorderly conduct, based upon the evidence offered at trial.

Furthermore, we reject defendant's theory that the fifth element — "in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person" — was satisfied when Baize resisted arrest after returning to answer the door. For defendant to have had probable cause to arrest Baize for fleeing and evading, he must have had probable cause to believe that all of the elements of the crime were satisfied at the moment he sought the arrest. *Wesley v. Campbell*, 779 F.3d 421, 429 (6th Cir. 2015). By defendant's own account, however, the fifth element — Baize's creation of the risk — was not satisfied until *after* defendant initiated the arrest and Baize physically resisted. *See* Trial Tr. vol. II at 160:11-161:5 (defendant admits that he did not make the decision to arrest until "we were trying to bring [Baize] out [and] he resisted") (PageID # 832-33); Def. Br. at 18 ("The substantial risk of injury occurred when Baize resisted arrest . . ."). It is therefore impossible, under defendant's theory, that defendant had probable cause to believe Baize had met all of the elements of fleeing and evading when defendant made the decision to arrest.

B. Jury Instruction ("Public Place")

Count 1 permitted the jury to find defendant guilty if it concluded that he unreasonably seized Baize by arresting Baize in his home absent exigent circumstances or consent. (PageID # 282, 286.) The district court did not commit reversible error with respect to the jury instructions concerning the warrantless entry.

Defendant argues that Jury Instruction 12 was prejudicial because it denied the jury the opportunity to make the factual determination whether Baize was standing in his threshold — allegedly a "public place" not subject to the Fourth Amendment's protection of the home — when defendant initiated the arrest. He further argues that the jury instructions should have

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reflected that any arrest initiated in the arrestee's threshold may be completed after the arrestee retreats within his home.

"When a party claims a jury instruction improperly or inaccurately stated the law, we review that claim de novo." *United States v. Roth*, 628 F.3d 827, 833 (6th Cir. 2011) (citing *United States v. Blanchard*, 618 F.3d 562, 571 (6th Cir.2010); *H.C. Smith Invs., L.L.C. v. Outboard Marine Co.*, 377 F.3d 645, 650 (6th Cir.2004)). "On the other hand, '[a] district court's refusal to give a jury instruction is reviewed for abuse of discretion.'" *Id.* (quoting *H.C. Smith Invs., L.L.C.*, 377 F.3d at 650). "A refusal to give requested instructions is reversible error only if (1) the instructions are correct statements of the law; (2) the instructions are not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the defendant's theory of the case." *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993) (citing *United States v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991)). We "will not reverse a decision on the basis of an erroneous jury instruction where the error is harmless." *United States v. Adams*, 583 F.3d 457, 469 (6th Cir. 2009) (quoting *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 822 (6th Cir. 2000)).

Defendant proposed an instruction that provided in part:

[T]he doorway of one's home is considered a "public place" where one has no reasonable expectation of privacy and is thus subject to a warrantless arrest. Even if the arrest occurs as a result of an officer reaching farther than the doorway area, the act of retreating into a home does not thwart an otherwise legal arrest pursuant to probable cause. If this is the case, the above restrictions relating to a police officer entering a home to make an arrest do not apply.

(PageID # 266.) The district court rejected this proposed instruction. Citing defendant's body camera footage, the judge stated, "really, I don't think a reasonable jury here can interpret . . . Mr. Baize as being in the doorway versus in the house." (PageID # 930.) The judge also relied

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on the Supreme Court's holding that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980). The judge ultimately instructed the jury, in part, as follows:

Arrests that occur in someone's home are presumed unreasonable unless one of three things are true: (1) the officer gets an arrest warrant authorized by a judge; (2) the person gives the officer consent to enter his or her home; or (3) there is an emergency situation — often referred to as exigent circumstances. Emergency situations may include a serious threat to someone's health or safety, the imminent destruction of evidence, or the hot pursuit of a fleeing suspect. If you find that the defendant arrested Deric Baize in his home without a warrant, consent, and in the absence of an emergency situation, then you may find that the arrest at issue was unreasonable.

(PageID # 286-87.)

Defendant argues that *United States v. Santana*, 427 U.S. 38 (1976), compels a holding that defendant could effectuate a warrantless arrest inside the home so long as it was lawfully initiated while Baize was at his doorway, but that case is distinguishable. In *Santana*, the police approached the defendant's home already having probable cause to believe that the defendant had committed a felony. The defendant was found standing in the threshold of her home: "one step forward would have put her outside, [and] one step backward would have put her in the vestibule of her residence." *Id.* at 40 n.1. The police announced themselves, causing the defendant to retreat into the vestibule. The police followed her inside to complete the arrest.

Santana contained two separate holdings. It first held that the threshold to the defendant's home was "public," insofar as the defendant was "exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." *Id.* at 42. At that point in time, it was proper to initiate a warrantless arrest. In the second holding, the majority

held that the defendant was unable to thwart that arrest by retreating into her home; but this was only true under the circumstances because there was “a realistic expectation that any delay would result in destruction of the evidence.” *Id.* at 43; *see also Kentucky v. King*, 563 U.S. 452, 462 (2011) (“[W]arrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”). Neither of these holdings are applicable to the instant case, and the district court did not abuse its discretion in declining to apply *Santana* and use defendant’s requested jury instruction.

First, it was a proper exercise of discretion to conclude that no reasonable juror could agree with defendant’s factual contention that Baize was standing in his threshold. A defendant is entitled to “some mention” of his theory in the jury instructions only when that theory “finds some support *in the evidence* and in the law” *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976) (emphasis added) (citing *United States v. Swallow*, 511 F.2d 514 (10th Cir. 1975)). Defendant’s body camera shows Baize open his inner door, leaving the screen door shut. Defendant was unable to cross the threshold and touch Baize without opening the screen door himself (which he did), and all the while Baize remained several feet removed from his threshold, inside of his home. Baize was not exposed to the same degree of public view, speech, hearing, and touch as though he was on his porch. And we have presumed that a person who is near, but interior to, his doorway is entitled to the benefit of *Payton*’s “threshold” rule. *Smith v. Stoneburner*, 716 F.3d 926, 930 (6th Cir. 2013) (“Stoneburner admits that, by reaching across the doorway to grab Charles, he entered the house”).

