No. 24-940

To be argued by:
Lance A. Clarke

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

– vs –

DARREN SMITH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Incorporating his main brief ("Br."), Darren Smith replies to the government's brief ("GB.").

ARGUMENT

A. The government's claim that the official-victim enhancement applies lacks merit.

The government agrees that the official-victim enhancement requires proof that Mr. Smith *knew* that Menton was a government officer and was *motivated by* that status. GB.22-23. For knowledge, the government relies solely on circumstantial evidence, mainly the broader pursuit by uniformed officers. *See* GB.23.

But under §3A1.2(a), the government had to prove that Mr. Smith explicitly knew that Menton was a government officer. *See United States v. Solarzano*, 832 Fed.Appx. 276, 282 (5th Cir. 2020) (§3A1.2(a) "explicitly requires knowledge").

The government's suggestion that Mr. Smith surely knew Menton's status because other uniformed, self-announcing officers pursued him is insufficient. Section 3A1.2(a) clearly requires direct knowledge of the Menton's status. If what Mr. Smith surely knew or *should have known* sufficed, §3A1.2(a) would mirror different-subsection §3A1.2**(c),** which only requires a lesser showing of "*knowing or having reasonable cause to believe* that a person was" an officer.[1] §3A1.2(c)(1)-(2) (emphasis added). Notably, even knowledge of the "possibility" the person "might" be an officer fails that lesser §3A1.2(c) showing. *United States v. Castillo,* 924 F.2d 1227, 1235 (2d Cir. 1991).

As to Menton—the only relevant victim here—evidence that Mr. Smith knew his status was scant. The government concedes that Menton was in plainclothes but argues Mr. Smith must have known because of a "visible law enforcement badge hanging from his neck." GB.23-24. But Menton never testified to wearing a visible badge, and if the video suggests he did, that was not proof Mr. Smith saw it during the pursuit. More, while Menton drew his gun and ordered Mr. Smith to stop, he never verbally identified himself as law enforcement.

The government cites *United States v. Young*, 910 F.3d 655, 673 (2d Cir. 2018), arguing that plainclothes officers with visible badges, yelling "please stop,"

[1] The government sought no enhancement under §3A1.2(c).

proved Mr. Smith "undoubtedly knew" Menton was an officer. GB.24. But *Young* reached those facts under the *lesser,* reasonable-cause-to-believe showing under §3A1.2(c). Thus, what Mr. Smith "undoubtedly knew," GB.24, did not constitute knowledge under §3A1.2(a).

None of the evidence resolves the problem the government recognizes: there was "no reason to think that a random civilian would join the pursuit." GB.23-24. That argument is speculative and fails to meet §3A1.2(a), which demands specific evidence of the defendant's knowledge and motivation, not mere conjecture about the actions of bystanders in a chaotic, downtown setting with numerous civilians present.

Finally, the government does not dispute that Mr. Smith was facedown with multiple people behind and on top of him, making it utterly implausible that he specifically knew the person behind him, to his right, was Menton, let alone an officer. Without specific evidence, such as Mr. Smith's statements, the trial evidence, on this record, failed to prove knowledge and alone proves the error.

Next, even if the evidence established knowledge, it did not prove, as the government claims, that Mr. Smith was "motivated by" Menton's status. Under the Guidelines, "motivated by" means the officer was specifically "*targeted because of*" the officer's status. *See* Federal Sentencing Guidelines Manual, Amendment §455 (emphasis added); *see also United States v. Feedback*, 53 F.4th 1132, 1135 (8th Cir.

2022) ("motivated by" requires an "'incentive' or 'reason' to *target* [the] government employee[].")

According to the government, this Court and others have held that knowledge "coupled with [the victim's] status being a *but-for cause* of the assault" suffices, citing *United States v. Salim*, 549 F.3d 67, 76 (2d Cir. 2008). GB.24 (emphasis added). But *Salim* coined no "but-for cause" test. There, this Court found the defendant was motivated by the victim's status because he knew the victim's status and assaulted him to obtain a key the victim had "only as a result of this status." *Id.* at 76. But "*only* as a result of this status," *id.* (emphasis added)—like "sole motivation"—requires more than "but for cause." *See, e.g., Natofsk v. City of New York*, 921 F.3d 337, 341, 348 (2d Cir. 2019) (describing that a factor being the "but for cause" of conduct requires less stringent proof than it being the "sole" or "only" motivating factor); *see also Carter v. TD Bank, NA*, No. 23-950, 2024 WL 2828470, at *4 (2d Cir. Jun. 4, 2024) ("The plaintiff need not prove that discrimination was the employer's sole motivation, but discrimination must be a 'but for cause' of the adverse employment action.").

