ORAL ARGUMENT REQUESTED
Nos. 15-7018, 15-7030, 15-7020, 15-7029

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

CHRISTOPHER A. BROWN,

and

RAYMOND A. BARNES,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE RONALD A. WHITE, D.C. NO. 6:13-CR-17-RAW

REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE/CROSS-APPELLANT

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As the United States argued in its opening brief (U.S. Br. 91-104), this Court should vacate and remand defendants' sentences.[1] Both sentences are procedurally

[1] The government's opening brief will be cited as "U.S. Br. ___." Barnes's and Brown's response/reply briefs will be cited as "Barnes R.Br. ___" and "Brown R.Br. ___," respectively.

flawed because the district court refused to state the specific reasons for its decision to grant defendants dramatic downward variances from the advisory Sentencing Guidelines range or explain how those sentences are justified in light of the factors set forth in 18 U.S.C. 3553(a).

More importantly, both sentences are indefensible as a substantive matter. The district court imposed prison terms of 12 months for Barnes and 6 months for Brown—80% to 90% lower than the bottom of the 70-87 month advisory Guidelines range for these two corrections officers who ran the Muskogee County Jail (MCJ). These officials (a) ordered or encouraged their subordinates to assault compliant and fully-restrained inmates; (b) personally carried out assaults against inmates; and (c) sought to conceal this culture of violence by retaliating and threatening reprisals against employees who reported the mistreatment. See U.S. Br. 6-15.

Defendants' conduct called for substantial terms of incarceration, not the extremely lenient sentences handed down by the district court.

ARGUMENT

DEFENDANTS' SENTENCES WERE PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

A. Defendants Ignore The Requirements Of 18 U.S.C. 3553(c)(2)

As the government argued in its opening brief (at 93-97), the district court violated 18 U.S.C. 3553(c)(2) and committed "significant procedural error" in

"failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall* v. *United States*, 552 U.S. 38, 51 (2007). "Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." *Rita* v. *United States*, 551 U.S. 338, 357 (2007).

Barnes contends, however, that the judge's duty was not "to give elaborate explanations" but only to provide "a record by which [the reviewing court] can discern whether [he] considered the § 3553(a) factors." Barnes R.Br. 11 (quoting *United States* v. *Sells*, 541 F.3d 1227, 1236 (10th Cir. 2008)). But Barnes cites the wrong standard. In *Sells*, the court imposed a *within*-Guidelines sentence. 541 F.3d at 1236-1237. This Court has made clear, however, that when "the sentence falls *outside* the Guidelines range," the sentencing court "*must* provide specific reasons for imposing a sentence different from the Guidelines." *United States* v. *Fraser*, 647 F.3d 1242, 1246 (10th Cir. 2011) (emphasis added); accord *United States* v. *Lente*, 647 F.3d 1021, 1034-1035 (10th Cir. 2011); see also U.S. Br. 94-95. Barnes, like Brown, fails even to cite Section 3553(c)(2), much less the controlling decisions that elucidate its requirements.

The district court's explanatory burden was particularly heavy here. When a court imposes an outside-Guidelines sentence, it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. "[A] major departure," as was

granted here, "should be supported by a more significant justification than a minor one." *Ibid.* To satisfy Section 3553(c)(2), "a district court must describe the salient facts of the individual case, including particular features of the defendant or of his crime, and must explain for the record how these facts relate to the § 3553(a) factors." *United States* v. *Mendoza*, 543 F.3d 1186, 1192 (10th Cir. 2008). Thus, it was procedural error for the court simply to "recite the § 3553(a) factors, without specifically connecting them to the facts of the case in order to explain why they supported a downward variance." *Ibid.*; accord *United States* v. *Chavez*, 723 F.3d 1226, 1232 (10th Cir. 2013).

Even the district court did not believe it met these standards, because it did not think it had to. In response to government counsel's request that it "make a record of the 3553(a) findings," the court responded: "I think I've been affirmed on that before, that I'm not required to do it." Vol. 2 at 1138; see also Vol. 2 at 1095-1096. And the boilerplate statements the court made in explaining how Barnes's sentence purportedly comported with the Section 3553(a) factors, which Barnes suggests were legally sufficient (at 26-27 (quoting Vol. 2 at 1093-1094)), are the same statements the court made during Brown's hearing (Vol. 2 at 1165-1166) and in other cases involving different defendants, see, *e.g.*, *Sells*, 541 F.3d at 1233-1234.

The statement of reasons is also the vehicle through which the district court must address "material, non-frivolous arguments" raised by a party. *Lente*, 647 F.3d at 1035 (citation omitted) (finding procedural error where court failed to address sentencing-disparity argument); accord *United States* v. *Morgan*, Nos. 13-6025, 13-6052, 2015 WL 6773933, at *20 (10th Cir. Nov. 6, 2015) (unpublished) (same). Thus, it is not enough for the district court merely to mention defendants' lack of criminal history and low risk of recidivism. U.S. Br. 93-97; see Brown R.Br. 32-33; Barnes R.Br. 26.