Defendant’s proposed jury instruction is also legally flawed, as it incorrectly suggests that the hot-pursuit exception to the warrant requirement applies any time a suspect retreats into his home, no matter the circumstances. “Before agents of the government may invade the

sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.” *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (citing *Payton*, 445 U.S. at 586). “When the government’s interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut” *Id.* “[I]f the presumption against warrantless entries stemming from minor crimes is to have any meaning, the exigency must be a serious one” *Stoneburner*, 716 F.3d at 931.

Even if defendant’s proposed instruction contained a properly limited definition of the hot-pursuit exception, defendant fails to explain how the exception applied to his decision to enter Baize’s home. In Kentucky, second-degree disorderly conduct is a misdemeanor, Ky. Rev. Stat. § 525.060(2), and there was no physical evidence of disorderly conduct that Baize could have destroyed. *See also Welsh*, 466 U.S. at 751 (“[T]he lower courts have looked to the nature of the underlying offense as an important factor to be considered in the exigent-circumstances calculus For example, courts have permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest.”). In *Stoneburner* — which involved a police officer who “held the door open, told [the retreating suspect] to stop and crossed the threshold of the doorway to grab [the suspect] by the wrist” — we rejected the officer’s hot-pursuit argument, observing:

Nor at any rate was the pursuit “hot” in any meaningful way. No emergency necessitated immediate police action. [The suspect] was not armed, a fact [the officer] knew because [the suspect] had just volunteered to let the officer pat him down He was not violent. There was no ongoing public nuisance. There was no sign that anyone inside the house was injured or needed emergency aid. And [the suspect] had committed no other, more serious, crimes.

716 F.3d at 929, 931-32.

Defendant's preferred jury instruction was overbroad, and the district court did not err by refusing to give an instruction containing a misstatement of the law. Even if the instruction was properly limited, defendant fails to establish that he was in hot pursuit, given that Baize's alleged disorderly conduct was a non-ongoing, non-violent misdemeanor that lacked any destructible physical evidence. Finally, as noted above, defendant admitted at trial that he did not decide to arrest Baize until after he reached across Baize's threshold and Baize resisted — an admission that contradicts his claim that he entered the home with intent to arrest. *See* Trial Tr. vol. II at 160:11-161:5. (PageID # 832-33.)

C. Jury Instruction ("Willfulness")

To be convicted under either count brought pursuant to 18 U.S.C. § 242, defendant must have acted "willfully." (PageID # 282, 284.) Defense counsel tendered the following instruction defining willfulness:

The word 'willfully' as that term is used in the indictment or in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

(PageID # 193.) At the charge conference, defense counsel stated that, "if the court is not inclined to give my instruction on willfulness, I would object to any instruction on willfulness and ask the court to follow the recommendations in the Sixth Circuit and not give a general instruction on willfulness." (PageID # 923.) The district court ultimately instructed the jury as follows:

The third element the government must prove with respect to each count is that the defendant acted willfully. A person acts willfully if he acts voluntarily and intentionally, with the specific intent to do something the law forbids. You may find that the defendant acted willfully if you find that he acted in open defiance or reckless

disregard of Deric Baize's right to be free from unreasonable seizure. In other words, the defendant acted willfully if he seized Deric Baize knowing *or recklessly disregarding the possibility* that the seizure was constitutionally unreasonable.

(emphasis added.) (PageID # 290.) Defendant argues that the emphasized language defines willfulness too broadly. The government disagrees, and it also argues that defendant's objection at the charge conference was not sufficiently specific to preserve this issue. (Gov't Resp. at 46-48.)

"When a party claims a jury instruction improperly or inaccurately stated the law, we review that claim de novo." *Roth*, 628 F.3d at 833 (citing *Blanchard*, 618 F.3d at 571; *H.C. Smith Invs., L.L.C.*, 377 F.3d at 650). This includes a defendant's claim that the court instructed the jury on the incorrect definition of a crime's required mental state. *Id.* "[W]e may reverse the trial court based on a faulty charge 'only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.'" *United States v. Blood*, 435 F.3d 612, 623 (6th Cir. 2006) (quoting *United States v. Pensyl*, 387 F.3d 456, 458 (6th Cir. 2004)).

"If no objection is made, or the objection is not sufficiently specific, we review the claimed defect in the instruction only for plain error." *Id.* (citing Fed. R. Crim. P. 52(b)). "In the context of challenges to jury instructions, '[p]lain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice.'" *United States v. Newsom*, 452 F.3d 593, 605 (6th Cir. 2006) (quoting *United States v. Combs*, 33 F.3d 667, 669 (6th Cir. 1994)). "No single provision of the instructions can be reviewed in isolation; we must consider the charge as a whole." *Pensyl*, 387 F.3d at 458 (citing *United States v. Lee*, 991 F.2d 343, 350 (6th Cir. 1993); *United States v. Prince*, 214 F.3d 740, 760-61 (6th Cir. 2000)).

We agree with the government that defendant's objection was not preserved. A party "must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). On appeal, defendant objects to the instruction's mention of "recklessness," as well as the implication that a mere "possibility" of unconstitutionality suffices to satisfy the willfulness requirement. (Def. Br. at 45.) At the charge conference, however, defense counsel made a blanket, general objection to *any* instruction on willfulness that did not mirror the one he proposed. (PageID # 923.) See *United States v. Semrau*, 693 F.3d 510, 527 (6th Cir. 2012) ("Merely proposing a jury instruction is insufficient to preserve an objection.") (citing *United States v. Carmichael*, 232 F.3d 510, 523 (6th Cir. 2000)). And defendant does not indicate that he made any objection after the charge conference, once he knew the contents of the instruction the jury would hear. (See Def. Reply at 15-16.) Accordingly, plain-error review applies. See Fed. R. Crim. P. 52(b).²

Defendant's objection to the inclusion of the concept of "recklessness" in the instruction does not survive plain-error review. Defendant himself acknowledges that "[w]illfull" is synonymous with "reckless," (Def. Br. at 44) and the Supreme Court has held that one acts willfully when acting "in reckless disregard of a constitutional requirement" *Screws v.*

² At the charge conference, defendant argued that "willfulness" should not be defined at all. (PageID # 923-24.) He claimed that "the Sixth Circuit does not recommend defining willfully." (PageID # 923.) To the extent that this argument comprised a timely, specific objection to Instruction 15, it does not relate to the instant arguments concerning the phrase "recklessly disregarding the possibility." Furthermore, it is a misstatement of the law. The Sixth Circuit does not recommend that the jury receive no instruction on willfulness. Rather, it eschews a generally applicable definition in favor of a case-specific one. See Pattern Crim. Jury Instr. 6th Cir. 2.05 (2017 ed.) (willfully) ("The Committee instead recommends that the district court define the precise mental state required for the particular offense charged as part of the court's instructions defining the elements of the offense.").

