Nos. 17-6391 & 18-5206

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAMON WAYNE HICKMAN & WILLIAM CURTIS HOWELL,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Hon. Karen K. Caldwell, No. 6:15-cr-00042)

CORRECTED BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendants-appellants' requests for oral argument.

JURISDICTIONAL STATEMENT

This consolidated appeal is from the district court's final judgments in criminal cases. The district court entered final judgment against Damon Hickman

on November 3, 2017. (Judgment, R. 240, PageID# 2254-2260).[1] The district court entered final judgment against William Howell on February 23, 2018. (Judgment, R. 259, PageID# 2425-2431). Hickman filed a timely Notice of Appeal on November 17, 2017. (Notice of Appeal, R. 241, PageID# 2261). Howell filed a timely Notice of Appeal on February 27, 2018. (Notice of Appeal, R. 260, PageID# 2432). The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

This consolidated appeal arises out of the assault and death of a pre-trial detainee, Larry Trent, at the Kentucky River Regional Jail. Damon Hickman, a supervisory deputy jailer, pleaded guilty to two counts of willful deprivation of constitutional rights, 18 U.S.C. 242, and one count of impeding a federal investigation, 18 U.S.C. 1519. On appeal, Hickman challenges multiple aspects of his sentence. William Howell, a supervisory deputy jailer, proceeded to trial on two counts of willful deprivation of constitutional rights, 18 U.S.C. 242, and was

[1] Citations to "R. __" refer to documents, by number, on the district court docket sheet. Citations to "PageID# __" refer to the page numbers in the paginated electronic record. Citations to "Hickman Br. __" refer to the page numbers in Hickman's opening brief. Citations to "Howell Br. __" refer to the page numbers in Howell's opening brief. Citations to "Gov't Ex. __" refer to trial exhibits from the William Curtis Howell trial in the Appendix to Brief for United States as Appellee, filed concurrently.

convicted on both counts. On appeal, Howell challenges two jury instructions given at his trial. Together, these appeals raise the following issues:

1. Whether the district court erred at sentencing when it applied enhancements to Hickman's base offense level for (a) use of a dangerous weapon; (b) permanent or life-threatening bodily injuries sustained by the victim; (c) physical restraint of the victim; (d) obstruction of justice; and (e) acting under color of law.

2. Whether the district court's denial of the United States' motion under Sentencing Guidelines § 5K1.1 for a downward departure in Hickman's case is reviewable.

3. Whether the district court abused its discretion by instructing the jury, following this Court's Pattern Jury Instruction 7.14, that Howell's omission of information from his incident reports could be considered as evidence of consciousness of guilt.

4. Whether the district court plainly erred when it instructed the jury that in order to find Howell deliberately indifferent to the victim's serious medical needs, the jury had to find both that the victim had an objectively serious medical need and that Howell was subjectively aware of that need and disregarded it.

STATEMENT OF THE CASE

1. Factual Background

a. On July 5, 2013, Larry Trent was booked into the Kentucky River Regional Jail following his arrest for driving under the influence of alcohol. (Transcript, R. 275, PageID# 3675). A few days later, an inmate reported that Trent seemed confused and disoriented. (Transcript, R. 274, PageID# 3421-3423). Concerned about Trent's condition, deputy jailers moved Trent to a separate cell that enabled deputies to monitor him closely. (Transcript, R. 274, PageID# 3423-3424).

Several hours later, Supervisory Deputy Jailers Damon Hickman and William "Curt" Howell arrived at the jail for their morning shifts. (Transcript, R. 273, PageID# 3168; Transcript, R. 274, PageID# 3554). After clocking in, a supervisory jailer who had been working the night shift informed Howell that Trent was having symptoms of alcohol or drug withdrawal. (Transcript, R. 274, PageID# 3566-3568). Howell briefly spoke with Trent that morning and described Trent as incoherent and "talking out of his head." (Transcript, R. 274, PageID# 3571).

Hickman also saw Trent acting strangely in his cell that morning; Trent was talking to himself and fidgeting with the screws on the cell door. (Transcript, R. 273, PageID# 3174-3175). Because Trent was showing withdrawal symptoms,

Hickman decided to remove all of the property from Trent's cell. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3174-3175).

Hickman asked Howell to assist him in removing the property from Trent's cell. (Transcript, R. 273, PageID# 3176; Transcript, R. 274, PageID# 3575). When Hickman opened the cell door, Trent rushed forward flailing his arms, striking Hickman. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3176-3177).

Hickman then punched Trent in the face twice and Trent fell to the floor. (Transcript, R. 273, PageID# 3177-3178). Simultaneously, Howell shocked Trent with his taser. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3178). Trent got up, and shuffled toward the booking area. (Transcript, R. 273, PageID# 3178). Howell repeatedly deployed his taser in an effort to stop Trent. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3178). Hickman and Howell grabbed Trent and, although Trent was no longer posing a threat, Hickman threw Trent on the floor and kicked him in the torso. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3179-3180; Transcript, R. 274, PageID# 3580-3581).

With the help of two other deputies, Hickman and Howell carried Trent back toward his cell. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3181-3182). While deputies were carrying Trent back to his cell, Trent

got ahold of Howell's taser. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3077-3079, 3182). Trent deployed the taser, but the taser prongs still were attached to him, so he repeatedly shocked himself. (Transcript, R. 273, PageID# 3079-3080). The deputies quickly placed Trent on the floor just outside of his cell and, within seconds, retrieved the taser. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3080-3083, 3183).

While Trent was lying on the floor fully restrained by four jailers, Hickman and Howell continued to assault Trent without justification. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3084-3089, 3135-3137, 3183-3189). Howell punched Trent in the head multiple times, kicked Trent in the face, and stomped on Trent's arm. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3084-3089, 3183-3189, 3260). While Howell punched Trent, he yelled that "he was going to knock [Trent's] fucking teeth down his throat." (Transcript, R. 273, PageID# 3086-3087). Hickman, who stands 6'6" tall and weighed 390 pounds, kneeled on top of Trent and repeatedly shocked him with the taser. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3082-3089, 3135-3137, 3193, 3234). Finally, after deputies put him back in his cell, Howell stepped into the cell, kicked Trent in the head, and called Trent a "motherfucker" before closing the door. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3139-3141, 3189-3191).

b. After the assault, despite knowing that Trent had been severely beaten, shocked multiple times with a taser, and was bleeding from an open head wound, Hickman and Howell did not seek medical care for Trent. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3192-3194, 3196-3197). Hickman admitted that he knew that Trent needed medical assistance, but was afraid to summon help because he did not want to get in trouble. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3196-3197).

c. Howell called Tim Kilburn, the jail administrator, shortly after the assault. (Transcript, R. 274, PageID# 3606-3607). Kilburn's documentation of the call reflects that Howell failed to inform Kilburn of the extent of the force used against Trent and that Trent was injured. (Gov't Ex. 64; Transcript, R. 274, PageID# 3629-3633).

Howell also completed two reports—an incident report and a taser report. Both reports excluded any reference to the severe beating and injuries suffered by Trent. (Gov't Ex. 37, 44). In the incident report, Howell stated that Trent came out of his cell fighting and that Howell "tased [Trent] * * * to restrain him." (Gov't Ex. 37). When the taser was ineffective in stopping Trent, Howell reported that other deputies became involved and that Trent obtained the taser. (Gov't Ex. 37). After deputies retrieved the taser, Howell continued, they "got [Trent] under

control" and "placed [Trent] in the cell." (Gov't Ex. 37). Hickman signed Howell's incident report as a witness. (Gov't Ex. 37).

The taser report provided a similar, inaccurate account of the assault, stating only that the "subject came out fighting" and the jailers could not "get him under control." (Gov't Ex. 44). Howell admitted that the reports should have documented the uses of force against Trent and any injuries that Trent suffered, but Howell stated that he forgot to include that information. (Transcript, R. 274, PageID# 3637-3642).

d. Four hours later, a maintenance worker found Trent on the floor of his cell unresponsive and not breathing. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3203-3204). Hickman called emergency responders. (Transcript, R. 273, PageID# 3204). The first emergency medical technician to arrive noted large amounts of blood on Trent's body and in his cell. (Transcript, R. 272, PageID# 2818; Gov't Ex. 8D, 8F). Emergency responders performed CPR and transported Trent to a nearby hospital, where he was pronounced dead. (Plea Agreement, R. 116, PageID# 706-707; Transcript, R. 272, PageID# 2825-2826; Transcript, R. 273, PageID# 3035).

An autopsy showed that Trent died from massive internal bleeding caused by a pelvic fracture, and that blunt force trauma to Trent's head, trunk, and extremities contributed to his death. (Transcript, R. 273, PageID# 3035-3036;

Gov't Ex. 9). At the time of his death, Trent had multiple shoe and boot prints on his body, including a large boot print, which matched Hickman's size 15 combat boots, over his ribs. (Plea Agreement, R. 116, PageID# 707; Transcript, R. 272, PageID# 2819; Transcript, R. 273, PageID# 3029-3030, 3033; Gov't Ex. 5G). Trent suffered fractured ribs beneath the boot print, which were not caused by medical treatment. (Gov't Ex. 9).