The government argued that a Guidelines sentence was necessary to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, and deter other corrections officers. Vol. 2 at 1087-1089, 1137, 1143; Vol. 1 at 674-678, 701-704; see 18 U.S.C. 3553(a)(2)(A)-(B). Government counsel especially emphasized the need for adequate sentences to deter similar conduct. As she argued at Brown's hearing: "[D]eterrence is a factor that applies not just to Mr. Brown" but is "something that applies to society as a whole. * * * [I]t is important for his fellow corrections officers to understand that this is a crime that will be punished and that it is not acceptable." Vol. 2 at 1143; see also Vol. 2 at 1087-1089 (Barnes's hearing); U.S. Br. 100-101. Yet apart from simply reciting the Section 3553(a) factors, the court did not address the

government's "material, non-frivolous" deterrence point. See Vol. 2 at 1089-1090, 1093-1094, 1160-1161, 1165-1166.

"After settling on the appropriate sentence, [the court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. Rather than "the very end of the sentencing hearing," however, Barnes insists it is "the record as a whole" that supplies the key to the court's "thought process," and he cites a litany of topics on which the court questioned both sides. Barnes R.Br. 11-29. Brown, for his part, simply argues that the court's generalized statements reciting the Section 3553(a) factors, coupled with the preceding discussion at his hearing, are sufficient—without regard to the requirements of Section 3553(c)(2). Brown R.Br. 28-29 (citing Vol. 2 at 1160-1162).

But again, the decisions Barnes cites for his "record as a whole" approach (at 11) are beside the point. In both cases, the reviewing courts' comments about the need to "assay the record as a whole to gauge the sentencing judge's thought process" were directed at defendants' contentions that the sentencing courts had failed to respond to particular arguments. See *United States* v. *Davis*, 599 F. App'x 815, 820 (10th Cir. 2013) (unpublished), cert. denied, 134 S. Ct. 1565 (2014); *United States* v. *Clogston*, 662 F.3d 588, 592 (1st Cir. 2011). Neither court suggested that the "record as a whole" could substitute for Section 3553(c)(2)'s

clear requirement that the sentencing court state its specific reasons for varying from the Guidelines range.

In any event, as discussed below, the district court's questions and comments on various topics during the hearings do not supply the missing reasons for its decision to grant the downward variances. And none of the issues identified by Barnes, whether considered alone or collectively, justify sentencing these defendants to imprisonment for only a fraction of the time recommended by the Guidelines.[2]

B. None Of The Topics On Which The District Court Asked Questions Supplies The Specific Reasons For The Downward Variances, And None Could Justify Variances Of This Magnitude

1. Barnes's Objections To Two Enhancements

Even though it overruled his objections, Barnes contends the district court "saw merit" in his arguments against two contested Guidelines enhancements—the two-level enhancement for restraint of victim, U.S.S.G. § 3A1.3, and the four-level enhancement for Barnes's role as an organizer or leader of criminal activity involving five or more participants, U.S.S.G. § 3B1.1. Barnes R.Br. 14; see Vol. 2

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[2] The arguments addressed in Section B, *infra*, were made by Barnes. Brown adopts and incorporates Barnes's sentencing arguments but does not explain how these arguments apply to Brown. See Brown R.Br. 39. Accordingly, although the following discussion responds primarily to Barnes, the government's responses apply equally to Brown to the extent Barnes's arguments are relevant to Brown.

at 1030-1036, 1044-1045; see also Vol. 2 at 1116-1118 (Brown's hearing). Barnes does not identify what was "meritorious" about his rejected objections.

The district court remarked that Barnes's objection to the physical-restraint enhancement was "not illogical," and that just because the court was not persuaded "for purposes of the objection" to the leadership enhancement, "doesn't mean they won't be taken into account in the variance proposal." Vol. 2 at 1030, 1045. Such cryptic remarks provide no insight into whether the court *in fact* relied on defendants' unmeritorious objections as a basis for varying downward, or whether, if the court did so rely, on what basis it believed the facts that made these *upward* adjustments appropriate nonetheless justified enormous *downward* variances.

Indeed, relying on defendants' objections to these enhancements as grounds for varying downward would have been substantively unreasonable. The facts justifying these enhancements underscored the *aggravating*, not mitigating, nature of defendants' offenses. Barnes's counsel argued at sentencing he did not believe Section 3A1.3 was intended to address a situation in which the victim is, "by virtue of their custody and transport, in physical restraint as of necessity." Vol. 2 at 1028-1029. But as the district court and other courts have recognized, the lawfulness of the physical restraint does not preclude application of Section 3A1.3. Vol. 2 at 1031, 1117; see, *e.g.*, *United States* v. *Gray*, 692 F.3d 514, 522 (6th Cir. 2012); *United States* v. *Clayton*, 172 F.3d 347, 353 (5th Cir. 1999); *United States*

v. *Evans*, 85 F.3d 617 (4th Cir. 1996) (unpublished); see also *United States* v. *LaVallee*, 439 F.3d 670, 704 (10th Cir. 2006) (upholding imposition of physical-restraint enhancement on prison guard). Barnes's trial counsel seemed to suggest there is something unfair about enhancing Barnes's sentence based on the abuse of "restrained" inmates. But as the Fifth Circuit has explained, in a case involving a chief deputy sheriff's assault on a lawfully handcuffed arrestee, the enhancement applies because "the physical restraint of a victim during an assault is an aggravating factor that intensifies the wilfulness, the inexcusableness and reprehensibleness of the crime and hence increases the culpability of the defendant." *Clayton*, 172 F.3d at 353.