Nor do the government's other cited cases cite a but-for-cause test. *See* GB.25. Instead, those cases also require that the defendant targeted the officer solely because of his status. *See United States v. Talley*, 164 F.3d 989, 1004 (6th Cir. 1999) (defendant convicted of solicitation to kill and FBI agent under §1114 was

"motivated . . . specifically by the desire to eliminate an FBI agent who could testify against him a trial");[2] *United States v. Williams*, 520 F.3d 414 (5th Cir. 2008) (relying on *Talley* and finding motivation where "*sole reason*" for assaulting corrections officer was officer's status) (emphasis added).[3]

Here, unlike in *Salim, Talley* and *Williams*, the evidence did not establish that Mr. Smith pointed his gun at, shot at or even pursued—in other words, specifically targeted—Menton, and certainly not "solely because of" Menton's status. Menton's mere presence did not equate to Mr. Smith intentionally targeting him, especially where Mr. Smith was evading multiple pursuers, not focusing on the status of any particular individual.

The government argues that the enhancement applies where a defendant assaults an officer to evade an arrest, citing *United States v. Rivera-Alonzo*, 584 F.3d 829 (9th Cir. 2009) and *United States v. Valencia-Cortez*, 816 Fed.Appx. 204, 205 (9th Cir. 2020). GB.25-26. But what the government neglects to acknowledge is that in both cases, like in *Salim, Talley,* and *Williams*, the defendants specifically targeted the officers only because of their status.

[3.] As even the government admits, the enhancement was appropriate in *Talley* where the defendant's "sole motivation" to kill the officer was because of his FBI status. *See* GB.25.

[3] The government also cites *United States v. Bailey*, 961 F.2d 180, 182 (11th Cir. 1992). But *Bailey* was rendered obsolete when the Sentencing Commission amended Application Note 4 of §3A1.2, effective November 1, 1992, clarifying §3A1.2(a) does not apply to a robbery of a postal employee, as the robbery offense guideline already accounted for that conduct.

In *Rivera-Alonzo*, 584 F.3d 829, the defendant knew of the Border Patrol Agent's status and specifically targeted him, "div[ing] at the agent's legs," and later physically fighting with the agent. *Id.* at 831. The defendant also admitted he targeted the officer to evade arrest for illegal reentry. *Id.* at 831-32.

Similarly, in *Valencia-Cortez,* 816 Fed.Appx. 204, the defendant, while trafficking people across the U.S.-Mexico border, threw a rock at a Border Patrol Agent's jaw. The defendant indisputably knew the victim's status and admitted he did that so as "not to be arrested for alien smuggling." *See* Answering Brief for the United States, *United States v. Valencia-Cortez*, No. 19-50246, 2020 WL 2772246, at *20 (May 22, 2020).

Thus, *Rivera-Alonzo* and *Valencia-Cortez* are distinguishable. In both, the defendants admitted knowing the officers' status and targeting them because of it to avoid prosecution for unlawful reentry. In contrast, there was, again, insufficient evidence that Mr. Smith specifically knew of Menton's status or targeted him, let alone because of it.

Finally, the government cites *United States v. Hernandez-Sandoval*, 211 F.3d 1115 (9th Cir. 2000) and *United States v. Garcia*, 34 F.3d 6 (1st Cir 1994). Neither deals with motivation under §3A1.2(a). Both only address whether the defendants "create[ed] a substantial risk of injury" to government officers under §3A1.2*(c)*—inapplicable under §3A1.2*(a)*, the relevant subsection here.

The government also argues that Mr. Smith cannot show plain error. *See* GB.27. But this Court "relax[es] the otherwise rigorous standards of plain review to correct sentencing errors," which "results in, at most, only a remand for resentencing." *United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002). The government posits the issue is "unsettled" and Mr. Smith identifies no governing caselaw. GB.27. But plain error exists where "plain statutory language" makes resolution of the issue "indisputably clear." *United States v. Maturin*, 488 F.3d 657, 663 (5th Cir. 2007). Here, "the guidelines make explicitly clear" that §3A1.2(a) requires knowledge and motivation. *Solarzano*, 832 Fed.Appx. at 282; *see also* Federal Sentencing Guidelines Manual, Amendment §455. Thus, §3A1.2(a), on its face, clearly resolves that both elements are utterly missing here.