The emergency room doctor who treated Trent explained that a significant amount of force must have been applied to Trent's pelvis in order to cause the type of severe fracture suffered by Trent. (Transcript, R. 273, PageID# 3040-3041). The doctor stated that a very hard kick could have caused the injury. (Transcript, R. 273, PageID# 3040-3041). The doctor further explained that although the pelvis fracture would have caused Trent extreme pain and resulted in blood loss that eventually would have caused him to lose consciousness, Trent likely could have survived for a minimum of 30 minutes after suffering the injury. (Transcript, R. 273, PageID# 3041-3045). Moreover, the doctor concluded, Trent likely would have survived if he had been given prompt medical attention. (Transcript, R. 273, PageID# 3045-3046).

e. Subsequently, Hickman falsified an observation log at the jail in an attempt to obstruct the investigation into Trent's death. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3202-3203; Gov't Ex. 46). Hickman

logged that he had checked on Trent numerous times after the assault and that Trent was okay each time Hickman had checked. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3202-3203; Gov't Ex. 46). Later, Hickman admitted that he had not checked on Trent and, in any event, it was clear after the assault that Trent was not okay. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3202-3203).

2. Procedural History

The United States indicted Hickman and Howell on October 27, 2015. (Indictment, R. 1, PageID# 1-5). Counts 1 and 2 charged Hickman and Howell with violating 18 U.S.C. 242, which prohibits willful deprivation of constitutional rights under color of law. (Indictment, R. 1, PageID# 2-3). Count 3 charged Hickman with violating 18 U.S.C. 1519, which prohibits falsifying a record to impede a Federal investigation. (Indictment, R. 1, PageID# 3-4).

a. Damon Hickman

i. Hickman pleaded guilty to two felony counts of violating 18 U.S.C. 242 and one felony count of violating 18 U.S.C. 1519. (Plea Agreement, R. 116, PageID# 703). As part of his guilty plea, Hickman stipulated to a factual basis for the plea. (Plea Agreement, R. 116, PageID# 703-707). Hickman also testified against Howell at Howell's trial.

The United States Probation Office prepared a presentence investigation report (PSR). In calculating the United States Sentencing Guidelines (U.S.S.G.) range, the PSR grouped together all three counts. (SEALED PSR, R. 243, PageID# 2286). Relying on the guideline applicable for aggravated assault, the PSR calculated the offense level for each of the Section 242 counts as 32. (SEALED PSR, R. 243, PageID# 2287). As instructed by Sentencing Guidelines § 3C1.1, the PSR increased by two levels the offense level—to 34—to account for Hickman's Section 1519 conviction. (SEALED PSR, R. 243, PageID# 2287). After taking into account an adjustment for Hickman's acceptance of responsibility, the PSR calculated a total offense level of 31, resulting in a Guidelines range of 108 to 135 months. (SEALED PSR, R. 243, PageID# 2287-2288, 2291).

Hickman objected to numerous aspects of the Guidelines calculation, including: (1) a four-level increase for use of a dangerous weapon, U.S.S.G. § 2A2.2(b)(2)(B); (2) a seven-level increase because the victim suffered permanent or life-threatening injuries, U.S.S.G. § 2A2.2(b)(3)(C); (3) a two-level increase because the victim was physically restrained in the course of the offense, U.S.S.G. § 3A1.3; (4) a six-level increase because he committed the offense under color of law, U.S.S.G. § 2H1.1(b)(1)(B); and (5) a two-level increase for engaging in

obstructive conduct, U.S.S.G. § 3C1.1. (Defendant's Objections to PSR, R. 203, PageID# 1378-1382).

The United States, in turn, requested a four-level upward variance to Hickman's offense level under 18 U.S.C. 3553(a)(1) and (a)(2)(A), because of the seriousness of the offense and Hickman's history of repeated assaults of inmates at the jail. (Sentencing Memorandum, R. 210, PageID# 1699-1703). The United States also submitted a motion under Sentencing Guidelines § 5K1.1 recommending a 35% downward departure. (SEALED Motion under Section 5K1.1, R. 212, PageID# 1710). The United States based the Section 5K1.1 motion on Hickman's substantial assistance in the prosecutions of other people who committed offenses at the jail. (SEALED Motion under Section 5K1.1, R. 212, PageID# 1710).

ii. The district court held a sentencing hearing on November 1, 2017. The court discussed Hickman's objections to the PSR and rejected each of them, adopting the advisory Guidelines range of 108 to 135 months. (Transcript, R. 250, PageID# 2371-2373).

The United States asked the district court to grant its request for an upward variance, bringing the Guidelines range to 168 to 210 months. (Transcript, R. 250, PageID# 2373-2384). The United States further asked the district court to grant its motion for a downward departure by departing 35% from the top end of the

upwardly varied Guidelines range (210 months). (Transcript, R. 250, PageID# 2373-2384). Accordingly, the United States asked the district court to impose a sentence of 136.5 months. (Transcript, R. 250, PageID# 2384). Hickman's attorney argued that Hickman's sentence should not be varied upward, but that he should still receive the benefit of at least a 35% downward departure. (Transcript, R. 250, PageID# 2384-2388). Hickman's attorney conceded, however, that any sentence within the 108 to 135 month guideline range "would be fair." (Transcript, R. 250, PageID# 2387-2388).

The district court denied both the United States' request for an upward variance and its motion for a downward departure under Section 5K1.1. According to the district court, it would normally "vary upward" in a case involving such egregious misconduct, but it was "not going to do that" because the "defendant has accepted responsibility for his actions and has cooperated with the government." (Transcript, R. 250, PageID# 2400). The district court then considered whether it should grant any downward departure. Recognizing that it was "not bound" by the United States' recommendation, the court rejected the United States' motion, stating that a departure was inappropriate here because Hickman's assistance was not substantial enough to dig "his way out of the hole that he has dug in this case." (Transcript, R. 250, PageID# 2401). Accordingly,

the district court determined that "a guideline sentence [was] appropriate." (Transcript, R. 250, PageID# 2400-2401).

The district court sentenced Hickman to 120 months' imprisonment on the Section 242 counts and 126 months' imprisonment on the Section 1519 count, to run concurrently. (Transcript, R. 250, PageID# 2401).

iii. The court entered judgment on November 3, 2017, and Hickman filed a timely notice of appeal. (Judgment, R. 240, PageID# 2254-2260; Notice of Appeal, R. 241, PageID# 2261).

b. William Howell

i. Howell proceeded to trial on two felony counts of violating 18 U.S.C. 242. Count 1 alleged that Howell deprived Trent of his constitutional right to be free from a jail official's deliberate indifference to his serious medical needs. (Indictment, R. 1, PageID# 2; Jury Instructions, R. 194, PageID# 1314-1317). Count 2 alleged that Howell deprived Trent of his constitutional right to be free from excessive force amounting to punishment. (Indictment, R. 1, PageID# 2-3; Jury Instructions, R. 194, PageID# 1319-1320).

After four days of testimony, but before the parties gave their closing statements, the district court held a jury instruction conference. (Transcript, R. 275, PageID# 3845-3874). As relevant here, Howell objected to two instructions. First, the United States, consistent with the language of this Court's Pattern Jury

Instruction 7.14, proposed that the court instruct the jury that Howell's omission of the uses of force from the incident reports he authored could lead to a consciousness-of-guilt inference. (Transcript, R. 275, PageID# 3846-3850). Howell objected to the instruction, suggesting that Howell's failure to include the information reflected "more of a lack of supervision in this case by administration than anything else." (Transcript, R. 275, PageID# 3848). The court overruled Howell's objection and included the instruction. (Transcript, R. 275, PageID# 3848-3849; Jury Instructions, R. 194, PageID# 1313).

Second, Howell objected to a portion of the proposed jury instruction on deliberate indifference. Howell objected to one sentence that stated that "[j]ail officials who actually know of a substantial risk to pretrial detainees' health or safety are not deliberately indifferent if the jail official responds reasonably * * * to the risk." (Transcript, R. 275, PageID# 3857-3858). Howell argued that the sentence improperly lowered the state of mind required for the jury to find that Howell was deliberately indifferent to Trent's serious medical needs. (Transcript, R. 275, PageID# 3858). The United States and the court agreed that the sentence was incorrect. (Transcript, R. 275, PageID# 3858-3859). Accordingly, the court sustained Howell's objection and modified the jury instruction by removing the objectionable sentence and replacing it with the following: "Mere negligence is insufficient to prove deliberate indifference. Deliberate indifference requires that

the defendant knew of and disregarded a substantial risk to Larry Trent's health and safety, even if the harm ultimately was not averted." (Jury Instructions, R. 194, PageID# 1315; Transcript, R. 275, PageID# 3871-3872). Neither party objected to the modified instruction. (Transcript, R. 275, PageID# 3872-3873).

ii. The jury returned guilty verdicts on both counts, finding that Howell had willfully deprived Trent of his constitutional rights because he had been deliberately indifferent to Trent's serious medical needs and had used excessive force against Trent. (Transcript, R. 275, PageID# 3959-3960; Jury Verdict, R. 195, PageID# 1340-1344). The district court sentenced Howell to 120 months' imprisonment on both Section 242 counts, to run concurrently. (Transcript, R. 271, PageID# 2642).

iii. The court entered judgment on February 23, 2018, and Howell filed a timely notice of appeal. (Judgment, R. 259, PageID# 2425-2431; Notice of Appeal, R. 260, PageID# 2432).