Equally perplexing is how Barnes's unsuccessful effort to avoid the leadership enhancement supported a downward variance. There certainly is no requirement, as Barnes argued, that he had to have directed *five* people to hurt an inmate for the enhancement to apply. Vol. 2 at 1041-1042. All the government had to prove was that "five persons participated in the criminal venture, and that Defendant exercised leadership control over at least one person." *United States* v. *Cruz Camacho*, 137 F.3d 1220, 1224 (10th Cir. 1998). As the court found: "[T]he defendant was a leader or organizer of five or more participants who carried out his directives, which violated the rights of the victims, making the enhancement appropriate in this case." Vol. 2 at 1045; see also Vol. 2 at 1118 (finding Brown a

"manager or supervisor" for purposes of Guidelines § 3B1.1 three-level enhancement). Barnes's leadership role was undeniable and an aggravating factor.

Moreover, even if the court found that Barnes's arguments against the two enhancements provided a basis for varying downward, that would neither explain nor justify *the size* of the variance. Eliminating the six-level upward adjustment altogether would have left Barnes with a total offense level of 21 (see Vol. 4 at 11) and a recommended Guidelines range of 37-46 months, see U.S.S.G. Sentencing Table—more than *triple* the prison term the court imposed.

2. Dangerousness Of The Inmates

Barnes further suggests the district court may have granted the downward variances because defendants needed to protect the jail from violent inmates. Barnes R.Br. 14-18. Not only did the court cite no such reason, as required by Section 3553(c)(2), but assaulting and condoning the assault of fully compliant, restrained inmates because of their perceived dangerousness is not a legitimate approach to discouraging inmate violence or a reasonable basis for a downward variance.

First, the court never stated that it granted the variances because of the inmates' perceived dangerousness. The court heard argument from and asked questions of both sides on this topic. Barnes's counsel admitted that "the case law says you cannot use punitive measures as a prophylactic measure to prevent violent

behavior in the future." But, he emphasized, "the law doesn't say you can't consider that when you're fashioning an appropriate sentence." Vol. 2 at 1055. While the court appeared to agree it *could* consider the point as part of "the nature and circumstances of the offense" (Vol. 2 at 1055), the court also did not state that it was persuaded to grant the variances for that reason. Instead, the court repeatedly emphasized that "we have a law enforcement officer with the highest responsibility at the jail to prevent wrongdoing, and it didn't happen. * * * But really, I mean, this was his job." Vol. 2 at 1059; see also Vol. 2 at 1056 ("And that would be, above all, your client's job would be to stop it."); accord Vol. 2 at 1105, 1113-1114 (Brown's hearing).

The court asked questions about the reputed dangerousness of Jace Rice (Vol. 2 at 1078), but as government counsel noted, there was no evidence in the record other than Barnes's own reported account at the pre-arrival meeting about Rice's alleged conduct in his *previous* jail. Vol. 2 at 1079. The court asked government counsel whether she agreed "that a culture of fear and intimidation is probably necessary to keep control in a jail" (Vol. 2 at 1077), but she did not stop at the answer "Absolutely," as Barnes's brief quotes (at 15). Instead, she went on to emphasize that while a legitimate "show of force"—*i.e.*, staff standing there to "create a presence"—may be appropriate, "that is different than people being thrown out on their heads." Vol. 2 at 1077; see also Vol. 2 at 1142 (Brown's

hearing). After hearing from both sides, the district court did *not* say it had concluded that the perceived dangerousness of the inmates provided a basis for a downward variance.

Barnes suggests the district court reduced defendants' sentences because it agreed that the "meet-and-greets" served a "very legitimate law enforcement purpose" but perhaps went too far. Barnes R.Br.16. This suggestion, however, is contradicted by the court's own findings emphasizing the complete lack of legitimate security purpose for the violence visited on compliant, restrained, and powerless inmates. The court cited jailers' accounts that inmates were "prohibited from stepping out of the transport vehicle as the deputies grabbed the restrained and compliant inmate, pulled the inmate from the vehicle, and threw them to the concrete ground. Most inmates landed face-down on the concrete pavement unable to move due to their restraints." Vol. 2 at 1044-1045. Far from endorsing the notion that defendants' alleged security purpose mitigated their culpability, the court found instead that "in general, * * * there was a continuum of violence perpetrated against prisoners at the -- at the Muskogee County Jail not for purposes of maintaining security, but for purposes of punishment or retribution." Vol. 2 at 1115; accord Vol. 2 at 1027 (Barnes's hearing).

