

1 Before:

2 PARKER, LOHIER, and MENASHI, *Circuit Judges*.

3
4 Defendants-Appellants Andrew Yurkiw, Amber LaGrandier, and Joseph
5 Solomito, officers of the New York City Police Department, appeal from a
6 judgment of the United States District Court for the Eastern District of New York
7 (Gold, M.J.). The judgment was entered pursuant to a jury verdict and a retrial
8 on damages, awarding \$90,000 in compensatory damages and \$355,000 in
9 punitive damages to Plaintiff-Appellee Thomas Jennings on his claims against
10 the officers for excessive force. The officers contend that the jury's \$355,000
11 punitive damages award should be deemed so high as to shock the judicial
12 conscience and that the district court abused its discretion in upholding it.
13 Jennings, for his part, cross-appeals the district court's remittitur after the first
14 trial of the compensatory damages award from \$500,000 to \$115,000 and
15 remittitur of the punitive damages award from \$2,500,000 to \$140,000.

16 We conclude that the district court did not abuse its discretion in
17 upholding the jury's \$355,000 punitive damages award after retrial and that the
18 damages were reasonable in light of the officers' misconduct.

19 On Jennings's cross-appeal, we conclude that the district court did not
20 abuse its discretion in remitting the compensatory damages award after the first
21 trial to \$115,000. The damages jury's compensatory award of \$90,000 after retrial
22 stands.

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24 AFFIRMED

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27 _____
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8
9

10 BARRINGTON D. PARKER, *Circuit Judge:*

11 Thomas Jennings was arrested on April 23, 2014, and charged with the
12 felony of second-degree assault, among other things, after the arresting officers
13 falsely claimed that Jennings struck one of them multiple times while resisting
14 arrest arising from a domestic dispute. Jennings was held in custody until May 2,
15 when he was released on bail from Rikers Island. All charges were later
16 dismissed on motion of the district attorney.

17 Jennings brought suit under 42 U.S.C. § 1983 against New York City Police
18 Officers Andrew Yurkiw, Amber LaGrandier, and Joseph Solomito, alleging that
19 the officers subjected him to unprovoked, excessive force, and then took
20 substantial coordinated steps to cover up their misconduct. After two trials in the
21 Eastern District of New York before Magistrate Judge Steven M. Gold (the
22 second focused exclusively on damages), two separate juries awarded Jennings
23 substantial punitive damages.

24 In the initial trial the jury returned a verdict for Jennings finding the
25 officers jointly and severally liable for \$500,000 in compensatory damages. The

1 jury awarded punitive damages of \$1,000,000 against Yurkiw and \$750,000 each
2 against LaGrandier and Solomito, for a total of \$2,500,000 in punitive damages.

3 The defendants moved for remittitur. The court granted the motion and
4 ordered a new trial on damages unless Jennings accepted remittitur of the
5 compensatory damages from \$500,000 to \$115,000, the punitive damages against
6 Yurkiw from \$1,000,000 to \$120,000, and the punitive damages against
7 LaGrandier and Solomito from \$750,000 to \$10,000 each. Jennings declined
8 remittitur, and the court conducted a retrial on damages.

9 The second jury returned a verdict finding the officers jointly and severally
10 liable for \$90,000 in compensatory damages. The jury also awarded punitive
11 damages of \$250,000 against Yurkiw, \$75,000 against LaGrandier, and \$30,000
12 against Solomito, for a total of \$355,000. Defendants again moved for remittitur
13 and this time the district court denied the motion. On this appeal, the officers
14 claim that the second jury's punitive damages award was too high and that the
15 district court abused its discretion in failing to remit it. For the reasons that
16 follow, we affirm.

17 On his cross-appeal, Jennings challenges the district court's remittitur of
18 his compensatory damages award from \$500,000 to \$115,000. He concedes that
19 the first jury's \$2.5 million punitive damages award warranted some remittitur
20 but contends that the court erred in remitting the first jury's punitive damages
21 award to \$140,000 and its compensatory damages award to \$115,000. For the
22 reasons that follow, we affirm the district court's remittitur following the first
23 trial.