Finally, the government does not dispute that correcting the error exposed Mr. Smith to a lower guidelines range (from total offenses level 28 to 22), establishing a "reasonable probability of a different outcome." *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). The error also adversely affects the integrity of these proceedings, warranting review. *See United States v Wernick*, 691 F.3d 108, 117-18 (2d Cir. 2012) (given "the resulting possibility that the error resulted in the defendant's being imprisoned for a longer time, and the relatively low cost of correcting the miscalculation, we believe that failure to notice the error would adversely affect the public perception of the fairness of judicial proceedings.").

The sentence should be vacated and the case remanded for resentencing.

B. The district court erred in denying the acceptance-of-responsibility adjustment; the government's contrary claims misconstrue the Guidelines.

Initially, the government misconstrues the acceptance-of-responsibility adjustment. *See* §3E1.1. Clarification is required.

Again, §3E1.1(a) authorizes a two-level adjustment where a defendant "clearly demonstrates acceptance of responsibility for his offense."

This adjustment only requires a defendant to demonstrate responsibility for the counts on which he was found guilty—his "offense(s) of conviction"—and no more. That is clear from the Commentary, *see id.,* Application Note 1(A) (relevant considerations include "truthfully admitting the conduct comprising the *offense(s) of conviction*) (emphasis added), and authorities of this Court and others. *See United States v. Santiago*, 906 F.2d 867 (2d Cir. 1990) ("the Guidelines do not require a defendant to accept responsibility for crimes other than those to which he has . . . been found guilty"); *United States v. Dixon*, 984 F.3d 814, 824 (9th Cir. 2020) (reversing where, at trial, defendant "accepted responsibility for all conduct for which he was convicted," but only protested count on which jury hung); *United States v. Piper*, 918 F.2d 839, 841 (9th Cir. 1990) (if proceeding to trial, "[t]o merit a reduction, a defendant must show contrition but he need not accept blame for all crimes of which he may be accused.").

Tellingly, the government does not dispute that a defendant need only demonstrate acceptance of responsibility as to his *crimes of conviction. See* GB.27-34. Nevertheless, the government maintains that Mr. Smith was properly denied the modification. It relies on Application Note 2, which provides that the adjustment "is not intended to apply to a defendant who puts the government to its burden of proof by denying essential factual elements of guilt, is convicted, and only then expresses remorse." GB.28. But on its face, that language only applies to a defendant who proceeded to trial "*by denying*" his ultimate offenses of conviction. *See* §3E1.1, Application Note 2 (emphasis added).

Likewise, Note 2's reference, thereafter, to "rare instances" applies only to defendants denying, rather than conceding, their offenses of conviction at trial. *See id.*[4]

Finally, the remainder of Note 2, calling for consideration of a defendant's "pre-trial statements and conduct," likewise only refers to defendants who contested their crimes of conviction at trial. In context, "[i]n each such instance" refers

[4] It makes no sense to construe Note 2 otherwise, as the government and the court below did. Indeed, the examples of the "rare instances" that Note 2 references—"(*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)"—only make sense when applied to defendants who proceed to trial to protest some aspect of their offenses of conviction. It should indeed be the rare occasion where a court finds that a defendant accepted responsibility, even though, at trial, he protested the very counts of which he was later found guilty. Here, at trial, Mr. Smith did not protest his factual guilt as to counts two, three, and four and, thus, that "rare instances" language does not apply to him. Accordingly, this Court need not reach for any "rare" justification to apply §3E1.1 here.

specifically to the "rare" cases where defendants lodge challenges to their crimes of conviction, unrelated to factual guilt. By its terms, it does not apply generally to any and all defendants who proceed to trial, regardless of whether they conceded guilt, as the government and court below believed.

Here, Mr. Smith did not go to trial to deny his factual guilt of counts two, three, and four—his offenses of conviction. Instead, Mr. Smith proceeded to trial and only denied the factual elements of count one—which were *not* the "factual elements of guilt," as referenced under Note 2. Because no unanimous jury found Mr. Smith guilty of count one, that he disputed it was not a valid reason to deny the adjustment.