Thus, accounts of the inmates' purported violence at their originating jails—whether accurate or not—cannot excuse defendants' abuse (and tolerance of abuse)

of those inmates when they arrived at MCJ compliant, restrained, and vulnerable, or justify a downward variance on that ground. Barnes's focus on the meet-and-greets also disregards evidence at trial that Barnes, assisted by Brown, personally assaulted Jeremy Armstead and Alton Murphy, two inmates at MCJ who did nothing to warrant the use of force. See U.S. Br. 11-12, 46, 89 n.14.

No one doubts that running a jail is a difficult undertaking. But the illegal and gratuitously violent acts committed here did not come about because of the difficult task Barnes and Brown faced in controlling violent inmates (Barnes R.Br. 18) and do not justify a major downward variance for either defendant.

3. Susceptibility Of Law Enforcement Officers To Abuse In Prison

Barnes maintains the district court "made plain" another reason for reducing the sentence—that his status as a former law enforcement officer "would place him at significant risk of injury, or worse, in jail," a risk Barnes believes was "not denied by the government." Barnes claims that as a result, he would require "harsh" protective measures. Barnes R.Br. 22, 36-37.

Barnes's argument rests on speculation and misleading characterizations of the relevant colloquies. The court heard arguments from both sides, at both sentencings, on the issue whether Barnes and Brown would be at risk in prison because they are former corrections officers. But in neither these exchanges nor its statements of reasons did the court cite defendants' alleged risk of abuse in prison

or "harsh" confinement conditions as a specific reason, as Section 3553(c)(2) requires, for imposing sentences far below the recommended Guidelines range. See Vol. 2 at 1067, 1071, 1086-1094, 1128, 1137-1138, 1160-1166; Supp. R. 3-4, 7-8.

Even assuming the court granted the downward variances in part because of defendants' alleged susceptibility to abuse, both the variances and their magnitude are substantively unreasonable.

First, defendants' assertions that they would be at risk were unsupported by any evidence in the record.[3] No evidence was presented that Barnes or Brown would be unusually vulnerable to assault in prison or that the federal Bureau of Prisons (BOP) would be unable to manage their imprisonment. Moreover, Barnes's claim that "given heightened concerns for his safety, he will be housed in a segregated unit inside the prison, deepening his social isolation and further restricting his ability to work, recreate, and participate in educational or vocational programs" (Barnes R.Br. 31-32) is entirely without factual support. The incarceration of former law enforcement officers is not extraordinary, and the BOP decides where and how to house any particular inmate. *United States* v. *Spano*,

[3] Barnes's new argument that he was vulnerable because his case allegedly received considerable media attention (see Barnes R.Br. 37 (citing Google hits)) was neither presented to nor relied on by the district court.

476 F.3d 476, 479 (7th Cir. 2007); cf. *United States* v. *Cabanillas*, 318 F. App'x 610, 614 (10th Cir. 2008) (unpublished) (upholding variance denial for former cooperating gang member who feared retaliation, noting that such incarceration was "not uncommon" and expressing confidence that BOP would "take all steps necessary"). BOP's plans for housing Barnes and Brown have not been announced, and neither the district court nor the parties know their expected conditions of confinement. See *Spano*, 476 F.3d at 479.

Second, Barnes misstates our position when he cites as a "mistake" the government's supposed contention that a defendant's susceptibility to abuse in prison can justify a variance "only" in situations where media coverage was overwhelming. Barnes R.Br. 36. Our opening brief never suggested that downward adjustments on this ground were appropriate *only* in the case of enormous media coverage. Instead, we stated, accurately, that courts generally have declined to reduce sentences on account of a law enforcement officer's claimed susceptibility to abuse in prison absent exceptional circumstances, which are not present here. U.S. Br. 102-103. As this Court has recognized, "in many instances, committing a crime while acting under color of law will result in a higher sentence * * * rather than a lower sentence." *LaVallee*, 439 F.3d at 708; see, *e.g.*, *United States* v. *Van Matre*, 524 F. App'x 307, 308-309 (8th Cir. 2013) (unpublished) (affirming denial of downward adjustment for police officer); *United*

States v. *Maybou*, 379 F. App'x 489, 490-492 (6th Cir. 2010) (unpublished) (affirming upward variance for former sheriff's deputy/prison guard); *United States* v. *Arroyo*, 546 F.3d 54, 56-58 (1st Cir. 2008) (upholding upward departure for police officer); *United States* v. *Strange*, 370 F. Supp. 2d 644, 649 (N.D. Ohio 2005) (rejecting downward departure for former deputy sheriff because his was "not an exceptional case").

We are hard-pressed to identify any case where a court granted (or upheld) a downward departure or variance for a former law enforcement officer on risk-of-abuse grounds without any record to support it, and defendants cite none. As the Supreme Court explained in affirming the variance denial in *Rita*: "The record makes out no special fear of retaliation, asserting only that the threat is one that any former law enforcement official might suffer." 551 U.S. at 359-360; cf. *Koon* v. *United States*, 518 U.S. 81, 112 (1996) (upholding downward departure where district court found the "extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make [defendants] unusually susceptible to prison abuse"); *LaVallee*, 439 F.3d at 708 (upholding downward departure because of police officers' susceptibility to abuse in prison where evidence demonstrated that a publication distributed among federal inmates had reported on the investigation; that because of their notoriety, defendants were on 23-hour lockdown; and that other inmates threatened defendants' lives).