SUMMARY OF ARGUMENT

1. Hickman challenges the calculation of his offense level for five reasons. None of the arguments has merit.

First, Hickman argues that the district court erred in applying a four-level increase under Sentencing Guidelines § 2A2.2(b)(2)(B) to his base offense level because he used a dangerous weapon—combat boots—during the commission of

the assault. But the district did not err in concluding that Hickman's size 15 combat boots were a dangerous weapon because Hickman used them intentionally to harm Trent, inflicting severe injury.

Second, Hickman argues that the district court erred in applying a seven-level enhancement under Sentencing Guidelines § 2A2.2(b)(3)(C) to his base offense level because Trent suffered permanent or life-threatening injuries as a result of the assault. But the district court did not err in applying this enhancement because Trent died as a result of the assault. Contrary to Hickman's assertion, it is irrelevant for purposes of applying this enhancement that he may not have inflicted the blow that fractured Trent's pelvis. The district court properly considered as relevant conduct not only Hickman's assaultive actions—including punching, kicking, tasing, and kneeling on top of Trent—but also all of the conduct that Hickman aided and abetted, including Howell's repeated punching and kicking of Trent while he was restrained. Trent died as a result of the combined assaultive acts, and the district court properly applied the enhancement because Hickman was either personally responsible for those acts or aided and abetted them.

Third, Hickman argues that the district court erred in applying a two-level enhancement under Sentencing Guidelines § 3A1.3 to his base offense level because Trent was physically restrained during the course of the assault. But Hickman admitted at Howell's trial that Trent was restrained by jailers and posed

no threat while Hickman and Howell repeatedly assaulted him. Hickman's testimony was corroborated by other jailers present during the assault. Therefore, the district court properly applied the physical-restraint enhancement to Hickman's base offense level.

Fourth, Hickman argues that the district court erred by applying a two-level enhancement under Sentencing Guidelines § 3C1.1 because he obstructed justice. In his plea agreement, Hickman admitted that this enhancement applied. Hickman now asserts that this enhancement amounted to impermissible double counting because, given his guilty plea to obstruction of justice under 18 U.S.C. 1519, the enhancement punishes him a second time for the same conduct. This argument is not correct. Hickman's conviction under 18 U.S.C. 1519 was grouped with his convictions for violating 18 U.S.C. 242, and the Section 1519 conviction was factored into Hickman's sentence only as a two-level enhancement to the grouped convictions.

Fifth, Hickman raises a double-counting challenge to the district court's imposition of a six-level enhancement under Sentencing Guidelines § 2H1.1(b)(1)(B) because Hickman committed the offenses under color of law. Hickman incorrectly asserts that his base offense level accounts for the fact that he acted under color of law because it is an element of the 18 U.S.C. 242 offenses. As required by the Guidelines, Hickman's base offense level was calculated under

Sentencing Guidelines § 2H1.1(a), which applies to all defendants who commit crimes against individual rights, regardless of whether they acted under color of law. The district court calculated Hickman's base offense level by cross-referencing to the aggravated assault guideline, which also does not incorporate punishment for actions taken while acting under color of law. Accordingly, Hickman was punished only once because he acted under color of law, through application of the enhancement Sentencing Guidelines § 2H1.1(b)(1)(B).

2. Hickman also contends that the district court erred because it granted the United States' request for a downward departure under Sentencing Guidelines § 5K1.1 (substantial assistance to authorities) but failed to apply that reduction or adequately explain the basis for the reduction it granted. This argument is factually incorrect. The record reflects that the district court *denied* the United States' motion for a downward departure and imposed a within-Guidelines sentence of 126 months. The district court's denial of a motion under Sentencing Guidelines § 5K1.1 is not reviewable by this Court.

3. Howell challenges the jury instruction—taken from this Court's Pattern Jury Instructions—explaining that the jury could consider Howell's omission of information from the incident reports he wrote after Trent's assault as evidence of consciousness of guilt. But the consciousness-of-guilt instruction is frequently used in situations where the defendant has concealed or suppressed evidence or

given a false account of events. Here, the United States presented substantial evidence that Howell omitted key information from the incident reports about the uses of force against Trent, which permitted the jury to infer that Howell did so because he knew that he had acted unlawfully and was trying to avoid punishment. Indeed, Howell admitted at trial that after he assaulted Trent he was afraid that he would be in trouble if the jail administrator found out, and contemporaneously with his drafting of the incident reports, Howell told Hickman that he was afraid they could be prosecuted for manslaughter.

4. Howell also challenges the district court's jury instruction on deliberate indifference. He asserts it was confusing and permitted the jury to convict him without a finding that Howell subjectively was aware of Trent's serious medical need and disregarded it. Because Howell did not object to the deliberate indifference instruction in the district court, this Court reviews the issue for plain error.

The instruction was not erroneous, much less plainly erroneous, because it properly instructed the jury that a finding of deliberate indifference required two things: First, that Trent was suffering from an objectively serious medical need; and second, that Howell subjectively was aware of the serious medical need and disregarded it. Indeed, the district court correctly admonished the jury that the objective part of the test did not depend on Howell's state of mind about the

seriousness of the injury, but rather depended on what a reasonable person in Howell's situation would have concluded. At the same time, as the district court correctly explained, the subjective component of the test required the jury to find that Howell knew of Trent's serious medical need and disregarded it.

ARGUMENT

I

THE DISTRICT COURT PROPERLY APPLIED MULTIPLE ENHANCEMENTS TO HICKMAN'S BASE OFFENSE LEVEL

A. Standard Of Review

This Court reviews the procedural reasonableness of a sentence for abuse of discretion. *United States* v. *Duke*, 870 F.3d 397, 401 (6th Cir. 2017). "[A] district court abuses its discretion if it commits a significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *United States* v. *Callahan*, 801 F.3d 606, 626 (6th Cir. 2015) (quoting *United States* v. *Johnson*, 640 F.3d 195, 201-202 (6th Cir. 2011)). This Court reviews de novo a district court's interpretation of the Guidelines. *Duke*, 870 F.3d at 401. With respect to a district court's application of the Guidelines, this Court reviews factual findings for clear error and mixed questions of law de novo. *Ibid.*

B. The District Court Did Not Err In Applying Five Enhancements To Hickman's Base Offense Level For Aggravated Assault

1. Dangerous Weapon Enhancement

Hickman first contends (Hickman Br. 12-13) that the district court should not have applied the enhancement for use of a dangerous weapon (combat boots) under Sentencing Guidelines § 2A2.2(b)(2)(B), which requires a four-level increase where "a dangerous weapon (including a firearm) was otherwise used" in an assault. This argument is baseless.

Under the Guidelines, a dangerous weapon is "an instrument capable of inflicting death or serious bodily injury," U.S.S.G. § 1B1.1, comment. (n.1(D)), and "includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury," U.S.S.G. § 2A2.2, comment. (n.1). "This Court employs a 'functional approach' to 'what constitutes a dangerous weapon' under the Guidelines." *Duke*, 870 F.3d at 401-402 (quoting *Callahan*, 801 F.3d at 628). Under the functional approach, the district court determines whether an object is a dangerous weapon "by 'looking at the circumstances in which the [instrument] was used.'" *Id.* at 402 (brackets in original) (quoting *United States* v. *Tolbert*, 668 F.3d 798, 803 (6th Cir. 2012)). Accordingly, this Court has "recognized that 'in the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings,

concrete curbs, clothes irons, and stink bombs.'" *Ibid.* (quoting *Callahan*, 801 F.3d at 628).

Here, Hickman's combat boots were a dangerous weapon because he used them to kick Trent while Trent was lying on the ground and not posing a threat. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3180). The force of the blow caused severe bruising and fractured several of Trent's ribs. (Transcript, R. 272, PageID# 2819; Transcript, R. 273, PageID# 3029-3030; Gov't Ex. 5F, 5G, 8J, 9). Under these circumstances, the district court did not err in applying the enhancement for use of a dangerous weapon because Hickman used his boots to cause grave injury to Trent and for no other reason than to inflict injury. See, *e.g.*, *Duke*, 870 F.3d at 401-404.

Hickman's arguments to the contrary are not persuasive. First, he suggests (Hickman Br. 12) that the size 15 combat boots were not a dangerous weapon because the boots were not capable of inflicting serious injury without a special characteristic, like steel toes. But the fact that Hickman's combat boots did not have some feature that made them more dangerous is not relevant to whether the boots were capable of inflicting serious bodily inquiry. The relevant inquiry in determining whether an instrument is a dangerous weapon is whether it is *capable of* inflicting harm. *Tolbert*, 668 F.3d at 801. That inquiry is objective, asking "whether a reasonable individual would believe that the object is a dangerous

weapon [*i.e.*, capable of inflicting serious bodily injury] under the circumstances." *Ibid.* (quoting *United States* v. *Rodriguez*, 301 F.3d 666, 668 (6th Cir. 2002)). Any reasonable person would believe that large combat boots—even without steel toes—wielded by Hickman, who at the time of the assault was 6'6" and weighed 390 pounds (Transcript, R. 273, PageID # 3193), were capable of inflicting serious injury to Trent. Indeed, this Court and many others have recognized, in applying this sentencing enhancement, that boots, including rubber boots and shoes can constitute dangerous weapons under the right circumstances. *Duke*, 870 F.3d at 402 (rubber boots); *United States* v. *Velasco*, 855 F.3d 691, 694 (5th Cir. 2017) (shoes in conjunction with hard ground); *United States* v. *White*, 675 F.3d 1106, 1110 (8th Cir. 2012) (tennis shoes); *United States* v. *Serrata*, 425 F.3d 886, 909-910 (10th Cir. 2005) (work boots).