Despite what it now claims, the government, below, recognized this correct view of Note 2. Below, its principal rationale for opposing the adjustment was Mr. Smith's refusal to admit that he intended to discharge the gun. That is why, as the government acknowledges, it tried—unsuccessfully—to have the court find that Mr. Smith intentionally fired the gun. *See* GB.8 (acknowledging that "the Government urged Judge Halpern to conclude that Smith had not accepted responsibility because he had failed to admit that he intentionally fired the gun. (A.88-91)."). But intent to discharge was only relevant to count one, [5] and because no unanimous jury reached

[5] Under count two, 18 U.S.C. §924(c), "discharge" "requires no separate proof of intent [to fire]," *Dean v. United States*, 556 U.S. 568, 577 (2009), as counsel argued, S.32-33.

it, the government asked the judge to find that essential fact "for sentencing purposes." *Id.*

The government's request revealed an undeniable truth: it recognized that there was no basis for denying the adjustment where Mr. Smith conceded his offenses of conviction and only disclaimed responsibility for unconvicted conduct. *See* §3A1.1(a), Application Note 1(A) ("A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection."). His denials could only be deemed a rejection of responsibility if the court found he intentionally discharged the gun. The government's recognition, thus, underscores that the court improperly penalized Mr. Smith for refusing to admit "conduct beyond the offense of conviction," contrary to Note 1(A).

The government's reliance on *United States v. Bodnar*, 37 F.4th 833 (2d Cir. 2022), *United States v. Taylor,* 475 F.3d 65 (2d Cir. 2007), and *United States v. Roseboro,* 835 Fed.Appx. 640 (2d Cir. 2020), is unavailing.

In *Bodnar*, 37 F.4th at 835-36, the defendant faced charges for conspiracy to distribute and possess marijuana, possession of 100 kilograms of marijuana, and money laundering. He was convicted of the conspiracy and marijuana counts but acquitted of money laundering. On appeal, Bodnar sought an adjustment, arguing that counsel's admission of count-two evidence at trial demonstrated acceptance of

responsibility. *Id.* at 846. This Court acknowledged that the concession showed some acceptance but held Bodnar had not "'clearly' accepted responsibility," emphasizing his admission that "he 'went to trial to contest factual issues,' namely the amount of marijuana seized for Counts One and Two." *Id.*

In *Taylor*, 475 F.3d at 70, the defendant was charged with selling firearms to an undercover officer for drugs and money. At trial, Taylor claimed entrapment, which the jury rejected, finding him guilty. *Id.* at 67. He later refused to give a statement to Probation and, despite seeking an adjustment at sentencing, denied guilt, insisting he would "always see it as entrapment." *Id.* at 70-71. The sentencing court found his defense the "equivalent of his denying intent" and denied a downward adjustment. *Id.* at 68. This Court affirmed, citing credibility and proper discretion, and applied Application Note 2, noting Taylor negated factual guilt at trial and refused to admit guilt to Probation. *Id.* at 69-71.

Unlike in *Bodnar* and *Taylor*, Mr. Smith never negated his offenses of conviction. And specifically, unlike Bodnar, for whom Application Note 2 properly applied, Mr. Smith did not concede at trial but then also dispute some factual elements of his guilt. And further unlike Taylor, Mr. Smith gave a statement to Probation fully accepting responsibility for his offenses of conviction. *See* PSR ¶21. Critically, this Court affirmed *Taylor* as a proper exercise of discretion, 475 F.3d at

70-71, unlike here, where the court erroneously applied Note 2 to Mr. Smith, who did not go to trial to dispute his offenses of conviction.

Notably, sequestered within its *Bodnar* discussion, the government newly claims on appeal (and in passing), that "counsel never conceded guilt as to any of the charged counts." GB.31. But that is flatly contradicted by counsel's unmistakable concession of guilt as to counts two, three and four and his repeatedly asking that the jury hold him accountable for those crimes. *See* T.24. Again, counsel did so in opening[6] and closing statements,[7] reminding the jury that during the trial, the defense relieved the government of its burden by not disputing the evidence as to the other

[6] The defense conceded "very little opposition to much of what the government is going to put before you," acknowledging that "Mr. Smith did make bad choices that day" and "he did have a firearm." T.22. "And you may think, well, then what are we here for? . . . . [T]he issues here are very narrow. Did Mr. Smith attempt to murder officer Menton?" T.22, 24. The defense would "ask [the jurors] to find him not guilty of attempting to murder" Menton. T.24. "[W]e will ask you to hold him accountable for the things that he did do," counsel explained, never once disputing counts two, three or four. T.24.

[7] Counsel stated: "I'm just going to be frank, Mr. Smith is not a likable person. And I get it. His actions, his choices, his behavior, they were appalling." T.273. "I think it's safe to say we all want to live in a society where we can send our children to school or to a store and not have to worry about them being hit with a stray bullet, not to have to worry about them being hit by a car because someone's fleeing from the police, not to have to worry about a guy running around with a gun in his hand. . . . Mr. Smith committed a host of crimes on September 25th but what he didn't do is try to kill those officers." T.273.

counts.[8] Counsel confined his arguments to count one and asked the jury to find him guilty of the others.[9]

The government's claim that counsel's admissions were "cryptic," GB.31, is baffling, given that the government admitted it understood counsel's concessions eased its trial burden, allowing it to focus on the "narrow set of [disputed] issues." *See* T.249 (prosecutor in closing arguments reminding the jury that "at the start of this trial [the defense] told you that we had a narrow set of issues over which we disagreed with. The core division . . . between the parties is whether this defendant had an intent to kill Detective Menton"). And importantly, while the government now denies these were admissions, it does not dispute that trial admissions can qualify as acceptance of responsibility.