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United States, 325 U.S. 91, 105 (1945). The inclusion of a synonym for willfulness in a jury instruction is not likely to produce a grave miscarriage of justice.

Defendant also objects to the portion of Instruction 15 that provided, “the defendant acted willfully if he seized Deric Baize . . . recklessly disregarding *the possibility* that the seizure was constitutionally unreasonable.” Defendant argues that this instruction permitted the jury to convict if there was only a “*possibility*” that Baize’s rights were violated. This argument, however, ignores the fact that, pursuant to a separate instruction, the jury had to specifically find that Baize’s rights were actually violated, which they did. (PageID # 286.)

D. Redaction of Order Dismissing Charges against Baize

The state-law charges defendant brought against Baize were dismissed after the state prosecutor and Baize’s defense counsel agreed to a dismissal order, which provided, “[Baize] stipulates that there was probable cause with respect to the charges herein.” (PageID # 250.) It is undisputed that Baize was not party to the creation of the order, did not know about the stipulation, and learned of the dismissal of the case against him over a month after it occurred. (PageID # 1181.) Baize’s signature is not on the order. (PageID # 250.) *See also* Def. Resp. to Gov’t Mot. in Limine at 1-2 (PageID # 254-55) (“[B]oth the defense attorney and the prosecutor signed the order, . . . signifying their agreement with the contents of the order [T]he parties *with legal training* . . . agreed that probable cause *did* exist.” (first emphasis added)).

At trial, the government introduced a copy of the dismissal order to prove an element of malicious prosecution. Defendant objected, however, because the government proposed redacting Baize’s purported stipulation from the order. (PageID # 90, 254, 792-93.) The government asserted that the stipulation in the order would mislead the jury as to a core element of its case, and that a limiting instruction would be ineffective. (PageID # 1170.) Defendant

asserted, on the other hand, that a redacted dismissal order would suggest prosecutors' belief that probable cause to arrest Baize was lacking. (PageID # 1172-73.) The district court sided with the government, and defendant now challenges the district court's ruling.

A district court's evidentiary decisions are reviewed for abuse of discretion. *United States v. Marrero*, 651 F.3d 453, 471 (6th Cir. 2011) (citing *United States v. Wagner*, 382 F.3d 598, 616 (6th Cir. 2004)). "That is, we will overturn a ruling on the admissibility of evidence only if the district court 'committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors, . . . improperly applied the law, or used an erroneous legal standard.'" *Id.* (quoting *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002)) (brackets omitted). "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Defendant does not allege that the district court misapplied the law or used an erroneous legal standard, so we may only overturn the district court's decision if it committed a clear error of judgment in the conclusion it reached. Additionally, defendant concedes that the jury was not bound by the stipulation and needed to make an independent finding whether probable cause existed. (Def. Br. at 33.)

The district court was entitled to conclude that the probative value of the probable-cause stipulation was substantially outweighed by its prejudicial effect. The mere fact of dismissal (as the redacted order reflects) does not communicate that the officer lacked probable cause to arrest. Rather, dismissal is a function of prosecutorial discretion and could have resulted from any number of things, such as the prosecutor's opinion about the ultimate burden of proof. *See also*

Def. Br. at 33 (“[T]he complete order more accurately reflects both the prosecutor’s and defense counsel’s belief that the case could not be proved beyond a reasonable doubt even though probable cause existed for arrest.”); Trial Tr. at 11:1-7 (“There may have been a concern that, hey, we might not be able to prove this beyond a reasonable doubt, but that’s not the probable cause standard.”) (PageID # 1173). This stands in contrast to an unequivocal statement, in a court document, in which it appeared (inaccurately) that Baize himself stipulated that defendant had probable cause to arrest him. The district court also gave careful consideration to the potential consequences of leaving the probable-cause stipulation unredacted, such as a need to bring in the attorneys in Baize’s prosecution to testify whether the dismissal was ministerial, which could further confuse the jury. (PageID # 1183-84.) Finally, the district court recognized the lack of evidence that Baize agreed to any such stipulation. (PageID # 1174-75.) We cannot say that the district judge committed a clear error of judgment.

Separately, defendant argues that the “rule of completeness” required admitting the unredacted dismissal order. (Def. Br. at 32-33.) Under that rule, “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.” Fed. R. Evid. 106. The rule of completeness, however, “allows a party to *correct* a misleading impression.” *United States v. Adams*, 722 F.3d 788, 826 (6th Cir. 2013) (emphasis added) (quoting *United States v. Holden*, 557 F.3d 698, 705 (6th Cir. 2009)). The purpose of the rule would not be accomplished if one allegedly misleading impression was substituted for another, more misleading one. Furthermore, Rule 106 permits inclusion of other parts of the writing if, “in fairness,” they ought to be considered. The district court’s decision to redact the stipulation pursuant to Rule 403 amounts to a conclusion that “fairness” would not be

served by admitting evidence it considered unduly prejudicial. *See Merrick v. Mercantile-Safe Deposit & Tr. Co.*, 855 F.2d 1095, 1104 n.10 (4th Cir. 1988) (“[T]he ‘fairness’ standard prescribed by Rule 106 strongly suggests the appropriateness of the type of inquiry more specifically required by Rule 403.”).