1 **BACKGROUND¹**

2 At the first trial, the jury heard testimony that on April 23, 2014, in
3 Brooklyn, NY, Jennings picked up his three-year-old son from day care and went
4 to the apartment of his son’s mother, Daquanna Henry, to retrieve some of his
5 son’s belongings. Jennings testified that an altercation with Henry ensued and
6 that he left the apartment, went to the lobby of the building, and called 911 for
7 assistance.

8 NYPD officers Yurkiw, Solomito, and LaGrandier responded to the scene.
9 LaGrandier entered Henry’s apartment while Yurkiw and Solomito waited
10 outside with Jennings, who was holding his son. Jennings testified that while he
11 spoke with Yurkiw, LaGrandier emerged from the apartment and snatched
12 Jennings’s son from his arms while the child cried and attempted to reconnect
13 with his father. LaGrandier then grabbed Jennings by the clothing and pinned
14 him against the wall, at which point Yurkiw, without warning, punched Jennings
15 twice in the face. Jennings testified that the blows were sufficiently hard that he
16 fell to the ground and “was just out of it from there.” Joint Appendix (“J. App’x”)
17 at 561–62. Instead of intervening to stop the attack, LaGrandier and Solomito
18 joined Yurkiw in continuing the beating. Jennings testified that he fell in and out
19 of consciousness as LaGrandier and Yurkiw dragged him from the apartment
20 through the lobby and into a police car.

¹ We view the facts in the light most favorable to Jennings, the prevailing party, and view all evidence in the light most favorable to sustaining the jury’s verdict. See *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 195 (2d Cir. 2004); *Payne v. Jones*, 711 F.3d 85, 98–99 n.10 (2d Cir. 2013).

1 In the immediate aftermath of the arrest, the officers began fabricating a
2 sharply different narrative. In reports to others, in official paperwork, and then at
3 trial, they claimed that in attempting to evade arrest and flee, Jennings assaulted
4 Yurkiw. Yurkiw testified that Jennings took off at a “full sprint” down the
5 apartment hallway after being told he was under arrest, and that while
6 attempting to flee, Jennings turned around and punched Yurkiw in the head,
7 face, and the side of his body. J. App’x at 190. Solomito offered a slightly
8 different account of what occurred. He testified that Yurkiw grabbed Jennings by
9 the wrist, that “Jennings turned and punched Officer Yurkiw on the top of the
10 head,” and then took off running while “pulling [Yurkiw] down the hallway.” J.
11 App’x at 368. Solomito then testified that Yurkiw fell, and that he (Solomito) had
12 to jump over him (Yurkiw) to tackle Jennings to the ground before arresting him.
13 LaGrandier, for her part, offered ambiguous testimony. At one point, she
14 testified that she was “running besides [sic] Thomas Jennings” while he
15 attempted to flee. J. App’x at 481. She also testified that she was beside Yurkiw
16 and ultimately that she didn’t see who threw Jennings to the ground.

17 The officers’ credibility was sharply called into question by video evidence
18 containing footage of Yurkiw and LaGrandier dragging Jennings’s limp body
19 through the lobby of the building and outside to the police vehicle. This evidence
20 tended to corroborate Jennings’s testimony that, as a consequence of the beating,
21 he was in and out of consciousness and unable to walk on his own.

22 Jennings testified that he had visible injuries and requested medical
23 assistance, but that these requests were ignored. Jennings was transported to the

1 81st precinct. After he had spent time in a cell an officer eventually called for
2 medical assistance, and Jennings was taken by ambulance to Woodhull Hospital.