Barnes offers *Spano* (at 36), in which the Seventh Circuit, affirming a sentence *at the top* of the recommended Guidelines range, stated in dicta that the district court could have considered whether to give defendant a lower sentence because he was a former police officer. 476 F.3d at 479. The court of appeals held, however, that the district court's refusal to do so was not unreasonable, suggesting there was no need to lower the sentences of allegedly endangered prisoners, as BOP had appropriate housing options. *Ibid.* That court's decision in *United States* v. *Ramirez-Gutierrez*, 503 F.3d 643, 646 (7th Cir. 2007), also cited by Barnes (at 36), is even less relevant; there, the court reserved judgment on whether harsh conditions of pretrial confinement—not at issue here—could justify a reduced sentence.

Lacking support in the record, Barnes tries to pin a concession on the government as to the "significant risk of injury, or worse" (Barnes R.Br. 22) he would face in prison. To do so, Barnes mischaracterizes both the court's comments about government motions for downward departures for at-risk cooperating witnesses and the government's position regarding the alleged risk Barnes and Brown would face in prison.

For starters, Barnes quotes (at 24) the district court's comment that "almost every time I grant a 5K motion in a case, one of the reasons I give is because of the

prospect of danger to a -- to an inmate who cooperates." Government counsel agreed there was "a possibility" of danger in that circumstance. Vol. 2 at 1087.

From that exchange, in which the judge reflected on his *own* motivations for granting what presumably were Guidelines § 5K1.1 motions for downward departure based on substantial assistance to authorities, Barnes leaps to this conclusion: "As the judge recognized, it is precisely because federal prosecutors accept the hardship-driven, equitable imperative to shorten the period of incarceration for at-risk prisoners that they ask federal courts to lower sentences for cooperating witnesses." Barnes R.Br. 23. But nowhere did the judge or government counsel make any statements about whether *prosecutors* asked for downward departures in these unknown cases because cooperating defendants—not, as here, non-cooperating corrections officers—were at risk for abuse in prison. The principal purpose of a Section 5K1.1 motion for downward departure, after all, is to create an incentive for defendants to *cooperate* with law enforcement agencies. See *United States* v. *Mariano*, 983 F.3d 1150, 1155 (1st Cir. 1993); *United States* v. *Lewis*, 896 F.2d 246, 249 (7th Cir. 1990). That did not happen here.

Barnes further contends that "[t]he prosecutor was forced to agree" in response to the judge's question whether "the prospect of danger to a law enforcement officer is also great." Barnes R.Br. 24 (quoting Vol. 2 at 1087). But

government counsel's actual response was, "I agree there is a possibility of danger, Your Honor. But the Bureau of Prisons has protections in place." Vol. 2 at 1087; see also Vol. 2 at 1086 (emphasizing that argument that prison is too dangerous "assumes the Bureau of Prisons can't do its job, and it assumes that a good jailer can't stop the violence at their jail"). Likewise, after the court asked, during Brown's hearing, whether government counsel would agree "the level of danger to a law enforcement officer in prison is greater" than to other inmates, she responded: "I don't think so because there are special procedures in place, and they get greater attention, greater sympathy, greater protections from the law enforcement officers who are there." Vol. 2 at 1137-1138. Thus, the government never agreed that Barnes's law enforcement career would "place him at significant risk of injury, or worse." Barnes R.Br. 22.

Given the absence of a record demonstrating that Barnes and Brown are particularly at risk for abuse, there is no justification for giving these supervisory corrections officers such light sentences because of their status as former corrections officers. Their mistreatment of the inmates in their care necessitates a substantial, not a short, period of incarceration. And even if some variance were permissible, the 83% and 91% reductions from the bottom of the recommended Guidelines range for Barnes and Brown, respectively, are unreasonable.

4. Barnes's Alleged Launching Of The Federal Investigation

Barnes contends the district court found significant that Barnes himself "triggered the investigation" that led to his arrest and convictions. Barnes claims he "set off the federal probe when he reported that a jailer under his supervision had abused a prisoner." Barnes R.Br. 25. First, as is true of the other topics Barnes cites, the court asked a question on this subject but never stated it was granting a downward variance on this basis. More importantly, however, the claim is false. Barnes did not initiate the federal investigation.

The court asked government counsel: "And it is true, in fact, that he [Barnes] started the investigation -- the federal investigation by reporting the abuse of Matt Lott, isn't it?" In responding, government counsel misspoke: "That is correct, Your Honor. That actually was found to be unfounded." Vol. 2 at 1073. What government counsel actually was agreeing to was that the report of Matt Lott's alleged abuse of inmate Josh Looney triggered the federal investigation—not that *Barnes* was the one to prompt the investigation.

Despite government counsel's slip-of-the-tongue at sentencing, the evidence at trial was clear on this point and should control. As Sheriff Charles Pearson testified, he learned that the Federal Bureau of Investigation (FBI) was looking at MCJ as a result of reports the FBI had received about Lott's alleged abuse of Looney both from Lott and another jailer, Dennis Frisbie. Vol. 2 at 2038-2039.