Defendant also claims that a limiting instruction would have eliminated the prejudice that justified redacting the stipulation. (Def. Br. at 34.) Given that “[w]e grant the district court ‘very broad’ discretion in determining whether the danger of undue prejudice outweighs the probative value of the evidence,” we disagree. *United States v. Poulsen*, 655 F.3d 492, 509 (6th Cir. 2011) (quoting *United States v. Vance*, 871 F.2d 572, 576 (6th Cir. 1989)). A limiting instruction “is not... a sure-fire panacea” for prejudice. *Haywood*, 280 F.3d at 724. Furthermore, the district court considered defendant’s request for a limiting instruction and posed it to the government, and the government set forth un rebutted reasons why that would be ineffective. (PageID # 1177-78.) *Accord* Fed. R. Evid. 403 advisory committee’s note (“In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”). Relatedly, the district court repeatedly suggested the parties come to an agreement about “some sort of stipulation to be read to the jury about the dismissal of the case against [Baize]” that would obviate the need to enter the dismissal order, but defendant did not pursue this option. (PageID # 1175-76, 1184.) *Accord id.* (“The availability of other means of proof may also be an appropriate factor” in a district court’s Rule 403 ruling.).

E. Cross Examination & Defendant’s Fifth Amendment Right

Again, we review evidentiary rulings for an abuse of discretion, reversing “only if the district court committed a clear error of judgment in the conclusion it reached upon a weighing

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of the relevant factors, . . . improperly applied the law, or used an erroneous legal standard.” *Marrero*, 651 F.3d at 471 (brackets omitted). This standard applies to constitutional challenges to evidentiary rulings. *See United States v. Schreane*, 331 F.3d 548, 564 (6th Cir. 2003) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997)). “Additionally, ‘reversal is appropriate only if the abuse of discretion was not harmless error,’ that is, only if the erroneous evidentiary ruling affected the outcome of the trial.” *Marrero*, 651 F.3d at 471 (quoting *United States v. Vasilakos*, 508 F.3d 401, 406 (6th Cir. 2007)) (brackets omitted).

Federal Rule of Evidence 608(b)(1) provides:

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness. . . . By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness’s character for truthfulness.

See also Fed. R. Evid. 608(b) advisory committee’s note (2) (observing that “the possibilities of abuse are substantial”; “the overriding protection of Rule 403” applies as a safeguard; and “the instances inquired into [must] be probative of truthfulness or its opposite and not remote in time”).

The internal affairs division of defendant’s police department investigated the propriety of defendant’s arrest of Baize. (PageID # 423.) In 1991 and 1998, too, defendant was the subject of internal affairs investigations, and in the course of those investigations, he lied to the investigators. (Def. Br. at 34-35; Def. Reply at 15.)

Defendant argues that permitting cross-examination concerning his lies to internal affairs investigators in 1991 and 1998 violated both his Fifth Amendment right against self-

incrimination and Federal Rule of Evidence 608(b). (Def. Br. at 34.) Over defendant's objection, however, the district court permitted the government to elicit defendant's testimony admitting these lies. The district court based its ruling on *Brown v. United States*, 356 U.S. 148 (1958), concluding that defendant's testimony about his own truthfulness had opened the door to such cross-examination. (PageID # 418-19.) In *Brown*, the Supreme Court established the general rule that a "voluntary witness," i.e., one who is not compelled to testify, such as defendant, "could not take the stand to testify in [his] own behalf and also claim the right to be free from cross-examination on matters raised by [his] own testimony on direct examination." *Id.* at 156. "[T]he breadth of his waiver is determined by the scope of relevant cross-examination." *Id.* at 154-55.

As proof that defendant "directly" vouched for his own credibility, the government offers the following testimony from defendant's direct examination:

- Q. Okay. Well, the allegation is that you lied or misled to the detriment of Mr. Baize here. Did you lie on that complaint?
- A. No, sir. What I wrote down was exactly what I observed.
- Q. Okay. Now, what about the — what about the attempting to elude? We've seen the statute. What you wrote about that is that to evade — after stating the obscenity again, to evade ran inside the trailer.
- A. Correct.
- Q. Is there anything false about that?
- A. Well, no. I mean, that's exactly what he did. In order to avoid me, when I gave him the instruction to stop, that's exactly what he did. He turned and ran into the trailer to avoid.

Gov't Resp. at 43 (citing Trial Tr. vol. II at 169:10-22 (PageID # 841)).

On the record before us, as well as the authority offered by defendant, we conclude that the district court did not abuse its discretion in ruling that defendant waived his Fifth Amendment right as to his prior statements to police investigators. Defendant's belief in the veracity of his charges against Baize was a chief issue in the case against him, and he voluntarily took the stand to vouch for that belief. Evidence of defendant's willingness to lie to other police departments to protect himself from allegations of misconduct is relevant to, and probative of, whether he would lie to the Bullitt County Sheriff's Office for the same general purpose. The evidence is not, as defendant argues, "unrelated to [his] direct testimony and the matter being tried." (Def. Br. at 37.)

Defendant claims that his prior statements to investigators were too remote in time. In support, he cites only *Johnson v. Elk Lake School District*, 283 F.3d 138, 145 n.2 (3d Cir. 2002). In *Johnson*, the plaintiff accused her high school guidance counselor of violating 42 U.S.C. § 1983 and state tort law by sexually harassing and abusing her. During cross-examination, plaintiff's counsel sought to question the defendant about having lied about making the dean's list in college on the resume he submitted when he applied for the guidance counselor job. The district court sustained the defendant's objection, stating that the inquiry was too "out in left field" to have any "immediate bearing on the case." *Id.*

The Third Circuit affirmed, applying the abuse-of-discretion standard. It noted that the remoteness of the lie, which occurred "more than nine years before the trial . . . substantially diminished its probative value." *Id.* The Third Circuit approved the district court's additional rationale, acknowledging that the evidence was only "arguably probative" of the defendant's truthfulness with respect to defending the sexual-harassment charge; the defendant's lie,

“although duplicitous and wrong, was not so indicative of moral turpitude as to be particularly probative of his character for untruthfulness.” *Id.*

Johnson is distinguishable. There, the Third Circuit reviewed the district court’s decision to *sustain* the defendant’s objection, whereas we are reviewing the district court’s decision to *overrule* a similar objection. *Compare Johnson*, 283 F.3d at 145 n.2 (affirming decision to prohibit inquiry into nine-year-old evidence of dishonest conduct), *with Deary v. City of Gloucester*, 9 F.3d 191, 196 (1st Cir. 1993) (affirming decision to permit inquiry into ten-year-old evidence of dishonest conduct); *see also Deary*, 9 F.3d at 196 (“[C]lose proximity in time is not required under Fed. R. Evid. 608(b).”). Importantly, the evidence in *Johnson* was “out in left field” vis-à-vis the crime charged; the evidence here, on the other hand, is very similar to conduct bearing on a core element of Count 2 that defendant addressed during his voluntary testimony. Although temporal remoteness reduces the probative value of the evidence, it does not eliminate it, and that probative value is bolstered by the similarities the older evidence has with the instant crime.