3 After examining Jennings at Woodhull on the day of his arrest, a doctor
4 determined that Jennings had physical injuries including a right eye hematoma,
5 several fractures in both nasal walls, a deviated nasal septum, and an inflamed
6 ethmoid sinus. Jennings was also seen by a medical professional two days later
7 on Rikers Island who confirmed those injuries and further testified that in
8 addition to Jennings’s nasal fracture, there was bruising on the area of Jennings’s
9 right eye. This testimony tended to show that his bruising was sufficiently
10 localized that it came from a fist, and not from a fall as Yurkiw had testified.

11 The jury heard additional testimony concerning the officers’ coverup of the
12 beating. After the arrest, Officer Pelocka Binns—who had no personal
13 knowledge of the arrest—prepared an arrest report based on information
14 provided by Yurkiw that included allegations that Jennings had assaulted him.
15 In support of this narrative, Yurkiw took a picture of what he claimed was a
16 bump at the top of his head caused by Jennings’s punches. He acknowledged
17 that he took the photograph for the purposes of prosecuting Jennings for the
18 assault, which requires physical injury as an element. Yurkiw testified that he
19 went to Wyckoff Hospital to be treated for the bump. The treating physician’s
20 assistant recorded that Yurkiw’s bump was “non-tender.” J. App’x at 472. In
21 other words, it did not hurt. During examination, a physician’s assistant
22 observed and documented visible bruising on Yurkiw’s right index and middle
23 finger knuckles, injuries that were consistent with his having thrown punches.
24 Yurkiw, however, had not taken any photos of this bruising. In fact, Yurkiw—

1 contrary to contemporaneous medical documentation—testified that he “didn’t
2 have any bruising [on his knuckles] at that time.” J. App’x at 125.

3 At the close of trial, the jury answered special interrogatories. Despite the
4 officers’ extensive testimony to the contrary, the jury found that at no point
5 before or after the assault did Jennings attempt to flee from any of the officers or
6 strike Yurkiw. The jury answered “No” to the question, “Do you find by a
7 preponderance of the evidence that plaintiff Jennings attempted to flee from
8 defendants or resist arrest?” J. App’x at 1199. The jury also answered “No” to the
9 question “Do you find by a preponderance of the evidence that plaintiff Jennings
10 punched or attempted to punch defendant Yurkiw?” J. App’x at 1200.

11 That jury awarded Jennings substantial compensatory and punitive
12 damages. The officers moved for remittitur or a retrial, and Magistrate Judge
13 Gold granted the motion for remittitur. The court concluded that LaGrandier and
14 Solomito were less culpable than Yurkiw because “LaGrandier and Solomito
15 used force against [Jennings] only after Yurkiw did, and the reprehensibility of
16 their conduct is mitigated by the likelihood that their motivation included a
17 desire to assist a fellow officer.” Special Appendix (“Sp. App’x”) at 62. Jennings
18 rejected the remittitur and elected for a new trial on damages.

19 At the retrial, the district court determined that, in light of the jury’s
20 answers to the special interrogatories and its decision to award punitive
21 damages, the jury would be asked only to determine the amount of damages but
22 not to retry liability. We see no reason to disturb this ruling.

23 At the damages trial, Yurkiw was the only one of the officers who elected
24 to testify, and more details about what occurred after the arrest emerged. The

1 arrest report containing information supplied by Yurkiw was received in
2 evidence. The report detailed that “[Yurkiw] states that while [e]ffecting an arrest
3 [Jennings] punched [Yurkiw] in the head causing swelling, redness and pain.”
4 Supplemental Appendix (“Supp. App’x”) at 1. On the witness stand, Yurkiw
5 denied reporting that no force was used in the arrest; but the arrest report stated
6 that the officers had used *no* force. It was uncontroverted that the officer who
7 prepared the arrest report did so on the basis of information received from
8 Yurkiw and that Yurkiw knew that this account would be forwarded to the
9 District Attorney’s office for the purpose of prosecuting Jennings for the felony
10 assault.