The Sheriff then called Barnes and encouraged him to be "fully cooperative" and to call the FBI and meet with them. Barnes did so. Vol. 2 at 2039.

Likewise, as FBI Agent Jennifer Chapman testified, the initial complaint about the alleged abuse came in the first week of June 2011. Vol. 2 at 2008-2009. Barnes called the FBI a few weeks *later* on June 27, 2011, informing Agent Rivers that Barnes "had knowledge that there was an investigation concerning the Muskogee County Jail" (Vol. 2 at 2011) and offering to come and speak to the FBI (Vol. 2 at 2001); see also Vol. 2 at 1330, 1333 (opening statement by Barnes's counsel that investigation began with Dennis Frisbie and Matt Lott contacting FBI). Agent Rivers did not accept Barnes's offer. Vol. 2 at 2001.

Thus, there was no "paradox" in which Barnes's report instigated the FBI investigation. Barnes R.Br. 26. That Barnes contacted the FBI after an alleged incident had already been reported is quite different from "set[ting] off the federal probe" himself. Barnes R.Br. 25.

5. Other Purported Reasons For The Variances

Barnes suggests that other factors further explained the variances. None does.

a. He claims the district court was unimpressed with the victim-inmates' injuries. Barnes R.Br. 19-22. Yet again, however, the court asked questions about the nature of the victims' injuries but never cited this ground as a reason for the

variances. In any event, no downward variance on this basis—and surely none of this magnitude—would be substantively reasonable on these facts. Certainly there are situations where the lack of grave injury to victims might be mitigating. But here defendants' conduct in encouraging and condoning (and in Brown's case, participating in) the slamming of inmates' heads into the concrete at the meet-and-greets, and Barnes's gratuitous assault (with Brown's support) on Jeremy Armstead, were particularly vicious and calculated to cause pain and inflict serious injury.

The circumstances of these assaults exacerbate, not diminish, defendants' culpability. Medical supervisor Kymberlie Shamblin specifically cautioned Barnes and other jailers at the pre-arrival meeting that Gary Torix had a preexisting head injury. Barnes's response was to joke to jailers, "be sure and don't knock him into everything on your way in, something to that effect" (Vol. 2 at 2148) and to egg them on with—"Let's do it" (Vol. 2 at 1873). Torix's resulting "nose dive" to the ground (Vol. 2 at 1800) caused him to suffer lacerations across his forehead; he had "blood coming down his face" and was "actually dripping blood" as he was carried into the jail. Vol. 2 at 1802, 2080; see also U.S. Br. 8-9. Barnes's direction to the deputy pulling Jace Rice from the transport vehicle, that "the first thing that touched the ground should be his head" (Vol. 2 at 1442, 1458), culminated in Rice suffering a knot, or red bump, on his head. Vol. 2 at 1451, 1750. Herbert Potts,

grabbed from the vehicle by Brown personally (Vol. 2 at 1921-1922, 1963-1964), also suffered a gash to the head (Vol. 2 at 1798). It should not need to be repeated, but head-first slams to the concrete of fully shackled inmates unable to brace themselves are quite serious offenses that inflict pain and threaten serious harm. That no lasting injury may have been caused does not mitigate the offense.

b. Barnes further suggests that the district court was "struggling with the credibility" of certain government witnesses. Barnes R.Br. 20-21. In response to government counsel's emphasis on trial testimony from jail staff that Barnes retaliated against or threatened staff who attempted to report the violence at MCJ, the court answered: "[W]hat you're saying is * * * there was direction through intimidation of employees. But what you can't tell me is the credibility the Court gives to that testimony." Vol. 2 at 1084.

Such an enigmatic comment does not establish that the court granted the variances because it decided some government witnesses were not credible or justify the variances in any event. As detailed in our opening brief, numerous witnesses testified at trial that Barnes and Brown created a culture of fear among MCJ staff by threatening or retaliating against employees if they attempted to report abusive behavior. See U.S. Br. 13-15. Likewise, defendants' presentence reports provide examples of defendants' "direction through intimidation of employees." Vol. 2 at 1084; see Vol. 4 at 6-7, 37-38. Any implication from the

court that this evidence was not credible would contradict its own findings that "the description, characterizations, [and] conclusions presented" in the presentence reports accurately depicted the offense conduct. Vol. 2 at 1027, 1115. A sentencing court may not vary from the advisory Guidelines range based on internally inconsistent credibility findings. *United States* v. *Brown*, 453 F.3d 1024, 1026 (8th Cir. 2006).

C. The Procedural Error Was Not Harmless

Barnes argues that even if there was procedural error, it was harmless. He contends that no evidence suggests the district court would have imposed higher sentences if it had explained its reasons. Barnes R.Br. 29.