Hickman also argues (Hickman Br. 12) that his boots were not a dangerous weapon because he used them to kick Trent only once. This argument is factually incorrect and legally irrelevant. There was testimony at Howell's trial that Hickman kicked and stomped Trent multiple times, inflicting serious injury. (Transcript, R. 273, PageID# 3257; Transcript, R. 274, PageID# 3373, 3382; Plea Agreement, R. 116, PageID# 705). But even if Hickman had only kicked Trent once, the serious injuries suffered by Trent as a result demonstrate that one kick is sufficient to render his boots dangerous weapons. See *Tolbert*, 668 F.3d at 800-

803 (concluding that one strike with a plastic water pitcher that did not result in serious injuries was sufficient to apply the dangerous weapon enhancement).[2]

Finally, Hickman argues (Hickman Br. 12) that his boots were not a dangerous weapon because he did not intend to injure Trent. But Hickman admitted that he had no justification for kicking Trent in the torso when Trent was lying on the floor of the booking area. (Plea Agreement, R. 116, PageID# 705; Transcript, R. 273, PageID# 3180). And Hickman kicked Trent so hard that he broke Trent's ribs and left major bruising on Trent's chest. See pp. 23, *supra*. The district court properly concluded that Hickman intended to injure Trent where Hickman applied extreme force and was not acting in self-defense or for some other innocent purpose. (Transcript, R. 250, PageID# 2353-2354). See *Tolbert*, 668 F.3d at 803 (explaining that use of plastic water pitcher to strike a federal

[2] At sentencing, the district court considers all relevant conduct, including all acts or omissions aided or abetted by the defendant. See *United States* v. *Gonzalez*, 501 F.3d 630, 642 (6th Cir. 2007); U.S.S.G. § 1B1.3(a)(1)(A). Even if Hickman had not struck Trent a sufficient number of times to render his boots a dangerous weapon, he is also responsible for all of the assaultive acts undertaken by Howell, which included kicking and stomping Trent multiple times with shoes. While Hickman stood by, Howell stomped on Trent's arm, kicked Trent in the face, and stepped into Trent's cell and kicked him at the end of the assault. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3139-3140, 3188-3191). In fact, Howell stomped and kicked Trent with such force that Trent had visible bruising on his arm and face that matched the treads on Howell's shoes. (Gov't Ex. 5C, 5D, 8C, 8H).

marshal in the head without justification provided sufficient evidence of intent to inflict bodily injury).

Hickman cites an unpublished case from the Fifth Circuit, *United States* v. *Nunez-Granados*, 546 F. App'x 483 (5th Cir. 2013), to support his assertion that his actions did not reflect an intent to harm Trent. But the defendant's assaultive conduct in *Nunez-Granados* bears no resemblance to Hickman's actions here. In that case, the defendant struck an officer in the face with his shoed foot as he was struggling to get free from the officer's grasp. *Id.* at 486-487. The officer did not suffer serious bodily injury. *Id.* at 486. The court concluded that Nunez-Granados had not intended to cause injury because his conduct was distinguishable from instances where defendants gratuitously kicked and stomped individuals who were posing no threat. *Id.* at 486-487. As noted above, Hickman kicked and stomped Trent while Trent was lying on the ground and posing no threat, and his actions resulted in severe injuries to Trent that ultimately contributed to his death.

2. Permanent Or Life-Threatening Bodily Injury Enhancement

Hickman contends (Hickman Br. 13) that the district court should not have applied the permanent or life-threatening bodily injury enhancement under Sentencing Guidelines § 2A2.2(b)(3)(C) because, although Trent suffered injuries resulting in his death, "there is no proof at all that [Hickman] was the individual who inflicted those injuries." This argument is not correct.

The Guidelines require a seven-level enhancement "[i]f the victim sustained bodily injury" that was permanent or life threatening during an assault. U.S.S.G. § 2A2.2(b)(3)(C). Permanent or life-threatening bodily injury is defined as "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent." U.S.S.G. § 1B1.1, comment. (n.1(J)). At sentencing, a court may consider as relevant conduct "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant * * * that occurred during the commission of the offense of conviction." U.S.S.G. § 1B1.3(a)(1). "It also includes all harm that resulted from these acts * * * and all harm that was the object of such acts." *United States* v. *Settle*, 414 F.3d 629, 632 (6th Cir. 2005); see U.S.S.G. § 1B1.3(a)(3); *United States* v. *Howse*, 478 F.3d 729, 732 (6th Cir. 2007).

Hickman was present for the entire course of the assault on Trent that resulted in Trent's death. The district court correctly considered as relevant conduct the harm that resulted from Hickman's assaultive conduct, as well as the harm that resulted from Howell's acts that Hickman aided and abetted. The autopsy report found that Trent died from hemorrhaging caused by a pelvic fracture and that blunt force trauma to his head, trunk, and extremities contributed to his death. (Plea Agreement, R. 116, PageID# 707; Gov't Ex. 9). Hickman

inflicted serious injuries to Trent that contributed to his death by punching Trent in the face multiple times (Transcript, R. 273, PageID# 3177); kneeling into Trent's back with his knee (Transcript, R. 273, PageID# 3082-3083, 3234); repeatedly stunning Trent with a taser while he was restrained (Transcript, R. 273, PageID# 3135-3137, 3183-3184); and kicking Trent in the torso, which resulted in broken ribs, while Trent was lying on the ground. (Plea Agreement, R. 116, PageID# 705). In addition, Hickman helped restrain Trent on the ground while Howell repeatedly punched and kicked Trent. (Transcript, R. 273, PageID# 3185-3189). And Hickman stood by when Howell entered Trent's cell and kicked him while he was on the ground posing no threat. (Transcript, R. 273, PageID# 3190-3191).

Accordingly, even if Hickman did not inflict the blow that fractured Trent's pelvis, ultimately causing his death, Trent died as a result of the combination of Hickman's assaultive conduct and the assaultive conduct committed by Howell that was aided and abetted by Hickman. In these circumstances, the district court correctly applied the permanent or life-threatening bodily injury enhancement to Hickman's offense level.

3. Physical Restraint Enhancement

Hickman makes two arguments (Hickman Br. 14) to support his assertion that the district court should not have applied Sentencing Guidelines § 3A1.3, which provides for a two-level enhancement "[i]f a victim was physically

restrained in the course of the offense." First, Hickman contends that the enhancement should not apply because Trent was not restrained at any point during the assault. Second, Hickman contends that the enhancement should not apply when the underlying charge involves excessive force. Neither argument has merit.

First, the guideline applies "[i]f a victim was physically restrained in the course of the offense." U.S.S.G. § 3A1.3. "Physically restrained" is defined as "the forcible restraint of the victim such as by being tied, bound, or locked up." U.S.S.G. § 1B1.1, comment. (n.1(K)). This Court has interpreted physical restraint broadly, treating the examples as a non-exhaustive list. See *United States* v. *Coleman*, 664 F.3d 1047, 1049-1051 (6th Cir. 2012) (interpreting physical restraint to include brandishing a firearm and requiring a person to move to a different place and stay there).

As discussed above, Hickman admitted that Trent was restrained by jailers and posing no threat while Hickman and Howell repeatedly assaulted him. (Plea Agreement, R. 116, PageID# 706; Transcript, R. 273, PageID# 3183-3189). And other jailers corroborated Hickman's account that Trent was restrained and unable to move while Hickman and Howell assaulted him. (Transcript, R. 273, PageID# 3084-3089, 3135-3137). This was sufficient for the district court to apply the enhancement.

Hickman's argument that the enhancement should not apply when the underlying charge involves excessive force fares no better. Hickman relies on *United States* v. *Clayton*, 172 F.3d 347 (5th Cir. 1999), but he misreads that case. In *Clayton*, an officer was convicted under Section 242 after he kicked and beat an arrestee who was handcuffed and face down. *Id.* at 349-350. The court held that the physical-restraint enhancement applied regardless of "the lawfulness of the defendant's restraint of the victim at the time the unreasonable or excessive force occurs," as long as the defendant "took advantage of the restraint" to commit the unlawful assault. *Id.* at 353. That holding is consistent with this Court's precedent in *United States* v. *Carson*, 560 F.3d 566, 588 (6th Cir. 2009), which held that the lawfulness of the restraint does not preclude application of Section 3A1.3. See also *United States* v. *Gray*, 692 F.3d 514, 521-522 (6th Cir. 2012). Here, even if Trent was lawfully restrained to some degree, Hickman and Howell took advantage of that restraint to act unlawfully. While Trent was lying face down on the ground, restrained, and unable to move under the weight of four jailers, Hickman kneeled on top of Trent and repeatedly shocked him with a taser and Howell punched Trent in the face, stomped on his arm, and kicked him in the head.