11 Jennings offered additional testimony about the officers’ conduct following
12 his arrest. He testified that after the beating, he asked Yurkiw and Solomito for
13 medical attention. Yurkiw acknowledged that it was his “obligation as a police
14 officer to request EMS, and if [he] thought [Jennings’s injury] was that serious
15 enough [sic], Interfaith [Hospital] [was] around the corner.” J. App’x at 1719.
16 Instead of being given medical attention, Jennings was brought to the police
17 station. He was then placed in a cell and chained to a bar where he was subjected
18 to insults from Yurkiw, who stood outside the cell and taunted him. Eventually,
19 Jennings was taken from the police precinct to Woodhull Hospital by ambulance.

20 The jury returned a verdict awarding Jennings “(a) \$90,000 in total
21 compensatory damages, jointly and severally against all three defendants, (b)
22 \$250,000 in punitive damages against defendant Yurkiw, (c) \$75,000 in punitive
23 damages against defendant LaGrandier, and (d) \$30,000 in punitive damages

1 against defendant Solomito, for a total of \$355,000 in punitive damages.” Special
2 App’x at 12.

3 The officers again moved for remittitur of the punitive damages award. In
4 denying their motion, the district court explained that:

5 Having heard the evidence presented in support of plaintiff’s claims
6 at both the original trial and the retrial on damages, and having had
7 the benefit of observing the verdicts returned by two juries after what
8 presumably were careful deliberations, I cannot say that the second
9 trial jury’s punitive damages award is so high as to shock the judicial
10 conscience and constitute a denial of justice.

11 Sp. App’x at 17–18 (quotation marks omitted).²

12 This appeal and cross-appeal followed.

13 DISCUSSION

14 I

15 A. *Legal Standards*

16 We review a district court’s decision on a motion to remit punitive
17 damages for abuse of discretion. *See Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir.
18 1996). The discretion enjoyed by trial courts in remitting damages is “relatively
19 narrow.” *Payne*, 711 F.3d at 100. That is because the ultimate question is whether
20 the award “shock[s] the judicial conscience” or amounts to a miscarriage of
21 justice. *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990). When, as here, a trial

² In denying remittitur, the district court also observed—in sharp distinction to its initial characterizations of LaGrandier’s role at the first trial—that the evidence from the second trial supported the inference that “LaGrandier was the first of the officers to become physically aggressive with [Plaintiff]” and that “the jury may even have inferred that LaGrandier pinned plaintiff against the wall in anticipation of Yurkiw’s blows.” Sp. App’x at 18.

1 judge refuses to disturb a jury’s award of a particular amount of damages, the
2 two entities entitled to deference—the judge and jury—point in the same
3 direction. *See Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1329 (2d Cir. 1990). Both
4 have observed the witnesses and both have considered the evidence in the
5 context of a trial involving live witnesses and cross examination.

6 Moreover, determining the amount of damages is a quintessential
7 responsibility of juries. Here, two separate juries concluded that substantial
8 punitive damages were appropriate. No officer contends that the jury was not
9 properly instructed or that any irregularity occurred in the district court’s
10 management of the jury. And no officer has shown that the verdict from the
11 second trial shocks the conscience or constitutes a miscarriage of justice.

12 *B. Review of the Punitive Damages Award*

13 We review a jury’s punitive damages award in accordance with *BMW of*
14 *North America, Inc. v. Gore*, 517 U.S. 559 (1996). We consider: “(1) degree of
15 reprehensibility of the defendant’s conduct, (2) relationship of the punitive
16 damages to the compensatory damages, and (3) criminal and civil penalties
17 imposed by the state’s law for the misconduct in question.” *Payne*, 711 F.3d at
18 101. While these guideposts are non-exhaustive, they assist in determining
19 whether a defendant had adequate notice of the magnitude of the sanctions to
20 which his misconduct might expose him. *See Gore*, 517 U.S. at 574–75; *see also id.*
21 at 606 (Scalia, J., dissenting) (observing that “the Court nowhere says that these
22 three ‘guideposts’ are the *only* guideposts; indeed, it makes very clear that they
23 are not”). In reviewing punitive damages awards, courts in this Circuit often

1 compare the award to rulings on awards in other cases. *See Payne*, 711 F.3d at
2 104.