This Court has made clear that "[f]ailure to provide proper explanation for the chosen sentence is reversible procedural error." *United States* v. *Peña-Hermosillo*, 522 F.3d 1108, 1112 (10th Cir. 2008). As the Court explained in *Mendoza*, if a party considers a sentencing court's Section 3553(c)(2) statement of reasons insufficient, "it must *either* timely object during the sentencing hearing *or* satisfy plain error review by explaining how the outcome might have been different had the district court provided a procedurally adequate verbal explanation for its choice of sentence." 543 F.3d at 1194 (emphasis added). Here, the government objected at both sentencing hearings to the court's statement of

reasons. The government need not also demonstrate that the outcome would have been different had the court complied with the statute.

The district court's error was not simply a failure to utter magic words. By articulating reasons, a sentencing court assures reviewing courts and the public "that the sentencing process is a reasoned process." *Rita*, 551 U.S. at 357. Here, the court not only declined to state the specific reasons for the downward variances, but it failed to address "the material, non-frivolous arguments" raised by a party. *Lente*, 647 F.3d at 1035; *Morgan*, 2015 WL 6773933, at *20. The government argued that a Guidelines sentence was necessary to promote respect for the law, provide just punishment, and afford adequate deterrence to other corrections officers. The "express consideration" of these factors "might have convinced the court to reach a different sentence." *Lente*, 647 F.3d at 1038; accord *Morgan*, 2015 WL 6773933, at *20.

D. This Court Should Address The Substantive Reasonableness Of Defendants' Sentences And Find Both Sentences Unreasonably Lenient

Barnes maintains the existence of procedural error should "block[] consideration" of the government's substantive challenge to defendants' sentences. Barnes R.Br. 30. But where a court can "easily conclude" that the sentences are substantively unreasonable, it can and, in our view, should, address it. See *Morgan*, 2015 WL 6773933, at *21, *24 (reversing probationary sentence imposed

on public official convicted of bribery that was "grossly at odds with the sentencing guidelines"). This is such a case.

1. The Alleged Dearth Of Evidence Of Brown's Guilt Provides No Justification For His Downward Variance

Rehashing the arguments he made in his opening brief challenging the sufficiency of the evidence, Brown contends the district court's decision to sentence him to only six months' imprisonment is substantively reasonable because of the "dearth of credible evidence against him." Brown R.Br. 30-32, 37. This argument is meritless.

First, the district court did not state, as again would be required under Section 3553(c)(2), that it was granting Brown a huge downward variance because it doubted the sufficiency of the evidence of Brown's guilt, despite having denied Brown's motion for judgment of acquittal. See Vol. 1 at 612-622, 706-707. In any event, such a basis for a downward variance would be illegitimate. The jury convicted Brown on three counts, and as we argued in our opening brief, the evidence was legally sufficient to support that verdict. U.S. Br. 30-53. The court could not grant a downward variance—and it gave no indication that it did—based on a view that Brown's convictions resulted from inadequate or suspect evidence. See *Morgan*, 2015 WL 6773933, at *16. As this Court has recognized, the sentencing court "cannot substitute 'its view of the evidence . . . for the jury's verdict.'" *Ibid.* (quoting *United States* v. *Bertling*, 611 F.3d 477, 481 (8th Cir.

2010)). "Once the jury has spoken, its verdict controls unless the evidence is insufficient or some procedural error occurred." *Ibid.* (quoting *United States* v. *Rivera*, 411 F.3d 864, 866 (7th Cir. 2005)); accord *id.* at *36 (Holmes, J., concurring).

2. The Length Of Defendants' Sentences Is Substantively Unreasonable

Barnes contends the district court arrived at his sentence by "careful[ly] balancing" the "mitigating reasons" against "Barnes's failure to halt the abuse." Barnes R.Br. 30. But there was no such "careful balancing." As discussed in Section B, *supra*, the reasons Barnes posits for the variances were not mitigating, and more than "fail[] to halt the abuse," Barnes actively *encouraged* the mistreatment of inmates at the meet-and-greets and personally assaulted Armstead and Murphy.

Furthermore, the court ignored entirely the Section 3553(a) factors emphasized by the government—in particular, the need for defendants' sentences to promote respect for the law, provide just punishment for the offense, and afford adequate deterrence to criminal conduct. 18 U.S.C. 3553(a)(2)(A)-(B). As this Court recently recognized: "General deterrence comes from a probability of conviction and significant consequences. If either is eliminated or minimized, the deterrent effect is proportionately minimized." *Morgan*, 2015 WL 6773933, at *22. Because deterrence is "a crucial factor" in cases involving "breach of trust"

and because the district court "did not seriously consider the need for the sentence imposed to promote respect for the law and to provide just punishment for the offense," this Court in *Morgan* reversed a probationary sentence as unreasonable. *Id.* at *22-23.

The need for just punishment and deterrence was equally crucial in *McQueen*, where the Eleventh Circuit reversed lenient custodial sentences imposed on corrections officers. The court found the sentences "wholly insufficient" to achieve the "just deserts" purpose of Section 3553(a) and that they "wholly fail[ed] to adequately deter criminal conduct"—an "especially compelling" need in the prison setting, where inmates are at the mercy of corrections officers. *United States* v. *McQueen*, 727 F.3d 1144, 1157-1158 (11th Cir. 2013); accord *United States* v. *Hooper*, 566 F. App'x 771, 773 (11th Cir. 2014) (unpublished) ("[G]eneral deterrence is especially compelling in the context of officials abusing their power."); see also U.S. Br. 100-102. That McQueen was subject to a potentially longer sentence than Barnes and Brown does not diminish the force of the Eleventh Circuit's reasoning. "Extraordinarily lenient sentences," as were handed down both there and here, "sap the goal of general deterrence." *McQueen*, 727 F.3d at 1159.