Finally, the government cites *United States v Roseboro*, 835 Fed.Appx. 640, where the defendant was convicted at trial of conspiracy to possess with intent to distribute heroin. *Id.* at 641. While he argued for the adjustment because his counsel

[8] The defense reminded the jury of its promise it "wouldn't contest much of the government's case and we didn't. In fact, you would agree that we sat there and – as defense attorneys, that's saying a lot. How many objections did you hear us give? How many times did we stand up and say that's not true? In fact, you heard over and over again no objection, no objection. We even stipulated to evidence so the government wouldn't have to bring additional witnesses." T.274. Counsel only disputed the attempted-murder evidence, *see* T.275-91, never once challenging counts two, three or four, *see* T.273-91.

[9] "The government is going to ask you to hold Mr. Smith accountable for his crimes. All we're asking is that you do the same thing. Hold him accountable for what he did, and more so . . . But you know he didn't try to kill these cops. You know he's not guilty of attempting to murder these cops." T.273-94.

conceded his guilt at trial to the conspiracy count, he had gone to trial to dispute the remaining charges, counts two through seven, of which he was acquitted. *Id.* at 642.

In *Roseboro*, the district court recognized that the first part of Application Note 2—denying the adjustment to defendants disputing factual guilt—did not apply, as the defendant admitted guilt to his offense of conviction at trial. *Id.* at 642. Still, it declined the reduction, reasoning that, for defendants convicted at trial, Note 2 required acceptance of responsibility to be judged "primarily upon pre-trial statements and conduct." *Id.* Since the defendant rejected pretrial plea offers and admitted guilt only during trial, the court denied the reduction, and this Court affirmed. *Id.* at 642.

But *Roseboro* missed a critical point: Note 2's focus on pretrial statements and conduct as the "primary" indicator of acceptance of responsibility applies only to defendants who dispute their offenses of conviction at trial—not to those, like the defendant in *Roseboro* or Mr. Smith—who concede their offense(s) of conviction during trial. The defendant in *Roseboro* never pointed that out to this Court. *See* Brief for Defendant-Appellant, *United States v. Roseboro*, No. 19-2052, 2020 WL 995408 (Feb. 25, 2020). The government also relied on that misreading of Note 2. *See* Brief for the United States of America, *United States v. Roseboro*, No. 19-2052, 2020 WL 2318699 (May 8, 2020). Thus, *Roseboro*, a nonprecedential opinion, neither binds this Court nor merits extension here.

Nevertheless, extending *Roseboro* here, the government similarly urges, as the district court agreed, that it was dispositive that Mr. Smith rejected pretrial offers. GB.32. But, again, Note 2 only instructs a court to "primarily" consider pretrial conduct in the "rare instances" where a defendant disputes his guilt at trial for reasons unrelated to factual guilt. Mr. Smith, who conceded his crimes of convictions (counts two, three and four), need not invoke any of those "rare" examples. And this court need not reach for any "rare" justification to apply the adjustment in this case as it would for a defendant who went to trial disputing a count, only to be convicted of it, and then seeking acceptance-of-responsibility credit for exceptional reasons, as Note 2 properly instructs. Thus, it was not dispositive or even "primarily" relevant that Mr. Smith rejected pretrial plea offers.

Even considering Mr. Smith's failure to plead before trial, Mr. Smith made abundantly clear at sentence that he rejected a plea because it required him to admit knowledge of Menton's federal-agent status, which he lacked during the incident. Though, for the first time on appeal, the government now claims that Mr. Smith's statement was "self-serving" and "simply false," GB.33, the government had a full and fair opportunity to dispute that below but failed to do so. In any event, the government's newly conceived rebuttal relies primarily upon assertion rather than clear evidence from plea terms.

Moreover, even if, as the government argues, the counts "did not require Smith to admit knowledge that Officer Menton was a federal agent," GB.33, Mr. Smith's admissions of knowledge would have been relevant to other sentencing considerations—such as the official-victim enhancement, which the government has vigorously asserted here. Thus, the government's claim that it mandated no such request for Mr. Smith's plea defies credibility.