3 **1. Degree of Reprehensibility**

4 In *Gore*, the Supreme Court noted that reprehensibility is “perhaps the
5 most important” consideration in assessing the reasonableness of an award of
6 punitive damages. 517 U.S. at 575. There, the Court identified certain
7 “aggravating factors” that are “associated with particularly reprehensible
8 conduct” and contribute to the sense that “some wrongs are more blameworthy
9 than others.” *Id.* at 575–76. Those aggravating factors include: (1) whether a
10 defendant’s conduct was marked by violence or presented a threat of violence,
11 (2) whether a defendant’s conduct evinced trickery or deceit as opposed to mere
12 negligence, and (3) whether the record supports a finding of intentional malice.
13 *Id.*

14 These factors all weigh against the officers. The officers attempt to
15 diminish the seriousness of their misconduct by characterizing their unprovoked
16 beating as “a few minutes of violence against [Jennings],” Officer Br. at 24. But,
17 “a few minutes of violence” is not a trivial matter. The jury heard testimony that
18 Jennings received an unprovoked beating at the hands of the officers. It heard
19 that LaGrandier snatched Jennings’s three-year-old son from his arms, grabbed
20 Jennings and pinned him against the wall. Yurkiw then struck Jennings in the
21 face with such force that he fell to the ground, at which point he began
22 experiencing “all kind of blows coming from everywhere.” J. App’x at 563. The
23 jury heard testimony from Jennings that he never threw punches at any of the
24 officers, attempted to flee, or otherwise resisted arrest. Even though Jennings had

1 visible injuries, he was brought straight to the police precinct, placed in a cell,
2 chained to a bar, and denied the medical attention he requested. As the trial
3 court observed:

4 The evidence was sufficient to support a finding that Defendant
5 Yurkiw delivered two unprovoked and violent punches that
6 rendered Plaintiff semiconscious, and that all Defendants then
7 engaged in administering further strikes to an already subdued
8 arrestee. Under the reprehensibility analysis, the jury could also have
9 reasonably considered the fact that Plaintiff had called for help as the
10 victim of an assault, only to find himself subjected to excessive force
11 by the responding officers.

12 Sp. App'x at 56–57.

13 Further, the jury could rightly have determined and apparently did
14 determine that the excessive force was made the more reprehensible because
15 none of the officers intervened to stop the attack, as each was required to do. We
16 have been clear that “a law enforcement officer has an affirmative duty to
17 intercede on the behalf of a citizen whose constitutional rights are being violated
18 in his presence by other officers.” *O’Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir.
19 1988); *see also DiSorbo v. Hoy*, 343 F.3d 172, 189 (2d Cir. 2003) (recognizing that
20 punitive damages may be higher where the misconduct involved several
21 officers).

22 The reprehensible nature of the officers’ conduct is underscored by the
23 elaborate steps they took to cover up their misconduct. The jury heard and was
24 entitled to consider a record that included falsified charging documents, false
25 accounts of the beating, faked or exaggerated injury, and perjured trial

1 testimony.³ See *Gore*, 517 U.S. at 579 (noting that factfinders may look to whether
2 the record “discloses . . . deliberate false statements, acts of affirmative
3 misconduct, or concealment of evidence of improper motive”).