Barnes further contends that a year in prison is not insignificant, an argument based partly on his unsupported assumption that his housing conditions

will be particularly harsh. Barnes R.Br. 31-32. He also cites the probationary sentence the Supreme Court found appropriate in *Gall*. Barnes R.Br. 32. There, however, the Court emphasized "the unique facts of Gall's situation," including Gall's unusual voluntary withdrawal from the conspiracy and "self-motivated rehabilitation." 552 U.S. at 54, 56-59. No such unique facts exist here. Nor can these light sentences be justified because of the collateral consequences of defendants' prosecution and conviction, such as the loss of their jobs and reputational harm. Barnes R.Br. 33. Section 3553(a)(2) makes plain that it is "the *sentence* imposed" that must comport with the statute's sentencing considerations. *Morgan*, 2015 WL 6773933, at *18 (quoting *United States* v. *Bistline*, 665 F.3d 758, 765 (6th Cir. 2012)).

That the district court sentenced both defendants to prison does not inoculate their sentences from meaningful review. This Court and others have reversed downward variances that resulted in custodial sentences where those variances are not "reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *United States* v. *Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (citation omitted); see, *e.g.*, *id.* at 1308-1309 & n.10 (reversing downward variance resulting in 57-month sentence, given "undeniably sparse record" that did not distinguish defendant "in any way from the run-of-the-mill career offender"); *United States* v. *Smith*, Nos. 14-3744, 14-3721, 2016 WL

336304, at *2-3 (7th Cir. Jan. 28, 2016) (reversing downward variance resulting in 14-month sentence imposed on police officer); *United States* v. *Dautovic*, 763 F.3d 927, 934-935 (8th Cir. 2014) (reversing downward variance resulting in 20-month sentence imposed on police officer), cert. denied, 135 S. Ct. 1441 (2015); *McQueen*, 727 F.3d at 1155-1161 (reversing downward variances leading to 12-month and 1-month sentences for corrections officers). The record in support of the variances given Barnes and Brown is every bit as "sparse." *Friedman*, 554 F.3d at 1308 n.10.

Finally, both Barnes and Brown fault the government's citation of comparison cases (U.S. Br. 102 n.17) to illustrate the greater terms of imprisonment federal courts routinely impose on law enforcement officers for violations of 18 U.S.C. 241 or 242. Barnes R.Br. 38-39; Brown R.Br. 35-37. But while defendants highlight factual differences in a few cases, the critical takeaway remains unaltered: in numerous cases involving civil rights offenses by law enforcement and corrections officers—even those involving Guidelines ranges at or below the recommended ranges here—federal courts have imposed prison terms far greater than what Barnes and Brown received. See, *e.g.*, *United States* v. *Carson*, 560 F.3d 566, 573, 586 (6th Cir. 2009) (affirming 33-month sentence within Guidelines range of 33-41 months); *United States* v. *Conatser*, 514 F.3d 508, 512, 520-522 (6th Cir. 2008) (affirming 70-month sentence within Guidelines

range of 70-87 months); *LaVallee*, 439 F.3d at 679, 702-703 (affirming 30-month and 41-month sentences within Guidelines ranges of 27-33 months and 41-51 months, respectively); *United States* v. *Bailey*, 405 F.3d 102, 112, 115 (1st Cir. 2005) (affirming 41-month sentence within Guidelines range of 41-51 months); *Strange*, 370 F. Supp. 2d at 646-647, 651 (imposing 21-month sentence for defendant with Guidelines range of 27-33 months, where beatings were "condoned and even ordered by superior officers"); see also Brown R.Br. at 35-37 (citing several of these cases).[4]

Tellingly, Barnes and Brown have failed to identify a single case in which a court has imposed (or upheld) a term of incarceration for supervisory corrections officers found guilty of such serious civil rights offenses, including the physical abuse of inmates in their care and custody, as short as the prison terms imposed on these defendants.

[4] The sentences in *LaVallee* and *Bailey* were reviewed on appeal post-*Booker*. See *LaVallee*, 439 F.3d at 703-707; *Bailey*, 405 F.3d at 113-115.

CONCLUSION

This Court should affirm defendants' convictions, vacate defendants' sentences, and remand this case to the district court for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2) because it contains 6,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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s/ Bonnie I. Robin-Vergeer
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Date: February 1, 2016

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE/CROSS-APPELLANT, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, has been scanned with the most recent version of Symantec Endpoint Protection (version 12.1.4112.4156), and is virus-free.

s/ Bonnie I. Robin-Vergeer
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Date: February 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2016, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE/CROSS-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that on February 2, 2016, I will cause seven paper copies of the same to be sent by Federal Express overnight to this Court.

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