In any event, a guilty plea is neither a necessary nor sufficient condition for the adjustment. Even a "defendant who enters a guilty plea *is not entitled* to an adjustment under this section *as a matter of right,*" §3E1.1, Application Note 3 (emphasis added). Thus, while a pre-trial plea may be relevant, it is not, as the court apparently believed, *see* S.28, the exclusive means of proving his acceptance of responsibility (and, again, because he does not come within Note 2, his failure to plead before trial should not be the "primary" measure either). Nor was it dispositive, as the court believed and urged by the government, GB.32-33.[10]

Instead, timeliness under §3E1.1(a) "is content specific." *See* Application Note 6. And even if his trial concessions were untimely, that is not dispositive. *See* Application Note 1(H) (whether a defendant qualifies under "subsection (a) . . .

[10] The court ruled, "given that this is the plea agreement that was offered, irrespective of what you could argue at sentencing, irrespective, it's an eligibility. Your client's not eligible for that kind of reduction, period." S.28.

consider[s] . . . [but is] *not limited to*" whether he "timely accepted responsibility.") (emphasis added).

Finally, though the government urges "great deference," GB.33, that only applies to "factual determinations." *United States v. Chu*, 714 F.3d 742, 746 (2d Cir. 2013). As to *legal* conclusions, this Court's review is *de novo. Id; United States v. Rodriguez*, 928 F.2d 65, 67 (2d Cir. 1991) (if "application of the Guidelines is influenced by a mistaken view of the law, our review is plenary"). Reviewing the court's determination's *de novo*, it misapplied Application Note 2 to Mr. Smith, which tainted its decision to deny the adjustment. Consequently, its decision was procedurally unreasonable. *See id.*

The sentence should be vacated and resentencing ordered.

C. The government misrepresents the record in claiming the district court did not rely on "disputed conduct" in sentencing Mr. Smith.

Initially, the government does not dispute and, thus, must concede, that the district court relying on facts that a unanimous jury never found beyond a reasonable doubt violated the Sixth Amendment. *See* Br. POINT I(C)(1). Instead, the government argues that the court did not rely on facts that no unanimous jury found beyond a reasonable doubt—what it calls "disputed conduct." *See* GB.B(1)(c). The record solidly contradicts that claim.

The government starts that "at no point" at sentencing did the district court "suggest that Smith intentionally fired the gun" or otherwise rely on it in imposing

sentence. But it was worse: the court found—without any jury finding—that Mr. Smith "intended to kill." S.42.

In the same vein, the government's claim that it "did not even request" that the court find Mr. Smith intended to kill, GB.35, is patently incredible, considering, first, that the government admits it "asked Judge Halpern to make a finding that Smith intentionally fired the gun." GB.34. And "intentionally fir[ing] the gun" was precisely what the government urged, at trial, represented Mr. Smith's intent to kill. *See* T.255-56 (the prosecutor arguing, in closing, that "[n]ow, you can find intent to kill on this alone. Those five shots at that critical moment from a defendant who had every intention of avoiding capture by law enforcement shows exactly what he was thinking.").

Nevertheless, by the government's recollection, the court never relied on a finding that Mr. Smith intended to kill in imposing sentence. Instead, the government claims, the court simply "noted" that Smith's remorse was not "crystal clear" because, instead of focusing on the gravity of his "very serious conduct," that "*the jury found he committed*" (the flight and discharge of a gun), Mr. Smith was "clinging to the notion that, no matter what" he "didn't kill anybody," while minimizing the "horrible horrific behavior," again, "found" by "the jury." The court did not accept as a given that Mr. Smith intended to kill, the government continues; it instead "simply acknowledged the jury's verdict and stated that the offenses of

which Smith was convicted were incredibly serious in their own right." Mr. Smith's arguments to the contrary "mischaracterize" the court's statements, the government posits. GB.35-36.

The government distorts the record with each successive claim.

While charging Mr. Smith with "mischaracterizing the court's statements," the government proceeds to do just that. True, the district court discussed intent-to-kill while noting that Mr. Smith's remorse was not "crystal clear." But that the court did so in the context of pointing out the "gravity of the 'very serious conduct'" that the "jury found he committed" and Mr. Smith "downplaying 'horrible horrific behavior' that the jury found he committed" is false. The cold record settles the score:

> [THE DISTRICT COURT]: You know, the remorse here is not as crystal clear. Of course you don't want to be here. Of course you're sorry for whatever events caused you to appear before me and be charged and convicted of all of these things. But you're clinging to the notion that, no matter what, you didn't intend to kill anybody. You didn't intend to kill anybody. The jury said they were hung on the issue of intent to kill, and I understand that, but this is horrible, horrific behavior and genuinely, genuinely, a person needs to be remorseful of this. S.41-42 (emphasis added).