4 **2. Ratio of Actual Harm to the Punitive Award**

5 Next, *Gore* directs reviewing courts to ask “whether there is a reasonable
6 relationship between the punitive damages award and the harm likely to result
7 from the defendant’s conduct as well as the harm that actually has occurred.”
8 *DiSorbo*, 343 F.3d at 187. While labeled a ratio, the reasonableness determination
9 “does not entail a simple mathematical formula, as there may be cases where a
10 particularly egregious act has resulted in only a small amount of economic
11 damages.” *Id.* (quotation marks omitted). Given the constellation of intentional
12 misbehavior by the officers, we see nothing untoward about the 1:4 ratio

³ The officers’ contention that “alleged behavior outside of the liability findings” is irrelevant to the determination of punitive damages is a bad argument extracted from mischaracterizations of our caselaw. For example, the officers cite *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) for the proposition that “a punitive award cannot rest on conduct independent from the acts upon which liability was premised,” Officer Reply Br. at 7 (quotation marks omitted). Yet that is not the rule from *State Farm*.

 In *State Farm*, the Supreme Court overturned the Utah Supreme Court’s imposition of a punitive damages award where “State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the [plaintiffs].” 538 U.S. at 420. The Court was concerned that the Utah courts “adjudicate[d] the merits of *other parties’* hypothetical claims against [State Farm],” *id.* at 423 (emphasis added), and that the company was punished “for conduct that may have been lawful where it occurred,” *id.* at 421. Even so, the Court *still* found that this evidence of potential harm to third parties—clearly outside the liability findings—may have been relevant if it had “a nexus to the specific harm suffered by the plaintiff.” *Id.* at 422. And here, there is no credible contention that any of the misconduct that was before the jury was directed at anyone but Jennings. The officers’ misconduct following the arrest clearly had a nexus to their use of excessive force and supports punitive damages.

1 between compensatory and punitive damages. *Johnson v. Nextel Commc'ns Inc.*,
2 780 F.3d 128, 149 (2d Cir. 2015) (“[T]here is no rigid upper limit on a ratio of
3 punitive damages to compensatory damages . . .”).

4 Even where compensatory damages are substantial, punitive damages
5 awards that are a multiple higher may be warranted because of the deterrent
6 function of punitive damages.⁴ “The purpose of § 1983 is not only to provide
7 compensation to the victims of past abuses, but to serve as a deterrent against
8 future constitutional deprivations, as well.” *Ciraolo v. City of New York*, 216 F.3d
9 236, 242 (2d Cir. 2000) (Calabresi, J., concurring); see *City of Newport v. Fact*
10 *Concerts, Inc.*, 453 U.S. 248, 266–68 (1981) (“[T]he deterrence of future abuses of
11 power by persons acting under color of state law is an important purpose of
12 § 1983.”). Because of this deterrent function, extra-compensatory damages are
13 warranted where the misconduct was designed to escape detection.⁵ “Where the
14 injurer makes active efforts to conceal the harm, [underdeterrence] is of course

⁴ The jury was properly instructed that in deciding whether to impose punitive damages and the proper quantum of damages, it should consider “whether punitive damages are likely to deter or prevent others from performing wrongful acts like the ones, one or more of the defendants, in this case you find to have committed” and “the degree to which an award of one sum or another will deter the defendant or persons like him or her from committing wrongful acts in the future.” J. App’x at 884.

⁵ As Judge Richard Posner observed in *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996):

When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter. Suppose a person who goes around assaulting other people is caught only half the time. Then in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs (but not the benefits, because they are realized in every assault) by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity.

Id. at 35.

1 exacerbated.” *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring). Given the
2 extensive misconduct directed at escaping liability, the deterrent capacity of the
3 1:4 ratio presented here passes muster.

4 **3. Sanctions for Comparable Conduct**

5 *Gore* next directs us to compare the punitive damages to “civil or criminal
6 penalties that could be imposed for comparable misconduct.” 517 U.S. at 583. The
7 court below observed that the comparable criminal provision for the misconduct
8 that the first jury found would be assault in the third degree, a misdemeanor
9 punishing reckless or intentional physical injury of another person. The
10 maximum penalty for this crime would have been one year of imprisonment and
11 a \$1,000 fine, which “strongly supports the imposition of some punitive award,
12 but it tells very little about whether the particular award was excessive.” *Payne*,
13 711 F.3d at 104. Based on this reference to state law, the officers argue that
14 “[t]here is no analogous provision of criminal law that gave the officers notice
15 that they were putting at risk up to several years’ worth of pay (in the case of the
16 award against Officer Yurkiw).” Officer Br. at 33.