Independent of his Fifth Amendment and Rule 608(b) claims, defendant alleges that he was prejudiced by the prosecutor’s method of eliciting the testimony about the prior investigations. On cross-examination, defendant stated that he could not remember the number of prior lies he told, agreeing that “[i]t was a couple of times” in response to the government’s suggestion that he had lied “multiple times.” (PageID # 423-424.) On re-direct, defendant said he lied exactly twice. (PageID # 883.) In its closing argument, however, the government stated in part that defendant “couldn’t even remember how many times he lied to investigators.” (PageID # 1018-19.)

Because defendant testified that he did, in fact, remember how many times he lied, the government's closing argument was inaccurate. But this impropriety was harmless, because the jury heard the defendant on both re-direct and re-cross clarify that he only lied twice.

F. Sentence Enhancement for Physically Restraining Victim

"The district court's sentencing determinations are reviewed for reasonableness, using a deferential abuse-of-discretion standard." *United States v. Gray*, 692 F.3d 514, 521 (6th Cir. 2012) (citing *United States v. Martinez*, 588 F.3d 301, 324 (6th Cir. 2009)). "Procedural reasonableness requires ensuring that 'the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . .'" *Id.* (quoting *Martinez*, 588 F.3d at 324). "When reviewing the district court's application of the Sentencing Guidelines, we review the district court's factual findings for clear error and mixed questions of law and fact *de novo*." *United States v. Tolbert*, 668 F.3d 798, 800 (6th Cir. 2012) (quoting *United States v. May*, 568 F.3d 597, 604 (6th Cir. 2009)). "The district court's interpretation of the Sentencing Guidelines is reviewed *de novo*." *Id.* (citing *United States v. Anglin*, 601 F.3d 523, 526 (6th Cir. 2010)).

Over defense counsel's objection, the district court applied a two-level enhancement to defendant's Guidelines range under USSG § 3A1.3. That enhancement applies "[i]f a victim was physically restrained in the course of the offense . . ." USSG § 3A1.3 (2016). "Section 3A1.3 does not apply . . . when physical restraint is already an element of the offense — that is, when it would double-count the physical restraint." *United States v. McCoy*, 480 F. App'x 366, 372 (6th Cir. 2012) (citing USSG § 3A1.3 cmt. n.2). "[I]mpermissible 'double counting' occurs when precisely the same aspect of a defendant's conduct factors into his sentence in two separate ways." *United States v. Farrow*, 198 F.3d 179, 193 (6th Cir. 1999) (citing *United States v.*

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Perkins, 89 F.3d 303, 310 (6th Cir. 1996)). In other words, double counting occurs “[i]f a single aspect of the defendant’s conduct both determines his offense level and triggers an enhancement” *Id.*

Defendant maintains that the enhancement was inapplicable because physical restraint was an element of the offense. (Def. Br. at 49.) He concedes that we have affirmed application of the enhancement to a defendant convicted under 18 U.S.C. § 242, *see Gray*, 692 F.3d at 521-22, but he argues that the element of physical restraint was “injected” into the instant case when the jury had to find that he violated Baize’s right to be free from unreasonable seizures in order to convict.

The district court did not misapply the Guidelines. Section 2H1.1(a)(3)(A) sets a base offense level of 10 “if the offense involved the use or threat of force against a person,” which occurred here when defendant arrested Baize. The district court indicated that it was applying the § 3A1.3 enhancement due to that arrest *and* the fact that defendant, through his police report, caused Baize to be incarcerated for two weeks. (PageID # 1394.) Because the base offense level and the enhancement each were adequately supported by separate instances of defendant’s conduct, no double counting occurred.

AFFIRMED.

United States District Court
Western District of Kentucky
LOUISVILLE DIVISION

UNITED STATES OF AMERICA
V.

Matthew B. Corder

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 3:15-CR-141-1-DJH

US Marshal No: 17450-033

Counsel for Defendant: **Donald J. Meier, Appointed**

Counsel for the United States: **Christopher J. Perras and Amanda E. Gregory**

Court Reporter: **Dena Legg**

THE DEFENDANT:

- ☐ Pursuant to plea agreement
- ☐ Pleaded guilty to count(s)
- ☐ Pleaded nolo contendere to count(s)
which was accepted by the court.
- ☒ Was found guilty on count(s) 1 and 2 of the Indictment after a plea of not guilty.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title / Section and Nature of Offense

**Date Offense
Concluded**

Count

FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) (Is) (are) dismissed on the motion of the United States.

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 shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

10/17/2016
Date of Imposition of Judgment


David J. Hale, Judge
United States District Court

October 19, 2016

DEFENDANT: **Corder, Matthew B.**
CASE NUMBER: **3:15-CR-141-1-DJH**

COUNTS OF CONVICTION

<u>Title / Section and Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
18:242 - Deprivation of Rights Under Color of Law Involving the Use of a Dangerous Weapon and Resulting in Bodily Injury	10/22/2014	1
18:242 - Deprivation of Rights Under Color of Law	10/23/2014	2

DEFENDANT: **Corder, Matthew B.**
CASE NUMBER: **3:15-CR-141-1-DJH**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of 27 months as to Count 1 and 12 months as to Count 2 of the Indictment, which shall be served concurrently, for a total term of 27 months imprisonment.

- ☒ The Court makes the following recommendations to the Bureau of Prisons: the defendant should be housed as close to home as possible.
- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ A.M. / P.M. on _____
- ☐ as notified by the United States Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☒ Before 2:00 p.m.
- ☐ as notified by the United States Marshal.
- ☒ as notified by the Probation or Pretrial Services Office.
- ☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

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 U.S. Marshal

DEFENDANT: Corder, Matthew B.

CASE NUMBER: 3:15-CR-141-1-DJH

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 1 year as to each of Counts 1 and 2, which shall run concurrently, for a total term of 1 year.

The defendant shall report to the probation office in the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) As directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he Or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of Each month;
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) The defendant shall support his or her dependents and meet other family responsibilities;
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other Acceptable reasons;
- 6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any Controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a Felony unless granted permission to do so by the probation officer;
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any Contraband observed in plain view of the probation officer;
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the Permission of the court;
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal Record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the Defendant's compliance with such notification requirement.