4. Obstruction Of Justice Enhancement

Hickman contends (Hickman Br. 14-16) that the district court should not have applied the obstruction of justice enhancement under Sentencing Guidelines

§ 3C1.1, because it amounted to impermissible double counting in violation of the Double Jeopardy Clause. Hickman argues that because he pleaded guilty to obstruction of justice under 18 U.S.C. 1519, the enhancement punishes him a second time for that conduct. But Hickman admitted in his plea agreement that he would be subject to the two-level enhancement for obstruction of justice under Section 3C1.1. (Plea Agreement, R. 116, PageID# 709). In any event, Hickman's argument fails for two reasons.

First, to the extent that Hickman argues that application of the obstruction of justice enhancement raises a constitutional concern (*i.e.*, a violation of the Double Jeopardy Clause) he is incorrect. "Double jeopardy principles generally have no application in the sentencing context 'because the determinations at issue do not place a defendant in jeopardy for an offense.'" *United States* v. *Wheeler*, 330 F.3d 407, 413 (6th Cir. 2003) (quoting *Monge* v. *California*, 524 U.S. 721, 728 (1998)); see *United States* v. *Walters*, 775 F.3d 778, 782 (6th Cir. 2015). Accordingly, there is no constitutional violation where, as here, "a district court simply applies multiple guidelines to determine the appropriate sentence for an offense of conviction." *Wheeler*, 330 F.3d at 413.

Second, Hickman's argument that application of the enhancement resulted in impermissible double counting under the Guidelines is incorrect. "[I]mpermissible double counting occurs when precisely the same aspect of a defendant's conduct

factors into his sentence in two separate ways." *Duke*, 870 F.3d at 404 (quoting *United States* v. *Farrow*, 198 F.3d 179, 193 (6th Cir. 1999), *superseded on other grounds by regulation*, U.S.S.G. App. C, Vol. II, Amend. 614, at 116). "[N]o double counting occurs if the defendant is punished for distinct aspects of his conduct." *Walters*, 775 F.3d at 782 (brackets in original) (quoting *United States* v. *Battaglia*, 624 F.3d 348, 351 (6th Cir. 2010)).

Here, Hickman's obstructive conduct factored into his sentence in only one way, as a two-level enhancement to the underlying Section 242 offenses. For purposes of sentencing, the district court grouped Hickman's obstruction of justice offense (Section 1519) for falsifying the observation log with the underlying offenses for deprivation of constitutional rights (Section 242). U.S.S.G. § 3C1.1, comment. (n.8), § 3D1.2(c). When an obstruction of justice offense is grouped with an underlying offense, the offense level for the grouped offense is the offense level for the underlying offense increased by the two-level obstruction enhancement under Section 3C1.1, or the offense level for the obstruction of justice offense, whichever is greater. U.S.S.G. § 3C1.1, comment. (n.8); see *United States* v. *Davist*, 481 F.3d 425, 427 (6th Cir. 2007).

This rule is designed to prevent the very double-counting that Hickman complains of by ensuring that the obstructive conduct is taken into account only once: either as a two-level enhancement to the base offense level (as here), or as

the overall offense level itself. See *United States* v. *Yielding*, 657 F.3d 688, 717 (8th Cir. 2011). The district court followed the grouping provisions by imposing a two-level obstruction-of-justice enhancement to the base offense level for the underlying aggravated assault. Accordingly, there was no impermissible double counting of the obstructive conduct. See *United States* v. *Moon*, 513 F.3d 527, 542-543 (6th Cir. 2008); see also *United States* v. *Fries*, 781 F.3d 1137, 1154 & n.7 (9th Cir. 2015); *United States* v. *Campbell*, 764 F.3d 880, 893 (8th Cir. 2014); *United States* v. *Fiore*, 381 F.3d 89, 95 (2d Cir. 2004); *United States* v. *Maggi*, 44 F.3d 478, 482 (7th Cir. 1995).

5. Under Color Of Law Enhancement

Finally, Hickman contends (Hickman Br. 16) that the district court should not have increased his offense level by six levels because he committed the offenses under color of law. U.S.S.G. § 2H1.1(b)(1)(B). According to Hickman, applying the under-color-of-law enhancement amounts to impermissible double counting in violation of the Double Jeopardy Clause because acting under color of law is an element of the Section 242 offense and is therefore accounted for in the base offense level. Once again, Hickman admitted in his plea agreement that he would be subject to the six-level enhancement for acting under color of law under Section 2H1.1(b)(1)(B). (Plea Agreement, R. 116, PageID# 708). In any event, his argument is not correct.

First, as noted above, Hickman's argument does not implicate any Double Jeopardy concerns. See pp. 30-31, *supra*. And framed as an impermissible double-counting argument, Hickman's argument still fails. As with the obstruction of justice enhancement, that Hickman assaulted Trent while acting under of color law was only factored into his sentence through application of the Section 2H1.1(b)(1)(B) enhancement.

Section 2H1.1(a) applies to all defendants who commit crimes against individual rights, regardless of whether they have acted under color of law. See, *e.g.*, 18 U.S.C. 247 (damage to religious property and obstruction of religious beliefs); 18 U.S.C. 249 (hate crimes). But when a defendant commits a crime against individual rights while acting under color of law, he is subject to the six-level enhancement in Sentencing Guidelines § 2H1.1(b)(1)(B). This is true whether the defendant's base offense level was determined through a cross-reference, see U.S.S.G. § 2H1.1(a)(1), as it was here, or through Section 2H1.1(a)(2)-(4). See *United States* v. *Webb*, 252 F.3d 1006, 1010 (8th Cir. 2001) (applying the "required" six-level enhancement for acting under color of law where sentence was calculated under Section 2H1.1(a)(3)(A)); *United States* v. *Conley*, 186 F.3d 7, 26 (1st Cir. 1999) (upholding application of under-color-of-law enhancement in Section 2H1.1(b) where district court calculated the base offense level by cross reference to aggravated assault guideline).

Moreover, the district court calculated Hickman's offense level by cross-referencing to the offense guideline applicable for aggravated assault. See U.S.S.G. § 2H1.1(a)(1), § 2A2.2. The aggravated assault guideline does not, by definition, include punishment for acting under color of law. See U.S.S.G. § 2A2.2. Indeed, many individuals who are sentenced using the aggravated assault guideline have not acted under color of law. See 18 U.S.C. 33 (destruction of motor vehicles or motor vehicle facilities); 18 U.S.C. 37 (violence at international airports); 18 U.S.C. 112(a) (assault of a foreign official).

Accordingly, Hickman's base offense level punishes him only for his crime—aggravated assault—against individual rights, not the fact that he committed the assault while acting under color of law. It is the color-of-law enhancement under Section 2H1.1(b)(1)(B) that specifically accounts for and punishes actors, like Hickman, who have committed the underlying offense while acting under color of law. Thus, there was no double counting here.

II

THE DISTRICT COURT'S DENIAL OF THE UNITED STATES' MOTION FOR A DOWNWARD DEPARTURE UNDER SENTENCING GUIDELINES § 5K1.1 IN HICKMAN'S CASE IS NOT REVIEWABLE

Hickman contends (Hickman Br. 8-10) that the district court erred by *granting* the United States' request for a downward departure under Sentencing Guidelines § 5K1.1 but failing to apply that reduction or adequately explain the

basis for the reduction it granted. This argument rests on a factually incorrect premise. The district court *denied* the United States' motion for a downward departure and imposed a within-Guidelines sentence of 126 months. And this Court has repeatedly made clear that, absent circumstances not presented here, it lacks jurisdiction to review a decision of the district court not to depart under Sentencing Guidelines § 5K1.1.

1. The district court calculated Hickman's sentencing Guidelines range as 108 to 135 months. (Transcript, R. 250, PageID# 2371-2372). The United States requested that the district court impose an upward variance under 18 U.S.C. 3553(a)(1) and (a)(2)(A) to account for the seriousness of the offense and the multiple other assaults Hickman committed at the jail. (Sentencing Memorandum, R. 210, PageID# 1699-1703). The United States also requested that the district court grant a 35% downward departure from the Guidelines range, under Sentencing Guidelines § 5K1.1, because Hickman provided substantial assistance in the prosecutions of other people who committed offenses at the jail. (SEALED Motion under Section 5K1.1, R. 212, PageID# 1710). See U.S.S.G. § 5K1.1.

The district court denied both requests. First, the court stated that "[o]rdinarily in a case like this, I would * * * vary upward, but because this defendant has accepted responsibility for his actions and has cooperated with the government, I'm not going to do that. I think a guideline sentence is appropriate."

(Transcript, R. 250, PageID# 2400-2401). The district court then considered whether it should grant any downward departure. Recognizing that it was "not bound by" the United States' recommendation, the court declined to grant any departure, stating that Hickman's cooperation was not substantial enough to enable him to dig "his way out of the hole that he has dug in this case." (Transcript, R. 250, PageID# 2401).