17 Yet each of the officers knew full well that their misconduct could expose
18 them not only to state sanctions but to federal criminal sanctions as well. The
19 N.Y.P.D. Use of Force Guidelines put the officers on notice that: “both federal
20 and state laws provide for criminal sanctions and civil liability against uniformed
21 members of the service, when force is deemed excessive, wrongful or improperly

1 applied.” N.Y.P.D. Patrol Guide, Use of Force Guidelines § 203-11 (Effective
2 08/01/13).⁶

3 Where a jury imposes punitive damages for a violation of § 1983, the
4 penalties imposed under federal criminal law offer a useful comparison. Section
5 242 provides:

6 Whoever, under color of any law. . . subjects any person . . . to the
7 deprivation of any rights, privileges, or immunities secured or
8 protected by the Constitution or laws of the United States . . . and if
9 bodily injury results from the acts committed in violation of this
10 section . . . shall be fined under this title or imprisoned not more than
11 ten years, or both

12 18 U.S.C. § 242. Congress has authorized a fine for violation of this section of up
13 to \$250,000. 18 U.S.C. § 3571(b)(3). Section 242 provides a reference point to
14 evaluate excessive force awards against individuals acting under color of law.

15 This provision also satisfies the notice concerns raised by *Gore*, as the
16 officers were unquestionably on notice that abuse of power could lead to a term
17 of imprisonment as well as to a substantial fine. If anything, these penalties
18 understate the notice the officers received. As we explained in *Lee*, “training as a
19 police officer [gives officers] notice as to the gravity of misconduct under color of
20 [their] official authority, as well as notice that such misconduct could hinder
21 [their] career[s].” 101 F.3d at 811.

⁶ In pertinent part, the guidelines also provide:

Members of the service are required to maintain control or intervene if the use of force against a subject clearly becomes excessive. Failure to do so may result in both criminal and civil liability.

N.Y.P.D. Patrol Guide, Use of Force Guidelines § 203-11 (Effective 08/01/13).

4. Comparison with Punitive Damages Awards in Similar Cases

Because each case presents a unique set of facts and circumstances, “our task is not to balance the number of high and low awards and reject the verdict . . . if the number of lower awards is greater.” *Ismail*, 899 F.2d at 187. A review of our cases confirms that the verdict was within the range where similar punitive damages awards were determined to be reasonable.

For example, in *Payne*, this Court remitted an award of \$300,000 to \$100,000 against an individual officer where there were “significant mitigating factors, so that the degree of reprehensibility was not all that high.” 711 F.3d at 101. Yurkiw’s conduct alone, in contrast, was more reprehensible and lacks comparable mitigating factors. In the absence of significant mitigating factors such as those present in *Payne*, we do not believe that the punitive award against any of the officers warrants remittitur. Here, the total punitive damages award of \$355,000 against all officers, including the \$250,000 levied against Yurkiw, are below the amounts this Court has previously found reasonable against several officers and an individual officer for similarly reprehensible conduct. *See, e.g., O’Neill*, 839 F.2d at 13–14 (sustaining an award against two officers totaling roughly \$438,000, accounting for inflation); *Ismail*, 899 F.2d at 185-87 (sustaining an award against one officer totaling roughly \$319,000, accounting for inflation).⁷ This is true even if we were to ignore that Yurkiw and the other officers took steps to conceal their use of excessive force. Taking the officers’ deliberate concealment of evidence into account only heightens the degree of malice

⁷ These totals are adjusted for inflation using the Bureau of Labor Statistics’ Inflation Calculator to estimate dollar equivalents. *See* CPI Inflation Calculator, U.S. BUREAU OF LAB. STAT., bls.gov/data/inflation_calculator.htm.