Despite the record, the government denies that the "horrible, horrific behavior" to which the court referred was not, in the court's own words, Mr. Smith's purported "inten[t] to kill," S.41, but rather the "conduct" "the jury found he

committed." GB.35. The government's characterization makes little sense because, at sentencing, the only conduct that Mr. Smith continued to dispute was his intent to discharge or kill—not counts two, three and four, which he conceded at trial and were the only conduct "the jury found." Thus, the court's remarks were directed solely at Mr. Smith's refusal to accept responsibility for, by its own words, his "intent to kill." Moreover, as the record shows, the court did not merely tie its finding about Mr. Smith's supposed "intent to kill" to what "the jury" found, as the government claims. Instead, the court contrasted what "the jury" did not find with what it patently believed to be Mr. Smith's true intent. S41 ("You didn't intend to kill anybody. The jury said they were hung on the issue of intent to kill, and I understand that, but…").

Viewed in the light of day, the district court's reference to the "horrible horrific behavior"—of which it found, as aggravating, Mr. Smith's failure "to be remorseful," representing his "indicia of seriousness" and the need for deterrence, S.43—was connected to its unsubstantiated finding that Mr. Smith intended to kill. That was, again, the only fact Mr. Smith persisted in denying at sentencing and what prompted the court's fact finding. Consequently, the record contradicts the government's claim that the court did not rely on unconvicted conduct as aggravating and supporting the sentence.

Additionally, in the absence of a unanimous verdict on the issue, the government, again, admits that it asked the court to find that Mr. Smith intentionally fired the gun, but the court refused. GB.34-35. In the government's view, given the court's "repeated refusal to conclude that Smith intentionally fired his gun, it is difficult to see how [the court] could have simultaneously relied on a finding that Smith intended to kill officer Menton." GB.35. The government refuses to recognize the error.

The essence of the error was that the court rejected the government's request to find that Mr. Smith intentionally fired his gun but nevertheless relied on that unproven fact in imposing sentence. The government's purported "difficult[y]," GB.35, in squaring the logic of both is unconvincing, at best. The procedural error arose precisely because the court relied on facts that no unanimous jury found beyond a reasonable doubt and—as the government concedes—facts that even the court refused to find by a preponderance of the evidence.[11]

Finally, the government argues, even if the court erred, Mr. Smith has not established plain error since he "has not identified any binding caselaw holding that

[11] The government argues the district court "hewed closely" to the PSR. GB.27. But, aside from the verdict not supporting an intentional discharge, the PSR did not find that Mr. Smith intentionally fired or intended to kill (*see* PSR). *See United States v. Carter*, 489 F.3d 528 (2d Cir. 2007) (finding plain error where "factual findings in the PSR are *not* adequate to support the sentence imposed."). Any mention in the PSR of the gun being fired was not equivalent to finding intent, because, as counsel argued, S.32-33, even *accidentally* discharging the gun sufficed under count two, which required no proof of intent. *See Dean*, 556 U.S. at 577.

similar comments from a district judge at sentence constitute procedural error." GB.36. The argument is a red herring. Mr. Smith need not cite a case with identical language to support the well-established principle that relying on unproven facts at sentencing is unconstitutional or procedurally erroneous, *see United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005). Notably, none of the cases the government cites specifically support the contrary position or even address the more lenient plain-error standard at sentencing. *See* GB.36.

And while the government argues that Mr. Smith has not shown he "would have received a different sentence" absent the error, GB.36, certainty is not required. Remand is required because this Court cannot exclude the possibility that, had it not considered the unconvicted conduct to support at least three aggravating factors, the district court might have imposed a shorter sentence. *See Molina-Martiez v. United States*, 578 U.S. 189, 201 (2016) ("Absent unusual circumstances, [a criminal defendant] will not be required to show more [than this possibility]."); *see also Rosales-Mireles v. United States*, 585 U.S. 129 (2018) (refusing to speculate what the district court might have done and remanding for even inadvertent errors "with the understanding that such errors *may* qualify for relief.") (emphasis added).

D. <u>The court procedurally erred in failing to properly consider the §3553(a) factors.</u>

First, because counsel objected to the imposition of a *de facto* mandatory Guidelines sentence, S.18, and urged consideration of mitigating factors, S.17-24

and Defense Sentencing Memorandum, the errors are reviewed for abuse of discretion, not plain error, as the government claims, GB 36-37. *See* Fed. R. Crim. P. 51(b); *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009).