Although Hickman's argument rests on his view that the district court granted the United States' motion for a downward departure, later in his brief he appears to concede the opposite. He states (Hickman Br. 11) that the trial court "acknowledged" the extent of Hickman's cooperation, "[y]et refused to both grant the motion or apply the reduction by stating that it is not required to do either." Because the district court in fact denied the motion, his argument is baseless.[3]

[3] We note that the district court's written statement of reasons indicates that it had granted the United States' motion for a downward departure and its request for an upward variance. (SEALED Statement of Reasons, R. 242-1, PageID# 2275-2276). The statement of reasons, however, does not comport with what the court said at sentencing. The district court orally and unambiguously denied both the motion under Section 5K1.1 and the request for a variance at sentencing. (Transcript, R. 250, PageID# 2400-2401). In these circumstances, it is well-settled that the oral sentence controls. See *United States* v. *Penson*, 526 F.3d 331, 334 (6th Cir. 2008) ("[W]hen an oral sentence conflicts with the written sentence, the oral sentence controls." (brackets in original) (quoting *United States* v. *Schultz*, 855 F.2d 1217, 1225 (6th Cir. 1988))). Indeed, had the district court *granted* both of the United States' requests, as it stated in the written judgment, the resulting sentence would have been outside the Guidelines range: The guideline range was

(continued…)

2. Even if Hickman's argument is construed as challenging the denial of the United States' motion for a downward departure, he fares no better. The district court's refusal to grant the downward departure is not reviewable. As this Court has explained, it lacks jurisdiction to review a decision of a district court "not to depart downward unless the record shows that the district court was unaware of, or did not understand, its discretion to make such a departure." *United States* v. *Blue*, 557 F.3d 682, 684-685 (6th Cir. 2009) (quoting *United States* v. *Santillana*, 540 F.3d 428, 431 (6th Cir. 2008)); see *United States* v. *Reilly*, 662 F.3d 754, 759 (6th Cir. 2011); *United States* v. *McBride*, 434 F.3d 470, 475-477 (6th Cir. 2006).[4] Indeed, "a court's failure to grant a downward departure is not reviewable even if based on clearly erroneous findings of fact." *United States* v. *Puckett*, 422 F.3d 340, 346 (6th Cir. 2005) (quoting *United States* v. *Clark*, 385 F.3d 609, 623 (6th Cir. 2004)).

(…continued)
108 to 135 months and the United States requested a sentence of 136.5 months. (Transcript, R. 250, PageID# 2372-2373, 2384).

[4] In *McBride*, this Court noted that while it could not review the denial of a "Chapter 5 Guideline departure," it could still review "a defendant's claim that his sentence is excessive based on the district court's unreasonable analysis of the section 3553(a) factors in their totality." 434 F.3d at 476-477. Hickman has not raised a reasonableness challenge to his sentence based on the district court's application of the Section 3553(a) factors. Accordingly, that argument is waived. See *United States* v. *Puckett*, 422 F.3d 340, 345 (6th Cir. 2005).

The exceptions to this rule are not applicable here. In ruling on a request for a downward departure, a district court need not "explicitly state that it is aware of its discretion to make such a departure." *Santillana*, 540 F.3d at 431. Instead, this Court "presume[s] that the district court understood its discretion, absent clear evidence to the contrary." *Ibid.* This Court "review[s] de novo whether the district court was aware of its authority to make a downward departure, examining the transcript of the sentencing hearing to make this determination." *United States* v. *Ridge*, 329 F.3d 535, 544 (6th Cir. 2003).

In this case, the sentencing transcript reflects that the district court was aware of its authority to depart downward from the Guidelines and simply exercised its discretion not to do so. The parties extensively discussed the United States' request for a downward departure based on Hickman's cooperation with the government. (Transcript, R. 250, PageID# 2373-2377, 2387-2388, 2400-2401). The court then determined that although Hickman had cooperated with the government, his cooperation was insufficient to warrant a downward departure given the "hole that he has dug in this case." (Transcript, R. 250, PageID# 2401). The court also noted that while it considered the United States' request, it recognized that the request was merely a recommendation and that the court did not have to follow it. (Transcript, R. 250, PageID# 2401). Under these

circumstances, there is no evidence in the record showing that the district court's decision is reviewable. See *Santillana*, 540 F.3d at 431.[5]

Hickman cites several cases (Hickman Br. 9-11) to support his argument that the district court's decision to deny the Section 5K1.1 motion is reviewable, but these cases do not help him. In *United States* v. *Mariano*, the First Circuit agreed that "[o]rdinarily, an appeal will not lie from a district court's refusal to depart from a properly calculated sentencing range" unless that refusal "stemmed from the * * * mistaken impression that it lacked legal authority to depart or, relatedly, from the court's misapprehension of the rules governing departure." 983 F.2d 1150, 1153 (1st Cir. 1993). There, the district court misapprehended the legal standard governing departures under Section 5K1.1, instead applying the legal standard governing departures under Section 5K2.0. The First Circuit concluded that the district court's confusion of the legal standards rendered its decision to deny a downward departure reviewable. Here, there is no indication in the record that the district court misunderstood its authority to depart or applied an incorrect legal standard.

[5] To the extent that Hickman argues (Hickman Br. 11) that the district court failed adequately to explain its denial, his argument fails. The district court understood its discretion to grant the United States' motion for a downward departure and chose to deny it. That decision, including the adequacy of the district court's reasoning, is unreviewable. See pp. 38-40, *supra*.

Similarly, in *United States* v. *Hashimoto*, the Fifth Circuit explained that a district court has "almost complete discretion to determine the extent of a departure under § 5K1.1" and that "[t]he district court *also* has almost complete discretion to deny the government's § 5K1.1 motion to depart downward." 193 F.3d 840, 843 (5th Cir. 1999); see also *United States* v. *Alvarez*, 51 F.3d 36, 39-40 (5th Cir. 1995) (same). Accordingly, the Fifth Circuit stated that it would "clearly lack jurisdiction over [the] case if [the defendant] was challenging * * * the denial of a § 5K1.1 motion." *Hashimoto*, 193 F.3d at 843. The court recognized that the only exception to the rule that it lacked jurisdiction over a challenge to the denial of a § 5K1.1 motion was when "the refusal was in violation of law." *Ibid.* That holding is consistent with the Sixth Circuit precedent discussed above and the conclusion that the district court's denial of the United States' Section 5K1.1 motion is unreviewable here.[6]

Finally, in *United States* v. *Campbell*, the Second Circuit, in discussing a departure under Section 5K2.0, stated that the appellate court looks at "the reasons

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[6] *Hashimoto* addresses also the situation, erroneously posited by Hickman here (Hickman Br. 8), where the district court grants a Section 5K1.1 motion but then fails to apply it by issuing a sentence within the Guidelines range. The court concluded that while that constitutes error, it did not require reversal of the sentence where "1) the sentencing judge recognized his authority to depart below the guideline range and 2) there was no ambiguity about the intended sentence." 193 F.3d at 844; see *United States* v. *Faulks*, 143 F.3d 133, 135-136 (3d Cir. 1998).

given by the district court" to determine if they are "sufficient to justify the magnitude of the departure." 967 F.2d 20, 26 (2d Cir. 1992). To the extent that this language suggests that a district court's decision to deny a downward departure under Section 5K1.1 is reviewable, it conflicts with this Court's decisions cited above and has no bearing here. See *Ridge*, 329 F.3d at 541-543, 545-546.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS JURY INSTRUCTION ON CONSCIOUSNESS OF GUILT IN HOWELL'S TRIAL

A. Standard Of Review

This Court reviews a properly preserved objection to a jury instruction for abuse of discretion. *United States* v. *Rios*, 830 F.3d 403, 431 (6th Cir. 2016); *United States* v. *Williams*, 612 F.3d 500, 506 (6th Cir. 2010). A "district court's decisions concerning whether to give a particular jury instruction" are also reviewed for abuse of discretion. *United States* v. *Lively*, 852 F.3d 549, 565 (6th Cir. 2017) (quoting *United States* v. *Capozzi*, 723 F.3d 720, 725 (6th Cir. 2013)). This Court assesses the instructions as a whole "to determine whether they adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in reaching its decision," and reverse only where, as a whole, they were "confusing, misleading, or prejudicial." *United States* v.

Russell, 595 F.3d 633, 642 (6th Cir. 2010) (quoting *United States* v. *Frederick*, 406 F.3d 754, 761 (6th Cir. 2005) and *United States* v. *Kuehne*, 547 F.3d 667, 669 (6th Cir. 2008)).

B. The District Court Did Not Abuse Its Discretion By Instructing The Jury That It Could Consider Howell's Omission Of Information From His Incident Reports As Evidence Of Consciousness Of Guilt

Howell argues (Howell Br. 17-23) that the district court abused its discretion by instructing the jury that it could consider evidence that he had omitted information from his incident and taser reports to show his consciousness of guilt. This instruction was modeled after this Court's Pattern Jury Instructions. The district court did not abuse its discretion in giving it.

1. The district court, in addressing the evidence the jury may consider and inferences it may draw from certain evidence, instructed the jury that if it believed that Howell had omitted information from his written reports, the jury may consider this conduct in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. (Transcript, R. 275, PageID# 3932; Jury Instructions, R. 194, PageID# 1313). As relevant here, the court instructed the jury:

> Now, you have heard testimony that after the crime was supposed to have been committed, the Defendant [William Curtis] Howell omitted information from written reports. If you believe that the Defendant William Curtis Howell omitted information from written reports, then you may consider this conduct, along with other evidence, in deciding whether the government had proved beyond a

> reasonable doubt that he committed the crimes charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment.
>
> On the other hand, sometimes an innocent person may omit information from written reports for some other reason. The defendant has no obligation to prove that he had an innocent reason for his conduct.