1 associated with their excessive force and further confirms that the punitive
2 damages were supported by the record evidence.⁸

3 II.

4 Jennings argues on cross-appeal that the district court erred by remitting
5 the compensatory damages award from \$500,000 to \$115,000 after the first trial.⁹
6 We disagree. The court found that Jennings’s physical injuries from the excessive
7 force were nasal fractures, various other swelling and bruises after his arrest, and
8 the longer-lasting injuries of a crooked nose and headaches, for which Jennings
9 had not sought ongoing treatment. Moreover, Jennings also suffered the

⁸ We easily reject the officers’ contention that the district court’s decision to uphold the punitive damages award after retrial was barred by the law of the case doctrine. The law of the case is “informed principally by the concern that disregard of an earlier ruling not be allowed to prejudice the party seeking the benefit of the doctrine.” *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 607 (2d Cir. 1999). “Prejudice” in this context refers not to bare harm, but to surprise or “lack of sufficient opportunity to prepare armed with the knowledge that the prior ruling is not deemed controlling.” *Id.* (cleaned up). Therefore, in this Circuit, the law of the case doctrine “need not be applied when no prejudice results from its omission.” *First Nat’l Bank of Hollywood v. American Foam Rubber Corp.*, 530 F.2d 450, 453 n.3 (2d Cir. 1976).

Moreover, the case for applying the doctrine is considerably weaker where, as in the context of a conditional remittitur, an issue is relitigated as a matter of right. *Cf. Hetzel v. Prince William Cnty.*, 523 U.S. 208, 211–12 (1998) (per curiam) (noting that the district court was correct to offer the option of a new trial when it entered judgment for reduced damages). The officers claim no prejudice or surprise from the district court’s reconsideration of the proper quantum of punitive damages before or after the retrial, particularly where the district court noted that its remittitur was a “speculative, arbitrary approximation[.]” Special App’x at 17. Nor could they. The officers requested remittitur. They were on full notice that there would be a retrial on damages and had a fair opportunity to present their defenses to the juries and to the district court.

⁹ Jennings also argues that the district court erred in remitting the first punitive damages award from \$2,500,000 to \$140,000. But as explained above, the \$355,000 in punitive damages levied by the jury after retrial and upheld by the district court is within a range that “represents a reasonable view of the evidence.” Pl. Br. at 28.

1 emotional trauma of experiencing excessive force in the presence of his son. The
2 district court remitted the compensatory award from \$500,000 to \$115,000, which
3 it observed was on the higher end for non-permanent physical injuries after
4 comparing Jennings’s injuries to those experienced in comparable § 1983 cases.

5 Jennings identifies no error, legal or factual, in this conclusion. Rather, in
6 canvassing cases where plaintiffs suffered broken noses and jaws, Jennings
7 argues that the district court should have remitted the award to between
8 \$150,000 to \$200,000. However, unlike those plaintiffs, Jennings did not undergo
9 surgery or otherwise seek ongoing treatment that would contribute to the pain
10 and suffering supporting the compensatory awards. And regarding his
11 emotional damages, Jennings’s evidence was not extensive. The district court did
12 not exceed its discretion in remitting Jennings’s compensatory damages award to
13 \$115,000, an “amount at the very high end of awards for non-permanent
14 injuries.” Sp. App’x at 53. Finally, we note that the district court’s conclusion that
15 \$115,000 rests on the high end for Jennings’s injuries for a single claim of
16 excessive force is confirmed by the fact that at the retrial the jury awarded
17 \$90,000 in compensatory damages. For these reasons, we conclude that the
18 district court did not abuse its discretion in remitting compensatory damages
19 following the first trial.

20 CONCLUSION

21 We have considered the parties’ remaining contentions and find them to
22 be without merit. The judgment of the district court is **AFFIRMED**.