Next, that the court was not legally bound by the government's statements, GB.37, does not imply that it failed to endorse them. At sentencing, the government promoted a *de facto* mandatory Guidelines sentence, arguing that such was "absolutely necessary," S.13, and "nothing less . . . would be appropriate." S.16. Thereafter, announcing the sentence, the court stated, the "3553(a) factors are used to decide whether a variance from the guidelines range is appropriate." S.37. According to the government, that showed the court did not "blindly follow" the Guidelines. GB.37. Far from it.

After *Booker*, the Guidelines are a "starting point," but "not the only consideration." *Gall v. United States,* 552 U.S. 38, 49-50 (2007). A court must also consider the §3553(a) factors, which stand on equal footing with the Guidelines, "to determine whether [the factors] support the sentence requested by a party," *id.*—not secondarily, as the court believed, to see if the factors justified "a variance." In so stating, the court conveyed that the Guidelines were presumptively reasonable unless the factors justified a deviation. That relegated the §3553(a) factors to a subsidiary role in assessing exceptions rather than equally guiding the sentence in the first instance, contrary to *Booker*. *See Nelson v. United States*, 555 U.S. 350, 352 (2009)

(finding sentencing judge comments presumed Guidelines' reasonableness, contradicting *Booker's* instruction "[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.").

Next, the government argues that the court's discussion of some defense mitigation shows it considered the §3553(a) factors. GB.37-38. But if anything, that discussion highlighted the error. A court must not simply identify the mitigation but must also "explain why [it] has rejected those arguments." *Rita v. United States*, 551 U.S. 338, 339 (2007); 18 U.S.C. §3553(c). Thus, a court simply "acknowledging [the defendant's arguments]," without stating why it has rejected them is procedurally unreasonable. *United States v. Peters*, 512 F.3d 787, 789 (6th Cir. 2008); *United States v. Poulin*, 745 F.3d 796, 801 (7th Cir. 2014) (beyond identifying mitigation, court is also "required to consider it and provide reasons explaining his acceptance or rejection of it."). The lack of explanations leaves an appellate court in "serious doubt whether the judge connected the facts relating to the statutory factors to the sentence he imposed." *United States v. Cunningham*, 429 F.3d 673, 676 (7th Cir. 2005).

Here, the court simply stated the mitigating factors without explaining why it rejected them—or the defense's 10-year request, at that. In contrast, the court provided a detailed, one-sided discussion of aggravating factors to justify the 19-year-Guidelines sentence, demonstrating its fidelity to a *de facto*, presumptive

Guidelines sentence. Mr. Smith's contentions are, thus, not mere "disagreement" with how the court "balanced" the factors. GB.39-40. Instead, the court failing to explain why it rejected the mitigation, or the defense's sentence request, was procedural error. *See Rita*, 551 U.S. at 391; §3553(c).

Finally, the government does not contest the court's focus on Mr. Smith's age at sentencing rather than at the offense; that it should have considered his youthfulness as mitigating; and that, for deterrence, it erroneously found that Menton suffered a sprained knee, contrary to the trial evidence of a scrape, *see* T105.

E. The 230-month sentence was exceptional and unreasonable.

The government argues Mr. Smith's sentence was substantively reasonable. GB.40. But while asserting it below, the government does not now defend it as analogous to *United States v. Michael Cabon*, 20 Cr. 103 (S.D.N.Y.) (Karas, J.) and *United States v. Ronnell Watson*, 19-cr-004 (E.D.N.Y.) (Kunz, J.). Again, Mr. Smith's sentence was disproportionate compared to both defendants (who received 188 and 382 months' respectively). In *Cabon*, the defendant, again, repeatedly stabbed an officer, and in *Watson*, the defendant was convicted of attempted murder—both unlike Mr. Smith, who neither inflicted serious physical injury nor targeted or attempted to kill a federal officer, respectively. Thus, the court's imposition of a 230-month sentence was not in the heartland of cases and, instead, placed Mr. Smith—*inter alia*, 24 years old during the offense, born into adversity,

suffered intellectual and physical challenges, accepted responsibility, is now a father, and has undergone a profound transformation—unjustly among the "very worst offenders where he did not belong." *United States v. Jenkins*, 854 F.3d 181, 190 (2d Cir. 2017).

CONCLUSION

For the reasons stated here and in Mr. Smith's main brief, the sentence should be vacated and resentencing ordered.

Respectfully submitted,

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