DEFENDANT: **Corder, Matthew B.**CASE NUMBER: **3:15-CR-141-1-DJH****CRIMINAL MONETARY PENALTIES**

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
Totals:	\$ 125.00		TBD

- ☒ The fine and the costs of incarceration and supervision are waived due to the defendant's inability to pay.
- ☒ The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ Restitution is not an issue in this case.
- ☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

<u>Name of Payee</u>	<u>** Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order Or Percentage Of Payment</u>
----------------------	------------------------------------	--	--

- ☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . \$
- ☐ The defendant shall pay interest on any fine of more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be Subject to penalties for default and delinquency 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 ordered that:
- ☐ The interest requirement is waived for the ☐ Fine and/or ☐ Restitution
- ☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **Corder, Matthew B.**
CASE NUMBER: **3:15-CR-141-1-DJH**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A ☐ Lump sum payment of \$ _____ Due immediately, balance due
☐ not later than _____, or
☐ in accordance with C, D, or E below); or
- B ☐ Payment to begin immediately (may be combined with C, D, or E below); or
- C ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of \$ _____
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after _____ The date of this judgment, or
- D ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of \$ _____
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after _____ Release from imprisonment to a term of supervision; or
- E ☒ Special instructions regarding the payment of criminal monetary penalties:

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least \$25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least \$60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

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

- ☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s): _____
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States: _____

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

FILED
WANECA L. ARMSTRONG, CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DEC 16 2015

U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES OF AMERICA

INDICTMENT

v.

NO. 3:15CR-141 DJH
18 U.S.C. § 242

MATTHEW B. CORDER

The Grand Jury charges:

COUNT 1

(Deprivation of Rights under Color of Law)

On or about October 22, 2014, in the Western District of Kentucky, Bullitt County, Kentucky, defendant **MATTHEW B. CORDER**, while acting under color of law, willfully deprived D.B. of the right, secured and protected by the Constitution and laws of the United States, to be free from unreasonable seizures. Specifically, defendant **MATTHEW B. CORDER** seized D.B. without probable cause to believe that D.B. committed a crime, and unlawfully entered D.B.'s home to effect the seizure. This offense involved the use of a dangerous weapon and resulted in bodily injury to D.B.

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

The Grand Jury further charges:

COUNT 2

(Deprivation of Rights under Color of Law)

On or about October 23, 2014, in the Western District of Kentucky, Bullitt County, Kentucky, defendant **MATTHEW B. CORDER**, while acting under color of law, willfully deprived D.B. of the right, secured and protected by the Constitution and laws of the United

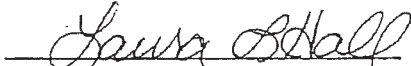
States, to be free from unreasonable seizures, which includes the right to be free from malicious prosecution. Specifically, defendant **MATTHEW B. CORDER** charged D.B. with the offenses of "disorderly conduct" and "fleeing and evading" without probable cause to believe that D.B. had committed those crimes, and knowingly included false and misleading information in the charging document. As a consequence, D.B. was detained in jail pending resolution of the charges, which were eventually dismissed.

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

A TRUE BILL.

Redacted

FOREPERSON


JOHN E. KUHN, JR.
UNITED STATES ATTORNEY

VANITA GUPTA
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

JEK:AEG:120815

UNITED STATES OF AMERICA v. MATTHEW B. CORDER

PENALTIES

Count 1: NM 10 yrs./\$250,000/both/NM 3 yrs. Supervised Release
Count 2: NM 1 yr./\$100,000/both/NM 1 yr. Supervised Release

NOTICE

ANY PERSON CONVICTED OF AN OFFENSE AGAINST THE UNITED STATES SHALL BE SUBJECT TO SPECIAL ASSESSMENTS, FINES, RESTITUTION & COSTS.

SPECIAL ASSESSMENTS

18 U.S.C. § 3013 requires that a special assessment shall be imposed for each count of a conviction of offenses committed after November 11, 1984, as follows:

Misdemeanor:	\$ 25 per count/individual	Felony:	\$100 per count/individual
	\$125 per count/other		\$400 per count/other

FINES

In addition to any of the above assessments, you may also be sentenced to pay a fine. Such fine is due immediately unless the court issues an order requiring payment by a date certain or sets out an installment schedule. You shall provide the United States Attorney's Office with a current mailing address for the entire period that any part of the fine remains unpaid, or you may be held in contempt of court. 18 U.S.C. § 3571, 3572, 3611, 3612

Failure to pay fine as ordered may subject you to the following:

1. INTEREST and PENALTIES as applicable by law according to last date of offense.

For offenses occurring after December 12, 1987:

No INTEREST will accrue on fines under \$2,500.00.

INTEREST will accrue according to the Federal Civil Post-Judgment Interest Rate in effect at the time of sentencing. This rate changes monthly. Interest accrues from the first business day following the two week period after the date a fine is imposed.

PENALTIES of:

10% of fine balance if payment more than 30 days late.

15% of fine balance if payment more than 90 days late.

2. Recordation of a LIEN shall have the same force and effect as a tax lien.
3. Continuous GARNISHMENT may apply until your fine is paid.

18 U.S.C. §§ 3612, 3613

If you **WILLFULLY** refuse to pay your fine, you shall be subject to an **ADDITIONAL FINE** of not more than the greater of \$10,000 or twice the unpaid balance of the fine; or **IMPRISONMENT** for not more than 1 year or both. 18 U.S.C. § 3615

RESTITUTION

If you are convicted of an offense under Title 18, U.S.C., or under certain air piracy offenses, you may also be ordered to make restitution to any victim of the offense, in addition to, or in lieu of any other penalty authorized by law. 18 U.S.C. § 3663

APPEAL

If you appeal your conviction and the sentence to pay your fine is stayed pending appeal, the court shall require:

1. That you deposit the entire fine amount (or the amount due under an installment schedule during the time of your appeal) in an escrow account with the U.S. District Court Clerk, or
2. Give bond for payment thereof.