(Transcript, R. 275, PageID# 3932; see Jury Instructions, R. 194, PageID# 1313). Howell objected to this instruction. (Transcript, R. 275, PageID# 3847-3850).

This instruction was modeled after this Court's Pattern Jury Instruction 7.14, which is entitled "Flight, Concealment of Evidence, False Exculpatory Statements." See Sixth Cir. Pattern Jury Instruction 7.14. This Court repeatedly has approved the use of Pattern Jury Instruction 7.14. *United States* v. *Swain*, 227 F. App'x 494, 497 (6th Cir. 2007); *United States* v. *Carter*, 236 F.3d 777, 792 n.11 (6th Cir. 2001); *United States* v. *Diakite*, 5 F. App'x 365, 370-371 (6th Cir. 2001). Indeed, the Court has recognized that the instruction may be used in a broad range of circumstances where the defendant's post-crime conduct potentially implicates his consciousness of guilt. See, *e.g.*, *United States* v. *Beckman*, 624 F. App'x 909, 914 (6th Cir. 2015) (giving instruction where defendant attempted to conceal or suppress evidence by attempting to remotely wipe clean cell phone containing incriminating information after police seized it); *United States* v. *Mari*, 47 F.3d 782, 785 & n.2 (6th Cir. 1995) (giving instruction where defendant's cover story

was implausible and his account conflicted with police officer's account); Committee Commentary 7.14, Sixth Cir. Pattern Jury Instructions.[7]

When addressing whether the district court erred in charging the jury on consciousness of guilt, this Court considers whether the record evidence fairly supported it. See *United States* v. *Dye*, 538 F. App'x 654, 665 (6th Cir. 2013); *United States* v. *Kirk*, 584 F.2d 773, 789 (6th Cir. 1978). Here, there was ample evidence at trial to support the issuance of the consciousness-of-guilt instruction. The incident reports themselves demonstrate that Howell omitted any reference to uses of force against Trent even though those acts occurred and were recorded on

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[7] This Court's Pattern Jury Instruction 7.14 reads as follows:

> **7.14 FLIGHT, CONCEALMENT OF EVIDENCE, FALSE EXCULPATORY STATEMENTS**
>
> (1) You have heard testimony that after the crime was supposed to have been committed, the defendant _____.
>
> (2) If you believe that the defendant _____, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may _____ for some other reason. The defendant has no obligation to prove that he had an innocent reason for his conduct.
>
> **Use Note**
>
> The language in paragraphs (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

videotape. (Gov't Ex. 37, 44; Transcript, R. 273, PageID# 2998-3001). Multiple witnesses testified that the omission of the use of force information was contrary to the policies and practices of the jail. (Transcript, R. 273, PageID# 3121-3122, 3199-3202; Transcript, R. 274, PageID# 3476-3479, 3497-3504). Howell even admitted at trial that he knew he would get in trouble if he included the information about the uses of force in the incident reports. (Transcript, R. 274, PageID# 3640-3641). Moreover, Howell authored the incident reports shortly after the assault occurred. (Transcript, R. 272, PageID# 2847-2850, 2897-2898; Transcript, R. 273, PageID# 2994-2995; Transcript, R. 274, PageID# 3609-3610). Howell also called jail administrator Tim Kilburn shortly after the incident, and Kilburn's documentation of the call reflects that Howell failed to inform Kilburn of the extent of the force used against Trent and that Trent was injured. (Gov't Ex. 64; Transcript, R. 274, PageID# 3629-3633). Finally, Howell told Hickman after the assault that he was afraid they would be charged with manslaughter. (Transcript, R. 273, PageID# 3204-3205). Taken together, this evidence permitted a jury to conclude that Howell attempted to conceal evidence of his conduct by deliberately omitting information from his incident reports because he knew his actions were unlawful. See, *e.g.*, *Beckman*, 624 F. App'x at 914.[8]

[8] As Howell notes (Howell Br. 18), this Court sometimes applies a four-part test to determine whether there is a sufficient evidentiary basis for the district

(continued…)

2. Howell does not contest the content of the instruction itself. Rather, he characterizes it as the '"flight' jury instruction" (Howell Br. 17), and argues that it is inappropriate here because Howell did not "flee his pending criminal charges" and "courts have never applied the instruction in a situation as far removed from flight as this." Howell Br. 18-19. This argument fails because use of the instruction is not so limited and, as noted above, the more aptly characterized "consciousness-of-guilt instruction" has been given in a wide variety of cases, including where the defendant has concealed or suppressed evidence.

(…continued)
court's decision to charge the jury on consciousness of guilt. See *Dye*, 538 F. App'x at 665; *United States* v. *Wilson*, 385 F. App'x 497, 501 (6th Cir. 2010); *United States* v. *Smith*, 27 F. App'x 577, 583 (6th Cir. 2001). But see *Swain*, 227 F. App'x at 497-498 (concluding there was an adequate evidentiary basis for flight instruction without analyzing four-factor test). Under the four-part test this Court considers whether "the evidence is sufficient to furnish reasonable support" for four inferences: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Wilson*, 385 F. App'x at 501. Typically, this four-part test only is applied in cases involving actual flight by the defendant. See, *e.g.*, *United States* v. *Singleton*, No. 89-1861, 1990 WL 72328, at *3 (6th Cir. May 31, 1990) (failing to apply four-part test where evidence of consciousness of guilt involved suppression or fabrication of evidence). In any event, as discussed *supra*, the evidence supported each of the four inferences. The evidence showed that Howell omitted information from the reports; that Howell authored the reports immediately following the criminal act; that Howell contacted his supervisor after the assault but failed to inform him about the uses of force or injury to the victim; and that shortly after writing the reports, Howell told Hickman that he was concerned that they were going to get charged with manslaughter.

Howell also argues (Howell Br. 19-22) that the district court erred by giving the consciousness-of-guilt instruction because there was insufficient evidence in the record to support it. But as discussed above, that is simply not true, and Howell does not challenge the admissibility of any of the evidence cited.

Howell counters that this evidence was contradicted by his own testimony that he merely forgot to include the use of force information in the incident reports and that he forgot to complete a third "use of force" report. (Howell Br. 19-20; Transcript, R. 274, PageID# 3641-3642). That Howell presented a competing explanation for his failure to include the use of force information does not render the jury instruction improper. See *United States* v. *Peterson*, 569 F. App'x 353, 356 (6th Cir. 2014). The instruction made clear to the jury that "*if* [they] believe" that Howell omitted information from the reports they "*may* consider this conduct, along with other evidence," thus ensuring that the jury was not compelled to find that Howell had deliberately concealed information because he knew he had acted unlawfully. (Transcript, R. 275, PageID# 3932 (emphases added)). The United States presented ample evidence from which a jury could conclude that Howell's omissions from the incident reports reflected his consciousness of guilt. That is all that is required for the district court to issue the consciousness-of-guilt instruction. Whether Howell's competing narrative was credible is a decision left to the jury. See *Peterson*, 569 F. App'x at 356.

Howell also suggests (Howell Br. 20-21) that because he was unaware of the charges against him at the time he wrote the incident reports, the evidence did not support an inference of consciousness of guilt. But knowledge of the charges is not required to show that the defendant's actions reflected consciousness of guilt. Indeed, consciousness of guilt "may be proven where it occurs after any event which would tend to spark a sharp impulse of fear of prosecution or conviction in a guilty mind." *United States* v. *Dillon*, 870 F.2d 1125, 1128 (6th Cir. 1989).

In any event, Howell knew that his conduct would likely result in criminal charges or prosecution when he wrote the incident reports. He testified that at the time he wrote the reports he knew he would get in trouble if the jail found out about his assaultive conduct. (Transcript, R. 274, PageID# 3640-3641). Howell also stated, at the time he completed the reports, that he was afraid of being charged with manslaughter. (Transcript, R. 273, PageID# 3204-3205). Moreover, this Court has recognized that knowledge of charges is even less relevant when the evidence showed that the concealment of evidence occurred in close proximity to the crime. See *Diakite*, 5 F. App'x at 371. Howell completed his incident reports within hours of the assault, when he knew that investigation and prosecution were likely forthcoming. (Transcript, R. 272, PageID# 2847-2850, 2897-2898; Transcript, R. 273, PageID# 2994-2995; Transcript, R. 274, PageID# 3609-3610).

Finally, Howell relies upon (Howell Br. 21-23) two out-of-circuit cases, *United States* v. *Beahm*, 664 F.2d 414 (4th Cir. 1981), and *United States* v. *Silverman*, 861 F.2d 571 (9th Cir. 1988), to support his argument that the instruction was not warranted here because he was not aware of any charges against him when he wrote the reports. As noted above, awareness of charges is not required to demonstrate consciousness of guilt. Moreover, these cases are not analogous here because the defendants did not flee immediately after the crime. In *Beahm*, the Fourth Circuit concluded that the district court erred by instructing the jury on flight where the defendant fled the jurisdiction three weeks after commission of the crime and there was no evidence that he was aware of the FBI's investigation of the crime. 664 F.2d at 420. The court recognized, however, that an instruction that "allowed the jury to consider the defendant's flight immediately after the commission of a crime" would have been proper. *Ibid.*

Similarly, in *Silverman*, the Ninth Circuit concluded that a flight instruction was improper where the defendant fled and concealed his identity but there was no evidence that he was aware of a Drug Enforcement Administration investigation into his conduct. 861 F.2d at 581-582. Once again, the court noted that a flight instruction would be proper when the flight followed immediately after commission of the crime. *Id.* at 581. And that is precisely what occurred here:

Howell attempted to conceal evidence of his criminal conduct immediately after it occurred by writing incomplete incident reports.