18 U.S.C. § 3572(g)

PAYMENTS

If you are ordered to make payments to the U.S. District Court Clerk's Office, certified checks or money orders should be made payable to the Clerk, U.S. District Court and delivered to the appropriate division office listed below:

LOUISVILLE: Clerk, U.S. District Court
106 Gene Snyder U.S. Courthouse
601 West Broadway
Louisville, KY 40202
502/625-3500

BOWLING GREEN: Clerk, U.S. District Court
120 Federal Building
241 East Main Street
Bowling Green, KY 42101
270/393-2500

OWENSBORO: Clerk, U.S. District Court
126 Federal Building
423 Frederica
Owensboro, KY 42301
270/689-4400

PADUCAH: Clerk, U.S. District Court
127 Federal Building
501 Broadway
Paducah, KY 42001
270/415-6400

If the court finds that you have the present ability to pay, an order may direct imprisonment until payment is made.

INSTRUCTION NO. 9—Elements of Count 1

Counts 1 and 2 of the Indictment charge the defendant with separate violations of Title 18, United States Code, Section 242. For you to find the defendant guilty of the crime charged in Count 1 of the Indictment, you must find that the government has proven each of the following elements beyond a reasonable doubt:

First, that the defendant acted under color of law;

Second, that the defendant deprived someone in the United States of a right secured or protected by the Constitution or laws of the United States, in this case, the right of Deric Baize to be free from an unreasonable seizures, which includes the right not to be arrested without probable cause, and the right to be free from warrantless arrest in one's home absent consent or exigent circumstances;

Third, that the defendant acted willfully; and

Fourth, that the offense resulted in bodily injury or involved the use, attempted use, or threatened use of a dangerous weapon.

If you are convinced beyond a reasonable doubt that the government has proven all four elements with respect to Count 1, then you may say so by returning a guilty verdict on that charge. Otherwise, you must find the defendant not guilty of that charge.

INSTRUCTION NO. 10—Elements of Count 2

Counts 1 and 2 of the Indictment charge the defendant with separate violations of Title 18, United States Code, Section 242. For you to find the defendant guilty of the crime charged in Count 2 of the Indictment, you must find that the government has proven each of the following elements beyond a reasonable doubt:

First, that the defendant acted under color of law;

Second, that the defendant deprived someone in the United States of a right secured or protected by the Constitution or laws of the United States, in this case, the right of Deric Baize to be free from unreasonable seizures, which include the right to be free from malicious prosecution; and

Third, that the defendant acted willfully.

If you are convinced beyond a reasonable doubt that the government has proven all three elements with respect to Count 2, then you may say so by returning a guilty verdict on that charge. Otherwise, you must find the defendant not guilty of that charge.

INSTRUCTION NO. 12—Element 2: Deprivation of A Constitutional Right

The second element requires the government to prove that the defendant deprived Deric Baize of a right secured or protected by the Constitution or laws of the United States. In this case, the government alleges that the defendant deprived the right of Deric Baize to be free from unreasonable seizures, which includes the right not to be arrested without probable cause, the right to be free from warrantless arrest in one's home absent consent or exigent circumstances, and the right to be free from malicious prosecution.

Probable cause to arrest someone is present if an objectively reasonable police officer under the circumstances would conclude that there was a fair probability that a person had committed or was committing a crime.

If you find that the defendant arrested Deric Baize without probable cause to believe Deric Baize had committed a crime, then you may find that the arrest at issue was unreasonable.

Arrests that occur **in someone's home** are presumed unreasonable unless one of three things are true: (1) the officer gets an arrest warrant authorized by a judge; (2) the person gives the officer consent to enter his or her home; or (3) there is an emergency situation—often referred to as exigent circumstances. Emergency situations may include a serious threat to someone's health or safety, the imminent destruction of evidence, or the hot pursuit of a fleeing suspect.

If you find that the defendant arrested Deric Baize in his home without a warrant, consent, and in the absence of an emergency situation, then you may find that the arrest at issue was unreasonable.

Malicious prosecution occurs when someone acting under color of law, such as a police officer, charges a person with a crime without probable cause to believe that the person actually

committed the charged crime, the officer's actions cause the person to suffer a deprivation of liberty apart from the initial arrest, and the charge against the person is ultimately dismissed.

If you find that the defendant charged Deric Baize with the Kentucky offenses of "second-degree disorderly conduct" and "second-degree fleeing and evading," without probable cause to believe that Deric Baize had actually committed one or both of those crimes, that the officer's actions in falsely charging those crimes deprived Deric Baize's liberty beyond the initial arrest, and that the charge against Deric Baize was ultimately dismissed, then you may find that Deric Baize was maliciously prosecuted.

INSTRUCTION NO. 13—The Kentucky Offense of “Second-Degree Disorderly Conduct”

The Kentucky offense of “second-degree disorderly conduct” is defined as follows:

“525.060 Disorderly conduct in the second degree

(1) A person is guilty of disorderly conduct in the second degree when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:

- (a) Engages in fighting or in violent, tumultuous, or threatening behavior;
- (b) Makes unreasonable noise;
- (c) Refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency, or
- (d) Creates a hazardous or physically offensive condition by an act that serves no legitimate purpose.”

The relevant Kentucky statutes define “public” as “affecting or likely to affect a substantial group of persons.” The relevant Kentucky statutes define “public place” to mean “a place to which the public or a substantial group of persons has access and includes but is not limited to highways, transportation facilities, schools, places of amusements, parks, places of business, playgrounds, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place.”

When considering whether a noise is unreasonable under subpart (b), you may consider the time, place, and manner of the noise.

INSTRUCTION NO. 14—The Kentucky Offense of “Second-Degree Fleeing and Evading”

The Kentucky offense of “second-degree fleeing and evading” is defined as follows:

“520.100 Fleeing or evading police in the second degree.

(1) A person is guilty of fleeing or evading police in the second degree when:

- (a) As a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person; or
- (b) While operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a recognized direction to stop his vehicle, given by a person recognized to be a peace officer.

(2) No offense is committed under this section when the conduct involved constitutes a failure to comply with a directive of a traffic control officer.”

INSTRUCTION NO. 15—Element 3: “Willfulness”

The third element the government must prove with respect to each count is that the defendant acted willfully. A person acts willfully if he acts voluntarily and intentionally, with the specific intent to do something the law forbids. You may find that the defendant acted willfully if you find that he acted in open defiance or reckless disregard of Deric Baize’s right to be free from unreasonable seizure. In other words, the defendant acted willfully if he seized Deric Baize knowing or recklessly disregarding the possibility that the seizure was constitutionally unreasonable.