IV

THE DISTRICT COURT'S JURY INSTRUCTION ON DELIBERATE INDIFFERENCE IN HOWELL'S TRIAL WAS NOT PLAIN ERROR

A. Standard Of Review

A challenge to a jury instruction that is raised for the first time on appeal is reviewed by this Court for plain error. *United States* v. *Damra*, 621 F.3d 474, 498 (6th Cir. 2010). To prevail under plain-error review, a defendant must show that there is (1) an error, "(2) that was obvious or clear, (3) that affected * * * substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States* v. *Al-Maliki*, 787 F.3d 784, 791 (6th Cir. 2015) (alteration omitted) (quoting *United States* v. *Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc)). "In the context of challenges to jury instructions, plain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *United States* v. *Castano*, 543 F.3d 826, 833 (6th Cir. 2008) (alteration omitted) (quoting *United*

States v. *Newsom*, 452 F.3d 593, 605 (6th Cir. 2006)); see *United States* v. *Mack*, 729 F.3d 594, 605 (6th Cir. 2013).[9]

B. The Deliberate Indifference Jury Instruction Was Not Erroneous, Much Less Plainly Erroneous

Howell argues (Howell Br. 14-17) that the district court improperly instructed the jury on the standard for deliberate indifference. According to Howell, the instruction improperly told the jury that Howell's subjective state of mind was irrelevant to a finding of deliberate indifference. Howell Br. 14-17. Howell is not correct. The jury instruction was not erroneous, much less plainly erroneous.

1. A jail official deprives a prisoner of his constitutional rights when he is deliberately indifferent to the prisoner's serious medical needs, *i.e.*, "where the

[9] Howell asserts (Howell Br. 14) that he objected to the jury instruction on deliberate indifference and therefore this Court reviews this issue de novo. But Howell's sole objection to the instruction concerned one sentence unrelated to the issue he raises here, and the United States and the court agreed that the sentence was incorrect and removed it from the instruction. (Transcript, R. 275, PageID# 3857-3859, 3871-3872; Jury Instructions, R. 194, PageID# 1315). The court further modified the instruction to assuage Howell's concerns and he raised no further objections to it. (Transcript, R. 275, PageID# 3872-3873). Accordingly, Howell's failure to raise below the issue he raises here, and his agreement at trial that the deliberate indifference instruction accurately reflected the law, renders this Court's review only for plain error. See *United States* v. *Semrau*, 693 F.3d 510, 526-527 (6th Cir. 2012) (stating that to properly preserve a challenge to a jury instruction the defendant "must inform the court of the specific objection and the grounds for the objection" (quoting Fed. R. Crim. P. 30(d))).

official knows of and disregards an excessive risk to inmate health and safety." *United States* v. *Gray*, 692 F.3d 514, 523 (6th Cir. 2012) (quoting *United States* v. *Lanham*, 617 F.3d 873, 885-886 (6th Cir. 2010)); see also *Santiago* v. *Ringle*, 734 F.3d 585, 590 (6th Cir. 2013) (discussing deliberate indifference in the context of a Section 1983 civil action). A deliberate indifference charge "has an objective component and a subjective component." *Santiago*, 734 F.3d at 590. The objective component requires the United States to prove that the inmate had a "'sufficiently serious' medical need." *Phillips* v. *Roane Cty.*, 534 F.3d 531, 539 (6th Cir. 2008) (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994)). The subjective component requires the United States to prove that the jail official was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," that he "dr[ew] the inference," and that he then disregarded the risk. *Gray*, 692 F.3d at 523 (quoting *Lanham*, 617 F.3d at 885); see also *Rouster* v. *County of Saginaw*, 749 F.3d 437, 446-447 (6th Cir. 2014).

Here, the court instructed the jury as follows:

> The Constitution forbids jail officials from acting with deliberate indifference toward a pretrial detainee's serious medical needs. A jail official like the defendant is deliberately indifferent to a serious medical need, and, therefore, violates the Constitution when he knows of and disregards a substantial risk to a pretrial detainee's health or safety. To find that the government has proved this second element beyond a reasonable doubt, you must find each of the following:

> First, Larry Trent's medical need was serious, meaning it posed a substantial risk of serious harm to his health. A serious medical need is one for which treatment has been recommended or that is so obvious that even a person without medical training would easily recognize that medical care is needed.
>
> A defendant's state of mind about the seriousness of the injury is not to be considered. Rather, you must ask yourself whether a reasonable person in the same situation as the defendant would have viewed Larry Trent's injuries as being a serious medical need.
>
> If you find that Larry Trent had a serious medical need, the government must then prove that the defendant was deliberately indifferent to that need. This is found only if the government proves that the defendant was aware of or perceived facts from which to infer that a substantial risk of serious harm to Larry Trent existed, that the defendant drew the inference that a substantial risk of serious harm existed, meaning that the defendant was actually aware of or knew that Larry Trent had a serious medical need, and that the defendant chose to disregard that substantial risk to Larry Trent.
>
> Mere negligence is insufficient to prove deliberate indifference. Deliberate indifference requires that the defendant knew of and disregarded a substantial risk to Larry Trent's health and safety, even if the harm was not ultimately averted.

(Transcript, R. 275, PageID# 3934-3936; see also Jury Instructions, R. 194, PageID# 1315).

Accordingly, the instruction correctly made clear that the jury must determine, first, whether Trent was suffering from an objectively serious medical need, and that for purposes of this inquiry Howell's "state of mind about the seriousness of the injury is not to be considered." (Transcript, R. 275, PageID# 3935). See *Burgess* v. *Fischer*, 735 F.3d 462, 476 (6th Cir. 2013) ("A medical

need is sufficiently serious if * * * it is so obvious that even a lay person would easily recognize the need for medical treatment."); *Blackmore* v. *Kalamazoo Cty.*, 390 F.3d 890, 897 (6th Cir. 2004) (same). The instruction then made clear that to find that Howell was deliberately indifferent, the jury had to find that he was subjectively aware of facts from which he could infer a substantial risk to the Trent, he actually drew the inference, and that he chose to disregard that substantial risk. Accordingly, the instruction properly reflected the standard for a jury finding of deliberate indifference. See, *e.g.*, *Rouster*, 749 F.3d at 446-447 (addressing elements of deliberate indifference).

2. Howell argues (Howell Br. 16-17) that the language of the instruction was confusing because it directed the jury not to consider Howell's state of mind in assessing whether Trent had an objectively serious medical need, but then directed the jury to consider Howell's subjective knowledge of the substantial risk to Trent. But the instruction was neither confusing nor contradictory. The instruction correctly directed the jury first to consider whether Trent had a serious medical need from the perspective of a reasonable person. See *Burgess*, 735 F.3d at 476; *Blackmore*, 390 F.3d at 897. If the jury concluded that Trent did not have an objectively serious medical need, the inquiry would have ended there. But if the jury concluded that Trent was suffering from an objectively serious medical need, the instruction directed the jury to consider Howell's subjective awareness of that

need and whether he disregarded it. Those directives are consistent with the two-part analysis for establishing deliberate indifference. See *Winkler* v. *Madison, Cty.*, 893 F.3d 877, 890-891 (6th Cir. 2018); *Bishop* v. *Hackel*, 636 F.3d 757, 766-767 (6th Cir. 2011); *Spears* v. *Ruth*, 589 F.3d 249, 254-256 (6th Cir. 2009). Accordingly, the deliberate indifference instruction was neither erroneous nor plainly erroneous.

CONCLUSION

This Court should affirm the district court's judgments as to both Hickman and Howell.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 12,968 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

s/ Elizabeth Nash
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Date: November 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I electronically filed the foregoing CORRECTED BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth Nash
ELIZABETH NASH
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ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellee United States designates the following documents from the electronic record in the district court:

Record Entry Number	Description	PageID# Range
1	Indictment	1-5
116	Plea Agreement	703 - 712
194	Jury Instructions	1299 - 1339
195	Jury Verdict	1340 - 1344
203	Def. Obj. to PSR	1378 - 1384
210	Sentencing Mem.	1685 - 1705
212	SEALED Mot. Section 5K1.1	1709 - 1712
240	Judgment	2254 - 2260
241	Notice of Appeal	2261 - 2268
242-1	SEALED Statement of Reasons	2274 - 2277
243	SEALED PSR	2278 - 2328
250	Transcript	2347 - 2408
259	Judgment	2425 - 2431
260	Notice of Appeal	2432 - 2433
271	Transcript	2579 - 2649
272	Transcript	2650 - 2920
273	Transcript	2921 - 3275
274	Transcript	3276 - 3671
275	Transcript	3672 - 3966