Intent is a state of mind, which can often be proven only by circumstantial evidence. Ordinarily, a defendant’s state of mind cannot be proven directly because no one can read another person’s mind and tell what that person is thinking. But a defendant’s state of mind can still be proven indirectly from the surrounding circumstances.

In determining whether the defendant acted willfully, you may consider any facts or circumstances you deem relevant to shed light on what was in the defendant’s mind. For example, you may consider the manner in which any constitutional violation was carried out and the duration of any constitutional violation. You may also consider what the defendant said; what the defendant did or failed to do; how the defendant acted; and whether the defendant knew, through training or experience, that his actions violated law or department policy.

In considering the defendant’s state of mind, you may infer that the defendant intended the natural and probable results of any acts he knowingly took or knowingly failed to take. In other words, you may infer that the defendant intended the consequences that a reasonable law enforcement officer, standing in similar circumstances and possessing similar knowledge, would

have expected to result from his actions. However, it is entirely up to you to decide what facts to find and what inferences to make from the evidence.

It is not a defense that the defendant may also have been motivated by anger or some other emotion, provided that the intent that I have described to you was present. You may, however, consider such motivations—as well as any malice displayed by the defendant—in determining whether the defendant acted willfully, as I have described that term to you.

WILLFULLY

The word “willfully”, as that term is used in the indictment or in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases), 2003 Edition, pp. 300-301

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
(Filed Electronically)

CRIMINAL ACTION NO. 3:15CR-141-DJH
UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

MATTHEW CORDER,

DEFENDANT.

DEFENDANT'S SUPPLEMENTAL JURY INSTRUCTIONS

Comes the defendant, by counsel, and moves the Court to instruct the jury as set forth in the attached proposed instructions.

/s/ Donald J. Meier
Assistant Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

Counsel for Defendant.

CERTIFICATE

I hereby certify that on July 20, 2016, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Hon Amanda Gregory, Assistant United States Attorney, and Hon. Christopher Perras, Trial Attorney, U.S. Department of Justice.

/s/Donald J. Meier

DEFENDANT'S INSTRUCTION

As I instructed you earlier, the Indictment alleges, among other things, that Defendant Matthew Corder arrested Derrick Baize for, and charged him with, two Kentucky crimes without having probable cause to believe that Derrick Baize had committed those crimes.

During this trial, you heard evidence about Defendant Corder's training on Kentucky crimes and the rules regarding the authority of police officers to make arrests. Two of the government's witnesses, instructors at the police academy, testified about what they taught Defendant Corder about these Kentucky crimes, as well as the rules regarding arrests. You may consider the testimony of these trainers in determining whether or not Defendant Corder acted with the required criminal intent—which is discussed in other instructions—when he arrested Derrick Baize.

However, it is I, and not these witnesses, who is tasked with instructing you regarding the law that you are to follow in this case. For that reason, I am going to instruct you now on the elements of the Kentucky crimes for which Defendant Corder arrested Derrick Baize, as well as on the rules regarding when a police officer may or may not make an arrest. These legal instructions are the ones that you must follow when you deliberate at the end of this case. If Ms. Herron or Mr. McBride or any other witness, described the law differently that I describe it to you now, you are to assume that these instructions from me are correct.

The two Kentucky crimes at issue are “second-degree disorderly conduct” and “second-degree fleeing and evading.”

The Kentucky offense of “second-degree disorderly conduct” is as follows:

525.060 Disorderly conduct in the second degree

- (1) A person is guilty of disorderly conduct in the second degree when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:
 - (a) Engages in fighting or in violent, tumultuous, or threatening behavior;

- (b) Makes unreasonable noise;
- (c) Refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency, or
- (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) Disorderly conduct in the second degree is a Class B misdemeanor.

In deciding whether the noise was “unreasonable” you must consider the time, place, nature and purpose of the noise.

Factors such as the late hour, the setting of a residential trailer park, the coarse and offensive nature of the language used, and whether there was a reasonable purpose for the noise should be considered.

A person is not guilty of disorderly conduct if his conduct annoys or alarms only the police. However, if there is only a risk that one’s conduct could annoy other individuals, even unintentionally, that element is satisfied.

The Kentucky offense of “second-degree fleeing and evading” is as follows:

520.100 Fleeing and evading police in the second degree

- (1) A person is guilty of fleeing or evading police in the second-degree when:
 - (a) As a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person, or
 - (b) While operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a recognized direction to stop his vehicle, given by a person recognized to be a peace officer.
- (2) No offense is committed under this section when the conduct involved constitutes a failure to comply with a directive of a traffic control officer.
- (3) Fleeing or evading police in the second degree is a Class A misdemeanor.

A police officer may not arrest a person for those offenses, or any other offenses, unless there is probable cause to believe that the person committed a crime. Probable cause is present if an objectively reasonable police officer under the circumstances would conclude that there was a fair

probability that a person had committed or was committing a crime. If a police officer seeks to arrest a person in his or her own home, there are additional requirements that must be met. A police officer may not enter a person's home to arrest a person unless one of three things are true: (1) the officer gets an arrest warrant authorized by a judge, (2) the person gives the officer consent to enter his or her home, or (3) there is an emergency situation. An emergency situation may include a serious threat to someone's health or safety, the imminent destruction of evidence, or the hot pursuit of a fleeing suspect.

However, the doorway of one's home is considered a "public place" where one has no reasonable expectation of privacy and is thus subject to a warrantless arrest. Even if, the arrest occurs as a result of an officer reaching farther than the doorway area, the act of retreating into a home does not thwart an otherwise legal arrest pursuant to probable cause. If this is the case, the above restrictions relating to a police officer entering a home to make an arrest do not apply.

Keep those rules in mind as you hear the evidence in this case. At the end of this case, after you have heard all of the evidence, I will elaborate on those rules, and give you further instructions on how to apply those rules to the evidence to reach your verdict.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment states in relevant part:

“The right of the people to be secure in their ... houses ... shall not be violated, and no Warrants shall issue, but upon probable cause ...”

The Fifth Amendment states in relevant part:

“No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...”

STATUTORY PROVISIONS

18 U.S.C. §242 - Deprivation of rights under color of law states:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.